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 REPLY BRIEF

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JURISDICTIONAL STATEMENT

Ms. Avery incorporates by reference the jurisdictional statement from her opening brief.

STATEMENT OF FACTS

Ms. Avery incorporates by reference the Statement of Facts from her opening brief.

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.

How much did she drink?

Unreasonable, speculative or forced inferences v. reasonable inferences

Jury instructions must be supported by substantial evidence. ***State v. Gateley***, 907 S.W.2d 212, 217 (Mo. App. S.D. 1995). But this Court cannot supply missing evidence or give the State the benefit of unreasonable, speculative, or forced inferences. ***State v. Whalen***, 49 S.W.3d 181, 184 (Mo. banc 2001).

Respondent concludes that "in the six hours (approximately) prior to the murder, appellant drank as many as twelve beers and at least one mixed drink – a total of thirteen alcoholic beverages" (Resp. Br. at 22).

In arriving at the total, respondent relies upon unreasonable, speculative, or forced inferences. The evidence shows that Ms. Avery drank "about eight beers" over the course of the day and only 1, possibly 2, beers during the four and a half hours immediately prior to the shooting.

The evidence concerning how much alcohol that Ms. Avery drank that night came from Ms Avery (through her statements to law enforcement officers) and Regina Buckner. Although Ms. Avery was questioned by several officers shortly after the shooting, none of them testified that she showed signs of intoxication or that she was under the influence of alcohol. Further, neither Ms. Buckner nor any employee at the Hickory House testified that Ms. Avery showed signs of intoxication or that she was under the influence of alcohol.

Missouri State Highway Patrol Investigator Miles Park testified that Ms. Avery told him that she had consumed "about eight beers" on the day in question (Tr. 582). In her written statement, she wrote that after she had arrived home around 2:00 p.m. she decorated a tree and talked on the phone before she went to the Hickory House (State's Exhibit P-85). She "had 4 beer[s] the[n] [Buckner] walked in" (State's Exhibit No. 85, pg. 1). They left at 4:20 p.m. (State's Exhibit No. 85, pg. 2). They met Mr. Paris at 6:15 p.m. (State's Exhibit No. 85, pg. 2). Later, they got some beer for the three of them (State's Exhibit P-85). When Ms.

Avery went home, she took "the beer (12 pack) & my 1 opened beer" into the house (State's Exhibit No. 85, pg. 3). This calculation only amounts to "about eight beers" over the course of the day, and only "1 opened beer" between the time they left the Hickory House at 4:20 p.m. until around 9:08 p.m., the time she shot Mr. Paris under sudden passion arising from adequate cause (as found by the jury).

Ms. Buckner's testimony established the following alcohol consumption. Ms. Avery told Ms. Buckner that she had three or four beers before Buckner arrived (Tr. 465). Although there was evidence that Ms. Avery drank beer with Ms. Buckner at Hickory House, there was no evidence presented as to how much she had there with Ms. Buckner (Tr. 465). When Ms. Buckner was questioned by the State about how much she witnessed Ms. Avery drink, Ms. Buckner speculated, "four to six?" (Tr. 465). But the question asked of Ms. Buckner did *not* limit the amount that Ms. Buckner witnessed at the Hickory House – it covered, potentially, the entire course of the day. So that testimony only establishes seven to ten beers over the course of the day (or, as Ms. Avery told officers, "about eight beers").[1]

[1] In respondent's transfer application, it stated in the issues presented that Ms. Avery "drank eight to eleven beers." (Resp. Transfer Application at 1).

After they left the Hickory House, Ms. Buckner seemed to recall Ms. Avery "having one [beer]" (Tr. 474, 501).[2] Again, this beer could have been included in Ms. Buckner's early testimony that she had witnessed Ms. Avery drink "four to six?" (Tr. 465). We also don't know if this was the same beer that Ms. Avery took with her when she went home after dropping off Ms. Buckner and took "the beer (12 pack) & my 1 opened beer" into her house (State's Exhibit No. 85, pg. 3). Further, the testimony only establishes that from the time they left Hickory House (about 4:20 p.m.) until the time of the shooting (around 9:08 p.m.) Ms. Avery only had one beer, and possibly had started another one if one speculates that her "opened beer" that she had when she dropped off Ms. Buckner (State's Exhibit No. 85, pg. 3) was not the same as the one beer that Ms. Buckner "seem[ed] like

