No. SC96016

IN THE

Supreme Court of Missouri

STATE OF MISSOURI,

Respondent,

v.

LARRY CLAY,

Appellant.

Appeal from the Jackson County Circuit Court
Sixteenth Judicial Circuit
The Honorable Kathleen A. Forsyth, Judge

RESPONDENT'S SUBSTITUTE BRIEF

JOSHUA D. HAWLEY
Attorney General

SHAUN J MACKELPRANG
Assistant Attorney General
Missouri Bar No. 49627

P.O. Box 899
Jefferson City, MO 65102
Tel.: (573) 751-3321
Fax: (573) 751-5391
shaun.mackelprang@ago.mo.gov

Attorneys for Respondent

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STATEMENT OF FACTS

Mr. Clay appeals his convictions of murder in the second degree, § 565.021, RSMo 2000, and armed criminal action, § 571.015, RSMo 2000 (L.F. 156-157). Mr. Clay asserts that the trial court did not correctly instruct the jury on the issue of self-defense (Points I and II), that the trial court improperly admitted evidence of uncharged crimes (Points III and IV), that the trial court abused its discretion in controlling closing argument (Point V), and that the trial court erred in not instructing the jury on the included offense of voluntary manslaughter (Point VI) (*see* App.Sub.Br. 14-19).

* * *

Joel White and Mr. Clay were friends (Tr. 313).[1] They had a good relationship, and they would shoot pool, sing, and drink together (Tr. 313-314). Jeff Becklean was also on friendly terms with Mr. Clay, but he had not known Mr. Clay very long (Tr. 313-314). The three men were together "[q]uite a few times" before March 3, 2013 (Tr. 314). On a couple of occasions, Steven McGhee also spent time with them (Tr. 314). They would "hang out" in Mr. Clay's basement (Tr. 314). Steven McGhee had known Mr. Clay most of his life (Tr. 313).

[1] The evidence here is stated in a light favorable to the verdict. *See State v. Bazell*, 497 S.W.3d 263, 265 (Mo. 2016).

On March 3, 2013, Mr. McGhee, Mr. Becklean, and Mr. White went over to Mr. Clay's house (Tr. 317). Mr. White was talking to Mr. Clay on the phone, and they were talking about going to Mr. Clay's house to shoot pool and drink (Tr. 317). They arrived after 10:00 p.m., and Mr. Clay greeted them (Tr. 318). They went into the basement and started shooting pool and listening to music (Tr. 319). Mr. Becklean, Mr. White, and Mr. Clay were drinking alcohol; Mr. McGhee, Mr. Becklean, and Mr. Clay were smoking marijuana (Tr. 320-321). The atmosphere was "cool, calm," and they were "just hanging out" (Tr. 322).

After a while, Mr. Clay started a "verbal altercation" with Mr. White (Tr. 323). Mr. Clay was "out of it" (Tr. 324). The argument lasted ten or fifteen seconds, and then Mr. White stood up to go to the pool table (Tr. 324). Mr. Clay also stood up, and Mr. McGhee stood between them and said that if Mr. Clay was upset and did not want them there, they could just leave (Tr. 323, 325). Mr. Clay and Mr. White yelled at each other, and then Mr. Clay reached over Mr. McGhee and "smacked [Mr. White] in the mouth" (Tr. 325). Mr. McGhee said Mr. Clay was "tripping and that he needed to let [them] leave" (Tr. 325-326). Mr. McGhee tried to get Mr. White out of the house, and he told Mr. Becklean "to either grab [Mr. Clay] or go grab your stuff and go start the car" (Tr. 326).

As Mr. McGhee tried to get Mr. White out of the house, Mr. Clay

stabbed Mr. McGhee twice in the arm (Tr. 327). Mr. McGhee's arm went numb (Tr. 328). Mr. White started to fight back against Mr. Clay (Tr. 328). Mr. White and Mr. Clay fought "all over [one] side of the basement' (Tr. 328). They fell to the ground and wrestled around (Tr. 329). Mr. White started to get the upper hand, and Mr. McGhee continued to try to break up the fight (Tr. 329-330). The fight reached a "stand off," and Mr. McGhee told Mr. Clay that he was "tripping" (Tr. 330). Mr. Clay looked at Mr. McGhee "in kind of a daze" (Tr. 330). Mr. Clay said, "I'm gonna kill that n----er" (Tr. 331). Mr. McGhee held Mr. Clay back so the other two men could leave (Tr. 331).

After Mr. White and Mr. Becklean went up the stairs, Mr. Clay said, "Well, let me go hit my alarm so it doesn't go off and the police don't come" (Tr. 331-332). Mr. Clay did not have a gun while in the basement (Tr. 332). Mr. McGhee went upstairs and saw that the other two men had walked out of the house (Tr. 337). Mr. Clay turned off his alarm system and then ran to the back of the house (Tr. 338).

Mr. McGhee, Mr. Becklean, and Mr. White got to the driveway (or near the driveway), and then Mr. Clay came out of the house (Tr. 339). Mr. Clay had a gun behind his back, and he pulled it out (Tr. 339). He repeated that he was going to kill Mr. White (Tr. 340). Mr. McGhee stepped between them and asked Mr. Clay "to either give [him] the gun or just go back in the house so [they could] leave" (Tr. 340). Mr. McGhee told Mr. Becklean to hurry and

start the car (Tr. 340). Mr. Clay said to Mr. McGhee, "No, just move out the way, just move out the way, this ain't got nothing to do with you, this between me and him" (Tr. 341).

Mr. Clay then went around Mr. McGhee and tried to "pistol whip" Mr. White (Tr. 341). He hit Mr. White once, but Mr. White dodged a second blow (Tr. 341). Mr. White said, "If you wanted to fight me again, you could drop the gun and fight [me] one on one like a man" (Tr. 342). At some point, Mr. Clay said to Mr. McGhee, "You need to get his ass out of here before I kill him" (Tr. 343). Ultimately, as Mr. White tried to get into the car, Mr. Clay hit him with the gun again (Tr. 344; *see* State's Ex. 17, 3:44:48). Mr. White then turned and hit Mr. Clay (Tr. 345; *see* State's Ex. 17). Mr. Clay stumbled backward and shot Mr. White (Tr. 345; *see* State's Ex. 17). Mr. White fell to the ground (Tr. 346; *see* State's Ex. 17). Mr. Becklean drove away (Tr. 346; *see* State's Ex. 17).

Mr. Clay walked toward Mr. McGhee and said, "He made me do it, he made me do it" (Tr. 347). Mr. McGhee said, "No, nobody make you do nothing, just go in the house, just please go in the house so I can check on him so I can see if he's okay" (Tr. 347). Mr. Clay went inside, and Mr. McGhee checked Mr. White, who was still breathing (Tr. 347). Mr. McGhee called the police, called home, and ran away from the scene (Tr. 347). Mr. McGhee later made contact with the police, and he received medical treatment for his stab wounds at the

hospital (Tr. 348).

On March 4, 2013, at about 3:40 a.m., Officer Joseph Miller of the Kansas City Police Department was dispatched to a residence at 9200 Eastern Avenue (Tr. 256-257). There had been a report of shots fired (Tr. 258). He and Officer Peter Neukirch arrived at the scene of the reported shooting in separate vehicles (Tr. 258). They exited their vehicles and drew their guns (Tr. 258). Officer Miller saw one man standing in the driveway (Mr. Clay), and one man lying in the driveway (Mr. White) (Tr. 258-259, 273).

The officers ordered Mr. Clay to the ground, and he complied (Tr. 259). Mr. Clay did not have any difficulty, and he did not appear to be injured (Tr. 260). The officers placed him in handcuffs (Tr. 260). Mr. White appeared to be lifeless; he was lying face down (Tr. 260). Officer Neukirch did not detect any signs of life (Tr. 261). Medical personnel arrived and determined that Mr. White was deceased (Tr. 261). Inside the residence, there was a handgun on a kitchen counter (Tr. 262, 428). The gun was loaded with eleven rounds of ammunition, and one round was in the chamber (Tr. 440-441). There was also a gun case on the counter containing more ammunition and a pair of brass knuckles (Tr. 444).

Mr. Clay told Officer Miller that Mr. White "punched [him] in the face" (Tr. 270). He said, "He jumped on top of me in the driveway" and "knocked me down" (Tr. 270-271). He told Officer Miller that some "guys" he knew had

showed up at his house, and that "Mr. White had jumped on him in his basement" (Tr. 273). Mr. Clay said that he got his gun and asked them to leave (Tr. 274). He said that "after they got outside . . . there was still a fight," and he shot Mr. White (Tr. 274). Mr. Clay was cooperative, and he told the police where to find the gun (Tr. 275). He also directed them to a knife by a sump pump (Tr. 277).

A video obtained from a home surveillance system in a house across the street contained footage of 9200 Eastern, including footage from 3:40 a.m. to 4:00 a.m. (Tr. 280-281, 287). The video showed Mr. Becklean leave the house first, followed by Mr. White and then Mr. McGhee (Tr. 353). The video showed Mr. Clay leave the house, continue the confrontation, and, ultimately, attack and shoot Mr. White (Tr. 354, 390-398; *see* State's Ex. 17). A spent shell casing was found in the street, just south of the driveway (Tr. 425). Subsequent testing confirmed that the shell casing had been ejected from the gun found in the kitchen (Tr. 601).

