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IN THE
SUPREME COURT OF MISSOURI

| | | |
|---|---|---|
| STATE OF MISSOURI, | ) | |
| | ) | |
| Respondent, | ) | |
| | ) | |
| vs. | ) | No. SC97697 |
| | ) | |
| MARK C. BRANDOLESE, | ) | |
| | ) | |
| Appellant. | ) | |

APPEAL TO THE SUPREME COURT OF MISSOURI
FROM THE CIRCUIT COURT OF PETTIS COUNTY, MISSOURI
EIGHTEENTH JUDICIAL CIRCUIT
THE HONORABLE ROBERT L. KOFFMAN, JUDGE

# APPELLANT'S SUBSTITUTE BRIEF

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## JURISDICTIONAL STATEMENT

Mark Brandolese, Appellant, was convicted after a jury trial in the Circuit Court of Pettis County of domestic assault in the second degree, Section 565.073 (Count I); and armed criminal action, Section 571.015 (Count II). The Honorable Robert L. Koffman sentenced Mr. Brandolese to 15 years' imprisonment on Count I, and a concurrent 10 years' on Count II.

Jurisdiction of this appeal originally was in the Missouri Court of Appeals, Western District. Article V, section 3, Mo. Const.; section 477.070. Following an opinion by that court reversing for a new trial, this Court granted the State's application for transfer and has jurisdiction. Article V, sections 3 and 10, Mo. Const.; Rule 83.04.

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## STATEMENT OF FACTS

In March, 2016, C.E. lived in Mark Brandolese's apartment; Mark's apartment house was located across the street from Sarena Sundberg's house. (TR.150-151). On March 6, Mark and C.E. became very intoxicated. (TR.39, 194, 221). Mark passed out in his recliner with his walking cane nearby. (TR.171, 180). Mark used a cane and had trouble walking. (TR.51). There were at least two walking canes in his apartment. (TR.229).

As Mark lay sleeping in his chair, C.E. approached and punched Mark in the face. (TR.171, 195). Mark woke up, grabbed his cane and hit C.E. with it; the two struggled, moving into the bathroom where a mirror was broken. (TR.175, 230). At some point, C.E. sustained a cut across his chest. (TR.183-184, 217).

On March 6, 2016, Pettis County assistant prosecutor Robert Anthony (Tony) Farkas, filed a complaint and probable cause statement, initiating this criminal case against Mark. (LF 1). Assistant prosecutor Farkas signed the complaint, charging Mark with first degree assault, armed criminal action and unlawful use of a weapon. (LF 4-5). Assistant prosecutor Farkas represented the State at hearings in this case on March 22, April 12, and May 17, 2016. (LF 2). The May 17th date was scheduled for the preliminary hearing; however, at the hearing, the parties agreed to a rescheduled date of June 21, 2016. (LF 2).

Two weeks after the May 17 hearing, the State obtained an Indictment against Mark, alleging the identical charges. (LF 18-19). The Indictment was signed by assistant prosecutor William Chapman. (LF 19). Later, the State filed an Information in lieu of Indictment alleging: domestic assault in the second degree for "knowingly caus[ing] physical injury to [C.E.] by means of a dangerous instrument by cutting him," § 565.073 (Count I); and armed criminal action for committing that crime through "the knowing use, assistance and aid of a dangerous instrument," §571.015 (Count II). (Supp. LF 1-2). Prosecutor Phillip Sawyer represented the State at Mark's trial. (Tr.60).

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Trial – Voir Dire

During voir dire, defense counsel asked Venireperson Karen Farkas if she was related to Tony Farkas. (Tr.102). Ms. Farkas stated that Tony is her brother and confirmed that he is a Pettis County prosecutor. (TR.102). Defense counsel moved to strike Ms. Farkas for cause. (TR.124). The trial court denied the defense strike for cause stating that defense counsel did not ask any questions to Ms. Farkas about whether or not she could be fair. (TR.124). The trial court opined that Ms. Farkas' status as the sister of a prosecutor may give the defense a reason to strike her with a peremptory challenge, but not for cause, without showing she was prejudiced. (TR.124). Ms. Farkas became Juror No. 7 at Mark's trial. (TR 128-129).

Trial - Evidence

The alleged victim, C.E., was not present and did not testify at Mark's trial. (TR.62). Defense counsel moved in limine to exclude C.E.'s hearsay statements to others because C.E. was not present to testify at trial. (TR.62; LF.60-63). Counsel asserted that C.E.'s out-of-court statements to others did not fall under any exception to the hearsay rule and that the admission of the hearsay statements violated his right to confront the witnesses against him. (LF.60-63). The State proffered no reason for C.E.'s absence, no record was made that he was unavailable for trial, and he had never given prior testimony. The State asserted that there was a police video of C.E. at the scene, and that his statements were admissible under the "excited utterance" exception. (TR.63). However, the State did not attempt to admit this video at trial.

The State's case

Ms. Sundberg testified that on March 6, C.E. came to her front door with blood on his face. (TR.147-148). She gave him a chair to sit in on her porch and a cold rag for his head, while she called 911. (TR.148, 156). Ms. Sundberg believed he had been in a fight, but she did not see the fight and she did not know who had started it. (TR.152-153).

The trial court sustained defense counsel's hearsay objection when the State elicited from Ms. Sundberg that "[C.E.] kept telling me over and over and over that Mark

hit him in the head with a cane." (TR.148). There was no request for the jury to disregard this statement and no request for a mistrial. (TR.148-149).

Officer Todd Nappe testified that he was dispatched to Ms. Sundberg's home for a report of a disturbance. (TR.155). He knew from dispatch that weapons were involved. (TR.155). Officer Nappe testified that, when he arrived, he spoke to C.E., who was sitting in a chair on Ms. Sundberg's porch, bleeding and intoxicated. (TR.156, 194).

Officer Nappe testified that C.E. told him that he lived across the street. (TR.158). While talking to C.E., Officer Nappe developed "some form of an idea what transpired." (TR.160). A hearsay objection to this response was overruled. (TR.161). Officer Nappe also testified, over objection, that C.E. told him that "he was cut with a knife." (TR.181). Nappe observed a cut across C.E.'s chest; it did not seem deep, although he did not know how deep it was. (TR.183-184,207-208; Ex.10). Relying on what C.E. had told him, Officer Nappe investigated the scene. (TR.161).

Officer Nappe observed blood drops between Ms. Sundberg's house and the house across the street. (TR.164; Exhibits 16, 17, 18). The steps of the house across the street had blood on them. (TR.165-166; Exhibits 14, 15).

Upon entering the house across the street, Officer Nappe found Mark sitting in his recliner, holding his cane. (TR.168, 180). Mark was also very intoxicated. (TR.194). Officer Nappe asked Mark about the altercation with C.E. (TR.169). Mark said that he had been sleeping, when C.E. punched him in the face. (TR.171). Mark said that C.E. started the fight by assaulting him. (TR.171-172,192,195). Mark said that he struck C.E. with his cane, and sliced him with a knife. (TR.180-181). There was blood on Mark's left hand and on the cane he was holding. (TR.172, 180; Ex.12).

Mark told Officer Nappe that the fight moved from the living room to the bathroom where he shoved C.E. into the mirror; Officer Nappe observed that the mirror above the sink was broken and there was a lot of blood on the floor and sink. (TR.173-175; Exhibits 2, 3, 4).

Officer Nappe collected a small black folding pocket knife from the living room. (TR.195; Ex.22). He collected this knife because "[C.E.] said it was a folding, black



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knife," and that was the only knife he found. (TR.203). The knife was not sent to the lab for testing; it was seized and placed in a box where it remained until trial. (TR.197, 205). There was no visible blood on the knife. (TR.202).

Officer Casey Devorss testified that he provided backup at the scene and that he later went to the hospital to photograph and speak to C.E. about his description of the knife. (TR.211).[1] During cross-examination, Officer Devorss testified that he heard Mark say that he had the right to defend himself. (TR.221). When the prosecutor objected that this was a "self-serving" statement, the trial court overruled the objection because it had already been answered. (TR.221). Defense counsel then asked Officer Devorss if Mark said that he was sleeping in his chair when C.E. struck him in the face, and Officer Devorss said he could not recall; but before defense counsel could impeach Officer Devorss with his deposition testimony, the prosecutor again objected that defense counsel was attempting to elicit a "self-serving statement." (TR.222). According to the prosecutor, Mark's statement to Officer Devorss was, "I'm in my chair. He punched me first." (TR.223). The trial court agreed that defense counsel could not elicit this "self-serving hearsay." (TR.223).

Officer Howell also testified that he questioned Mark separately about how the altercation occurred. (TR.228). The State elicited from Officer Howell that Mark told him that he struck C.E. with a fist, struck him with a cane, pushed him into a mirror, and cut him with a knife. (TR.228).

Excluded defense evidence - Cody McDaniel

Defense counsel wanted to call Cody McDaniel to testify at trial. (TR.22). At a hearing one week before trial, the prosecutor stated, "I will stipulate to [defense counsel] being allowed to endorse and call Cody McDaniel if he wants to." (TR.22). The court allowed the defense to endorse Cody, noting that he would only get to testify if it was relevant and material to the case. (TR.23).

[1] Several photos of C.E. at the hospital were shown to the jury. (TR.185, 208). Mark was also transported to the hospital to determine if he was fit for confinement. (TR.194).



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During voir dire, defense counsel told the prospective jurors that the defense would be calling Cody McDaniel as a witness. (TR.101). During defense counsel's opening statement, counsel told the jury that the defense would present one witness, another roommate of C.E. named Cody, and that Cody would testify that C.E. was a drunk and a violent man. (TR.144).

After the State rested, the defense attempted to call Cody McDaniel as a witness. (TR.244). The State objected that Cody's entire testimony was objectionable because his sole purpose would be to testify about C.E.'s reputation as a drunk and a violent person. (TR.244). Defense counsel explained that he wanted Cody to testify because Cody was also roommates with C.E., and that C.E. drank very heavily and became violent with him too. (TR.245, 248). The trial court asked, "What's that got to do with this case?" (TR.246). The trial court believed that evidence of the victim's violent, aggressive character was not admissible. (TR.246). It ruled that evidence that C.E. was also violent with Cody McDaniel had nothing to do with Mark's case, and was not factually or legally relevant. (TR.247-249,259).

As an offer of proof, Cody McDaniel testified that C.E. lived with him for a month and a half during the summer of 2016. (TR.253). Cody had given up drinking alcohol, and he had told C.E. that a condition of living with him was that there would be no alcohol in his house. (TR.260). One day, Cody came home to find that C.E. had brought beer and vodka into the house (TR.260). Cody began pouring the liquor out and C.E. got upset. (TR.255). Cody testified that C.E. came at him "swinging." (TR.260). Cody warned him "don't do it," but C.E. swung on him again. (TR.260). Cody testified that C.E. had been violent with him a couple of times and that he had to defend himself. (TR.261). The trial court ruled that Cody's proposed testimony was not admissible. (TR.259).

