SUPREME COURT OF MISSOURI
en banc

KEITH MEINERS,	)	*Opinion issued January 23, 2018*
	)	
Appellant,	)	
	)	
v.	)	No. SC96278
	)	
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

APPEAL FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY
The Honorable Colleen Dolan, Judge

Keith Meiners ("Meiners") appeals the motion court's overruling of his Rule 29.15 motion for postconviction relief. Meiners was convicted of second-degree murder for the death of James Willman ("Victim"). At trial, Meiners requested the jury also be instructed on both voluntary and involuntary manslaughter. The trial court rejected both instructions, and, on direct appeal, appellate counsel did not raise these refused instructions as points of error. In his Rule 29.15 motion, Meiners argued his appellate counsel was ineffective for failing to raise these issues. The motion court denied postconviction relief, finding his appellate counsel was not ineffective. Because appellate counsel did not fail to exercise the customary level of skill and diligence of a

reasonably competent attorney, her performance was not constitutionally deficient. The motion court's judgment is affirmed.

Background

A jury convicted Meiners of second-degree murder for the death of James Willman ("Victim"). The evidence adduced at trial demonstrated on the night of the murder, Meiners invited Victim and a number of other individuals over to his home to drink. Also in attendance was Justice Brickey ("Witness"), who was present at the scene of the crime and became one of the State's key witnesses. Meiners and Victim were not strangers, as Victim had previously been romantically involved with Meiners's then-girlfriend.

After some time, Meiners, Victim, and Witness left to go to a second party in Victim's car. As Victim drove the other two men from the party, Witness asked Victim to pull the car over because he was feeling nauseous. After the car stopped, Witness saw Meiners, who had been sitting behind Victim in the backseat, strangling Victim with duct tape. Witness testified Meiners then pulled Victim out of the driver's seat and onto the road. According to Meiners, Victim then pulled a switchblade on Meiners and attempted to stab him, but Meiners knocked the knife away. Meiners, continuing his attack, stood over Victim and punched him repeatedly as Victim screamed for him to stop. Witness briefly attempted to pull Meiners off of Victim but was unsuccessful; Witness described Meiners as "out of control" and "filled with rage." When Meiners finally stopped punching Victim, he was no longer moving.

Meiners and Witness dragged Victim to the side of the road. Witness saw Meiners standing on Victim's chest and neck. Additional trial testimony demonstrated Meiners told another witness he stood on Victim's neck until he could no longer feel a pulse.

Meiners admitted to killing Victim at trial. The jury was instructed on both first- and second-degree murder. Meiners's attorney asked the court for additional instructions on voluntary and involuntary manslaughter. The trial court rejected both instructions, and the jury found Meiners guilty of second-degree murder. Meiners's motion for new trial, which argued the trial court erred by not submitting these instructions, was overruled.

On direct appeal, appellate counsel did not raise either refused instruction. In his amended Rule 29.15 motion for postconviction relief, Meiners argued appellate counsel was ineffective for failing to raise these points of error on appeal because, according to Meiners, there was evidentiary support for both instructions. At the evidentiary hearing, appellate counsel testified she had flagged both refused instructions as potential issues to raise on appeal but ultimately concluded there was insufficient evidence of sudden passion to argue the jury should have been instructed on voluntary manslaughter. She did acknowledge, however, that a person pulling a knife on another could cause sudden passion. As to the refused involuntary manslaughter instruction, appellate counsel stated she did not believe the evidence adduced at trial fit any scenario in which recklessness could be found, and it was for this reason she did not raise the issue on appeal.

The motion court denied postconviction relief, finding that Meiners's counsel on appeal had performed competently. It determined the record demonstrated no evidence

of sudden passion, rejecting each of Meiners's arguments. The motion court held Meiners's knowledge of his girlfriend's relationship with Victim would not cause sudden passion due to the attenuated connection between this knowledge and Meiners's attack; further, the motion court rejected Meiners's contention that sudden passion arose after Victim attacked Meiners with a knife because sudden passion is not an applicable defense when the defendant is the initial aggressor. Due to the lack of evidence, the motion court determined appellate counsel was not ineffective in declining to raise this issue on appeal.

