No. SC94313

In the

Supreme Court of Missouri

STATE OF MISSOURI,

Respondent/Cross-Appellant,

v.

ELVIS SMITH,

Appellant/Cross-Respondent.

Appeal from the City of St. Louis Circuit Court

Twenty-Second Judicial Circuit

The Honorable Julian L. Bush, Judge of Division Four

APPELLANT'S SUBSTITUTE BRIEF, STATEMENT, AND ARGUMENT

Gwenda Reneé Robinson
Missouri Bar No. 43213
District Defender, Office B/Area 68
Office of the State Public Defender
1010 Market Street, Suite 1100
St. Louis, Missouri 63101
314.340.7662 (telephone)
314.340.7685 (facsimile)
Gwenda.Robinson@mspd.mo.gov

ATTORNEY FOR APPELLANT

INDEX

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Constitutional Provisions

JURISDICTIONAL STATEMENT

By indictment in St. Louis City Circuit No. 1222-CR02065-01, the State charged Appellant Elvis Smith with Count I of the class A felony of murder in the first degree in violation of § 565.020, Counts II and IV of the unclassified felony of armed criminal action in violation of § 571.015, Count III of the class B felony of assault in the first degree in violation of § 565.050, and Count V of the class C felony of unlawful possession of a firearm in violation of § 571.070, RSMo Cum. Supp. 2010.[1]

The State tried Mr. Smith on the charges from July 16, 2012 through July 19, 2012. At the close of the State's case, the trial court granted Mr. Smith's motion for judgment of acquittal on Count V. On July 19, 2012, the jury found Mr. Smith guilty of Counts I through IV, but the trial court subsequently refused the jury verdicts on Counts III and IV on the grounds that Mr. Smith's conviction of those counts violated Mr. Smith's right to be free of double jeopardy.

On September 28, 2012, the trial court sentenced Mr. Smith on Counts I and II to concurrent terms of imprisonment in the Missouri Department of Corrections

[1] Appellant Elvis Smith (Mr. Smith) will cite to the appellate record as follows: Trial Transcript, "(Tr.)"; and Legal File, "(L.F.)." All statutory references are to RSMo 2000 unless otherwise stated.

of life imprisonment without the possibility of parole and thirty years. Mr. Smith timely filed his notice of appeal on October 2, 2012.

On April 29, 2014, the Missouri Court of Appeals, Eastern District issued its opinion in *State v. Smith*, ____ S.W.3d ____, 2014 WL 1686935 (Mo. App. E.D. April 29, 2014), affirming the trial court's judgment. On August 19, 2014, this Court sustained respondent's/cross-appellant's application for transfer, and transferred this case to this Court. Consequently, this Court has jurisdiction over Mr. Smith's appeal. Mo. Const., Art. V, § 10 (as amended 1982); Rule 83.04.

STATEMENT OF FACTS

In February 2011, Martez Williams a.k.a. "Terrell" purchased Dormin sleeping pills from Wilber Hardwict, also known as "Thorough" or "Daryl," believing them to be heroin (Tr. 282, 322, 326).[2] Mr. Williams was upset about the purchase and complained to Mr. Hardwict (Tr. 326).

On May 21, 2011, Mr. Williams telephoned Mr. Hardwict and requested three heroin pills (Tr. 374). Mr. Hardwict spoke with Appellant Elvis Smith, "Little D," who sold drugs for Mr. Hardwict, and arranged a meeting place for the sale (Tr. 290, 375, 393-394).

Mr. Smith met Mr. Williams and gave him the three heroin pills, expecting payment (Tr. 327, 375). But Mr. Williams refused to pay and told Mr. Smith that Mr. Hardwict owed him the pills (Tr. 327, 375).

Mr. Smith asked Mr. Williams not to take whatever had happened with Mr. Hardwict out on him and told him to take it up with Mr. Hardwict (Tr. 375). Mr. Smith wouldn't receive payment from Mr. Hardwict for the sale if Mr. Williams wouldn't pay for the pills (Tr. 393-394). Mr. Williams told Mr. Smith that Mr. Hardwict knew where to find him and left with the heroin pills (Tr. 212-213, 375, 394).

---

[2] During Mr. Smith's trial testimony, the transcript refers to Mr. Hardwict as "Daryl" (Tr. 374).

Mr. Smith told Mr. Hardwict what Mr. Williams had said about Mr. Hardwict owing him and Mr. Hardwict claimed he didn't know anything about it (Tr. 376). Mr. Hardwict was angry that Mr. Smith had given Mr. Williams the heroin pills without receiving the thirty dollars for them (Tr. 376-377, 399).

