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 REPLY BRIEF

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INDEX

TABLE OF AUTHORITIES

Page

***CASES*:**

***CONSTITUTIONAL PROVISIONS*:**

***STATUTES*:**

ARGUMENTS[1]

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.

Prosecutor Farkus commenced a criminal case against Mark by filing felony charges and appearing in the case. Prosecutor Farkus's sister then sat in judgment of Mark, in the same criminal case, after the trial court refused to strike her for cause. Respondent argues that this result does not offend Section 494.470 for two primary reasons: First, Respondent asserts that the statutory phrase "*prosecuting or circuit attorney"* refers to one person and one person only – the head of the office; and second, that even if the statute applies to assistant prosecutors, Farkus did not participate in the trial. Mark responds to both arguments below.

First, Respondent asserts that the Legislature intended the word *prosecuting* to be used as an adjective and not a verb. Mark has no quarrel with Respondent's framework of using adjectival phrases to analyze this statute; however, Respondent cannot cherry pick one adjectival phrase and ignore others. If such analysis is to be used, Respondent must also acknowledge that the statutory phrases, "in a criminal case" and "in the same cause" also apply to describe the "prosecuting or circuit attorney."

[1] Mark replies to Points I and III, and relies on his Substitute Brief as to other points.

Mark agrees with Respondent that the elected prosecuting attorney, as head of that office, is named in every criminal case, and thus, is part of every criminal case prosecuted in the county, even if he or she does not participate in each individual trial. Therefore, contrary to Respondent's assertion, the kin[2] of any elected prosecutor *would* be disqualified from the criminal case, because the elected prosecutor is "in the same cause" and "in a criminal case" by virtue of his or her title. Mark did not suggest otherwise in his brief, and he agrees that kin of the head prosecutor should not participate as a juror in a criminal case.

Respondent, however, fails to respond to the anomalous result of its own argument, which was pointed out in Mark's brief: namely, if an elected prosecutor and assistant prosecutor tried a case together, and sisters of both prosecutors were on the venire panel, under Respondent's interpretation of the statute, only the sister of the elected prosecutor could be struck for cause. More absurdly, if an assistant prosecutor tried 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 in the case could survive a strike for cause.

Such illogical result is avoided by giving the phrases "in a criminal case" and "in the same cause" proper recognition. In the above scenario, applying the statute correctly: 1) the sister of the elected prosecutor would be disqualified for cause because the elected prosecutor is "in the same cause," by virtue of his title; and 2) the sister of any other prosecutor who is "in the same cause," by virtue of entering the criminal case, filing motions, or litigating on behalf of the state, similarly would be disqualified. A "prosecuting or circuit attorney" is "in a criminal case" or "in the same cause" either by virtue of being the elected prosecutor or circuit attorney or by otherwise participating in a criminal case.

Determining which prosecutors are "in a criminal case" or "in the same cause" is readily ascertainable. Indeed, it is a very simple test, and easily applied. If a prosecutor's

[2] "within the fourth degree of consanguinity or affinity"

name appears in the case, he is "in the same cause," period. By virtue of elected title or based on actual involvement in the case, he has an interest in the litigation, and his relatives should not participate in resolving the disputed issues. In the rare event[3] that a prosecutor's sister appears on the venire panel, any judge can determine if the prosecutor has appeared "in the same cause" simply by reviewing the docket sheets. Here, Prosecutor Farkus, who originally brought the criminal charges against Mark, was "in the same cause" and his sister should not have sat in judgment of Mark.

The simplicity of such test has been recognized both by the Legislature as well as this Court. Indeed, this Court has made clear time and again that "[t]he term Prosecutor as used in the Rules of Criminal Procedure…includes an Assistant prosecutor for the reason, no doubt, that the office commands from both the same qualifications and the same duty." *State v. Falbo*, 333 S.W.2d 279, 284 (1960); *see also State ex rel. Nothum v. Walsh*, 380 S.W.3d 557, 565 (Mo. 2012) ("[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). Respondent's brief does not address this case law.

