IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,	**)**	
	)	
Respondent,	**)**	
	)	
vs.	**)**	**No. SC 85990**
	)	
PHILLIP BELTON,	**)**	
	)	
Appellant.	**)**	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
SIXTEENTH JUDICIAL CIRCUIT, DIVISION FOURTEEN
THE HONORABLE JOHN M. TORRENCE, JUDGE

APPELLANT'S SUBSTITUTE STATEMENT, BRIEF, AND ARGUMENT

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JURISDICTIONAL STATEMENT

Phillip Belton appeals his conviction following a jury trial in the Circuit Court of Jackson County, Missouri, for first degree involuntary manslaughter, § 565.024,[1] and armed criminal action, § 571.015. The Honorable John M. Torrence sentenced Mr. Belton to consecutive terms of imprisonment of five years on each count. After the Missouri Court of Appeals, Western District, issued its opinion in WD 61900, this Court granted the State's application for transfer pursuant to Rule 83.03. This Court has jurisdiction of this appeal under Article V, Section 3, Mo. Const. (as amended 1976).

[1] All statutory citations are to RSMo 1994, unless otherwise stated.

STATEMENT OF FACTS

Donald Adkins lived at 808 Bales Court in Kansas City (Tr. 332).[2] Numerous people visited Mr. Adkins's house on a regular basis to deal in drugs and to get high (Tr. 333-35, 349). Everybody liked Mr. Adkins, whom some called "Pops," because he allowed people to come to his house to deal and get high and because he did not give anyone any trouble over their activities while they were there (Tr. 349). People smoked crack in the bedrooms and prostitutes turned tricks there (Tr. 377).

Desimund Star had lived with Mr. Adkins for about a month and a half in December 1999 (Tr. 332). Mr. Star and Mr. Adkins would use crack cocaine together and with others who came to the house to get high (Tr. 333-34). They obtained the crack cocaine from a variety of sources, one of which was Phillip Belton (Tr. 334).

In the late afternoon or early evening of December 11, 1999, Mr. Star and Mr. Adkins were at Adkins's house with Tamara Hill and Ed Randall (Tr. 335). They were all sitting around and getting high as other people began showing up at the house over the course of the evening (Tr. 338, 442). Among the visitors to the house was Mr. Belton, who came into the house with another man and a woman (Tr. 339, 362-63). When Ms. Hill arrived, there were six or eight people there (Tr. 442).

To Mr. Star, it appeared that Mr. Belton "wasn't himself," since he usually was "cool" and "humorous" (Tr. 340-41). On this occasion, Mr. Belton was either upset or under the influence, "or something." (Tr. 341). However, Ms. Hill observed that

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[2] The Record on Appeal consists of a transcript (Tr.) and a legal file (L.F.).

there was “no fighting, no words, no problems” (Tr. 446). Star said that Mr. Adkins owed Mr. Belton money, but Mr. Adkins and Mr. Belton “had an understanding” and Mr. Belton was not bothered (Tr. 377).

Star, who admitted that he was high on crack cocaine, noticed that Mr. Belton had a gun in his hand (Tr. 340, 366). Ms. Hill also saw the gun, and they both saw Mr. Belton showing it off and waving it around (Tr. 342, 446). The gun was being passed around by three different men (Tr. 446-47). Hill heard someone ask if the gun was loaded, and everyone thought that it was not (Tr. 447-48). Star said Mr. Belton “started joking and playing around with us” and they were “joking back with him” (Tr. 341).

Although Star had not said anything about where Mr. Belton was pointing the gun, the prosecutor asked:

> Q. Okay. You said that the defendant was pointing a gun. Who was he specifically pointing the gun at?
>
> A. Pretty much me and [Mr. Adkins] because we were the only two he was pretty much playing with.

(Tr. 343). In his testimony at trial, Star did not recall Mr. Belton saying anything threatening to Mr. Adkins (Tr. 343-44, 368), but he told a detective that Mr. Belton said, “I’ll put a hole in your head. I’m going to put a hole in your body this big.” (Tr. 344-45). Mr. Star left the house because he did not know if Mr. Belton was serious (Tr. 341, 346).

Ms. Hill -- who was described by Mr. Star as "a prostitute, a runaway" -- did not know Mr. Belton before that night (Tr. 444). Mr. Belton "pulled out a gun, and everybody was just talking, talking about the gun and showing it off, and they were waving it around. I saw the gun in three different men's hands." (Tr. 446). She remembered someone asking whether the gun was loaded or unloaded (Tr. 447).

There was no fighting, but everybody was "passing [the gun] around and showing it off." (Tr. 448). "[A]t some point somebody turned around and the gun was pointed at" Hill (Tr. 448). She explained that it was not aimed at her -- "[t]hey were just swinging it around, and it swung around and pointed at me." (Tr. 460). She was not in fear for her life; it was "a new thing they had, and they were just showing it off to us is all they were doing." (Tr. 466).

