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No. SC96138

In the Supreme Court of Missouri

STATE OF MISSOURI,

Respondent,

v.

ANDREW BARNETT,

Appellant.

Appeal from the Circuit Court of the City of St. Louis
Twenty-Second Judicial Circuit
The Honorable Thomas J. Frawley, Judge

RESPONDENT'S SUBSTITUTE BRIEF

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STATEMENT OF FACTS

Defendant was convicted by a jury following a trial in the Circuit Court of the City of St. Louis, the Hon. Thomas J. Frawley presiding, of first-degree assault, a class A felony, and armed criminal action, an unclassified felony. Sections 565.050 & 571.015, RSMo (2000).[1] (LF 120-121; Tr. 966). Defendant was sentenced in accordance with the recommendation of the jury to 30 years in prison for assault and 25 years in prison for armed criminal action, to be served concurrently. (LF 122-123, 139-141; Tr. 1033).

The sufficiency of the evidence to convict is not at issue. Viewed in the light most favorable to the verdicts, the evidence at trial and reasonable inferences therefrom established the following facts:

On January 31, 2014, Defendant pulled a standard hunting knife with a blade between 4 ½ and 6 inches long on Victim in The Little Bar in the City of St. Louis. (Tr. 283-288, 290-291, 293, 297-298, 434-435, 462-465). After that incident, Defendant and Victim did not like one another "at all" and frequently "barked" across the bar at each other. (Tr. 352-353, 376, 392-393, 408). Although he denied it, Defendant had a knife in his pocket or clipped on his pants every time he was in The Little Bar. (Tr. 287-288).

[1] All statutory citations are to RSMo (2000) unless otherwise indicated. The legal file will be cited as "LF" and the trial transcript as "Tr."

On May 7, 2014, the bartender stepped between the two men during a verbal altercation and warned that they would be expelled from the bar if anything happened; Defendant told the bartender that if he and Victim got into a fight or went out back, she should lock the door and not let anyone come out back behind the bar. (Tr. 439-440). Defendant was overheard asking another patron "for his blades back." (Tr. 352, 355, 446-447). The patron gave Defendant his knife back. (Tr. 355). Defendant subsequently overturned a table with drinks on it towards Victim, knocking Victim's hat and sunglasses to the floor; the bartender told both men to leave. (Tr. 352-362, 395-396, 412, 414, 438-444).

Defendant went out the back door; Victim left approximately five minutes later and was told to leave through the front door. (Tr. 443-444).

Defendant was waiting for Victim; Defendant and Victim subsequently approached one another in the parking lot area behind the bar to begin what initially appeared to be a fist fight, but Defendant stabbed Victim multiple times with a hunting knife. (Tr. 399-401, 424-425, 444-445; Ex. 39). Victim was rendered a quadriplegic by the stabbing. (Tr. 582). Defendant then fled, first on foot and then by car, driving past the bleeding Victim and an eyewitness to make his escape. (Tr. 401, 402, 422). Victim was unarmed and no knife was found at the scene following Defendant's flight. (Tr. 404).

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After the two men left after being thrown out, the bartender asked another customer (Anthony Grimm) to check the area behind the bar to make sure nothing was happening, since he was headed in that direction, and he did so. (Tr. 396-403). Defendant used to hang out with Grimm and had dated Grimm's girlfriend's daughter. (Tr. 390).

Grimm saw the two men walk towards one another, meet up, and begin what he thought was a fist fight. (Tr. 399, 404). He then saw Victim "drop like a bag of rocks" and Defendant "ran off." (Tr. 399). The entire interaction took only a matter of seconds. (Tr. 422). Grimm initially thought that Victim must have been knocked out, but upon arriving to check on him, found that Victim had been stabbed on his stomach and neck and was bleeding from his back and side. (Tr. 400-401, 424-425). Grimm saw Defendant run to his car and drive off through the alley and onto an adjoining street. (Tr. 401, 422). Defendant drove right past Grimm and Victim during his escape. (Tr. 402). Victim had no weapon near or around him. (Tr. 404).

Grimm ran into the bar, yelling that 911 should be called, and that Victim had been stabbed and was "bleeding to death." (Tr. 403, 445). A nurse who happened to be present in the bar tended to Victim as they waited for help to arrive. (Tr. 423, 424). A lot of people came out and told Victim to "hang on for his life" and tried to tend to him "to keep him from bleeding to death." (Tr. 426).

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Sgt. Neal testified that he found Victim on his back in the rear parking lot of The Little Bar. (Tr. 488). Victim was unconscious and bleeding from his upper torso. (Tr. 499, 501).

Once medical help arrived, Victim was intubated prior to arrival at the emergency room and arrived as a level one trauma patient, the most severe. (Tr. 575). Victim had four stab wounds, one to the back of his head, one over his right chest, one in the left axillary (armpit area), and one over the upper abdomen. (Tr. 576-577). A fatty layer of the abdomen was protruding through the abdominal wound. (Tr. 576). This wound was at least 5"-6" deep, the distance from the anterior abdominal wall to the pancreas. (Tr. 583-584, 594). They were stab wounds, rather than slash wounds because the depth of the wounds into the body exceeded the length across the skin. (Tr. 577, 583-584).

Victim also had severe hypotension (low blood pressure) and required exploratory surgery to determine the source of internal bleeding. (Tr. 578-579). The surgery revealed that Victim had a laceration to the mesentery (roots) of the transverse colon and another laceration through the pancreas. (Tr. 579-580, 586).

