JURISDICTIONAL STATEMENT

This appeal is from convictions of murder in the second degree, §565.021, RSMo 2000, and armed criminal action, §571.015, RSMo 2000, obtained in the Circuit Court of the City of St. Louis, Missouri, for which appellant was sentenced to concurrent terms of thirty years for murder and ten years for armed criminal action in the custody of the Missouri Department of Corrections. The Court of Appeals, Eastern District, remanded the cause with directions for the trial court to hold a hearing to determine the admissibility of evidence of the victim's reputation for violence in State v. Gonzales, ED82455, slip opinion, (Mo.App. E.D. May 18, 2004). This Court has jurisdiction as it sustained appellant's application for transfer pursuant to Supreme Court Rule 83.04. Article V, §3, Missouri Constitution (as amended 1982).

STATEMENT OF FACTS

Appellant, Ronnie Gonzales, was charged with murder in the first degree, §565.020, RSMo 2000, and armed criminal action, §571.015, RSMo 2000, in the Circuit Court of the City of St. Louis, Missouri (L.F. 13-14). On November 12, 2002, the cause proceeded to trial before a jury, the Honorable Dennis Schaumann presiding (Tr. 1).

Appellant does not challenge the sufficiency of the evidence to support his convictions. Viewed in the light most favorable to the verdict, the following evidence was adduced: On October 31, 2001, Fred and Gloria Hoppe were living at 7010 Pennsylvania, St. Louis (Tr. 196-197, 256). They collected rents from the tenants at the building next door, 7018 Pennsylvania, for the owner (Tr. 198). Appellant, a friend of the Hoppes, came to their house that night around 7:00 p.m. to pick up a videotape that Fred Hoppe had prepared for him (Tr. 204, 259). Appellant told Fred Hoppe that he had been down at Slow Tom's Tavern, where he worked cleaning the tavern, and that he had been in a confrontation at the tavern before coming over (Tr. 204-209, 260). Appellant used the Hoppes' telephone to call Slow Tom's and told someone there to "shove it" (Tr. 264).

While appellant was at the Hoppe home, Michael Gossir, another friend of the Hoppes and one of the tenants next door, arrived and stood in the foyer by the front door (Tr. 210, 260, 265). Appellant made a sarcastic comment to Gossir, "This is Halloween. Where's your uniform or mustache, whatever" (Tr. 211, 265). Gossir responded "what did you hear about talking about me" (Tr. 266). Appellant and Gossir began having a heated conversation (Tr. 213). Appellant, who had been sitting in a chair in the living room, walked towards the front

door (Tr. 213, 261, 266). Appellant and Gossir were face to face and continued to have a heated conversation and cursing at each other (Tr. 216, 266). Appellant and Gossir then began pushing each other and continued to argue (Tr. 216, 266). Gossir then began to back up towards the kitchen, while he and appellant continued to push each other (Tr. 217). While appellant and Gossir continued to argue, Gloria Hoppe told them that she did not appreciate them cursing in her home and asked them to get out (Tr. 267). While Gloria Hoppe walked around to the kitchen to call the police, appellant pushed Gossir through the kitchen door and Gossir fell on his back on the kitchen floor (Tr. 217-218, 269-272). Gossir got up and walked backward out of the kitchen; appellant put his hands behind his back and followed Gossir out of the kitchen (Tr. 218-219, 272-273). Appellant then took a knife and stabbed Gossir in the rib cage (Tr. 219, 273-274). Gossir doubled over; Fred Hoppe tried to hold him up but they fell over, knocking the television on the floor (Tr. 219-220, 274). Gossir fell onto the floor, backwards (Tr. 219-220, 274).

Fred Hoppe helped Gossir to a chair and noticed blood all over his chair (Tr. 220). Blood was all over the living room (Tr. 220). Gossir fell out of the chair and onto the floor (Tr. 221-222). Appellant ran out of the house; Gloria Hoppe followed him out and said, "I can't believe that you did that to Mike" (Tr. 221-222, 274-276). Appellant did not respond but picked up the Hoppe dog that had run out of the house as well and handed her back to Gloria Hoppe and ran off (Tr. 276). Gloria Hoppe went inside the house and called the paramedics (Tr. 221-222, 276-277). Gossir died before the paramedics arrived (Tr. 221).

Gossir died from a stab wound to the chest (Tr. 306-307, 313). The wound was on the

left side of the chest, it was between three and four inches in length, and pierced the heart twice[1] (Tr. 307-309). The stab wound was seven inches deep (Tr. 312). Gossir also had an eight inch abrasion on his back and a fractured rib (Tr. 306-308).

Appellant testified on his own behalf and called one witness, a police officer who interviewed the Hoppes after the murder. Appellant claimed that Gossir started the argument and that he did not intend to stab him with the knife (Tr. 327-344).

Appellant was acquitted of murder in the first degree but was convicted of the lesser included offense of murder in the second degree and was convicted of armed criminal action (L.F. 74-84). Appellant was sentenced to concurrent terms of thirty years for murder and ten years for armed criminal action (Tr. 529).

On May 18, 2004, the Eastern District Court of Appeals, relying on this Court's holding in State v. Johns, 34 S.W.3d 93 (Mo.banc 2000), remanded the cause with directions for the trial court to hold a hearing to determine whether defendant knew of the victim's reputation of violence and to determine the admissibility of that evidence. State v. Gonzales, ED82455, slip opinion (Mo.App. E.D. May 18, 2004). This Court granted appellant's motion for transfer.

[1]Although there were two wounds in the heart, the wounds were caused by the same knife with a single insertion and the knife was most likely withdrawn partially and reinserted (Tr. 311).

ARGUMENT

I.

THE TRIAL COURT DID NOT ERR IN EXCLUDING EVIDENCE OF THE VICTIM'S REPUTATION FOR VIOLENCE BECAUSE THIS EVIDENCE WAS NOT ADMISSIBLE TO SUPPORT HIS CLAIM OF SELF-DEFENSE IN THAT APPELLANT FAILED TO LAY A PROPER FOUNDATION TO SHOW THAT HE WAS ACQUAINTED WITH THE VICTIM'S COMMUNITY OR THAT HE KNEW OF THE VICTIM'S REPUTATION AND TO ADMIT THIS EVIDENCE TO MERELY SHOW THE VICTIM'S REPUTATION FOR VIOLENCE AS PROPENSITY TO BE AN "INITIAL AGGRESSOR" WAS NOT PROPER.

