

NO. SC85300

**IN THE
SUPREME COURT OF MISSOURI**

STATE OF MISSOURI,

Respondent,

v.

JAMIE AVERY,

Appellant.

**APPEAL FROM THE CIRCUIT COURT OF WEBSTER COUNTY, MISSOURI
FORTIETH JUDICIAL CIRCUIT
THE HONORABLE JOHN W. (BILL) SIMS, JUDGE**

RESPONDENT'S SUBSTITUTE STATEMENT, BRIEF AND ARGUMENT

**JEREMIAH W. (JAY) NIXON
Attorney General**

**NICOLE E. GOROVSKY
Assistant Attorney General
Missouri Bar No. 51046**

**P. O. Box 899
Jefferson City, MO 65102-0899
(573) 751-3321**

Attorneys for Respondent

TABLE OF CONTENTS

	PAGE
TABLE OF CONTENTS	1
TABLE OF AUTHORITIES	2
JURISDICTIONAL STATEMENT	5
STATEMENT OF FACTS	6
ARGUMENT	
I. Voluntary manslaughter instruction (Responds to Appellant’s Point I) ...	14
II. Self-defense, and defense of premises instructions (Responds to Appellant’s Points II & III)	22
III. Alleged juror misconduct (Responds to Appellant’s Point IV)	29
IV. Admission of transcript into evidence (Responds to Appellant’s Point V)	35
CONCLUSION	38
CERTIFICATE OF COMPLIANCE AND SERVICE	39
APPENDIX	A1

TABLE OF AUTHORITIES

PAGE

Cases

<u>Ray v. Gream</u> , 860 S.W.2d 325 (Mo.banc 1993)	32, 33
<u>State v. Avery</u> , No. 24710 (Mo.App.S.D. April 28, 2003)	5, 13
<u>State v. Battle</u> , 32 S.W.3d 193 (Mo.App., E.D. 2000)	20
<u>State v. Crawford</u> , 904 S.W.2d 402 (Mo.App., E.D. 1995)	23
<u>State v. Creighton</u> , 52 S.W.2d 555 (Mo. 1932)	20
<u>State v. Davidson</u> , 941 S.W.2d 732 (Mo.App., S.D. 1997)	23
<u>State v. Dulaney</u> , 989 S.W.2d 648 (Mo.App., W.D. 1999)	27
<u>State v. Dunn</u> , 817 S.W.2d 241 (Mo.banc 1991), <u>cert. denied</u> , 503 U.S. 992 (1992) .	36
<u>State v. East</u> , 976 S.W.2d 507 (Mo.App.W.D. 1998)	25
<u>State v. Fears</u> , 803 S.W.2d 605 (Mo.banc 1991)	17, 19, 20
<u>State v. Feltrop</u> , 803 S.W.2d 1 (Mo.banc 1991), <u>cert. denied</u> 111 S.Ct. 2918 (1991) .	32
<u>State v. Fouts</u> , 939 S.W.2d 506 (Mo.App., S.D. 1997)	20
<u>State v. Hibler</u> , 5 S.W.3d 147 (Mo.banc 1999)	14
<u>State v. Houcks</u> , 954 S.W.2d 636 (Mo.App.W.D. 1997)	24, 25
<u>State v. Isa</u> , 850 S.W.2d 876 (Mo.banc 1993)	36
<u>State v. Kiser</u> , 959 S.W.2d 126 (Mo.App., S.D. 1998)	27
<u>State v. Kiser</u> , 959 S.W.2d 126 (Mo.App., S.D. 1998)	27
<u>State v. Kreutzer</u> , 928 S.W.2d 854 (Mo.banc 1996), <u>cert. denied</u> , 117 S.Ct. 752 (1997)	

.....	32
<u>State v. Lumpkin</u> , 850 S.W.2d 388 (Mo.App.W.D. 1993)	26, 27
<u>State v. Martinelli</u> , 972 S.W.2d 424 (Mo.App., E.D. 1998)	33
<u>State v. Patterson</u> , 484 S.W.2d 278 (Mo. 1972)	20
<u>State v. Peal</u> , 463 S.W.2d 840 (Mo. 1971)	23, 25, 26
<u>State v. Randolph</u> , 496 S.W.2d 257 (Mo.banc 1973)	25
<u>State v. Redmond</u> 937 S.W.2d 205 (Mo.banc 1996)	18, 20
<u>State v. Rousan</u> , 961 S.W.2d 831 (Mo.banc 1997), <u>cert. denied</u> , 118 S.Ct. 2387 (1998)	32
<u>State v. Wahby</u> , 775 S.W.2d 147 (Mo.banc 1989)	36, 37
<u>State v. Walton</u> , 796 S.W.2d 374 (Mo.banc 1990)	33, 34
<u>State v. Weems</u> , 840 S.W.2d 222 (Mo.banc 1992)	22, 23
<u>State v. Westfall</u> , 75 S.W.3d 278 (Mo.banc. 2002)	15
<u>State v. Williams</u> , 815 S.W.2d 43 (Mo.App., W.D. 1991)	23
<u>State v. Williams</u> , 948 S.W.2d 429 (Mo.App., E.D. 1997)	36
<u>State v. Wright</u> , 175 S.W.2d 866 (Mo.banc 1943)	25

Statutes and Rules of Court

Article V, §10, Missouri Constitution (as amended 1982)	5
---	---

Section 563.031, RSMo 2000	23
Section 563.036, RSMo 2000	26
Section 565.002(7), RSMo. 2000	17, 19
Section 565.020, RSMo 2000	6
Section 565.021, RSMo 2000	5, 6
Section 565.023, RSMo 2000	17
Section 571.015, RSMo 2000	5, 6

JURISDICTIONAL STATEMENT

This appeal is from convictions of murder in the second degree, §565.021, RSMo 2000, and armed criminal action, §571.015, RSMo 2000, obtained in the Circuit Court of Webster County, for which appellant was sentenced to serve two consecutive thirty year sentences in the Department of Corrections. The Missouri Court of Appeals, Southern District, affirmed appellant's convictions and sentences. State v. Avery, No. 24710, *Slip op.* (Mo.App.S.D. April 28, 2003).

