IN THE SUPREME COURT OF MISSOURI

SC 96016

STATE OF MISSOURI,
PLAINTIFF and RESPONDENT

v.

LARRY CLAY,
DEFENDANT and APPELLANT

On Appeal
From The Circuit Court of Jackson County, Missouri
16th Judicial Circuit
Honorable Kathleen A. Forsyth
Case No. 1316-CR00641-01

APPELLANT'S SUBSTITUTE REPLY BRIEF

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Respondent's Statement of Facts ignores Appellant Larry Clay's ("Clay") acquittals on counts 3 and 4, related to the dispute in the basement. L.F., pp. 123-24. The State spends several pages describing events in the basement in a manner which asserts that Clay was responsible for the dispute in the basement. *E.g.*, Sub. Resp.'s Br., p. 7 ("After a while, Mr. Clay started a 'verbal altercation' with Mr. White (Tr. 323))." This directly undercuts the State's later argument that – when viewing the dispute as a whole – Clay is the initial (and only) aggressor. *E.g.*, *id*. at 29-30. If the State is going to assert that it was one continuous struggle that began in the basement and ended when Joel White ("White") was shot, *see e.g.*, *id*., this only further serves to support Clay's argument: The jury acquitted Clay of any wrong-doing during the "start" of the struggle in the basement. L.F., pp. 123-24.

I. The State's Brief incorrectly argues that (A) the withdrawal language is "optional"; (B) Clay waived review of Instruction 14; (C) Clay could not argue withdrawal because it was inconsistent with his theory of defense; (D) Clay suffered no prejudice; and (E) there was no substantial evidence of withdrawal (Opening Brief, Point I).

The State acknowledges that the evidence relating to whether the withdrawal instruction must be given *must* be viewed in the light most favorable to Clay. *E.g.*, Sub. Resp.'s Br., p. 23. Even without viewing the evidence in this way, the error was clear, the prejudice was clear, and Clay requires a new trial for counts 1 and 2, via a properly-instructed jury, regarding self-defense; initial aggressor; and withdrawal.

A. The withdrawal language was not "optional" in this case.

The State paints the removal of the withdrawal language from Missouri Approved Instruction 306.06A in Instruction 14 as some minor transgression by referring to it as "optional." *E.g.*, Sub. Resp.'s Br., p. 17. It is *not* optional: "The paragraph in parentheses in the material in [1] of part A ***will*** be used if there is further evidence that the defendant withdrew from the encounter." 306.06A, Notes on Use, ¶4(a) (Appx., pp. A01; A12) (emphasis added).

B. Clay did not waive review of Instruction 14.

The State's mantra for all instructional error in this case continues to be that Clay "jointly drafted and submitted the self-defense instruction to the trial court." *E.g.*, Sub. Resp. Br., p. 17. This is not true. The State's Brief even acknowledges that only "*[i]nitially*" it appeared that there would be some "joint drafting," but ultimately the State submitted Jury Instruction 14 and Clay's Instruction 14 was rejected. *Id*. at 18, 20. The Transcript even makes it clear that Clay's trial counsel was in the courtroom while Instruction 14 was being drafted by the State. Tr., pp. 824-26. Clay's Substitute Opening Brief expands upon the facts in the record which support the assertion that Clay did not "jointly draft" Instruction 14 and such is incorporated here by referend. *E.g.*, Sub. App.'s Br., pp. 26-30. Plus, the State unequivocally submitted Instruction 14 because the State literally typed "***Submitted by Plaintiff***" on the "dirty" copy of Instruction 14 submitted and accepted by the trial court. L.F., pp. 83-85 (emphasis added). Thus, review is for plain error.

The State relies on *State v. Bolden*, 371 S.W.3d 802, 806 (Mo. banc 2012), for the proposition that "the proffering of an incorrect instruction to the trial court is an invited error by the party who proffered the instruction." *Bolden* applies ***only*** when the incorrect instruction was actually given to the jury. *Id*. at 805. *Bolden* does ***not*** apply when the incorrect instruction is ***not*** given to the jury. *State v. Celis-Garcia*, 344 S.W.3d 150, 154 n.3 (Mo. banc 2011) (citing *State v. Derenzy*, 89 S.W.3d 472, 475 (Mo. banc 2002); *State v. Wurtzberger*, 40 S.W.3d 893, 897-98 (Mo. banc 2001)). Clay did ***not*** submit Instruction 14, the State did. *E.g.*, L.F., p. 85 ("Submitted by Plaintiff").

