No. 85990

IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,

Respondent,

v.

PHILLIP BELTON,

Appellant.

Appeal from the Circuit Court of Jackson County, Missouri
16th Judicial Circuit, Division 14
The Honorable John M. Torrence, Judge

RESPONDENT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

This appeal is from convictions of involuntary manslaughter in the first degree, § 565.024.1.(1), RSMo 2000, and armed criminal action, § 571.015, RSMo 2000, obtained in the Circuit Court of Jackson County, the Honorable John M. Torrence presiding. Appellant was sentenced to serve two consecutive terms of five years in the Missouri Department of Corrections. The Court of Appeals, Western District, affirmed appellant's conviction and sentence for involuntary manslaughter but reversed his conviction for armed criminal action. Pursuant to Supreme Court Rule 83.04, this Court granted respondent's application for transfer. This Court has jurisdiction. Article V, § 10, Missouri Constitution (as amended 1982).

STATEMENT OF FACTS

Appellant, Phillip Belton, was charged with murder in the second degree, § 565.021, RSMo 2000, and armed criminal action, § 571.015, RSMo 2000 (L.F. 3). After a trial by jury, he was convicted of involuntary manslaughter and armed criminal action (L.F. 41; Tr. 619-620). Viewed in the light most favorable to the verdict, the facts were as follows:

On December 11, 1999, appellant went to the home of Donald Adkins at 808 Bales Court in Kansas City, Missouri (Tr. 233, 339). Appellant was armed with a gun, and he "wasn't himself" (Tr. 340). Appellant was "upset" and "under the influence," and, at some point, he started waving the gun around (Tr. 340-341). Appellant's erratic behavior was perceived by one witness, Desimund Star, as "joking and playing around" (Tr. 341, 343).[1] But, despite appellant's "playful" attitude, Star was uncomfortable, and he tried to calm the situation down with humor (Tr. 343-344). Star later told police that appellant had said, "I'll put a hole in your head. I'm going to put a hole in your body this big." (Tr. 345). Star also told police that appellant said he could "shoot this way or that way or do this and do that with the gun" (Tr. 345). Before any shots were fired, and not knowing if appellant was serious, Star left the house (Tr. 346). Star knew that the victim owed appellant money for some drugs, but he did not think that appellant was "tripping on that little change" (Tr. 377).

Another witness, Oscar Vargas, also went to the victim's house on December 11,

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[1] Star was at the house smoking "crack" and "getting high" with the victim when appellant arrived (Tr. 335).

arriving at the same time as appellant (Tr. 387). Vargas heard a woman mention a bat that was in one of the bedrooms, and at that point, appellant pulled out his gun and said, "is someone bothering you? You know, we'll take care of him" (Tr. 390). When Vargas asked appellant for some money that appellant owed him, appellant started "going on about his money" that was owed to him (Tr. 391). Appellant was holding his gun and waving it, and he said to the victim, "You know, I ought to shoot you in the head just because you think I wouldn't do it" (Tr. 392). The victim "mumbled" and "laughed . . . off" appellant's threat (Tr. 422-423). Appellant also talked about shooting up the house (Tr. 393). Feeling threatened, Vargas asked to leave (Tr. 393, 408-409). Before Vargas left, he saw the others split a piece of crack cocaine (Tr. 394).

A third witness, Tamara Hill, had arrived at the victim's house prior to appellant (Tr. 444-445). She also saw appellant pull out his gun and wave it around (Tr. 446). More than one person handled the gun as appellant showed the gun off (Tr. 446). Despite the fact that "[e]verybody was friends," Hill felt nervous and left the living room and went into one of the bedrooms (Tr. 448). A few minutes later, appellant shot the victim in the head (Tr. 449, 482-483).[2] When Hill emerged from the room, people were running around the room and the victim was dead (Tr. 449). She heard a male voice say, "Oh, my G--, the gun was loaded" (Tr. 452). Hill testified that she believed the shooting was an "accident" (Tr. 446-447). She also testified that "everybody" thought the gun was unloaded (Tr. 447).

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[2] In November 2000, appellant told a fellow inmate that he had "accidentally" shot a white man in the head (Tr. 482-483).

The victim died from a fatal gunshot wound to the head (Tr. 295, 298). The shot entered between the victim's eyes and passed through his brain (Tr. 298). The bullet passed completely through the victim's head and came to rest on the kitchen floor (Tr. 251). The victim's body was found sitting in the chair where he had been sitting on the evening of December 11, 1999 (Tr. 234, 249, 348, 443-444).

At trial, which was held on June 24-26, 2002, appellant did not testify, and he did not call any witnesses. The jury found appellant guilty of the lesser included offense of involuntary manslaughter and the associated charge of armed criminal action (Tr. 619-620). Appellant was sentenced to serve two consecutive terms of five years in the Missouri Department of Corrections (Tr. 642).