This appeal does not involve any of the categories reserved for the exclusive appellate jurisdiction of the Supreme Court of Missouri. On July 17, 2003, pursuant to Supreme Court Rules 30.27 and 83.04, this case was transferred to this Court. Therefore, this Court has jurisdiction of this appeal pursuant to Article V, §10, Missouri Constitution (as amended 1982).

STATEMENT OF FACTS

Appellant, Jamie Avery, was charged by information with one count of murder in the first degree, §565.020, RSMo 2000, and one count of armed criminal action, §571.015, RSMo 2000 (L.F. 6). On December 3, 2001, the case went to trial, the Honorable John W. Sims presiding (Tr. 108). The jury found appellant guilty of one count of murder in the second degree, §565.021, RSMo 2000, and one count of armed criminal action, §571.015, RSMo 2000 (Tr. 1194). Appellant was sentenced to two consecutive terms of thirty years imprisonment (Tr. 1220).

Appellant does not challenge the sufficiency of the evidence in this case. Viewed in the light most favorable to the verdict, the evidence was as follows: During late fall in 2000, appellant was in a relationship with John Hamilton, and she lived at his home (Tr. 770, 995). Soon after she moved in with Hamilton, appellant began having a sexual relationship with a man to whom her friend had introduced her named Bruce Paris (Tr. 686, 995-996).

One day while visiting Paris's home, appellant told Paris's friends that she loved Paris and that she had plans to leave Hamilton so she and Paris could move to Chicago to be together (Tr. 594). She also stated that if she couldn't have Paris no one could, and that she gave everyone three chances before using violence (Tr. 593).

Moments after appellant made those statements, Paris arrived home with another woman and told appellant that they would not be moving to Chicago together (Tr. 595, 627). Appellant became upset and began screaming at Paris that he had lied to her (Tr. 628). While Paris was driving appellant back to Hamilton's house, appellant told him that she was going to

kill him for what he had done to her and added that if she couldn't do it, she knew someone who could (Tr. 633). She said that she would make him pay for everything he and any other man had ever done to her (Tr. 634).

The next day, Paris went to North Carolina with a former girlfriend and stayed there for ten days (Tr. 596, 637). Paris then returned to Missouri and went alone to Chicago for a month before he again returned to Missouri on December 4, 2000 (Tr. 598, 639). On December 5, Paris told his friend Regina Buckner that he wanted to see appellant again and asked her to give appellant the message (Tr. 692).

Buckner found appellant at the Hickory House bar that afternoon (Tr. 696, 1014). Upon hearing that Paris wanted to see her, appellant yelled that she hated him and that he had gotten her in trouble with her boyfriend Hamilton (Tr. 696-697, 1016). She also stated "let him come to Hickory County, let him come to my house, I have guns waiting on him" (Tr. 699-700). The owner of the bar heard appellant state that Hamilton had given her permission to "blow Bruce [Paris] away" if he bothered her (Tr. 749). A waitress at the bar also heard appellant state that she was going to kill Paris and that "I mean it. I will blow his head off" (Tr. 759).

After Buckner and appellant played darts and drank for awhile, they went back to Hamilton's house to drink some more (Tr. 700). Eventually they decided to leave the house to find Paris (Tr. 704, 1021). Appellant asked Buckner if she could take a gun with them (Tr. 704). Because Buckner was planning on driving and did not want weapons in her car, she said "no" (Tr. 704). They ended up taking appellant's car (Tr. 706).

They drove to a local store where Paris was supposed to meet them and waited in the car for him (Tr. 706). When Buckner went inside to go to the restroom, Paris arrived and got into the passenger seat next to appellant (Tr. 706, 1024). Buckner returned to the car and the three then “drove around,” bought alcohol and smoked marijuana (Tr. 708, 1029). During this time, Buckner observed that appellant and Paris were playful and flirtatious with each other (Tr. 711). Eventually they went to appellant’s house (Tr. 713, 1033).

At appellant’s home, Buckner called her friend Becky to say that she would be leaving appellant and Paris and coming to Becky’s house shortly (Tr. 716, 1033). Buckner then asked appellant to drive her to her car which was at a gas station (Tr. 1037). Appellant and Buckner left the house with Paris remaining alone there (Tr. 716, 1037).

Appellant then returned to her house where Paris remained (Tr. 1037). When she returned, it was approximately 7:58 p.m., and Paris was talking on the phone with his boss and friend Chris Irick (Tr. 600, 1037). Paris asked Irick to bring a change of clothes and some food for him to work the next day because he would be out all night (Tr. 600). Irick mentioned to Paris that his ex-girlfriend, Michelle Morelan had been trying to reach him (Tr. 601). Paris replied that he would call her and then call Irick back by 9 p.m. (Tr. 602). Paris never did call back (Tr. 602).

At 9:09 p.m. appellant called the Hickory County Sheriff’s Department and in a hysterical voice said “I have shot an intruder” (Tr. 279). The police arrived at the house by 9:17 p.m. and found Paris dead and slumped in a sitting position against the open front door

(Tr. 295, 298, 357). There was a significant amount of blood in the doorway and on the porch (Tr. 301, 358).

There was a gun sitting on the corner of the coffee table in the living room and it had three live rounds, one empty chamber and one spent shell casing inside (Tr. 309-311). In the kitchen there were live rounds on the floor (Tr. 311-312, 364). There were several bottles of alcohol in the living room (Tr. 364).

Upon searching Paris's clothing, one of the officers found a picture of appellant in his pocket (Tr. 265). On the back of the photograph appellant had written "To Bruce, Love ya naked. Love always, Jamie" (Tr. 370, 1077).

The officers found appellant in the kitchen doorway as she was talking on the phone to John Hamilton (Tr. 311-312). She said to Hamilton "Oh my God I shot him" (Tr. 786). Appellant asked the officers many times if the victim was dead, and she told them that she did not know who the intruder was (Tr. 314-318, 341, 361).