Hill did not like guns in the house; she left the room and went into a bedroom to watch TV (Tr. 448). While she watched Jerry Springer, another man came in, saying he did not like being around guns (Tr. 448). All she had heard from the other room was "[j]ust normal conversation." (Tr. 463). There was also laughter -- "like a little get-together party" (Tr. 463).

Four or five minutes after she went into the bedroom, Hill heard a gunshot (Tr. 449). She told the man with whom she was watching TV to "go in there first" (Tr. 449-50). He left, then came back and said, "Come on, let's go." Mr. Adkins "has been shot" (Tr. 450). Hill left the room and saw people running around yelling, screaming, panicking (Tr. 451-52). She heard a man say, "Oh, my God, I didn't know it was loaded" (Tr. 452). Hill looked over toward the table and saw Mr. Adkins lying

motionless (Tr. 451). Everyone was "freaking out" and saying, "get out, get out, get out" (Tr. 452). A man took Hill by the arm and pulled her out the door (Tr. 452).

Ms. Hill thought the shooting was "just an accident." (Tr. 446-47). She went on to describe it as a "bad accident," because everybody was getting along and nobody knew the gun was loaded (Tr. 456). She also said the gun went off by accident (Tr. 456). Mr. Adkins died as a result of a single gunshot wound to the head, entering through his right eyebrow (Tr. 295, 298).

Oscar Vargas lived next door to Mr. Adkins on Bales Court (Tr. 381-82). Vargas had been to Adkins's house before, and he knew about the drug activity that went on at the house (Tr. 383). He also knew Mr. Belton, having purchased drugs from him in the past (Tr. 383-84). On the evening of December 11, Vargas saw Mr. Belton arrive at Mr. Adkins's house in his blue Caprice Classic (Tr. 385-86). Mr. Belton was with his son[3] and a woman that Vargas did not know (Tr. 386). Vargas figured that since Mr. Belton was there, Mr. Adkins must have had money to buy drugs (Tr. 386). Mr. Adkins owed Vargas some money, so Vargas decided to go over to the house to see if Mr. Adkins could give him money for beer (Tr. 386).

Mr. Vargas went into the house with Mr. Belton and his two companions (Tr. 387). Once inside, Vargas saw Star and Hill sitting at a table with Mr. Adkins, and

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[3] Mr. Star said the man was not Mr. Belton's son (Tr. 342). Ms. Hill said Mr. Belton and two men entered together (Tr. 445). The man she referred to as the "Mexican" came at a different time (Tr. 444-45).

several other people in the house (Tr. 388-89). Vargas asked Mr. Adkins, "What's up? Can I get that?" (Tr. 390-91). He said Mr. Adkins knew he was asking about money (Tr. 390-91). Mr. Belton then asked when he would get money that Mr. Adkins owed him (Tr. 391).

Vargas saw Mr. Belton pull out a gun; he asked Mr. Adkins if someone was bothering him, saying, "You know, we'll take care of him." (Tr. 390). Mr. Belton then talked about money Mr. Adkins owed him and was waving the gun around (Tr. 391). Vargas said they just had a little confrontation over the money (Tr. 392). Mr. Belton's son also had a gun (Tr. 402). According to Vargas, Mr. Belton told Mr. Adkins, "You know, I ought to shoot you in the head just because you think I wouldn't do it" (Tr. 392). Vargas also said that Mr. Belton asked Mr. Adkins why he had a baseball bat and Mr. Adkins said he was having problems with his company (Tr. 407). It appeared that Mr. Belton was threatening the others and protecting Mr. Adkins (Tr. 408).

Mr. Vargas believed that Mr. Belton was going to "shoot the house up," and asked if he could leave (Tr. 393-94). Vargas thought Mr. Belton could have been joking, but he did not take it that way, and he felt that things were "really intense" (Tr. 393-94). The people there smoked some drugs, then "everybody was cool, kind of," and Vargas left (Tr. 394). Star let him out, and Mr. Vargas went home (Tr. 395). He later heard that Mr. Adkins had been shot in the head, and he eventually told the police what he had seen that night at Mr. Adkins's house (Tr. 395-96). He told a detective that he thought Mr. Belton "was maybe just joking" (Tr. 411).

In early 2001, Carlos Ward was in federal custody in a holding facility in Leavenworth, Kansas, for conspiracy to distribute "more than five kilos of cocaine base," possession with intent to distribute more than fifty grams of cocaine base, and felon in possession of a firearm (Tr. 470-71, 479-80). One of the other inmates in his module at the facility was Mr. Belton (Tr. 480).

