



**In the Missouri Court of Appeals
Eastern District
DIVISION TWO**

STATE OF MISSOURI,	)	No. ED104327
	)	
Respondent,	)	
	)	Appeal from St. Louis County Circuit Court
vs.	)	Cause No. 14SL-CR05018-01
	)	
THOMAS OATES,	)	Honorable Kristine A. Kerr
	)	
Appellant.	)	Filed: July 5, 2017

OPINION

Thomas Oates (“Oates”) appeals the judgment of conviction of two counts of felony murder (§ 565.021.1(2)) and two related counts of armed criminal action (§ 571.015.1). Oates was initially charged with two counts of conventional second degree murder (§ 565.021.1(1)) and two counts of armed criminal action for shooting and killing two individuals. After his indictment, the State notified him that it may submit two felony murder charges, and if so, they would be based on “the attempted perpetration of the class C felony of Distribution of a Controlled Substance” pursuant to § 195.211.¹

After a jury trial, Oates was convicted on two counts of felony murder pursuant to § 565.021.1(2) and two related counts of armed criminal action. Before the case was submitted to the jury, Oates sought to include an instruction on self-defense as a basis for negating criminal

¹ All references to § 195.211 are to RSMo Supp. 2003. Effective January 1, 2017, this section has been transferred to § 579.055.

liability for the felony murder charges. The trial court refused the instruction, finding felony murder to be a strict liability offense which precluded a defendant from raising a self-defense claim as a matter of law. Based on the statutory language of §§ 565.021.1(2) and 563.031.1(3),² we disagree with the trial court. Moreover, the evidence adduced at trial was sufficient to submit a self-defense instruction to the jury on both counts. Accordingly, this Court reverses the judgment and remands the case for a new trial.

I. Background

On May 21, 2014, Oates, his girlfriend (“Girlfriend”), and the two victims (collectively “Victims”) met at a gas station for a potential marijuana sale—Oates as the seller and Victims as the potential buyers. Girlfriend remained in the vehicle while Oates approached Victims in their car. Oates presented the marijuana to Victims to inspect as part of the preliminary negotiations. Oates and Victims were arguing over terms of price and quantity. Oates claims he reached into Victims’ car to retrieve the container of marijuana, and the victim who was in the driver’s seat of the car (“Victim Driver”) pressed the gas and drove away from the gas station. As this was happening, Oates tried to jump inside the car through the open driver’s side window. For a short period of time, Oates’s feet were “dangling” from the car as it was in motion. Victim Driver came to a stop, at which point Oates further entered through the driver’s side window until his body was fully inside the vehicle. Oates testified he ended up in the backseat. A few seconds after the stop, two shots were fired from inside the car. Oates exited the vehicle and ran away holding two guns. Oates ran back to the vehicle where Girlfriend was waiting and told her, “I just saved my life.” The two shots fired inside the vehicle proved to be fatal for both Victims.

² The substantive language of § 563.031 applicable to the charges on appeal became effective on August 28, 2007. See L. 2007, S.B. Nos. 62 & 41, § A.

A couple of individuals witnessed some or all of the incident and remained near the scene. When the police arrived, Oates was quickly identified as the person fleeing Victims' car after the two gunshots were fired. Oates was then arrested outside of Girlfriend's residence.

Oates was indicted for conventional second degree murder (two counts, one for each victim) and two accompanying armed criminal action counts. The State later filed a Notice of Intention to Submit Murder Second Degree-Felony, which informed Oates that if the State chose to submit two felony murder charges under § 565.021.1(2), it would be based on the deaths of Victims resulting from Oates's attempted perpetration of the class C felony of Distribution of a Controlled Substance.

