IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,	**)**	
	)	
Respondent,	**)**	
	)	
vs.	**)**	**No. SC89390**
	)	
JAMIE AVERY,	**)**	
	)	
Appellant.	**)**	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF WEBSTER COUNTY, MISSOURI
FORTIETH JUDICIAL CIRCUIT
THE HONORABLE JOHN W. (BILL) SIMS, JUDGE

APPELLANT'S SUBSTITUTE BRIEF

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INDEX

Page

TABLE OF AUTHORITIES

***CASES*:**

***CONSTITUTIONAL PROVISIONS*:**

***STATUTES*:**

RULES:

***MISCELLANEOUS*:**

JURISDICTIONAL STATEMENT

Jamie Avery appeals her convictions for voluntary manslaughter, § 565.023, RSMo 2000,[1] and armed criminal action, § 571.015, following a jury trial held on July 18-25, 2005 (Tr. 7). On October 4, 2005, the trial court, the Hon. John W. Sims, Judge, sentenced Ms. Avery to concurrent sentences of fifteen years and thirty five years imprisonment (Tr. 1051-52; L.F. 71-73). Ms. Avery filed a timely notice of appeal on October 6, 2005 (L.F. 74-76). Jurisdiction of this appeal originally was in the Missouri Court of Appeals, Southern District. Article V, Section 3, Mo. Const.; section 477.060. On May 1, 2008, the Southern District reversed Ms. Avery's judgment and sentences and remanded for a new trial because the trial court erred in giving a voluntary intoxication instruction, MAI-CR3d 310.50, because there was no evidence that Ms. Avery was intoxicated or from which it could be reasonably inferred that her faculties were impaired from her consumption of alcohol. This Court thereafter granted the Respondent's application for transfer, so this Court has jurisdiction. Article V, Sections 3 and 10, Mo. Const. and Rule 83.03.

[1] All statutory references are to RSMo 2000, unless otherwise indicated. The Record on Appeal consists of a transcript (Tr.), a legal file (L.F.), and a transcript (1Tr.) and legal file (1L.F.) from an earlier trial. On December 14, 2005, the Southern District granted a motion to transfer the record from that earlier trial.

STATEMENT OF FACTS

Jamie Avery was originally charged by information with first-degree murder and armed criminal action (1L.F. 6). After a jury found Ms. Avery guilty of the lesser-included offense of second-degree murder and armed criminal action, this Court reversed Ms. Avery's convictions because the trial court erred in failing to give instructions on self-defense, defense of premises, and voluntary manslaughter. *State v. Avery*, 120 S.W.3d 196 (Mo. banc 2003).

Subsequently, Ms. Avery was charged by amended information with second-degree murder and armed criminal action (L.F. 9-10). The jury acquitted Ms. Avery of second-degree murder but found her guilty of the lesser-included offense of voluntary manslaughter and the related armed criminal action, and it also recommended sentences because she had no prior convictions (Tr. 977, 1040; L.F. 48-49, 54-55). Viewed in the light most favorable to the verdict in Ms. Avery's second trial, the facts are as follows.

Jamie Avery and John Hamilton lived together in Hickory County (Tr. 448, 696). In October 2000, Ms. Avery had a sexual encounter with Bruce Paris, the deceased (Tr. 458-59, 699-700). Thereafter she and Mr. Paris began making plans to go to Chicago together with a mutual friend, Regina Buckner who was married (Tr. 437, 439-42, 454-56).[2] Before these plans came to fruition, however, Mr.

[2] Mr. Paris and Ms. Buckner had a long-term affair (Tr. 437, 439-442, 857). Mr. Paris was married to someone else (Tr. 857).

Paris called off the trip because he had rekindled his relationship with an ex-girlfriend, Michelle Morlan (Tr. 516-18). Upon hearing this news, Ms. Avery became upset and made some verbal threats against Mr. Paris (Tr. 522). She said that he would pay for what he had done to her and for what every other man had done to her in the past (Tr. 522). Mr. Paris left the State of Missouri with Ms. Morlan (Tr. 525-26).

Sometime after that, Mr. Hamilton and Ms. Avery received some suspicious, harassing phone calls (Tr. 729-33, 746-47). During one of these calls Mr. Paris got on the phone after a female had initially called and asked for Ms. Avery (Tr. 729-33, 746-47).

On December 6, 2000, about a week after the last phone call, Mr. Paris told Ms. Buckner that he wanted to see Ms. Avery again (Tr. 463). That afternoon, Ms. Buckner found Ms. Avery drinking at a restaurant/bar and told her that Mr. Paris wished to see her again (Tr. 466). Ms. Avery initially replied that she had no intention of seeing Mr. Paris again (Tr. 466, 678). She said that Mr. Hamilton gave her permission to shoot Mr. Paris if he got near her and that she had "guns waiting" (Tr. 466, 680, 689-90).

However, that evening she and Ms. Buckner drove to a local store to meet Mr. Paris (469). Ms. Avery asked if she could take a gun with her, but Ms. Buckner did not want her to do so (Tr. 470). They met up with Mr. Paris at about 6:00 or 6:30 p.m. (Tr. 471). The three drove around town drinking alcohol, while Ms. Buckner and Mr. Paris also smoked marijuana (Tr. 471-75). During the drive,

Mr. Paris grabbed Ms. Avery's breast (Tr. 476). After this incident, the three eventually went to Ms. Avery's home (Tr. 476). It was dark (Tr. 476).

While there, Ms. Buckner phoned a friend, Becky Gibbs (Tr. 478). After her phone call, she asked Ms. Avery to take her back to her car (Tr. 480, 503). Mr. Paris remained alone at Ms. Avery's home so that he could make a phone call to the man he was staying with while Ms. Avery returned Ms. Buckner to the latter's car (Tr. 462, 479, 482).

At about 8:00 p.m., Ms. Morlan received a phone call from Mr. Paris (Tr. 524, 533). She heard a female yelling and screaming in the background before the call was disconnected (Tr. 524, 534). About fifteen to twenty minutes later, Mr. Paris called Ms. Morlan again (Tr. 524). He said he was calling from a pay phone (Tr. 534). Ms. Morlan wanted to give Mr. Paris a car title and they discussed about how she could get it to him (Tr. 525). He told Ms. Morlan that Ms. Avery was a "psycho bitch" (Tr. 534). Ms. Morlan asked Mr. Paris why he was "back with Jamie," and he answered something like, "I've made my bed. I'll sleep in it." (Tr. 525, 534). He never asked Ms. Morlan for a ride (Tr. 534).

After being dropped off at her car, Ms. Buckner went to her friend Becky Gibbs' house and told her that Mr. Paris was with Ms. Avery (Tr. 482-83). Ms. Gibbs was a friend of Ms. Avery's boyfriend, John Hamilton, who was in California on business (Tr. 698, 702-03). She called Mr. Hamilton and told him that Mr. Paris was in his home (Tr. 483-84, 504, 706, 708). Mr. Hamilton immediately called Ms. Avery and confronted her with this information (Tr. 708-

10). Ms. Avery said that she still loved Mr. Hamilton and she asked him if he wanted her to kill Mr. Paris (Tr. 711, 715).[3] Mr. Hamilton told her no and that he would deal with Mr. Paris when he got back from California (Tr. 711).

At approximately 9:09 p.m., Ms. Avery called the Hickory County Sheriff's Department and while crying, stated very hysterically, "I have shot an intruder." (Tr. 226-27, 332). She had barricaded herself in a bedroom; she did not know where Mr. Paris was (Tr. 229, 232). She shot him with Mr. Hamilton's gun while he was coming through the door (Tr. 229, 232).

