

2014 WL 1663747 (Mo.App. E.D.) (Appellate Brief)  
Missouri Court of Appeals, Eastern District.

STATE OF MISSOURI, Respondent,  
v.  
Kelvin E. PURNELL, Appellant.

No. ED 100829.  
April 11, 2014.

Appeal to the Missouri Court of Appeals Eastern District  
From the Circuit Court of St. Louis County, Missouri Twenty-First Judicial Circuit  
The Honorable Robert S. Cohen, Judge

**Appellant's Statement, Brief, and Argument**

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**\*1 JURISDICTIONAL STATEMENT**

Kelvin Purnell was convicted in a jury trial in the Circuit Court of St. Louis County of second degree assault of a law enforcement officer, §565.082 and armed criminal action, §571.015.

Judge Robert S. Cohen sentenced Kelvin to seven years for second degree assault of a law enforcement officer and fifteen years for armed criminal action with those sentences ordered served concurrently to one another.

This appeal does not involve any issue reserved for the exclusive appellate jurisdiction of the Missouri Supreme Court, thus jurisdiction lies in the Missouri Court of Appeals, Eastern District. [Article V, Section 3, Mo. Const.](#) (as amended 1982); §477.050.

**\*2 STATEMENT OF FACTS**

**The Charges**

Kelvin Purnell was charged as follows: (1) Count I - first degree assault of a law enforcement officer, §565.081, involving Officer Andrew Weusthoff through attempting to kill or cause serious physical injury to him by trying to shoot him on or about May 10, 2012; and (2) Count II - armed criminal, §571.015, based on Count I (L.F.22). <sup>1</sup>

Respondent also charged Kelvin in the alternative as follows: (1) Count III second degree assault of a law enforcement officer, §565.082, involving Officer Andrew Weusthoff through recklessly placing Weusthoff in apprehension of immediate serious physical injury by firing a gun while Weusthoff was attempting to handcuff him on or about May 10, 2012; and (2) Count IV - armed criminal action, §571.015, based on Count III (L.F.23).

Respondent charged Kelvin with three additional counts, but nolle prossed the remaining counts during trial (L.F.29;Tr.234-35). The nolle prossed charges were as follows: (1) Count V - second degree assault of a law enforcement officer, §565.082, involving Officer Andrew Weusthoff through recklessly placing Weusthoff in apprehension of immediate serious physical injury by attempting to gain control of Weusthoff's gun while fighting with Weusthoff; (2) Count VI - armed criminal **\*3** action, §571.015, based on Count V; and (3) Count VII - resisting arrest, §571.015 (L.F.23).

All charges arose from a single incident that arose on May 10, 2012 at 6787 Carol Lee in Berkeley (L.F.22-25;Tr.111).

**Respondent's Case**

Berkeley patrolman Officer Andrew Weusthoff recounted that he received an assignment to accompany a social worker at 6787 Carol Lee on May 10, 2012 as a standby to prevent any disturbance (Tr. 110-12). Weusthoff indicated such a procedure is routine to keep peace and maintain safety (Tr. 110-12). Weusthoff is six feet three inches tall (Tr.150,166). Weusthoff described Kelvin as slim (Tr.166).

Weusthoff had done one prior standby assignment at 6787 Carol Lee when Kelvin was present (Tr.112). Kelvin lived there with his father (Tr.112-13). That prior call was routine, but it was not clear who called the police or why (Tr. 112). Kelvin was

there with his siblings and his father and at one point there was a small verbal disagreement that did not require Weusthoff's intervention (Tr.112-13).

On May 10th Weusthoff was directed to meet at 6787 Carol Lee social worker, Nancy Downing, who was with the Division of Aging (Tr. 113). Downing was accompanied by Kelvin's two sisters (Tr. 113). Downing informed Weusthoff that she was there to accompany Kelvin's father, Charles Purnell, to his nursing home placement (Tr. 113). Charles had had discussions with Downing about him going to a nursing home and that was what Charles wanted to do (Tr. 113-14).

**\*4** Weusthoff and Downing got no answer when they knocked on the front door (Tr. 113-14). Weusthoff went around the house knocking on windows (Tr. 114). Weusthoff got to one window and someone called out "who is out there?" (Tr.114-15). Weusthoff responded: "the police" and directed the person to go to the front door (Tr.114-15).

Kelvin answered the door and greeted Downing by name (Tr. 115). Weusthoff was dressed in full uniform and his police vehicle was parked in front of the house where Weusthoff believed it was visible from the house's windows (Tr. 115-16). Weusthoff told Kelvin that Downing was there to check on his father (Tr.116).