A jury trial was held in the Circuit Court of St. Louis County from March 14, 2016 through March 17, 2016. The facts adduced at trial are not a source of contention between the State and Oates. The most pertinent evidence adduced at trial—for purposes of this appeal and for making a viable self-defense claim—is the testimony provided by Oates. Oates testified that he was partially inside the car when Victim Driver began driving away from the gas station. Oates held onto the car and attempted to climb in through the driver-side window. Oates testified that if he could not get inside the car, he thought he “was going under the car and was going to get dragged.” He added that the car was “going fast” and he “heard horns” as the car was in motion. Eventually, Oates was able to fully enter the window, where he “fell in [and] smashed the cup that was in the console.” Victim Driver then hit the brakes and caused him to fall into the back seat. Oates further testified that Victim Passenger told him to calm down, but Victim Passenger then reached for a pistol under his seat. Oates explained Victim Passenger dropped the gun, and believing Victim Passenger would shoot and kill him after regaining control of the gun, Oates took out his own gun and shot Victim Passenger before he could shoot Oates. Victim

Driver then reached for the same gun Victim Passenger had dropped, and Oates—once again believing he would otherwise be shot and killed—shot Victim Driver before she could pick up the gun. Oates testified he then exited the vehicle and took Victim Passenger’s gun with him to prove he had shot Victims in self-defense. He then entered his and Girlfriend’s vehicle and explained to her that he saved his own life because Victims had attempted to kill him.

The jury was instructed on four different homicide theories: two counts of second degree murder (both conventional and felony murder) and two counts of the lesser-included offenses of conventional second degree murder—voluntary manslaughter and involuntary manslaughter in the first degree. Oates requested the court to instruct the jury on self-defense as to each degree of homicide submitted to the jury. The jury was instructed on self-defense as to conventional murder second, voluntary manslaughter and involuntary manslaughter, but the court sustained the State’s objection to a self-defense instruction as to felony murder. This ruling is the focal point of Oates’s appeal. The jury was also instructed on armed criminal action in connection with each homicide instruction given.

On March 17, 2016, the jury convicted Oates on two counts of second degree felony murder (pursuant to § 565.021(2)) and two counts of armed criminal action (pursuant to § 571.015.1).³ The court sentenced Oates to 15 years in prison for the murder of Victim Driver and 10 years for the murder of Victim Passenger. The court also sentenced him to 5 years in prison on each of the two accompanying armed criminal action counts. The sentences for all four counts were set to run concurrently for a total sentence of 15 years. Oates has raised two arguments on

³ All references to § 571.015 are to RSMo 2000.

appeal. Finding the first point dispositive on the matter, we need not address the merits of Point II.⁴

II. Discussion

Point I – Oates was entitled to a self-defense instruction for his felony murder charges because the predicate felony was “non-forcible.”

We must address two questions to determine if Oates was entitled to a self-defense instruction for his felony murder charges: (1) is self-defense ever available as a defense to felony murder when the predicate offense is a *non-forcible* felony? And, if so, (2) is Oates entitled to a self-defense instruction based on the particular facts in this case?

a. Self-defense is potentially an available defense to felony murder in Missouri when the predicate felony is not forcible.

Oates argues that the trial court erred in refusing to instruct the jury on self-defense as to felony murder because the defense is available by law when the underlying felony is not forcible, and the court already determined there was sufficient evidence to support self-defense. The State contends the trial court did not err by refusing to give the self-defense instructions on both counts of felony murder, because “self-defense is, as a matter of law, not a defense to felony murder where it was not a defense to the underlying felony [regardless of whether the predicate felony is forcible or non-forcible].” Based on the State’s conclusion, Oates would only be entitled to raise a self-defense claim if such a defense was available to excuse his underlying predicate crime of “Distribution of a Controlled Substance,” which it clearly is not.

⁴ In Point II, Oates requests we reverse the trial court’s denial of his “Motion to Strike the State’s Notice to Submit Felony Murder Second Degree Instruction.” We need not address Oates’s second point, however, as he would not receive any relief beyond what was granted under Point I. *See State v. Hall*, 956 S.W.2d 427, 430 (Mo. App. E.D. 1997) (citing *Burks v. United States*, 437 U.S. 1 (1978)) (explaining that when a defendant “merely alleges [the] trial court err[ed] in giving an incorrect instruction” due to the State’s inadequate notice of its “intent to seek a felony murder instruction...double jeopardy does not attach and retrial is permissible”).

