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NOTE

To Instruct, or Not To Instruct, That Is the Question

State v. Jackson, 433 S.W.3d 390 (Mo. 2014) (en banc).

JARED GUEMMER*

I. INTRODUCTION

A criminal trial is an arduous process. By the end of this process, the fact-finder – often a jury – makes a determination regarding the defendant’s culpability for the crimes with which she is charged. Sometimes, the State’s evidence is insufficient to prove guilt of the charged offense beyond a reasonable doubt. In such cases, the jury may also consider the defendant’s guilt as to a lesser charge that is included within the charged offense. The jury’s job is to ensure justice is done, and the defendant is convicted on the correct charge or acquitted entirely.

However, judges do not always provide juries with the opportunity to consider all possible options. Sometimes, judges deny juries the ability to consider a lesser included offense. They do this by refusing to instruct the jury that it may consider the lesser offense, and what must be proven in order to determine guilt for that offense. As a result, guilt becomes an all-or-nothing proposition. Some guilty defendants may escape punishment entirely, while those guilty of a lesser crime may be punished more severely than their actions deserve.

In *State v. Jackson*, the Supreme Court of Missouri considered whether a trial court must instruct the jury regarding a lesser included offense.¹ Specifically, it confronted this question in the context of a “nested” lesser included offense: an offense whose elements are entirely subsumed by the greater offense, and the greater offense has some “differential element” that the State bears the burden to prove.² The court ultimately concluded that a jury instruction on such a lesser included offense, when requested by the defendant, must always be granted.³ A judge’s refusal to grant the requested instruction jeopardizes the defendant’s right to a trial by jury.⁴ Thus, the court ensured

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1. *State v. Jackson*, 433 S.W.3d 390, 392 (Mo. 2014) (en banc).

2. *Id.*

3. *Id.*

4. *Id.* at 402.

that juries would have the opportunity to consider a lesser degree of liability for the defendant's actions.

II. FACTS AND HOLDING

A jury found that Denford Jackson walked into a coffee shop/convenience store the morning of August 29, 2009, and robbed the store's cash register while holding a gun on an employee.⁵ Jackson was convicted of robbery in the first degree and armed criminal action.⁶

Only three people were in the store at the time of the robbery, two customers and the employee.⁷ The customers testified that Jackson entered the coffee shop side of the store and spoke with one of them for a short time.⁸ Neither customer saw a gun in Jackson's possession, but Jackson kept one of his hands in his pocket during the entire conversation.⁹ After the conversation ended, Jackson went to the other side of the store, where the cash register was located.¹⁰ When the customers next saw Jackson, he was standing at the cash register, behind the store's employee.¹¹ Neither customer saw whether Jackson had a gun, and neither knew a robbery occurred until the employee ran out of the kitchen to say she had been robbed.¹²

The employee testified she was in the kitchen when Jackson entered the door behind the cash register.¹³ As she approached him, Jackson grabbed her arm and turned her toward the door and the cash register.¹⁴ She said she "felt something in [her] back," and that she "[l]ooked down and it was a gun."¹⁵ She testified that she "could see it after [she] had looked down and he guided

5. *Id.* at 392.

6. *Id.* at 394–95. Robbery in the first degree requires the jury find that Jackson, in the course of taking the property, "displayed or threatened the use of what appeared to be a deadly weapon or dangerous instrument." *Id.* at 394; see MO. REV. STAT. § 569.020.3 (2000). Thus, robbery in the first degree merely requires a jury to conclude that the employee reasonably believed Jackson was armed with a gun. See *id.* Armed criminal action requires that the jury find that Jackson committed the robbery "by, with, or through the use, assistance, or aid of a dangerous instrument or deadly weapon." MO. REV. STAT. § 571.015.1 (2000). This means that the jury found, beyond a reasonable doubt, that Jackson did, in fact, use a gun when he robbed the convenience store, rather than only finding that the employee was reasonable in her belief that the object in Jackson's hand appeared to be a gun. *Jackson*, 433 S.W.3d at 394 n.2.

7. *Jackson*, 433 S.W.3d at 392.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* at 392–93.

13. *Id.* at 393.

14. *Id.*

15. *Id.*

[her] forward,”¹⁶ and she noted that it had a “six-inch barrel,” was “silverish,” and “was a revolver.”¹⁷ After he took the money from the register, Jackson took the employee back to the kitchen, made her lie down, and checked her pockets for more money.¹⁸ He then left through a door on the shop’s convenience store side.¹⁹

The State introduced video surveillance tapes from the shop into evidence, which showed Jackson entering the shop and standing near the customers while always keeping one hand in his pocket.²⁰ The video shows Jackson taking something out of his pocket and examining it after walking away from the customers.²¹ He then entered the kitchen area where the employee was working.²² The video shows the two of them coming out of the kitchen, with Jackson behind the employee, holding something to her back.²³ As they exit from behind the register, the employee turns and the object in Jackson’s hand is briefly visible.²⁴ Jackson then grabs the employee and leads her back to the kitchen.²⁵

A detective testified for the State regarding the videos.²⁶ He testified that Jackson could be seen holding a small dark blue or black pistol to the employee’s back, and that Jackson’s movements prior to entering the kitchen were the movements one would see from someone checking to make sure a revolver is loaded.²⁷ On cross-examination, the detective agreed that a blurry video might show an object that looked like a gun, when it might actually be something like a cell phone.²⁸ The detective refused to say this object could be a cell phone because “people do not check to see if their cell phone is loaded right before committing a crime.”²⁹

After the close of evidence, Jackson’s attorney requested a jury instruction for the lesser included offense of second-degree robbery.³⁰ Jackson’s attorney argued that the jury could look at the video and determine that a gun was not used, and that the employee was not reasonable in her belief that Jackson had a gun.³¹ The trial judge refused to grant the instruction, stating, “[I]f I were to submit it here then I’d have to submit it every time there’s a

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.* at 393–94.

28. *Id.* at 394.

29. *Id.*

30. *Id.*

31. *Id.*

robbery first brought, and I don't think that's the law."³² Jackson was convicted of first-degree robbery³³ and armed criminal action.³⁴ Jackson appealed.³⁵

The Missouri Court of Appeals for the Eastern District affirmed Jackson's conviction, finding no error in the trial court's refusal to grant the jury instruction for the lesser included offense.³⁶ The court declined to provide a written opinion because there would be no jurisprudential value in doing so.³⁷

On transfer to the Supreme Court of Missouri, Jackson argued there was a sufficient basis in the evidence to support an acquittal for first-degree robbery, and that he was, therefore, entitled to a jury instruction on second-degree robbery.³⁸ Jackson argued that the surveillance video in the shop, combined with the discrepancy between the detective's and employee's testimony regarding the gun's appearance, established a basis in the evidence to acquit him of first-degree robbery.³⁹

The State said this evidence only disputed whether Jackson actually used a gun, not whether the employee's belief that Jackson had a gun was reasonable.⁴⁰ Additionally, the State argued that the jury's right to disbelieve evidence submitted by the State did not, by itself, establish a sufficient basis in the evidence to acquit Jackson of the charged offense.⁴¹ There must be a sufficient basis in the evidence in order to trigger the statute governing when a trial court is required to grant a jury instruction for a lesser included offense.⁴²

In a 4-3 decision, the Supreme Court of Missouri reversed the trial court's refusal to grant Jackson's request to instruct the jury on the lesser included offense of second-degree robbery.⁴³ The court vacated his conviction and remanded for a new trial.⁴⁴ It held that a trial court may not refuse to grant a jury instruction for a lesser included offense requested by a defendant under Missouri Revised Statutes Section 556.046 when the elements of the lesser included offense are entirely subsumed by the charged offense, and the differential element is one on which the State bears the burden of proof.⁴⁵

32. *Id.*

33. *Id.*

34. *Id.* at 394 n.2.