That day, Jessie White received information about what had happened with Mr. Williams from Mr. Smith and Mr. Hardwict (Tr. 280, 290). Mr. White heard Mr. Smith say that he would get Mr. Williams (Tr. 280-281). David Thomas a.k.a. "Baby D" also heard Mr. Smith say about people, "Motherf***er, is going to learn about playing" (Tr. 298, 303, 305, 310, 320).

Mr. Hardwict gave Mr. Smith a gun, a revolver (Tr. 395). Mr. Hardwict was upset about what had happened with Mr. Williams (Tr. 238).

Mr. Smith carried the gun because he was afraid of Mr. Williams (Tr. 238, 389, 395). Mr. Williams and Mr. Smith saw one another in the Peabody Complex frequently (Tr. 326, 374, 380). Mr. Smith knew Mr. Williams had a reputation for robbing people and Mr. Williams had prior convictions for robbery, assault, stealing, and tampering (Tr. 323-324, 341, 388-389).

On the afternoon of Sunday, May 22, 2011, people in the 1400 block of Castle Lane in the Clinton Peabody Complex were outside, sitting, talking, and hanging out (Tr. 247, 277, 282, 292, 324, 327-328). Kids were outside playing (Tr. 350). The weather was nice and warm (Tr. 254).

Mr. Smith and Mr. Hardwict went to the store, and returned to the Peabody Complex with a pack of cigarettes and a bag of snacks (Tr. 376). As they walked around an apartment building in the area of Castle Lane and Dillon Drive, they encountered Mr. Williams and Josh (Tr. 212, 291, 376).[3]

Mr. Smith asked Mr. Williams if he had the money, the thirty dollars he owed him (Tr. 325-326, 377). Mr. Williams said he didn't have the money, and asked, "What you want to do about it, fight?" (Tr. 325, 377). He said, "We can fight" or "Let's fight" (Tr. 293, 308-310, 328, 377, 396). Mr. Williams took his hat off his head and threw it on the ground (Tr. 212-213, 377, 396; State's Ex. 10). He took off his shirt and got in Mr. Smith's face, inches away from him (Tr. 212-213, 257-258, 294; State's Ex. 10). Mr. Smith told Mr. Williams that he wasn't going to fight him and backed away from him (Tr. 377).

Josh grabbed Mr. Williams and pleaded with him to cool off, but Mr. Williams told Josh to let go of him and snatched away from Josh (Tr. 377-378). To Mr. Smith, it appeared that Mr. Williams seemed to become more aggressive and was trying to move around Josh (Tr. 378). Mr. Smith felt threatened and frightened (Tr. 378).

[3] Police never learned the true identify of Josh a.k.a. "Jake" and Appellant Smith will refer to him by first name, "Josh," only (Tr. 234).

Mr. Smith gave the pack of cigarettes and bag in his hands to Mr. Hardwict and drew the gun (Tr. 250-251, 259, 292-293, 310, 319, 328, 350, 353, 377-378). Mr. Hardwict told Mr. Smith to shoot, "pop," or kill Mr. Williams (State's Ex. 10). Mr. Smith's hand visibly shook (Tr. 299).

Juan House, who was outside at the time of the shooting, saw Mr. Smith draw the gun on Mr. Williams and Josh who were facing Mr. Smith (Tr. 251, 256, 259). So did Mr. Thomas (Tr. 293).

Mr. Thomas recalled Mr. Smith waved the gun at everyone (Tr. 294, 317). Mr. Thomas said when Mr. Smith did this, Mr. Williams attempted to use Josh as a human shield, but Josh spun Mr. Williams off of him, landing both Josh and Mr. Williams on the ground in front of Mr. Smith (Tr. 294-295).

Mr. Smith, on the other hand, stated that Mr. Williams had pushed or thrown his human shield, Josh, at him, throwing him "off balance" (Tr. 212-213; State's Ex. 10).

Mr. Thomas recalled Mr. Smith fired the first shot at Mr. Williams when Mr. Williams was on the ground (Tr. 295, 299, 306-307, 313-314). Mr. Smith indicated he fired one shot to his left side, into the ground, as Mr. Williams was facing him (Tr. 378).

Mr. House recalled Mr. Williams never fell to the ground and ran away first (Tr. 251, 256-257, 259-260). After Josh got off the ground, he ran in a different direction from Mr. Williams (Tr. 251, 259-260).