Similarly, the motion court held appellate counsel was not ineffective for failing to raise on appeal the trial court's refusal to instruct on involuntary manslaughter. Because the evidence demonstrated Meiners repeatedly kicked, punched, and strangled Victim before dragging him to a field to die, the motion court found appellate counsel was not ineffective for declining to raise the refused instruction as error on appeal.

Meiners argues the motion court clearly erred in overruling his Rule 29.15 motion for postconviction relief because appellate counsel was allegedly ineffective for failing to raise the refused instructions on appeal.

Standard of Review

This Court reviews a motion court's judgment denying postconviction relief to determine whether its findings and conclusions are clearly erroneous. Rule 29.15(k); *Mallow v. State*, 439 S.W.3d 764, 768 (Mo. banc 2014). A judgment is clearly erroneous only if this Court is "left with a definite and firm impression that a mistake has been made." *Id.* The movant has the burden of proving all allegations by a preponderance of the evidence. *Id.*

To be entitled to postconviction relief based on ineffective assistance of appellate counsel, the movant must satisfy the two-prong test set out in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To meet this test, the movant must first establish that appellate counsel's performance was deficient. *Id.* at 687. This requires a showing that the attorney "failed to exercise the level of skill and diligence that a reasonably competent counsel would in a similar situation." *McIntosh v. State*, 413 S.W.3d 320, 324 (Mo. banc 2013). The error overlooked on appeal must have been "so obvious that a competent and effective lawyer would have recognized and asserted it." *Williams v. State*, 168 S.W.3d 433, 444 (Mo. banc 2005). In evaluating an attorney's performance, this Court must "eliminate the distorting effects of hindsight … [and] evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689. In addition to showing counsel's performance was deficient, the movant must also demonstrate the deficient performance resulted in prejudice to his defense. *Id.* at 687. Prejudice occurs when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

Analysis

Meiners argues his counsel was ineffective for failing to raise voluntary and involuntary manslaughter instructions on direct appeal because any attorney exercising customary skill and diligence would have done so. The motion court denied these claims after finding neither rejected jury instruction was supported by the evidence presented at trial.

I. Instructing on Lesser-Included Offenses

A trial court must instruct the jury on a lesser-included offense when there is a basis in the evidence for acquitting the defendant of the higher offense and convicting the defendant of the lower offense. Sec. 556.046.[1] Meiners argues there was clearly a basis in the evidence for acquittal for first-degree murder because the jury did indeed acquit him of that offense. In addition, he asserts there are bases in the evidence for convictions of either voluntary or involuntary manslaughter, which are lesser-included offenses of first-degree murder. Sec. 565.029.

II. The Refused Voluntary Manslaughter Instruction

Meiners argues his appellate counsel was ineffective for failing to raise on appeal the rejected voluntary manslaughter instruction because there was a basis in the evidence to convict him or her of that lesser offense. A person is guilty of voluntary manslaughter if he or she "[c]auses the death of another person … [while] under the influence of sudden passion arising from adequate cause." Sec. 565.023. Sudden passion arises out of "provocation by the victim or another acting with the victim which … arises at the time of the offense and is not solely the result of former provocation." Sec. 565.002(15) (RSMo 2014). Adequate cause is of a type "that would reasonably produce a degree of passion in a person of ordinary temperament sufficient to substantially impair an ordinary person's capacity for self-control." Sec. 565.002(1).

[1] All references are to RSMo 2000 unless otherwise noted.

To support his claim of sudden passion, Meiners points to evidence that his girlfriend had dated Victim previously, he had gotten into an argument with Victim during their drive, and Victim pulled a knife on Meiners in his attack, during which Witness described Meiners as "filled with rage" and "out of control." Because this evidence fails to provide a sufficient evidentiary basis for finding sudden passion, the motion court did not err in overruling Meiners's Rule 29.15 motion.

Sudden passion must arise at the time of the offense and there must not have been a cooling-off period. *State v. Redmond*, 937 S.W.2d 205, 208 (Mo. banc 1996). Meiners had been aware of his girlfriend's romantic history with Victim for some time prior to the crime. He was aware of the relationship when he invited Victim to his home to socialize and when he attended a second party with Victim. Meiners cannot argue this past relationship was a legitimate source of sudden passion when he had an abundance of time to process this information and there was no evidence this knowledge somehow sparked sudden ire on the night of the crime.