35. *Id.* at 395.

36. *State v. Jackson*, 2012 WL 6131696, at *1 (Mo. Ct. App. 2012).

37. *Id.*

38. *Jackson*, 433 S.W.3d at 397; *see also* MO. REV. STAT. § 556.046 (2000).

39. *Jackson*, 433 S.W.3d at 397.

40. *Id.*

41. *Id.*; *see also* § 556.046.

42. *Jackson*, 433 S.W.3d at 397; *see also* § 556.046.

43. *Jackson*, 433 S.W.3d at 409–10.

44. *Id.* at 392.

45. *Id.*

III. LEGAL BACKGROUND

This Part will discuss three primary aspects of the law related to the holding in *Jackson*. First, it will provide an explanation of the statutory language analyzed by the *Jackson* court. Second, it will explore the case law that establishes a direct precedential lineage for lesser included offense instructions. Finally, it will note the methods by which a defendant is granted the right to a trial by jury.

A. The Statutory Law

Lesser included offenses are governed by Section 556.046.⁴⁶ Under Section 556.046, there are three circumstances when an offense may be a lesser included offense, but the only circumstance relevant to this case is when the offense “is established by proof of the same or less than all of the facts required to establish the commission of the offense charged.”⁴⁷ In essence, “An offense is a lesser included offense if it is impossible to commit the greater without necessarily committing the lesser.”⁴⁸

For example, a defendant commits first-degree robbery when he “forcibly steals property and in the course thereof he . . . displays or threatens the use of what appears to be a deadly weapon or a dangerous instrument.”⁴⁹ A defendant commits second-degree robbery “when he forcibly steals property.”⁵⁰ The differential element between these two crimes is the use of “what appears to be a deadly weapon or dangerous instrument” during the commission of the crime.⁵¹ A person is incapable of committing first-degree robbery without also committing second-degree robbery. A defendant commits second-degree robbery when she forcibly steals property, and she commits first-degree robbery when she forcibly steals property while displaying or threat-

46. See § 556.046.

47. *Id.* § 556.046.1(1). Another circumstance is when the offense “is specifically denominated by statute as a lesser degree of the offense charged.” *Id.* § 556.046.1(2). Also, when the offense “consists of an attempt to commit the offense charged or to commit an offense otherwise included therein.” *Id.* § 556.046.1(3).

48. *State v. Derenzy*, 89 S.W.3d 472, 474 (Mo. 2002) (en banc) (citing *State v. Barnard*, 972 S.W.2d 462, 465 (Mo. Ct. App. 1998)). In his majority opinion in *Jackson*, Judge Wilson refers to this as a “nested” lesser included offense. *Jackson*, 433 S.W.3d at 392.

49. MO. REV. STAT. § 569.020.3 (2000). Those aspects of the statute not relevant to the facts of this case have been omitted.

50. *Id.* § 569.030. The differential element between first-degree robbery and second-degree robbery is whether the defendant “displayed or threatened the use of what appeared to be a deadly or dangerous instrument.” *Id.* § 569.020. Thus, if the jury concluded that Jackson forcibly stole property, but also concluded the employee’s belief that Jackson had a gun was unreasonable, it could acquit him of first-degree robbery and convict him of second-degree robbery. See *id.*

51. *Id.* § 569.020, .030.

ening the use of what appears to be a dangerous instrument.⁵² Therefore, second-degree robbery is a lesser included offense of first-degree robbery.

Under Section 556.046.2, a trial court is not required to instruct the jury regarding a lesser included offense “unless there is a basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense.”⁵³ However, Section 556.046.3, added to Section 556.046 in 2001,⁵⁴ states that a trial court shall instruct the jury for an included offense “only if there is a basis in the evidence for acquitting the defendant of the immediately higher offense and there is a basis in the evidence for convicting the defendant of that particular included offense.”⁵⁵ Whether these statements are interchangeable is one aspect of the disagreement between the majority and dissent in *Jackson*.⁵⁶

B. The Primary Precedent

Four cases have most influenced Missouri’s jurisprudence regarding jury instructions for lesser included offenses.

In *State v. Olson*, decided in 1982, the defendant was convicted of rape, sodomy, and assault in the first degree by use of a dangerous instrument.⁵⁷ The defendant asserted the trial court erred in failing to instruct the jury on second- and third-degree assault.⁵⁸ The defendant testified in his own defense, claiming the victim never entered his vehicle and that he did not attack her.⁵⁹

The court in *Olson* rejected the defendant’s argument, and held that Section 556.046.2 requires a trial court to instruct the jury on a lesser included offense only “where there is some affirmative evidence of a lack of an essential element of the higher offense which would not only authorize acquittal of the higher but sustain a conviction of the lesser.”⁶⁰ In essence, the *Olson* court required a defendant to produce evidence that, if true, would negate an element of the greater offense.

In 1997, *State v. Santillan* overruled *Olson* to the extent it required a defendant to present affirmative evidence of the lack of an essential element of a higher offense.⁶¹ There, Santillan was charged and convicted of first-degree murder, and he asserted the trial court erred in refusing to grant him an in-

52. *Id.* §§ 569.020.3–.030.

53. MO. REV. STAT. § 556.046.2 (2000).

54. *Jackson*, 433 S.W.3d at 396.

55. § 556.046.3.

56. *See Jackson*, 433 S.W.3d at 396, 415.

57. 636 S.W.2d 318, 319 (Mo. 1982) (en banc), *overruled by Jackson*, 433 S.W.3d 390.

58. *Id.* at 320.

59. *Id.*

60. *Id.* at 321–22.

61. 948 S.W.2d 574, 576 (Mo. 1997) (en banc).

struction for second-degree murder.⁶² The differential element between the two offenses was whether the defendant deliberated before he caused the death of another.⁶³

The State presented evidence that it claimed demonstrated deliberation.⁶⁴ The defendant and the deceased were friends who were interested in the same woman.⁶⁵ Additionally, the deceased suffered two wounds, no attempt was made to get medical attention for the deceased, and the defendant tried to bury the deceased's body.⁶⁶

The court in *Santillan* ultimately held that an instruction for the lesser included offense was appropriate because "a reasonable juror could draw inferences from the evidence presented that the defendant did not deliberate."⁶⁷ Further, the court held that "[t]o the extent that *Olson* . . . may be read to require a defendant to put on affirmative evidence as to the lack of an essential element of the higher offense, [it is] overruled."⁶⁸

Seven years later, in 2004, the court addressed the issue again in *State v. Pond*.⁶⁹ The defendant was convicted of first-degree statutory sodomy, and he argued that he was entitled to a jury instruction on the lesser included offense of first-degree child molestation.⁷⁰ The differential element between the offenses is "penetration . . . of the male or female sex organ."⁷¹

The victim initially testified that the defendant "put his fingers 'in [her] body.'"⁷² On cross-examination, the victim said she never mentioned that the defendant penetrated her, that she originally told her mother that the defendant only "touched" her, and that, during the preliminary hearing, she said the defendant "pushed on her private area."⁷³ The State argued the defendant was not entitled to a jury instruction for a lesser included offense because he did not present any affirmative evidence.⁷⁴ Additionally, it argued that the mere fact that a jury "might disbelieve some of the State's evidence" does not entitle the defendant to an instruction for a lesser included offense.⁷⁵

The court rejected the State's first argument, basing its rejection on the prior ruling in *Santillan*.⁷⁶ The court rejected the State's second argument, stating, "A defendant is entitled to an instruction on any theory the evidence

62. *Id.* at 574–75.