Appellant alleges that "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." (App. Br. 24-25). Appellant alleges that this Court's opinion in State v. Johns, 34 S.W.3d 93 (2000), changed the admissibility of the victim's reputation for violence to require a showing that the defendant knew of the victim's reputation for violence to show that the victim was the initial aggressor. Appellant's claim presupposes that the issue of whether the victim is the initial aggressor is independent from the defendant's reasonable fear of the victim. In other words, appellant seeks to render his state of mind at the time he used force against the victim irrelevant. Appellant's claim that evidence of whether the victim is the initial aggressor is independent of a claim of reasonable fear is without basis.

Relevant Facts

Appellant's testimony relevant to this claim is as follows:

Q. So you, is it fair to say that you just knew him [Gossir] to see him and that's about it?

A. I just knew who he was, but I didn't know him personally as a friend.

Q. Okay. And did you ever have any problems with Mike Gossir?

A. Not at all.

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

Mr. Craddick [the prosecutor]: Objection, Your Honor. Lack of foundation.

(Tr. 331). Counsel approached the bench where the following colloquy occurred between the trial court and counsel:

Ms. Offerman: He testified that he knew Mike Gossir in that neighborhood from fifteen years. And--

The Court: If he knows of specific incidents, and correct me if I'm wrong, he can testify. But just generally what is his repurtation, he cannot testify to that.

Mr. Craddick: And it would be the State's position to know his reputation. He has to know the friends and associates of people that know Michael and that foundation hasn't been laid.

The Court: Exactly. So it's just a blind statement, "Do you know his

reputation." We don't know what to base it on. Sustain the objection at this time. If you can lay a foundation with him, so be it. We'll deal with it at that time.

Ms. Offermann: So just to clarify here, he can testify as to what he heard about incidents involving Mike Gossir and other third parties.

Mr. Craddick: I believe the law is he can testify about specific incidents that he knows about the defendant as long as they're not too remote and have something to do with this particular case. I mean you know fifteen years ago he poked a bird's eyes out isn't relevant to what we're talking about. So it depends on what he knows and how remote they are.

The Court: Do you have any idea what his response is going to be to this question you've asked him?

Ms. Offermann: Well, I think he's going to say that he knows of an incident where Mike Gossir verbally attacked a guy across the street.

The Court: When?

Ms. Offermann: Within the last year or two.

The Court: Verbally attacked?

Ms. Offermann: And spit on him and accused him of, you know, I don't know, threatening to kill him or something, or plotting to kill him.

The Court: Mr. Craddick?

Mr. Craddick: Well, let's accept that that's true. That still doesn't

give–that doesn't connect the defendant to any character trait involved in this case. I mean having an argument with somebody is not the same as having to physically defend yourself because he's confronted with a case of deadly force.

The Court: Is his testimony going to be, correct me if I'm wrong again, that he knows of an incident where Mr. Gossir verbally abused another person?

Ms. Offermann: Well--

The Court: Was there any aggression? Any violence?

Ms. Offermann: I'm not really sure what he's going to say. So I think perhaps what we should do is just do an offer of proof outside the hearing of the jury and then you can determine whether or not it's admissible.

The Court: All right. Very good. I'll sustain the objection. Let's move along, please.

(Tr. 332-334). Appellant's testimony resumed. Following appellant's testimony, the following colloquy occurred outside the hearing of the jury:

The Court: Is there anything else for the records at this time?

Mr. Craddick: Now that the defendant has testified and there was no foundation laid for any stuff about these prior incidents, I don't believe there's any foundation for anybody to testify about these prior instances now. Even after I objected as to foundation, no foundation was laid with this witness that he knew about any prior incidents or any other incident that involved Michael Gossir. So it's clear now that a third party can't testify to incidents that weren't

in the defendant's presence of mind to testify about when he said he feared for his life.

The Court: Ms. Offermann?

Ms. Offermann: That's sort of like which comes first, the chicken or the egg. You excluded any testimony by my client as far as–

The Court: I did not.

Ms. Offermann: I'm sorry, but he objected to that and you excluded it. I would ask that my client be allowed to put on an offer of proof as to what he would have testified to had he been allowed to.

Mr. Craddick: Judge there wasn't any–there wasn't any ruling by the Court that didn't allow him to testify to that. The only objection was made as to foundational material and no such foundation was laid, so it's not the State's fault or the Court's fault that a foundation was not laid with the witness while they testified as to these other matters with no foundation being laid. There is no basis to admit the testimony.

Ms. Offermann: I don't understand how I could possibly lay a foundation without him answering some questions and he was not allowed to answer any questions.

Mr. Craddick: I'll tell you exactly how you could have laid the foundation. You could have said, "Do you know Michael Gossir's friends and associates, have you been in their presence, and while in their presence, did they

discuss his reputation or character about certain traits in the community? If they have, did you know about those things?" But you never laid that foundation. And that's how character reputation evidence is admissible in the Court. And until that foundation is laid, it's not admissible.

Ms. Offermann: Well, I was not allowed to ask any questions concerning that.

Mr. Craddick: I don't think that's the Court's ruling.

The Court: I ruled you may try to lay the foundation, but you said you wanted to make an offer of proof. Ms. Offermann, this point aside, you still wish to make an offer of proof regarding the other witnesses tomorrow?

Ms. Offermann: Yes, I do.

The Court: I will allow you to make your offer of proof tomorrow.

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The Court: Well, if you're prepared to proceed in the morning with the other witnesses for your offer of proof, I'll allow you to make your offer of proof. As to your client testifying, there was no foundation laid and there's no need for an offer of proof, in my estimation, as to what he would have testified as to Mr. Gossir's reputation because there was nothing there that he offered regarding any foundation for–knowledge of that. As to these other witnesses, you have–we'll have to address that in the morning, if you know you have them or not.

(Tr. 368-371).

Appellant also attempted to call three different witnesses to testify about the victim's reputation for violence in the community. Their testimony was preserved by offers of proof (Tr. 416-432). The witnesses testified that the victim had a reputation of bizarre aggressive behavior (Tr. 416-432). The trial court denied admission of their testimony at trial (Tr. 434).

