IN THE MISSOURI SUPREME COURT

No. SC86488

STATE OF MISSOURI,

Respondent,

vs.

KANITA THOMAS,

Appellant.

On Transfer from the Missouri Court of Appeals, Eastern District
From the 22nd Judicial Circuit, Division 19
The Honorable Jimmie M. Edwards, Judge

RESPONDENT'S SUBSTITUTE STATEMENT, BRIEF AND ARGUMENT

JEREMIAH W. (JAY) NIXON
Attorney General

LISA M. KENNEDY
Assistant Attorney General
Missouri Bar No. 52912

Post Office Box 899
Jefferson City, Mo 65102-0899
Telephone: (573) 751-3321
FAX: (573) 751-5391
Attorneys for Respondent

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE

Cases

Other Authorities

JURISDICTIONAL STATEMENT

This appeal is from convictions for second degree murder, Section 565.021 (Count I),[1] and armed criminal action, Section 571.015 (Count II), obtained in the Circuit Court for St. Louis City, the Honorable Jimmie Edwards presiding. Judge Edwards sentenced appellant to concurrent sentences of twenty-five years imprisonment for Count I and fifteen years for Count II.

On December 7, 2004, the Missouri Court of Appeals, Eastern District issued its opinion reversing the judgment and remanding for a new trial. Judge Lawrence Crahan, Jr., dissented on one issue and transferred this case to the Missouri Supreme Court pursuant to Rule 83.03.

[1]All statutory citations are to RSMo 2000 unless otherwise indicated.

STATEMENT OF FACTS

Appellant, Kanita Thomas, was charged by amended information in the Circuit Court for St. Louis City with first degree murder (Count I) and armed criminal action (Count II) (L.F. 28-29). Appellant's jury trial began on January 28, 2003, before the Honorable Jimmie Edwards (L.F. 3).

Appellant does not contest the sufficiency of the evidence. Viewed in the light most favorable to the verdict, the facts adduced at trial are as follows: On December 2, 2001, appellant and her friend Tarynn Johnson decided to go to a party (Tr. 291-292, 319). Appellant wanted to change her clothes before they went to the party so the two friends went to the apartment appellant shared with her boyfriend, Edward Anthony Jefferson (Anthony) (Tr. 292, 320). Appellant started looking through her clothes to find something to wear (Tr. 321). Anthony arrived home and he and appellant started arguing and talked about breaking up (Tr. 292, 296, 322-333). When appellant asked Ms. Johnson to go to the car, she left the apartment, which was on the third floor, and walked down the stairs toward the second floor landing (Tr. 324, 341). She could still hear appellant and Anthony arguing (Tr. 325).

Anthony slapped appellant once with his open hand (Tr. 292). Appellant then went into the kitchen and got a knife, which she put in her pocket (Tr. 293).[2] She continued looking for clothes to wear to the party (Tr. 434). Appellant came out of the apartment and then went back inside several times, once asking Ms. Johnson to hold her bag (Tr. 310, 326-327). Anthony

[2]There was an exit located in the kitchen that went outside (Tr. 313).

said something to appellant as she was leaving the apartment through the front door and appellant then turned around and stabbed Anthony in the chest (Tr. 293-294). When appellant came out of the apartment for the final time, she told Ms. Johnson that "I stuck him" (Tr. 329). Anthony stood in the doorway of the apartment; there was blood on his chest (Tr. 329). Anthony then fell into the landing area of the hallway (Tr. 311, 330). The location of blood pools on the floor right inside the doorway was consistent with appellant stabbing Anthony right inside the doorway (Tr. 312).

Appellant called for help and for someone to call 911 (Tr. 330). Appellant's neighbor, Jamie Smith, heard a "big thud" and heard appellant screaming for help (Tr. 360). Ms. Smith came out of her apartment with her phone (Tr. 330, 360). Prior to hearing appellant scream for help, Ms. Smith had heard a woman in the hallway yelling, "Vanita, come on; Vanita, come on" (Tr. 359). Then she heard the same woman yelling, "what did you do, what did you do?" (Tr. 360).

Ms. Smith saw Ms. Johnson standing on the landing between the second and third floors, went up the stairs, and stood next to her (Tr. 360). She turned and saw Anthony laying on the third floor landing with appellant kneeling next to him (Tr. 360-361, 363). Anthony was unconscious and there was a lot of blood (Tr. 361-362). Ms. Smith called 911 and told them to send an ambulance because there was a man bleeding (Tr. 364). The dispatcher told Ms. Smith to apply pressure to the wound (Tr. 364). Ms. Smith returned to her apartment, got a towel, and gave it to appellant (Tr. 364). Appellant pressed the towel on the wound for a few seconds but kept grabbing Anthony's arms and lifting him up (Tr. 365). The dispatcher also

asked Ms. Smith if she knew who had hurt Anthony (Tr. 365). After Ms. Smith repeatedly asked appellant and Ms. Johnson who had done it, appellant finally said, "he left" (Tr. 366).

Police officers from the St. Louis City Police Department arrived on the scene (Tr. 263, 370). They found Anthony laying in the hallway on the third floor (Tr. 264, 371). Anthony's feet were pointed towards his own door (Tr. 267). There was a lot of blood (Tr. 265-267, 281). Appellant was near Anthony's body in the hallway (Tr. 265). Officer Michael Tillman questioned appellant about what happened (Tr. 263). Initially, appellant told Officer Tillman that she returned home to retrieve some of her belongings and got into an argument with Anthony (Tr. 268). Appellant then claimed that as she was walking out down the steps, a man she could not describe stabbed Anthony in the chest and then ran down the steps past her (Tr. 268-269). When Officer Tillman kept asking appellant what happened, appellant kept changing her story (Tr. 269-270). Due to the discrepancy of her statements, appellant was detained (Tr. 270).

Officer Tillman looked around appellant's apartment (Tr. 272). The officer believed the stabbing might have happened inside the apartment because there was "an extremely large pool of blood" directly inside the apartment (Tr. 273, 284).

Homicide detectives arrived at the scene and took over the investigation (Tr. 275). Sergeant Phil Wasem of the Homicide Unit questioned appellant at the scene about what happened (Tr. 282). Appellant told Sergeant Wasem that Anthony came out of the apartment as she and Ms. Johnson were walking up the stairs and said that "he stabbed me" (Tr. 282-283). The sergeant learned from appellant's neighbors that they had heard females in the hallway and

one witness said she heard "two females only" and did not hear a male (Tr. 283). Sergeant Wasem entered the apartment and saw a pool of blood directly inside the apartment (Tr. 284). He also found a knife in the kitchen sink (Tr. 287, 404-405).

Appellant did not have any marks, cuts, or bruises on her face and her clothes were not torn (Tr. 270-271, 296). She did not exhibit any signs of being involved in a physical confrontation (Tr. 271).