An autopsy revealed that Mr. White had suffered a gunshot wound to the torso, sharp force injuries, and blunt force trauma (Tr. 480, 482). The bullet injured both of Mr. White's lungs, his heart, and his liver (Tr. 482). Mr. White had six sharp force injuries (Tr. 482). There were three stab wounds and three "incised wounds," or slashing wounds (Tr. 483). One stab wound entered his chest and hit a rib (Tr. 483). There were two incised wounds on

his abdomen, and a third incised wound on the back of his right hand (Tr. 483, 490). Another stab wound entered his abdomen, and a third stab wound entered his right thigh (Tr. 484). Mr. White had abrasions on the right side of his forehead, and a laceration on the backside of his head (Tr. 484). He also had an abrasion on his back and on the back side of his left hand (Tr. 485). A toxicology screening showed alcohol in his system (.274 BAC) but no other drugs (Tr. 494-495, 503). The cause of death was the gunshot (Tr. 495).

Subsequent examination of the gun revealed the presence of blood on the top of the gun, on the left side of the slide (Tr. 606-608). The blood stain was a "transfer stain," meaning that the gun had come into contact with an object that transferred blood to the gun (Tr. 606). The blood on the gun produced a single genetic profile that matched Mr. White (Tr. 628). The expected frequency of that genetic profile was one in 18 quintillion unrelated individuals (Tr. 629).

Detective Rodney Haney questioned Mr. Clay (Tr. 512-513). An audio video recording was made of the questioning (Tr. 514; State's Ex. 73). In the interview, in giving his account of the events, Mr. Clay said that there was not an altercation outside, and that he did not go within twenty feet of Mr. White while outside (Tr. 527). Mr. Clay had a scratch above and to the right of his nose, some scuff marks around his right elbow, and some scuff marks around his right knee (Tr. 584-585). He had no other apparent injuries from

the incident (Tr. 586-589).

The State charged Mr. Clay by indictment with murder in the second degree, § 565.021, RSMo 2000, assault in the second degree, § 565.060, RSMo Supp. 2014, and two counts of armed criminal action, § 571.015, RSMo 2000 (L.F. 36-37). The case went to trial on January 20, 2015 (*see* Tr. 2). After the State had presented its case-in-chief, the defense presented the testimony of Mr. Becklean and Mr. Clay (Tr. 641, 706).

Mr. Becklean testified that, before the shooting, Mr. White "seemed to be getting a little impaired" because he was "getting a little more loud than usual" (Tr. 651). He said that Mr. White became "[j]ust kind of belligerent" (Tr. 652). He testified that Mr. Clay and Mr. White "started to verbally spar, and they were kind of going at it" (Tr. 653). He said that "it started to seem like it was getting personnel [sic] and not friendly anymore" (Tr. 654). He said that he suggested they leave, but that Mr. White did not want to leave (Tr. 654).

Mr. Becklean testified that, at some point, he looked up and saw Mr. Clay and Mr. White "throwing fists" (Tr. 657). Mr. Becklean stated that Mr. White "may have" thrown the first punch, but he said that he could not say with certainty (Tr. 657). He stated that Mr. McGhee tried to "get in the middle of it and break them both up" (Tr. 659). He said that after the fight broke up, Mr. White said something like "I'm ready for round two" (Tr. 660).

He testified that as they were going up the stairs, "all of a sudden they started going at it again" (Tr. 662).

Mr. Becklean testified that he then said he was leaving, and that he went to the front door (Tr. 664). He said that Mr. McGhee was "in the middle still trying to break everything up and still trying to help keep the peace" (Tr. 664). Mr. Becklean said that they made their way outside, and that Mr. Clay then came out after them (Tr. 666-667). He said that he saw Mr. Clay "come up behind Mr. White and hit him with, looked like the butt of a gun" (Tr. 670). He said that Mr. White "pitched forward, started to kind of like stumble forward," and that he then heard a shot (Tr. 671). He said that he drove away and called 911 (Tr. 671-672).

Mr. Clay testified that after Mr. White had done some things that he did not like, he told Mr. White that he had had enough to drink, and that it was time for Mr. White to leave (Tr. 718). He stated that Mr. White punched him when he took the bottle of whiskey from Mr. White (Tr. 721). He testified that he hit Mr. White, and that Mr. White then tackled him when he put the bottle down on a table (Tr. 722). Mr. Clay testified that Mr. White then beat him while they were on the floor, and that Mr. McGhee kicked him in the face (Tr. 723-724). Mr. Clay testified that he managed to pull out his knife, and that he hit and stabbed Mr. White with the knife, causing Mr. White to let him go (Tr. 726). He said that he then held off Mr. White with the knife, and

that he stabbed Mr. McGhee twice when Mr. McGhee tried to grab him (Tr. 727-728).

Mr. Clay testified that he was then able to run upstairs and get his gun (Tr. 729). He stated that he heard Mr. White say, "That b--ch is going to get his gun, ain't he?" (Tr. 729). He said that Mr. McGhee said, "Probably so" (Tr. 729). Mr. Clay said that he responded, "Yeah, that's right; you need to get out of my house" (Tr. 729). He stated that he got his gun, and that he yelled down the stairs, "You need to get out of my house before I come down there, it's going to be a problem" (Tr. 730).

Mr. Clay testified that they left, but that "all of a sudden [he] heard this loud noise" and thought "he had busted the mirror out of [his] truck or [his] car" (Tr. 731-732). Mr. White testified that he "took off running" and went outside (Tr. 732-733). He said that he "peeked" at the others and saw that they had opened his gate the wrong way, causing the lock to fly off and hit the truck (Tr. 733). He said that he passed by Mr. White, and that Mr. White tried to grab his arm (Tr. 733). He said that he jerked his hand back, and that Mr. White punched him in the back of the neck (Tr. 733).

Mr. Clay testified that he asked Mr. Becklean to get Mr. White off his property and that he asked them to get in the car and leave (Tr. 734). He said that he walked Mr. White off his property, but that Mr. White "tried to run back up on [him] again" when he turned around (Tr. 735). He said that Mr.

White walked back up behind him and said, "take the gun, stick it up your ass, I kill your ass" (Tr. 735). Mr. Clay said that he turned around and said, "Man, just get off my property" (Tr. 736). He said that he then mentioned his neighbors and eventually said he could call the police (Tr. 736-737).

Mr. Clay said he walked toward the house and that Mr. White ran up behind him (Tr. 737). He then said that Mr. White was standing in front of him, and that Mr. McGhee was on the other side of Mr. White (Tr. 738). He said that Mr. White reached for the gun, and that when Mr. Clay reached down to knock his hand away, Mr. White "swung a big roundhouse" (Tr. 739). Mr. Clay said that he then "fired as [he] was backing up trying to get away from him to leave" (Tr. 739).

The jury found Mr. Clay guilty of murder in the second degree and its associated count of armed criminal action (Tr. 920; L.F. 123). The jury found Mr. Clay not guilty of the assault against Mr. McGhee and its associated count of armed criminal action (Tr. 920). The trial court sentenced Mr. Clay to twenty-five years' imprisonment for murder, and 10 years' imprisonment for armed criminal action (Tr. 1014; L.F. 156). The court ordered the sentences to run concurrently (Tr. 1014-1015).

ARGUMENT

I.

The trial court did not plainly err in submitting a jointly proffered self-defense instruction that did not include the optional "withdrawal" language from MAI-CR 3d 306.06A.

In his first point, Mr. Clay asserts that the trial court "erred, plainly erred, and abused its discretion in submitting the 'initial aggressor' part of Missouri Approved Instruction 306.06A as submitted by the State without including the 'withdrawal' language from that same part of the instruction" (App.Sub.Br. 20). He asserts that "the 'withdrawal' language is required as a matter of law any time the issue of 'withdrawal' is injected into the case, regardless of source, in that any dispute in the evidence and the facts was for the jury to decide" (App.Sub.Br. 20).

A. Mr. Clay waived any challenge to the self-defense instruction that was submitted to the jury

The Court should decline to review this claim. Mr. Clay waived this claim, in that he jointly drafted and submitted the self-defense instruction to the trial court. In other words, because Mr. Clay invited this alleged error, he cannot now assert that the trial court plainly erred in submitting the jointly-drafted instruction. *See State v. Bolden*, 371 S.W.3d 802, 805 (Mo. 2012).

At trial, at the instructions conference, in discussing Instruction No. 14

(the self-defense instruction that was applicable to the homicide), the trial court stated that the instruction was "going to be amended by the defendant" (Tr. 801). Defense counsel confirmed that the trial court was "correct," and he stated, "*We are proposing the initial aggressor language*, plus adding threats" (Tr. 801) (emphasis added). The parties discussed whether the instruction would refer to "deadly force," and defense counsel stated that he "certainly [didn't] mind adding it if the Court finds that deadly force was used, which in this case is apparent" (Tr. 803-804). The parties then discussed other language, and defense counsel pointed out that his proposed instruction omitted from the first paragraph the phrase "from harm," as indicated in the most recent version of MAI-CR 3d 306.06A (Tr. 805). The prosecutor agreed that that omission was correct (Tr. 806). The prosecutor then agreed that it could strike that language from its proposed instruction (which otherwise matched the defense's instruction in Part A), and the court stated, "Okay. I'm back to working from the State's copy" (*see* Tr. 806; L.F. 164, 167). The parties then discussed language to include in Part C of the instruction and ultimately agreed to the language that would be included there (Tr. 807-810).

After the proposed self-defense instruction had been revised in the various ways discussed by the parties (and after a fresh version had been prepared), the parties reviewed the changes, and agreed that they were correct (Tr. 826). Defense counsel stated, "Looks good" (Tr. 826). At no point

did defense counsel propose that the "withdrawal" language in Part A[1] be included in the instruction.