Mr. Williams indicated he turned and ran before the first shot fired (Tr. 334-335, 337). Mr. Williams ran towards Chouteau Avenue, towards the gas station (Tr. 329-330). He ran zigzag or diagonal, so he wouldn't get hit (Tr. 317, 330).

Mr. Williams stopped running once he got by some dumpsters, and looked back at Mr. Smith, facing him (Tr. 315-316, 330, 378-379, 397). Mr. Smith figured Mr. Williams was attempting to retrieve a gun from there and raised his gun (Tr. 339, 378-379). Mr. Hardwict told Mr. Smith to get Mr. Williams and Mr. Smith fired again (Tr. 339, 378-379).

Mr. Williams resumed running (Tr. 330). The shots were coming in his direction (Tr. 317, 339).

Mr. Smith fired three or four shots (Tr. 251, 329; State's Ex. 10). Mr. House saw Mr. Smith shoot three times, first, at the ground, second, toward the building called Chouteau, and again, down Castle Lane (Tr. 251, 253-254, 260, 265, 271).

The shots awakened Mr. White who was sleeping in his home in the Peabody Complex (Tr. 277-279). After hearing the first shot, he looked out the

window and saw Mr. Williams running across the parking lot (Tr. 279). The shots stopped after Josh and Mr. Williams ran out of sight (Tr. 270-271, 274).

According to Mr. House, none of the bullets ever came close to hitting Josh or Mr. Williams (Tr. 274). Mr. House said Mr. Williams ran out of range when the first shot fired, and was out of the complex by the time the third shot fired (Tr. 261, 270, 274; *see also* Tr. 335, 337). Mr. House said the third shot was not fired at Mr. Williams, but in the opposite direction of where Mr. Williams had run, or in the direction in which Josh had run (Tr. 271-273).

Penny Griffin was also outside in the Peabody Complex playing with her children when the shooting occurred (Tr. 349). There were about thirteen children playing on the playground and four, including Jnylah Douglas, were in her charge (Tr. 350, 353). She called the children inside (Tr. 353).

She recalled that Mr. Smith fired the first shot when Mr. Williams was directly in front of him, and that Mr. Smith fired in the air, away from Mr. Williams, toward the playground where no one was (Tr. 353, 358, 362, 366-367, 370). Mr. Williams and Josh ran (Tr. 354-355).

Ms. Griffin didn't try to see where the other shots went, but tried to get her children in the house (Tr. 358, 361). A bullet went through a bush that Josh had run past and wounded Jnylah Douglas (Tr. 272, 300). She died from a bullet wound to the head on June 7, 2011 (Tr. 233-234, 343-344, 348).

Police later learned of Mr. Smith's involvement in the shooting death and placed his photo in a photo lineup for Mr. Williams to view (Tr. 203-206). Mr. Williams identified Mr. Smith from the photo lineup (Tr. 207-208). After interviewing other witnesses, police put out a wanted for Mr. Smith's arrest and arrested him the next day (Tr. 210).

They took Mr. Smith to the homicide office where Mr. Smith waived his rights and gave a statement to a homicide detective (Tr. 211-212; State's Ex. 10). Mr. Smith initially told Detective Dana Fox that on the day of the shooting, Mr. Williams had drawn a gun, robbed him of his money, and fired shots as he ran away (Tr. 212, 392; State's Ex. 10).

Mr. Smith later told Detective Fox about Mr. Williams taking drugs from him the day before the shooting, and Mr. Williams' confrontation with him on the day of the shooting (Tr. 212-213; State's Ex. 10). Mr. Smith maintained that he was defending himself from Mr. Williams and never intended to shoot Jnylah Douglas (Tr. 239, 241-242; State's Ex. 10).

By indictment in St. Louis City Circuit No. 1222-CR02065-01, the State charged Mr. Smith with Count I of murder in the first degree, Counts II and IV of armed criminal action, Count III of assault in the first degree, and Count V of unlawful possession of a firearm (L.F. 21-23).

The State tried Mr. Smith on the charges from July 16, 2012 through July 19, 2012 (L.F. 2-5). At the close of the State's case, the trial court granted Mr. Smith's motion for judgment of acquittal on Count V (Tr. 403-404).

At trial, Mr. Smith testified that he was focused on Mr. Williams and that he fired the shots because he was trying to scare Mr. Williams away from him (Tr. 389-390, 398-399). He testified that he fired one shot into the ground and two shots in the air, but that he did not try to hit anyone and did not intend to hit anyone (Tr. 378-379, 389-390, 393, 396-398).