Oates’s argument relies almost exclusively on statutory interpretation to support his contention. Interestingly, the State barely touches on Oates’s arguments and relies on exploring the historical application of felony murder and its mechanics. These arguments will be discussed at length *infra* in Sec. II(a)(iii).

i. Standard of Review

“Statutory interpretation is a question of law that this Court reviews de novo.” *State v. Whipple*, 501 S.W.3d 507, 513 (Mo. App. E.D. 2016) (citing *Finnegan v. Old Republic Title Co. of St. Louis, Inc.*, 246 S.W.3d 928, 930 (Mo. banc 2008)). The primary rule of statutory construction is to determine and effectuate the intent of the General Assembly based on the statute’s language. *Bateman v. Rinehart*, 391 S.W.3d 441, 446 (Mo. banc 2013). When the statutory language is clear, we will not engage in statutory construction, as “there is nothing to construe beyond applying the plain meaning of the law.” *Id.* (quoting *State ex rel. Valentine v. Orr*, 366 S.W.3d 534, 540 (Mo. banc 2012)).

However, if, and only if, the statute’s language is “ambiguous or would lead to an absurd or illogical result,” will we look beyond the plain meaning of the statute. *Id.* at 446. Also, when the ambiguous language is part of a criminal statute, it “will be construed in the defendant’s favor.” *State v. Hardin*, 429 S.W.3d 417, 419 (Mo. banc 2014). When a court cannot use precedent or other authority as guidance on the issue of interpreting a statute, as is largely the case in the appeal before us, our Supreme Court has noted “the language of the statute itself provides the best guide,” and it has provided some general guidelines to ascertain the legislature’s intent:

In determining the intent and meaning of statutory language, ‘the words must be considered in context and sections of the statutes in *pari materia*, as well as cognate sections, must be considered in order to arrive at the true meaning and scope of the words.’ *State ex rel. Wright v. Carter*, 319 S.W.2d 596, 600 (Mo.

banc 1959). ‘The provisions of a legislative act are not read in isolation but construed together, and if reasonably possible, the provisions will be harmonized with each other.’ *Bachtel v. Miller County Nursing Home Dist.*, 110 S.W.3d 799, 801 (Mo. banc 2003).

State v. McLaughlin, 265 S.W.3d 257, 267 (Mo. banc 2008) (quoting *State ex rel. Evans v. Brown Builders Elec. Co., Inc.*, 254 S.W.3d 31, 35 (Mo. banc 2008)).

When engaging in statutory construction, we presume the General Assembly carefully constructed the law, giving every word, sentence, and clause in the statute a purpose; we presume the legislature did not insert superfluous language. *Bateman*, 391 S.W.3d at 446. Additionally, we assume the General Assembly has knowledge of existing laws at the time it drafts a statute. *Turner v. Sch. Dist. of Clayton*, 318 S.W.3d 660, 667 (Mo. banc 2010).

ii. Relevant Statutes

The interpretation of two statutory subdivisions is required to resolve Oates’s point on appeal: § 563.031.1(3) (the “Forcible Felony Exception”) and § 565.021.1(2) (the “Felony Murder Provision”).

Section 563.031. Use of force in defense of persons. —

1. A person may, subject to the provisions of subsection 2 of this section, use physical force upon another person when and to the extent he or she reasonably believes such force to be necessary to defend himself or herself or a third person from what he or she reasonably believes to be the use or imminent use of unlawful force by such other person, *unless*...

(3) The actor was attempting to commit, committing, or escaping after the commission of a *forcible* felony.

§ 563.031.1(3) (emphasis added).