The wound to Victim's neck penetrated all the way to the spine. (Tr. 580-581). Testing showed that Victim had a soft tissue injury that fractured the joint between the second and third vertebrae. (Tr. 581). An MRI showed

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that Victim's spinal cord had been completely split and had separated. (Tr. 582).

As a result of the spinal cord injury, Victim had quadriplegia. (Tr. 582). Because the nerves to the diaphragm came off as a result, Victim became ventilator-dependent. (Tr. 582-583). Victim is unable to talk, has no use of his arms or legs, and requires a machine to breathe. (Tr. 276, 278, 583). Victim's father testified that Victim "was pretty much murdered that night as far as I'm concerned, I've got nothing left." (Tr. 276). Victim had "coded" and temporarily died during the month before trial but had been revived by CPR. (Tr. 277). He had been readmitted to the hospital four times since being stabbed by Defendant. (Tr. 277). Victim has a baby daughter, whom he can no longer care for. (Tr. 281).

Grimm informed Sgt. Neal that Defendant was the person who had assaulted Victim. (Tr. 492-495, 497). Sgt. Neal was familiar with Defendant and attempted to take Defendant into custody at his known address but Defendant wasn't there. (Tr. 495). Sgt. Neal relayed a description of Defendant's vehicle to his dispatcher, who found the vehicle was registered to a nearby St. Louis County address. (Tr. 495-496). That information was relayed to St. Louis County police. (Tr. 496).

Officer Snyder of St. Louis County testified that the suspect's license plate number was registered to Defendant with an address of 12 Grantview

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Lane. (Tr. 506). The car was located at that address (Defendant's father's house) and Defendant was inside. (Tr. 509-510, 512). Defendant had no observable injuries that the officer recalled, but had trouble going to his knee when arrested and handcuffed. (Tr. 510-511, 513-514).

Because Victim was gravely wounded, initially "critical, unstable with death imminent," his case was assigned to the homicide division. (Tr. 516-517).

On the morning of May 8, a caller told police that they had observed a white male park a vehicle, get out, and place something in the storm sewer at Grantview Lane. (Tr. 517-522). Police removed two manhole covers from the storm sewer and retrieved some items of clothing, including three T-shirts and a pair of blue jeans. (Tr. 523-524). Blood was found on these items of clothing and on the exterior door handle, steering wheel, and gearshift of Defendant's car. (Tr. 548-549).

DNA analysis established that all of the blood samples from Defendant's car were consistent with Defendant's DNA. (Tr. 550). Only one in 300 billion people would randomly possess that DNA profile. (Tr. 550-551, 566).[2] Blood found on a paper towel in a garbage can at 12 Grantwood Lane was also Defendant's, as was blood found on the right front pocket of the

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[2] The total population of the Earth is currently about 7 billion people. (Tr. 551).

discarded jeans and blood on two of the T-shirts. (Tr. 552-553, 556-560, 569-571).

Defendant was given his *Miranda* rights twice and gave a videotaped statement in which he admitted having an altercation with Victim in the parking lot behind The Little Bar on the night in question but denied that he stabbed Victim. (Ex. 39). Defendant admitted that Victim and he got on one another's nerves multiple times over a period of months at The Little Bar and, after initially denying that he carries a knife, admitted that he pulled a knife on Victim at the same bar in January 2014. (Ex. 39).

Defendant further admitted that he gave two knives to a friend named Bob (whose nickname was "Canine") at the bar on the night of the stabbing, but he claimed he found them on the floor and that he never got them back. (Ex. 39).

Defendant told police that he wore a black T-shirt without any writing on it and jeans that night to The Little Bar and that they were back at his apartment because he changed clothes in anticipation of going to bed. (Ex. 39.) He guaranteed there would not be any blood on the clothes he wore. (Ex. 39.)

After prompting, Defendant admitted that his former girlfriend's mother's boyfriend, Anthony, was at the bar that night and described him as a "good guy." (Ex. 39). As noted above, the eyewitness who identified

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Defendant and had previously hung out with Defendant, whose girlfriend's daughter had dated Defendant, and who testified that Victim was unarmed, was named Anthony Grimm. (Tr. 390, 399-406, 422-427).

Following his convictions and sentences, Defendant appealed to the Missouri Court of Appeals, Eastern District, which affirmed in a *per curiam* order and memorandum opinion. *State v. Barnett*, 2016 WL 6440402 (Mo. App. E.D. November 1, 2016).

As relevant to the issue before this Court, the Court of Appeals stated the facts of the case as follows:

> The State charged Andrew Barnett with one count of first-degree assault and one count of armed criminal action. Specifically, the State alleged that, during a physical altercation outside the Little Bar ("the Bar") on the morning of May 8, 2014, Barnett repeatedly and knowingly stabbed Victim with a knife.
>
> At trial, Anthony Grimm ("Grimm") testified that both Barnett and Victim were present in the Bar on the night of May 7, 2014. Late in the evening, Victim walked over to Barnett's table and an altercation occurred. Grimm asserted that during this altercation, Barnett flipped the table towards Victim. The bartenders quickly intervened in the dispute and ejected Barnett and Victim from the Bar. According to Grimm, Barnett left the Bar through the rear entrance, while Victim

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eventually left through the front entrance. Grimm maintained that, shortly thereafter, he also went outside through the rear entrance, where he saw Barnett and Victim "[meet] up and what I thought was into a fist fight." Grimm did not see any knives during the fight or near the scene afterwards. However, Grimm recalled that Victim "drop[ped] like a bag of rocks" during the fight. Grimm initially believed that Barnett had knocked Victim unconscious. Grimm claimed that Barnett then ran to his vehicle and drove away from the Bar. As Barnett drove away, Grimm walked over to Victim and noticed that Victim had suffered extensive injuries resembling stab wounds. Grimm then went into the Bar to request aid.

