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IN THE
SUPREME COURT
STATE OF MISSOURI

STATE OF MISSOURI,	)	
	)	
Respondent,	)	**No: SC 96138**
	)	
vs.	)	
	)	
ANDREW L. BARNETT,	)	
	)	
Appellant.	)	

APPEAL TO THE SUPREME COURT OF MISSOURI
FROM THE CIRCUIT COURT OF THE CITY OF ST. LOUIS, MISSOURI
22ND JUDICIAL CIRCUIT
HONORABLE THOMAS J. FRAWLEY

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

In the Circuit Court of the City of St. Louis, Cause No: 1422-CR01725-01, the State of Missouri charged that Defendant, Andrew Barnett, committed a Class A Felony Assault in the First Degree and an unclassified Felony of Armed Criminal Action. After a trial by jury in which he was convicted of both charged crimes, the jury determined and the Court sentenced Mr. Barnett to a term of imprisonment on Count I of thirty (30) years, and on Count II of twenty-five (25) years, sentences to run concurrent. A Notice of Appeal was timely filed with this Court, and the case does not involve any issues reserved for the exclusive jurisdiction of the Supreme Court of Missouri. The Missouri Court of Appeals, Eastern District affirmed Appellate's conviction. Appellant's timely Motion for Rehearing and/or Application for Transfer to the Missouri Supreme Court filed in the Missouri Court of Appeals, Eastern District was denied. Thereafter, Appellant timely filed his direct application for transfer to the Supreme Court was sustained. This Court has jurisdiction pursuant to Rules 83.02, 83.04 and Article V, Sections 3 and 10, MO. Const.

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STATEMENT OF FACTS

In the Circuit Court of the City of St. Louis, Cause Number 1422-CR01725-01, the State of Missouri charged that Defendant, Andrew Barnett, committed a Class A Felony Assault in the First Degree and an unclassified Felony of Armed Criminal Action (L.F. 16-17). Specifically, the State charged that Defendant violated Section 565.050 R.S.Mo. by stabbing victim Schmeiderer, and also charged Defendant with violation of Section 571.015 R.S.Mo. for Armed Criminal Action for using a dangerous instrument in commission of the Assault in the First Degree charge, all allegedly occurring on May 8th, 2014. (L.F. 16-17).

During pre-trial matters, the Court requested and Defendant filed Memos with reference to self-defense of Defendant. (L.F. 31-34; 35-43). On 10/13/15, trial of this matter began and the Court took up pre-trial issues and motions in limine. (L.F. 47-48). On the issue of self-defense, the Court reserved any rulings on submission or evidence pertaining to same until it arose during trial and/or after consideration of the evidence allowed. (T. 12-22).

Defendant testified that the first time he met victim Schmeiderer was in January 2014 when victim Schmeiderer came up behind him at the bar and pulled him off his bar stool. (T. 682-83). Thereafter, defendant would occasionally see victim Schmeiderer at the bar, with victim Schmeiderer always trying to start stuff, calling him names and urging him to fight. (T. 685-686). Defendant further testified that he always ran into victim Schmeiderer at the bar during daytime hours, so he began to go the bar at

nighttime to avoid him. (T. 687). Defendant testified that he did not know victim Schmeiderer's name as Schmeiderer had introduced himself as "asshole". (T. 682-83).

Defendant testified that he receives Social Security disability and has been on same since 2010. (T. 663). Defendant testified that he had previously been attacked and beaten with a baseball bat to the back of his head, was in a coma and had multiple fractures to his face, skull and mouth. (T. 653). Defendant further testified that since said attack, he had seizures, black-out like episodes, suffered from post-traumatic stress disorder, severe anxiety disorder, ADHD, night terrors/nightmares and sleep deprivation. (T. 653-654). Defendant further testified that when he is in a threatening situation he gets scared and goes into an immediate self-defense mode. (T. 656-657). Defendant testified to many other physical injuries and problems he has, including a fractured cervical vertebrae, right shoulder surgery, broken hand, injured elbow and left knee surgery. (T. 659-663).

Defendant further testified about his medical treatment, psychotherapy, and many medications. (T. 664-665). Defendant testified that he went off his medications and began drinking heavily in early 2014. (T. 668). On May 7th and May 8th, 2014, Defendant was not taking his medications and was drinking. (T. 669). On the date of incident, 5/8, Defendant was drinking during the day, went to the bar at 6 P.M. that date and drank more before his encounter with victim Schmeiderer. (T. 671-679).