[3] Although Mr. Hamilton had previously testified at an earlier trial, the first time he told the state about this alleged statement was the day before this second trial started (Tr. 717-18, 722). A few days before trial, Mr. Hamilton told Brenda Evans that he thought that he was going to be "thrown under the bus" and that defense counsel "was going to pin this" on him (Tr. 749). Ms. Evans testified that the weekend before trial Mr. Hamilton said he thought the defense was going to "pin this on him", so he was going to talk to the prosecutor Monday morning and say that he remembered a conversation with Ms. Avery on the night of the shooting (Tr. 860). Hamilton testified that he told Ms. Evans about this statement about a month or two prior to this retrial (Tr. 717-18, 722). Ms. Evans denied that Mr. Hamilton had told her about this late disclosed statement before the weekend before trial (Tr. 861).

After calling the police, Ms. Avery called Mr. Hamilton, crying hysterically, "God, I shot him" (Tr. 712). During this conversation, Ms. Avery told him that she was scared and that Mr. Paris was going to hurt her so she shot him (Tr. 712, 728). She did not know if Mr. Paris was still there because she was locked in the bedroom (Tr. 712).

The police arrived at about 9:17 p.m. and found Mr. Paris dead slumped in a sitting position against the open front door (Tr. 333, 335, 338). Ms. Avery told officers that she had shot an intruder (Tr. 343, 359). She was extremely upset, hysterical and was crying (Tr. 253, 278, 343, 359). She said that she had shot Mr. Paris and asked several times if he was dead (Tr. 253).

The police found a five-shot revolver on the living room floor near a coffee table (Tr. 347, 350. 354, 377). The revolver had three live rounds, one empty chamber, and one spent casing inside it (Tr. 353-54). There also was a live round on the living room floor (Tr. 264-65). Mr. Paris' pants might have been unzipped (Tr. 286-87) and there was a picture of Ms. Avery with a note on it from her in his pocket (Tr. 262-63, 328). Upon being confronted with the picture, Ms. Avery said that she had given Mr. Paris the picture earlier that evening (Tr. 589). He had seen the picture sitting on her coffee table and asked to keep it (Tr. 589). A marijuana pipe was found on Mr. Paris (Tr. 276, 317) and his shirt was found in Mr. Hamilton's vehicle (Tr. 301-02). Inside the shirt were drug scales (Tr. 314-15).

Hickory County Sheriff Ray Tipton transported Ms. Avery to the sheriff's department (Tr. 398). She was hysterical (Tr. 398, 418). She kept saying, "I killed him" (Tr. 398-99, 418).

Later that evening, after receiving *Miranda* warnings, Ms. Avery gave a five-page written statement to Sheriff Tipton (Tr. 402-03; State's Exhibit No. 85). She was not under arrest at that time (Tr. 401, 419). That handwritten statement related the following regarding the events immediately surrounding the shooting (State's Exhibit No. 85).

After Mr. Paris had left Ms. Avery's residence, she got Mr. Hamilton's revolver to go outside and walk the dog (State's Exhibit No. 85, pg. 5; Tr. 414). She got the revolver because she is afraid of the dark (State's Exhibit No. 85, pg. 5; Tr. 425-26).[4] She heard a noise and saw a figure walking toward her (State's Exhibit No. 85, pg. 5; Tr. 414). She was scared and ran inside but did not shut the door behind her (State's Exhibit No. 85, pg. 5; Tr. 414). She pointed the revolver at the door (State's Exhibit No. 85, pg. 5). It was Mr. Paris (State's Exhibit No. 85, pg. 5; Tr. 414). As she backed up, he came at her and said "put down the f---ing gun or I will beat your ass" (State's Exhibit No. 85, pg. 5; Tr. 414, 422, 426).

[4] Mr. Hamilton knew that Ms. Avery was afraid of the dark (Tr. 720). He was not allowed to testify that the reason why she was afraid of the dark was because she had been gang-raped when she was young (Tr. 720-21). The revolver was Mr. Hamilton's; he kept it in his bedroom (Tr. 744-45).

He then grabbed the revolver (State's Exhibit No. 85, pg. 5; Tr. 428). As he did so, Ms. Avery pulled away and pulled the trigger (State's Exhibit No. 85, pg. 5; Tr. 414, 428). She then ran into the bedroom, barricaded herself inside, and tried to call for help (State's Exhibit No. 85, pg. 5; Tr. 415).

During the early morning hours of December 7th, Miles Parks, an investigator with the Missouri State Highway Patrol, met with Ms. Avery (Tr. 580). He questioned her about her written statement (Tr. 581). She said that as Mr. Paris approached her, he grabbed the revolver and she pulled back and the revolver went off (Tr. 591, 593). When he came at her, he said, "Put the gun down, or I'll beat your ass." (Tr. 583). She had the revolver in her left hand and he grabbed it with his right hand (Tr. 591, 593). She did not believe that the revolver was cocked when he grabbed it (Tr. 590).

Later that day, she gave another statement to George Knowles, an investigator with the Missouri State Highway Patrol, in which she first mentioned that she had to display the revolver to Mr. Paris to get him to leave some twenty minutes before the shooting (Tr. 610-19; State's Exhibit No. 84). Ms. Avery told Mr. Knowles that she had not been totally truthful with the officers who were investigating the scene (Tr. 616). She said Mr. Paris had been in her home and that she had asked him to leave, but he refused (State's Exhibit No. 84). He placed his foot in front of the door when she tried to open it (State's Exhibit No. 84). She became scared of him because he would not leave, so she retrieved a revolver from her bedroom (State's Exhibit No. 84). She displayed it to Mr. Paris

and ordered him to leave (State's Exhibit No. 84). Later in the evening, she took her dog outside and saw movement (State's Exhibit No. 84). She was scared so she ran inside (State's Exhibit No. 84). Mr. Paris got onto the porch; she recognized him (State's Exhibit No. 84). She pulled the revolver out from the waistband of her pants and told him to move (State's Exhibit No. 84). Mr. Paris told her that she had better put the revolver down or else he was going to kick her ass (State's Exhibit No. 84). He made a movement towards her; she backed away and fired one shot (State's Exhibit No. 84). He fell to the ground (State's Exhibit No. 84). She dropped the gun and went into the bedroom where she called the police (State's Exhibit No. 84). Ms. Avery also told Mr. Knowles that Mr. Paris had made a number of harassing telephone calls to her (State's Exhibit No. 84). She said that earlier she and a friend had a conversation at a bar wherein she said that Mr. Hamilton would blow off Mr. Paris' head if he came to their house (Tr. 617).

An autopsy revealed Mr. Paris' blood alcohol level as .097 (Tr. 672) and one of Ms. Avery's hairs, with the root still attached, was clutched in his right hand (Tr. 567, 571, 673, 775-76). There was no gunshot residue on either Mr. Paris' or Ms. Avery's hands, although there were some "particles" (Tr. 838, 843). A criminalist with the Missouri State Highway Patrol testified that the sweatshirt that Mr. Paris was wearing when he was shot had powder particles indicating that it was a close range shooting (Tr. 836-37). Mr. Paris was only shot once (Tr. 657). The bullet entered his forearm on the non-palm side, continued through his

forearm in a tunnel like fashion, exited near the elbow and then entered his neck (Tr. 642-43, 652-53). His cause of death was a gunshot wound, which entered the rights side of the neck, and lacerated two major blood vessels of the neck, causing massive hemorrhage and aspiration of blood into his lungs (Tr. 639, 647, 651). A slug was removed from the front part of his body near the left collarbone (Tr. 565, 647-48). The nose of it was slightly flat, indicating that it struck some sort of object somewhere in the body, probably the collarbone (Tr. 667-68). The bullet traveled from the right to the left, and from the neck to the clavicle it traveled down slightly (Tr. 648-49).

