No. SC95877

In the
# Supreme Court of Missouri

**STATE OF MISSOURI,**

**Respondent,**

**v.**

**JEFFREY L. BRUNER,**

**Appellant.**

**Appeal from the Circuit Court of Jasper County**
**Twenty-Ninth Judicial Circuit**
**The Honorable Gayle L. Crane, Judge**

## RESPONDENT'S SUBSTITUTE BRIEF

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**STATE OF MISSOURI**

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## STATEMENT OF FACTS[1]

A jury found Appellant (Defendant) guilty of one count of first-degree murder and one count of armed criminal action. (L.F. 77-78). Defendant was sentenced to serve life in prison without parole for the murder conviction, and five years for the armed criminal action conviction, to run concurrently. (L.F. 96). Defendant seeks reversal of his convictions and sentences, arguing that the trial court erred in refusing to give his proffered self-defense instruction. (Def.'s Br. 16).

The night of November 1, 2013, Defendant shot and killed Derek Moore outside a movie theater. (Tr. 307-09, 419). Mr. Moore was on a date with Defendant's estranged wife, Ms. Hale. (Tr. 477). Defendant and Ms. Hale were still married, but she had moved out of their house about two weeks earlier. (Tr. 567-68).

Defendant and Ms. Hale had a 14-year-old daughter. (Tr. 251). On November 1st, before the shooting, Defendant and his daughter went to McDonald's for dinner. (Tr. 245). While they were waiting for the food they had ordered, Defendant's daughter showed him a picture that had been

[1] Consistent with the standard of review for the claim asserted on appeal, this statement of facts presents the evidence in the light most favorable to Defendant.

posted on Facebook. (Tr. 247-48). The picture was of Ms. Hale and Mr. Moore outside a movie theater. (Tr. 477-79). The picture caption read, "Date night." (Tr. 247).

Defendant was "hurt," "angry", and "felt betrayed." (Tr. 576). Defendant and his daughter "went up and asked for [the food] to go instead of to eat there." (Tr. 576). On the way home, Defendant texted Ms. Hale "WTF" and "where are you at." (Tr. 577). She did not respond. (Tr. 577). Defendant told his daughter that "it's not like I'm going to kill the guy," and "[i]t would be like your mom to try to put me in jail." (Tr. 579).

When they got home, Defendant asked his daughter to pull up the Facebook picture on her laptop. (Tr. 251). Defendant got a gun from the clothes hamper in the bedroom, and put it in his coat pocket. (Tr. 583). Defendant got another gun out of the safe, along with an extra magazine. (Tr. 583-85). He knew both guns were loaded. (Tr. 584).

Defendant drove to the movie theater. (Tr. 586). Defendant "just wanted to talk to [Ms. Hale] and help her to see that what she was doing wasn't right and to come back home." (Tr. 586). Defendant believed that God was going to punish Ms. Hale for "the path that she was going down" and Defendant "wanted to save her from that." (Tr. 586). He brought the guns "because of how big the guy was in the picture." (Tr. 581). Defendant was 5'10" and weighed 175 pounds, and he thought Mr. Moore was 6'4" or 6'5".

(Tr. 596). Defendant thought that "if [Mr. Moore] tried to beat [him] up or something, that [Defendant] would be able to back him off with [the gun]." (Tr. 637-38).

When Defendant got to the theater, he drove around the parking lot looking for Ms. Hale's car. (Tr. 586). Not seeing her car, he parked in front of the theater and waited. (Tr. 586). Defendant waited approximately an hour. (Tr. 590-91).

Eventually, Defendant saw Mr. Moore and Ms. Hale coming out of the theater. (Tr. 592). He approached them and asked Ms. Hale, "what's going on[?]" (Tr. 593). Ms. Hale responded, "we're on a date." (Tr. 593). Defendant said, "we didn't talk about dating, and she said, I don't need your permission." (Tr. 593). Ms. Hale acted "defiant" and "really cocky toward [Defendant]." (Tr. 593). Mr. Moore told Defendant, "she moved out, pal" and Mr. Moore "moved real close to Defendant." (Tr. 594). Defendant stepped back. (Tr. 594). Defendant asked Ms. Hale, "how could you put this on Facebook for our 15-year-old daughter to see," and Mr. Moore moved toward Defendant and said, "who the fuck are you?" (Tr. 594). At that point, Defendant "wished [he] had just thought to leave." (Tr. 621).

Defendant backed up "countless times" because Mr. Moore kept saying "who the fuck are you," and every time Mr. Moore stepped toward Defendant, Defendant backed up. (Tr. 595). At one point, Ms. Hale got between Mr.

Moore and Defendant and put her hand on Mr. Moore's chest. (Tr. 595-96).

