No. SC101071

In the Supreme Court of Missouri

STATE OF MISSOURI,

Respondent,

v.

RICHARD BURKETT,

Appellant.

Appeal from Circuit Court of Texas County, Missouri
Twenty-Fifth Judicial Circuit
The Honorable William Hickle, Judge

RESPONDENT'S BRIEF

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STATEMENT OF FACTS

Appellant (Defendant) appeals a Texas County Circuit Court judgment convicting him of one count of assault in the first degree (Count I) and one count of armed criminal action (Count II). Defendant raises two points on appeal: (1) that the jury was not instructed on self-defense and (2) that the State misstated the law as to first-degree assault in closing argument.

Defendant was charged for events that occurred on November 7, 2022. (D2). He was tried by a jury on December 20, 2023, and found guilty on both counts. (Tr. 270-71). The trial court sentenced Defendant as a prior and persistent offender to a total of thirty years in the Missouri Department of Corrections. (S. Tr. 14)[1].

Defendant does not challenge the sufficiency of the evidence. Viewed in the light most favorable to the verdict,[2] the following evidence was adduced:

Defendant and his brother-in-law (Victim) (Tr. 176) were outside a convenience store when Victim asked Defendant to move out of his guesthouse. (Tr. 162-63). Defendant followed Victim into the store, they argued, and Defendant tried to "headbutt" Victim. (Tr. 163). Victim grabbed Defendant by

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[1] Sentencing Transcript

[2] *State v. McCord*, 621 S.W.3d 496, 498 (Mo. banc 2021).

the neck with one hand to avoid being struck and "took him down to the ground." (Tr. 163-64). They wrestled for ten to fifteen seconds. (Tr. 172). Two bystanders pulled Victim off Defendant and separated them. (Tr. 164). Defendant then took a semi-automatic handgun from his waistband and pointed it at Victim's head, three inches away. (Tr. 164, 170). He said, "You're a dead mother fucker," and pulled the trigger. (Tr. 165). The gun clicked but did not fire. (Tr. 165, 177). Defendant manipulated the gun as if he was trying to unjam or load it. (Tr. 169). The storeowner (Owner) pulled his shotgun out and told Defendant to leave. (Tr. 177, 180). Defendant hit Victim in the head, left the store, and fled to another county. (Tr. 165, 189, 244). He later got rid of the gun. (Tr. 206).

In his police interview, Defendant gave four different versions of events to Sheriff's Deputy A.E. (Deputy). (Tr. 203-06). First, Defendant said that Victim grabbed him by the throat during a verbal argument, Defendant struck Victim to get him off, and then Victim took Owner's shotgun and pointed it at Defendant. (Tr. 203). Deputy told Defendant he did not believe that story. (Tr. 203). Next, Defendant said that he pulled a firearm, but only after Victim pointed Owner's shotgun at Defendant. (Tr. 204). Again, Deputy told Defendant he did not believe him. (Tr. 205). Defendant then said that Victim never had the shotgun, but Defendant pulled his gun because he thought Victim was going to get Owner's shotgun. (Tr. 205). Deputy told Defendant he

still did not believe him and that the store had cameras.[3] (Tr. 205). At that point, Defendant admitted that Victim grabbed him by the throat after Defendant struck Victim first, that Defendant pointed a gun at Victim after the fight was over, and that Victim never had a firearm. (Tr. 205). Defendant said that he did not pull the trigger because the gun was unloaded (Tr. 205-06) and he only wanted to scare Victim (Tr. 207). He said that he tried to load the gun after Owner took out his shotgun. (Tr. 208).

