In the
Missouri Supreme Court

STATE OF MISSOURI,
Respondent**,**

vs. **No. SC86129**

RONNIE GONZALES,
Appellant**.**

Appeal to the MISSOURI SUPREME COURT
From the Circuit Court of St. Louis City
Twenty-second Judicial Circuit,
The Honorable Dennis Schaumann, JUDGE

Appellant's Substitute Brief

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[1] This Index contains hyperlinks to each section of *Appellant's Substitute Brief*.

Authorities[2]

CASES:

[2] For this Court's convenience, undersigned counsel is filing a CD that contains this *Appellant's Supplemental Brief* (.doc), the Appendix (.pdf), referenced Exhibits (.jpg), and Authorities .doc or .pdf).

***CONSTITUTIONAL PROVISIONS*:**

***STATUTES*:**

RULES:

MAI's:

MISCELLANEOUS:

Jurisdiction

A St. Louis City jury found Ronnie Gonzales, appellant, guilty of second degree murder and armed criminal action. *See* §§565.021 and 571.015.[3] The Honorable Dennis Schaumann sentenced Ronnie to concurrent terms of thirty and ten years' imprisonment, respectively. The Eastern District remanded Ronnie's case with directions, which would result in a new trial *if and only if* he proved that *he knew* the alleged victim's reputation for being violent, aggressive and turbulent. This Court granted Ronnie's request to transfer in order to:

1.a. **Reexamine *State v. Johns*,** 34 S.W.3d 93, 111 (Mo.banc 2000), which went astray when it concluded that "the defendant must show that he was aware of the victim's violent reputation…."

1.b. **Resolve the following Conflict in the Law:**

The defendant need not know of the victim's reputation for violence. *State v. Buckles*, 636 S.W.2d 914, 622	**The defendant must know of the victim's reputation for violence.** *Johns, supra*.

[3] All statutory citations are to RSMo 2000.

(Mo.banc 1982); *accord* MAI-CR3d 306.06.	

1.c. **To answer the following question of general interest and importance:** Since *Johns* did not overrule *Buckles* and since the Missouri Supreme Court reiterated the *Buckles* rule when it modified MAI-CR3d 306.06 just two years after *Johns*, what is the state of the law in Missouri?

Thus, jurisdiction lies in this Court and the case proceeds as if on original appeal. Mo. Const., Art. V, §10 (as amended 1982).

Facts

Darkness had fallen on All Hallow's Eve, 2001, when Fred and Gloria Hoppe began "eating dinner and watching [TV]." (Tr. 259, 282).[4] Mr. Hoppe had found his place on the sofa directly across from his TV, and Mrs. Hoppe had settled into a recliner near the front door (Tr. 199, 281-282). Ronnie Gonzales, their friend of fifteen years, came calling–though the Hoppes were not expecting Ronnie that evening, he was always welcome (Tr. 203-204, 259, 329). Inviting him inside, Mrs. Hoppe commented that she had thought it might be Mike Gossir, another long-time friend (Tr. 199, 247-248, 258, 334).

Mr. Hoppe had been taping a wrestling program for Ronnie, and Ronnie had popped in to ask about that tape (Tr. 203-204, 258-259, 329). Ronnie said he had left *Slow Tom's* tavern after being in a "confrontation" with someone (Tr. 209, 260). Later, he called *Slow Tom's* and "told them to shove it." (Tr. 264). Mike Gossir arrived about 20 minutes after Ronnie (Tr. 210-211, 260, 264). Mrs. Hoppe opened the door, and, as Mike stepped into the foyer, Ronnie commented, "This

[4] With a "satellite" and a "52, 55-inch" TV, Mr. Hoppe enjoyed TV (Tr. 199, 203).

is Halloween. Where's your uniform or mustache?" (Tr. 211) or "Where's your false face or your wig or mustache?" (Tr. 265, 288).


Ex. 2

At 6 feet, 353 pounds, Mike was a "big fella" (Tr. 213-214, 305); at 5'2" and 150 pounds, Ronnie is not (Tr. 328). Mike filled the Hoppes' tiny foyer (Ex. 2).[5] Ronnie got up to leave (Tr. 214, 265, 335). As Ronnie approached the foyer, Mike said, "What did you hear about talking about me?"[6] (Tr. 265; *see also* Tr. 239, 440). Mrs. Hoppe described Mike as being "a very gentle type of person" (Tr. 264).[7]

The Hoppes had known both Ronnie and Mike for over 15 years and both men were welcome in the Hoppes' home (Tr. 199, 203, 256-258). They quickly

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[5] The foyer is the gray carpeted area (Tr. 223-224, 228).

[6] Ronnie testified that Mike said, "Why don't you threaten me now, Ronnie;" and that he replied that he did not now what Mike was talking about (Tr. 336).

[7] Ronnie tried to rebut this with evidence of Mike reputation in the neighborhood for being aggressive and turbulent, but the court excluded that evidence (Tr. 248, 301-302, 331-332, 416-434).

wore out their welcome on this evening. Face to face in the foyer, Mike and Ronnie first cursed at each other and then pushed and shoved one another (Tr. 212-213, 216, 266). The Hoppes could not testify as to who started the pushing and shoving match (Tr. 216, 266). Mrs. Hoppe told them both to leave (Tr. 266-267). They stayed, and "all of a sudden [Ronnie] put his fist out and knocked [Mike] down on the kitchen floor." (Tr. 271, 291, 296).[8] From his seat on the sofa, Mr. Hoppe could not see the kitchen, but he heard such a loud thud that he assumed Mike had fallen to the floor (Tr. 218, 236, 241-243).

Ex. 6

Getting scared, Mrs. Hoppe headed toward the kitchen to call the police, but, with the foyer blocked, she backtracked through the living room and entered the dining area (Tr. 267-268, 270; Ex. 6). To get to the phone, Mrs. Hoppe had to go past the table and around the counter that separates the dining area from the kitchen and over to the sink (Tr. 268, 291).

[8] Ronnie disputes this, testifying the Mike threw him into the kitchen "like a rag doll" (Tr. 338).

Ronnie entered the kitchen from the foyer, and Michael stood up and started backing out of the kitchen towards the foyer (Tr. 272-273). Ronnie made it through the doorway, past the refrigerator and to the sink, where he turned around to face the foyer (Tr. 292; Ex. 4). Right behind him, Mrs. Hoppe saw Ronnie "put his hands behind his back." (Tr. 272). Then, "all of a sudden," Mrs. Hoppe saw Ronnie take his fist and "go into Mike's chest." (Tr. 273, 297).[9] From her close vantage point, Mrs. Hoppe saw nothing in Ronnie's hand (Tr. 273-274, 298). Nor did she see any injury to Mike (Tr. 297).[10]


Ex. 4

[9] Ronnie disputes this, testifying that as he picked himself up off the floor, Mike entered the kitchen and came toward him (Tr. 338). Fearing for his life, Ronnie grabbed something from the counter and "holded [sic] it in front of [himself]" for protection. (Tr. 341, 344, 357). Backed against the counter, Ronnie saw Mike "drawed [sic] back his arm like he was going to punch me, so I just ducked and still holding my arm up straight and Mike suddenly stopped." (Tr. 341).