Further, to prove sudden passion, the defendant must show the victim took some action to provoke the defendant and the defendant was not the initial aggressor. *State v. Stidman*, 259 S.W.3d 96, 103 (Mo. App. 2008). Words alone are not sufficient to show provocation that arises to adequate cause. *Redmond*, 937 S.W.2d at 208. An argument with Victim would not produce such passion as to cause a person of ordinary temperament to physically attack the other and is inadequate to find sudden passion here. And though there was testimony alleging Victim had pulled out a switchblade and

attempted to stab Meiners, this occurred only after Meiners first strangled Victim with duct tape and dragged him from the vehicle. As such, Meiners was the initial aggressor.

Likewise, there was no basis in the evidence to support Meiners's argument he acted out of sudden passion because he was described by witnesses as "filled with rage" and "out of control." Though these descriptions could potentially *corroborate* a claim of sudden passion, Meiners presents no evidence Victim was the source of this anger. A heated temperament alone is insufficient to prove an individual was overcome with sudden passion arising out of adequate cause.

Appellate counsel found this same lack of evidence in preparing the direct appeal. Counsel testified at the evidentiary hearing that, after reviewing the legal file, she saw no grounds for asserting sudden passion. An appellate counsel does not have a duty to raise every appealable issue; counsel may strategically decide to forgo certain arguments in favor of others. *Storey v. State*, 175 S.W.3d 116, 148 (Mo. banc 2005). Appellate counsel's decision to not address the refused voluntary manslaughter instruction on appeal was a considered, intentional decision. It was not unreasonable, and the motion court did not err in denying Meiners's claim of ineffective assistance based on counsel's decision to not raise on appeal the trial court's refusal to instruct on voluntary manslaughter.

III. The Refused Involuntary Manslaughter Instruction

Meiners also argues appellate counsel was ineffective for not appealing the trial court's refusal to instruct on involuntary manslaughter. A person is guilty of involuntary manslaughter if he or she recklessly causes the death of another person. Sec. 565.024.

Involuntary manslaughter is considered a "nested" lesser-included offense of second-degree murder because the only differential element between these two crimes is the heightened *mens rea* requirement. *State v. Jackson*, 433 S.W.3d 390, 404 (Mo. banc 2014). Involuntary manslaughter requires a showing of recklessness, while second-degree murder requires a higher showing of knowledge. Because the greater offense will always encompass the requisite elements of the lesser offense, involuntary manslaughter is "nested" in second-degree murder. *Id.* A jury's right to believe or disbelieve evidence is a sufficient basis in the evidence to acquit of the higher offense and convict of the lower offense, as the jury can always find the state failed to meet its burden on the differential element. *Id.* at 399. Following *Jackson*, trial courts are effectively required to instruct on nested lesser-included offenses if asked to do so. *Id.* at 402.

Jackson was decided shortly after Meiners's conviction had been affirmed on direct appeal, and appellate counsel consequently did not have the benefit of its guidance. Meiners argues appellate counsel was nevertheless ineffective in not raising this issue on appeal because *Jackson* simply held what was already implied in the law. *See id.* at 402 ("This holding was implied (at least) in [*State v. Pond*, 131 S.W.3d 792 (Mo. banc 2004)], and it was stated expressly in [*State v. Williams*, 313 S.W.3d 656 (Mo. banc 2010)]."). Meiners contends these instructions were always implicitly required to be given if requested. By not raising this issue on appeal, Meiners asserts that appellate counsel's performance fell below an objective standard of reasonableness. Beyond *Jackson*, Meiners also argues that because he did not bring a weapon to the scene, but

instead used his fists and duct tape to kill Victim, the jury could find his conduct was reckless rather than knowing.

Whether counsel's performance fell below the standard expected of a competent attorney turns on the state of the law at the time of the appeal. Though *Jackson* explains it was simply making explicit what had long been implicit, this Court must determine whether the legal principles emphasized in *Jackson* had previously been so unmistakably obvious as to render appellate counsel's performance objectively unreasonable. An examination of Missouri's jurisprudence on this issue is instructive.

