No. 83782

IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,

Respondent,

v.

LARNA LUE EDWARDS,

Appellant.

Appeal from the Circuit Court of Caldwell County, Missouri
43rd Judicial Circuit, Division 2
The Honorable Stephen K. Griffin, Judge

RESPONDENT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

This appeal is from a conviction of voluntary manslaughter, § 565.023, RSMo 1994, obtained in the Circuit Court of Caldwell County, the Honorable Stephen K. Griffin presiding. For that offense, appellant was sentenced to five years in the Missouri Department of Corrections.

On May 29, 2001, the Missouri Court of Appeals, Western District, reversed appellant's conviction and remanded the case for a new trial, holding that appellant's jury had not been properly instructed on the issue of battered spouse syndrome as it pertains to self-defense. Pursuant to Supreme Court Rule 83.04, this Court granted transfer on August 21, 2001. This Court has jurisdiction. Article V, § 10, Missouri Constitution (as amended 1982).

STATEMENT OF FACTS

Appellant, Larna Lue Edwards, was charged by information with murder in the second degree, § 565.021.1.(1), RSMo 1994 (L.F. 1). After a trial by jury, she was found guilty of the lesser offense of voluntary manslaughter, § 565.023.1.(1), RSMo 1994 (L.F. 50). Appellant does not contest the sufficiency of the evidence. Viewed in the light most favorable to the verdict, the facts were as follows:

Appellant was married to Bill Edwards, the victim, for about forty-three years (Tr. 245, 248). Over the course of their marriage, the victim physically and verbally abused appellant and their three children (Tr. 245-265, 270-272, 276-283, 333-347, 355-361, 380-384, 387).[1] The victim also sexually abused their daughter (Tr. 337-339).

On July 23, 1996, appellant and the victim went to a car dealership in Kansas City, Missouri, and agreed to buy a truck from Randy Curnow (Tr. 35, 205). As appellant and the victim drove home, however, the victim started an argument about the truck they had just decided to purchase (Tr. 205, 244). The victim accused appellant of lying and he said that they did not have the money to buy the truck (Tr. 205).

The argument continued after they arrived home (Tr. 205). The victim pushed appellant

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[1] Throughout her statement of facts, the appellant recites various "facts" that were merely hearsay statements that experts relied upon in reaching their conclusions. Those hearsay statements, therefore, should only be considered to the extent that they support or undermine the experts' opinions.

and slapped her, but eventually, appellant was able to take a bath and go to bed (Tr. 205-206, 245). When she went to bed, appellant was scared, because she "didn't know if [she]'d ever wake up" (Tr. 206, 245). She had felt that fear many times over the course of their marriage (Tr. 245).

The next day, July 24, 1996, at about 6:15 a.m., the victim hit appellant again, stopping her wristwatch and knocking off her glasses (Tr. 206, 252). Then, after appellant had fixed breakfast and gone to the post office, appellant and the victim went to "The Country Store," a store that they owned and operated (Tr. 206, 253). At the store, the victim renewed the argument about the truck and accused appellant of lying (Tr. 206-207).

Appellant raised her arm to ward off a blow, and the victim hit appellant very hard on the arm (Tr. 207, 253). The blow was very forceful, and appellant thought that the victim had broken her arm (Tr. 254). Until that blow, appellant was "all right," but then she saw the look in the victim's eyes, and she "knew one of [them] was not going to walk out of that store" (Tr. 254).[2]

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[2] Appellant claims in her Statement of Facts, and in Point I, that the victim hit her "with an object, apparently a metal pipe" (App.Sub.Br. 11, 46). This is merely a speculative assertion. Appellant did not testify that she was hit with an object; rather, at trial, she said that she did not know if she had been hit with an object, and she acknowledge that in her statement to police she had said that appellant hit her with his fist (Tr. 275). Furthermore, appellant testified that when she shot the victim immediately after the blow, the victim had nothing in

At that point, appellant "snapped" or "cracked" or "lost it" (Tr. 207-208, 211). She retrieved a .38 caliber handgun that they kept at the store, and she pointed it at the victim (Tr. 208-209). The victim saw the gun and said, "You Goddamn son-of-a-bitch" (Tr. 281). Appellant then shot the victim four times from a distance of about five feet (Tr. 65-76, 207-209, 266). All four bullet wounds went from back to front, indicating that the victim had not been directly facing appellant when she fired the gun (Tr. 95-96, 107).

After shooting the victim, appellant called her son, and eventually the police arrived on the scene (Tr. 48, 130). While at the scene, appellant admitted to shooting her husband (Tr. 179). Appellant was taken to the sheriff's office, and, after executing a Miranda rights waiver, appellant gave a statement and again confessed to shooting her husband (Tr. 186-188, 203-214)

At trial, appellant testified in her own defense (Tr. 242). Appellant testified that the victim had verbally and physically abused her throughout their married life (Tr. 245-265, 270-272, 276-283). Appellant also testified that she shot the victim in self-defense because she "knew that he was going to kill [her]" (Tr. 254-255). Appellant offered the testimony of her three children, who testified that they had been abused by the victim (Tr. 333-347, 355-361, 380-384, 387). Several friends and neighbors, including appellant's doctor, testified that they had seen bruises on appellant's arms or face, or that they had seen the victim commit acts of violence toward appellant (Tr. 411, 413-417; Supp.Tr. 153, 156, 165, 174, 176, 187, 191, 194,

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his hands (Tr. 317).

205). John Howell, a psychologist, testified that appellant had been suffering from post-traumatic stress disorder, that appellant also suffered from a dissociative disorder, and that appellant "was acting in self defense when she shot [the victim]" (Tr. 471-483). Marilyn Hutchinson, another psychologist, testified extensively about battered spouse syndrome, offered her conclusion that appellant suffered from the syndrome, and explained how the syndrome had affected appellant (Supp.Tr. 24-100).

The jury found appellant guilty of voluntary manslaughter (L.F. 50; Tr. 581). Thereafter, appellant was sentenced to five years in the Missouri Department of Corrections (L.F. 56). This appeal followed.

On appeal, the Court of Appeals, Western District, reversed and remanded, holding that the jury had not been properly instructed on the issue of battered spouse syndrome as it related to appellant's claim of self-defense. State v. Edwards, No. WD55243 (Mo.App. W.D. March 28, 2000). On May 17, 2000, respondent filed an application for transfer, and on June 27, 2000, this Court granted transfer.

Just prior to oral argument in this Court, respondent discovered that Instruction No. 7, the self-defense instruction that appellant had included in the legal file, was not the instruction that had been given to the jury. Respondent moved to extend the submission date so that a certified copy of the correct instruction could be submitted to the Court in a supplemental legal file. This Court ordered the parties to prepare a stipulated supplemental legal file containing the correct instruction or to advise the Court otherwise if the parties were unable to do so.

On November 7, 2000, the parties filed a stipulated supplemental legal file, which contained the self-defense instruction that had actually been submitted to the jury at trial. Then, on December 6, 2000, this Court retransferred the case to the Court of Appeals for further proceedings in light of the supplemented record on appeal.

On May 29, 2001, the Court of Appeals again reversed and remanded appellant's case, again holding that the trial court erred in submitting the self-defense instruction. State v. Edwards, No. WD55243 (Mo.App. W.D. May 29, 2001). Respondent again sought transfer, and, on August 21, 2001, this Court again granted transfer. Thus, this appeal is currently before this Court.

POINTS RELIED ON

I.

THE TRIAL COURT DID NOT PLAINLY ERR IN SUBMITTING INSTRUCTION NO. 7, THE SELF-DEFENSE INSTRUCTION, BECAUSE THE INSTRUCTION PROPERLY INSTRUCTED THE JURY ON BATTERED SPOUSE SYNDROME, IN THAT IT EXPLICITLY TOLD THE JURY TO CONSIDER EVIDENCE RELATED TO BATTERED WOMAN SYNDROME IN DETERMINING WHO WAS THE INITIAL AGGRESSOR AND WHETHER APPELLANT "REASONABLY BELIEVED SHE WAS IN IMMINENT DANGER OF HARM FROM" THE VICTIM.

State v. Copeland, 928 S.W.2d 828 (Mo. banc 1996), cert. denied, 519 U.S. 1126 (1997);

State v. Pisciotta, 968 S.W.2d 185 (Mo.App. W.D. 1998);

State v. Everett, 448 S.W.2d 873 (Mo. 1970);

State v. Chambers, 671 S.W.2d. 781 (Mo. banc 1984);

§ 563.033.1, RSMo 2000;

MAI-CR 3d 306.06.

II.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO SUBMIT INSTRUCTION "B," A VERDICT DIRECTOR FOR INVOLUNTARY MANSLAUGHTER, BECAUSE THE EVIDENCE DID NOT ESTABLISH A BASIS FOR ACQUITTAL OF MURDER IN THE SECOND DEGREE AND CONVICTION OF INVOLUNTARY MANSLAUGHTER, IN THAT THERE WAS NO EVIDENCE THAT APPELLANT ACTED RECKLESSLY IN SHOOTING THE VICTIM.

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

§ 562.025.2.(2), RSMo 2000;

§ 556.046.2, RSMo 2000;

§ 565.024.1(1), RSMo 2000;

§ 562.016.4, RSMo 2000.

