IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	No. SC 83782
	)	
LARNA L. EDWARDS,	)	
	)	
Appellant.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF CALDWELL COUNTY, MISSOURI
FORTY-THIRD JUDICIAL CIRCUIT
THE HONORABLE STEPHEN K. GRIFFIN, JUDGE

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

Larna L. Edwards appeals her conviction following a jury trial in the Circuit Court of Caldwell County, Missouri, of voluntary manslaughter, Section 565.023, RSMo 1994. The Honorable Stephen K. Griffin sentenced Ms. Edwards to five years imprisonment in the Missouri Department of Corrections. After the Missouri Court of Appeals, Western District, reversed Ms. Edwards' conviction, this Court granted respondent's application for transfer pursuant to Rule 83.04. This Court has jurisdiction over this cause pursuant to Article V, Section 10, Mo. Const. (as amended 1976).

STATEMENT OF FACTS

Larna Edwards began dating her husband Bill when she was in ninth grade and he was in tenth (Supp. Tr. 70). She never dated anyone else (Supp. Tr. 70). While Larna was still in high school, Bill told her that they were going to elope; she did not "get to vote" (Supp. Tr. 72). The night before they were to elope, he beat her up (Supp. Tr. 72). This set the pattern for the next forty-three years of marriage (Tr. 245).

After Larna graduated from high school, she and Bill moved away from her family and settled in Kansas City (Supp. Tr. 73). They had their first child six or seven months later (Supp. Tr. 73). They bought a liquor store in Claycomo, and Larna managed the store while raising their three children (Supp. Tr. 73). Because Bill came in and out of the store all day, Larna had no way to be away from him (Supp. Tr. 73). He always expected her to account for her whereabouts; she had no freedom of movement (Tr. 283).

Bill continuously brutalized Larna and their children throughout their married life (Tr. 248, 254). He hit Larna with his fist or the back of his hand (Tr. 249-251, 333, 355, 380). He kicked her and pulled out handfuls of her hair (Tr. 250, 355-356). He threatened to kill Larna and the children and told her that she could never go far enough away that he would not find her (Tr. 247, 249, 255-256). He broke furniture and beat her with pieces of tables or chairs (Tr. 277, 333-335). He cursed at her and told her that she was dumb, stupid and that nobody liked her (Tr. 257, 386). He beat her weekly, sometimes daily; he would reach

over and backhand her for no reason (Tr. 259, 278). While Larna was pregnant with their third child, Bill beat her in the abdomen so severely that she miscarried the four-month fetus several hours later (Tr. 270-272, Supp. Tr. 75).

Sometimes Larna could tell when Bill was about to attack her; he would have a "look" in his eyes (Tr. 280). Often, however, he hit her in the night while she slept. Consequently, she slept poorly, not knowing if she would wake up in the morning (Tr. 281).

Others saw frequent bruises and black eyes on Larna over the years (Supp. Tr. 153, 156, 174, 183, 186, 191, 194, 204). An employee at the liquor store saw Bill scream and swear at Larna, and saw bruises on her arms at different times (Supp. Tr. 205-207). In the early 1970s, Larna sold real estate (Supp. Tr. 77). She came to the office with bruises on her face and arms (Supp. Tr. 155-156). A coworker, Fred Schottlin, once saw Bill shove Larna into a wall (Supp. Tr. 155-156). Larna came to Schottlin's house one evening after she had been beaten by her husband (Supp. Tr. 162). Bill followed her, obviously drunk, and pounded on Schottlin's door (Supp. Tr. 163). He would not leave until Schottlin threatened to call the police (Supp. Tr. 163-164).

The family physician, Dr. Gerald Roderick, observed frequent bruises and black eyes on Larna (Tr. 410-411, 420). One time, he described Larna as "pretty well beat up" (Tr. 410-411). Larna would not let the doctor treat her on those occasions, because she did not want the abuse "on the record" (Tr. 420). Dr. Roderick urged Larna to leave Bill, but she told him that Bill would kill her (Tr.

416, 436, 439). Dr. Roderick believed, "if ever there was one, Larna Edwards was a battered person" (Tr. 435). She was completely dominated by Bill (Tr. 439). Larna had no money of her own; Bill "controlled everything" (Tr. 257, 269).

Larna attempted to leave Bill two times (Tr. 256). On one occasion, Dr. Roderick and another family friend took her back to her husband (Tr. 426-427). Another time, she returned to Bill when he promised that it would never happen again (Tr. 256). Larna also tried to seek help from the sheriff (Tr. 131-132). She went to the sheriff's office without an appointment and said that she and Bill were having problems (Tr. 132). The sheriff believed that Larna wanted him to "be aware" of the problem, but he never did anything about it (Tr. 172, 181).

Bill also abused his children (Tr. 251-252, 335, 380-381). His "favorite tactic" was to grab his victims by the hair and kick them (Tr. 356). On one occasion, Bill grabbed his older son, Rick, by the hair and kicked him down a flight of stairs (Tr. 358, 382). Bill hit the children with his fists, kicked them, and whipped them with a belt, inflicting bruises, cut lips and black eyes (Tr. 263-264, 335, 359, 380-382).

When his daughter, Jackie, was about thirteen years old, Bill began raping her on a regular basis (Tr. 261, 337-338). She confided in Dr. Roderick, telling him that her father "made her go to bed with him" (Tr. 416). The doctor reported the sexual abuse to the Clay County juvenile authorities, who ultimately returned Jackie to the home (Tr. 339, 416-417). Larna knew that Bill was molesting Jackie, but she was afraid that he would kill them both (Tr. 261). All three children left

home at the earliest opportunity – Jackie and the youngest child, John, both reported that Bill kicked them out at about age seventeen or eighteen (Tr. 260, 336, 357, 382).

Bill and Larna moved to Kingston after Dr. Roderick referred Jackie to Clay County juvenile authorities (Tr. 242-243). They opened a convenience store called "The Country Store" which sold a variety of merchandise, including guns and ammunition (Tr. 294-295). Friends and customers continued to see signs of abuse, including Larna's bruises and black eyes (Supp. Tr. 165, 171, 191). An employee of the Country Store once walked in on Bill with his fist drawn back, as if he were about to strike Larna in the face (Supp. Tr. 165-166).

On July 23, 1996, Bill and Larna went to Kansas City to consider buying a truck from a dealer, Randy Curnow, whom they knew as a friend (Tr. 31-34). They verbally agreed to buy the truck the next day (Tr. 35). On the way home from the dealership, Bill began telling Larna that they did not have the money to buy the truck (Tr. 244-245). He started pushing and shoving her on the ride back (Tr. 245).

The next morning, at 6:15 a.m., Bill hit Larna hard enough to break her watch (Tr. 252). After making breakfast, she went to the post office to get the mail (Tr. 253). When she returned, they went to the store for the day (Tr. 253).

At the store, Bill hit Larna with an object, apparently a metal pipe (Tr. 253, 275).[1] She raised her arm to protect her glasses and took the blow on her forearm (Tr. 253). This strike hurt worse than any other before (Tr. 275, L.F. 26). It left a dark bruise and raised a large welt on her arm (Tr. 253). She thought her arm was broken (L.F. 26).

Larna saw the familiar "look" in his eyes, and she knew that he was going to beat her (Tr. 328). She believed that one of them was not going to walk out of that store, and that Bill was going to kill her (Tr. 265, 285). She turned and grabbed the gun that Bill always kept under the counter (Tr. 265-266). She shot him four times, although she did not herself know how many times she fired the gun (Tr. 64, 266). He was not hitting her or coming at her with anything when she shot him (Tr. 317). Bill died from at least two of the gunshot wounds (Tr. 64-78).

Larna called her son, John, who came to the store (Tr. 266). John called the authorities, and the deputies arrived and took Larna to the sheriff's office (Tr. 46-50, 273). She was placed under arrest, and Deputy Roger Porter interviewed her at the station (Tr. 176-177, 185-187).

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[1] The metal pipe is Defendant's Exhibit 20 (Tr. 373, Ex. 20). It can be seen lying close to Bill's hand in the picture admitted as Defendant's Exhibit 6 (Tr. 129, 200, 216, Ex. 6). Sheriff's deputies did not seize anything from Bill's hand when they responded to the store (Tr. 154-155, 183, 197-199).

Larna told Porter that she understood her rights and that she waived them (Tr. 186-187). She signed a ***Miranda***[2] waiver form (Tr. 187, L.F. 21). Porter questioned Larna, "and you have waived your rights?" (L.F. 22).

Larna: Yes, sir.

[Porter]: And are [you] willing to talk to me?

Larna: Yes, sir. I will have a lawyer.

[Porter]: You want a lawyer?

Larna: I will have one. I can afford one.

[Porter]: OK, but do you want to talk to me now? And let me know what happened?

Larna: I want Gene McFadden (sic) from Gallatin.

[Porter]: OK.

Larna: He's been a long time family friend.

[Porter]: -- Are you willing to talk to me now?

Larna: I can't tell you any different that I would tell him. And I'm not lying about anything.

[Porter]: OK, do you want to talk to me?

Larna: What?

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[2] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

[Porter]: Do you want to tell me what happened?

Larna: Yes, I'll tell you what happened.

(L.F. 22).

Larna told Porter that when Bill hit her she "just snapped" and "I know I shot him twice and I don't know how much more" (L.F. 23). She retrieved the gun from her computer (L.F. 23-24). He called her a "son of a bitch" or something, and then she shot him (L.F. 26). She was about five to six feet away from Bill when she fired (L.F. 25).

At the end of the interview, Porter asked Larna again, "You know at the beginning of this you said you wanted to hire an attorney… but you also waived your rights to that attorney and you wanted to talk to me. I[s] that correct? … And you know you have the right to have that attorney present? You understand that? … But you did waive those rights?" (L.F. 28). Larna answered yes to his questions, and continued, "I waived them. I'm telling you the truth. I'm not telling anybody anything other tha[n] what I would tell him" (L.F. 28). Larna was "emotionally upset" and crying throughout the interview (Tr. 219).