Anthony died as a result of the stab wound to his chest (Tr. 396). The wound went downward, entering the front of his body under his second rib and going to the back of his body (Tr. 395). To make that path, the blade of the knife would have been pointed towards the floor (Tr. 395). The knife wound was at least four inches deep and went through the pericardial sac surrounding Anthony's heart and into his pulmonary artery (Tr. 395, 400). Appellant was transported to police headquarters (Tr. 289, 372). Appellant's clothing was seized, including a pair of socks, striped shirt, maroon pants, and white tennis shoes (Tr. 370, 373). Sergeant Wasem received information that appellant had stabbed Anthony (Tr. 289). Because appellant was believed to be a suspect, she was advised of her *Miranda* rights (Tr. 290-291). Appellant said she understood her rights and waived them (Tr. 291). Appellant told Sergeant Wasem about the events that led up to her stabbing Anthony (Tr. 291-298). She told the sergeant, "I stuck him" (Tr. 297-298).

Sergeant Wasem also asked appellant about an incident on September 19, 2001, when she had previously stabbed Anthony (Tr. 294, 376). In that incident, appellant said she woke Anthony up in the middle of the night and he slapped her (Tr. 378). After that, appellant threw

candles at Anthony and then Anthony got up and slapped and punched her (Tr. 379). When appellant threatened to call the police, Anthony left the apartment (Tr. 379). When Anthony returned, appellant said she armed herself with a knife and stabbed him as he approached her (Tr. 379). Appellant never said Anthony had anything in his hands (Tr. 379). The officer who responded to the apartment saw only a minor abrasion over one of appellant's eyes and on her cheek (Tr. 380-381). Anthony was hospitalized and appellant was arrested after the stabbing incident (Tr. 295, 382). The stab wound Anthony received on September 19 was only a couple of inches below the wound that killed Anthony on December 2 (Tr. 393-394).

Appellant told Sergeant Wasem she made up the story of the unknown attacker because she was afraid of the police and because she had previously stabbed Anthony (Tr. 297).

Delores Thomas, appellant's mother, Erica Thomas, appellant's cousin, and appellant testified for the defense. Erica testified that she was on the phone with appellant on September 19, 2001 (Tr. 421). Erica said she heard Anthony yelling at appellant and then heard Anthony scream when appellant stabbed him (Tr. 422-423). Erica called the police to report the incident (Tr. 421-423). Delores testified regarding appellant's appearance after she was allegedly "beaten up" by Anthony (Tr. 412-413).

Appellant testified that Anthony had been upset with her for several days before she stabbed him on December 2, because he saw her in a car with another man (Tr. 429). Appellant said while she was getting ready to go to a party, Anthony came back to the apartment (Tr. 431, 433). When she asked him where he had been, he said, "Bitch, don't say nothing to me" (Tr. 433-434). Appellant testified that she stood in front of the mirror and continued to pick out

clothes to wear for the party (Tr. 434). Anthony then said, "Get that bitch out of here" (Tr. 435). He paced back and forth and blocked appellant's view of the mirror (Tr. 435). Appellant testified that when she asked Anthony why he treated her like he did, he smacked her on her mouth (Tr. 435). Appellant said she picked up a knife that was sitting on her radio and held it in her hand while she continued to get dressed (Tr. 436). Appellant testified that although she had a skirt and shoes to wear to the party, she changed back into her regular clothes because she could not find a white shirt (Tr. 437-438).

Appellant decided to leave the apartment; she took her work uniform with her so she would not have to return the next day (Tr. 439). After she exited the apartment, she unlocked the door and went back inside because Anthony had slammed the door behind her (Tr. 440). Appellant testified that when she re-entered the apartment, Anthony called her a "[b]itch," and had his fist up (Tr. 440). Appellant testified that she still had the knife in her hand and she jerked it twice and told Anthony to get back (Tr. 440). Appellant testified that at her warning, Anthony did get back (Tr. 440). Appellant felt that she had "stuck him" with the knife (Tr. 440). Anthony went inside the apartment and shut the door (Tr. 441). Appellant heard the door knob turn and started walking down the stairs (Tr. 442). The door opened and Anthony was standing in the doorway with blood "gushing" out of his chest (Tr. 442). Appellant claimed that she had no intent to "stick" Anthony but was scared that he was going to hit her (Tr. 441, 449). Appellant testified that when the victim walked toward her with his fist raised, she "panicked and went back out, and [] didn't go down the steps because I probably would have fell" and felt that "it would have been hard to go down the steps" (Tr. 486-487, 490).

At the close of the evidence and arguments of counsel, the jury found appellant guilty of second degree murder and armed criminal action (Tr. 541; L.F. 83). On March 28, 2003, the court sentenced appellant to a total of twenty-five years imprisonment (Sent. Tr. 12; L.F. 83-84). Appellant appealed directly to the Missouri Court of Appeals, Eastern District, which reversed appellant's convictions and remanded the case for a new trial. *State v. Thomas*, No. ED82826 slip op. (December 7, 2004). Judge Lawrence Crahan, Jr., dissented on one issue and transferred the case to this Court pursuant to Rule 83.03.

ARGUMENT

I.

The trial court did not err in refusing appellant's instruction "A" on involuntary manslaughter because the trial court found that there was no basis in the evidence for acquitting her of second degree murder.

Appellant contends that the trial court erred in refusing to submit Instruction A, an instruction on the lesser included offense of involuntary manslaughter (App. Br. 16). Appellant argues that the instruction should have been given because there was sufficient evidence for the jury to conclude that she recklessly, rather than knowingly, killed the victim with the knife (App. Br. 16).

A. Relevant Facts

Appellant was charged with murder in the first degree, and the jury was instructed on the lesser included offense of conventional murder in the second degree **(**L.F. 28, Tr. 499). At the instruction conference, appellant requested an instruction on the lesser included offense of involuntary manslaughter (Tr. 503). The court denied the instruction (Tr. 503-504). Appellant's request for an instruction on self-defense was also denied (Tr. 504-505). **B. Standard of Review**

Trial courts are not obligated to charge the jury with respect to an included offense unless there is a basis for a verdict acquitting the defendant of the offense charged and convicting her of the included offense. Section 556.046.2, RSMo 2003 Cum. Supp. If in doubt, however, the trial judge should instruct on the lesser included offense. *State v.*

Santillan, 948 S.W.2d 574, 576 (Mo. banc 1997)).[3] Involuntary manslaughter is a lesser included offense of second degree murder. Section 565.025.2(2)(b).