Both sides submitted proposed self-defense instructions. (TR.271-273; LF.71, 78-79). Defense counsel objected that the question of whether deadly force was used was at issue and that the State's instruction provided incorrect language as to that issue.

(TR.271-272). The trial court gave the State's version, over defense objection, and refused both of defense counsel's instructions: Exs. AA and BB. (TR.270-273).

During the State's closing argument, the prosecutor disputed that C.E. was the initial aggressor, asking the jury,

> [D]id you see any marks on [Mark's] face consistent with being punched? No. Did you see any marks on his body at all, indicating that he had been in an altercation? No…We have no way of knowing, believing, nor is there any evidence that that punch occurred.

(TR.291-292).

The jury instruction for domestic assault in the second degree alleged that Mark "knowingly caused physical injury to [C.E.] by means of a dangerous instrument by cutting him" (Inst. 5) (LF.69). The jury was also instructed on the lesser-included offense of domestic assault in the third degree, which alleged that Mark "recklessly caused physical injury to [C.E.] by cutting him" (Inst. 6) (LF.70). The domestic assault in the third degree instruction included a definition of "recklessly." (LF.70).

Before the jury retired to deliberate, the trial court told them:

> I'm going to let you know, if questions come -- if you have questions and they're submitted to me for whatever reason, I am under rules on how I may answer those questions. Please do not get frustrated if I don't give you a direct answer to a question you may submit. I will give you any answers that the law lets me give and no more than that, so please don't get frustrated by that.

(TR.301-302).

While deliberating, the jury sent a note asking the trial court:

> We have a definition of "recklessly," on instruction page No. 6. We would like a clearer definition on "knowingly" on instruction page No.5.

(TR.302; SLF.3). The following discussion ensued:

> STATE: Number -- they -- they -- yeah. It's knowingly stabbed him. The definition is not on there is what they're saying. It's not at the bottom.
>
> COURT: I can't give it to them.



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STATE: Knowingly is defined in the chapter. Are you not -- can you not submit a definition?

COURT: I'm not submitting another instruction after it's been submitted. They have the law. You are bound by the law as it is given to you.

STATE: Are we sure about that?

COURT: Let's go off the record.

COURT: All right. The Court's answer is as follows: You are bound by the law as it has been presented to you. This is the only answer the Court is allowed to give you.

STATE: Thank you, Judge.

(TR.302-303). The Court submitted the following response to the jury:

> You are bound by the law as it has been presented to you. This is the only answer the Court is allowed to give you.

(TR.303; SLF.3).

The jury returned guilty verdicts for domestic assault in the second degree and armed criminal action. (TR.303-304; LF.80-81). The trial court sentenced Mark, as a persistent offender, to concurrent terms of fifteen (15) years and ten (10) years, respectively (TR.317-319; LF.97-98). A timely notice of appeal was filed (LF.100-102), and this appeal follows.



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## POINTS RELIED ON

### I.

**Sister of prosecutor "in the cause" was disqualified from serving under § 494.470**

**The trial court plainly erred in failing to strike Venireperson No. 16, Karen Farkas, for cause, because this ruling violated Mark's right to a fair and impartial jury, guaranteed by U.S. Const., Amends 6 & 14 & Mo. Const., Art. I, §§ 10 & 18(a), and § 494.470, in that Venireperson No. 16 indicated she was the sister of Prosecutor Farkas, and, by statute, she was statutorily disqualified, as a matter of law, to serve on the criminal jury because her brother was a prosecutor "in the cause," and the challenge for cause to her service should have been sustained, yet she served on Mark's jury and was one of the twelve jurors who found him guilty, resulting in manifest injustice.**

*Sommers v. Wood*, 895 S.W.2d 622 (Mo. App. E.D. 1995);
*Gordon v. Oidtman*, 692 S.W.2d 349 (Mo. App. W.D. 1985);
*Kennedy v. Tallent*, 492 S.W.2d 33 (Mo. App. E.D. 1973);
U.S. Const., Amends. 6 & 14;
Mo. Const., Art. I, Sections 10 & 18(a); and
Sections 56.060, 56.180 & 494.470.

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## II.

**State's "initial aggressor" language was erroneous and no definition was provided**

**The trial court plainly erred in not *sua sponte* modifying State's Inst. 7, a non-compliant version of the self-defense instruction, to remove the "initial aggressor language" altogether or to include a definition for that term, because the trial court's failure to modify State's Inst. 7 incorrectly submitted the law of self-defense under the facts of this case, and violated Mark's rights to due process of law, to present a defense and to a fair trial before a properly instructed jury, guaranteed by U.S. Const., Amends. 6 & 14 & Mo. Const., Art. I, §§ 10 & 18(a), in that the evidence did not support using "initial aggressor" language at all, but if it did, Inst. 7 omitted the required definition of that term, and while the State argued that Mark was the initial aggressor, the jury lacked guidance on this term, which misdirected the jury on Mark's primary defense and affected the verdict, resulting in manifest injustice.**

*State v. Westfall*, 75 S.W.3d 278 (Mo. banc 2002);

*State v. Kennedy*, 894 S.W.2d 723 (Mo. App. S.D.1995);

*State v. Mangum*, 390 S.W.3d 853 (Mo. App. E.D. 2013);

*State v. Zumwalt*, 973 S.W.2d 504 (Mo. App. S.D. 1998);

U.S. Const., Amends. 6 & 14;

Mo. Const., Art. I, Sections 10 & 18(a);

Rule 30.20; and

MAI-CR3d 306.06, MAI-CR3d 306.06A.

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## III.

**Erroneous self-defense instruction left jury unguided on deadly/non-deadly force**

**The trial court plainly erred in not *sua sponte* modifying State's Inst. 7, a non-compliant version of the self-defense instruction which incorrectly stated the law regarding the use of force under the facts of this case, because the trial court's failure to properly modify State's Inst. 7 violated Mark's rights to due process of law, to present a defense and to a fair trial before a properly instructed jury, guaranteed by U.S. Const., Amends. 6 & 14 & Mo. Const., Art. I, §§ 10 & 18(a), in that State's Inst. 7: 1) erroneously omitted the option of non-deadly force, when it was at issue in this case; and 2) provided improper guidance regarding under what circumstances deadly force may be used pursuant to current substantive law, and the lack of proper guidance on these issues misdirected the jury on Mark's primary defense and affected the verdict, resulting in a manifest injustice.**

*State v. Westfall*, 75 S.W.3d 278 (Mo. banc 2002);

*State v. Zumwalt*, 973 S.W.2d 504 (Mo. App. S.D. 1998);

*State v. Mangum*, 390 S.W.3d 853 (Mo. App. E.D. 2013);

U.S. Const., Amends. 6 & 14;

Mo. Const., Art. I, Sections 10 & 18(a);

Section 563.031;

Rule 30.20; and

MAI-CR3d 306.06, MAI-CR3d 306.06A.

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## IV.

**The jury asked for a definition of knowingly but did not get one**

**The trial court plainly erred in failing to provide a correct answer to the deliberating jury's written question, which asked for a definition of "knowingly" and specifically noted that they had been given an instruction defining "recklessly," because the trial court's failure to provide the definition of knowingly, available under MAI-CR3d 333.00, failed to provide guidance to the jury on the applicable law and relieved the State of its burden to prove the contested issue of Mark's mental state, in violation of Mark's rights to a fair trial, to present a defense, and to due process of law guaranteed by U.S. Const., Amends. 6 & 14 & Mo. Const., Art. I, §§ 10 & 18(a), in that the trial court has an inherent responsibility to provide the jury with guidance by a "lucid statement of the relevant legal criteria," and when "a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy," and the trial court's failure to provide the definition of "knowingly," when the jury sought guidance and when it was authorized to do so, undermined the fairness of the fact-finding process, and affected the jury's verdict, resulting in manifest injustice.**

*Bollenbach v. United States*, 326 U.S. 607 (1946);

*State v. Robinson*, 484 S.W.3d 862 (Mo. App. E.D. 2016);

*United States v. Nunez*, 889 F.2d 1564 (6th Cir. 1989);

*State v. Goree*, 672 S.W.2d 369, 370 (Mo. App. E.D. 1984);

U.S. Const., Amends. 6 & 14;

Mo. Const., Art. I, Sections 10 & 18(a);

Rule 30.20; and

MAI-CR3d 319.74, MAI-CR3d 333.00.

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## V.

**Important defense evidence of C.E.'s reputation for violence wrongly excluded**

**The trial court abused its discretion in refusing to let Mark present Cody McDaniel's testimony as evidence of C.E.'s reputation for violence because such ruling violated Mark's rights to due process, a fair trial, and to present a defense, guaranteed by U.S. Const., Amends. 6 & 14 & Mo. Const., Art. I, §§ 10 & 18(a), in that since Mark asserted self-defense, C.E.'s reputation for violence was admissible on the question of who was the initial aggressor, and excluding Cody's testimony about C.E.'s acts of violence against him allowed the State to portray C.E. – who was not present and did not testify at trial – as the injured victim, while preventing Mark from completing the picture with C.E.'s aggressive acts.**

*State v. Gonzales*, 153 S.W.3d 311 (Mo. banc 2005);

U.S. Const., Amends. 6 & 14;

Mo. Const., Art. I, Sections 10 & 18(a); and

Rule 29.11.

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## VI.

## C.E.'s out-of-court hearsay statements were inadmissible

**The trial court plainly erred in allowing the State to admit C.E.'s hearsay statements into evidence at trial through Sarena Sundberg ("[C.E.] kept telling me over and over and over that Mark hit him in the head with a cane") and Officer Nappe (C.E. said "he was cut with a knife" and "[C.E.] said it was a folding, black knife"), because the admission of this evidence violated Mark's rights to due process, a fair trial, and to confront the witnesses against him, guaranteed by U.S. Const., Amends. 6 & 14, and Mo. Const., Art. I, §§ 10 & 18(a), and resulted in manifest injustice, in that: 1) C.E. was not shown to be "unavailable;" 2) Mark had no prior opportunity to cross-examine C.E.; and 3) C.E.'s out-of-court statements were hearsay that did not fall under any exception.**

*Crawford v. Washington*, 541 U.S. 36 (2004);
*Davis v. Washington*, 547 U.S. 813 (2006);
*State v. March*, 216 S.W.3d 663 (Mo. banc 2007);
*State v. Cooper*, 509 S.W.3d 854 (Mo. App. S.D. 2017);
U.S. Const., Amends. 6 & 14;
Mo. Const., Art. I, Sections 10 & 18(a); and
Rule 30.20.