Section 565.021. Second degree murder, penalty. —

1. A person commits the crime of murder in the second degree if he...

(2) Commits or attempts to commit *any* felony, and, in the perpetration or the attempted perpetration of such felony or in the flight from the perpetration or attempted perpetration of such felony, another person is killed as a result of the perpetration or attempted perpetration of such felony or immediate flight from the perpetration of such felony or attempted perpetration of such felony.

§ 565.021.1(2) (emphasis added).

With regards to felony murder, § 565.021 has remained the same in substance⁵ since its enactment in 1984.⁶ The interpretation of the statute itself, in isolation, is clear and unambiguous. However, the questions before us deal with the interplay between §§ 563.031.1(3) and 565.021.1(2). We must view the statutes collectively to surmise the intent of our legislature, and if reasonably possible, do so in a way that the statutes operate in harmony. *McLaughlin*, 265 S.W.3d at 267. In construing these statutes together, it is important to keep in mind the order in which the relevant statutory language was written. Because the substance of the Felony Murder Provision has remained static since 1984 and the Forcible Felony Exception became effective in 2007, we assume the latter was constructed by the General Assembly with awareness and understanding of any older statutory language, such as that of the Felony Murder Provision. *See Turner*, 318 S.W.3d at 667-68; *see also* L. 2007, S.B. Nos. 62 & 41, § A.

The focus of Oates’s argument is on the difference in scope of each statute as it pertains to their range of applicable felonies: the Felony Murder Provision states that a person commits second degree murder if he or she “[c]ommits or attempts to commit **any** felony...” while the Forcible Felony Exception is more restrictive. It only precludes an

⁵ The only changes to § 565.021.1 as it relates to felony murder occurred in RSMo Non. Cum. Supp. 2014 when the General Assembly changed the subsection from “A person commits the **crime** of murder in the second degree if he...” to “A person commits the **offense** of murder in the second degree if he **or she**...” (emphasis added to note changes in language).

⁶ Felony murder fell within § 565.003 until it was repealed effective October 1, 1984, at which time it fell within § 565.021, RSMo Cum. Supp. 1984. *State v. Lytle*, 715 S.W.2d 910, 911 n.1. (Mo. banc 1986) (*see also State v. Williams*, 24 S.W.3d 101, 110 (Mo. App. W.D. 2000) (“In 1983, as part of its revision of the homicide statutes, the legislature repealed §§ 565.003 and 565.004, RSMo 1978, and enacted in lieu thereof § 565.020, dealing with first degree murder, and § 565.021, dealing with second degree murder, both effective October 1, 1984...felony murder was relegated strictly to being classified as second degree murder, under § 565.021.”)).

individual from asserting a self-defense claim if he or she was “attempting to commit, committing, or escaping after the commission of a **forcible** felony.” §§ 565.021.1(2) and 563.031.1(3) (emphasis added). When used in a statute within Chapter 563, “forcible felony” is defined as “any felony involving the use or threat of physical force or violence against any individual, including but not limited to murder, robbery, burglary, arson, kidnapping, assault, and any forcible sexual offense[.]” § 563.011(3). Section 563.011(3) enumerates a non-exhaustive list of “forcible” felonies. The predicate felony Oates was convicted of (Distribution of a Controlled Substance under § 195.211) does not qualify as a “forcible” felony; the offense does not involve “the use or threat of physical force or violence against any individual.” § 563.011(3).⁷

iii. Analysis

Before addressing the relevant amendment to § 563.031⁸ in 2007, we must explore the law regarding self-defense instructions in felony murder cases predating this effective date. The addition of the Felony Murder Exception (§ 563.031.1(3)) appears to clarify or restrict the availability of a defense of persons defense by expressly enumerating a circumstance in which it