C. There Was no Basis for a Verdict Acquitting Appellant of Second Degree Murder

A person commits the crime of second degree murder if she "knowingly causes the death of another person or, with the purpose of causing serious physical injury to another person, causes the death of another person." Section 565.021.1(1). A person acts "knowingly" when he is aware that his conduct is practically certain to cause a result. Section 562.016.3(2). By contrast, a person causes death or serious physical injury "recklessly" when he consciously disregards a substantial and unjustifiable risk that death or serious physical injury will follow, and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation. Section 562.016.4. Under Section 565.024.1.(1), a person commits the crime of involuntary manslaughter if he "recklessly" causes the death of another person. In this case, there was no evidence consistent with the physical evidence that gave rise to an inference that appellant did not act knowingly. "Direct proof of mental state in a criminal case is seldom available and such intent is usually inferred from circumstantial evidence." *State v. Johnson*, 770 S.W.2d 263, 267 (Mo. App. W.D. 1989). "A defendant's mental state may be determined from evidence of his conduct before the act, the act itself and from the defendant's subsequent conduct." *Id*.

---

[3]Section 556.046 is now used for consideration of lesser included offenses in homicide cases. Section 565.025.1.

In the light most favorable to granting the involuntary manslaughter instruction, the evidence was as follows: Appellant testified that she and Anthony argued (Tr. 323, 325, 336, 341). Anthony slapped her with his open hand, threatened appellant, and called appellant "bitch" (Tr. 434-436, 463). Appellant armed herself with a knife (Tr. 293). Appellant left the apartment; Anthony was still inside (Tr. 440). The door closed behind her (Tr. 440). Appellant unlocked the apartment door and went back inside the apartment, still holding the knife (Tr. 440). Anthony called her a "[b]itch," and walked toward her with his fist raised (Tr. 440). Appellant testified she covered her face with her arm and "jerked" the knife at Anthony twice (Tr. 484, 490). Appellant said she was not aiming the knife at any particular part of Anthony's body, but was just trying to make him back away (Tr. 484). She told police that she did not intend to "stick" Anthony (Tr. 440-441, 449, 485). The stab wound caused by appellant went downward, which meant the blade of the knife would have been pointed towards the floor (Tr. 395). The wound was at least four inches deep and punctured Anthony's pericardial sac and pulmonary artery (Tr. 395, 400). The stab wound that killed Anthony was only a couple of inches above the stab wound he received from appellant on September 19 (Tr. 393-394).

An instruction on the lesser included offense of involuntary manslaughter is mandated only "where there is some affirmative evidence of a lack of an essential element" of murder in the second degree. *State v. Arbuckle*, 816 S.W.2d 932, 936 (Mo. App. S.D. 1991); Section 556.046.3 RSMo 2003 Cum. Supp. Such requirement can be met only by substantial evidence, or stated another way, evidence with probative value. *Id.* at 936-937. In this case there was no basis for a verdict acquitting appellant of second degree murder.

Appellant's testimonial denial of intent to kill Anthony is not a basis for a verdict acquitting appellant of second degree murder. *Arbuckle*, 816 S.W.2d at 937. A "denial of intention to kill does not necessarily require an instruction for a lesser degree of the offense charged when 'the statements of defendant were so incumbered with the physical facts and conduct of defendant, [and] so unreasonable and inconsistent with the experience of mankind.'" *Id*. (*quoting State v. Nelson*, 118 Mo. 124, 23 S.W. 1088, 1089 (1893)). It will be presumed that a person intends the natural and probable consequences of his acts. *State v. O'Brien*, 857 S.W.2d 212, 218 (Mo. banc 1993). "A person is presumed to have intended that death follow acts which are likely to produce that result." *State v. Isom*, 906 S.W.2d 870, 874 (Mo. App. S.D. 1995), *overruled on other grounds by State v. Beeler*, 12 S.W.3d 294 (Mo. banc 2000).

In the present case, appellant's act of stabbing Anthony in the chest near his heart, coincidentally only two inches from where she had stabbed him in a previous argument, with a knife that had a blade long enough and sharp enough to make a four inch wound, was likely to cause Anthony's death or cause him serious physical injury and thus appellant is presumed to have intended to kill Anthony or cause him serious physical injury. *See State v. Hamlett*, 756 S.W.2d 197, 200-201 (Mo. App. S.D. 1987) (Defendant's attack on victim was deliberate, not accidental, and even if defendant, as he said, had no desire to kill victim, such a result

followed. "Since the assault, by fists and feet, was a means likely to produce death, Hamlett is presumed to have intended that death would follow his acts.").[4]

Appellant's claim that she acted in self-defense is not a basis for a verdict acquitting appellant of second degree murder because, as discussed in Point II of Respondent's brief, there is no evidence to support a self-defense instruction. There was no real or apparent necessity for appellant to kill Anthony in order to save herself from an immediate danger of serious bodily injury or death. Anthony was not armed and did not threaten appellant with a weapon (Tr. 470-471). Neither did appellant do all within her power consistent with her own personal safety to avoid the danger and the need to take a life. *State v. Crawford*, 904 S.W.2d

---

[4] Numerous cases have found a defendant's denial of an intent to kill to be so "incumbered with the physical facts and conduct of defendant, [and] so unreasonable and inconsistent with the experience of mankind," that they found a defendant's actions to transcend recklessness. *See State v. Boston*, 910 S.W.2d 306, 312 (Mo. App. W.D. 1995) (defendant's conduct in firing several gunshots toward a window of a house which he knew was full of people "transcended mere recklessness"); *State v. Green*, 778 S.W.2d 326, 328 (Mo. App. S.D. 1989) (where defendant confronted victim in a public street with a shotgun, told him he was going to kill him and shot him in the head at a distance of twelve feet, but testified that he did not intend to kill victim, court found that defendant's conduct went beyond recklessness because it was a means likely to produce death and defendant was presumed to have intended that death follow his acts).

402, 405-406 (Mo. App. E.D. 1995). Appellant armed herself with a knife but did not leave the apartment (Tr. 293, 436). When she finally left the apartment and the door closed behind her, appellant unlocked the apartment door and went back inside the apartment still holding the knife (Tr. 440). Appellant had the opportunity to abandon the altercation with Anthony, but instead she renewed it by going back inside the apartment with the knife. *See State v. Bray*, 818 S.W.2d 291, 293 (Mo. App. W.D. 1991).