Two former inmates who had been incarcerated with Ms. Avery after her arrest testified for the State. One inmate testified that Ms. Avery told her that after she had asked Mr. Paris to leave her house, he came back after dark (Tr. 792, 794). Ms. Avery is afraid of the dark, Mr. Paris scared her, and so she got the gun (Defendant's Exhibit O). They wrestled over the gun and he was shot (Defendant's Exhibit O). She then locked herself in another room because she did not know where he had been shot (Defendant's Exhibit O).

The other inmate testified that Ms. Avery said that she and a friend were in a restaurant and she told her friend that she already had a gun and that if she could get her boyfriend to come to her house she would kill him (Tr. 812, 814).[5] The

[5] Presumably that "friend" would have been state's witness Ms. Buckner. Ms. Buckner did not testify that there were any plans to shoot Mr. Paris. None of the

inmate testified that Ms. Avery said that her friend got "him" to come to the house and she killed him (Tr. 813). The plan went perfectly (Tr. 813, 814). The inmate further said that Ms. Avery said that when she called 911 she rubbed her eyes and made herself cry and act upset and said that the man was an intruder (Tr. 813). According to the inmate, Ms. Avery laughed and bragged that she was going "to get off" and that the shooting was exciting to her (Tr. 815). This inmate tried to tell someone about this conversation when she was released from jail the next day, but they "blew [her] off" (Tr. 819-20). She waited several months before she put her version about the alleged conversation in writing (Tr. 820). She contacted her attorney with this information hoping that it would help her pending charges for illegally obtaining food stamps (Tr. 820-21).

The State also produced two jailers who testified to parts of a conversation between Ms. Avery and some inmates that the jailers overhead on a monitor (Tr. 759-61, 780-81). They heard Ms. Avery say something like, "what do you do, what do you do, so I just shut the door" (Tr. 781); and, "What do you do with a guy like that? What do you do? You shoot him." (Tr. 761). Ms. Avery also said that she "must have got him in the jugular, because blood was spewing everywhere" and he was "gurgling" (Tr. 762, 781). The jailers heard the inmates laughing as Ms. Avery talked about it (Tr. 761-62, 781).

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employees at the restaurant who testified for the State testified that they heard of any plot between Ms. Avery and Ms. Buckner to kill Mr. Paris.

State's witness Ms. Morlan, Mr. Paris' ex-girlfriend, testified that Mr. Paris had a reputation for fighting with women (Tr. 537). Brenda Evans, who had a child with Mr. Paris, testified that Mr. Paris could be violent, and he was very aggressive toward people including women (Tr. 856, 858). She was not allowed to testify if he was aggressive in any sort of sexual way with women (Tr. 858).

After the foregoing evidence was presented, a jury instruction conference was held. At that time, Ms. Avery objected to State's Instruction No. 6 (L.F. 22; Tr. 870), which is patterned after MAI-CR3d 310.50 and is set out in the argument section and the appendix to this brief (Appendix). Ms. Avery objected that there was no evidence that she was intoxicated at any time on the day of the shooting (Tr. 870). The jury was given that instruction over Ms. Avery's objection (Tr. 876; L.F. 22).

The jury found Ms. Avery guilty of the lesser included offense of voluntary manslaughter and the related armed criminal action (Tr. 977; L.F. 48-49), and after a penalty phase recommended terms of imprisonment of fifteen and forty years respectively (Tr. 1040; L.F. 54-55). The trial court granted Ms. Avery the full twenty-five days to file a motion for new trial (Tr. 1042), which was timely filed on August 19, 2005 (L.F. 63-70). Point Nine of that motion alleged that the trial court erred in sustaining the State's objection to testimony from Brenda Evans that Mr. Paris was a registered sex offender because this evidence would be relevant on the issue of whether Ms. Avery shot Mr. Paris in self defense because he was attacking her (L.F. 66-67). Point Fourteen of that motion alleged that the trial

court erred by submitting Instruction No. 15, the voluntary manslaughter verdict director, because it only required the jury to find that it was Ms. Avery's "purpose to cause physical injury to" Mr. Paris whereas MAI-CR3d required that the jury find that it was Ms. Avery's "purpose to cause **serious** physical injury" to Ms. Paris (L.F. 68-69) (omitted word emphasized). Point Fifteen of that motion alleged that the trial court erred by submitting Jury Instruction No. 16, MAI-CR3d 310.50, over Ms. Avery's objection, which instructed the jury about an intoxicated condition not relieving a person of responsibility for her conduct, in that although there was evidence of alcohol consumption by Ms. Avery, there was no evidence that she was intoxicated, and thus such an instruction was not supported by the evidence (L.F. 69).

On October 4, 2005, the trial court overruled the motion for new trial after Ms. Avery agreed to waive Point Fourteen of her motion for new trial, which dealt with the missing word "serious" in front of physical injury in the voluntary manslaughter verdict director (Tr. 1044-46, 1048), and sentenced Ms. Avery to concurrent sentences of fifteen years and thirty-five years imprisonment pursuant to an agreement with the State in return for Ms. Avery's agreement to withdraw Point Fourteen (Tr. 1051-52; L.F. 71-73).

On October 6, 2005, Ms. Avery timely filed a notice of appeal, in *forma pauperis* (L.F. 74-76; Tr. 1059). This appeal follows. Any further facts necessary for the disposition of this appeal will be set out in the argument portion of this brief.

POINTS RELIED ON

I.

The trial court erred in giving the State's Instruction No. 6, patterned after MAI-CR3d 310.50, over Ms. Avery's objection, because the giving of this instruction was contrary to MAI-CR3d 310.50 and § 562.076, depriving Ms. Avery of her rights to due process and a properly instructed jury, as guaranteed by the 14th Amendment to the United States Constitution and Article I, § 10 of the Missouri Constitution, in that there was no evidence that Ms. Avery was in an intoxicated condition; and the giving of the instruction prejudiced Ms. Avery because it likely confused the jury or misled them to believe that Ms. Avery admitted to some wrongdoing and was attempting to escape liability based on intoxication and that she was, in fact, intoxicated, which would negatively affect her credibility, which was the key issue at trial.

State v. Bristow, 190 S.W.3d 479 (Mo. App. S.D. 2006);

State v. James, 869 S.W.2d 276 (Mo. App. E.D. 1994);

State v. Kehner, 886 S.W.2d 130 (Mo. App. E.D. 1994);

State v. Avery, slip op., No. SD27290 (Mo. App. S.D. 2008);

U.S. Const., Amend. XIV;

Mo. Const., Art. I, Sec. 10;

Sections 562.076, and 565.002(4);

Rules 28.02(f), 28.03, 29.11(d); and

MAI-CR3d 310.50.

II.

The trial court abused its discretion in excluding evidence that Bruce Paris was a registered sex offender, because the ruling denied Ms. Avery's rights to due process, a fair trial and to present a defense as guaranteed by the 6th and 14th Amendments to the United States Constitution and Article I, §§ 10 and 18(a) of the Missouri Constitution, in that Ms. Avery's theory of defense, presented through instructions for self-defense and defense of premises, was that she was defending herself from an attack by Mr. Paris, thus the fact that Mr. Paris was a registered sex offender was relevant evidence to establish whether Mr. Paris was the aggressor and whether he was attempting to sexually assault Ms. Avery when he attacked her, and the State opened the door to such evidence when one of its witnesses testified that Bruce Paris was a "good guy."