63. *Id.* at 576.

64. *Id.* at 575.

65. *Id.*

66. *Id.*

67. *Id.* at 576.

68. *Id.*

69. 131 S.W.3d 792 (Mo. 2004) (en banc).

70. *Id.* at 793.

71. *Id.* at 793–94 (quoting MO. REV. STAT. § 566.010.1 (2000)).

72. *Id.* at 794.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

establishes,” and “A jury may accept part of a witness’s testimony, but disbelieve other parts.”⁷⁷ The court noted that it “leaves to the jury” the job of “determining the credibility of witnesses, resolving conflicts in testimony, and weighing evidence.”⁷⁸ It said that “Section 556.046.2 requires only a basis for the jury to acquit on the higher offense,” and “If the evidence supports differing conclusions, the judge must instruct on each.”⁷⁹ The court ultimately determined that “[t]he jury could have believed part of the victim’s testimony, that defendant touched her, and disbelieved that defendant penetrated her.” A reasonable jury could find the prior statements more believable than those at trial.⁸⁰ Therefore, the defendant was entitled to an instruction on the lesser included offense.⁸¹

Finally, in 2010, the court decided *State v. Williams*, where the defendant was convicted of second-degree robbery through accomplice liability.⁸² The defendant was denied his request for an instruction for the lesser included offense of felony stealing.⁸³ The differential element between the two offenses is the element of force.⁸⁴

The defendant testified that his friend, “Sweets,” took marijuana from the victim during a drug transaction at the victim’s apartment.⁸⁵ However, he also testified that he did not enter the apartment, and that he did not see Sweets use force in taking marijuana or money from the victim.⁸⁶

The State argued there was no basis in the evidence for acquitting the defendant of second-degree robbery and instead convicting him of felony stealing because, while the defendant is not required to put forth his own affirmative evidence, there must nonetheless be some evidence in the record that would support a lesser included instruction.⁸⁷ The State argued that the defendant “was not entitled to the instruction on the sole basis that the jury might disbelieve some of the state’s evidence,”⁸⁸ and its ability to disbelieve evidence or refuse to draw necessary inferences “does not entitle the defendant to an instruction otherwise unsupported by the evidence.”⁸⁹ The court rejected this argument, noting that it rejected the same argument in *Pond*, and stated, “A defendant is entitled to an instruction on any theory the evidence

77. *Id.*

78. *Id.*

79. *Id.* (emphasis omitted).

80. *Id.* (quoting *State v. Robinson*, 26 S.W.3d 414, 418 (Mo. Ct. App. 2000)).

81. *Id.* at 795.

82. 313 S.W.3d 656, 657 (Mo. 2010) (en banc).

83. *Id.*

84. *Id.* Second-degree robbery requires the State prove that the defendant forcibly stole property, while felony stealing does not. *Id.* at 657–58.

85. *Id.* at 657.

86. *Id.*

87. *Id.* at 660–61.

88. *Id.* at 661.

89. *Id.* at 660.

establishes.”⁹⁰ The court briefly noted, “If a reasonable juror could draw inferences from the evidence presented that an essential element of the greater offense has not been established, the trial court should instruct down.”⁹¹

The court held there was a basis for a verdict acquitting the defendant of second-degree robbery, because “[t]he jurors could have believed [the defendant] was complicit in the taking of money from [the victim], believed [the victim’s] testimony that no gun or knife was used, and disbelieved [the victim’s] testimony about the use of physical force.”⁹² The court made no mention of the jury choosing to believe the testimony of the defendant.⁹³

C. *The Right to a Trial by Jury*

The Sixth Amendment of the U.S. Constitution protects a defendant’s right to be tried by an impartial jury.⁹⁴ The Missouri Constitution provides, “[T]he right of trial by jury as heretofore enjoyed shall remain inviolate”⁹⁵ Insofar as these rights to trial by jury are concerned, the Supreme Court of the United States has held that the U.S. Constitution prohibits judges from directing a verdict of guilt in a criminal proceeding.⁹⁶ Additionally, the Supreme Court has held that due process demands that a criminal defendant must be found guilty of all facts constituting the offense charged, beyond a reasonable doubt.⁹⁷

In 1895, in *Sparf v. United States*, the Supreme Court of the United States held that a trial court did not violate a defendant’s Sixth Amendment rights when it told a jury that it could convict a defendant of murder or acquit him entirely, but it could not convict him of manslaughter because there was absolutely no evidence to support a conviction for manslaughter.⁹⁸ However, so long as there is an adequate and independent foundation in state substantive law, “[A] state decision resting on . . . state substantive law is immune from review in the federal courts.”⁹⁹ Therefore, so long as Missouri’s substantive law provides an adequate and independent foundation upon which a decision deviating from *Sparf* may rest, Missouri is not required to restrict its interpretation of the right to a trial by jury to the interpretation handed down in *Sparf*.

The Supreme Court of Missouri held that a trial court is prohibited by the Missouri Constitution from directing a verdict of guilt, that the presump-

90. *Id.* (quoting *State v. Pond*, 131 S.W.3d 792, 794 (Mo. 2004) (en banc)).

91. *Id.* (quoting *State v. Derenzy*, 89 S.W.3d 472, 474 (Mo. 2002) (en banc)).

92. *Id.*

93. See generally *Williams*, 313 S.W.3d 656.

94. U.S. CONST. amend. VI.

95. MO. CONST. art. I, § 22(a).

96. *Connecticut v. Johnson*, 460 U.S. 73, 84 (1983).

97. *In re Winship*, 397 U.S. 358, 363 (1970).

98. 156 U.S. 51, 64, 103 (1895).

99. *Wainwright v. Sykes*, 433 U.S. 72, 81 (1977).

tion of the defendant's innocence rests with him throughout the criminal proceeding, and the fact that a prima facie case for the defendant's guilt has been made does not shift that presumption.¹⁰⁰ Therefore, the Missouri Constitution provides an adequate and independent foundation that allows Missouri to create its own right to a trial by jury, and to determine what protections that right grants.