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## ARGUMENTS

### I.

**Sister of prosecutor "in the cause" was disqualified from serving under § 494.470**

**The trial court plainly erred in failing to strike Venireperson No. 16, Karen Farkas, for cause, because this ruling violated Mark's right to a fair and impartial jury, guaranteed by U.S. Const., Amends 6 & 14 & Mo. Const., Art. I, §§ 10 & 18(a), and § 494.470, in that Venireperson No. 16 indicated she was the sister of Prosecutor Farkas, and, by statute, she was statutorily disqualified, as a matter of law, to serve on the criminal jury because her brother was a prosecutor "in the cause," and the challenge for cause to her service should have been sustained, yet she served on Mark's jury and was one of the twelve jurors who found him guilty, resulting in manifest injustice.**

*Facts and Preservation*

During voir dire, Karen Farkas, Venireperson No. 16, indicated that her brother is a Pettis County prosecutor. (TR 102). Defense counsel later moved to strike Ms. Farkas for cause. (TR 124). The trial court denied defense counsel's strike for cause because defense counsel did not ask any questions to Ms. Farkas about whether or not she could be fair. (TR 124). In the trial court's opinion, Ms. Farkas' status as the sister of a prosecutor may give the defense a reason to strike her with a peremptory challenge, but not for cause, without a showing she was prejudiced. (TR 124). Ms. Farkas sat on Mark's jury as Juror No. 7, and found him guilty. (TR 128-129). Defense counsel failed to renew this challenge to the strike of Ms. Farkas in Mark's motion for new trial.

*Standard of review*

When the defendant is aware of facts which would sustain a challenge for cause, he must present his challenge during the voir dire examination or prior to the swearing of the jury, otherwise, the point is waived. *State v. Goble*, 946 S.W.2d 16, 18–19 (Mo. App. S.D. 1997). This requirement of contemporaneous objections to the venireperson's

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qualifications "serves to minimize the incentive to sandbag in the hope of acquittal and, if unsuccessful, mount a post-conviction attack on the jury selection process." *Id.* (quoting *State v. Hadley*, 815 S.W.2d 422, 423 (Mo. banc 1991). "A challenge made for the first time after conviction can only be considered for plain error resulting in a miscarriage of justice or manifest injustice." *State v. Woods*, 662 S.W.2d 527, 529 (Mo. App. E.D. 1983).

Here, Mark moved to strike Ms. Farkas for cause before the jury was selected, and specifically identified the basis for his challenge; therefore, sandbagging is not a concern. However, because counsel failed to repeat the challenge in Mark's motion for new trial, Mark requests plain error review. *Rule 30.20*. Since Ms. Farkas was statutorily disqualified to serve, she should have been automatically disqualified by the trial court for cause – there was no need to exercise any discretion in that decision. The error is also evident, obvious and clear: a prospective juror, directly related to a prosecutor in the cause, served on Mark's jury, even though defense counsel moved to strike her for cause and she was disqualified to serve by statute.

Typically, a trial court's ruling on a challenge for cause will not be disturbed on appeal unless it is clearly against the evidence and is a clear abuse of discretion. *State v. Clark-Ramsey*, 88 S.W.3d 484, 486 (Mo. App. W.D. 2002). Although the standard of review is for a clear abuse of discretion, a venireperson whose ability to be fair and impartial is "questionable" is not qualified to serve and should be struck**.** *State v. Edwards*, 740 S.W.2d 237, 241 (Mo. App. E.D. 1987). Errors in the exclusion of potential jurors should always be made on the side of caution. *State v. Stewart*, 692 S.W.2d 295, 298 (Mo. banc 1985). Appellate courts have admonished trial courts to be extra prudent and to err on the side of caution in determining whether a juror should be removed. *State v. Coleman*, 725 S.W.2d 113, 114 (Mo. App. E.D. 1987).

## *Analysis*

The Sixth and Fourteenth Amendments to the United States Constitution, and Article I, § 18(a) of the Missouri Constitution, guarantee a criminal defendant the right to

a fair and impartial jury. *State v. Clark*, 981 S.W.2d 143, 146 (Mo. banc 1998). Likewise, the right to a jury trial guarantees a fair trial by a panel of impartial, indifferent jurors. *Irvin v. Dowd*, 366 U.S. 717, 722 (1961).

In relevant part, Section 494.470 states:

> 1. … no person who is kin…to the…prosecuting or circuit attorney in a criminal case within the fourth degree of consanguinity or affinity shall be sworn as a juror in the same cause.

The questions presented in this case are: 1) whether Assistant Prosecutor Farkas was a "prosecuting attorney" in this cause; and 2) if so, does this statute apply to him, such that his sister should have been struck for cause under Section 494.470? Both questions should be answered in the affirmative.

The crux of Respondent's argument in its transfer application is that this statute refers only to the "prosecuting or circuit attorney;" therefore, argues Respondent, the statute does not apply to any assistant prosecuting attorneys, such as assistant prosecuting attorney Farkas here. Such logic fails on several fronts.

First, it should be noted that Respondent made none of these arguments in its briefing to the Court of Appeals. In that case, Respondent argued that the record did not reflect that Ms. Farkas was a prosecutor in Pettis County at all, or that he participated in Mark's case. As shown by the record, Ms. Farkas' brother, Robert Anthony (Tony) Farkas, was, in fact, a prosecutor in Mark's case – he signed the complaint initiating the criminal charges against Mark – and participated in pretrial hearings in Mark case. Respondent acknowledges these facts in the transfer application.

Second, Respondent argues that the Legislature, in enacting Section 494.470, intended to exclude only the kin to the elected prosecuting attorney from serving as jurors, not the kin to every assistant prosecuting attorney. Respondent argues that this is because the intent of the statute is to disqualify kin to parties in a lawsuit. But in making this argument, Respondent ignores other critical statutes.

Part of Respondent's argument is based on the language in *Section 56.060.1*, which states that the "prosecuting attorney shall commence and prosecute all civil and



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criminal actions in the prosecuting attorney's county…" According to Respondent's logic, this language shows that the Legislature only intended the elected prosecutor to be the nominal party in the criminal case. But Respondent failed to cite *Section 56.180* in its transfer application, which states that "assistant prosecuting attorneys shall be and are hereby empowered to sign in their own name informations in criminal causes in all courts having jurisdiction in criminal causes." Nor did Respondent cite this Court's opinion in *State ex rel. Nothum v. Walsh*, 380 S.W.3d 557, 565 (Mo. 2012), where it observed that "[a]n assistant or deputy prosecuting attorney legally appointed is generally clothed with all the powers and privileges of the prosecuting attorney" and that "Missouri courts have held repeatedly that an assistant prosecuting attorney's actions are 'as if done by the prosecutor.' " *Id. (cleaned up).* Both the Legislature and this Court have acknowledged that prosecutorial power and function resides in the prosecutor and her assistant prosecutors. Applying *Section 494.470* only to the elected prosecutor defeats the intent of the Legislature to disqualify the kin of the persons involved in prosecuting a cause. Carrying Respondent's argument to its irrational conclusion, if an elected prosecutor and assistant prosecutor tried a case together, and if sisters of both prosecutors were on the venire panel, only the sister of the elected prosecutor could be struck for cause under Section 494.470. Or, in another example, if an assistant prosecutor was prosecuting the case alone, and the aforementioned sisters were both on the venire, only the sister of the elected prosecutor would be struck for cause under the statute, while the sister of the assistant prosecutor actually trying the case could survive a strike for cause under the statute. This Court should not accept this flawed logic. *See City of Green Ridge v. Kriesel*, 25 S.W.3d 559, 563-64, fn2 (Mo. App. W.D. 2000).

Instead of focusing on who the *parties* are, by enacting *Section 494.470*, the Legislature's core concern was to disqualifying persons who are "interested" in the ligation or are related to those who are interested in the litigation. The entirety of subsection one shows that *interest in the litigation* is the polestar of the statute, not the specific identities of the parties:

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> 1. *No witness or person summoned as a witness* in any cause, *no person who has formed or expressed an opinion* concerning the matter or any material fact in controversy in any case that may influence the judgment of such person, and *no person who is kin to either party in a civil case or to the injured party, accused, or prosecuting or circuit attorney in a criminal case* within the fourth degree of consanguinity or affinity shall be sworn as a juror in the same cause.

*Section 494.070.1*. (emphasis). The statute clearly focuses on those persons who are perceived to have a disqualifying interest in the case. Such disqualifying interest can arise from their status as: a witness; a person summoned as a witness; a person who has formed an opinion that may influence their judgment; as kin to a party in a civil case; or as kin to a victim, an accused or a prosecutor in a criminal case. The concern of the statute as a whole is to remove for cause those people from the venire who have an interest in the case. Clearly, it is the venireperson's relation as kin to the person with prosecutorial interest in the case, and not the prosecutor's exact status as "elected" or "assistant" that is the focus of the statute. Any prosecuting authority who has been involved "in the same cause" may not have kin participating in resolving the issues in the case as a sworn juror.

Respondent's transfer application suggests that Mark's argument is that the kin of *all* assistant prosecutors must be disqualified. This is incorrect. Under the statute, kin within the fourth degree of consanguinity or affinity to a "*prosecuting…attorney in a criminal case*" are prohibited from being a juror "in the same cause." This qualifying language in the statute is important. The statute does not say "in the trial," but "in the same cause." Therefore, if a prosecutor was involved "in the same cause," then the kin of such prosecutor cannot serve as a juror in that cause. Here, prosecutor Farkas initiated the criminal charges against Mark, and proceeded to represent the State against Mark in court hearings. He was clearly a "prosecuting attorney" "in the same cause." Therefore, his sister could not sit in judgment of Mark.

This statute would not disqualify the kin of every prosecutor in the office, however. If they were not a "prosecuting attorney" "in the same cause," their kin would not have the same disqualifying interest keeping them off the jury. Being kin to *any*

prosecutor is not disqualifying. However, being kin (here, the sister) of the prosecutor who charged the defendant and participated in the same cause, is disqualifying. The trial court was on notice that these circumstances existed in this case, and it should have granted defense counsel's strike for cause.

In *Sommers v. Wood*, 895 S.W.2d 622, 624 (Mo. App. E.D. 1995), venireperson Gutting indicated that she was a cousin of the defendant. Analyzing Section 494.470, the Eastern District determined that if the prospective juror was the defendant's first, second or third cousin, she is related to him within the fourth degree and by statute was disqualified to serve as a juror in this case. *Id.* In that event, the trial court erred as a matter of law, not as a matter of discretion, in refusing to strike Gutting for cause, and the case had to be retried. *Id. See also Gordon v. Oidtman*, 692 S.W.2d 349, 356 (Mo. App. W.D. 1985) (When a juror discloses or it is determined that a juror is related by blood or marriage to a party within the fourth degree, he is incompetent to serve as a juror under [a prior version of the statute], and the court should excuse him); *Kennedy v. Tallent*, 492 S.W.2d 33, 35 (Mo. App. E.D. 1973).

The same is true here. Under the statute, no person who is kin to the prosecuting attorney in a criminal case within the fourth degree of consanguinity or affinity shall be sworn as a juror in the same cause. Assistant prosecuting attorney Farkas' sister should not have sat on Mark's jury because he was a prosecutor in the cause; he both filed the initial criminal complaint against Mark, and furthered the prosecution. The trial court erred in requiring defense counsel to establish additional prejudice before she could be struck for cause. Rather, she was automatically disqualified to serve by law under the statute. Whether preserved or not, the trial court erred as a matter of law, and a manifest injustice resulted when Mark was tried and convicted by a disqualified juror. Mark is entitled to a new trial and this Court must reverse.