Moreover, evidence that appellant armed herself with a knife during an argument with Anthony on September 19, 2001, and stabbed him when he approached her shows that appellant intended to cause Anthony serious physical injury or intended to kill Anthony when she stabbed him on December 2, 2001. The knife wound appellant inflicted on Anthony in September was only a couple of inches below the wound that killed Anthony in December (Tr. 393-394). Anthony was hospitalized after the September stabbing incident (Tr. 295, 382). Numerous cases have held that evidence of prior misconduct by the defendant against the same victim in murder and assault cases is admissible as being logically and legally relevant to show motive, intent, and animus toward the victim. *See e.g., State v. Danikas*, 11 S.W.3d 782, 789-790 (Mo. App. W.D. 2000); *State v. Hayes*, 88 S.W.3d 47 (Mo. App. W.D. 2002); *State v. Tolliver*, 101 S.W.3d 313 (Mo. App. E.D. 2003); *State v. Garner*, 14 S.W.3d 67 (Mo. App. E.D. 2000); *State v. Wright*, 30 S.W.3d 906, 913 (Mo. App. E.D. 2000); *State v. Smotherman*, 993 S.W.2d 525, 528 (Mo. App. S.D. 1999); *see also* collected cases in *State v. Williams*, 865 S.W.2d 794 (Mo. App. S.D. 1993). In the present case, the jury could consider appellant's

prior stabbing of Anthony as evidence that she intended to cause Anthony serious physical injury or intended to kill Anthony when she stabbed him on December 2.

Although there is no basis for a verdict acquitting appellant of second degree murder, appellant nonetheless claims that she is entitled to an instruction on involuntary manslaughter because she alleges there is evidence to convict her of involuntary manslaughter (App. Br. 20). Specifically, appellant claims that her actions "exactly fit the definition of recklessness" stated in *State v. Beeler*, 12 S.W.3d 294 (Mo. banc 2000) (App. Br. 20). *Beeler* states that recklessness includes the conscious use of a weapon in intended self-defense when the act constitutes unreasonable force. *Beeler*, 12 S.W.3d at 299. Appellant claims that there is evidence that she acted recklessly because she used unreasonable force in defending herself in that although Anthony was unarmed, she "blindly lash[ed] out with the knife" instead of merely warning him away by displaying the knife or departing the premises (App. Br. 20).

Beeler is inapposite here because the issue in the present case is whether the trial court was "obligated" to instruct down because there was evidence to acquit of appellant of second degree murder and convict her of involuntary manslaughter. Section 556.046.3, RSMo 2003 Cum. Supp. This was not an issue in *Beeler* because the trial court had instructed down and the question was whether the court had properly done so. *Beeler*, 12 S.W.3d at 300. For the reasons stated above, the trial court was not obligated to instruct the jury on the lesser included offense of involuntary manslaughter because there is no basis for a verdict acquitting appellant of second degree murder. Appellant's first point should be denied.

II.

The trial court did not err, plainly or otherwise, in refusing appellant's instruction "C" on self-defense because that instruction was not supported by evidence in that appellant failed to adduce testimony showing that there was a real or apparent necessity for her to kill Anthony in order to save herself from an immediate danger of serious bodily injury or death and that she did all within her power consistent with her personal safety to avoid the danger and the need to take a life.

Appellant contends that the trial court erred in refusing to submit Instruction C, an instruction on self-defense even though it deviated from MAI-CR3d 306.06 (App. Br. 23). Appellant argues that there was substantial evidence to support the instruction (App. Br. 23).

A. Relevant Facts

Appellant was charged with murder in the first degree, and the jury was instructed on the lesser included offense of conventional murder in the second degree **(**L.F. 28, Tr. 499). At the instruction conference, appellant requested an instruction on the lesser included offense of involuntary manslaughter (Tr. 503). The court denied the instruction (Tr. 503-504). Appellant's request for an instruction on self-defense was also denied (Tr. 504-505).

B. Appellant's Offered Self-Defense Instruction Was Not in Proper Form

Instruction C would have informed the jury that "If the defendant reasonably believed she was in imminent danger of harm from the acts of Edward Jefferson [Anthony] and the defendant used only such force as reasonably appeared to be necessary to defend herself, then she acted in lawful self-defense" (L.F. 68). This paragraph is authorized only when there is no

evidence as to the use of deadly force. Part B[2][A] MAI-CR3d 306.06. When there is some evidence that the defendant used deadly force and it is an issue in the case whether the defendant used deadly force, and there is also evidence supporting the lawful use of deadly force, Part B[2][D] should be used. In this case it would have read:

> If the defendant reasonably believed she was in imminent danger of harm from the acts of Anthony and she used only such non-deadly force as reasonably appeared to her to be necessary to defend himself, then she acted in lawful self-defense, or if the defendant reasonably believed she was in imminent danger of death or serious physical injury from the acts of Anthony and she reasonably believed that the use of deadly force was necessary to defend herself, then her use of deadly force was in lawful self-defense.

Appellant's proffered instruction would have also informed the jury that they could consider evidence of the prior relationship between appellant and the victim, including acts of violence, in determining whether appellant reasonably believed she was in imminent danger of harm from the victim (L.F. 69). This paragraph erroneously omitted some of the language contained in Part C[3] MAI-CR3d 306.06. It should have informed the jury that they could consider evidence of the prior relationship in determining who the initial aggressor in the encounter was *as well as* considering it in determining whether appellant reasonably believed she was in imminent danger of harm from Anthony.

The record demonstrates that Instruction C tendered by appellant incorrectly used paragraph Part B[2][A] of MAI-CR3d 306.06, and omitted language from paragraph Part C[3].

Appellant concedes that her tendered instruction deviated from MAI-CR3d 306.06 (App. Br. 23). Appellant's failure to submit a correct instruction renders her claim of error reviewable only for plain error. *State v. Derenzy*, 89 S.W.3d 472, 475 (Mo. banc 2002).

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

The trial court did not err, plainly or otherwise, in failing to give Instruction C because 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) an absence of aggression or provocation on the part of the defender; (2) a real or apparent necessity for the defender to kill in order to save himself from an immediate danger of serious bodily injury or death; (3) a reasonable cause for the defendant's belief in such necessity; and (4) an attempt by the defender to do all within his power consistent with his personal safety to avoid the danger and the need to take a life. *State v. Crawford*, 904 S.W.2d 402, 405-406 (Mo. App. E.D. 1995); *State v. Chambers*, 671 S.W.2d 781, 783 (Mo. banc 1984); Section 563.031. The defendant has the burden of injecting the issue of self-defense into her case. Section 563.031.4. 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. Appellant testified that she and Anthony argued on December 2, 2001 (Tr. 323, 325, 336, 341). Anthony slapped her with his open hand, threatened appellant, and called appellant "bitch" (Tr. 434-436, 463). Appellant went into the kitchen and armed herself with a knife (Tr. 293, 436). She returned to the bedroom and continued to look for clothes to wear to the party (Tr. 434). Appellant left the apartment; Anthony was still inside (Tr. 440). The door closed behind her (Tr. 440). Appellant unlocked the apartment door and went back inside the apartment, still holding the knife (Tr. 440). Anthony called her a "[b]itch," and walked toward her with his fist raised (Tr. 440). Appellant testified she covered her face with her arm and "jerked" the knife at Anthony twice (Tr. 484, 490). Anthony died from a four inch deep stab wound that punctured his pericardial sac and pulmonary artery (Tr. 395, 400).