Defendant also testified at trial. (Tr. 218-44). He maintained that the gun was unloaded. (Tr. 222). He denied pointing the gun at Victim's temple (Tr. 222), pulling the trigger (Tr. 324-35), or trying to unjam or load the gun (Tr. 224). On cross-examination, Defendant testified that he changed his story to police because Deputy told him there was video evidence. (Tr. 229-30). But Defendant reverted to his original story at trial, which was that Owner told Victim, "Here, shoot him," and handed Victim a shotgun. (Tr. 222). He said that he retrieved and pointed his gun at Victim only after Victim pointed the shotgun at Defendant. (Tr. 222). Defendant also denied trying to "headbutt"

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[3] There were no cameras in the store. (Tr. 205). Police may use trickery or deception during interrogations. *State v. Phillips*, 563 S.W.2d 47 (Mo. banc 1978) (police trickery does not necessarily make a statement involuntary). Defendant has not raised any issue regarding the voluntariness of his statements on appeal. (Def's Br. 13-14).

Victim. (Tr. 221). He said that Victim started the fight by choking him (Tr. 221) and that he punched Victim to stop the choking. (Tr. 222).

Defense counsel did not attempt to rehabilitate Defendant's self-defense testimony with re-direct examination. (Tr. 245). In closing argument, counsel told the jury, "[W]ho pulled the gun first is not as relevant." (Tr. 258). Instead, she argued that the gun was unloaded and Defendant meant only to scare Victim. (Tr. 259). Counsel acknowledged Defendant's varying stories and emphasized his consistency in saying the gun was unloaded. (Tr. 259). "[O]f all the stories" the jury heard, she said, no testimony contradicted Defendant's claim that the gun was unloaded and he only meant to scare Victim. (Tr. 259).

Meanwhile, the State argued that you scare someone by brandishing a gun; you do not point it at their head and pull the trigger unless you mean to harm them. (Tr. 266-68). The prosecutor theorized that the gun jammed, Defendant tried to unjam it, then he fled. (Tr. 256-57).

ARGUMENT

I. The trial court did not commit reversible plain error by failing to sua sponte give a self-defense instruction because Defendant waived the claim at trial, statutory and rule changes abrogated the trial court's sua sponte duty to instruct on self-defense, and Defendant did not suffer a manifest injustice or miscarriage of justice.

Plain-error review is discretionary and should be used sparingly. *State v. Brandolese*, 601 S.W.3d 519, 526 (Mo. banc 2020). Yet, the Court of Appeals has interpreted this Court's precedents to compel the liberal assignment of plain error and manifest injustice to allegations of instructional error. With self-defense instructions, in particular, appellate courts have used the trial court's sua sponte duty to instruct and the restriction of waiver principles to shift the burden of disproving reversible plain error onto the State.

In cases like this, where a defendant's decision not to request a self-defense instruction is reviewed on plain error, an ambiguous record is not supposed to be a windfall to the defendant. Here, Defendant reviewed the instructions packet, declined to offer any additional instructions, repudiated self-defense in closing argument, and relied on another defense instead. The trial court took him at his word and did not submit a self-defense instruction. Defendant's affirmative acts amount to a waiver and invited error, and they reflect a strategic decision. Defendant provides no basis to refute that

conclusion and meet his burden of proving that he suffered a manifest injustice.

Defendant's case presents three broader issues for this Court to clarify or re-examine regarding plain error in self-defense instructions. First, this Court should overturn *State v. Wurtzberger*, 40 S.W.3d 893 (Mo. banc 2001), and return to applying traditional waiver rules to allegations of instructional error. Second, the Court should re-examine the trial court's sua sponte duty to instruct on affirmative and special-negative defenses and overturn *State v. Westfall* to the extent it says that trial courts have a per se obligation to sua sponte submit self-defense instructions. Third, the Court should reaffirm that appellate courts can and should decline plain-error review when a defendant does not provide substantial grounds to believe a manifest injustice will result, and they should not find manifest injustice unless the defendant affirmatively proves that the error had an evident effect on the jury's verdict and denying relief would, in fact, result in a manifest injustice.

A. Relevant Facts

Defendant pointed a gun at his brother-in-law and pulled the trigger during an argument in a Texas County convenience store. (Tr. 162-63, 164, 165). The gun clicked but did not fire. (Tr. 165, 177). Defendant told police and the jury that the gun was unloaded and he knew it was unloaded. (Tr. 205-07). He did not want to hurt anyone, only to scare Victim. (Tr. 207, 222). His story

remained consistent on that point. (Tr. 259). Witnesses testified that either a jam or an unloaded gun could cause the clicking sound. (Tr. 178, 207-08). They described Defendant manipulating the gun after pulling the trigger, but it was unclear whether he was trying to clear a jam or load the gun. (Tr. 169, 181, 191).

