No. SC97697

In the
Supreme Court of Missouri

STATE OF MISSOURI,

Respondent,

v.

MARK C. BRANDOLESE,

Appellant.

Appeal from Pettis County Circuit Court
Eighteenth Judicial Circuit
The Honorable Robert Koffman, Judge

RESPONDENT'S SUBSTITUTE BRIEF

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STATEMENT OF FACTS

Appellant (Defendant) appeals a Pettis County Circuit Court conviction for one count of second-degree domestic assault and one count of armed criminal action. Defendant asserts six claims of trial court error on appeal: (1) the court plainly erred in failing to excuse for cause a veniremember who was the sister of an assistant prosecutor; (2) the court plainly erred in failing to sua sponte remove initial-aggressor language from the self-defense instruction; (3) the court plainly erred in failing to sua sponte modify the self-defense instruction to include a reference to non-deadly force; (4) the court plainly erred in failing to give the jury a definition of *knowingly* as requested in a jury note; (5) the court abused its discretion in excluding defense testimony regarding the victim's alleged commission of a specific act of violence *after* the charged offense occurred; and (6) the court plainly erred in allegedly permitting hearsay evidence.

Defendant does not challenge the sufficiency of the evidence to support the convictions. Viewed in the light most favorable to the verdict,[1] the evidence presented at trial showed the following:

[1] *State v. Letica*, 356 S.W.3d 157, 161 (Mo. banc 2011).

On March 6, 2016, the victim (C.E.) appeared at his neighbor's house hardly able to stand with "gashes and blood…all over his face." (Tr. 147–50, 152–53.) The victim lived across the street in a house with Defendant. (Tr. 149–50, 158–60.) Police were called, and an ambulance took the victim to the hospital; he had a cut above his left eye and a long diagonal cut across his chest. (Tr. 147, 160, 192–93, 211, 216–17, 219; State's Exhibits 5, 6, 7, 8, 9, 10.) Police followed a blood trail leading from the neighbor's house, along the sidewalk, and up the steps to Defendant's house. (Tr. 164–67; State's Exhibits 13, 14, 15, 16, 17, 18.)

Defendant, who was sitting in a recliner holding a cane with apparent blood on it, readily admitted to officers that he had been in an altercation with the victim.[2] (Tr. 168–69; State's Ex. 12.) Defendant said the fight started in the living room when, he claimed, the victim punched him in the face while Defendant was asleep. (Tr. 169, 171, 195.) Defendant said that he hit the victim with his fists, struck the victim with a cane, and cut the victim's "neck" with a folding knife. (Tr. 173, 175, 180–81, 203–04, 228, 232–34.) The fight then moved into the bathroom, where Defendant said he shoved the victim into the vanity and broke the mirror. (Tr. 175, 230; State's Ex. 4.)

[2] An officer testified that it appeared both the victim and Defendant were intoxicated. (Tr. 220–21.)

Police found blood on the coffee table in the living room and on multiple surfaces in the bathroom; police also seized a black folding knife Defendant said he used to cut the victim. (Tr. 170, 180–81, 231; State's Exhibits 2, 3, 11.) An officer examined Defendant and found no injuries or visible marks on Defendant's face; he did, however, have blood on his hands. (Tr. 171–72; State's Ex. 12.) Defendant never claimed that the victim had a weapon, and police found nothing indicating that the victim had a weapon. (Tr. 232.)

Defendant was charged in Pettis County Circuit Court as a persistent felony offender with one count of second-degree domestic assault and one count of armed criminal action. (Supp. L.F. 1–2.) Before trial began, the court found that Defendant was a persistent offender. (Tr. 70.) Defendant's case was tried on May 3-4, 2017, with Judge Robert Koffman presiding. (L.F. 14–15.) Defendant did not testify at trial. (Tr. 264–66.) The jury found Defendant guilty as charged on all counts, and the court later imposed concurrent sentences of 15 years for domestic-assault and 10 years for ACA. (Tr. 303–04, 316–17; L.F. 15–16, 80–81, 97–98.)

ARGUMENT

I (failure to automatically exclude veniremember).

The trial court did not plainly err by not excluding "Juror No. 16" from serving on Defendant's jury on the ground that she was the sister of an assistant prosecutor because § 494.470, RSMo, did not require the automatic exclusion of this juror in that this section automatically disqualifies the kin of the prosecuting (or circuit) attorney from jury service, not the kin of assistant prosecuting attorneys. Moreover, nothing in the record showed that the juror in question could not be fair and impartial.

A. The record regarding this claim.

The docket sheets show that in March 2016 a complaint and probable cause statement was filed against Defendant by "Robert A. Farkas." (L.F. 1.) The criminal complaint was signed by Pettis County assistant prosecutor "R. Anthony Farkas." (L.F. 5.) The docket sheets also show that "APA Farkas" appeared at hearings on March 22, April 12, and May 17, 2016, during which Defendant's preliminary hearing was continued.[3] (L.F. 2.) Defendant was later indicted by a grand jury on June 1, 2016.[4] (L.F. 9.)

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[3] The docket sheets show that "APA Chapman" and "PA Sawyer" appeared at other hearings.

[4] Assistant Prosecuting Attorney William Chapman signed the indictment underneath the grand jury foreperson's signature. (L.F. 19.)

The only attorney representing the State at Defendant's trial was Phillip Sawyer, the elected prosecutor of Pettis County.[5] (Tr. 76–77.) A veniremember responding to a question from defense counsel during jury selection revealed that her brother was Tony Farkus, who was "a prosecutor":

> [Defendant's Counsel]: I notice your last name. Are you a relative of Tony Parkas?[6]
>
> Juror No. 16: Yes. That's my brother.
>
> [Defendant's Counsel]: Oh. So your brother is a prosecutor?
>
> Juror No. 16: Yeah.

(Tr. 102.) Defense counsel asked this veniremember no further questions.

The court overruled Defendant's counsel's motion to strike Veniremember No. 16 for cause on the ground that counsel failed to inquire whether she could be a fair and impartial juror:

> [Defendant's Counsel]: Tony Farkas' sister, Number 16, I think she should go for cause.
>
> The Court: Again, the question wasn't asked—
>
> [The Prosecutor]: There was no question.

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[5] Nothing in the record shows that assistant prosecutor Farkas participated in any manner in Defendant' case after Defendant was indicted.

[6] This spelling of the veniremember's borther's last name ("Parkus") appears to be a typographical error. On the same transcript page, the veniremember's last name is spelled "Farkus." (Tr. 102.)

> The Court: —to delve into why she couldn't be fair. It just—all the question was, she's Tony Farkas' sister, nothing on why she can't be fair. I'm not taking that one for cause.
>
> [Defendant's Counsel]: Even though her beloved brother works for the prosecutor.
>
> The Court: That's great.
>
> [Defendant's Counsel]: Okay.
>
> The Court: I don't even know if it's a beloved brother. I didn't hear any evidence to that, either. The questions that would prejudice her have not been asked. She's giving you something that causes you to strike her for preemptory challenge, I would agree, but for cause, I haven't heard it. Overruled. Next?

(Tr. 124.) The veniremember in question, Karen Farkus, served as a juror in Defendant's trial. (Tr. 128.) Defendant did not assert a claim regarding this matter in the motion for new trial. (L.F. 82–95.)

B. Standard of review.

Because Defendant did not rely on the juror-disqualification statute in moving to strike the veniremember for cause and because this claim was not asserted in the motion for new trial, it is not preserved for appellate review. Consequently, it may only be reviewed, if at all, for plain error.