By that point, the three had "ended up toward or close to" a median. (Tr. 596). Mr. Moore and Ms. Hale walked around Defendant, so that Defendant was closest to the theater:

A. [by Defendant] I could see that median kind of in my peripheral vision, and I didn't want to trip over it and so I stopped. And then they started like circling around me to my right.

Q. [by defense counsel] Did you circle with them?

A. I was just pivoting.

(Tr. 598).

As Mr. Moore was going around Defendant, Mr. Moore said: "I'm not from here, mother fucker, I'll have your throat slit in[2] two hours." (Tr. 598). Defendant asked, "why are you threating me[?]" (Tr. 599). Mr. Moore said, "I don't play these redneck games." (Tr. 599). Mr. Moore had stepped up on the median and was facing Defendant when Mr. Moore said, "you don't know who the fuck you are messing with." (Tr. 599). Mr. Moore was in "what [Defendant] would call a fighting stance." (Tr. 638). Defendant saw Mr. Moore's right arm move and Defendant "perceived that he was trying to grab

[2] On cross-examination, Defendant testified that Mr. Moore said, "I will have your throat slit within two hours." (Tr. 625).

[him]." (Tr. 638). Defendant did not remember Mr. Moore having a weapon. (Tr. 640-41).

Defendant "backed up," pulled out a gun, and shot Mr. Moore multiple times. (Tr. 307, 638-39). Mr. Moore "went down on his knees and then he went down onto his fours." (Tr. 309). Defendant then shot Mr. Moore again, multiple times. (Tr. 307-09). Mr. Moore fell to the ground, and Defendant kicked him twice in the head and face. (Tr. 307-08, 310). Mr. Moore was shot six times: once "on the outside of the right shoulder" (Tr. 420-21), three times in the back (Tr. 422-26), once on the "thumb side" of his left forearm (Tr. 427-28), and once on the "front of the left forearm." (Tr. 434-36). The gunshot wound on the front of the left forearm "was most simply explained by a ricochet." (Tr. 436). Mr. Moore died as a result of multiple gunshot wounds. (Tr. 419).

After shooting Mr. Moore, the next thing Defendant could remember was sitting in his car holding the steering wheel. (Tr. 602). Defendant came out of his car without a gun. (Tr. 310-13). People at the theater forced Defendant to lie on the ground until the police arrived. (Tr. 313, 335-36).

## ARGUMENT

### I.

**The trial court did not err in refusing Defendant's proffered self-defense instruction because there was no substantial evidence that Defendant shot Mr. Moore in self-defense. Additionally, Defendant did not suffer prejudice from the trial court's refusal of his instruction.**

**A. Preservation and standard of review.**

Defendant submitted an instruction on self-defense, which was refused by the trial court, and Defendant alleged this claim of instructional error in his motion for new trial. (Tr. 652-53; L.F. 82-83).

"The circuit court must submit a self-defense instruction when substantial evidence is adduced to support it[.]" *State v. Smith*, 456 S.W.3d 849, 852 (Mo. banc 2015). "In determining whether the circuit court erred in refusing to submit an instruction on self-defense, the evidence is viewed in the light most favorable to the defendant." *Id.* "Whether the evidence raises the issue of self-defense is a question of law." *State v. Nunn*, 697 S.W.2d 244, 246 (Mo. App. E.D. 1985).

**B. Relevant record.**

Dr. Franks, a clinical psychologist, testified for Defendant. (Tr. 493). Dr. Franks diagnosed Defendant with "an acute stress disorder," which is

thought to "represent the early stages of post traumatic stress disorder," and "is basically characterized by an abnormal reaction to a stressful situation." (Tr. 508). A person with an acute stress disorder reacts to a stressful situation "in an abnormal way and experience[s] what's called depersonalization or dissociation." (Tr. 504-05). In laymen's terms, Dr. Franks described "depersonalization" and "dissociation" as a "snap," where the "individual does something that is just completely uncharacteristic for their history, and part of them – a very primitive, poorly controlled, emotionally driven part of themselves surfaces and they do something that under normal circumstances they would never do." (Tr. 514).

When asked how the acute stress disorder would affect Defendant's ability to deliberate, Dr. Franks testified that:

> It would cloud his thinking. It would diminish his clarity of thought and reasoning ability. It would reduce his impulse control and it would reduce his ability to control his emotions.

(Tr. 546). Dr. Franks gathered that Defendant was "the type of guy that internalizes problems, pressures that can result in some sort of explosive response[.]" (Tr. 523-24). Dr. Franks testified that Ms. Hale's "infidelity was very stressful" to Defendant, and that it could "create a build up that [could] ultimately result in an explosive reaction." (Tr. 508).