Weusthoff testified that Kelvin stepped in front of Weusthoff and put up his arm, which Weusthoff interpreted as trying to separate Weusthoff from Downing (Tr.116-17). Weusthoff testified that when Kelvin stepped in front of him, Weusthoff reacted by putting a handcuff on Kelvin's right arm (Tr. 117). Weusthoff told Kelvin that he was detained until Weusthoff could figure out what was going on, but he was not under arrest (Tr.117-18). Kelvin was struggling and pulling away (Tr.117-18). Weusthoff's objective became trying to get Kelvin's left hand into the handcuffs (Tr.118).

As Weusthoff and Kelvin struggled with one another, Weusthoff heard a loud bang that he thought was a gun shot (Tr. 118-19). Weusthoff reported that a gun fell out of Kelvin's pocket and bounced back into Kelvin's hand (Tr. 152). Weusthoff saw the muzzle flash over Kelvin's right shoulder (Tr.136). Weusthoff thought Kelvin **\*5** had used his left hand to fire the gun (Tr. 118-19,152). Kelvin fired one shot only and Weusthoff believed Kelvin intended to fire at him (Tr.136,152).

Kelvin and Weusthoff crashed into a coffee table with Kelvin going face first (Tr.119-20,144,146). The two fought for control of the gun (Tr.120-21). At some point, Weusthoff drew his police gun on Kelvin and directed it at Kelvin's head (Tr. 120-21). Weusthoff told Kelvin to drop his gun (Tr.121). Weusthoff then used the butt of his gun to strike Kelvin in the head (Tr.121-22).

At some point, Kelvin lost control of the gun he had and started to try to grab Weusthoff's gun (Tr.122). Weusthoff realized the magazine was falling out of his gun (Tr. 122). Weusthoff did not know how much longer he could keep control of his gun, so he put the muzzle into the carpet and fired off the last shot in it (Tr.122). Weusthoff reported that Kelvin grabbed the magazine that fell out of Weusthoff's gun and Kelvin ran to the back of the house to a bedroom (Tr.123-24). After the second shot, the struggling stopped (Tr.162-64).

During the struggle, Weusthoff called to Downing to call for backup help (Tr. 123). Weusthoff ended up with two guns (Tr. 124). Weusthoff's gun was empty and the other was not Weusthoff's (Tr.124). Weusthoff went out the front door to behind a big tree where he reloaded his gun with an extra magazine (Tr.124,134). Weusthoff's gun was a Glock .45 caliber (Tr.126). Inside with Kelvin was Kelvin's father and Downing (Tr.124). Backup arrived to assist Weusthoff (Tr. 124-25).

**\*6** Weusthoff testified that as he and Downing entered the house that Kelvin stepped toward him and bumped Weusthoff's chest (Tr.140-41). Weusthoff recognized that this was an emotional situation between Kelvin and his sisters (Tr.141-42). When Weusthoff entered the house, Kelvin did not have a gun in his hands (Tr.142-43). Even though Weusthoff had not seen a weapon in Kelvin's hands, he proceeded to handcuff him (Tr. 143).

Weusthoff said that he did not fire the shot that hit the piano (Tr. 149-50).

Nancy Downing recounted that she is a long-term care specialist with the Missouri Department of Health and Senior Services (Tr.170). When this incident arose, Downing was an adult protective and community worker whose job was to respond to hot line allegations of abuse, neglect, and **financial exploitation** (Tr.170). Downing did respond to a hot line call regarding 6787 Carol Lee (Tr. 170). Based on Downing's investigation, a determination was made that the adult hot line call needed to be removed from the household and Charles moved to a nursing home for rehabilitation (Tr.171).

Downing contacted Charles' daughter and Kelvin about the need to place Charles in a nursing home (Tr.171). Kelvin told Downing that he had power of attorney to act for Charles (Tr. 172-73). Downing requested that Kelvin provide her copies of the supporting documentation for that power by May 10th (Tr.172-73,178-79). That deadline was set because of Medicare guidelines for admitting Charles to a nursing home (Tr. 173-74). Downing met Charles' daughter, Carla, with the police at \*7 the house because Carla had always relied on a police escort when she went to the home (Tr.174).