Standard of Review

The trial court is granted great latitude in the admission of evidence and its decision will not be disturbed on appeal unless the trial court abused its discretion. State v. White, 909 S.W.2d 391, 394 (Mo.App. W.D. 1995). "Evidence must be relevant to be admissible." State v. Shurn, 866 S.W.2d 447, 457 (Mo. banc 1993). In Missouri, relevance has two aspects: logical relevance and legal relevance. State v. Anderson, 76 S.W.3d 275, 276 (Mo. banc 2002). "Evidence is logically relevant if it tends to make the existence of a material fact more or less probable." Id. While evidence must be logically relevant, it need not be conclusive; it is relevant as long as it "logically tends to prove a fact in issue or corroborates relevant evidence which bears on the principal issue." State v. Mercer, 618 S.W.2d 1, 9 (Mo. banc 1981). To be admissible, logically relevant evidence also must be legally relevant. Anderson, 76 S.W.3d at 276. Legal relevance refers to the probative value of the evidence weighed against its costs, including unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or cumulativeness. Id. Evidence is legally relevant if its probative value outweighs its prejudicial effect. State v. Mayes, 63 S.W.3d 615, 629 (Mo. banc 2001). See also State v. Williams, 976 S.W.2d 1, 4 (Mo.App. W.D.1998). State v. Kennedy, 107 S.W.3d 306, 310 -

311 (Mo.App. W.D. 2003).

Admission of Victim's Reputation for Violence to Prove Victim was the Initial Aggressor and the Defendant's Reasonable Fear of Victim

The law of self-defense centers around the defendant's state of mind; that is to say, whether the defendant was in reasonable fear and his use of force was reasonable considering the circumstances. See State v. Waller, 816 S.W.2d 212, 215 (Mo.banc 1991). Whether the victim is the initial aggressor is not an element of self-defense. In fact, the jury is never required to find that the victim was the initial aggressor. The jury is only required to find that the defendant's use of force was reasonable considering the circumstances and his state of mind. Thus, as will be discussed below, the issue of whether the victim is the initial aggressor is applicable only when discussing the defendant's state of mind and his reasonable fear of the victim.

Missouri Courts have held that a victim's reputation for violence[2] is admissible to prove that the defendant was in reasonable fear of the victim and to prove who was the initial aggressor. State v. Waller, 816 S.W.2d 212 (Mo.banc 1991); State v. Hall, 982 S.W.2d 675 (Mo.banc 1999); State v. Hafeli, 715 S.W.2d 524 (Mo.App. E.D. 1986) (overruled on other grounds); State v. Buckles, 636 S.W.2d 914 (Mo.banc 1982) (overruled on other grounds)[3].

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[2]Specific acts of violence by the victim are also admissible to establish the defendant's reasonable fear of the victim. Waller, supra. Appellant does not claim that he should have been allowed to admit evidence of the victim's specific acts of violence.

[3]Once a defendant admits evidence of the victim's reputation for violence, a defendant opens the door to admission of evidence of the defendant's bad character. See State v. Oates, 12 S.W.3d 307 (Mo.banc 2000); State v. Arney, 731 S.W.2d 36 (Mo.App. S.D. 1987).

> 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.

Buckles, supra at 922[4] (emphasis added); see also Waller, supra.

In State v. Johns, 34 S.W.3d 93 (Mo.banc 2000), in discussing the admissibility of the victim's reputation for violence, this Court held that:

> At trial, defense counsel asked Deputy Robin Peppinger whether the victim had a reputation for drinking. The State objected, citing a lack of relevance. In chambers, the defense made an offer of proof that can be summarized as follows: (1) the victim often drank alcohol; (2) he was known to fight when drinking alcohol; and (3) Johns drank alcohol with the victim from time to time during the seven-month period preceding the murder. The trial court sustained the State's objection and excluded the proffered evidence.
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> **When the defendant asserts self-defense, a victim's reputation for violence is generally admissible on the question of who is the aggressor.**

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[4]This Court in Waller supra, abrogated the Buckles holding, allowing evidence of specific acts of violence by the victim to be admitted where the defendant established that he was aware of the specific acts and the defendant was admitting the evidence to establish his reasonable fear of the victim. This is not an issue here.

> **State v. Hall, 982 S.W.2d 675, 681 (Mo.banc 1998). But the defendant must show that he was aware of the victim's violent reputation or of "the specific act or acts of violence." State v. Waller, 816 S.W.2d 212, 216 (Mo.banc 1991).** In this case, the trial court found insufficient evidence to support the proposition that Johns was aware of the victim's reputation for violence. The only evidence offered by the defense on the issue of John's awareness was the testimony of Deputy Peppinger, who noted that Johns and Steward "hung out" in the same crowd and drank alcohol together. There is no evidence to suggest that Johns ever witnessed a violent reaction from the victim or heard about the victim's violent behavior toward others. Under these specific facts, the trial court did not abuse its discretion in excluding the evidence.

Johns[5], at 111 (emphasis added).

Appellant claims that this Court's analysis in Johns regarding admission of evidence of the victim's reputation for violence went "astray" (App. Br. 22). Rather than going "astray," as appellant characterizes this Court's opinion in Johns, the opinion clarifies the relationship between the issues of who is the initial aggressor and whether the defendant is in reasonable fear of the victim. These two issues are necessarily interrelated. As a threshold matter, one's never entitled to self-defense unless one has a reasonable fear of the victim. Thus, the issue in determining whether self-defense is justified is never whether the victim was the initial

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[5]Cases prior to Johns, supra, used similar language to discuss the admissibility of the victim's reputation for violence. See Hall, supra.

aggressor but rather turns on whether the defendant reasonably believed that the victim was the initial aggressor and therefore had a reasonable fear of the victim. In other words, the defense of justification (self-defense) is dependent upon appellant's state of mind. Waller, supra. (A defendant may assert self-defense where his belief that he was subject to an imminent attack is a reasonable belief; the defendant's state of mind, therefore, is critical). Indeed the jury is never even required, under any circumstances, to find that the victim was the initial aggressor as part of any of the elements of self-defense. See MAI-CR 306.06.

