No. SC96650

In The Supreme Court of Missouri

STATE OF MISSOURI,

Respondent,

vs.

THOMAS OATES,

Appellant.

Appeal from the St. Louis County Circuit Court
Twenty-First Judicial Circuit, Division 14
Case No. 14SL-CR05018-01
The Honorable Kristine A. Kerr, Judge

APPELLANT'S SUBSTITUTE REPLY BRIEF

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ISSUE PRESENTED:

The issue is not whether the evidence supported a self-defense instruction. The trial court found that it did, the prosecutor did not contest that fact, and the jury's verdict reflected that it believed that Oates acted in self-defense. Instead, the issue is a legal one: Is self-defense an available defense to felony murder when the underlying felony is not a forcible felony?

A. SELF-DEFENSE IS AN ABSOLUTE DEFENSE FOR THE CRIMINAL PROSECUTION OF FELONY MURDER IF THE UNDERLYING FELONY IS NOT A FORCIBLE FELONY

Section 565.021.1(2) provides, in pertinent part, that a person commits second degree felony murder if he attempts to commit "any felony," and in the attempted perpetration of such felony, another person is killed as a result of the attempted perpetration of such felony. Respondent argues that the use of "any" indicates that the legislature intended that "every" felony could serve as an underlying felony for the purpose of charging a defendant with second degree felony murder under § 565.021.1(2).

Appellant agrees that "every" felony "could" serve as an underlying felony for felony murder. But Respondent's argument is a *non sequitur* argument. Although every felony can serve as the underlying felony, it does not necessarily follow that statutory defenses are unavailable for felony murder.

Certainly the felony murder statute does not declare that self-defense is unavailable for felony murder. Self-defense is not mentioned in § 565.021. This is significant because the Missouri legislature knows how to preclude a specific defense for a specific crime when it wishes to do so.

For instance, if certain requirements are met, consent can be a defense to offenses involving physical injury or a threat of physical injury. Section 565.010. But for the offense of hazing, the hazing statute specifically provides that "[s]ection 565.010 does not apply to hazing cases or to homicide cases arising out of hazing activity." Section 578.365.4. Thus, the hazing statute specifically excludes consent as a defense to that offense.

This illustrates that when the Missouri legislature wishes to make a defense inapplicable to a particular offense, it knows how to do so. Yet the legislature elected not to explicitly exclude self-defense as a defense within the second degree felony murder statute. If the legislature had wanted to prohibit self-defense for felony murder, it could have easily provided within the felony murder statute something similar to: "Section 563.031 does not apply to offenses charged under Section 565.021.1 (2)." Yet it did not.

Similarly, the self-defense statute, § 563.031, does not provide that it cannot be used as a defense for felony murder, unless the defendant was "attempting to commit, committing, or escaping after the commission of *a forcible felony*." Section 563.031.1(3) (emphasis added). Yet the Missouri legislature knows how to write a defense statute to preclude its use for an offense. See

§ 562.071.2, which specifically provides that the defense of duress is not available as to the crime of murder or as to any offense when the defendant recklessly places himself in a situation in which it is probable that he will be subjected to the force or threatened force described in § 562.071.1. Also see, § 566.020.3 (Mistake as to age – consent not a defense, when.) ("Consent is not a defense to any offense under this chapter if the alleged victim is less than fourteen years of age.").

If the Missouri legislature wanted to preclude self-defense as to all felony murders, it could have provided, as it did for duress, that self-defense is not available for felony murder; or, it also could have, when drafting § 563.031.1(3), provided that a person could not use force to defend himself if "[t]he actor was attempting to commit, committing, or escaping after the commission of [a] felony," instead of limiting the exclusion of self-defense to situations where the defendant was committing or attempting to commit "a forcible felony." E.g., § 16-3-21(b)(2) Ga. Code Ann., "A person is not justified in using force under the circumstances specified in subsection (a) of this Code section if he … [i]s attempting to commit, committing, or fleeing after the commission or attempted commission of a felony;" Utah Code Ann. § 76-2-402(2)(b), "A person is not justified in using force … if he … is attempting to commit, committing, or fleeing after the commission or attempted commission of a felony….;" § 776.041(1), Florida Statutes, "The justification described in the preceding sections of this chapter is not available to a person who: (1) Is

attempting to commit, committing, or escaping after the commission of, a forcible felony."

The Missouri legislature, however, took a different approach. It chose to provide, without exception, that a person who uses force and satisfies the requirements of the self-defense statute, § 563.031, has "an absolute defense" as to any "criminal prosecution:"

> A person who uses force as described in section[] 563.031…is justified in using such force and such fact shall be an absolute defense to criminal prosecution….