At trial, Defendant testified that when he first encountered victim Schmeiderer in the bar on 5/8, victim Schmeiderer told Defendant "its on now". (T. 682). Defendant Schmeiderer was known by the nickname of "asshole". (T. 682). Victim Schmeiderer

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would always try to start stuff with Defendant and urge him to fight, which Defendant always refused. (T. 686). On 5/8, victim Schmeiderer called Defendant names, urged him to go outside and told him he would kick Defendant's ass, but Defendant told him to leave him alone. (T. 691). Victim Schmeiderer then approached Defendant's table at the bar with his arm behind him as if he was holding something behind his back. (T. 694). At that time, victim Schmeiderer told Defendant "I'm going to fuck you up", and again asked him to go outside, and then leaned forward and swung his right arm at Defendant. (T. 695). Defendant's table fell over at that point, and the bartender told them to stop and to get out of the bar. (T. 695-696). Defendant left out the back door of the bar immediately, and advised friends he was heading home. (T. 696-697). On his way to his car, Defendant stopped in the alley in the back of the bar to relieve himself by the dumpster. (T. 703-704). While doing so, he heard victim Schmeiderer's voice from behind say "you ready, mother fucker". Defendant told victim to go on his way and that he wasn't going to fight. (T. 705). Defendant turned back around to continue urinating, and a second later heard victim's voice from behind say, "now you're going to die you mother fucking bitch. (T. 705). As Defendant turned while still urinating, he saw victim about arm's length away coming at him. (T. 705-6). As Defendant turned around from the dumpster, victim Schmeiderer came at him, swinging his right arm at Defendant, and grabbing defendant's shoulder. (T 707-08). Defendant saw a shiny metal object in victim Schmeiderer's left hand coming toward Defendant's face. (T. 708). Defendant tried to shove him off but victim had him by the shirt. (T. 708). Defendant shoved him again and was able to get away. (T. 708-09). Defendant testified he was scared and

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afraid of victim Schmeiderer at this time. (T.709). Defendant further testified that victim was yelling at him as he was getting away, "I'm going to find you – I'm going to kill you" (T. 712, 715).

During trial proceedings, Defendant called Albert Barton, a licensed clinical social worker, to testify with regard to his treatment for Defendant regarding emotional/mental issues. (T. 809 et seq). Mr. Barton testified that he had provided treatment and therapy to Defendant from October 28, 2010 through April 20th, 2011. (T. 817-818). Mr. Barton also had reviewed Defendant's medical records from St. Louis University Hospital following his assault injuries of 2009, the records of Dr. Wayne Stillings who provided treatment to Defendant, and it was Mr. Barton's opinion that Defendant suffered from post-traumatic stress disorder from his assault of 2009. (T. 821-822). Mr. Barton further testified that Defendant was depressed, had anxiety and was on medication for these conditions. (T. 822-823). Mr. Barton testified that he provided psychotherapy to Defendant for his depression, anxiety, PTSD, nightmares, stress and sleep deprivation. (T. 824-825). Mr. Barton testified that the physical trauma suffered by Defendant had an effect on his psychological condition. (T. 825-826). Mr. Barton further opined that patients with similar problems/disorders will tend to over-react in a crisis. (T. 827-828). He further opined that based on his prior treatment of Defendant, his training and experience, that Defendant's decision-making process as of 2011 would have been impaired when confronted with a traumatic or stressful event. (T. 827-829). He indicated it was probable that an individual suffering from the aforementioned symptoms in 2011 would still have those problems in 2014. (T. 830). Finally, Mr. Barton testified

that based on his prior treatment, conclusions, probability that his condition had not changed, his condition would have had an effect on him making judgments concerning the incident at the bar in 2014. (T. 834). He also opined that an individual with such symptoms including PTSD and anxiety disorder could possibly over-react to a physical confrontation. (T. 834-835). On re-direct exam, Mr. Barton further indicated that Defendant's drinking would have a bad effect on his judgment. (T. 852-853). Defendant also testified that he was sacred and had excessive anxiety at the time of the incident. (T. 709).

Additionally, the State presented witness Laut who testified that defendant had previously handed him a pocket knife to hold that evening, but gave it back to defendant as he was leaving that night. (T. 352; 355; 385). Witness Laut saw the victim approach the defendant in the bar on the night of incident, chest pump him, and witness Laut had to grab the table to stop it from spilling over. (T. 370-71). Witness Laut said victim always told everyone he was a bad ass. (T. 374). Witness Laut testified that he did not see any indication from the defendant that he wanted to go outside and fight with victim at any time. (T. 372). Following the incident inside the bar on the night in question, defendant told witness Laut that he was leaving to avoid any arguments. (T. 370). Witness Laut further testified that he saw the victim after the incident with a puncture wound. (T. 383).