Downing recounted that she and Weusthoff knocked on the door for some time before Kelvin answered (Tr.174-75). Weusthoff entered first and followed by Downing (Tr.175). Downing indicated that when Weusthoff entered, Kelvin was backing up and Weusthoff reached for his handcuffs (Tr. 180-81). Downing went toward Charles' bedroom (Tr. 175). Downing heard Weusthoff and Kelvin struggling (Tr.175). During the struggle, Downing heard furniture and glass breaking (Tr.181). Downing heard Kelvin say that Weusthoff was going to have to shoot Kelvin in the head (Tr.184-86).

Downing recounted that Weusthoff yelled for her to call backup and Downing called 911 (Tr.175-76). Downing heard two distinct gunshots from where she was in the bedroom (Tr.177). Before the first shot, Downing heard Weusthoff tell Kelvin "take it easy, man" and "put it the fuck down" (Tr. 185).

Officer Fumagalli was part of the SWAT team that responded (Tr.187). Fumagalli saw Kelvin through a front window and Kelvin was holding a long gun (Tr.188-89,192-93). When the SWAT team arrived everyone was out of the house, except for Kelvin (Tr.190-91). The SWAT team negotiated with Kelvin who eventually surrendered after about four hours (Tr.189-91).

Officer Nigh found a bullet in the piano (Tr.194,201,207,213). A .25 automatic shell casing was found inside the house (Tr.201-02,206). There was a \*8 carpet burn and a hole in the hardwood flooring with damage to a wooden basement support beam because of a bullet ricocheting off of it (Tr.201-02). A .45 bullet was recovered in the basement (Tr.207-08). Officer Jackson gave Nigh a .25 automatic pistol and cartridges taken from it (Tr.210-11). Nigh testified that a long rifle type BB gun, a shotgun, a speed loader for a revolver, and miscellaneous boxes of ammunition were found in a bedroom closet (Tr.204-05,208-09,214,216-17).

## Defense Case

Kelvin recounted that he was living at 6787 Carol Lee with his father and his son and caring for both of them (Tr.237). Kelvin was asleep in his bedroom when Weusthoff and Downing arrived at his house (Tr.237-38). Downing had been to their house twice before (Tr.237-38). Weusthoff had been to the house before (Tr.238).

Kelvin's father had a 2:15 doctor's appointment scheduled for that day (Tr.238). When Kelvin's father finished breakfast, Kelvin helped move his father in his wheelchair (Tr.238). The wheelchair was necessary because Kelvin's father was being treated with medications that caused him to be heavily sedated (Tr.238). Kelvin helped his father with his prescribed daily therapy (Tr.238).

Kelvin's father heard sounds that caused him to believe someone was breaking into the house and he responded by calling to Kelvin (Tr.238-39). Kelvin's father's calling to him startled and woke-up Kelvin (Tr.238-39). Kelvin responded to that perceived threat by getting his gun (Tr.238-39). During the 1990s, Kelvin had worked as a security officer (Tr.242-43). Kelvin heard banging on the front door so

\*9 he went to it (Tr.239). When Kelvin got to the front door, he put his gun in his pants pocket (Tr.239).

Kelvin looked out the door and saw Downing and thought that Downing was bringing her report from their previous two meetings at the house (Tr.239). Kelvin let Downing inside and at the same time Weusthoff rushed in with handcuffs out (Tr.239). Weusthoff went to put the handcuffs on Kelvin, but he dropped them, while Downing ran to Kelvin's father's bedroom (Tr.240-41).

After Weusthoff dropped the handcuffs, Weusthoff pulled his gun out and placed it to Kelvin's head (Tr.240-41). Weusthoff threatened to kill Kelvin (Tr.241). Kelvin tried to run to the front door, but Weusthoff grabbed him and they fell on the glass coffee table causing it to break (Tr.241,243). Weusthoff still had the gun to Kelvin's head (Tr.241-42). Weusthoff fired his gun while Kelvin was trying to get to the front door (Tr.241-43). Weusthoff's gun was close to Kelvin's head when it fired and the bullet grazed Kelvin's head causing him to bleed profusely (Tr.243-44).

Kelvin never took his gun out of his pants pocket, but at some point it fell out of that pocket (Tr.244-45). Kelvin saw Weusthoff reaching down to grab Kelvin's gun and it fired (Tr.246). Weusthoff then went out the door (Tr.246). Downing ran out the front door (Tr.246-47). Kelvin took his father outside (Tr.246-47).

Kelvin passed out in his bedroom (Tr.246). About four hours passed before Kelvin left the house (Tr.247). Kelvin was taken to the Berkeley police station and \*10 then to the hospital (Tr.247-48). Kelvin had cuts on his hand and a gunshot graze laceration [wound](#) to his head (Tr.248).