Larna was charged with murder in the second degree (L.F. 1-2). Her defense attorney filed a notice of intent to rely on the defense of battered spouse syndrome, under Section 563.033, RSMo 1994 (L.F. 13-16). In support of this defense, defense counsel presented the testimony of three expert witnesses: Dr. Gerald Roderick, the family physician who had seen evidence of Larna's abuse over the years, Dr. John Howell, a psychologist who evaluated Larna's

"dangerousness" for her pretrial bond hearing, and Dr. Marilyn Hutchinson, retained by the defense to evaluate Larna and testify in support of the battered spouse syndrome defense (Tr. 410-411, 448, Supp. Tr. 13). The prosecutor objected throughout their testimony and throughout Larna's testimony, indicating that this evidence was either inadmissible or irrelevant (Tr. 246, 271, 284, 407, Supp. Tr. 13, 25, 29, 35, 49, 61, 69, 85, 87, 89, 93).

When Larna first began to testify about the beatings she had endured over the years, the prosecutor objected: "Unless he can show that this goes to some credible theory of self-defense, when she was beat years ago, it is not relevant. The instruction is very clear. She has to be in reasonable fear of serious bodily injury or death at the time, and she has to form a reasonable belief that a deadly force was necessary" (Tr. 246). The Court ruled, "I think it has to be something that was in her mind, at that time" (Tr. 247).

When Larna began to testify about the abuse that resulted in the loss of her baby in 1964 or 1965, the prosecutor objected. "I don't think it's relevant to the issue of self-defense if it happened in 1964 or '65. He has offered testimony that has injected self-defense. He didn't need this testimony for that issue" (Tr. 271). The court overruled the prosecutor's objection (Tr. 272). And later when Larna

was describing how Bill would yell at her, the prosecutor objected "Judge, this isn't relevant to the issue" (Tr. 284).[3]

The prosecutor cross-examined Larna, "How is it that you were in fear of death or serious bodily injury at the time you shot him?" (Tr. 328).

A: The look in his eyes.

Q: So, you want this Court and jury to find you not guilty because of the feeling you got, or the belief you formed by looking at someone's eyes?

* * *

Q: Okay. Another thing, before you can use deadly force in Missouri, even if you're in fear of death or serious bodily harm, you have to believe that … the deadly force itself – that you have to use deadly force to save your life, that there's not some other means to save your life?

(Tr. 328-330). Defense counsel's objection to this last question was sustained (Tr. 330).

Dr. Howell testified by deposition (Tr. 440). Just before it was read to the jury, the prosecutor made the following objection:

[3] Defense counsel withdrew the question, and this objection was not ruled (Tr. 284).

> We want to object to Howell's deposition, any of it being read, because we don't think a sufficient basis has been made to establish self defense.
>
> This is a case involving deadly force, not just the use of force. In order to inject the issue of self defense where deadly force is used, two things have to be present: One, the person has to be in reasonable fear of serious bodily injury or death, and they also have to reach the conclusion that deadly force – they have to reach a reasonable conclusion that deadly force is necessary to protect themselves. And, we don't think the evidence has thus far established that.
>
> Therefore, for Howell to testify generally that she was suffering from some syndrome or from some mental disease or defect that altered her perception of that, that would only be admissible if a sufficient showing of self defense was made generally.

(Tr. 407). The trial court overruled the objection (Tr. 408).

Dr. Howell testified that he had evaluated Larna, initially, for a finding of whether she was a danger to others for her bond hearing (Tr. 448). He found that she was not a danger to herself or others (Tr. 458). Dr. Howell's diagnosis of Larna was an Axis I finding of "Physical abuse of adult victim," along with chronic post traumatic stress disorder and dissociative disorder (Tr. 462). He also

concluded that Larna was acting in self-defense when she shot Bill; that she believed that she was in imminent danger (Tr. 471).[4]

Dr. Howell testified that Larna saw a pattern of behavior in Bill which threatened serious physical injury or death (Tr. 476). She had suffered from post traumatic stress disorder for many years (Tr. 479). Although Larna had no cognitive impairment which would have prevented her knowing abstractly that it was wrong to shoot her husband, she was not capable of conforming her conduct to the law (Tr. 497).

Throughout the testimony of Dr. Marilyn Hutchinson, the prosecutor again objected that evidence of battered spouse syndrome should not be admitted without a "prima facie" case of self-defense (Supp. Tr. 13, 35, 61). Dr. Hutchinson, however, was permitted to testify in support of Larna's defense.

Dr. Hutchinson is a clinical psychologist who specializes in treating trauma survivors – whether that trauma is from abuse or rape, or from car wrecks or plane crashes (Supp. Tr. 4-7). To explain Larna's situation, Dr. Hutchinson described the three major theories of battered spouse syndrome: (1) cycle of violence, (2) learned helplessness, and (3) traumatic bonding theory (Supp. Tr. 24). As Dr. Hutchinson explained "battered spouse syndrome" is an example of post traumatic

[4] At this point, the prosecutor interjected, "You understand that under Missouri law there has to be a reasonable apprehension of serious physical injury or death. Did you know that?" (Tr. 471).

stress disorder (Supp. Tr. 27, 32). Battered spouse syndrome is not a diagnosis, but rather, it is the legal term used to define that particular type of post traumatic stress disorder (Supp. Tr. 32). In other words, adult abuse itself is a context, not a diagnosis (Supp. Tr. 33). Dr. Hutchinson found Larna to be a victim of adult abuse (Supp. Tr. 33).

The first theory that Dr. Hutchinson discussed was the cycle of violence (Supp. Tr. 37). The cycle has three phases: the tension building phase, the battering phase, and the honeymoon phase (Supp. Tr. 37). These phases cycle over and over (Supp. Tr. 37). At first there is a tension in the air as if something is going to happen, followed by an eruption of violence (Supp. Tr. 38). The cycle concludes with apologies and "hearts and flowers," as the batterer expresses contrition (Supp. Tr. 38). The cycle can last one day or three months (Supp. Tr. 38). Normally in a battering relationship, the tension phase gets longer, the battering phase gets longer, and the honeymoon gets shorter (Supp. Tr. 38). Battered women tend to focus on the honeymoon phase as "what the relationship really is" (Supp. Tr. 38).

Dr. Hutchinson explained that early in Larna and Bill's relationship, Bill was very apologetic when he would beat Larna (Supp. Tr. 39). He would promise that he would not do it again (Supp. Tr. 39). Over time, however, the honeymoon became almost nonexistent (Supp. Tr. 40).

Learned helplessness theory also applied to Larna (Supp. Tr. 40). It has been shown through psychological experiments that if an individual learns that

they cannot escape, they learn not to try (Supp. Tr. 42). That learning supercedes what seems like an obvious out; the battered person no longer acts in her own self protection (Supp. Tr. 44).

The third battered spouse syndrome theory that Dr. Hutchinson discussed was traumatic bonding theory (Supp. Tr. 44). An example of this is people in concentration camps who began to identify with the people hurting them (Supp. Tr. 44). They began to be thankful when the abuse stopped instead of angry when it happened (Supp. Tr. 45). This also happens to battered women and battered children (Supp. Tr. 45).

Dr. Hutchinson also found four factors, common to most battering relationships, in Larna and Bill's marriage: extreme jealousy, alcohol and drug abuse, isolation of the battered spouse from the support of other people, and increasing intensity in the violence over time (Supp. Tr. 52-53). Larna also showed characteristics of a battered woman: low self-esteem, denial of the fear and anger she experienced, learned helplessness, a belief that she was responsible for the bad relationship, and fearfulness (Supp. Tr. 53-57). In Larna's case, this fear was caused by Bill's repeated threats to kill Larna or take away her children (Supp. Tr. 57).

Larna also had a lack of economic resources, which is typical of a battered person (Supp. Tr. 57). Bill was the primary wage earner and controlled the family’s money (Supp. Tr. 57). Larna did not even have access to a checking account (Supp. Tr. 57). Dr. Hutchinson emphasized that battered women often do

not know of the resources available to help them, and if they do, they are frightened to use them (Supp. Tr. 58).

Dr. Hutchinson testified that the plateau of violence which Bill and Larna's relationship had reached was at the highest level it had been (Supp. Tr. 66). The cycle of violence had gotten very fast, and the honeymoon period was nonexistent (Supp. Tr. 68). Women who reach this level start to feel that they have no choice (Supp. Tr. 58). Larna had been told "there is no place you can run where I can't find you" (Supp. Tr. 68).

Dr. Hutchinson relied on Larna's specific life and characteristics in reaching her conclusions (Supp. Tr. 70). She testified that Larna grew up as the youngest of three children on a farm (Supp. Tr. 70). It was a small, protected sort of environment (Supp. Tr. 70). She met Bill in the ninth grade, and never dated anyone else after that (Supp. Tr. 70). She was naïve about men, and had a sense of not being very powerful in the relationship (Supp. Tr. 71). When he began beating her up the night before they got married, it really laid a foundation for the relationship (Supp. Tr. 71-72).

Over the course of their marriage, Larna learned to lie about where she got her bruises or her black eyes (Supp. Tr. 76). When her daughter Jackie was later sexually abused by Bill, Larna discounted it the way she discounted her own abuse (Supp. Tr. 76).

Larna's psychological testing showed a strong sense of duty, partly from her insecurity (Supp. Tr. 79). She does not want to offend people, and tries very hard

to do the right thing (Supp. Tr. 79). She is afraid people will be angry or disappointed in her (Supp. Tr. 79). She is very angry at men, but is afraid of those feelings, so she covers them with feelings of guilt (Supp. Tr. 80). At the time of the shooting, she was in a chronic state of "overload" (Supp. Tr. 80). Larna was a lonely person; she kept people at a superficial level and at a distance because of the fear that they would hurt her (Supp. Tr. 81). Dr. Hutchinson diagnosed Larna with post traumatic stress disorder and dependent personality disorder (Supp. Tr. 82, 96).