The State presented witness Grimm who verified that the victim repeatedly asked defendant to go outside and fight prior to the night of the incident. (T. 430-31). Witness Grimm was outside the bar on the night in question and saw defendant and victim get into a fist fight. (T. 399). Witness Grimm saw no one else outside at the time of the fight or

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immediately thereafter, and he saw the victim drop to the ground during the fight. (T. 400). Witness Grimm approached the victim immediately after the incident and saw victim was bloody and had been stabbed. (T. 400).

The State also presented witness Goodson who testified that despite her warning for victim and defendant to remain at opposite ends of the bar, she saw the victim approach defendant while in the bar and they were yelling at each other. (T. 440-42). While in the bar that evening, witness Goodson overheard the defendant ask a friend for his blades back. (T. 446). After Defendant and victim left the bar that evening, she heard witness Laut come back into the bar screaming "he's been stabbed…call 911…he's bleeding to death". (T. 445).

Moreover, and over objection of defendant, the State played the video interrogation of defendant at time of initial arrest. (T. 729-730; 740-744; Supplemental L.F.-video). Throughout the video, the interrogating officers repeatedly made statements that: they know the defendant stabbed the victim; they have witnesses that saw defendant stab the victim; that a claim of self-defense would be reasonable; and that defendant might not remember the whole incident as a result of his many injuries. (Supplemental Legal File-video-1:29; 1:38; 1:43; 1:45).

During a break in trial proceedings, the Court revisited the issue of self-defense. (T. 750). Defendant advised that they would submit a self-defense instruction. (T. 750-751). The Court advised that it would not allow Defendant to do so. (T.752). The court further advised that self-defense instruction would not be allowed in light of Defendant's denial of the act. (T. 759-760).

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During the jury instruction conference, Defendant offered Instruction A patterned from M.A.I. 306.07-Self-Defense, and the Court refused same, further instructing it was not the most recent version in M.A.I. (T. 904). However, the Court also advised that Defendant would not be allowed to submit on self-defense, even after submitting the corrected version. (T. 898-921). Defendant later submitted the corrected and most current M.A.I. Self-Defense Instruction as a substitute for Instruction A, and the Court again confirmed its refusal of said submission. (T. 921-922; L.F. 110-117).

At the conclusion of the case, the Court submitted same to the jury on assault in the first degree and armed criminal action, along with a downward instruction for assault in the second degree. (L.F. 99-102). On 10/16/15, the jury returned a verdict of guilty of assault in the first degree and guilty of armed criminal action. (L.F. 120-121). Following evidence in the penalty phase, the jury assessed punishment for the guilty verdict on assault in the first degree of thirty (30) years, and punishment for the guilty verdict of armed criminal action of twenty-five (25) years. (L.F. 122-123). Thereafter, the Court imposed Judgment and Sentence on Defendant in accordance with the jury assessment, with sentences running concurrent. (L.F. 139-141).

Defendant filed a Motion for New Trial on 11/3/15, alleging among other issues, that the Court erred in refusing to submit the issues of self-defense to the jury for consideration. (L.F. 125-137). The Court denied Defendant's Motion for New Trial on 11/6/15. (L.F. 138). Likewise, the Court had previously denied Defendant's Motion for Directed Verdict at end of State's evidence and at end of case. (L.F. 75-92).

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Following pronouncement of Judgment and Sentence of Defendant on 11/6/15, Defendant filed his timely Notice of Appeal on 11/16/15. (L.F. 142-44).

The Court of Appeals affirmed the verdict on 11/1/16, and subsequently denied Defendant's Motion for Rehearing or Transfer to the Missouri Supreme Court on 12/15/16. Thereafter, Defendant's direct application for transfer to the Supreme Court was granted on 3/6/18.

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POINTS RELIED ON

I. THE TRIAL COURT ERRED IN REFUSING DEFENDANT'S PROPOSED SELF-DEFENSE INSTRUCTION A IN THAT THERE WAS SUBSTANTIAL EVIDENCE THAT DEFENDANT DID NOT PROVOKE THE ATTACK OR THAT HE WAS THE AGGRESSOR, THAT DEFENDANT REASONABLY BELIEVED HE WAS DEFENDING HIMSELF FROM SERIOUS BODILY HARM OR DEATH, THAT DEFENDANT USED NO MORE FORCE THAN NECESSARY, THAT DEFENDANT ATTEMPTED TO AVOID THE CONFRONTATION, AND THAT THE STATE INJECTED EVIDENCE OF STABBING AND JUSTIFICATION FOR SELF-DEFENSE, ENTITLING HIM TO SUBMIT SAME TO JURY, THUS VIOLATING HIS RIGHTS TO DUE PROCESS OF LAW, TO PRESENT A DEFENSE, AND TO A FAIR TRIAL, AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTIONS 10 AND 18 (a) OF THE MISSOURI CONSTITUTION.