A. Missouri's Jury Instruction Jurisprudence

A jury's ability to disbelieve evidence was once rejected as a basis for instructing on a lesser-included offense – instructing down. *State v. Olson*, 636 S.W.2d 318, 321 (Mo. banc 1982). *Olson* held that, for a court to instruct on a lesser-included offense, there must be some affirmative evidence of an absent essential element of the higher offense that "would not only authorize acquittal of the higher but sustain a conviction of the lesser." *Id.* at 322. This affirmative evidence requirement was later struck down in *State v. Santillan*, 948 S.W.2d 574, 576 (Mo. banc 1997). *Santillan* stated the only requirement for a defendant to be entitled to a lesser-included instruction is a "basis in the evidence to acquit on the higher offense." *Id.* For the first time, this Court used a reasonable-juror standard: if a reasonable-juror could draw inferences from the evidence presented that an essential element of the higher offense was lacking, the trial court should instruct down. *Id.*

This Court later determined that the jury's ability to draw (or decline to draw) inferences from the evidence presented could, by itself, warrant instructing down. *State v. Hineman*, 14 S.W.3d 924, 927 (Mo. banc 1999). In *Hineman*, the Court found that, due to conflicting evidence, the defendant's mental state – the differential element between first- and second-degree assault – could be determined only by the jury making inferences based on the evidence presented. *Id.* Because the jury is permitted to draw reasonable inferences and may choose to believe some, none, or all of the evidence, it was error for the trial court to refuse to instruct on second-degree assault. *Id.* at 928.

Even after *Hineman*, however, this Court occasionally used language calling the reasonable-juror standard to mind. This standard required a factual evaluation of the evidence. Even the cases *Jackson* cited favorably, and stated it was simply reaffirming, used language suggesting the reasonable-juror standard might still be viable. *See Pond*, 131 S.W.3d at 794 (overruling cases relying on *Olson* and its rejected requirement of affirmative evidence but finding a "reasonable jury" could find a basis in the evidence to acquit on the higher offense and convict on the lower); *see also State v. Williams*, 313 S.W.3d 656 (Mo. banc 2010). In *Williams*, this Court used a reasonable-juror standard in finding the trial court erred in refusing to instruct on felony stealing, a lesser-included offense of robbery. *Id.* at 660. Perhaps because this Court had never expressly overruled the reasonable-juror standard, multiple decisions from the court of appeals continued using the reasonable-juror standard when determining whether a lesser-included instruction was required if requested. *See, e.g., State v. Greer*, 348 S.W.3d 149, 154 (Mo. App. 2011) ("[O]ur Supreme Court applies the reasonable-juror standard, which requires

an instruction for a lesser-included offense only if a reasonable juror could draw inferences from the evidence presented that an essential element of the greater offense has not been established.") (internal quotations omitted); *State v. Jefferson*, 414 S.W.3d 82, 85 (Mo. App. 2013) ("[A]n instruction for a lesser-included offense is only required if a reasonable juror could draw [the necessary] inferences from the evidence presented …."); *State v. Lowe*, 318 S.W.3d 812, 817 (Mo. App. 2010) ("A lesser-included instruction need not be given unless a reasonable juror could draw inferences from the evidence presented that an essential element of the greater offense has not been established.").[2]

Indeed, it was not until *Jackson* that the often-used reasonable-juror standard was explicitly overruled. 433 S.W.3d at 401. As *Jackson* explained, a jury may always disbelieve any part of the evidence and may refuse to draw any necessary inferences from that evidence. *Id.* at 392. This reasonable-juror standard "tacks far too close to the forbidden waters of directing a verdict in a criminal case[,] … [t]he effect of such a ruling … is the same as a directed verdict on the differential element." *Id.* at 401. A trial court cannot impute its own evaluation of the evidence onto a "reasonable jury," no matter how convincing the evidence may be. *Id.* at 400-01.