"[P]lain errors affecting substantial rights may be considered in the discretion of the court when the court finds that manifest injustice or miscarriage of justice has resulted therefrom." Rule 30.20. "Substantial rights are involved if, facially, there are significant grounds for believing that the

error is of the type from which manifest injustice or miscarriage of justice could result if left uncorrected." *State v. Johnson*, 524 S.W.3d 505, 513 (Mo. banc 2017). "[I]f plain error affecting substantial rights is found, the [appellate court] determines whether the error actually did result in manifest injustice or a miscarriage of justice." *Id.* An appellate court should "exercise its discretion to conduct plain error review *only* when the" proponent "establishes facially substantial grounds for believing that the trial court's error was 'evident, obvious, and clear' and 'that manifest injustice or miscarriage of justice has resulted.'" *State v. Jones*, 427 S.W.3d 191, 195 (Mo. banc 2014) (quoting *State v. Baumruk*, 280 S.W.3d 600, 607 (Mo. banc 2009)) (emphasis added). Unless the [defendant] makes this facial showing," an appellate court should "decline to review for plain error under Rule 30.20." *Id.* at 195–96.

"The plain language of Rule 30.20 demonstrates that not every allegation of plain error is entitled to review." *State v. Nathan*, 404 S.W.3d 253, 269 (Mo. banc 2013). "The plain error rule is to be used sparingly and may not be used to justify a review of every point that has not been otherwise preserved for appellate review." *Jones*, 427 S.W.3d at 195. "Rule 30.20 is no panacea for unpreserved error, and does not justify review of all such complaints, but is used sparingly and limited to error that is evident, obvious, and clear." *State*

v. Phillips, 319 S.W.3d 471, 476 (Mo. App. S.D. 2010) (quoting *State v. Smith*, 293 S.W.3d 149, 151 (Mo. App. S.D. 2009)). "[N]ot all prejudicial error—that is, reversible error—can be deemed plain error." *Id.* An appellate court is not required to grant plain-error review; it does so solely within its discretion. *Id.*

"Manifest injustice is determined by the facts and circumstances of the case, and the defendant bears the burden of establishing manifest injustice." *State v. Baxter*, 204 S.W.3d 650, 652 (Mo. banc 2006); *see also State v. Schallon*, 341 S.W.3d 795, 799 (Mo. App. E.D. 2011) ("It is a defendant's burden to demonstrate manifest injustice or a miscarriage of justice.").

"The primary rule of statutory construction is to give effect to legislative intent as reflected in the plain language of the statute." *State v. Blocker*, 133 S.W.3d 502, 504 (Mo. banc 2004). "If the plain language of [a] statute creates an ambiguity, the statute will be construed to avoid unreasonable or absurd results." *Id.*

C. Section 494.470 does not apply to exclude from jury service the kin of *assistant* prosecuting attorneys.

Missouri law precludes any person from serving on a jury in a criminal case if that person is "kin" to the "prosecuting or circuit attorney…in the same cause":

> 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 494.470.1, RSMo 2016 (emphasis added). The statute thus precludes the kin of the prosecuting or circuit attorney in a criminal case from being sworn as a juror in the same cause.

The juror in question here merely stated that her brother, whose name was Tony Farkas, was a "prosecutor." Although no further record was made during jury selection identifying where the juror's brother worked, the legal file shows that a Pettis County assistant prosecuting attorney named Robert Anthony Farkus signed the criminal complaint and made appearances at hearings before Defendant was indicted.

Assuming that the veniremember's brother was the assistant prosecutor who signed the criminal complaint and appeared at a few pre-indictment hearings during which Defendant's preliminary hearing was continued, the question becomes whether this made him the "prosecuting or circuit attorney" in the case when the record shows that only the elected prosecutor represented the State during Defendant's trial. As explained below, the statute disqualifies from jury service only the kin of the prosecuting (or

circuit) attorney under whose name and authority the criminal case was brought.

A predecessor statute to section 494.470, which was specifically applicable to criminal cases, disqualified "kin" of the "prosecutor" from serving as a juror. *See* section 546.120, RSMo 1986.[7] A separate statute dealt with juror disqualification in civil cases. *See* section 494.190, RSMo 1986.[8] The General Assembly repealed both statutes in 1989 and enacted section 494.470, which addresses juror disqualification in both civil and criminal proceedings.

One purpose of section 494.470 is to disqualify the relatives of any *party* in a lawsuit from serving as jurors. Ascertaining the party in a civil lawsuit is relatively straightforward; one only need look to the named plaintiff(s) and defendant(s). But in a criminal case only one party is identified by a proper name, the accused, and the juror-disqualification statute accounts for that person's relatives. Although not named as a party in a criminal case, the person or persons injured by the accused's alleged offenses are identified in

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[7] "Where the indictment or information alleges an offense against the person or property of another, neither the injured party nor any person of kin to him shall be a competent juror on the trial, nor shall any person of kin to the prosecutor or defendant in any case serve as a juror on the trial thereof."

[8] "[N]o person…who is of kin to either party to any such cause within the fourth degree of consanguinity or affinity, shall be sworn as a juror in the same cause."

section 494.470 as "the injured party." Finally, because the plaintiff in every criminal case is the State, the statute identifies the prosecuting or circuit attorney as the nominal party, and any kin to that specific person within the fourth degree of consanguinity or affinity is disqualified from serving as a juror in that case.

Treating the elected prosecuting or circuit attorney as the nominal party makes sense because the elected prosecutor (unless disqualified for some reason) is the only person authorized to "commence and prosecute all…criminal actions in the prosecuting attorney's county…." Section 56.060.1, RSMo 2016. *See also State ex rel. Gardner v. Boyd*, 561 S.W.3d 389, 398 (Mo. banc 2018) (noting that the elected prosecutor or circuit attorney "holds one of the most powerful positions in our legal system, and [a court] cannot control the way [the prosecutor or circuit attorney] chooses to exercise the broad, almost unfettered, discretion conferred upon her by statute"). Because of the discretionary authority vested in the elected prosecutor to bring a criminal case, the General Assembly reasonably decided that relatives of the person making these decisions, i.e. the elected prosecutor, should not serve as jurors in a criminal case.[9]

[9] Defendant supports his argument by relying on section 56.180, RSMo, which permits assistant prosecutors to sign their own names on informations.

Defendant contends that the word *prosecuting* in the phrase "prosecuting or circuit attorney" refers to any attorney, whether the elected prosecutor or an assistant prosecutor, who takes part in the prosecution of the case. This argument relies on the word *prosecuting* acting as a verb rather than an adjective. In other words, Defendant's argument focuses on the action an attorney takes in prosecuting the case rather than on the attorney's position as the prosecuting or circuit attorney. There are several fundamental flaws with Defendant's argument.