Defendant also testified that he acted in self-defense. (Tr. 222, 240). However, his version of events changed at least four times. (Tr. 203-05). After police heard his third story, the officer replied that there was a video of the incident.[4] (Tr. 205). Defendant then gave a fourth story, that he struck Victim first and that he pointed his gun at Victim after the altercation. (Tr. 205-08). At trial, having discovered there was not actually a video, Defendant returned to the original version. (Tr. 222, 229). He testified that Victim initiated the fight and that Defendant pulled a gun after Owner handed Victim a shotgun and said, "Here, shoot him." (Tr. 222). The prosecutor confronted Defendant with his previous admission that he pulled a gun first, and Defendant indicated that he changed his story to align with the supposed video evidence:

Q. . . . [Y]ou changed your story with the deputy, didn't you?

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[4] There were no cameras in the store. (Tr. 205). Police may use trickery or deception during interrogations. *State v. Phillips*, 563 S.W.2d 47 (Mo. banc 1978) (police trickery does not necessarily make a statement involuntary). Defendant has not raised any issue regarding the voluntariness of his statements on appeal. (Def's Br. 13-14).

A. Well, I told him I didn't—I didn't pull the gun first.

Q. No. You changed it and said you did pull the gun first.

A. Because he told me that there was video evidence.

(Tr. 229). All three witnesses also refuted Defendant's self-defense story. (Tr. 164, 170, 175, 182, 186, 193). According to them, Defendant struck Victim first (Tr. 164, 193), Victim never had a gun (Tr. 170, 182), and the two were separated before Defendant pointed his gun at Victim (Tr. 172).

After Defendant's cross-examination, defense counsel did not attempt to rehabilitate Defendant's self-defense testimony. (Tr. 245). Counsel acknowledged Defendant's varying stories in closing argument. (Tr. 260). Defense counsel posited that lying to police out of fear was understandable (Tr. 260) and that, regardless of his varying statements, the jury had to determine whether Defendant intended to hurt Victim or just scare him. (Tr. 261). She told the jury, "[W]ho pulled a gun first is not as relevant." (Tr. 258).

The parties had an informal instructions conference off-the-record, and the trial court asked if Defendant had objections to any of the instructions or verdict forms. (Tr. 247). Defendant denied having an objection. (Tr. 247). When the trial judge asked if anyone had additional instructions they wished to tender for the court's consideration, defense counsel said, "no." (Tr. 248).

B. Defendant waived plain-error review.

This Court should expressly overrule *State v. Wurtzberger* and hold that Defendant waived plain-error review by stating he had no objection to the jury instructions and did not wish to offer any additional instructions. But even if the Court does not overrule *State v. Wurtzberger*, Defendant's conduct, corroborated by his strategic arguments at trial, invited instructional error and precludes relief for that claim on appeal.

1. The Court should overrule *State v. Wurtzberger*.

The doctrine of *stare decisis* generally presumes that legal precedents must be followed to "prevent the arbitrary interpretation and application of the law" and to ensure that "similar cases are treated similarly." *Lucas v. Ashcroft*, 688 S.W.3d 204, 213-14 (Mo. banc 2024). "Of course, judicial precedent is not absolute." *Id.* at 213. Departure is warranted when the precedent is "clearly erroneous and manifestly wrong"; when its application would be "evidently contrary to reason"; when it "is demonstrated unreasonable or incorrect through the passage of time and experience"; or when "it results in recurring injustice or absurd results." *Id.* at 214 (internal quotations omitted). At least three of those exceptions apply here: the holding of *Wurtzberger* is clearly erroneous, it is demonstrated unreasonable and incorrect through time and experience, and it has resulted in recurring injustice or absurd results.

a. The *Wurtzberger* holding is clearly erroneous.