* * *

Defendant testified about the shooting:

A. I remember seeing the gun come out and I remember seeing one or two shots and I remember hearing three, but I guess what I need to do is backup and say that at the point that he made the initial threat it's like everything started closing in on me.

Q [by defense counsel]: Okay. The initial threat about slitting your throat?

A. Yes. I got this really sick feeling in my stomach. I felt like I was kind of like sink[ing]. And it was like the sky was getting darker. Everything is – it's like everything was getting farther, farther away. And sounds were sounding like they were farther and farther away. And everything was like closing in on me. And by the time he said, you don't know who the fuck you're messing with my vision was just about gone. I mean it was like –

Q. Like you were blind?

A. Well, it is like I was black[ing] out or something. It was like everything closed in.

Q. Could you see Mr. Moore in front of you?

A. I – I – I could see, but it wasn't real clear. It was –

Q. Was it a person or just an object?

A. It was a person, but it was like getting blurry.

(Tr. 600-01).

Q. [by prosecutor]: You don't remember shooting [the gun]?

A. I'm just telling you what I remember seeing. It's like it wasn't even me. I don't know how to explain it. I think I said it was kind of like your [sic] falling asleep and all of a sudden you flinch.

(Tr. 626-27).

A. . . .[T]hat whole time period is such a daze. I can't really honestly testify to anything after this happened. I mean cause it – everything is so like it was a dream. It was like surreal. Nothing seemed to make sense.

Q. [by prosecutor]: When this "dream sequence" ended isn't it true when you were in the presence of mind to take your coat off and put your gun up?

A. No. It was probably a week or two after the event before things seemed real. None of [sic] seem real. It was seemed [sic] like it – none of it seemed possible. It just – nothing seemed real.

(Tr. 634).

Q. [by prosecutor] . . . During this episode you have the clarity of mind to state that now [Mr. Moore] steps towards you. Is that correct?

A. I didn't say stepped towards me. He was kind of like this to me and there was some kind of arm motion, but at that point like I said before things were kind of closing in, so what that motion was isn't real clear to me.

Q. So did this motion take place before the darkness closed in or did this motion come to you after the darkness closed in?

A. I guess I'm not being clear. Have you ever passed out?

Q. No.

A. I have passed out twice. Once in a Christmas program in elementary school in elementary once in parade practice and when I was in the military. And this was very, very similar where everything just cuts like – and I guess I would call it tunnel vision. Everything gets darker and you can still see in the middle, but it just keeps coming in and the last thing to go is your hearing. And that was very, very similar to that experience I had when I was in the fourth grade and when I was in military.

(Tr. 639-40).

* * *

Defendant's daughter testified that, after they left McDonald's she asked him why he was taking her home. (Tr. 250). Defendant responded that "he didn't want [her] to see him kill a man." (Tr. 250). Defendant told her

that she probably would not have a mom or dad by the end of the night. (Tr. 251). Defendant also told her that he would be going to jail that night. (Tr. 251).

* * *

Ms. Hale said that Defendant was a very jealous person, and he told her "a million times" that if he could not have her, nobody will. (Tr. 533). Ms. Hale testified that when Defendant approached her and Mr. Moore outside the theater, he was very angry. (Tr. 486). Ms. Hale never heard Mr. Moore threaten Defendant. (Tr. 487).

* * *

Numerous witnesses testified about Defendant's statements immediately after shooting Mr. Moore. Mr. Montez testified that Defendant "kept trying to explain himself, and that Defendant said "she shouldn't have put what she did online" and "they were separated and she was cheating on him." (Tr. 313-14). Mr. Cupp testified that Defendant was "telling [people] about how long he had been married," that "there had been something posted on the Internet," and his "daughter had seen it and he was angry." (Tr. 323). Mr. Smith testified that Defendant said: "Yeah. I did it. Twenty-one years of marriage and this is what it comes down to." (Tr. 328). Mr. Richardson testified that Defendant said: "[T]hey posted it all over Facebook. What's a guy supposed to do." (Tr. 337).

* * *

The jury was instructed on first-degree murder, second-degree murder, and voluntary manslaughter. (L.F. 56, 58, 59). The jurors were also instructed that, they could consider "evidence that the defendant had or did not have a mental disease or defect in determining whether the defendant had the state of mind required to be guilty of murder in the first degree." (L.F. 57).

Defense counsel did not mention "self-defense" to the jury during *voir dire*, opening statement, or at any other time in trial. Defendant sought to have the jury instructed on self-defense, and offered the following instruction, which was refused:

INSTRUCTION NUMBER _____

PART A – GENERAL INSTRUCTIONS

One of the issues in this case is whether the use of force by the defendant against Derek Moore was lawful. In this state, the use of force, including the use of deadly force, to protect oneself is lawful in certain situations.