First, the syntax of the statutory language shows that the word *prosecuting* is being used an adjective to describe the attorney to which the statute is referring, not as a verb describing what that attorney is doing in the case. In Chapter 56, RSMo, the General Assembly uses the phrases *prosecuting attorney* and *circuit attorney* to refer to the elected county prosecutor or the elected prosecutor in St. Louis City, respectively. *See* sections 56.010 and 56.430, RSMo 2016. Similarly, the General Assembly uses the phrases *assistant prosecuting attorney* and *assistant circuit attorney* to refer to the attorneys a prosecuting attorney or circuit attorney may appoint. *See* sections 56.151 and 56.540, RSMo 2016. "In construing a

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Even if assistants may sign their own names on pleadings, their authority to act still derives from the elected prosecuting attorney, as explained below.

statute it is appropriate to take into consideration statutes involving similar or related subject matter when such statutes shed light upon the meaning of the statute being construed, even though the statutes are found in different chapters and were enacted at different times." *Citizens Elec. Corp. v. Director of Revenue*, 766 S.W.2d 450, 452 (Mo. banc 1989). The General Assembly consistently uses the phrases *prosecuting attorney* or *circuit attorney* to refer to the elected prosecutor, but it uses the phrases *assistant prosecuting attorney* or *assistant circuit attorney* to refer to the elected prosecutor's assistants. *See, e.g.,* sections 56.350, 56.823, 565.032.2(5), 571.030, RSMo 2016. In specifically using the phrase "prosecuting or circuit attorney" in section 494.470, the General Assembly intended to refer to the elected prosecutor, not to every assistant that prosecutor may have appointed.

Second, if the word *prosecuting* was intended to be a verb, the addition of the word *circuit* between *prosecuting* and *attorney* does not make linguistic sense. In adding the word *circuit*, the General Assembly intended to make the juror-disqualification statute applicable to St. Louis City, where the elected prosecutor is labeled the circuit attorney rather than a prosecuting attorney.

Third, Defendant's contention that the statute disqualifies the kin of only attorneys actually prosecuting the case would lead to the anomalous result

that the kin of an elected prosecutor who took no part in the prosecution of the case would not be automatically disqualified. In other words, the kin of the person with ultimate supervisory control over the initiation and conduct of prosecutions would not be disqualified if the elected prosecutor took no part in prosecuting the case.

Additionally, any contention that the statutory phrase "prosecuting or circuit attorney" includes all assistant prosecuting or assistant circuit attorneys is also without merit. An expansion of the juror-disqualification statute on this ground would be erroneous for at least two reasons.

First, an elected prosecutor's assistants derive their authority to act solely from the elected prosecutor, and they act on that elected prosecutor's behalf much like an attorney in a civil case acts on behalf of a named party. *See* sections 56.151 ("All assistant prosecuting attorneys…shall hold office at the pleasure of the prosecuting attorney.") and 56.550 ("The duties of said assistants shall be to assist the circuit attorney generally in the conduct of his office, under his direction and subject to his control…."). In other words, assistant prosecutors are not "parties" to the criminal case like the elected prosecutor, and the intent of the juror-disqualification statute is to disqualify kin to parties in a lawsuit.

Second, the construction of this phrase as encompassing any assistant prosecutor defies a basic canon of statutory construction. Expanding the phrase "prosecuting or circuit attorney" to include all assistant prosecutors would constitute a judicial amendment to the statute to give it a meaning both beyond the statute's plain language and contrary to the presumed intent of the General Assembly. *See Brown v. Raffety*, 136 S.W.2d 717, 719 (Spr. 1940) (a "court has no authority to amend the statute by judicial construction, even though it should be of the opinion that the statute, as so amended, would be more reasonable, and would, therefore, be a better statute than the one enacted by the Legislature").

Additionally, other than establishing that the juror in question was the sister to an assistant prosecutor, Defendant asked no further questions probing whether the juror harbored any bias or was unable to act impartially. "The burden is on the defendant to probe into any area on voir dire which is considered to be grounds for disqualification." *State v. Riley*, 716 S.W.2d 416, 419 (Mo. App. E.D. 1986) (holding that the trial court did not abuse its discretion in failing to exclude for cause a veniremember who was the wife of a former assistant prosecutor absent any evidence of bias or impartiality).

The trial court did not plainly err in failing to remove the veniremember in question either under the juror-disqualification statute or for cause.

II (self-defense—initial-aggressor language).

The trial court did not plainly err in failing to sua sponte remove the initial-aggressor language from the self-defense instruction submitted by the State (Instruction No. 7) because there was conflicting evidence on who was the initial aggressor.

A. The record regarding this claim.

The evidence at trial showed that the victim staggered into his neighbor's house with a gash on his head and blood all over his face. (Tr. 148, 153.) Police responded and followed a blood trail from the neighbor's house to the victim's residence, where the victim lived with Defendant. (Tr. 158, 164–67.) The victim was taken to the hospital. (Tr. 152, 211–12.)

Defendant was found sitting in a recliner holding a cane with apparent blood on it. (Tr. 168, 179–80; State's Ex. 12.) Defendant confirmed he had been in a fight with the victim, and he admitted to police that he hit the victim with his fists, struck the victim with his cane, and "sliced" the victim with a knife. (Tr. 169–83, 197, 203, 228–31, 232–33.) Defendant said the fight started in the living room, where police found blood on the coffee table, and moved to the bathroom, where Defendant said he shoved the victim into vanity and broke a mirror. (Tr. 170, 175, 230; State's Exhibits 4, 11.) Police

found blood on multiple surfaces in the bathroom. (Tr. 231; State's Exhibits 2, 3, 4.)

Although Defendant claimed that the victim started the fight by punching him in the face while he was asleep, Defendant had no visible injuries. (Tr. 171, 195.) Police found only blood on Defendant's hands. (Tr. 172, 230; State's Ex. 12.) Defendant never claimed that the victim had a weapon, and police found no weapon connected to the victim. (Tr. 187, 232.)

The State submitted a self-defense instruction containing initial-aggressor language, and the defense submitted two alternative self-defense instructions, neither of which contained any initial-aggressor language.[10] (Tr. 270–73; L.F. 71, 78–79.) The court submitted the State's proposed self-defense instruction (Instruction No. 7) to the jury:

> 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

[10] The submissions by both parties appear to have been based on an outdated version of the pattern self-defense instruction, MAI-CR 3d 306.06 (eff. 1-1-07). The parties' self-defense instructions for this incident, which occurred in March 2016, should have been patterned after MAI-CR 3d 306.06A (eff. 1-1-09).

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.

(L.F. 71.)

B. Standard of review.

Defendant did not object to the self-defense instruction on the ground asserted for the first time on appeal. He concedes that this claim is subject to only plain-error review.[11]

Defendant's failure to object at trial to the instruction violates Rule 28.03, which provides:

> Counsel shall make specific objections to the instructions or verdict forms considered erroneous. No party may assign as error the giving or failure to give instructions or verdict forms unless the party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection. Counsel need not repeat objections already made on the record prior to delivery of the instructions and verdict forms. The objections must also be raised in the motion for new trial in accordance with Rule 29.11.

Rule 28.03.

"Instructional error seldom rises to the level of plain error." *State v. Wright*, 30 S.W.3d 906, 912 (Mo. App. E.D. 2000); *State v. Holman*, 965 S.W.2d 464, 470 (Mo. App. W.D. 1998). For instructional error to be plain error, the defendant must show more than mere prejudice; he must "demonstrate that the trial court so misdirected or failed to instruct the jury that it is evident that the instructional error affected the jury's verdict." *State v. Baker*, 103 S.W.3d 711, 723 (Mo. banc 2003).

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[11] The general plain-error-review standard is outlined in Point I.

Although Rule 28.02 provides that the failure to give an instruction required by MAI-CR 3d constitutes error and that the error's prejudicial effect shall be judicially determined, it also states that this rule applies only if a timely objection is made:

> The giving or failure to give an instruction or verdict form in violation of this Rule 28.02 or any applicable Notes On Use shall constitute error, the error's prejudicial effect to be judicially determined, provided that objection has been timely made pursuant to Rule 28.03.

Rule 28.02(f).