On March 2, 2004, the Court of Appeals, Western District, affirmed appellant's conviction for involuntary manslaughter but reversed his conviction for armed criminal action, holding that armed criminal action could not be predicated upon a reckless crime. State v. Phillip Belton, No. WD61900, slip op. at 1, 5 (Mo.App. W.D. March 2, 2004). This Court granted respondent's application for transfer on June 22, 2004.

ARGUMENT

I.

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL, BECAUSE THERE WAS SUFFICIENT EVIDENCE TO SUPPORT APPELLANT'S CONVICTIONS OF INVOLUNTARY MANSLAUGHTER AND ARMED CRIMINAL ACTION, IN THAT THE EVIDENCE SHOWED THAT APPELLANT EITHER KNOWINGLY OR RECKLESSLY SHOT THE VICTIM WITH A DEADLY WEAPON AND THEREBY CAUSED HIS DEATH.

Appellant contends that the trial court erred in overruling his motion for judgment of acquittal (App.Sub.Br. 14). He asserts that the evidence was insufficient to support the conclusion that he "recklessly caused the death of [the victim] by shooting him" (App.Sub.Br. 14). Appellant's claim focuses upon the sufficiency of the evidence showing a culpable mental state of "recklessly;" he does not contest that he caused the victim's death by shooting him in the head with a deadly weapon.

A. The Standard Of Review

In reviewing the sufficiency of the evidence, appellate review is limited to a determination of whether there was sufficient evidence from which a reasonable finder of fact might have found the defendant guilty beyond a reasonable doubt. State v. Chaney, 967 S.W.2d 47, 52 (Mo. banc), cert. denied, 119 S.Ct. 551 (1998). In applying the standard, the reviewing court accepts as true all of the evidence favorable to the state, including all favorable inferences drawn from the evidence, and disregards all evidence and inferences to the contrary.

Id. Appellant may not rely on inferences contrary to the jury's verdict. Id.

In Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), the United States Supreme Court emphasized the deference given to the trier of fact. The Court stated:

> 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 the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

Id. at 318-319.

B. The Evidence was Sufficient to Support Appellant's Convictions

"A person commits the crime of involuntary manslaughter in the first degree if he . . . recklessly causes the death of another person[.]" § 565.024.1.(1), RSMo 2000. "A person 'acts recklessly' or is reckless when he consciously disregards a substantial and unjustifiable risk that circumstances exist or a result will follow, and such failure constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation." § 562.016.4, RSMo 2000.

Additionally, "any person who 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 is also guilty of the crime of armed criminal action[.]" § 571.0151.1, RSMo 2000.

1. Involuntary manslaughter

As appellant points out in his brief, the state's primary theory on the murder charge was

that appellant "knowingly" shot the victim – that appellant was guilty of murder in the second degree (App.Sub.Br. 16). Accordingly, as appellant also points out, the state's evidence "focused primarily on its theory of an intentional shooting" (App.Sub.Br. 16).[3]

Indeed, the evidence showed that appellant entered the victim's house, and that appellant pulled out a gun and waved it around (Tr. 340-341, 392, 446). The evidence also showed that appellant pointed the gun at the victim and threatened to shoot the victim in the head (Tr. 343-345, 392-393). Finally, the evidence showed that appellant admitted that he had killed a man by shooting him in the head (Tr. 482-483).[4] From this evidence, a rational juror could have concluded beyond a reasonable doubt that appellant knowingly caused the victim's death by shooting the victim in the head, consistent with his earlier threat to shoot the victim in the head.

Appellant disputes this conclusion, arguing that his admission that he shot the victim, which was admitted into evidence through state's witness Carlos Ward, was insufficient

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[3] Respondent assumes that when appellant says "intentional" in connection with murder in the second degree, appellant means to say "knowing." Respondent makes this assumption because otherwise appellant's use of the word "intentional" has no meaning. An act can be both "intentional" and "reckless," see State v. Carlile, 9 S.W.3d 745, 753 (Mo.App. S.D. 2000); thus, when appellant says "intentional" in connection with murder in the second degree, he must be intending to say "knowing."

[4] The victim died from a fatal gunshot wound to the head that entered between the victim's eyes and passed through his brain (Tr. 295, 298).

because, as related by Ward, appellant said the shooting was "accidental" (App.Sub.Br. 16). Thus, appellant argues that the "testimony did not support a finding that the shooting was intentional or reckless, but rather only that it was accidental" (App.Sub.Br. 16-17).[5] However, this argument is overly simplistic and ignores the standard of review, which requires that appellant disregard all evidence and inferences contrary to the verdict. Thus, while it is true that appellant's admission to Ward minimized his involvement by claiming that the shooting was "accidental" (Tr. 482-483), a rational juror was free to disregard appellant's self-serving claim of "accident" and simply accept appellant's admission that he had shot the victim. Indeed, because people often tend to minimize their culpability, a rational juror could have reasonably concluded that appellant's shooting the victim was something other than accidental; and, when viewed in conjunction with other evidence, a rational juror could have concluded that the shooting was, consistent with appellant's earlier actions and threats to shoot the victim in the head, committed knowingly.