It was also *Jackson* that first classified lesser offenses comprised of a subset of elements of the higher offense as "nested" lesser-included offenses. *Id.* at 404. With nested lesser-included offenses, if the evidence supports a conviction of the higher

[2] Other cases that held similarly and provided precedence at the time of Appellant's direct appeal were *Williams*, 313 S.W.3d at 660, and *State v. Knight*, 355 S.W.3d 556, 558 (Mo. App. 2011).

offense, it must also necessarily support a conviction of the lower offense. *Id.* Nested offenses omit, rather than negate, the differential element. *Id.* at 405. Because the jury may disbelieve *any* evidence or refuse to draw *any* inference, it is essentially always possible that a jury could find a basis in the evidence to acquit of the greater offense and convict of the lesser. Though this Court did not explicitly hold that instructions on nested lesser-included offenses are always required if requested, it acknowledged that trial courts giving these instructions "virtually every time they are requested" was the likely practical consequence of the opinion. *Id.* at 402.

By the time *Jackson* was decided, it was well-established that: (1) instructing down under section 556.046 requires a basis in the evidence to acquit of the greater offense and convict of the lesser offense; (2) a jury may disbelieve some, none, or all of the evidence and may refuse to draw any necessary inference; and (3) this ability to disbelieve evidence or decline to infer the existence of a necessary element alone is sufficient to justify instructing down. *Jackson* was the first case to explicitly unify these principles and, by also rejecting the reasonable-juror standard, to find there is essentially always a basis in the evidence to instruct on nested lesser-included offenses. "The holdings of *Pond* and *Williams* should have made lesser-included offense instructions nearly universal, at least when the differential element is one for which the state bears the burden of proof." *Id.* at 399.

Although *Jackson* made express what previously was only implied, what this Court must determine is whether the legal landscape at the time of the appeal was *so clear*, or the requirement of these instructions was *so apparent*, that any reasonably

competent attorney should have raised these issues on appeal. As demonstrated by the above cases, the law was not so firmly established as to render appellate counsel's decision to forgo these issues on appeal as deficient. *Jackson* did not retroactively require appellate attorneys to raise an issue that, though it may amount to ineffective assistance if not raised today in light of *Jackson*, was not so obvious at the time of appeal.

B. Appellate Counsel Was Not Ineffective for Failing to Appeal the Refused Involuntary Manslaughter Instruction

Appellate counsel will only be found ineffective if the unraised claim of error was so obvious that any competent or effective lawyer would have raised it. *Williams*, 168 S.W.3d at 444. Appellate counsel acknowledged that, after *Jackson*, this instruction would likely have been given if requested, and the State concedes the same. But this Court reviews appellate counsel's performance by evaluating the state of the law at the time of the appeal. *State v. Chambers*, 891 S.W.2d 93, 106 (Mo. banc 1994).

As set out above, the law at the time of the appeal required a trial court to instruct down only if a reasonable juror could find a basis in the evidence for the lower instruction. Appellate counsel had to rely on Missouri's jurisprudence that used the reasonable-juror standard, i.e., *Greer*, *Jefferson*, *Lowe*, and *Williams*. Appellate counsel did not have the benefit of *Jackson*'s deliberate examination of the law and its express rejection of the reasonable-juror standard. To hold appellate counsel ineffective would be to require the prediction of *Jackson*'s holding. As this Court has repeatedly held, a failure to anticipate a change in the law does not constitute ineffective assistance of

counsel.[3] *Zink v. State*, 278 S.W.3d 170, 190 (Mo. banc 2009) (counsel not ineffective for failing to predict a change in the law).[4]

Evaluating appellate counsel's performance under the state of the law at the time of the appeal, she was not ineffective for declining to raise on appeal the refused involuntary manslaughter instruction. Though Meiners argued his unarmed status supported a finding of reckless conduct, the evidence adduced demonstrated he strangled Victim with duct tape, punched him repeatedly, dragged him to the side of the road, and stood on his neck until he appeared lifeless. A person is presumed to have intended death if they act in a way that is likely to produce that result. *State v. Shaffer*, 439 S.W.3d 796, 799-800 (Mo. App. 2014). It was not unreasonable for appellate counsel to forgo this issue on the basis there was no evidence to support a theory of recklessness. Eliminating hindsight and evaluating counsel's performance – and the law – at the time of the appeal, counsel was not ineffective during Meiners's direct appeal. As such, the motion court's finding was not clearly erroneous.

