MISSOURI COURT OF APPEALS
WESTERN DISTRICT

STATE OF MISSOURI

RESPONDENT,

v.

TYLER J. GATES

APPELLANT.

DOCKET NUMBER WD83104

DATE: October 27, 2020

Appeal From:

Jackson County Circuit Court
The Honorable Jack R. Grate, Judge

Appellate Judges:

Division Four: Cynthia L. Martin, Chief Judge, Presiding, Alok Ahuja, Judge and Edward R. Ardini, Jr., Judge

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Attorneys:

Gregory L. Barnes, Jefferson City, MO, for respondent.

Jeannie M. Willibey, Kansas City, MO, for appellant.

MISSOURI APPELLATE COURT OPINION SUMMARY

MISSOURI COURT OF APPEALS
WESTERN DISTRICT

STATE OF MISSOURI, RESPONDENT,
v.
TYLER J. GATES, APPELLANT.

WD83104 Jackson County

Before Division Four Judges: Cynthia L. Martin, Chief Judge, Presiding, Alok Ahuja, Judge, and Edward R. Ardini, Jr., Judge

Tyler J. Gates appeals his convictions of felony murder in the second degree predicated on the forcible felony of robbery and armed criminal action following a jury trial. Gates argues that the trial court infringed on his constitutional right to testify in his own defense by excluding portions of his testimony explaining that he shot the victim in self-defense, and that had the excluded evidence been admitted, he would have been acquitted. Gates also argues that the trial court committed plain error by failing to instruct the jury *sua sponte* on self-defense and by failing to strike a venireperson *sua sponte*.

AFFIRMED.

Division Four Majority holds:

(1) It can only be plain error to fail to instruct on self-defense if self-defense is legally available as a defense to the crime charged. MAI-CR 4th 406.06[2], sections 563.074.1 and 563.031.1(3) combined, and *State v. Oates*, 540 S.W.3d 858 (Mo. banc 2018), each consistently supports the conclusion that, as a matter of law, self-defense is not available as a defense to felony murder, and thus should not be instructed, where the actor was committing, attempting to commit, or escaping from committing a forcible felony at the time the actor used force to protect himself against the use or threatened use of force by another. As such, the trial court did not plainly err in failing to instruct the jury on self-defense *sua sponte*.

(2) The trial court's exclusion of discrete portions of Gates's trial testimony did not amount to an arbitrary or mechanical *per se* exclusion of evidence that categorically deprived Gates of the right to testify in his own defense. Instead, Gates's efforts to admit evidence through his testimony were appropriately subjected to the trial court's assessment of admissibility of the proffered evidence for the purpose offered.

(3) Gates's claim of constitutional error with respect to the trial court's exclusion of discrete portions of his testimony is unpreserved and subject to plain error review. To preserve error in the exclusion of evidence, the evidence must have been the subject of an offer of proof identifying the basis for admitting the evidence. In making his offer of proof, Gates only sought admission of all aspects of his anticipated testimony for the purpose of establishing self-defense as a legal justification for felony murder. The excluded portions of Gates's testimony were not

admissible for this purpose as self-defense is not available as a legal justification for felony murder. Other references made by Gates at earlier points in the trial regarding the reason for admitting his testimony preserve nothing for our review.

(4) Applying plain error review, Gates did not explain at trial, and has not explained on appeal, how the discrete evidence that was excluded at trial evidently, obviously, or clearly would have made the key issue at trial more or less probable: that Gates robbed or was attempting to rob the Victim. Further, the trial court's exclusion of limited discrete evidence through Gates's testimony was not outcome determinative.

(5) Given Venireperson No. 38's other answers during voir dire, the trial court did not commit error, plain or otherwise, in failing to strike Venireperson No. 38 for cause *sua sponte*.

Judge Ahuja's Dissenting Opinion States:

The dissent would reverse Gates's convictions and remand for a new trial. In Judge Ahuja's view, the circuit court denied Gates his constitutional right to present a meaningful defense when it prohibited him from testifying as to the events which occurred in his car leading directly to the victim's shooting. Even though self-defense was not available as a legal justification in this felony murder prosecution, Gates's testimony that the victim was attempting to rob Gates, and that Gates shot the victim to defend himself, was relevant to negate the State's allegation that the victim was killed in the course of a robbery committed by Gates. Gates adequately explained to the circuit court that he was seeking to testify to negate essential elements of the State's case, not to establish the inapplicable defense of self-defense.

Majority Opinion by: Cynthia L. Martin, Chief Judge, Presiding October 27, 2020
Judge Edward R. Ardini, Jr., Judge, concurs
Dissenting Opinion by: Alok Ahuja, Judge

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