And, because the evidence was sufficient to support a finding that appellant knowingly caused the victim's death, it was also sufficient to support the conclusion that appellant acted recklessly. Section 562.021 specifically provides for such circumstances. It states, in relevant part:

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[5] This is a change from appellant's position in the Court of Appeals where he conceded that the evidence was sufficient to support a reasonable inference that appellant knowingly killed the victim (App.Sub.Br. 15).

> 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.

§ 562.021.4, RSMo 2000 (emphasis added).[6] Here, "recklessness" sufficed to establish the culpable mental state of involuntary manslaughter, and, consequently, evidence that appellant acted "purposely or knowingly" was sufficient to establish the lesser culpable mental state of "recklessly." This conclusion is consistent with the rule set forth by the legislature, namely, that no judgment shall be "in any manner affected . . . [b]ecause the evidence shows or tends to show [the defendant] to be guilty of a higher degree of the offense than that of which he is convicted[.]" § 545.030.1.(17), RSMo 2000. See State v. Pierce, 932 S.W.2d 425, 428 (Mo.App. E.D. 1996).

Moreover, even if the foregoing statutory principles are ignored, the evidence presented at trial was sufficient to support a finding that appellant acted "recklessly." As three witnesses

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[6] Section 562.021.4 does not address when a trial court either may or is obligated to instruct on lesser included offenses. Whether a trial court may instruct down, or whether a trial court is obligated to instruct down is governed by § 556.046, RSMo Cum. Supp. 2003. Appellant does not contest the propriety of instructing down in this case.

confirmed, appellant "waved" his gun around after entering the victim's house (Tr. 340-341, 392, 446). Appellant "wasn't himself," and he was "upset" and "under the influence" (Tr. 340-341). And, in that condition, appellant started "joking and playing around" with the gun, pointing the gun at people in the house, and making threats to shoot the victim and the victim's house (Tr. 341, 343-345, 392-393, 411). These events occurred immediately prior to appellant's shooting the victim (Tr. 446-447, 449, 482-483).

From this evidence, the jury could have reasonably concluded that appellant acted recklessly when he shot the victim. For example, the jury could have believed that appellant was merely posturing or playing or joking, but that, in handling a loaded gun while under the influence, and in waving the gun around (or simply pointing the gun at people), appellant ignored a substantial and unjustifiable risk that he would fatally shoot one of the people in the room. See id. (defendant who drove his car toward the victim's vehicle while the victim was inspecting it, ignored a substantial and unjustifiable risk that he would hit the victim with his car); State v. Fox, 916 S.W.2d 356, 360 (Mo.App. E.D. 1996) (defendant who was intoxicated displayed and pointed a knife at the defendant); State v. Jennings, 887 S.W.2d 752, 754 (Mo.App. W.D. 1994) (raising a loaded gun toward the victim was reckless conduct supporting a conviction for involuntary manslaughter).[7] The jury was free to disregard Hill's testimony

[7] The Court of Appeals affirmed appellant's conviction for involuntary manslaughter on this basis, stating: "At a minimum, the evidence was sufficient to establish the shooting death occurred as result of [appellant's] conscious disregard for the substantial risks involved in

that "everybody" knew the gun was unloaded (especially in light of appellant's declaration that he could "put a hole" in the victim's head), and the jury was free to conclude, reasonably, that appellant's conduct in handling the loaded gun was a "gross deviation from the standard of care which a reasonable person would exercise in the situation."[8]

Appellant claims that the evidence was nevertheless insufficient because there was no direct evidence that he was "waving the gun around" when he shot the victim (App.Sub.Br. 18). He further asserts that a rational finder of fact could not reasonably infer that he did wave the gun at the victim (App.Sub.Br. 18). But, in fact, there was sufficient evidence that appellant waved or pointed the gun at the victim immediately prior to the shooting.[9] From the physical evidence alone there was evidence that the gun was pointed at the victim at least momentarily – either when appellant waved the gun or pointed it at the victim. Additionally, from appellant's admission that the shooting was "accidental" a rational juror could have inferred that appellant committed some act – e.g. waving or pointing the gun – that (at least in appellant's mind)

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waving a gun around and pointing it toward [the victim]." State v. Phillip Belton, No. WD61900, slip op. at 3 (Mo.App. W.D. March 2, 2004).

[8] Alternatively, the jury could have credited Hill's testimony that everyone thought the gun was unloaded, and found appellant guilty for disregarding the substantial and unjustifiable risk that the gun was in fact loaded when he pulled the trigger.

[9] The jury was not required to find that appellant "waved" the gun; rather, the jury was required to determine whether appellant "recklessly caused the death" of the victim by "shooting him" (L.F. 18).

justified the use of the word "accidental" in describing the shooting. Moreover, given appellant's reckless conduct from the time he arrived at the victim's house, it was certainly reasonable to infer that his reckless conduct continued up to the point of the actual shooting.