An appellate court should be especially reluctant to consider plain error relief on an instructional issue when a defendant has failed to comply with Rule 28.03. A defendant waives plain-error review of an instruction he or she submitted or jointly proffered. *See State v. Clay*, 533 S.W.3d 710, 714–15 (Mo. banc 2017); *State v. Bolden*, 371 S.W.3d 802, 805–06 (Mo. banc 2012). A defendant may also waive plain-error review by submitting an alternative instruction that was also erroneous. *See also State v. Oudin*, 403 S.W.3d 693 (Mo. App. W.D. 2013) (when the defense submits an instruction the trial court rejects but which contains the same error as the instruction challenged on appeal, plain-error review is waived); *State v. Robertson***,** 182 S.W.3d 747, 757 (Mo. App. W.D. 2006) (holding that "review of jury instructions for plain error is discretionary"). *But see State v. Shaw*, 541 S.W.3d 681, 691 n.7 (Mo.

App. W.D. 2017) (distinguishing *Bolden* on the ground that plain-error review was not waived when the defendant did not proffer the instruction in the form given to the jury).[12]

Here, Defendant complains about the trial court giving a "non-compliant version of the self-defense instruction." But Defendant also proffered a self-defense instruction that was similarly "non-compliant" since it was patterned after the same outdated MAI-CR self-defense instruction as the State's instruction. Consequently, by submitting an instruction patterned after the outdated MAI-CR pattern instruction, Defendant has waived plain-error review of any claim or argument that the trial court erred simply by giving a self-defense instruction that was patterned after an outdated MAI-CR pattern instruction. *See Oudin*, 403 S.W.3d at 698. Defendant's claim on appeal that the trial court erred by giving a self-defense instruction that contained initial-aggressor language may potentially be reviewed for plain error.

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[12] Defendant relies on *State v. Clay* for the proposition that plain-error review is waived only when the defendant *collaborates* on the instruction ultimately given to the jury. Although *Clay* involved a jointly proffered instruction, this Court did not hold that plain-error review is waived *only* in cases of joint collaboration. In fact, *Clay* cites *Oudin*, which found a waiver of plain-error review in a case not involving collaboration, with approval. *See Clay*, 533 S.W.3d at 715.

Defendant's reliance on *State v. Westfall*, 75 S.W.2d 278 (Mo. banc 2002), is unavailing. In *Westfall*, the court had held that a trial court plainly errs when it completely fails to submit a self-defense instruction where the record contains substantial evidence to support it. *See Bolden*, 371 S.W.3d at 805–06. The Supreme Court held that the defendant in *Bolden* had waived appellate review because she had requested submission of the defense-of-others instruction. *Id.* at 806. Moreover, the court found that the rule in *Westfall* did not apply in *Bolden* because the trial court had, in fact, given a defense-of-others instruction notwithstanding the defendant's argument that it had given the wrong one. *Id.* The court said that it would not "use plain error [review] to impose a *sua sponte* duty on the trial court to correct Defendant's invited errors." *Id.* In reaching this holding, the court overruled *State v. Beck*, 167 S.W.3d 767 (Mo. App. W.D. 2005), which had relied on *Westfall* to hold that "a trial court has the *sua sponte* duty to correct an erroneous instruction proffered by the party claiming error." *Id.* at 805. The *Bolden* court stated that *Beck* had "minsterpret[ed] the rule in *Westfall*," which had held that plain-error review is available only when a trial court completely fails to submit a mandatory instruction. *Id.* at 806. Here, of course, the court submitted a self-defense instruction, albeit not the erroneous one submitted by the defense.

Other cases suggest, however, that plain-error review may be available on an instructional issue when a defendant submits an incorrect *verdict director* or an improperly worded lesser-included-offense instruction, or if the defendant fails to object to an erroneous *verdict director* submitted by the State. *See Celis-Garcia*, 344 S.W.3d at 154 n. 3 (defendant's incorrect verdict director); *State v. Derenzy*, 89 S.W.3d 472, 475 (Mo. banc 2002) (defendant's improperly worded lesser-included-offense instruction); *State v. Wurtzberger*, 40 S.W.3d 893, 897–98 (Mo. banc 2001) (defendant's failure to object to an erroneous verdict director). These cases do not apply here.

C. Defendant suffered no manifest injustice from inclusion of the initial-aggressor language.

Defendant's point relied on asserts two claims: (1) the evidence did not warrant the insertion of any initial-aggressor language into the self-defense instruction; and (2) manifest injustice resulted because the instruction submitted to the jury, which was based on an outdated pattern instruction, did not contain the applicable pattern instruction's definition of *initial aggressor*. Both claims are without merit.

1. The evidence on the initial-aggressor issue was in conflict and the law required the self-defense instruction to include initial-aggressor language.

"In reviewing the adequacy of jury instructions, [an appellate court] determines whether sufficient evidence existed for that instruction, viewing

all facts and inferences in the light most favorable to the state, and ignoring all adverse inferences. *State v. Hughes*, 84 S.W.3d 176, 179 (Mo. App. S.D. 2002). "The state need not present undisputed evidence that defendant was an initial aggressor in order to submit the issue to the jury." *State v. Walton*, 166 S.W.3d 95, 100 (Mo. App. S.D. 2005). "Conflicting evidence as to who was the initial aggressor presents an issue of fact for the jury to decide." *Id.*

The Notes on Use to the relevant pattern instruction, MAI-CR 3d 306.06A, required insertion of the initial-aggressor language "unless there is no evidence that the defendant was the initial aggressor." MAI-CR 3d 306.06A, Notes on Use ¶4(a). "When there is contradictory evidence as to who was the initial aggressor, that issue is a question of fact and is properly submitted to the jury." *State v. Abdul-Khaliq*, 39 S.W.3d 880, 887 (Mo. App. W.D. 2001). "In such cases, the trial court does not err in submitting the initial aggressor paragraphs of the self-defense instruction to the jury, and in fact it is required to do so." *Id.*

The record contains sufficient evidence from which the jury could infer that Defendant, who had no visible injuries and admitted hitting the victim with his fists and a cane and slicing the victim with a knife, was the initial aggressor. The victim was the only one who suffered any injuries from the altercation, including a gash on his head and a laceration across his chest

caused by a knife Defendant wielded. Defendant's statement to police that the victim started the fight does not control this issue because the jury was not obligated to believe this self-serving statement. *See State v. Hayes*, 88 S.W.3d 47, 59 (Mo. App. W.D. 2002) (holding that the jury was not "required to accept…as credible" the defendant's claim that he was not the initial aggressor).

Even if the evidence on the initial-aggressor issue had not been in conflict, Defendant fails to explain how inclusion of an accurate statement of law, i.e., an initial aggressor cannot claim self-defense, resulted in manifest injustice. *See State v. Zetina-Torres*, 482 S.W.3d 810, 810 (Mo. banc 2016) (noting that "there is no prejudice if an instruction is an accurate statement of law and supported by the evidence").

The trial court thus did not plainly err by permitting insertion of the initial-aggressor language into the self-defense instruction.

2. The failure of the instruction to define the phrase *initial aggressor* did not result in manifest injustice.

Although the evidence warranted insertion of the initial-aggressor language, the self-defense instruction submitted by the court in this case failed to contain language explaining that an initial aggressor is not justified in using force to defend against an attack he provoked. The pattern

instruction required inclusion of the following paragraph immediately after the introductory paragraph if there was evidence that the defendant was the initial aggressor:

> *[Use the material in [1] unless there is no evidence the defendant was the "initial aggressor." Omit brackets and number.]*
>
> [1] A person can lawfully use force to protect himself against an unlawful attack. However, an initial aggressor, that is, one who first (attacks) (or) (threatens to attack) another, is not justified in using force to protect himself from the counter-attack that he provoked.
>
> (A person who is the initial aggressor in an encounter can regain the privilege of using force in lawful self-defense if he withdraws from the original encounter and clearly indicates to the other person his desire to end the encounter. Then, if the other person persists in continuing the incident by threatening to use or by using force, the first person is no longer the initial aggressor, and he can then lawfully use force to protect himself.)