In light of this record, Mr. Clay cannot assert that the trial court plainly erred in submitting the self-defense instruction. It is well settled that "[i]f the defendant injects self-defense into the case and there is substantial evidence to support a self-defense instruction, it is reversible error for the trial court to fail to submit a self-defense instruction to the jury under plain error review." *State v. Bolden*, 371 S.W.3d 802, 805 (Mo. 2012). However, "the proffering of an incorrect instruction to the trial court is an invited error by the party who proffered the instruction." *Id.* at 806. "It defies logic and the clear directives of Missouri law to allow a defendant to both proffer an instruction to the trial court and to complain that the trial court's submission of that instruction to the jury is reversible error." *Id.*

This Court "has long held that a defendant cannot complain about an instruction given at his request." *Id.* " 'It is axiomatic that a defendant may not take advantage of self-invited error or error of his own making.' " *Id.* Thus, in *Bolden*, where the defendant collaborated with the State to draft a defense-of-others instruction and then proffered it to the trial court, and where the defendant later argued on appeal that the instruction contained errors and omissions, the Court held that the defendant had "waived appellate review of the trial court's submission of that instruction to the

jury." *Id*. The Court stated, "Although plain error review is discretionary, this Court will not use plain error to impose a *sua sponte* duty on the trial court to correct Defendant's invited errors." *Id*.

The same is true in Mr. Clay's case. Initially, the defense was going to "amend" Instruction No. 14, and Mr. Clay proposed the same language that was ultimately included in Part A[1] of Instruction No. 14 (*see* Tr. 801, 853; L.F. 83, 167).[2] The defense then collaborated with the State and agreed upon the language that would be included in the self-defense instruction (Tr. 803-810). Once the final instruction was completed, the parties agreed that the instruction was correct (Tr. 826). There was never any indication that the defense wanted to submit the "withdrawal" language, or that the defense believed that the withdrawal paragraph was warranted under the evidence.[3]

Accordingly, Mr. Clay cannot now assert that the trial court plainly

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[2] Page 167 of the legal file is in Mr. Clay's "Second Supplemental Uncertified Legal File on Appeal."

[3] In fact, it would have been counter to the defense theory to suggest that Mr. Clay was an initial aggressor who needed to "withdraw" to regain the right to use self-defense. The defense theory was that Mr. Clay was the victim of unlawful force from the outset. *See*, *e.g.*, *State v. Morrow*, 41 S.W.3d 56, 59-60 (Mo.App. W.D. 2001).

erred in submitting the instruction that he (along with the State) submitted to it. *State v. Bolden*, 371 S.W.3d at 806; *see also State v. Holmes*, 491 S.W.3d 214, 220 (Mo.App. W.D. 2016) (defendant could not claim plain error where "his own trial counsel used the same [allegedly erroneous] language in other verdict directors"); *State v. Oudin*, 403 S.W.3d 693, 697-698 (Mo.App. W.D. 2013) ("The combination of Oudin's failure to object to the [defense-of-others] instruction given and her submission of an instruction containing the same alleged error results in waiver of her claim on appeal.").

Mr. Clay attempts to avoid this well-settled principle by arguing that "*Bolden* applies ***only*** when [a party's] incorrect instruction was actually given to the jury" (App.Sub.Br. 27). He asserts that he "did ***not*** submit Instruction 14, the State did" (App.Sub.Br. 27). He points out that Instruction No. 14 indicates on its face that it was "Submitted by Plaintiff," and he asserts that "[n]o more proof should be required that the State submitted Instruction 14 besides the fact that the State literally typed 'Submitted by Plaintiff' on the 'dirty' copy of Instruction 14 submitted and accepted by the trial court" (App.Sub.Br. 28). But while no additional proof would ordinarily be required to prove which party submitted an instruction, the record in this case provides ample proof (as outlined above) that Instruction No. 14 was, in fact, jointly drafted and agreed upon by the parties, notwithstanding the notation made on the face of the instruction (*see* Tr. 803-810, 826). Thus, in light of the

record made at trial, the Court should hold that defense counsel worked with the prosecutor in drafting the instruction and approved its final form and, accordingly, that Mr. Clay's claim was waived.

Mr. Clay also asserts that the State's argument in favor of waiver has been rejected by this Court (App.Sub.Br. 27-28, citing *State v. Celis-Garcia*, 344 S.W.3d 150, 154 n.3 (Mo. 2011)). He characterizes the State's argument as a three-fold argument, namely, that "(1) Clay did not object to the State's instruction and, in fact, stated that it 'looks good'; (2) Clay submitted instructions with the same errors of which he now complains; and (3) similarly to the second argument, Clay did not submit a correct instruction" (App.Sub.Br. 27). But the State's argument is not that Mr. Clay merely failed to object, or that Mr. Clay did not submit a correct instruction. Rather, the State's argument is that Mr. Clay actively collaborated in the choice of language that would be used in the instruction, and that he expressly approved and thereby jointly submitted the instruction that was ultimately submitted to the jury. Thus, as in *Bolden*, Mr. Clay affirmatively waived any challenge to the instruction.

B. The trial court did not plainly err in submitting Instruction No. 14.

Even if the Court were to review for plain error, Mr. Clay would not be entitled to relief. "When [an] unpreserved allegation concerns instructional

error, plain error exists when it is clear that the circuit court has so misdirected or failed to instruct the jury that manifest injustice or miscarriage of justice has resulted." *State v. Zetina-Torres*, 482 S.W.3d 801, 810 (Mo. 2016). "Plain error can serve as the basis for granting a new trial on direct appeal only if the error was outcome determinative." *Deck v. State*, 381 S.W.3d 339, 358 (Mo. 2012).

As a general matter, "[i]n determining whether the circuit court erred in refusing to submit an instruction on self-defense, the evidence is viewed in the light most favorable to the defendant." *See State v. Smith*, 456 S.W.3d 849, 852 (Mo. 2015) (citing *State v. Westfall*, 75 S.W.3d 278, 280 (Mo. 2002)). "The circuit court must submit a self-defense instruction 'when substantial evidence is adduced to support it, even when that evidence is inconsistent with the defendant's testimony," [ ] and failure to do so is reversible error." *Id*. (citation omitted).

Here, there was no plain error. First, as outlined above, the defense expressly agreed to the language used in Instruction No. 14. Thus, the trial court should not be convicted of plainly erring in submitting the agreed upon self-defense instruction. Indeed, as noted above, it would have been counter to the defense theory to suggest that Mr. Clay was an initial aggressor who needed to "withdraw" to regain the right to use self-defense. The defense theory was that Mr. Clay was the victim of unlawful force from the outset

(and throughout the encounter), and that he had no need to "withdraw" at any time—which probably explains why defense counsel never requested the "withdrawal" language. In fact, in describing the encounter in the driveway, defense counsel urged the jury to review the video footage, and he argued that "Larry Clay wasn't the initial aggressor" (Tr. 894).[4]

Second, there was no substantial evidence showing that Mr. Clay was an initial aggressor who withdrew from the encounter. "Self-defense is not available to a defendant if he was the initial aggressor unless he withdrew from the conflict in such manner to have shown his intention to desist." *State v. Morrow*, 41 S.W.3d 56, 59 (Mo. 2001). "A withdrawal is the abandonment of the struggle by one of the parties." *Id.* "The withdrawal must be made in good faith and be more than mere retreat, which may be simply a continuance of hostilities." *Id.* "Additionally, the withdrawal or abandonment must be perceived by or made known to the adversary." *Id.* As stated in § 563.031, an initial aggressor can justifiably use force if "[h]e or she has withdrawn from the encounter and effectively communicated such withdrawal to such other person but the latter persists in continuing the incident by the use or

[4] Mr. Clay acknowledges in his brief that he "argued at trial—and continues to argue— . . . he was not the 'initial aggressor' when he exited his home" (App.Br. 22).

threatened use of unlawful force." § 563.031, RSMo Cum. Supp. 2013.

Here, there was no substantial evidence that Mr. Clay withdrew from the encounter and effectively communicated his withdrawal to Mr. White. Mr. McGhee's testimony showed that when Mr. Clay came out of the house, he had a gun behind his back, and he pulled it out (Tr. 339). Mr. Clay repeated that he was going to kill Mr. White (Tr. 340). Mr. McGhee stepped between them and asked Mr. Clay "to either give [him] the gun or just go back in the house so [they could] leave" (Tr. 340). Mr. McGhee told Mr. Becklean to hurry and start the car (Tr. 340). Mr. Clay said to Mr. McGhee, "No, just move out the way, just move out the way, this ain't got nothing to do with you, this between me and him" (Tr. 341).

Mr. Clay then went around Mr. McGhee and tried to "pistol whip" Mr. White (Tr. 341). He hit Mr. White once, but Mr. White dodged a second blow (Tr. 341). Mr. White said, "If you wanted to fight me again, you could drop the gun and fight [me] one on one like a man" (Tr. 342). At some point, Mr. Clay said to Mr. McGhee, "You need to get his ass out of here before I kill him" (Tr. 343). Ultimately, as Mr. White tried to get into the car, Mr. Clay hit him with the gun again (Tr. 344; *see* State's Ex. 17, 3:44:48). Mr. White then turned and hit Mr. Clay (Tr. 345; *see* State's Ex. 17, 3:44:49). Mr. Clay stumbled backward and shot Mr. White (Tr. 345; *see* State's Ex. 17, 3:44:50). Mr. White fell to the ground (Tr. 346; *see* State's Ex. 17, 3:44:50). Mr. McGhee

did not testify that Mr. Clay ever withdrew from the encounter or that he communicated his withdrawal to Mr. White.[5]

Mr. Becklean testified that when he went to the door, Mr. McGhee was "in the middle still trying to break everything up and still trying to help keep the peace" (Tr. 664). Mr. Becklean said that they made their way outside, and that Mr. Clay then came out after them (Tr. 666-667). He testified that, outside, both men continued to yell at each other on the driveway (Tr. 666-669). He said that ultimately he saw Mr. Clay "come up behind Mr. White and hit him with, looked like the butt of a gun" (Tr. 670). He said that Mr. White "pitched forward, started to kind of like stumble forward," and that he then heard a shot (Tr. 671). He said that he drove away and called 911 (Tr. 671-672). Mr. Becklean did not testify that Mr. Clay ever withdrew from the encounter or that he communicated his withdrawal to Mr. White.