IV. INSTANT DECISION

State v. Jackson provided the Supreme Court of Missouri the opportunity to address, once again, the issue of when a trial court is required to instruct a jury on a lesser included offense.¹⁰¹ The Supreme Court of Missouri's opinion, authored by Judge Paul C. Wilson, and joined by then-Chief Justice Russell and Judges Fischer and Teitelman, focused on only one issue:

[W]hether the trial court can refuse to give a lesser included instruction requested by the defendant under Section 556.046 when the lesser offense consists of a subset of the elements of the charged offense and the differential element (i.e., the element required for the charged offense but not for the lesser offense) is one on which the state bears the burden of proof.¹⁰²

In its 4-3 decision, the court held that the right of the jury to disbelieve any or all evidence and its right to refuse to draw necessary inferences to support a conviction was sufficient to give rise to a jury instruction for a lesser included offense.¹⁰³

Judge Laura Denvir Stith authored an opinion concurring in part, and dissenting in part, which was joined by Judge Breckenridge.¹⁰⁴ Judge George W. Draper III authored a separate dissent, which will not be analyzed in this Note because much of its reasoning is also articulated in Judge Stith's opinion.¹⁰⁵ Judge Draper disagreed with Judge Stith's conclusions regarding the facts of the case, but not in her analysis of the principal opinion.¹⁰⁶

A. *The Majority*

The court's analysis began by considering the elements at issue when determining whether a trial court is required to give an instruction on a "first-

100. *State v. Shelby*, 64 S.W.2d 269, 275 (Mo. 1933) (en banc).

101. 433 S.W.3d 390, 392 (Mo. 2014) (en banc).

102. *Id.*

103. *Id.* at 399, 409–10.

104. *Id.* at 409–10.

105. *Id.* at 422 (Draper, J., dissenting).

106. *Id.*

level” lesser included offense under Section 556.046.¹⁰⁷ The court stated that the addition of 556.046.3 did not change its analysis, and that Sections 556.046.2 and 556.046.3 are interchangeable when considering first-level lesser included offenses.¹⁰⁸ The elements to be considered are: (1) “a party timely requests the instruction;”¹⁰⁹ (2) “there is a basis in the evidence for acquitting the defendant of the charged offense; and”¹¹⁰ (3) “there is a basis in the evidence for convicting the defendant of the lesser included offense for which the instruction is requested.”¹¹¹ The court concluded that the only question in this case was whether the second element was met because when dealing with a nested lesser included offense, there will always be a basis in the evidence for convicting the defendant of the lesser included offense.¹¹²

The court then addressed, and dismissed, the arguments of both briefs.¹¹³ The court agreed with the State’s assertion that Jackson’s argument failed to address whether the employee was reasonable in her belief that Jackson had a gun, but that this was “immaterial,” because the proper question was whether the jury’s right to disbelieve evidence submitted by the State could, on its own, establish a basis in the evidence to acquit Jackson of the greater offense under Section 556.046.¹¹⁴

The court’s analysis then focused on the direct precedent governing jury instructions for lesser included offenses under Section 556.046.¹¹⁵ The court noted the State’s continued reliance on *Olson*, even though that case was repeatedly rejected.¹¹⁶ First, the State relied on *Olson* in *Santillan*, where the Supreme Court of Missouri overruled *Olson*’s requirement that a defendant assert affirmative evidence demonstrating the lack of an essential element.¹¹⁷ Then, *Olson* was rejected again in *Pond*, which also rejected the State’s argument that the jury’s ability to disbelieve evidence was not sufficient to entitle a defendant to an instruction for a lesser included offense by stating,

107. *Id.* at 396 (majority opinion). The court was silent on what it meant when it referred to a “first-level” lesser included offense. *See id.* However, it likely refers to the first lesser included offense in a series of lesser included offenses. *See id.* For example, a first-level lesser included offense of first-degree assault would be second-degree assault, while third-degree assault would be a second-level lesser included offense. *See* MO. REV. STAT. §§ 565.050, .060, .070 (2000).

108. *Jackson*, 433 S.W.3d at 396. The court did not discuss how these statutes might affect the requirement to grant a requested jury instruction for a lesser included offense that is not a first-level lesser included offense. *See id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* at 396, 404. This is because it is impossible to commit the greater offense without also committing the lesser included offense. *Id.* at 404.

113. *Id.* at 397; *see supra* Part II (discussing the arguments briefed by the parties).

114. *Jackson*, 433 S.W.3d at 397.

115. *Id.*

116. *Id.*

117. *Id.* at 397–98.

“A jury may accept part of a witness’s testimony, but disbelieve other parts.”¹¹⁸

The majority then turned to *Williams*, where it emphasized the court’s express rejection of the State’s argument that the defendant “was not entitled to the instruction on the sole basis that the jury might disbelieve some of the State’s evidence.”¹¹⁹ The court determined that *Williams* clearly rejected any continued reliance on *Olson*’s suggestion that some affirmative evidence must be presented to the trial court in order to require the court to instruct the jury on a lesser included offense, but that it also failed to expressly overrule *Olson*.¹²⁰ Therefore, the court announced that it would now overrule the surviving language of *Olson* that continued to suggest that some affirmative evidence was required in order to establish a basis in the evidence to support a jury instruction for a lesser included offense.¹²¹

The court stated that it would now expressly hold what *Pond* and *Williams* implied: the jury’s right to disbelieve the evidence and its right to refuse to draw necessary inferences, standing alone, is a sufficient basis in the evidence to acquit the defendant of the charged offense, and that *Olson* is overruled to the extent that it suggests otherwise.¹²²

The court then shifted its analysis to the context in which the decision to grant, or refuse to grant, a jury instruction for a lesser included offense is made.¹²³ The court noted that decisions of what evidence the jury must believe, and what inferences the jury is required to draw, is left to the jury, and judges are not to decide what reasonable jurors must do.¹²⁴ Evidence never proves an element of a crime until every juror says it does, and no inference is drawn until every juror draws it.¹²⁵ It is in this context that the language of Section 556.046 must be interpreted.¹²⁶

The court stated that it is the “universally accepted law of this state that a court in the trial of a criminal prosecution cannot direct the jury to return a verdict of guilty[.]”¹²⁷ It then quoted *State v. Shelby* for the proposition that “no court in Missouri has the power or right to direct a verdict of guilty in the face of our constitutional guaranty of trial by jury, our statute forbidding the judge to sum up or comment on the evidence.”¹²⁸ Further, “The presumption

118. *Id.* at 398 (emphasis omitted) (quoting *State v. Pond*, 131 S.W.3d 792, 794 (Mo. 2004) (en banc)).

119. *Id.* (emphasis omitted) (quoting *State v. Williams*, 313 S.W.3d 656, 661 (Mo. 2010) (en banc)).

120. *Id.* at 399.

121. *Id.*

122. *Id.* at 399, 401–02.

123. *Id.* at 399.

124. *Id.*

125. *Id.* at 400.

126. *Id.* at 399, 400, 402.

127. *Id.* at 401 (alteration in original) (quoting *State v. McNamera*, 110 S.W. 1067, 1071–72 (Mo. 1908)).

128. *Id.* (quoting *State v. Shelby*, 64 S.W.2d 269, 275 (Mo. 1933) (en banc)).

of innocence with which defendant is clothed, and never which shifts, *rests with him throughout . . .*”¹²⁹ With these statements, the court indicated that the Missouri Constitution’s grant of the right to trial by jury would govern, rather than the Sixth Amendment of the U.S. Constitution.