Kelvin never took his gun out of his pocket to point it at Weusthoff and never attempted to fire his gun at Weusthoff (Tr.248-49). Kelvin never fired his gun (Tr.248-49).

Kelvin knew that his sisters wanted their father placed in a nursing home, but Kelvin did not want that (Tr.250). Downing had not sent Kelvin paperwork indicating that his father was going to be placed in a nursing home on May 10th (Tr.250).

Kelvin indicated that when Weusthoff dropped the handcuffs that Weusthoff pulled his gun out (Tr.250-51). Kelvin testified that Weusthoff never placed the handcuffs on him (Tr.250-51). The handcuffs were recovered in Kelvin's bedroom with a handcuff key inside them that belonged to Kelvin, which Kelvin had inserted into the handcuffs (Tr.250-51).

Kelvin acknowledged the .25 caliber pistol belonged to him and was the one that had been in his pocket(Tr.251-52). Kelvin acknowledged that a .22 rifle and a 12 gauge shotgun were recovered from his bedroom closet (Tr.252-53).

Nicki Kasen was an ER nurse at Christian Northwest (Tr.259). The Berkeley police brought Kelvin into the ER having a right side head laceration and [abrasions to his hands](#) and arms (Tr.260). Kasen indicated that Kelvin's [head injury](#) could have been caused by a bullet grazing his head or getting struck with the butt of a gun \*11 (Tr.260). A [head CT scan](#) was done to be sure there was no internal bleeding or injury (Tr.261).

Kelvin consented to collections for a gunshot residue test kit being done of his hands for Officer Hoyt (Tr.266,269-71). The police decided not to test the material collected because the collection occurred more than eight hours after this incident and gunshot residue is not expected to remain on a person's hands after eight hours (Tr.272-74).

### **Refused Lesser Included Instruction**

Defense counsel offered a third degree assault of a law enforcement officer, Class A, misdemeanor Instruction A modeled on MAI-CR 319.39 (Tr.277-82;L.F.51). That instruction was supported by evidence from Weusthoff that there was physical contact with him when Kelvin approached him (Tr.277-78).

Respondent argued that third degree assault of a law enforcement officer instruction was not a lesser included instruction to the second degree assault of a law enforcement officer that the jury received (Tr.278). Respondent argued that the second degree instruction required a finding of recklessness whereas the third degree instruction required a finding of knowingly, and therefore, different mental states precluded giving third degree (Tr.277-79;L.F.43-44,51).

Respondent also argued against the third degree instruction because the second degree instruction required a finding Weusthoff was placed in apprehension of serious physical injury through Kelvin firing a gun (Tr.278). In particular, respondent argued \*12 because the offense involved the use of a deadly weapon, a gun, that precluded as a matter of law giving a misdemeanor instruction (Tr.278-79). Respondent argued that knowingly causing physical contact under third degree by Kelvin bumping Weusthoff's chest was a "completely different offense" than second degree (Tr.278).

The court refused the third degree instruction finding that it agreed with all respondent's arguments opposing that instruction (Tr.279-82). The court stated that it did not remember the chest bump evidence and it did not consider that to have any pertinence to the overall context of the evidence (Tr.281-82).

### *Closing Arguments*

In initial closing argument, respondent argued that Kelvin took a gun out of his pocket and fired at Weusthoff (Tr.288-89). Respondent also argued that Kelvin wanted to kill or seriously injure Weusthoff when he tried to take control of Weusthoff's gun to shoot Weusthoff (Tr.289).

In the defense closing argument, counsel argued that Kelvin did not fire any shots and that Weusthoff was responsible for both shots that were fired (Tr.295-98,302). Counsel reminded the jury that it had heard evidence that Kelvin had agreed to do the hand gunshot residue testing the police asked him to do (Tr.299). Counsel noted that Kelvin was upset because he did not want his invalid father taken to a nursing home because Kelvin wanted to care for him (Tr.298-99,305). Counsel urged the jury to find that the two gunshots were fired accidentally as Kelvin, who was five feet nine inches, struggled with Weusthoff, who was six feet three inches(Tr.300-01).

\*13 In rebuttal, respondent argued that Kelvin was lying that Weusthoff was responsible for Kelvin's gun firing (Tr.309-11).

### **Verdicts And Sentencing**

The jury found Kelvin guilty of second degree assault of a law enforcement officer and the related charge of armed criminal action (L.F.59-60).

The trial court found that Kelvin was a prior offender (Tr.97-98). The trial court sentenced Kelvin to seven years for second degree assault of a law enforcement officer and fifteen years on the armed criminal action charge with those sentences to be served concurrently (Tr.321;L.F.76-77).