Mr. Smith acknowledged that he was angry about Mr. Williams having taken the pills without payment and about Mr. Williams having challenged him to a fight (Tr. 398-399). But he testified that "$30 is not money for me to go kill somebody for $30" (Tr. 399).

On July 19, 2012, the jury found Mr. Smith guilty of Counts I through IV, but the trial court subsequently refused the jury verdicts on Counts III and IV on the grounds that Mr. Smith's conviction of those counts violated Mr. Smith's right to be free of double jeopardy (Tr. 444-445; L.F. 27-30).

On September 28, 2012, the trial court sentenced Mr. Smith on Counts I and II to concurrent terms of imprisonment in the Missouri Department of Corrections of life imprisonment without the possibility of parole and thirty years (Tr. 458;

L.F. 63-65). Mr. Smith timely filed his notice of appeal on October 2, 2012 (L.F. 67-69). This appeal follows (L.F. 67-69).

POINT – I.

The trial court clearly erred in refusing the defense's self-defense instruction A because Mr. Smith's assertion that the shooting death of Jnylah Douglas was accidental, and not intentional, did not preclude the submission of a self-defense instruction on Count I of murder in the first degree under the theory of transferred intent, and substantial evidence from the defense and the State supported submission of a self-defense instruction on Count I of murder in the first degree and Count III of assault in the first degree for the accidental, unintentional killing of Jnylah Douglas by a random shot fired at Martez Williams and for shooting at Martez Williams. The trial court's failure to submit the proffered self-defense instruction prejudiced Mr. Smith. The trial court's error denied Mr. Smith's rights to due process of law, to present a defense, and to a fair trial as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, §§ 10 and 18(a) of the Missouri Constitution. This Court must reverse Mr. Smith's convictions and remand for a new trial.

State v. Avery, 120 S.W.3d 196 (Mo. banc 2003);

State v. Westfall, 75 S.W.3d 278 (Mo. banc 2002);

State v. Zumwalt, 973 S.W.2d 504 (Mo. App. S.D. 1998);

State v. Weems, 840 S.W.2d 222 (Mo. banc 1992);

MAI-CR3d 306.06;

U.S. Const., Amend. V, VI, & XIV;

Mo. Const., Art. I, §§ 10 & 18(a);

§ 563.031;

Rules 29.11 & 30.20.

POINT – II.

The trial court plainly erred, causing manifest injustice or a miscarriage of justice, in entering written sentence and judgment that Mr. Smith had been found guilty after a guilty plea to Count I of murder in the first degree and Count II of armed criminal action because Mr. Smith went to trial on both counts. The trial court's inclusion of this clerical error in Mr. Smith's written sentence and judgment prejudices Mr. Smith and denies his right to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, § 10 of the Missouri Constitution. This Court must remand for the trial court's correction of this clerical error *nunc pro tunc*.

Moore v. State, 318 S.W.3d 726 (Mo. App. E.D. 2010);

State v. Fuller, 267 S.W.3d 764 (Mo. App. S.D. 2008);

State v. Goss, 259 S.W.3d 625 (Mo. App. S.D. 2008);

State v. Butchee, 255 S.W.3d 548 (Mo. App. S.D. 2008);

U.S. Const., Amend. V & XIV;

Mo. Const., Art. I, §§ 10 & 18(a);

Rules 29.12 & 30.20.

ARGUMENT – I.

The trial court clearly erred in refusing the defense's self-defense instruction A because Mr. Smith's assertion that the shooting death of Jnylah Douglas was accidental, and not intentional, did not preclude the submission of a self-defense instruction on Count I of murder in the first degree under the theory of transferred intent, and substantial evidence from the defense and the State supported submission of a self-defense instruction on Count I of murder in the first degree and Count III of assault in the first degree for the accidental, unintentional killing of Jnylah Douglas by a random shot fired at Martez Williams and for shooting at Martez Williams. The trial court's failure to submit the proffered self-defense instruction prejudiced Mr. Smith. The trial court's error denied Mr. Smith's rights to due process of law, to present a defense, and to a fair trial as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, §§ 10 and 18(a) of the Missouri Constitution. This Court must reverse Mr. Smith's convictions and remand for a new trial.