[10] Likewise, Ronnie saw no blood or anything to indicate Mike was seriously hurt (Tr. 343, 354, 364).

Mike gasped like he was out of breath and backed out of the kitchen (Tr. 274, 297). Mr. Hoppe saw Ronnie hit Mike with what looked like a "clenched [right] fist" (Tr. 244; *see also* Tr. 343). Ronnie went out the front door (Tr. 274).

Mike died of a single entry puncture wound just below his left nipple (Tr. 306-307), and the State charged Ronnie with first degree murder and armed criminal action (L.F. 13-14).

While investigating the matter that evening, Detective Wasem "asked [Mr. Hoppe], 'So when Ronnie approached him and started cussing,' and [Mr. Hoppe] responded, 'No, actually I've got to be fair about it, Mike is the one that asked him, said he heard [Ronnie] was talking about him, and it was Mike started it.'" (Tr. 440). At trial, however, Mr. Hoppe denied these words and maintained that "[t]hey were both argumentative." (Tr. 239). Counsel asked to confront Mr. Hoppe by playing this excerpt of his audiotaped statement to Det. Wasem, but the court refused to let her (Tr. 240-241).

After hearing the evidence, the court understood that it "[was] duty bound to instruct on self-defense" (Tr. 374). The State agreed (Tr. 374); however, it objected that Instruction No. A omitted the "initial aggressor" paragraph (Tr. 394-395; *see* L.F. 70-71, included in the Appendix at A1-A2). Describing Ronnie's

question about a Halloween mask as "fighting words," Judge Schaumann refused Instruction No. A and submitted self-defense via Instruction No. 15 instead (L.F. 64-65, included in the Appendix at A-3-A4).

The jury found Ronnie guilty of second degree murder and armed criminal action and recommended terms of thirty and ten years' imprisonment, respectively (L.F. 74-76). On January 10, 2003, the Honorable Dennis Schaumann sentenced Ronnie accordingly, ordering the sentences to run concurrently (Tr. 511, 529; L.F. 115-117; Appendix at A5-A7).

This appeal followed (L.F. 110-112).

Points Relied On

I. Improper Exclusion of Gossir's Reputation for Aggressiveness

The trial court abused its discretion in refusing to let Ronnie present evidence of Mike Gossir's general reputation for "turbulence and violence" *even after* the State elicited from Mrs. Hoppe that Mike "seemed to us a very gentle type of person" because such rulings violated Ronnie's rights to due process, a fair trial, and to present a defense. *See* U.S. Const., Amends. V, VI and XIV; Mo.Const., Art. I, §§ 10 and 18(a). Since Ronnie asserted self-defense, Mike's reputation for turbulence and violence was admissible on the question of who was the aggressor. Excluding testimony from Ronnie, Sherry Baker, Robert Ost and Wayne Melton that Mike had a reputation in the neighborhood for being turbulent, violent and aggressive, let the State portray Mike as a one dimensional "gentle giant" while preventing Ronnie from completing the picture with Mike's turbulence and violence.

State v. Buckles, 636 S.W.2d 914 (Mo.banc 1982);

State v. Johns, 34 S.W.3d 93 (Mo.banc 2000);

State v. Cross, 343 S.W.2d 20 (Mo. 1961);

State v. Williams, 784 S.W.2d 309 (Mo.App., E.D. 1990);

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

Mo.Const., Art. I, §§ 10 and 18(a);

MAI-Cr3d 306.06;

Wigmore on Evidence, 3d Ed., Vol. III, § 692.

II. Submitting "Initial Aggressor" Without Evidentiary Supprort

The trial court plainly erred in refusing Instruction No. A and, in its place, submitting Instruction No. 15 because those rulings deprived Ronnie of his rights to due process and a fair trial before a properly instructed jury. *See* U.S. Const., Amends. V, VI and XIV; Mo.Const., Art. I, §§ 10 and 18(a). Paragraph 2 of Instruction No. 15 submitted the question of "initial aggressor" as a limit on Ronnie's right to self-defense. The State and the trial court relied upon the evidence that Ronnie asked Mike Gossir "where's your [Halloween] mask" as being fighting words that made Ronnie the initial aggressor. The law, however, defines an initial aggressor as "one who *first attacks or threatens to attack* another." Absolutely no evidence supports the notion that Ronnie did either; Instruction No. 15 is a "straw man." It so misdirected the jury that it has caused manifest injustice.

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

State v. Harney, 51 S.W.3d 519 (Mo.App., W.D. 2001);

State v. White, 622 S.W.2d 939, 943 (Mo.banc 1982);

State v. Williams, 815 S.W.2d 43 (Mo.App., W.D. 1991);

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

Mo.Const., Art. I, §§ 10 and 18(a);

Rules 28.03, 29.11, 30.20;

MAI-Cr3d 306.06.

III. Precluding Impeachment During Cross-examination

The trial court abused its discretion in refusing to let Ronnie play Mr. Hoppe's audiotaped statement to impeach him during cross-examination because that ruling violated Ronnie's rights to due process, confrontation and a fair trial. U.S. Const., Amends. V, VI and XIV; Mo.Const., Art. I, §§ 10 and 18(a). In a taped statement to police, Mr. Hoppe admitted, "To be perfectly fair about it, Mike is the one that asked him and said he heard [Ronnie] was talking about him or something, Mike started it." When Mr. Hoppe denied this at trial, counsel sought to use the audiotape to "sift, modify or explain what ha[d] been said." The court, however, opined that Ronnie could not use this recorded, prior inconsistent statement to impeach Mr. Hoppe directly on cross-examination.

Hungate v. Hudson, 185 S.W.2d 646 (Mo. 1945);

State v. Moore, 88 S.W.3d 31 (Mo.App., E.D. 2002);

State v. Cole, 867 S.W.2d 685 (Mo.App., E.D. 1993);

State v. Fleer, 851 S.W.2d 582 (Mo.App., E.D. 1993);

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

Mo.Const., Art. I, §§ 10 and 18(a).

IV. Admitting Uncharged, Unrelated "Confrontation"

The trial court plainly erred, resulting in manifest injustice, when it let Mr. and Mrs. Hoppe testify that Ronnie told them he had been in a confrontation at Slow Tom's tavern before coming to their home because such rulings violated Ronnie's rights to due process, a fair trial before an impartial jury and to be tried only for the offense charged. See U.S. Const., Amends. V, VI and XIV; Mo.Const., Art. I, §§ 10, 17 and 18(a). While the State may have had a right to present evidence of Ronnie's reputation related to aggressiveness, it did not have a right to present evidence of this specific confrontation since it was not against Mike. This confrontation did not tend to prove any matter in issue; it merely portrayed Ronnie as a man with a propensity for being confrontational and lured the jury into finding him guilty based on a ground different from proof specific to the charged offenses.