Additionally, appellant's use of the word "accidentally" in describing his conduct does not dictate the conclusion that the shooting was, in fact, an accident. A lay person would not necessarily know the legal definition of "recklessness," which, as stated above, involves a conscious disregard of a substantial and unjustifiable risk and a gross deviation from the standard of care that a reasonable person would exercise in the situation. Consequently, a lay person ordinarily will not use the technical legal definition of "recklessness" in describing events. Thus, what a lay person calls an "accident" may very well be a "reckless" act in the eyes of the law. See State v. Gaskins, 66 S.W.3d 110, 113 (Mo.App. S.D. 2001) (the defendant, who was convicted of involuntary manslaughter, said that shooting was an accident). In short, the determination of whether a shooting was reckless, does not depend upon the label attached to the shooting by the defendant.

Here, for example, the jury heard evidence from Ward (appellant's confession) and Hill that the shooting was an accident (Tr. 446-447, 482-483). However, the jury was not required to accept that aspect of their testimony. Hill tried to portray the evening as a friendly party where "[e]verybody was friends," and she stated her belief that the shooting was accidental (Tr. 446-448). The jury was free to disbelieve her characterization of events, especially in light of (1) her admittedly drugged condition and possible desire to exonerate one of her drug providers, and (2) appellant's overt violence and the anxiety that his violence engendered

among more than one person present. Indeed, Hill's at-trial characterization of the events stood in contrast to her actions on the night in question, when she left the room, knowing that there was a risk that she could get shot. As for Ward's testimony about appellant's admitting that he "accidentally" shot a man, the jury was free to believe, as discussed above, that appellant simply tried to minimize his culpable mental state in relating the events to Ward.

In short, there was ample evidence that appellant's conduct with the gun was reckless and that appellant's "accidental" shooting of the victim was actually a reckless shooting. These were reasonable inferences that the jury could have drawn, and, accordingly, the evidence was sufficient to support the jury's finding that appellant recklessly caused the victim's death.

2. Armed criminal action

Based upon his argument that there was insufficient evidence to support a conviction of involuntary manslaughter, and because the armed criminal action conviction was dependent upon the commission of the underlying offense, appellant also asserts that there was insufficient evidence to support his conviction of armed criminal action. However, as discussed above, there was sufficient evidence to support a conviction of involuntary manslaughter; thus, there was also sufficient evidence to support appellant's conviction of armed criminal action.[10] This point should be denied.

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[10] Appellant's alternative argument, that armed criminal action cannot be premised upon involuntary manslaughter, is addressed in Point II, below.

II.

THE TRIAL COURT DID NOT ERR IN SUBMITTING INSTRUCTION NO. 8, THE VERDICT DIRECTOR FOR ARMED CRIMINAL ACTION (WHICH WAS PREDICATED UPON THE UNDERLYING FELONY OF INVOLUNTARY MANSLAUGHTER), IN DENYING HIS MOTION FOR JUDGMENT OF ACQUITTAL AS TO COUNT II (ARMED CRIMINAL ACTION), OR IN ENTERING JUDGMENT AND SENTENCE ON COUNT II, BECAUSE, CONTRARY TO APPELLANT'S CLAIM, ARMED CRIMINAL ACTION CAN BE PREDICATED UPON A RECKLESS CRIME.

Appellant contends that the trial court erred in submitting the verdict director for armed criminal action, in denying his motion for judgment of acquittal as to that offense, and in entering judgment and sentence (App.Sub.Br. 19). He claims that the mental state of involuntary manslaughter – "recklessly" – "does not support a charge of armed criminal action" (App.Sub.Br. 19). He premises his argument upon this Court's recent decision in State v. Williams, 126 S.W.3d 377 (Mo. banc 2004), which held that armed criminal action "requires a mental state of either purposeful or knowing conduct" (App.Sub.Br. 19).

A. Factual Background

The trial court submitted the lesser included offense of involuntary manslaughter to the jury (L.F. 18). It also submitted a verdict director for an associated charge of armed criminal action (L.F. 8). The verdict director for armed criminal action was drafted, in relevant part, as follows:

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** 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).

At the instructions conference, appellant objected to this instruction, pointing out that involuntary manslaughter had a reckless mental state while armed criminal action had a knowing mental state (Tr. 576). Appellant did not recall the specific statute, but, undoubtedly referring to § 562.021.3, he pointed out that the statute had changed, and that recklessness was no longer sufficient (Tr. 576).[11] Thus, he argued that he did not think "Armed Criminal Action should be submitted with Involuntary Manslaughter" (Tr.576). The objection was overruled (Tr. 577), and the claim was again raised in appellant's motion for new trial (and subsequently on appeal to the Court of Appeals) (L.F. 33; App.Sub.Br. 17).

While appellant's appeal was pending, this Court handed down its decision in State v. Williams, 126 S.W.3d 377. In Williams, this Court overruled State v. Cruz, 71 S.W.3d 612

[11] Section 562.021.3 is the statute that supplies a culpable mental state when the definition of an offense does not prescribe a culpable mental state. § 562.021.3, RSMo 2000.