State vs. Westfall, 75 S.W. 3d 278 (Mo 2002)

State vs. Smith, 436 S.W. 3d 849 (Mo banc 2015)

State vs. Bruner, No. SC95877, Slip Op. (Mo. banc Jan. 16, 2018)

563.031 R.S. Mo.

556.051 R.S. Mo.

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ARGUMENT

I. THE TRIAL COURT ERRED IN REFUSING DEFENDANT'S PROPOSED SELF-DEFENSE INSTRUCTION A, IN THAT THERE WAS SUBSTANTIAL EVIDENCE THAT DEFENDANT DID NOT PROVOKE THE ATTACK OR THAT HE WAS THE AGGRESSOR, THAT DEFENDANT REASONABLY BELIEVED HE WAS DEFENDING HIMSELF FROM SERIOUS BODILY HARM OR DEATH, THAT DEFENDANT USED NO MORE FORCE THAN NECESSARY, THAT DEFENDANT ATTEMPTED TO AVOID THE CONFRONTATION, AND THAT THE STATE INJECTED EVIDENCE OF STABBING AND JUSTIFICATION FOR SELF-DEFENSE, ENTITLING HIM TO SUBMIT SAME TO JURY, THUS VIOLATING HIS RIGHTS TO DUE PROCESS OF LAW, TO PRESENT A DEFENSE, AND TO A FAIR TRIAL, AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTIONS 10 AND 18 (a) OF THE MISSOURI CONSTITUTION.

A. Standard of Review

This Court has de novo review over a trial court's decision refusing a proffered jury instruction. *State vs. Jackson*, 433 S.W. 3d 389, 395 (Mo. banc 2014); *accord State vs. Comstock*, 492 S.W. 3d 204, 205-06 (Mo. App. 2016). The trial court must submit a self-defense instruction when there is substantial evidence to support same. *State vs. Westfall,* 75 S.W. 3d 278, 281 (Mo. banc 2002). Submission of a self-defense instruction is required even if the substantial evidence supporting same is inconsistent with Defendant's testimony. *State vs. Westfall*, 75 S.W. 3d at 281. Failure to submit a self-defense instruction in these circumstances is reversible error. *State vs. Smith*, 465 S.W. 3d 849, 852 (Mo. banc 2015). Further, in determining whether the Trial Court erred in

refusing to submit a self-defense instruction to the jury, the Court must view the evidence in the light most favorable to the defendant. Id. at 852.

B. Analysis

As this Court reaffirmed in *State vs. Smith*, 456 S.W. 3d 849, 852 (Mo. banc 2015) and *State vs. Bruner*, No. SC95877, slip op. at 11 (Mo. banc Jan. 16, 2018), if there is substantial evidence presented supporting the elements of self-defense, then the issue is injected and self-defense must be submitted by instructing the jury that the State has a burden of proving a lack of self-defense beyond a reasonable doubt. In both *Smith* and *Bruner*, this Court found that the defendants did not present substantial evidence of self-defense. The present case at bar surpasses that hurdle.

At trial of this matter, the court refused to submit Defendant's proferred self-defense instruction, which read:

INSTRUCTION NO. A

PART A – GENERAL STATEMENT OF LAW

One of the issues as to Count I in this case is whether the use of force by the Defendant against Kristopher Schmeiderer was lawful. In this state, the use of force including use of deadly force, to protect oneself is lawful in certain situations.

> In order for a person lawfully to use (non-deadly) force in self-defense, he must reasonably believe such force is necessary to defend himself from what he reasonably believes to be the imminent use of unlawful force. Under this instruction, a person is not permitted to use deadly force unless he reasonably believes that the use of deadly force is necessary to protect

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himself against death or physical injury. As used in this instruction, "deadly force" means physical force which is used with a purpose of causing or which a person knows to create a substantial risk of causing death or serious physical injury.

As used in this instruction, the term "reasonably believe" means a belief based on reasonable grounds, that is, grounds that could lead a reasonable person in the same situation to the same belief. This depends upon how the facts reasonably appeared. It does not depend upon whether the belief turned out to be true or false.

PART B – CASE-SPECIFIC STATEMENT OF LAW

On the issue of self-defense as to Count I in this case, you are instructed as follows:

First, if defendant used only such non-deadly force as reasonably appeared to be necessary to defend himself, then his use of force is justifiable and he acted in lawful self-defense, or if

Second, the defendant reasonably believed that the use of deadly force was necessary to protect himself from death or serious physical injury from the acts of assault by Kristopher Schmeiderer, then his use of deadly force is justifiable and he acted in lawful self-defense.

The state has the burden of proving beyond a reasonable doubt that the defendant did not act in lawful self-defense. Unless you find beyond a

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reasonable doubt that the defendant did not act in lawful self-defense under this instruction, you must find the defendant not guilty under Count I.