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## II.

## "Initial aggressor" language erroneously submitted and undefined

**The trial court plainly erred in not *sua sponte* modifying State's Inst. 7, a non-compliant version of the self-defense instruction, to remove the "initial aggressor language" altogether or to include a definition for that term, because the trial court's failure to modify State's Inst. 7 incorrectly submitted the law of self-defense under the facts of this case, and violated Mark's rights to due process of law, to present a defense and to a fair trial before a properly instructed jury, guaranteed by U.S. Const., Amends. 6 & 14 & Mo. Const., Art. I, §§ 10 & 18(a), in that the evidence did not support using "initial aggressor" language at all, but if it did, Inst. 7 omitted the required definition of that term, and while the State argued that Mark was the initial aggressor, the jury lacked guidance on this term, which misdirected the jury on Mark's primary defense and affected the verdict, resulting in manifest injustice.**

### *Facts*

Mark's defense was self-defense – that C.E. attacked him, punching him the face, while he was asleep in his chair, and he defended himself. (TR.171, 195). Mark uses a cane to walk and there were at least two walking canes in his apartment. (TR.229). Officer Nappe testified that Mark said that he had been sleeping, when C.E. started the fight by assaulting him and punching him in the face. (TR.171-172, 192, 195). Mark said he struck C.E. with his cane, and sliced him with a knife. (TR.180-181). Mark also told Officer Nappe that the fight moved from the living room to the bathroom where he shoved C.E. into the mirror; Officer Nappe observed that the mirror above the sink was broken. (TR.173-175; Exhibits 2, 3, 4).

C.E. did not testify at Mark's trial. (TR.62). The State introduced C.E.'s hearsay statements through two witnesses: Sarena Sundberg testified that "[C.E.] kept telling me over and over and over that Mark hit him in the head with a cane." (TR.148). Ms. Sundberg did not see the fight and she did not know who had started the fight. (TR.152-

153). Officer Nappe testified that C.E. told him that "he was cut with a knife" – "it was a folding, black knife," and that was the only knife Officer Nappe found in the apartment. (TR.181, 203). Officer Nappe observed a cut across C.E.'s chest; it did not seem deep, although he did not know how deep it was. (TR.183-184,207-208; Ex.10). No witness testified that C.E. made any statements about who started the fight, and no witness testified to having observed the fight.

During the State's closing argument, the prosecutor disputed that C.E. was the initial aggressor, and implied that Mark had started the fight by asking the jury, "did you see any marks on [Mark's] face consistent with being punched? No. Did you see any marks on his body at all, indicating that he had been in an altercation? No…We have no way of knowing, believing, nor is there any evidence that that punch occurred." (TR.291-292).

*Preservation and Standard of Review*

Over defense objection, the trial court submitted the self-defense instruction prepared and submitted by the State as Instruction No. 7. (TR.270-273; LF.71). Defense counsel did not assist the State in drafting Instruction No. 7; rather, defense counsel submitted two different self-defense instructions that were refused, Instructions AA & BB. (TR.273; LF.78-79). Defense counsel primarily argued that the State's proposed self-defense instruction was incorrect because it failed to reflect that the issue of the use of deadly force was in question under the facts of this case. (TR.271-272). The trial court specifically ruled:

> THE COURT: All right. The Court has determined that the Defendant is entitled to a self-defense instruction, based on the evidence and the law cited by the Defendant. However, the Court has determined that the law applicable to the case, which is supported by the evidence, is 306.06 as submitted in its subparts, as submitted by the State. The Court denies the use of Defendant's Exhibits AA or BB.

(TR.273).



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In the motion for new trial, defense counsel raised only the failure to submit the proposed defense instructions AA and BB, but did not raise error in the submission of the State's self-defense instruction. (LF.88-90). The State's self-defense instruction was patterned after MAI-CR3d 306.06, which was only for use on offenses committed before August 28, 2007. See Notes on Use (1) to MAI-CR3d 306.06A. This instruction read:

INSTRUCTION NO. 7

One of the issues in this case is whether the use of force by the defendant against [C.E.] was in self-defense. In this state, the use of force, including the use of deadly force, to protect oneself from harm is lawful in certain situations.

In order for a person lawfully to use force in self-defense, he must reasonably believe he is in imminent danger of harm from the other person. He need not be in actual danger but he must have a reasonable belief that he is in such danger.

But a person is not permitted to use deadly force, that is, force that he knows will create a substantial risk of causing death or serious physical injury, unless he reasonably believes he is in imminent danger of death or serious physical injury.

And, even then, a person may use deadly force only if he reasonably believes the use of such force is necessary to protect himself.

As used in this instruction, the term "reasonable belief" 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.

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

If the defendant was not the initial aggressor in the encounter with [C.E.], and if the defendant reasonably believed he was in imminent danger of death or serious physical injury from the acts of [C.E.] and he reasonably believed that the use of deadly force was necessary to defend himself, then his use of deadly force was 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 reasonable doubt that the defendant did not act in lawful self-defense, you must find the defendant not guilty of both counts.

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.

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

MAI-CR3d 306.06

(LF 71).

Although defense counsel objected to submitting State's Inst. 7, he did not renew that claim of error in the motion for new trial (LF.82-96). Therefore, Mark asks for plain error review under *Rule 30.20*. Instructional error constitutes plain error when it is clear that the trial court so misdirected or failed to instruct the jury as to cause manifest injustice or miscarriage of justice. *State v. Farris*, 125 S.W.3d 382, 390 (Mo. App. W.D. 2004). A manifest injustice occurs as a result of instructional error where it is apparent that the instructional error affected the jury's verdict. *Id.* To ascertain whether or not the omission of language from an instruction is error, the evidence is viewed in the light most favorable to the defendant and the theory proposed by the defendant. *State v. Westfall*, 75 S.W.3d 278, 280-81 (Mo. banc 2002).

Mr. Brandolese did not actively collaborate in drafting the State's instruction that he asserts is erroneous. *See State v. Clay*, 533 S.W.3d 710, 715 (Mo. banc 2017). Nor does he waive plain error review by failing to fully object to the faulty jury instruction or by failing to submit a correct instruction. *State v. Celis-Garcia*, 344 S.W.3d 150, 154 (Mo. banc 2011); *State v. Derenzy*, 89 S.W.3d 472, 475 (Mo. banc 2002) (submission of an incorrect instruction did not waive plain error review); *State v. Wurtzberger*, 40 S.W.3d 893, 897–98 (Mo. banc 2001) (counsel's affirmative statement that he had no objection to the instruction and his failure to submit an alternative instruction did not waive plain error review).

Here, Mark's challenge to the State's self-defense instruction under this Point is that it should not have contained "initial aggressor" language at all, but if inclusion of "initial aggressor" was proper, it should have been defined. Mark did not include "initial aggressor" language in his proffered instructions because his theory of self-defense was



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that C.E. was the "initial aggressor" and that there was no evidence supporting an inference that Mark was the "initial aggressor." The State's theory, however, was that Mark was the "initial aggressor" in the encounter, and that the jury had to first find that Mark was not the "initial aggressor" before it could evaluate Mark's right to use self-defense. However, even if the inclusion of such language was proper, the term "initial aggressor" was not defined, as required.

*Discussion*

One of the primary problems in this case is that everyone was utilizing self-defense instructions that were ten years out of date. They were using MAI-CR3d 306.06, when they should have been using MAI-CR3d 306.06A. (See Notes on Use 1 to MAI-CR3d 306.06A, which instructs, "This is a revision of MAI‑CR 3d 306.06 (1‑1‑07). This instruction should be used for offenses committed on or after August 28, 2007.") However, under either version of the self-defense instruction, when "initial aggressor" language is used, it must be defined. Here, Mark argues that there was no evidence presented to support the use of "initial aggressor" language in State's Instruction 7, and even if there was, the State failed to submit the definition language in Part A of the instruction, which provides guidance on the "initial aggressor" language.

"An initial aggressor is one who first attacks or threatens to attack another." *State v. Walton*, 166 S.W.3d 95, 100 (Mo. App. S.D 2005) (quoting *State v. Hughes*, 84 S.W.3d 176, 179 (Mo. App. S.D. 2002)). Self "defense is not available ... if the defendant was the initial aggressor, unless he withdrew from the conflict." *Hughes*, 84 S.W.3d at 179. "The state need not present undisputed evidence that defendant was an initial aggressor in order to submit the issue to the jury." *Walton*, 166 S.W.3d at 100. "Conflicting evidence as to who was the initial aggressor presents an issue of fact for the jury to decide." *Id.*; see also *Hughes*, 84 S.W.3d at 179 ("If there is contradictory evidence as to who was the initial aggressor, it is a question of fact for the jury to decide.").

The Notes on Use to the pattern self-defense instruction follow the teachings in these cases. See MAI-CR3d 306.06 and MAI-CR3d 306.06A, Notes on Use 4. This Note

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on Use provides that the initial-aggressor language is not used only if "there is no evidence that the defendant was the initial aggressor or provoked the incident." Notes on Use 4(a). If there is some evidence that the defendant was the initial aggressor, the initial-aggressor language is to be included. *Id.*

As set forth above, no witness observed any part of the fight, and C.E., the alleged victim, did not even testify. Mark told the officers that C.E. started the fight and he responded in self-defense. Ms. Sundberg and Officer Nappe testified that C.E. told them about injuries that Mark inflicted upon him, but neither of them testified that C.E. claimed that Mark *started* the fight. C.E.'s statements detailing injuries he received at some point during the fight, regardless of their hearsay nature, are not "evidence" that Mark was the initial aggressor. Therefore, since there was no evidence presented that Mark was the "initial aggressor" in the encounter, this language should not have been included in Instruction 7 at all. Including language in the instruction requiring the jury to find that Mark "was not the initial aggressor," when no evidence was presented on this issue, misinstructed the jury and led to confusion about what they had to find. This is especially true when the prosecutor in closing argued to the jury that Mark's lack of injuries meant that C.E. did not actually punch Mark (TR.291-292).

However, even if a reasonable inference could be drawn that Mark's lack of injuries alone meant that he was the initial aggressor, (which Mark does not concede), the term "initial aggressor" also was not defined in Instruction 7, as required. Part A[1] of the pattern instruction is authorized if there is evidence that the defendant was the initial aggressor. See MAI–CR3d 306.06 and MAI-CR3d 306.06A. Part A[1] informs the jury that an initial aggressor (one who attacks or threatens to attack another person) is not justified in using force to protect himself from a counterattack which he provoked. The pattern instruction also includes a paragraph which indicates that the initial aggressor can regain the privilege of using force in lawful self-defense if he withdraws from the original encounter and clearly indicates his desire to end that encounter but the other person persists. See also Part B[1] of the same pattern instructions which contains specific instructions concerning the same matters.