Mr. Ward met Mr. Belton and the two talked and played chess and cards with each other (Tr. 480-81). In one of their conversations, Mr. Belton told Mr. Ward that he had killed a man (Tr. 482-83). Mr. Belton explained that he had shot the man accidentally in the head (Tr. 482). When Mr. Ward met with his attorney to discuss the plea agreement in the case for which he was being held, he mentioned his conversation with Mr. Belton (Tr. 486). Mr. Ward later relayed the story to the detective investigating Mr. Adkins's death (Tr. 322, 487). Mr. Ward was facing a range of punishment of between 292 and 365 months for his federal offenses, and after a departure for his aid in this case, received a sentence of 100 months (Tr. 471, 506-07).

The State charged Mr. Belton by indictment with second degree murder, § 565.021, and armed criminal action, § 571.015 (L.F. 1-2). It later filed an information charging him as a prior and persistent offender (L.F. 3-4). At the instruction conference, Mr. Belton's counsel objected to the submission of Instruction No. 8, the verdict director for armed criminal action in conjunction with involuntary manslaughter (L.F. 20; Tr. 576). Counsel argued that the involuntary manslaughter instruction alleged that Mr. Belton acted recklessly, but reckless conduct would not

support a charge of armed criminal action, thus the count of armed criminal action should not be submitted in conjunction with involuntary manslaughter (Tr. 576). The trial court overruled the objection (Tr. 577).

The jury found Mr. Belton guilty of the lesser included offense of involuntary manslaughter in the first degree and armed criminal action in conjunction with involuntary manslaughter (L.F. 29; Tr. 619-20). On August 23, 2002, the court sentenced him to consecutive terms of five years' imprisonment on each count (L.F. 41-42; Tr. 642-43). Mr. Belton filed notice of appeal on August 30, 2002 (L.F. 44-45).

POINTS RELIED ON

I.

The trial court erred in overruling Mr. Belton's motion for judgment of acquittal at the close of all the evidence, and in entering judgment and sentence against Mr. Belton for his convictions of first degree involuntary manslaughter and armed criminal action, because these rulings violated Mr. Belton's right to due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that the State did not present sufficient evidence at trial from which the jury could have found beyond a reasonable doubt that Mr. Belton recklessly caused the death of Donald Adkins by shooting him, because Tamara Hill testified only to events at least four or five minutes before the shooting, and there was no evidence as to what happened at the time the gun discharged.

Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979);

State v. Grim, 854 S.W.2d 403 (Mo. banc), *cert. denied*, 510 U.S. 997 (1993);

State v. Whalen, 49 S.W.3d 181 (Mo. banc 2001);

State v. Mallett, 732 S.W.2d 527 (Mo. banc 1987);

U.S. Const., Amend. XIV;

Mo. Const., Art. I, Sec. 10; and

§§ 562.016, 563.070, 565.024, and 565.025, RSMo 1994.

II.

The trial court erred in submitting Instruction No. 8, in overruling Mr. Belton's motion for judgment of acquittal at the close of all evidence, and in entering judgment and sentence against Mr. Belton for his conviction of armed criminal action, because such rulings violated Mr. Belton's right to due process of law, as guaranteed by Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that pursuant to § 562.021, the mental state of recklessness does not support a charge of armed criminal action; that offense requires a mental state of either purposeful or knowing conduct, and the jury specifically found that Mr. Belton acted recklessly, rather than knowingly, in shooting Mr. Adkins.

State v. Williams, 126 S.W.3d 377 (Mo. banc 2004);

State v. Grim, 854 S.W.2d 403 (Mo. banc), *cert. denied*, 510 U.S. 997 (1993);

State ex rel. Howard Elec. Co-op. v. Riney, 490 S.W.2d 1 (Mo. banc 1973);

U.S. Const., Amend. XIV;

Mo. Const., Art. I, Sec. 10;

§ 562.021, RSMo 1986;

§ 562.021, RSMo Cum. Supp. 1993;

§ 562.021, RSMo Cum. Supp. 1997;

§ 571.015, RSMo 1994; and

MAI-CR3d 332.02 (10/1/98 and 9/1/03 versions).

ARGUMENT

I.

The trial court erred in overruling Mr. Belton's motion for judgment of acquittal at the close of all the evidence, and in entering judgment and sentence against Mr. Belton for his convictions of first degree involuntary manslaughter and armed criminal action, because these rulings violated Mr. Belton's right to due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that the State did not present sufficient evidence at trial from which the jury could have found beyond a reasonable doubt that Mr. Belton recklessly caused the death of Donald Adkins by shooting him, because Tamara Hill testified only to events at least four or five minutes before the shooting, and there was no evidence as to what happened at the time the gun discharged.

The State produced no witness to the shooting. It presented Oscar Vargas, who testified that Mr. Belton was waving a gun around sometime around 9:00 p.m. (Tr. 391, 404). It presented Desimund Star, who testified that he left after seeing Mr. Belton wave the gun around and say he would put a hole in Mr. Adkins's head, though he also said he was high on cocaine at the time and was not sure if Mr. Belton was serious (Tr. 340-42, 346). And it presented Tamara Hill, who saw everybody "passing [the gun] around and showing it off" (Tr. 448), but who was in a bedroom and had heard only "normal conversation" for four or five minutes when she heard the

shot (Tr. 448-49, 463). Finally, it presented a "jailhouse snitch" who testified that Mr. Belton admitted accidentally shooting a man (Tr. 482). This evidence does not allow a jury to conclude beyond a reasonable doubt, *i.e*., to a near certainty, that Mr. Belton acted recklessly.