As used in this instruction, the term "serious physical injury" means physical injury that creates a substantial risk of death or that causes serious disfigurement or protracted loss or impairment of the function of any part of the body.

PART C – EVIDENTIARY MATTERS

Evidence has been introduced that Kristopher Schmeiderer had a reputation for being violent and turbulent, and that the defendant was aware of that reputation. You may consider this evidence in determining whether the defendant reasonably believed that the use of force was necessary to defend himself from what he reasonably believed to be the imminent use of unlawful force by Kristopher Schmeiderer.

Evidence has been introduced of the prior relationship between defendant and Kristopher Schmeiderer including evidence of arguments and acts of violence. You may consider this evidence in determining who was the initial aggressor in the encounter, and you may also consider it in determining whether the defendant reasonably believed that the use of force was necessary to defend himself from what he reasonably believed to be the imminent use of unlawful force by Kristopher Schmeiderer.

If any threats against defendant were made by Kristopher Schmeiderer and were known by or had been communicated to the defendant, you may

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consider this evidence in determining whether the defendant reasonably believed that the use of force was necessary to defend himself from what he reasonably believed to be the imminent use of unlawful force by Kristopher Schmeiderer.

You, however, should consider all of the evidence in the case in determining whether the defendant acted in lawful self-defense.

MAI-CR 3d -306.06A

(L.F. 107-110).

The initial inquiry is determining whether a defendant has injected the issue of self-defense as required pursuant to §563.031.5 which provides:

> The defendant shall have the burden of injecting the issue of justification under this section. If a defendant asserts that his or her use of force is described under subdivision (2) of subsection 2 of this section, the burden shall then be on the State to prove beyond a reasonable doubt that the defendant did not reasonably believe that the use of such force was necessary to defend against what he or she reasonably believed was the use or imminent use of unlawful force.

This court has determined that defendant's burden of "injecting the issue" means:

1) The issue referred to is not submitted to the trier of fact unless supported by evidence; and

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2) 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.

Section 556.051 R.S. Mo. Thus the statute requires that defendant bear the burden of showing self-defense is supported by the evidence in order for self-defense to be injected. Thereafter, the burden shifts to the State to prove lack of self-defense beyond a reasonable doubt. *State vs. Bruner*, No. SC95877, slip op. at 10.

As such, the next line of inquiry must necessarily be determining the quantum of evidence to satisfy the burden of injecting self-defense. In *State vs. Westfall*, this Court established the quantum of proof required as "substantial evidence". *State vs. Westfall,* 75 S.W. 3d at 281; *State vs. Smith*, 456 S.W. 2d at 852. Sufficient "substantial evidence" is simply the minimum amount of "evidence putting a matter at issue". *State vs. Avery*, 120 S.W. 3d at 200. If the evidence tends to establish defendant's theory, or at least supports conclusions upon which a jury may differ, the defendant should be allowed an instruction on same. *Westfall*, 75 S.W. 3d at 280. Substantial evidence of self-defense can be derived from defendant's testimony alone as long as that testimony contains some evidence that defendant acted in self-defense, and a self-defense jury instruction is warranted even if the substantial evidence adduced is inconsistent with defendant's testimony. Id at 280-81.

After establishing the quantum of evidence necessary, we must then look at the elements of self-defense to determine if the facts evidence and testimony in this case provides substantial evidence of self-defense. Pursuant to the self-defense statute §563.031, the relevant elements are:

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1. A person may, subject to the provisions of subsection 2 of this section, use physical force upon another person when and to the extent he or she reasonably believes such force to be necessary to defend himself or herself or a third person from what he or she reasonably believes to be the use or imminent use of unlawful force by such other person, unless:

   (1) The actor was the initial aggressor; …

2. A person may not use deadly force upon another person under the circumstances specified in subsection 1 of this section unless:

   (1) He or she reasonably believes that such deadly force is necessary to protect himself, or herself or her unborn child, or another against death, serious physical injury, or any forcible felony;

   ….

3. A person does not have a duty to retreat from a dwelling, residence, or vehicle where the person is not unlawfully entering or unlawfully remaining. A person does not have a duty to retreat from private property that is owned or leased by such individual.

Additionally, the elements of self-defense set out in common law are in line with the statute, allowing for the infliction of serious bodily harm upon a showing that the Defendant: (1) did not provoke the attack nor was he the aggressor; (2) reasonably believed that he was faced with the necessity of defending himself from serious bodily harm, (3) used no more force than was necessary, and (4) attempted to avoid the confrontation. See *State vs. Delgado*, 774 S.W. 2d 549, 552 (Mo app 1989); *State vs.*

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White, 222 S.W. 3d 297, 300 (Mo app 2007). Further, in considering whether the Trial Court erred in failing to instruct the jury on a justification defense, the evidence is viewed in the light most favorable to the Defendant. *State vs. White*, 222 S.W. 2d at 300. If the evidence tends to establish a theory of self-defense, or supports differing conclusions, the instruction must be given. Id. The purpose of such a submission is because any conflict in evidence is to be resolved by the jury after being properly instructed on the issues. Id.