Section 563.074.1.

Felony murder is a "criminal prosecution." Thus, self-defense is "an absolute defense" to the "criminal prosecution" of Oates for felony murder since the underlying felony was not a forcible felony. But Oates was deprived of this absolute defense as to the criminal prosecution for felony murder because the trial court failed to instruct the jury as to self-defense for felony murder.

B. A PERSON WHO COMMITS A FELONY IS NOT NECESSARILY AN INITIAL AGGRESSOR; THE FELONY MUST INVOLVE AN ATTACK OR THREAT TO ATTACK ANOTHER PERSON

Respondent is also incorrect that a person who commits "any felony" is an "initial aggressor." (Respondent's Brief at 36-40). "An initial aggressor is one who first attacks or threatens to attack another." *State v. Morse*, 498 S.W.3d 467, 472

(Mo. App. W.D. 2016); *State v. Anthony*, 319 S.W.3d 524 (Mo. App. S.D. 2010). Also see, MAI-CR 3d 306.06A and MAI-CR 4th 406.06, which define an initial aggressor as "one who first (attacks) (or) (threatens to attack) another." Some felonies do not involve an attack or a threat to attack. E.g., forgery, passing a bad check, possession of drugs, etc. Thus, a person who commits "any felony" is not necessarily an initial aggressor.

Here, Oates' alleged felony was an "attempt to commit distribution of a controlled substance" based upon an allegation that he "approached the car" in which Lane and Davis were seated and "displayed marijuana to them" (LF 112). This did not involve an attack or a threat to attack, particularly since Lane and Davis are the ones who requested Oates meet them there to sell marijuana to them. Oates was not the initial aggressor for doing something that Lane and Davis asked him to do.

Lane and Davis were the initial aggressors. When Lane stepped on the gas pedal and the car shot off, Oates was caught in the window of the car, so he jumped in the window because he was afraid that he was going to get run over (Tr. 769). As a result, for a short period of time, Oates's feet were dangling from the car window as it was in motion (Tr. 388, 390, 391, 395). After he fell into the car, Lane hit the brakes, causing Oates to fall into the back seat (Tr. 770). Davis reached under his seat, grabbed a pistol, and pointed it towards Oates (Tr. 770-71, 793). This evidence conclusively shows that Oates was not the initial aggressor by

displaying marijuana to Lane and Davis. It was Lane and Davis who attacked and threatened to attack him.

Furthermore, § 563.031.1 provides that a person may not use physical force to defend himself if (1) the actor was the initial aggressor, or (3) the actor was attempting to commit, committing, or escaping after the commission of a "forcible felony." If, as Respondent wrongly asserts, a person who commits "any felony" is by law an "initial aggressor," then there would be no need to have a separate provision that a person cannot defend himself if he was committing a "forcible felony" since that would be covered under the "initial aggressor" limitation under Respondent's unsupported theory. This Court presumes that the General Assembly carefully constructed the law, giving every word, sentence, and clause in the statute a purpose; this Court presumes the legislature did not insert superfluous language. *Bateman v. Rinehart*, 391 S.W.3d 441, 446 (Mo. banc 2013).

C. ATTEMPTED DISTRIBUTION OF A CONTROLLED SUBSTANCE IS NOT A FORCIBLE FELONY

As noted above, under § 563.031.1(3), a defendant can use force to defend himself unless he "was attempting to commit, committing, or escaping after the commission of a forcible felony." Respondent argues that if this Court agrees that self-defense is only barred in a felony murder charge if the underlying felony is a forcible felony, then Oates' underlying felony was such a forcible felony. Respondent is incorrect. Oates' underlying felony was not a forcible felony.

A "forcible felony" is "any felony involving the use or threat of physical force or violence against any individual, including but not limited to murder, robbery, burglary, arson, kidnaping, assault, and any forcible sexual offense." Section 563.011(3).

The felony that Oates was alleged to have committed was not "murder, robbery, burglary, arson, kidnaping, assault, and any forcible sexual offense." Thus it had to involve "the use or threat of physical force or violence against any individual." Section 563.011(3). "Threat" is defined as: "A communicated intent to inflict harm or loss on another or on another's property, esp. one that might diminish a person's freedom to act voluntarily or with lawful consent; a declaration, express or implied, of an intent to inflict loss or pain on another[.]" Black's Law Dictionary (10th Ed.2014).