State v. Gonzales, 153 S.W.3d 311 (Mo. banc 2005);

State v. Waller, 816 S.W.2d 212 (Mo. banc 1991);

People v. Lynch, 104 Ill.2d 194, 470 N.E.2d 1018 (Ill. 1984);

State v. Jones, 134 S.W.3d 706 (Mo. App. S.D. 2004);

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

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

Rule 29.11; and

Federal Rules of Evidence Rules 404(a)(2) and 405(b), 28 U.S.C.A.

ARGUMENT

I.

The trial court erred in giving the State's Instruction No. 6, patterned after MAI-CR3d 310.50, over Ms. Avery's objection, because the giving of this instruction was contrary to MAI-CR3d 310.50 and § 562.076, depriving Ms. Avery of her rights to due process and a properly instructed jury, as guaranteed by the 14th Amendment to the United States Constitution and Article I, § 10 of the Missouri Constitution, in that there was no evidence that Ms. Avery was in an intoxicated condition; and the giving of the instruction prejudiced Ms. Avery because it likely confused the jury or misled them to believe that Ms. Avery admitted to some wrongdoing and was attempting to escape liability based on intoxication and that she was, in fact, intoxicated, which would negatively affect her credibility, which was the key issue at trial.

Facts and Preservation

During her direct examination by the State, Regina Buckner testified that the afternoon of the shooting Ms. Avery was drinking at a restaurant/bar (Tr. 464-65). Ms. Avery drank beer (Tr. 465). She said that she had three or four beers before Buckner had arrived (Tr. 465). When Ms. Buckner was questioned by the State how much she witnessed Ms. Avery drink, Ms. Buckner speculated, "four to six?" (Tr. 465). The two of them stayed at the bar for about an hour and a half when Ms. Avery invited Ms. Bucker to her house for another drink (Tr. 467).

Although Ms. Buckner testified she had a drink while at Ms. Avery's residence, she did not testify as to what Ms. Avery might have drunk there (Tr. 468). Later that evening, after they met up with Bruce Paris, Ms. Avery might have had one beer while they were driving (Tr. 474).

Sheriff Ray Tipton testified on direct examination by the State that when he questioned Ms. Avery she said that earlier that day, she, Ms. Buckner, and Bruce Paris were "running around" and doing some drinking (Tr. 410). Earlier, Ms. Avery and Ms. Buckner had been drinking at a bar (Tr. 411). Ms. Avery also had some to drink before Ms. Buckner arrived and then they might have drunk some more after Ms. Buckner arrived (Tr. 411).

Missouri State Highway Patrol investigator Miles Parks testified on direct examination by the State that Ms. Avery told him that she had consumed about eight beers that day (Tr. 582).[6] In Ms. Avery's handwritten statement that was introduced into evidence by the State, State's Exhibit No. 85, Ms. Avery wrote that she had four beers before Ms. Buckner arrived at the bar (State's Exhibit No.

[6] Evidence in other cases have shown that generally, an average beer will raise the body's blood alcohol concentration by 0.02 percent; and the body metabolizes alcohol at a rate of 0.02 percent per hour. E.g., ***Mullan v. State***, 668 S.W.2d 427, 428 (Tex. App. 6 Dist.1984); ***Douthitt v. State***, 127 S.W.3d 327, 331 (Tex. App.-Austin 2004); ***Fitzgerald v. Director of Revenue***, 922 S.W.2d 478, 479 (Mo. App. S.D. 1996).

85, pg. 1). They left the bar at about 4:20 (State's Exhibit No. 85, pg. 2). They later met up with Mr. Paris at about 6:15 p.m. (State's Exhibit No. 85, pg. 2). Later, Ms. Avery opened up a beer while at her residence (State's Exhibit No. 85, pg. 3). Although Ms. Avery was questioned by several officers shortly after the shooting after she had called for help, none of them testified that Ms. Avery showed signs of intoxication or that she was under the influence of alcohol.

In the Southern District's opinion reversing Ms. Avery's convictions and sentences, the court summarized the evidence regarding what Ms. Avery had to drink as follows:

> [Ms. Avery] did not admit any wrongdoing or try to defend the charges against her by claiming she was intoxicated. It was the State that introduced all of the evidence relating to [Ms. Avery's] consumption of alcohol on December 6, 2000. …None of these person opined that [Ms. Avery] appeared to be intoxicated, nor did they provide any testimony from which it could reasonably be inferred that [Ms. Avery's] faculties were impaired from her consumption of alcohol. For example, [Ms. Avery] played darts at the Hickory House and later drove the Blazer to Halfway to pick up Paris without any apparent difficulties. Neither was there any evidence that [Ms. Avery] had slurred speech, coordination problems or other recognized indicia of intoxication.

State v. Avery, slip op. at 5-6, No. SD27290 (Mo. App. S.D. 2008).[7]

The State offered Instruction No. 6, patterned after ***MAI-CR3d 310.50***, which provided:

> The state must prove every element of the crime beyond a reasonable doubt. However, in determining the defendant's guilt or innocence, you are instructed that an intoxicated condition from alcohol will not relieve a person of responsibility for her conduct.

(L.F. 22; Tr. 870, 876; Appendix).

At the jury instruction conference, Ms. Avery objected to the State's instruction patterned after ***MAI-CR3d 310.50*** (L.F. 22; Tr. 870). Ms. Avery argued that there was no evidence that she was intoxicated at any time on the day of the shooting (Tr. 870). The State did not respond, and the jury was given that instruction over Ms. Avery's objection (Tr. 876; L.F. 22).

During argument, the State argued that Ms. Avery had consumed a number of beers and the State contended that this put her "in the same frame of mind" as

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[7] In a footnote, the Court also noted that in contrast, there was testimony that Ms. Avery had been intoxicated once in October 2006, and showed obvious signs of intoxication and that no witness testified to any similar behavior by Ms. Avery on December 6, 2000. ***Avery***, slip op. at 6, n.2.

in October 2006[8] and rekindled her anger against Mr. Paris because she had been drinking on both occasions (Tr. 900-01).

Subsequently in Ms. Avery's timely motion for new trial she raised that the trial court erred in submitting Instruction 6, ***MAI-CR3d 310.50***, over her objection because there was no testimony that she was intoxicated at the time of the shooting, and thus the instruction was not supported by the evidence (L.F. 69; claim 15). Therefore, the submission of this instruction prejudiced her and violated her rights to due process and a fair trial under 14th Amendment to the United States Constitution and Article I, § 10 of the Missouri Constitution (L.F. 69). This claim is properly preserved for appeal. ***Rules 28.03*** and ***29.11(d)***.

Standard of Review

"The giving or failure to give an instruction or verdict form in violation of this Rule 28.02 or any applicable Notes on Use shall constitute error, the error's prejudicial effect to be judicially determined . . ." ***Rule 28.02(f)***; ***State v. Cooper***, 215 S.W.3d 123, 125 (Mo. banc 2007). This Court must find both error in submitting an instruction and prejudice before it may reverse the trial court's decision to give an instruction. ***State v. Gateley***, 907 S.W.2d 212, 216-19 (Mo. App. S.D. 1995) (error to give ***MAI-CR3d 310.50***, although it was not prejudicial, particularly since there was no objection by the defendant, because defense's own evidence implied that his drinking was an excuse for his actions).

[8] See the previous footnote.