(Mo.App. W.D. 2001), and clarified that "armed criminal action requires a culpable mental state of acting purposely or knowingly." Id. at 382.[12] This Court stated: "the armed criminal action statute requires that a defendant **knowingly or purposely used a dangerous instrument**." Id. at 385 (emphasis added).

Relying on Williams, the Court of Appeals, Western District, reversed appellant's conviction for armed criminal action, holding that involuntary manslaughter – because of its reckless mental state – "cannot serve as the underlying felony offense for a charge of armed criminal action." State v. Phillip Belton, No. WD61900, slip op. at 5 (Mo.App. W.D. March 2, 2004). On June 22, 2004, this Court granted respondent's application for transfer.

B. The Trial Court did not Err in Submitting Instruction No. 8, in Denying Appellant's Motion for Judgment of Acquittal, or in Entering Judgment and Sentence for the Offense of Armed Criminal Action

Repeating the same rationale used by the Court of Appeals, appellant argues that this Court's decision in State v. Williams "mandates reversal" of his conviction for armed criminal action (App.Sub.Br. 25). He argues that "one cannot 'knowingly' use a weapon 'recklessly.'" (App.Sub.Br. 25). However, appellant's interpretation of Williams is incorrect.

1. The History of § 562.021 and Armed Criminal Action

Though appellant gives a brief history of § 562.021 and the armed criminal action

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[12] State v. Cruz had held that armed criminal action had the same culpable mental state of the underlying felony.

statute (and later draws conclusions from that brief history), he fails to provide a complete picture of the interaction between the two statutes. Prior to 1993, the Court of Appeals routinely stated that the armed criminal action statute does not "expressly" or "specifically" set forth a culpable mental state or clearly indicate a purpose to dispense with a culpable mental state. See e.g. State v. Rowe, 838 S.W.2d 103, 109 (Mo.App. E.D. 1992); State v. Hernandez, 815 S.W.2d 67, 71-72 (Mo.App. S.D. 1991); State v. Miller, 657 S.W.2d 259, 261 (Mo.App. E.D. 1983). With that premise in mind, the Court of Appeals then routinely turned to the then current language of § 562.021, subsection 2, to supply a mental state for the offense of armed criminal action. See e.g. State v. Rowe, 838 S.W.2d at 109.

All of those cases, which involved crimes committed prior to the repeal of § 562.021.2 in 1993, relied upon a pre-1993 version of § 562.021.2 which stated:

> 2. Except as provided in section 562.026 if the definition of an 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.

See § 562.021.2, RSMo 1986 (emphasis added). Accordingly, all of those pre-1993 cases concluded that the culpable mental state for armed criminal action was "purposely, knowingly, or recklessly." See e.g. State v. Rowe, 838 S.W.2d at 109.[13] Then, having determined that the

[13] These pre-1993 cases served as the foundation for cases of varying vintage which repeated, virtually without explication, that armed criminal action requires a culpable mental

culpable mental state was variable, those courts simply incorporated the culpable mental state of the underlying felony into the offense of armed criminal action — so long as the underlying felony had a culpable mental state of at least recklessness. See e.g. id. (holding that "recklessly" is the requisite culpable mental state for armed criminal action in an involuntary manslaughter case); State v. Hernandez, 815 S.W.2d at 72 (holding that involuntary manslaughter based upon "criminal negligence" would not support a conviction of armed criminal action).[14]

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state of "purposely, knowingly, or recklessly." State v. Bush, 8 S.W.3d 173, 177 (Mo.App. W.D. 1999) (in dicta); State v. Gilpin, 954 S.W.2d 570, 580 (Mo.App. W.D. 1997) (crime took place in 1994 after § 526.021.2 was repealed); State v. Pogue, 851 S.W.2d 702, 704 n.3 (Mo.App. S.D. 1993), overruled in part by State v. Williams, 126 S.W.3d at 383-384 (pre-1993 crime); State v. Elam, 779 S.W.2d 716, 718 (Mo.App. E.D. 1989). See also State v. Schmidt, 865 S.W.2d 761, 764 (Mo.App. E.D. 1993) (upholding armed criminal action conviction which was based upon underlying felony of involuntary manslaughter).

[14] One notable wrinkle in the pre-1993 rationale was the decision in State v. Pogue, 851 S.W.2d 702, 706-707 (Mo.App. S.D. 1993), which held that despite the defendant's having an appropriate culpable mental state of "recklessly," under the facts of that case, the evidence would not support a conviction of armed criminal action because the "dangerous instrument" used in the underlying felony – an automobile – was an ordinary item not used "with a purpose to cause death or serious injury." The rationale in Pogue was adopted in at least two other cases – State v. Dowdy, 60 S.W.3d 639, 644 (Mo.App. W.D. 2001), and State v. Idlebird, 896 S.W.2d

In the midst of those pre-1993 decisions handed down by the Court of Appeals, this Court seemed to indicate that the question had not been resolved. The Court noted:

> It remains an open question whether a culpable state of mind is required to prove the armed criminal action offense enacted by § 571.015, RSMo 1986. The open question, however, is whether the statute requires "a culpable state of mind of *acting*."