⁷ We must note that Missouri courts have not interpreted the meaning of “forcible felony” beyond restating the statutory language of the forcible felony exception. *See, e.g., State v. Comstock*, 492 S.W.3d 204, 209 (Mo. App. S.D. 2016) (“A forcible felony is ‘any felony involving the use or threat of physical force or violence against any individual, including but not limited to murder, robbery, burglary, arson, kidnapping, assault, and any forcible sexual offense.’”). Moreover, it is not clear if “forcible felony” is limited to inherently forcible felonies or if generally non-forcible felonies may be deemed forcible depending on the specific facts and circumstances surrounding the felony. (*See People v. Greer*, 326 Ill. App. 3d 890, 893, 762 N.E.2d 693, 695 (2002)) (explaining that “felony murder” under Illinois law requires the commission or the attempt attempted commission of “a forcible felony other than second degree murder,” and the test applied in Illinois is “not whether the underlying felony is normally classified as nonviolent, but whether, under the facts of a particular case, it is contemplated by the defendant that violence might be necessary to enable the defendant to carry out the offense.”). We find the distribution of a controlled substance is not inherently “forcible,” and the specific facts of this case do not show Oates’s attempted commission of the felony was “forcible.” Accordingly, we conclude the Forcible Felony Exception does not preclude Oates from asserting self-defense. Nonetheless, we decline to speculate whether a felony that is not necessarily forcible may be classified as a “forcible felony” based on the specific facts of the case.

⁸ The effective statute at the time of the trial was §563.031, RSMo 2010. However, as there are no substantive changes to the statute since its enactment in 2007, all versions of the statute are equivalents for purposes of this appeal.

is inapplicable, hence the use of the word “unless” in subsection 1. The statute specifically bars the use of such a defense when the actor was “attempting to commit, committing, or escaping after the commission of a **forcible** felony.” § 563.031.1(3) (emphasis added). To the extent the legislature sought to restrict the availability of § 563.031, it does not impact the case before us; the predicate felony was **not forcible**. Accordingly, we will examine previous Missouri cases for guidance and the language of the 2007 amendment for further clarity.

The parties have not provided, and we have not discovered in our research, Missouri cases directly addressing the issue before us since the Felony Murder Provision’s enactment under § 565.021(2). Nonetheless, some Missouri cases have discussed the possibility of issuing a self-defense instruction in felony murder cases, implicitly suggesting such an instruction is not barred as a matter of law for felony murder. For example, in *State v. Starr*, the Western District noted MAI-CR 3d 306.06 does *not* preclude a self-defense instruction for felony murder. 998 S.W.2d 61, 65 (Mo. App. W.D. 1999).⁹ However, because “there was no evidence at trial to justify” the defendant’s shooting of the victim during an attempted robbery, the court found the instruction “unnecessary” and its omission non-prejudicial. *Id.* at 66.

Similarly, in *State v. Gheen*, the Western District discussed the trial court’s decision to refuse a self-defense instruction for Gheen’s felony murder charge. 41 S.W.3d 598, 606 (Mo. App. W.D. 2001). Instead of simply stating a self-defense instruction is not an available defense to felony murder, the court chose to address the sufficiency of evidence to meet the requirements for establishing the defense. *Id.* (finding the trial court did not err in refusing a self-defense

⁹ In 1980, relying on MAI-CR 2d and its Notes on Use, the Missouri Supreme Court held that self-defense is not a defense to felony murder under § 565.003. *State v. Newman*, 605 S.W.2d 781, 786 (Mo. banc 1980). *Starr* noted that changes in the law subsequent to *Newman*, such as the Supreme Court’s approval of MAI-CR 3d, made *Newman*’s rationale for stating self-defense is not available as a defense to felony murder is “no longer viable.” *Starr*, 998 S.W.2d at 65. *Starr*’s position was re-affirmed in *State v. Peal*, 393 S.W.3d 621, 634 n.11 (Mo. App. W.D. 2013).

instruction because the defendant was the initial aggressor and did not do everything in his power to avoid danger). Although these cases hint that a self-defense instruction may be permitted if there is sufficient evidence to establish the defense, we have not found clear, definitive precedent on the matter. Accordingly, we turn to the statutory language of §§ 565.021.1(2) and 563.031.1(3).