Facts

At trial, defense counsel submitted defense instruction A which stated:

> One of the issues as to counts I and III is whether the use of force by the defendant that resulted in the

death of Jnylah Douglas was in lawful self defense. In this state, the use of force, including the use of deadly force, to protect oneself is lawful in certain situations.

A person can lawfully use force to protect himself against an unlawful attack. However, an initial aggressor, that is, one who first attacks or threatens to attack another, is not justified in using force to protect himself from the counter-attack that he provoked.

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 lawful 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.

On the issue of self-defense as to Counts I and III, you are instructed as follows:

First, if the defendant was not the initial aggressor in the encounter with Martez William [sic], and

Second, 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 Martez Williams, and

Third, if he used only such non-deadly force as reasonably appeared to be necessary to defend himself, then his use of deadly force is justifiable and he acted in lawful self-defense, or if

Fourth, 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 Martez Williams,

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, you must find the defendant not guilty under Counts I and III.

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 acts of violence not involving the defendant committed by Martez Williams and that the defendant was aware of these acts. 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. You may not consider this evidence in determining who was the initial aggressor in the encounter or for any other reason.

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

(L.F. 61-62).

The State objected to submission of the defense's self-defense instruction and the trial court sustained the State's objection (Tr. 409). The trial court refused to submit the defense's self-defense instruction (Tr. 409).

The trial court had previously informed defense counsel during a sidebar that it did not believe the defense had made a submissible case on self-defense because Mr. Smith maintained the shooting death of Jnylah Douglas was an accident, rather than an intentional shooting (Tr. 381-382).

After the trial court's refusal of Mr. Smith's self-defense instruction and Mr. Smith's conviction, defense counsel assigned error to the trial court's ruling in Mr. Smith's timely-filed new-trial motion (L.F. 36-40). Consequently, this assignment of error is properly preserved for appellate review. Rule 29.11(d). Should this Court conclude otherwise, Mr. Smith respectfully requests plain error review under Rule 30.20.

Standard of Review

The general rule is that an instruction must be based upon substantial evidence and the reasonable inferences from it. *State v. Habermann*, 93 S.W.3d 835,

837 (Mo. App. E.D. 2002) (citing *State v. Westfall*, 75 S.W.3d 278, 280 (Mo. banc 2002)). It is error for the trial court to refuse an instruction supported by the evidence, and this Court will reverse if the trial court's error results in prejudice to the defendant. *State v. Hiltibidal*, 292 S.W.3d 488, 493 (Mo. App. W.D. 2009); *Westfall*, 75 S.W.3d at 280.

In determining whether refusal to submit a self-defense instruction was error, this Court must view the evidence in the light most favorable to the defendant. *Westfall*, 75 S.W.3d at 280. Failure to give a self-defense instruction that is supported by the evidence constitutes reversible error. *Westfall*, 75 S.W.3d at 280; *State v. Weems*, 840 S.W.2d 222, 226 (Mo. banc 1992).

The trial court must submit a self-defense instruction "when substantial evidence is adduced to support it, even when that evidence is inconsistent with the defendant's testimony." *State v. Avery*, 120 S.W.3d 196, 200 (Mo. banc 2003) (citing *Westfall*, 75 S.W.3d at 281); MAI-CR3d 306.06, Note on Use 2. "Substantial evidence" is evidence that puts the matter in issue, and the defendant has the burden of injecting self-defense into the case through substantial evidence. *Weems*, 840 S.W.2d at 226; § 563.031.5, RSMo Cum. Supp. 2010. This evidence may come from the defendant's evidence, from the State's evidence, or through the testimony of a third-party. *Avery*, 120 S.W.3d at 201.

If the evidence supports differing conclusions as to whether the defendant acted in self-defense, he or she is entitled to an instruction on it. *State v. Miller*, 91 S.W.3d 630, 633 (Mo. App. W.D. 2002). "This is because any conflict in the evidence is to be resolved by a jury properly instructed on the issues." *State v. White*, 222 S.W.3d 297, 300 (Mo. App. W.D. 2007).

Relevant Law on Self-Defense

The right of self-defense is a person's privilege to defend himself or herself against attack. *State v. Chambers*, 671 S.W.2d 781, 783 (Mo. banc 1984). The right is codified in Section 563.031, RSMo Cum. Supp. 2010. To warrant the use of deadly force in self-defense, four elements must be met: (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 defender's belief in such necessity, and (4) an attempt by the defender to do all within his power consistent with his personal safety to avoid the danger and the need to take a life. *Chambers*, 671 S.W.2d at 783.