Discussion

Section 562.076.1 provides, in pertinent part, that a person who is in an intoxicated condition, whether from alcohol, drugs or other substance, is criminally responsible for conduct. That statute further provides that evidence that a person was in a voluntarily intoxicated condition may be admissible when otherwise relevant on issues of conduct but in no event shall it be admissible for the purpose of negating a mental state which is an element of the offense. ***§ 562.076.3***. Further, in a jury trial, "the jury shall be so instructed *when evidence that a person was in a voluntarily intoxicated … condition has been received into evidence*." ***§ 562.076.3*** (emphasis added). ***MAI-CR3d 310.50*** is based on this statute. Thus, under ***§ 562.076.3***, an instruction is only to be given when there is evidence that the defendant "was in a voluntarily intoxicated … condition."

In ***State v. James***, 869 S.W.2d 276 (Mo. App. E.D. 1994), there was evidence that the defendant's wife complained of his drinking shortly before the incident, defendant had been drinking and smelled of alcohol after the incident, and when he was arrested it was found that defendant had defecated on himself. ***Id***. at 278. The Eastern District reversed finding that evidence of drinking and defecation alone was insufficient to infer impairment and therefore the giving of an instruction patterned after ***MAI-CR3d 310.50*** was error.

The ***James*** court found prejudice because it was likely that the jury was confused or misled because the defendant did not attempt to defend the charges against him by arguing he was intoxicated. ***James***, 869 S.W.2d at 278. Since the

defendant did not raise the issue of intoxication, submitting the voluntary intoxicated condition instruction was likely to have confused the jury or mislead them to believe that defendant admitted to some wrongdoing and was attempting to escape liability based on intoxication. ***Id***. Thus, the instruction may have impermissibly lightened the state's burden of proving beyond a reasonable doubt that the defendant committed the charged crimes.

Similarly, in ***State v. Kehner***, 886 S.W.2d 130 (Mo. App. E.D. 1994) (State's application for transfer denied by this Court on November 22, 1994), in a murder case involving self-defense, the Eastern District again reversed when the trial court gave an instruction based on ***MAI-CR3d 310.50***. In that case, there was evidence that defendant bought an eight-pack of seven-ounce beers and consumed two of these earlier in the day; defendant testified that he might have consumed four or five beers that day; and, an officer smelled and observed liquor in a container in defendant's pick-up truck. ***Id***. at 133-134. This testimony did not warrant the voluntary intoxication instruction. ***Id***. at 134.

The ***Kehner*** court also found prejudice. The court noted that the defendant did not attempt to defend the charges against him by arguing that he was intoxicated; rather, he attempted to defend the charges by claiming self-defense. ***Id***. Therefore, the submission of this instruction was likely to have confused the jury or misled them to believe defendant admitted to some wronging and was attempting to escape liability based on intoxication. ***Id***. Because the defendant had presented a theory of self-defense and therefore a substantial issue existed

regarding his state of mind at the time of his action, the ***Kehner*** court could not say that the giving of the instruction was harmless. ***Id***.

At the time ***James*** and ***Kehner*** were tried the Notes on Use for giving an instruction patterned after ***MAI-CR3d 310.50*** were different than when Ms. Avery's case was tried. ***State v. Mouse***, 989 S.W.2d 185, 189, n.4 (Mo. App. S.D. 1999). When ***James*** and ***Kehner*** were tried, the Notes on Use required there to be evidence of impairment. ***Id***; ***Gateley***, 907 S.W.2d at 217. Nevertheless, ***§ 562.076*** still requires evidence that Ms. Avery was "in an *intoxicated* condition," ***§ 562.076.1***, and that the jury is only "so instructed when evidence that a person was in a voluntarily *intoxicated* … condition has been received into evidence." ***§ 562.076.3*** (emphasis added). Thus, there must be evidence of intoxication, not just alcohol consumption, to warrant the instruction.

In ***State v. Bristow***, 190 S.W.3d 479 (Mo. App. S.D. 2006) (State's application for transfer denied by this Court on May 30, 2006), the Southern District addressed the same situation that is presented in Ms. Avery's case. In ***Bristow***, the evidence showed that the defendant had drunk probably eight beers since noon that day, but defendant denied being intoxicated. ***Id***., at 481. His defense to charges of first degree assault and armed criminal action for stabbing the victim at a bar was self-defense. ***Id***., at 481-82. On appeal, Bristow complained that the trial court committed reversible error when it gave the jury Instruction No. 13, patterned after MAI-CR3d 310.50 and submitted by the State, over his timely objection. ***Id***., at 482. Bristow argued that it was error to give the

instruction because the record lacked evidence that he was intoxicated. ***Id***. He argued that the instruction had the potential for misleading or confusing the jury because he did not try to defend the charges against him by claiming he was intoxicated nor did he admit any wrongdoing. ***Id***. Rather, the record showed the contrary, namely, that Bristow consistently relied upon a theory of self-defense without every admitting any wrongful conduct. ***Id***. at 482-83. The Southern District agreed with Bristow and reversed for a new trial. ***Id***. at 482-87.

In doing so, the court noted that ***§ 562.076.3*** states the jury is to be instructed on the subject of voluntary intoxication only "when evidence that a person was in a voluntarily intoxicated or drugged condition has been received into evidence." ***Id***. at 483. This subsection comports with the general rule regarding any instruction in a criminal case, i.e., that instructions must be based on substantial evidence and reasonable inferences drawn therefrom. ***Id***.

The court then addressed the question of "what constitutes sufficient evidence of a voluntarily intoxicated condition to trigger the giving of MAI-CR3d 310.50." ***Id***. at 484. The court refused to accept the State's argument that any evidence of alcohol consumption was sufficient to show an "intoxicated condition." ***Id***. The court was persuaded that Bristow correctly asserted that there must be evidence showing some level of impairment resulting from an intoxicated condition before MAI-CR3d 310.50 is proper. ***Id***. Although the phrase "intoxicated condition" was left undefined by the legislature in ***§ 562.076***, those are words that had a well-defined and well-understood meaning. ***Id***. at 485. For

instance, in Chapter 565, the legislature defined "intoxicated condition" as "under the influence of alcohol, a controlled substance or drug, or any combination thereof." ***§ 565.002(4)***. ***Id***. Based on the plain meaning of "intoxicated condition" as gleaned from dictionaries and on the definition of that term as used by both the legislature and courts before enactment of ***§ 562.076***, the court found that the legislature did not intend to equate the phrase "intoxicated condition" in ***§ 562.076*** to alcohol or drug consumption alone without any evidence of resulting impairment therefrom. ***Id***. at 485-86. The court held that when the legislature via ***§ 562.076*** spoke of "[e]vidence that a person was in a voluntarily intoxicated condition," it meant to require, at a minimum, some evidence from which it could be reasonably inferred that an accused's alcohol consumption had impaired his condition of thought or action; or had caused the loss of the normal control of his faculties; or that he exhibited some abnormal mental or physical condition that was the result of indulging in intoxicating liquors or drugs or that tended to deprive him of the clearness of intellect and control of himself that he would otherwise possess. ***Id***. at 486. Because of the absence of evidence that Bristow was in an "intoxicated condition," it was error to give an instruction patterned after MAI-CR3d 310.50. ***Id***.