Before the State can deprive Mr. Belton of his liberty, the Due Process Clause requires that it prove each element of the charged offense beyond a reasonable doubt. ***In re Winship***, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970); *also see*, ***State v. O'Brien***, 857 S.W.2d 212, 215 (Mo. banc 1993). This impresses "upon the fact finder the need to reach a subjective state of *near certitude* of the guilt of the accused" and thereby symbolizes the significance that our society attaches to liberty. ***Jackson v. Virginia***, 443 U.S. 307, 315, 99 S.Ct. 2781, 2787, 61 L.Ed.2d 560 (1979). (emphasis added). The critical inquiry is whether the evidence could reasonably support a finding of guilt beyond a reasonable doubt. *Id*., 443 U.S. at 318, 99 S.Ct. at 2788-2789.

This Court considers "whether a reasonable juror could find each of the elements beyond a reasonable doubt." ***State v. Grim***, 854 S.W.2d 403, 411 (Mo. banc), *cert. denied*, 510 U.S. 997 (1993). In reviewing the case on appeal, this Court takes the evidence and *reasonable* inferences therefrom in the light most favorable to the State. *Id*. It disregards inferences contrary to the verdict, "unless they are such a natural and logical extension of the evidence that a reasonable juror would be unable to disregard them." *Id*. The Court must also ensure that the jury did not decide the facts "based on sheer speculation." *Id*. at 414. Neither the jury nor this Court may

"supply missing evidence, or give the [State] the benefit of unreasonable, speculative or forced inferences." ***State v. Whalen***, 49 S.W.3d 181, 184 (Mo. banc 2001).

The State's theory at trial was that Mr. Belton intentionally killed Donald Adkins in a dispute over money owed for drugs (Tr. 584-86). The State submitted the case on this theory -- that Mr. Belton knowingly caused Mr. Adkins's death -- and on a theory of involuntary manslaughter -- that he recklessly caused Mr. Adkins's death (L.F. 17, 18). The jury rejected the State's primary theory and acquitted Mr. Belton of second degree murder, but found Mr. Belton guilty of involuntary manslaughter (L.F. 29). However, the evidence presented did not support such this finding.

Involuntary manslaughter is a lesser-included offense of second degree murder. § 565.025. To convict Mr. Belton of involuntary manslaughter, as defined in § 565.024, the State had to prove beyond a reasonable doubt that Mr. Belton "recklessly caused the death of Donald Adkins." (L.F. 18). Under § 562.016.4, "[a] person **'acts recklessly'** or is reckless when he consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation."

As noted, the State did not present any witnesses to the actual shooting, and the evidence the State did present focused primarily on its theory of an intentional shooting. Even when the State presented Mr. Belton's alleged statement to Carlos Ward, he provided no details of the shooting; he merely said that Mr. Belton told him he accidentally shot a man (Tr. 482). Mr. Ward's testimony did not support a finding

that the shooting was intentional or reckless, but rather only that it was accidental. But accidental conduct does not support a homicide conviction.

§ 563.070.1 states that "[c]onduct which would otherwise constitute a crime under chapter 565, RSMo, is excusable and not criminal when it is the result of accident in any lawful act by lawful means without knowingly causing or attempting to cause physical injury and without acting with criminal negligence." In ***State v. Mallett***, 732 S.W.2d 527, 536 (Mo. banc 1987), this Court said that there is no need for a separate instruction on accident under § 563.070, because such an instruction would be redundant, in that a finding of the elements of any homicide offense is inconsistent with the defense of accident.

Thus, a true "accidental" shooting would not support the jury's finding of recklessness. The jury would have had to speculate -- prohibited under ***Whalen***, *supra* -- that "accidentally" meant consciously disregarding "a substantial and unjustifiable risk that circumstances exist or that a result will follow." No evidence permits such an inference.

And if Mr. Belton's use of the term "accidentally" cannot alone serve as support for the jury's verdict, then it can only be, as the Court of Appeals found, that Mr. Belton's conduct at least four or five minutes before the shooting supports the finding of recklessness. The Western District said:

> An accidental shooting, where the irresponsible use of a gun is shown, can support a finding of recklessness. [citation omitted] At a minimum, the evidence was sufficient to establish the shooting death occurred as

> result of Belton's conscious disregard for the substantial risks involved in waving a gun around and pointing it toward Adkins. The jury could reasonably conclude his conduct was reckless, in that it grossly deviated from the standard of care a reasonable person would use under similar circumstances.