III.

THIS COURT SHOULD NOT REVIEW APPELLANT'S CLAIM THAT THE TRIAL COURT PLAINLY ERRED IN FAILING TO INSTRUCT THE JURY, SUA SPONTE, TO DISREGARD VARIOUS PORTIONS OF THE PROSECUTOR'S CLOSING ARGUMENT, BECAUSE APPELLANT DID NOT OBJECT OR INCLUDE THIS CLAIM IN HER MOTION FOR NEW TRIAL. IN ANY EVENT, THE TRIAL COURT DID NOT PLAINLY ERR, BECAUSE THE PROSECUTOR'S COMMENTS DID NOT RESULT IN MANIFEST INJUSTICE, IN THAT THE PROSECUTOR DID NOT 1) IMPLY SPECIAL KNOWLEDGE, 2) WARN THE JURY THAT IT WOULD HAVE TO ACCOUNT TO THE COMMUNITY FOR AN ACQUITTAL, 3) MISSTATE THE LAW OR, 4) SHIFT THE BURDEN OF PROOF TO THE DEFENSE. TO THE EXTENT THAT THE PROSECUTOR REFERRED TO OUTSIDE FACTS OR STATED IMPROPER OPINIONS, THERE WAS NO MANIFEST INJUSTICE, BECAUSE THE COMMENTS WERE OF LITTLE CONSEQUENCE AND NOT DECISIVE IN THE JURY'S DETERMINATION.

State v. Cobb, 875 S.W.2d 533 (Mo. banc), cert. denied, 115 S.Ct. 250 (1994);

State v. Delaney, 973 S.W.2d 152 (Mo.App. W.D. 1998);

State v. Clemons, 946 S.W.2d 206 (Mo. banc), cert. denied, 118 S.Ct. 416 (1997);

State v. Rogers, 976 S.W.2d 529 (Mo.App. W.D. 1998).

IV.

THE TRIAL COURT DID NOT PLAINLY ERR IN ADMITTING APPELLANT'S STATEMENT TO THE POLICE, BECAUSE THE STATEMENT WAS NOT TAKEN IN VIOLATION OF HER RIGHT TO HAVE COUNSEL PRESENT, IN THAT 1) APPELLANT WAIVED HER RIGHT TO HAVE COUNSEL PRESENT, AND 2) APPELLANT'S STATEMENTS AT THE BEGINNING OF THE INTERVIEW, INCLUDING "I WILL HAVE A LAWYER," WERE NOT A REQUEST FOR COUNSEL TO BE PRESENT DURING THE INTERVIEW. MOREOVER, ANY ERROR WAS HARMLESS.

Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981);

Davis v. United States, 512 U.S. 452, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994);

State v. Bucklew, 973 S.W.2d 83 (Mo. banc 1998); cert. denied, 119 S.Ct. 826 (1999);

Arizona v. Fulminante, 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991);

Supreme Court Rule 30.20.

ARGUMENT

I.

THE TRIAL COURT DID NOT PLAINLY ERR IN SUBMITTING INSTRUCTION NO. 7, THE SELF-DEFENSE INSTRUCTION, BECAUSE THE INSTRUCTION PROPERLY INSTRUCTED THE JURY ON BATTERED SPOUSE SYNDROME, IN THAT IT EXPLICITLY TOLD THE JURY TO CONSIDER EVIDENCE RELATED TO BATTERED WOMAN SYNDROME IN DETERMINING WHO WAS THE INITIAL AGGRESSOR AND WHETHER APPELLANT "REASONABLY BELIEVED SHE WAS IN IMMINENT DANGER OF HARM FROM" THE VICTIM.

Appellant contends that Instruction No. 7, the self-defense instruction, did not properly instruct the jury on the issue of battered spouse syndrome (App.Sub.Br. 36). Appellant claims that the instruction "failed to follow the substantive law of battered spouse syndrome" by failing to require the jury to weigh the evidence "in light of how an otherwise reasonable person who is suffering from battered spouse syndrome would have perceived the situation" (App.Sub.Br. 36).

A. Preservation

This claim was not properly preserved. At trial, appellant requested that the court submit various instructions related to battered spouse syndrome, including Instructions A, D, and E (Tr. 501-506; Supp.L.F. 1, 5-8). At trial, appellant argued that those additional, modified instructions were necessary to instruct the jury that "the reasonable belief under the battered spouse syndrome is the reasonable belief of a battered spouse" (Tr. 506). Appellant also

argued that the pattern language of MAI-CR 3d 306.06 was not sufficient to instruct the jury (Tr. 503).

In her motion for new trial, there was no claim that the trial court had erred in submitting Instruction No. 7; rather, appellant simply asserted that the trial court had erred in refusing to submit Instruction A (L.F. 53).[3]

The motion for new trial did assert secondarily that the "Boiler Plate Instructions" had not adequately addressed the issue of battered spouse syndrome; however, none of the proffered instructions suggested that the phrase "reasonable person" be replaced with the phrase "otherwise reasonable person who is suffering from battered spouse syndrome" (Supp.L.F. 1, 5-8). Instead, all of appellant's proffered instructions mimicked the MAI's use of the phrase "reasonable person" (Supp.L.F. 1, 5-8).

In short, appellant's claim that the instruction should have been modified to say "otherwise reasonable person who is suffering from battered spouse syndrome" is a new claim that was not made to the trial court. Additionally, appellant's claim (as it is now presented to this Court) differs from the claim that was raised below in the Court of Appeals. Below,

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[3] While Instruction A did deal with battered spouse syndrome and self-defense, it did not purport to supplant the self-defense instruction; rather, it purported to guide the jury's consideration of the evidence related to battered spouse syndrome (Supp.L.F. 1). There was no claim in the motion for new trial that the trial court had erred in refusing appellant's Instruction E, the modified self-defense instruction proffered at trial (L.F. 51-55).

appellant contended that the trial court erred in refusing to submit Instructions A, D, and E. Now, however, appellant ignores the instructions she proffered at trial in favor of simply arguing the alleged inadequacies of Instruction No. 7.[4]

To preserve a claim of instructional error, a party must object at trial and include the claim in a motion for new trial. Supreme Court Rule 28.03. Where, as here, the claim asserted on appeal was not included in the motion for new trial, review should be limited to plain error review. See State v. Wurtzberger, 40 S.W.3d 893, 897-898 (Mo. banc 2001).

Additionally, after transfer, a party cannot "alter the basis of any claim that was raised in the court appeals brief[.]" Supreme Court Rule 83.07. Here, the appellant has altered the basis of the original claim by shifting from asserting error based upon the trial court's refusal of Instructions A, D, and E, to asserting error based upon the trial court's failing to modify the instruction with language that was never presented to the trial court. Consequently, review of this claim should be limited to plain error review.

B. The Standard of Review

To prevail on a claim that the trial court plainly erred in submitting an instruction, the

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[4] Such a shift is not surprising because, as discussed above, the proffered instructions suffered from the same linguistic infirmities alleged to plague Instruction No. 7 (in addition to other legal infirmities twice recognized by the Court of Appeals. See State v. Edwards, No. WD55243, slip op. at 13-14 (Mo.App. W.D. March 28, 2000); State v. Edwards, No. WD55243, slip op. at 11-12 (Mo.App. W.D. May 29, 2001)).

defendant must go beyond a demonstration of mere prejudice and must establish that the trial judge so misdirected or failed to instruct the jury as to cause manifest injustice or a miscarriage of justice. State v. Hill, 970 S.W.2d 868, 872 (Mo.App. W.D. 1998); State v. Root, 820 S.W.2d 682, 688 (Mo.App. S.D. 1991). Manifest injustice depends on the facts and circumstances of the particular case and appellant bears the burden of establishing manifest injustice amounting to plain error. State v. Zindel, 918 S.W.2d 239, 241 (Mo. banc 1996). An appellate court is warranted in adopting a more practical view of the result of the instructional error. State v. Hill, 970 S.W.2d at 872.

C. Instruction No. 7 Properly Instructed the Jury on the Issue of Battered Spouse Syndrome

1. Background

Evidence of battered woman syndrome is admissible, in certain circumstances, under § 563.033.1, RSMo 2000. That section provides: "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." § 563.033.1, RSMo 2000.