Robert Laut ("Laut") testified that on the night of May 7, 2014, he was at the Bar and talked to Barnett. Laut claimed that during this conversation, Barnett asked him to hold one or more of Barnett's folding knives. Laut placed the folding knives in his pocket. Laut testified that as Barnett prepared to leave the Bar, Barnett approached him and asked for the knives. Laut said that he returned the knives to Barnett, who then left the Bar.

The State also offered the testimony of Dr. Kevin Mahoney ("Dr. Mahoney"), who testified to the nature of Victim's wounds. Dr. Mahoney opined that Victim's wounds severed his spine, resulted in

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quadriplegia, and rendered Victim dependent on a ventilator. Dr. Mahoney reported that Victim's injuries were consistent with wounds caused by a stabbing.

The State produced evidence that Barnett suffered a significant laceration on his right thumb on May 7–8, 2014. Barnett's blood was also found in his car, specifically on the exterior door handle on the driver's side, on the right-hand side of the steering wheel, and on the gearshift in the car's center console. The State also offered into evidence testimony asserting that detectives recovered Barnett's bloodied clothes from a storm drain located near the residence of Barnett's father.

Kristin Goodson ("Goodson"), the bartender at the Bar, testified that Barnett told her at some point the same night to "lock the door and not let anybody out there" if Barnett and Victim "went out back" to fight. Goodson also recalled that she heard Barnett ask Laut to return the knives. Goodson also testified about a previous altercation in January 2014 ("the January 2014 incident"), between Barnett and Victim. Goodson testified that Victim approached Barnett from behind placing him in a choke-hold. Goodson did not remember seeing a knife brandished during the January 2014 incident. However, Goodson recalled that Barnett later told another bar patron that he pulled a

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knife. Goodson was not certain if Barnett was referring to the January 2014 incident.

Cheryl Wirtel ("Wirtel"), the mother of one of Victim's children, testified that Barnett had threatened Victim with a knife in the January 2014 incident. Wirtel maintained that the January 2014 incident occurred while Barnett, Victim, and Wirtel were all at the counter of the Bar. Wirtel asserted that Barnett brandished a knife at Victim underneath the Bar's counter, threatening to kill him. After this threat, Wirtel immediately left the bar with Victim.

Barnett testified on his own behalf. Barnett claimed that Victim approached him inside the Bar in a threatening manner and took a "drunk swing" at him. In the skirmish, Barnett bumped into the table, prompting the bartenders to order Barnett and Victim to leave. Barnett testified that he then left the bar without asking Laut to return any knives. Upon exiting the rear entrance of the Bar, Barnett stopped to urinate on the side of a nearby dumpster. Barnett asserted that, while he was urinating, Victim approached him from behind and shouted at him. Barnett claimed that Victim initiated contact with him and that he saw something "metal and shiny" in Victim's hand. Barnett was able to knock Victim's hand away and shove him to the ground. Barnett then walked to his vehicle and departed from the scene as Victim was

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starting to rise. As Barnett drove away from the fight, he saw three men standing on the street who had witnessed the events transpire. Importantly, Barnett insisted that he only shoved and grappled with Victim and that Victim had no noticeable stab wounds when Barnett departed.

Barnett additionally acknowledged that he had received a laceration on his right thumb. However, Barnett claimed that this wound occurred earlier on May 7, 2014, when he was taking out garbage and cut his thumb on a piece of metal protruding from a dumpster.

Barnett further testified about the January 2014 incident. Barnett explained that Victim approached Barnett from behind, placing his arm around Barnett's neck. Barnett stated that he tried to free himself from Victim and did not threaten Victim with a knife. This encounter was the first time Barnett met Victim. Barnett claimed that he changed the times he frequented the Bar in order to avoid having contact with Victim. Barnett testified that subsequent encounters with Victim at the Bar resulted in verbal disputes.

* * *

Also during the cross-examination of Barnett, the State submitted into evidence a video of police interrogating him the morning

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of May 8, 2014. Barnett's account to the officers in the videotaped interrogation omitted any reference to his stop behind the bar to urinate or the presence of three potential witnesses who had allegedly observed the fight. In the video recording of the interrogation, the officers told Barnett that two witnesses saw Barnett stab Victim, even though only one eyewitness testified at trial. Several times during the questioning, the officers expressed to Barnett their difficulty believing Barnett's account of events and asked pointed questions regarding apparent inconsistencies in his interrogation answers. As the questioning continued, one officer told Barnett that he believed Barnett was lying.

During the interrogation the officers also asked Barnett if he stabbed Victim in self-defense. The officers promised to tell the prosecutor if Barnett claimed self-defense. In response, Barnett adamantly and repeatedly asserted that he never stabbed Victim and that Victim did not have any stab wounds when Barnett left. The officers also hypothesized to Barnett that a reasonable man, if attacked, may be required to use force to defend himself. In reply, Barnett again denied stabbing Victim in self-defense.