Thus, the question is, of what relevance is whether the victim is the initial aggressor. Evidence regarding whether the victim is the initial aggressor is only relevant to show that the defendant had a reasonable fear of the victim, and thus, that the defendant was justified in using force against the victim; that is to say, the defendant's state of mind. Thus, when Johns and Hall say that the victim's reputation for violence must be known to the defendant in order to introduce evidence regarding the initial aggressor, it is because the victim's reputation is actually only relevant for showing that the defendant was in reasonable fear of the victim.

For example, if the victim is the initial aggressor, the defendant has a right to use force to defend himself only if he has a reasonable fear of the victim. If a defendant has such a reasonable belief, he is permitted to use that amount of force that he reasonably believes necessary to protect himself. Thus, if the defendant claims self-defense, the defendant must have been in reasonable fear of the victim's actions of aggression.

In order to prove that the defendant was reasonably afraid of the victim, the defendant must introduce evidence that he had knowledge of the victim's prior violent acts or reputation

to justify his fear. Whether the victim was the initial aggressor only provides grounds to support the defendant's reasonable fear and thus, his use of force against the victim.

Indeed, if one looks at the vast majority of cases discussing the admission of the victim's reputation for violence, the cases discuss both the initial aggressor and the reasonable fear of the victim together:

> A defendant prosecuted for homicide or assault may claim, as a defense, that use of physical force upon the alleged victim was not unlawful because it was necessary to protect himself or others from the victim's aggression. A defendant may assert the defense, however, only where his belief that he was subject to an imminent attack is a reasonable belief. The defendant's state of mind, therefore, is critical.

See State v. Waller, supra at 215; State v. Rutter, 93 S.W.3d 714 (Mo.banc 2002) (Where defendant attempted to admit evidence of a specific act of violence to demonstrate that he was reasonably afraid of victim; defendant also claimed victim was initial aggressor); State v. Harrison, 24 S.W.3d 215 (Mo.App. W.D. 2000)(Defendant alleged that he was in reasonable fear of the victim's attack on him and moved to introduce reputation evidence); State v. White, 909 S.W.2d 391 (Mo.App. W.D. 1995) (Defendant alleged that he was afraid of the victim due to prior acts of violence and that the victim was the initial aggressor; admission of reputation of violence was held inadmissible as defendant failed to show he knew of the reputation); State v. Harris, 781 S.W.2d 137 (Mo.App. S.D. 1989) (Where defendant claimed that victim's reputation for violence was admissible to show whether the defendant had a reasonable

apprehension of fear and that the victim was the initial aggressor, court held that evidence only admissible where defendant shows knowledge of the victim's reputation). The cases never talk about just admitting the evidence to establish that the victim was the initial aggressor; they talk about these areas in tandem because they are interrelated[6], in that, as discussed above, the victim's status as iniial aggressor is only relevant to show a defendant's reasonable fear of the victim.

This Court in Johns, in holding as it did, recognized the relationship between these two concepts of initial aggressor and reasonable fear, by requiring that the defendant prove knowledge of the victim's reputation before admitting this evidence. This Court further acknowledged that the defendant's state of mind is always relevant.

Therefore, if the issue is whether the defendant reasonably acted in self-defense, the victim's reputation for violence would be admissible to show that the victim was the initial aggressor and thus, the defendant was in reasonable fear of the victim, provided, of course, that the defendant could show that he knew of this reputation.

Appellant, however, alleges that he was entitled to introduce evidence of the victim's

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[6]Although there could be cases where a defendant would introduce evidence regarding his reasonable fear of the victim where he was not claiming that the victim was the initial aggressor, (i.e. where the defendant was the initial aggressor, he has retreated and the victim continues the incident and the defendant wants to show his reasonable fear to show that the amount of force was reasonable; where although the victim is not the initial aggressor, the defendant has a reasonable belief that he is in danger), admission of evidence that the victim was the initial aggressor is only be relevant in cases where reasonable fear is also at issue. That is because where the victim is the initial aggressor, the defendant is only allowed to use such force as is necessary which is contingent on his reasonable fear or reasonable belief of danger from the victim arising from the victim's initial aggression.

reputation for violence for the sole purpose of showing that because the victim had a reputation for violence, he must have been the initial aggressor (App. Br. 30). In other words, appellant alleges that this evidence was admissible to show the victim's propensity to commit violence. However, a defendant should not be able to introduce the victim's reputation for violence merely to show that because the victim has a reputation for violence, the victim must have been the initial aggressor. The opposite would certainly never hold true. For example, whether or not the defendant knew of the victim's reputation does not establish, as a matter of fact, that the victim was the initial aggressor. Thus, a defendant should not be able to admit the victim's reputation for violence merely to show the victim's propensity for violence.

Absent the defendant's knowledge of the victim's reputation, the victim's reputation for violence is legally irrelevant. For example, a person (defendant) could commit a violent, unprovoked act upon someone whom the aggressor had no knowledge to be violent. Later acquired knowledge of that victim's propensity for violence had no impact on the defendant's state of mind. Thus, the victim's reputation for violence would not support a finding of self-defense as it would be merely propensity evidence. This is the purpose in which defendant seeks to introduce this evidence.

Missouri Courts have long held that propensity evidence (with limited exceptions) is not admissible. See State v. Rehberg, 919 S.W.2d 543, 548 (Mo.App. W.D. 1995) (Evidence of prior crimes or misconduct is inadmissible as propensity evidence); State v. Bernard, 849 S.W.2d 10 (Mo.banc 1993) ("The general rule concerning the admission of evidence of uncharged crimes, wrongs, or acts is that evidence of prior uncharged misconduct is

inadmissible for the purpose of showing the propensity of the defendant to commit such crimes"); State v. Shaw, 847 S.W.2d 768 (Mo.banc 1993) (Evidence that merely indicates that the defendant is a "bad person" and thus has a propensity to commit crimes serves no legitimate purpose); State v. Baker, 23 S.W.3d 702, 714 (Mo.App. E.D. 2000) (In prosecutions related to sexual conduct, the opinion and reputation of the victim's prior sexual contact is inadmissible; the Rape Shield Statute is designed to protect victims); see also State v. Sloan, 912 S.W.2d 592, 598 (Mo.App. E.D. 1995); State v. Brown, 636 S.W.2d 929 (Mo.banc 1982) (overruled on other grounds) (Evidence of a sexual assault victim's prior sexual conduct "has no reasonable bearing upon the issue of consent or credibility" and introduction serves only to humiliate and embarrass the witness in a "fishing expedition" which puts the victim on trial rather than the defendant; "The idea that a woman's prior consent is per se relevant to the question of a later consent" is a "tired, insensitive and archaic platitude of yesteryear"); State v. Gibson, 636 S.W.2d 956 (Mo.banc 1982) (Rape Shield statute redresses the faulty premise that prior sexual experience was probative of a general inclination to have sexual experience).