The *Wurtzberger* decision represents the rule that affirmatively stating "no objection" does not waive plain-error review of instructional errors. *See e.g. State v. Celis-Garcia*, 344 S.W.3d 150, n. 3 (Mo. banc 2011), citing *Wurtzberger*, 40 S.W.3d at 897-98. That rule is clearly erroneous because it contradicts traditional waiver principles and is unsupported by sound legal reasoning.

Ordinarily, "[p]lain error review is waived when counsel has affirmatively acted in a manner precluding a finding that the failure to object was a product of inadvertence or negligence." *State v. Johnson*, 284 S.W.3d 561, 582 (Mo. banc 2009) (internal quotations omitted). This means that plain-error review is unavailable if a party affirmatively states that it has no objection, or if the party consciously refrains from objecting for strategic reasons. *Id.* (citing *State v. Mead*, 105 S.W.3d 552, 556 (Mo. App. W.D. 2003)). This "general rule" regarding waiver applies to all kinds of allegations of trial error. *State v. Anderson*, 294 S.W.3d 96, 100 (Mo. App. E.D. 2009) (*e.g.* persistent offender status); *see also State v. Marr*, 499 S.W.3d 367, 377 (Mo. App. W.D. 2016) (members of jury panel); *State v. Stevens*, 949 S.W.2d 257, 258 (Mo. App. S.D. 1997) (refusal to answer question during deliberation); *Richardson v. State*, 555 S.W.2d 83, 87 (Mo. App. 1977) (certification). It has even been applied to instructional error. *See State v. Thompson*, 711 S.W.3d 339, 347-48 (Mo. banc 2025); *State v. Jackson-Bey*, 690 S.W.3d 181, 186-87 (Mo. banc 2024); *State v.*

Sanders, 449 S.W.3d 812, 816 (Mo. App. S.D. 2014); *State v. Wright*, 30 S.W.3d 906, 911-12 (Mo. App. E.D. 2000).

In *State v. Wurtzberger*, the defendant claimed plain error based on an incorrect instruction on attempt, even though he had said "no objection" to the instruction at trial. 40 S.W.3d at 895, 897. The trial court's definition of attempt had been ruled erroneous by the Supreme Court of Missouri while the defendant's appeal was pending. *Id.* at 896-97 (citing *State v. Withrow*, 8 S.W.3d 75, 80 (Mo. banc 1999)). On appeal, the State argued that the defendant waived plain-error review by failing to make a timely objection as required by Rule 28.03, citing *State v. Martindale*, 945 S.W.2d 669, 673 (Mo. App. E.D. 1997) ("[I]f the revised version of Rule 28.03 is to have any effect, the failure to specifically object must constitute a waiver.").[5] *Wurtzberger*, 40 S.W.3d at 897.

The *Wurtzberger* court analyzed the interplay between Rule 28.03 and Rule 30.20 and rejected the idea that Rule 28.03 waived plain-error review:

> Although the state is correct that appellant waived appellate review when counsel failed to raise a specific objection to the disputed attempt instruction, it misconstrues the extent of the waiver. Unpreserved claims of plain error may still be reviewed under Rule 30.20 if manifest injustice would otherwise occur. To be sure, there is some confusion regarding the interplay between

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[5] *See cf.* Rule 28.03 ("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 . . . ."); Rule 28.03 (1994) ("A party may, but is not required to, object . . . on the record . . . .").

> Rule 30.20 and Rule 28.03. *State v. Bradshaw* . . . interpreted *State v. Martindale* as disallowing all review, including plain-error review, in the absence of a timely objection. ***But, in fact, there is no case, not even Martindale itself, holding that Rule 28.03 trumps Rule 30.20.***

Wurtzberger, 40 S.W.3d at 898 (emphasis added). The court held that the defendant did not waive plain-error review "when he failed to specifically object." *Id.*