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But Part A[1] of MAI–CR3d 306.06 or MAI-CR3d 306.06A, concerning "initial aggressor," were not included in Instruction 7. As a result, Instruction 7 did not instruct the jury about the significance of the identity of an "initial aggressor," yet in Part B, Instruction 7 asked the jury to determine if Mark was the initial aggressor. The jury was left without further guidance about the significance of an "initial aggressor" or how their determination of that issue could impact the verdict. Under these circumstances, asking the jury to identify the initial aggressor would have been meaningless and confusing. Permitting the jury to consider any alleged evidence on the issue of "initial aggressor" without also including the other appropriate provisions of MAI-CR3d 306.06, was erroneous. *See State v. Kennedy*, 894 S.W.2d 723, 727-728 (Mo. App. S.D. 1995) (same proposed instruction deemed inappropriate to the extent it permitted consideration of evidence on the issue of "initial aggressor" without also including the other appropriate provisions of MAI–CR3d 306.06 Parts A[1] and B[1] dealing with that matter).

Instructions should not be confusing, ambiguous, or equivocal, nor should they mislead the jury. *State v. Wilkerson*, 786 S.W.2d 236, 239 (Mo. App. W.D. 1990). Here, as in *Kennedy*, *supra*, Instruction 7 was inappropriate to the extent it permitted consideration of the issue of an "initial aggressor" without also including the other appropriate definitional provisions in Part A. Not only did Instruction 7 not comply with MAI-CR3d 306.06A (which shall be used after 2007), it also did not comply with the outdated instruction it was based on, MAI-CR3d 306.06. The giving of an instruction in violation of MAI-CR3d or its Notes on Use constitutes error, its prejudicial effect to be judicially determined. *State v. Tilley*, 826 S.W.2d 1, 2 (Mo. App. E.D. 1991).

There was arguably no evidence that Mark was the initial aggressor because: 1) C.E. did not testify at all; and 2) the State's argument that Mark was the initial aggressor was based solely on the State's tenuous inference that since Mark sustained no visible injuries, he must have struck C.E. first. Mark's statement to officers is that C.E. hit him while he slept. Presumably, absent any supporting evidence, the initial aggressor language should not have been used at all, and the Court should reverse on that basis. See Note on Use 4 to MAI-CR3d 306.06 and MAI-CR3d 306.06A.

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However, if this Court finds that there was evidence or reasonable inferences that Mark was the initial aggressor, then that term must be defined, and it was prejudicial to give the initial aggressor language without further definition. *See People v. Beasley*, 778 P.2d 304, 306 (Colo. App. 1989) (giving instruction was reversible error, as court may have induced jurors to characterize defendant as the first aggressor even though another individual actually started the conflict).

Plain error has been found where the instructions submitted erroneously instructed on a contested element of the State's case, albeit in the negative. *State v. Mangum*, 390 S.W.3d 853, 869 (Mo. App. E.D. 2013) (failure to include multiple assailant language in the self-defense instruction that was given). Once the trial court determined that the defendant had carried his burden of injecting the issue of self-defense into the case, it was the State's burden to prove, beyond a reasonable doubt, that the defendant did not act in lawful self-defense. Instruction 7 excused the State from this burden.

In *Westfall*, *supra*, the given instruction submitted language that is to be given when the evidence is clear that deadly force was used by the defendant and there is no dispute as to that issue, but the question of whether there was deadly force should have been left to the jury. 75 S.W.3d at 281-82. This Court found plain error warranting a new trial. *Id.* at 283-84. In *State v. Zumwalt*, 973 S.W.2d 504, 509 (Mo. App. S.D. 1998), a self-defense instruction which named the victim as the aggressor was prejudicial in a trial where the defendant claimed that he was trying to protect himself against another person.

Under the facts of this case, a manifest injustice has resulted because the instructional error went to the heart of Mark's defense at trial. The jury was incorrectly instructed on the possibility that Mark was the initial aggressor when there was no evidence of it. Further, if "initial aggressor" language was warranted, Instruction 7 failed to include the definitional section in Part A of the instruction, which misdirected and failed to instruct the jury correctly on his main defense. When the State then argued that Mark might have been the initial aggressor, this served to emphasize the incorrect portion of the instruction, resulting in manifest injustice. This Court should reverse for a new trial with correct instructions.

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## III.

**Erroneous instruction left jury without guidance on deadly/non-deadly force issue**

**The trial court plainly erred in not *sua sponte* modifying State's Inst. 7, a non-compliant version of the self-defense instruction which incorrectly stated the law regarding the use of force under the facts of this case, because the trial court's failure to properly modify State's Inst. 7 violated Mark's rights to due process of law, to present a defense and to a fair trial before a properly instructed jury, guaranteed by U.S. Const., Amends. 6 & 14 & Mo. Const., Art. I, §§ 10 & 18(a), in that State's Inst. 7: 1) erroneously omitted the option of non-deadly force, when it was at issue in this case; and 2) provided improper guidance regarding under what circumstances deadly force may be used pursuant to current substantive law, and the lack of proper guidance on these issues misdirected the jury on Mark's primary defense and affected the verdict, resulting in a manifest injustice.**

*Facts*

Mark's defense was self-defense – that C.E. attacked him, punching him the face, while he was asleep in his chair, and he defended himself. (TR.171, 195). Mark told the police that he struck C.E. with his cane, and sliced him with a knife. (TR.180-181). Mark also told Officer Nappe that the fight moved from the living room to the bathroom where he shoved C.E. into the mirror; Officer Nappe observed that the mirror above the sink was broken. (TR.173-175; Exhibits 2, 3, 4).

C.E. did not testify at Mark's trial. (TR.62). Officer Nappe testified that C.E. told him that "he was cut with a knife" – "it was a folding, black knife," and that was the only knife Officer Nappe found in the apartment. (TR.181, 203). Officer Nappe observed a cut across C.E.'s chest; it did not seem deep, although he did not know how deep it was. (TR.183-184, 207-208; Ex.10). No witness testified that C.E. made any statements about who started the fight, and no witness testified to having observed the fight.

*Preservation and Standard of Review*

Over defense objection, the trial court submitted the self-defense instruction prepared and submitted by the State as Instruction No. 7. (TR.270-273; LF.71). Defense

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counsel did not assist the State in drafting Instruction No. 7; rather, defense counsel submitted two different self-defense instructions that were refused, Instructions AA & BB. (TR.273; LF.78-79). Defense counsel primarily argued that the State's proposed self-defense instruction was incorrect because it failed to reflect that the issue of the use of deadly force was in question under the facts of this case. (TR.271-272). The trial court specifically ruled:

> THE COURT: All right. The Court has determined that the Defendant is entitled to a self-defense instruction, based on the evidence and the law cited by the Defendant. However, the Court has determined that the law applicable to the case, which is supported by the evidence, is 306.06 as submitted in its subparts, as submitted by the State. The Court denies the use of Defendant's Exhibits AA or BB.

(TR.273).

In the motion for new trial, defense counsel raised only the failure to submit the proposed defense instructions AA and BB, but did not raise error in the submission of Instruction 7. (LF.88-90). The State's self-defense instruction was patterned after MAI-CR3d 306.06, which was only for use on offenses committed before August 28, 2007. See Notes on Use (1) to MAI-CR3d 306.06A. This instruction read:

INSTRUCTION NO. 7

One of the issues in this case is whether the use of force by the defendant against [C.E.] was in self-defense. In this state, the use of force, including the use of deadly force, to protect oneself from harm is lawful in certain situations.

In order for a person lawfully to use force in self-defense, he must reasonably believe he is in imminent danger of harm from the other person. He need not be in actual danger but he must have a reasonable belief that he is in such danger.

But a person is not permitted to use deadly force, that is, force that he knows will create a substantial risk of causing death or serious physical injury, unless he reasonably believes he is in imminent danger of death or serious physical injury.

And, even then, a person may use deadly force only if he reasonably believes the use of such force is necessary to protect himself.

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As used in this instruction, the term "reasonable belief" 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.

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

If the defendant was not the initial aggressor in the encounter with [C.E.], and if the defendant reasonably believed he was in imminent danger of death or serious physical injury from the acts of [C.E.] and he reasonably believed that the use of deadly force was necessary to defend himself, then his use of deadly force was 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 reasonable doubt that the defendant did not act in lawful self-defense, you must find the defendant not guilty of both counts.

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.

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

MAI-CR3d 306.06

(LF.71).

Although defense counsel objected to submitting State's Instruction 7, he did not renew that claim of error in the motion for new trial (LF.82-96). Therefore, Mark asks for plain error review under *Rule 30.20*. Instructional error constitutes plain error when it is clear that the trial court so misdirected or failed to instruct the jury as to cause manifest injustice or miscarriage of justice. *State v. Farris*, 125 S.W.3d 382, 390 (Mo. App. W.D. 2004). A manifest injustice occurs as a result of instructional error where it is apparent that the instructional error affected the jury's verdict. *Id.* To ascertain whether or not the omission of language from an instruction is error, the evidence is viewed in the light most favorable to the defendant and the theory proposed by the defendant. *State v. Westfall*, 75 S.W.3d 278, 280-81 (Mo. banc 2002).

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Mr. Brandolese did not actively collaborate in drafting the State's instruction that he asserts is erroneous. *See State v. Clay*, 533 S.W.3d 710, 715 (Mo. banc 2017). Nor does he waive plain error review by failing to submit a correct instruction. *State v. Celis-Garcia*, 344 S.W.3d 150, 154 (Mo. banc 2011); *State v. Derenzy*, 89 S.W.3d 472, 475 (Mo. banc 2002) (submission of an incorrect instruction did not waive plain error review); *State v. Wurtzberger*, 40 S.W.3d 893, 897–98 (Mo. banc 2001) (counsel's affirmative statement that he had no objection to the instruction and his failure to submit an alternative instruction did not waive plain error review); *State v. Shaw*, 541 S.W.3d 681, 691 (Mo. App. W.D. 2017) (In fn7, it is noted that defendant's proffered instruction was not in the form submitted to the jury).

*Discussion*

In this Point, Mark raises a second challenge to the State's self-defense instruction because, in addition to omitting the definition for "initial aggressor," (See Point II, *supra*), Instruction 7 only submitted the theory that Mark used "deadly force," and omitted the use of "non-deadly force" language, when non-deadly force was directly at issue in this case.[2] Under the facts of this case, the trial court should have submitted an instruction that used both non-deadly and deadly force, as both were arguably supported by the evidence. By submitting State's Instruction 7, the trial court only submitted the use of deadly force language to the jury, and not the alternative of non-deadly force, which was directly at issue.

In relevant part, State's Instruction 7 submitted that:

> …if the defendant reasonably believed he was in imminent danger of death or serious physical injury from the acts of [C.E.] and he reasonably believed that the use of deadly force was necessary to defend himself, then his use of deadly force was in lawful self-defense.

