IN THE
SUPREME COURT OF MISSOURI

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	No. SC99799
	)	
	)	
JASON HURST,	)	
	)	
Appellant.	)	

APPEAL TO THE SUPREME COURT OF MISSOURI
FROM THE CIRCUIT COURT OF NEWTON COUNTY, MISSOURI
FORTIETH JUDICIAL CIRCUIT
THE HONORABLE KEVIN L. SELBY, JUDGE

APPELLANT'S SUBSTITUTE REPLY BRIEF

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JURISDICTIONAL STATEMENT

Appellant adopts and incorporates by reference the Jurisdictional Statement from his original brief.

STATEMENT OF FACTS

Appellant adopts and incorporates by reference the Statement of Facts from his original brief.

ARGUMENT

The trial court erred in refusing defense counsel's submitted justification by necessity instruction because that refusal was in violation of Mr. Hurst's rights to due process of law, a fair trial before a properly instructed jury and the right to present a defense, as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution as well as Article I, Section 10 of the Missouri Constitution, in that, in the light most favorable to giving the instruction, there was substantial evidence to support the instruction that it was justified for Mr. Hurst to defend himself and his wife against abuse and potentially worse by Newton County Sheriff's deputies.

Appellant and respondent agree about a number of things, which will permit this reply brief to narrow the issues before the Court. The parties are in accord in the following respects.

"Substantial evidence" means "evidence putting a matter in issue." (Resp. br. 42 – citing ***State v. Bruner***, 541 S.W.3d 529 (Mo. banc 2018) for the proposition that "substantial evidence" does not "increase the burden of injecting self-defense"). ***Bruner*** cites ***State v. Avery***, 120 S.W.3d 196, 200 (Mo. banc 2003), for that general proposition. ***Bruner***, 541 S.W.3d at 535. In other words, when we say "substantial evidence," we mean "substantive evidence."

The parties also agree that justification by necessity is an affirmative defense, as opposed to self-defense, which is a special negative defense. Sections 563.026; 563.031. Both special negative defenses and affirmative defenses require the defendant to show that there is substantial evidence supporting giving the instruction before the trial court is obligated to give it, but in the case of affirmative defenses, the defendant also has the burden of persuading the jury once the issue had been successfully injected. However, as this case deals only with issue of whether the instruction should have been given because it was supported

by substantial evidence, cases dealing with this same issue in self-defense cases, such as ***Bruner***, are as instructive as cases dealing with justification by necessity. This is because the standard for this question is the same regardless of whether the defense in question is an affirmative defense or a special negative. As such, the only real legal issue before this Court is contained in Respondent's application for transfer – whether the justification instruction should be given when it is "supported solely by a defendant's subjective belief in its necessity" (see Resp. br. 18).[1] Initially, it should be noted that Mr. Hurst's testimony was not the only evidence supporting his defense. Witness John Thurston testified at trial that officers held Mrs. Hurst and Mrs. Thurston surrounded in their car, corroborating Mr. Hurst's testimony and substantiating his belief of imminent danger (Tr. 190-193).

Second, the true answer to respondent's question is "yes" – a defendant's belief is enough, so long as it is reasonable. Section 563.026 contains an implicit reasonableness test, where it reads, "according to ordinary standards of intelligence and morality." Section 563.026.1. But so long as a defendant's subjective belief is a reasonable one, that is enough. Respondent cites ***Bruner*** and its progeny as if the defendant's belief is *irrelevant* – instead, the belief must simply be reasonable. *See* ***Bruner***, 541 S.W.3d at 536.

The question of reasonableness is a fact question for the jury. ***State v. Chambers***, 671 S.W.2d 781, 783 (Mo. banc 1984). The jury cannot decide this issue unless it is given the justification instruction.[2]

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[1] Respondent cites ***State v. Moore***, 904 S.W.2d 365, 369 (Mo. App., E.D. 1995), for that proposition, but that case does not seem to say that. Respondent's brief says, following that citation, "see ***State v. Vandiver***, 757 S.W.2d 308, 312 (Mo. App., W.D. 1988). Appellant will discuss ***Vandiver*** further.

[2]Respondent says in its brief that "the jury did not find Defendant's testimony supporting the instruction credible and Defendant bore the risk of non-persuasion for the necessity defense (Resp. br. 41). This is, of course, the point.

Respondent argues that Mr. Hurst has not met the "factors" to support the giving of a justification instruction. The factors that can be gleaned from the statute, Section 563.026, are four. As this Court instructed in ***Bruner***, tests derived from the common law that do not parallel the factors set out in the statute are not helpful. ***Bruner*** 541 S.W.3d at 536-537.

Under Section 563.026, conduct is "justified" (1) when it is necessary as an emergency measure (2) to avoid an imminent public or private injury (3) which is about to occur through no fault of the actor (4) which is reasonable under a balancing of harm to be avoided versus the commission of the offense (paraphrased). Respondent argues that other factors to be considered include "no reasonable alternative" (Resp. br. 36), and "no reasonable expectation that actions would be effective," but those does not appear in the statute, and in fact, Respondent notes that they are derived from common law that existed prior to the statute (Resp. br. 35). Appellant will instead discuss the statutory factors.

Emergency

Mr. Hurst testified he heard the officers, who had beaten, tased, and maced him, say that they were going to "get" his wife and heard her screaming for help (Tr. 375-376). A reasonable juror could find that this constituted an emergency to someone handcuffed in a police car who saw officers surrounding his wife's car. Respondent cites only Mr. Hurst's testimony that he drove to Neosho to find surveillance cameras, which was only part of the story, and not the emergency to which Mr. Hurst was responding. (Resp. br. 30).