Larna has almost no memory of the shooting, which is consistent with post traumatic stress disorder (Supp. Tr. 94). She was extremely fearful when talking to Dr. Hutchinson about the shooting (Supp. Tr. 95). Dr. Hutchinson described Larna's hyper-vigilance as consistent with most battered women (Supp. Tr. 92). Larna's experience as a battered woman "made her extremely fearful in that moment" (Supp. Tr. 94). In effect, Larna had "the emotions from the previous instances that contributed to the post traumatic stress disorder dumped into this moment in time" (Supp. Tr. 94). Larna had reached her breaking point.

> [R]epeated instances of violence rise to the level of being almost unbearable over and over again. They're right at the edge of, I almost can't stand it anymore. And that, when things get somehow out of sync and a new plateau, if you will, then sometimes, in fact, that response … is this is unbearable and they can't stand one more incidence of violence.

(Supp. Tr. 100).

At the instruction conference, defense counsel objected to giving an unmodified self-defense instruction, because it misinstructed the jury on battered spouse syndrome evidence (Tr. 501-505). He offered three instructions on battered spouse syndrome which modified the traditional self-defense instruction (Supp. L.F. 1-8). He also offered a lesser included offense instruction of involuntary manslaughter (Supp. L.F. 2-3). These instructions were refused (Tr. 501-505). The self-defense instruction actually given to the jury was as follows.

INSTRUCTION NO. 7

One of the issues in this case is whether the use of force by the defendant against Bill Edwards was in self-defense. In this state, the use of force, including the use of deadly force to protect oneself from harm is lawful in certain situations.

In order for a person lawfully to use force in self-defense, she must reasonably believe she is in imminent danger of harm from the other person. She need not be in actual danger but she must have a reasonable belief that she is in such danger.

If she has such a belief, she is then permitted to use that amount of force which she reasonably believes to be necessary to protect herself.

But a person is not permitted to use deadly force, that is, force which she knows will create a substantial risk of causing death or serious physical

injury, unless she reasonably believes she is in imminent danger of death or serious physical injury.

And, even then, a person may use deadly force only if she reasonably believes the use of such force is necessary to protect herself.

As used in this instruction, the term "reasonable belief" means a belief based on reasonable grounds, that is, grounds which could lead a reasonable person in the same situation to the same belief. This depends upon how the facts reasonably appeared. It does not depend upon whether the belief turned out to be true or false.

On the issue of self-defense in this case, you are instructed as follows:

If the defendant reasonably believed she was in imminent danger of death or serious physical injury from the acts of Bill Edwards and she reasonably believed that the use of deadly force was necessary to defend herself, then she acted in lawful self-defense.

The state has the burden of proving beyond a reasonable doubt that the defendant did not act in lawful self-defense. Unless you find beyond a reasonable doubt that the defendant did not act in lawful self-defense, you must find the defendant not guilty.

As used in this instruction, the term "serious physical injury" means physical injury that creates a substantial risk of death or that causes serious

disfigurement or protracted loss or impairment of the function of any part of the body.

Evidence has been introduced of the reputation of the defendant for being peaceful and law-abiding. You may consider this evidence in determining who was the initial aggressor in the encounter and for no other purpose.

Evidence has been introduced that Bill Edwards had a reputation for being violent and turbulent, and that the defendant was aware of that reputation. You may consider this evidence in determining whether the defendant reasonably believed she was in imminent danger of harm from Bill Edwards.

Evidence has been introduced of the prior relationship between defendant and Bill Edwards including evidence of arguments and acts of violence. You may consider this evidence in determining who was the initial aggressor in the encounter and you may also consider it in determining whether the defendant reasonably believed she was in imminent danger of harm from Bill Edwards.

Evidence has been introduced of acts of violence not involving the defendant committed by Bill Edwards and that the defendant was aware of these acts. You may consider this evidence in determining whether the defendant reasonably believed she was in imminent danger of harm from

Bill Edwards. You may not consider this evidence in determining who was the initial aggressor in the encounter or for any other reason.

Evidence has been introduced of threats made by Bill Edwards against defendant. You may consider this evidence in determining who was the initial aggressor in the encounter.

If any threats against defendant were made by Bill Edwards and were known by or had been communicated to the Defendant, you may consider this evidence in determining whether the defendant reasonably believed she was in imminent danger of harm from Bill Edwards.

You, however, should consider all of the evidence in the case in determining whether the defendant acted in lawful self-defense.

MAI-CR3d 306.06

Plaintiff Prepared

Given 10/24/97 SKG

(Stip. Supp. L.F. 2-4).

During the state's closing argument, the prosecutor argued to the jury that the standard of self-defense is what a reasonable person would believe (Tr. 539). He told them to "read the self-defense instruction," and he emphasized the portions that read "reasonable fear," "form that belief reasonably," "reasonably necessary" and "form a reasonable belief" (Tr. 542-543, 548). He told the jury that a person can only use self-defense if she does not "have other alternatives" and that Larna was legally "required to run and flee" (Tr. 543-544). In the closing part of his

closing argument, he emphasized again that self-defense means *reasonably* believe she is at risk (Tr. 578).

The prosecutor also made the following arguments:

"If you think it doesn't matter to me, what you do in your community, you're wrong" (Tr. 537).

"We're not California, where murder is seemingly not against the law anymore. We're not a society that permits 5,000 other witnesses to come into our community and tell us what life is worth. This is your job. It's your community.

I respectfully suggest that you send a message about what life is worth. Do we send a message to our young people, perhaps many troubled young people who are married, that the courthouse isn't there for their protection, that Judge Griffin and the sheriff aren't there to help them? Do we send that message?

Do we send a message that the laws the Missouri legislature has enacted that will actually remove an abusive spouse from the home and make it crime to go back until a hearing is held? Do we say that's all for naught? Do the taxes we pay to pay the sheriff and build this courthouse go for nothing?" (Tr. 537).

"You're required under Missouri law to run and flee, if the only alternative is deadly force" (Tr. 544).

"Defendant should have called Mr. McFadin not after she shot her husband, but before and said, 'I need help. File the divorce, file an ex parte, do something to help me.'" (Tr. 538).

"The defendant in this case has spent one night in jail. One night in jail, and she has moved freely throughout this community. She has gone throughout the community in her pickup truck that she bought within a week after this death. And if you don't think that has some perception problems for law enforcement in this community, you're wrong. What job are you going to give your young prosecutor if you find the defendant not guilty in this case? What message are you going to send to the young people of this community? That it's okay to shoot a man four times in the back and then come to court with your experts and say, 'oh, it was post-traumatic stress syndrome?' And, bluntly, I'm offended by that" (Tr. 575).

"The defendant just saying, 'he'll kill me, he'll kill me, I was afraid for my life;' those aren't self-proving. There must be some evidence to back that up" (Tr. 539).

"[The murder law] doesn't say it's murder in the second degree unless you made some bad choices by marrying a man that beat you before you were married. It doesn't say it's murder unless you stay with him repeatedly, year after year, enduring the beatings" (Tr. 535).

"I'm here to suggest to you respectfully, because it's your community, that you send a strong message that murder has to be an almost unthinkable resort, that there are many things that ought to be tried first; the police, the ex parte, the sheriff" (Tr. 538).

"What will you say by your verdict? What will we say we've done five years from now, ten years from now, that we all learned to be helpless?" (Tr. 576).

The jury returned a verdict of voluntary manslaughter, and recommended a five year sentence (Tr. 581, L.F. 50). On December 8, 1997, the Honorable Stephen K. Griffin sentenced Larna to five years imprisonment (S.Tr. 3, 44, L.F. 56). Notice of appeal was filed December 17, 1997 (L.F. 58).

On March 28, 2000, the Western District Court of Appeals reversed Larna's conviction on a claim of instructional error. ***State v. Edwards***, ___ S.W.3d ___, No. WD 55243 (Mo. App., W.D., filed May 29, 2001). The state filed an application for transfer, which was granted. ***Id***. It was discovered by the state just before oral argument in this Court that the incorrect self-defense instruction was contained in the legal file. ***Id.*** This Court then retransferred the cause to the Western District Court of Appeals, which again reversed Larna's conviction on May 29, 2001. ***Id.*** The state again sought transfer, which was granted. This appeal follows.

POINTS RELIED ON

I.

The trial court erred in overruling defense counsel's objection to instructing the jury on self-defense using an unmodified version of MAI-CR3d 306.06, because failure to modify the instruction violated Larna Edwards' rights to due process of law and to present a defense, guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that the self-defense instruction failed to follow the substantive law of battered spouse syndrome found in Section 563.033, RSMo 1994, and caselaw interpreting that statute, under which the evidence must be weighed in light of how an otherwise reasonable person who is suffering from battered spouse syndrome would have perceived the situation. The failure to modify the instruction thereby precluded the jury from giving effect to Larna's defense of battered spouse syndrome.

State v. Carson, 941 S.W.2d 518 (Mo. banc 1997);

State v. El Dorado Management Corp., Inc., 801 S.W.2d 401 (Mo. App., E.D. 1990);

State v. Williams, 787 S.W.2d 308 (Mo. App., E.D. 1990);

Eddings v. Oklahoma, 455 U.S. 104 (1982);

U.S. Const., Amends. V, VI and XIV;

Mo. Const., Art. I, Secs. 10 and 18(a);

Sections 563.033 and 563.061, RSMo 1994; and

MAI-CR3d 306.06.

II.

The trial court erred in refusing to submit defendant's proposed instruction B, MAI-CR3d 313.10, submitting the lesser included offense of involuntary manslaughter, because this denied Larna her rights to due process of law and a fair trial, guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that there was evidence from which the jury could conclude that appellant did not knowingly or purposely cause the death of her husband but that she did so recklessly.