Sheriff Ray Tipton took appellant to the station and she told him multiple times that she "killed him" (Tr. 422). After receiving *Miranda* warnings, appellant gave a statement to the police. She said that she had been drinking at the Hickory House when Buckner came in, that they met Paris and drove around, and that she suggested that they go to her house so that Paris and Buckner could talk (Tr. 434-437).

When asked about the picture of her that Paris had in his pocket, she told the sheriff that Paris saw it on the coffee table so she wrote on it and gave it to him (Tr. 437). Next she claimed that she took Paris back to the Hickory House, took Buckner to her car and then went

home alone (Tr.437-438). She said that she always carried a gun when she was alone in the house, and that she took it with her when she took her dog outside that night (Tr. 438). While outside, she stated, she heard a noise and saw a figure walking toward her, so she got scared, ran inside and did not shut the door behind her (Tr. 438). She claimed that she then pulled the gun out, pointed it at the door, and as Paris entered he told her to put the gun down or he would beat her (Tr.438). She then told the sheriff that Paris grabbed the gun, she pulled away, and as she did so, the trigger was pulled (Tr. 438).

Later, during an interview with George Knowles of the Missouri State Highway Patrol, appellant divulged that she had not been truthful with the other officers (Tr.542). This time she stated that Paris had been an invited guest in her house and she asked him to leave but he refused (Tr.542). In response, she explained, she went into her bedroom and got a handgun (Tr.542). Paris then left, but appellant stated that when she later went outside to take the dog out, she saw movement and Paris came back up to the house (Tr. 542-543). She then claimed that she pointed the gun at him, told him to leave, and when he told her to put the gun down and moved toward her she backed away and the gun fired (Tr. 543, Defense Ex. F). She stated that she did not mean to shoot him (Defense Ex. F).

Appellant was then held in the Webster County jail and she shared a cell with Jammie Seitz, and Tanya Honeycutt (Tr. 821,911). While there, appellant told Seitz that when Paris came into the house the second time, he told her that he had missed his ride, and that she hadn't meant to shoot him but it just happened while they were wrestling (Tr. 824-826). After Seitz went to sleep, appellant told Honeycutt that she and her friend had planned to find Paris,

bring him to her house, and kill him (Tr. 917). She explained that her plan was to claim that the victim was an intruder and that she had made herself look hysterical by rubbing her eyes a lot so the police thought they looked red (Tr. 918-919). She stated that a waitress at the bar had overheard the plan, but that her attorney would “dig up dirt” on the waitress (Tr. 918). Appellant laughed as she told the story and said that it was exciting and a thrill (Tr. 919-920).

Two of the county jailers overheard a portion of this discussion over the jail monitoring system (Tr. 845). One testified that she heard appellant say that she shot Paris in the jugular vein and that blood came shooting out of his neck, and that he gurgled on the blood (Tr. 850-851). During this discussion, the jailer explained, she heard appellant laughing (Tr. 851). Another jailer heard appellant say “what do you do with a guy like that? You shoot him” and then she heard laughter (Tr. 859).

At trial, appellant presented evidence that one of her hairs was found on the victim’s hand, and that there was no gunshot residue found on her hands (Tr. 953, 978). Appellant testified at trial that on the day of the crime she did not like Paris, especially because he had been making crank phone calls to her house, but that she went with Buckner to meet him in order to protect her (Tr. 1010-1011, 1015-1021). She stated that appellant had grabbed her breast in the car as they drove around, he then covered her mouth and she bit him while she was driving (Tr. 1030).

She further alleged that when they got to her house, she only gave the photograph of herself to Paris because he promised that if she did, he would leave her alone (Tr. 1035). She stated that she left Paris alone in her house while she returned Buckner to her car, but that when

she returned, he refused to leave (Tr. 1042). After she got a gun, she testified, Paris left the house, but he came back twenty minutes later when she took her dog outside (Tr. 1045-1050). Appellant claimed that she ran back inside the house, left the front door open, and recognized Paris when he came to the door (Tr. 1050).

She said that she had no intention of shooting Paris, but that he reached for the gun and it went off by accident (Tr. 1054, 1084). She explained that she had not told the officers the truth because she didn't want them to know that she had used a gun to get Paris out of her house, and had no explanation for other discrepancies between her statement and her testimony except that she had made mistakes in her statements (Tr. 1060-1063, 1077-1081).

Following the evidence and closing arguments, the jury found appellant guilty of murder in the second degree and armed criminal action (Tr. 1194). Appellant was sentenced to serve two concurrent thirty year sentences in the Department of Corrections (Tr. 1220). Appellant directly appealed her convictions and sentences in the Missouri Court of Appeals, Southern District, and the court affirmed. State v. Avery, No. 24710, *Slip op.* (Mo. App. S.D. April 28, 2003).

The Court of Appeals, Southern District denied appellant's motion for rehearing or transfer of the case on May 14, 2003. This Court granted transfer of the case on July 17, 2003.

ARGUMENT

I.

THE TRIAL COURT DID NOT ERR IN REFUSING TO INSTRUCT THE JURY ON THE LESSER INCLUDED OFFENSE OF VOLUNTARY MANSLAUGHTER BECAUSE THERE WAS NO BASIS FOR CONVICTION OF VOLUNTARY MANSLAUGHTER IN THAT THERE WAS NO EVIDENCE THAT APPELLANT ACTED UNDER THE INFLUENCE OF SUDDEN PASSION ARISING OUT OF ADEQUATE CAUSE.

Appellant was charged with murder in the first degree, and the jury was instructed on the lesser included offenses of conventional murder in the second degree, involuntary manslaughter in the first degree, and involuntary manslaughter in the second degree (L.F. 115-120). Appellant contends that the trial court erred in refusing to instruct the jury on voluntary manslaughter (App.Br. 29-41). She claims that she was entitled to an instruction on voluntary manslaughter because there was a basis to find that she acted under the influence of sudden passion arising from adequate cause (App.Br. 29-41).