The Legislature also uses the phrase "prosecuting or circuit attorney" numerous times to describe more than just the elected prosecutor, especially within statutes related to trial preparation and procedure, probation and sentencing. The following are examples of statutes where the phrase "prosecuting or circuit attorney" clearly encompass the conduct of assistant prosecutors or assistant circuit attorneys in the proceedings:

SECTION	**Statutory Language**
§ 545.415	"…**a prosecuting or circuit attorney** in any criminal case pending in any court may obtain the deposition of any person on oral examination."

[3] Mark has found no other published criminal cases involving Section 494.470.

§ 56.085	"In the course of a criminal investigation, **the prosecuting or circuit attorney** may request the circuit or associate circuit judge to issue a subpoena to any witness who may have information for the purpose of oral examination under oath to require the production of books, papers, records, or other material of any evidentiary nature at the office of the prosecuting or circuit attorney requesting the subpoena."
§ 56.087	"**The prosecuting or circuit attorney** has the power, in his or her discretion, to dismiss a complaint, information, or indictment, or any count or counts thereof, and in order to exercise that power it is not necessary for the prosecutor or circuit attorney to obtain the consent of the court. The dismissal may be made orally by **the prosecuting or circuit attorney** in open court, or by a written statement of the dismissal signed by **the prosecuting or circuit attorney** and filed with the clerk of court."
§ 595.223	"**No prosecuting or circuit attorney**…shall request or require a victim of an offense under chapter 566, or a victim of an offense of domestic assault or stalking to submit to any polygraph test or psychological stress evaluator exam as a condition for proceeding with a criminal investigation of such offense."
§ 217.703.2	"…the sentencing court may, upon its own motion or a motion of **the prosecuting or circuit attorney**, make a finding that the offender is ineligible to earn compliance credits…"
§ 491.710	"The court and **the prosecuting or circuit attorney** shall take appropriate action to insure a speedy trial in order to minimize the length of time the child must endure the stress of his or her involvement in the proceeding."
§ 559.036.7	"**The prosecuting or circuit attorney** may file a motion to revoke probation or at any time during the term of probation…"

§ 544.250	**"No prosecuting or circuit attorney** in this state shall file any information charging any person or persons with any felony, until such person or persons shall first have been accorded the right of a preliminary examination before some associate circuit judge in the county where the offense is alleged to have been committed."
§ 552.020 & § 552.030	"The clerk of the court shall deliver copies of the report or reports to **the prosecuting or circuit attorney** and to the accused or his counsel."

In each of the above statutes, "prosecuting or circuit attorney" clearly applies to actions that have always been taken by *assistant* prosecuting or circuit attorneys as well as the heads of those offices. The same is true here under Section 494.470 – especially when the further qualifier of "in a criminal case" and "in the same cause" is also used in that statute. These additional phrases would not be necessary if "prosecuting or circuit attorney" only applied to the head of the office. The Legislature certainly intended that *any* prosecutor in the same criminal cause should not have kin sitting on the jury.

Further, Respondent's claim that Prosecutor Farkus's sister could sit as a juror because Farkus did not participate *at trial* does not pass muster. The statute does not say that only kin of the prosecutor *at trial* or who *tries the case* may not sit on the jury; rather, the statute states that "no person who is kin to…[a] prosecuting… attorney in *a criminal case* … shall be sworn as a juror *in the same cause*." Again, as discussed above, a prosecutor can be *in a criminal case* in many ways, and he is certainly *in a criminal case* when he commences the criminal case by filing felony charges against the defendant, as Prosecutor Farkus did here. His sister was disqualified to serve on Mark's jury.

The statute clearly is designed to disqualify those who have, or whose kin have, an *interest in the litigation*. Such disqualifying interest can arise from the potential juror's status as: a witness; a person summoned as a witness; a person who has formed an opinion that may influence their judgment; kin to a party in a civil case; or kin to a

victim, an accused or a prosecutor in a criminal case. Section 490.470.1. 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," or their exact role in the case, which is disqualifying. 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. This is the clearest interpretation of the Legislature's intent and the easiest rule to apply in any criminal case.