In order for a person lawfully to use force in self-defense, he must reasonably believe such force is necessary to defend himself from what he reasonably believes to be the imminent use of unlawful force.

But, a person is not permitted to use deadly force unless he reasonably believes that the use of deadly force is necessary to protect himself against death or serious physical injury.

As used in this instruction "deadly force" means physical force which is used with the purpose of causing or which a person knows to create a substantial risk of causing death or serious physical injury.

As used in this instruction, the term "reasonably believe" means a belief based on reasonable grounds, that is, grounds that 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.

PART B – CASE-SPECIFIC STATEMENT OF THE LAW

On the issue of self-defense as to Count I you are instructed as follows:

First, if the defendant reasonably believed that the use of force was necessary to defend himself from what he reasonably believed to be the imminent use of unlawful force by Derek Moore, and

Second, the defendant reasonably believed that the use of deadly force was necessary to protect himself from death or serious physical injury from the acts of Derek Moore, then his use of deadly force is justifiable and he 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 under this instruction, you must find the defendant not guilty under Count I.

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.

PART C – EVIDENTIARY MATTERS

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

If any threats against defendant were made by Derek Moore and were known by or had been communicated to the defendant, you may consider this evidence in determining whether the defendant reasonably believed that the use of force

was necessary to defend himself from what he reasonably believed to be the imminent use of unlawful force by Derek Moore.

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

MAI-CR306.06A

Submitted by Defendant

(L.F. 68-70).

**C. The trial court did not err, and Defendant did not suffer prejudice.**

The trial court did not err in refusing Defendant's proffered self-defense instruction. A person may use physical force upon another when the person believes such force is necessary to defend himself from what he reasonably believes is the use or imminent use of unlawful force by the other. *See* § 563.031.1, RSMo Supp. 2013.[3] A person may not use deadly force upon another to defend himself unless he reasonably believes such deadly force is necessary to protect himself against death, serious physical injury or any

[3] All statutory references are to the Revised Statutes of Missouri 2000, as updated by the 2013 Cumulative Supplement, unless otherwise noted.

forcible felony. *See* § 563.031.2(1). "Reasonably believes" means "a belief based on reasonable grounds, that is, grounds that could lead a reasonable person in the same situation to the same belief." *Smith*, 456 S.W.3d at 852.

A defendant is not entitled to a self-defense instruction based on the use of deadly force unless there is substantial evidence[4] of four elements:

(1) an absence of aggression or provocation on the part of the defender;

(2) 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;

(3) a reasonable cause for the defendant's belief in such necessity; and

[4] This Court has described the quantum of proof necessary to require the giving of a self-defense instruction in various ways. *See State v. Weems*, 840 S.W.2d 222, 226 (Mo. banc 1992) (citing *State v. McQueen*, 431 S.W.2d 445, 448-49 (Mo. 1968)). However, more recently, the Court has settled on the "substantial evidence" standard. *See, e.g.*, *Smith*, 456 S.W.3d at 852; *State v. Avery*, 120 S.W.3d 196, 200 (Mo. banc 2003); *State v. Westfall*, 75 S.W.3d 278, 280-81 (Mo. banc 2002).

(4) an attempt by the defender to do all within his power consistent with his personal safety to avoid the danger and the need to take a life.

*State v. Thomas*, 161 S.W.3d 377, 379 (Mo. banc 2005); *see also State v. Avery*, 120 S.W.3d 196, 200-01 (Mo. banc 2003) "'Substantial evidence' is evidence putting a matter in issue." *Avery*, 120 S.W.3d at 200. Whether evidence was presented that "put the matter in issue," is a case-by-case inquiry that depends on the facts of each case.

Here, there was no substantial evidence putting self-defense at issue. Specifically, there was no substantial evidence of the four elements required to submit to the jury a self-defense instruction based on the use of deadly force.

There was no substantial evidence of a real or apparently real necessity for Defendant to kill Mr. Moore in order to save himself from an immediate danger of serious bodily injury or death. According to Defendant, Mr. Moore cursed at him, repeatedly caused him to back up, threatened to have his throat slit within or in two hours, and moved his right arm, which Defendant perceived as "trying to grab" him. (Tr. 594-95, 598, 638). When Mr. Moore moved his right arm, he did not step towards Defendant, and Defendant was able to back away from him. (Tr. 638-39). Mr. Moore never threatened Defendant with a weapon, and there was no evidence that Mr. Moore had a

weapon. This evidence did not show that Defendant was in immediate danger, real or apparent, of serious bodily injury or death. *See Dorsey v. State*, 113 S.W.3d 311, 317-18 (Mo. App. S.D. 2003) (as a matter of law, the defendant was not entitled to use deadly force in self-defense because there was no indication that the victim ever possessed or threatened the defendant with a weapon); *see also State v. Wiley*, 337 S.W.3d 41, 45 (Mo. App. S.D. 2011) ("[D]eadly force cannot be used to repel a simple assault and battery."); *State v. Burks*, 237 S.W.3d 225, 229 (Mo. App. S.D. 2007) (there was no substantial evidence that the defendant was in fear of serious bodily harm, notwithstanding the defendant's fear that the victim and another man would "kick the snot" out of him).