MAI-CR 3d 306.06A. The Notes on Use to the pattern instruction required the inclusion of this language unless there was *no* evidence that the defendant was the initial aggressor or provoked the incident:

> Subject to some exceptions, the use of force in self-defense is not justified if the defendant was the initial aggressor. The material in [1] of part A will be used unless there is no evidence that the defendant was the initial aggressor. If there is no evidence indicating the defendant was the initial aggressor or provoked the incident, then the material in [1] of part A will not be used. If there is evidence the defendant was the initial aggressor, then the material in [1] of part A will be used (unless, as indicated in the next paragraph, it is clear that the defendant was justified in being the initial aggressor). The paragraph in parentheses in the material in [1] of part A will be used if

there is further evidence that the defendant withdrew from the encounter.

MAI-CR 3d 306.06A, Notes on Use ¶4(a).[13]

Although the instruction failed to include the initial-aggressor language required under the applicable pattern instruction, Defendant has not demonstrated that he suffered manifest injustice, and the omission may have inured to defendant's benefit because the jury was not explicitly told that he could not claim self-defense if he provoked the attack. Instead, the jury was instructed only that if Defendant was the "initial aggressor," he could not claim self-defense. If the jury had believed Defendant's claim to police that the victim struck him first, it would have made no difference if the language explaining that an initial aggressor is "one who first attacks" had been included in the instruction. Use of the phrase "initial aggressor" by itself was sufficient to inform the jury on this matter, and Defendant has not shown the jury was so misdirected that it affected its verdict on the self-defense issue. The parenthetical language regarding an initial aggressor withdrawing from the attack would not have been included in the instruction in any event

[13] The self-defense instruction submitted in this case also did not include the initial-aggressor paragraph from the outdated MAI-CR 3d pattern instruction on which the instruction was apparently based. *See* MAI-CR 3d 306.06 (eff. 1-1-07)

because no evidence supported the giving of that part of the pattern instruction. What was included in the instruction given to the jury permitted the jury to find that Defendant acted in self-defense.

A defendant cannot establish prejudice justifying the reversal of a criminal conviction by offering nothing other than speculation. *See State v. Forrest*, 183 S.W.3d 218, 224 (Mo. banc 2006). In *State v. Taylor*, 134 S.W.3d 21 (Mo. banc 2004), the defendant claimed the wording of certain jury instructions "could have allowed the jury to infer that the burden of proof was not beyond a reasonable doubt." *Id.* at 30. The court rejected this claim because the defendant "offer[ed] only conclusory statements and speculation that the alleged error in instruction would have influenced the jury's verdict." *Id.* In *State v. Wolfe*, 793 S.W.2d 580 (Mo. App. E.D. 1990), the defendant claimed that he was prejudiced by the prosecution's failure to disclose a test result because "disclosure 'may very well have affected' his preparation for trial." *Id.* at 588. The court held that this claim of prejudice was "well short of the reasonable likelihood of an effect on the outcome [of trial] that defendant must demonstrate to show fundamental unfairness." *Id.* Here, Defendant has failed to carry his burden of proving that he suffered manifest injustice from submission of the self-defense instruction, and he relies on mere conclusions in arguing that omission of additional language resulted in prejudice.

Defendant's reliance on *State v. Kennedy*, 894 S.W.2d 723 (Mo. App. W.D. 1995), is misplaced. There, the defendant argued on appeal that the trial court had erred in failing to give a self-defense instruction he had proffered. In rejecting this claim, the Court of Appeals noted that the defendant's proposed instruction erroneously failed to contain language required by the pattern instruction defining the phrase *initial aggressor*. This was problematic in *Kennedy* because the defendant's proposed instruction "would not have instructed the jury about the significance of the identity of an "initial aggressor," yet it would have told the jury that it could consider evidence of the past relationship between [the defendant] and [the victim] on that issue." *Id.* at 727. The court held that "*[u]nder these circumstances* identifying the initial aggressor would have been meaningless and confusing to the jury." *Id.* at 727–28 (emphasis added). *Kennedy* is thus distinguishable from what occurred in Defendant's case.

The record supported the giving of the initial-aggressor language included in the self-defense instruction, and Defendant has not established that he suffered manifest injustice by the instruction's failure to include additional initial-aggressor language from the applicable pattern instruction.

III (self-defense—deadly-force language).

The trial court did not plainly err in submitting the self-defense instruction (Instruction No. 7) to the jury on the ground that it did not fully comply with the applicable pattern instruction regarding deadly-force language because Defendant has failed to establish that the deviations from the pattern instruction affected the jury's verdict and resulted in manifest injustice.

A. Standard of Review.

Defendant concedes that this claim is subject only to plain-error review. This standard of review is outlined in Points I and II.[14]

B. Defendant suffered no manifest injustice from the deadly-force language included in the self-defense instruction.

Defendant contends that he suffered manifest injustice because the self-defense instruction (set out in full in Point II) failed to contain an option for non-deadly force and also failed to provide proper guidance to the jury on the use of deadly force. Although the self-defense instruction submitted to the

[14] The only objection Defendant made at trial to the State's self-defense instruction was that it should not have included any deadly force language because this incident was a "fistfight" and no weapon was used "that created a threat of deadly force. (Tr. 271–72.) Defendant appears to have abandoned that claim on appeal. As explained below, the record shows that Defendant used deadly force in attacking the victim with a knife.

jury, as well as the one the defense submitted, did not fully comply with the applicable pattern instruction, Defendant has failed to establish that he suffered manifest injustice because the record shows that Defendant used deadly force in assaulting the victim.

Defendant first contends that the parenthetical material containing the phrase *non-deadly* should have been inserted in the instruction as shown in the pattern instruction. In addition, Defendant complains about the omission or alteration of other paragraphs contained in the pattern instruction. The pattern instruction applicable to Defendant's case provided the following:

> *[Use the material in [3] in ALL cases. Omit brackets and number. See [3] of part B and Notes on Use 5(b) as to what constitutes deadly force. The selection made in [3] of part A of the instruction must be consistent with the selection made in [3] of part B. The parenthetical term "non-deadly" should only be selected if the material in [4] of part A is used.]*
>
> [3] In order for a person lawfully to use (non-deadly) force in self-defense, he must reasonably believe such force is necessary to defend himself from what he reasonably believes to be the ((imminent) use of unlawful force) ((imminent) commission of a forcible felony).
>
> [*Use the material in [4] and [5] ONLY if there is evidence the defendant used deadly force. Omit brackets and number. The selection made in [4] of part A of the instruction must be consistent with the selection made in [3B] of part B. Use the parenthetical material "Under this instruction" ONLY if another instruction on the defensive use of deadly force is given. See, e.g., MAI-CR 3d 306.11.*]

[4] But (, under this instruction,) a person is not permitted to use deadly force unless he reasonably believes that the use of deadly force is necessary to protect himself against (death or serious physical injury) (the commission of a forcible felony).

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

[*Use the material in [6] in ALL cases. Omit brackets and number.*]

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

MAI-CR 3d 306.06A.

