In the Missouri Court of Appeals
Eastern District
DIVISION FOUR

STATE OF MISSOURI,	)	No. ED94705
	)	
Respondent,	)	
	)	Appeal from the Circuit Court of
vs.	)	the City of St. Louis
	)	
EMILY BOLDEN,	)	Honorable John J. Riley
	)	
Appellant.	)	FILED: September 20, 2011

Introduction

Emily Bolden (Defendant) appeals the judgment of conviction entered by the Circuit Court of the City of St. Louis after a jury found her guilty of first-degree assault and armed criminal action. Defendant claims the trial court: (1) plainly erred in submitting to the jury an incorrect instruction on defense of another; and (2) abused its discretion in refusing to grant a new trial or evidentiary hearing based on Defendant's allegations of juror misconduct. We affirm.

Factual and Procedural Background

In April 2007, Defendant's brother and co-defendant, Randy Bolden (Randy), was living with Katina Harris (Ms. Harris), the mother of his children, at her home on Oregon Street in the City of St. Louis. Fannie Powell (Ms. Powell) lived on the same street with her husband,[1] her adult daughters, Tiffany and Danielle Powell, and her grandchildren.

[1] Ms. Powell's husband was deceased at the time of trial.

On April 21, 2007, Defendant, Ms. Powell, and Danielle attended a barbeque at Ms. Harris's house. During the party, Ms. Powell confronted Randy about the manner in which he disciplined his son and encouraged Ms. Harris to send her children to the Powells' home if she was concerned for their safety. Later, Randy and Ms. Harris began arguing and, when Defendant became involved, Ms. Harris asked Defendant to leave.

At around 9:00 p.m., Tiffany Powell was sitting outside her house when she saw Defendant and Randy drive down the street to Ms. Harris's home. Randy ran up to the house, kicked the front door, then jumped back in the car. Defendant reversed down the street to the Powells' house. Randy and Defendant stepped out of the car, and, using "foul language," informed Tiffany that they were looking for Ms. Harris. Ms. Powell heard the yelling and went outside.

Randy threw Tiffany to the ground and "laid on top of [her] so [she] couldn't move. . . ." Meanwhile, Defendant, who was holding a large kitchen knife, began fighting and stabbing Ms. Powell. Ms. Powell fell, hitting her head on the concrete. Ms. Powell stood up and staggered into the street, at which point Defendant stabbed Ms. Powell in her shoulder. Randy then pulled Defendant off of Ms. Powell and said, "Let's go." Before Defendant and Randy drove away, Randy told Ms. Powell and Tiffany: "Tell [Ms. Harris and Danielle] this is the message, we're leaving a message for them," and Defendant repeated Randy's statement.

After Defendant and Randy left, Ms. Powell called the police and provided Defendant's license plate number and a description of Defendant's car. An ambulance took Ms. Powell and Tiffany to the hospital, where Ms. Powell received twenty-five stitches on her head, eleven stitches on her shoulder, eight stitches on her arm, and six stitches on her finger.

The State charged Defendant and Randy with three counts of assault in the first degree and three counts of armed criminal action.[2] The trial court tried Defendant and Randy jointly in a jury trial on February 1 through February 4, 2009.

At trial, Defendant testified that an unknown man who had been inside the Powells' house attacked Randy, and Defendant "was just swinging the knife" in an effort to protect her brother. Based on Defendant's justification defense, the trial court instructed the jury on the use of deadly force in defense of another person.

The jury found Defendant guilty on the counts of first-degree assault and armed criminal action relating to Ms. Powell, and acquitted her on the remaining counts. The trial court sentenced Defendant to concurrent terms of ten years' imprisonment for first-degree assault and three years' imprisonment for armed criminal action. Defendant appeals.

Discussion

In her first point on appeal, Defendant claims the trial court plainly erred in submitting to the jury Instruction 14, which directed the jury to find Defendant not guilty of Count III, first-degree assault of Ms. Powell, if Defendant used force against Ms. Powell to defend Randy from "death or serious physical injury from the acts of Fannie Powell." Specifically, Defendant contends the instruction contained "material defects that misdirected the jury" and prejudiced her case because Instruction 14: (1) was incorrectly patterned on an outdated MAI instruction; (2) omitted explanatory language about imminent danger from those allegedly acting with the victim; (3) incorrectly used a masculine pronoun instead of a feminine pronoun; (4) incorrectly referred to the imminent use of unlawful force by Tiffany, rather than Ms. Powell; and (5)

[2] The three charges of assault and armed criminal action related to Ms. Powell, Ms. Harris, and Tiffany.

instructed the jury that it "must find the defendant not guilty under Count I," rather than not guilty under Count III.

Defendant acknowledges that she did not preserve this claim for appeal and asks this court to review for plain error pursuant to Rule 30.20. Plain error review involves a two-step analysis. State v. Baumruk, 280 S.W.3d 600, 607 (Mo. banc 2009). First, we determine whether the claim of error facially establishes substantial grounds for believing that manifest injustice or miscarriage of justice has resulted. Id. If such error is found, we consider whether the claimed error resulted in a manifest injustice or miscarriage of justice. Id. at 607-08.