Additionally, that Mr. Moore said, "I'm not from here, mother fucker, I'll have your throat slit within two hours," was not substantial evidence of an *immediate* danger to Defendant. "[T]he mere possibility that an event may happen in the future does not create the immediate danger underlying the right to kill in self-defense." *State v. Martin*, 666 S.W.2d 895, 899 (Mo. App. E.D. 1984). The inference from Mr. Moore's threat was that Mr. Moore was not going to "slit" Defendant's throat then, he was going to have someone else do it later. "An inference is a conclusion that is drawn from established facts, and must be both logical and reasonable." *State v. Mickle*, 164 S.W.3d 33, 50 (Mo. App. W.D. 2005). It is not logical or reasonable to infer from Mr. Moore's

comment that Mr. Moore himself was going to "slit" Defendant's throat at that moment. This is especially true considering that there was no evidence Mr. Moore had a weapon. To that end, there was no substantial evidence of a real or apparently real necessity for Defendant to kill Mr. Moore in order to save himself from an immediate danger of serious bodily injury or death.

Nor was there substantial evidence of a reasonable cause for Defendant's belief in such necessity. The reasonableness of the defendant's belief is determined by an objective test. *State v. Edwards*, 60 S.W.3d 602, 612 (Mo. App. W.D. 2001). "This objective standard measures conduct based on what a hypothetical ordinary reasonable and prudent person would have believed and how [he] would have reacted." *Id.* "Thus, the standard is whether the facts available to the defendant at the moment deadly force is used would have caused a hypothetical reasonable and prudent person to reasonably believe that deadly force was necessary to save himself or herself from an immediate danger of serious bodily injury or death." *Id.*; *see also Hendrix v. State*, 369 S.W.3d 93, 99 (Mo. App. W.D. 2012) ("a defendant's proclivities or propensities are irrelevant to the issue of whether the defendant acted as a reasonable person"; therefore, evidence that the defendant suffered degenerative joint disease was not admissible to support the defendant's self-defense claim).

Here, a reasonable and prudent person would not have reasonably believed that deadly force was necessary to save himself from an immediate danger of serious bodily injury or death at the hands of Mr. Moore. Defendant testified that he did not remember Mr. Moore having a weapon (Tr. 640-41), and there was no evidence presented from which a juror could have reasonably inferred that Defendant believed Mr. Moore had a weapon. Defendant testified that prior to shooting Mr. Moore, he perceived Mr. Moore was trying to grab him, but he also testified that Mr. Moore did not step towards him. (Tr. 638-39). In light of the fact that Defendant did not believe Mr. Moore had a weapon, and that he perceived Mr. Moore merely tried to grab him without moving toward him, a belief on the part of Defendant that he needed to kill Mr. Moore to save himself from immediate danger of death or serious bodily injury was not reasonable.

Regarding the next element, there was no substantial evidence that Defendant did all within his power consistent with his personal safety to avoid danger and the need to kill Mr. Moore. Defendant testified that when he "perceived that [Mr. Moore] was trying to grab [him]," Defendant "backed up" and pulled out a gun. (Tr. 638-39). Thus, Defendant was able to move out of harm's way, yet he still shot Mr. Moore. In fact, Defendant shot Mr. Moore six times, then kicked him in the head and face. (Tr. 307-08, 420-28, 434-36).

Defendant's actions were wholly inconsistent with someone who was avoiding the need to take a life.

Rather than shoot Mr. Moore, Defendant could have shown Mr. Moore the gun to scare him off. Defendant could have fired a warning shot. Defendant could have gone to the theater to get away from Mr. Moore—at that point, Defendant was closer to the theater than Mr. Moore. Defendant did not do any of these things. Instead, the *only* thing Defendant did to avoid the alleged perceived danger was shoot Mr. Moore six times. Defendant was not entitled to a self-defense instruction because there was no substantial evidence showing that Defendant did all within his power consistent with his personal safety to avoid taking a life.