[2] Ms. Buckner was unclear about the time frame. She said that they were supposed to meet Mr. Paris at either 6:00 or 6:30 p.m. and that he was eight minutes late (Tr. 471). In Ms. Avery's written statement, she said that they met Mr. Paris at 6:15 p.m. (State's Exhibit No. 85, pg. 2). Thus, it is likely that the meeting time was supposed to be 6:00 p.m. It took them about thirty minutes to drive to there from Ms. Avery's home (Tr. 469). Thus, they would have left there around 5:30 p.m. According to Ms. Buckner, they had stayed at Ms. Avery's home for about an hour (Tr. 468). Thus, they would have left the Hickory House at about 4:30 p.m. This is consistent with Ms. Avery's written statement that they left the Hickory House at 4:20 p.m. (State's Exhibit No. 85, pg. 2).

[she] recall[ed]" seeing Ms. Avery drink while they were driving around (Tr. 474, 501)

Respondent miscalculates the number of drinks by using unreasonable, speculative, or forced inferences. ***Whalen***, 49 S.W.3d at 184. Respondent first correctly starts out stating that Ms. Avery drank three to four beers prior to Ms. Buckner arriving at the Hickory House (Resp. Br. at 19-20). The first error respondent makes, however, is that Respondent believes that Ms. Buckner observed Ms. Avery drink four to six more beers *all* at the Hickory House and then Respondent adds other beers that Ms. Buckner might have observed elsewhere (Resp. Br. at 20).

The problem with this calculation is that the question the State asked Ms. Buckner was, "How many did you witness her drink?" wherein she guessed, "Four to six?" (Tr. 465). The State's question did *not* limit the amount Ms. Buckner observed Ms. Avery drink to only when they were at the Hickory House – it covered the entire amount she saw Ms. Avery that day.

Respondent then attempts to argue that the evidence shows that Ms. Avery drank a mixed drink – even though there was no testimony that Ms. Avery drank anything other than beer. The State asked Ms. Buckner, "Did *you* have another drink back at John's house?", and she answered, "Yes." (Tr. 468). She was then asked, "What kind of drink, what were *you* drinking back there at John's house?" and she answered, "Parrot Bay and pineapple juice" (Tr. 468). She was then asked, "What were *you* drinking that out of?" and she answered, "a glass from the

kitchen" (Tr. 468). From the mere fact that police later found three glasses, one can of pineapple juice, and one bottle of Parrot Bay rum in the house (Tr. 294, 299), Respondent speculates that "appellant drank at least one mixed drink" (Resp. Br. at 20, n. 5), even though neither Ms. Avery nor Ms. Buckner testified that Ms. Avery drank a mixed drink and there was no testimony that there was any alcohol, or that there had ever been any alcohol, in the three glasses found at the scene, as opposed to water, or diet Pepsi, which had also been found at the scene (Tr. 390).

A fair counting of the evidence shows that, during the course of the day, Ms. Avery drank between seven and ten beers (Ms. Buckner's testimony), or, in other words, "about eight beers" (Ms. Avery's statement to law enforcement), only one of which she drank in the four and a half hours preceding the shooting.

No evidence that Ms. Avery was in an intoxicated condition at the time of the shooting, as required by § 562.076 before MAI-CR3d 310.50 is to be given

In its transfer application, Respondent asserts that the Southern District's opinion below required "direct evidence of alcohol 'impairment' as opposed to evidence from which 'intoxication' can be inferred" in order to support the submission of ***MAI-CR3d 310.50***. But what the Southern District held was, "Considering the quantity of alcohol consumed, the time span of the consumption, the fact that Defendant 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." ***State v. Avery***, slip op. at 9, No. SD27290 (Mo. App. S.D. 2008).

The Southern District's opinion did *not* require direct evidence of alcohol impairment; rather, it correctly held that there was no evidence from which intoxication could be inferred in order to support the submission of ***MAI-CR3d 310.50***. The Southern District's opinion was not in conflict with existing law; rather it followed it. Respondent just disagrees with the conclusion and wants this Court to act as an error-correcting court and arrive at a different conclusion than the Southern District did. *See*, ***State v. Freeman***, 2008 WL 4711005, 6 (Mo. banc 2008) (Wolff, J., concurring).

Section 562.076.3 specifically states that a jury instruction shall be given when there is "evidence that a person was in a voluntarily intoxicated or drugged condition." 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." Consistent with that statute, ***MAI-CR3d 310.50***, provides:

> 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; Emphasis added).