State v. Burns, 978 S.W.2d 759 (Mo.banc 1998);

Cave v. Singletary, 971 F.2d 1513 (11th Cir. 1992);

State v. Bernard, 849 S.W.2d 10, 16 (Mo.banc 1993);

Old Chief v. United States, 519 U.S. 172, 117 S.Ct. 644 (1997);

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

Mo.Const., Art. I, §§ 10, 17 and 18(a);

Rule 30.20.

Argument

I. Excluding Evidence of Mike's Reputation for Aggressiveness

The trial court abused its discretion in refusing to let Ronnie present evidence of Mike Gossir's general reputation for "turbulence and violence" *even after* the State elicited from Mrs. Hoppe that Mike "seemed to us a very gentle type of person" because such rulings violated Ronnie's rights to due process, a fair trial, and to present a defense. *See* U.S. Const., Amends. V, VI and XIV; Mo.Const., Art. I, §§ 10 and 18(a). Since Ronnie asserted self-defense, Mike's reputation for turbulence and violence was admissible on the question of who was the aggressor. Excluding testimony from Ronnie, Sherry Baker, Robert Ost and Wayne Melton that Mike had a reputation in the neighborhood for being turbulent, violent and aggressive, let the State portray Mike as a one dimensional "gentle giant" while preventing Ronnie from completing the picture with Mike's turbulence and violence.

Ronnie answered the State's charge of first degree murder by asserting self-defense. The State portrayed Mike Gossir as a "very gentle type of person" (Tr. 301) –

something of a gentle giant. But the trial court refused to let Ronnie refute that image with evidence that Mike was aggressive, bizarre, "hot headed," and "short temper[ed]" (Tr. 333-334, 418, 422, 425, 430). The trial court tipped the scales against Ronnie.

Unlike life, a criminal trial *is* supposed to be fair. Indeed, the trial court must ensure that it is. *State v. Tiedt*, 357 Mo. 115, 206 S.W.2d 524, 526 (Mo.banc 1947). Although the trial court submitted self-defense, it diluted that submission by withholding any evidence of Mike's reputation for turbulence and violence. Without Ronnie's evidence of that reputation, the jury only got to see Mike as a man with "one dimension, unburdened by the accumulated baggage" of his reputation in his neighborhood. *See State v. Hedrick*, 797 S.W.2d 823, 826 (Mo.App., W.D. 1990). As such, the trial court's ruling undermined "[t]he fundamental purpose of a criminal trial[, which] is the *fair ascertainment of the truth*." *State v. Carter*, 641 S.W.2d 54, 58 (Mo. banc 1982) (emphasis added).

Whether to admit evidence is addressed to the trial court's discretion. *State v. Bernard*, 849 S.W.2d 10, 13 (Mo.banc 1993). Trial courts have broad, but not unfettered discretion. *Id.* They do not have discretion to ignore the law. *See Lutsky v. Blue Cross Hospital Service, Inc.*, 695 S.W.2d 870, 881 (Mo.banc 1985);

Milgram v. Jiffy Equipment Co., 247 S.W.2d 668, 676 (Mo. 1952) ("not even a court of equity has any discretion as to what the law may be."). Yet, that is precisely what the trial court had to do to exclude evidence of Mike's reputation for turbulence and violence.

Pointing to *State v. Williams*, 784 S.W.2d 309 (Mo.App., E.D. 1990), the trial court opined that the

> only kind of evidence [regarding Mike's reputation for aggressiveness] that can be brought forward is evidence of specific acts by this victim against [Ronnie]...I think evidence of his reputation for that type of behavior other than against [Ronnie] is not proper and will be excluded from this trial.

(Tr. 253). The trial court mixed apples (general reputation) with oranges (specific acts). In *State v. Waller*, 816 S.W.2d 212, 216 (Mo.banc 1991), this Court permitted Mr. Waller to use evidence of specific acts of violence *perpetrated by this victim against him* in order to show *his* reasonable apprehension of danger. That limitation is irrelevant to the evidence that Ronnie wanted to use in order to show that Mike Gossir was the *initial aggressor.*

Defense counsel insisted that Mike's reputation was admissible "to lend credibility and additional evidence that [Mike] was the initial aggressor." (Tr. 254). Indeed, it was.

> On the issue of self-defense *there can be no doubt* of the rule that evidence of the *deceased's reputation for turbulence and violence is admissible* as *relevant to show who was the aggressor* and whether a reasonable apprehension of danger existed; *but such evidence must be proved by general reputation testimony*, not specific acts of violence and defendant must show he knew of such reputation when the issue is reasonable apprehension.

State v. Buckles, 636 S.W.2d 914, 622 (Mo.banc 1982) (emphasis added); *accord* MAI-CR3d 306.06. In 1991, *Waller, supra*, expanded *Buckles* to permit specific acts of violence by the victim against the defendant.

So, at this point, a defendant claiming self-defense could present three types of evidence regarding the victim's propensity for turbulence and violence:

1. The Victim's general reputation for turbulence & violence to show who was the *initial aggressor*. *Buckles, supra*;
2. The Victim's general reputation for turbulence and violence to show whether the defendant was in *reasonable apprehension of harm*. *Id*; and

3. The Victim's specific acts of violence against the defendant to show whether the defendant was in *reasonable apprehension of harm.* *Waller, supra*.

Then, in 2000, this Court's analysis went astray with the opinion in *State v. Johns*, 34 S.W.3d 93, 111 (Mo.banc 2000). *Johns* wrote:

> When the defendant asserts self-defense, a victim's reputation for violence is generally admissible **on the question of who is the aggressor.** But the *defendant must show that he was aware of the victim's violent reputation* or of "the specific act or acts of violence."

Id., quoting *Waller*, 816 S.W.2d at 216 (emphasis added). This statement is just not true unless *Johns* intended to reverse *Buckles* (which it did not do) and to render MAI-CR3d 306.06 obsolete (which it reaffirmed two years later). *Johns* unfortunately took guidance from *Waller*, *supra,* and *Waller* simply does not address the situation faced by the *Johns* court, or this one.

Waller addressed evidence aimed at explaining the *defendant's reasonable apprehension of danger***.** The bold text in the above quote from *Johns*, i.e., "**on the question of who is the aggressor",** clearly shows that Mr. Johns had tried to use his victim's reputation for violence and turbulence in order to establish that his

victim was the *initial aggressor*. *Waller*'s requirement that the *defendant know* about such reputation is irrelevant when the issue is who was the initial aggressor.