Slip Op. at 3-4. The flaw in the Court's reasoning, and the reason the evidence was not sufficient to support this conviction, is that, as above, the jury could only speculate that Mr. Belton was "waving the gun around" when it went off. There was no such evidence. No one had seen Mr. Belton with the gun for at least four or five minutes before the shooting. The mere fact that he waved the gun at one time does not allow a *reasonable* inference that he did so later. And if such an inference is not reasonable, this Court need not take it as true. ***Grim***, 854 S.W.2d at 411.

The jury could only speculate that Mr. Belton was recklessly waving the gun when he shot Mr. Adkins, and this was an insufficient basis on which to convict him of involuntary manslaughter. Further, Count II, armed criminal action, cannot stand if there is insufficient evidence to support the underlying offense. ***State v. Weems***, 840 S.W.2d 222, 228 (Mo. banc 1992). Therefore, this Court must reverse Mr. Belton's convictions of involuntary manslaughter and armed criminal action and discharge him from his sentences.

II.

The trial court erred in submitting Instruction No. 8, in overruling Mr. Belton's motion for judgment of acquittal at the close of all evidence, and in entering judgment and sentence against Mr. Belton for his conviction of armed criminal action, because such rulings violated Mr. Belton's right to due process of law, as guaranteed by Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that pursuant to § 562.021, the mental state of recklessness does not support a charge of armed criminal action; that offense requires a mental state of either purposeful or knowing conduct, and the jury specifically found that Mr. Belton acted recklessly, rather than knowingly, in shooting Mr. Adkins.

In the event that this Court rejects Mr. Belton's argument in Point I, supra, that both of his convictions should be reversed for insufficient evidence, this Court should nonetheless reverse his conviction for armed criminal action because reckless conduct does not support such a charge.

Procedural History

The trial court instructed the jury on Count I as second degree murder, for knowingly causing Donald Adkins's death, or alternatively, as involuntary manslaughter, for recklessly causing his death (L.F. 17, 19). It also submitted Count II, armed criminal action, under each alternative (L.F. 18, 20). The jury ultimately

found Mr. Belton guilty of involuntary manslaughter and armed criminal action in connection with that offense (L.F. 29; Tr. 619-20).

Mr. Belton raised the issue in his motion for new trial and in the Court of Appeals that the trial court erred in submitting the offense of armed criminal action based on the underlying offense of involuntary manslaughter, and that his conviction for armed criminal action could not stand (L.F. 33, 39). He argued that that offense requires a culpable mental state of "knowingly," but that, in rejecting second degree murder and finding him guilty of involuntary manslaughter -- for recklessly shooting Mr. Adkins -- the jury found that he did not have the requisite mental state.

While Mr. Belton's appeal was pending in the Western District, this Court handed down its decision in ***State v. Williams***, 126 S.W.3d 377 (Mo. banc 2004). The Court said:

> Because the definition of armed criminal action does not expressly state a culpable mental state and a culpable mental state is required, armed criminal action requires a culpable mental state of acting purposely or knowingly. Section 562.021.3.

Id., at 382. This Court overruled ***State v. Cruz***, 71 S.W.3d 612 (Mo.App. W.D. 2001), which held that the prescribed mental state for armed criminal action is the same as that for the underlying felony. ***Williams***, *Id*.

The Court of Appeals in this case, in light of ***Williams***, held that, "a conviction for involuntary manslaughter, which requires a mental state of recklessness (not

purposeful or knowing conduct), cannot serve as the underlying felony offense for a charge of armed criminal action." ***State v. Belton***, No. WD61900, Slip Op. at 5. This Court then sustained the State's application to transfer this appeal to this Court.

Standard of Review

As previously noted, before the State can convict Mr. Belton of a crime, due process requires that it prove each element of the charged offense beyond a reasonable doubt. ***In re Winship***, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970); ***State v. O'Brien***, 857 S.W.2d 212, 215 (Mo. banc 1993). In reviewing the case on appeal, this Court considers "whether a reasonable juror could find each of the elements beyond a reasonable doubt," taking the evidence and reasonable inferences therefrom in the light most favorable to the State, and disregarding inferences contrary to the verdict, "unless they are such a natural and logical extension of the evidence that a reasonable juror would be unable to disregard them." ***State v. Grim***, 854 S.W.2d 403, 411 (Mo. banc), *cert. denied*, 510 U.S. 997 (1993).

Applicable Law

A. *History*.

Under § 571.015.1, a person is guilty of armed criminal action if he "commits any felony under the laws of this state by, with, or through the use, assistance, or aid of a dangerous instrument or deadly weapon. . . ." Again, in ***Williams***, this Court specifically overruled ***Cruz*** on the issue of whether the offense of armed criminal action includes a culpable mental state through the application of § 562.021. 126 S.W.3d at 382. Still, some history of §§ 562.021 and 571.105 and MAI-CR3d 332.02

is relevant to an understanding of how a reversal of Mr. Belton's conviction is mandated by ***Williams***.