Notably, the *Wurtzberger* court never expressly said that stating "no objection" to an instruction does not waive plain-error review. *Wurtzberger*, 40 S.W.3d at 898; *see also State v. Beck*, 167 S.W.3d 767, 775-76 (Mo. App. W.D. 2005), *overruled on other grounds by State v. Bolden*, 371 S.W.3d 802 (Mo. banc 2012) (*Wurtzberger* precludes waiver based on a failure to object.). But the opinion also never explained why the defendant, who said "no objection" to the disputed verdict director, did not waive review pursuant to the existing waiver standard. *Wurtzberger*, 40 S.W.3d at 898. As a result, the court decided *Wurtzberger* far more broadly than it needed to. Although the court concluded that non-compliance with Rule 28.03 does not waive Rule 30.20 review, it does not follow that affirmatively stating "no objection" produces the same result. In fact, that conclusion directly conflicted with the existing standard for waiver. Thus, the *Wurtzberger* court clearly erred by treating the defendant's statement of "no objection" as a mere failure to object under Rule 28.03.

Realistically, the facts in *Wurtzberger* may distinguish it from the general waiver rule, in that the disputed instruction was not objectionable at the time of trial. *See State v. Bucklew*, 973 S.W.2d 83, 90 (Mo. banc 1998) (Waiver is the intentional relinquishment of a known right.).[6] Therefore, *Wurtzberger* ought to stand for the proposition that an appellate court will not deem a response of no objection to result in a complete waiver of appellate review and will exercise its discretion to conduct plain-error review when an instruction, which was correct when used at the defendant's trial, is subsequently declared erroneous by an appellate court while the defendant's case is still on direct appeal. That does not mean ***all*** instructional errors are subject to plain-error review despite an affirmative statement of "no objection."[7] To the extent that *State v. Wurtzberger* held otherwise, it was inconsistent with existing law, it failed to justify its departure from that law, and the holding was clearly erroneous.

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[6] The defendant argued that responding "no objection" was not an affirmative waiver because "the trial took place prior to this Court's decision in *Withrow*, and it was that case which gave rise to the objection omitted by Mr. Wurtzberger's trial counsel." Substitute Reply Brief at 7, *State v. Wurtzburger*, 40 S.W.3d 893 (Mo. banc 2001) (No. SC82871).

[7] Perhaps the *Wurtzberger* court did not intend its ruling to apply to all cases in which defendants said "no objection." Even if the holding was correct on its facts, the application of that rule to all instances of defendants saying "no objection" is clearly erroneous and evidently contrary to reason. *Lucas*, 688 S.W.3d at 214.

b. Time and experience have shown the *Wurtzberger* rule to be unreasonable and incorrect.

Over the past twenty-four years, the *Wurtzberger* rule has failed to serve the primary purpose of *stare decisis*: to promote security in the law. *See Lucas*, 688 S.W.3d at 213. It has sown confusion, produced inconsistent results, and met skepticism from courts. The ongoing evolution and search for clarity in this area show that courts cannot rely on *Wurtzberger* to provide a workable waiver standard for instructional error, *see id.* at 214 (key factor in *stare decisis* analysis), and it should be abandoned.

The *Wurtzberger* decision invited uncertainty from the start. It rejected a basic mode of waiver without explanation and without clarifying whether or how other forms of waiver still applied to instructional errors. Indeed, courts initially questioned whether a defendant could waive instructional errors at all. *See Schnelle v. State*, 103 S.W. 165, n. 1 (Mo. App. W.D. 2003) ("There are serious questions about whether plain error review can be waived."); *Wright*, 30 S.W.3d at 912 ("concept of plain error review has recently been questioned"). Yet, not all courts agreed, and varying results ensued. *See Sanders*, 449 S.W.3d at 816 (found waiver based on statement of no objection, "as opposed to a failure to object," but declined plain-error review "waiver notwithstanding"); *State v. Marshall*, 302 S.W.3d 720, 724 (Mo. App. S.D. 2010) (found waiver when defendant withdrew instruction); *Wright*, 30 S.W.3d at 912 (found

waiver, but reviewed because *Wurtzberger* called waiver into question); *see cf. State v. Myles*, 479 S.W.3d 649 (Mo. App. E.D. 2015) (*Wurtzberger* "expressly addressed" the issue, and affirmative statement of no objection does not waive plain-error review).