"In the context of instructional error, plain error results when the trial court has so misdirected or failed to instruct the jury that it is apparent to the appellate court that the instructional error affected the jury's verdict and caused manifest injustice or miscarriage of justice." State v. Hibler, 21 S.W.3d 87, 96 (Mo.App.W.D. 2000) (quotations omitted). "Instructional error, even if clear and obvious, is rarely found to result in manifest injustice or a miscarriage of justice, requiring reversal for plain error." State v. Parsons, 339 S.W.3d 543, 549 (Mo.App.S.D. 2011).

At the instruction conference on February 4, 2010, Defendant and the State jointly submitted Instruction 13, relating to the charge of first-degree assault of Tiffany Powell, and Instruction 14, relating to the charge of first-degree assault of Ms. Powell, which were modeled on MAI-CR 3d 306.08(A). The trial court asked defense counsel and the prosecutor, "And it's the new version that came out [] effective the first of January[,] I believe?" Both lawyers agreed and stated that they had no objections. Defense counsel advised the trial court: "For the record, I had an instruction of defense of others, and counsel for the state and I collaborated over what

we thought would be the best version given the change in the law and our disagreements over the language and settled upon the instruction that was submitted – ultimately submitted by the state."

Instruction 14 provided:

> One of the issues as to Count III is whether the use of force by the defendant against Fannie Powell was lawful. In this state, the use of force, including the use of deadly force, to protect another person is lawful in certain situations. . . .
>
> On the issue of defense of another person as to Count III, you are instructed as follows:
>
> First, if, under the circumstances as the defendant reasonably believed them to be, Randy Bolden was not the initial aggressor in the encounter with Fannie Powell, and
>
> Second, in [sic] the defendant reasonably believed that the use of force was necessary to defend Randy Bolden from what the defendant reasonably believed to be the imminent use of unlawful force by Tiffany [sic] Powell, and
>
> Third, the defendant reasonably believed that the use of deadly force was necessary to protect Randy Bolden from death or serious physical injury from the acts of Fannie Powell, then her use of deadly force is justifiable and she acted in lawful defense of another person.
>
> The state has the burden of proving beyond a reasonable doubt that the defendant did not act in lawful defense of another person. Unless you find beyond a reasonable doubt that the defendant did not act in lawful defense of another person under this instruction, you must find the defendant not guilty under Count I [sic]. . . .

While reading Instruction 14 to the jury, the trial court noticed and corrected two of the errors about which Defendant now complains. Specifically, the trial court said to counsel, "Look at the second to last paragraph in Instruction 14. The last sentence of the second to the last paragraph. It should say – Fannie Powell, right?" Defense counsel and the prosecutor agreed, and the trial court announced, "I'm going to change that with my pen. All right?" and continued reading Instruction 14. The trial court then noted that Instruction 14 incorrectly referred to Count I, instead of Count III, and changed the instruction accordingly. With regard to the two typographical errors that the trial court noted and verbally corrected, we presume that the jury

accepted and acted upon the trial court's corrections. Buckallew v. McGoldrick, 908 S.W.2d 704, 710 (Mo.App.W.D. 1995).

Defendant complains of another typographical error contained in Instruction 14. Specifically, she argues that the trial court plainly erred in submitting Instruction 14 because it incorrectly used a masculine pronoun in place of a feminine pronoun. Defendant fails to show that this error resulted in manifest injustice or a miscarriage of justice. "Typographical or inadvertent errors are not necessarily prejudicial when a literate juror could conclude what the instructions were intended to communicate." Buckallew, 908 S.W.2d at 710

Defendant also contends that the trial court plainly erred in submitting Instruction 14 because it was patterned on MAI-CR 3d 306.08A, which applies to offenses committed after August 28, 2007, and Defendant's crime was committed on April 21, 2007. Defendant asserts that this was "evident, obvious, and clear error." Indeed, failure to comply with the Missouri Approved Instructions-Criminal and the applicable Notes on Use is presumed prejudicial. State v. Jones, 296 S.W.3d 506, 512 (Mo.App.E.D. 2009). However, because we are reviewing for plain error, the error must constitute a manifest injustice. Id. Defendant does not contend, nor do we find, that this error affected the jury's verdict.

Finally, we address Defendant's claim that the trial court plainly erred in failing to modify Instruction 14 to reflect that Defendant's use of deadly force in defense of others was based upon an attack of Randy by multiple assailants. Contrary to Defendant's argument, we conclude that Instruction 14 permitted the jury to consider the actions of individuals other than Ms. Powell in determining whether Defendant acted in lawful self-defense. See e.g., State v. Goodine, 196 S.W.3d 607, 621 (Mo.App.S.D. 2006). Instruction 14 defined "reasonably believe" as "a belief based on reasonable grounds, that is, grounds that could lead a reasonable

person in the same situation to the same belief." "Thus the jury was entitled to consider the *situation* of [Defendant] in determining whether [s]he had a reasonable belief that [s]he was in imminent danger of harm…." Id. at 621-22.