Section 563.033 did not, however, create a separate defense of justification. State v. Copeland, 928 S.W.2d 828, 838 (Mo. banc 1996), cert. denied, 519 U.S. 1126 (1997); see also State v. Pisciotta, 968 S.W.2d 185, 189 (Mo.App. W.D. 1998). Rather, § 563.033 simply provided for the admission of evidence pertaining to battered spouse syndrome to show a battered spouse's state of mind at the time of the offense to assist the jury in evaluating a claim

of self-defense. See id.; State v. Williams, 787 S.W.2d 308, 311-313 (Mo.App. E.D. 1990).[5]

In the case at bar, pursuant to § 563.033, appellant was allowed to present extensive evidence about battered spouse syndrome and the years of physical and verbal abuse that she suffered while married to the victim. Appellant testified that she and her children had been physically and verbally abused by the victim for many years (Tr. 245-265, 270-272, 276-283); appellant's children also testified that they had been abused by the victim (Tr. 333-347, 355-361, 380-384, 387); several friends and neighbors, including appellant's doctor, testified that they had seen bruises on appellant's arms or face, or that they had seen the victim commit acts of violence toward appellant (Tr. 411, 413-417; Supp.Tr. 153, 156, 165, 174, 176, 187, 191, 194, 205); John Howell, a psychologist, testified that appellant had been suffering from post-

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[5] Citing State v. Williams, appellant asserts that § 563.033 modified the traditional elements of self-defense (App.Sub.Br. 42-43). In fact, what Williams did was clarify that a self-defense instruction can be submitted in battered-spouse cases even in the absence of evidence all of the elements of a traditional self-defense case. State v. Williams, 787 S.W.2d at 312-313. It did not hold that the elements of self-defense were different or that the self-defense instruction had to be modified to reflect such a change; rather, it simply pointed out that for a battered spouse, some elements of self-defense can be established by evidence that would not normally establish those elements in a traditional self-defense case. Id. State v. Gallegos, 719 P.2d 1268 (N.M.Ct.App. 1986), which is cited in appellant's brief, stands for the same proposition.

traumatic stress disorder, that appellant also suffered from a dissociative disorder, and that appellant "was acting in self defense when she shot [the victim]" (Tr. 471-483); Marilyn Hutchinson, another psychologist, testified extensively about battered spouse syndrome, offered her conclusion that appellant suffered from the syndrome, and explained how the syndrome had affected appellant (Supp.Tr. 24-100).

Accordingly, in light of the evidence presented, the court instructed the jury on the issue of self-defense, using the pattern language found in MAI-CR 3d 306.06 (L.F. 45-46). The instruction, Instruction No. 7, was submitted to the jury as follows:

> 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 as 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.

(Stip.Supp.L.F. 2-4). MAI-CR 3d 306.06.

Appellant attacks this instruction, claiming that it precluded the jury from "fully utilizing the lay and expert testimony regarding" battered spouse syndrome (App.Sub.Br. 47). More to the point, and following the Court of Appeals holding, appellant claims that, in essence, the instruction "told the jury to *disregard* [her] defense of battered spouse syndrome" (App.Sub.Br. 47). See State v. Edwards, No. WD55243, slip op. at 20 (May 29, 2001). Finally, appellant also argues that the evidentiary paragraphs of Instruction no. 7 "did not allow the jury to consider previous acts of violence or threats in assessing whether [she] could have retreated from the situation or whether she had reasonable cause to believe she was in danger of death or serious physical injury" (App.Sub.Br. 52).

To remedy the instruction, appellant argues that the 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'" (App.Sub.Br. 44). Unlike the Court of Appeals, however, appellant fails to recognize that such a modification is only proper if the jury believes that the

defendant is a battered spouse. See State v. Edwards, No. WD55243, slip op. at 20 (May 29, 2001) ("if the jury believes the defendant was suffering from battered spouse syndrome, it must weigh the evidence in light of how an otherwise reasonable person who is suffering from battered spouse syndrome would have perceived and reacted").[6]

Thus, as will be discussed below, the modifications suggested by the appellant are both unnecessary and legally improper. Unnecessary because the instruction already requires the jury to consider the defendant's peculiar circumstances, and legally improper because requiring the jury to accept the defendant's status as a battered spouse invades the province of the jury and treats battered spouse syndrome as a separate defense of justification.

2. The Suggested Modification Invades the Province of the Jury

To replace the phrase "reasonable person" with the phrase "reasonable person suffering from battered spouse syndrome" plainly instructs the jury that it must accept the evidence of battered spouse syndrome as true. Whether the evidence was true, i.e., whether the defendant was, in fact, a battered spouse, however, was a question properly left to the jury's determination. It was for the jury to decide whether the evidence of battered spouse syndrome

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[6] Appellant does not suggest (as the Court of Appeals opinion implicitly did) that the jury should be required to determine as a threshold issue whether the defendant was, in fact, a battered spouse. In any event, requiring a threshold determination is both redundant (the instruction has the threshold determination built into its standard pattern language) and fraught with problems. See Respondent's Application for Transfer.

was true, and the instruction's use of the term "reasonable person" was not wrong simply because there was evidence that suggested that the defendant, due to battered spouse syndrome, was "unreasonable."

Inserting the phrase "reasonable person who is suffering from battered spouse syndrome" improperly invades the province of the jury by unduly directing the jurors' attention to the credibility of a witness or class of witnesses or the manner in which certain testimony should (or must) be received. See State v. Everett, 448 S.W.2d 873, 878 (Mo. 1970); State v. Leisure, 810 S.W.2d 560, 574 (Mo.App. E.D. 1991). Specifically, it instructs the jury to assume that the defendant is a battered spouse — it does not allow the jury to make that determination independently. Admittedly, self-defense instructions do direct the jury to consider evidence for various limited purposes, but it is absolutely improper for the instruction to assume any fact as true.

3. Battered Spouse Syndrome is not a Separate Defense of Justification

In addition, inserting the phrase "reasonable person who is suffering from battered spouse syndrome," treats battered spouse syndrome as a separate defense of justification. If such a modification is required in battered-spouse cases, then in any case where evidence of the syndrome is introduced, a defendant is automatically included in a separate class of people that has its own form of self-defense. Battered spouse syndrome, however, is not a separate defense of justification. See State v. Copeland, 928 S.W.2d at 838.

Allowing battered defendants to automatically classify themselves in a certain group (rather than requiring the jury to make that determination) would also open the door for other

defendants with alleged mental infirmities to seek the same treatment. For example, any defendant suffering from post-traumatic stress disorder (which infirmity is the psychiatric diagnosis that encompasses battered spouse syndrome) could present such evidence at trial as relevant to his or her beliefs and actions in self-defense and request that the jury be instructed that they should determine whether the defendant's beliefs and actions were reasonable based upon how "an otherwise reasonable and prudent person suffering from post-traumatic stress syndrome" would believe and act.

4. MAI-CR 3d 306.06 Need not be Modified

This is not to say that the plight of battered women will be ignored. To the contrary, whether a battered spouse has a "reasonable belief" that deadly force is necessary, is measured by an objective standard that allows the jury to fully consider the battered spouse's subjective perceptions.

In appellant's case, for example, the jury was instructed to consider the evidence of battered spouse syndrome in determining whether appellant reasonably believed that she was in imminent danger of harm (Stip.Supp.L.F. 2-4). Appellant's perception of imminent harm, if believed by the jury, was, therefore, an integral part of determining whether appellant reasonably believed that using deadly force was necessary. Put simply, if the jury believed that appellant was, in fact, a battered spouse, the jury was free to conclude that appellant reasonably believed that deadly force was necessary. The battered spouse's "unreasonable" belief is, in fact, reasonable under the objective standard because the battered spouse's subjective perception reveals a real or apparent necessity to use deadly force.

Thus, it is unnecessary to modify the pattern language. The phrase "reasonable person who is suffering from battered spouse syndrome" is simply a longer (and legally improper) way of saying "reasonable person in the same situation." The jury should not be told what the defendant's situation is; rather, the jury should be left to make that determination for itself (based upon the evidence presented at trial).

In addition, the pattern instruction's use of the phrases "reasonable person" and "reasonable belief" does not preclude the "unreasonable" battered spouse from the jury's consideration. A battered spouse might do or believe things that *seem* to be unreasonable to the uninformed, outside observer (i.e., a lay person not privy to expert testimony introduced at trial); however, the battered spouse's actions and beliefs (if the jury credits the evidence of battered spouse syndrome presented at trial) are those of a "reasonable person" in that situation.

In fact, in the case at bar, the express language of the instruction made it clear that the subjective belief of the appellant was critical to the jury's determination. For example, the second paragraph of the instruction stated: "for a person 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" (Stip.Supp.L.F. 2). That language clearly implies that the jury must consider the defendant's subjective perception of objective reality, i.e., that there must be some real, objective event that thereby causes a reasonable — though subjective — belief that harm is imminent.

The implication is spelled out more explicitly just four paragraphs later. There, the

instruction told the jury:

> 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.

(Stip.Supp.L.F. 2) (emphasis added).

This combination of objective reality, subjective belief, and reasonableness is present in every self-defense case. Two elements of self defense are commonly listed as follows: (1) that there is a real or apparently real necessity for the defender to kill in order to save himself from an immediate danger of serious bodily injury or death, and (2) that there is a reasonable cause for the defender's belief in such necessity. State v. Chambers, 671 S.W.2d. 781, 783 (Mo. banc 1984). These two elements are intimately intertwined, and perhaps depending upon how the elements are enumerated and written, one or the other has been called objective and the other subjective. See State v. Grier, 609 S.W.2d 201, 207 (Mo.App. W.D. 1980) (stating that the "reasonableness of the belief" is an objective element). What is clear, however, is that objective reality, subjective perception, and reasonableness combine in these two elements in any self-defense case. More specifically, it is clear that there must be some event (or cause) that creates a reasonable, though subjective, belief that deadly force is necessary to avoid death or serious physical injury. And, as the self-defense instruction explains, the reasonableness of the belief must be determined by examining how a "reasonable person in the same situation"

would think.