Mr. Clay testified that, after the fight in the basement, he was able to run upstairs and get his gun (Tr. 729). He stated that he heard Mr. White

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[5] Mr. Clay asserts that Mr. McGhee "testified that White reinitiated the encounter because he needed to 'make his point' and that he struck Clay" (App.Sub.Br. 33). But Mr. McGhee did not testify that White "reinitiated the encounter." When Mr. McGhee said that Mr. White needed to "make his point," he was describing a part of the continuous conflict (*see* Tr. 394-396).

say, "That b--ch is going to get his gun, ain't he?" (Tr. 729). He said that Mr. McGhee said, "Probably so" (Tr. 729). Mr. Clay said that he responded, "Yeah, that's right; you need to get out of my house" (Tr. 729). He stated that he got his gun, and that he yelled down the stairs, "You need to get out of my house before I come down there, it's going to be a problem" (Tr. 730).

Mr. Clay testified that they left, but that "all of a sudden [he] heard this loud noise" and thought "he had busted the mirror out of [his] truck or [his] car" (Tr. 731-732). Mr. White testified that he "took off running" and went outside (Tr. 732-733). He said that he "peeked" at the others and saw that they had opened his gate the wrong way, causing the lock to fly off and hit the truck (Tr. 733). He said that he passed by Mr. White, and that Mr. White tried to grab his arm (Tr. 733). He said that he jerked his hand back, and that Mr. White punched him in the back of the neck (Tr. 733).

Mr. Clay testified that he asked Mr. Becklean to get Mr. White off his property and that he asked them to get in the car and leave (Tr. 734). He said that he walked Mr. White off his property and said the others would "pick [him] up in the street," but that Mr. White "tried to run back up on [him] again" when he turned around (Tr. 735). He said that Mr. White walked back up behind him and said, "take the gun, stick it up your ass, I kill your ass" (Tr. 735). Mr. Clay said he turned around and said, "Man, just get off my property" (Tr. 736). He said that he then mentioned his neighbors and

eventually said he could call the police (Tr. 736-737).

Mr. Clay said he walked toward the house and that Mr. White ran up behind him (Tr. 737). He then said that Mr. White was standing in front of him, and that Mr. McGhee was on the other side of Mr. White (Tr. 738). He said that Mr. White reached for the gun, and that when Mr. Clay reached down to knock his hand away, Mr. White "swung a big roundhouse" (Tr. 739). Mr. Clay said that he then "fired as [he] was backing up trying to get away from him to leave" (Tr. 739).

The video showed that Mr. Clay confronted Mr. White in the driveway (about one minute and eleven seconds before the shooting), and that Mr. Clay swung his right hand at Mr. White (State's Ex. 17, 3:43:40-3:43:47). The video showed that Mr. Clay (with his hands at his sides) backed Mr. White down the driveway, until Mr. White was about two steps into the street (3:43:47-3:43:57). Mr. Clay then turned (with his hands still down at his sides) and walked back up the driveway, while Mr. White walked slowly back onto the driveway and moved up the driveway behind Mr. Clay (3:43:57-3:44:08). Still separated by a few feet, Mr. Clay then turned back toward Mr. White, and Mr. White turned away from Mr. Clay and walked (with his back toward Mr. Clay) around the back of Mr. Becklean's car (3:44:08-3:44:18).

At that point, Mr. Becklean stepped between the two men to get into his car, Mr. White moved toward Mr. Clay (walking behind Mr. Becklean),

and Mr. McGhee walked back onto the driveway and went around Mr. Becklean's car (3:44:18-3:44:26). Mr. Clay and Mr. White again stood face to face, and Mr. Clay walked Mr. White back again and followed him around the back of Mr. Becklean's car (3:44:26-3:44:47). Mr. Clay then swung his right hand at Mr. White, Mr. White retaliated, and Mr. Clay moved backward and shot Mr. White (3:44:47-3:44:51).

In asserting that there was evidence to support the "withdrawal" language, Mr. Clay asserts that he "clearly and unequivocally indicated his abandonment of the struggle to White, McGhee, and Becklean around 3:43:58 of State's Ex. 17" (App.Sub.Br. 23). He points out that he walked Mr. White off of his property and told him to wait to be picked up (App.Sub.Br. 23). He asserts, "It is at this point that [he] clearly and unequivocally evidenced his intent to end the encounter: ***he lowered his gun, turned his back on White and walked up his driveway toward his front door***" (App.Sub.Br. 23-24). He further asserts, "The video evidence is unequivocal: Clay is not walking towards any of the three men (nor is he 'fleeing') at that point" (App.Sub.Br. 24).

Mr. Clay's assertions, however, are not supported by the evidence. The video evidence is not clear and unequivocal, as it has no sound; thus, the video does not reveal what the men were saying to each other, and whether they continued to yell at one another while Mr. Clay was walking back up his

driveway (after forcing Mr. White off the driveway). Mr. McGhee and Mr. Becklean both described a physical and verbal encounter that did not cease until the fatal shooting. Even Mr. Clay's testimony failed to show a cessation of hostilities after he forced Mr. White off the driveway, as he testified that when he turned away, Mr. White immediately came up behind him (*see* Tr. 734-739). Mr. Clay did not testify that he withdrew from the encounter or that he communicated his withdrawal to Mr. White.

In addition, Mr. Clay's assertion on appeal that he "lowered his gun" after forcing Mr. White off his driveway is not supported by any evidence. No one testified that Mr. Clay lowered his gun, and the video shows that Mr. Clay's hands were down at his sides while he forced Mr. White to back up down the driveway (*see* State's Ex. 17, 3:43:47-3:43:57). Mr. Clay then turned (with his hands still down at his sides) and walked back up the driveway, while Mr. White walked slowly back onto the driveway and moved up the driveway behind Mr. Clay (3:43:57-3:44:08). In short, there was neither a withdrawal from the encounter nor a communication of any withdrawal that could have been communicated by Mr. Clay's use of the gun. To the contrary, the video shows that throughout the encounter, Mr. Clay generally held the gun at his side and only raised it when he swung at Mr. White.

Mr. Clay's assertion that he walked toward his front door is also not supported by the evidence. On the video, while Mr. Clay did walk back up the

driveway, he appeared to be walking toward his garage (not his front door), and he turned around to confront Mr. White while Mr. White is still some distance from him (3:43:57-3:44:18). Mr. Clay did not testify that he was trying to go back inside his house, and there was no evidence suggesting that Mr. Clay told Mr. White he was leaving or going back inside.

In sum, the testimonial evidence and video evidence showed an ongoing encounter that continued without cessation until the fatal shot was fired. Mr. Clay and Mr. White were yelling and threatening each other, and they both moved around the driveway over the course of a little over a minute—sometimes standing face-to-face, sometimes walking while facing one another, and sometimes walking while facing away from each other. At no point did Mr. Clay withdraw from the encounter or effectively communicate his withdrawal from the encounter to Mr. White.

Lastly, because there was no substantial evidence of a withdrawal by Mr. Clay (and no communication of that withdrawal), and because the defense theory was to argue that Mr. Clay was not the initial aggressor, there is no reason to believe that the trial court's alleged error in failing to *sua sponte* include withdrawal language in the self-defense instruction led the jury to convict instead of acquit. This point should be denied.

II.

The trial court did not err in refusing Mr. Clay's proposed non-MAI instruction on the issue of "the duty to retreat," and Mr. Clay waived his claim that the trial court should have *sua sponte* modified the jointly drafted self-defense instruction to incorporate language on the issue of the duty to retreat.

In his second point, Mr. Clay asserts that the trial court "erred in overruling [his claim] regarding the trial court's rejection of [his] Instruction 16 (explaining his lack of duty to retreat)" (App.Sub.Br. 37). He asserts further that "if the trial court would not submit Instruction 16 as a stand-alone instruction, the trial court was required to modify Missouri Approved Instruction 306.06A to accurately reflect the change in section 563.031.3, rather than reject the instruction and improperly instruct the jury regarding [his] lack of a duty to retreat" (App.Sub.Br. 37).

A. The standard of review

"Pursuant to Rule 28.02(a) '[i]n every trial for a criminal offense the court shall instruct the jury in writing upon all questions of law arising in the case that are necessary for their information in giving the verdict.' " *State v. Plunkett*, 473 S.W.3d 166, 171 (Mo.App. W.D. 2015). "Rule 28.02(f) provides the proper 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.' " *Id.* "Thus, '[t]he trial court's refusal to give a party's proffered instruction is reviewed *de novo*, evaluating whether the instructions were supported by the evidence and the law.' " *Id.*

" 'The trial court's judgment will be reversed only if such an error results in prejudice[.]' " *Id.* " 'Prejudice exists when there is a reasonable probability that the trial court's error affected the outcome at trial.' " *Id.*

B. The trial court properly refused Instruction No. 16

At the instructions conference, after the defense agreed to the self-defense instruction that the parties had collaborated to produce, defense counsel submitted a non-MAI instruction on the issue of "the duty to retreat" (Tr. 813). The instruction stated, "A person does not have a duty to retreat from private property that is owned or leased by such individual in order to avoid the need to use force in self-defense" (L.F. 160). The trial court refused this instruction, stating, "I think that this is misleading to give this instruction and the instructions we've already crafted in accordance with the MAI instructions on self-defense" (Tr. 815). Mr. Clay made no request that the trial court modify the self-defense instruction that the parties had agreed upon and submitted.