Thus, there must be evidence of intoxication, not just alcohol consumption, to warrant the instruction. Following this requirement that is specifically stated in the statute and pattern 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 was self-defense. ***Id***., at 481-82.

In reversing, the ***Bristow*** 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. 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***. 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***. *Also see*, ***§ 577.001.3***, which defines "intoxicated condition" as being "under the influence of alcohol, a controlled substance, or drug, or any combination thereof."

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 ***Bristow*** court found that the legislature did not intend to equate the phrase "intoxicated condition" in ***§ 562.076*** to alcohol

or drug consumption alone. ***Id***. at 485-86. 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***.

Bristow merely followed the existing statutes, existing case law, and dictionary definitions in discussing what "intoxicated condition" means. ***Bristow*** correctly followed this Court's prior cases. For instance, in ***State v. Reifsteck***, 317 Mo. 268, 295 S.W. 741, 742 (Mo. 1927), this Court held that the words "intoxicated condition" are of common, everyday use, having a well-defined and well-understood meaning; that "every one knows that the words refer to the *impaired condition* of thought and action and the loss of the normal control of one's faculties, caused by imbibing vinous, malt, or spirituous liquors"; and thus the failure of the court to define them by instructions was not error. *In accord*, ***State v. Cox***, 478 S.W.2d 339, 341-42 (Mo. 1972). *Also see,* ***State v. Viviano***, 882 S.W.2d 748, 754 (Mo. App. E.D. 1994) ("Because sufficient evidence supports an inference of impairment, the trial court did not abuse its discretion in submitting this [voluntary intoxication] instruction to the jury."); ***State v. James***, 869 S.W.2d 276 (Mo. App. E.D. 1994) (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); ***State v. Kehner***, 886 S.W.2d 130 (Mo. App. E.D. 1994) (State's application for transfer denied by this Court) (evidence that defendant bought an eight-pack of seven-ounce beers and consumed two of these earlier in the day, defendant testified 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, did not warrant the voluntary intoxication instruction).

Thus, the ***Bristow*** court and the Southern District's opinion below in ***Avery*** merely followed the relevant statutes and well-established existing law. The tests and doctrines cited by those courts are not contrary to those cases cited by Respondent's brief.

For instance, in ***State v. Owsley***, 959 S.W.2d 789 (Mo. banc 1997), wherein there was evidence that the defendant was voluntarily intoxicated because he had consumed one and one-half pints of gin before murdering the victim, one of the defendant's points on appeal was that he should have been permitted to introduce evidence of his voluntary intoxication in order to negate the requirement element of deliberation on the murder charge. ***Id***. at 795. This is an implied concession by the Owsley that he was intoxicated, and the amount of intoxicants is far greater than here.

In ***State v. Taylor***, 944 S.W.2d 925, 936 (Mo. banc 1997), the "evidence of intoxication had been submitted as a potential explanation for the shooting" and the defendant in his statement was in fact arguing that his judgment or actions were impaired from alcohol, resulting in an accidental discharge of a gun because he was "nervous and drinking." ***Id***. The record does not show how much Taylor was drinking, but it does show that he was using his "drinking" as an excuse for his shooting the victim. No such evidence exists in Ms. Avery's case.

In ***State v. Richardson***, 910 S.W.2d 795, 797 (Mo. App. E.D. 1995), *overruled on other grounds State v. Carson*, 941 S.W.2d 518 (Mo. banc 1997), at an arson trial, the defendant wanted to offer evidence concerning his intoxicated state in order to account for his unreasonable behavior after the fire, and there was evidence from a Deputy Fire Marshall that defendant smelled of alcohol, slurred his speech, had trouble keeping his balance when walking, and appeared to be "under the influence." Further, the defendant testified he "was still affected by the alcohol pretty much so" after 6:00 a.m. the day of the fire. ***Id***. Thus, Ms. Avery's case is inapposite.

In ***State v. Gary***, 913 S.W.2d 822, 828-29 (Mo. App. E.D. 1995), *overruled on other grounds State v. Carson*, 941 S.W.2d 518 (Mo. banc 1997), the evidence showed "not only that Defendant had been drinking on that evening and that he possessed empty and full beer cans and a bottle of hard alcohol in his car, the evidence was also rampant with evidence of Defendant's erratic conduct. The evidence also showed Defendant drove his vehicle in a reckless manner and that he failed to successfully negotiate a right-hand turn. Additionally, by Defendant's own testimony, he was not thinking clearly and had trouble distinguishing reality." ***Id***. at 829. Ms. Avery's case is dissimilar to ***Gary***.