This Court clarified eleven years later, in *State v. Bolden*, 371 S.W.3d at 806, that defendants could still waive appellate review if they invited instructional error.[8] But many lower courts still read *Wurtzberger* to generally erase waiver for instructional errors and interpreted *Bolden* to create an "extremely limited" exception for instructions proffered by defendants. *State v. Jones*, 686 S.W.3d 293, 302 (Mo. App. E.D. 2024) (exception to general principle in *Wurtzberger*—inapposite where defendant did not submit the challenged instruction); *State v. Gannan*, 658 S.W.3d 103, 111, fn. 6 (Mo. App. W.D. 2022) ("extremely limited" exception"); *see also Slip op.* at fn. 3; *State v. Coyle*, 671 S.W.3d 702, 712 (Mo. App. W.D. 2023). *But see State v. Cook*, 687 S.W.3d 487, 490 (Mo. App. E.D. 2024) (Courts have not extended the limitation of waiver by stating "no objection" to other affirmative acts inconsistent with negligence

[8] *State v. Bolden* expressly set out to limit the scope of *State v. Westfall*, 75 S.W.3d 278 (Mo. banc 2002), not *State v. Wurtzberger*, but it did both. It confirmed that waiver of instructional errors, at least in a limited form, still existed.

or inadvertence.); *State v. Plunkett*, 487 S.W.3d 480, 490 (Mo. App. S.D. 2016) (waived by strategically forgoing instruction).

Case law on waiver of instructional error has continued to evolve since *State v. Bolden*, raising more questions about the scope and validity of the *Wurtzberger* rule. In *State v. Brandolese*, 601 S.W.3d at 531, this Court held that the defendant invited error by requesting an improper instruction and thereby waived error in the instruction given, even though (unlike in *Bolden*) the challenged instruction was not offered by the defendant. *Id.* This decision retreated from the court's position in *State v. Celis-Garcia*, 344 S.W.3d at n. 3, where it held that submitting verdict directors suffering the same defect challenged on appeal did not waive plain-error review. Additionally, in *State v. Jackson-Bey*, 690 S.W.3d at 187, this Court recited the general waiver standard—an affirmative act inconsistent with negligence or inadvertence—indicating that that general rule does in fact apply to instructional errors. And in *State v. Thompson*, this Court held that defense counsel affirmatively waived plain-error review by stating "no objection" to an instruction. 711 S.W.3d at 348 (citing *Bolden*, 371 S.W.3d at 806 (no sua sponte duty to correct invited errors)). Notably, *Thompson* appears to contradict the *Wurtzberger* rule, but it relies on invited error as the basis for waiver instead of Rule 28.03 or the "affirmative act" language cited in *Jackson-Bey*.

The Court of Appeals has paid these recent cases little attention. Opinions exclude the *Brandolese* decision from citations to this Court's precedents on waiver of instructional error. *See Slip op.* n. 3; *Jones*, 686 S.W.3d at 302; *Gannan*, 658 S.W.3d at 111, n. 6. The court below disregarded *Jackson-Bey* because it was not a self-defense case. *Op. on Motion for Rehearing or Transfer* at p. 1.[9] And, although *Thompson* is too recent to fully assess its reception in the Court of Appeals, the court below did not address the case when denying Respondent's motion for rehearing or transfer. *Op. on Motion for Rehearing or Transfer* at p. 1-2.

Some courts have avoided the uncertainty of the waiver issue by declining review or finding no manifest injustice. *See e.g. State v. Vitale*, 688 S.W.3d 740, 750 (Mo. App. E.D. 2024) (declined to review "[f]or the same reasons that Defendant may arguably have waived plain error review"); *State v. Davidson*, 599 S.W.3d 257 (Mo. App. S.D. 2020) (no manifest injustice because defense counsel strategically refrained from objecting). While that is one way to handle these cases, courts do not consistently exercise their