Prosecutor Farkas's sister should not have sat on Mark's jury because Farkus was a prosecutor in the same cause; he filed the initial criminal complaint against Mark and furthered the prosecution. The trial court plainly erred in requiring defense counsel to establish additional prejudice before she could be struck for cause. Rather, she was automatically disqualified to serve under Section 494.470. Manifest injustice resulted when Mark was tried and convicted by a disqualified juror, related to a prosecuting attorney in the same cause. Mark is entitled to a new trial and this Court must reverse.

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.

Because of the defective instructions submitted by the State, the jury was unable to evaluate whether: 1) any alleged force used by Mark was justified as non-deadly, and 2) whether Mark was subjected to a forcible felony, and was thus lawfully allowed to repel the commission of such forcible felony with deadly force.

Respondent concedes that the State's Instruction was defective and did not comply with the applicable pattern instruction, but argues that it does not matter because the record shows that Mark used deadly force during the assault. (Resp. Br. 39). The record shows no such thing. In the light most favorable to the defense, Mark was attacked by C.E. when C.E. punched him in the face. Mark, who is disabled, defended himself with his cane and a knife. (TR.171, 180-181, 195). Officer Nappe observed a cut across C.E.'s chest, but it did not seem deep. (TR.183-184, 207-208; Ex.10). C.E. did not testify at Mark's trial, and no one testified that Mark had started the fight. (TR.62). Although Respondent concedes that this Court has said that "the use of a knife does not mean, as a matter of law, that deadly force was used," see *State v. Westfall*, 75 S.W.2d 278 (Mo. banc 2002), it nonetheless argues that Mark's use of a knife in this case constituted

deadly force. (Resp. Br. 42). The problem is that this issue must be resolved by the jury under proper instructions.

Under the above facts, in the light most favorable to the defense, the use of the knife could have been non-deadly, as C.E.'s cut "did not seem deep." (TR.181-183, 207). 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. 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. However, they did not have the instructions to guide them in resolving this disputed issue.

Respondent also concedes that the self-defense statute in effect at the time of this incident permitted the use of deadly force to protect against a "forcible felony" (Resp. Br. at 43), and that the State's instruction submitted to the jury did not contain this language to reflect this substantive change in the law. (Resp. Br. 41-42). However, Respondent again argues that, "under the facts of this case," C.E. was not committing a "forcible felony" against Mark because Mark was asleep when C.E. punched him in the face, and that there was no evidence that C.E. committed further acts. (Resp. Br. 44). Surely Respondent is not suggesting that a victim must be punched in the face more than once in order to act in self-defense. Further, in the light most favorable to the defense, the struggle continued into the bathroom, where Mark, arguably, continued to be assaulted by C.E. and continued to defend himself. Again, the resolution of this issue – whether Mark was subjected to a forcible felony – is a question for the jury to resolve under proper instructions. C.E.'s alleged commission of a domestic assault on Mark was a "forcible felony" that Mark was entitled to repel, but the jury did not know that because the instruction gave them no guidance. See *State v. Comstock*, 492 S.W.3d 204, 209 (Mo. App. S.D. 2016).

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. Yet, the jury was not given the correct guidance about determining whether deadly or non-deadly force was used, or the correct circumstances under which deadly force would be justified, such as to repel a forcible felony. This is critical because, in the light most favorable to the defense, the standard for justifying non-deadly self-defense is much lower, *Westfall*, 74 S.W.3d at 282, and C.E.'s actions could easily constitute the forcible felony of domestic assault, *Comstock, supra.*

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 by the State excused it 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.

CONCLUSION

For the reasons set forth in Points I-VI of his Substitute brief, and as set forth above, Mark requests a new trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, Amy M. Bartholow, hereby certify to the following. The attached Substitute Reply Brief complies with the limitations contained in Rule 84.06(b). The Substitute Reply Brief was completed using Microsoft Word, Office 2010, in Times New Roman size 13 point font. Excluding the cover page, the signature block, and this certificate of compliance and service, the Substitute Reply Brief contains **3,078** words, which does not exceed the 7,750 words allowed for an appellant's Substitute Reply brief.

I hereby certify that on this 11th day of July, 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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Amy M. Bartholow