State v. Santillan, 948 S.W.2d 574, 576 (Mo. banc 1997);

State v. Hopson, 891 S.W.2d 851 (Mo. App., E.D. 1995);

State v. Miller, 772 S.W.2d 782 (Mo. App., S.D. 1989);

State v. Beeler, 12 S.W.3d 294 (Mo. banc 2000);

U.S. Const., Amends. V, VI and XIV;

Mo. Const., Art. I, Secs. 10 and 18(a);

Sections 556.046.2, 562.016.4, 565.023.1(1) and 565.024.1, RSMo 1994; and

MAI-CR3d 313.10.

III.

The trial court plainly erred in failing to sua sponte instruct the jury to disregard the prosecutor's argument to the jury that:

> **"If you think it doesn't matter to me what you do in your community, you're wrong."**
>
> **"You're required under Missouri law to run and flee, if the only alternative is deadly force."**
>
> **"Defendant should have called Mr. McFadin not after she shot her husband, but before and said, 'I need help. File the divorce, file an ex parte, do something to help me.'"**
>
> **"The defendant in this case has spent one night in jail. One night in jail, and she has moved freely throughout this community. She has gone throughout the community in her pickup truck that she bought within a week after this death. And if you don't think that has some perception problems for law enforcement in this community, you're wrong. What job are you going to give your young prosecutor if you find the defendant not guilty in this case? What message are you going to send to the young people of this community? That it's okay to shoot a man four times in the back and then come to court with your experts and say, "Oh, it was post-traumatic stress syndrome?" And, bluntly, I'm offended by that."**

"The defendant just saying, 'He'll kill me, he'll kill me, I was afraid for my life;' those aren't self-proving. There must be some evidence to back that up."

"[The murder law] doesn't say it's murder in the second degree unless you made some bad choices by marrying a man that beat you before you were married. It doesn't say it's murder unless you stay with him repeatedly, year after year, enduring the beatings."

"I'm here to suggest to you respectfully, because it's your community, that you send a strong message that murder has to be an almost unthinkable resort, that there are many things that ought to be tried first; the police, the ex parte, the sheriff."

"What will you say by your verdict? What will we say we've done five years from now, ten years from now, that we all learned to be helpless?"

because the argument violated Larna's rights to due process of law and a fair trial, in violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that the argument improperly injected the prosecutor's personal opinion, warned the jury that the community would hold it responsible for the verdict if it found Larna not guilty, implied special knowledge and expertise about the facts and the law, and misstated the law.

State v. Thomas, 780 S.W.2d 128 (Mo. App., E.D. 1989);

State v. Ellsworth, 908 S.W.2d 375 (Mo. App., E.D. 1995);

State v. Storey, 901 S.W.2d 886 (Mo. banc 1995);

Newlon v. Armontrout, 885 F.2d 1328 (8th Cir. 1989), ***cert. denied***, 497 U.S. 931 (1991);

U.S. Const., Amends. V, VI and XIV;

Mo. Const., Art. I, Secs. 10 and 18(a); and

Rule 30.20.

IV.

The trial court erred or plainly erred in overruling appellant's motion to suppress and objection during trial to her statement to the police, because admission of the statement violated Larna's right to counsel, in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 18(a) of the Missouri Constitution, in that the statement was made subsequent to her request for counsel and continued interrogation by law enforcement officers was improper once she had invoked her right.

Edwards v. Arizona, 451 U.S. 477 (1981);

Oregon v. Bradshaw, 462 U.S. 1039 (1983);

Arizona v. Roberson, 486 U.S. 675 (1988);

State v. Simon, 680 S.W.2d 346 (Mo. App., S.D. 1984);

U.S. Const., Amends. VI and XIV; and

Mo. Const., Art. I, Sec. 18(a).

ARGUMENT

I.

The trial court erred in overruling defense counsel's objection to instructing the jury on self-defense using an unmodified version of MAI-CR3d 306.06, because failure to modify the instruction violated Larna Edwards' rights to due process of law and to present a defense, guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that the self-defense instruction failed to follow the substantive law of battered spouse syndrome found in Section 563.033, RSMo 1994, and caselaw interpreting that statute, under which the evidence must be weighed in light of how an otherwise reasonable person who is suffering from battered spouse syndrome would have perceived the situation. The failure to modify the instruction thereby precluded the jury from giving effect to Larna's defense of battered spouse syndrome.

On the issue of self-defense, the trial court submitted an unmodified version of the pattern instruction MAI-CR3d 306.06, over defense counsel's objection (Tr.

501-505, Stip. Supp. L.F. 2-4).[5] The unmodified instruction given to the jury was as follows.

INSTRUCTION NO. 7

One of the issues in this case is whether the use of force by the defendant against Bill Edwards was in self-defense. In this state, the use of force, including the use of deadly force to protect oneself from harm is lawful in certain situations.

In order for a person lawfully to use force in self-defense, she must reasonably believe she is in imminent danger of harm from the other person. She need not be in actual danger but she must have a reasonable belief that she is in such danger.

If she has such a belief, she is then permitted to use that amount of force which she reasonably believes to be necessary to protect herself.

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[5] The Court of Appeals treated this issue as preserved. ***State v. Edwards***, ___ S.W.3d ___, No. WD 55243 (Mo. App., W.D., filed May 29, 2001). If this Court finds that trial counsel's objections and his references in the new trial motion were insufficient to preserve this issue, then plain error review is requested. Rule 30.20. Instructional error is plain where the trial court so misdirected or failed to instruct the jury as to cause a manifest injustice or miscarriage of justice. ***State v. Nolan***, 872 S.W.2d 99 (Mo. banc 1994). The error must have "affected the jury's verdict." ***Id.***

But a person is not permitted to use deadly force, that is, force which she knows will create a substantial risk of causing death or serious physical injury, unless she reasonably believes she is in imminent danger of death or serious physical injury.

And, even then, a person may use deadly force only if she reasonably believes the use of such force is necessary to protect herself.

As used in this instruction, the term "reasonable belief" means a belief based on reasonable grounds, that is, grounds which could lead a reasonable person in the same situation to the same belief. This depends upon how the facts reasonably appeared. It does not depend upon whether the belief turned out to be true or false.

On the issue of self-defense in this case, you are instructed as follows:

If the defendant reasonably believed she was in imminent danger of death or serious physical injury from the acts of Bill Edwards and she reasonably believed that the use of deadly force was necessary to defend herself, then she acted in lawful self-defense.

The state has the burden of proving beyond a reasonable doubt that the defendant did not act in lawful self-defense. Unless you find beyond a reasonable doubt that the defendant did not act in lawful self-defense, you must find the defendant not guilty.

As used in this instruction, the term "serious physical injury" means physical injury that creates a substantial risk of death or that causes serious disfigurement or protracted loss or impairment of the function of any part of the body.

Evidence has been introduced of the reputation of the defendant for being peaceful and law-abiding. You may consider this evidence in determining who was the initial aggressor in the encounter and for no other purpose.

Evidence has been introduced that Bill Edwards had a reputation for being violent and turbulent, and that the defendant was aware of that reputation. You may consider this evidence in determining whether the defendant reasonably believed she was in imminent danger of harm from Bill Edwards.

Evidence has been introduced of the prior relationship between defendant and Bill Edwards including evidence of arguments and acts of violence. You may consider this evidence in determining who was the initial aggressor in the encounter and you may also consider it in determining whether the defendant reasonably believed she was in imminent danger of harm from Bill Edwards.

Evidence has been introduced of acts of violence not involving the defendant committed by Bill Edwards and that the defendant was aware of these acts. You may consider this evidence in determining whether the

defendant reasonably believed she was in imminent danger of harm from Bill Edwards. You may not consider this evidence in determining who was the initial aggressor in the encounter or for any other reason.

Evidence has been introduced of threats made by Bill Edwards against defendant. You may consider this evidence in determining who was the initial aggressor in the encounter.

If any threats against defendant were made by Bill Edwards and were known by or had been communicated to the Defendant, you may consider this evidence in determining whether the defendant reasonably believed she was in imminent danger of harm from Bill Edwards.

You, however, should consider all of the evidence in the case in determining whether the defendant acted in lawful self-defense.

MAI-CR3d 306.06

Plaintiff Prepared

Given 10/24/97 SKG

(Stip. Supp. L.F. 2-4).

The instruction conflicted with the substantive law of Missouri, as codified in Section 563.033, RSMo 1994, and the caselaw which has interpreted that statute. Where MAI-CR and the Notes on Use conflict with the substantive law, they are not binding on the trial court. ***State v. Carson***, 941 S.W.2d 518, 520 (Mo. banc 1997). In fact, where the law has been materially altered by statute following the promulgation of an MAI-CR instruction, the trial court *must* modify the

instruction to comply with the change in the law. ***State v. El Dorado Management Corp., Inc.,*** 801 S.W.2d 401, 406 (Mo. App., E.D. 1990).

The substantive law of self-defense was modified by Section 563.033

Section 563.033, RSMo 1994, provides that "Evidence that the actor was suffering from the battered spouse syndrome shall be admissible upon the issue of whether the actor lawfully acted in self-defense or defense of another." By enacting this statute, the legislature intended for the battered spouse to be able to present her defense – including evidence of the abuse and the syndrome that resulted. However, there is no instruction that gives effect to this legislative intent, thus precluding a battered spouse from truly presenting her defense. Neither the pattern self-defense instruction nor that given to Larna's jury gives effect to the substantive law of battered spouse syndrome. Under ***Carson***, the instruction was required to be modified.