Finally, there was no substantial evidence showing an absence of aggression or provocation on the part of Defendant. Defendant acted as the aggressor when he went to the theater armed with two guns and an extra magazine. Defendant provoked the altercation that resulted in Mr. Moore's death by seeking out Ms. Hale on her date with Mr. Moore and attempting to convince Ms. Hale that dating Mr. Moore was wrong. It is of no import that Defendant never intended to kill Mr. Moore; he acted as a provocateur, and his intent in doing so was irrelevant.

Moreover, even if Defendant were not considered the initial aggressor, he became an aggressor by failing to walk away when he had the opportunity.

"When an accused has an opportunity to decline or abandon the altercation and does not, he then becomes an aggressor, whether or not he initiated the initial altercation." *See State v. Gheen*, 41 S.W.3d 598, 606 (Mo. App. W.D. 2001). Mr. Moore and Ms. Hale circled past Defendant as they walked to the parking lot, and Defendant did not use that opportunity to try and walk away. There was no evidence from which the jury could infer that Defendant was prevented from walking away: Defendant testified he was able to back up toward the theater when he perceived Mr. Moore tried to grab him. (Tr. 638-39). In fact, Defendant testified that, during his encounter with Mr. Moore, he wished he had just thought to leave. (Tr. 621). Defendant had the opportunity to abandon the altercation, but he chose not to do so. The evidence did not show an absence of aggression or provocation on the part of Defendant such that he was entitled to claim self-defense.

Defendant was not entitled to a self-defense instruction because there was no substantial evidence to support such an instruction. The most recent self-defense case decided by this Court is illustrative, as the facts are similar. In *State v. Smith*, this Court held that the trial court did not err in refusing to submit a self-defense instruction. 456 S.W.3d at 852. The Court held that the record did not establish that the defendant "reasonably believed the use of deadly force was necessary." *Id.* In *Smith*, "[the victim] threatened to fight, yelled at, and came within inches of [the defendant]." *Id.* Here, Mr. Moore

threatened to fight, yelled at, and came within inches of Defendant. In *Smith*, "[the victim] neither hit nor exhibited a weapon to [the defendant]." *Id.* Here, Mr. Moore neither hit nor exhibited a weapon to Defendant. In *Smith*, "[n]o one, including [the defendant] saw a weapon on [the victim] during the incident." *Id.* Here, no one, including Defendant, saw a weapon on Mr. Moore. Accordingly, as in *Smith*, there was no substantial evidence that Defendant was "faced with a real or apparently real necessity to use deadly force to defend himself" against Mr. Moore. *See id.*

Defendant argues against application of the four-element test because "a question remains whether this test is inconsistent with Section 563.031.2, which does not include this four-factor test." (Def.'s Br. 22). But the four elements are not inconsistent with § 563.031, and, in fact, correspond to the provisions of the self-defense statute. The first element—an absence of aggression or provocation on the part of the defender—corresponds to § 563.031.1(1), which allows the use of force in self-defense unless "[t]he actor was the initial aggressor." The second and third elements—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 a reasonable

cause for the defendant's belief in such necessity—correspond with § 563.031.1 and .2(1).[5]

The fourth element—an attempt by the defender to do all within his power consistent with his personal safety to avoid the danger and the need to take a life—corresponds with § 563.031.3, which describes a defender's duty to retreat.[6] The duty to retreat—although not explicitly defined in the

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[5] § 563.031.1 provides that: "A person may, subject to the provisions of subsection 2 of this section, use physical force upon another person when and to the extent he or she reasonably believes such force to be necessary to defend himself or herself or a third person from what he or she reasonably believes to be the use or imminent use of unlawful force by such other person[.]" § 563.031.2(1) provides that: "A person may not use deadly force upon another person . . . unless . . . [h]e or she reasonably believes that such deadly force is necessary to protect himself . . . against death, serious physical injury, or any forcible felony[.]"

[6] After Defendant killed Mr. Moore, the legislature narrowed a person's duty to retreat. Previously, a person did not have a duty to retreat from a dwelling, residence, or vehicle if the person was lawfully present there, or from his own private property. *See* § 563.031.3, RSMo Supp. 2013. Beginning on October 15, 2016, a person no longer has a duty to retreat "[i]f the person is in any

statute—generally requires that a defendant avoid killing another if he can do so consistent with his own safety. The element also corresponds with the provisions of the self-defense statute that require the defender only use force to the extent such force is necessary to protect himself. *See* § 563.031.1, .2(1). Thus, the fourth element speaks to the defender's duty to retreat before using deadly force.

Application of the four-element test ensures that self-defense instructions are only submitted where there is evidence putting at issue all of the statutory requirements. Missouri courts, including this Court, should continue to apply the test when determining whether a self-defense instruction is warranted.