Appellant also cites a physical fight between Anthony and herself on September 19, where Anthony hit appellant and appellant stabbed him in return, as evidence that was relevant to the determination of who the aggressor was on December 2, and whether appellant reasonably believed she was in imminent danger of harm from Anthony (App. Br. 25; Tr. 294, 376, 378-379).

A self-defense instruction was not warranted in this case. First, there was no reasonable basis for appellant's belief that she needed to employ deadly force to protect herself from impending death or serious physical injury. *See State v. Fincher*, 655 S.W.2d 54, 59 (Mo. App. W.D. 1983) (the only evidence of any aggression by the victim was that the victim raised

his arms with closed fists after the defendant fired the first so-called warning shot. This "gesture" was at a distance from the defendant, and defendant was not in danger of being struck by the victim). Appellant admitted that at the time she stabbed Anthony he was not armed with any type of weapon (App. Br. 26; Tr. 470-471). Appellant said that Anthony was walking toward her with his fist raised, and she told him to get back (Tr. 440). Appellant testified that at her warning, Anthony did get back (Tr. 440). Appellant also "jerked" the knife at Anthony twice (Tr. 440). This evidence does not raise a reasonable inference that Anthony was attempting to take the knife from appellant. In addition, the evidence does not indicate that Anthony had the ability to kill or seriously injure appellant. Given the circumstances in this case, where appellant was armed and the victim was not, any size difference between appellant and Anthony was not consequential. Anthony was five-feet-seven and weighed 238 pounds (Tr. 391). Appellant was also five-feet-seven and weighed 175 pounds (L.F. 7). As appellant recognizes, fear of size alone is not sufficient to justify the use of deadly force in self-defense. *Chambers*, 671 S.W.2d at 783. "Self-defense does not grant the defender the privilege to use deadly force against an obviously nondeadly attack." *Fincher*, 655 S.W.2d at 60.

Second, the evidence does not support a finding that appellant did all within her power consistent with her personal safety to avoid danger and the need to take a life. This is so because appellant retreated from the altercation, exited the apartment, and returned to the altercation brandishing a knife (Tr. 440). If a defendant continues or renews an altercation when she had an opportunity to abandon or decline further, she becomes the aggressor,

although she was not at fault in the original struggle. *State v. Bray*, 818 S.W.2d 291, 293 (Mo. App. W.D. 1991) (the defendant became the aggressor because he retreated from the altercation, entered his home, obtained a gun, and returned to the altercation where he killed the victim). *See also State v. Harris*, 717 S.W.2d 233, 236 (Mo. App. E.D. 1986) (Where the defendant was in the victim's yard voluntarily, the court found that if the defendant, even if not the initial aggressor, was expecting to have difficulty with the victim, his right to defend himself did not arise until he had done everything in his power to avoid the necessity of using a weapon); *State v. Allison*, 845 S.W.2d 642 (Mo. App. W.D. 1993) (defendant failed to do all within his power to avoid the need to take a life where defendant left the porch, where the argument with the victim began, to retrieve a rifle from his bedroom and then returned to the dining room to confront the victim with the rifle); *State v. Stinson*, 714 S.W.2d at 841 (evidence showing the defendant had deliberately acted to arm herself and to pursue the argument with her husband was sufficient for the jury to conclude that the appellant was the aggressor and failed to do all within her power to avoid any perceived danger from the victim). As these cases suggest, appellant did not do all that was within her power consistent with her personal safety to avoid danger and the need to take a life, because she renewed the altercation with Anthony by reentering the apartment after she had left.

In transferring the present case to this Court, Judge Crahan of the Missouri Court of Appeals, Eastern District, agreed with Respondent that appellant was not entitled to an instruction on self-defense because the evidence established that appellant did not attempt to do all within her power, consistent with her personal safety, to avoid the danger and the need

to take a life. Judge Crahan also argued that the majority's holding could not be reconciled with *State v. Henson*, 552 S.W.2d 378 (Mo. App. Springfield Dist. 1977) and *State v. Adkins*, 537 S.W.2d 246 (Mo. App. St. L. Dist. 1976). *State v. Thomas*, No. ED82826 slip op. at 9-11 (December 7, 2004).

In *Henson*, the victim and the defendant were arguing in a trailer when the victim brandished a butcher knife at the defendant. *Henson*, 552 S.W.2d at 380. The defendant left the trailer, retrieved a gun from his car, re-entered the trailer, and shot the victim. *Id*. On appeal, the court found no error in the trial court refusing to instruct on self-defense because the defendant's re-entry into the trailer was not necessary and the "law will not condone defendant's voluntary resumption of the confrontation." *Id*. at 380-381.

The court in *Henson* cited the holding in *Adkins* with approval. In *Adkins*, the defendant and the victim were fighting inside an automobile. *Adkins*, 537 S.W.2d at 247. The defendant emerged from the automobile but then re-entered it and resumed the struggle, resulting in the victim's death. *Id*. The court found no error in the trial court's refusal of a self-defense instruction and observed:

> The force used in self-defense must not exceed the bounds of what is necessary or reasonably appears necessary for defense or prevention. . . . Further, where the accused continued or *renewed* the struggle when he had an opportunity to abandon or decline further, he became the aggressor, irrespective of whether he was at fault with the original difficulty, and is not justified in claiming self-defense.

Id. at 249-250, *quoting* 40 C.J.S. *Homicide*, secs. 131 and 133 (emphasis added).

The majority responded to Judge Crahan's dissent and stated that its holding did not contradict the principle of law stated in *Henson* and *Adkins*, namely that a defendant is not entitled to a self-defense instruction where there is evidence that the defendant renewed the struggle when she had an opportunity to abandon it. *State v*. *Thomas*, No. ED82826 slip op. at 4 n. 1 (December 7, 2004). The majority opinion also argued that *Henson* and *Adkins* were factually distinguishable from the present case because in those cases there was no explanation for the defendant's failure to leave the premises when given the chance, while in this case "Thomas testified that she felt she could not have safely retreated down the stairs when she left the apartment." *Id*. The majority opinion also stated that there was evidence in *Hensen* that the defendant clearly re-entered the trailer to renew the confrontation and that there was no evidence in *Adkins* that the victim had any part in renewing the struggle when the defendant got back in the car, while in this case appellant "merely went back in to her own home and did not use the weapon until after Jefferson came toward her in a threatening manner." *Id*.