The trial court did not commit error in refusing to submit Mr. Clay's non-MAI instruction. " 'Rule 28.02(c) mandates the exclusive use of the

Missouri Approved Instructions—Criminal whenever there is an instruction applicable under the law.' " *State v. Plunkett*, 473 S.W.3d at 172. " 'Whenever there is an MAI–CR instruction applicable under the law ..., the MAI–CR instruction is to be given to the exclusion of any other instruction." *Id.*

In *Plunkett*, the Court of Appeals held that a trial court does not err in refusing to submit a separate "duty to retreat" instruction. *Id.* ("Wife's tendered instruction failed to comport with Rule 28.02(d) because the use of a separate instruction to address the duty to retreat did not follow the format of MAI–CR instructions and because the instruction failed to use language that was simple and brief."). The Court of Appeals observed that MAI-CR 3d 306.11 provided a brief, impartial, non-argumentative example of how the "no duty to retreat" principle could be incorporated into a self-defense instruction. *Id.* The Court observed that "MAI–CR3d 306.11 incorporates the 'no duty to retreat' principle described in section 563.031.3 in simple terms by providing in Part A, paragraph [2] that '[a] person lawfully occupying a (dwelling) (residence) (vehicle) is not required to retreat before resorting to the use of force to defend himself.' " *Id.*

In other words, instead of proffering a separate instruction related to self-defense, the Court held that "it was incumbent upon [the defendant] to oppose [the self-defense instruction] and to tender in lieu thereof a modified version of MAI-CR 3d 306.06A modeling the reference to 'no duty to retreat'

that appears in MAI-CR 3d 306.11." *Id*. This conclusion necessarily followed the well-settled rule that where there is an applicable instruction (*i.e.*, the self-defense instruction), the applicable instruction must be used to the exclusion of non-MAI instructions (and modified if necessary). *See* Rule 28.02(c) ("Whenever there is an MAI-CR instruction . . . applicable under the law and Notes on Use, the MAI-CR instruction . . . shall be given or used to the exclusion of any other instruction . . . .").

The same is true in Mr. Clay's case. To instruct the jury on self-defense, the applicable instruction was MAI-CR 3d 306.06A.[6] Thus, Mr. Clay should have asked the court to modify Instruction No. 14 instead of giving a separate instruction that purported to give additional guidance on the issue of self-defense. Indeed, it could have been confusing to the jury to have a separate, single instruction that purported to relate to self-defense, particularly where there were two separate self-defense instructions that instructed the jury on

[6] Although the applicable MAI was 306.06A, the Notes on Use to 306.11 make plain that it is also applicable to certain situations arising under § 563.031, *e.g.*, defense of a residence from unlawful entry (after the repeal of § 563.036). *See* MAI-CR 3d 306.11, Note on Use 1. Alternatively, MAI-CR 3d 306.11 could be used with modifications. *See State v. Whipple*, 501 S.W.3d 507, 520 n. 11 (Mo.App. E.D. 2016).

the issue of self-defense with regard to the homicide (instruction No. 14, which referred to deadly force) and the assault (Instruction No. 15, which referred to force) (*see* L.F. 83-88).

In addition, it is not apparent that Mr. Clay's proposed instruction was free from argument or that it correctly stated the law, particularly as to the use of "deadly force" in committing the homicide. The form language in MAI-CR 306.11 states that "[a] person lawfully occupying a (dwelling) (residence) (vehicle) is not required to retreat *before resorting to the use of force* to defend himself" (emphasis added). Mr. Clay's proposed instruction stated, however, that "[a] person does not have a duty to retreat from private property that is owned or leased by such individual *in order to avoid the need to use force* in self-defense" (emphasis added) (L.F. 160). While various Missouri cases have, in analyzing whether a self-defense instruction should have been submitted, stated that a person should do everything that can be done consistent with personal safety to avoid the need to take a life, *see*, *e.g.*, *State v. Burks*, 237 S.W.3d 225, 229 (Mo.App. S.D. 2007), the self-defense instruction does not instruct the jury in those terms. Instead, the instruction speaks in terms of the reasonableness of using force or deadly force, and it instructs the jury when such force can and cannot be used.

Perhaps more significantly, Mr. Clay's proposed instruction referred to the use of "force in self-defense," and it failed to distinguish between "force"

and "deadly force." As stated above, however, there were two self-defense instructions in this case—one that referred to "deadly force" and one that referred to "force" (L.F. 83-88). Thus, if the proffered instruction had been submitted, the jury could have been misled to believe that the "duty to retreat" instruction did not apply to "deadly force" (which is treated differently). Thus, the trial court did not err in concluding that the proffered separate instruction could have been confusing or misleading to the jury.[7]

C. Mr. Clay waived his claim that the trial court should have *sua sponte* modified the jointly drafted self-defense instruction

Mr. Clay asserts additionally that, if submitting a separate instruction was not the correct course, the trial court should have modified the applicable self-defense instruction *sua sponte*. But, as discussed above in Point I, the defense and the State jointly proffered Instruction No. 14 to the trial court; thus, Mr. Clay cannot assert that the trial court plainly erred in failing to *sua*

[7] Mr. Clay discusses a 2016 amendment to § 563.031 and argues that it logically supports his argument (App.Sub.Br. 39-41). However, because Mr. Clay shot Mr. White in 2013, the subsequent amendment to § 563.031 is irrelevant to any issue in this case. *See State v. James*, 267 S.W.3d 832, 840-841 (Mo.App. S.D. 2008) (substantive changes to § 563.031 apply only to conduct committed after the effective date of the statute).

sponte modify Instruction No. 14. *See State v. Bolden*, 371 S.W.3d 802, 806 (Mo. 2012) ("the proffering of an incorrect instruction to the trial court is an invited error by the party who proffered the instruction"); *State v. Plunkett*, 473 S.W.3d at 173-174. As the Court of Appeals stated in *Plunkett*, "[defendant] waived any claim of error in this regard when [he] affirmatively approved the State's proffered self-defense instruction without objecting that it failed to instruct on Wife's lack of a duty to retreat." *Id.*

Citing *State v. Edwards*, 60 S.W.3d 602, 612 (Mo.App. W.D. 2001), Mr. Clay points out that "[w]here the law has been materially altered by statute following the promulgation of the MAI-CR instruction, the trial court may no longer rely upon the MAI instruction as an accurate statement of the law, and the trial court must modify the MAI instruction to comply with the change in law." However, this general principle does not exempt Mr. Clay's case from this Court's holding in *Bolden*.

In *Bolden*, the defendant argued that the self-defense instruction submitted in her case was based on the most current version of the applicable MAI when, in light of when she committed her offense, the instruction should have been based on the *prior* version of the applicable MAI. 371 S.W.3d at 804-805. In other words, she asserted that the trial court plainly erred in giving an MAI that was not based on the substantive law in effect at the time she committed her offense. *Id.* This Court rejected the defendant's claim,

however, because the erroneous instruction had been "jointly proffered" by the parties. *Id*. at 805. The Court held that the defendant could not complain about an instruction given at her request. *Id*. at 806. The same is true here.

D. The trial court did not plainly err

In any event, there was also no manifest injustice from the trial court's failing to modify the instruction *sua sponte*. Contrary to Mr. Clay's argument on appeal, the mere fact that "duty to retreat" language was not included in the instruction did not tell the jury that "it was illegal for Clay to be outside on the morning of March 4" (App.Sub.Br. 47). Moreover, the prosecutor did not argue that Mr. Clay "illegally" left his home that morning. By asking whether the victim would have been alive if Mr. Clay had stayed inside, the prosecutor was merely pointing out that the shooting could have been avoided. The prosecutor did not thereby argue that Mr. Clay had a "duty to retreat," or that Mr. Clay left his house illegally. Rather, the prosecutor merely pointed out that Mr. Clay continued the conflict that ended with Mr. White's death by going outside with his gun.

Additionally, in arguing that Mr. Clay was the initial aggressor when he went outside, the prosecutor was merely arguing a reasonable inference from the evidence. The fact that a person has no duty to retreat does not mean that the person cannot be the initial aggressor. The question of whether a person must retreat when confronted with violence is separate

from the question of whether the person was the first to use violence. *See generally State v. Whipple*, 501 S.W.3d 507, 516-517 (Mo.App. E.D. 2016) (holding that the fact that a person does not have a duty to retreat does not entitle the person to use self-defense).

In short, the State did not argue that Mr. Clay had a duty to retreat, or that Mr. Clay illegally went outside. Rather, the State argued merely that Mr. Clay was the aggressor when he went outside with a gun, after the other men had already left the house. Mr. Clay has not otherwise articulated how the absence of a "no duty to retreat" modification resulted in manifest injustice; thus, even putting aside the waiver of this alleged error, it cannot be said that the trial court plainly erred. This point should be denied.

III.

The trial court did not plainly err in admitting evidence about marijuana use on the night of the murder and in admitting evidence of brass knuckles found in the gun case next to the gun. (Responds to Points III and IV of the appellant's brief.)

In his third and fourth points, Mr. Clay asserts that the trial court erred in admitting evidence of uncharged marijuana-related crimes and evidence of his possessing brass knuckles (App.Sub.Br. 48-49, 53-54). He asserts that the evidence of uncharged crimes portrayed him as a "drug user" and a "lawbreaker," and that the evidence was irrelevant and unduly prejudicial (App.Sub.Br. 48-49, 53-54).