In cementing the relationship between the self-defense statute and common law, this Court confirmed that in order to inject self-defense or use of force justification pursuant to §563.031 R.S.Mo., the defendant must "reasonably believe such force is necessary to defend himself from what he reasonably believes to be use or imminent use of unlawful force by another." *State vs. Smith*, 456 S.W. 3d at 852. In *Smith,* this Court also confirmed that deadly force is justified only if the defendant "reasonably believes that such deadly force is necessary to protect himself, herself…against death, serious physical injury, or any forcible felony." Id at 852. Defining "Reasonable belief" under such circumstances means:

> "A belief based on reasonable grounds, that is grounds that could lead a reasonable person in the same situation to the same belief. This depends upon how the facts reasonably appeared. It does not depend upon whether the belief turned out to be true or false." MAI-CR 3d 306.06 A [6]; *Smith,* 456 S.W. 3d at 852. *State vs. Bruner,* No. SC95877, slip op. at 13.

Further, "deadly force" means "physical force which is used for the purpose of causing or which a person knows to create a substantial risk of causing death or physical

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injury". MAI-CR 3d 306.06 A [5]; *Smith* 456 S.W. 3d at 852; *State vs. Bruner*, No. SC95877, slip op. at 13.

With the legal inquiry framework established, we must now place the evidence of this case within that frame to determine whether defendant has injected self-defense requiring an appropriate instruction. In *Smith* and *Bruner*, this court looked to the three elements set out in §563.031 R.S.MO. when reviewing the facts of those cases to determine, when viewed in the light most favorable to defendant, whether:

(1) Defendant established his reasonable belief that the use of deadly force was necessary. *Smith*, 456 S.W. 3d at 852; *Bruner*, No. SC95877, slip op. at 12-13.

(2) Defendant was the initial aggressor. Id.

(3) Defendant tried to avoid further confrontation, but when unsuccessful, began to fear imminent serious physical injury or death. Id.

In the present case, there is substantial evidence that defendant reasonably believed the use of deadly force was necessary, that he was not the initial aggressor, and that he tried to avoid, back away or decline to fight, all to no avail, ultimately resulting in an attack on him by the victim where Defendant feared imminent serious physical injury or death.

First, the evidence in this case indicates the victim had a history of aggression toward defendant, often engaging in verbal abuse, name calling, and attempts to physically confront defendant. (T. 682-83; 685-86; The victim was known by others and apparently acknowledged his nickname of "asshole". (T. 682-83). Despite the history of aggressive behavior of victim, defendant testified that he had never fought previously with victim as defendant had always declined the "invitation". (T. 686). More specifically, on the night

in question, defendant and other witnesses testified that the victim engaged in his regular verbal abuse and threats. (T. 682; 691; 694). Defendant testified that the victim attempted to engage him in physical confrontations several times that evening but that defendant refused same at all times. (T. 691; 694). Defendant's testimony indicated that just prior to the incident, the victim had approached Defendant inside the bar where he continued to verbally abuse and goad defendant into a fight, even taking a swing at defendant, resulting in a bar table knocking over. (T. 694; 695-96). At this point, defendant and multiple witnesses testified that the bartender interrupted and demanded that they both leave. (T. 695-96). Defendant and multiple witnesses testified that defendant left willingly and immediately with no further verbal or physical contact with the victim; whereas the victim complained and argued about the command to leave. (T. 696-97). Witness Laut testified that defendant told him he was leaving and going home, and there is no testimony from defendant or any witness that he had any intent to get in a physical altercation with defendant after leaving the bar. (T.352; 355; 370; 372; 385).

Defendant testified that while relieving himself in the alley on his way to his car, the victim unexpectedly approached him from behind asking him if he was ready to fight. (T. 703-04). Yet again, Defendant told him to go away and that he was not going to fight. (T. 705). As defendant turned back to continue urinating, victim continued to approach defendant and told him he was going to die. (T. 705). Victim took a swing at defendant and grabbed his shoulder. (T. 707-08). Defendant testified that he saw a shiny metal object in the victim's left hand coming toward his face, (T. 708). Witness Grimm testified that he saw victim and defendant in a physical altercation. (T. 399). Defendant testified that he

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was afraid of the victim at this time. (T. 709). Thus, we have a victim with not only a history of aggression toward this defendant, but a victim who was threatening the defendant with immediate physical harm and threats to kill him, and was making physical contact with him by swinging a fist, and wielding a shiny metal object toward his face at the time of the incident. Defendant was being attacked physically and the victim was threatening to kill him right then. This is a significant departure from the *Bruner* case where that defendant was not in a physical confrontation/fight with the victim and that victim had not alleged immediate harm to *Bruner*.