State v. Reynolds, 819 S.W.2d 322, 328 n.8 (Mo. banc 1991) (citations omitted; emphasis in original).

Then, in 1993, § 562.021.2 was repealed. Thus, there was no longer any statutory support for the rationale followed by the Court of Appeals in the pre-1993 cases. In was in this context that State v. Jennings, 887 S.W.2d 752 (Mo.App. W.D. 1994), was decided. In that case, after noting that § 562.021.2 had been repealed (and that the defendant had committed his crime after the effective date of the repeal), the Court relied upon a plain reading of the armed criminal action statute and pre-1993 case law to conclude that armed criminal action carried the culpable mental state of the underlying felony. The Court stated:

> Considering the plain and ordinary language of § 571.015, a person is guilty of armed criminal action if one commits a felony "by, with, or through the use, assistance or aid of a dangerous instrument or deadly weapon." Section

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656, 664 (Mo.App. W.D. 1995) – but this Court has repudiated that aspect of those cases. State v. Williams, 126 S.W.3d at 383-384.

> 571.015.1. "By definition, armed criminal action incorporates all the elements of the underlying felony." State v. Hernandez, 815 S.W.2d 67, 72 (Mo.App. 1991). By such incorporation, armed criminal action adopts the level of mental culpability required of the underlying offense.

Id. at 755 (emphasis added). Because the court specifically eschewed any reliance upon § 562.021.2, it must be assumed that the court's reliance upon Hernandez was for the simple proposition that the plain language of the armed criminal statute "incorporates" the elements of the underlying felony charge.

After Jennings, therefore, the state of the law was fairly simple: armed criminal action incorporated the level of mental culpability required by the underlying offense, and no other mental state was required. Additionally, due to Pogue (which had not yet been overruled), if the armed criminal action charge alleged the use of an ordinary item as a "dangerous instrument," then there was an additional culpable mental state attached to the use of that instrument that had to be satisfied, i.e., that the instrument was used with a dangerous purpose. See State v. Pogue, 851 S.W.2d at 705-707.[15]

Despite the holding in Jennings, at least a couple of cases resurrected — or at least gave lip service to — the rationale of the pre-1993 cases. See State v. Bush, 8 S.W.3d 173, 177 (Mo.App. W.D. 1999) (in dicta); State v. Gilpin, 954 S.W.2d 570, 580 (Mo.App. W.D. 1997). The crimes in these two cases, however, were committed after § 562.021.2 was repealed in

[15] As noted above, this aspect of the Pogue case has been overruled.

1993; thus, they should not have relied upon the pre-1993 rationale for supplying a culpable mental state to the offense of armed criminal action.[16]

Then, about three years after Jennings was decided, the legislature enacted new provisions that became part of § 562.021. Some of the repealed language of the former subsection 2 was re-enacted (as the current subsection 3), and a completely new subsection 2 was added. Subsections 2 and 3 now read:

> 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*

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[16] Additionally, though decided in 1999 and 1997, the crimes in these two cases were committed *before* the effective date of § 562.021, RSMo Cum. Supp. 1997. In Bush, the crime was committed on March 4, 1997, and in Gilpin, the crime was committed on February 3, 1994; the effective date of § 562.021, RSMo Cum. Supp. 1997, was August 28, 1997.

state.

§ 562.021.2-.3, RSMo 2000 (changes to the language in subsection 3 emphasized).

As is evident, in the new subsection 3, the legislature introduced *two* major changes to the language formerly used in the pre-1993 statute: first, that the new subsection 2 must be examined before a mental state will be supplied in the absence of an "expressly" prescribed culpable mental state "for any elements of the offense;" and second, that the mental state supplied by subsection 3 is only established if a person acts purposely or knowingly (but not recklessly).

It was in that context that the Court of Appeals, Western District, decided State v. Cruz, 71 S.W.3d 612. In that case, in attempting to give meaning to all of the changes made in § 562.021, the Court of Appeals concluded that the first element of armed criminal action – the commission of an underlying felony – implicitly prescribed a culpable mental state (i.e., the culpable mental state of the underlying felony), and that, pursuant to the new language of § 562.021.2, no other culpable mental state was required for the offense of armed criminal action. Id. at 619. Significantly, the court formulated its conclusion as follows: "The upshot of our interpretation, of course, is that the prescribed culpable mental state for ACA, under § 571.015.1, would be the same as for the underlying felony[.]" Id. The court acknowledged that its interpretation conflicted with the then current MAI; however, it pointed out that the substantive law of the state was controlling. Id. (citing State v. Carson, 941 S.W.2d 518, 520

(Mo. banc 1997)).[17]

Then, a few years after Cruz was decided, this Court decided Williams. In Williams, though relying upon the revised statutory language of § 562.021, this Court's analysis resembled the pre-1993 conceptualization of the interplay between § 562.021 and the armed criminal action statute. This Court stated:

> According to section 562.021.3, where the definition of an 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[.]"
>
> 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.