Generally, self-defense is a person's right to defend herself against attack. ***State v. Chambers***, 671 S.W.2d 781, 783 (Mo. banc 1984). Four elements are required to justify the use of deadly force in self-defense: (1) an absence of provocation or aggression on the part of the defender; (2) a reasonable belief that deadly force is necessary to protect herself against an immediate danger of death, serious physical injury, rape, sodomy, or kidnapping or serious physical injury through robbery, burglary or arson; (3) a reasonable cause for that belief; and (4) an attempt by the defender to do all within his or her power consistent with his or

her own personal safety to avoid the danger and the need to take a life. Section 563.061; ***Chambers***, 671 S.W.2d at 783. The third element, the reasonable cause for the belief that deadly force is necessary, is viewed from the circumstances as they appeared to the defendant. ***State v. Grier***, 609 S.W.2d 201, 206, n.2 (Mo. App., W.D. 1980). However, the reasonableness of the belief itself, the second element, is determined by an objective test. ***Id***. This means that the right of self-defense is measured against whether a reasonable and prudent person would believe deadly force was necessary. ***See, State v. Epperson***, 571 S.W.2d 260, 265 (Mo. banc 1978), ***cert. denied***, 442 U.S. 909 (1979).

The standard self-defense instruction uses a hypothetical reasonable person as the standard for whether deadly force was necessary to defend oneself. It does not tell the jury to consider what a reasonable person *suffering from battered spouse syndrome* would have thought. The instruction should have been modified to reflect this development in the law, otherwise, Section 563.033 is meaningless. The jury could hear the evidence, and yet be precluded from fully using the evidence during its deliberations. Battered spouse syndrome evidence is admissible in Missouri for precisely that reason: because it explains what might otherwise be inexplicable – why a defendant chose to use deadly force in a situation where a reasonable person would simply leave the relationship. ***State v. Pisciotta***, 958 S.W.2d 185, 189 (Mo. App., W.D. 1998).

In ***State v. Williams***, 787 S.W.2d 308 (Mo. App., E.D. 1990), the Eastern District Court of Appeals agreed. It held that if evidence of battered spouse

syndrome is to have any meaning under the statute, "it must be as a modification of the mental state required of the battered woman. More accurately stated, it is that the syndrome creates a perception in the battered woman *so that as to her the required elements have been met."* 787 S.W.2d at 312 (emphasis added). The Court gave Williams a new trial for the purpose of instructing the jury on self-defense, even though she had established only the absence of provocation element without reference to battered spouse syndrome. ***Id.*** The Court in that case recognized that Section 563.033 modifies the traditional elements of self-defense.

The instruction should have been modified to comply with the change in the substantive law

Larna Edwards was entitled to a modified instruction, in order to properly instruct the jury in her case. The only basis for the submission of a self-defense instruction was the evidence of battered spouse syndrome admitted under the statute. The evidence of abuse was clear and undisputed. Countless witnesses testified to the years of abuse that Larna suffered at the hands of her husband, including watching him beat the children and knowing that he was raping their daughter (Tr. 153, 156, 174, 183, 186, 191, 194, 204, 248-281). Larna's family physician believed that she was a battered woman (Tr. 435). She was diagnosed with post traumatic stress disorder by two psychologists, who believed that she

developed the disorder as a result of her years of abuse (Tr. 462, Supp. Tr. 82, 96).[6]

The self-defense instruction should have been modified to change the traditional "reasonable person" standard to a "reasonable person suffering from battered spouse syndrome," as the Court of Appeals found, or even a "reasonable battered person." ***State v. Edwards***, ***supra***. Other states have modified their standards of self-defense accordingly. In North Dakota, for example, the jury need find only that, from the battered defendant's point of view, she honestly and reasonably believed she was in imminent danger of great bodily harm or death. ***State v. Leidholm***, 334 N.W.2d 811, 818 (N.D. 1983).

A second aspect of the self-defense doctrine on which battered spouse syndrome is probative is the reasonableness of the defendant's subjective belief that she is in danger of the "imminent" use of force by the abuser. In ***State v. Gallegos***, 104 N.M. 247, 719 P.2d 1268, 1273 (Ct. App. 1986), the defendant was the victim of a recurring pattern of abuse in which her ex-husband got drunk, went into the bedroom, called to her to join him, and then beat her. One day when he called Gallegos into the bedroom, she entered with a gun and shot him while he

[6] Dr. Marilyn Hutchinson testified that battered spouse syndrome is a subcategory of the actual psychological diagnosis, which is post traumatic stress disorder; "battered spouse syndrome" is the forensic term for Larna's condition, rather than the psychological one (Supp. Tr. 27, 32).

lay on the bed. He was not threatening her at the time. 719 P.2d at 1272. Gallegos claimed that she knew that a beating would follow – it always had in the past after her ex-husband ordered her into the bedroom. She offered evidence of battered woman syndrome to demonstrate that her perception of and reaction to the recurring pattern of abuse was common among battered women. The trial court admitted the evidence, but rejected her proposed instruction on self-defense, finding that without an obvious threat at the time of the slaying, her ex-husband's prior violent conduct could not support a self-defense instruction. ***Id***. at 1269-1270.

The appellate court held that the trial court erred in refusing to give the defendant's proposed self-defense instruction, finding that the ex-husband's past pattern of behavior was sufficient to justify the defendant's belief that an attack was imminent. ***Id***. at 1272-1273. According to the court, evidence of battered woman syndrome was crucial to establishing that the commencement of the pattern of behavior fit within the definition of "imminence." ***Id***. at 1271.

> Incidents of domestic violence tend to follow predictable patterns. … Remarks or gestures which are merely offensive or perhaps even meaningless to the general public may be understood by the abused individual as an affirmation of impending physical abuse. To require the battered person to await a blatant, deadly assault before she can act in

> defense of herself would … amount to sentencing her to "murder by installment."

Id.

Here, there was similar testimony that Larna's years of abuse made her sensitive to the subtle behaviors that preceded her husband's rage. Recently the pattern of his behavior had changed; he was increasingly paranoid about money, and his violent behavior had increased (Supp. Tr. 90). He had just inflicted upon Larna an unusually painful blow, apparently with a short piece of metal pipe, and she observed a certain "look in his eyes. It was wild or at times, it was just like there was nothing there" (Tr. 280). Prior to the shooting, "he had the look like there was nobody there," which Larna had come to associate with violent episodes (Tr. 280). Dr. Hutchinson described Larna's hyper-vigilance as consistent with most battered women (Supp. Tr. 92). Larna's experience as a battered woman "made her extremely fearful in that moment" (Supp. Tr. 94). In effect, Larna had "the emotions from the previous instances that contributed to the post traumatic stress disorder dumped into this moment in time" (Supp. Tr. 94). Larna had reached her breaking point.

> [R]epeated instances of violence rise to the level of being almost unbearable over and over again. They're right at the edge of, I almost can't stand it anymore. And that, when things get somehow out of sync and a

new plateau, if you will, then sometimes, in fact, that response … is this is unbearable and they can't stand one more incidence of violence.

(Supp. Tr. 100).

Larna was prejudiced by having a jury misinstructed in the law

Without the benefit of an appropriate instruction, the jury was precluded from fully utilizing the lay and expert testimony regarding the decades of violence Larna suffered on the issue of self-defense. There was no mechanism for the jury to give effect to that testimony on the factual issues in the case. ***Eddings v. Oklahoma***, 455 U.S. 104, 110 (1982). The incorrect instruction therefore denied Larna her right to present a defense. In essence, it told the jury to *disregard* Larna's defense of battered spouse syndrome. That the jury heard the evidence does not cure the fact that they were improperly instructed. ***See, State v. Parker***, 617 S.W.2d 83 (Mo. App., E.D. 1981) (failure to give self-defense instruction not harmless where supported by the evidence).

Instead of being properly instructed, Larna's jury was told over and over by the prosecutor to disregard Larna's defense: that battered spouse syndrome should not be considered for self-defense. The prosecutor emphasized all of the common misconceptions about battered persons. First, the prosecutor argued that Larna forfeited her right of self-defense by failing to flee the relationship:

We don't let the situation escalate to a point where we have no alternative, or rather is it more accurate to say to the point where we think we have no alternative.

(Tr. 534).

[The murder law] doesn't say it's murder in the second degree unless you made some bad choices by marrying a man that beat you before you were married. It doesn't say it's murder unless you stay with him repeatedly, year after year, enduring the beatings.

(Tr. 535).

I'm here to suggest to you respectfully, because it's your community, that you send a strong message that murder has to be an almost unthinkable resort, that there are many things that ought to be tried first; the police, the ex parte, the sheriff.

(Tr. 538).

Think of the countless times that she left. One of the sons testified that they packed stuff up in trash bags and left. We know she went to Oregon, Missouri, and that two friends of the family, Dr. Roderick, in fact, went and got her and took her home.

We know that she left for two weeks. We know on the morning that this happened that she went to the post office just minutes before she shot him. She could have drove that car to the sheriff's office. You say that would have put her in further danger, that's not what the evidence suggests.

* * *

She's made choice after choice after choice, just like we all do. Bad choices, unfortunate choices, ones for which I'm sorry that she made. And now, after making all those choices, she wants you to excuse the consequences of those choices.

(Tr. 539-540).

You're required under Missouri law to run and flee, if the only alternative is deadly force. So, you must be in a situation where your life is in danger, your life is in danger, and then and only then, says the instruction, may you use deadly force.

(Tr. 543-544).

Deadly force, only when your life is threatened, or you form a reasonable belief that you're going to suffer serious bodily injury, and only then if there's no alternative to deadly force.

She could have just kept driving that morning when she got the mail. She did that once, remember? … She could have drove to Mr. McFadin's office, could have drove to the sheriff's office. She could have drove to the Tospin home. She could have drove to her son's home. He lives in Cody, Wyoming. She could have got there. She could have asked for help.

(Tr. 547-548). In other words, the prosecutor told the jury that Larna lost the right to defend herself by permitting past incidents of abuse without fleeing the

relationship. Under this argument, she could not under any circumstances satisfy the reasonable person standard set out in the self-defense instruction.