[2] Mark's proffered instructions AA & BB submitted theories that Mark used non-deadly force (LF.78-79); the trial court rejected these in favor of the State's instruction that only submitted deadly force. His proffered instructions were not in the form submitted to the jury. *See Shaw, supra.*

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(LF.71). However, because it was an issue in this case whether Mark used deadly force at all, and if he did so, whether it was lawful, Instruction 7 should have read:

> …if the defendant reasonably believed he was in imminent danger of harm from the acts of [C.E.] and he used only such non-deadly force as reasonably appeared to him to be necessary to defend himself, then he acted in lawful self-defense, or if the defendant reasonably believed he was in imminent danger of death or serious physical injury from the acts of [C.E.] and he reasonably believed that the use of deadly force was necessary to defend himself, then he acted in lawful self-defense.

MAI-CR3d 306.06. Without both options, the jury was only allowed to determine that Mark acted in lawful self-defense if his use of deadly force was reasonable, in that he reasonably believed he was in imminent danger of death or serious physical injury. The facts allow a different scenario. The jury could have easily determined that Mark did not use deadly force, and that he only used non-deadly force because it reasonably appeared to him that he was in imminent danger of harm from C.E.

Further complicating this issue is the fact that the incorrect version of the instruction submitted to the court was also based on the outdated version of the self-defense instruction. As shown above, Instruction No. 7 was incorrect under the old version of the self-defense instruction MAI-CR3d 306.06, but it is even more egregiously incorrect under the current version – MAI-CR3d 306.06A. This is because the MAI self-defense instruction was revised to reflect the major changes to Section 563.031 in RSMo Supp. 2008, specifically relating to the use of deadly force. See Notes on Use 1, MAI-CR3d 306.06A. Section 563.031.2(1) allows the use of deadly force in self-defense to protect against "any forcible felony." *Id.* Arguably, under the facts presented, when C.E. punched Mark in the face while he was sleeping, C.E. was committing the "forcible felony" of assault upon Mark. Under those circumstances, even if Mark had used deadly force – which the jury did not have to find – he could have been justified in doing so to repel not just death or serious physical injury, but also C.E.'s commission of the "forcible

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felony" against him. The jury had none of these options to consider, thus severely hampering Mark's defense.

Even if the Court was correct that there was some evidence that Mark used deadly force, it remained an issue in the case for the jury to resolve whether Mark, indeed, used deadly force, and there was also evidence supporting the lawful use of deadly force. As this Court noted in *Westfall*, *supra*, there is no authority that the use of a knife constitutes the use of deadly force as a matter of law. 74 S.W.3d at 283. This is especially important here when the evidence supported a finding that the knife allegedly used was a "small" pocket knife and C.E.'s wound was not deep. (TR.195, 206-207).

The instruction given to the jury also omitted language concerning the use of non-deadly force and only submitted to the jury what was required if Mark used deadly force. "The distinction is critical because the standard for justifying non-deadly self-defense is much lower." *Westfall*, 74 S.W.3d at 282. Here, the jury might have found that after C.E. started punching Mark, that Mark spontaneously used the only means at hand to protect himself – his walking cane and a pocket knife – and that the use of these instruments was non-deadly. The evidence establishes questions of fact as to whether deadly force was used, yet the jury was not allowed to resolve that question due to the instructional error.

Other cases have reversed for less omitted or incorrect language in self-defense instructions than there was in this case. For instance, in *Tilley*, *supra*, the self-defense instruction Part A[4] omitted, "This depends upon how the facts reasonably appeared." 826 S.W.2d at 2. And Part B[3][C] omitted the italicized portion of the following paragraph: "If the defendant reasonably believed he was in imminent danger of harm from the acts of [victim] and he used only such non-deadly force as reasonably appeared to him to be necessary to defendant himself, then he acted in lawful self-defense and must be found not guilty." *Id.*

In *Westfall*, *supra*, the given instruction submitted language that is to be given when the evidence is clear that deadly force was used by the defendant and there is no dispute as to that issue, but the question of whether there was deadly force should have

been left to the jury. 75 S.W.3d at 281-82. This Court found plain error warranting a new trial. *Id.* at 283-84.

In *State v. Beck*, the trial court's failure to *sua sponte* modify a defendant's self-defense instruction in a manner that was different than the MAI-CR3d pattern instruction (so that it was clear that the jury could consider acts of the victim's friends in determining whether defendant acted in self-defense) was found to be plain error warranting a new trial. 167 S.W.3d 767, 785-89 (Mo. App. W.D. 2005) (overruled on other grounds by *State v. Bolden*, 371 S.W.3d 802, 805-806 (Mo. banc 2012).

In *State v. Zumwalt*, 973 S.W.2d 504, 509 (Mo. App. S.D. 1998), a self-defense instruction which named the victim as the aggressor was prejudicial in a trial where the defendant claimed that he was trying to protect himself against another person.

No one observed this fight other than Mark and C.E. C.E. did not testify at trial, and Mark told the police that he acted in self-defense. Under the facts of this case, a manifest injustice has resulted because the instructional error went to the heart of Mark's defense at trial. The jury was incorrectly instructed on the possibility that Mark was the initial aggressor when there was no evidence of it (See Point II). And the jury was not given the decision whether or not to determine whether there was deadly force used in this case, or if deadly force was used, the correct circumstances under which deadly force would be justified. This is critical because the standard for justifying non-deadly self-defense is much lower. *Westfall*, 74 S.W.3d at 282.

Once the trial court determined that the defendant had carried his burden of injecting the issue of self-defense into the case, it was the State's burden to prove, beyond a reasonable doubt, that the defendant did not act in lawful self-defense. The instruction submitted excused the State from this burden, and this plain error resulted in manifest injustice. *See State v. Mangum*, 390 S.W.3d 853, 869 (Mo. App. E.D. 2013). This Court should reverse Mark's convictions, and remand the cause for a new trial.



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## IV.

## The jury wanted a definition of knowingly but did not get one

**The trial court plainly erred in failing to provide a correct answer to the deliberating jury's written question, which asked for a definition of "knowingly" and specifically noted that they had been given an instruction defining "recklessly," because the trial court's failure to provide the definition of knowingly, available under MAI-CR3d 333.00, failed to provide guidance to the jury on the applicable law and relieved the State of its burden to prove the contested issue of Mark's mental state, in violation of Mark's rights to a fair trial, to present a defense, and to due process of law guaranteed by U.S. Const., Amends. 6 & 14 & Mo. Const., Art. I, §§ 10 & 18(a), in that the trial court has an inherent responsibility to provide the jury with guidance by a "lucid statement of the relevant legal criteria," and when "a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy," and the trial court's failure to provide the definition of "knowingly," when the jury sought guidance and when it was authorized to do so, undermined the fairness of the fact-finding process, and affected the jury's verdict, resulting in manifest injustice.**

### *Facts*

The jury was instructed on domestic assault in the second degree, which alleged that Mark "knowingly caused physical injury to C.E. by means of a dangerous instrument by cutting him" (Inst. 5) (LF.69). The jury was also instructed on the lesser-included offense of domestic assault in the third degree, which alleged that Mark "recklessly caused physical injury to C.E. by cutting him" (Inst. 6) (LF.70). The domestic assault in the third degree instruction included a definition of "recklessly," which "means to consciously disregard a substantial and unjustifiable risk that circumstances exist or that a result will follow, and such disregard constitutes a gross deviation from the standard care which a reasonable person would exercise in the situation." (LF.70).

Before the jury retired to deliberate, the trial court commented:

I'm going to let you know, if questions come -- if you have questions and they're submitted to me for whatever reason, I am under rules on how I may answer those questions. Please do not get frustrated if I don't give you a direct answer to a question you may submit. I will give you any answers that the law lets me give and no more than that, so please don't get frustrated by that.

(TR.301-302).

While deliberating, the jury sent a note asking:

We have a definition of "recklessly," on instruction page No. 6. We would like a clearer definition on "knowingly" on instruction page No.5.

(TR.302; SLF.3). The following discussion ensued:

STATE: Number -- they -- they -- yeah. It's knowingly stabbed him. The definition is not on there is what they're saying. It's not at the bottom.

COURT: I can't give it to them.

STATE: Knowingly is defined in the chapter. Are you not -- can you not submit a definition?

COURT: I'm not submitting another instruction after it's been submitted. They have the law. You are bound by the law as it is given to you.

STATE: Are we sure about that?

COURT: Let's go off the record.

COURT: All right. The Court's answer is as follows: You are bound by the law as it has been presented to you. This is the only answer the Court is allowed to give you.

STATE: Thank you, Judge.

(TR.302-303). The Court submitted the following response to the jury:

You are bound by the law as it has been presented to you. This is the only answer the Court is allowed to give you.

(TR.303; SLF.3).



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The jury returned guilty verdicts for domestic assault in the second degree and armed criminal action. (TR.303-304; LF.80-81).

*Preservation and Standard of Review*

Defense counsel did not object when the trial court failed to correctly answer the jury's question. Therefore, Mark asks for plain error review under *Rule 30.20*. The analysis proceeds in two steps. *State v. Smith*, 370 S.W.3d 891, 896 (Mo. App. E.D. 2012) (internal citation omitted). First, it must appear, on the face of the claim, an evident obvious, and clear error has occurred. *Id*. If so, the second step considers whether manifest injustice or a miscarriage of justice actually resulted. *Id*. Instructional error constitutes plain error when it is clear that the trial court so misdirected or failed to instruct the jury as to cause manifest injustice or miscarriage of justice. *State v. Farris*, 125 S.W.3d 382, 390 (Mo. App. W.D. 2004). A manifest injustice occurs as a result of instructional error where it is apparent that the instructional error affected the jury's verdict. *Id.* To ascertain whether or not the omission of language from an instruction is error, the evidence is viewed in the light most favorable to the defendant and the theory proposed by the defendant. *State v. Westfall*, 75 S.W.3d 278, 280-81 (Mo. banc 2002).

*Discussion*

There is no doubt that the trial court was allowed to submit a definition of knowingly to the jury. Under Notes on Use 8(b) to MAI-CR3d 319.74 (domestic assault in the second degree):

> (b) The following terms, if used in the instruction, may be defined by the court on its own motion and must be defined upon written request in proper form by the state or by the defendant:
>
> "consent,"
>
> "deadly weapon,"
>
> "knowingly,"
>
> "physical injury."

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See MAI-CR 3d 333.00.

MAI-CR3d 319.74, Notes on Use 8(b). The definition of "knowingly" in MAI-CR3d 333.00 – Specific, should have been given to the jury as follows:

The following term used in these instructions is defined as follows:

**Knowingly –**

A person knew, or acts knowingly, or with knowledge,

(a) With respect to his conduct or to attendant circumstances when the person was aware of the nature of his or her conduct or that those circumstances existed, or

(b) With respect to a result of a person's conduct when he or she was aware that his or her conduct was practically certain to cause that result.