The State asserts three reasons why plain error review of Instruction 14 was "waived" by Clay; all three reasons have been rejected in recent case law from this Court. The State asserts that plain error review was waived because (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) Clay did not submit a correct instruction. Sub. Resp.'s Br., pp. 17-22. Each argument has been considered by this Court and rejected, as summarized in *Celis-Garcia*:

> The state argues that [the defendant] waived her right to plain error review by failing to object to the state's verdict directors and by submitting her own verdict directors that suffered from the same defect she now challenges ... Contrary to the state's argument, ***this Court previously has determined that a defendant does not waive plain error review by failing to object to a faulty jury instruction or by failing to submit a correct instruction***. []*Derenzy*, 89 S.W.3d [at] 475[] (submission of an incorrect instruction did not waive plain

> error review); []*Wurtzberger*, 40 S.W.3d [at] 897-98 [](counsel's affirmative statement that he had no objection to the instruction and his failure to submit an alternative instruction did not waive plain error review).

344 S.W.3d at 154 n.3 (emphasis added). Plain error review is correct; Clay incorporates his arguments proving a manifest injustice has resulted. *E.g.*, Sub. App.'s Br., pp. 26-37.

C. Withdrawal language was required in Instruction 14 even if it was inconsistent with Clay's theory of defense.

The State argues that the the withdrawal language could not have been submitted because it was inconsistent with Clay's theory of defense. However, withdrawal was "injected" into the case, via (at minimum) the State's use of the video or the State's argument that the confrontation was one ongoing struggle that started in the basement. Once withdrawal is "injected" into the case, the instruction is ***required*** regardless of the source of the evidence and "regardless of whether the evidence supporting [the withdrawal] defense is inconsistent with the defendant's testimony or theory of the case." *State v. White*, 222 S.W.3d 297, 300 (Mo. App. W.D. 2007).

D. Clay was prejudiced by this error.

Clay was prejudiced by the failure to give the withdrawal instruction because the jury was instructed that once an individual is the "initial aggressor," he can ***never*** use self-defense to defend himself and that is a clear and unequivocal misstatement of the law, when withdrawal has been "injected." Any conflict in the evidence must be resolved by a properly-instructed jury. *State v. Zumwalt*, 973 S.W.2d 504, 507 (Mo. App. W.D. 1998).

First, prejudice can be presumed: A trial court's "[f]ailure to provide the required instruction, or give it in accordance with an accompanying Note on Use" is "presumed to prejudice the defendant unless it is clearly established by the State that the error did not result in prejudice." *State v. Westfall*, 75 S.W.3d 278, 284 (Mo. banc 2002). This is true ***even if the error is not preserved***. *White*, 222 S.W.3d at 301.

Further, the manifest injustice and miscarriage of justice here is readily ascertainable: The State repeatedly acknowledged that whether Clay was the "initial aggressor" was the "key issue" in this case. *E.g.*, Tr., p. 816; *see also* Tr., p. 873 ("Let's talk about the outside, the initial aggressor outside … the most important aspect of this case, is who was the initial aggressor outside."). By failing to properly instruct the jury regarding initial aggressor (by failing to instruct the jury regarding withdrawal), the jury decided the "key issue" in this case with a faulty instruction. This instruction – as mentioned above – prohibited Clay from ***ever*** using self-defense if the jury found that he was ***ever*** the "initial aggressor." Once the withdrawal issue was injected, the State had the burden of proving beyond a reasonable doubt, that Clay did not withdraw:

> By omitting the jury instruction on [withdrawal], the trial court completely relieved the State of its burden to prove beyond a reasonable doubt that [Clay] did not act in self-defense [because he withdrew from the encounter]. Substantial evidence of [withdrawal and] self-defense was presented at trial but the jury was given no means by which to consider it in reaching a verdict.

See White, 222 S.W.3d at 301.

The jury falsely believed that Clay could never defend himself from White, if Clay was ever determined to be the "initial aggressor." *As drafted* (by the State), Instruction 14 would have forbidden Clay from even defending himself if White had left and returned later that morning with a firearm of his own. The State cannot "clearly establish[] … that the error did not result in prejudice." *Westfall*, 75 S.W.3d at 284.