Thus, while Respondent asserts that "*Bristow*, *Kehner*, and *James* conflict with this Court's precedents and should not be followed" (Resp. Br. at 24), those cases do not and Respondent does not state just exactly what about those opinions are in conflict with which of this Court's prior cases.

The Southern District in the case below held "A thorough review of the record reveals no evidence from which the jury could have reasonably inferred that Defendant was in an intoxicated condition. Therefore, we hold that he giving of Instruction No. 6 was error." ***State v. Avery***, slip op. at 11, No. SD27290 (Mo. App. S.D. 2008). The Southern District correctly stated the law as set out by ***§ 562.076*** and this Court's prior cases, and it properly applied it. As noted above and in Ms. Avery's opening brief, there was no evidence from which the jury could have reasonably inferred that Ms. Avery was in an intoxicated condition.

Ms. Avery was prejudiced by the giving of this instruction. The test for determining prejudice when an instruction is given that is not supported by the evidence is whether there is the potential for misleading or confusing the jury. ***James***, 869 S.W.2d at 278. 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. 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. This Court cannot say that the giving of the instruction was harmless. ***Bristow***, 190 S.W.3d at 487.

In summary, 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 and relevant statutes. 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."

Introduction

"The relevancy of evidence depends upon whether the evidence tends to confirm or refute a fact in issue, or to corroborate evidence that is relevant and pertains to the primary issue in the case." ***State v. McCoy***, 69 S.W.3d 482, 484 (Mo. App. S.D. 2000). Evidence need only be relevant, not conclusive, and it is relevant if it logically tends to prove a fact in issue or corroborates relevant evidence which bears on the principal issues. ***State v. Richardson***, 838 S.W.2d 122, 124 (Mo. App. E.D. 1992).

At trial, Ms. Avery's defense was that she was defending herself from a nighttime home invasion attack against her by Mr. Paris, after she had already ordered him out of the house at gun point and earlier in the evening he had grabbed her breast, and when his body was later examined at the scene his zipper was undone and he had one of her hairs in her hand. The question is whether the fact that Mr. Paris was a registered sex offender tends to confirm that he was the initial aggressor during his home invasion attack against Ms. Avery under these circumstances.

Preservation

Respondent argues that this issue was not properly preserved for appeal (Resp. Br. at 33-36). Appellant disagrees.

The State made an oral motion in limine to prohibit "any attempts of this witness [Brenda Evans] to try and mention that the victim in this case, Bruce 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). The trial court asked if it was "conceded" that the registration was in Dallas County, Missouri (Tr. 846). Defense counsel replied, "Yes," one of the prosecutors said, "It's on NCIC," and the other prosecutor replied, "If [the other prosecutor] has seen it, then I will trust that" (Tr. 846). Defense counsel noted that because Ms. Evans and Mr. Paris had a child together, she was aware that he was a registered sex offender (847). The trial court replied, "Well, *I'm not questioning her knowledge that he was registered*, the question is whether the phenomena of registration is admissible

evidence under the Gonzales case." (Tr. 847) (Emphasis added). The court later stated his understanding that Mr. Paris "was a registered sex offender, because of a conviction for child molestation" (Tr. 849). Defense counsel said that was correct, and the court replied "All right." (Tr. 849). Later, defense counsel asked whether "*for the purposes of preserving*, is the State willing to concede that he was a registered sex offender in, I think it's Dallas County?" (Tr. 852-53) (Emphasis added). The prosecutor confirmed that Mr. Paris "was registered in Dallas County at the time of his demise" (Tr. 852). Defense counsel again asked, "Can we have that agreement?" and the prosecutor replied, "I know it, and [the other prosecutor] knows it." (Tr. 852-53).

After Ms. Evans testified, without a hearsay objection by the State, that she was aware that Mr. Paris was a registered sex offender (Tr. 854), the trial court did not refuse it Ms. Avery's failure to prove that Mr. Paris was a registered sex offender, rather "it's refused on the basis of, it is either the fact of the registration is a specific act of violence, and also that the Court finds that the prejudicial effect of the evidence outweighs it's probative value" (Tr. 855).

It is patently unfair for the State to now complain that the offer of proof was insufficient after it had conceded that Mr. Paris was a registered sex offender in Dallas County, Missouri (Tr. 846), the trial court said it was "not questioning [Ms. Evans'] knowledge that he was registered" because the court knew that Mr. Paris "was a registered sex offender, because of a conviction for child molestation" (Tr. 849), and the State "for the purposes of preserving" was willing

"to concede that he was a registered sex offender … in Dallas County" (Tr. 852-53).