Notes on Use 2(B) of MAI-CR3d 333.00 – General provides:

B. A term may be defined when the Notes on Use permit the definition of that term. Typical language that authorizes, but does not require, a definition is "The following term(s), if used in the instruction, may be defined by the Court on its own motion and must be defined upon written request in proper form by the state or by the defendant."

And Notes on Use 2(F) of MAI-CR3d 333.00 – General provides:

F. A definition of a term, word, or group of words shall not be given unless permitted by paragraphs A, B, C, D, or E above, even if requested by counsel or the jury. **If the jury, while deliberating, requests the definition of a term whose definition is *not permitted* by paragraphs A, B, C, D, or E above, the following response is suggested**:

I am not permitted to define the word(s) _____ for you. (Except for those terms for which you have been supplied definitions, each) (Each) word used in the instruction has its common and generally understood meaning.

(emphasis added).

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And Notes on Use 5 of MAI-CR3d 333.00 – General provides:

> 5. The Court is given discretion as to how to submit the definitions to the jury. If a term is used in only one instruction, the definition of that term may be added at the bottom of that instruction, or may be submitted to the jury as a separate instruction.

It is clear from the full guidance given in MAI-CR3d Notes on Use to 333.00 - General, that the trial court is not only allowed to provide a definition of knowingly when requested by a deliberating jury, it is presumed that such instruction will be given. It is only when a deliberating jury "requests the definition of a term whose definition *is not permitted*," that the trial court should instruct that it is not permitted to define the word. See MAI-CR3d 333.00-General, Notes on Use 2[F]. The trial court here was permitted to define the word "knowingly," and it told the jury that it would define a word if the law allowed it do so, (which it does). Nonetheless, the trial court failed to provide appropriate guidance to the jury through the requested and permitted definition of "knowingly," and it affirmatively mislead them by telling them it was not permitted to define the word. The trial court's error affected the verdict.

The trial court has an affirmative duty to resolve confusion expressed by a deliberating jury. "A jury's execution of its duty necessarily depends on the instructions it receives from the court." *State v. Robinson*, 484 S.W.3d 862, 872–73 (Mo. App. E.D. 2016). In Missouri, the trial court's duty to instruct the jury on the law was established as early as 1876. *See State v. Martin*, 602 S.W.2d 772, 775 (Mo. App. E.D. 1980) (*citing State v. Lane*, 64 Mo. 319 (1876)). Towards the end of the nineteenth century, Justice Joseph Story explained the intertwined duties of judge and jury:

> [It is] the duty of the court to expound the law, and that of the jury to apply the law as thus declared to the facts as ascertained by them. In this separation of functions of court and jury is found the chief value, as well as safety, of the jury system. Those functions cannot be confounded or disregarded without endangering the stability of public justice, as well as the security of private and personal rights.

*State v. Robinson*, 484 S.W.3d at 872–73 (quoting *Sparf v. United States*, 156 U.S. 51, 106 (1895)). "Upon the [trial] court *rests the responsibility of declaring the law.*" *Id.* (*emphasis in Robinson*). That responsibility is related to the duty to define and explain technical terms which the jury may otherwise misapply. *Id.* (*citing State v. Jackson*, 369 S.W.2d 199, 205 (Mo.1963)).

"Discharge of the jury's responsibility for drawing appropriate conclusions from the testimony depended on discharge of the judge's responsibility to give the jury the required guidance by a lucid statement of the relevant legal criteria." *Bollenbach v. United States*, 326 U.S. 607, 612–13 (1946). "When a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy. In any event, therefore, the trial judge had no business to be 'quite cursory' in the circumstances in which the jury here asked for supplemental instruction." *Id.*

A trial court must exercise its sound discretion in deciding what instructions to give a jury that seeks clarification and guidance on a legal issue. *United States v. Nunez*, 889 F.2d 1564, 1568 (6th Cir. 1989); *United States v. Sarno*, 73 F.3d 1470, 1486 (9th Cir. 1995); *United States v. Skarda*, 845 F.2d 1508, 1512 (8th Cir. 1988). A trial court must, if it gives a supplemental instruction, ensure that the instruction contains a clear statement of the law. *State v. Goree*, 672 S.W.2d 369, 370 (Mo. App. E.D. 1984); *State v. Hudson*, 521 S.W.2d 43, 47-48 (Mo. App. St.L.D. 1975). If the jury "indicates confusion about an important legal issue, it is not sufficient for the court to rely on more general statements in its prior charge." *Nunez*, 889 F.2d at 1568; *see United States v. Warren*, 984 F.2d 325, 330 (9th Cir. 1993); *United States v. Bolden*, 514 F.2d 1301, 1308 (D.C. Cir. 1975). As the Supreme Court noted in *Bollenbach*, "a conviction ought not to rest on an equivocal direction to a jury on a basic issue." 326 U.S. at 613.

The right to an impartial jury is enshrined in both the federal and state constitutions. U.S. Const. amend. VI; Mo. Const. art. I, sec. 18(a). *State v. Robinson*, 484 S.W.3d at 872. The right to a jury trial is no procedural formality; it is a fundamental reservation of power in our constitutional structure, meant to stand as a bulwark against "judicial despotism," *Id.* (*quoting United States v. Booker*, 543 U.S. 220, 238–39 (2005)),



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and to ensure the people's ultimate control in the judiciary, *Id.* (*citing Blakely v. Washington*, 542 U.S. 296, 305–06 (2004)). Trial by jury has been called the "most priceless" safeguard for the preservation of individual liberty. *Id.* (*quoting Irvin v. Dowd*, 366 U.S. 717, 721 (1961)). Under the Constitution, the institution of the criminal trial purports "to provide a fair and reliable determination of guilt, and no procedure or occurrence which seriously threatens to divert it from that purpose can be tolerated." *Id.* (*quoting Estes v. Texas*, 381 U.S. 532, 564 (1965) (Warren, C.J., concurring)).

This Court cannot find that a fair and reliable determination of guilt resulted here. Mark's mental state was the primary issue that the jury had to grapple with – whether he acted knowingly or recklessly, or in reasonable self-defense. Recognizing its responsibility to determine this important issue, the jury asked for guidance on the definition of a knowing mental state, but the trial court refused to provide such guidance, even though it should have done so. MAI-CR 333.00, Notes on Use 2[F] presumes that when a deliberating jury asks for a definition that is permitted, that it shall be given. And "[w]henever there is an MAI–CR instruction" applicable under the law and Notes on Use, that instruction "*shall* be given or used to the exclusion of any other instruction or verdict form." *State v. Robinson*, 484 S.W.3d at 869 (quoting Rule 28.02(c)).

In failing to correctly answer the jury's question with the permitted definition of "knowingly," the trial court failed in its responsibility to "give the jury the required guidance by a lucid statement of the relevant legal criteria," *Bollenbach*, 326 U.S. at 612–13. When the jury made "explicit its difficulties," the trial court should have "clear[ed] them away with concrete accuracy," as the Missouri Approved Instructions contemplate and direct it to do. The trial court's failure to correctly answer the jury affected its deliberations, and necessarily, its verdict. In fact, the trial court's response, coupled with the definition of "recklessly" that was given, invited a roving commission on the meaning of "knowingly." A manifest injustice has resulted, and this Court should reverse for a new trial.

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## V.

## Important defense evidence of C.E.'s reputation for violence wrongly excluded

**The trial court abused its discretion in refusing to let Mark present Cody McDaniel's testimony as evidence of C.E.'s reputation for violence because such ruling violated Mark's rights to due process, a fair trial, and to present a defense, guaranteed by U.S. Const., Amends. 6 & 14 & Mo. Const., Art. I, §§ 10 & 18(a), in that since Mark asserted self-defense, C.E.'s reputation for violence was admissible on the question of who was the initial aggressor, and excluding Cody's testimony about C.E.'s acts of violence against him allowed the State to portray C.E. – who was not present and did not testify at trial – as the injured victim, while preventing Mark from completing the picture with C.E.'s aggressive acts.**

### *Facts & Preservation*

Defense counsel wanted to call Cody McDaniel – another of C.E.'s roommates who had been subjected to C.E.'s violence – to testify at trial. (TR.22). At a hearing one week before trial, the prosecutor stated, "I will stipulate to [defense counsel] being allowed to endorse and call Cody McDaniel if he wants to." (TR.22). The court allowed the defense to endorse Cody, noting that he would only get to testify if it was relevant and material to the case. (TR.23).

During voir dire at trial, defense counsel told the prospective jurors that the defense would be calling Cody McDaniel as a witness. (TR.101). During defense counsel's opening statement, counsel told the jury that the defense would present one witness, another roommate of C.E.'s named Cody, and that Cody would testify that C.E. was a drunk and a violent man. (TR.144).

After the State rested its case, the defense attempted to call Cody McDaniel as a witness. (TR.244). The State objected that Cody's entire testimony was objectionable because his sole purpose would be to testify about C.E.'s reputation as a drunk and a violent person. (TR.244). Defense counsel explained that he wanted Cody to testify because Cody was also roommates with C.E., and that C.E. drank very heavily and

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became violent with him too. (TR.245, 248). The trial court asked, "What's that got to do with this case?" (TR.246). The trial court ruled that evidence of C.E.'s violent, aggressive character was not admissible, and excluded Cody's testimony as not factually or legally relevant. (TR.24-249,259).

As an offer of proof, Cody McDaniel testified that C.E. lived with him for a month and a half during the summer of 2016. (TR.253). Cody had given up drinking alcohol, and he had told C.E. that a condition of living with him was that there would be no alcohol in his house. (TR.260). One day, Cody came home to find that C.E. had brought beer and vodka into the house (TR.260). Cody began pouring the liquor out and C.E. got upset. (TR.255). Cody testified that C.E. came at him "swinging." (TR.260). Cody warned him "don't do it," but C.E. swung on him again. (TR.260). Cody testified that C.E. had been violent with him a couple of times and that he had to defend himself. (TR.261).

The trial court did not change its ruling that Cody's proposed testimony was not admissible. (TR.259). This ruling was renewed as error in Mark's motion for new trial, (LF.90-91), and it is preserved for review. *Rule 29.11(d)*.

*Standard of Review*

A trial court enjoys considerable discretion in the admission or exclusion of evidence. *State v. Gonzales*, 153 S.W.3d 311, 312 (Mo. banc 2005). However, that discretion is abused when a ruling is clearly against the logic of the circumstances and is so unreasonable as to indicate a lack of careful consideration. *Id.*

*Discussion*

The trial court abused its discretion in refusing to let Mark present evidence of C.E.'s reputation for "turbulence and violence" because such rulings violated Mark's rights to due process, a fair trial, and to present a defense. *See* U.S. Const., Amends. VI and XIV*;* Mo. Const., Art. I, §§ 10 and 18(a). Since Mark asserted self-defense, C.E.'s reputation for turbulence and violence was admissible on the question of who was the aggressor. At trial, Mark's defense was that C.E. was the initial aggressor and that Mark reacted in self-defense. In support of his defense, Mark sought to introduce evidence of

C.E.'s reputation for violent behavior. The trial court excluded the evidence, reasoning that it was irrelevant.