Admission of evidence to establish a person's propensity to commit such wrongs, in this case, violence, is extremely prejudicial as it allows the jury to use the evidence of the prior violence to infer that the person a propensity or proclivity to commit violence, which, in turn, results in the jury finding that the victim must be the initial aggressor simply because he has been aggressive in the past. State v. Brooks, 810 S.W.2d 627, 630 (Mo.App. E.D. 1991). In fact, this Court has recognized the extreme prejudice in admitting evidence of a victim's acts of violence or reputation of violence in cases where a defendant is claiming self-

defense. In Waller, supra at 214-215, this Court stated that one of the dangers in including evidence of the victim's specific acts of violence is that "the jury could be led to consider the victim's character to infer that the victim acted in conformity with former conduct." (citing State v. Jacoby, 260 N.W.2d 828, 838 (Iowa 1977)). After abrogating Buckles, supra, and holding that a defendant could now admit known specific acts of violence by a victim to show the defendant's reasonable fear of the victim, this Court held:

> The trial court must caution the jury that the evidence is to be considered solely with regard to the reasonableness of the defendant's apprehension that the victim was about to inflict bodily harm upon the defendant, and not for the purpose of establishing that the victim probably acted in conformity with the prior acts of violence. The trial court should caution the jury that the character of the deceased and the deceased's specific past violent acts are not otherwise relevant to the issues before them.

Waller, supra at 216. (citations omitted). Finally, in State v. Clark, 747 S.W.2d 197 (Mo.App. E.D. 1988), the Eastern District Court of Appeals, in dicta, recognized that evidence of the character of a victim is not admissible in support of a contention of self-defense to show that the victim acted in conformity therewith and was the first aggressor. (citing Mo. Evidence Restated, Section 404(c) (Mo. Bar 1984).

Admission of evidence solely to prove the propensity of the victim to commit acts of violence is highly prejudicial and lacks probative value. Thus, it is not legally relevant. As this Court stated in Waller, supra, a victim's character is not relevant to the jury's determination

of the defendant's guilt. The mere fact that the victim may have a reputation for violence does not tend to prove that the victim was an initial aggressor. At most, it prejudices the jury against the victim, putting the victim on trial rather than the defendant. See Waller, supra; Brown, supra (Evidence of sexual assault victim's prior sexual experiences puts victim on trial). The victim's propensity to commit violence is not relevant to the jury's consideration of whether the defendant acted in self-defense.

Therefore, if a defendant moves to admit evidence that a victim has a reputation for violence, the defendant must show that he had knowledge of that reputation. The only way that reputation for violence is relevant to a person's claim of justification in using self-defense is where a defendant establishes that he reasonably believed that it was necessary to use the appropriate amount of force to protect himself (i.e. in reasonable fear of the victim) because the defendant has a reasonable belief that he was in imminent danger from the victim (i.e. the victim was the initial aggressor). The victim's reputation for violence is not relevant to merely show the victim's propensity for violence.

In the case at bar, the trial court ordered that appellant had failed to lay a proper foundation to admit the evidence of the victim's reputation for violence (Tr. 332-334). Although defense counsel asked to make an offer of proof, the trial court ordered that appellant should lay a proper foundation and then an offer of proof could be made (Tr. 332-334). Although given the opportunity to lay a proper foundation during appellant's testimony, appellant failed to do so under the apparent concern that such testimony was unknown. Without a foundation, appellant was not entitled to make his offer of proof as to the victim's

reputation for violence. Without testimony showing that appellant was acquainted with the victim's community or that appellant knew of the victim's reputation for violence, appellant failed to lay a proper foundation. See State v. Stewart, 529 S.W.2d 182, 184 (Mo.App. KCD 1975) (Witness must testify to knowledge of the victim, the community in which the victim lived, and the victim's character or reputation for proper foundation to be laid). The victim's reputation for violence was not admissible and the trial court did not err in denying appellant the opportunity to make an offer of proof.

Should this Court find that appellant did lay a proper foundation, the appropriate remedy is, as the Eastern District found, to remand the cause for a limited hearing, to allow defendant to make an offer of proof regarding his knowledge of the victim's reputation for violence. See State v. Gonzales, ED82455, slip opinion (Mo.App. E.D. May 18, 2004), citing State v. Bost, 820 S.W.2d 516, 519 (Mo.App. W.D. 1991).

Finally, appellant alleges that the State opened the door to admission of the victim's reputation for violence because Mrs. Hoppe volunteered that the victim seemed to be a gentle person. This statement was not elicited by the State[7], the State did not focus on this statement, and appellant failed to make any objection to this volunteered statement. The State did not open the door to any testimony regarding the victim's reputation for violence and the trial court did not err in denying admissibility of this evidence.

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[7]Appellant concedes that this was an unresponsive answer to the State's question. See (App. Br. 28). Although appellant suggests that only the State could object to her answer, this is not true. Had appellant felt that he was harmed by this response, he could have lodged an objection. Appellant failed to do so.

Based on the foregoing, appellant's claim must fail.

II.

THE TRIAL COURT DID NOT PLAINLY ERR IN SUBMITTING INSTRUCTION NO. 15, THE INSTRUCTION ON SELF-DEFENSE WHICH INCLUDED THE OPTIONAL "INITIAL AGGRESSOR" PARAGRAPH AND IN REFUSING APPELLANT'S INSTRUCTION NO. A, WHICH DID NOT INCLUDE THE "INITIAL AGGRESSOR" LANGUAGE BECAUSE THE EVIDENCE SUPPORTED SUCH LANGUAGE IN THAT THE EVIDENCE SHOWED THAT APPELLANT WAS THE PERSON WHO INITIALLY CONFRONTED THE VICTIM, APPELLANT APPROACHED THE VICTIM FROM ACROSS THE ROOM, AND APPELLANT WAS CURSING, SHOVING, AND HITTING THE VICTIM.