A. The Standard Of Review

Trial courts are obligated to instruct on a lesser included offense if there is a basis for the jury to: 1) acquit defendant of the offense charged; and 2) convict defendant of the lesser included offense. State v. Hibler, 5 S.W.3d 147, 148 (Mo.banc 1999). If in doubt, the trial judge should instruct on the lesser included offense. Id. In determining whether an instruction on a lesser offense should be given, appellate courts view the evidence in the light most

favorable to the giving of the instruction and will consider reasonable inferences from the evidence that favor that result. State v. Westfall, 75 S.W.3d 278, 280 (Mo.banc. 2002).

B. The Evidence

In support of her claim that she was entitled to an instruction on voluntary manslaughter, appellant relies on evidence handpicked from three differing stories she told over the course of the investigation into this crime. However, none of the evidence admitted at trial supported a voluntary manslaughter instruction. In the light most favorable to the giving of the instruction, the evidence presented was as follows:

At the scene of the crime, appellant told officers, “I have shot an intruder. I’ve shot an intruder,” and she claimed that she did not know who the intruder was (Tr. 279). Later, during an interview with officers at the Sheriff’s Department, appellant said that she had lied, that she knew the victim, that she was with the victim on the day of the crime, and that they had been drinking and the victim smoked marijuana (Tr. 636). She told the officers that later that evening, she walked the dog while carrying her gun because, she said, she always carried a gun while her boyfriend was away (Tr. 438). She stated that while outside, she heard a rustling noise that scared her so she ran inside leaving the door open (Tr. 438). Appellant claimed that the victim, who had been invited into the home earlier came to the door and told appellant to “put f--king the gun down or [he would] beat her f--king ass” (Tr. 438). She then said in her statement to the police that “he then grabbed the gun and I pulled away and I pulled the trigger” (Tr. 438, Defense Ex. F). She repeatedly exclaimed that she had not meant to shoot Paris (Defense Ex. F).

Then, during an interview with the Missouri Highway Patrol, appellant stated that she had not been truthful with the officers from the Sheriff's Department (Tr. 542). This time, she said that she had been in a sexual relationship with the victim and that he had been invited into her home, but that he did not want to leave (Tr. 542-543). She claimed that he did leave after she pulled out a gun and told him to get out (Tr. 542). After walking the dog, she explained, she ran inside, and when the victim returned to the door and told her to put the gun down, she recognized him (Tr. 543). She explained that she backed away to run and hide, but as she did so she fired one shot (Tr. 543). She explained that she did not know how the gun had gone off, but that she was positive that she had not mean to shoot Paris (Defense Ex. F).

At trial, appellant testified that the victim had touched her breast earlier in the day and that she did not like him because he had made crank phone calls to her home (Tr. 1010, 1015, 1016, 1030). She testified that she had invited appellant into her home, pointed the gun at him to get him to leave, and that when he returned she recognized him and knew he had no weapons, but that he reached for the gun and it went off accidentally (Tr. 1030, 1042-1044, 1051-1052, 1084). She stated that she had no intention of pulling the trigger and that she had purposely refrained from shooting him when she realized that she knew him (Tr. 1052, 1054, 1084).

C. There Was No Evidence of Sudden Passion Arising From Adequate Cause

In the present case, there was no evidence from which the jury could have convicted appellant of voluntary manslaughter because there was no evidence that appellant acted under sudden passion arising from adequate cause.

Voluntary manslaughter occurs when one causes the death of another under circumstances that would constitute murder in the second degree except that the death was caused under the influence of sudden passion arising from adequate cause. State v. Fears, 803 S.W.2d 605, 608 (Mo.banc 1991); § 565.023.1(1), RSMo. 2000. Sudden passion arising from adequate cause is an objective standard that is measured by the ordinary person's capacity for self control. Id. at 609.

As the record shows in the case at bar, even viewed in the light most favorable to appellant, there was no basis to convict appellant of voluntary manslaughter. Absolutely nothing in appellant's testimony or in other trial evidence could support a claim of sudden passion. "Sudden passion" means passion directly caused by and arising out of provocation by the victim or another acting with the victim which passion arises at the time of the offense and is not solely the result of former provocation. Id.; §565.002(7), RSMo. 2000. Passion may be rage, anger, or terror, but it must be so extreme that, for the moment, the action is being directed by passion rather than reason. Id. Sudden passion is not established where there has been adequate time for the passion to cool. Id. The defendant has the burden of injecting the issue of influence of sudden passion arising from adequate cause. §565.023.2, RSMo 2000. "This means the issue is not submitted to the trier of fact unless supported by the evidence. 556.05." State v. Redmond 937 S.W.2d 205, 208 (Mo.banc 1996).

Appellant cites harassing phone calls that the victim allegedly made to appellant days prior to the crime, and drinking, smoking or breast touching that occurred hours before the shooting as evidence supporting her claim of sudden passion (App.Br. 30-31). None of these

things occurred “at the time of the offense” and therefore are not sufficient to show *sudden* passion. Redmond, 937 S.W.2d at 208.

Moreover, the victim’s refusal to leave the house twenty minutes before the shooting may have made appellant angry at the time, but she had plenty of time to cool down prior to the victim’s return. Therefore, the only portion of the evidence that is relevant to a claim of sudden passion is appellant’s three stories to the police regarding the actual time of the crime. In her first statement to the police, appellant stated that she had shot an intruder and that she did not know who he was. She did not claim that she had any feelings of rage, anger, or terror, that directed her actions by passion rather than reason.

Then in her next story she claimed that the victim allegedly rustled the bushes outside her home and then entered through the wide open door. She stated that she recognized Paris and did not want to shoot. This showed that she was not feeling “sudden passion” to shoot him. Her repeated contention that she never meant to hurt the victim showed that she did not feel a sudden passion to shoot. Therefore, no evidence of sudden passion was before the jury. Because there was no factual dispute at trial whatsoever regarding whether appellant felt sudden passion, it was proper to not put the issue before the jury. *See State v. Weems*, 840 S.W.2d 222, (Mo.banc 1992) (If there is a factual dispute the instruction must be given because factual issues are in the discretion of the jury).