Furthermore, we find that, Defendant invited the errors about which she now complains when she, jointly with the prosecutor, submitted Instruction 14 to the trial court. "If a party gets what [s]he requests from the trial court, [s]he should not be able to convict it of error, plain or otherwise, for complying with [her] request." State v. Marshall, 302 S.W.3d 720, 725 (Mo.App.S.D. 2010) (quotation omitted); see also State v. Burns, 292 S.W.3d 501, 508 n.3 (Mo.App.S.D. 2009) ("A defendant cannot stand idly by, permitting the giving of an erroneous instruction, and then benefit from his inaction.") (quotation omitted). Point denied.

In her second point on appeal, Defendant claims the trial court abused its discretion in refusing to grant a new trial or evidentiary hearing for juror misconduct "because the court had credible information suggesting that juror Shawn Richardson was not qualified to serve and had engaged in misconduct." We disagree.

We review the trial court's denial of a motion for new trial for an abuse of discretion. State v. Cooper, 336 S.W.3d 212, 215 (Mo.App.E.D. 2011). "A trial court abuses its discretion if its ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration." Fleshner v. Pepose Vision Inst., P.C., 304 S.W.3d 81, 87 (Mo. banc 2010) (quotation omitted). "If reasonable persons can differ as to the propriety of the trial court's action, then it cannot be said that the trial court abused its discretion." Cooper, 336 S.W.3d at 215 (quotation omitted).

Prior to the sentencing hearing on April 9, 2010, defense counsel moved the court to "compel the attendance of Sean [sic] Richardson." Defense counsel explained that, after the trial court polled the jurors and accepted their verdict and the trial court excused the jury, Mr. Richardson informed the trial court that "he had some problems or was troubled with the verdict." The trial court placed defense counsel and the prosecutor in contact with Mr. Richardson. Defense counsel told the trial court:

> In my conversations with Mr. Richardson, he indicated to me that he was disturbed by the verdict, that during the jury deliberations themselves he went along with the proceedings, that the verdicts were not his, that he should have voted not guilty, or at least at the time of polling that he should have said no, that those were not his verdicts.
>
> He questioned his ability to be a competent juror, thought that other people would be better at doing that, rendering a decision on this type of case. And he also mentioned to me that – and something that I did [not] include in my motion but occurred to me when I was sitting at counsel table that this was a brawl and anything could have happened.

The prosecutor informed the trial court that she, too, spoke to Mr. Richardson after he presented himself to the trial court, and reported:

> I had a lengthy conversation with him, and during that conversation he did express to me that he thought there might have been someone else who could have been a better juror. He said that he felt this because he's never been on jury duty before.
>
> He did say that he did work with the jury. He said he reviewed all the instructions personally. He said he paid attention to all of the facts and the evidence in the case, and he used that in order to make his verdict.
>
> When I asked him did he – is he changing his mind, did he have a different verdict that he felt pressured into, he said no. And he said, "I am just as liable as they are," meaning the rest of the jury. At no point did he express to me that he wanted to change his mind. At no point did he express to me that he did not feel like he had a part in the process.

The trial court responded that, pursuant to relevant case law, the fact that a juror wishes to change his mind after the jury returns a unanimous verdict is not enough to set aside a verdict. Defense counsel responded, "…that's my understanding of the case law also." The trial court

denied Defendant's motion to compel Mr. Richardson to testify in an evidentiary hearing, and similarly denied Defendant's motion for a new trial.

A juror will not be heard to impeach his own verdict or the verdict of a jury of which he was a member. State v. Harding, 734 S.W.2d 871, 875 (Mo.App.E.D. 1987). "The rule is perfectly settled, that jurors speak through their verdict, and they cannot be allowed to violate the secrets of the jury room, and tell of any partiality or misconduct that transpired there, nor speak of the motives which induced or operated to produce the verdict." Strong v. State, 263 S.W.3d 636, 643 (Mo. banc 2008) (quotation omitted). Juror testimony is improper if it merely alleges matters inherent in the verdict, which include a juror not joining in the verdict.[3] Fleshner, 304 S.W.3d at 87. This prohibition against impeaching the verdict promotes finality of verdicts and protects jurors from harassment by unsuccessful litigants. Cooper, 336 S.W.3d at 216. Because Mr. Richardson's statements related to the decision-making process and matters inherent in the verdict, the trial court did not abuse its discretion in refusing to grant a new trial or an evidentiary hearing. Point denied.

Conclusion

The judgment of conviction is affirmed.

_____

Patricia L. Cohen, Presiding Judge

Lawrence E. Mooney, J., and
George W. Draper III, J., concur.

[3] "Matters inherent in the verdict include a juror not understanding the law as stated in the instructions, a juror not joining in the verdict, a juror voting a certain way due to misconception of the evidence, a juror misunderstanding the statements of a witness, and a juror being mistaken in his calculations." Fleshner, 304 S.W.3d at 87 n.4.