Appellant claims that the trial court plainly erred in submitting Instruction No. 15, the instruction on self-defense which included the optional "initial aggressor" paragraph and in refusing appellant's proposed instruction No. A, which did not include the "initial aggressor" language (App. Br. 17). Appellant alleges that there was no evidence that appellant was the initial aggressor and that the instruction "so misdirected the jury that it has caused manifest injustice" (App. Br. 17).

Appellant acknowledges that his claim is not preserved for appeal as the claim was not included in his motion for new trial and requests plain error review (App. Br. 21; L.F. 90-96). Plain error review is used sparingly and does not justify review of every alleged trial error not preserved for review. State v. Dowell, 25 S.W.3d 594, 606 (Mo.App. W.D. 2000). Relief under the plain error standard is granted only when there is a strong, clear demonstration that

a defendant's rights have been so substantially affected that a manifest injustice or miscarriage of justice inexorably results if left uncorrected. State v. Hyman, 11 S.W.3d 838, 842 (Mo.App. W.D. 2000). Should this Court grant plain error review, this Court first looks to see if "evident, obvious, and clear" error appears on the face of the claim. Dowell, 25 S.W.3d at 606. Only if error appears on the face of the claim does this Court then exercise its discretion to determine whether or not a manifest injustice has occurred. Id. The burden is on appellant to prove that an error resulted in a manifest injustice. Id. A mere allegation of prejudice will not suffice. Id. Further, instructional error seldom rises to the level of plain error, and any such error must have so misdirected or failed to instruct the jury that it is apparent that the instructional error affected the jury's verdict. State v. Todd, 70 S.W.3d 509, 527 (Mo.App. W.D. 2002).

Appellant's claim must fail because the evidence supported giving the "initial aggressor" language in the self-defense instruction and thus, his proposed Instruction No. A, which omitted the "initial aggressor" language was properly refused. Although Instruction A was not used, the jury was instructed on the issue of self-defense as follows:

Instruction No. 15

One of the issues as to Count I is whether the use of force by the defendant against Michael Gosser[8] was in self-defense. In this state, the use of force including the use of deadly force to protect oneself from harm is lawful in certain situations.

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

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

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

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

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[8]The victim's last name in the trial transcript is spelled "Gossir," but is spelled in the Instructions as "Gosser."

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

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

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

If the defendant was not the initial aggressor in the encounter with Michael Gosser and if the defendant reasonably believed he was in imminent danger of serious physical injury from the acts of Michael Gosser and he reasonably believed that the use of deadly force was necessary to defend himself, then 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 Count I.

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

(L.F. 64-65) (emphasis added). The refused Instruction A was virtually identical to Instruction No. 15, except that Instruction A omitted the emphasized portions (L.F. 70-71).

Appellant argues that the "initial aggressor" language should have been omitted from the instruction, because, viewing the evidence in the light most favorable to him, he was not the initial aggressor (App. Br. 17-18). Appellant's claim is without merit.

In making the threshold determination of whether a self-defense instruction should be submitted to the jury, the evidence is viewed in the light most favorable to the defendant. State v. Chambers, 671 S.W.2d 781, 783 (Mo. banc 1984). However, once that threshold determination has been made, the instruction must be drafted in accordance with the evidence; and, if there is any evidence that the defendant was the initial aggressor, the initial aggressor language must be included in the instruction. See State v. Allison, 845 S.W.2d 642, 645 (Mo.App. W.D. 1992) (trial court did not err in submitting "initial aggressor paragraphs" because "[u]pon contradictory evidence as to who was the initial aggressor, it was a question of fact and properly submitted to the jury"). See also State v. Colson, 926 S.W.2d 879, 881-883 (Mo.App. S.D. 1996) (defendant's refused self-defense instruction was defective, in part, because there was evidence that defendant was the initial aggressor, and the instruction lacked the initial aggressor language).

The pattern instruction for self-defense, MAI-CR 3d 306.06, in relevant part, is drafted as follows:

PART A - GENERAL INSTRUCTIONS

> One of the issues (as to Count ___) (in this case) is whether the use of force by the defendant against [*name of victim*] was in self-defense. In this state, the use of force (including the use of deadly force) to protect oneself

from harm is lawful in certain situations.

> [*Use the material in [1] ONLY if there is evidence the defendant was the "initial aggressor." Omit brackets and number.*]
>
> [1] 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 which he provoked.

(emphasis added).

MAI-CR 3d 306.06, Notes on Use 3, explains the use of the "initial aggressor" paragraph as follows:

> **3.** This instruction is divided into three parts.
>
> The first part of the instruction, part A, sets out the general requirements for the lawful use of force in self-defense. Those portions that are relevant to the case will be used. The phrase in parentheses in the opening paragraph will be used if there is evidence of the use of deadly force.
>
> (a) Subject to some exceptions, the use of force in self-defense is not justified if the defendant was the "initial aggressor." If there is no evidence indicating the defendant was the initial aggressor or provoked the incident, then the material in [1] of part A **will not** be used. If there is evidence the defendant was the initial aggressor, then the material in [1] of part A **will** be used (unless,

as indicated in the next paragraph, it is clear that the defendant was justified in being the initial aggressor).

(emphasis added). Thus, if there is any evidence that the defendant was the initial aggressor, the initial aggressor paragraph must be included in the instruction.

In the case at bar, there was evidence that appellant was the initial aggressor. As outlined in the statement of facts, while appellant was at the Hoppe home, Gossir arrived and stood in the foyer by the front door (Tr. 210, 260, 265). Appellant made a sarcastic comment to Gossir, "This is Halloween. Where's your uniform or mustache, whatever" (Tr. 211, 265). Gossir responded "what did you hear about talking about me" (Tr. 266). Appellant and Gossir began having a heated conversation (Tr. 213). Appellant, who had been sitting in a chair in the living room, walked towards the front door and Gossir (Tr. 213, 261, 266). Appellant and Gossir were face to face and continued to have a heated conversation and cursing at each other (Tr. 216, 266). Appellant and Gossir then began pushing each other and continued to argue (Tr. 216, 266). Gossir then began to back up towards the kitchen, while he and appellant continued to push each other (Tr. 217). Appellant pushed Gossir through the kitchen door and Gossir fell on his back on the kitchen floor (Tr. 217-218, 269-272). Gossir got up, walked backward out of the kitchen; appellant put his hands behind his back and followed Gossir out of the kitchen (Tr. 218-219, 272-273). Appellant then took a knife and stabbed Gossir in the rib cage (Tr. 219, 273-274).