Two years after *Johns*, this Court updated MAI-Cr3d 306.06. That update included the following:

PART C - SPECIAL MATTERS

[*Insert any of the following numbered paragraphs that are supported by the evidence and requested in writing in proper form by either party. Omit brackets and numbers.*]

[1] Evidence has been introduced (of the reputation of the defendant for being [*Insert trait or traits, such as "peaceful and law-abiding" or "violent and turbulent."*]) (and) (**of the reputation of [*name of victim*] for being [*Insert trait or traits*.]**). **You may consider this evidence in determining who was the initial aggressor** in the encounter (and for no other purpose).

[2] Evidence has been introduced that [*name of victim*] had a reputation for being (violent) (violent and turbulent) ([*other trait or traits indicating aggressiveness*]), **and that the defendant was aware of that**

reputation. You may consider this evidence in determining whether the defendant reasonably believed he was in imminent danger of harm from [*name of victim*].

MAI-Cr3d 306.06 (*italics* in original; **bold** added). Part C explicitly contemplates evidence of the victim's reputation being admitted under either of two scenarios:

1. where the defendant may be **unaware** of it – C[1]; and

2. where the defendant must be **aware** of it – C[2].

"**If there is no evidence the defendant was aware of the reputation** of the victim, or the only reputation evidence is as to the reputation of the defendant, **then the phrase in parentheses at the end of paragraph [1]**, which limits the use of this evidence, **should be used**." MAI-Cr3d 306.06, Notes on Use 7 (emphasis added). In other words, if the defendant is unaware of the victim's reputation for violence and turbulence, then that evidence must be admitted but limited to proving who was the initial aggressor. This is precisely the long-standing rule that *Buckles*, *supra*, reaffirmed.

Here, Ronnie sought to use Mike's reputation for violence and turbulence in order to show that **Mike** was the initial aggressor. Thus, whether Ronnie

knows that reputation or not, evidence of it must be admitted. *Buckles, supra; accord* MAI-Cr3d 306.06, Notes on Use 7.

The issue first arose during Ronnie's testimony: Mike had lived at 7018 Pennsylvania for 15-18 years (Tr. 199, 247-248, 258). Ronnie had known Mike "for all the years that he lived there." (Tr. 330). They were not friends, but they knew of each other (Tr. 331). When Ronnie would try to say hello, Mike would "just look[] at [Ronnie] and moan[] something and walk on." (Tr. 330-331). Nonetheless, the two had never had any problems with each other (Tr. 331).[11]

Defense counsel next asked:

Q Do you know what kind of reputation Mike Gossir had in that neighborhood?

A [RONNIE] Well, from what I heard --

(Tr. 331). The State's objection stopped Ronnie from answering, but the most reasonable inference is that Ronnie had heard about Mike's reputation in their neighborhood (Tr. 331).

At the bench, defense counsel explained that Ronnie knew of "an incident where Mike Gossir verbally attacked a guy across the street." (Tr. 333). Mike

[11] This just confirms that the evidence was not being offered under *Waller, supra.*

had apparently accused the man of "threatening to kill him or something, or plotting to kill him." (Tr. 333). Trying to avoid this Mike's reputation for aggression and turbulence, the State complained that "that doesn't connect the ***defendant*** to any character trait in this case." (Tr. 333) (emphasis added).[12] The court agreed and excluded Mike's reputation (Tr. 333-334). While this specific incident would not be admissible since it was not directed against Ronnie, that result does not render Mike's reputation for turbulence and violence inadmissible. *Buckles, supra;* MAI-CR3d 306.06.

The State's argument diverted the trial court from the real issue: the admissibility of Mike's *reputation* for turbulence and violence as a means of showing he was the initial aggressor. A few questions later, the State supplemented its argument for exclusion, alleging that Ronnie had not laid the foundation for his knowledge of Mike's reputation since Ronnie did not testify that he knew Mike's "friends and associates" or that he had discussed Mike's reputation with those friends and associates (Tr. 369). This misstates the law.

[12] This objection is relevant to evidence offered under *Waller, supra,* but not to evidence offered under *Buckles, supra;* MAI-Cr3d 306.06.

To testify about Mike's reputation, Ronnie only had to establish that he was acquainted with Mike's reputation for the trait in question – i.e., turbulence and violence – *in the neighborhood* **or** *among Mike's associates.* *State v. Cross*, 343 S.W.2d 20, 22 (Mo. 1961), *citing* *State v. Kain*, 330 S.W.2d 842, 846 (Mo. 1960). The reputation which is built up *in the neighborhood of a man's domicile* is admissible. *Cross*, 343 S.W.2d at 22; *accord* *Wigmore on Evidence, 3d Ed., Vol. III, § 692*, *pp. 20-21.* Such a reputation is, by its nature, of slow formation. *Cross*, *supra.* The evidence showed that Ronnie had 15-18 years to become acquainted with Mike's reputation for turbulence and violence within their shared neighborhood. The trial court's exclusion of Mike's reputation ignores the controlling case law and indicates a lack of careful consideration. *State v. Moore*, 88 S.W.3d 31, 36 (Mo.App., E.D. 2002). It abused its discretion. *Lutsky*, *supra.*

The record clearly shows that the court ignored controlling law and did not give careful consideration to the matter. In the State's case-in-chief, it elicited this description of Mike Gossir:

Q [THE PROSECUTOR] Can you describe Michael to the jury?

A [MRS. HOPPE] Well, he was a big fella. He weighed about three fifty. But he seemed to us **a very gentle type of person**.

(Tr. 264) (emphasis added). Later, defense counsel reminded the court of Mrs. Hoppe's description of Mike being "a very gentle type of person" and argued that that description had opened the door to Ronnie's evidence of Mike's reputation for turbulence and violence (Tr. 301). The court, however, sustained the State's objection, describing Mrs. Hoppe's description of Mike as "an off hand comment by the witness."[13] (Tr. 301-302). This shocks one's sense of justice. *Moore*, 88 S.W.3d at 36.

Letting Mrs. Hoppe's description go unanswered, the trial court let the State portray Mike as a gentle giant. While that may have been one side of Mike Gossir, it did not tell the whole story. *Hedrick*, *supra*. His reputation would have painted a different picture for the jury – one of turbulence and violence.

In an offer of proof to the court, defense counsel presented this additional evidence of Mike's turbulent reputation:

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[13] The State , however, let Mrs. Hoppe's description stand, though it – and **only it** – could have had that description struck as non-responsive. *State v. McWhirter*, 935 S.W.2d 778, 782 (Mo.App., W.D. 1996) ("The failure to get a responsive answer *hurts only the questioner*.") (citations omitted) (emphasis added).