The error becomes even more apparent from additional errors in this case, such as when the State was permitted to ***incorrectly*** argue that it was illegal for Clay to exit his home (and that he automatically became the "initial aggressor" for doing so). The State was relieved of proving that Clay was the initial aggressor, because the State was permitted to tell the jury that Clay was the initial aggressor ***as a matter of law*** because he was outside. Then, the State was relieved of proving that Clay did not withdraw, because the State was permitted to tell the jury that once Clay was the initial aggressor ***as a matter of law*** he could ***never*** defend himself. Relieving the State of the duty to fully prove its case beyond a reasonable doubt is a manifest injustice. This prejudice is absolutely certain when the State is simply permitted to prove facts that have nothing to do with the charged crime (*i.e.*, Clay went outside). As such, reversal is required on Clay's convictions for murder in the second degree and the associated ACA.

E. There is clear and substantial evidence of withdrawal.

The State asserts that "no substantial evidence" exists to show that Clay withdrew. First, the State vastly overstates Clay's burden, because the issue of "withdrawal" must simply be "injected," not proved via "substantial evidence" before the withdrawal instruction must be given. *E.g.*, *State v. January*, 176 S.W.3d 187, 195 (Mo. App. W.D.

2005). Further, Clay's Opening Brief reviewed the evidence before the trial court which clearly showed the withdrawal via video evidence *submitted by the State*. *E.g.*, Sub. App.'s Br., pp. 22-24.

Viewing the tape of the dispute in the driving, counsel for Clay and counsel for the State appear to disagree on some non-material aspects of the tape. Counsel for Clay has submitted the tape to this Court (in a format which is readily-viewable in Windows Media Player, a courtesy rarely afforded to criminal defendants in discovery).[1] The major dispute seems to revolve around whether Clay was pointing his gun at White as he walked White off the property (and the related issue of whether Clay lowered the gun before disengaging from the conflict, or simply always had the gun at his side). This issue is immaterial, given the issues on which both parties agree:

[1] Counsel for Clay wonders if some of the differences may stem from the fact that the State usually produces video evidence in *multiple* different formats, several of which *cannot* be played in Windows Media Player or VLC (two common and well-regarded media players). If the State has access to a native format, playable in some other media player, it is possible that counsel for the State is viewing a clearer version of the media. In any event, should this Court ever seek more information regarding amendments to the discovery Rules for the production of video to require videos be produced in a format which can be played in a widely-available media player, counsel for Clay would be willing to address these issues.

- Both parties agree that Clay was armed with a gun and walked White off of Clay's driveway, into the street. *E.g.*, Sub. Resp.'s Br., p. 28; and
- Both parties agree that Clay then turned his back on White and walked back up the driveway with his gun at his side. *Id.*

Whether Clay lowered the gun or always had the gun at his side is irrelevant.[2] What is relevant is that Clay "abandon[ed]the struggle." *State v. Morrow*, 41 S.W.3d 56, 59 (Mo. banc 2001). Counsel for Clay can think of no more clear way to make the abandonment of a struggle known to the other party than *turning your back on that individual and walking away from him*. *See id*. Clay is not running or retreating, he is simply walking away. White's decision to come back onto the property to re-initiate the confrontation occurred after Clay indicated his intent to withdraw.

[2] For what it is worth, counsel for Clay has replayed the tape a number of times since receiving the State's Substitute Brief and it certainly looks like Clay points his weapon at White as Clay walks White off the driveway. However, counsel for Clay does admit that the footage is grainy and, in any event, lowering the gun is not a material fact. The material facts are agreed upon by the parties: Clay walked White off of his property and then turned his back on White and walked away.

II. The trial court was required to give a non-MAI instruction (or modify the MAI Instruction) in order to correctly instruct the jury regarding Clay's lack of a duty to retreat from his property *and* to prevent the State from convicting Clay based upon the mere fact that he left his house (Opening Brief, Point II).