Oates' alleged felony was an "attempt to commit distribution of a controlled substance." (LF 112). More particularly, it was alleged that Oates committed such an attempt because he "approached the car" in which Lane and Davis were seated and "displayed marijuana to them" (LF 112).

Approaching a car and displaying marijuana in an attempt to distribute marijuana to two people who set up the deal is not a forcible felony. It did not involve the use of physical force or violence on his part. It also did not involve the threat of physical force or violence. Oates' approaching a car and displaying marijuana to two people who had requested him to sell marijuana to them is not a

communicated intent to inflict harm or loss on them, i.e., it was not a "threat of physical force or violence against any individual." Section 563.011(3).

In *Perkins v. State*, 576 So.2d 1310 (1991), the Florida Supreme Court held that cocaine trafficking was not a "forcible felony" within the meaning of the self-defense statute making self-defense unavailable to a person attempting to commit, committing, or escaping after the commission of a forcible felony.

In Florida, self-defense is not available to a person who is attempting to commit, committing, or escaping after the commission of, a forcible felony. § 776.041(1), Florida Statutes. A "forcible felony" includes "any other felony which involves the use or threat of physical force or violence against any individual." § 776.08, Florida Statutes.

The *Perkins* court noted that although violence sometimes accompanies narcotics trafficking, that fact alone did not place drug trafficking within the letter of the statutory language. *Perkins*, 576 So.2d at 1313. The definition of forcible felony did not say that a forcible felony is any felony that "may sometimes" involve violence, or even a felony that "frequently does" involve violence. *Id.* Rather, the statute required that the felony actually "involves" the use or threat of physical force or violence against an individual. *Id*. Thus, the statutory language of the crime itself must include or encompass conduct of the type described. *Id*. "If such conduct is not a necessary element of the crime, then the crime is not a forcible felony…." *Id*. A "forcible felony" that is not included in the list of

offenses that are forcible felonies, has to be "a felony whose statutory elements include the use or threat of physical force or violence against any individual." *Id*.

Similarly, in *Commonwealth v. Fantauzzi*, 91 Mass.App.Ct. 194, 73 N.E.3d 323 (Mass. App. 2017), the appellate court reversed the defendant's conviction because of the trial court's error in failing to instruct the jury on self-defense with respect to felony murder where the predicate felony was unlawful possession of a firearm, which the defendant brought with him during an attempted drug sale where the proposed buyers attempted to rob him. *Fantauzzi*,73 N.E.3d at 325-26.

The *Fantauzzi* court noted that prior decisional history had held that self-defense was inapplicable to a charge of felony murder, and this general rule had been incorporated into the Model Instructions. *Id*. at 330. Those prior decisions suggested that the rationale for that rule was that the nature of the underlying felony marked the defendant as the initiating and dangerous aggressor. *Id*. But Fantauzzi's case did not fit within that general rule because, viewing the evidence in the light most favorable to the defendant, the evidence showed that the defendant only used the firearm once the drug deal went awry and after the victim pointed a taser at him and the victim's companion held a knife to the defendant's throat. *Id*. As a result, that case differed from other felony murders where a defendant is the first aggressor. *Id*. at 332.

The *Fantauzzi* court, although recognizing that bringing a firearm to a drug transaction presented obvious risks of violence, held that where the felony was not inherently dangerous, and the defense was based on the assertion that the

defendant was not the aggressor and initiator of the violence, an instruction of self-defense in relation to felony murder should be given. *Id*.

An "attempt to commit distribution of a controlled substance" is not a forcible felony. Oates was not precluded under § 563.031.1(3), from relying upon self-defense as to felony murder. Therefore, under § 563.074.1, he was "justified in using such force and such fact [is] an absolute defense to criminal prosecution." Contrast § 562.071.2, which expressly provides that the defense of duress is "not available" "[a]s to the crime of murder" or "when the defendant recklessly places himself or herself in a situation in which it is probable that he or she will be subjected to force or threatened force described in" § 562.071.1.

D. THIS COURT'S PRIOR CASES DO NOT PRECLUDE A RULING THAT SELF-DEFENSE IS AVAILBLE UNDER THE CURRENT STATUTORY SCHEME IF THE UNDERLYING FELONY IS NOT A FORCIBLE FELONY.