The 1986 version of § 562.021 included paragraph two:

> 2. Except as provided in section 562.026 if the definition of any offense does not expressly prescribe a culpable mental state, a culpable mental state is nonetheless required and is established if a person acts purposely or knowingly or recklessly, but criminal negligence is not sufficient.

§ 562.021, RSMo 1986 (App. A-3). In 1993, the legislature removed this paragraph, § 562.021, RSMo Cum. Supp. 1993 (App. A-4), then, added it back in 1997, modified to remove "recklessly" as a permissible mental state; it required purposeful or knowing conduct:

> 3. Except as provided in subsection 2 of this section and section 562.026,[4] if the definition of any offense does not expressly prescribe a culpable mental state for any elements of the offense, a culpable mental state is nonetheless required and is established if a person acts purposely or knowingly; but reckless or criminally negligent acts do not establish such culpable mental state.

§ 562.021, RSMo Cum. Supp. 1997 (App. A-5). In response to this change, this Court in 1998 modified MAI-CR3d 332.02 to read as follows:

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[4] These exceptions are not relevant to this appeal following ***Williams***.

As to Count ___, if you find and believe from the evidence beyond a reasonable doubt:

First, that defendant (committed) (is guilty of) the offense of [*name of the "underlying" felony*], as submitted in Instruction No. ___, and

Second, that defendant **knowingly** committed that offense (by) (or) (with) (or) (through) the (use) (or) (assistance) (or) (aid) of a (dangerous instrument) (deadly weapon),

then you will find the defendant guilty under Count ___ of armed criminal action.

MAI-CR3d 332.02 (10/1/98) (emphasis added). This was a revision of the October 1995 version. Note 2 of the Notes on Use stated:

> Since the statute does not prescribe a culpable mental state, the crime is committed if the defendant acted 'knowingly'. The mental state of 'recklessly' is not sufficient. Section 562.021, RSMo Supp. 1997."

Analysis

This was the state of the law at the time this case arose, and the jury was instructed accordingly. Instruction No. 8 informed the jury:

INSTRUCTION NO. 8

As to Count II, if you find and believe from the evidence beyond a reasonable doubt:

First, that defendant is guilty of the offense of involuntary manslaughter,

as submitted in Instruction No. 6, and

Second, that defendant knowingly[5] committed that offense by or with or through the use or assistance or aid of a deadly weapon,

then you will find the defendant guilty under Count II of armed criminal action.

As used in this instruction, the term "dangerous instrument" means any instrument, article or substance which, under the circumstances in which it is used, is readily capable of causing death or other serious physical injury.[6]

However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of that offense.

(L.F. 20) (MAI-CR3d 332.02).

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[5] After this Court transferred and then retransferred ***Cruz*** in 2002, it changed MAI-CR3d 332.02 to its current form by removing the word "knowingly" from the second element, leaving no culpable mental state in the instruction. Note 2 of the Notes on use now refers to ***Cruz*** "[f]or a discussion of the applicable mental state. . . ." MAI-CR3d 332.02 (9/1/03).

[6] This paragraph should have been deleted because the charge was based upon using a deadly weapon rather than a dangerous instrument (L.F. 3, 20).

B. **Williams** *mandates reversal of Mr. Belton's conviction.*

Again, this Court said in ***Williams*** that "armed criminal action requires a culpable mental state of acting purposely or knowingly," 126 S.W.3d at 382, and this shows this Court's intent to return to the 1998 version of the instruction. The State concedes this in its transfer application, arguing that the term "knowingly" needs to be inserted in the second element. (Respondent's Transfer Application at 4). Therefore, under ***Williams***, the second element properly requires that Mr. Belton have *knowingly* committed the offense of involuntary manslaughter, through the use of a deadly weapon. 126 S.W.3d at 382.

This Court said, "Williams correctly contends that the information should have alleged that he 'knowingly' committed second-degree assault by, with, or through the use, assistance, and aid of a dangerous instrument." *Id*. And the Western District correctly followed ***Williams's*** explicit holding that the issue was whether Mr. Belton "*knowingly*" committed the offense of involuntary manslaughter through the use of a deadly weapon. It held that one cannot "knowingly" use a weapon "recklessly."

C. *The State's arguments in its Transfer Application do not withstand scrutiny.*

The State asks this Court to abandon ***Williams*** scant months after it was decided and rule that the culpable mental state of "knowingly" does not apply to armed criminal action after all. The State sought transfer to this Court because, it claimed, the decision of the Court of Appeals (1) misstates and fails to follow ***Williams*** by altering the "first element" of armed criminal action to require that a

defendant knowingly commit an underlying offense; (2) limits the scope of armed criminal action, and eliminates crimes involving reckless or negligent conduct as predicate offenses; and (3) contravenes the legislative intent to authorize additional punishment for any felony committed through the use of a weapon. (Trans.App. at 1).