Missouri's felony murder provision has been interpreted by our State's appellate courts on numerous occasions, and the breadth of its "any felony" language was explored in great depth in *State v. Bouser*, 17 S.W.3d 130, 138 (Mo. App. W.D. 1999) (interpreting § 565.021.1(2)). The Western District explained that the Felony Murder Provision's reference to "any felony" clearly "indicates our legislature intended that *every* felony could serve as an underlying felony for the purpose of charging a defendant with second degree felony murder pursuant to § 565.021.1(2)." *Id.* at 139 (emphasis in original). The court went on to note that "any" is an unambiguous term meaning "all-comprehensive" and "equivalent to 'every.'" *Id.* Although the Western District case from 1999 does not (and could not) discuss the language of the Forcible Felony Exception (created in 2007), its rationale is instructive. Unlike the "all-comprehensive" language in Missouri's felony murder provision, the language precluding a defendant from raising a justification defense under § 563.031.1(3) is limited to ***forcible*** felonies. In *Bouser*, the court explored the changes between Missouri's previous felony murder rule under § 565.003. Section 565.003 was effective from 1978 until October 1, 1984, when it was repealed and replaced by § 565.021.1(2) in 1984, the substantive language of which remains fully operative today. *See id.* at 138-39. Similar to the current Felony Murder Provision, Missouri's previous felony murder statute (§ 565.003, RSMo 1978) restricted the types of felonies that fell within the statute's scope. In fact, even the types of felonies considered by these provisions have substantial overlap:

§ 565.003, RSMo 1978 applied to “arson, rape, robbery, burglary, or kidnapping,” and § 563.031.1(3) applies to “forcible felonies,” which includes “murder, **robbery, burglary, arson, kidnapping**, assault, and any forcible sexual offense.” See § 563.011(3) (emphasis added); see also *State v. Baker*, 607 S.W.2d 153, 155 (Mo. banc 1980).

The Western District explained what our General Assembly intended to accomplish by modifying Missouri’s felony murder law in 1984: in addition to reducing the offense of felony murder from first degree murder to second degree murder, it sought to broaden the class of felonies that could serve as the predicate offense for a felony murder charge (expanding from four specific underlying felonies to “every” or “any” felony). *Bouser*, 17 S.W.3d at 139-40. The court bolsters its interpretation of the expanded felony murder provision by noting “[n]owhere does the statute limit the felony to be used in charging under this statute to any particular type of or specific felony, i.e., inherently dangerous, as some other states have done.” *Id.* at 139.

Conversely, in assessing the “forcible felony” language of § 563.031.1(3), it is logical to view the limiting language in the statute as a manifestation of our legislature’s intent to preclude a justification defense only when the defensive actions of the defendant occur during the commission, attempted commission, or escape after the commission of a **forcible** felony. The General Assembly’s decision to use different descriptive language to identify felonies in Missouri’s felony murder and “use of force in defense of persons” statutes today was not arbitrary nor immaterial. We assume every word in a statute is intended to have an effect. *Bateman*, 391 S.W.3d at 446.

Furthermore, if the legislature aimed to bar a defendant from asserting a self-defense claim for a felony murder charge, regardless of the underlying felony, we believe this likely

would have been expressed in the defense of persons statute or elsewhere in Chapter 563.¹⁰ See *Turner*, 318 S.W.3d at 668 (explaining the legislature’s decision not to use language excluding the applicability of a statute when “it easily could have added such an exception,” but “[i]t did not,” helped establish that such an exception was not intended). Our Supreme Court further explained it must enforce statutes “as they are written, not as they might have been written,” and the Court cannot supply what the legislature has omitted from controlling statutes. *Id.* at 667-68. These guidelines help us reach our decision today.

