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 REPLY BRIEF

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CONTENTS

TABLE OF AUTHORITIES

Page

***CASES*:**

***STATUTES*:**

JURISDICTIONAL STATEMENT

Appellant, Phillip Belton, incorporates herein by reference the Jurisdictional Statement from his opening brief as though set out in full.

STATEMENT OF FACTS

Mr. Belton incorporates herein by reference the Statement of Facts from his opening brief as though set out in full.

ARGUMENT

I.

The State ignores that, to rely on inferences to support a conviction, those inferences must be reasonable. It also ignores that this Court will not consider any evidence that Mr. Belton acted knowingly in shooting Mr. Adkins, because this evidence is not consistent with the jury's verdict, which was that the State did not prove that Mr. Belton acted knowingly. The inference that Mr. Belton was "waving" the gun when he shot Mr. Adkins merely because he was doing so four or five minutes before is not reasonable but is invalid speculation.

The State ignores a significant provision of this Court's opinion in ***State v. Grim***, 854 S.W.2d 403 (Mo. banc), *cert. denied*, 510 U.S. 997 (1993). It claims that, under ***State v. Chaney***, 967 S.W.2d 47, 52 (Mo. banc), *cert. denied*, 525 U.S. 1021 (1998), a reviewing court "accepts as true all of the evidence favorable to the state, including all favorable inferences drawn from the evidence." (Resp.Br. 9-10).

This leaves out an important word from this Court's opinion in ***Grim***: the Court specifically said that "Under the ***Dulany***[1] standard, we are required to take the evidence in the light most favorable to the State and to grant the State all *reasonable* inferences from the evidence." 854 S.W.2d at 411 (emphasis added). This is a crucial word, and though it did not appear in this Court's opinion in ***Chaney***, this Court reaffirmed its importance in ***State v. Whalen***, 49 S.W.3d 181 (Mo. banc 2001), in

[1] ***State v. Dulany***, 781 S.W.2d 52, 55 (Mo. banc 1989).

which the Court quoted the above passage from ***Grim***, then went on to say that "[t]he Court may not 'supply missing evidence, or give the [State] the benefit of unreasonable, speculative or forced inferences.' " 49 S.W.3d at 184 (citation omitted).

The reason in general that it is crucial that the State is entitled only to reasonable inferences is that it this is mandated by due process. As the State quotes:

> this inquiry does not require a court to ask itself whether it believes that the evidence at trial established guilt beyond a reasonable doubt. Instead, the relevant question is whether, after viewing the evidence in a light most favorable to the prosecution, any *rational trier of fact* could have found the essential elements of the crime beyond a reasonable doubt.

Jackson v. Virginia, 443 U.S. 307, 318-19, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979) (emphasis added). (Resp.Br. 10). By definition, a jury could not act "rationally" yet give the State the benefit of unreasonable inferences. Thus giving the State *every* inference violates due process.

And the reason in this particular case that it is crucial that inferences must be reasonable is that it takes an *un*reasonable inference to conclude that Mr. Belton acted recklessly in shooting Mr. Adkins. It requires an inference that what was happening four to five minutes *before* Mr. Adkins was killed was still happening when the shot was fired. There was no such evidence and such an inference would be speculative at best.

The State's position is that the evidence would have supported a jury verdict of murder. (Resp.Br. 11-12).[2] It then relies on § 562.021.4 to conclude that if the evidence was sufficient to prove knowing conduct, it was *a fortiori* sufficient to prove reckless conduct, because that section provides that the proof of a higher mental state also establishes all states below that. (Resp.Br. 13).