State v. Williams, 126 S.W.3d at 382. This Court did not analyze the effect of the new statutory language in subsection 2; however, this Court overruled Cruz and thereby implicitly repudiated the analysis set forth in that opinion.

2. The opinion in Williams clarified that armed criminal action has a culpable mental state that is separate and distinct from the culpable

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[17] This Court granted transfer in Cruz but subsequently re-transferred the case back to the Court of Appeals.

mental state of the underlying felony

What this long recitation illustrates is that Missouri courts *prior* to Williams have consistently, but by sometimes different means, equated the culpable mental state of armed criminal action with that of the underlying felony. In one fashion or another, courts have simply held that the offense of armed criminal action incorporates the culpable mental state of the underlying felony or simply has the same mental state, i.e., that armed criminal action does not have a separate and distinct culpable mental state. In Williams, however, this Court's analysis indicated a break from that previous view.

The offense of armed criminal action has two elements: first, the commission of "any felony;" and second, that the felony be committed "by, with, or through the use, assistance, or aid of a dangerous instrument or deadly weapon[.]" § 571.015.1, RSMo 2000. Citing § 562.021, this Court held in Williams that the offense of "armed criminal action requires a culpable mental state of acting purposely or knowingly." State v. Williams, 126 S.W.3d at 382. This Court did *not* hold, contrary to the Court of Appeals opinion below, that a reckless felony "cannot serve as the underlying offense for a charge of armed criminal action."

Admittedly, this Court's reliance upon § 562.021 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. And, as a consequence, appellant views this portion of the opinion as evidence of "this Court's intent to return to the 1998 version of the [pattern] instruction" (App.Sub.Br. 25).

However, in stating its holding in Williams, this Court expressly stated: "the armed

criminal action statute requires that a defendant **knowingly or purposely used a dangerous instrument.**" Id. at 385 (emphasis added). Moreover, in addition to consistently stating that the culpable mental state of "knowingly or purposely" attached to the use of a deadly weapon or dangerous instrument, this Court further indicated – in answering a related question – that the culpable mental state attached to the use of the deadly weapon or dangerous instrument should be viewed as wholly separate from the culpable mental state of the underlying crime. In other words, the culpable mental state of armed criminal action is connected to a *circumstance* of the underlying conduct and not the *result* of the underlying conduct.

For instance, in answering the question of whether an ordinary item (a car) was a "dangerous instrument" for purposes of armed criminal action, this Court distinguished between the culpable mental state of armed criminal action and the culpable mental state attached to the underlying felony in that case. This Court reiterated that armed criminal action carries a culpable mental state of "acting purposely or knowingly." Id. at 383. However, this Court then explained that "[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." Id. at 383-384 (emphasis added). In other words, the intent to cause death or a certain result – the culpable mental state of the underlying felony – is separate and distinct from the knowing or purposeful use of the dangerous instrument.[18]

[18] In so holding, this Court overruled part of State v. Pogue, one of the many cases that

This conclusion was conceptually consistent with earlier cases that relied upon § 562.021 to supply a culpable mental state,[19] and it is consistent with § 562.016.3, which defines when a person acts "knowingly." That statute provides:

> 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 2000. As is evident, the culpable mental state of "knowingly" attaches either to "conduct or to attendant circumstances" or to "a result of [one's] conduct."

The offense of armed criminal action does not – unlike a homicide offense – contemplate any particular result. It states, in relevant part: "any person who 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 is also guilty of the crime of armed criminal action[.]" § 571.015, RSMo 2000. The absence of a "result" element means that the culpable mental state must attach to something else; and, here, it is evident that what the culpable mental state attaches to is the attendant circumstance of using a deadly weapon or dangerous instrument. In other

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relied upon the pre-1993 rationale of supplying a culpable mental state for the offense of armed criminal action.

[19] Contrary to appellant's assertion, respondent is *not* "ask[ing] this Court to abandon Williams scant months after it was decided" (App.Sub.Br. 25).

words, if the defendant knows that he is using a deadly weapon or dangerous instrument, then he can be guilty of armed criminal action – even if the felony committed is merely reckless.

Appellant argues that this interpretation of Williams will "remove[] the culpable mental state from armed criminal action," "because there will be few, if any, factual situations" where a person will not know that he is using a deadly weapon (App.Sub.Br. 27). This, of course, is probably true with regard to deadly weapons like guns. However, regardless of whether it will be easy for the state to prove that a gun-toting person is guilty of armed criminal action when that person commits a felony with that gun, the fact remains that this interpretation of Williams is supported by the plain language of the relevant statutes.