Sherry Baker knew Mike (Tr. 416). They were neighbors for three years (Tr. 417). Ms. Baker, however, had known Mike longer than just three years. Her mother had lived in that neighborhood for the five or six years before Ms. Baker moved there, and Ms. Baker knew Mike during that period (Tr. 417). From observing Mike and talking to other neighbors, Ms. Baker learned that Mike was "hot headed" with a "short temper" (Tr. 418). He had a reputation in the neighborhood for being aggressive (Tr. 418).

Robert Ost has lived on Pennsylvania street for thirty years (Tr. 422). He has known Mike since Mike moved to the neighborhood in 1985 (Tr. 422). From talking with others in the neighborhood who knew Mike, Mr. Ost explained that Mike reputation in the neighborhood was for being aggressive (Tr. 422, 425).

Wayne Melton lived in the neighborhood and knew Mike for nine years (Tr. 429). Mr. Melton also served as the neighborhood's mail carrier and talked with many residents who knew Mike (Tr. 430). Mike had a reputation in that neighborhood for being bizarre and aggressive (Tr. 430).[14]

[14] Mr. Melton experienced Mike's aggressiveness first-hand, but he did not file any charges against Mike (Tr. 432).

The State got to present Mike as a man with "one dimension, unburdened by the accumulated baggage" of his reputation in his neighborhood." *Hedrick*, 797 S.W.2d at 826. In *Hedrick*, the State did much the same, presenting its child victim unburdened by the accumulated baggage of her tumultuous family life. *Id.* Tipping the scales against Mr. Hedrick in this way required that he receive a new trial. *Id.* at 827-828. It requires the same for Ronnie. This Court must reverse Ronnie's convictions and remand for a fair trial.

II. *Submitting "Initial Aggressor" Without Evidentiary Supprort*

The trial court plainly erred in refusing Instruction No. A and, in its place, submitting Instruction No. 15 because those rulings deprived Ronnie of his rights to due process and a fair trial before a properly instructed jury. *See* U.S. Const., Amends. V, VI and XIV; Mo.Const., Art. I, §§ 10 and 18(a). Paragraph 2 of Instruction No. 15 submitted the question of "initial aggressor" as a limit on Ronnie's right to self-defense. The State and the trial court relied upon the evidence that Ronnie asked Mike Gossir "where's your [Halloween] mask" as being fighting words that made Ronnie the initial aggressor. The law, however, defines an initial aggressor as "one who *first attacks or threatens to attack* another." Absolutely no evidence supports the notion that Ronnie did either; Instruction No. 15 is a "straw man." It so misdirected the jury that it has caused manifest injustice.

In determining whether to submit an instruction, courts must view "the evidence … in the light most favorable to the defendant." *State v. Westfall*, 75 S.W.3d 278, 280 (Mo.banc 2002). So viewed, the trial court understood that it "[was] duty bound to instruct on self-defense" (Tr. 374). The State shared this understanding (Tr. 374), but it objected that Instruction No. A omitted the "initial

aggressor" paragraph (Tr. 394-395; *see* L.F. 70-71; Appendix at A1-A2). Of course, as defense counsel noted, the jury heard **no evidence** from which it could find that Ronnie was the initial aggressor because the jury heard **no evidence** as to who started the pushing and shoving match (Tr. 394-395).

Nevertheless, the trial court refused Instruction No. A, opining, "Aggression can *come from words.* That's what they used to call *fighting words,*[15] or they still do." (Tr. 395-396) (emphasis added). In place of Instruction No. A, the trial court submitted Instruction No. 15 which included the "initial aggressor" paragraph:

> 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 an attack of another*, is not justified in using force to protect themselves from a counter attack he provoked.

(L.F. 64-65, included in the Appendix at A3-A4) (emphasis added); *See* MAI-Cr3d 306.06.

[15] Fighting words are "those [words] which by their very utterance inflict injury or intend to incite an immediate breach of the peace. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-572, 62 S.Ct. 766, 769 (1942).

No one knew who started the physical attack (Tr. 216, 266). Indeed, Mrs. Hoppe told them **both** to leave her home (Tr. 266-267). So, what "fighting words" did Ronnie utter that "threaten[ed] an attack"? None.

About twenty minutes into Ronnie's surprise visit with the Hoppes, Mike Gossir knocked on the door (Tr. 203-204, 210-211, 259-260, 264, 329). When Mrs. Hoppe opened the door, Mike stepped into the foyer, and Ronnie commented, "This is Halloween. Where's your uniform or mustache?" (Tr. 211) or "Where's your false face or your wig or mustache?" (Tr. 265, 288). Ronnie got up to leave so that the Hoppes could visit with Mike, who they had been expecting (Tr. 214, 265, 335). As Ronnie approached the foyer, Mike complained, "What did you hear about talking about me?" (Tr. 239, 265, 440). Ronnie testified that Mike said, "Why don't you threaten me now, Ronnie;" and that he replied that he did not now what Mike was talking about (Tr. 336). The evidence attributed **no other** words to Ronnie – except that he participated with Mike in a swearing match (Tr. 212-213, 216, 266).

The State tried to contort Ronnie's sarcasm into agitation and aggression by eliciting that he told the Hoppes that he had left *Slow Tom's* after being in a

"confrontation" with someone there (Tr. 5, 209, 260).[16] That alleged confrontation had no bearing on what happened between Mike and Ronnie. Contrary to the State's pre-trial assertions (Tr. 5), the Hoppes **did not** testify that Ronnie arrived at their home "agitated." The "confrontation" at *Slow Tom's* illustrates the misleading force of propensity evidence. *See State v. Burns*, 978 S.W.2d 759, 761 (Mo.banc 1998). It did not logically elevate Ronnies' alleged sarcasm into fighting words tantamount to an initial aggression against Mike.

A self-defense instruction must be supported by substantial evidence. *State v. Morrow*, 41 S.W.3d 56, 59 (Mo.App., W.D. 2001). Here, all agreed that substantial evidence supported **an** instruction on self-defense (Tr. 374). But **no** evidence supported **the** instruction the court opted to give. The court pinned the validity of Instruction No. 15 to Ronnie's comment to Mike – i.e., "This is Halloween. Where's your uniform or mustache?" (Tr. 212) or "Where's your false face or your wig or mustache?" (Tr. 265, 288). Mr. Hoppe described this comment as being joking or perhaps "a little sarcas[tic]," but **not threatening** (Tr. 236-237). Neither of the Hoppes felt in any way threatened by this sarcastic remark (Tr. 234, 278).

[16] *See* Point IV, *infra*.