Second, the prosecutor argued that Larna's claim that she was afraid her husband was going to kill her was refuted by the fact that his previous beatings were not fatal, and therefore she had no reason to suspect that this one would be.

> But did those prior beatings amount to serious physical injury? There's no evidence of it. Just coming into court and paying a high priced expert saying you were in fear doesn't make it so.

(Tr. 535).

> There was no evidence that Larna Edwards ever got any medical attention for any of the injuries she had suffered. Not any evidence of it. The injury she claims was so debilitating that occurred sometime around the time of the shooting, no medical treatment. You heard her testify that the blows were always one to two blows, no medical treatment.

(Tr. 538).

> What would a reasonable person believe? That she was in reasonable fear of serious physical injury and that will be defined for you. It's defined as an injury that causes the loss of a use of a limb or disfigures you in some way. A bruise goes away.

(Tr. 539). The jury instruction given on self-defense did not protect Larna from the misconception that domestic violence does not escalate, and that she was unreasonable because she believed this beating would be the last.

Third, the prosecutor argued that Larna's belief that she was in danger was unreasonable. This goes to the very crux of the improper instruction:

> Remember that she, in her own words, said that he was not striking her at the time she shot him. He was not coming at her. The evidence would suggest that he turned to get away. The evidence suggests that there's no reasonable fear of serious bodily injury or death … not being struck on the arm, serious bodily injury or death.

(Tr. 577).

> Oh, it was the look in his eyes. It was the look in his eyes. Is that the license you want to put forth in your verdict, that if someone is angry shoot first, and ask questions later? Shoot four times first, then run to the city and get you a high priced expert?

(Tr. 577).

Unfortunately, each of the prosecutor's arguments had inappropriate support in the instructions. The jury may well have interpreted the self-defense instruction the way the prosecutor told them to – that evidence of battered spouse syndrome could not be relied upon to resolve the issues raised. In essence, the prosecutor's misunderstanding indicated how difficult it is for lay person jurors to understand this complex issue – especially where they are given a confusing and misleading instruction on self-defense to guide them.

Conclusion

As the Court of Appeals found, it is "readily apparent that Instruction Number 7 failed to properly instruct the jury." ***State v. Edwards***, ***supra***. The instruction restricted the jury's consideration of the evidence of acts of violence committed by Bill to determine who was the initial aggressor in the encounter and whether Larna "reasonably believed she was in imminent danger of harm from Bill Edwards." The instruction did not allow the jury to consider previous acts of violence or threats in assessing whether Larna could have retreated from the situation or whether she had reasonable cause to believe she was in danger of death or serious physical injury. Furthermore, "reasonable belief" for purposes of the instruction was defined as "a belief based on reasonable ground, that is, grounds which could lead a reasonable person in the same person in the same situation to the same belief" (Stip. Supp. L.F. 2-4).

Therefore, the jury was told by the evidence that Larna was terror-stricken and had a distorted mental state based on long years of physical and emotional abuse which would cause her to perceive and react differently to events than would the average person. But the instruction told the jurors, in effect, to disregard that evidence. It directed the jurors to determine whether Larna had a reasonable belief that she was in imminent danger based on what a reasonable and prudent person would think. Obviously, a reasonable a prudent person does not perceive and react in the same way that an otherwise reasonable and prudent person who is suffering from battered spouse syndrome based on a prolonged

history of physical abuse would perceive and react. Thus, the instruction precluded the jury from making a determination as to whether Larna was suffering from battered spouse syndrome and, if so, whether she had a reasonable belief that she was in imminent danger based on what an otherwise reasonable and prudent person who is suffering from battered spouse syndrome would think.

Instruction Number 7 did not following the existing substantive law as expressed in Section 563.033 and construed in ***Williams, supra***. It should have been modified, and failure to do so requires reversal of Larna's conviction.

II.

The trial court erred in refusing to submit defendant's proposed instruction B, MAI-CR3d 313.10, submitting the lesser included offense of involuntary manslaughter, because this denied Larna her rights to due process of law and a fair trial, guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that there was evidence from which the jury could conclude that appellant did not knowingly or purposely cause the death of her husband but that she did so recklessly.

An accused is entitled to an instruction on any theory of defense which the evidence tends to establish. ***State v. Arbuckle***, 816 S.W.2d 932, 935 (Mo. App., S.D. 1991). In this case, appellant requested an instruction submitting the lesser included offense of involuntary manslaughter to the jury:

INSTRUCTION NO. B (REFUSED)

If you do not find the defendant guilty of voluntary manslaughter, you must consider whether she is guilty of involuntary manslaughter.

If you find and believe from the evidence beyond a reasonable doubt;

First, that on or about July 24, 1996, in the County of Caldwell, State of Missouri, the defendant caused the death of Bill Edwards by shooting him, and

Second, that the defendant recklessly caused the death of Bill Edwards, and Third, that defendant did not act in lawful self-defense as submitted in

instruction number _____,

then you will find the defendant guilty of involuntary manslaughter.

However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of involuntary manslaughter.

In determining whether the defendant recklessly caused the death of Bill Edwards, you are instructed that a person acts recklessly as to causing the death of another person, when there is a substantial and unjustifiable risk, he will cause death and he consciously disregards that risk, and such disregard is a gross deviation from what a reasonable person would do in the circumstances.

If you do find that defendant guilty of involuntary manslaughter, you will assess and declare one of the following punishments;

1. Imprisonment for a term of years fixed by you, but no less than 1 year, and not to exceed 7 years.

2. Imprisonment in the County Jail for a term fixed by you, but not to exceed 1 year.

3. Imprisonment for a term of years fixed by you, but not less than one year, and not to exceed 7 years, and in addition a find, the amount to be determined by the Court.

4. Imprisonment in the County Jail for a term fixed by you, but not to exceed one year and in addition a fine, the amount to be determined by the Court.

5. No imprisonment but a find, in the amount to be determined by the Court.

The maximum fine which the Court may impose is $5,000.

(Supp. L.F. 2-3). The court refused the instruction (Tr. 502-503). The facts of this case justify allowing the jury to consider involuntary manslaughter.

Section 556.046.2 provides: "The 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." Involuntary manslaughter under Section 565.024.1 occurs if the defendant "recklessly causes the death of another person." Section 562.016.4 provides:

> A person "acts recklessly" or is reckless when he consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation.

Appellant was convicted of voluntary manslaughter, which requires that the defendant act "knowingly" or "purposely." Section 565.023.1(1), RSMo 1994. Appellant contends that the submission of involuntary manslaughter was required in this case because there was evidence from which the jury could conclude that

Larna did not intend to kill her husband, but fired recklessly, without aiming, in a blind hysteria. Further, there was expert testimony that she suffered from an impaired mental state, by reason of years of domestic violence inflicted upon her by her husband, which deprived her of the awareness of emotional and perceptual information which a reasonable person would have used under similar circumstances (Tr. 485). As a result of her mental condition, Larna was not capable of conforming her conduct to the requirements of the law (Tr. 497).

In reviewing the decision of the trial court to refuse a lesser-included offense instruction, this Court must view the evidence in the light most favorable to giving the instruction. ***State v. Saffold***, 563 S.W.2d 127, 129 (Mo. App., K.C.D. 1978). The defense is not required to produce affirmative proof negating one or more elements of the greater offense; the question is whether "the evidence, in fact or by inference, would provide a basis for both an acquittal of [the greater offense] and a conviction of [the lesser offense]." ***State v. Moore***, 729 S.W.2d 239, 240 (Mo. App., E.D. 1987). The Supreme Court has made it clear that "if there is any doubt upon the evidence, the trial court should resolve any doubts in favor of instructing on the lower degree of the crime, leaving it to the jury to decide which of two or more grades of an offense, if any, the defendant is guilty." ***State v. Santillan***, 948 S.W.2d 574, 576 (Mo. banc 1997).

The evidence in this case showed that Mr. Edwards had inflicted a painful blow on Larna immediately prior to the shooting. Larna then reached for the gun, but testified that she did not recall firing the fatal shots, stating, "There's a lot of

this stuff that I really can't remember what happened, but I reached for the gun" (Tr. 266). She further testified that she had "no idea" how many times she shot him or where she hit him. ***Id.*** The prosecutor drew out additional testimony from Larna that she did not intend to shoot her husband:

Q. All four of those shots hit your husband?

A. I have no idea.

Q. So, when you suggest to this Court and jury that you closed your eyes and –b

A. I didn't say I closed my eyes.

Q. You said you just fired, right?

A. Yes, sir.

Q. You just fired?

A. Yes, sir.

Q. And all four shots hit your husband?

A. I don't know.

(Tr. 301). Larna told Deputy Roger Porter on the day of the incident that when her husband hit her, she "just snapped" (Tr. 206-207).

In addition to Larna's testimony that at the time of the shooting she did not know if any of the bullets struck her husband, mental health experts testified that her mental capacity was substantially impaired by years of physical abuse. Dr. John Howell testified that Larna was in a dissociative state at the time of the incident:

> This neuropsychological process served to defend her from the overwhelming fear. It also deprived her of awareness of emotional and perceptual information which a reasonable person would have used in considering the full meaning and import of her actions. This dissociative episode was an acute response to a specific threatening situation and appears to have resolved following the resolution of that threatening situation.

(Tr. 485). He concluded that as a result of her mental disease, Larna was not capable of conforming her conduct to the requirements of the law (Tr. 497). Dr. Marilyn Hutchinson found that at the time of the event, Larna was suffering from posttraumatic stress disorder (Supp. Tr. 82). Her testimony also supports the proposition that Larna did not intend to kill her husband:

> One of the things she relayed to me was that she has almost no memory for different aspects of it, which is consistent with posttraumatic stress disorder. One of the criteria for posttraumatic stress disorder is amnesia for some significant aspects of the trauma. She is amnesic for this – some portions of this particular instance.
>
> And that, to me, was important in that PTSD was present in that moment, that it was active and was available to her unconscious, the things that had happened before had ended up almost overwhelming her emotionally.