Lastly, appellant’s claim that the fact that the victim’s zipper on his pants was open and that he had one of appellant’s hairs on his hand is evidence to support the voluntary manslaughter instruction is misleading (App.Br. 32). This evidence was not ever presented to

show that appellant had been attacked by the victim, and appellant never stated that the victim attacked her. Therefore, the evidence could not have led the jury to find evidence of sudden passion in this case.

Even if there had been evidence of sudden passion, appellant's claim is still without merit because there was no evidence of "adequate cause" from which sudden passion could have arisen. "Adequate cause" means,

Cause 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.

§565.002.1, RSMo 2000. To be adequate, the provocation must be of a nature calculated to inflame the passions of the ordinary, reasonable, temperate person, State v. Fears, 803 S.W.2d 605 (Mo. banc 1991). Words, no matter how insulting, are insufficient to establish adequate cause. Id.

Therefore, even if appellant had shown that she had sudden passion, there was absolutely no evidence of adequate cause to ignite sudden passion as the victim's alleged actions in entering the house and uttering profane words would not inflame the passions of the ordinary, reasonable, temperate person.

Appellant's reliance on State v. Redmond, 937 S.W.2d 205 (Mo. banc 1996), State v. Fears, 803 S.W.2d 605, (Mo. banc 1991), State v. Fouts, 939 S.W.2d 506 (Mo. App., S.D. 1997), State v. Patterson, 484 S.W.2d 278 (Mo. 1972), and State v. Creighton, 52 S.W.2d 555 (Mo. 1932) to show that appellant had adequate cause to ignite sudden passion is misplaced

here. In each of these cases, the victim either came at the defendant with a weapon or committed some type of physical battery that gave rise to sudden passion. Here, the victim had no weapons, and did not ever touch appellant until he reached for the gun at which time she stated that it accidentally went off.

Appellant's reliance on State v. Battle, 32 S.W.3d 193 (Mo.App., E.D. 2000) is also misplaced because in that case the victim's behavior had been extreme and it escalated until the time of the crime. The victim had tried to hurt the defendant with his car, physically struck the defendant's girlfriend, threatened to kill the defendant and his girlfriend, continuously glared at the defendant and his girlfriend and finally appeared to be reaching for a weapon. Id. at 197. There was no such extreme or cumulative behavior in the case at bar.

Appellant is correct that adequate provocation does not require physical violence, but the victim's actions in this case did not supply adequate cause to ignite any sudden passion. She contends that she was not "obliged to wait in order to ascertain whether he would accomplish the violence actually threatened" (App.Br. 36). However, appellant's cited cases on this issue are misleading because they deal only with justification for using self-defense, and have nothing to do with how to determine if there was sudden passion arising from adequate cause.

In this case, appellant presented no evidence to show that she intentionally shot the victim because she feared physical violence. Although appellant did claim a few times that she was "scared to death," she explained that she was so scared because she was afraid of the dark (Tr. 1085). An unreasonable fear of the dark, although unfortunate, is not enough to support

a claim of adequate cause because it is insufficient to inflame the passions of the ordinary, reasonable, temperate person.

Because there was no evidence to support claims of sudden passion or adequate cause, there was no evidence to support giving a voluntary manslaughter instruction in this case. There was simply no factual dispute on this issue for the jury to determine. Therefore, the trial court properly refused to instruct the jury on voluntary manslaughter. Appellant's first point must fail.

II.

THE TRIAL COURT DID NOT ERR IN REFUSING TO SUBMIT TO THE JURY APPELLANT'S INSTRUCTIONS ON SELF-DEFENSE OR DEFENSE OF PREMISES BECAUSE THE EVIDENCE PRESENTED AT TRIAL REGARDING THE SHOOTING DID NOT SUPPORT THE INSTRUCTIONS (Responds to appellant's points II and III).

In her second point on appeal, appellant claims that the trial court erred in refusing to submit appellant's proposed self-defense instruction to the jury (App.Br. 42), and in her third point on appeal, appellant claims that the trial court erred in refusing to submit appellant's proposed defense of premises instruction (App.Br. 54). Appellant contends that the trial court erred in finding that there was no evidence to support the giving of self-defense or defense of premises instructions, that the instructions would be inconsistent with appellant's theory of an accidental shooting, and that appellant's testimony alone was not sufficient to support giving the instructions (App.Br. 42-43, 54-55).

A. There Was No Evidence Presented to Support A Self-Defense Instruction

The trial court is required to instruct on self-defense where the evidence, viewed in the light most favorable to the defendant, supports such an instruction in that there is substantial evidence putting self-defense at issue. State v. Weems, 840 S.W.2d 222, 226 (Mo. banc 1992).

To support a self-defense instruction, the evidence must show: 1) that the defender was not the aggressor or did not provoke the hostile action; 2) a real or apparent necessity for the defender to kill in order to save herself from immediate danger of serious bodily injury or

death; 3) reasonable cause for the defender's belief in such necessity; and 4) an attempt by the defender to do all within her power consistent with her personal safety to avoid the danger and the need to take a life. State v. Crawford, 904 S.W.2d 402, 405-06 (Mo.App., E.D. 1995); *see* State v. Davidson, 941 S.W.2d 732, 735 (Mo.App., S.D. 1997); State v. Williams, 815 S.W.2d 43, 48 (Mo.App., W.D. 1991); §563.031, RSMo 2000. The defendant has the burden of injecting the issue of self-defense into her case. §563.031.4, RSMo 2000. In determining whether a self-defense instruction should be submitted, evidence is to be considered in the light most favorable to appellant. State v. Weems, 840 S.W.2d 222, 226 (Mo.banc 1992).

The evidence, viewed in the light most favorable to appellant shows that there was no evidence to support a self-defense instruction. According to appellant's trial testimony, the gun went off accidentally (Tr. 1051-1052, 1084). A self-defense theory concedes an intent to harm made necessary by danger of death or serious injury. State v. Peal, 463 S.W.2d 840, 842 (Mo. 1971). However, appellant specifically denied any intentional shooting and stated that she never had any intention to shoot Paris because she knew him and did not see him as a random intruder (Tr. 1052).