A. Section 563.031.3 was amended, so the MAI was incorrect.

Section 563.031.3 was amended after the publication of the relevant MAI (and both before and after the trial):[3]

> Where 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***…

State v. Edwards, 60 S.W.3d 602, 612 (Mo. App. W.D. 2001) (emphasis added). The State's argument that only the MAI can be given fails. The State's remaining three arguments also fail:

B. Clay's "No Duty to Retreat" Instruction complied with the law.

Clay's Opening Brief set forth the reasons why Clay's "No Duty to Retreat" Instruction complied with the law and is incorporated herein by reference. Sub. App.'s

[3] The legislative intent of the post-trial amendment does not directly control, but does shed some light on the duty to retreat in Missouri. Especially an amendment (SB656) which appears to be a direct response to an overly narrow view of the *lack* of a duty to retreat in case law. *E.g.*, *State v. Henderson*, 311 S.W.3d 411 (Mo. App. W.D. 2010).

Br., pp. 42-47. The MAI ***cannot*** be relied upon when the law changes, *Edwards*, 60 S.W.3d at 612, and even the State admits that Section 563.031.3 was amended after the MAI was published. Further, the discussion of the "No Duty to Retreat" Instruction brought the error to the attention of the trial court and required the trial court to amend Instruction 14 to comply with the law, even if Clay did not correctly submit the Instruction as a stand-alone instruction.

C. It Was Plain Error for the trial court to fail to amend Instruction 14.

"[T]he trial court must modify the MAI instruction to comply with the change…" *Edwards*, 60 S.W.3d at 612. Clay argues that this Court must exercise plain error review, especially given that Clay's trial counsel did alert the trial court to the change of law *and* the extreme prejudice he suffered as a result of Instruction 14. The State attempts to sidestep this issue by once again asserting that plain error review is not available because Clay "jointly drafted" Instruction 14, even though Instruction 14 was submitted by the State. As discussed above, and incorporated herein by reference, Clay did ***not*** submit Instruction 14, the State did. *E.g.*, L.F., p. 85 ("Submitted by Plaintiff"). Clay does not waive plain error review for failing to object to the Instruction, failing to submit a correct instruction, or by consenting to the use of an instruction. *E.g.*, *Celis-Garcia*, 344 S.W.3d at 154 n.3 (citing *Derenzy*, 89 S.W.3d at 475; *Wurtzberger*, 40 S.W.3d at 897-98)).

D. Failing to give Clay's "No Duty to Retreat" Instruction prejudiced Clay.

Clay incorporates his discussion of prejudice regarding the improper self-defense instruction from his Substitute Opening Brief. *E.g.*, Sub. App.'s Br., pp. 42-48. It is *per se* prejudicial to fail to properly instruct regarding self-defense: "Missouri courts have

repeatedly found manifest injustice or miscarriage of justice in the failure to instruct, ***or properly instruct***, on self-defense." *White*, 222 S.W.3d at 301 (emphasis added). Further, as set forth more completely in the Opening Brief, the State used the improper instruction to assert that Clay's behavior – "illegally" leaving his home and/or not retreating back into his home – was the direct cause of White's death. Tr., pp. 778, 870, 874. Via this erroneous instruction "the trial court completely relieved the State of its burden to prove beyond a reasonable doubt that [Clay] did not act in self-defense." *White*, 222 S.W.3d at 301. The State attempts to refute this by offering an unsupported argument that the prosecutor's comments were not arguing that Clay was guilty simply because he left his house.[4] However, the prosecutor's comments regarding Clay leaving the house assert exactly that. *E.g.*, Tr., pp. 778, 870, 874 ("You're going to see that [Clay] could have prevented all of this. But he didn't."). The State cannot now walk back these comments and assert that the prosecutor did not say what the prosecutor said on the record.

[4] It is of note that Clay's investigation of the destruction of his property was justified. *See e.g.*, Sub. App.'s Br., p. 6. Consider that the two attackers (White and McGhee) turn *right* after exiting the gate and are shielded from view by shadows from the motion light, until the 3:43:33 mark of State's Exhibit 17. Becklean turns *left* to go to his car. State's Exh. 17, at 3:42:55. Whereas, Clay's property and vehicles are located to the *right* (where White and McGhee have turned). It is not unreasonable for Clay to believe that White and/or McGhee were destroying his property, since that is what White threatened to do while leaving Clay's house. *E.g.*, Tr., pp. 729-33.