Because Meiners has failed to prove the first prong of the *Strickland* test, this Court need not address prejudice. *Strickland*, 466 U.S. at 697; *State v. Simmons*, 955 S.W.2d 729, 746 (Mo. banc 1997). Meiners has failed to establish that his appellate

[3] Though *Jackson* strongly emphasizes that it is clarifying – rather than changing – the law, it was nevertheless the first case to flatly reject the reasonable-juror standard. The explicit rejection of this standard in Missouri jurisprudence certainly worked an advancement in the law so significant that no appellate counsel could be expected to have predicted.

[4] *See also Glass v. State*, 227 S.W.3d 463, 472 (Mo. banc 2007); *Peiffer v. State*, 88 S.W.3d 439, 445 (Mo. banc 2002); *State v. Brown*, 902 S.W.2d 278, 298 (Mo. banc 1995); *State v. Parker*, 886 S.W.2d 908, 923 (Mo. banc 1994).

counsel overlooked an alleged error on appeal that was "so obvious that a competent and effective lawyer would have recognized and asserted it." *Williams*, 168 S.W.3d at 444.

Conclusion

The motion court did not err in overruling Meiners's motion for postconviction relief under Rule 29.15. The motion court's judgment is affirmed.

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Mary R. Russell, Judge

Draper, Powell, Breckenridge, and Stith, JJ., concur;
Fischer, C.J., concurs in result in separate opinion filed;
Wilson, J., dissents in separate opinion filed.

SUPREME COURT OF MISSOURI
en banc

KEITH MEINERS,	)	
	)	
Appellant,	)	
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STATE OF MISSOURI,	)	
	)	
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OPINION CONCURRING IN THE RESULT

I concur with the analysis of Judge Wilson's dissenting opinion that appellate counsel's "performance did not conform to the degree of skill, care, and diligence of a reasonably competent attorney[,]" *Barton v. State*, 432 S.W.3d 741, 749 (Mo. banc 2014) (citation and quotation marks omitted), but I also concur in the result reached by the principal opinion. I write separately to express my view that Meiners failed to meet his burden that prejudice resulted from counsel's performance even though it was below the professional standard of care.[1]

To demonstrate the prejudice prong of an ineffective-assistance-of-appellate-counsel claim, "The claimed error must have been sufficiently serious to create a

[1] The motion court made a specific finding of fact that Meiners failed to prove he was prejudiced, and neither the principal opinion nor Judge Wilson's dissenting opinion suggest that finding is clearly erroneous.

reasonable probability that, if it was raised, the outcome of the appeal would have been different." *Tisius v. State*, 183 S.W.3d 207, 215 (Mo. banc 2006). In other words, Meiners "must show a reasonable probability that, but for his counsel's" failure to raise the circuit court's refusal to give the requested involuntary manslaughter instruction as a point of error, "he would have prevailed on his appeal." *Smith v. Robbins*, 528 U.S. 259, 285 (2000).

Meiners pleaded that he was prejudiced by appellate counsel's failure to raise the circuit court's refusal to give the requested involuntary manslaughter instruction as a point of error on direct appeal and that, had counsel done so, there was a reasonable probability the court of appeals would have "reversed and remanded for a new trial." The motion court found and concluded Meiners failed to prove this allegation. That finding and conclusion is not clearly erroneous.

In my view, there is no reasonable probability an appeal of the circuit court's refusal to give the requested involuntary manslaughter instruction would have resulted in reversal of the second-degree murder conviction. A review of the record shows overwhelming evidence of Meiners' guilt of second-degree murder.[2] Based on this record, Meiners has not demonstrated a reasonable probability the jury would have "gone down" to involuntary manslaughter from second-degree murder even if he had received the requested instruction.

[2] Indeed, the evidence supporting the second-degree murder conviction was so overwhelming Meiners did not contest the sufficiency of the evidence to support the conviction on direct appeal.