Second, and although the above-mentioned facts allude to same, there is substantial evidence that the defendant was not the initial aggressor at any point that evening. In the bar earlier that night, the victim told defendant he was going to harm him, the victim called defendant names, the victim approached the defendant in the bar and took a swing at him, the victim surprised defendant in the alley, pursuing him and escalating his verbal threats with the physical threat by throwing a punch at defendant, grabbing him, and attempting to harm or kill him with a shiny metal object. Defendant did not initiate any of the verbal threats nor any of the verbal confrontations, physical confrontations or final physical confrontation that evening.

Third, defendant testified that he declined any verbal invitation to fight that evening. He testified that despite the victim throwing the punch at him in the bar, he did not fight back. Defendant and all other witnesses also testified that when asked to leave, defendant left immediately without further verbal or physical confrontation with the victim or anyone else. Defendant had retreated from any provocation within the bar and was heading home.

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Despite that withdrawal, it was the victim himself who came after defendant outside the bar, verbalizing his intent to hurt him and actually physically confronting him with a punch and attempted harm with a metal object. Defendant had restrained himself and retreated at all times inside the bar, had retreated from the bar and was not in pursuit of the victim; defendant had become the victim, and had no other way to respond other than defending himself at the time of a physical assault by the victim. Not only was he in fear of imminent serious physical injury or death, but he was actually being physically injured.

As an overlay to the first and third prongs of inquiry, it should also be noted that there was testimony from the defendant and his treating LCSW as to his multiple physical and mental disabilities at the time of this incident. (T. 809-853). Defendant knew his physical ability to adequately defend himself or even run away were greatly diminished, and he knew that his head with its significant prior physical and mental damage could certainly not sustain additional physical trauma without significant consequences. His physical and mental disabilities created a heightened fear that he would suffer serious physical injury or worse in the event of such an assault as was occurring. Defendant himself testified he had excessive anxiety at the time of the incident. (T. 709).

Although this case and the *Bruner* case address the same issue on appeal, the present case is distinguished from *Bruner* based on the evidence presented. In *Bruner*, there is neither a physical confrontation nor a threat of immediate physical confrontation. In *Bruner*, there was no evidence supporting any attempt by the victim to attack that defendant, and the victim only claimed that he could slit *Bruner's* throat in two hours – thus no immediate or imminent threat of harm at that time. In the present case, we have a

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series of verbal threats escalating to physical confrontations, culminating in a physical assault coupled with verbal intent by the victim to kill defendant. In *Bruner*, there is no evidence that the victim had a weapon at the time of incident; whereas, in the present case, the victim was physically assaulting the defendant with his fists and had a shiny object in his other hand. A jury could reasonably draw an inference that the victim was wielding a weapon. In *Bruner*, there was no testimony that the defendant was in fear of his life, serious physical injury or forcible felony; whereas, in the present case, defendant not only testified that he was afraid, but was actually being assaulted at the time. Overall, the *Bruner* case required that all evidence of self-defense be inferred from other evidence; whereas, in the present case, there is actual testimony and substantial evidence of self-defense.

In *Bruner,* this court reaffirmed that words are insufficient to support a claim of self-defense and that deadly force is not justified in response to a "fear" of being grabbed or even punched. *State vs. Avery*, 120 S.W. 3d at 206; *State vs. Wiley*, 237 S.W. 3d 41, 45 (Mo. App 2011); *State vs. Bruner*, No. SC95877, slip. Op. at 17. The evidence in the present case surpasses both those standards. Defendant suffered not only verbal threats of harm and death, not only fear of harm and death, but actual physical assault by the victim and substantial fear of being injured by victim's fist or the object in the victim's hand swinging at him. This is substantial evidence sufficient to justify the use of deadly force in his own self-defense.

Defendant has satisfied all the requirements to be eligible for a self-defense instruction. The credibility of Defendant's testimony on these issues is left to the province of the jury, but they should have had the consideration of a self-defense instruction when

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considering the evidence. The law does not permit the Court to insert its own view of credibility for that of the jury. *White*, 222 S.W. 3d at 300.

A Trial Court's failure to give mandatory instructions is presumed prejudicial unless the State clearly established that the error did not result in prejudice. *White* at 300. Missouri Courts have repeatedly found manifest injustice or miscarriage of justice in the failure to instruct or properly instruct on self-defense. Id. Once there is a finding of error in failing to properly instruct on self-defense, a manifest injustice will generally be found. See, *eg., Beck*, 167 S.W. 3d 767, 788 (Mo. App-W.D. 2014); *State vs. White*, 92 S.W. 3d 183, 184 (Mo. App 2002).