The same trial court error resulted in reversal in *Gonzales*, *supra*. In *Gonzales*, the defendant and Mike Gossir had an altercation that resulted in the stabbing of Gossir. *Gonzales*, 153 S.W.3d at 312. At trial, Gonzales claimed that Gossir was the initial aggressor and that he stabbed Gossir in self-defense. *Id.* In support of his contention, Gonzales sought to introduce evidence of Gossir's reputation for violent, turbulent, and bizarre behavior, through numerous witnesses. *Id.* The trial court excluded this evidence, reasoning that Gossir's reputation was irrelevant as to who was the initial aggressor. *Id.*

On appeal, the State argued that, in the absence of evidence that Gonzales was aware of Gossir's reputation, the evidence was inadmissible. *Id.* at 313. This Court disagreed and reversed, explicitly holding that "a defendant is not required to demonstrate his awareness of the victim's reputation to the extent the victim's reputation for violence is offered on the question of who was the initial aggressor." *Id.* In determining who was the initial aggressor, the question is what the victim probably did, not what the accused probably thought the victim was going to do. *Id.* Neither the defendant's belief that the victim was the initial aggressor nor the reasonableness of that belief bear on the determination of who actually "started it," because "[t]he inquiry is one of objective occurrence, not of subjective belief." *Id.* The identity of the initial aggressor is a fact that exists wholly independent of the defendant's state of mind; thus, unlike the reasonableness of the defendant's apprehension of danger, the defendant need not have been aware of the victim's reputation for evidence of that reputation to be logically relevant. *Id.* Because the trial court excluded evidence of Gossir's violence, and because it was highly relevant to the question of who was the initial aggressor in the altercation, this Court reversed Gonzales' conviction and ordered a new trial. *See id.*

The same should hold true here. Mark sought to introduce evidence through another of C.E.'s roommates, Cody McDaniel, of C.E.'s reputation for violence. The State's objection was that Cody's would be about C.E.'s reputation as a drunk and a violent person, which was inadmissible. (TR.244). But reputation evidence is relevant



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and admissible on that issue of who was the initial aggressor, regardless of Mark's lack of knowledge of that reputation. Moreover, the evidence was highly probative on the issue of "initial aggressor" in light of the fact that C.E. did not testify at trial, the State attempted to dispute Mark's account of the altercation with C.E.'s out-of-court hearsay statement, and the State portrayed Mark as the initial aggressor. The exclusion of Mark's proffered evidence speaking to C.E.'s reputation indicates a lack of careful consideration constituting an abuse of discretion. This Court should order a new trial.

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## VI.

## C.E.'s out of court statements were inadmissible

**The trial court plainly erred in allowing the State to admit C.E.'s hearsay statements into evidence at trial through Sarena Sundberg ("[C.E.] kept telling me over and over and over that Mark hit him in the head with a cane") and Officer Nappe (C.E. said "he was cut with a knife" and "[C.E.] said it was a folding, black knife"), because the admission of this evidence violated Mark's rights to due process, a fair trial, and to confront the witnesses against him, guaranteed by U.S. Const., Amends. 6 & 14, and Mo. Const., Art. I, §§ 10 & 18(a), and resulted in manifest injustice, in that: 1) C.E. was not shown to be "unavailable;" 2) Mark had no prior opportunity to cross-examine C.E.; and 3) C.E.'s out-of-court statements were hearsay that did not fall under any exception.**

### *Facts and Preservation*

C.E. did not testify at trial. (Tr. 1 *et seq*.) He was not shown to be unavailable and he had never been deposed or provided any previous cross-examined testimony (TR 247). Instead, the State elicited C.E.'s out-of-court statements at trial through Sarena Sundberg and Officer Nappe.

The trial court sustained defense counsel's hearsay objection when the State elicited from Ms. Sundberg that "[C.E.] kept telling me over and over and over that Mark hit him in the head with a cane." (TR.148). There was no request for the jury to disregard this statement and no request for a mistrial. (TR.148-149).

Officer Nappe testified that when he arrived at Sundberg's house, he spoke to C.E. (TR.156, 194). Officer Nappe testified that C.E. told him that he lived across the street. (TR.158). While talking to C.E., Officer Nappe developed "some form of an idea what transpired." (TR.160). A hearsay objection to this response was overruled. (TR.161). Officer Nappe also testified, over objection, that C.E. told him that "he was cut with a

knife." (TR.180-181).[3] Relying on what C.E. told him, Officer Nappe investigated the scene. (TR.161). Officer Nappe collected a small black folding pocket knife from the living room. (TR.195; Ex.22). He collected this knife because "[C.E.] said it was a folding, black knife," and that was the only knife he found. (TR.203).

*Standard of Review*

Since Mark's attorney did not object to most of this hearsay and did not raise a confrontation objection until his motion for new trial, Mark asks this Court to review for plain error. *Rule 30.20. State v. Holden,* 278 S.W.3d 674, 680–81 (Mo. banc 2009); *Strong v. State,* 263 S.W.3d 636, 646 (Mo. banc 2008) (a constitutional claim must be raised at the earliest opportunity and preserved at every step of the judicial process). Claims of plain error are reviewed under a two-prong standard: whether there is error that is evident, obvious, and clear; and whether a manifest injustice or miscarriage of justice has, indeed, occurred as a result of the error. *State v. Ray,* 407 S.W.3d 162, 170 (Mo. App. E.D. 2013). The outcome of plain error review depends heavily on the specific facts and circumstances of each case. *Id.*

*Discussion*

Here, it is "evident, obvious, and clear" that C.E.'s out-of-court statements were not admissible and were erroneously admitted by the State. C.E.'s out-of-court statements constituted inadmissible hearsay and violated Mark's Confrontation Clause rights. For C.E.'s out-of-court statements to be admissible, they must clear two hurdles. "First, the

[3] Defense counsel first objected when the prosecutor asked Officer Nappe, "How did you know that [C.E.] was cut with a knife?" (TR 180). The trial court overruled this objection as not calling for a hearsay response. (TR 181). The prosecutor then elicited:

Q: How did you know or come to believe that [C.E.] was cut with a knife?
A. He told me he was cut with a knife.
Q. He, who?
A. [C.E.].

(TR 181). No objection, request to disregard, or request for a mistrial was made. (TR 181).



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statements must survive traditional hearsay analysis. Second, because this is a criminal case, the statements must survive Sixth Amendment Confrontation Clause analysis." *State v. Bennett,* 218 S.W.3d 604, 609–10 (Mo. App. S.D. 2007) (citing *State v. Kemp,* 212 S.W.3d 135, 145 (Mo. banc 2007)). *See also State v. Cannon,* 215 S.W.3d 295, 302 n. 1 (Mo. App. W.D. 2007).

"Hearsay statements are out-of-court statements that are used to prove the truth of the matter asserted and depend on the veracity of the statement for its value." *Bennett,* 218 S.W.3d at 610 (quoting *Kemp,* 212 S.W.3d at 146). Hearsay statements are inadmissible unless they fall under an exception. *State v. McFadden,* 391 S.W.3d 408, 431 (Mo. banc 2013). If the statement is not offered for the truth of the matter asserted, it does not constitute hearsay and need not fit within an exception to the hearsay rule. *State v. Tyra,* 153 S.W.3d 341, 346 (Mo. App. S.D. 2005).

The Confrontation Clause of the Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him[.]" U.S. Const., amend VI. Missouri's constitution provides the same right. Mo. Const. Art. I, Section 18(a); *State v. Schaal,* 806 S.W.2d 659, 662 (Mo. banc 1991); *State v. Davidson,* 242 S.W.3d 409, 416 (Mo. App. E.D. 2007). It further requires a court to exclude all testimonial evidence unless the declarant is unavailable to testify and the defendant had a prior opportunity to cross-examine the declarant. *Id.*; *State v. March,* 216 S.W.3d 663, 665 (Mo. banc 2007) (citing *Crawford v. Washington,* 541 U.S. 36, 68 (2004)).

C.E.'s out-of-court statements about how his injuries occurred, who inflicted them, and with what weapon, were inadmissible hearsay. These statements fell within no exception to the hearsay rule. They were not excited utterances as there was no ongoing emergency and C.E. was sitting calmly in a chair on the porch when the officers arrived to investigate.

The admission of C.E.'s out-of-court statements also violated the Confrontation Clause. *See Davis v. Washington,* 547 U.S. 813, 822 (2006) (defining testimonial statements as those made when there is no ongoing emergency, and when the primary

purpose of the interrogation is to establish or prove past events potentially relevant to later prosecution). C.E.'s statements were certainly made when there was no ongoing emergency and when the police were gathering evidence relevant to prosecution. C.E. did not testify at trial and the defense did not have a prior opportunity to cross-examine him. Thus, admission of his statements violated Mark's Confrontation Clause rights. *See Davidson*, 242 S.W.3d at 417.

The admission of C.E.'s inadmissible out-of-court hearsay statements resulted in a manifest injustice and a miscarriage of justice will occur if Mark's convictions are based, in part, on these unsworn out-of-court statements. This evidence could not help but have an effect on the jury's verdict because the jury was tasked with evaluating the truth of what happened during the altercation between C.E. and Mark, when there were no other witnesses to what occurred. *See State v. Cooper*, 509 S.W.3d 854, 859 (Mo. App. S.D. 2017) (case reversed where the only evidence that Cooper caused the injury to Victim's arm by grabbing and twisting her wrist was Victim's statement to that effect in response to Officer Rogers's question about what had happened).

Without C.E.'s inadmissible out-of-court statements, the jury was left with Mark's statements that were made in the context of acting in self-defense. In that regard, C.E.'s statements are not merely cumulative of evidence that was already before the court in the form of Mark's statements, because Mark's statements were made in a different context and for a different conclusion – self-defense – whereas C.E.'s statements were construed as being made as the victim of an assault. If an alleged victim's out-of-court statements are allowed to make the State's case, the State would never call the alleged victim to testify and place them in the crucible of confrontation. Allowing the prosecutor to obtain a conviction upon such inadmissible, unchallenged and unconstitutional evidence warrants a new trial. This Court must reverse.



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## CONCLUSION

For the reasons set forth in Points I-VI, Mark request a new trial.

Respectfully submitted,

*/s/ Amy M. Bartholow*

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## CERTIFICATE OF COMPLIANCE AND SERVICE

I, Amy M. Bartholow, hereby certify to the following. The attached Substitute brief complies with the limitations contained in Rule 84.06(b). The Substitute brief was completed using Microsoft Word, Office 2010, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the Substitute brief contains **17,275** words, which does not exceed the 31,000 words allowed for an appellant's brief.

I hereby certify that on this 20th day of May, 2019, the foregoing was placed for delivery through the Missouri e-Filing System to Evan J. Buchheim, Assistant Attorney General, at Evan.Buchheim@ago.mo.gov.

*/s/ Amy M. Bartholow*

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