In several of the cases cited by Respondent, the defendant's claim regarding a justification instruction was defeated by the lack of a true emergency. These cases are easily distinguished. In ***State v. Simmons***, 861 S.W.2d 128 (Mo. App., E.D., 1993), the defendant escaped from a police station because he had been assaulted earlier. But there was no true emergency, because he was no longer at the scene and no longer in danger of any harm. 861 S.W.2d at 131-132. In ***State v. Vandiver***, 757 S.W.2d 308 (Mo. App., W.D. 1988), the court found no

emergency where a prison inmate felt justified in carrying a weapon in the institution for his own protection.

State v. Stewart, 186 S.W.3d 832 (Mo. App., S.D., 2006), was cited by the Southern District in its opinion in the instant case, which found the case from its own court distinguishable. ***Hurst***, No. SD37396, slip. op. at 6. The ***Stewart*** Court found no emergency where a revoked driver drove a drunken friend rather than let the drunk friend drive, since the defendant could simply have taken the friend's keys. 186 S.W.3d at 835

Avoid imminent public or private injury

This factor could also be subsumed in the "emergency" factor, depending upon how one wanted to parse the statute. In any event, Respondent's assertion that "Defendant and his wife were not facing a risk of imminent harm at the time Defendant fled in the police car" (Resp. br. 31) is simply incorrect. In the light most favorable to giving the instruction, Mr. Hurst believed that his wife was facing a risk of imminent harm – being illegally assaulted or harmed by the police officers.

Respondent cites ***State v. O'Brien***, 784 S.W.2d 187 (Mo. App., E.D. 1990), where the Court found no risk of imminent danger. ***O'Brien*** is a trespass case involving an abortion clinic, where the defendant claimed she had to trespass in order to prevent abortions, so it is not very relevant to this inquiry. As the Court of Appeals found, the "harm sought to be avoided" was, at the time, a constitutionally protected activity. 784 S.W.2d at 192.[3] Mr. Hurst, in contrast, believed the officers were not attempting to arrest or detain his wife in accordance with their duties as police officers, but instead illegally assault her.

[3] Any justification argument in a case such as ***O'Brien*** would presumably be barred by subsection 2 of Section 563.026 anyway, which says that justifiability of conduct "may not rest upon considerations pertaining only to the morality and advisability of the statute, either in its general application or with respect to its application to a particular class of cases arising thereunder."

No fault of actor

Mr. Hurst may have caused his own arrest by his actions, but he did not cause the danger to his wife that he was trying to prevent by his later actions charged in this case. Respondent argues that Mr. Hurst created the situation (Resp. br. 33) but fails to mention the danger to Mrs. Hurst at issue in the justification defense. The ***Owen*** case cited by Respondent is probably the closest factually to the instant case. ***State v. Owen***, 748 S.W.2d 893 (Mo. App., W.D. 1988). In that case, the defendant drove away from an arresting officer and testified at his trial that he panicked because he had been beaten by an officer before. The Court of Appeals held that the defendant was at fault in creating the situation when he initially resisted the officer's attempts to arrest him. 748 S.W.2d at 895.

This case is different. Mr. Hurst could not have claimed that his initial altercation with the officers was justified – a person cannot resist even an unlawful arrest. ***State v. Thomas***, 625 S.W.2d 115 (Mo. 1981). But it was the danger Mrs. Hurst was in – caused by neither her nor Mr. Hurst – that justified Mr. Hurst's actions in taking the police car in order to distract the officers.

Balancing harm with crime

The ultimate balancing test in the statute is the question of reasonableness – it has to be a fact question. And if there is a question, and there is evidence to support giving the instruction, it should be for the jury to decide. As this Court has held, the defendant is entitled to instruct the jury on "any theory of innocence … however improbable that theory may seem, so long as the most favorable construction of the evidence supports it." ***Bruner***, 541 S.W.3d at 540. As this Court pointed out in ***State v. Jackson***, 433 S.W.3d 390 (Mo. banc 2014),

> A defendant is entitled to an instruction on any theory the evidence establishes. ***[State v.] Hibler***, 5 S.W.3d [147,] 150 [(Mo. banc 1999)]. This Court leaves to the jury determining the credibility of witnesses, resolving conflicts in testimony, and weighing evidence. ***Rousan v. State***, 48 S.W.3d 576, 595 (Mo. banc 2001). ***A jury may accept part of a witness's***

> ***testimony, but disbelieve other parts. State v. Redmond***, 937 S.W.2d 205, 209 (Mo. banc 1996). If the evidence supports differing conclusions, the judge must instruct on each. ***Hibler***, 5 S.W.3d at 150.

(emphasis in original).

Mr. Hurst was entitled to an instruction on his only defense. He respectfully requests that this Court reverse his convictions and remand for a new and fair trial.

CONCLUSION

For the reasons presented in this reply and his original brief, appellant respectfully requests that this Court reverse his convictions and remand for a new and fair trial.

Respectfully submitted,

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Certificate of Compliance and Service

I, Ellen H. Flottman, hereby certify to the following. The attached reply brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2010, in Times New Roman size 13-point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 2,080 words, which does not exceed the words allowed for a reply brief.

On this 19th day of December, 2022, an electronic copy of Appellant's Substitute Brief was placed for delivery through the Missouri e-Filing System to Julia E. Rives, Assistant Attorney General, at Julia.Rives@ago.mo.gov.

/s/ Ellen H. Flottman

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