The court reasoned that when a court decides whether to instruct the jury on a lesser included offense in a criminal case under Section 556.046, based on a determination of what a reasonable juror must or must not find or infer, treads dangerously close to directing a verdict of guilt in a criminal case.¹³⁰ To refuse to instruct the jury on a lesser included offense because the evidence is so compelling as to make it unreasonable for a juror to acquit the defendant as to the differential element creates the same effect as a directed verdict of guilt as to the differential element.¹³¹ The court analogized such a refusal to a trial judge giving a second-degree robbery instruction to the jury, but then telling the jury that it must find Jackson guilty of first-degree robbery if it finds all of the elements of second-degree robbery have been met.¹³² Therefore, the majority determined Section 556.046 must be interpreted in accordance with the defendant’s constitutional right to a trial by jury, and the majority stated that its holding is faithful to the language of Section 556.046 when it is placed within this constitutional context.¹³³

Thus, the trial court is not permitted to refuse to grant a defendant’s request for a jury instruction for a nested lesser included offense, when the burden to prove the differential element is on the State, because the jury’s right to disbelieve evidence is sufficient, by itself, to establish a basis in the evidence to acquit the defendant of the charged offense.

B. *The Dissent*

Judge Laura Denvir Stith, joined by Judge Breckenridge, concurred with the majority’s result, but dissented from the court’s holding that the jury’s right to disbelieve evidence is sufficient, on its own, to establish a basis in the evidence that would require a trial court to instruct a jury on a lesser included offense.¹³⁴ The dissent agreed with the majority’s statement of the elements to be fulfilled under Section 556.046, but reasoned that the court’s conclusion “guts” Sections 556.046.2 and 556.046.3.¹³⁵

The dissent rejected the court’s claim that its holding reaffirmed the holdings of *Pond* and *Williams*.¹³⁶ The dissent’s reading of *Williams* emphasized the statement in *Williams* that Section 556.046.2 only requires an in-

129. *Id.* (quoting *Shelby*, 64 S.W.2d at 275).

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.* at 402.

134. *Id.* at 410 (Stith, J., concurring in part and dissenting in part).

135. *Id.* at 414.

136. *Id.* at 416.

struction for a lesser included offense when “a reasonable juror could draw inferences from the evidence” that the differential element of the greater offense was not established.¹³⁷ The dissent asserted that *Williams* required the application of the same reasonable juror standard as that utilized in *Pond*.¹³⁸ Based on these readings, the dissent concluded that the court’s holding eliminated the reasonable juror standard from the analysis of Section 556.046, which the court had overruled in *Williams*, *Pond*, and numerous other cases establishing Missouri’s jurisprudence regarding jury instructions for lesser included offenses.¹³⁹

The dissent also attacked the court’s application of statutory construction to Section 556.046, arguing that the plain meaning of Sections 556.046.2 and 556.046.3 is clear and unambiguous.¹⁴⁰ The statute expressly requires a “basis in the evidence” to acquit the defendant of the greater charge before a trial court is required to instruct the jury as to a lesser included offense.¹⁴¹ The dissent’s position was that the court’s holding makes this language mere surplusage, rendering it meaningless, which violates a basic principle that courts should avoid interpreting a statute in a manner that strips statutory language of its meaning.¹⁴²

The dissent also disagreed with the court’s conclusion that a trial judge may not apply a reasonable juror test in determining whether there was a basis in the evidence to support a jury instruction for a lesser included offense.¹⁴³ The dissent said the court’s “logic confuses questions of law with questions of fact.”¹⁴⁴ The dissent’s position was that the jury’s right to find facts and the trial judge’s duty to declare the law are separate functions, and that the court was mistaken when it said the judge intrudes upon the jury’s province when she refuses to instruct the jury on a lesser included offense because she determined that no reasonable juror could find that there was a basis in the evidence to acquit the defendant as to the differential element.¹⁴⁵ It noted that the Supreme Court of the United States has expressly “disapproved of state laws that require a trial court to instruct down when there ‘is not a scintilla of evidence to support the lesser verdicts.’”¹⁴⁶

137. *Id.* (quoting *State v. Williams*, 313 S.W.3d 656, 660 (Mo. 2010) (en banc)).

138. *Id.* at 417. The holding in *State v. Pond* stated, “A reasonable jury could find the prior statements more believable than those at trial.” 131 S.W.3d 792, 794 (Mo. 2004) (en banc).

139. *Jackson*, 433 S.W.3d at 417 (Stith, J., concurring in part and dissenting in part).

140. *Id.* at 415.

141. *Id.* at 414.

142. *Id.*

143. *Id.* at 411.

144. *Id.*

145. *Id.*

146. *Id.* at 412 (quoting *Roberts v. Louisiana*, 428 U.S. 325, 334 (1976) (plurality opinion)).

In order to reach its conclusion, the dissent relied on a decision of the Supreme Court of the United States in *Sparf v. United States*.¹⁴⁷ According to the dissent, *Sparf* held that a trial court has the authority to decide, as a matter of law, whether a jury should be instructed as to a lesser included offense.¹⁴⁸ Relying on *Sparf*, the dissent said that the jury's power to disregard the law does not deprive the trial court of its authority to declare and instruct the jury regarding the law.¹⁴⁹ The dissent stated the jury's right to disbelieve evidence is a factor to be considered by the trial court in determining what reasonable conclusions and inferences the evidence supports.¹⁵⁰ The fact that a jury may believe some evidence, but disbelieve other evidence, allows the court to instruct the jury as to a lesser included offense when there is a conflict in the evidence and the findings related to that conflict are the difference between an acquittal and a conviction as to the differential element.¹⁵¹ The trial judge has the duty to determine what instructions the evidence supports.¹⁵² Therefore, a trial judge does not encroach upon the defendant's right to a trial by jury by refusing to instruct on a lesser included offense.¹⁵³

V. COMMENT

The majority and the dissent disagree on every major point of law. The only things on which they agree are the facts, the elements to be met under Section 556.046, and that Jackson should have been granted a jury instruction for the lesser included offense of second-degree robbery. While they agree on the end result – that Jackson should have received the lesser included jury instruction – they disagree on how to reach that result. This Part supports and augments the reasoning of the majority opinion, discusses the merits of the dissent while explaining its arguments' shortcomings, and criticizes those aspects of the majority's opinion that may have undesirable consequences.

This Part focuses on the two most prominent points of contention. First, it addresses the proper interpretation of the direct precedent, with a particular focus on *Pond* and *Williams*. Did the court reaffirm those decisions, as it claimed, or did it effectively overrule them, as the dissent argues? Second, this Part considers the proper interpretation of Section 556.046, which is dependent upon an analysis of the defendant's right to a trial by jury, and how that right is affected when a trial judge refuses to instruct the jury on a lesser included offense.

147. *Id.* at 411–13 (citing *Sparf v. United States*, 156 U.S. 51, 102–03, 105–07 (1895)).

148. *Id.* at 412.

149. *Id.* at 411. The power of the jury to which the dissent refers is the power of jury nullification, which the dissent characterizes as the power “to acquit arbitrarily.” *Id.* at 412.

150. *Id.*

151. *Id.* at 413.