In *State v. Williams*, 815 S.W.2d 43, 46 (Mo.App., W.D. 1991), Kenneth Jones approached Charles Williams and announced, "Man, I been lookin' for you." Mr. Williams responded, "Man, I been lookin' for you." *Id.* The two men then argued. Significantly, however, Mr. Williams brandished a hand gun during the argument. *Id.* After shooting Mr. Jones, Mr. Williams was not entitled to a self-defense instruction because he was the initial aggressor. *Id.*

While Ronnie grabbed some sort of instrument which punctured Mike's heart, he did not do that until after the physical attack had begun and **no evidence** demonstrated who initiated that physical attack. As stated, the only question is whether Ronnie "threaten[ed] an attack." Certainly, the evidence would support a finding that Ronnie was sarcastic. MAI-Cr3d 306.06, Notes on Use 4(a), however, does not define an initial aggressor as one who merely utters sarcasm. It defines an initial aggressor as one who threatens an attack.

The trial court's failure to comply with this definition provided by the MAI's and applicable Notes on Use created error. *State v. Smashey*, 672 S.W.2d 154, 157 (Mo.App., E.D. 1984). The approved instructions "contemplate religious observance" of both the forms and the corresponding notes on use. *State v. White*, 622 S.W.2d 939, 943 (Mo.banc 1982). The *only* time that a trial court may

properly ignore the MAI instruction is when it conflicts with the substantive law. *State v. Carson*, 941 S.W.2d 518 (Mo.banc 1997). MAI-Cr3d 306.06 defines "initial aggressor" consistent with the substantive law. It must be adhered to.

The trial court created error that is presumed to have prejudiced Ronnie. *White*, 622 S.W.2d at 943. Ordinarily, to avoid reversal, the State would have to "clearly" show that no prejudice resulted. *Id.* It could not do that, here; however, review is complicated. While counsel made a specific and impassioned objection at trial as required by Rule 28.03, she did not include in the motion for new trial as required by Rule 29.11(d) (L.F. 90-96). Counsel's oversight requires review for plain error. *See* Rule 30.20.

"In the context of instructional error, [reversible] plain error results when the trial court has so misdirected or failed to instruct the jury that it is apparent to the appellate court that the instructional error affected the jury's verdict." *State v. White*, 92 S.W.3d 183, 192 (Mo.App., W.D. 2002) (quotation omitted).

> [A]n appellate court will be more inclined to reverse in cases where the erroneous instruction "did not merely allow a wrong word or some other ambiguity to exist, [but] excused the State from its burden of proof on [a] contested element of the crime." Additionally, this court has previously

> held that where a verdict director effectively omits an essential element of the offense, such an instruction rises to the level of plain error if the evidence in the case fails to establish the existence of the omitted element "beyond serious dispute."

State v. Harney, 51 S.W.3d 519, 533-534 (Mo.App., W.D. 2001) (citation omitted) (reversing on error not raised at trial or on appeal).

Instead of omitting an essential element, here, the trial court inserted an element with no evidentiary support. Instruction No. 15 put Ronnie at an extreme disadvantage. It colored the very manner in which the jury would have to view the evidence. Instruction No. 15 forced the jury to begin its deliberations from what amounted to a false premise – i.e., that there was evidence of initial aggression by Ronnie. There was not.

The only evidence of **any** provocative statement points to Mike as being the initial aggressor. Ronnie got up to leave so the Hoppes could visit with Mike (Tr. 214, 265, 335). As Ronnie approached the foyer, Mike complained, "What did you hear about talking about me?" (Tr. 265; *see also* Tr. 239, 440); or "Why don't you threaten me now, Ronnie?" (Tr. 336). Instruction No. 15 asked the jury to consider the wrong question, and, thus, it could not produce a fair

verdict. If left uncorrected, this error will result in manifest injustice. This Court must reverse Ronnie's convictions and remand his case for a new trial before a properly instructed jury.

III. Precluding Impeachment During Cross-examination

The trial court abused its discretion in refusing to let Ronnie play Mr. Hoppe's audiotaped statement to impeach him during cross-examination because that ruling violated Ronnie's rights to due process, confrontation and a fair trial. *See* U.S. Const., Amends. V, VI and XIV; Mo.Const., Art. I, §§ 10 and 18(a). In a taped statement to police, Mr. Hoppe admitted, "To be perfectly fair about it, Mike is the one that asked him and said he heard [Ronnie] was talking about him or something, Mike started it." When Mr. Hoppe denied this at trial, counsel sought to use the audiotape to "sift, modify or explain what ha[d] been said." The court, however, opined that Ronnie could not use this recorded, prior inconsistent statement to impeach Mr. Hoppe directly on cross-examination.

At trial, Mr. Hoppe testified that when Mike entered the foyer, Ronnie made "some comment about Halloween" – specifically, "This is Halloween. Where's your uniform or mustache, whatever." (Tr. 211). The State and the trial court relied on this comment to characterize Ronnie as the "initial aggressor." (Tr. 394-396).[17] But, when police investigated Mike's death, Mr. Hoppe admitted

[17] *See* Point II, *supra*.

that, “To be perfectly fair,…Mike started it.” (Tr. 239). On cross-examination about this taped statement, Mr. Hoppe was only willing to “agree to words to that effect…” (Tr. 239). All the while, he steadfastly maintained that “They were both argumentative.” (Tr. 239).

A criminal trial’s fundamental purpose is to produce a “fair ascertainment of the truth.” *State v. Carter*, 641 S.W.2d 54, 58 (Mo.banc 1982). The right to confront one's accusers is "an essential and fundamental” tool in ensuring that this purpose is realized. *Pointer v. Texas*, 380 U.S. 400, 404, 85 S.Ct. 1065, 1068 (1965). Indeed, cross-examination is the "greatest legal engine ever invented for the discovery of truth." *State v. Schaal*, 806 S.W.2d 659, 663 (Mo.banc 1991); *accord* *Hungate v. Hudson*, 185 S.W.2d 646, 649 (Mo. 1945). “[The purpose of cross-examination] is to sift, modify or explain what has been said, to develop new or old facts in a view favorable to the cross-examiner or to discredit the witness.” *Hungate*, 185 S.W.2d at 649 (citations omitted).

In the criminal context, the Confrontation Clause ensures the accused an opportunity to conduct effective cross-examination of adverse witnesses. *Kentucky v. Stincer*, 482 U.S. 730, 739, 107 S.Ct. 2658, 2664 (1987). A defendant may not be unduly restricted in his attempt to confront an adverse witness with

evidence favorable to his defense. *State v. Moorehead*, 811 S.W.2d 425, 427 (Mo. App., E.D. 1991). While trial courts have discretion to control cross-examination, they do not have unfettered discretion. *State v. Davenport*, 5 S.W.3d 547, 550 (Mo. App., E.D. 1999). "Abuse of discretion occurs when the trial court's ruling is clearly against the logic of the circumstances then before the court, and is so unreasonable and arbitrary that the ruling shocks the [court's] sense of justice, and indicates a lack of careful consideration." *State v. Moore*, 88 S.W.3d 31, 36 (Mo.App., E.D. 2002).