With those principles in mind, it is clear that, even in cases where there is evidence of battered spouse syndrome, the current version of MAI-CR 3d 306.06 adequately instructs the jury on the issue of self defense. If the evidence pertaining to battered spouse syndrome is accepted by the jury as true, then the objective reality of the defendant changes — it becomes that of a battered spouse.

For example, assuming that the jury accepted the evidence pertaining to battered spouse syndrome as true, then an objective event (or cause) like a certain "look in the eyes" can create a reasonable, though subjective, belief in the mind of the battered spouse that death or serious physical injury is about to follow. The battered spouse's belief that harm is imminent is not unreasonable (though it might appear unreasonable to a person not in the same situation) because the objective reality for a battered spouse is that a certain look in the eyes can precede a severe beating. Of course, to reach that conclusion, the jury must first accept the battered spouse syndrome evidence as true. Once the jury accepts the evidence pertaining to battered spouse syndrome as true, there is nothing in the instruction to preclude the jury from considering that evidence as it applies to the issue of self-defense.

In short, contrary to appellant's assertion, Instruction No. 7 allowed the jury to determine whether a reasonable person in appellant's situation (as a battered spouse if the evidence was believed) would have reasonably believed that the use of deadly force was necessary to defend herself. In fact, Instruction No. 7 easily lent itself to supporting the defense theory that appellant was a battered woman who acted in self-defense. If the jury had

accepted the evidence pertaining to battered spouse syndrome as true, then by following the instruction, the jury would have altered the viewpoint of the hypothetical, reasonable person so that it matched appellant's viewpoint — the jury would have put the hypothetical, reasonable person into appellant's hopeless, battered situation and given that person appellant's reasonable belief that death or serious physical injury was imminent.

And under those circumstances, there is a good possibility that the jury would have acquitted appellant on the basis of lawful self-defense. But first, the jury had to accept as true the expert testimony that pertained to battered spouse syndrome. Instruction No. 7 adequately and properly instructed the jury.

5. The Prosecutor's Arguments were Proper

Appellant finds further fault with Instruction No. 7 by pointing out that it did not preclude the prosecutor from strenuously arguing against the application of battered spouse syndrome (App.Sub.Br. 47-51). However, while the prosecutor obviously did not accept the defense theory, the prosecutor's arguments regarding the defense theory were proper. The prosecutor argued, quite understandably, from the viewpoint that battered spouse's syndrome was not an acceptable explanation for appellant's actions on the day of the killing. There was nothing wrong with that.

The prosecutor was not bound to accept the premise that appellant was a battered spouse whose perceptions were controlled by the syndrome just because the defense was able to call witnesses who were willing to say so. To the contrary, the prosecutor was obligated to argue the case according to the state's evidence. To suggest that the prosecutor cannot argue against

the validity of a defense is simply incorrect. See State v. Kreutzer, 928 S.W.2d 854, 872 (Mo. banc 1996), cert. denied, 519 U.S. 1083 (1997) (prosecutor may comment on the evidence and the credibility of the defendant's case and may even belittle and point to the improbability and untruthfulness of specific evidence). For appellant to go even further, and argue that a jury instruction should actually tell the jury that certain evidence must be viewed, or accepted, in a certain way is plainly erroneous. The instruction must remain neutral to both sides.

Admittedly, the force of the prosecutor's arguments was considerable. They could even be considered callous — especially if one believes that appellant was helplessly and hopelessly trapped in a cycle of violence. In fact, if the jury had not been persuaded by the prosecutor and had actually believed the expert testimony about the effects of battered spouse syndrome, the prosecutor's arguments would likely have sealed a victory for appellant. In that case, appellant would now be pleased that the prosecutor proved himself to be so insensitive and heartless.

In the absence of such events, however, it was defense counsel's obligation to counter the prosecutor's arguments by strenuously arguing for the validity and application of the battered spouse syndrome and persuading the jury that appellant was, in fact, helplessly trapped in a cycle of violence. Instruction No. 7 would not have precluded (and did not preclude) such counterstrikes by defense counsel, and, of course, the role of the self-defense instruction was not to bolster the validity of the battered spouse syndrome by identifying appellant as a battered spouse.

6. Instruction No. 7 Allowed the Jury to Fully Consider the Evidence

Lastly, appellant argues that the evidentiary paragraphs of the self-defense instruction

"did not allow the jury to consider previous acts of violence or threats in assessing whether [she] could have retreated from the situation or whether she had reasonable cause to believe she was in danger of death or serious physical injury" (App.Sub.Br. 52). With regard to appellant's belief that she was in imminent danger of "death or serious physical injury," the jury *was* specifically instructed that the evidence of battered spouse syndrome could be considered in determining whether appellant reasonably believed that she was in imminent danger of "harm," which would necessarily include any kind of harm, including "death or serious physical injury." The instruction, therefore, did not *preclude* the jury from considering the evidence of battered spouse syndrome in determining whether appellant reasonably believed that she was in danger of death or serious physical injury.

Also, it should be noted that no jury is ever instructed that certain evidence can be considered in determining whether the defendant reasonably believed that he or she was in imminent danger of "death or serious physical injury." Rather, all of the relevant evidentiary paragraphs merely state that certain evidence can be considered in determining whether the defendant reasonably believed that he or she was in imminent danger of "harm." There is no need to modify this language; the instruction's use of the term "harm" adequately covers all harm, including "death or serious physical injury."

With regard to instructing the jury about the defendant's duty to retreat, it should be noted that no jury is ever instructed on that issue. As with the meaning of "harm," the duty to retreat (which is intimately tied to the necessity to use force (rather than retreat)) is an issue better left to the argument of counsel. If the spouse is a battered spouse, he or she may indeed

find it more difficult to "retreat" from the situation; however, that fact should be left to the argument of counsel and the independent determination of the jury. In any event, the instruction as it stands does not *preclude* the jury from considering evidence of battered spouse syndrome in determining whether the defendant reasonably believed that force (rather than retreat) was necessary.

D. Conclusion

In sum, Instruction No. 7 properly instructed the jury with regard to the evidence pertaining to battered spouse syndrome. Under the language of the instruction, the jury was instructed to determine (1) whether appellant reasonably believed that death or serious physical injury was imminent (allowing the jury to consider evidence of battered spouse syndrome); and (2) whether a reasonable person in appellant's circumstances (whatever circumstances the jury decided to accept as true) would have reasonably believed that the use of deadly force was necessary to defend herself. The trial court did not plainly err in submitted MAI-CR 3d 306.06; this point should be denied.

II.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO SUBMIT INSTRUCTION "B," A VERDICT DIRECTOR FOR INVOLUNTARY MANSLAUGHTER, BECAUSE THE EVIDENCE DID NOT ESTABLISH A BASIS FOR ACQUITTAL OF MURDER IN THE SECOND DEGREE AND CONVICTION OF INVOLUNTARY MANSLAUGHTER, IN THAT THERE WAS NO EVIDENCE THAT APPELLANT ACTED RECKLESSLY IN SHOOTING THE VICTIM.

Appellant contends that the trial court erred in refusing to submit Instruction B, a verdict director for involuntary manslaughter (App.Sub.Br. 57). Appellant asserts that "there was evidence from which the jury could conclude that [she] did not intend to kill her husband, but fired recklessly, without aiming, in a blind hysteria" (App.Sub.Br. 57). Further, appellant asserts that there was evidence that "she suffered from an impaired mental state . . . which deprived her of the awareness of emotional and perceptual information which a reasonable person would have used under similar circumstances" (App.Sub.Br. 57).

Involuntary manslaughter is a lesser-included offense of second degree murder. State v. Beeler, 12 S.W.3d 294, 297 (Mo. banc 2000) (citing § 562.025.2.(2), RSMo 2000). A trial court is obligated to instruct on a lesser-included offense only if the evidence establishes a basis for acquittal of the greater offense and conviction of the lesser included offense. Id. (citing § 556.046.2, RSMo 2000).

A person commits the crime of involuntary manslaughter if he "recklessly" causes the death of another person. Id. (citing § 565.024.1(1), RSMo 2000). A person acts "recklessly"

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. Id. (citing § 562.016.4, RSMo 2000). "Recklessness resembles knowing conduct in one respect in that it involves awareness of risk, that is, of a probability less than a substantial certainty." Id. at 299. "By contrast, to act knowingly is to be aware that the conduct is practically certain to cause a result." Id.

In the case at bar, there was no evidence that appellant acted recklessly. Appellant first cites portions of her own testimony in an attempt to show recklessness (App.Sub.Br. 57-58); however, her own testimony does not support her claim. For example, appellant cites to the following testimony that was given on direct examination:

> Q (By [defense counsel] continuing:) What fear did you have, after he struck you, and you put your arm up?
>
> A I knew he was going to kill me.
>
> Q All right. And, can you kind of tell the jury what you did then?
>
> A I turned around and I — There's a lot of this stuff that I really can't remember what happened, but I reached for the gun. It was one that he always carried in his pocket, and he put it underneath the counter when he went to the store.
>
> **It was a .38 Special, and I just grabbed it, and I shot him**.
>
> Q Do you know how many times you shot him?
>
> A I have no idea.

Q Do you know where you hit him?

A No, sir.

Q Was this kind of a blur to you?

A Yes, sir.

(Tr. 265-266) (emphasis added).