(Supp. Tr. 94).

The totality of the evidence strongly supports a case for involuntary manslaughter, especially in light of expert testimony that Larna's mental capacity was substantially impaired. ***See, e.g., State v. Hopson***, 891 S.W.2d 851, 853 (Mo. App., E.D. 1995), finding that the trial court should have instructed the jury on the lesser offense of involuntary manslaughter where the victim had assaulted the defendant in the past, and the defendant drew a firearm and discharged it toward the victim while "in an impaired condition from the alcohol and drugs." Like Hopson, Larna denied an intent to kill, and was emotionally distraught from the cumulative effect of years of physical abuse. From the totality of the evidence, including Larna's testimony that she just snapped, and that she did not know whether or how many times she shot her husband, the jury could find 'that a person in an impaired condition who intends to fire the weapon as a warning in a confined area is acting in reckless fashion as defined in the statute." ***Id. Also see, State v. Miller***, 772 S.W.2d 782 (Mo. App., S.D. 1989) (finding that involuntary manslaughter instruction was appropriate where defendant, though claiming that he acted in self-defense, "essentially covered his eyes and retreated while firing all of the rounds in his gun"), ***State v. Vincent***, 785 S.W.2d 805 (Mo. App., S.D. 1990), and ***State v. Israel***, 872 S.W.2d 647, 648 (Mo. App., E.D. 1994) (finding the court should have instructed on involuntary manslaughter where defendant had "the right to fire [the] pistol in self defense [but did] it recklessly").

In ***State v. Beeler***, 12 S.W.3d 294 (Mo. banc 2000), this Court reversed the defendant's conviction of involuntary manslaughter. The Court made clear that a

finding of recklessness is not inconsistent with the defense of self-defense. ***Id.*** at 299.

The evidence demonstrates that a reasonable jury could have a reasonable doubt that Larna knowingly and purposely killed her husband. The trial court clearly erred in failing to give the jury the option of considering involuntary manslaughter. Precluding the jury from considering involuntary manslaughter obviously prejudiced Larna. Although she was charged with murder in the second degree, the jury found Larna guilty of voluntary manslaughter and gave her the lowest sentence possible (Tr. 581). The jury clearly was moved by the compelling evidence of over four decades of serious physical abuse which Larna had endured, but the instructions gave them insufficient direction for giving effect to that evidence. Larna's conviction should therefore be reversed, and the case remanded for a new trial with further directions to submit an instruction on involuntary manslaughter.

III.

The trial court plainly erred in failing to sua sponte instruct the jury to disregard the prosecutor's argument to the jury that:

> **"If you think it doesn't matter to me what you do in your community, you're wrong."**
>
> **"You're required under Missouri law to run and flee, if the only alternative is deadly force."**
>
> **"Defendant should have called Mr. McFadin not after she shot her husband, but before and said, 'I need help. File the divorce, file an ex parte, do something to help me.'"**
>
> **"The defendant in this case has spent one night in jail. One night in jail, and she has moved freely throughout this community. She has gone throughout the community in her pickup truck that she bought within a week after this death. And if you don't think that has some perception problems for law enforcement in this community, you're wrong. What job are you going to give your young prosecutor if you find the defendant not guilty in this case? What message are you going to send to the young people of this community? That it's okay to shoot a man four times in the back and then come to court with your experts and say, "Oh, it was post-traumatic stress syndrome?" And, bluntly, I'm offended by that."**

"The defendant just saying, 'He'll kill me, he'll kill me, I was afraid for my life;' those aren't self-proving. There must be some evidence to back that up."

"[The murder law] doesn't say it's murder in the second degree unless you made some bad choices by marrying a man that beat you before you were married. It doesn't say it's murder unless you stay with him repeatedly, year after year, enduring the beatings."

"I'm here to suggest to you respectfully, because it's your community, that you send a strong message that murder has to be an almost unthinkable resort, that there are many things that ought to be tried first; the police, the ex parte, the sheriff."

"What will you say by your verdict? What will we say we've done five years from now, ten years from now, that we all learned to be helpless?"

because the argument violated Larna's rights to due process of law and a fair trial, in violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that the argument improperly injected the prosecutor's personal opinion, warned the jury that the community would hold it responsible for the verdict if it found Larna not guilty, implied special knowledge and expertise about the facts and the law, and misstated the law.

In the face of overwhelming evidence that Bill Edwards had abused appellant for more than four decades prior to his death, and that he was the initial aggressor when Larna shot him, and to attempt to obscure the significance of unrefuted evidence that Larna suffers from posttraumatic stress disorder and battered woman syndrome, the prosecutor in this case resorted to improper, inflammatory argument to persuade the jury to reject appellant's claim that she acted in self-defense.

In his opening argument, the prosecutor injected his personal opinion that appellant should be convicted of murder, stating, "If you think it doesn't matter to me, what you do in your community, you're wrong" (Tr. 537). This argument was followed by arguments intended to ridicule the defense of battered woman syndrome, and arguing that the legislature intended the Adult Abuse Act to supersede the statutory authorized use of the defense:

> We're not in California, where murder is seemingly not against the law anymore. We're not a society that permits 5,000 other witnesses to come into our community and tell us what life is worth. This is your job. It's your community.
>
> I respectfully suggest that you send a message about what life is worth. Do we send a message to our young people, perhaps many troubled young people who are married, that the courthouse isn't there for their protection, that Judge Griffin and the sheriff aren't there to help them? Do we send that message?

> Do we send a message that the laws the Missouri legislature has enacted that will actually remove an abusive spouse from the home and make it crime to go back until a hearing is held? Do we say that's all for naught? Do the taxes we pay to pay the sheriff and build this courthouse go for nothing?

(Tr. 537). The prosecutor then argued that a battered woman should use deadly force only as "an almost unthinkable last resort, that there are many things that ought to be tried first; the police, the ex parte, the sheriff" (Tr. 538). He told the jury, "You're required under Missouri law to run and flee, if the only alternative is deadly force. So, you must be in a situation where your life is in danger, your life is in danger. And then and only then . . . may you use deadly force . . ." (Tr. 544-545). In the closing half of his argument, the prosecutor stated:

> The defendant in this case has spent one night in jail. One night in jail, and she has moved freely throughout the community. She has gone throughout the community in her pickup truck that she bought within a week after this death. And if you don't think that has some perception problems for law enforcement in this community, you're wrong. What job are you going to give your young prosecutor if you find the defendant not guilty in this case? What message are you going to send to the young people of this community? That it's okay to shoot a man four times in the back and then

come to court with your experts and say, "Oh, it was post-traumatic stress syndrome?" And, bluntly, I'm offended by that.

(Tr. 575).

These arguments were improper because they injected many improper factors into the jury's consideration, including the prosecutor's personal opinion and expertise, the expectations of local law enforcement, appealed to the fear and prejudices of the jury, misstated the law, and asked the jury to divine the intent of the legislature in applying the battered woman defense. Further, the prejudicial effect of these arguments are compounded by the failure of trial counsel to object, and the failure of the trial court to take any protective or curative measures whatsoever.

A prosecutor may not argue to the jury that he has personal opinions, knowledge or expertise about the case, ***State v. Jones***, 604 S.W.2d 665 (Mo. App., E.D. 1980); ***State v. Bramlett***, 647 S.W.2d 820 (Mo. App., W.D. 1983), nor may the prosecutor challenge the jury on how they will account to the community if they find the defendant not guilty. ***State v. Thomas***, 780 S.W.2d 128 (Mo. App., E.D. 1989). The obvious problem with such argument is that it is testimonial in nature, and implies that law enforcement has special knowledge which is not before the jury, and that the jury should be guided by the expertise of law enforcement – and not the evidence – in arriving at a verdict. ***State v. Ellsworth***, 908 S.W.2d 375 (Mo. App., E.D. 1995). A prosecutor's statement of personal opinion or belief is improper; in essence, such argument attempts to put before the

jury "facts" which are outside the record. ***State v. Storey***, 901 S.W.2d 886, 900 (Mo. banc 1995). In ***Storey***, this Court observed:

> A prosecutor arguing facts outside the record is highly prejudicial. . . . . A prosecutor's assertions of personal knowledge . . . are "apt to carry much weight against the accused when they should carry none" because the jury is aware of the prosecutor's duty to serve justice, not just win the case. Berger v. United States, 295 U.S. 78, 88, 79 L.Ed. 1314, 55 S.Ct. 629 (1935).

901 S.W.2d at 901. The Court explained that "this form of argument essentially turns the prosecutor into an unsworn witness not subject to cross-examination. The error is compounded because the jury believes – properly – that the prosecutor has a duty to serve justice, not merely to win the case." ***Id.***

The prosecutor also argued that the defendant's own testimony must be corroborated by other evidence, thereby improperly shifting the burden of proof to the defense:

> The defendant just saying, 'He'll kill me, he'll kill me, I was afraid for my life; those aren't self-proving. *There must be some evidence to back that up*.

(Tr. 539) (emphasis added). There is no requirement in the law that the defendant's testimony on any subject must be independently corroborated. Nevertheless, the prosecutor blatantly violated the principle of law that the Due Process Clause requires that the accused be presumed innocent and that the state

bear the burden of proving each and every element of its case beyond a reasonable doubt. ***Coffin v. United States***, 156 U.S. 432 (1895). Trial error which has the effect of relieving the state of its burden of persuasion beyond a reasonable doubt denies the defendant due process of law. ***Francis v. Franklin***, 471 U.S. 307 (1985).