But the State again ignores the law in making this proclamation. The jury did *not* find that Mr. Belton acted knowingly. And as this Court said in ***Whalen***, the Court "views the evidence in the light most favorable to the *verdict*. . . ." 49 S.W.3d at 184 (emphasis added). The verdict here was manslaughter, not murder, thus the jury specifically rejected that Mr. Belton acted knowingly. Therefore, this Court must ignore the evidence that is not consistent with that verdict, including the evidence of threats that Mr. Belton allegedly made toward Mr. Adkins. This leaves only the evidence that Mr. Belton said the shooting was an accident, and that four or five

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[2] The State also claims that Mr. Belton changed his position from his brief in the Court of Appeals, citing Mr. Belton's brief at 15 (albeit incorrectly referencing Mr. Belton's substitute brief) (Resp.Br. 12). This is not true. Although Mr. Belton said that the evidence "supported only one of two findings: that either Mr. Belton intentionally shot Mr. Adkins, . . . or that the incident . . . was a 'bad accident'" he also clearly argued that the evidence supporting a charge of murder "should be disregarded as 'evidence and inferences to the contrary' of the verdict;" *citing* ***Grim***.

minutes before the shooting, he was seen waving the gun around -- as were other people.[3]

If there had been evidence that Mr. Belton was actually waving the gun at the time of the shooting, rather than four or five minutes before, then the jury could have reasonably concluded that he acted recklessly. But evidence of such a gap between such reckless actions and the shooting means that the leap from shooting to recklessness is not a reasonable inference but mere speculation.

For these reasons, as well as those stated in his opening brief, this Court must reverse Mr. Belton's convictions of involuntary manslaughter and armed criminal action and discharge him from his sentences.

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[3] Tamara Hill testified that 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" her (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).

II.

The State's argument is simply that knowing possession is equal to knowing use, which is not consistent with this Court's decision in *State v. Williams* that the offense of armed criminal action requires the knowing use of a weapon, and thus applied the knowledge element to the manner of use and not the mere fact that a defendant possessed a weapon -- that in this case Mr. Belton was found to have used recklessly rather than knowingly.

After its recitation of the history of the changes to § 562.021.3, RSMo Cum. Supp. 1997, the State says that this Court's opinion in ***State v. Williams***, 126 S.W.3d 377 (Mo. banc 2004), "resembled the analytical framework of the pre-1993 cases, which essentially imported the culpable mental state of the underlying felony into the offense of armed criminal action wholesale." (Resp.Br. 29). The State has it backwards. In holding that § 562.021.3 supplied the mental state, this Court *rejected* the "incorporation" theory, on the basis of which ***State v. Cruz***, 71 S.W.3d 612 (Mo.App. W.D. 2001), held that the prescribed mental state for armed criminal action is the same as that for the underlying felony. ***Williams***, 126 S.W.3d at 382.

The State rewrites the armed criminal action statute to make it say, not that the defendant [knowingly][4] *used* a gun, but rather that he knowingly *had* or *possessed* a gun, that he then used in the commission of a felony. It says that the culpable mental

[4] This element is supplied by § 562.021.3, RSMo Cum. Supp. 1997, per ***Williams***, 126 S.W.3d at 382.

state attaches to the attendant circumstances, not merely the conduct at issue. (Resp.Br. 33). It gets this, it says, from this Court's "consistent pairing [in ***Williams***] of 'knowingly or purposely' with 'use,' 'used,' or 'using' and 'dangerous instrument.' " (Resp.Br. 33). However, knowingly *having* a gun that one uses, recklessly, is not the same as knowing *use* of the gun.

In ***Williams*** the issue was whether the defendant used the car as a dangerous instrument, and the Court held that he did so if he knowingly employed it to attempt to cause injury to the victim. 126 S.W.3d at 385. But the analysis of ***Williams*** stopped there, because the jury also found that the defendant *attempted* to cause injury, *i.e*., that he had this purpose. Therefore, the finding of guilty of armed criminal action was appropriate. But that is not the case here. Although this case involved a deadly weapon rather than a dangerous instrument, there still was no finding of a *knowing* "employment" of the gun. Indeed, the jury's finding was the opposite.

The essence of the State's argument is set out at pages 32-33 of its brief:

> first, that a deadly weapon is different from a dangerous instrument; second, that a defendant's *use* of a gun in committing an offense will generally be knowing or purposeful due to the inherently dangerous nature of guns; and third, that armed criminal action (the knowing or purposeful use of a deadly weapon or dangerous instrument) can be predicated upon any "crime" (so long as it is a felony as required by § 571.015).