It is clear that “self-defense” may be raised to negate criminal liability in conventional second degree murder cases. See *State v. White*, 92 S.W.3d 183, 191 (Mo. App. W.D. 2002) (explaining self-defense acts “as a complete bar to a conviction for murder”). We find that a justification defense under the Forcible Felony Exception (§ 563.031.1(3)) applies similarly to both Missouri’s Felony Murder Provision (§ 565.021.1(2)) and conventional second degree murder provision (§ 565.021.1(1)); the latter two provisions establish the elements of an offense, while the former provides a means of negating criminal liability for that offense. Therefore, although “any” felony may be used to establish a basis for felony murder, when a death results from the use of reasonable force as permitted in § 563.031.1(3)—which only precludes use during the commission of a felony that is **forcible**—self-defense is a potential defense to negate criminal liability. We cannot add—nor do we wish to add—language to the statute to further limit the availability self-defense. See *Turner*, 318 S.W.3d at 667-68.

¹⁰ We are mindful that the maxim of implied exclusion should be used with “great caution.” *Six Flags Theme Parks, Inc. v. Dir. of Revenue*, 179 S.W.3d 266, 270 (Mo. banc 2005). We do not employ the tool as a decisive piece of evidence for determining the General Assembly’s intent. Rather, we use it as support for the conclusion we reach today and view it in the context of the evidence as a whole, only intending to accord it the proper weight it is due. We find it worth noting the ease with which a felony murder exclusion may have been added, especially given the potential magnitude of the defense’s availability in cases such as this (a second degree murder conviction compared to no criminal liability, if a jury finds the defendant’s conduct otherwise complied with § 563.031).

From this Court’s perspective, it is more reasonable to conclude the General Assembly did not intend to categorically preclude a defendant from raising a defense of persons defense during the commission of non-forcible felonies ***resulting in a death***. In fact, our legislature has demonstrated its ability and willingness to provide for an “exception to an exception” in the exact same subsection (subdivision 1 of § 563.031.1). Section 563.031.1 is constructed as such:

- **Subsection 1 provides the general rule for when a person may use physical force:**

“1. A person may...use physical force upon another person when and to the extent he or she reasonably believes such force to be necessary to defend himself or herself or a third person from what he or she reasonably believes to be the use or imminent use of unlawful force by such other person.” § 563.031.1.

- **The three subdivisions within subsection 1 provide three general exceptions to subsection 1’s general operative rule:**

(1) The actor was the initial aggressor...;

(2) Under the circumstances as the actor reasonably believes them to be, the person whom he or she seeks to protect would not be justified in using such protective force; and

(3) The actor was attempting to commit, committing, or escaping after the commission of a ***forcible*** felony.

- **The three subparagraphs provided in subdivision 1 of subsection 1 provide three exceptions to the initial-aggressor exception:**

(1) The actor was the initial aggressor; except that in such case his or her use of force is nevertheless justifiable provided:

(a) He or she has withdrawn from the encounter and effectively communicated such withdrawal to such other person but the latter persists in continuing the incident by the use or threatened use of unlawful force; or

(b) He or she is a law enforcement officer and as such is an aggressor pursuant to section 563.046; or

(c) The aggressor is justified under some other provision of this chapter or other provision of law;

Unlike the initial-aggressor exception of subdivision 1, no exceptions are provided under subsection 3's Forcible Felony Exception, which supports the conclusion that the General Assembly did not intend to create a felony murder exception.

After diligently examining Missouri precedent, the statutory history of the relevant sections, and the effective language of these sections, we find self-defense is not precluded "as a matter of law" from being raised by a defendant charged with felony murder when the predicate felony can be classified as "non-forcible."

b. Oates was entitled to a self-defense instruction under these particular facts.