* * *

The trial court refused Barnett's proposed jury instructions on self-defense (MAI-CR 3d 306.06(a)) and diminished capacity (MAI-CR 3d 308.03). The trial court submitted an instruction on first-degree assault, along with a mitigating sudden-passion instruction, and an instruction on armed criminal action. After deliberating, the jury returned a guilty verdict on both first-degree assault and armed criminal action. The jury recommended thirty years' imprisonment for first-degree assault and twenty-five years' imprisonment for armed criminal action. The trial court adopted the jury's recommendation and ran the two sentences concurrently. Barnett filed a motion for a new trial containing the issues raised in this appeal, which the trial court denied.

Memorandum Supplementing Order Affirming Judgment Pursuant to Rule 30.25(b), *State v. Andrew Barnett*, No. ED103667 (Mo. App. E.D. Nov. 1, 2016) (hereinafter "Memo Opinion") at 2-5, 6, 7; Respondent's Substitute Brief Appendix at 3-6, 7, 8.

Defendant filed a timely motion for rehearing or transfer, which the Court of Appeals denied on December 15, 2016. On December 30, 2016, Defendant filed an application for transfer in this Court, which the Court sustained on March 6, 2018.

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ARGUMENT

The trial court did not err by rejecting Defendant's proffered instruction on self-defense because Defendant denied stabbing Victim and there was no evidence authorizing the use of lethal force.

Defendant challenges the denial of his proposed self-defense instruction. At trial, Defendant denied stabbing Victim, denied possessing a knife at the time, and claimed that he merely pushed Victim's arm and hand aside, shoved him to the ground, and left before Victim sustained any stab wounds. Defendant denied acting in self-defense to police, despite being given multiple opportunities to make such a claim, and denied stabbing Victim.

The State's evidence established that Defendant stabbed Victim multiple times during the course of a fist fight, resulting in four stab wounds and rendering Victim a quadriplegic, then evidenced consciousness of guilt by fleeing to an address other than his own and disposing of his bloody clothing in a sewer hole.

No evidence established that Defendant was authorized to use lethal force under the theory presented. An eyewitness who knew Defendant testified that Victim was unarmed and that it appeared to be a fist fight.

Defendant testified that a laceration on his thumb which bled profusely was sustained from "a piece of metal that was hanging out of the dumpster" when he took out the garbage earlier on that day. (Tr. 670-672).

A. Standard of review

Claims of instructional error are reviewed *de novo*. *State v. Bruner*, 541 S.W.3d 529, 534 (Mo. banc 2018); *State v. Sanders*, 522 S.W.3d 212, 215 (Mo. banc 2017). Instructional error requires reversal when the error "is so prejudicial that it deprived the defendant of a fair trial." *Sanders*, 522 S.W.3d at 215. The trial court's rejection of a proffered instruction "should be affirmed" if "the trial court was correct" for "any reason[.]" *Id.*

In determining whether a refusal to submit an instruction was error, "the evidence is viewed in the light most favorable to the defendant." *Bruner*, 541 S.W.3d at 534; *State v. Smith*, 456 S.W.3d 849, 852 (Mo. banc 2015). The circuit court must submit a self-defense instruction "when substantial evidence is adduced to support it, even when that evidence is inconsistent with the defendant's testimony"; "failure to do so is reversible error." *Bruner*, 541 S.W.3d at 534. "Substantial evidence" is evidence putting a matter in issue. *State v. Avery*, 120 S.W.3d 196, 200 (Mo. banc 2003); *Bruner*, 541 S.W.3d at 535.

B. Requirements for justification of self-defense

A defendant may be justified in the use of physical force when he reasonably believes such force is necessary to defend himself from what he reasonably believes to be the use or imminent use of unlawful force by

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another. Section 563.031.1, RSMo (Cum. Supp. 2013); *Smith*, 456 S.W.3d at 852.

A person may not use "deadly force" upon another person unless he or she "reasonably believes that such deadly force is necessary to protect himself, or herself, or herself or her unborn child, or another against death, serious physical injury, or any forcible felony[.]" Section 563.031.2(1), RSMo (Cum. Supp. 2013);[3] *Bruner*, 541 S.W.3d at 536; *Smith*, 456 S.W.3d at 852. "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." MAI–CR 3d 306.06A[6]; *Smith*, 456 S.W.3d at 852. "Deadly force" means "physical force which is used with the purpose of causing or which a person knows to create a substantial risk of causing death or serious physical injury." MAI–CR 3d 306.06A[5]; *Smith*, 456 S.W.3d at 852.

At the time of trial in October 2015, Section 563.031.5 provided that: "The defendant shall have the burden of injecting the issue of justification

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[3] Section 563.011(3) defines "forcible felony" as "any felony involving the use or threat of physical force or violence against any individual, including but not limited to murder, robbery, burglary, arson, kidnapping, assault, and any forcible sexual offense." Here, Defendant's proposed self-defense instruction cited only the fear of death or serious physical injury as justifications for the use of lethal force. (LF 110-117).

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under his section." *Id.*; *Bruner*, 541 S.W.3d at 534. As defined at the time, the phrase, "The defendant shall have the burden of injecting the issue" meant:

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

(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, RSMo (2000); *Bruner*, 541 S.W.3d at 534.