From these convictions this appeal followed.

### **\*14 POINTS RELIED ON**

#### **I. LESSER INCLUDED OFFENSE - THIRD DEGREE ASSAULT OF A LAW ENFORCEMENT OFFICER**

**The trial court erred in refusing to instruct the jury on the lesser included offense of third degree assault of a law enforcement officer because that ruling denied Kelvin Purnell his rights to due process of law and a fair trial before a properly instructed jury, as guaranteed by the VI and XIV Amendments to the U.S. Constitution, and [Article I, §§ 10 and 18\(a\) of the Missouri Constitution](#), in that third degree assault of a law enforcement officer is a lesser included offense of**

second degree assault of a law enforcement officer and there was evidence to support giving the lesser instruction which included Weusthoff's testimony that Kelvin did not have a gun in his hand when Weusthoff entered the house and that Kelvin stepped toward him and bumped Weusthoff's chest.

*State v. Hibler*, 5 S.W.3d 147 (Mo. banc 1999);

*State v. Pond*, 131 S.W.3d 792 (Mo. banc 2004);

*State v. Westfall*, 75 S.W.3d 278 (Mo. banc 2002);

U.S. Const., Amend. VI;

U.S. Const., Amend. XIV;

Mo. Const. Art. I, §10;

Mo. Const. Art. I, §18(a);

\*15 MAI-CR3d 319.39.

#### **\*16 II. ARMED CRIMINAL ACTION LACKS A VALID UNDERLYING FELONY CONVICTION**

The trial court erred in entering judgment and sentence for armed criminal action after having failed to give a required instruction on the lesser included offense of third degree assault of a law enforcement officer because those actions denied Kelvin Purnell his rights to due process of law, as guaranteed by the XIV Amendment to the U.S. Constitution, and [Article I §10 of the Missouri Constitution](#), in that a conviction for armed criminal action requires a valid conviction for an underlying felony and Kelvin's conviction for second degree assault of a law enforcement officer is invalid as the jury was not given the option to consider third degree assault of a law enforcement officer (Point I).

*State v. Avery*, 120 S.W.3d 196 (Mo. banc 2003);

*State v. Smith*, 229 S.W.3d 85 (Mo. App., W.D. 2007);

U.S. Const., Amend. XIV;

Mo. Const. Art. I, §10.

#### **\*17 ARGUMENT**

##### **I. LESSER INCLUDED OFFENSE - THIRD DEGREE ASSAULT OF A LAW ENFORCEMENT OFFICER**

The trial court erred in refusing to instruct the jury on the lesser included offense of third degree assault of a law enforcement officer because that ruling denied Kelvin Purnell his rights to due process of law and a fair trial before a properly instructed jury, as guaranteed by the VI and XIV Amendments to the U.S. Constitution, and [Article I, §§ 10 and 18\(a\) of the Missouri Constitution](#), in that third degree assault of a law enforcement officer is a lesser included offense of second degree assault of a law enforcement officer and there was evidence to support giving the lesser instruction which included Weusthoff's testimony that Kelvin did not have a gun in his hand when Weusthoff entered the house and that Kelvin stepped toward him and bumped Weusthoff's chest.

The trial court refused to instruct the jury on the lesser included offense of third degree assault of a law enforcement officer under submitted Instruction A. There was a basis to acquit Kelvin Purnell of the greater offense of second degree assault of a law enforcement officer and to convict him of the lesser offense of third degree assault of a law enforcement officer. It was prejudicial error to fail to instruct on the lesser included offense.

### Preservation

\*18 Defense counsel offered a third degree assault of a law enforcement officer Class A misdemeanor Instruction A modeled on MAI-CR 319.39 (Tr.277-82; L.F.51). The Court refused the third degree instruction (Tr.279-82). The motion for new trial alleged that it was error to refuse the lesser included third degree instruction (L.F.62-64). Thus, this claim was preserved.

### Tendered Instruction A

Counsel offered the lesser included instruction for third degree assault of a law enforcement officer (Tr.277-82;L.F.51) Instruction A (modeled on MAI-CR3d 319.39) provided as follows:

As to Count, you do not find the defendant guilty of assault of a law enforcement officer in the second degree as submitted in Instruction No.\_\_\_\_, you must consider whether he is guilty of assault of a law enforcement officer in the third degree under this instruction.