And, notably, when discussing the application of its holding to cases in which there is a deadly weapon such as a gun, this Court indicated that there was no limitation on the types of underlying offenses that can support a charge of armed criminal action. This Court stated: "A deadly weapon, such as a gun, is inherently dangerous. Its *use* in *a crime* can be charged as 'armed criminal action.'" State v. Williams, 126 S.W.3d at 384 (emphasis added). The import of this language is at least threefold: 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).

That this Court's holding applied to the *circumstance* of using a deadly weapon or dangerous instrument – and not the *result* of the underlying conduct – is apparent from its

consistent pairing of "knowingly or purposely" with "use," "used," or "using" and "dangerous instrument." As outlined above, in stating its holding, this Court reiterated:

> This Court holds that the armed criminal action charge requires that a defendant *knowingly or purposely used a dangerous instrument*. A dangerous instrument is "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." *The state is not required to prove that the defendant intended to cause death or serious physical injury*.

Id. at 385 (emphasis added).[20] Again, as discussed above, the Court treated the culpable mental state of armed criminal action – e.g. the knowing use of the dangerous instrument (or deadly weapon) – as separate from the culpable mental state of the underlying offense – e.g. the subjective intent to cause death or serious physical injury.

3. Because Armed Criminal Action has its own Culpable Mental State, it Can be Premised Upon Any Felony

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[20] Appellant argues that the state "confuses" this aspect of Williams, and that this portion of the opinion is not relevant to the question here because it was examining the question of whether a car is a dangerous instrument (App.Sub.Br. 27-28). Respondent acknowledges that the question at hand in Williams was different; nevertheless, this Court's analysis was illustrative of the fact that the culpable mental state of armed criminal action does not attach to the "result" of the underlying conduct.

Distinguishing between the culpable mental states of armed criminal action and the underlying felony makes sense. It is not uncommon for defendants to knowingly use guns (or other dangerous instruments) and later argue that they were merely reckless as to the *result* of their conduct and the resulting injury. However, there is nothing in the armed criminal action statute to suggest that reckless felonies should be exempted from the legislature's intent to punish the unlawful use of deadly weapons. To the contrary, the plain language of the armed criminal action statute indicates that the legislature intended to authorize additional punishment for any person who commits "*any felony* . . . by, with, or through the use, assistance, or aid of a dangerous instrument of deadly weapon[.]" § 571.015.1 (emphasis added).[21]

Accordingly, while the offense of armed criminal action requires the commission of an underlying felony (with its own culpable mental state), its culpable mental state is separate from the culpable mental of the underlying felony. That is, the culpable mental state of armed criminal action – "knowingly" – attaches to the "use, assistance, or aid" of the deadly weapon, and it is separate from the culpable mental state necessary to prove the underlying felony. Thus, in the case at bar, when the defendant knowingly used a gun, and recklessly shot the victim between the eyes, he was guilty of both the underlying offense and armed criminal action.[22] It, therefore, was not error to submit the verdict director, to deny the motion for

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[21] A few felonies are excepted from the ambit of the armed criminal action statute, see § 571.015.4, RSMo 2000, but none of those exceptions is relevant here.

[22] Appellant argues that the legislature's intent in revising § 562.021 was to remove

judgment of acquittal, or to enter judgment and sentence on the offense of armed criminal action.

In sum, Williams should not be read to exclude all reckless felonies from the ambit of the armed criminal action statute. Under Williams, the underlying felony carries a culpable mental state that is separate and distinct from the culpable mental state of armed criminal action. To hold otherwise, and conflate the culpable mental state of armed criminal action with the culpable mental state of the underlying felony, would eliminate numerous felonies[23] from the ambit of the armed criminal action statute and contravened the plain language of § 571.015,

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reckless felonies from the ambit of the armed criminal action statute (App.Sub.Br. 28-29). To support this claim, he refers to the history of the section and its interaction with the armed criminal action statute (App.Sub.Br. 28-29). Respondent agrees that § 562.021 should be used to supply the culpable mental state of armed criminal action (as this is the practice that courts have consistently followed when the statute contained the relevant provision); however, respondent simply argues that this Court's holding in Williams does not compel the conclusion that appellant and the Court of Appeals reached.

[23] For example, under the Court of Appeals holding in this case, armed criminal action cannot be predicated upon the class D felony of involuntary manslaughter in the first degree, § 565.024.1.(1), RSMo 2000, the class C felony of assault in the second degree, § 565.060.1.(3), (5), RSMo 2000, the class D felony of assault while on school property, § 565.075.1.(3), RSMo 2000, or the class B felony of assault of a law enforcement officer or emergency personnel in the second degree, § 565.082.1.(2), RSMo Cum. Supp. 2003.

which states that armed criminal action can be predicated upon "any felony." This point should be denied.

CONCLUSION

In view of the foregoing, respondent submits that appellant's convictions and sentences should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains 8,195 words, excluding the cover, this certification, the signature block, and the appendix, as determined by WordPerfect 9 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this _____ day of August 2004, to:

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