In interpreting this statute, this Court has settled on "describing the quantum of proof required" as "substantial evidence." *Bruner*, 541 S.W.3d at 535; *Smith*, 456 S.W.3d at 852; *State v. Bolden*, 371 S.W.3d 802, 805 (Mo. banc 2012). "Sufficient 'substantial' evidence is provided" if there is "evidence putting a matter in issue." *Bruner*, 541 S.W.3d at 535. "If the evidence tends to establish the defendant's theory, or supports different conclusions, the defendant is entitled to an instruction on it." *Id.*

A person may not use self-defense if he was the initial aggressor unless he has withdrawn from the encounter and effectively communicated such withdrawal to the other person but the latter persists in continuing the incident by the use or threatened use of unlawful force, unless the aggressor is a law enforcement officer or there is some other statutory or legal exception. §563.031.1(1), RSMo. (Cum. Supp. 2013); *id.* at 536.

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The issue turns on "whether the three elements set out in section 563.031 were injected" rather than on the common-law test used in earlier cases. *Bruner*, 541 S.W.3d at 537. *See*, §563.031.2 (deadly force may only be used to protect the defender or another against death, serious physical injury, or any forcible felony, or when a dwelling, residence, vehicle or private property is unlawfully entered, and only when defendant is not the initial aggressor).[4]

C. Defendant was not entitled to a self-defense instruction.

1. Defendant denied stabbing Victim.

In both his statement to police and his trial testimony, Defendant adamantly denied stabbing Victim. Defendant claimed that he merely shoved Victim's arm, shoved him to the ground, walked to his car, and drove away. Defendant insisted that someone else must have stabbed Victim after he left the scene. Defendant denied having any knives in his possession during the

[4] Statutory exceptions to the duty to retreat prior to using deadly force are set forth in Section 563.031.3, none of which are implicated here. *See*, Section 1.1010, RSMo (2000) (adopting the common law of England and all statutes and acts of parliament made prior to the fourth year of the reign of James the First, of a general nature, which are not local to that kingdom and not repugnant to the Constitution of the United States, the constitution of this state, or the statute law in force for the time being); *State v. Allison*, 845 S.W.2d 642, 647 (Mo. App. W.D. 1992) (discussing common-law duty to retreat before using deadly force). The subsequent legislative amendment to Section 563.031.3(3), RSMo (Supp. 2016), providing that there is no duty to retreat from "any other location" where "such person has the right to be" was not in force at the time of this crime in August of 2014.

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encounter. Because Defendant denied using deadly but justified force, neither of his stories supported a self-defense instruction. In fact, police offered Defendant every opportunity to claim self-defense and he repeatedly refused to do so.

2. Defendant's statement to police did not inject self-defense based on police questions or commentary whose factual premise was adamantly and repeatedly denied by Defendant.

The Court of Appeals opinion explains why Defendant's attempt to shoehorn in police questions and commentary offering Defendant an opportunity to claim self-defense—which Defendant repeatedly and adamantly denied to do—failed to inject the issue:

> Because Barnett's testimony is inconsistent with a claim of self-defense, we consider whether the State or other third parties injected the issue of self-defense into the case [in such a way] that would require the trial court to give a self-defense instruction. . . . Citing *State v. Wright*, 175 S.W.2d 866 (Mo. 1943), Barnett reasons that the State injected the issue of self-defense into the case when it introduce into evidence the video of his police interrogation in which the police officers repeatedly ask Barnett if he stabbed the victim in self-defense. In *Wright*, the defendant testified at trial that he did not attack the victim; however, the State introduced into evidence his prior

inconsistent statements that he had acted in self-defense. *Id.* at 870-71. Ruling that the defendant was entitled to a jury instruction on self-defense, the Supreme Court of Missouri reasoned, "[I]f the State has introduced the whole admission or statement, the defendant would be entitled to rely on the parts thereof favorable to him.... [I]f the State desires to present his statement to the jury they must consider the part in his favor, though inconsistent with his own testimony." *Id.* at 872.

Barnett's reliance upon *Wright* is unavailing because unlike the defendant in *Wright*, Barnett never made a prior inconsistent statement to police that he had acted in self-defense. Although the officers inquired and presented Barnett with the opportunity to claim self-defense, Barnett repeatedly and emphatically maintained that he did not commit the act in question. No evidence to the contrary was produced by the State. During the interrogation, the officers asked and informed Barnett that if he stabbed Victim in self-defense, they would present such information to the prosecutor. The officers also hypothesized that a reasonable man may legally use force under certain circumstances. Barnett would have this Court equate the questions prof[f]erred by law enforcement to a statement or admission by the defendant. *Wright* does not support such a ruling. These statements by police were in the context of a police interrogation and

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were questions to Barnett rather than assertions of fact. *See, e.g., State v. Jones,* 398 S.W.3d 518, 526 (Mo. App. E.D. 2013) (determining that the officer's statements in an interrogation were not evidence used to prove the event at issue). Whether the questions raised by the police regarding self-defense constituted evidence injecting the issue of self-defense into the case depended entirely on Barnett's response to the questions. Barnett's unequivocal denial of having acted in self-defense deprives the officer's questions of any evidentiary support for a claim of self-defense. Because the interrogation video did not present any evidence of self-defense, we reject Barnett's argument that the State injected the issue of self-defense into the case.

Memo Opinion at 15-16; Respondent's Substitute Brief Appendix at 16-17.