With regard to the evaluation in the majority opinion that appellant failed to leave the premises when given the chance because "[appellant] testified that she felt she could not have safely retreated down the stairs when she left the apartment," the record does not reflect that appellant so testified. The record shows that appellant left the apartment, with the victim slamming the door after her (Tr. 440). Appellant was standing on the landing outside of her apartment and the initial confrontation was over (Tr. 440). Contrary to what the majority opinion states, appellant *did not* testify that she did not continue down the stairs at that point

because she was afraid of falling. Instead, appellant testified that when she was outside on the landing, she then unlocked the apartment door, and went back inside the apartment, still holding the knife (Tr. 440). Appellant testified that *after* she re-entered the apartment, the victim walked toward her with his fist raised, and it was at that time that she "panicked and went back out, and [] didn't go down the steps because I probably would have fell" and felt that "it would have been hard to go down the steps" (Tr. 486-487, 490).

This case is therefore similar to *Henson* and *Adkins* because there was no explanation for appellant's failure to leave the landing outside of the apartment when given the chance. The door was shut behind her and she had her work uniform for the next day (Tr. 439-440). There is no evidence that she was afraid of falling on the stairs when she was alone on the landing (Tr. 486-487, 490). Instead of calmly walking down the stairs, appellant decided to renew the confrontation with the victim by unlocking the apartment door and re-entering the apartment still holding the knife (Tr. 440).

This case is also similar to *Hensen* and *Adkins* in that, contrary to what the majority opinion states, the record reflects that appellant re-entered the apartment to renew the confrontation. Appellant testified that after she was outside the closed apartment, she unlocked the door "because [the victim] had slammed the door in my head" (Tr. 440). Appellant was not merely going back in to the apartment for some innocent purpose, but wanted to renew the confrontation because of the victim's act of slamming the door on her as she left the apartment.

This case is also similar to *Adkins* in that there was no evidence in either case that the victim had any part in renewing the confrontation. The victim in this case slammed the door behind appellant after she left the apartment (Tr. 440). The initial confrontation was over. The victim did *not* follow appellant out of the apartment to renew the confrontation. Appellant renewed the confrontation by re-entering the apartment brandishing a knife (Tr. 440). It was only after appellant re-entered the apartment with the knife that appellant walked toward appellant with his fist raised (Tr. 440).

In light of the above, Respondent submits that the trial court did not err, plainly or otherwise, when it refused to submit appellant's instruction on self-defense to the jury because appellant failed to present evidence that injected that defense into the case. Thus, appellant's second point must fail.

III.

The trial court did not plainly err in failing to instruct the jury *sua sponte* on voluntary manslaughter because appellant did not suffer manifest injustice in that there was no evidence presented at trial that appellant acted under the influence of sudden passion arising from adequate cause when she stabbed and killed Edward Anthony Jefferson.

Appellant contends that the trial court plainly erred in failing to instruct the jury *sua sponte* on the issue of voluntary manslaughter (App. Br. 29). Appellant claims there was evidence to support the instruction, and that she suffered manifest injustice due to its absence (App. Br. 29).

A. Relevant Facts

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 **(**L.F. 28, Tr. 499). Appellant's requests for instructions on involuntary manslaughter and self-defense were denied (Tr. 503-505). Appellant did not request a voluntary manslaughter instruction during the instruction conference, nor did appellant object to the lack of such an instruction (Tr. 497-506). When the court asked defense counsel if she had any additional jury instructions to offer, counsel responded, "No, Your Honor" (Tr. 505). The motion for new trial did not assert any claim of instructional error for failing to instruct on voluntary manslaughter (L.F. 74-82). For the first time on appeal, appellant argues that the trial court plainly erred by failing to instruct on voluntary manslaughter on the grounds that there was a basis in the evidence for

acquitting appellant of first or second degree murder and there was evidence that appellant acted in "sudden passion arising from adequate cause" (App. Br. 29).

B. Standard of Review

As appellant concedes, this claim was not preserved for review (App. Br. 29). Rule 28.03 requires that defense counsel make specific objections to instructional error and include such claims of error in the motion for new trial. It states:

> Counsel shall make specific objections to instructions or verdict forms considered erroneous. **No party may assign as error the giving or failing to give instructions or verdict forms unless the party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection.** Counsel need not repeat objections already made on the record prior to delivery of the instructions and verdict forms. The objections must also be raised in the motion for new trial in accordance with Rule 29.11.

Supreme Court Rule 28.03 (emphasis added).

Instructional error seldom rises to the level of plain error. *State v. Wright*, 30 S.W.3d 906, 912 (Mo. App. E.D. 2000). A defendant must go beyond a demonstration of mere prejudice, *State v. Cates*, 3 S.W.3d 369, 372 (Mo. App. S.D. 1999), and establish that the trial court has so failed to instruct the jury that it is apparent to the appellate court that the instructional error affected the jury's verdict, resulting in manifest injustice or miscarriage of justice. *State v. Bozarth*, 51 S.W.3d 179, 181 (Mo. App. W.D. 2001).

C. Analysis

1. Trial Counsel's Decision Whether to Request a Voluntary Manslaughter Instruction is Usually a Matter of Trial Strategy

Although the burden of injecting the issue of voluntary manslaughter is placed upon the defendant, Section 565.023; MAI-CR 313.04, Notes on Use 4, appellant claims that the trial court plainly erred in not, *sua sponte,* instructing the jury on voluntary manslaughter. The trial court can not be convicted of error for failing to make strategic decisions that interfere with a defendant's case.

"Numerous cases hold that a trial court will not be convicted of error, plain or otherwise, in failing to *sua sponte* give a lesser included offense instruction where, as here, it was not requested by defense counsel." *State v. Kobel*, 927 S.W.2d 455, 460 (Mo. App. W.D. 1996). This is because trial counsel's decision on whether to ask for an instruction is usually a matter of trial strategy. *Id*. *See State v. McCoy*, 971 S.W.2d 861, 864 (Mo. App. W.D. 1998) ("The strategy for not submitting a sudden passion or a voluntary manslaughter instruction, even if the evidence would warrant such submission, is left to the judgment of the parties."). Thus, a defendant "may not complain of prejudice when the court has conducted the trial in harmony with his apparent strategy and intent in not seeking an instruction." *Id*.

2. There Was No Evidence Appellant Acted in Sudden Passion Arising from Adequate Cause

In addition, there is no evidence in the record that would have supported the giving of a voluntary manslaughter instruction. MAI-CR3d 313.04, Notes on Use 4. It is clear that

"[t]he court shall not be obligated to charge the jury with respect to an included offense unless there is a basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense." Section 556.046.2, RSMo 2003 Cum. Supp.; *State v. Beeler*, 12 S.W.3d 294, 297 (Mo. banc 2000).