Although neither Fred or Gloria Hoppe testified as to whether it was appellant or Gossir who shoved the other person first, the evidence did reflect that appellant made a sarcastic

comment to Gossir and that it was appellant who got off of his chair and walked across the room, getting into Gossir's face where they continued to have heated words. The evidence also reflected that it was appellant who pushed Gossir hard enough that he fell to the floor. This evidence supported giving the "initial aggressor" language. State v. Hughes, 84 S.W.3d 176 (Mo.App. S.D. 2002) (Inclusion of initial aggressor language proper where evidence showed that a group of five boys, including defendant, descended on victim's private property, the boys were looking for a fight, and that defendant was arrogant, cocky and loud at crime scene, and history of trouble existed between victim's son and group of boys). The jury could reasonable infer from this evidence that appellant was the initial aggressor.

Moreover, even though the Hoppes did not testify as to who shoved whom first, or who cussed at whom first, this evidence was, at the very least, contradictory as to who was the "initial aggressor" and thus, the language was properly included in the self-defense instruction. Allison, supra. Appellant was not entitled to remove an issue from the jury's consideration merely because there was contradictory testimony. Consequently, the trial court did not err in refusing Instruction No. A and submitting Instruction No. 15.

Finally, appellant cannot show he suffered a manifest injustice. First, in order to establish a manifest injustice from instructional error, an appellant must show that the instruction so misdirected the jury. Todd, 70 S.W.3d at 527. In the case at bar, the instructional language at issue, the initial aggressor language, does not direct the jury to do anything. This language is simply defining the law of self-defense. The jury is not directed by this language. Thus, even if the inclusion of this language was in error, it was certainly not

manifest injustice as it did not misdirect the jury.

Second, appellant did not suffer a manifest injustice because, even assuming that the evidence did not support the giving of the initial aggressor language, appellant would have been convicted as there was overwhelming evidence that appellant did not act in self-defense. One acting in self defense is only entitled to use the amount of force necessary to defend themself. State v. Westfall, 75 S.W.3d 278, 282 (Mo. banc 2002). In the case at bar, there was simply no evidence that appellant was justified in using deadly force. State v. Strother, 807 S.W.2d 120, 123 (Mo.App. W.D. 1991) (The facts indicated a simple assault situation, i.e., the two men pushing and shoving, grabbing hold of each other and struggling, which would not justify deadly force. Some affirmative action, gesture or communication by the person feared indicating the immediacy of the danger, the ability to avoid it and the necessity of using deadly force must be present to justify the use of deadly force). Appellant did not suffer a manifest injustice. Appellant was not justified in using deadly force and thus, even with the inclusion of the initial aggressor language, appellant did not suffer a manifest injustice.

Based on the foregoing, appellant's claim must fail.

III.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN SUSTAINING THE STATE'S OBJECTION TO PLAYING PORTIONS OF FRED HOPPE'S AUDIOTAPED STATEMENT TO POLICE DURING HOPPE'S CROSS-EXAMINATION BECAUSE APPELLANT WAS NOT PRECLUDED FROM ADMITTING AND PLAYING THE AUDIOTAPE IN THAT THE TRIAL COURT RULED THAT APPELLANT COULD INTRODUCE AND PLAY THE AUDIOTAPE DURING HIS CASE AND APPELLANT WAS NOT PREJUDICED IN THAT THE SAME EVIDENCE WAS ADMITTED DURING OFFICER WASEM'S TESTIMONY.

Appellant claims that the trial court erred in sustaining the State's objection to playing portions of Fred Hoppe's audiotaped statement to police during Fred Hoppe's cross-examination (App. Br. 24). Appellant alleges that he should have been able to use the audiotaped statement to impeach Hoppe's testimony and the statement would have shown that the victim, not appellant, was the initial aggressor (App. Br. 24).

During Fred Hoppe's cross-examination, appellant questioned Hoppe about statements made to officers following the stabbing:

> Q. Do you remember saying, "No, actually I've got to be fair about it, Mike is the one who asked him, said he heard he was talking about him or something and Mike started it?" Did you say that to the police officer?
>
> A. Well, I tell you like I said earlier, I don't know how many officer talked to me. People talked to me. And I don't know exactly word for word

what was said. You know.

Q. Do you believe that you could have said that?

A. I believe what?

Q. You believe you could have said that? Give me–

A. That I said what again?

Q. That, "To be perfectly fair about it, Mike is the one that asked him and said he heard he was talking about him or something, Mike started it?"

A. I will agree to words to that effect. I don't know the exact words. Mike was–Mike was asking Ronnie something about him talking, hearing something about him talking about him. They were both argumentative.

Q. Okay. But you remember telling the police officers that you believed Mike started it?

A. I didn't exactly say Mike started it, no. I didn't say Mike started anything. I didn't.

(Tr. 239-240). Counsel then approached the bench and appellant requested a recess so she could set up an audiotape in order to play a portion of Hoppe's audiotaped statement to the jury (Tr. 240-241). The trial court denied appellant's request, stating "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. 241).

During appellant's case in chief, appellant did not seek to introduce Hoppe's audiotaped statement. However, appellant did call Officer Phillip Wasem, the officer who tape-recorded

Hoppe's statement (Tr. 438-439). Officer Wasem testified that:

> Q. And you asked Fred, "So when Ronnie approached him and started cussing him," and Fred Hoppe responded, "No, actually I've got to be fair about it, Mike is the one that asked him, said he heard he was talking about him or something, and it was Mike started it."
>
> A. That was on the tape, yes, ma'am.

(Tr. 440).

Although appellant alleges that the trial court precluded him from introducing the audiotape to impeach Fred Hoppe, appellant fails to recognize that the trial court did not preclude admission of the audiotape or the playing of the audiotape. Rather, the trial court merely precluded the playing of the audiotape during Hoppe's cross-examination. As can be seen from the above quoted statements by the trial court, the trial court explained that although the trial court would not allow the audiotape to be introduced during Hoppe's testimony, appellant was free to introduce and play the audiotape during his case in chief. Appellant was not precluded from introducing the audiotape and using it to impeach Fred Hoppe. The fact that appellant chose not to introduce the audiotape during his case does not charge the trial court with error. Appellant was free to admit the audiotape statement but chose not to do so.