The self-defense instruction submitted to the jury in this case, though worded differently, substantially complied with the language in bracketed paragraph 3 above:

> 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.

(L.F. 71.) Similarly, the paragraph patterned after bracketed paragraph [4], though differently worded than the pattern instruction, was not so substantially different that it can be said it affected the jury's verdict:

> 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.

(L.F. 71.) Finally, the definition of *reasonable belief* contained in the instruction was nearly identical to the pattern instruction, except it did not use the phrase *reasonably believe*:

> 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.

(L.F. 71.)

It is Defendant's burden to prove that he suffered manifest injustice from the self-defense instruction given. He cannot carry that burden simply by demonstrating that its language did not fully comply with the applicable pattern instruction. As relevant to this case, the self-defense statute had not been substantially altered between the 2007 and 2009 MAI revisions. *See* section 563.031, RSMo Supp. 2008. As the Notes on Use to the applicable pattern instruction indicate, the changes, although related to the use of deadly force, involved the use of deadly force to protect against a forcible felony or unlawful entry into a car or dwelling:

> Section 563.031, RSMo Supp 2008. 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.
>
> The major changes of Section 563.031 relate to the use of deadly force. Section 563.031.2(1) allows the use of deadly force in self-defense

> to protect against "any forcible felony." Section 563.031.2(2) allows the use of deadly force in self-defense against a person who unlawfully enters a dwelling, residence or vehicle. Section 563.036, RSMo 2000 (repealed effective August 28, 2007).
>
> This instruction covers only the basic use of force in self-defense. The use of force relative to dwellings, residences and vehicles is not covered by this instruction. That use of force is covered by MAI-CR 3d 306.11.

MAI-CR 3d 306.06A, Notes on Use ¶1.

The deadly force language submitted to the jury complied with the pattern instruction that had been in effect before the revision applicable to Defendant's case. *See* MAI-CR 3d 306.06 (eff. 1-1-07). Defendant has not shown that the use of a self-defense instruction that was only two years out of date resulted in manifest injustice under the facts of this case.

Moreover, under the facts of this case Defendant's slashing with a knife across the victim's entire chest constituted the use of deadly force. Although the use of a knife does not mean, as a matter of law, that deadly force was used, the manner in which Defendant used the knife in this case constituted deadly force. *See Westfall*, 75 S.W.3d at 283–84 (holding that "[t]here is no authority that the use of a knife constitutes the use of deadly force as a matter of law" and that "whether deadly force was used depends not only on the amount of force used but also on the defendant's purpose to cause, or

awareness of the likelihood of causing, death or serious physical injury"). In *Westfall*, the defendant testified that he blindly struck at the victim with a carpet knife in self-defense, which left superficial wounds to the victim's head and neck, in an effort to thwart the victim's attack on him. *Id.* at 280. Defendant's case is distinguishable because he did not testify at trial; he told police he struck the victim with a cane and cut him with a knife *after* the victim punched him while he was sleeping in a chair. (Tr. 171, 180–81, 195.) Moreover, Defendant's knife attack left a laceration diagonally across the victim's chest and a blood trail from inside the residence where the attack took place across the street to the neighbor's house.[15]

Defendant also contends that the instruction's failure to include forcible-felony language also created manifest injustice. The self-defense statute in effect when Defendant committed these acts permitted the use of deadly force to protect against a "forcible felony":

> 2. A person may not use deadly force upon another person under the circumstances specified in subsection 1 of this section unless:
>
> (1) He or she reasonably believes that such deadly force is necessary to protect himself, or herself or her unborn child, or another against death, serious physical injury, or *any forcible felony*….

[15] One witness said that the victim had been "sliced" with the knife and had "serious cuts" across the chest, but agreed on cross-examination that the cuts were not too deep. (Tr. 181–83, 207.)

Section 563.031.2(1), RSMo Cum. Supp. 2013. *Forcible felony* was defined as "any felony involving the use or threat of physical force or violence against any individual, including but not limited to murder, robbery, burglary, arson, kidnapping, assault, and any forcible sexual offense." Section 563.011(3), RSMo Cum. Supp. 2013.

The record does not clearly show that any forcible-felony language was warranted because Defendant did not testify at trial and the evidence presented showed only that Defendant struck the victim with a cane and cut him with a knife after the victim allegedly punched him in the face while Defendant was sleeping in a chair. (Tr. 195.) No evidence specifically showed that Defendant was using deadly force to protect himself against any the commission of a forcible felony because the act on which he based his claim of self-defense occurred while he was sleeping. Moreover, the record does not show the commission of any further acts committed against Defendant that would constitute a forcible felony against which Defendant was authorized to use deadly force to protect himself against.

The failure of the instruction to contain further guidance on non-deadly force did not result in manifest injustice under the facts of this case. In *State v. Rost*, 429 S.W.3d 444 (Mo. App. S.D. 2014), the court held that the trial court's erroneous exclusion of non-deadly-force language from the self-defense

instruction did not result in manifest injustice when the jury found him guilty of second-degree assault for causing only physical injury, rather than serious physical injury, and also found him guilty of armed criminal action for committing the offense by using a dangerous instrument. *Id.* at 451–52. Here, Defendant was found guilty of second-degree domestic assault for causing physical injury to the victim, and he was also found guilty of armed criminal action for committing this offense with a dangerous instrument.

This claim should be rejected because Defendant has failed to establish that he suffered manifest injustice.

IV (jury note—definition of *knowingly*).

The trial court did not plainly err in responding to the jury's note by declining the prosecutor's apparent request to provide the jury with a definition of *knowingly* when that definition was not required by the MAI pattern instruction, had not been requested by either party during the instructions conference, and the defense did not object to the court's proposed response to the jury's note.

A. The record regarding this claim.

The verdict director for the charged offense of second-degree domestic assault (Instruction No. 5), which was submitted by the State, required the jury to find that Defendant "knowingly caused physical injury to" the victim. (L.F. 69; Tr. 270.) A definition of *knowingly* was not included in the verdict director. (L.F. 69.) Defendant neither objected to this verdict director nor requested that it include a definition of *knowingly*. (Tr. 274–75.)

The verdict director for the lesser-included offense of third-degree domestic-assault (Instruction No. 6), which was submitted by Defendant, required the jury to find that Defendant "recklessly caused physical injury to" the victim. (L.F. 69; Tr. 270.)

The jury sent a note during deliberations advising the court that while there was a definition of *recklessly* in the third-degree-assault verdict

director (Instruction No. 6), no definition of *knowingly* appeared in the second-degree-assault verdict director (Instruction No. 5): "We have a definition of 'recklessly' on Instruction…No. 6. …We would like a clearer definition on 'knowingly' on Instruction No. 5." (Tr. 302; Supp. L.F. 3.) Although the prosecutor suggested that the court could provide the definition, the court said it could not do so after deliberations had begun:

> [The Prosecutor]: …It's knowingly stabbed him. The definition is not on there is what they're saying. It's not at the bottom.
>
> The Court: I can't give it to them.
>
> [The Prosecutor]: Knowingly is defined in the chapter. Are you not—can you not submit a definition?
>
> The 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.
>
> [The Prosecutor]: Are we sure about that?
>
> The Court: Let's go off the record.
>
> THE 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.

(Tr. 302–03.) Defendant did not object to the court's proposed response to the jury's note. The jury later returned a verdict finding Defendant guilty of the charged offense of second-degree domestic assault. (Tr. 303; L.F. 80.)