Respondent cites a few cases from this Court in arguing that self-defense does not apply to felony murder where it is not a defense to the underlying felony (Respondent's Brief at 44-52): *State v. Hart*, 237 S.W. 473 (Mo. 1922), *State v. Painter*, 44 S.W.2d 79 (Mo. 1931), *State v. Hamilton*, 85 S.W.2d 35 (Mo. 1935), *State v. King*, 119 S.W.2d 322 (Mo. 1938), *State v. Kenyon*, 126 S.W.2d 245 (Mo. 1938), *State v. Burnett*, 365 Mo. 1060, 293 S.W.2d 335 (1956), and *State v.*

Newman, 605 S.W.2d 781 (Mo. 1980). These cases are inapposite to Oates' case, particularly since they did not interpret the statutes involved in this case.

In *Hart*, 237 S.W. at 482, this Court, without citation to any authority, merely held that the only evidence in that case upon the subject of self-defense was "that the men came into the bank with their guns in their hands. There was no ground for self-defense." *Hart* did not hold that self-defense was never available for felony murder. At most, it held that when a defendant comes into a bank with a gun in his hand, he is an initial aggressor and thus cannot claim self-defense to a counter attack that he provoked.

In *Painter*, a self-defense instruction was given in that case, and this Court held that there was no evidence in the case also calling for an instruction "on imperfect self-defense." 44 S.W.2d at 82-83. This Court also noted that if the "defendant sought and entered into the difficulty for the purpose of inflicting upon the deceased death or great bodily harm, he thereby lost the right to invoke self-defense" (i.e., if the defendant was the initial aggressor, he could not assert self-defense). But this Court did not hold that self-defense is unavailable for felony murder.

In *Hamilton*, this Court noted that "the evidence" in that case, wherein the defendants shot and killed a gas station attendant during an attempted armed robbery, did not "justify the submission of the issue of self-defense," because there was "no abandonment, request for peace, or surrender communicated to deceased." 85 S.W.2d at 37. Thus, it appears that this Court ruled that the evidence

did not support self-defense because the defendants were the initial aggressors and did not withdraw from the encounter and communicate such withdrawal to the decedent.

In *Hamilton*, this Court cited *Hart* for the proposition that "self-defense may only be asserted against an unlawful attack," and noted that the defendants were "engaged in attempted robbery by means of dangerous and deadly weapons, and brought on the combat in an effort to accomplish the crime;" thus, the deceased "had the legal right to defend himself and his place of business against defendants' felonious acts." *Id*. This Court did not hold that self-defense is unavailable for felony murder; it only held that self-defense was not available because the evidence showing that the defendants were the initial aggressors did not justify its submission.

King also involved a situation where the decedent was shot and killed by the defendant during a robbery. 119 S.W.2d at 324-25. During a discussion of whether the defendant was entitled to a lesser included offense, this Court cited *Painter*, *supra*, for the proposition that an accused forfeits the right of self-defense where the accused is the aggressor because the decedent has the right to resist the robbery and asportation. *Id*. at 326-27. Again, this Court did not hold that self-defense is unavailable for felony murder.

Kenyon involved a first-degree murder case where the decedent was killed by the defendant during a kidnapping to extort ransom and the defendant was charged with killing him after deliberation. 126 S.W.2d at 249-50. This Court held

that in such a case the defendant could not claim self-defense where the victim resisted the kidnapping and the defendant shot and killed him. *Id*., *citing King*, *supra*. This Court did not hold that self-defense is unavailable for felony murder.

In *Burnett*, the evidence showed that the decedent was shot and killed by the defendant while the defendant was attempting to perpetrate a robbery. 293 S.W.2d at 337. This Court held that "there was no evidence in the record to sustain the giving of" a self-defense instruction because the state's evidence "tended to show the offense charged was committed in the perpetration of an attempted robbery." *Id*. at 343. Thus, "there was no issue of self-defense," citing *Hart, supra*, *King, supra*, *Hamilton*, *supra*, and *Kenyon*, *supra*.

As noted above, these cases cited by *Burnett* involved forcible felonies such as robbery and kidnapping, where the evidence was clear that the defendant was the initial aggressor in the course of events. Thus, those defendants were not entitled to rely upon self-defense because by being the initial aggressors, the defendants lost the right to invoke self-defense. At most, this case stands for the unremarkable proposition that a defendant who is the initial aggressor by attempting to rob or kidnap the decedent cannot claim self-defense where the decedent is merely lawfully defending himself against the robbery or kidnapping.

In *Newman*, this Court did state that "self-defense is not a defense to homicide committed in the perpetration of arson, rape, burglary, robbery or other felony." 605 S.W.2d at 786. But in doing so, this Court cited to *Burnett*, 293 S.W.2d at 343, and as noted above, *Burnett's* holding was not that broad. The

Newman Court then noted that the defendant's testimony that he did not have the intent to steal the decedent's property "was no more than a denial or converse of one of the elements required to be proved by the state," and this it "did not require a reference in the first degree murder instruction to the self-defense instruction." *Id*.[1]

So perhaps *Newman* only stands for the proposition that where a defendant denies that he committed the underlying felony, then a cross-reference to self-defense is not necessarily required.