III. It was error to fail to exclude evidence regarding marijuana consumption and possession of marijuana and marijuana paraphernalia as well as possession of brass knuckles, because – *among the substantial other reasons listed and discussed in Clay's Opening Brief* – such evidence did not prove or relate to any material fact (Opening Brief, Points III & IV).

The State justifies turning Clay's trial into a trial regarding marijuana use/possession and possession of brass knuckles by asserting that (1) Clay did not object to the marijuana evidence and Clay discussed marijuana also; and (2) marijuana and the brass knuckles proved a "material fact." Resp. Br., pp. 27-34.

A. It was plain error to admit evidence of uncharged marijuana crimes and evidence of brass knuckles.

The State relies on case law holding that "[t]here 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." *State v. Burnfin*, 771 S.W.2d 908, 910-11 (Mo. App. W.D. 1989). The State then asserts the tautology that since it was relevant to prove a "material fact" the evidence was admissible ***but the State does not point to any "material fact" which is proved via the***

marijuana evidence or the existence of brass knuckles. *E.g.*, Sub. Resp.'s Br., pp. 42-48. Instead, the State argues that the evidence goes to "credibility."[5] *Id*. at 44.

This Court is familiar with the requirement that defendants must point to facts in the record to support their legal statements. As such, the State must be held to the same standard and must point to a "material fact" which marijuana possession (or possession of brass knuckles) somehow proved. The State did not do this, because the State cannot do this, because the marijuana evidence (and brass knuckles) do not relate to any element of the crimes alleged by the State. *See e.g.*, L.F. 68-120 (jury instructions).

The case law regarding the admission of uncharged marijuana possession (and weapons – such as brass knuckles) is so clear that it is unduly prejudicial that it would require this Court to overturn decades of case law to hold that Clay was not prejudiced by the State's irrelevant evidence. *E.g.*, *State v. Krebs*, 106 S.W.2d 428, 429 (Mo. 1937); *Burnfin*, 771 S.W.2d at 911; *State v. Jones*, 583 S.W.2d 212, 214-16 (Mo. App. W.D. 1979). This Court has already conducted this analysis and held that evidence introduced simply to show that the defendant is a "lawbreaker" or a "drug user" is too prejudicial and should be excluded. Further, the argument that drug use can always be used to show "credibility" would swallow the rule created by this case law.

[5] The State also argues that the brass knuckles prove that a deadly force was used, because Clay selected the gun over the brass knuckles. Sub. Resp.'s Br., pp. 46-48. In a case in which a gun was used to kill a person, this argument by the State is without merit.

IV. Clay's trial counsel preserved the errors regarding the State's Motion to prohibit Clay from arguing that Clay had no duty to retreat and to permit the State to argue that Clay had a duty to retreat during closing and *even if the error was not preserved*, plain error review requires reversal due to the prejudice, fundamental unfairness, manifest injustice, and miscarriage of justice brought about by the State's improper argument regarding Clay's duty to retreat – as set forth more completely in Clay's Opening Brief (Opening Brief, Point V).

Clay argued that he should be able to inform the jury that he did not have a duty to retreat and, conversely, that the State should not be able to argue that Clay had a duty to retreat during closing. *See* Tr., pp. 798-827; L.F., pp. 45-47. Clay objected to the State's motion to argue that Clay had a duty to retreat in closing. *Id*. Clay also filed Motions for Acquittal and a Motion for New Trial which specifically addressed this error. L.F., pp. 125-41. The "duty to retreat" issue is preserved for review by this Court. Courts of Appeals review questions of law *de novo*. See e.g., *State v. Taylor*, 298 S.W.3d 482, 492, 503-04 (Mo. banc 2009). Therefore, whether the trial court's ruling regarding Clay's "duty to retreat" was erroneous is reviewed *de novo*. The State counters that because Clay's trial attorney relied on his previous argument during a portion of the Transcript, review should be for plain error. Sub. Resp.'s Br., p. 36.

Further, Clay's Opening Brief *also* discusses the manner in which plain error review would apply, because of the manifest injustice and prejudice has resulted. Sub. App.'s Br., pp. 60-63. Clay incorporates by reference that argument. To summarize; however, it is important to note that by ***incorrectly*** arguing that it was illegal for Clay to

exit his home (and that he automatically became the "initial aggressor" for doing so – especially in light of the fact that the State kept the "withdrawal language" from the jury, as discussed above) "the trial court completely relieved the State of its burden to prove beyond a reasonable doubt that [Clay] did not act in self-defense." *White*, 222 S.W.3d at 301. Clay was convicted of "leaving his house" not murder second degree.