This testimony was offered to support appellant's claim of self-defense, and it does not show that appellant consciously disregarded any substantial and unjustifiable risk. Appellant did not testify, for example, that she fired the gun without aiming at the victim, or that she did not intend to hit the victim. She simply testified that she "knew [the victim] was going to kill [her]," that she "grabbed" the gun, and that she "shot [the victim]." The testimony supports a claim of self-defense, or, perhaps, a claim of sudden passion; it does not show that appellant consciously disregarded a substantial and unjustifiable risk.

Appellant cites similar testimony that was elicited on cross-examination (App.Sub.Br. 58). That testimony was offered as follows:

Q [By the prosecutor] You've testified that you shot your husband, but you don't remember all of the shots; is that right?

A No, sir, I do not.

Q I take it you understand, from the testimony that's been given here, that you fired four shots?

A I did not know it.

Q You know it now?

A Yeah, after you told me.

Q Well, I'm not the one telling you. You've been in the courtroom —

A I know. I'm sorry. I apologize.

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 —

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

[DEFENSE COUNSEL]: Objection, Your Honor.

Q (By [the prosecutor] continuing:) **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.

Q Do you have some doubt about that?

A I have no idea.

(Tr. 300-301). This testimony, too, fails to support her claim.

The fact that appellant "just fired" does not support an inference that she consciously disregarded a substantial and unjustifiable risk of killing her husband. When a person "just fires" a gun at another person, the shooter is practically certain that death or serious physical

injury will be the result, i.e., the act is knowing. This is especially true when the shooter fires at another person, several times, at close range, as did appellant.

A different conclusion could be reached, for example, if appellant had testified that she did not know that the gun was loaded. Under those circumstances, it could possibly have been said that she consciously disregarded a substantial and unjustifiable risk that the gun was loaded. Appellant, however, offered no such testimony, and it should not be manufactured for her. In fact, appellant's testimony on cross-examination revealed little or nothing about her state of mind at the time she fired the gun.

Appellant next points out that she told Deputy Roger Porter that she "just snapped" when she shot the victim (App.Sub.Br. 58). This, too, was not evidence of recklessness. It was, perhaps, evidence that appellant acted under the influence of sudden passion; however, when viewed in context, it is apparent that appellant did not act recklessly. In her statement, appellant described the shooting as follows:

> . . . . And, then he smacked me across the arm. Then I went back where my computer is at, and I don't know what happened.
>
> **But, it just snapped, and I shot him. I know I shot him twice, and I don't know how much more. I don't know**.
>
> The gun is there. It's a gun we've had for umpteen years. We had it in Claycomo.

(Tr. 207) (emphasis added). This evidence does not support appellant's claim.

Appellant said that she "snapped," and that she shot the victim twice. Nowhere did

appellant say that she did not aim at her husband, or that she did not intend to kill him. had she offered such testimony, it might be said that she consciously disregarded the substantial risk that she would, in fact, kill her husband. Without such details, however, appellant cannot claim to have merely acted recklessly. Again, a person who shoots another person multiple times, at close range, is practically certain that death will be the result. There was simply no evidence of a conscious disregard of a substantial and unjustifiable risk.

Finally, appellant cites the testimony of two psychologists. First, appellant points out that John Howell testified that appellant was in "a dissociative state at the time of the incident" (App.Sub.Br. 58-59). Howell testified that the dissociative state "served to defend her from the overwhelming fear [and] 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" (Tr. 485). Howell concluded that appellant knew that her actions were wrong, but that she could not stop herself from shooting the victim (Tr. 486). Again, this testimony did not show an act of recklessness. At best, it showed that appellant, while knowing it was wrong to shoot the victim, did so without any culpable mental state or, perhaps, under the influence of sudden passion.

Second, appellant cites the testimony of Marilyn Hutchinson (App.Sub.Br. 59). Hutchinson's testimony was offered to show that appellant was suffering from post-traumatic stress disorder. That evidence was offered primarily to prove that appellant was a battered woman, and that she had acted in self-defense. Aside from self-defense, Hutchinson's testimony, at best, supported an inference of no culpable mental state or sudden passion.

Appellant's reliance upon State v. Hopson, 891 S.W.2d 851 (Mo.App. E.D. 1995), is misplaced. In Hopson, the defendant testified that he drew a pistol to scare the victim, that he intended to fire away from the victim, and that the gun simply discharged when the victim reached out and grabbed the gun. Id at 852. Under those circumstances, and in light of the mitigating details surrounding the shooting, the Eastern District held that an instruction on involuntary manslaughter was warranted. Id. at 852.

In the case at bar, appellant offered no such analogous testimony.[7] She did not testify that she merely intended to scare the victim; she did not testify that she intended to fire away from the victim; and she did not testify that the gun simply discharged after the victim grabbed the gun. To the contrary, appellant testified simply that she grabbed the gun and shot the victim (Tr. 266). In fact, every account of the incident, and the physical evidence, belies the possibility that appellant's actions were "reckless" as defined by § 562.016.4, RSMo 1994 (see Tr. 95-96, 207-210, 244, 253-255, 265-266). Appellant's actions simply went beyond

[7] The case at bar is similarly distinguishable from State v. Miller, 772 S.W.2d 782 (Mo.App. S.D. 1989) (defendant shot a bystander and there was evidence that the gun discharged when it was grabbed by a third party); State v. Vincent, 785 S.W.2d 805 (Mo.App. S.D. 1990) (defendant, who had whirled around and fired a gun toward the victim, testified, "all I wanted to do was just scare her where she would go back in and leave me alone"); and State v. Isreal, 872 S.W.2d 647 (Mo.App. E.D. 1994) (the defendant covered his eyes, shot at his attacker in self-defense, and hit a bystander), which appellant also cites (App.Sub.Br. 60).

recklessness.[8]

In short, there was no evidentiary basis for acquittal of murder in the second degree and conviction of involuntary manslaughter. The "reckless" mental state necessary for involuntary manslaughter requires evidence that the defendant consciously disregarded a substantial and unjustifiable risk that a result would follow or that circumstances existed and that such disregard was a gross deviation from the standard of care that a reasonable person would

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[8] For examples of cases where conduct was held to have gone beyond recklessness, see, State v. Coleman, 949 S.W.2d 137, 144 (Mo.App. W.D. 1997) (firing a shot at an occupied car, even without looking, went beyond recklessness); State v. Albanese, 920 S.W.2d 917, 925 (Mo.App. W.D. 1996) (even if defendant claimed not to intend to kill, swinging a knife at his attacker went beyond recklessness); State v. Boston, 910 S.W.2d 306, 312 (Mo.App. W.D. 1996) (shooting toward the window of an occupied house went beyond recklessness); State v. Boyd, 913 S.W.2d 838, 843 (Mo.App. E.D. 1995) (turning and firing a gun at attacker, who grabbed defendant from behind, was not reckless); State v. Isom, 906 S.W.2d 870, 872-874 (Mo.App. S.D. 1995) (even if not intending to kill, shooting perceived attacker in upper body went beyond recklessness); State v. Green, 778 S.W.2d 326, 327-328 (Mo.App. E.D. 1989) (even though defendant denied intent to kill, confronting victim with a shotgun and shooting him from twelve feet away went beyond recklessness); and State v. Smith, 747 S.W.2d 678, 680-681 (Mo.App. W.D. 1988) (shooting several times into an occupied car went beyond recklessness).

exercise in the situation. The evidence in appellant's case showed that appellant knowingly shot the victim, while under the influence of sudden passion, and there were no mitigating facts that decreased appellant's culpable mental state to recklessness.[9] This point should be denied.

[9] Appellant cites State v. Beeler for the limited proposition that recklessness is not inconsistent with self-defense (App.Sub.Br. 60-61). She does not assert, and has never asserted on appeal or at trial, that she recklessly engaged in self-defense by using an unreasonable amount of force to protect herself.

III.

THIS COURT SHOULD NOT REVIEW APPELLANT'S CLAIM THAT THE TRIAL COURT PLAINLY ERRED IN FAILING TO INSTRUCT THE JURY, SUA SPONTE, TO DISREGARD VARIOUS PORTIONS OF THE PROSECUTOR'S CLOSING ARGUMENT, BECAUSE APPELLANT DID NOT OBJECT OR INCLUDE THIS CLAIM IN HER MOTION FOR NEW TRIAL. IN ANY EVENT, THE TRIAL COURT DID NOT PLAINLY ERR, BECAUSE THE PROSECUTOR'S COMMENTS DID NOT RESULT IN MANIFEST INJUSTICE, IN THAT THE PROSECUTOR DID NOT 1) IMPLY SPECIAL KNOWLEDGE, 2) WARN THE JURY THAT IT WOULD HAVE TO ACCOUNT TO THE COMMUNITY FOR AN ACQUITTAL, 3) MISSTATE THE LAW OR, 4) SHIFT THE BURDEN OF PROOF TO THE DEFENSE. TO THE EXTENT THAT THE PROSECUTOR REFERRED TO OUTSIDE FACTS OR STATED IMPROPER OPINIONS, THERE WAS NO MANIFEST INJUSTICE, BECAUSE THE COMMENTS WERE OF LITTLE CONSEQUENCE AND NOT DECISIVE IN THE JURY'S DETERMINATION.