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

First, that on May 10, 2012, in the County of St. Louis, State of Missouri, the defendant knowingly caused physical contact with O[fficer] Andrew Weusthoff without the consent of Andrew Weusthoff by bumping his chest, and

Second that Andrew Weusthoff was a law enforcement officer, and \*19 Third, that defendant knew Andrew Weusthoff was a law enforcement officer, then you will find the defendant guilty under this instruction of assault of a law enforcement officer in the third degree.

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

(L.F.51).

### Standard of Review

A defendant is entitled to an instruction on any theory that the evidence and the reasonable inferences therefrom tend to establish. *State v. Westfall*, 75 S.W.3d 278, 280 (Mo. banc 2002). If the evidence tends to support differing conclusions, the defendant is entitled to an instruction. *Id.* at 280.

It is for the jury to determine the credibility of witnesses and for it to resolve conflicts in the testimony and the weighing of evidence. *State v. Pond*, 131 S.W.3d 792, 794 (Mo. banc 2004). A jury can accept part of a witness' testimony, but disbelieve other parts. *Id.* at 794. If the evidence supports differing conclusions, a trial judge is required to instruct on each. *Id.* at 794.

Doubt as to whether to instruct on an included offense is to be resolved in favor of instructing on the included offense. *State v. Yacub*, 976 S.W.2d 452, 453 (Mo. banc 1998). The failure of the trial court to instruct on all lesser-included \*20 offenses supported by the evidence is error. *State v. Derezny*, 89 S.W.3d 472, 475 (Mo. banc 2002). When a lesser included instruction



is erroneously refused, a defendant is required to establish prejudice. *State v. Marshall*, 410 S.W.3d 663, 678 (Mo. App., S.D. 2013).

### Third Degree Was a Lesser Included

#### Under §556.046.1 (2)

The “elements” test set forth in *Blockburger v. United States*, 284 U.S. 299, 304 (1932) is only one test for determining whether an offense is a lesser-included offense. *State v. Garnett*, 298 S.W.3d 919, 923 n.2 (Mo. App., E.D. 2009). Section 556.046.1 (emphasis added), provides that an offense is a lesser included offense when:

(1) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or

**(2) It is specifically denominated by statute as a lesser degree of the offense charged; or**

(3) It consists of an attempt to commit the offense charged or to commit an offense otherwise included therein.

In *State v. Hibler*, 5 S.W.3d 147, 151 (Mo. banc 1999), the Court recognized that third degree assault was specifically denominated by statute as a lesser degree of first and second degree assault under 556.046.1 (2), and therefore, third degree was a lesser included of first and second degrees. *See also*, \*21 *State v. Swingler*, 632 S.W.2d 267, 269 (Mo. App., E.D. 1982) (recognizing legislature can denominate one offense as a lesser included offense of another).

Section 565.081.1 defines first degree assault of a law enforcement officer and provides:

A person commits the crime of assault of a law enforcement officer, corrections officer, emergency personnel, highway worker in a construction zone or work zone, utility worker, cable worker, or probation and parole officer in the first degree if such person attempts to kill or knowingly causes or attempts to cause serious physical injury to a law enforcement officer, corrections officer, emergency personnel, highway worker in a construction zone or work zone, utility worker, cable worker, or probation and parole officer.

That alternative was offered in Instruction No. 6 (L.F.40-41) and rejected by the jury (L.F.57).

Section 565.082.1 (6) defines second degree assault of a law enforcement officer and provides it occurs when a person:

Purposely or recklessly places a law enforcement officer, corrections officer, emergency personnel, highway worker in a construction zone or work zone, utility worker, cable worker, or probation and parole officer in apprehension of immediate serious physical injury

\*22 That alternative was submitted in Instruction No. 8 (L.F.43-44) and found by the jury (L.F.59).

Section 565.083.1 (3) defines third degree assault of a law enforcement officer and provides it occurs when:

Such person knowingly causes or attempts to cause physical contact with a law enforcement officer, corrections officer, emergency personnel, highway worker in a construction zone or work zone, utility worker, cable worker, or probation and parole officer without the consent of the law enforcement officer, corrections officer, emergency personnel, highway worker in a construction zone or work zone, utility worker, cable worker, or probation and parole officer

That alternative was offered in Instruction A, but the trial court refused to give that Instruction (Tr.277-82;L.F.51).

Like in *Hibler*, third degree assault of a law enforcement officer is a lesser included offense of both first and second degree assault of a law enforcement officer because **the Legislature** has denominated it to be so. *See Hibler* relying on 556.046.1 (2). This is true even though the prosecutor argued that third degree was not a lesser included of second degree because there were different mental state requirements for each and because a deadly weapon, a gun, was involved (Tr.277-79;L.F.43-44,51).