3. No third-party testimony injected the issue of self-defense.

The Court of Appeals also explained that the only other eyewitness testimony, proffered by a man who hung out with Defendant and who dated the mother of a girl Defendant had dated, did not inject the issue:

We further find no evidence in the record that any third party injected the issue of self-defense that could warrant giving a self-defense instruction. The testimony by Grimm, the only eye-witness, does not justify a self-defense jury instruction. The evidence provided by Grimm, viewed in a light most favorable to Barnett, is that Barnett

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used deadly force during no more than a fist fight. Grimm testified that he did not see any knives or weapons. A person is not entitled to use deadly self-defense to ward off an assault or battery under the circumstances as described by Grimm. *See Dorsey v. State*, 113 S.W.3d 311, 317 (Mo. App. S.D. 2003).

Memo Opinion at 16; Respondent's Substitute Brief Appendix at 17.

4. No evidence of real or apparent necessity to use deadly force.

In *State v. Smith*, *supra*, this Court held that the defendant was not entitled to a self-defense instruction where the victim "threatened to fight, yelled at, and came within inches of" the defendant but neither hit nor exhibited a weapon to the defendant. *Id.*, 456 S.W.3d at 852. "No one, including" the defendant "saw a weapon" on the victim during the incident. *Id*. While the defendant testified that after the victim fled towards a dumpster, he "figure[d]" he was looking for a gun, the defendant "was not faced with a real or apparently real necessity to use deadly force to defend himself against [the victim]" when he fired the first shot before the victim ran away. *Id*. Thus, "the circuit court did not err in its refusal to submit a self-defense instruction." *Id*.

Here, neither Defendant's nor the State's version of events supported the real or apparent necessity for Defendant to use deadly force. Defendant denied that he did so, and he denied having any knives at the time of the

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stabbing. The State proved that Defendant was armed with two knives but Victim had none; no one, including Defendant, saw any weapon on Victim, and none was found at the scene where Victim was incapacitated. While Defendant testified at trial (contrary to his earlier statement) that Victim approached him while he was urinating by a dumpster and that he felt threatened by his approach and his yelling, Defendant did not testify that he was unable to repel Victim's unsuccessful swing or the grappling of his shoulder without using lethal force or that Victim was armed. Rather, he testified that shoving Victim's arm eliminated any threat from an alleged "metal and shiny" object in Victim's hand—which he did not testify that he perceived to be a weapon—and that he shoved Victim to the ground to escape the grappling of his shoulder and escaped any further threat. Thus, under *Smith*, there was no real or apparent necessity for Defendant to use deadly force as a preemptive first resort. *Id.*

As in *Smith*, the defendant "failed to meet his burden of injecting self-defense by proffering substantial evidence of the elements of self-defense under the statute." *See also, Bruner*, 541 S.W.3d at 537.

In *State v. Bruner*, *supra*, the defendant "escalated what would at most have been a simple assault—an attempt by [the victim] to 'grab' him—into a deadly confrontation." *Bruner*, 541 S.W.3d at 537. Victim had yelled and threatened to fight, but "used the same kind of language found insufficient in

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Smith" even though it included a threat to kill the defendant by slicing the defendant's throat within two hours. *Id*. at 531, 537.

In *Bruner*, the victim—who was on a date with the defendant's wife—moved in front of the defendant's wife and approached the defendant. *Id*. at 531. The defendant "stepped backward and made clear he was not interested in speaking to" the victim. *Id*. The victim "stepped toward" the defendant "repeatedly, and each time, [the defendant] stepped backward." *Id*.

After the defendant stopped backing up to avoid tripping on a median, the victim and defendant's wife walked past the defendant, "who pivoted to remain facing them." *Id*. The victim "was upon the median" while the defendant was below him on a driveway. *Id*. The defendant testified that the victim was in a "fighting stance" and that while he had not moved toward him to hit him, he said, "I'm not from around here, motherf**ker, I'll have your throat slit in two hours." *Id*. at 531-532. The defendant responded, "Why are you threatening me?" *Id*. The victim replied, "I don't play these redneck games" and "You don't know who the f**k you are messing with." *Id*. at 532.

The defendant in *Bruner* "did not testify that he then killed" the victim "in self-defense or that he did so because he feared for his life." *Id*. Rather, his defense was "that he did not act of his own volition" because "the stress caused him to go into a dissociative mental state" and that he felt as if everything "was closing in on [him]." *Id*. The defendant then took out his gun

and shot the victim multiple times. *Id.* The defendant "did not testify he saw or thought" the victim "had a weapon." *Id.* "He also never testified he was afraid" the victim "would cause him death or serious physical injury, or commit a forcible felony against him, or, indeed, that he feared" the victim would "punch him." *Id.* Nor did he "consider leaving the scene[.]" *Id.*

In *Bruner*, the trial court denied the defense's proposed self-defense instruction "on the basis there was no evidence from the defendant's testimony or from any of the other witnesses that the defendant had any reasonable belief he was defending himself from imminent serious physical injury or death." *Id.* at 533-534.