B. Standard of review.

Defendant concedes that this claim is subject only to plain-error review because he did not object at trial to the court's proposed response to the jury note. The plain-error standard of review is outlined in Point I.

C. Defendant suffered no manifest injustice from the trial court's failure to give the jury a definition of *knowingly* after deliberations had begun, especially when Defendant did not request it.

"[T]he response to a jury question is within the trial court's sound discretion," but "the practice of exchanging communications between the judge and jury is not recommended." *State v. Moore*, 518 S.W.3d 877, 885 (Mo. App. E.D. 2017). "Therefore, neutral and generic responses about being guided by the evidence presented and following the instructions previously given are the safest, most favored responses." *Id.* The trial court did not plainly err in answering the jury's note by telling the jury to be guided by the instructions they had already been given. *See State v. Thompson*, 147 S.W.3d 150, 161–62 (Mo. App. S.D. 2004) (declining plain-error review of a claim challenging the court's response to a jury note when the court replied that the "law to guide your deliberations is stated in the instructions"). This Court has questioned the practice of "giving…additional verdict-directing instructions after a jury has begun deliberating and in response to an inquiry…." *State v. Amos*, 553 S.W.2d 700, 705 (Mo. banc 1977).

The Notes on Use to the pattern instruction for second-degree domestic assault state that when the term *recklessly* is used in the verdict director, it *must* be defined. *See* MAI-CR 3d 319.74, Notes on Use ¶8. The Notes on Use to that pattern instruction further provide that if the term *knowingly* is used it "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." *Id.* Neither party requested during the instructions conference that this term be defined. Moreover, Defendant did not request that the term be defined in response to the jury's note, perhaps as a strategy decision in light of the prosecutor's desire that the definition be given. *See State v. D.W.N.*, 290 S.W.3d 814, 834–35 (Mo. App. W.D. 2009). Defendant has failed to establish that he suffered any manifest injustice by the court's response to the jury note, and any claim of prejudice is based on pure speculation.

Defendant relies on the Notes on Use to MAI-CR 3d 333.01 to argue that the trial court was required to provide the jury a definition:

> 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.

MAI-CR 3d 333.00, Notes on Use ¶2(F).[16] This note on use simply states that no word may be defined in response to a jury note unless it is permitted by the preceding subparagraphs to that note. This note does not require a trial court to define a word in response to a jury note if a definition is permitted by the preceding subparagraphs. This should be especially true in this case when no party requested a definition of the word during the instructions conference and when defense counsel sat silent as the court refused the prosecutor's request that the court respond to the jury's note with a definition of the word. Finally, Defendant relies only on speculation and conjecture to support his claim that the failure to give the jury a definition resulted in a guilty verdict for second-degree assault. *See State v. Goodwin*, 43 S.W.3d 805, 820 (Mo. banc 2001).

Defendant has not shown manifest injustice, and this claim should be rejected.

[16] Subparagraph B to this note on use provides that a "term may be defined when the Notes on Use permit the definition of that term." MAI-CR 3d 333.00, Notes on Use ¶2(B).

V (exclusion of evidence).

The trial court did not abuse its discretion in excluding the testimony of a defense witness on the issue of the victim's "reputation" for violence because the witness's testimony described only one specific act of drunkenness and aggressiveness involving the witness *after* the charged incident in this case had occurred.

A. The record regarding this claim.

During opening statements, Defendant's counsel told the jury that he was going to call a witness who would testify that the victim "was a drunk and violent man" and that the witness "had the same experience" with the victim as Defendant had. (Tr. 144.) Counsel then alerted the jury to "listen for firsthand knowledge" when this witness testified. (Tr. 144.)

After the State rested its case, Defendant's counsel informed the court that the defense intended to call Cody McDaniel to testify that the victim drank heavily and had acted violently toward McDaniel. (Tr. 244–45.) Defense counsel further argued that the proposed witness would show the victim's "modus operandi" of being drunk and violent. (Tr. 248.)

The prosecutor questioned the witness outside the presence of the jury in preparation for an objection to his testimony. (Tr. 251–53.) McDaniel testified that he had no firsthand knowledge of the charged incident but had discussed

it with Defendant in jail. (Tr. 253–54.) McDaniel claimed that he lived with the victim for about a month and a half after the charged incident in this case occurred. (Tr. 253.) McDaniel said the victim drank in McDaniel's house against his wishes, and when McDaniel tried to pour the victim's liquor out, the victim tried to grab or swing at McDaniel, but McDaniel put the victim in an "arm bar." (Tr. 255–56.) McDaniel also described an incident in which the victim allegedly kicked McDaniel's dog. (Tr. 256–57.) Finally, McDaniel said that his understanding was that he was supposed to testify about the victim being an alcoholic and acting aggressively toward McDaniel. (Tr. 257.)

The prosecutor objected to McDaniel's proposed testimony, while Defendant's counsel responded that the victim's drunkenness and violence were relevant to the self-defense claim. (Tr. 257.)

During Defendant's offer of proof, McDaniel testified that the victim was a roommate of his in the summer of 2016 and that the victim was "heavily alcoholic," "didn't clean himself" or his room, and was violent toward McDaniel. (Tr. 260.) McDaniel then described an incident in which he and the victim got into an altercation about the victim's drinking that ended when McDaniel put the victim in an "arm bar." (Tr. 260–61.) McDaniel said that although the victim "swung" at him it a couple of times, it was "not really anything aggressive." (Tr. 261.)

The trial court rejected the offer of proof and excluded McDaniel's testimony. (Tr. 259.) Defendant included a claim regarding this matter in his motion for new trial. (L.F. 90–91.)

B. Standard of review.

The trial court is vested with broad discretion to admit and exclude evidence at trial, and error will be found only if this discretion was clearly abused. *State v. Simmons*, 955 S.W.2d 729, 737 (Mo. banc 1997). On direct appeal, this Court reviews the trial court "for prejudice, not mere error, and will reverse only if the error was so prejudicial that it deprived the defendant of a fair trial." *State v. Morrow*, 968 S.W.2d 100, 106 (Mo. banc 1998).

"In a criminal proceeding, questions of relevance are left to the discretion of the trial court and its ruling will be disturbed only if an abuse of discretion is shown." *State v. Santillan*, 1 S.W.3d 572, 578 (Mo. App. E.D. 1999). A trial court will be found to have abused its discretion only when a ruling is "clearly against the logic and circumstances before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration; if reasonable persons can differ about the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion." *State v. Brown*, 939 S.W.2d 882, 883 (Mo. banc 1997).

In reviewing claims pertaining to the erroneous exclusion of evidence, an appellate court "reviews the trial court 'for prejudice, not mere error, and will reverse only if the error was so prejudicial that it deprived the defendant of a fair trial.'" *State v. Zink*, 181 S.W.3d 66, 73 (Mo. banc 2005) (quoting *State v. Middleton*, 995 S.W.2d 443, 452 (Mo. banc 1999)). "Trial court error is not prejudicial unless there is a reasonable probability that the trial court's error affected the outcome of the trial." *Zink*, 181 S.W.3d at 73.