None of the other stories appellant told the police about the shooting entitle appellant to a self-defense instruction either. During her first interview with the Sheriff's Department, appellant stated that she knew the victim, and that he had been invited into her home earlier in the day (Tr. 438). She claimed that the victim came to the door after she had walked her dog while carrying a gun, and he told her to "put f--king the gun down or [he would] beat her f--king

ass,” (Tr.438). She then said that the victim grabbed for the gun, and as she pulled away, she pulled the trigger (Tr. 438). She did not say that she had shot intentionally.

Later, in another interview with a Missouri Highway Patrol officer, appellant said that the victim grabbed for the gun, but that she didn’t know how she had pulled the trigger (Defense Ex.F). She said that she never meant to shoot, she had only meant to run and hide (Tr. 438; Defense Ex. F).

As the facts above show, appellant did not present evidence of self-defense because she never claimed that the shooting was intentional. Therefore, the trial court ruled as it did because it felt that there was no evidence that appellant acted in self-defense in using deadly force against Bruce Paris. Rather, appellant’s own testimony was that the shooting was an accident. Missouri case law does not recognize the situation of accidental self-defense. State v. Houcks, 954 S.W.2d 636 (Mo.App.W.D. 1997).

Appellant argues that she did present evidence to show that appellant shot in self-defense (App.Br.46). However, before appellant is entitled to an instruction whereby the jury found he was justified in using deadly force, appellant *a fortiori* must have actually used deadly force. But there is no evidence in appellant’s case that appellant willfully used deadly force because under her own description of the events, she never intended to fire the gun – which was the only deadly force apparent. This testimony would support a theory of accidental killing, i.e., the gun went off by accident. But it does not support a theory of self-defense – the justified use of deadly force – because there was no evidence in appellant’s story that she even used deadly force.

Even if there had been evidence of self-defense presented at trial, appellant was not entitled to the instruction. This is because generally the defenses of accident and self-defense are inconsistent. State v. Randolph, 496 S.W.2d 257 (Mo. banc 1973), and when two defense theories are inconsistent, a defendant is entitled to instructions on both only if they are proved by proper evidence. State v. Peal, 463 S.W.2d 840, 842 (Mo. 1971). The proper evidence necessary to justify the inconsistent defense instructions must be offered by the State or a third party witness. State v. Wright, 175 S.W.2d 866 (Mo. banc 1943); State v. Peal, 463 S.W.2d 840 (Mo. 1971); State v. Randolph, 496 S.W.2d 257 (Mo. banc 1973); State v. Houcks, 954 S.W.2d 636 (Mo. App. W.D. 1997). The defendant alone cannot provide the basis for the inconsistent defenses. Peal, 463 S.W.2d at 842.

Appellant contends that she raised the issue of self-defense through a combination of her trial testimony and her out of court statements (App.Br. 51). However, as stated above, it is not enough for appellant to use her self-serving statements alone to support inconsistent defenses. Wright, 175 S.W.2d at 871; State v. East, 976 S.W.2d 507, 509 (Mo. App. W.D. 1998). Appellant never admitted that she intentionally shot the victim, and there was no evidence presented at trial, other than pieces of her own statements that would even come close to supporting a self defense theory. “A defendant’s uncorroborated testimony is not sufficient to support inconsistent defenses.” East, 976 S.W.2d at 509 (citing State v. Peal, 463 S.W.2d 840, 842 (Mo. 1971)). Appellant’s uncorroborated, self-serving testimony is insufficient to support a claim of self-defense, and consequently, the trial court did not err in refusing to submit the self-defense instruction.

B. There Was No Evidence Presented To Support A Defense Of Premises Instruction

Appellant also claims that the trial court erred in not providing the jury with a defense of premises instruction. “In Missouri, defense of premises is, essentially, accelerated self-defense.” State v. Lumpkin, 850 S.W.2d 388, 392 (Mo.App.W.D. 1993). Therefore, for the reasons stated above regarding the trial court not giving a self-defense instruction, appellant was not entitled to an instruction on defense of premises either.

Moreover, even notwithstanding the explanations set out above, appellant’s claim that the trial court erred in not giving a defense of premises instruction is unavailing. The law on defense of premises is set out in §563.036, RSMo 2000, and reads, in pertinent part, as follows:

1. A person in possession or control of premises or a person who is licensed or privileged to be thereon, may, subject to the provisions of subsection 2 of this section, use physical force upon another person when and to the extent that he reasonably believes it necessary to prevent or terminate what he reasonably believes to be the commission or attempted commission of the crime of trespass by the other person.

According to State v. Lumpkin, 850 S.W.2d 388, 391 (Mo.App.W.D. 1993):

A defense of premises[] instruction must be given by the trial court only when there is evidence of attempted unlawful entry and evidence that the lawful occupant reasonably believed

1) immediate danger of entry existed; 2) the entry was being attempted in order to kill or inflict serious bodily harm on the occupant; and 3) deadly force was required to prevent the entry.

see also State v. Dulaney, 989 S.W.2d 648, 651 (Mo.App., W.D. 1999); State v. Kiser, 959 S.W.2d 126, 130 (Mo.App., S.D. 1998) (deadly force may only be used in defense of a dwelling when a trespasser is attempting to enter to inflict serious physical injury).

No evidence was ever presented at trial that the victim was attempting to burglarize appellant's home. At best, given the evidence presented, the victim may have been trespassing. However, in defense of premises from a trespass a person may not use deadly force unless she reasonably believes the other person is attempting to commit arson or burglary upon her dwelling. State v. Kiser, 959 S.W.2d 126 (Mo.App., S.D. 1998).

Therefore, the trial court did not err in refusing to submit the defense of premises instruction to the jury, and appellant's second and third points must fail.

III.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO REMOVE JUROR JUSTINA SAVAS FROM THE JURY IN THE MIDDLE OF TRIAL BECAUSE THE RECORD SHOWS THAT SAVAS WAS AN IMPARTIAL JUROR IN THAT SHE ASSURED THE COURT THAT NOTHING ABOUT RECOGNIZING A WITNESS OR REMEMBERING AN INCIDENT INVOLVING AN ACQUAINTANCE OF APPELLANT WOULD IMPAIR HER ABILITY TO BE FAIR AND IMPARTIAL, AND THERE WAS NO INTENTIONAL NON-DISCLOSURE OF THE INFORMATION (Responds to point IV of appellant's brief).