Argument

The trial court clearly erred in refusing the defense's self-defense instruction A. The trial court refused the defense's self-defense instruction, in part, because Mr. Smith asserted that the shooting was accidental (Tr. 381-382). But the trial

court's ruling is based on a misapplication of the law to the facts of Mr. Smith's case.

Mr. Smith acknowledges the general rule of law that a defendant is not entitled to an instruction on self-defense if the defendant claims accident. *Avery*, 120 S.W.3d at 201. This is because self-defense constitutes an intentional but justified killing, whereas accident connotes an unintentional killing. *State v. Thompson*, 390 S.W.3d 171, 174 (Mo. App. E.D. 2012) (citing *Avery*, 120 S.W.3d at 201). Consequently, the defenses of self-defense and accident are inconsistent. *Id.* But no such inconsistency is apparent in Mr. Smith's case and the general rule, stated in the paragraph above, doesn't apply to Mr. Smith's transferred-intent case.

The State based its theory of prosecution against Mr. Smith for Count I of murder in the first degree on the doctrine of transferred intent or the notion that the intent follows the bullet. The State maintained that Mr. Smith attempted to kill or cause serious physical injury to Martez Williams by shooting him and that a shot meant for Mr. Williams struck and killed Jnylah Douglas (Tr. 415-416; L.F. 49, 52, 55).

Under the doctrine of transferred intent, "[i]f, after deliberation, a defendant intends to kill victim X and kills victim Y instead, the doctrine of transferred intent provides that the defendant is guilty of first-degree murder

notwithstanding the mistake." *State v. Nathan*, 404 S.W.3d 253, 267 (Mo. banc 2013). "The defendant cannot escape the liability that would have attached had things gone as planned simply because the defendant killed someone other than the intended victim." *Id.*

Yet, the defendant can avoid liability for the accidental killing of an unintended victim or bystander under the doctrine of transferred intent if the bystander is unintentionally killed by a random shot fired in the proper and prudent exercise of self-defense. *State v. Zumwalt*, 973 S.W.2d 504, 506 (Mo. App. S.D. 1998). "[I]f the killing or injury of a person intended to be hit would, under all the circumstances, have been excusable or justifiable on the theory of self-defense, then the unintended killing or injury of a bystander by a random shot fired in the proper and prudent exercise of such self-defense is also excusable or justifiable." *Id.* Consequently, here, if Mr. Smith shot at Martez Williams in the exercise of lawful self-defense, then the accidental shooting death of unintended victim, Jnylah Douglas, is justifiable.

The trial court overlooked the foregoing in determining whether to submit the defense's proffered self-defense instruction and erroneously based its refusal to submit the instruction on Mr. Smith's characterization of the shooting as an "accident" (*see* Tr. 390; State's Ex. 10).

Although Mr. Smith, in his statements to police and testimony, characterized the shooting of Jnylah Douglas as an accident, he repeatedly maintained his shooting at Martez Williams was in self-defense. The defense conducted voir dire on self-defense and opened on it (Tr. 107-110, 116, 121-122, 141, 178-184, 198).

Moreover, substantial evidence from the defense and the State supported submission of a self-defense instruction on Count I of murder in the first degree and Count III of assault in the first degree for the accidental, unintentional killing of Jnylah Douglas by a random shot fired at Martez Williams and for shooting at Martez Williams.

At trial, the prosecution called Detective Dana Fox, who took Mr. Smith's videotaped statement (Tr. 199). Detective Fox testified that Mr. Smith initially told him that Martez Williams had drawn a gun, robbed him of his money, and fired shots as he ran away (Tr. 212, 392; State's Ex. 10).

Detective Fox testified that Mr. Smith later changed his statement, admitted firing shots at Mr. Williams, and maintained that he had fired at Mr.

Williams, who was his target, and not Jnylah Douglas, in self-defense (Tr. 212-214, 239, 241-242; State's Ex. 10).[4]

Evidence at trial showed that Mr. Williams was the initial aggressor in the shooting incident. Evidence showed Mr. Williams engaged Mr. Smith in an argument that was loud enough to draw the neighbors' attention (Tr. 239, 248-249, 350, 376-377). Mr. Williams said, "Let's fight" (Tr. 293, 308-310, 377, 396). He took his hat off his head and threw it on the ground (Tr. 212-213, 377, 396; State's Ex. 10). He took off his shirt and got in Mr. Smith's face, inches away from him (Tr. 212-213, 257-258, 294; State's Ex. 10). Mr. Smith testified he told Mr. Williams that he wasn't going to fight him and backed away from him, indicating his withdrawal (Tr. 377).