This Court affirmed, noting that the verbal threats were insufficient, and that while the evidence showed the defendant and the victim "came into close contact with one another, taking 'fighting' poses," the men never touched. *Id.* at 537. The defendant in *Bruner* had testified that "he saw some movement of" Victim's "right arm and thought perhaps" the victim was going to grab him and, again, that he saw "some kind of arm motion" and "things were kind of closing in, so what the motion was isn't real clear to me." *Id.* at 537-538. The defendant "did not testify that he acted in self-defense." *Id.* at 538. Neither the defendant nor the eyewitnesses "saw a weapon" in the victim's possession. *Id.*

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This Court held that the defendant "failed to inject sufficient evidence that he reasonably believed deadly force was necessary to protect himself from death, serious physical injury, or any forcible felony." *Id.* This Court held that at best, the defendant "showed a fear of a simple assault or battery," but "[d]eadly force cannot be used to repel a simple assault or battery." *Bruner,* 541 S.W.3d at 538 (quoting *Dorsey v. State*, 113 S.W.3d 311, 317 (Mo. App. S.D. 2003)). *See also, State v. Kendrick*, 2018 WL 1914861 (Mo. App. W.D. April 24, 2018) at *6 (defendant not entitled to a self-defense instruction where he "introduced a deadly instrument into what had been, at most, a simple battery and significantly raised the level of violence").

This Court rejected speculation that the defendant "thought" the victim "had a knife in his hand and was fearful" that the victim "was going to slit his throat." *Id.* This Court stated that it cannot "supply missing evidence" or grant the defendant "the type of 'unreasonable, speculative, or forced inferences'" the defendant's argument proposed. *Id.* The Court observed that the only "relevant evidence on" the defendant's "objective and subjective state of mind" was that the victim "was swearing and threatening him and he believed" the victim "was about to make unwanted or offensive contact by grabbing him." *Id.* The Court concluded, "Such evidence is not sufficient to justify deadly force." *Id.* (citing § 563.031.2(1)).

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Similarly, in the case at bar, Defendant's testimony that he thought he saw a shiny metal object in Victim's hand is insufficient to produce anything more than an unreasonable, speculative, or forced inference that Defendant needed to use deadly force. As held by the Court of Appeals:

> Here, Barnett testified that he merely shoved Victim to the ground and that Victim was rising when he drove away. Barnett denied having a knife. Although Barnett testified that Victim had a shiny object in his hand, Barnett did not testify that he struggled over that object. Barnett's testimony is that he shoved Victim and left. Barnett adamantly denied ever having possession of a knife during his altercation with Victim. Equally as important, the record presents no evidence suggesting that Victim's multiple stab wounds were consistent with Victim falling on a knife if pushed by Barnett. Barnett's testimony is that Victim was not noticeably injured by the shove outside the Bar. Barnett's own testimony is thus necessarily inconsistent with a legal claim that he stabbed Victim in self-defense.
>
> Further, Barnett's own factual testimony provides no basis for allowing the use of deadly force. Barnett testified that during the brief altercation, he was able to knock the Victim's hand away and push Victim to the ground. Barnett's self-described acts ended any threat that may have been posed by Victim, and enabled Barnett to depart

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> safely. Barnett's own testimony demonstrated that, under his scenario, the limited force used by him—a shove—was sufficient to end the threat, and that Barnett did not believe any more force was necessary to defend himself under the circumstances. Missouri law allows one to use force that inflicts serious bodily injury, but only to the extent necessary to protect the defender (or certain others) from death, serious physical injury, or a forcible felony. Section 563.031.2; *State v. Hiltibidal*, 292 S.W.3d 488, 493 (Mo. App. W.D. 2009). By Barnett's own admission, deadly force was not necessary or even used under the circumstances. Therefore, Barnett's testimony is necessarily inconsistent with this element of a claim of self-defense. Barnett presented no evidence of self-defense to warrant a jury instruction on this issue under his testimony alone.

Memo Opinion at 13-14; Respondent's Substitute Brief Appendix at 14-15.

Indeed, had Defendant believed Victim had a knife or other deadly weapon, it would have been easy enough for him to testify to that. A "metal and shiny" object could well be a wedding or other ring, a top to a beer can, or any number of non-life-threatening objects. As in *Bruner*, *supra*, Defendant declined to testify that he thought Victim was armed; that he felt his life was in danger; that he feared serious physical injury; or that he thought lethal force was necessary to prevent a forcible felony. Rather, despite his claim of a

verbal threat to kill from Victim, he claimed he did not use lethal force and was able to duck an alleged swing and to repel a simple grapple in which Defendant had hold of his shoulder with a shove to the arm allegedly holding the object, another shove to break Victim's hold on his shoulder, and a retreat. (Tr. 708-709).

As in *Bruner*, Defendant failed to satisfy Section 563.031.2's requirements for the use of lethal force because, at best, he showed merely a fear of simple assault or battery and "[d]eadly force cannot be used to repel a simple assault or battery." *Bruner,* 541 S.W.3d at 538; *Dorsey*, 113 S.W.3d at 317; *Kendrick*, 2018 WL 1914861 at *6.

5. There was no evidence that Defendant needed to stab the unarmed Victim five times to accomplish self-defense.

Defendant admits that one of the elements of self-defense requires a showing that Defendant "used no more force than was necessary[.]" Substitute Brief for Appellant at 20. *See*, *State v. Delgado*, 774 S.W.2d 549, 552 (Mo. App. S.D. 1989); *State v. White*, 222 S.W.3d 297, 300 (Mo. App. W.D. 2007).

Here, Defendant failed to adduce any proof that he needed to stab the unarmed Victim five times to defend himself from a grapple hold and potential fist-fight. *Smith* holds that such a scenario does not establish the need for deadly force. *Smith*, 456 S.W.3d at 852.