This Court should reject the State's arguments and reverse Mr. Belton's conviction.

D. *The culpable mental state of "knowingly" properly applies to the second element of armed criminal action and, so applied, requires reversal.*

In its first argument -- that the Court of Appeals erroneously applied the culpable mental state to the first, rather than the second element of armed criminal action -- it is the State that has it backwards. The Court of Appeals did not effectively insert the term "knowingly" into the first element of armed criminal action. It was the *second* element that required, as mandated by ***Williams*** -- that Mr. Belton have *knowingly* committed the underlying offense through the use of a weapon. As pointed out above, Mr. Belton could not knowingly commit a reckless act. Further, however one answers this question, the jury found that Mr. Belton did *not* act knowingly. Indeed, it specifically rejected this proposition in rejecting second degree murder.

The State's interpretation would either remove the element of "knowingly" from the offense of armed criminal action entirely, or else it would apply that element to the mere *possession* of a weapon, not its use. The State would apparently have this Court rule that the mental state is satisfied if the actor commits the underlying offense

knowing that he *has* a weapon -- whether he knowingly *uses* it or not. That is not what this Court said in ***Williams***, and if that is the result in this case, the Court need not have bothered reversing ***Cruz***, because there will be few, if any, factual situations that would not qualify under such an interpretation. Such a result will have effectively removed the culpable mental state from armed criminal action, despite the ruling in ***Williams*** and the current language of § 562.021.3.

E. *This Court's discussion in* **Williams** *of whether a car is a dangerous instrument does not apply to Mr. Belton's case*.

The State confuses two independent portions of ***Williams***. It argues that this Court said "'[t]he armed criminal action charge requires that a defendant knowingly or purposely *used* a dangerous instrument . . . [and] [t]he state is not required to prove that the defendant had the subjective intent to cause death or serious physical injury.'" (Trans.App. at 5-6, quoting ***Williams***, 126 S.W.3d at 383-84) (emphasis added by the State).

But at this point in its opinion, this Court was discussing Williams's claim that the State failed to prove that he employed his car as a dangerous instrument. *Id*. It was not addressing the necessary culpable mental state for armed criminal action, but rather the evidence necessary to show that an ordinary object was used as a dangerous instrument. The Court rejected Mr. Williams's claim, which was based on ***State v. Pogue***, 851 S.W.2d 702, 706 (Mo.App. S.D. 1993), that such an object only becomes

a dangerous instrument when used in such a manner as to demonstrate an intent to cause death or serious injury. ***Williams***, 126 S.W.3d at 384.

This analysis has no application to the issue in Mr. Belton's case. ***Williams***, again, requires proof that the defendant "knowingly or purposely *used*" a weapon. *Id*., at 385. And again, Mr. Belton could not knowingly use a weapon recklessly. Also, in ***Williams***, the State alleged and proved that Mr. Williams had the purpose to use his car to commit an assault. 126 S.W.3d at 380. Thus, the discussion of whether the car was used as a dangerous instrument has no bearing on the issue of the required culpable mental state in Mr. Belton's case.

F. *Applying* **Williams** *to reverse Mr. Belton's conviction would neither limit the scope of armed criminal action beyond what the Legislature intended in raising the culpable mental state in 562.021*.

The second and third grounds for the State's transfer application are that the Western District's opinion would (2) limit the scope of armed criminal action, and eliminate crimes involving reckless or negligent conduct as predicate offenses; and (3) contravene the legislative intent to authorize additional punishment for any felony committed through the use of a weapon. (Trans.App. at 1). It says that involuntary manslaughter, and several crimes of assault involving reckless conduct would be eliminated from the reach of § 571.015. (Trans.App. at 8).

But it is an accepted rule of statutory construction that "where a judicial construction has been placed upon the language of a statute for a long period of time,

so that there has been abundant opportunity for the lawmaking power to give further expression to its will, the failure to do so amounts to legislative approval and ratification of the construction placed upon the statute by the courts, and that such construction should generally be adhered to, leaving it to the legislature to amend the law should a change be deemed necessary." ***State ex rel. Howard Elec. Co-op. v. Riney***, 490 S.W.2d 1, 9 (Mo. banc 1973); quoting 50 Am.Jur. Statutes, § 326.

With this in mind, it is important to note that the courts of this state for years before 1997 had interpreted § 562.021 to supply the culpable mental state for the offense of armed criminal action. *See*, *e.g*., ***State v. Miller***, 657 S.W.2d 259, 261 (Mo.App. E.D. 1983); ***State v. Elam***, 779 S.W.2d 716, 718 (Mo.App. E.D. 1989); ***State v. Hernandez***, 815 S.W.2d 67, 72 (Mo.App. S.D. 1991); ***State v. Rowe***, 838 S.W.2d 103, 109 (Mo.App. E.D. 1992); ***State v. Gilpin***, 954 S.W.2d 570, 580 (Mo.App. W.D. 1997).