Evidence at trial further showed that Mr. Williams' associate, Josh, grabbed Mr. Williams and pleaded with him to cool off, but that Mr. Williams told Josh to let go of him and snatched away from Josh (Tr. 377-378). Mr. Smith testified that Mr. Williams seemed to become more aggressive and was trying to move around Josh, who was blocking Mr. Williams from Mr. Smith (Tr. 378).

[4] Mr. Smith testified at trial that what he had told Detective Fox about the robbery wasn't true, but that Mr. Williams had robbed him the day before the shooting (Tr. 391-392).

Mr. Smith testified that he felt threatened and became frightened (Tr. 378). Mr. Smith testified he knew Mr. Williams' reputation; Mr. Williams had robbed people before and had been to prison for robbery (Tr. 388-389, 395). Mr. Williams was also younger than Mr. Smith and Mr. Smith didn't want to fight him (Tr. 250-251, 258, 377).

Evidence at trial showed that Mr. Smith gave the pack of cigarettes and bag in his hands to Mr. Hardwict and drew a gun (Tr. 250-251, 259, 292-293, 310, 319, 328, 350, 353, 377-378). Mr. Smith's hand was visibly shaking (Tr. 299).

The evidence showed that Mr. Williams took Josh and threw or pushed him at Mr. Smith, throwing Mr. Smith "off balance" (Tr. 212-213; State's Ex. 10). Mr. Smith fired three or four shots (Tr. 251, 329; State's Ex. 10). Mr. Smith testified he fired the shots to get Mr. Williams away from him (Tr. 389-390, 398-399).

The evidence showed that Mr. Williams ran from Mr. Smith after the firing of the first shot, but that he stopped by some dumpsters, looked back, and faced Mr. Smith (Tr. 295, 306, 313-316, 330, 378-379, 397). Mr. Smith testified he figured Mr. Williams was attempting to retrieve a gun from there and fired again (Tr. 339, 378-379). Evidence at trial showed the shots were fired at Mr. Williams or in his direction (Tr. 317, 339).

Viewed in the light most favorable to the defense, the evidence mentioned in the preceding paragraphs constituted substantial evidence of self-defense, and

raised a question of fact for the jury about whether Mr. Smith acted in self-defense. The evidence established that Mr. Smith was not the initial aggressor in the incident, that he tried to avoid further confrontation with Mr. Williams by backing away and declining to fight him, and that when this was unsuccessful, he began to fear imminent serious physical injury or death at the hands of Mr. Williams. The evidence showed that only then did Mr. Smith draw his gun and begin firing.

Viewed in the light most favorable to the defense, evidence about Mr. Williams' aggression on the day of the shooting, Mr. Smith's knowledge of Mr. Williams' reputation for violence, and Mr. Smith's belief that Mr. Williams was retrieving a gun from the area to which he had run, established the reasonableness of Mr. Smith's belief that firing his gun was necessary to prevent Mr. Williams from seriously injuring or killing him.

Consequently, the trial court clearly erred in refusing the defense's self-defense instruction A, and the trial court's error prejudiced Mr. Smith. There is a reasonable probability that had the trial court given the refused self-defense instruction, jurors would have had reasonable doubt about Mr. Smith's guilt and would have acquitted him of the offenses for which he was on trial. The trial court's error denied Mr. Smith's rights to due process of law, to present a defense, and to a fair trial as guaranteed by the Fifth, Sixth, and Fourteenth Amendments

to the United States Constitution and Article I, §§ 10 and 18(a) of the Missouri Constitution. This Court must reverse Mr. Smith's convictions and remand for a new trial.

ARGUMENT – II.

The trial court plainly erred, causing manifest injustice or a miscarriage of justice, in entering written sentence and judgment that Mr. Smith had been found guilty after a guilty plea to Count I of murder in the first degree and Count II of armed criminal action because Mr. Smith went to trial on both counts. The trial court's inclusion of this clerical error in Mr. Smith's written sentence and judgment prejudices Mr. Smith and denies his right to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, § 10 of the Missouri Constitution. This Court must remand for the trial court's correction of this clerical error *nunc pro tunc*.

Facts and Preservation of the Error

Mr. Smith proceeded to trial on both Count I of murder in the first degree and Count II of armed criminal action (Tr. 1-468; L.F. 2-4, 13, 20, 24-25). Nonetheless, the written sentence and judgment reflects that Mr. Smith was convicted of both counts upon a plea of guilty (L.F. 63).