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Viewed in the light most favorable to Defendant—even though no events involving urination at a dumpster were mentioned in his lengthy videotaped statement to police—Defendant claimed at trial that he was:

> …standing there unzipped and actually just started to pee [when] I hear a voice behind me. And I turn over, kind of turn my body to the right I look over and there is [Victim] right there at that small fence in the opening to the parking lot right there at Holly Hills. And he says are you ready, motherfucker. And I didn't think much of it, I said, go on your way, you know, I'm not going to fight.
>
> And I'm sure there was some more words called, but I didn't think much of it really at the time because I just turned around and started peeing again. And it was no more than a second later I hear from behind, now you're going to die, you motherfucking bitch.
>
> I turn around at this time. I didn't zip, I'm peeing on myself, you know. I turn around because I wasn't done and I see him and that was – that's when he came towards me.

(Tr. 705).

Defendant testified that Victim "was no more than arms length away." (Tr. 706). Defendant claimed that Victim "had come around with his right arm and I had kind of ducked a little bit. But his right arm went around my left shoulder and he had grabbed on to my right shoulder here, my right

shoulder. And this time I'm bent over to where my left shoulder would have been touching his belly." (Tr. 708).

Defendant claimed that he looked down "and I see his left arm come and I saw something shiny, I don't know what it was. It was metal and shiny in his left hand coming up towards my face." (Tr. 708). Defendant claimed that, in response, "I used my left arm and I hit his arm, the arm that had whatever he had in his hand. And I gave him a shove with my left arm, tried to get away, but we wouldn't break apart because he was holding onto my shirt real hard." (Tr. 708). Defendant claimed that Victim "came up again" and that Defendant "gave him another good shove and that's when we broke apart. He fell down and I, I almost stumbled but I caught myself on the dumpster next to me because it was right there. And then I walked as fast as I could, but not very fast, but to my car to get away." (Tr. 708-709).[5]

Defendant never contended that the shiny, metal object he allegedly saw was a knife or any other weapon, or even that he believed it to be either. It is undisputed that no knife was found at the scene near the paralyzed Victim. Moreover, by Defendant's account, simply shoving Victim twice was sufficient to dispose of the threat and get away. There was no justification for

[5] Defendant does not rely on his testimony that he was afraid to get struck in the head because, due to previous injuries, one blow could knock him out or he could die from it. (Tr. 657). Defendant does not contend that he was required to use lethal force to escape such a blow; rather, he testified that simple shoves enabled him to escape.

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stabbing Victim, much less stabbing him five times and rendering him a quadriplegic for life. Thus, under *Delgado* and *White*, cases cited by Defendant, Defendant failed to meet the requirements for submission of a self-defense instruction.

Because a self-defense instruction was unsupported by the evidence, the trial court did not err.[6]

D. Conclusion

Defendant testified he never stabbed Victim, much less that he did so in self-defense. While Defendant contended that he may have lost memory of some events which took place after he arrived home, Defendant insisted that he remembered all of the events in the fight with Victim and that he did not commit the act of stabbing.

While Defendant claims that the statements made by police officers while questioning him somehow form the basis for injecting self-defense, Defendant is mistaken. As discussed above, the officers' questions and statements calling for a response from Defendant were admissible only to supply context for Defendant's statements.

Admission of a third party's statements in connection with a Defendant's statements "not [as] direct evidence" but "only in connection with

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[6] Defendant's proffered self-defense instructions did not allege that he was required to act or use lethal force to prevent a forcible felony. (LF 110-117).

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the" defendant's reply is "a recognized exception to the hearsay rule." *State v. Stokes*, 492 S.W.3d 622, 625 (Mo. App. E.D. 2016). As in *Stokes*, the trial court "could reasonably have admitted" the officers' statements "in order to help explain the context" for Defendant's statements. *Id. See also*, *State v. Webber*, 982 S.W.2d 317, 323 (Mo. App. S.D. 1998) (admitting statement not for the truth of the matter asserted but to supply context for other admissible statements made); *State v. Molasky*, 655 S.W.2d 663, 668-669 (Mo. App. E.D. 1983) (same); *State v. Spica*, 389 S.W.2d 35, 46-48 (Mo. banc 1965) (testimony of such statements is a recognized exception to the hearsay rule).

Despite officers' repeated willingness to consider a self-defense claim if Defendant made it, Defendant adamantly refused to admit stabbing Victim or to using lethal force against Victim. Hence, the statements made to supply context to Defendant's statements do not support a self-defense instruction.

Defendant's girlfriend's mother's boyfriend (Anthony Grimm) witnessed the fight which resulted in the stabbing and testified he saw the whole thing, that Victim dropped like a rock, and that when he got to Victim he had been stabbed multiple times with no intervening events. Grimm testified that he saw no weapon in the possession of Victim before or after what appeared to be a fist fight. His testimony did not support a self-defense instruction.

No knife was found on the paralyzed Victim or at the scene, supporting the inference that only Defendant was armed. No eyewitness, nor Defendant

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testified that Victim was ever armed during the attack. Hence, no evidence supported Defendant's alleged right to use lethal force based on the theory proffered in his proposed instruction.

Defendant's sole point on appeal should be rejected.

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CONCLUSION

Because no evidence supported the statutory elements required to permit the use of lethal force to repel a simple grapple of the shoulder and potential fist fight, the trial court did not err by refusing Defendant's proffered self-defense instruction. Defendant's convictions and sentences should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached brief complies with Supreme Court Rule 84.06(b) and contains 8,383 words, excluding the cover page, this certification, and the signature block, as counted by Microsoft Word 2010.

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