In his fourth point on appeal, appellant claims that the trial court abused its discretion in overruling appellant's request to remove Juror Justina Savas from the jury in the middle of the trial (App.Br.72). Appellant argues that because the juror recognized one of the witnesses as a person who worked in the same building in which she worked, and because Juror Savas remembered hearing a story about an acquaintance of appellant, that there was prejudicial non-disclosure that may have influenced the verdict (App.Br. 66).

A. The Facts

During voir dire, the venire panel was asked if they knew state's witness Caryl Adams, and no one raised a hand indicating that they knew her (Tr. 156-157). However, after Adams testified on the fourth day of trial, Juror Savas informed the court that although she did not recognize Caryl Adams by name, she realized that she had seen her before while working in the Webster County Courthouse (Tr. 868). Savas stated "I do not know her personally or to

speak to her” (Tr. 868). When asked if she would accept or reject Adams’ testimony without regard to the fact that she worked in the same building, Savas responded that she would (Tr. 869).

Juror Savas also informed the court of the following:

The second thing is, when the young lady, first name Jammie, Seitz I believe was her name, when she was brought in it was told that she had been in jail in Webster County. And also yesterday finding out that Ms. Avery had also been jailed in Webster County, which I didn’t realize that she had been incarcerated in our jail upstairs, and **I’ve never met her, I don’t know her**, and I don’t know the name other than Jamie, I work downstairs in the vault to the recorder’s office and in the recorder’s office they also issue marriage licenses and there was an occasion where a gentleman came in to get a marriage license to marry – to apply to be married to a young lady upstairs that was incarcerated. **And I was not there, I don’t know if he came in or I don’t know if he called, I do not know the issue. I wasn’t in the office. I was out.** But when I came in to the office one of the workers in the office had told us that this gentleman had wanted to apply for a marriage license and was upset that it had been refused by I believe by Nancy Webster. And you’ll have to

help me, Nancy, because, and I'm not sure what his appearance was, like I said I didn't see him. I don't even know that he came in physically or if he called, but that he was upset. And there have been threats made and what I understand there have been threats made to Nancy. So they were just telling us to be aware being that we worked in the courthouse to just be aware because these threats had been made.

(Emphasis added) (Tr. 869-870).

The court asked the juror if she would be able to set aside the information, and Savas replied "I'm fine with it" (Tr. 870). The judge then asked if she would be able to make her decisions "based solely on the evidence presented in this courtroom and solely upon the instructions of law which this Court will give you" (Tr. 871). Again, Juror Savas said that she could, and that she would have no problems (Tr. 871).

After this discussion, defense counsel asked that Juror Savas be removed from the jury (Tr. 872). He argued that he did not believe that the juror had done anything wrong, and that "as a matter of fact, I think [Juror Savas has] gone out of her way to make sure that [appellant] gets a fair trial..." (Tr. 872). The Prosecutor stated that he had no response except to state that the juror's response that she could be fair and impartial is the same response that keeps venire persons from being struck for cause during voir dire (Tr. 873).

The court ruled:

I think she has rehabilitated herself in reference to being struck for cause. She says she can set all this aside and make her decision as a juror based solely on the evidence presented in court and the instructions given by the court. Defense's motion to remove the juror is denied.

(Tr. 873).

B. Standard Of Review

The trial court is vested with broad discretion in determining qualifications of a prospective juror because it is in the best position to evaluate the venire member's commitment to follow the law. State v. Rousan, 961 S.W.2d 831, 839 (Mo.banc 1997), cert. denied, 118 S.Ct. 2387 (1998); *see also* State v. Kreutzer, 928 S.W.2d 854, 866 (Mo.banc 1996), cert. denied, 117 S.Ct. 752 (1997). The court's ruling will not be disturbed absent clear abuse of discretion and a real probability of injury to the complaining party. State v. Feltrop, 803 S.W.2d 1, 7 (Mo.banc 1991), cert. denied 111 S.Ct. 2918 (1991). The critical question in reviewing the exercise of discretion is whether the challenged venire persons indicated unequivocally their ability to evaluate the evidence fairly and impartially. Id.; Ray v. Gream, 860 S.W.2d 325, 331-32 (Mo.banc 1993).

C. There Was No Abuse Of Discretion

The concealment of information by a juror may merit a new trial where the basis for disqualification was investigated during voir dire, complaining counsel does not have knowledge of the deception, and the juror's concealment of the truth is intentional. State v. Martinelli, 972 S.W.2d 424, 432 (Mo.App., E.D. 1998). In this case, however, appellant concedes that there was no intentional concealment or non-disclosure of information by Juror Savas (App.Br. 66). Therefore, as appellant concedes, he is not automatically entitled to a new trial, and "the relevant inquiry becomes whether [Savas's] presence on the jury did or may have influenced the verdict so as to prejudice Ms. Avery" (App.Br. 66).

Juror Savas's recognition of witness Adams as a person whom she had seen in the courthouse is inconsequential as the mere fact of acquaintance with a witness or a party in a criminal case does not disqualify a juror absent some showing of prejudice or bias. State v. Walton, 796 S.W.2d 374, 378 (Mo.banc 1990). The Juror's explanation that she could be fair and impartial shows that there was no prejudice to appellant.

Likewise, the juror's knowledge of the marriage license incident is not sufficient to warrant granting appellant a new trial because the self-assessment of a prospective juror that he or she can set aside any bias is in itself sufficient to support the trial court's determination that the juror is not disqualified. Ray v. Gream, 860 S.W.2d 325, 334 (Mo.banc 1993). "[R]eliance on such evidence is the common and long-accepted practice of our trial courts." Id.