In support of her claim that she was entitled to an instruction on voluntary manslaughter, appellant relies on her trial testimony as well as Ms. Johnson's trial testimony. In the light most favorable to the giving of the instruction, *State v. Westfall*, 75 S.W.3d 278, 280 (Mo. banc 2002), the evidence presented was as follows: appellant and Anthony were arguing (Tr. 323, 325, 336, 341), Anthony slapped appellant with his open hand (Tr. 435-436, 463), Anthony told Ms. Johnson to, "Get that bitch out of here" (Tr. 434-435), Anthony paced back and forth and looked appellant in her eyes (Tr. 435), Anthony lifted the mattress up to make the clothes on the mattress slide off (Tr. 437, 479-480), Anthony threatened to make appellant "eat that knife" (Tr. 436), and Anthony weighed more than appellant (Tr. 391; L.F. 7). Appellant left the apartment; Anthony was still inside (Tr. 440). The door closed behind her (Tr. 440). When appellant reopened the apartment door from the outside, and stepped inside the apartment, Anthony came towards appellant, called her "bitch," and had his fist up (Tr. 440). Appellant also references the physical fight between Anthony and herself that occurred on September 19 as being relevant in contributing to her sudden passion on December 2 (App. Br. 32).

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.

Under Missouri law, a person commits the crime of voluntary manslaughter if the individual causes the death of another person 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. Section 565.023. "Sudden passion" is defined as "passion directly caused 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." Section 565.002(7). For adequate cause to exist, there must be a 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. Section 565.002(1). Passion may be rage or terror, but it must be so extreme that for the moment, the action is being directed by passion and not reason. *State v. Boyd*, 913 S.W.2d 838, 842 (Mo. App., W.D. 1995). In addition, the offense must have been done in a sudden passion and not after there has been time for the passion to cool. *State v. Fears*, 803 S.W.2d 605, 609 (Mo. banc 1991). Furthermore, "[w]ords alone, no matter how opprobrious or insulting, are not sufficient to show adequate provocation." *State v. Redmond*, 937 S.W.2d 205, 208 (Mo. banc 1996).

Appellant cites a physical fight between Anthony and herself on September 19, where Anthony hit appellant and appellant stabbed him in return, as evidence supporting her claim of sudden passion (App. Br. 32). This fight occurred over a month prior to the charged conduct,

not "at the time of the offense," and therefore is not sufficient to show *sudden* passion. *Redmond*, 937 S.W.2d at 208. One month is more than an adequate amount of time for appellant's passions to cool. *See State v. Deckard*, 18 S.W.3d 495, 501 (Mo. App. S.D. 2000) (finding that the defendant had time to cool his anger after he heard about the alleged provoking incident because later that same day he drove to his ex-girlfriend's place of employment and talked with her before retrieving a shotgun from his vehicle and shooting victim).

Moreover, the record shows that appellant left the apartment, but then turned around, unlocked the door, and reentered the apartment with the knife (Tr. 440). If, as appellant argues, appellant had truly been terrorized and in fear of receiving a beating at the victim's hands, appellant would not have reentered the apartment. Anthony's words and actions toward appellant prior to her leaving the apartment did not cause such extreme terror in appellant so as to cause appellant's own actions to be directed by passion and not reason.

Nor does the evidence that Anthony came towards appellant with a raised fist and called her "bitch," constitute adequate cause. When taken in context with Anthony's words and actions prior to appellant leaving the apartment, his words and actions upon appellant's reentry into the apartment with the knife were insufficient to ignite a sudden passion in appellant because they were not sudden or unexpected. "What is required is a sudden, unexpected encounter or provocation tending to excite passion beyond control." *State v. Hahn*, 37 S.W.3d 344, (Mo. App. W.D. 2001) (where defendant went back upstairs with the specific and stated intention to attack victim, packing a butcher knife, evidence that the victim jumped on defendant could not have been sudden or unexpected).

In sum, the trial court did not err in refusing to instruct the jury *sua sponte* on voluntary manslaughter because appellant did not request the instruction and none of the evidence showed that the appellant acted with sudden passion resulting from adequate cause. *See State v. Brummall*, 51 S.W.3d 113, 117-118 (Mo. App. W.D. 2001) (holding that the trial court did not err in refusing to instruct the jury on voluntary and involuntary manslaughter when there was no evidence presented to support the instruction).

IV.

The trial court did not plainly err in sustaining the State's objection to appellant questioning Tarynn Johnson whether she had ever been convicted of a crime because the question was not asked in good faith in that counsel asked the question only because appellant told counsel that Ms. Johnson had an alleged conviction for some crime, and defense counsel did not know what crime Ms. Johnson had been convicted of or where or when Ms. Johnson received the conviction. Moreover, appellant cannot demonstrate manifest injustice as there was overwhelming evidence of appellant's guilt.

Appellant argues that she had an absolute right to cross-examine Ms. Johnson about whether she had ever been convicted of a crime (App. Br. 34). Appellant alleges that she asked the question in good faith on the basis of information from appellant (App. Br. 34).

A. Relevant Facts

During the cross-examination of State's witness Tarynn Johnson, defense counsel asked Ms. Johnson if she had ever been convicted of a crime (Tr. 354). The prosecutor objected to the question, and the following proceedings were had at the bench:

> THE COURT: Has she ever been convicted of a crime?
>
> MS. OFFERMAN: Yeah.
>
> THE COURT: What for?
>
> MS. BOARDMAN: I've never been made aware of that.
>
> THE COURT: Where did you get that information from?
>
> MS. OFFERMAN: From my client.

THE COURT: Ms. Offerman, unless you have a certified copy of a sentencing and judgment, you can not do that now.

I'm going to sustain that objection. Have you run this lady?

MS. BOARDMAN: I believe that my investigator hasn't run everybody, and I haven't any information. If she has any convictions, I'm not aware of it. And I don't know – where is this supposed to have been?

MS. OFFERMAN: I don't know.

THE COURT: This--

MS. OFFERMAN: It is perfectly legitimate.

THE COURT: This is not a fishing expedition. You ask a question – if you ask her a question like that, you'd better know the answer to it. Unless you know the answer to it, unless you're telling me you know the answer to it, you can't ask that question.

MS. OFFERMAN: Well, my client answered it.

THE COURT: I'm telling you, you have to take responsibility for what you ask.

MS. OFFERMAN: Well, Your Honor, we don't have the ability to run record checks.

THE COURT: Well, keep her on. She will stay on her subpoena, but I will not permit you to ask her a question unless you know the answer to it.

(Tr. 354-356). Proceedings returned to open court and defense counsel did not ask any further questions of Ms. Johnson (Tr. 356). Appellant never indicated that she wanted to make an offer of proof. Moreover, in appellant's motion for a new trial appellant did not indicate what Ms. Johnson would have testified to if questioned on this matter (L.F. 78-80).