152. *Id.*

153. *Id.*

A. *The Direct Precedent: The Proper Interpretation of Pond and Williams*

Much of the debate in *Jackson* rests on what *Santillan*, *Pond*, and *Williams* meant when they rejected arguments made by the State in reliance on *Olson*.¹⁵⁴ This Part will provide an analysis of the language of *Pond* and *Williams*, the two cases most at issue. Following this analysis, it will be clear that *Pond*'s interpretation of what constitutes a basis in the evidence, for the purpose of granting a lesser included offense instruction, differs from that of *Williams*. It will further show that the holding of *Jackson* is entirely consistent with the holding of *Williams* because the decision in *Williams* demonstrates that there is no need for some alternative evidence that the jury can believe in place of the evidence it disbelieves. The jury's disbelief of evidence is sufficient, on its own, to establish a right to a lesser included offense instruction.

The court found the State's continued reliance on certain aspects of *Olson* unjustified in light of *Pond* and *Williams*.¹⁵⁵ It is clear that *Pond* was a narrow decision.¹⁵⁶ It essentially followed the reasoning of *Santillan*, which held a jury instruction for the lesser included offense should have been given because, "[A] reasonable juror could draw inferences from the evidence presented that the defendant did not deliberate."¹⁵⁷ The only new factor in *Pond* was the State's argument that the jury's ability to disbelieve some part of the State's evidence did not establish a basis to acquit the defendant of the greater offense.¹⁵⁸ The *Pond* court rejected the State's argument because the jury could disbelieve the State's evidence and instead choose to believe the evidence elicited during the cross-examination of the State's witness.¹⁵⁹ It is important to note that the court in *Pond* explicitly concluded that "[a] reasonable jury could find the prior statements more believable than those at trial."¹⁶⁰

The court in *Williams* failed to articulate a belief that the jury could elect to believe one aspect of the evidence while disbelieving another, and the court's holding does not indicate a conflict in the evidence.¹⁶¹ The defendant in *Williams* testified that he did not see Sweets use physical force to steal from the victim,¹⁶² while the victim testified that Sweets used physical

154. See generally *id.*

155. *Id.* at 398–99 (majority opinion).

156. See generally *State v. Pond*, 131 S.W.3d 792 (Mo. 2004) (en banc).

157. *State v. Santillan*, 948 S.W.2d 574, 576 (Mo. 1997) (en banc).

158. *Pond*, 131 S.W.3d at 794.

159. *Id.*

160. *Id.*

161. *State v. Williams*, 313 S.W.3d 656, 660 (Mo. 2010) (en banc). This is contrary to the circumstances in *Pond*, where there was an explicit conflict in the evidence. *Pond*, 131 S.W.3d at 794.

162. *Williams*, 313 S.W.3d at 657.

force.¹⁶³ However, the defendant's statement that he did not see Sweets use physical force is not the same as the defendant saying Sweets did not use physical force. The defendant and victim's versions of the events differed, but the differing statements did not directly conflict with each other like they did in *Pond*. Therefore, unlike in *Pond*, the jury could only acquit the defendant of the greater offense if it chose to disbelieve the victim's account of the events. As the *Williams* court put it, "The jurors could have believed Williams was complicit in the taking of money from [the victim], believed [the victim's] testimony that no gun or knife was used, and disbelieved [the victim's] testimony about the use of physical force."¹⁶⁴ Furthermore, the *Williams* court directly rejected the State's argument that the defendant "was not entitled to the instruction on the sole basis that the jury might disbelieve some of the state's evidence,"¹⁶⁵ and its ability to disbelieve evidence or refuse to draw necessary inferences "does not entitle the defendant to an instruction otherwise unsupported by the evidence."¹⁶⁶ Unlike in *Pond*, where the jury had alternative evidence it could choose to believe, the *Williams* jury only had the choice of disbelieving evidence. This amounts to a tacit acknowledgement that the jury's ability to disbelieve evidence is sufficient, by itself, to establish a basis in the evidence to acquit the defendant of the greater offense.

The dissent accurately claims that *Pond* applied the reasonable juror standard, and that it required some evidence in the record to show the differential element was lacking.¹⁶⁷ However, its claim to *Williams* is tenuous. The dissent rests its argument on the fact that *Williams* said, "If a reasonable juror could draw inferences from the evidence presented that an essential element of the greater offense has not been established, the trial court should instruct down."¹⁶⁸ However, this statement references a standard the *Williams* court simply did not apply in its holding.¹⁶⁹ Additionally, the *Williams* court flatly rejected the State's argument that there must be some affirmative evidence – not necessarily introduced by the defendant – in the record to support the instruction on the lesser included offense.¹⁷⁰

The *Williams* court claimed the State's argument in *Williams* was rejected previously in *Pond*.¹⁷¹ This was not the case. *Pond* rejected the State's

163. *Id.* at 660.

164. *Id.* Unlike in *Pond*, the decision to disbelieve the victim's claim of physical force stands on its own. In *Pond*, the decision to disbelieve the victim's claim of penetration was supported by the jury's ability to instead believe the prior contradictory statements made by the victim. *Pond*, 131 S.W.3d at 794.

165. *Williams*, 313 S.W.3d at 661.

166. *Id.* at 660.

167. *Pond*, 131 S.W.3d at 794.

168. *State v. Jackson*, 433 S.W.3d 390, 411 (Mo. 2014) (en banc) (Stith, J., concurring in part and dissenting in part) (quoting *Williams*, 313 S.W.3d at 660).

169. *See generally Williams*, 313 S.W.3d 656.

170. *Id.* at 661.

171. *Id.*

argument that the defendant was required to put on affirmative evidence, and *Pond* said the fact that a jury “might disbelieve some of the State’s evidence” did not entitle the defendant to an instruction.¹⁷² In *Williams*, the State’s argument asserted that some affirmative evidence must exist in the record, and it also argued that a defendant is “not entitled to the instruction on the sole basis that the jury might disbelieve some of the state’s evidence,”¹⁷³ and the fact that it may disbelieve evidence or decline to draw necessary inferences “does not entitle the defendant to an instruction otherwise unsupported by the evidence.”¹⁷⁴ The State’s argument in *Williams* is a far cry from the arguments rejected in *Pond*. *Pond* was a natural application of the holding of *Santillan* to a new set of facts. *Williams* was a massive expansion of the logic in *Pond*, but the impact of this expansion was not obvious until now. By rejecting the need for *any* affirmative evidence in the record to support a lesser included instruction, *Williams* effectively held that a jury’s right to disbelieve evidence was sufficient to establish a right to a lesser included offense instruction.

The dissent’s arguments would properly be directed at the *Williams* court, whose holding essentially overruled the surviving language of *Olson*. *Williams* departed from precedent, rejecting *Olson*, *Santillan*, and *Pond*’s requirement that there be some evidentiary support for the instruction.¹⁷⁵ Instead, *Williams* required trial courts to instruct on a lesser included offense merely based on the jury’s ability to disbelieve the State’s evidence.¹⁷⁶

Therefore, the court’s holding in *Jackson*, while more elaborate and clearly articulated, essentially reaffirmed the holding of *Williams*. Any expansion of the holding in *Williams* is a natural and logical expansion. The *Jackson* court stated in clear terms what the *Williams* court implied: the jury’s right to disbelieve evidence and refuse to draw necessary inferences, standing alone, is sufficient to establish a basis in the evidence to acquit the defendant of the charged offense.¹⁷⁷

B. The Defendant’s Right to a Trial by Jury

Justice Scalia has noted, “The Constitution does not trust judges to make determinations of criminal guilt.”¹⁷⁸ This statement attacked the view that a defendant’s conviction could stand because “judges could tell that [the defendant] is unquestionably guilty.”¹⁷⁹ In *Jackson*, the Supreme Court of Mis-

172. *Pond*, 131 S.W.3d at 794.