In State v. Walton, supra, a prospective juror indicated during voir dire that she knew one of the victims because he had worked for her husband in the past. Id. When asked whether the relationship with the victim would influence her judgment, the venire person indicated that it would not. Id. The Missouri Supreme Court found that the trial court did not abuse its discretion in permitting the challenged prospective juror to serve on the panel. Id. The court held that the trial court was in the best position to determine the venire person's credibility and to believe her answers that she would not be biased. Id. at 379. The court further determined that any conclusion of possible bias would require one to engage in an assumption not supported by the evidence. Id.

In the present case, Juror Savas repeatedly and unequivocally stated that she would have no problem setting aside any outside knowledge that she may have in order to assess the evidence presented in a fair and impartial manner (Tr. 868-871). The trial court in the present case was in the best position to assess the juror's credibility and to determine if the information would cause her to be biased against appellant. Therefore, appellant cannot show that the court abused its discretion in refusing to disqualify her. Therefore, appellant's claim should be denied.

IV.

THE TRIAL COURT DID NOT ERR OR ABUSE ITS DISCRETION IN ADMITTING INTO EVIDENCE STATE'S EXHIBIT P-94, A TRANSCRIPT OF APPELLANT'S VIDEOTAPED STATEMENT TO THE POLICE, ALONG WITH DEFENSE EXHIBIT F, THE VIDEOTAPE, BECAUSE THE TRANSCRIPT WAS ADMISSIBLE IN THAT IT AIDED THE JURY IN UNDERSTANDING INAUDIBLE PORTIONS OF THE VIDEOTAPE. FURTHERMORE, APPELLANT IS UNABLE TO SHOW THAT SHE WAS PREJUDICED IN ANY WAY BY THE JURY BEING ALLOWED TO HAVE THE TRANSCRIPT WHILE VIEWING THE VIDEOTAPE (Responds to point V of appellant's brief).

In his fifth point on appeal, appellant claims that the trial court abused its discretion by allowing the State to present a transcript of appellant's statement to the police along with the defendant's presentation of the videotape recording of the statement (App.Br. 69). Appellant further contends that she was prejudiced because the jury was allowed to read the transcript at the same time as they watched the videotape (App.Br. 69).

During trial, appellant sought to present a videotape of her statement to the police (Tr. 545-546). After much debate over the admissibility of the videotape, the court ruled that the videotape was admissible for the sake of completeness (Tr. 571). Thereafter, the State requested that the jury be provided with a transcript of the statement so that the jury could follow it while watching the videotape (Tr. 578). Defense counsel objected to the transcript because, he stated, it would be distracting and the jurors would not watch the videotape (Tr.

580). The court ruled that the jury would be allowed to follow along with the transcript while watching the videotape (Tr. 581). Appellant raised this issue in his motion for a new trial (L.F. 140-141).

A trial court is vested with broad discretion in ruling on questions of admissibility of evidence and, absent a clear showing of an abuse of that discretion, the appellate court should not interfere with the trial court's ruling. State v. Dunn, 817 S.W.2d 241, 245 (Mo.banc 1991), cert. denied, 503 U.S. 992 (1992). Also, in matters involving the admission of evidence, appellate courts review for prejudice, not mere error. State v. Isa, 850 S.W.2d 876, 895 (Mo.banc 1993).

Furthermore, transcripts of recordings may be used if portions of the tape are “inaudible or there is a need to identify the speakers.” State v. Wahby, 775 S.W.2d 147, 154 (Mo.banc 1989). “Admissibility of transcripts of tape recordings is for the sound discretion of the trial court.” Id. In order to constitute reversible error, appellant must show that the admission of the transcript prejudiced her case. State v. Williams, 948 S.W.2d 429, 432 (Mo.App., E.D. 1997).

In the present case, the transcript was necessary in order to aid the jury in understanding inaudible portions of the videotape. During the videotaped statement, appellant was crying hysterically and many of her responses are difficult to hear (Defense Ex. F). In fact, she was crying so hard, that the officer conducting the interview had to ask her multiple times if she was “OK,” and if she needed a drink (Defense Ex. F; State’s Ex. P-94). Therefore it was

entirely within the trial court's discretion to allow the transcript into evidence to aid the jury in understanding the videotape. Wahby, 775 S.W.2d at 154.

Appellant's claim that she was prejudiced because the court allowed the jurors to have a copy of the transcript while they watched they watched the videotape is equally unavailing. Appellant claims that this was an attempt by the State to distract the jury and to minimize the effectiveness of the videotape, because she alleges, the State did not want the jury to see and hear appellant crying (App.Br. 75). However, appellant could not have suffered any prejudice because one only needs to listen to the videotape to recognize how difficult it would be to ignore appellant's hysterical crying during the statement even while reading (Defense Ex. F). It was because the crying was so overwhelming that the transcript served to aid the jury in understanding the statement in the first place. Therefore, appellant is unable to show that allowing the jury to read an accurate transcript while watching a videotape affected her defense in any way.

Moreover, nothing prohibited appellant from requesting that the videotape be shown more than once, or from playing it again during closing arguments. Appellant's failure to do so precludes her from now claiming that she was prejudiced and that she was deprived of her right to present a defense. Therefore, appellant's fifth point is without merit and must be denied.

CONCLUSION

For the foregoing reasons, respondent submits that appellant's conviction and sentence should be affirmed.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON

Attorney General

NICOLE E. GOROVSKY

Assistant Attorney General

Missouri Bar No. 51046

P. O. Box 899

Jefferson City, MO 65102-0899

(573) 751-3321 (Phone)

(573) 751-5391 (Fax)

Attorneys for Respondent

CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains 8,586 words, excluding the cover, this certification and the appendix, as determined by WordPerfect 9 software; and

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

3. That two true and correct copies of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this ___ day of July, 2003 to:

Craig Johnston
Assistant Public Defender
3402 Buttonwood
Columbia, Mo. 65201-3724

JEREMIAH W. (JAY) NIXON
Attorney General

NICOLE E. GOROVSKY
Assistant Attorney General
Missouri Bar No. 51046

P. O. Box 899
Jefferson City, MO 65102-0899
(573) 751-3321 (Phone)
(573) 751-5391 (Fax)

Attorneys for Respondent