

**Summary of SC92175, *State of Missouri v. Emily Bolden***

Appeal from the St. Louis circuit court, Judge John J. Riley

Argued and submitted May 9, 2012; opinion issued July 3, 2012

**Attorneys:** Bolden was represented by Jessica M. Hathaway of the public defender's office in St. Louis, (314) 340-7662; and the state was represented by Shaun J. Mackelprang and Jayne T. Woods of the attorney general's office in Jefferson City, (573) 751-3321.

*This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.*

**Overview:** A woman convicted of robbery and armed criminal action appeals her convictions, challenging an instruction the trial court submitted to the jury at her request. In a unanimous decision written by Judge Mary R. Russell, the Supreme Court of Missouri affirms the trial court's judgment. By jointly proffering (offering to the trial court) the challenged instruction, the woman waives appellate review of it. Further, it defies logic and Missouri law to allow a defendant to proffer an instruction and then challenge the trial court's submission of that instruction to the jury. This Court will not impose a duty on a trial court to correct, on the court's own motion, erroneous instructions proffered by the complaining party.

Judge David M. Byrn, a circuit judge in the 16th Judicial Circuit (Jackson County), sat in this case by special designation in place of Judge George W. Draper III.

**Facts:** Emily Bolden and her brother were involved in an altercation with Fannie Powell and her daughter at Powell's home. Though accounts differed as to what exactly happened, Bolden stabbed Powell 11 times, and Bolden took her brother to the hospital for treatment of a stab wound to his eye. The state charged Bolden and her brother jointly with two counts of first-degree assault and two counts of armed criminal action and Bolden separately with one count of second-degree assault and an additional count of armed criminal action. As to the charge against Bolden for the first-degree assault of Powell, the court instructed the jury about defense of others. During the conference about jury instructions, the state and Bolden jointly submitted what they believed to be the appropriate instruction, and Bolden did not object to its submission to the jury. The jury convicted Bolden, who appeals.

**AFFIRMED.**

**Court en banc holds:** Bolden waived appellate review by proffering the defense-of-others jury instruction about which she now complains. If a defendant injects self-defense into a case and there is substantial evidence to support a self-defense instruction, it is reversible error for a trial court to fail to submit such an instruction to the jury. *State v. Westfall*, 75 S.W.3d 278, 281 n.9 (Mo. banc 2002). A defense-of-others justification essentially is an extension of self-defense. Accordingly, if a defendant produces substantial evidence to support a defense-of-others instruction, it is error for a trial court to fail to submit such an instruction. Here, however, the trial court accepted the jointly proffered instruction from both parties and submitted that instruction to the jury. Although the instruction did not instruct the jury properly that it could

consider the actions of multiple assailants when considering whether Bolden's actions were reasonable, the trial court did not fail to submit a defense-of-others instruction to the jury.

*State v. Beck*, 167 S.W.3d 767, 777 (Mo. App. 2005), expanded the rule in *Westfall*, reading it to require reversal of an assault conviction under plain error review when the trial court failed to correct counsel's erroneous proffered defense-of-others instruction. This is a misinterpretation of the rule in *Westfall*. It is reversible trial court error to fail to submit a mandatory instruction, but the proffering of an incorrect instruction to the trial court is an invited error by the party that proffered the instruction. It defies logic and clear directives of Missouri law to allow a defendant both to proffer an instruction to the trial court and to complain that the trial court's submission of that instruction to the jury is reversible error. Although plain error review is discretionary, this Court will not use plain error to impose a duty for the trial court, *sua sponte* (on its own motion, without the suggestion of a party) to correct errors the defendant invited. To that extent, *Beck* is overruled.