173. *Williams*, 313 S.W.3d at 661.

174. *Id.* at 660.

175. *Id.* at 660–61.

176. *Id.* at 661.

177. *State v. Jackson*, 433 S.W.3d 390, 399, 400 (Mo. 2014) (en banc).

178. *Neder v. United States*, 527 U.S. 1, 32 (1999) (Scalia, J., dissenting) (emphasis omitted).

179. *Id.* at 31 (emphasis omitted).

souri shared Justice Scalia's concern. It attacked the notion that a judge may look at the evidence, know that a jury would be irrational to acquit the defendant of the charged offense, and therefore refuse consideration of a lesser included offense.¹⁸⁰ This concern was at the core of the court's discussion of Section 556.046.¹⁸¹

The dissent's assertion that the court failed to interpret Section 556.046 by its plain language is clearly correct.¹⁸² A "basis in the evidence"¹⁸³ to acquit means a basis in the evidence upon which the decision to acquit may rest. It does not, by its plain language, refer to the jury's ability to disregard evidence.¹⁸⁴ Therefore, the court must justify its application of statutory construction to Section 556.046.

The court's position is that its interpretation of Section 556.046 is the only way to interpret the statute without risking the fundamental right to a jury trial and the presumption of innocence.¹⁸⁵ At its core, this is a constitutional argument. The court's position is that the dissent's interpretation of the statute leads to a result that would contravene the Missouri Constitution.¹⁸⁶

The court should have made its reliance on the Missouri Constitution, rather than the U.S. Constitution, explicit. The *Jackson* court is essentially interpreting Article I, Section 22(a) of the Missouri Constitution, which guarantees that the right to trial by jury shall remain inviolate.¹⁸⁷ The court only hints at its reliance on the Missouri Constitution in a block quotation from *State v. Shelby*,¹⁸⁸ nevertheless, the fact that this decision is based on the Missouri Constitution is the key to refuting the dissent's argument. Such an important factor in a court decision should not be tucked away in a block quote.

Because the court's statutory interpretation was influenced by its *state* constitutional concerns, the dissent's reliance on federal constitutional law is misplaced.¹⁸⁹ It is a well-established principle that states may grant greater protections under their own constitutions than those granted by the U.S. Constitution.¹⁹⁰ The fact that the Supreme Court of the United States disapproves of rules regarding lesser included instructions, such as the one adopted by the court in *Jackson*, is of little consequence.¹⁹¹ The Supreme Court of Missouri is not beholden to any other jurisdiction, including the federal government,

180. *Jackson*, 433 S.W.3d at 400.

181. *See generally id.* at 390.

182. *Jackson*, 433 S.W.3d at 415 (Stith, J., concurring in part and dissenting in part).

183. *Id.* at 396 (majority opinion).

184. *Id.* at 396–97.

185. *Id.* at 402.

186. *See id.*

187. MO. CONST. art. I, § 22(a).

188. *Jackson*, 433 S.W.3d at 401.

189. *See id.* at 411–12 (Stith, J., concurring in part and dissenting in part).

190. *See Wainwright v. Sykes*, 433 U.S. 72, 81 (1977).

191. *See Jackson*, 433 S.W.3d at 412 (Stith, J., concurring in part and dissenting in part).

when it interprets its own constitution to grant greater rights. Additionally, *Sparf*'s refusal to recognize the right of a jury to make its own determinations, even when those determinations ignore the law, may no longer be approved by the Supreme Court of the United States. The Court noted, "[T]he very reason the Framers put a jury-trial guarantee in the Constitution is that they were unwilling to trust the federal government to mark out the role of the jury."¹⁹²

The dissent correctly highlights the majority's lack of precedential support for the proposition that a refusal to instruct the jury as to a lesser included offense is tantamount to directing a verdict. However, the strength of the court's argument is its rationale, and sometimes a decision must be made without the benefit of direct precedent.¹⁹³ The jury is the entity that determines guilt or innocence of a crime, not the judge. For a judge to refuse to instruct the jury on a lesser offense that is included within the charged offense also denies the jury the opportunity to decide the defendant's guilt on that offense. It is true, the judge has not denied the jury the right to acquit the defendant of the charged offense, and she has thus not directed a verdict of guilt in a literal sense, but she has denied the jury the opportunity to find guilt on a lesser offense whose elements the jury determined were fully met. Instead, the jury must find guilt on the greater offense, whose elements it might believe have not been proven beyond a reasonable doubt, or acquit the defendant entirely when it believes the defendant acted criminally.¹⁹⁴ A jury may feel compelled to find guilt even though it believes a differential element has not been proven beyond a reasonable doubt. It feels this compulsion because it believes the defendant committed a wrong, and thus should be punished, but the judge has not instructed it on an appropriate lesser included offense. In such a circumstance, the judge has essentially directed a verdict of guilt.

Furthermore, contrary to the dissent, the jury does not decide what the law is when it elects to convict on a lesser included offense.¹⁹⁵ Rather, it finds a fact unproven.¹⁹⁶ A judge's refusal to grant an instruction for a lesser included offense amounts to a finding of fact that the differential element has been met.

The court's rule here essentially mirrors the rules regarding verdicts. A judge may direct an acquittal of the defendant when the evidence fails to meet the elements, but she may not direct a verdict of guilt, no matter how overwhelming the evidence might be.¹⁹⁷ With the court's holding in place, a similar rule takes shape regarding jury instructions: a judge may refuse to instruct

192. *Blakely v. Washington*, 542 U.S. 296, 308 (2004).

193. *Jackson*, 433 S.W.3d at 411 (Stith, J., concurring in part and dissenting in part).

194. *Id.* at 403 (majority opinion).

195. *Id.* at 411 (Stith, J., concurring in part and dissenting in part).

196. *See id.*

197. *See Connecticut v. Johnson*, 460 U.S. 73, 84 (1983); *see also* FED. R. CRIM. P. 29.

the jury on the charged offense, and instead instruct it solely on a lesser included offense,¹⁹⁸ but she may not refuse to instruct the jury on a first-level,¹⁹⁹ nested, lesser included offense, no matter how overwhelming the evidence might be regarding the differential element.

The jury acts as a check on the judiciary.²⁰⁰ If this is to hold true, it must be the jury's role to decide what crime the defendant should be found guilty of, so long as the determination is made within the reasonable bounds of the law (i.e., the defendant is not convicted of a crime for which he has not been charged).