The court also found Bristow was prejudiced. By giving the instruction, the jury was led to believe two things: (1) that Bristow was attempting to escape liability based on intoxication, i.e., he implicitly admitted some wrongdoing, and (2) that Bristow was, in fact, intoxicated which would negatively affect his

credibility, i.e., the key issue at trial. ***Id***. at 487. These two implications directly contradicted Bristow's claim of self-defense. ***Id***. When the court instructed the jury, it impliedly ratified these two implications. ***Id***. On the other hand, both the prosecutor and Bristow claimed otherwise. ***Id***. "The jury could not help but be hopelessly confused and misled by the two contrary positions. As such, the jury instruction was prejudicial to Defendant." ***Id***.

In the case below, the Southern District Court of Appeals followed the reasoning of these well-settled cases requiring some evidence of intoxication or alcohol impairment before allowing the State to submit a voluntary intoxication instruction. ***Avery***, *supra*.

Here, there was no evidence that Ms. Avery was intoxicated or under the influence of alcohol. Certainly Ms. Avery did not claim to be intoxicated. Of note, it was the State, not Ms. Avery, who elicited testimony and evidence that Ms. Avery had been drinking that day. Although there was evidence that Ms. Avery had drunk about eight beers during the course of the day, the same number as in ***Bristow***, there was no evidence as to when she started, and at least half of those beers occurred several hours before the shooting. Further, none of the officers who questioned Ms. Avery after the shooting indicated that she was in any way impaired. There was insufficient evidence of intoxication to support the giving of Instruction No. 6 patterned after ***MAI-CR3d 310.50***. The Southern District agreed:

> Considering the quantity of alcohol consumed, the time span of the consumption, the fact that [Ms. Avery] never claimed to have been intoxicated and the absence of any discernible alcohol-related impairment, we conclude that no inference of intoxication from alcohol consumption alone was warranted in the case at bar.

Avery, slip op., at 9.

In its transfer application, the State only relies upon one case, which it claimed was in conflict with Ms. Avery's and Mr. Bristow's cases – ***State v. Taylor***, 944 S.W.22d 925, 936 (Mo. banc 1997). But that case is not in conflict with either of these cases. This Court in ***Taylor*** *never* held that that there did not need to be evidence of intoxication or an impaired condition in order for a voluntary intoxication instruction to be submitted. The problem in that case, which makes Ms. Avery's case inapposite, is that there the "evidence of intoxication had been submitted as a potential explanation for the shooting." ***Id***.

Ms. Avery has never used the fact that she had been drinking that day as an explanation for shooting Mr. Paris. She shot him because he was attacking her in her house and he told her that he was going to beat her, and thus she needed to defend herself and her premises. In stark contrast, the defendant in ***Taylor*** said that he accidently shot the victim after he was driving around drinking, and that he believed he accidently discharged the gun because he was "nervous and drinking." ***Id***. Thus, the defendant in ***Taylor*** attempted to use his drinking as an explanation for the shooting. ***Id***.

Respondent's transfer application states that "[t]o support the submission of the voluntary-intoxication instruction, there need only be evidence from which a juror could reasonably infer that a person was intoxicated." (Resp. Application at 3). But as the Southern District pointed out in its well-reasoned opinion below:

> For an inference to be reasonable, it must rise above the level of conjecture and speculation. *See*, ***Leary v. U.S.***, 395 U.S. 6, 36 (1969). At a minimum, the inferred fact must be more likely than not to flow from the proven fact in order to be considered rational, reasonable and logical. ***Id***.

Avery, slip op. at 10, n.5.

Here, other than the mere fact that Ms. Avery drank some beers over the course of a day, there was no evidence presented from which it could be reasonably inferred that she was intoxicated or in an impaired condition at the time she defended herself and her premises. In other words, the State wants this Court to engage in conjecture and speculation, which is impermissible. ***Leary***, *supra*; ***State v. Whalen***, 49 S.W.3d 181, 184 (Mo. banc 2001) (this Court cannot supply missing evidence or give the State the benefit of unreasonable speculative or forced inferences). The courts in ***Bristow***, ***James*** and ***Kehner***, as well as the Southern District in ***Avery***, *supra*, have all logically, and correctly, concluded that when there is only evidence of alcohol consumption and no evidence of intoxication or impaired condition, a voluntary intoxication instruction is inappropriate. *Also see*, ***§ 562.076.3***, which states the jury is to be instructed on the subject of voluntary intoxication only "when evidence that a person was in a

voluntarily *intoxicated* or drugged condition has been received into evidence." (emphasis added).

Respondent in its transfer application also worries that the jury might infer from the evidence that Ms. Avery was intoxicated and might draw "incorrect legal conclusions" about the effect of voluntary intoxication upon Ms. Avery's mental state (Respondent's Application at 4). As noted above, there was no evidence from which a jury could make a "reasonable inference" that Ms. Avery was intoxicated. Further, if the State was so worried that such an inference might unreasonably be made by jurors, then it should not have introduced evidence regarding what and how much Ms. Avery had been drinking. As noted by the Southern District in its below, Ms. Avery "did not admit any wrongdoing or try to defend the charges against her by claiming she was intoxicated. It was the State that introduced all of the evidence relating to [Ms. Avery's] consumption of alcohol on December 6, 2000." ***Avery***, slip op. at 5.

Ms. Avery was prejudiced by the giving of this instruction. As in ***Bristow***, ***James*** and ***Kehner***, it was likely that the jury was confused or misled because Ms. Avery did not attempt to defend the charges against her by arguing she was intoxicated. ***Bristow***, 190 S.W.3d at 482-83; ***James***, 869 S.W.2d at 278; ***Kehner***, 886 S.W.2d at 134. Rather, she attempted to defend the charges by claiming self-defense and defense of premises. ***Bristow, id***.; ***Kehner***, ***id***. As noted by the court in ***Bristow***, by giving the instruction, the jury was led to believe two things: (1) that the defendant was attempting to escape liability based on intoxication, i.e.,

defendant implicitly admitted some wrongdoing, and (2) that defendant was, in fact, intoxicated which would negatively affect the defendant's credibility, i.e., the key issue at trial. ***Bristow***, 190 S.W.3d at 487.

Thus, the submission of this instruction was likely to have confused the jury or misled them to believe Ms. Avery admitted to some wronging and was attempting to escape liability based on intoxication. ***Id***. Further, the instruction would logically lead to the inference that the trial court believed that there was evidence that Ms. Avery was intoxicated, otherwise why would it give the instruction, and intoxication has long been viewed "as an aggravation of the offense." ***Montana v. Egelhoff***, 518 U.S. 37, 44 (1996); ***State v. Cross***, 27 Mo. 332, 338 (1858). This Court cannot say that the giving of the instruction was harmless. ***Bristow***, 190 S.W.3d at 487.

Finally, in its brief in the Southern District, Respondent argued that the Southern District's opinion in ***Bristow*** would result in a finding of prejudice in every case where the voluntary-intoxication instruction was improperly given (Resp. Br. at 22). That is not so. For instance, in ***State v. Gateley***, 907 S.W.2d 212, 216-19 (Mo. App. S.D. 1995), the court affirmed a conviction wherein it was error to give ***MAI-CR3d 310.50***. The court affirmed because the defense's own evidence implied that his drinking was an excuse for his actions. ***Id***. at 218. It was the Defendant's own evidence, and not the instruction in question, which emphasized his drinking and implied that it was an excuse for his actions. ***Id***.

Thus, in an appropriate case, the giving of ***MAI-CR3d 310.50*** can be shown by the State to be harmless error.

Ms. Avery case is distinguishable from ***Gateley*** and not distinguishable in any meaningful way from ***Bristow***, ***James***, or ***Kehner***, and thus contrary to what was stated in Respondent's transfer application, the Southern District's opinion in the case below is not in conflict with prior Missouri cases; rather it followed a well-settled line of cases. Unlike ***Gateley***, Ms. Avery did not introduce evidence of her own drinking – it was the State who introduced the evidence. Like ***Bristow***, Ms. Avery did not attempt to defend the charges against her by arguing she was intoxicated – she defended the charges by claiming self-defense and defense of premises.