The State was relieved of proving that Clay was the initial aggressor, because the State was permitted to tell the jury that Clay was the initial aggressor ***as a matter of law*** because he was outside. Then, the State was relieved of proving that Clay did not withdraw, because the State was permitted to tell the jury that once Clay was the initial aggressor ***as a matter of law*** he could never defend himself. It was plain error for the trial court to deny Clay's motion for new trial, because the State grossly mischaracterized the law and it prejudicially altered the jury's verdict. Relieving the State of the duty to fully prove its case beyond a reasonable doubt is a manifest injustice. There is "a reasonable probability that, absent the comments, the verdict would have been different." *State v. Perry*, 447 S.W.3d 749, 755 (Mo. App. E.D. 2014). If the jury had been instructed regarding the lack of a duty to retreat – such that it was not purportedly "illegal" for Clay to be outside – there is a reasonable probability that the jury would never have found Clay to be the initial aggressor.

V. This Court should review the trial court's errors regarding submission of MAI 314.04 for murder in the second degree without including the required portions regarding the nested lesser-included offense of voluntary manslaughter and/or MAI 314.08, because Missouri Supreme Court case law requires at least plain error review. (Opening Brief, Point VI).

A. Standard of review.

Once again, review is not waived because Clay did not draft or "jointly draft" the erroneous instruction: *E.g.*, *Celis-Garcia*, 344 S.W.3d at 154 n.3 (emphasis added). However, the standard of review may be for plain error, or *de novo*, depending on the assertions made in Clay's Opening Brief. Sub. App.'s Br., pp. 66-68. This depends in large part upon whether this Court finds that voluntary manslaughter is a "nested" lesser included offense of murder in the second degree. *Id*. at 64-66.

- If this Court finds that voluntary manslaughter is ***not*** a "nested" lesser included offense of murder in the second degree, then:
    - Review is for plain error, if Clay's trial attorney did not ask for the voluntary manslaughter instruction to be omitted. *E.g.*, *Celis-Garcia*, 344 S.W.3d at 154 n.3; ***or***
    - Review is waived if Clay's trial attorney did ask for the voluntary manslaughter instruction to be omitted. *State v. Leisure*, 796 S.W.2d 875, 877 (Mo. banc 1990).
- If this court finds that voluntary is a "nested" lesser included offense of murder in the second degree, the standard of review currently is the same as if it was ***not*** a

"nested" lesser included offense of murder in the second degree; however, Clay argues that, *based upon previous holdings and the transfer of several cases related to "nested" lesser included offenses*:

- The standard of review will be changed to *de novo* regardless of whether the change was requested by Clay's attorney, upon the hand down of the "nested" lesser included offenses previously-transferred; ***or***
- In any event, Clay argues that this Court should change the standard of review to *de novo*, regardless of whether the change was requested by Clay's attorney, to assure that "nested" lesser included offenses are "nearly universal." *E.g.*, *State v. Jackson*, 433 S.W.3d 390, 395 (Mo. banc 2014).[6]

B. Voluntary Manslaughter is a "nested" lesser included offense of murder in the second degree.

Clay relies on and incorporates by reference his arguments that voluntary manslaughter is a nested lesser included offense of murder in the second degree. Sub. App.'s Br., pp. 64-66. "Lesser-included offenses that are separated from the greater offense by one differential element for which the state bears the ***burden of proof*** are referred to as 'nested' lesser-included offenses." *State v. Randle*, 465 S.W.3d 477, 479 (Mo. banc 2015) (emphasis added).

[6] This argument relies, in part, upon the fact that the trial court is specifically tasked with submitting "nested" lesser included offenses. *E.g.*, MAI-314.08, Notes on Use ¶3 (Appx. to Sub. App.'s Br., p. A59).

> [Lack of sudden passion] is an element of the crime and when properly introduced, it requires a finding by the jury that the defendant did not commit the murder under the influence of sudden passion to find the defendant guilty of second degree murder … Once a defendant has properly injected the issue of sudden passion, the state bears the burden of disproving it beyond a reasonable doubt …

State v. Price, 928 S.W.2d 429, 431 (Mo. App. W.D. 1996) (internal citation omitted).