C. Future Consequences and Considerations

The consequences of the Supreme Court of Missouri's decision in *Jackson* remain to be seen. When a defendant requests a jury instruction for a lesser included offense, for which the elements consist of a subset of the elements of the charged offense, the defendant is guaranteed the jury will be given the opportunity to consider the option of acquitting the defendant of the greater offense while convicting her of the lesser offense.²⁰¹ Certainly, the court indicated that its intention was for such lesser included offense instructions to be granted every time they are requested.²⁰²

The court's decision in *Jackson* leaves one question unanswered. It does not discuss how its ruling applies to lesser included offenses other than "first-level" lesser included offenses.²⁰³ The court's limitation of this rule to first-level lesser included offenses seems arbitrary at best. Why is a defendant charged with first-degree robbery automatically entitled to an instruction on second-degree robbery, but not to an instruction for felony stealing? The differential element between second-degree robbery and felony stealing is the use of force.²⁰⁴ Would a jury not be entitled to disbelieve the use of force while also disbelieving the use or threatened use of what appeared to be a

198. Doing so would be an extension of the notion that a judge may direct a verdict of acquittal, which is permitted in federal courts by FED. R. CRIM. P. 29.

199. The majority opinion references this concept of a "first-level" lesser included offense. *See generally Jackson*, 433 S.W.3d 390. It most likely refers to the first of a series of lesser included offenses. *Id.* at 396 n.10. For example, first-, second-, and third-degree assault are all part of a series of offenses. *See* MO. REV. STAT. §§ 565.050, .060, .070 (2000). Second- and third-degree assault are both lesser included offenses of first-degree assault. *See id.* §§ 565.060, .070. Second-degree would be the "first-level" lesser included offense. *See id.* § 565.060.

200. *Blakely v. Washington*, 542 U.S. 296, 306 (2004) ("Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary.").

201. MO. REV. STAT. § 556.046 (Cum. Supp. 2013).

202. *State v. Jackson*, 433 S.W.3d 390, 402 (Mo. 2014) (en banc).

203. *Id.* at 398.

204. *Compare* MO. REV. STAT. § 569.020 (2000), with MO. REV. STAT. § 571.015 (2000).

weapon? If the jury's right to disbelieve evidence applies to the first-level lesser included offense, why does it not apply to the second- or third-level lesser included offenses? The court's failure to articulate its reasoning on this issue is disconcerting, and it may create uncertainty in how courts determine when they are required to instruct a jury on multiple lesser included offenses. Perhaps the line must be drawn somewhere. But, if it is to be drawn at these first-level lesser included offenses, the trial courts must be provided with some rule to allow them to understand how second- or third-level lesser included offenses must be treated.

Additionally, certain statements made by the court in *dicta* are concerning. The court references the fact that a defendant may be entitled to post-conviction relief when trial counsel fails to request a jury instruction for a lesser included offense, when that failure can be attributed to "inadvertence" as opposed to a reasonable trial strategy.²⁰⁵ Later in the opinion, the court says one consequence of its decision is that trial courts will likely give jury instructions for lesser included offenses, even when they are not requested, simply to avoid the possibility of post-conviction relief hearings.²⁰⁶ This *dictum*, though perhaps well-intentioned, is ill-conceived. It is unlikely that the court intended to imply that a court could *sua sponte* instruct the jury as to a lesser included offense without the defendant's assent, but it may have left open a path that leads precisely to that interpretation. A defendant should always be permitted to take his or her chances and decline a jury instruction for a lesser included offense, even if doing so is irrational. Any implication to the contrary endangers the right of the defendant to control his own trial strategy.

A court should say what it means and mean what it says,²⁰⁷ because clarity on these issues, where ambiguity benefits no one, can solve problems before they ever arise.

VI. CONCLUSION

Missouri will have to wait to see where the court's decision in *Jackson* will take it. There is already some indication that the lower courts are hostile toward the court's decision. The Missouri Court of Appeals for the Eastern District refused to hold that a trial court erred in declining to give a lesser included jury instruction for third-degree assault, because differing mental states – knowingly committing the act for second-degree assault and acting recklessly for third-degree assault – do not constitute a differential element for the purposes of *Jackson* or Section 556.046. Thus, proving second-degree

205. *Jackson*, 433 S.W.3d at 396 n.7 (quoting *McNeal v. State*, 412 S.W.3d 886, 889–90 (Mo. 2013) (en banc)).

206. *Id.* at 402.

207. See DR. SEUSS, *HORTON HATCHES THE EGG* (1940) (demonstrating the importance of clarity in words and meaning).

assault does not also prove third-degree assault.²⁰⁸ This is a holding without any basis in *Jackson*, and it is utterly refuted by statute.²⁰⁹ A similar case in the Missouri Court of Appeals for the Western District reached the opposite result.²¹⁰ The Supreme Court of Missouri granted transfer in both cases, and it held that the defendants were each entitled to an instruction for the nested lesser included offense of third-degree assault.²¹¹

What might be the most interesting prospect of the *Jackson* decision is the possibility that it might have an impact outside of Missouri. The vast majority of the country's jurisdictions utilize rules resembling the rule advocated for by Judge Stith's dissent.²¹² It may be interesting to see how the court's position is received by other states if the opportunity to rule on a similar issue were to arise.

There will certainly be those who believe the *Jackson* decision is harmful to the justice system. Undoubtedly, there will be an increase in verdicts where juries compromise, finding a defendant guilty of a lesser offense because one or two jurors held out against the charged offense. However, this is not necessarily harmful to the justice system. Such compromises are more conducive to the purpose of the jury system. No one should be convicted of a more serious crime because a lone, holdout juror did not believe the evidence proved guilt beyond a reasonable doubt and was browbeaten into finding the defendant guilty. Now, those jurors have the opportunity to hold their ground and find a defendant guilty of a crime they believe the defendant was proven to have committed.

It is also far less likely that a guilty defendant will go free when the prosecution over-charges the defendant because, assuming the defendant requested a lesser included jury instruction, the jury will now be able to take that into consideration.²¹³ Indeed, a defendant guilty of a lesser included crime should not go free simply because the jury was not instructed on a lesser included offense. While many of these scenarios would have likely resulted in a jury instruction for a lesser included offense under the old rule, *Jackson* takes away the trial court's discretion and leaves it entirely to the jury to make its decision based on the evidence presented before it.

208. *State v. Randle*, 2014 WL 4980347, at *2 (Mo. Ct. App. 2014). The court based its decision on the third element of *Jackson's* interpretation of Section 556.046, which requires "a basis in the evidence for convicting the defendant of the lesser included offense for which the instruction is requested." *Jackson*, 433 S.W.3d at 396.

209. *See* MO. REV. STAT. § 562.021.4 (2000); *see Jackson*, 433 S.W.3d 390; *see Randle*, 2014 WL 4980347, at *17–18 (Mooney, J., dissenting).

210. *See State v. Roberts*, 2014 WL 6476715 (Mo. Ct. App. 2014).

211. *See State v. Randle*, 465 S.W.3d 477 (Mo. 2015) (en banc); *State v. Roberts*, 465 S.W.3d 899 (Mo. 2015) (en banc).

212. *See Jackson*, 433 S.W.3d at 418–21 (Stith, J., concurring in part and dissenting in part).

213. It seems doubtful that many defendants will be willing to take the risk of being found guilty of a greater charge by declining to request a lesser included jury instruction, except when they are absolutely certain that they can obtain an acquittal.