C. Defendant's "reputation" evidence was properly excluded.

Defendant relies on *State v. Gonzales*, 153 S.W.3d 311 (Mo. banc 2005), to support his claim that the "reputation" testimony offered by the defense was admissible on the self-defense issue. In *State v. Waller*, 816 S.W.2d 212 (Mo. banc 1991), the court held that "the trial court may permit a defendant to introduce evidence of the victim's prior specific acts of violence of which the defendant had knowledge, provided that the acts sought to be established are reasonably related to the crime with which the defendant is charged." *Id.* at 216. In *Gonzales*, the court cited with approval *State v. Buckles*, which held that evidence of a victim's "reputation" for violence cannot be proved by specific acts of violence:

> On the issue of self-defense there can be no doubt of the rule that evidence of the deceased's reputation for turbulence and violence is admissible as relevant to show who was the aggressor and whether a

> reasonable apprehension of danger existed*; but such evidence must be proved by general reputation testimony, not specific acts of violence*, and defendant must show he knew of such reputation when the issue is reasonable apprehension.

Gonzales, 153 S.W.3d at 313 (quoting *State v. Buckles*, 636 S.W.2d 914, 923 (Mo. banc 1982)) (emphasis added).

The problem with Defendant's claim is that his proposed witness's testimony did not pertain to the victim's reputation for violence. Instead, the witness testified to a specific act of violence that occurred *after* the charged incident in this case occurred. "A trial court is not required to admit all evidence proffered about a victim's prior specific acts of violence." *State v. Rutter*, 93 S.W.3d 714, 731 (Mo. banc 2002).

> When other competent evidence has raised the question of self-defense, the trial court must exercise caution in discretionary rulings that permit a defendant to introduce evidence of a victim's prior specific acts of violence: (1) for which the defendant has laid a proper foundation; (2) of which the defendant had specific knowledge; (3) that are reasonably related to the crime with which the defendant is charged; (4) that are not too remote in time; (5) that are of quality such as to be capable of contributing to the defendant's fear of the victim; and (6) that are not of quality substantially different from the act that the defendant accuses the victim of committing.

Id. Whether the victim committed an act of violence after Defendant's assault on him in this case was not relevant to the issue of Defendant's reasonable apprehension of harm during the charged incident. Defendant

obviously could not have had any knowledge of this later incident when he assaulted the victim.

Although *Gonzalez* notes that a defendant need not be aware of a victim's *reputation* for violence when that evidence is being offered to prove who was the initial aggressor, the testimony here was not reputation evidence but was evidence of a specific bad act the victim allegedly engaged in after the charged incident occurred. Whether the victim committed one allegedly violent act after the charged offense occurred has little, if any, relevance to whether he was the initial aggressor in this case. The level of violence encompassed by this act was apparently negligible. The witness stated during the offer of proof that while victim swung at him a couple of times, it was not "anything aggressive." The trial court's determination that this testimony had no probative value relative to the self-defense issue in Defendant's case did not "shock the sense of justice" and thereby reveal an abuse of discretion.

The trial court did not abuse its discretion in excluding this testimony.

VI (hearsay).

The trial court did not plainly err in allegedly allowing the disputed hearsay evidence because the record shows that the trial court either sustained Defendant's hearsay objection, the question did not call for hearsay evidence, or Defendant was not prejudiced because the same information was proved by otherwise admissible evidence.

A. The record regarding this claim.

The trial court sustained Defendant's hearsay objection to a neighbor's volunteered testimony that the victim repeatedly told her that Defendant hit him in the head with a cane:

> Q. Okay. When you called 911, if you recall, …what did you tell them; what were you aware of?
>
> A. …[The victim] kept telling me over and over and over that…Mark hit him in the head with a cane.
>
> [Defense Counsel]: Objection.
>
> The Court: What's your objection?
>
> [Defense Counsel]: Hearsay, and that's not hearsay.
>
> [The Prosecutor]: Excited utterance.
>
> [Defense Counsel]: It's not an excited utterance.
>
> The Court: Are you objecting or not?
>
> [Defense Counsel]: I am objecting.

[The Prosecutor]: Excited utterance. He showed up at her house and told her what was going on and to call 911.

[Defense Counsel]: I think you should—

The Court: I think I'm going to sustain that.

(Tr. 148–49.) Other testimony showed that Defendant readily admitted to striking the victim with a cane. (Tr. 180, 230.)

The trial court overruled a hearsay objection when the prosecutor's question merely asked the investigating officer whether his investigation provided him with some idea of what had occurred:

Q. Did you develop some form of an investigation or some form of an idea what transpired by talking to [the victim]?

A. Yes.

[Defense Counsel]: Objection, hearsay.

The Court: Overruled.

(Tr. 160.)

Defendant objected when the investigating officer was asked how he knew the victim was cut by a knife, and he said that the victim had told him. But the officer testified immediately thereafter that Defendant admitted that he cut the victim with a knife:

Q. Okay. Now, you said something about seizing a knife or something?

A. Yes.

Q. What evidentiary value did the knife contain?

A. That's the knife that—I seized the knife, because that's the knife that [the victim] was cut with.

Q. Okay. How did you know [the victim] was cut with a knife?

[Defense Counsel]: Objection, hearsay.

The Court: It doesn't call for a hearsay answer. Overruled.

[By [the Prosecutor]]:

Q. How did you know or come to believe that [the victim] was cut with a knife?

A. He told me he was cut with a knife.

Q. He, who?

A. [The victim].

Q. Okay. And after developing that information, did you at some point talk to [Defendant] about the knife?

A. Yes.

Q. Did [Defendant] provide you any statement with regard to a knife?

A. He said he sliced him with a knife.

Q. Okay. And that prompted you to seize the knife?

A. Yes.

(Tr. 180–81.) Later, Defendant did not object when an officer testified that Defendant used a black folding knife to cut the victim. (Tr. 203.)

B. Standard of review.

Defendant concedes that this claim is not preserved for appellate review and requests plain-error review. The plain-error standard is set out in Point I.

C. Defendant's hearsay claims are without merit.

"A hearsay statement is any out-of-court statement that is used to prove the truth of the matter asserted and that depends on the veracity of the statement for its value." *State v. Forrest*, 183 S.W.3d 218, 224 (Mo. banc 2006). "Hearsay statements generally are inadmissible." *State v. Sutherland*, 939 S.W.2d 373, 376 (Mo. banc 1997).

The first incident during trial about which Defendant complains did not result in any error because the trial court sustained Defendant's hearsay objection. The court did not allow the State to introduce the hearsay evidence, and the prosecutor's question did not call for a hearsay answer. Defendant's failure to move to exclude the testimony does not prove trial court error. In any event, evidence that Defendant struck the victim in the head with a cane was properly admitted through the officers' testimony in which they stated that Defendant readily admitted striking the victim with a cane.

The second incident about which Defendant complains did not result in the admission of any hearsay testimony. The officer merely stated that he

had an "idea" of what might have occurred based on his investigation. He did not testify what that "idea" was.

The third and final incident about which Defendant complains did not involve a question directly asking for hearsay. To the extent the question was objectionable, Defendant was not prejudiced by the officer's testimony stating that the victim, who did not testify at trial, stated that Defendant cut him with a knife. First, it appears the question was asked to establish the officer's subsequent conduct in questioning Defendant about the knife. Second, immediately after that testimony was elicited, the prosecutor elicited further testimony from the officer showing that Defendant admitted to the officer that he had cut or sliced the victim with a knife. Moreover, other testimony to which no objection was made showed that the victim reported that Defendant cut him with a knife.

Defendant has failed to prove either that the trial court erred or that he suffered manifest injustice, and his claim under this point should be rejected.

CONCLUSION

The circuit court committed no reversible error, and Defendant's conviction and sentences should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies that the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 12,970 words, excluding the cover, certification, and appendix, if any, as determined by Microsoft Word 2016 software, and that pursuant to Rule 103.08, the brief was served upon all other parties through the electronic filing system.

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