Defendant also argues that the trial court is not allowed to refuse to give a self-defense instruction "solely because it determines that no reasonable juror could find the that the absence of self-defense had been proved beyond a reasonable doubt[.]" (Def.'s Br. 21). But a trial court can refuse a self-defense instruction on that basis, and this Court has affirmed such a refusal. *See State v. Chambers*, 714 S.W.2d 527, 531 (Mo. banc 1986)

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location such person has the right to be." *See* § 563.031.3(3), RSMo (effective Oct. 15, 2016). This change in the statute reinforces that, at the time Defendant killed Mr. Moore, Defendant did have a duty to retreat.

("We have conducted a searching examination of the trial transcript and have considered the evidence in a light most favorable to defendant, and we are unable to conclude that there was sufficient evidence to support an instruction on self-defense ***or to allow the trier of fact to conclude that defendant's conduct was reasonable***." (emphasis added)).

Nonetheless, even if this Court were to find that the trial court erred in refusing to submit a self-defense instruction, "there must be prejudice to [Defendant] before the jury's verdict is overturned." *State v. Starr*, 998 S.W.2d 61, 65 (Mo. App. W.D. 1999); *see also State v. Jackson*, 433 S.W.3d 390, 396 n.4 (Mo. banc 2014) ("An appellate court will not remand for a new trial on the basis of [instructional] error . . . unless there is a reasonable probability that the trial court's error affected the outcome of the trial.").

Prejudice is presumed when a trial court erroneously refuses to submit a self-defense instruction, but that presumption is rebuttable. *See Westfall*, 75 S.W.3d at 284; *see also Starr*, 998 S.W.2d at 65-66. An erroneous refusal of a self-defense instruction is "presumed to prejudice the defendant unless it is clearly established by the State that he error did not result in prejudice." *Westfall*, 75 S.W.3d at 284. "Starting with a presumption of prejudice, the reviewing court will consider the facts and the instructions together in deciding if it is 'clearly shown' that no prejudice exists." *Starr*, 998 S.W.2d at 65. Under the facts here, the presumption of prejudice was rebutted.

First, considering the facts presented at trial, Defendant did not suffer prejudice from the trial court's refusal of his self-defense instruction. "Overwhelming evidence of guilt may lead an appellate court to find that a defendant was not prejudiced." *State v. Davis*, 318 S.W.3d 618, 642 (Mo. banc 2010) (any error in the verdict-directing instructions was not prejudicial due to the overwhelming evidence of the defendant's guilt); *see also State v. Leisure*, 796 S.W.2d 875, 880 (Mo. banc 1990) ("Error, which in a close case might call for reversal, may be disregarded as harmless when the evidence of guilt is strong.").

Here, considering the record in its entirety, there was no reasonable probability that the failure to give a self-defense instruction affected the outcome of the trial. The majority of Defendant's case-in-chief was devoted to proving that Defendant had an abnormal stress reaction as a result of his acute stress disorder, the opposite of showing that Defendant reacted as would a "hypothetical reasonable and prudent person." *See Edwards*, 60 S.W.3d at 612.

Dr. Franks testified that Defendant's acute stress disorder caused him to react in an "abnormal way," and to experience "depersonalization" and "dissociation." (Tr. 504-05). In laymen's terms, Dr. Franks described "depersonalization" and "dissociation" as a "snap," where the "individual does something that is just completely uncharacteristic for their history, and part

of them – a very primitive, poorly controlled, emotionally driven part of themselves surfaces and they do something that under normal circumstances they would never do." (Tr. 514).

Dr. Franks testified that Defendant's acute stress disorder would "cloud his thinking," "diminish his clarity of thought and reasoning ability," and "reduce his impulse control." (Tr. 546). Dr. Franks gathered that Defendant was "the type of guy that internalizes problems, pressures that can result in some sort of explosive response[.]" (Tr. 523-24). Dr. Franks testified that Ms. Hale's "infidelity was very stressful" to Defendant, and that it could "create a build up that [could] ultimately result in an explosive reaction." (Tr. 508).

Defendant's testimony indicated that he was experiencing symptoms of dissociation and depersonalization when he shot Mr. Moore and in the days that followed. (Tr. 600-01, 627-28, 634, 639-40). Defendant testified that "everything was getting farther away," he felt like he was "kind of like sinking," he felt like he was "blacking out," his vision was "just about gone," and he "could see, but it wasn't real clear." (Tr. 600-01). Defendant testified that "[i]t's like it wasn't even [him]," everything was "like it was a dream," it was "surreal," and "[n]othing seemed to make sense. (Tr. 627-28, 634).