Appellant contends that the trial court plainly erred in failing to instruct the jury, sua sponte, to disregard various portions of the prosecutor's closing and rebuttal arguments (App.Sub.Br. 62-63). Appellant contends that the prosecutor's arguments "improperly injected the prosecutor's personal opinion, warned the jury that the community would hold it responsible for the verdict, implied special knowledge and expertise about the facts and the law, and misstated the law" (App.Sub.Br. 63).

A. These Claims were not Preserved for Review

This Court should decline to review these claims. Appellant made no objection to any part of the prosecutor's closing or rebuttal argument (Tr. 533-549, 574-579). Appellant also failed to include these claims of error in her motion for new trial (L.F. 51-55). Appellant's lack of objection should be fatal to these claims. See State v. Kempker, 824 S.W.2d 909, 911 (Mo. banc 1992); State v. East, 976 S.W.2d 507, 512 (Mo.App. W.D. 1998); State v. Marsh, 945 S.W.2d 60, 62 (Mo.App. S.D. 1997).

In East, for example, when faced with similar claims, the Court of Appeals declined to review for plain error. The court stated that relief should rarely be granted,

> because, in the absence of objection and request for relief, the trial court's options are narrowed to uninvited interference with summation and a corresponding increase of error by such intervention.

State v. East, 976 S.W.2d at 512. The court went on to say,

> [T]he absence of an objection is fatal to the defendant's contention [that the circuit court should have intervened, *sua sponte*, when a prosecutor makes an improper argument]. Had objection been made the trial judge could have taken appropriate steps to make correction. The defendant was not necessarily entitled to a mistrial.[10] The judge could consider the state of the evidence and

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[10] Respondent acknowledges that appellant is not claiming that the trial court should have declared a mistrial.

> the apparent effect on the jury and might conclude that it would be sufficient to sustain the objection and then caution the jury if requested. Defense Counsel did not give him this chance.

Id. (citing State v. Kempker, 824 S.W.2d at 911).

The same reasoning applies in the case at bar. Had defense counsel objected, the trial court could have evaluated the evidence and taken appropriate action. Now, however, the only remedy is the drastic remedy of granting a new trial. A new trial is particularly unwarranted, however, when it cannot be said with any certainty that defense counsel's silence was not part of a calculated trial strategy.

B. The Prosecutor's Comments did not Result in Manifest Injustice

In any event, the trial court did not plainly err. As to closing argument, to prevail on plain error review, a defendant must show manifest prejudice affecting substantial rights. State v. Reed, 971 S.W.2d 344, 348 (Mo.App. W.D. 1998). A conviction will be reversed only if improper argument had a decisive effect on the jury's determination, and the defendant has the burden of proving the effect of the argument on the jury. Id. As outlined above, plain error relief should rarely be granted. State v. Thompson, 985 S.W.2d 779, 787-788 (Mo. banc 1999).

In this point, appellant highlights various portions of the prosecutor's closing and rebuttal argument and makes various claims based on various legal theories. Respondent has endeavored to respond appropriately. First, appellant claims that the prosecutor "injected his personal opinion" and "ridicule[d] the defense of battered woman syndrome" (App.Sub.Br. 64)

with the following:

> This is a small community, nothing like the one I grew up in. You may be thinking these are just words, this is just a lawyer in a nice suit. **If you think it doesn't matter to me, what you do in your community, you're wrong**.
>
> I grew up just up the road. These communities value life. **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 to you that you must send a message about what life is worth. De 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 that the Missouri legislature has enacted that will actually remove an abusive spouse from the home and make it a 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?**
>
> Their expert finally had to admit, after about five questions, that the taking of a human life in an abusive situation ought to be the last resort. Do you

remember how reluctant she was to admit that? But, she finally had to admit the ultimate form of spousal abuse is killing your spouse.

I'm here to suggest to you respectfully, because it is 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. 537-538) (emphasis added).[11]

Contrary to appellant's claim, the prosecutor did not ridicule the battered spouse syndrome evidence with these comments; rather, the prosecutor urged the jury to carefully consider under what circumstances killing is justified, and to send an appropriate message to the community. It is permissible for a prosecutor to argue the necessity for law enforcement, the duty of the jury to convict the defendant and prevent crime, and the results to society of a failure to uphold the law. State v. Schaefer, 855 S.W.2d 504, 507 (Mo.App. E.D. 1993). A prosecutor may also legitimately argue that the jury should send a message that criminal conduct will not be tolerated or should be severely punished. State v. Cobb, 875 S.W.2d 533, 537 (Mo. banc), cert. denied, 115 S.Ct. 250 (1994). See also State v. Simmons, 944 S.W.2d 165, 181-182 (Mo. banc), cert. denied, 118 S.Ct. 376 (1997); State v. Kinder, 942 S.W.2d 313, 319 (Mo. banc), cert. denied, 118 S.Ct. 149 (1997).

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[11] The emphasized portions in this and the following excerpts identify the comments that appellant claims were improper.

With regard to the prosecutor's "personal opinion," respondent gleans, perhaps, three from the highlighted testimony: first that this case was important to the prosecutor; second, that killing should be a last resort; and third, that life is important. First, when the prosecutor stated, "If you think it doesn't matter to me, what you do in your community, you're wrong," the prosecutor did not imply special knowledge of facts that were not before the jury. See State v. Mease, 842 S.W.2d 98, 109 (Mo. banc 1992), cert. denied, 508 U.S. 918 (1993) (prosecutor argued, "it's not an easy decision" to ask for the death penalty, "[b]ut we make it in this case"). Second, stating that "murder has to be an almost unthinkable resort," is an opinion supported by the law and by the testimony of appellant's expert witness (Supp.Tr. 119). Finally, the fact that life is important, is self-evident -- both from common experience and the law.

The prosecutor's reference to "California, where murder is seemingly not against the law anymore," was a reference to outside "facts," but it did not imply any special knowledge of facts or circumstances in the case at bar; rather, the prosecutor made that statement to illustrate the importance of upholding the law in the community and sending an appropriate message. To the extent that it did refer to an outside fact, it did not result in manifest injustice or a miscarriage of justice.

Also, contrary to appellant's claim, the above argument did not refer to the prosecutor's "expertise," "appeal[] to the fear and prejudices of the jury," "mistate[] the law," or "ask[] the jury to divine the intent of the legislature in applying the battered woman defense" (App.Sub.Br. 66). Again, as outlined above, the prosecutor's argument was intended to urge the

jury to carefully consider the circumstances of this case and send an appropriate message to the community.

Appellant also cites the following portion of the prosecutor's rebuttal argument:

> Ladies and Gentlemen, if you think your verdict is not important, I respectfully suggest to you that you're wrong.
>
> **The defendant in this case has spent one night in jail. One night in jail, and she has moved freely throughout your 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 couples 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) (emphasis added). Again, however, this argument was intended to remind the jury of the importance of its duty, and to encourage the jury to send an appropriate message to the community. See State v. Clay, 975 S.W.2d 121, 138-139 (Mo. banc 1998), cert. denied, 119 S.Ct. 834 (1999). The references to law enforcement and the community's "young prosecutor"

were brief and not unduly inflammatory; and, more importantly, the prosecutor's comments did not challenge the jury to either convict appellant or face repercussions from an angry community. See State v. Delaney, 973 S.W.2d 152, 156-157 (Mo.App. W.D. 1998).

The prosecutor's commenting that he was "offended" also did not result in manifest injustice. See State v. Clemons, 946 S.W.2d 206, 229 (Mo. banc), cert. denied, 118 S.Ct. 416 (1997) (prosecutor argued, *inter alia*, that defense theories were "preposterous" and "in my opinion, probably . . . pretty stupid"); State v. Kreutzer, 928 S.W.2d 854, 872-873 (Mo. banc 1996), cert. denied, 117 S.Ct. 752 (1997) (prosecutor may belittle and point to the improbability and untruthfulness of specific evidence); State v. Spears, 821 S.W.2d 537, 542-543 (Mo.App. E.D. 1991).

Appellant also claims that the prosecutor erroneously instructed the jury on the issue of self-defense, highlighting the following:

> The evidence would suggest that [the victim] turned to get away. The evidence suggests that there's no reasonable fear of serious bodily injury or death. And if you read that instruction in its entirety, you'll find that deadly force is not favored in the law. You may use deadly force, but only in the rarest of circumstances.
>
> You must believe two things. One, that you form a reasonable fear that you're about to suffer serious bodily injury or death, not being struck on the arm, serious bodily injury or death. And, you must form that belief reasonably.
>
> But, then there's an and. It's not an/or. And you must believe that deadly

force, that the deadly force itself, is your only alternative, that it's reasonably necessary to use deadly force in that circumstance. That you don't have other alternative, like walking out of the store, like getting in your car, even running.

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, so says the instruction, **may you use deadly force**.

(Tr. 543-544) (emphasis added). The prosecutor did not erroneously instruct the jury with this argument; rather, the prosecutor properly argued that, under the facts of this case, deadly force was not justified.