Accordingly, even though appellate counsel's performance was below the professional standard of care, Meiners failed to meet his burden of prejudice pursuant to *Strickland v. Washington*, 466 U.S. 668, 687 (1984)—i.e., that the outcome of the appeal would have resulted in a reversal of his conviction.

_____
Zel M. Fischer, Chief Justice

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DISSENTING OPINION

The Court holds the motion court did not clearly err in finding appellate counsel was not ineffective for failing to argue that the trial court erred in denying Meiners' request for an involuntary manslaughter instruction because, at the time of Meiners' appeal, it would not have been apparent to a reasonably competent lawyer that the jury's right to disbelieve the evidence, in and of itself, entitled Meiners to this nested lesser-included offense instruction. I respectfully disagree.

At the time of Meiners' appeal, this Court had decided *State v. Pond*, 131 S.W.3d 792 (Mo. banc 2004) and *State v. Williams*, 313 S.W.3d 656 (Mo. banc 2010). In *Williams*, which was decided nearer in time to Meiners' appeal, the defendant was charged with second-degree robbery and requested an instruction on the nested lesser-included offense of felony stealing. The trial court denied the defendant's request.

After the defendant was convicted, he appealed on the ground the trial court erred in refusing to give the instruction. This Court agreed and held the trial court should have given the instruction because there was a basis in the evidence for the jury to acquit the defendant of second-degree robbery and convict him of felony stealing, i.e., the jury's right to disbelieve the evidence and conclude the property was taken without force. *See Williams*, 313 S.W.3d at 660 ("The jurors could have … disbelieved [the victim's] testimony about the use of physical force.").

Williams cites to *Pond* for the purpose of rejecting – again – the state's argument that the mere possibility the jury might disbelieve some of the evidence was not a sufficient basis in the evidence entitling the defendant to an instruction on the nested lesser-included offense of felony stealing. *See id.* at 661 ("Here, as in *Pond*, the State … argues that a defendant is not entitled to a lesser-included offense instruction merely because a jury might disbelieve some of the State's evidence. In *Pond*, this Court rejected the State's argument ….") (citation and quotation marks omitted).

In *State v. Jackson*, 433 S.W.3d 390, 399 (Mo. banc 2014), this Court rejected – for the third time – the state's argument that the jury's right to disbelieve the evidence and to refuse to draw needed inferences was not a sufficient basis in the evidence entitling a defendant to an instruction on a nested lesser-included offense. In doing so, the Court repeatedly explained it was merely following *Pond* and *Williams* and was not applying a new principle:

> [T]he Court's holding acknowledges what most of the villagers already have seen[.] … This is not a new holding but, because the state persists in insisting that [the jury's right to disbelieve the evidence and refuse to draw

> needed inferences is not a sufficient basis in the evidence], the Court here underscores its holdings in *Pond* and *Williams*.

Id. at 404; *see also, e.g., id*. at 402 ("This holding was implied (at least) in *Pond*, and it was stated expressly in *Williams*."). At the time of Meiners' appeal, therefore, it would have been apparent to a reasonably competent lawyer that it would be prudent to argue the trial court erred in denying Meiners' request for an involuntary manslaughter instruction because, as *Pond* and *Williams* made clear, the jury's right to disbelieve the evidence, in and of itself, entitled Meiners to this nested lesser-included offense instruction.

The state contends appellate counsel was not ineffective because *Williams* used the reasonable juror standard. To be sure, the concurring opinion in *Jackson* urged this reading of *Williams*, but a majority of this Court expressly rejected that reading of *Williams*. *Id*. at 403 n.13 ("The basis for the holding in *Williams* is that the jury is entitled to believe all, part or none of the evidence, ***not that such belief or disbelief was (or was not) reasonable***.") (emphasis added).[1] Accordingly, a reasonably competent attorney would have understood at the time of Meiners' appeal that the reasonable juror

[1] Indeed, there is no other way to read the case. *Williams* is noticeably silent on the issue of whether a reasonable juror could believe the property was taken from the victim without the use of force. This Court expressed no opinion on the matter (which would be strange if the reasonable juror standard was the basis for the Court's decision) and devoted almost no attention to the facts of the case (which would be strange if the Court was purporting to discern what evidence a reasonable juror could and could not believe). Instead, as explained above, *Williams* held the trial court erred in refusing to give the instruction for the lesser-included offense of stealing because the "jurors could have … disbelieved [the victim's] testimony about the use of physical force." *Williams*, 313 S.W.3d at 660.

standard could no longer be used to justify denying a requested lesser-included offense instruction when the lesser offense was nested within the greater offense.