A. The standard of review

Mr. Clay concedes that he "did not object to the State's voluminous evidence regarding marijuana, so review is for plain error" (App.Sub.Br. 49). He also concedes that while he lodged an objection (relevance) to the brass knuckles evidence, he "did not include such objections in his Motion for New Trial, so review is for plain error" (App.Sub.Br. 54).

" 'The plain error rule is to be used sparingly and may not be used to justify a review of every point that has not been otherwise preserved for appellate review.' " *State v. Jones*, 427 S.W.3d 191, 195 (Mo. 2014). "This Court will exercise its discretion to conduct plain error review only when the

appellant's request for plain error review establishes facially substantial grounds for believing that the trial court's error was 'evident, obvious, and clear' and 'that manifest injustice or miscarriage of justice has resulted.' " *Id*. "Unless the appellant makes this facial showing, this Court will decline to review for plain error." *Id*. at 195-196.

B. The trial court did not plainly err

As a general rule, "[a] criminal defendant has the right to be tried only for the crime with which he is charged." *State v. Burnfin*, 771 S.W.2d 908, 910 (Mo.App. W.D. 1989). "Admission of evidence of unrelated crimes is prejudicial because it may result in a conviction founded upon crimes of which the defendant was not accused." *Id*. "There are situations in which evidence of other crimes may be admitted in support of such issues as motive, intent, the absence of mistake or accident, common scheme or plan or the identity of the person charged." *Id*. "The test for admission of evidence of other crimes is whether the evidence logically tends to prove a material fact in issue." *Id*.

1. The marijuana-related evidence (Point III)

Mr. Clay faults the trial court for failing to *sua sponte* exclude evidence related to marijuana use at Mr. Clay's house on the night of the murder (App.Br. 39). He asserts that the State presented "voluminous evidence" of marijuana-related crimes (App.Br. 40).

The trial court should not be faulted, however, for failing to exclude evidence where the defense also eliciting similar evidence. *See generally State v. D.W.N.*, 290 S.W.3d 814, 825 (Mo.App. W.D. 2009) ("A trial court does not plainly err when it fails to *sua sponte* prohibit the introduction of objectionable evidence when the totality of the surrounding circumstances reflect a clear indication that trial counsel strategically chose not to object to the evidence."). Here, the record shows that marijuana was often referenced and never objected to by defense counsel.

Moreover, the record shows that defense counsel spent time inquiring about marijuana use, apparently attempting to establish that Mr. McGhee and Mr. White were smoking it (*see* Tr. 403-404). Defense counsel also asked about an alleged delivery of "illegal drugs" to the home, and he asked whether Mr. Clay had told the police that Mr. McGhee "brought some weed" to the house that night (Tr. 534, 563). A defense witness, Mr. Becklean, testified on direct examination, that Mr. McGhee had some marijuana, and that he never saw Mr. Clay smoking marijuana or possessing paraphernalia (Tr. 648-649). In short, the record shows that both sides were interested in presenting evidence of marijuana use (for different reasons); thus, the trial court cannot be faulted for failing to exclude the evidence *sua sponte*. *Cf. State v. Burnfin*, 771 S.W.2d at 911 (defense counsel objected to the evidence of marijuana use).

In addition, the evidence of marijuana use in this case was admissible for at least two other purposes. First, inasmuch as Mr. Clay, Mr. McGhee, and Mr. Becklean were all said to have used marijuana (Tr. 320-321), that evidence was relevant on the issue of their credibility as witnesses in the case (Tr. 320-321). All three men testified in this case, and among the most common means of impeaching a witness's credibility is "admission of evidence showing the witness's incapacity or problems in his or her ability to perceive or memory." *See State v. Davis*, 474 S.W.3d 179, 190 (Mo.App. E.D. 2015).

"Any possible impairment of a witness's ability to recall is relevant to his or her credibility." *State v. Oplinger*, 193 S.W.3d 766, 770 (Mo.App. S.D. 2006). " 'A witness' abnormality is a standard ground for impeachment and one form of abnormality is that which exists when one is under the influence of drugs or drink. If a witness is "under the influence" at the time of the occurrence or at the time he testifies, this condition is provable, on cross or by extrinsic evidence, to impeach.' " *Id.* at 770-771.; *see also State v. Phillips*, 939 S.W.2d 502, 504-505 (Mo.App. W.D. 1997) (holding that the trial court did not err in permitting the State to cross-examine the defendant about whether he was using methamphetamine when he committed the acts constituting the alleged offenses; whether defendant was under the influence of drugs was relevant in evaluating the accuracy and reasonableness of his perceptions); *State v. Selvy*, 921 S.W.2d 114, 116 (Mo.App. S.D. 1996) (the trial court did

not err in permitting defendant to be cross-examined about whether he was high on cocaine when the crime occurred). *Cf. State v. Burnfin*, 771 S.W.2d at 910-911 (defendant did not testify and his marijuana use was apparently admitted solely to show that he was using "dope").

In addition, whether Mr. Clay and the others, including Mr. White, were using alcohol and marijuana was relevant to provide a complete and coherent picture of the events. "Evidence of uncharged crimes that are part of the circumstances or sequence of events surrounding the offense is admissible." *State v. Myers*, 997 S.W.2d 26, 35 (Mo.App. S.D. 1999). "If the evidence helps to present a complete and lucid picture of the crime charged, it is not required that the evidence be sorted and separated so as to exclude the testimony tending to prove the crime for which a defendant is not on trial." *Id*. Thus, for instance, in *Myers*, "evidence that defendant was under the influence of an illegal drug when he randomly shot at vehicles from an overpass was a part of the circumstances of the offenses that was logically and legally relevant to prove defendant's guilt." *Id*.

Here, similarly, the evidence helped to provide a complete and coherent picture. The evidence showed that the men involved in the offenses were on friendly terms; thus, information that provided relevant background and tended to explain how or why things became violent was relevant to the jury's determination of guilt. Point III should be denied.

2. The brass knuckles (Point IV)

Mr. Clay's gun was found on a kitchen counter (Tr. 262, 428). The gun was loaded with eleven rounds of ammunition, and one round was in the chamber (Tr. 440-441). There was also a gun case on the counter containing more ammunition and a pair of brass knuckles (Tr. 444-445). Aside from a crime scene technician mentioning that he found the brass knuckles in the gun case, there was no further mention of them.

At trial, Mr. Clay objected to the relevance of the brass knuckles, and the court ruled that given the proximity of the brass knuckles to the gun, the evidence would be admitted (Tr. 438). The trial court did not plainly err.

First, the brass knuckles had some relevance as they tended to prove that Mr. Clay's intent in getting his gun was to cause serious physical injury or death to the victim. Mr. Clay had been involved in a fistfight, but instead of grabbing his brass knuckles to continue that fight, he escalated the violence and grabbed his gun, which was apparently located in the same case with the brass knuckles. In short, he had a choice of weapons, and he decided to escalate the violence to the use of deadly force when he had other options. Evidence of the brass knuckles was, thus, relevant to the issues in the case, and it cannot be said that the trial court plainly erred.

Respondent acknowledges that evidence of weapons unconnected to the charged offense has been deemed irrelevant in various cases. *See*, *e.g.*, *State*

v. Holbert, 416 S.W.2d 129 (Mo. 1967), *State v. Krebs*, 106 S.W.2d 428 (Mo. 1937), and *State v. Perry*, 689 S.W.2d 123 (Mo.App. W.D. 1985). But while the evidence in these cases lacked sufficient probative value (and, thus, resulted in reversal), these cases confirm, or at least acknowledge, that evidence of other weapons can be admissible if the weapons tend to prove a legitimate issue in the case. *See Holbert*, 416 S.W.2d at 132 ("If it is logically pertinent in that it reasonably tends to prove a material fact in issue, it is not to be rejected merely because it incidentally proves the defendant guilty of another crime."); *Krebs*, 106 S.W.2d at 60-61 (" 'The general rule does not apply where the evidence of another crime tends directly to prove guilt of the crime charged. Evidence which is relevant is not rendered inadmissible because it tends to prove him guilty of some other crime.' "); *State v. Perry*, 689 S.W.2d 123 (Mo.App. W.D. 1985) (acknowledging a Supreme Court case that indicated "that '[a]rticles showing motive, or malice, or intent, or knowledge or preparation, may be received in evidence *if shown to be connected with the crime or the accused*' ").

Here, the brass knuckles were in close proximity to the gun, and they were relevant as stated above. "A weapon found at or near the scene of a crime is usually held admissible if it 'throws any relevant light upon any material matter in issue.' " *State v. Roller*, 31 S.W.3d 152, 159 (Mo.App. S.D. 2000) (quoting *State v. LaRette*, 648 S.W.2d 96, 103-104 (Mo. 1983)).

"Generally, it may be said that any legally competent evidence which, when taken alone or in connection with other evidence, affords reasonable inferences upon the matter in issue, tends to prove or disprove a material or controlling issue or to defeat the rights asserted by one or the other of the parties, and sheds any light upon or touches the issues in such a way as to enable the jury to draw a logical inference with respect to the principal fact in issue is relevant and admissible." *Id.*

In short, here, because the brass knuckles were apparently in the gun case with the gun that Mr. Clay used to escalate the violence of the situation, the brass knuckles were relevant to show his intent and to cast doubt on his claim of lawful self-defense. Moreover, even if evidence of the brass knuckles should not have been admitted, Mr. Clay did not suffer manifest injustice from the brief reference to them. The brass knuckles were not mentioned in closing argument or otherwise highlighted in any way. In fact, even defense counsel acknowledged that the evidence was not unduly prejudicial, as he stated on the record in lodging his objection, "It doesn't hurt me but I don't understand the relevance of it" (Tr. 438). Point IV should be denied.