C. The trial court is required to properly instruct the jury.

The trial court – ***in addition to the parties*** – is required to properly instruct the jury regarding voluntary manslaughter. *E.g.*, MAI 314.08, Notes on Use ¶3 (Appx. to Sub. App.'s Br., p. A59). As such, the State's argument that the trial court was not required to instruct the jury regarding this issue is without merit:

> … To justify such a submission, evidence of sudden passion arising from adequate cause must have been introduced. Once such evidence has been introduced and an instruction on voluntary manslaughter is requested by a party ***or on the Court's own motion***, then this instruction on voluntary manslaughter will be given.

Id. (emphasis added). The facts showing "sudden passion arising from adequate cause" are in incorporated from Clay's Opening Brief. *E.g.*, Sub. App.'s Br., pp. 68-71.

Further, while the State casts doubt on the validity of Clay's claims regarding the submission of this instruction as part of Clay's purported "all-or-nothing defense." *Id*. at 58. Unfortunately, it was the State that pursued an "all-or-nothing offense," but managed

to stack the deck against Clay, via erroneous instructions. Consider the Notes on Use for MAI-314.04 regarding voluntary manslaughter:

> A homicide that would be murder in the second degree – conventional is voluntary manslaughter if committed under the influence of sudden passion arising from adequate cause … The burden of injecting this issue is on the defendant. ***If there is evidence supporting sudden passion from adequate cause, paragraph (Third) must be given***. Further, an instruction on voluntary manslaughter, MAI-CR 3d 314.08, may be given upon request of a party or on the Court's own motion.

Id. at ¶4 (Appx., at p. A26) (emphasis added).

As such, the State pursued the "all-or-nothing offense" by submitting a case in which voluntary manslaughter was injected and failing to offer the separate voluntary manslaughter instruction (*i.e.*, the State wanted a conviction on second degree murder, or nothing). However, the State then stacked the deck against Clay by failing to submit the ***required*** portion of the second degree murder instruction – which would have required acquittal on second degree murder, if the state did not disprove "the influence of sudden passion arising from adequate cause." *Id*. It is for this reason that this Court's case law has been clear that attorneys should **stop messing with the MAI**; however, it appears that this Court's case law has simply not been clear enough as – for whatever reason –

attorneys continue to tinker with the MAI.[7] The MAI are designed to assure that a jury is properly instructed. To that end, *and to the extent that it requires a change in the law*, this Court should adopt a policy that when the parties have so unnecessarily and erroneously deviated from the MAI – **regardless of the reason for that deviation** – reversal is required. Even if it must ultimately be viewed as a "penalty" for such deviations (such as in suppression of evidence matters), such policy might send a clear message to every party that the jury must be properly instructed.

D. Even if voluntary manslaughter is not a "nested" lesser included offense, or if review is otherwise for plain error, the error was plain and Clay was manifestly prejudiced.

Clay has herein set forth argument regarding the presumptively-prejudicial nature of instructional error and incorporates that argument herein. Additionally, Clay specifically covered the plain error of this mistake in his Opening Brief and incorporates it here by reference. Sub. App.'s Br., pp. 71-74.

[7] Certainly some tinkering can be for nefarious motives, such as intentionally trying to alter an MAI to disfavor a party, but less nefarious motives exist as well, such as simple attorney hubris in thinking we know "better" than the MAI drafters or honest mistake. In any event, the message should be clear: **This should not happen and parties need to start submitting MAI as drafted and directed by the Notes on Use**.

CONCLUSION

For the foregoing reasons, Clay has been unfairly prejudiced and a manifestly unjust result has occurred. This Court should reverse his convictions for murder in the second degree and the associated ACA count and remand for dismissal or a new trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

The undersigned hereby certifies that the foregoing document (the Substitute Reply Brief of Appellant) has a word count of 5,660 using Microsoft Word's tools calculated in accordance with Missouri and Local Rules and is otherwise in compliance with Missouri and Local Rules and the undersigned hereby additionally certifies that the foregoing document was filed via this Court's Electronic Filing System on March 16, 2017, and thereby both were served upon all counsel of record.

/s/ Clayton E Gillette