### Third Degree Also a Lesser Included Under Blockburger \*23 Elements Test

In addition, even under a *Blockburger* elements analysis, *supra*, third degree assault of a law enforcement officer, as submitted in Instruction A (L.F.51) was a lesser included offense of second degree assault of a law enforcement officer, as submitted in Instruction No. 8 (L.F.43-44). “An offense is a lesser-included offense if it is impossible to commit the charged offense without necessarily committing the lesser.” *State v. Whiteley*, 184 S.W.3d 620, 623 (Mo. App., S.D. 2006). For there to be a basis for an acquittal of the greater offense, “there must be some evidence that an essential element of the greater offense is lacking and the element that is lacking must be the basis for acquittal of the greater offense, and the conviction of the lesser.” *State v. Barnard*, 972 S.W.2d 462, 466 (Mo. App., W.D. 1998).

Instruction No. 8, the second degree assault of a law enforcement officer instruction, provided as follows:  
As to Count III, if you find and believe from the evidence beyond a reasonable doubt:

First, that on or about May 10, 2012, in the County of St. Louis, State of Missouri, the defendant recklessly placed Andrew Weusthoff in apprehension of immediate serious physical injury by firing a gun while Andrew Weusthoff was attempting to handcuff the defendant, and

Second, that Andrew Weusthoff was a law enforcement officer, and

**\*24** Third, that defendant knew or was aware that Andrew Weusthoff was a law enforcement officer, then you will find the defendant guilty under this instruction of assault of law enforcement officer in the second degree.

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

As used in this instruction, a person acts recklessly or is reckless when the person consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation.

(L.F.43-44).

Paragraphs “Second” and “Third” of both Instruction A and Instruction No. 8, *supra*, contain the identical elements (L.F.43-44, 51). Those elements are Weusthoff’s status as a law enforcement officer and Kelvin’s knowledge of that status (L.F.43-44, 51). It was impossible to commit third degree without also committing second degree as to the paragraphs “Second” and “Third.” *See Whiteley*.

Instructions A and No. 8 differed only as to elements in their paragraphs “First,” *supra*. Instruction No. 8’s paragraph “First,” *supra*, posited that Kelvin recklessly placed Weusthoff in apprehension of immediate serious physical injury by **\*25** firing a gun, while Weusthoff was attempting to handcuff Kelvin (L.F.43-44). Instruction A’s paragraph “First,” *supra*, posited that Kelvin knowingly caused physical contact with Weusthoff, without Weusthoff’s consent, by bumping Weusthoff’s chest (L.F.51). The essential element of the greater second degree offense for which there was evidence of it lacking was Kelvin

having acted recklessly placing Weusthoff in apprehension of immediate serious physical injury in firing a gun while Weusthoff was attempting to handcuff him (L.F.43-44). In contrast for third degree, there was evidence Kelvin acted knowingly to cause physical contact with Weusthoff without Weusthoff's consent by bumping Weusthoff's chest (L.F.51). Thus, even applying a *Blockburger* elements analysis, third degree assault of a law enforcement officer was a lesser included of second degree.

### **There Was Evidence To Support Giving Instruction A And Kelvin Was Prejudiced**

Weusthoff testified that Kelvin answered the door and greeted Downing by name (Tr.115). Kelvin stepped in front of Weusthoff and put up his arm, which Weusthoff interpreted as trying to separate Weusthoff from Downing (Tr.116-17). Weusthoff testified that when Kelvin stepped in front of him, Weusthoff reacted by putting a handcuff on Kelvin's right arm (Tr. 117). Weusthoff told Kelvin that he was detained until Weusthoff could figure out what was going on, but he was not under arrest (Tr.117-18). Kelvin was struggling and pulling away (Tr.117-18).

**\*26** Weusthoff testified that as he and Downing entered the house that Kelvin stepped toward him and bumped Weusthoff's chest (Tr. 140-41). Weusthoff recognized that this was an emotional situation between Kelvin and his sisters (Tr.141-42). When Weusthoff entered the house Kelvin did not have a gun in his hands (Tr.142-43). Even though Weusthoff had not seen a weapon in Kelvin's hands, he proceeded to handcuff him (Tr. 143). Kelvin testified that he let Downing inside and at the same time Weusthoff rushed in with handcuffs out (Tr.239). Instruction A posited that Kelvin should be convicted of third degree assault of a law enforcement officer because Kelvin caused physical contact with Weusthoff without Weusthoff 's consent by bumping Weusthoff's chest (L.F.51). Because there was evidence to support the lesser included offense instruction, it was required to be submitted. See *State v. Westfall*, *supra*.