Faced with Mr. Hoppe's divergent testimony, defense counsel sought to play a portion of his recorded statement to police (Tr. 240). The following record demonstrates the unreasonableness and arbitrariness of the trial court's refusal to let counsel play the tape:

> [DEFENSE COUNSEL]: Your Honor, this is the part where he's denying what he said on the tape, and I would like the opportunity to play that portion to the jury. I would ask for a recess so I can locate that portion of his statement.
>
> [THE PROSECUTOR]: You can put that on in your own case. That's impeachment testimony.

[DEFENSE COUNSEL]: This is impeachment.

[THE PROSECUTOR]: That's right. **It goes in your own case**. He's given you the answer. **You have to do that in your own case**.

THE COURT: That's true. **This would not be the proper time for that**.

[THE PROSECUTOR]: If you think that that tape, in its context, says, and you think it does say, I believe that's impeachment. Taking a statement out of context as to who started what is not impeachment. He said who said the first words.

[DEFENSE COUNSEL]: Well, it's clear on the tape that he's talking about the police officer trying to get him to say that Ronnie started the fight and he clearly says, "No, Mike, to be perfectly fair, Mike started it."

THE COURT: **That evidence has to come in in your case**...You've got your answer. You've asked him on cross-examination, and then **if you wish to impeach him on that, you do it with the evidence in your case with the tape**.

(Tr. 240-241) (emphasis added). The trial court's ruling shocks the sense of justice and indicates less than careful consideration. *Moore, supra.*

In *State v. Cole*, 867 S.W.2d 685, 686 (Mo.App., E.D. 1993), the **State** called its first witness, Lena Mitchell, and on direct examination, she testified in a way that contradicted the tape recorded statement she had given to police. **On cross-examination**, Mr. Cole's attorney "pointed out four" of Ms. Mitchell's inconsistencies. *Id.* Each time, counsel "played an isolated portion of the taped statement containing the inconsistencies." *Id.* So confronted, Ms. Mitchell "changed or recanted her in-court testimony" each of the four times. *Id.* The trial court's error in *Cole* occurred when it let the State admit Ms. Mitchell's entire taped statement on re-direct since that had the effect of simply reiterating her entire direct examination and unduly bolstered her testimony. *Id.* at 686-687.

This is precisely what Ronnie sought to do. The trial court's position that such impeachment could **not** occur during cross-examination unduly restricted Ronnie's right to confront adverse witnesses. Counsel did not ask for much – only to play a small segment of Mr. Hoppe's audio taped statement to Det. Wasem. In that segment, Det. Wasem "asked [Mr. Hoppe], 'So when Ronnie approached him and started cussing,' and [Mr. Hoppe] responded, 'No, actually **I've got to be fair about it, Mike is the one that asked him, said he heard**

[Ronnie] was talking about him, and it was Mike started it.'" (Tr. 440) (emphasis added). The trial court abused its discretion.

A similar question arose in *State v. Fleer*, 851 S.W.2d 582 (Mo.App., E.D. 1993). There, Mr. Fleer's attorney asked leave to do the same thing after a State's witness testified in a way that contradicted her prior tape recorded statement. *Id.* at 592. The State avoided the recording by "vouch[ing] for the accuracy of the partial transcript of the tape recorded statement." *Id.* The court let defense counsel read excerpts from that transcript and then let counsel ask the witness to read the transcript for herself. *Id.* The witness maintained ignorance, insisting that "she did not remember her answer." *Id.* The court then let counsel read the transcript statement to the jury for a second time, and counsel did so. *Id.* On appeal, however, Mr. Fleer expanded his objection and argued that the audio tape was "the best evidence." *Id.* This Court concluded that allowing counsel only to read the witness's transcript statement, **which the State conceded to be accurate**, did not create manifest injustice. *Id.*

Distinguishing this case from *Fleer* is the State's concession in *Fleer* that the transcript accurately related the witness's taped statement. Here, the State contended that counsel was taking Mr. Hoppe's statement out of context, thus

changing its meaning (Tr. 241). Only playing the tape could have resolved that dispute. And it would have resolved it in Ronnie's favor because "it's clear on the tape that he's talking about the police officer trying to get him to say that Ronnie started the fight and he clearly says, "No, Mike, to be perfectly fair, Mike started it." (Tr. 241).

Also, unlike Mr. Fleer, Ronnie does not have to expand his argument. Defense counsel aptly preserved this issue, putting the prejudice resulting from the trial court's ruling that the proposed impeachment could not be done during cross-examination like this: "[It] diminish[ed] the significance of the contradictions and in [Mr. Hoppe's] account of events, and preclude[ed] the defense from asking follow-up questions which would have demonstrated the unreliability of [his] account of events…." (L.F. 97; Tr. 240-241).

This Court must reverse Ronnie's convictions and remand for a fair trial.

IV. Admitting Uncharged, Unrelated "Confrontation"

The trial court plainly erred, resulting in manifest injustice, when it let Mr. and Mrs. Hoppe testify that Ronnie told them he had been in a confrontation at Slow Tom's tavern before coming to their home because such rulings violated Ronnie's rights to due process, a fair trial before an impartial

jury and to be tried only for the offense charged. See U.S. Const., Amends. V, VI and XIV; Mo.Const., Art. I, §§ 10, 17 and 18(a). While the State may have had a right to present evidence of Ronnie's reputation related to aggressiveness, it did not have a right to present evidence of this specific confrontation since it was not against Mike. This confrontation did not tend to prove any matter in issue; it merely portrayed Ronnie as a man with a propensity for being confrontational and lured the jury into finding him guilty based on a ground different from proof specific to the charged offenses.

On Halloween Night, 2001, the Hoppes ate dinner and watched TV (Tr. 259, 282). Between 7:00 and 7:30 p.m., Ronnie came calling to ask about a video tape Mr. Hoppe was making for him (Tr. 203-204, 260, 264). Contrary to the State's assertions the morning of voir dire (Tr. 5), neither of the Hoppes described Ronnie as being "agitated" when he arrived. Nonetheless, the trial court let the State elicit from the Hoppes that Ronnie told them he had been in a "confrontation" at *Slow Tom's* tavern before coming to their house (Tr. 209, 260). About fifteen to twenty minutes after arriving, Ronnie called *Slow Tom's*, where he worked "clean[ing] up the bar" and "told them to shove it" (Tr. 260, 264). Ronnie was standing by the phone when Mike arrived (Tr. 287).

Ronnie asked Mike, "**This is Halloween**. Where's your uniform or mustache…" (Tr. 212) (emphasis added); or "Where's your false face or wig or mustache?" (Tr. 265, 288). The Hoppes did not feel threatened by this sarcastic remark (Tr. 234, 278). Indeed, the remark is quite benign. So, the State used the alleged confrontation at *Slow Tom's* to pull Ronnie's sarcasm up by its own bootstraps, trying to make him the "initial aggressor." While the confrontation was not sufficient to warrant an instruction on "initial aggressor",[18] it was sufficient to lure the jury away from the issue before it – did Ronnie act in lawful self-defense.