B. Preservation

Appellant's claim is not properly preserved for appeal because appellant did not make an offer of proof. When an objection by the State is sustained, the defendant is obligated to make a proper offer of proof to preserve the matter for purposes of review. *State v. Bowers*, 964 S.W.2d 232, 238 (Mo. App. E.D. 1998). The purpose of an offer of proof is to provide the substance of excluded testimony in sufficient detail to demonstrate its relevance and materiality. *Id*. Besides demonstrating relevancy, the offer of proof must be specific and definite. *Id*.

Here, appellant arguably made one offer of proof following the prosecutor's explanation of the State's objection to appellant's cross-examination of Ms. Johnson (Tr. 354-355). During the offer of proof, defense counsel simply stated that appellant had told her that Ms. Johnson had been convicted of a crime, but that she did not know what the conviction was for (Tr. 354-355). A record check had not been run on Ms. Johnson (Tr. 356). This offer of proof fails because it was not specific, stating only that appellant told defense counsel that Ms. Johnson had been convicted of some crime, not that defense counsel knew what specific crime Ms. Johnson was convicted of and on what date she was convicted. The offer also fails because it is not definite, failing to state that Ms. Johnson would testify to being convicted of a crime

and presenting the evidence in the highly speculative terms of counsel knowing the answer to the question she wanted to ask because her client answered it for her.

C. Standard of Review

Because appellant did not make an adequate offer of proof for the admissibility of the prior conviction evidence, review is available, if at all, only for plain error. Supreme Court Rule 30.20. Relief under the plain error standard is granted only when an alleged error so substantially affects a defendant's rights that a manifest injustice or miscarriage of justice inexorably results if left uncorrected. *State v. Santillan*, 1 S.W.3d 572, 578 (Mo. App. E.D. 1999). Plain error does not embrace all trial error, and this Court's discretion to reverse a conviction based on plain error should be utilized sparingly. *Id.* Appellant bears the burden of demonstrating manifest injustice or a miscarriage of justice. *Id.* A showing of mere prejudice is not enough. *Id.* An assertion of plain error places a much greater burden on a defendant than an assertion of prejudicial error. *State v. Reed*, 21 S.W.3d 44, 47 (Mo. App. S.D. 2000).

D. Defense Counsel did not have a Good-Faith Basis for Asking Ms. Johnson if She Had Ever Been Convicted of a Crime

Appellant argues that defense counsel had a good-faith basis in asking Ms. Johnson if she had ever been convicted of a crime (App. Br. 36-37). Counsel is authorized to cross-examine a witness about alleged prior convictions if counsel acts in good faith. *State v. Spencer*, 50 S.W.3d 869, 878 (Mo. App. E.D. 2001). Bad faith is not inferred from the failure to produce a record of a conviction in a form admissible in impeachment should the witness deny the conviction. *State v. Charlton*, 465 S.W.2d 502, 503 (Mo. 1971). This is because the failure of counsel to come forward with record contradiction of the witness' denial has a tendency to injure that party, and to act to the advantage of the other party. *Id.* A good faith basis for inquiring into alleged prior convictions has been found where the prosecutor had the conviction in hand and the pedigree information matched that of the defendant, *Spencer*, 50 S.W.2d at 878; where the prosecutor had an index record of an arrest for rape in hand, *State v. Ware*, 449 S.W.2d 624, 626 (Mo. 1970); and where the prosecutor stated he asked the question in good faith based upon knowledge supplied to his office by the Kansas State Patrol, *Charlton*, 465 S.W.2d at 503.

There is no such evidence in this case that supports a good-faith basis for defense counsel asking Ms. Johnson if she had any prior convictions. Defense counsel merely attested that appellant told her that Ms. Johnson had a prior conviction (Tr. 354-355). Defense counsel did not know where Ms. Johnson received this alleged conviction, and did not tell the trial court what the conviction was for or when Ms. Johnson allegedly received this conviction (Tr.

354-355). Because defense counsel did not have a good-faith basis in questioning Ms. Johnson about any prior convictions, the trial court did not err in not allowing that line of questioning.

E. Appellant Cannot Demonstrate Manifest Injustice

Assuming *arguendo* that there was evidence that Tarynn Johnson had a prior conviction and that the exclusion of the prior conviction evidence was erroneous, appellant cannot demonstrate manifest injustice because the error was harmless. Where the right to cross-examine has been affected by error, that error can be held harmless. *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986). The factors to consider include the importance of the witness's testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and the overall strength of the prosecution's case. *Id*.

Here, even if Ms. Johnson's testimony were to be entirely discounted by the jury, there was still appellant's own testimony that she armed herself with a knife during the argument with Anthony, but stayed in the apartment looking for clothes (Tr. 434). Appellant also testified that she left the apartment but then unlocked the closed door and reentered the apartment still holding the knife (Tr. 440). Appellant testified that she covered her face with her arm, "jerked" the knife at Anthony twice, and felt that she had "stuck him" with the knife (Tr. 440). The stab wound was four inches deep and went downward, meaning the blade of the knife would have been pointed towards the floor (Tr. 395, 400). The location of the blood pools on the floor

right inside the doorway was consistent with appellant stabbing Anthony right inside the doorway (Tr. 312). Appellant had previously stabbed Anthony and that wound was only a couple of inches below the wound that killed Anthony on December 2 (Tr. 294, 376, 393-394). Appellant also initially told the police that an unknown man had stabbed Anthony, and kept changing her story until she finally admitted that she had stabbed Anthony (Tr. 268-270, 282-283, 291-298, 366). Due to this evidence, it is highly unlikely that the jury would have reached a different conclusion if they had learned that Ms. Johnson had a prior conviction and appellant could not have suffered manifest injustice from her inability to impeach Ms. Johnson with a prior conviction.

Because defense counsel did not have a good-faith basis to ask Ms. Johnson whether she had any prior convictions, and because appellant cannot demonstrate manifest injustice from the exclusion of the question, the trial court did not plainly err in sustaining the State's objection. Therefore, appellant's fourth point must fail.

CONCLUSION

In view of the foregoing, Respondent submits that appellant's convictions and sentences should be affirmed.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General

_____

LISA M. KENNEDY
Assistant Attorney General
Missouri Bar No. 52912

Post Office Box 899
Jefferson City, Mo 65102-0899
Telephone: (573) 751-3321
FAX: (573) 751-5391
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 and contains _____ 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 and is virus-free; and

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this ___ day of February, 2005, to:

Henry Robertson
Attorney at Law
P.O. Box 43052
St. Louis, Missouri 63143
(314) 647-5603
Attorney for Appellant

JEREMIAH W. (JAY) NIXON
Attorney General

_____
LISA M. KENNEDY
Assistant Attorney General
Missouri Bar No. 52912

Post Office Box 899
Jefferson City, Mo 65102-0899
Telephone: (573) 751-3321
Facsimile: (573) 751-5391
Attorneys for Respondent

APPENDIX