IV.

The trial court did not plainly err or commit reversible error in controlling closing argument insofar as it related to the lack of a duty to retreat. (Responds to Point V of the appellant's brief.)

In his fifth point, Mr. Clay asserts that the trial court erred in sustaining the State's objection to defense counsel's "arguing that Clay had no duty to retreat" and in permitting the State "to argue that Clay had a duty to retreat" (App.Sub.Br. 58). He asserts that his "intended argument was in accord with Section 563.031.3," and that "the State's misstatement of the law told the jury that it was *per se* illegal for Clay to be outside of his home which automatically made Clay the 'initial aggressor' and required the jury to convict Clay as a matter of law" (App.Sub.Br. 58).

A. Preservation and the standard of review

During the instructions conference, after the trial court refused Mr. Clay's proffered instruction about "no duty to retreat," the prosecutor requested that defense counsel "be prevented from informing the jury that there is no duty to retreat from private property in the State of Missouri" (Tr. 825). The trial court agreed and stated, "Argue just the MAI instructions" (Tr. 825). Defense counsel stated that it was "not [his] intent to use that language at all," and he started to say what his argument "would be" (Tr. 825). He then changed his mind and stated that he was "not going to" outline what he

intended to argue (Tr. 825). The trial court invited defense counsel to outline his argument, stating, "Well, any argument you want to make on the record, go right ahead" (Tr. 825). Defense counsel declined the court's invitation and stated that he would "stand by [his] previous arguments" (Tr. 825).

In light of this record, it is not apparent exactly what argument defense counsel intended to make to the jury. Defense counsel expressly stated that he was not going to argue the language in his proffered instruction, and he declined to give the trial court an idea of what he wanted to argue in relation to the facts of the case (Tr. 825). Accordingly, defense counsel failed to give the trial court a basis for changing its ruling in light of the argument that counsel proposed to make. *Cf. State v. Dickson*, 596 S.W.2d 482, 484 (Mo.App. E.D. 1980) (upon objection to closing argument, defense counsel made an "offer of proof" about the argument he intended to make to the jury). As a consequence, this Court should not convict the trial court of erroneously limiting defense counsel's argument where defense counsel refused to state what he intended to argue.

Mr. Clay also asserts that the State was permitted to argue that Mr. Clay had a duty to retreat (App.Sub.Br. 61). He cites to arguments on pages 870 and 874, where the prosecutor argued (without objection) that Mr. Clay was the "initial aggressor," that "[h]e was the initial aggressor as soon as he stepped outside of his residence onto the path," and that Mr. Clay "could have

prevented all of this" (App.Sub.Br. 61). However, because there was no objection to these arguments, Mr. Clay's claim on appeal was not preserved.

"An error committed during closing argument will only result in a reversal when it amounts to prejudicial error." *State v. Walter*, 479 S.W.3d 118, 124 (Mo. 2016). " 'A conviction will be reversed based on plain error in closing argument only when it is established that the argument had a decisive effect on the outcome of the trial and amounts to manifest injustice.' " *Id.* " 'The defendant's failure to object to an improper argument is often strategic, and uninvited intervention may emphasize the matter in a way the defendant chose not to.' " *Id.* "In reviewing closing arguments, this Court examines the context of the argument made in light of the entire record." *Id.*

B. The trial court did not plainly err or commit reversible error

First, the prosecutor's arguments about Mr. Clay being the initial aggressor were not erroneous. In arguing that Mr. Clay was the "initial aggressor as soon as he stepped outside of his residence," the prosecutor did not assert or imply that Mr. Clay had a duty to retreat. In context, the prosecutor argued as follows:

> Ladies and gentlemen, in this case Larry Clay was the initial aggressor. He was the initial aggressor as soon as he stepped outside of his residence onto the path. He is the initial

aggressor when he went out there with the gun.

(Tr. 870). As is evident, the prosecutor's argument was based on the fact that Mr. Clay went outside armed with a gun, *i.e.*, that he continued the fight he had begun (according to the State's evidence) by escalating the violence to the use—or, initially, threatened use—of deadly force. This was a reasonable inference from the evidence, and the fact that Mr. Clay did not legally have a duty to retreat did not prevent him from being the initial aggressor when it came to the use of force. Whether a person has a duty to retreat from violence is separate from the issue of whether a person was the first to use violence.

The prosecutor's other allegedly improper argument was made as follows:

> [In the context of asking the jury to watch the surveillance video:] You're going to see that he came out of that residence after they had left. You are going to see that he could have locked the door. You're going to see that he had the opportunity to call 911 if he would have stayed in that residence. You're going to see that he could have prevented all of this. But he didn't.

(Tr. 874). This argument, too, was merely an argument based on the evidence presented, and the prosecutor was merely arguing that there was no need for Mr. Clay to escalate the violence and run outside with his gun. Again, the prosecutor did not argue that Mr. Clay had a legal duty to retreat, or that Mr.

Clay illegally went outside; rather, the prosecutor merely pointed out that Mr. Clay did not have to use deadly force that night.

Mr. Clay is correct that § 563.031.3 states that a person does not have a duty to retreat from his own property. Consistent with that general principle, defense counsel argued in closing that Mr. Clay told the police that he was "jumped" in his own basement (Tr. 892). Counsel argued that Mr. Clay told the men to get out of his house (Tr. 892). Counsel argued:

> Why does he grab his gun? Because he got beat up by two guys in his basement and he wanted them out of his house. He asked them to leave repeatedly and they won't. It's his house and he wants them out.

(Tr. 892). Counsel then argued that he could not judge Mr. Clay for going outside to protect his property because "[i]t was his stuff" (Tr. 892). Counsel repeatedly argued that Mr. Clay was attacked "in his house," and counsel asserted that Mr. Clay was not guilty under the law (*see* Tr. 903-904).

It is true that the trial court ruled that defense counsel should not specifically argue about the lack of a duty to retreat. But as discussed above in Point II, the trial court correctly refused Mr. Clay's separate instruction about "no duty to retreat," and Mr. Clay did not request a modification of the self-defense instruction that he jointly submitted with the State. It was, therefore, appropriate for the court to advise the parties to argue the law as

set forth in the instructions.

Moreover, even if it was incorrect for the trial court to prohibit defense counsel from arguing that a person does not have a duty to retreat from his own property, the trial court's ruling was not plain error that resulted in a manifest injustice. No one argued that Mr. Clay had a duty to retreat. As outlined above, the prosecutor was not permitted to argue that Mr. Clay was automatically the initial aggressor, or that Mr. Clay had a duty to retreat; and defense counsel was able to argue that Mr. Clay was lawfully protecting his property—both in the basement and in the driveway (at his own home)—during the encounter. Thus, Mr. Clay has not shown plain error resulting in manifest injustice from the trial court's alleged errors in controlling closing argument. This point should be denied.

V.

The trial court did not plainly err in failing to submit *sua sponte* an instruction for the included offense of voluntary manslaughter. (Responds to Point VI of the appellant's brief.)

In his sixth point, Mr. Clay asserts that the trial court plainly erred in failing to submit, *sua sponte*, "the required instruction regarding the nested lesser included offense of voluntary manslaughter" (App.Sub.Br. 63-64). He points out that "no record [was] made as to why this nested lesser included offense was removed[,]" and he asserts that "the jury's verdict would have been different if the jury had been instructed properly regarding this nested lesser included offense, and as a matter of law, failing to give a nested lesser included offense when an MAI is on point results in fundamental unfairness, a manifest injustice, and a miscarriage of justice requiring at least a new trial" (App.Sub.Br. 63).

A. The standard of review

" 'Plain error review is discretionary.' " *State v. Eoff*, 193 S.W.3d 366, 374 (Mo.App. S.D. 2006). "A request for plain error review requires this Court to go through a two-step analysis." *Id*. " 'First, [the Court] determine[s] whether the asserted claim of plain error facially establishes substantial grounds for believing a manifest injustice or miscarriage of justice has occurred.' " *Id*.

"Only if facially substantial grounds are found to exist [does the Court] then move to the second step of this analysis and determine whether a manifest injustice or miscarriage of justice has actually occurred." *Id*. "To find plain error in the context of jury instruction, the trial court 'must have so misdirected or failed to instruct the jury as to cause manifest injustice or miscarriage of justice.' " *Id*. (quoting *State v. Black*, 50 S.W.3d 778, 788 (Mo. 2001)). " 'Absent a finding of facial plain error, this Court should decline its discretion to review the claim.' " *Id*.

B. The trial court did not plainly err in failing to submit an instruction for the included offense of voluntary manslaughter

"A trial court must instruct a jury as to lesser-included offenses when *each* of the following requirements is met: a. *a party timely requests the instruction*; b. there is a basis in the evidence for acquitting the defendant of the charged offense; and c. there is a basis in the evidence for convicting the defendant of the lesser included offense *for which the instruction is requested*." *State v. Leonard*, 490 S.W.3d 730, 743 (Mo.App. W.D. 2016) (citing *State v. Jackson*, 433 S.W.3d 390, 396 (Mo. 2014)).

" '[I]nstructions on . . . lesser-included offense[s] [are] not required to be given if not requested . . . ." *Id*. (quoting *State v. Ise*, 460 S.W.3d 448, 463 (Mo.App. W.D. 2015)). " '[A] request for the instruction is a prerequisite for imposing the requirement on a court.' " *Id*. " 'If a defendant does not

specifically request a lesser included offense instruction, the defendant may not complain about the trial court's failure to give the instruction.' " *Id.* (quoting *State v. Fowler*, 938 S.W.2d 894, 898 (Mo. 1997)).