Additionally, there is one final layer of inquiry for the Court on the issue of self-defense. At time of trial, it was the Court's opinion that the self-defense instruction proffered by Defendant could not be accepted as it was inconsistent with Defendant's claim that he did not stab the victim. However, Defendant submits that self-defense is submissable when the inconsistent evidence of self-defense is offered by the State or by the Defendant through the testimony of a third party. See *eg., State vs. Eldridge*, 554 S.W. 2d 422, 425 (Mo. App 1977); *State vs. Randolph,* 496 S.W. 2d 257 (Mo. banc 1973); *State vs. Peal*, 463 S.W.2d 840, 842 (Mo. 1971); *State vs. Baker*, 277 S.W. 2d 627 (Mo. 1955).

In the present case, Defendant's testimony at trial was that he did not stab the victim. However, it was the State who presented the evidence of extra-judicial video statement wherein the police were allowed to testify multiple times that they knew Defendant had stabbed the victim and that they had witnesses who saw the stabbing. Moreover, the video statement included multiple inconsistent statements, gestures and head nods by Defendant

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to that of his testimony at trial. See Supp. L.F. generally – video. The officers themselves also interjected the issue of self-defense themselves multiple times through the video statement, suggesting Defendant acted in self-defense and as a reasonable man would have done under the circumstances, and suggested that perhaps he could not recall the stabbing due to his multiple physical and mental injuries. (Supp. L.F. – video).

In *State vs. Wright*, 352 Mo. 66, 175 S.W. 2d 866, 877 (1943), the defendant testified at trial that he was not the one who attacked the victim. He nonetheless sought to submit self-defense based on his prior inconsistent statements to police that he acted in self-defense. The court in *Wright* noted that it was the State, not Defendant, that had introduced the prior inconsistent statements by Defendant that supported self-defense. Id. Thus, the *Wright* court in citing *State vs. Creighton,* 330 Mo. 1176, 52 S.W. 2d 556, 562 (1932) for the proposition that a prior inconsistent extra judicial statement of the Defendant can support submission of self-defense where the evidence was introduced by the State, confirmed:

> The well settled rule is that ….if the State has introduced the whole admission or statement, the Defendant would be entitled to rely on the parts thereof favorable to him. He is not the one who introduced it. He is merely saying, in effect, that if the State desires to present his statements to the jury, they must consider the part in his favor, though inconsistent with his own testimony.
>
> Id; *Wright*, 175 S.W. 2d at 872.

The *Wright* case is on point. The State chose, over objection, to introduce extra judicial statements of Defendant Barnett into evidence, claimed they knew that Defendant

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did stab the victim, that 2 witnesses saw him do the stabbing and that it appeared from the circumstances that this was a self-defense issue. The State also presented multiple witnesses who testified Defendant had a knife as he left, that victim had been aggressive to defendant that evening, that victim approached defendant outside the bar and got in a fist fight with defendant, and that victim had been stabbed. There was substantial evidence offered by the State that defendant had stabbed the victim that night, along with evidence that he was acting in self-defense. As the State was responsible for introducing the inconsistent evidence, Defendant should return the benefit of the use of self-defense in response thereto. Submission of a self-defense instruction is required even if the substantial evidence supporting same is inconsistent with Defendant's testimony. *State vs. Westfall*, 75 S.W. 3d at 281. As such, it was error for the Court to refuse to instruct the jury on self-defense. *Wright*, 175 S.W. 2d at 870-871. The question of self-defense is a question for the jury. *State vs. Stenson,* 714 S.W. 2d 839 (Mo App WD 1986).

C. CONCLUSION

There was substantial evidence in this case that the defendant acted on a reasonable belief that deadly force was necessary to protect him from death, serious physical injury, or forcible felony, and the proferred self-defense instruction should have been given to the jury for consideration herein. Mr. Barnett was entitled to a self-defense instruction, it was reversible error for the Court to refuse the self-defense instruction, and defendant respectfully requests this matter be remanded for new trial.

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Respectfully submitted,

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*/s/ Heidi L. Leopold*______________

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CERTIFICATE OF COMPLIANCE

We certify that the attached brief complies with limitations contained in Rule 84.06 (b). The brief is completed using Microsoft Word in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the Brief contains 7,158 words, which does not exceed the 31,000 words allowed for an appellant's brief.

/s/ Heidi L. Leopold ________

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CERTIFICATE OF SERVICE

On the 25th day of April, 2018, copies of Appellant's Substitute Brief and Appellant's Substitute Brief Appendix were served through the Missouri E-Filing system on:

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