As noted in the principal opinion, some decisions in the court of appeals continued to apply the reasonable juror standard after *Pond* and *Williams*. Leaving aside the soundness of these decisions, a reasonably competent attorney would have consulted this Court's precedents in this field and – at least – noted they were inconsistent with the decisions in the court of appeals. *See* Mo. Const. art. V, § 2 (this Court's decisions are "controlling in all other courts"). Having noted these inconsistencies, a reasonably competent attorney would have challenged in Meiners' appeal the trial court's failure to give the requested instruction on involuntary manslaughter.

It makes no difference that neither *Pond* nor *Williams* explicitly overruled the reasonable juror standard. What matters is that both *Pond* and *Williams* refused to allow the reasonable juror standard to be used by the state to excuse the failure to give a requested instruction on a nested lesser offense. *Jackson* repeatedly noted *Williams* was decided on the ground that the jury's right to disbelieve the evidence, in and of itself, is a sufficient basis in the evidence entitling a defendant to a lesser-included offense instruction, rendering the reasonable juror standard irrelevant. *See Jackson*, 433 S.W.3d at 399, 402, 404 (citing *Williams*, 313 S.W.3d at 660). A reasonably competent attorney would have grasped this point at the time of Meiners' appeal.

Admittedly, *Jackson* was the first decision to use the phrase "nested lesser" in describing those included offenses that consist of a subset of the elements of the greater offense. But a rose by any other name is still a rose. This Court's pre-*Jackson* cases

make clear that, at the time of Meiners' appeal, a reasonably competent attorney would have understood the idea captured by this phrase and, therefore, would have known Meiners could not commit second-degree murder without committing involuntary manslaughter. *See, e.g., State v. Harris*, 620 S.W.2d 349, 355 (Mo. banc 1981) ("[I]t is impossible to commit the greater [offense] without first committing the lesser"). Accordingly, a reasonably competent attorney would have known there was a basis in the evidence for the jury to acquit Meiners of second-degree murder and convict him of involuntary manslaughter – namely, the jury's right to disbelieve Meiners acted knowingly and to conclude that he instead acted recklessly.

At the end of the day, the notion that *Jackson* worked any change in the law is entirely at odds with *Jackson* itself, which repeatedly explains it was merely following *Pond* and *Williams* and was not applying a new principle. *See Jackson*, 433 S.W.3d at 399, 402, 404. Moreover, it is at odds with *McNeal v. State*, 500 S.W.3d 841 (Mo. banc 2016), a post-*Jackson* case that implicitly rejected the notion that *Jackson* worked any change in the law. In *McNeal*, the defendant was convicted of second-degree burglary and sought post-conviction relief on the ground that trial counsel was ineffective for failing to request an instruction on the nested lesser-included offense of trespassing. Under *Jackson*, which was decided after the defendant's trial, the defendant would have been entitled to the instruction had the request been made. This Court affirmed the motion court's denial of the defendant's claim that trial counsel was ineffective for failing to request an instruction on a nested lesser-included offense. In affirming, however, the Court did not rely on the fact that the defendant's trial occurred before

Jackson. Instead, the Court merely held it was not clearly erroneous to conclude counsel's failure to request the instruction was a matter of trial strategy rather than incompetence. *McNeal*, 500 S.W.3d at 844-45.

At the time of Meiners' appeal, *Pond* and *Williams* gave a reasonably competent attorney a sufficient basis to attack the trial court's refusal to give the requested involuntary manslaughter instruction in this case. *Jackson* did not create this argument; it merely confirmed it. Accordingly, I do not believe Meiners was given the effective assistance of counsel guaranteed to him by the constitutions of the United States and the State of Missouri. On that ground, I would reverse the judgment and grant his motion for post-conviction relief.

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Paul C. Wilson, Judge