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[9] This raises another issue regarding waiver of instructional error: whether all instructional errors are subject to the same waiver standard. The concept of waiver suggests that they should be. Waiver is not a question of whether an error occurred or its effect, but of whether the defendant is entitled to relief. It rests on the premise that even if the challenged action ***would have*** violated a right, the defendant voluntarily gave up that right. *See Bucklew*, 973 S.W.2d at 90 (intentional relinquishment of a known right).

discretion to that effect. Thus, the lack of clear guidance on waiver has produced inconsistent results across similar cases. *See e.g. Slip op.* (relief granted after counsel affirmatively expressed no objection and disclaimed the defense in closing argument); *see cf. State v. Davis*, 619 S.W.3d 602, 603 (Mo. App. S.D. 2021) (declined to review when defense counsel affirmatively stated no objection); *State v. Beerbower*, 619 S.W.3d 117 (Mo. App. S.D. 2020) (no manifest injustice because objecting to the instruction was "unlikely to serve defense counsel's strategy" as gleaned from the record).[10]

c. The *Wurtzberger* rule has resulted in recurring injustice or absurd results.

The Court of Appeals has acknowledged that the *Wurtzberger* rule is not working well but continues to recognize it as the predominant standard so long as it remains good law.[11] The court has repeatedly stated, "Unless and until the Supreme Court re-evaluates the availability of plain error review of jury instructions in a criminal case, particularly when the defendant has affirmatively expressed no objection to the instructions at trial . . . , we are without authority to conclude that plain error review has been waived." *Slip*

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[10] Courts' misapplication of the standard for manifest injustice exacerbates the problem of inconsistent results. *See infra* at Section I(E) – Manifest Injustice.

[11] Courts generally presume that opinions have not been overruled *sub silentio*, *i.e.* "without making a particular point of the matter," and prefer to overrule decisions expressly. *See State v. Wade*, 421 S.W.3d 429, 433 (Mo. banc 2013).

op. at n. 3; *State v. Ausler*, 697 S.W.3d 24, n. 2 (Mo. App. E.D. 2024); *Cook*, 687 S.W.3d at 490; *Jones*, 686 S.W.3d at 302; *Coyle*, 671 S.W.3d at 712.

Specifically, courts have expressed concern for the abuse of *Wurtzberger* and "sand-bagging" by defendants. *Vitale*, 688 S.W.3d at 749; *Coyle*, 671 S.W.3d at n. 7; *Davis*, 619 S.W.3d at 604 (Sheffield, J., concurring) (quoting *State v. Weyant*, 598 S.W.3d 675, n. 2 (Mo. App. W.D. 2020)). The *Wurtzberger* rule places the onus on the State and the trial court not just to assert a defense on the defendant's behalf, but to do so ***over*** the defendant's affirmative statement to the contrary. Defendants can lull the trial court into a sense of safety by agreeing to instructions at trial, knowing it will not waive appellate review, then seek a new trial if the verdict does not go their way. Courts have referred to this as "holding the 'instructional error card' in trial counsel's 'strategy pocket' until after the trial." *Weyant*, 598 S.W.3d at n. 3. The risk of such gamesmanship is heightened by the trial court's sua sponte duty to instruct, which lessens the ordinarily onerous burden of plain-error review, *see infra* Sec. I(D), and by the prevalence of informal instructions conferences, where defendants may assure the trial court of their strategic waiver off the record while leaving an ambiguous "no objection" on the record for appellate review.

Additionally, courts have observed that instructional-error claims are "particularly ill-suited for plain error analysis when the decision not to object

to the state's instructions may have been motivated by reasonable trial strategy." *State v. Ess*, 453 S.W.3d 196, n. 6 (Mo. banc 2015) (Wilson, J., concurring in part and dissenting in part); *State v. Creviston*, 694 S.W.3d 630, 637 (Mo. App. S.D. 2024); *Davis*, 619 S.W.3d at 604 (Sheffield, J., concurring); *Beerbower*, 619 S.W.3d at 125; *Davidson*, 599 S.W.3d at 262. Thus, "policy justifications and judicial economy" support a rule waiving plain-error review by affirmatively indicating one does not object to an instruction. *Ausler*, 697 S.W.3d at n. 2.