This Court cannot say that the giving of the instruction was harmless particularly in such a close case where Ms. Avery was acquitted of second degree murder and found guilty of the lesser offense of voluntary manslaughter. Ms. Avery is entitled to a new trial. The submission of Instruction No. 6 over Ms. Avery's objection was prejudicial error, for which her convictions should be reversed and the cause remanded for a new trial.

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II.

The trial court abused its discretion in excluding evidence that Bruce Paris was a registered sex offender, because the ruling denied Ms. Avery's rights to due process, a fair trial and to present a defense as guaranteed by the 6th and 14th Amendments to the United States Constitution and Article I, §§ 10 and 18(a) of the Missouri Constitution, in that Ms. Avery's theory of defense, presented through instructions for self-defense and defense of premises, was that she was defending herself from an attack by Mr. Paris, thus the fact that Mr. Paris was a registered sex offender was relevant evidence to establish whether Mr. Paris was the aggressor and whether he was attempting to sexually assault Ms. Avery when he attacked her, and the State opened the door to such evidence when one of its witnesses testified that Bruce Paris was a "good guy."

Facts and Preservation

During the State's examination of Regina Buckner, the State asked her, "What kind of things did you tell Jamie [Avery] about Bruce [Paris]? " (Tr. 450). Ms. Buckner replied, "Just basically, that he was a good guy" (Tr. 450). But the trial court refused to let Ms. Avery counter that image with evidence that Mr. Paris was a registered sex-offender.

Prior to Brenda Evans' testimony, the State moved in limine to prevent Ms. Evans from "mentioning certain prior bad acts" of Mr. Paris (Tr. 845).

Specifically, the State wanted to prevent Ms. Evans from testifying that Mr. Paris "had a conviction for some sort of child molestation crime, or that he was a registered sex offender in the County of Dallas" (Tr. 845).[9] Ms. Avery countered that she intended to have Ms. Evans testify that Mr. Paris was a registered sex offender, although she did not intend to elicit the specific conviction (Tr. 846).

The trial court did not question Ms. Evans' knowledge that Mr. Paris was a registered sex-offender but questioned whether such registration was admissible (Tr. 847). Ms. Avery argued that the evidence was admissible under ***State v. Gonzales***, 153 S.W.3d 311 (Mo. banc 2005) as to the issue of who was the initial aggressor (Tr. 848). It was admissible reputation evidence (Tr. 848-49). The trial court excluded this evidence ruling:

> The way I read the Gonzales opinion is this, that reputation for turbulence and violence is admissible as relevant to show who was the aggressor. Such evidence must be proved by general reputation testimony, not specific

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[9] The Missouri State Highway Patrol Sex Offender Registry shows that Mr. Paris was registered in Dallas County for the offense of sodomy. See, Appendix and http://www.mshp.dps.mo.gov/CJ38/OffenderDetails?id=66000389. Sodomy is a sexually violent offense. ***In re Gibson***, 168 S.W.3d 72, 74 (Mo. App. S.D. 2004). The State conceded that Mr. Paris was a registered sex offender in Dallas County (Tr. 852-53).

> acts of violence. And I believe that the registry falls within an area of specific acts. That would be offered as evidence of a specific act. So, I'm going to limit the testimony to general reputation testimony, concerning what she [Ms. Evans] knows concerning the reputation of the deceased in that general area.

(Tr. 851).

In an offer of proof, Ms. Evans testified that she and Mr. Paris had a child together in 1996, and that some point after that date, but prior to Mr. Paris' death, she became aware that he was a registered sex offender (Tr. 854).[10] The trial court refused the offer of proof on the basis that "registration is a specific act of violence, and also that the Court finds that the prejudicial effect of the evidence outweighs it's (sic) probative value" (Tr. 855).

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[10] At Ms. Avery's first trial, Ms. Evans, testified that after she broke up with Mr. Paris he would visit her and would refuse to leave (1Tr. 989, 991). At the second trial, there was evidence that Ms. Avery had earlier asked Mr. Paris to leave, but he refused, so she had to get a gun to get him to leave (State's Exhibit No. 84). Also at the first trial there was evidence that after Mr. Paris set up the meeting with Ms. Avery, he mentioned to a friend that he had not had sex in a couple of weeks (1Tr. 616-17). After the shooting, it was discovered that Mr. Paris' zipper was down (Tr. 286-87).

Point Nine of Ms. Avery's motion for new trial alleged that the trial court erred in sustaining the State's objection to testimony from Brenda Evans that Mr. Paris was a registered sex-offender because the exclusion of this evidence denied the jury of evidence regarding Mr. Paris' reputation for being violent and turbulent (L.F. 66-67). This evidence would have been important for the jury to consider as to Ms. Avery's assertion that she shot Mr. Paris in self-defense and as to her assertion that Mr. Paris was attacking her when she shot him (L.F. 67). This ruling violated Ms. Avery's rights to due process and a fair trial as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, and Article I, §§ 10 and 18(a) of the Missouri Constitution (L.F. 67). This issue is properly preserved for appeal. ***Rule 29.11(d)***.

Standard of Review

Trial courts are given considerable discretion in the admission or exclusion of evidence. ***Gonzales***, 153 S.W.3d at 312. But that discretion is abused when a ruling is clearly against the logic of the circumstances and is so unreasonable as to indicate a lack of careful consideration. ***Id***.

Discussion

"The Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" ***Crane v. Kentucky***, 476 U.S. 683, 688 (1986) (*citing*, ***Strickland v. Washington***, 466 U.S. 668, 684-85 (1984)); ***Olden v. Kentucky***, 488 U.S. 227 (1990). The denial of the opportunity to present relevant and competent evidence negating an essential element of the State's case

may constitute denial of due process. ***State v. Ray***, 945 S.W.2d 462, 469 (Mo. App. W.D. 1997). Further, a defendant has a constitutional right to a fair and impartial trial. ***State v. Hill***, 817 S.W.2d 584, 587 (Mo. App. E.D. 1991). If the defendant is deprived of the opportunity to present relevant evidence to the jury, her rights under the 6th and 14th Amendments to the United States Constitution may have been violated. ***Id***.

Regarding evidence of a deceased's reputation or specific acts of violence relevant to prove self-defense, the law of this State *used to be* that where the defense is self-defense, evidence is competent to prove that the deceased bore the reputation of being of a violent and turbulent disposition or character, but that such must be proved by testimony concerning his general reputation and not by evidence of specific acts of violence having no connection with defendant. E.g., ***State v. Duncan***, 467 S.W.2d 866, 867-68 (Mo. 1971). Missouri had long adhered to the rule that evidence of the deceased's specific acts of violence having no connection with the defendant was inadmissible. ***State v. Waller***, 816 S.W.2d 212, 214 (Mo. banc 1991). However, this Court in ***Waller*** abrogated this rule:

> Where justification is an issue in a criminal case, the trial court may permit a defendant to introduce evidence of the victim's prior specific acts of violence *of which the defendant had knowledge*, provided that the acts sought to be established are reasonable related to the crime with which the defendant is charged.

Id. at 216 (emphasis added).