Evidence was admissible as to who was the initial aggressor

Regarding the merits, Respondent argues that this Court should not expand the rules of evidence concerning what a defendant can show in a self-defense case on the issue of who was the initial aggressor, arguing that the fact that Mr. Paris was a registered sex offender as a result of his conviction for some sort of child molestation crime "did not show a specific prior act of violence" (Resp. Br. at 38).

But in Missouri, a conviction for either child molestation or sodomy, among other similar offenses, are sexually violent offenses. ***In re Gibson***, 168 S.W.3d 72, 74 (Mo. App. S.D. 2004) (*citing*, ***section 632.480***). *Also see*, ***U.S. v. Velazquez-Overa***, 100 F.3d 418 (5th Cir. 1996) (crime of indecency with child involving sexual contact is crime of violence); ***U.S. v. Reyes-Castro***, 13 F.3d 377, 379 (10th Cir. 1993) (attempted sexual abuse of a child is a crime of violence); ***United States v. Bauer***, 990 F.2d 373 (8th Cir.1993) (Statutory rape is a crime of violence even if victim consented); ***U.S. v. Rodriguez***, 979 F.2d 138 (8th Cir. 1992) (Commission of lascivious acts with child was crime of violence"); ***U.S. v. Wood***, 52 F.3d 272 (9th Cir. 1995) (conviction for indecent liberties with minor was crime of violence); ***U.S. v. Taylor***, 98 F.3d 768 (3rd Cir. 1996) (conviction for indecent exposure involving minor victim was crime of violence).

The fact that Mr. Paris was a registered sex offender is relevant to whether he was the aggressor and whether he was breaking into Ms. Avery's home to

attack her even if Ms. Avery did not know that he was a registered sex offender. In Appellant's opening brief, she cited several cases in support of the position that specific acts of violence, including prior convictions, should be admissible on the issue of who was the initial aggressor, even when those acts are not known by the defendant. *See*, ***Jenkins v. State***, 625 S.W.2d 324 (Tex. App. 1982) (reversible error because the trial court refused to admit the deceased's prior assault conviction); ***People v. Lynch***, 104 Ill.2d 194, 470 N.E.2d 1018 (Ill. 1984) (reversible error when jury was not allowed to hear evidence of the deceased's three convictions for battery even though the defendant did not know about them); ***State v. Lewchuk***, 4 Neb.App. 165, 539 N.W.2d 847 (1995) (defendant entitled 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 knew of prior acts).

Other jurisdictions agree. ***State v. Miranda***, 405 A.2d 622 (Conn. 1978) (trial court committed reversible error when it excluded proof of victim's prior criminal convictions, offered to show victim's violent tendencies in support of defendant's claim of self-defense); ***Commonwealth v. Beck***, 402 A.2d 1371 (Pa. 1979) (in murder prosecution, in which defendant contended he acted in self-defense, reversible error occurred in excluding evidence of victim's prior assault conviction even though defendant did not have knowledge of conviction; such a conviction implies a character involving aggressive tendencies); ***State v. Schmidt***, 417 N.E.2d 1264 (Ohio App. 1979) (Evidence of decedent's character to establish

that he was the aggressor includes specific acts of violence previously committed and prior convictions); ***Commonwealth v. Adjutant***, 824 N.E.2d 1 (Mass. 2005) (trial court had discretion to admit evidence of victims' prior violence conduct, despite defendant lack of knowledge, for purpose of supporting defendant's disputed self-defense claim that victim was first aggressor).

Ms. Avery was prejudiced by the fact that the jury did not hear that Mr. Paris was a registered sex offender. Ms. Avery's defense was that she was defending herself against an attack by Mr. Paris, an attacked that possibly was of a sexual nature. The undisputed, conceded fact that Mr. Paris was a registered sex offender was probative of that matter. The jury had found that Ms. Avery had adequate cause to shoot Mr. Paris when it found her not guilty of second-degree murder but guilty of voluntary manslaughter, so this additional evidence might have tipped the scales further from sudden passion as the result of adequate cause to self-defense or defense of premises. This was a close case and 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 5,300 words, which does not exceed the 7,750 words allowed for an appellant's reply 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 November 11, 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 hand-delivered this _____ day of November, 2008, to the Office of the Attorney General, 221 W. High, Jefferson City, Missouri 65101.

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