Appellant had a duty to avoid the use of deadly force if there was another, safe alternative. Where a person is capable of removing himself from the scene, self-defense is not justified. State v. Rogers, 976 S.W.2d 529, 533 (Mo.App. W.D. 1998). Use of deadly force in self-defense requires the following prerequisites: (1) an absence of aggression or provocation on the part of the defendant, (2) a real or apparently real necessity for the defendant to kill in order to save himself from an immediate danger of serious bodily injury or death, (3) a reasonable cause for the defendant's belief in such necessity, and (4) an attempt by the defendant to do all within his power consistent with his personal safety to avoid the danger and the need to take a life. State v. Coleman, 949 S.W.2d 137, 143 (Mo.App. W.D. 1998). Retreat when possible with safety, is a duty required before resorting to deadly force. State v. Harris, 717 S.W.2d 233, 236 (Mo.App. E.D. 1986). See also State v. Sherrill, 496

S.W.2d 321, 325-326 (Mo.App. St.L.D. 1973) ("Self-defense is a last resort and in order to justify a homicide on such grounds the doer of the homicidal act must have done everything in his power, consistent with his own safety, to avoid the danger and avert the necessity, and he must retreat, if retreat be practicable.").

The facts in this case showed that appellant moved away from the victim after being struck (Tr. 207-209, 287-288); that she retrieved a gun (Tr. 207-209); that she pointed the gun at the victim long enough to hear the victim say, "You Goddamn son-of-a-bitch" (Tr. 209, 281); and that she fired the gun at the victim, who was about five feet away, turning away, and, perhaps, retreating (Tr. 95-96, 207-209, 266). It was not, therefore, improper for the prosecutor to argue that appellant was not justified in her use of force, or that appellant should have retreated.

In her point relied on (though not in the argument portion of her brief, appellant also takes issue with the following argument:

> The defendant says, "But I couldn't leave, he would kill me." That's not what evidence suggests. This case is to be decided on the evidence. Merely making claims that aren't substantiated don't do it. You can't pay a witness that you met less than ten days ago $5,000 and have her carry the ball for you.
>
> **The 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. 545-546). Though included in the point relied on, appellant makes no argument regarding

this claim;[12] however, it is evident that this comment was made in an attempt to undermine the battered-spouse-syndrome theory of the defense. The argument was entirely proper. See State v. Kreutzer, 928 S.W.2d at 872.

Finally, appellant argues that the prosecutor's closing argument "shifted the burden of proof to the defense" with the following:

> The testimony was that she had left this man at least twice. Once for two weeks, probably at about the time she was selling real estate.
>
> You recall that testimony from Mr. Schottler. She was traveling freely about, marketing houses, visiting with clients, going to title offices. Made enough money to buy her own home. Her son suggested that they leave, and they left.

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[12] In his point relied on, appellant identifies two additional comments made by the prosecutor that are never mentioned in the argument portion of his brief. The comments appear on pages 535 ("[the murder law] doesn't say . . .") and 576 ("What will you say by your verdict?") in the trial transcript. Having failed to present any argument on them, any claim with regard to those comments should be deemed abandoned. See State v. Vivone, 857 S.W.2d 489, 498 (Mo.App. S.D. 1993) (where parts of point are not pursued individually in the argument section of appellant's brief, those points are abandoned or waived on appeal); State v. Boyer, 803 S.W.2d 132, 136 (Mo.App. W.D. 1991). In any event, neither comment was improper, and neither comment resulted in manifest injustice.

> Did Bill Edward track her down and kill her. No. You see, just saying it doesn't make it so. **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). These comments did not impermissibly shift the burden of proof to the defendant; rather, these comments were designed to exploit the weakness of the evidence that appellant had offered in support of her claim of self-defense. The prosecutor was certainly entitled to argue that appellant's evidence was weak. See State v. Kreutzer, 928 S.W.2d at 872; State v. Coleman, 949 S.W.2d at 144-145. In short, this comment was simply made to illustrate a lack of persuasive evidence to support the appellant's theory of the case.

In sum, there is no reason to believe that any of the prosecutor's comments — to the extent that they might have been improper — had a decisive effect upon the jury's verdict. The prosecutor's arguments were designed to properly persuade the jury, and any improper reference to the prosecutor's personal opinions, law enforcement, or outside facts was of little or no consequence. In short, appellant has failed to show that the prosecutor made a plainly unwarranted argument that resulted in manifest injustice or a miscarriage of justice. The trial court did not plainly err in failing to instruct the jury, sua sponte, to disregard any portion of the prosecutor's closing argument.

Finally, appellant cites various cases in which counsel was found to have been ineffective for failing to object to improper comments in closing argument (App.Sub.Br. 67-68). On direct appeal, claims of ineffective assistance of counsel are not cognizable. State

v. Baller, 949 S.W.2d 269, 274 (Mo.App. E.D. 1997); State v. Hurt, 931 S.W.2d 213, 214 (Mo.App. W.D. 1996). The exclusive remedy for a claim of ineffective assistance is a motion for post-conviction relief pursuant to Supreme Court Rule 29.15. State v. Wheat, 775 S.W.2d 155, 157-158 (Mo. banc 1989), cert. denied 493 U.S. 1030 (1990); State v. Hurt, 931 S.W.2d at 214. Nevertheless, appellant's reliance upon those cases illustrates precisely why such claims of plain error generally should not be reviewed on direct appeal where counsel's motivations cannot be fully examined.

IV.

THE TRIAL COURT DID NOT PLAINLY ERR IN ADMITTING APPELLANT'S STATEMENT TO THE POLICE, BECAUSE THE STATEMENT WAS NOT TAKEN IN VIOLATION OF HER RIGHT TO HAVE COUNSEL PRESENT, IN THAT 1) APPELLANT WAIVED HER RIGHT TO HAVE COUNSEL PRESENT, AND 2) APPELLANT'S STATEMENTS AT THE BEGINNING OF THE INTERVIEW, INCLUDING "I WILL HAVE A LAWYER," WERE NOT A REQUEST FOR COUNSEL TO BE PRESENT DURING THE INTERVIEW. MOREOVER, ANY ERROR WAS HARMLESS.[13]

Appellant contends that the trial court "erred or plainly erred" in overruling her objection to the admission of an interview that she gave to the police after shooting her

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[13] In her point relied on, appellant frames this claim as a violation of the Sixth and Fourteenth Amendments to the United States Constitution, and Article I, § 18(a) of the Missouri Constitution (App.Sub.Br. 54). Appellant, however, did not have a Sixth Amendment right to counsel at the time she was questioned by Officer Porter, because that right "attaches only at the initiation of adversary criminal proceedings[.]" Davis v. United States, 512 U.S. 452, 456-457, 114 S.Ct. 2350, 2354, 129 L.Ed.2d 362 (1994). Likewise, appellant did not have an Article I, § 18(a) right to counsel at the time of the interview, because that right applies to "criminal prosecutions." Nevertheless, appellant was entitled to her Miranda rights, and respondent will address the claim accordingly.

husband (App.Sub.Br. 54). Appellant claims that the statement was taken in violation of her right to have an attorney present (App.Sub.Br. 54).

Respondent has no way of knowing whether this claim was actually raised prior to trial, as is normally required, because a copy of appellant's motion to suppress statements (if it exists) is not included in the legal file.[14] In addition, this claim was not raised in appellant's motion for new trial (L.F. 51-55). Consequently, appellate review is limited to plain error review. See State v. Galazin, No. 83415, slip op. at 7-10 (Mo. banc October 23, 2001); State v. Root, 820 S.W.2d 682, 686 (Mo.App. S.D. 1991).

A. The Standard Of Review

To prevail on plain error review, appellant must show that the error affected her rights so substantially that a miscarriage of justice or manifest injustice results if the error is not corrected. State v. Skillicorn, 944 S.W.2d 877, 884 (Mo. banc), cert. denied, 118 S.Ct. 568 (1997); Supreme Court Rule 30.20. Manifest injustice depends on the facts and circumstances of the particular case and the defendant bears the burden of establishing manifest injustice amounting to plain error. State v. Zindel, 918 S.W.2d 239, 241 (Mo. banc 1996).

A trial court's ruling on a motion to suppress will not be upset on review if the ruling

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[14] Appellant also has not provided a transcript of any pre-trial hearings. The docket sheets do indicate, however, that a "motion to suppress" was "taken under advisement" the day before trial (L.F. 6). Respondent would note, however, that it is appellant's responsibility to provide this Court with a complete record. Supreme Court Rule 30.04(c).

is supported by substantial evidence. State v. Lyons, 951 S.W.2d 584, 588 (Mo. banc 1997), cert. denied, 118 S.Ct. 1082 (1998). The evidence is reviewed in the light most favorable to the ruling. Id. The question in the case at bar is whether appellant invoked her right to counsel at the beginning of her interview.

B. The Facts

Officer Porter interviewed appellant on July 24, 1996, shortly after the shooting (Tr. 186). Prior to the interview, appellant executed a Miranda waiver form (L.F. 21; Tr. 186-187). Porter read the waiver form to appellant, gave appellant the opportunity to read the form to herself, and asked appellant whether she understood her rights (Tr. 187). Porter watched while appellant signed and initialed the form (Tr. 187-188). The waiver form included a recitation of appellant's right to have an lawyer present during questioning (L.F. 21). The waiver form also included a confirmation that appellant had read her rights, that she understood her rights, and that she waived her rights before making her statement (L.F. 21; Tr. 188).