Thus, ***Waller***, *expanded* admissibility from general reputation for violence evidence to specific acts of violence by the deceased provided "the defendant had knowledge." ***Id***. at 215-17. Ms. Avery concedes, however, that ***Waller*** is not controlling on the issue presented here because there was no evidence that Ms. Avery knew that Mr. Paris was a registered sex offender. ***State v. Johns***, 34 S.W.3d 93, 111 (Mo. banc 2000). But that does not end the inquiry.

This Court in ***Gonzalez***, *supra*, held that evidence of the deceased's reputation for violence, turbulence, and aggression is logically relevant to two distinct issues in self-defense – the reasonableness of the defendant's fear of the deceased and to prove that the deceased was the initial aggressor. 153 S.W.3d at 312, *citing* ***State v. Buckles***, 636 S.W.2d 914 (Mo. banc 1982) (overruled in part by ***Waller***). ***Gonzales*** stated that while the defendant must know about the deceased's violent reputation to admissible when it is offered for the purpose of showing the reasonable of the defendant's fear of the victim, a defendant is not required to demonstrate his or her awareness of the deceased's reputation to the extent the deceased's reputation for violence is offered on the question of who was the initial aggressor. 153 S.W.3d at 313. This Court noted that the defendant's state of mind is wholly irrelevant to the question of who was the initial aggressor. ***Id***. at 314. The question is what the victim probably did, not what the defendant probably thought the victim was going to do. ***Id***. Thus the defendant need not have been aware of the deceased's reputation for evidence of that reputation to be logically relevant. ***Id***.

This Court concluded that the defendant in ***Gonzales*** was entitled to introduce evidence as to the deceased's reputation for violence, aggressiveness, and turbulence to prove that the deceased was the initial aggressor. ***Id***. Such evidence was relevant and admissible on that issue *regardless of defendant's knowledge* of that reputation. ***Id***.

Ms. Avery acknowledges that ***Gonzales*** involved only reputation evidence unknown by defendant going to the issue of who was the initial aggressor and did not involve a situation of specific acts of violence. Here, arguably evidence that Mr. Paris was a registered sex offender involves reputation evidence and therefore it is admissible under ***Gonzales***.

But even if this Court finds that such evidence involves a "specific act" rather than reputation evidence, as found by the trial court, Ms. Avery believes that a logical extension of ***Waller*** and ***Gonzales*** would allow evidence of specific acts of violence, aggressiveness, or turbulence to go the issue of who was the initial aggressor even when those acts are unknown by Ms. Avery. ***Waller*** allowed specific acts of violence to go to the reasonableness of whether the defendant was in reasonable apprehension of harm when those acts were known by the defendant. ***Gonzales*** allowed general reputation evidence to show who was the initial aggressor even when the defendant did not know about that reputation. There is no logical reason to exclude specific acts even when unknown by the defendant as to the issue of who was the initial aggressor.

That Mr. Paris was a registered sex offender is as relevant, if not more, to whether he was the aggressor and whether he was breaking into Ms. Avery's home to attack her as would evidence that Mr. Paris had a general reputation of violence, aggressiveness, or turbulence, which clearly is admissible under ***Gonzalez*** even if Ms. Avery did not know of such reputation. *Also see*, ***Federal Rules of Evidence Rule 405(b), 28 U.S.C.A*** ("In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct); ***Federal Rules of Evidence Rule 404(a)(2), 28 U.S.C.A.*** ("Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except … [i]n a criminal case … evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor.).

In ***Jenkins v. State***, 625 S.W.2d 324 (Tex. App. 1982), the appellate court found it reversible error because the trial court refused to admit the deceased's prior assault conviction, which was offered for the purpose of showing that the deceased was in fact the aggressor.

In ***People v. Lynch***, 104 Ill.2d 194, 470 N.E.2d 1018 (Ill. 1984), the Illinois Supreme Court found reversible error when the trial court refused to allow the defendant to introduce evidence of the deceased's three convictions for battery

even though the defendant did not know about them. Such convictions were admissible for the purpose of proving the deceased was the aggressor since they were reliable evidence of a violent character. 470 N.E.2d at 1020-21.

In ***State v. Lewchuk***, 4 Neb.App. 165, 539 N.W.2d 847 (1995), the court reversed finding that the defendant was entitled to present evidence of deceased's violent and aggressive character to support claim of self-defense and to present evidence of specific instances of conduct demonstrating deceased's violent, aggressive character to corroborate defendant's claim that the deceased was the aggressor, regardless of whether defendant was aware of deceased's prior acts.

These cases support that the jury should have heard that Mr. Paris was a registered sex offender.

Further, the evidence was admissible for another reason. As noted above, State's witness Regina Buckner testified on direct examination that Mr. Paris was "a good guy." (Tr. 450). Such testimony opened the door to the fact that Mr. Paris was a registered sex offender. A party may introduce even otherwise inadmissible evidence to counteract inferences raised by the opposing party's witnesses. ***State v. Jones***, 134 S.W.3d 706, 716 (Mo. App. S.D. 2004). Ms. Avery was entitled to show that Mr. Paris was not "a good guy."

As noted above, in ***Gonzales***, *supra*, this Court found that evidence as to the deceased's reputation for violence, aggressiveness, and turbulence, was relevant and admissible to prove that the deceased was the initial aggressor. But it also held that such evidence was "highly probative" in light of "the State's

portrayal of [the deceased] as a 'gentle giant.'" ***Gonzales***, 153 S.W.3d at 314. Similarly, evidence that Mr. Paris was a registered sex offender was highly probative in light of the state's portrayal of him as a "good guy" (Tr. 450).

In the Southern District, the State argued that evidence that Mr. Paris was a registered sex offender is inadmissible hearsay (Resp. Br. at 25-26). Respondent's argument should be rejected. Prior to Ms. Avery's offer of proof, the trial court said, "I'm not questioning [Ms. Evans'] knowledge that he was registered, the question is, whether the phenomena of registration is admissible evidence …" (Tr. 847). When the trial court refused the offer of proof, it was not because of hearsay; rather it was because the court ruled that such evidence was a specific act of violence (Tr. 855). The State did not object that the evidence that Mr. Paris was a registered sexual offender was hearsay. Thus, the evidence presented in the offer of proof can be considered whether or not it was hearsay. *See*, ***Travis v. Stone***, 66 S.W.3d 1, 4 (Mo. banc 2002); ***State v. Crawford***, 68 S.W.3d 406, 408 (Mo. banc 2002). Not only did the State fail to object that such evidence is hearsay, the State conceded for purposes of the offer of proof that Mr. Paris was a registered sexual offender in Dallas County, Missouri (Tr. 852-53).

Ms. Avery was prejudiced. As in ***Waller*** and ***Gonzales***, self-defense and defense of premises was a critical issue in the case. The exclusion of specific acts of violence, turbulence, and aggression was found to be prejudicial in ***Waller***. Similarly, the exclusion of evidence that Mr. Paris was a sex-offender prejudiced

Ms. Avery. This was a close case; the exclusion of evidence that the deceased was a registered sexual offender was an abuse of discretion that requires reversal.

CONCLUSION

For the foregoing reasons, this Court should reverse Ms. Avery's convictions and remand for a new trial.

Respectfully submitted,

_____
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CERTIFICATE OF COMPLIANCE AND SERVICE

I, Craig A. Johnston, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2002, in Times New Roman size 13-point font. I hereby certify that this brief includes the information required by Rule 55.03. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 11,291 words, which does not exceed the 31,000 words allowed for an appellant's brief.

The floppy disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using McAfee VirusScan, which was updated on October 2, 2008. According to that program, the disks provided to this Court and to the Attorney General are virus-free.

Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were mailed, postage prepaid this _____ day of October, 2008, to the Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102-0899.

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