i. Standard of Review for Refusal of a Self-Defense Instruction

We review *de novo* whether the trial court's decision to refuse a requested jury instruction constitutes reversible error. *See State v. Johnson*, 470 S.W.3d 767, 768 (Mo. App. E.D. 2015); *see also State v. Comstock*, 492 S.W.3d 204, 205-06 (Mo. App. S.D. 2016) (applying the same standard of review to an appeal of the trial court's refusal to submit a self-defense instruction for the criminal defendant). In determining whether the trial court committed reversible error for refusing to submit a self-defense instruction to the jury, "the evidence is viewed in the light most favorable to the defendant." *State v. Smith*, 456 S.W.3d 849, 852 (Mo. banc 2015). In fact, a trial court **must** give a defendant a self-defense instruction "when substantial evidence is adduced to support it, even when that evidence is inconsistent with the defendant's testimony, and failure to do so is reversible error." *Id.* (internal citations omitted). "'Substantial evidence' means evidence putting the matter in issue." *Whipple*, 501 S.W.3d at 513 (quoting *State v. Avery*, 120 S.W.3d 196, 200 (Mo. banc 2003)) (quotations in original). A defendant must establish four elements with substantial evidence to be entitled to a self-defense instruction:

(1) [H]e did not provoke or was not the aggressor; (2) he had reasonable grounds for believing he was faced with immediate danger of serious bodily harm; (3) he did not use more force than was reasonably necessary; and (4) he did everything in his power and consistent with his own safety to avoid the danger.”

Id. at 517. Moreover, to justify the use of **deadly** force, the defendant must reasonably believe deadly force is necessary to protect himself or herself from immediate danger of death or serious bodily harm. *Id.* at 514-15.

ii. Analysis

In assessing whether evidence is “substantial,” our Court also draws reasonable inferences therefrom and views the evidence in the light most favorable to the defendant. *State v. Crudup*, 415 S.W.3d 170, 175 (Mo. App. E.D. 2013). “Substantial evidence supporting a self-defense instruction may stem from the defendant’s testimony alone, as long as the testimony contains some evidence showing that he acted in self-defense.” *Id.* After reviewing the record, we find Oates has clearly made a sufficient showing of the four prerequisites for a self-defense instruction. Oates’s testimony provides sufficient evidence that (1) Victim Passenger was the aggressor—not Oates; (2) he had reasonable grounds for believing he faced immediate danger when Victim Passenger pulled a gun from under his seat; (3) although deadly, the force he used was reasonably necessary given the circumstances; and (4) he did everything in his power to avoid danger, as Oates’s ability to prevent the danger was greatly restricted in the small confines of a car and the imminent threat of being shot. Accordingly, Oates has also established he reasonably believed his use of deadly force was necessary to prevent his immediate death or serious bodily harm. For nearly identical reasons, Oates has presented sufficient evidence that his shooting of Victim Driver was justified, and he was entitled to a self-defense instruction on his felony murder charge for her death.

III. Conclusion

We find that a defendant is not precluded from asserting a self-defense instruction related to a felony murder charge as a matter of law. Nonetheless, the defendant must provide sufficient evidence to establish the four prerequisites for a self-defense instruction in general, as well as sufficient evidence to demonstrate he reasonably believed deadly force was necessary. In this case, Oates had provided sufficient evidence to be entitled to a self-defense instruction on felony murder; this is supported by the record, as well as the trial court's submission of self-defense instructions as to Oates's other six counts of homicide. Accordingly, we reverse the judgment and remand the case for a new trial.¹¹ Moreover, because Oates's two armed criminal action convictions require the commission of a related felony, and Oates was convicted of no other felonies to which the convictions may attach, his two armed criminal action convictions under § 571.015 must also be reversed and remanded to the trial court for a new trial.



Colleen Dolan, Judge

Sherri B. Sullivan, P.J., concurs.

Roy L. Richter, J., concurs.

¹¹ At this time, we cannot instruct the trial court to issue a self-defense instruction upon retrial. *See State v. Weddle*, 88 S.W.3d 135, 138 (Mo. App. S.D. 2002). “The evidence on which a self-defense instruction is based may differ on retrial from the evidence adduced in the trial that produced this appeal. Instructions given a jury must be consistent with the evidence adduced.” *Id.*