There is really no dispute as to basic fact of the "first" claim. Deadly weapons and dangerous instruments are different; the former are specifically defined, while the question whether an object is a dangerous instrument must be determined on a case by case basis. However, if the State is suggesting that there is a difference for purposes of whether § 562.021.3 supplies the culpable mental state of "purposely" or "knowingly," then there is nothing in this Court's opinion in ***Williams*** to suggest that this is the case. Although the Court, in *dicta,* said that the "use" (without adding the modifier "knowing") of a deadly weapon in a crime, "can be charged as armed criminal action" 126 S.W.3d at 384, this does not say that such use does not have to be "knowing."

If the Court had meant to distinguish deadly weapons from dangerous instruments for this purpose, it would not have said that "armed criminal action requires a culpable mental state of acting purposely or knowingly." 126 S.W.3d at 382. It did not say "armed criminal action *in a case involving the use of a dangerous instrument*" requires this mental state, it said armed criminal action, period. There was no limitation that this was required only where the object is a dangerous instrument. And there is nothing in § 562.021.3 that suggests that it may be applied to the one method of committing armed criminal action and not the other.

The State's "second" conclusion from ***Williams*** -- "that a defendant's *use* of a gun in committing an offense will generally be knowing or purposeful due to the inherently dangerous nature of guns" -- also confuses the concepts of "use" and "possession." While a person's *possession* of a gun will generally only be done

"purposely or knowingly," it is not true that a person's *use* of that gun will generally only be "purposely or knowingly." If so, there could be no crime involving the reckless or criminally negligent use of a gun, which plainly is not true.

The State further shows its confusion over this issue by attempting to apply a portion of the definition of "knowingly" from § 562.016.3:

> A person **"acts knowingly"**, or with knowledge,
>
> (1) With respect to his conduct or to attendant circumstances when he is aware of the nature of his conduct or that those circumstances exist; or
>
> (2) With respect to a result of his conduct when he is aware that his conduct is practically certain to cause that result.

§ 562.016.3, RSMo 1994. The State argues that Mr. Belton's "knowledge" of an attendant circumstance -- that he had a gun -- satisfied this Court's holding in ***Williams*** that the defendant must knowingly use the weapon. (Resp.Br. 33). But under this theory, as long as the person knowingly possesses a gun, it would not matter if he knowingly uses it. This ignores both the holding in ***Williams*** that "armed criminal action requires a culpable mental state of *acting* purposely or knowingly," *id*., at 382 (emphasis added), and the language of the verdict director in this case, which was adopted by this Court after § 562.021.3, RSMo Cum. Supp. 1997 was enacted. Instruction No. 8 told the jury:

> 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 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.

(L.F. 20) (emphasis added). The State has yet to answer how Mr. Belton can have *knowingly committed* the offense of involuntary manslaughter, an offense which has a culpable mental state of recklessness.

The State's "third" theory -- that because armed criminal action has its own culpable mental state, it can be predicated on *any* felony (Resp.Br. 33) -- is an attempt to repeal § 562.021.3 and make armed criminal action a strict liability offense. Making this a strict liability offense can only be accomplished by focusing on having a weapon rather than using one, which is not consistent with this Court's statements in ***Williams*** that armed criminal action requires acting purposely or knowingly, 126 S.W.3d at 382, and that this charge "requires that a defendant knowingly or purposely used a [deadly weapon]." *Id*. at 385.

Because the jury specifically rejected that Mr. Belton acted knowingly, the only way the State can claim it proved this required mental state is to argue that he knowingly possessed a gun. This is not knowing use, or acting knowingly, and this Court must therefore reverse Mr. Belton's conviction for armed criminal action and discharge him from his sentence.

CONCLUSION

For the reasons set forth in Point I herein and in his opening brief, 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 herein and in his opening brief, 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 reply 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 2,547 words, which does not exceed the 7,750 words allowed for a reply 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 August, 2004. According to that program, these disks are virus-free.

On the _____ day of September, 2004, two true and correct copies of the foregoing reply 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