After appellant executed the waiver, Porter waited about fifteen minutes before beginning the interview (Tr. 204). Porter waited because he wanted to give appellant "time to calm down and, out of respect for her, [he] wanted to make sure she was calm and able to talk" (Tr. 204). The interview then proceeded as follows:

[Porter]: Today's date is . . .

Larna, this is a Miranda Warning and Waiver. You've read this Miranda Warning?

[Appellant]: Yes, sir.

Q And you have waived your rights?

A Yes, sir.

Q And are willing to talk to me?

A Yes, sir. I will have a lawyer.

Q You want a lawyer?

A I will have one. I can afford one.

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

A I want Gene McFadin from Gallatin.

Q Ok.

A He's been a long time family friend.

Q Are you willing to talk to me now?

A I can't tell you any different than I would tell him, and I'm not lying about anything.

Q Ok, do you want to talk to me?

A What?

Q Do you want to tell me what happened?

A Yes, I'll tell you what happened.

(L.F. 22; Tr. 203-205).

At the conclusion of the interview, Porter again inquired whether appellant had waived her right to have counsel present (L.F. 28; Tr. 213). Appellant responded as follows:

Q You know, at the beginning of this, you said you wanted to hire an

attorney, Mr. McFadin. But, you also waived your rights to that attorney, and you wanted to talk to me; is that correct?

A Yes.

Q And, you know you have the right to have that attorney present; do you understand that?

A Yes, sir.

Q But, you did waive those rights?

A I waived them. I'm telling you the truth. I'm not telling anybody anything, other than what I would tell him.

(L.F. 28; Tr. 213).

At trial, defense counsel objected to the admission of the interview, arguing that appellant had invoked her right to counsel (Tr. 188-190). Defense counsel based his argument upon the comments that appellant had made at the beginning of her interview (Tr. 188-190). The prosecutor argued that appellant's comments concerning her lawyer were general and equivocal, and that they indicated only that appellant intended to hire an attorney in the future (Tr. 191). The prosecutor also pointed out that Officer Porter, "being cautious," probed until he was sure that appellant was willing to make a statement (Tr. 190-191). The trial court concluded as follows:

THE COURT: The Court's read all the cases, I think. And, in reviewing the document, it appears to the Court that the answers given were a reflection of who she was going to hire in the case and not a request to have the

attorney present at the time.

I think, under the case law and under that specific situation, that she was not requesting an attorney be there during that.

So I will overrule the objection, based on that, and go ahead and receive State's Exhibit Number 1.

(Tr. 191).

The prosecutor then asked the trial court to rule that appellant's statement had been made voluntarily, but the court stated that "we might need a little additional questions" on that issue (Tr. 192). The prosecutor then continued to question Officer Porter (Tr. 193-200). Porter testified that appellant had not been threatened or in any way induced to make her statement (Tr. 200-201). Porter again testified that he had explained to appellant her Miranda rights (Tr. 201). At that point, the prosecutor again asked the court to make a finding that appellant's statement had been made voluntarily (Tr. 201). In response, defense counsel stated, "I have no objection" (Tr. 201). Appellant's interview was then read into evidence (Tr. 203-214).

C. Appellant Waived Her Right To Have Counsel Present

There was substantial evidence that appellant waived her right to have counsel present, and that appellant voluntarily spoke with Officer Porter. Appellant was informed of her Miranda rights, and she executed a waiver of those rights (Tr. 186-188). When asked whether she was willing to speak with Porter, she responded affirmatively (Tr. 204-205). When asked again at the conclusion of her statement whether she had waived her right to have an attorney

present, appellant responded affirmatively (Tr. 213). And, significantly, although she testified extensively at trial, appellant never once testified that she had wanted to have her attorney present during the interview with Officer Porter (see Tr. 274, 299-300).

The trial court found that appellant's statements, including, "I will have a lawyer," and "I want Gene McFadin from Gallatin" were not a request for counsel to be present during the interview; rather, that appellant was merely commenting on who she intended to hire (Tr. 191). Appellant's twice stating "I *will* have a lawyer" (using a future tense construction), gave substantial support to the trial court's conclusions. In addition, given appellant's written and subsequent oral waivers, and her oral affirmations that she was willing to speak with Officer Porter, the trial court's conclusion was supported by substantial evidence.

Appellant argues, however, that continued questioning after her references to "a lawyer" (L.F. 22; Tr. 203-205), were "a textbook violation of Edwards v. Arizona, 451 U.S. 477[, 101 S.Ct. 1880, 68 L.Ed.2d 378] (1981)" (App.Sub.Br. 56). In Edwards, the Supreme Court of the United States outlined a rigid rule regarding the invocation of the right to counsel, stating:

> [W]e now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused, such as Edwards, 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.

Id. at 484-485, 101 S.Ct. at 1884-1885 (footnote omitted).

Subsequent cases, however, have refused to extend the Edwards rule to cases where the accused makes an ambiguous or equivocal reference to an attorney. See Davis v. United States, 512 U.S. 452, 460, 114 S.Ct. 2350, 2355, 129 L.Ed.2d 362 (1994). In Davis, the Court stated:

> Although a suspect need not "speak with the discrimination of an Oxford don," he must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney. If the statement fails to meet the requisite level of clarity, Edwards does not require that the officers stop questioning the subject.

Id. at 459, 114 S.Ct. at 2355 (citations omitted). Missouri courts have followed the same rationale. See State v. Bucklew, 973 S.W.2d 83, 90-91 (Mo. banc 1998); cert. denied, 119 S.Ct. 826 (1999); State v. Parker, 886 S.W.2d 908, 918 (Mo. banc 1994), cert. denied, 514 U.S. 1098 (1995); State v. Reese, 795 S.W.2d 69, 71-72 (Mo. banc 1990), cert. denied, 498 U.S. 1110 (1991); State v. Scott, 943 S.W.2d 730, 740 (Mo.App. W.D. 1997); State v. Jones, 914 S.W.2d 852 (Mo.App. E.D. 1996).

In Bucklew, for example, during interrogation, the defendant asked, "Well do you think I should have an attorney present?" and "How fast could you get an attorney here?" State v. Bucklew, 973 S.W.2d at 90. This Court held that those questions — the defendant's alleged

"request" — were ambiguous and equivocal, and that they did not rise to the "certainty of expression that constitutes a valid request for an attorney[.]" Id. at 91.

Likewise, in the case at bar, appellant's comments were, at best, an ambiguous and equivocal "request" for an attorney. Appellant stated, "I will have a lawyer," "I can afford one," and "I want Gene McFadin." (Tr. 204). In context, as the trial court concluded, it appears that appellant was merely talking about the attorney that she intended to hire (Tr. 191). Not knowing whether appellant had invoked her right to have counsel present during the interview, however, Officer Porter asked appellant whether she wanted an attorney and whether she was still willing to speak with him at that time (Tr. 204-205). Appellant did not indicate that she wanted her attorney present during the interview, and she did not refuse to answer any questions (Tr. 204-205). Consequently, Officer Porter continued to question appellant until he was certain that appellant wanted to make a statement at that time.

In short, Porter was not required to cease questioning when appellant made ambiguous and equivocal references to an attorney.[15] The trial court did not err in overruling appellant's objection; this point should be denied.

D. Appellant Did Not Suffer Manifest Injustice

Even if appellant's request is construed as an unambiguous and unequivocal request for

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[15] In Davis, the Supreme Court also specifically declined to adopt a rule that police officers must ask "clarifying questions" when a suspect makes an ambiguous or equivocal reference to an attorney. Id. at 461-462, 114 S.Ct. 2356.

an attorney, appellant did not suffer manifest injustice. In Arizona v. Fulminante, 499 U.S. 279, 309-311, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991), the Supreme Court held that the Chapman[16] harmless error rule applies to the admission of an involuntary confession.

In situations where the harmless error rule applies, this Court has affirmed the principle that "an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt." State v. Bucklew, 973 S.W.2d at 91 (quoting Delaware v. Van Arsdall, 475 U.S. 673, 681, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986)).

In the case at bar, the fact that appellant killed the victim was completely undisputed and uncontradicted. Even the events leading up to and surrounding the shooting were largely undisputed. More importantly, however, appellant's statement to the police did not reveal any facts that were not also revealed by the remainder of the state's case and appellant's own testimony (Tr. 242-330). Consequently, the jury's only task was to determine whether appellant was justified in killing the victim, or whether appellant had acted under the influence of sudden passion arising out of adequate cause.

Thus, even if appellant's statement to the police was erroneously admitted, appellant did not suffer manifest injustice. In fact, to the contrary, the existence of a prior consistent statement to the police was probably beneficial to the defense. This point should be denied.

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[16] Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

CONCLUSION

In view of the foregoing, respondent submits that appellant's conviction and sentence should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

(1) That the attached brief complies with the limitations contained in this Court's Special Rule No. 1(b), and that the brief, excluding the cover, the certificate of service, this certificate, and signature block, contains 15,404 words (as determined by WordPerfect 9 software);

(2) That the floppy disk filed with this brief, and containing a copy of this brief, has been scanned for viruses and is virus-free; and

(3) That two true and correct copies of the brief, and a copy of the floppy disk containing a copy of the brief, were mailed, postage prepaid, this _____ day of November, 2001, to:

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