Therefore, this Court should conclude that the legislature in 1997 had as at least one purpose in reenacting § 562.021.3 to raise the culpable mental state of armed criminal action from "recklessly" to "knowingly." If the State's interpretation that "knowingly" applies only to whether one knows he has a weapon, there would have been no reason to raise the culpable mental state of armed criminal action. Had the legislature intended the State's interpretation, it would have modified the armed criminal action statute itself to exempt it from § 562.021 or to include its own mental state. But it did neither, and this is further support for Mr. Belton's argument that the reckless use of a weapon cannot support a conviction for armed criminal action.

Summary

The State presented its case to the jury on second degree murder and asked the jury to find that Mr. Belton knowingly shot and killed Mr. Adkins (L.F. 17). It also hedged its bet and submitted the lesser included offense of involuntary manslaughter, because it believed there was evidence that Mr. Belton acted recklessly rather than knowingly (L.F. 18; Tr. 591-92). The jury took the State up on this approach, and in fact found that Mr. Belton acted recklessly (L.F. 29; Tr. 619-20). It was logically inconsistent for the jury to then find that he acted knowingly in using the weapon it had just found that he used recklessly.

Therefore, in light of ***Williams*** and the language of § 562.021.3, the trial court erred in submitting armed criminal action to the jury based on the underlying offense of involuntary manslaughter, in overruling Mr. Belton's motion for judgment of acquittal, and in entering judgment and sentence on that count. The jury specifically found that Mr. Belton acted recklessly, choosing involuntary manslaughter over second degree murder. Based upon this finding, the conviction for armed criminal action cannot stand. This Court must therefore reverse Mr. Belton's conviction for that offense and discharge him from his sentence.

CONCLUSION

For the reasons set forth in Point I, appellant Phillip Belton respectfully requests that this Court reverse his convictions and sentence and discharge him therefrom. For the reasons set forth in Point II, Mr. Belton respectfully requests that this Court reverse his conviction and sentence for armed criminal action and discharge him therefrom.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, Kent Denzel, hereby certify as follows:

The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word 2002, in 13 point Times New Roman font, and includes the information required by Rule 55.03. According to the word-count function of Microsoft Word, excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 7,005 words, which does not exceed the 31,000 words allowed for an appellant's brief.

The floppy disks filed with this brief and served on opposing counsel contain a complete copy of this brief, and have been scanned for viruses using McAfee VirusScan, updated in July, 2004. According to that program, these disks are virus-free.

On the _____ day of July, 2004, two true and correct copies of the foregoing brief and a floppy disk containing a copy thereof were mailed, postage prepaid, to the Office of the Attorney General, 1530 Rax Court, 2nd Floor, Jefferson City, MO 65109.

_____
Kent Denzel

APPENDIX

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§ 562.021, RSMo 1986. **Culpable mental state, application.**

1. If the definition of any offense prescribes a culpable mental state but does not specify the conduct, attendant circumstances or result to which it applies, the prescribed culpable mental state applies to each such material element.

2. Except as provided in section 562.026 if the definition of any offense does not expressly prescribe a culpable mental state, a culpable mental state is nonetheless required and is established if a person acts purposely or knowingly or recklessly, but criminal negligence is not sufficient.

3. If the definition of an offense prescribes criminal negligence as the culpable mental state, it is also established if a person acts purposely or knowingly or recklessly. When recklessness suffices to establish a culpable mental state, it is also established if a person acts purposely or knowingly. When acting knowingly suffices to establish a culpable mental state, it is also established if a person acts purposely.

4. Knowledge that conduct constitutes an offense, or knowledge of the existence, meaning or application of the statute defining an offense is not an element of an offense unless the statute clearly so provides.

(L. 1977 S.B. 60)

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§ 562.021, RSMo Cum. Supp. 1997. **Culpable mental state, application.**

1. If the definition of any offense prescribes a culpable mental state but does not specify the conduct, attendant circumstances or result to which it applies, the prescribed culpable mental state applies to each such material element.

2. If the definition of an offense prescribes a culpable mental state with regard to a particular element or elements of that offense, the prescribed culpable mental state shall be required only as to specified element or elements, and a culpable mental state shall not be required as to any other element of the offense.

3. Except as provided in subsection 2 of this section and section 562.026, if the definition of any offense does not expressly prescribe a culpable mental state for any elements of the offense, a culpable mental state is nonetheless required and is established if a person acts purposely or knowingly; but reckless or criminally negligent acts do not establish such culpable mental state.

4. If the definition of an offense prescribes criminal negligence as the culpable mental state, it is also established if a person acts purposely or knowingly or recklessly. When recklessness suffices to establish a culpable mental state, it is also established if a person acts purposely or knowingly. When acting knowingly suffices to establish a culpable mental state, it is also established if a person acts purposely.

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