Appellate courts yield broad, but not unfettered discretion to a trial court's decision to admit evidence. *State v. Bernard*, 849 S.W.2d 10, 16 (Mo.banc 1993). A trial court has no discretion to admit irrelevant evidence. *Id.* Before admitting *any* evidence – especially evidence of uncharged bad acts – the court must answer "yes" to two questions: (1) Is the evidence logically relevant, i.e., does it tend to prove or disprove a fact in issue; and (2) If it is logically relevant, is it also legally relevant, i.e., does its probative value outweigh its prejudicial affect? *State v. Rousan*, 961 S.W.2d 831, 848 (Mo.banc 1998).

[18] *See* Point II, *supra*.

(1) Was the confrontation logically relevant? **No.**

By asserting that he acted in self-defense, Ronnie broadened the inquiry to whether he was the initial aggressor. *State v. Morrow*, 41 S.W.3d 56, 59 (Mo.App., W.D. 2001). The alleged confrontation at *Slow Tom's* tavern neither proved nor disproved this. Had the confrontation been *with* Mike, then, certainly, it would have been logically relevant. But it didn't involve Mike. The only evidence points to it involving an unnamed third party. The State wanted to present this evidence to show "[Ronnie's] attitude and demeanor just before he confronts [Mike] about various matters." (Tr. 2). Had the Hoppes' testimony comported with the State's assertions, the confrontation might have been admissible. But it didn't. Their testimony that Ronnie partook in a barroom confrontation came from nowhere. It had no tendency to prove any matter in issue. Its only value was its tendency to portray Ronnie as having the propensity to be confrontational.

(1) Was the confrontation legally relevant? **No.**

Trial courts cannot admit evidence that simply "lure[s] the factfinder into declaring guilt on a ground different from proof specific to the offense charged." *Old Chief v. United States*, 519 U.S. 172, 180, 117 S.Ct. 644 (1997). Yet, that is

precisely what the trial court did, here. It let the State throw the alleged "confrontation" at *Slow Tom's* into the mix despite there being **no** evidentiary support for it having contributed in any way to what happened between Mike and Ronnie. That confrontation had **no** logical relevance except as propensity. It lured the jury away from the real issue – i.e., what happened inside the Hoppes' home that led to Mike's death? Evidence that diverts the jury's attention should be excluded. *Rousan*, 961 S.W.2d at 848.

Ronnie, however, must request review for plain error. Rule 30.20. While counsel moved *in limine* to exclude this inflammatory evidence (L.F. 36-37), she did not object when the Hoppes testified about it (Tr. 209, 260). Counsel's motion for new trial alleged that the trial court erred in reserving its ruling on her motion *in limine*, noting, "Any objection by the defense [during the Hoppes' testimony] would only serve to highlight the testimony in the minds of the jurors…." (L.F. 94-96). The State is bound to characterize this as a strategic choice not to object and to ask this Court to deny plain error review as a result. Nothing could be more unfair to Ronnie.

"[T]he dangerous tendency and misleading probative force of [propensity] evidence require that its admission be subjected by the courts to *rigid scrutiny*."

State v. Burns, 978 S.W.2d 759, 761 (Mo.banc 1998) (emphasis added). In deciding whether to exercise its discretion, this Court must consider the reasonableness of counsel's explanation for not objecting. "[T]he mere incantation of the word 'strategy' does not insulate attorney behavior from review. The attorney's choice of tactics must be *reasonable* under the circumstances." *Cave v. Singletary*, 971 F.2d 1513,1518 (11thCir. 1992) (emphasis in original). Counsel's decision to leave Ronnie unprotected from the misleading force of this evidence cannot be condoned as reasonable under the circumstances.

Before trial, the State had claimed that the Hoppes would testify that Ronnie

> told them before [Mike] arrived that he had had – he had been in a bar, been drinking, and had some sort of altercation or fight down there and he was agitated about that particular matter and he indicated he was going to go back. And these aren't the exact words, but he indicated he was going to go back to the bar and settle something with someone or have another confrontation. And right after that occurred, right after that conversation occurs, the defendant – the victim shows up and the defendant starts a confrontation with the victim.

(Tr. 2). Their actual testimony bore out **none** of the State's pre-trial assertions. They **did not** testify that Ronnie arrived in an "agitated" state. They **did not** testify that he said anything about returning to the bar to rejoin the confrontation or, worse, to start a new one. Counsel's failure to object to this highly prejudicial evidence should not serve as grounds to deny review. Rigid scrutiny calls for plain error review.

This was a hotly contested case. This propensity evidence lured the jury away from the weakness in the State's case. ***The*** evidence relied upon by the State and the Court to make Ronnie the "initial aggressor" was his sarcastic remark when Mike entered the foyer. Without this propensity evidence, the ability of mere sarcasm to serve as a threat to attack would be laughable. With this propensity evidence distracting the jury's attention the laughable became plausible.

Above all else, Ronnie's trial should have been fair. Indeed, the trial court bore the solemn obligation to act, even *sua sponte*, to ensure that Ronnie received a fair trial. *State v. Roberts*, 838 S.W.2d 126, 131 (Mo.App., E.D. 1992); *see also Newlon v. Armontrout*, 885 F.2d 1328, 1336 (8thCir. 1989). It did not, and, if it's

failure to act is left uncorrected, Ronnie will suffer manifest injustice. Thus, this Court should reverse Ronnie's convictions and remand for a fair trial.

Conclusion

For all the reasons discussed, Ronnie Gonzales, appellant, respectfully requests that this court reverse his convictions for second degree murder and armed criminal action and remand for a new and fair trial.

Respectfully Submitted,

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Certificate of Compliance and Service

I, Gary E. Brotherton, hereby certify as follows:

- ✓ The attached brief complies with the limitations contained in Rule 84.06. The brief was completed using Microsoft Word, OfficeXP, in Book Antiqua, size 13-point font, or greater. According to MS Word, excluding the cover page, the signature block, this certificate of compliance and service, and the appendix, this brief contains **9,371** words, which does not exceed the **31,000** words allowed for an appellant's supplemental brief in this Court.

- ✓ The floppy disk filed with this brief contains a copy of this brief, the CD contains a copy of this brief, appendix, exhibits and authorities. Both have been scanned for viruses using Norton's Antivirus 2004 Professional, which is updated continually. According to that program, the disks are virus-free.

- ✓ A true and correct copy of the attached brief, floppy disk – containing a copy thereof and CD – containing a copy of the brief, appendix, exhibits referenced and authorities were hand-delivered this 30th day of **September 2004**, to the Office of the Attorney General, Supreme Court Building, Jefferson City, Missouri 65102.

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Gary E. Brotherton

Appendix

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