Moreover, giving the lesser included instruction was required because a jury can accept part of a witness' testimony, but disbelieve other parts. See, *Pond, supra*. Weusthoff reported that a gun fell out of Kelvin's pocket and bounced back into Kelvin's hand and that Kelvin fired at him (Tr. 118-19,136,152).

In contrast, Kelvin recounted that he never took his gun out of his pants pocket, but at some point it fell out of that pocket (Tr.244-45). Kelvin saw Weusthoff reaching down to grab Kelvin's gun and it fired (Tr.246). Kelvin testified that he never intentionally took his gun out of his pocket and he never fired or attempted to fire it at Weusthoff (Tr.248-49).

**\*27** Kelvin was prejudiced through the failure to submit third degree assault of a law enforcement officer because this jury rejected respondent's effort to convict Kelvin of first degree assault of a law enforcement officer and convicted him of second degree (L.F.57-60). This jury learned that Weusthoff had done a prior standby assignment at Kelvin's house when Kelvin was present and that it was routine (Tr.112-13). Weusthoff recognized that this was an emotional situation between Kelvin and his sisters (Tr.141-42). Even though Weusthoff had had prior uneventful contact with Kelvin, Weusthoff's immediate response to Kelvin merely stepping between Weusthoff and Downing and Kelvin putting up his arm was to try to handcuff Kelvin (Tr. 116-18). That act of trying to handcuff Kelvin resulted in the struggle that followed (Tr.116-18).

Weusthoff testified that a gun fell out of Kelvin's pocket and bounced back into Kelvin's hand (Tr.152). Kelvin also testified that a gun fell out of his pocket and that when Weusthoff reached down to grab the gun it fired and he never fired at Weusthoff (Tr.244-46,248-49). In light of both Weusthoff and Kelvin testifying that a gun fell out of Kelvin's pocket, the jury could have reasonably concluded that Kelvin did not fire at Weusthoff, but Kelvin did bump Weusthoff's chest (Tr.140-41) which warranted a third degree assault of a law enforcement officer conviction, rather than a second degree conviction.

This Court should reverse for a new trial at which the jury is instructed on third degree assault of a law enforcement officer.

### **\*28 II. ARMED CRIMINAL ACTION LACKS A VALID UNDERLYING FELONY CONVICTION**

**The trial court erred in entering judgment and sentence for armed criminal action after having failed to give a required instruction on the lesser included offense of third degree assault of a law enforcement officer because those actions denied Kelvin Purnell his rights to due process of law, as guaranteed by the XIV Amendment to the U.S. Constitution, and Article I §10 of the Missouri Constitution, in that a conviction for armed criminal action requires a valid conviction for an underlying felony and Kelvin's conviction for second degree assault of a law enforcement officer is invalid as the jury was not given the option to consider third degree assault of a law enforcement officer (Point I).**

As discussed in Point I, Kelvin's conviction for second degree assault of a law enforcement officer is invalid because the jury was not instructed on third degree assault of a law enforcement officer.

Based on having found Kelvin guilty of second degree assault of a law enforcement officer, the jury also convicted him of armed criminal action (L.F.45,60). The court sentenced Kelvin to fifteen years for armed criminal action, §571.015 (Tr.321;L.F.76-77).

**\*29** When the underlying conviction used to support an armed criminal action conviction is reversed, then the armed criminal action conviction also must be reversed. *State v. Avery*, 120 S.W.3d 196, 206 (Mo. banc 2003). *See also, State v. Smith*, 229 S.W.3d 85, 97-98 (Mo. App., W.D. 2007).

Kelvin's conviction for second degree assault of a law enforcement officer is invalid and must be reversed because the trial court failed to instruct the jury on the lesser included offense of third degree assault of a law enforcement officer. *See* Point I. Because Kelvin's conviction for second degree assault of a law enforcement officer must be reversed, his conviction for armed criminal action is also invalid and must be reversed. *See Avery* and *Smith*.

This Court should reverse Kelvin's conviction for armed criminal action.

### **\*30 CONCLUSION**

For the reasons discussed, this Court should reverse Kelvin Purnell's convictions for second degree assault of a law enforcement officer and armed criminal action and order a new trial at which the jury is instructed on the lesser included offense of third degree assault of a law enforcement officer.

#### Footnotes

**1** The record on appeal is referenced as follows: (1) Legal File (L.F.); and (2) Trial Transcript (Tr.).