Defendant's principal defense, as shown by his testimony and the testimony of Dr. Franks, was that Defendant killed Mr. Moore as a result of an abnormal stress reaction brought on by his acute stress disorder. To that

end, defense counsel did not mention self-defense to the jury during *voir dire*, opening argument, or any point in the trial. In light of the amount of evidence Defendant presented to support his principal defense, Defendant was not prejudiced by the trial court's failure to submit a self-defense instruction. *Cf. State v. Banks*, 215 S.W.3d 118, 121-22 (Mo. banc 2007) (trial court error in allowing improper closing argument was prejudicial because the argument attacked the defendant's "principal defense").

Moreover, when prejudice is judicially determined, the record is considered in its entirety, and not in the light most favorable to a particular party. Thus, this Court should consider the following evidence when determining if the record, in its entirety, contained overwhelming evidence of Defendant's guilt.

Defendant's daughter testified that, after they left McDonald's she asked him why he was taking her home. (Tr. 250). Defendant responded that "he didn't want [her] to see him kill a man." (Tr. 250). Defendant told her that she probably would not have a mom or dad by the end of the night. (Tr. 251). Defendant also told her that he would be going to jail that night. (Tr. 251).

Ms. Hale told the police that Defendant was a very jealous person, and he told her "a million times" that if he could not have her, nobody will. (Tr. 533). Ms. Hale testified that when Defendant approached her and Mr. Moore

outside the theater, he was very angry. (Tr. 486). Ms. Hale never heard Mr. Moore threaten Defendant. (Tr. 487).

Numerous witnesses testified about Defendant's statements immediately after shooting Mr. Moore. Mr. Montez testified that Defendant "kept trying to explain himself, and that Defendant said "she shouldn't have put what she did online" and "they were separated and she was cheating on him." (Tr. 313-14). Mr. Cupp testified that Defendant was "telling [people] about how long he had been married," that "there had been something posted on the Internet," and his "daughter had seen it and he was angry." (Tr. 323). Mr. Smith testified that Defendant said: "Yeah. I did it. Twenty-one years of marriage and this is what it comes down to." (Tr. 328). Mr. Richardson testified that Defendant said: "[T]hey posted it all over Facebook. What's a guy supposed to do." (Tr. 337). The evidence overwhelmingly showed Defendant's guilt.

Second, the instructions submitted and the jury's verdict also showed that Defendant did not suffer prejudice. If the jury had believed that Defendant shot Mr. Moore out of an objectively reasonable fear for his life, then the jurors would not have convicted Defendant of first-degree murder. The element that differentiated first-degree and second-degree murder was deliberation. (*See* L.F. 56, 58). The element that differentiated second-degree murder and voluntary manslaughter was whether Defendant killed Mr.

Moore under "the influence of sudden passion arising from adequate cause." (*See* L.F. 58-59). "Sudden passion" was defined as "passion directly caused by and arising out of the provocation by Derek Moore, which passion arose at the time of the offense and was not solely the result of former provocation." (L.F. 58). "Adequate cause" was defined as "cause that would reasonably produce a degree of passion in a person of ordinary temperament sufficient to substantially impair an ordinary person's capacity for self-control." (L.F. 58).

The jury did not find that Defendant acted under a sudden passion arising from adequate cause, and instead found Defendant killed Mr. Moore "upon cool deliberation." The jury's verdict belies self-defense in that "the element of deliberation serves to ensure that the jury believes the defendant acted deliberately, consciously, and not reflexively." *State v. Nathan*, 404 S.W.3d 253, 266 (Mo. banc 2013). Because the jury rejected the premise that Defendant acted under adequate cause, there was no reasonable probability that the jury would have found Defendant acted in objectively reasonable self-defense. As such, submitting a self-defense instruction would not have affected the outcome of the trial. *See Starr*, 998 S.W.2d at 65-66 (the defendant was not prejudiced from the failure to instruct on self-defense: had the jury believed the defendant's theory of self-defense, the jury would have found him not guilty under the felony murder verdict director submitted).

Considering the overwhelming evidence showing that Defendant did not act in self-defense, together with the instructions given and the jury verdict, there was no reasonable probability that the submission of a self-defense instruction would have changed the outcome of the trial. Accordingly, Defendant did not suffer prejudice from the trial court's refusal to submit his proffered self-defense instruction.

In conclusion, there was no substantial evidence that Defendant shot Mr. Moore in self-defense; thus, the trial court did not err in refusing to instruct the jury on self-defense. Moreover, there was no reasonable probability that the outcome of the trial would have been different had the trial court submitted Defendant's proffered self-defense instruction. Defendant's point should be denied.

## CONCLUSION

The Court should affirm Defendant's convictions and sentences.

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 Missouri Supreme Court Rule 84.06 and contains 7,263 words as calculated pursuant to the requirements of Supreme Court Rule 84.06, as determined by Microsoft Word software; and

2. That a copy of this notification was sent through the eFiling system on this 4th day of October, 2016, to:

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