In any event, even if the trial court had excluded the audiotape, it was harmless error and appellant was not prejudiced. Generally, even the improper exclusion of evidence will not constitute reversible error when substantially the same evidence is otherwise admitted. State v. Gilbert, 121 S.W.3d 341, 345 (Mo.App. S.D. 2003); State v. Nibarger, 391 S.W.2d 846,

849 (Mo. 1965); Felton v. Hulser, 957 S.W.2d 394, 399 (Mo. App. W.D. 1997). ("The erroneous exclusion of evidence is harmless, and the party suffers no prejudice if the same facts are shown by other evidence.") If the jury receives the gist of the testimony appellant allegedly wished to develop, he cannot be prejudiced by the court's ruling. State v. Schneider, 736 S.W.2d 392, 401 (Mo. banc 1987), cert. denied, 484 U.S. 1047 (1988); State v. Gilmore, 681 S.W.2d 934, 940 (Mo. banc 1984), cert. denied, 484 U.S. 933 (1987). As quoted above, appellant introduced Hoppe's audiotaped statements through Officer Wasem's testimony. The statements appellant wished to introduce were introduced and appellant argued the alleged inconsistencies in his closing argument (Tr. 464-481). Appellant was not prejudiced by the trial court's ruling.

Based on the foregoing, appellant's claim must fail.

IV.

THE TRIAL COURT DID NOT PLAINLY ERR IN ADMITTING TESTIMONY THAT APPELLANT HAD BEEN IN A CONFRONTATION AT A TAVERN BEFORE COMING TO THEIR HOME THE NIGHT HE KILLED MIKE GOSSIR BECAUSE THIS EVIDENCE WAS RELEVANT IN THAT THE EVIDENCE ESTABLISHED APPELLANT'S STATE OF MIND BEFORE HE ATTACKED AND KILLED THE VICTIM.

Appellant claims that the trial court plainly erred in admitting testimony from the Hoppes that appellant had been in a confrontation at a tavern before coming to their home the night he killed Mike Gossir (App. Br. 37). Appellant alleges that the evidence was not relevant to any issue in the case and that the evidence "merely portrayed [appellant] 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" (App. Br. 37).

Appellant admits that he failed to object to this testimony at trial and thus his claim is not preserved for review (App. Br. 40). His claim may be reviewed, if at all, for plain error. Plain error review is used sparingly and does not justify review of every alleged trial error not preserved for review. State v. Dowell, 25 S.W.3d 594, 606 (Mo.App. W.D. 2000). Relief under the plain error standard is granted only when there is a strong, clear demonstration that a defendant's rights have been so substantially affected that a manifest injustice or miscarriage of justice inexorably results if left uncorrected. State v. Hyman, 11 S.W.3d 838, 842 (Mo.App. W.D. 2000). Should this Court grant plain error review, this Court first looks to see

if "evident, obvious, and clear" error appears on the face of the claim. Dowell, 25 S.W.3d at 606. Only if error appears on the face of the claim does this Court then exercise its discretion to determine whether or not a manifest injustice has occurred. Id. The burden is on appellant to prove that an error resulted in a manifest injustice. Id. A mere allegation of prejudice will not suffice. Id.

A trial court has broad discretion to admit or exclude evidence, and the appellate court will reverse only upon a showing of a clear abuse of discretion. State v. Simmons, 944 S.W.2d 165, 178 (Mo. banc), cert. denied, 522 U.S. 953 (1997). A trial court will be found to have abused its discretion when a ruling is "clearly against the logic and circumstances before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration; if reasonable persons can differ about the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion." State v. Brown, 939 S.W.2d 882, 883 (Mo. banc 1997).

For evidence to be admissible, it must be relevant, logically tending to prove or disprove a fact in issue or corroborate relevant evidence that bears on the principle issue. State v. Woods, 984 S.W.2d 201, 205 (Mo.App. W.D. 1999); see also State v. Weaver, 912 S.W.2d 499, 510 (Mo. banc 1995), cert. denied, 519 U.S. 856 (1996). In addition, evidence is logically relevant if it tends to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. State v. Wayman, 926 S.W.2d 900, 905 (Mo.App. W.D. 1996).

In the case at bar, Fred and Gloria Hoppe testified that after appellant arrived at their

home, appellant told Fred Hoppe that he had been down at Slow Tom's Tavern, where he worked cleaning the tavern, and that he had been in a confrontation at the tavern before coming over (Tr. 204-209, 260). Appellant used the Hoppe's telephone to call Slow Tom's and told someone there to "shove it" (Tr. 264). After appellant hung up the telephone, Gossir arrived and stood in the foyer by the front door (Tr. 210, 260, 265). That is when the confrontation began.

Evidence that appellant had been in a confrontation that evening before coming to the Hoppe home and that he called the tavern to tell them to "shove it" was relevant to the case at bar. This evidence painted a complete picture of the events. The fact that appellant had been in a confrontation was relevant to explain his frame of mind when he called the tavern, telling them to "shove it." This evidence established appellant's frame of mind, his agitated state and the reason he was hostile towards the victim. State v. Daniels, 649 S.W.2d 568 (Mo.App. S.D. 1983) (Evidence that the defendant was angry over being arrested was admissible and relevant to show state of mind while attacking victim). The evidence was relevant and the trial court did not plainly err in admitting this testimony.

Moreover, appellant cannot establish that he suffered a manifest injustice. Even assuming that this testimony was irrelevant, appellant cannot establish that admission of this testimony created a miscarriage of justice. Although the Hoppes testified that appellant was in a confrontation at the tavern, no evidence was elicited regarding whether it was a verbal or physical confrontation, whether appellant had assaulted someone, or if someone had assaulted appellant. No specific facts were elicited about the confrontation. The only evidence was that

a confrontation had occurred and appellant was angry that night. Contrary to appellant's argument, this was not propensity evidence and did not "distract the jury's attention." Moreover, considering the overwhelming evidence of appellant's guilt, including two eyewitnesses, it cannot be said that the admission of this had any effect on the jury's verdict. The admission of this evidence did not create a manifest injustice.

Based on the foregoing, appellant's claim must fail.

CONCLUSION

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