The argument in this case is improper because it commits every sin condemned by the Missouri Supreme Court. The prosecutor made a blatant suggestion that "law enforcement" would have an adverse perception of a verdict favorable to Larna. He repeatedly personalized himself and law enforcement to the jury. Although trial counsel made no attempt to protect his client from the prosecutor's inflammatory argument, his failure does not diminish the need for this Court to remedy the error. The absence of any curative measures on the part of the trial court increases the prejudicial effect of the prosecutor's improper argument. ***Newlon v. Armontrout***, 885 F.2d 1328, 1337-1338 (8th Cir. 1989), ***cert. denied***, 497 U.S. 931 (1991) (finding prejudicial constitutional error where "defense counsel did not cure the prosecutor's error . . . by objecting" and "the trial judge made no comment sua sponte to the jury and issued no curative instruction . . ."). ***Accord, Antwine v. Delo***, 54 F.3d 1357, 1364 (8th Cir. 1995) (finding trial counsel ineffective for failing to object to the prosecutor's improper closing argument).

Improper closing argument has been remedied on appeal as plain error under Missouri Rule 30.20. Missouri's plain error rule is "particularly broad and

generous." ***State v. Ervin***, 835 S.W.2d 905 (Mo. banc 1992), ***cert. denied***, 507 U.S. 954 (1993).

Larna was prejudiced by the error in this case. The jury rejected her claim of self-defense, even though Mr. Edwards had a history of assaultive and threatening behavior toward appellant and others, even though Mr. Edwards was considerably larger than appellant, and even though the shooting came on the heels of painful blows inflicted upon Larna by her husband. There is a reasonable probability that the prosecutor's unchecked misconduct affected the outcome of the trial, and so egregiously infected the jury's deliberation as to violate Larna's right to due process of law. ***Donnelly v. DeChristoforo***, 416 U.S. 637 (1974). This Court should therefore reverse Larna's conviction and remand the case for a new trial.

IV.

The trial court erred or plainly erred in overruling appellant's motion to suppress and objection during trial to her statement to the police, because admission of the statement violated Larna's right to counsel, in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 18(a) of the Missouri Constitution, in that the statement was made subsequent to her request for counsel and continued interrogation by law enforcement officers was improper once she had invoked her right.

Larna was arrested at the scene of her husband's shooting and transported to the sheriff's office, where, less than an hour after her husband's death, Caldwell County Deputy Roger Porter interrogated her about the incident. Deputy Porter described Larna as "crying" and "emotionally upset," so that he had to wait for her to compose herself, prior to the interrogation (Tr. 219). The audiotape of her questioning reflects that at the outset, she invoked her right to counsel:

ROGER: Larna, this is a Miranda warning and waiver. You've read this Miranda warning?

LARNA: Yes, sir.

ROGER: And, you have waived your rights?

LARNA: Yes, sir.

ROGER: And are willing to talk to me?

LARNA: Yes, sir. I will have a lawyer.

ROGER: You want a lawyer?

LARNA: I will have one. I can afford one.

ROGER: Ok, but do you want to talk to me now? and let me know what happened?

LARNA: I want Gene McFadden from Gallatin.

ROGER: Ok.

LARNA: He's been a long time family friend.

ROGER: -- Are you willing to talk to me now?

LARNA: I can't tell you any different that I would tell him. And I'm not lying about anything.

ROGER: Ok, do you want to talk to me?

LARNA: What?

ROGER: Do you want to tell me what happened?

LARNA: Yes, I'll tell you what happened.

(L.F. 28, Tr. 213). In spite of Larna's request for counsel, the interrogation continued unabated, and without clarification of her statements about Mr. McFadden. Only at the end of Larna's detailed statement discussing the shooting death of her husband did Deputy Porter attempt to address, through leading questions, Larna's desire for counsel.

Trial counsel objected to the admission of Larna's statement on the grounds that it was taken in violation of her right under the federal and state constitutions because the interrogation continued in spite of her emotionally distraught

condition and her request for counsel (Tr. 191). Counsel's objection was overruled, and the statement was admitted into evidence (Tr. 191).

This Court is obligated to determine whether, under the totality of the circumstances, Larna's statement was obtained in a manner compatible with the requirements of the constitution. ***Miller v. Fenton***, 474 U.S. 104, 112 (1985).

> The admissibility of a confession turns as much on whether the techniques for extracting the statement, as applied to this suspect, are compatible with a system that presumes innocence and assures that a conviction will not secured by inquisitorial means as on whether the defendant's will was in fact overborne.

474 U.S. at 116. The standard of review does not change when the inquiry shifts from the voluntariness of the statement to the voluntariness of an asserted ***Miranda***[7] waiver. ***Collazo v. Estelle***, 940 F.2d 411 (9th Cir. 1991) (en banc). The Supreme Court has made it clear that:

> The inquiry whether a waiver is coerced has to distinct dimensions. First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the "totality of the

[7] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

> circumstances surrounding the interrogation" revealed both an uncoerced choice and the requisite level of comprehension may a court properly conclude that ***Miranda*** rights have been waived.

Colorado v. Spring, 479 U.S. 564, 573 (1987) (quoting ***Moran v. Burbine***, 475 U.S. 412, 421 (1986)).

The continued interrogation of Larna in the face of her request for counsel, without further clarification of her request, is a textbook violation of ***Edwards v. Arizona***, 451 U.S. 477 (1981). That case made it clear beyond doubt that "an accused . . . , having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." 451 U.S. 484-485. The goal of the court in ***Edwards*** was "to protect an accused in police custody from being badgered by police officers . . . ," ***Oregon v. Bradshaw***, 462 U.S. 1039, 1044 (1983). The Supreme Court explained that "to a suspect who has indicated his inability to cope with the pressures of custodial interrogation by requesting counsel, any further interrogation without counsel having been provided will surely exacerbate whatever compulsion to speak the suspect may be feeling." ***Arizona v. Roberson***, 486 U.S. 675, 686 (1988). Thus, "If a suspect believes that he is not capable of undergoing such questioning without advice of counsel, then it is presumed that any subsequent waiver that has come at the authorities' behest, and not at the suspect's own instigation, is itself the produce of

the 'inherently compelling pressures' and not the purely voluntary choice of the suspect." 486 U.S. at 681.

The prosecution in this case justified the continued interrogation, after Larna's request for counsel, by claiming the request was not "unambiguous and unequivocal" (L.F. 191). When asked if she wanted to talk to police, Larna replied, "Yes, sir. I will have a lawyer." Deputy Porter asked her if she wanted a lawyer, to which she replied, "I can afford one" (L.F. 22, Tr. 204-205). The officer at that point attempted to direct the questioning to the event rather than clarify her request for counsel, stating, "Okay, but do you want to talk to me now? And let me know what happened?" Larna replied, "I want [attorney] Gene McFadin from Gallatin." Without discussing Larna's right to have her counsel present during questioning, Deputy Porter persisted in directing his questioning toward the death of Larna's husband. There was no further attempt to clarify Larna's right to counsel until the very end of her tape recorded statement (L.F. 28, Tr. 213). By that time, the cat was out of the bag.

The state has the burden of proving by preponderance of the evidence that the defendant declined to invoke her right to speak with an attorney and voluntarily consented to questioning. ***State v. Christian***, 604 S.W.2d 758 (Mo. App. 1980); ***accord, State v. Hughes***, 596 S.W.2d 723, 726 (Mo. banc 1980); ***State v. Olds***, 569 S.W.2d 745, 751 (Mo. banc 1978). The Supreme Court has made it very clear that "invocation and waiver are entirely distinct inquiries, and the two must not be blurred by merging them together." ***Smith v. Illinois***, 469

U.S. 91, 98 (1984). Waiver cannot be established by "showing only that [the accused] responded to further police-initiated custodial interrogation." ***Edwards v. Arizona***, 451 U.S. at 484.

At the time of her interrogation, Larna was extremely upset. She had a large, painful bruise on her arm inflicted by the decedent. In the face of her expressed desire for Gene McFadin – worded in the present tense – the subsequent questioning was obviously designed to finesse, rather than clarify, her desire for counsel during the interrogation. Larna testified that she gave the statement to Deputy Porter because "I thought I had to" (Tr. 299-300). The record establishes that after Larna made her desire for counsel known, Deputy Porter did not advise her of her right to suspend the interrogation until counsel could be present. Instead, Porter asked the same question, three times, without referring to Larna's right to counsel (L.F. 22).[8]

Trial counsel omitted this ground for relief from his motion for new trial. Plain error review, however, is warranted, where as here, admission of the

[8] Porter's first question, "You want a lawyer?" elicited an affirmative response (L.F. 22). The entirety of Porter's subsequent questioning was, "Okay, but do you want to talk to me now? And let me know what happened? Are you willing to talk to me now? Okay, do you want to talk to me? Do you want to tell me what happened?" (L.F. 22). Porter never touched upon the subject of Larna's right or desire to have counsel after she made her wishes known.

statement affects substantial rights. ***See***, ***State v. Simon***, 680 S.W.2d 346, 349 (Mo. App., S.D. 1984).

For the foregoing reasons, appellant's conviction should be reversed and the cause remanded with directions to suppress Larna's statement and conduct a new trial.

CONCLUSION

For the foregoing reasons, appellant respectfully requests that this Court reverse her conviction and remand for a new trial.

Respectfully submitted,

_____
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Certificate of Compliance and Service

I, Ellen H. Flottman, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06 and Special Rule 1(b). The brief was completed using Microsoft Word, Office 2000, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 16,265 words, which does not exceed the 31,000 words allowed for an appellant's brief.

The floppy disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using a McAfee VirusScan program, which was updated in September, 2001. According to that program, the disks provided to this Court and to the Attorney General are virus-free.

Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were mailed, postage prepaid this _____ day of October, 2001, to Shaun Mackelprang, Assistant Attorney General, P.O. Box 899, Jefferson City, Missouri 65102-0899.

_____
Ellen H. Flottman