" 'Part of the rationale for this rule is that failing to request a lesser-included offense instruction is often trial strategy; the jury may convict the defendant of the lesser offense if it is submitted, but the jury may not convict the defendant of any crime if the lesser offense is not submitted.' " *Id.* (quoting *State v. Williams*, 145 S.W.3d 874, 878 (Mo.App. E.D. 2004)). " 'A defendant is permitted to adopt a trial strategy and to attempt to persuade the jury of it.' " *Id.* (quoting *State v. Dexter*, 954 S.W.2d 332, 344 (Mo. 1997)). " 'When the failure to request a lesser-included instruction is a matter of strategy, the court should not second guess the [defense].' " *Id.* " 'Rather, the defendant may determine whether he will give the jury an "all or nothing" choice, or request submission of lesser-included offense instructions.' " *Id.* " 'Once having made the determination, the defendant may be held to accept the consequences of that decision.' " *Id.*

Here, Mr. Clay concedes that he "did not offer an instruction on voluntary manslaughter and, in fact, [his] attorney may have asked for 'voluntary manslaughter' to be removed from the instructions" (App.Sub.Br. 66). As such, the trial court cannot be convicted of committing plain error. To the contrary, the record shows that no request was made by the defense for

the instruction (*see* Tr. 799-800), and Mr. Clay implicitly acknowledges that counsel may have had a strategic reason for affirmatively removing such an instruction from the jury's consideration (*see* App.Sub.Br. 66, 68; *see also* Tr. 799-800; L.F. 162). As the record shows, when the trial court stated that a reference to voluntary manslaughter had been removed from the verdict director for murder in the second degree, defense counsel stated, "Okay, right. Thank you" (Tr. 800).

In addition, the record shows that defense counsel argued for an acquittal on all charges based on Mr. Clay's claim of lawful self-defense (*see* Tr. 884, 897-898, 903-904). Thus, while arguing self-defense would not *preclude* submitting an included offense, there are indications in the record that Mr. Clay pursued an all-or-nothing defense based on his claim of self-defense. The trial court should not be convicted of plain error, where there was no request for the instruction and the court's uninvited action could have interfered with Mr. Clay's strategy. *See State v. Leonard*, 490 S.W.3d at 744; *see also State v. Mayes*, 63 S.W.3d 615, 636 (Mo. 2001) (an included-offense instruction is not required to be given unless the defendant requests it); *State v. Black*, 50 S.W.3d 778, 788 (Mo. 2001) (the defendant must specifically request an included-offense instruction); *State v. Ise*, 460 S.W.3d 448, 463 (Mo.App. W.D. 2015) (declining to review for plain error the defendant's claim that the trial court failed to submit included-offense instruction *sua sponte*);

State v. Rowe, 363 S.W.3d 114, 120 (Mo.App. S.D. 2012) (the trial court is not obligated to give included-offense instructions *sua sponte*).

Relying on *State v. Jackson*, Mr. Clay argues, "Because this Court has held that submitting 'nested' lesser included offenses should be 'nearly universal' due to the fact that the jury is always free to disbelieve part or all of the state's evidence, . . . this Court should hold that ***even assuming Clay's attorney asked for removal of the voluntary manslaughter portion of MAI 314.04*** this Court should conduct a *de novo* review of this error" (App.Sub.Br. 67-68). He asserts that "voluntary manslaughter is a 'nested' lesser included offense [or murder in the second degree] and it is—as a matter of law—a manifest injustice to fail to give nested lesser included offense instructions" (App.Sub.Br. 72).

He further asserts that the Court in *Jackson* (in footnote 7) "suggested that nested lesser included instructional error is important enough to overrule the typical rule that a defendant cannot invite his own error" (App.Sub.Br. 72). He points out that, in *Jackson*, the Court noted (citing *McNeal v. State*, 412 S.W.3d 886, 889-890 (Mo. 2013)) that counsel can be ineffective for failing to request an included offense instruction (App.Sub.Br. 72). He then observes that "there was no record made as to why defense counsel requested this change [in Mr. Clay's case] and, without that record, the matter is simply too important for this Court to fail to review"

(App.Sub.Br. 73). He asserts, "The message from this Court is clear from the previous cases: Give nested lesser included offense instructions, or have a great explanation on the record for failing to give such instructions, or reversal is required" (App.Sub.Br. 73). But there are at least two significant problems with Mr. Clay's arguments.

First, voluntary manslaughter—which requires proof of "sudden passion arising from adequate cause"—is not a "nested" included offense of murder in the second degree. *See State v. Payne*, 488 S.W.3d 161, 164 (Mo.App. E.D. 2016); *see also State v. Davis*, 474 S.W.3d 179, 187 (Mo.App. E.D. 2015) (stating that an assault in the second degree based on "sudden passion" is not "nested" within an assault in the first degree that is committed without sudden passion).

Mr. Clay asserts that *Payne* was wrongly decided because it "conflat[ed] the '***burden of injection***' of an element and the "***burden of proof***' of an element" (App.Sub.Br. 64). He points out that when murder in the second degree and voluntary manslaughter are both submitted to the jury, the jury is instructed in the verdict director for murder in the second degree that it must find that "the defendant did not [cause the victim's death] under the influence of sudden passion arising from adequate cause" (App.Sub.Br. 65). He argues that this required finding is an "element" of the offense of murder in the second degree, and that the elements of voluntary manslaughter are a

smaller subset included within murder in the second degree.

But Mr. Clay is incorrect. While the numbered paragraphs of the verdict director often contain elements of the offense, they are not used exclusively to submit elements. For instance, numbered paragraphs are often used to submit the special negative defense of self-defense; and, while the State bears the burden of proof on a special negative defense, such a defense is not actually an "element" of the offense.

In cases where the offenses of murder in the second degree and voluntary manslaughter are both submitted, the negative finding that the jury must make to find the defendant guilty of murder in the second degree—the absence of sudden passion—is treated like a special negative defense. It is included in the verdict director for murder in the second degree not because it is an element of murder in the second degree, but because, under the law, the State bears the burden of disproving issues that the defendant has "the burden of injecting." *See* § 556.051(2), RSMo 2000 (providing that, when the defendant has the burden of injecting an issue, "If the issue is submitted to the trier of fact any reasonable doubt on the issue requires a finding for the defendant on that issue.").

In other words, although "sudden passion arising from adequate cause" is an element of voluntary manslaughter under § 565.023, it is submitted as a negative proposition in the verdict director for murder in the second degree in

order to ensure that the State carries its burden of proof. Of course, the negative proposition must only be submitted in conjunction with a voluntary manslaughter instruction if there is actually evidence of sudden passion arising from adequate cause. *See* § 556.051(1), RSMo 2000 ("The issue referred to is not submitted to the trier of fact unless supported by evidence[.]"). Thus, the offense of voluntary manslaughter is not "nested" within the offense of murder in the second degree because it requires proof of facts that are not included within murder in the second degree. *See Payne*, 488 S.W.3d at 164 ("Because voluntary manslaughter includes an additional element not present in first- or second-degree murder, specifically the presence of sudden passion arising from adequate cause, it is possible to commit either of the two greater offenses without committing voluntary manslaughter."). *But see Graven v. State*, 343 S.W.3d 762, 765 (Mo.App. S.D. 2011) (identifying "sudden passion" as a "special negative defense" to murder in the second degree, and identifying it as an "element" of murder in the second degree; but also noting, *arguendo*, that the defendant's claim was without merit even if "sudden passion" were an element of voluntary manslaughter).

Second, even if voluntary manslaughter were a "nested" included offense, there is nothing in *Jackson* suggesting that a trial court is obligated to submit an included offense instruction without a request by defense

counsel. To the contrary, while the Court noted in *Jackson* (in footnote 7) that defense counsel can be ineffective for failing to request an included offense instruction, the Court expressly stated that a trial court is *not* obligated to instruct on an included offense unless it is requested by the defendant. 433 S.W.3d at 396.

Moreover, the absence of any record explaining why defense counsel chose to forgo a voluntary manslaughter instruction in Mr. Clay's case does not compel this Court to reverse Mr. Clay's convictions. Rather, the lack of a record *precludes* definitive review of counsel's reasoning; and until Mr. Clay alleges and proves that trial counsel was, in fact, ineffective (in a motion pursuant to Rule 29.15), it should be presumed that counsel's decision was a matter of trial strategy that the trial court was not expected to second-guess.

In short, because Mr. Clay did not request an instruction for the included offense of voluntary manslaughter, and because defense counsel apparently did not want the instruction (consistent with an all-or-nothing defense predicated on Mr. Clay's claim of self-defense), it cannot be said that the trial court plainly erred in failing to submit a voluntary manslaughter instruction *sua sponte*. This point should be denied.

CONCLUSION

The Court should affirm Mr. Clay's convictions and sentences.

Respectfully submitted,

CHRIS KOSTER
Attorney General

/s/ Shaun J Mackelprang

SHAUN J MACKELPRANG
Assistant Attorney General
Missouri Bar No. 49627

P.O. Box 899
Jefferson City, MO 65102
Tel.: (573) 751-3321
Fax: (573) 751-5391
shaun.mackelprang@ago.mo.gov

Attorneys for Respondent

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with Rule 84.06(b) and contains 15,097 words, excluding the cover, the table of contents, the table of authorities, this certification, and the signature block, as counted by Microsoft Word.

JOSHUA D. HAWLEY
Attorney General

/s/ Shaun J Mackelprang

SHAUN J MACKELPRANG
Assistant Attorney General
Missouri Bar No. 49627

P.O. Box 899
Jefferson City, MO 65102
Tel.: (573) 751-3321
Fax: (573) 751-5391
shaun.mackelprang@ago.mo.gov

Attorneys for Respondent