There is further evidence that *Newman* should be read narrowly because the following year, this Court stated that a person could be convicted of felony murder "even though he did not intend to kill someone, *unless the death is excusable or justifiable*." *State v. O'Neal*, 618 S.W.2d 31, 38 (Mo. 1981) (Emphasis added). Since a killing is excusable or justifiable if the perpetrator acted in self-defense, this Court's opinion in *O'Neal* is an indication that self-defense can be available in a felony murder case. *In accord*, *State v. Starr*, 998 S.W.2d 61 (Mo. App. W.D. 1999) (noting that *O'Neal* was "at odds with *Newman*"); and, *State v. Peal*, 393 S.W.3d 621, 634 n. 11 (Mo. App. W.D. 2013) ("the rationale in *Newman* is no longer viable"). *Also see*, *State v. Clark*, 652 S.W.2d 123, 125 n.2 (Mo. banc

[1] A self-defense instruction was given in that case for the capital murder, second-degree murder, and manslaughter instructions given to the jury. 605 S.W.2d at 785.

1983) (although not an issue in the case, the felony murder instruction given in that case, and set out in a footnote, contained a cross-reference to a self-defense instruction).

But more importantly, none of this Court's cases cited by Respondent dealt with the current versions of the statutes involved here. The Missouri legislature is free to set the parameters of the statutory language for any defense to a crime. *State v. Lassen*, 679 S.W.2d 363 (Mo. App. S.D. 1984) (General Assembly was free to reject the idea that duress should be a defense to the crime of murder). As noted above, the legislature could have explicitly provided, in either the self-defense statute or the felony murder statute, that self-defense is not available for felony murder. It did not do so. Instead, at the same time it added the forcible felony preclusion in the self-defense statute, it also enacted § 563.074.1, which provided that, without exception, that if a person uses force and satisfies the requirements of § 563.031, he has "an absolute defense" as to any "criminal prosecution.

E. RESPONDENT HAS FAILED TO IDENTIFY A SINGLE JURISDICTION THAT HAS A SIMILAR STATUTORY JUSTIFICATION SCHEME LIKE MISSOURI

Although Respondent lists some cases from other jurisdictions to support its argument that felony murder remains a "'strict liability' offense to which justification does not apply," (Respondent's Brief at 55-73), Respondent has failed

to identify a single state with a similar statutory justification scheme like that used in Missouri.[2] Thus, those cases are inapposite. E.g., Respondent cites to *State v. Soules*, 286 P.3d 25 (Utah App. 2012), but Utah Code Ann. § 76-2-402(2)(b) specifically provides that "[a] person is not justified in using force … if he … is attempting to commit, committing, or fleeing after the commission or attempted commission of a felony…."

CONCLUSION

In Missouri, self-defense is not a defense to felony murder if the defendant committed or attempted to commit a "forcible felony," such as murder, robbery, burglary, arson, kidnaping, assault, and any forcible sexual offense. Section 563.031.1(3). Oates was not alleged to have committed or attempted to have committed a forcible felony. His underlying felony, attempting to sell marijuana, was not a forcible felony.

Because Oates satisfied the requirements of the self-defense statute, § 563.031, as found by the trial court, he was justified in using the force that he did and it was an absolute defense to the criminal prosecution of him for felony murder. Section 563.074.1. But Oates was deprived of this absolute defense as to

[2] It is noteworthy that the cases cited by Respondent's brief that collected cases from other states where self-defense is not available for felony murder did not include Missouri as being one of those states.

the criminal prosecution for felony murder because the trial court failed to instruct the jury as to self-defense for felony murder. This Court should reverse and remand.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, Craig A. Johnston, hereby certify: The attached substitute reply brief complies with the limitations contained in Rule 84.06(b). It was completed using Microsoft Word 2010, in Times New Roman size 13 point font, and includes the information required by Rule 55.03. According to the word-count function of Microsoft Word, excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the substitute reply brief contains 4,330 words, which does not exceed the 7,750 words allowed for an Appellant's substitute reply brief. And, on this 30th day of November, 2017, electronic copies of Appellant's Substitute Reply Brief, and Appellant's Substitute Reply Brief Appendix, were sent through the Missouri e-Filing System to Gregory L. Barnes, Assistant Attorney General, at greg.barnes@ago.mo.gov.

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