Mr. Smith concedes that this assignment of error was not properly preserved for appellate review, but respectfully requests plain error review under Rule 30.20.

Standard of Review

Plain error relief is appropriate when the alleged error so affects the rights of the defendant as to cause a manifest injustice or miscarriage of justice. *State v. Phelps*, 965 S.W.2d 357, 358 (Mo. App. W.D. 1998); Rule 29.12(b).

Argument

The failure to accurately memorialize the trial court's judgment as announced in open court is a clerical error. *State v. Johnson*, 220 S.W.3d 377, 384 (Mo. App. E.D. 2007) (citing *State v. Goodine*, 196 S.W.3d 607, 624 (Mo. App. S.D. 2006)). This is because the legal force attached to a judgment comes from the court's judicial act, not a clerical entry in the record. *Gooddine*, 196 S.W.3d at 624.

Supreme Court Rule 29.12(c) authorizes the court to correct clerical errors in entering the rendered judgment with a *nunc pro tunc* order if such error is clear from the record. *Moore v. State*, 318 S.W.3d 726, 737 (Mo. App. E.D. 2010). The rule provides that "[c]lerical mistakes in judgments, orders or other parts of the record and errors in the record arising from oversight or omission may be corrected by the court at any time after such notice, if any, as the court orders." Rule 29.12(c).

Here, the trial court's mistake of incorrectly marking the boxes designated for recording the manner in which the defendant's guilt was found is a clerical mistake. Under Rule 29.12, the trial court may correct errors in the recording of the nature of the proceedings, i.e., whether the defendant was convicted after a trial or a plea. *See, e.g., State v. Fuller*, 267 S.W.3d 764, 767 (Mo. App. S.D. 2008)

(correcting the written judgment to accurately reflect that defendant went to trial and did not plead guilty); *State v. Goss*, 259 S.W.3d 625, 628 (Mo. App. S.D. 2008) (same); *State v. Butchee*, 255 S.W.3d 548, 552 (Mo. App. S.D. 2008) (same); *State v. Spry*, 252 S.W.3d 261, 267 (Mo. App. S.D. 2008) (same).

This Court must remand for the trial court's correction of its clerical error *nunc pro tunc*. The trial court plainly erred, causing manifest injustice or a miscarriage of justice, in entering written sentence and judgment that Mr. Smith had been found guilty after a guilty plea to Count I of murder in the first degree and Count II of armed criminal action when Mr. Smith went to trial on both counts. The trial court's inclusion of this clerical error in Mr. Smith's written sentence and judgment prejudices Mr. Smith and denies his right to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, § 10 of the Missouri Constitution.

CONCLUSION

WHEREFORE, based on his argument in Point I, Mr. Smith respectfully requests this Court to reverse his convictions and sentences and remand for a new trial. In the alternative, based on his argument in Point II, Mr. Smith requests remand for correction of his written sentence and judgment *nunc pro tunc*.

Respectfully submitted,

/s/ Gwenda Reneé Robinson

Gwenda Reneé Robinson, #43213
District Defender, Office B/Area 68
Missouri State Public Defender
Eastern Appellate/Post-conviction
1010 Market Street, Suite 1100
St. Louis, MO 63101
314.340.7662 (telephone)
314.340.7685 (facsimile)
Gwenda.Robinson@mspd.mo.gov

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE AND COMPLIANCE

Pursuant to Missouri Supreme Court Rule 84.06(g), I hereby certify that on Monday, September 29, 2014, a true and correct copy of the foregoing was e-filed with the Court and sent to Shaun Mackelprang, the Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102 at Shaun.Mackelprang@ago.mo.gov per the Missouri E-Filing System Clerk. In addition, I hereby certify that this brief includes the information required by Rule 55.03 and that it complies with the word limitations of Rule 84.06(b). This brief was prepared with Microsoft Word for Windows, uses Californian FB 14 point font, and contains 6,632 words.

/s/ Gwenda Reneé Robinson

Gwenda Reneé Robinson, #43213
District Defender, Office B/Area 68
Missouri State Public Defender
Eastern Appellate/Post-conviction
1010 Market Street, Suite 1100
St. Louis, MO 63101
314.340.7662 (telephone)
314.340.7685 (facsimile)
Gwenda.Robinson@mspd.mo.gov

ATTORNEY FOR APPELLANT