For all these reasons, this Court should follow *State v. Jackson-Bey* and *State v. Thompson*, overrule *State v. Wurtzberger*, and explicitly hold that instructional errors are waived when a defendant affirmatively acts in a manner that precludes a finding of inadvertence or negligence, including when defense counsel states "no objection" to the proposed instructions. Here, the trial court asked whether the defense objected to any instructions or verdict forms and whether the defense wanted the court to consider any additional instructions. Defense counsel responded "no" to each of those questions. (Tr. 247-48). That affirmative statement precludes a finding of negligence or inadvertence, and Defendant thereby waived plain-error review of the trial court's failure to submit a self-defense instruction.

2. Defendant invited the error.

Even if this Court does not overrule *State v. Wurtzberger*, it should deny plain-error review because Defendant invited the trial court's error.

"It is axiomatic that a defendant may not take advantage of self-invited error or error of his own making." *Bolden*, 371 S.W.3d at 806. Courts will not review invited errors, even under Rule 30.20. *Id.* (held that defendant waived review). This principle is not limited to defendants who submitted an erroneous instruction, but applies broadly to errors invited at trial. *Myers v. Buchanan*, 333 S.W.2d 18, 23-24 (Mo. banc 1960) (discussing application of invited error).[12]

An invited error is an error in which the complaining party joined or acquiesced, *State v. Gee*, 684 S.W.3d 363, 372 (Mo. App. W.D. 2024), or one that he encouraged or prompted. *Invited Error*, BLACK'S LAW DICTIONARY (12th ed. 2024). A party invites error when he "affirmatively accepts and agrees to what the trial court proposed," adopts the allegedly erroneous position voluntarily, or tries to use the court's erroneous view to his own advantage. *Myers*, 333

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[12] Courts claiming that invited instructional error is limited to *Bolden*'s facts do not cite authority for that characterization and, in fact, ignore the explicit language of *Bolden*, which does not purport to create a limited exception, but rather to invoke an axiomatic principle of appellate review. *See Jones*, 686 S.W.3d at 302; *Gannan*, 658 S.W.3d at 111, fn. 6; *see also Slip op.* at fn. 3; *State v. Coyle*, 671 S.W.3d at 712.

S.W.2d at 23-24 (adopts or uses to advantage); *Gee*, 684 S.W.3d at 373 (affirmatively accepts). Such conduct induces the trial court to commit error and estops the party from later asserting that error. *Id.*

Here, Defendant voluntarily adopted the submission of the proposed instructions without a self-defense instruction. Counsel told the trial court that he agreed with those instructions and did not want the court to consider any others. (Tr. 247-48). In doing so, defense counsel induced the court, relying on his affirmative representation, to also adopt the instructions packet without any additions or alterations. Defendant's conduct was equivalent to the defendant's invited error in *State v. Plunkett*, where the defense jointly offered instructions as ***all*** of the instructions to be given. 487 S.W.3d at 490. The *Plunkett* court concluded:

> Neither logic nor the law allows a defendant to both proffer a specific set of instructions to the trial court as '*all* of the instructions that are to be given' [ ]and to complain that the trial court's submission of *only* that set of instructions is reversible error.

Id. Likewise, Defendant cannot assure the trial court that he does not want the court to consider other instructions and then complain that the trial court did not consider another instruction.[13]

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[13] Defendant attempts to distinguish *Plunkett* because the defendant in that case submitted a self-defense instruction for one count and not others. (Def's Br. 24). But other facts show counsel's awareness and consideration of self-

Further, Defendant did not just acquiesce to the instructions packet. He adopted a theory consistent with those instructions. *See Myers*, 333 S.W.2d at 23-24 (adopted erroneous position to his advantage). Instead of pursuing a justification defense, defense counsel tried to refute the intent element of first-degree assault. She argued that "who pulled a gun first is not as relevant." What mattered, defense counsel said, was that Defendant knew his gun was unloaded. (Tr. 261). Not only would submitting a self-defense instruction not serve that theory, *see Beerbower*, 619 S.W.3d at 126 (fixing error unlikely to serve defense strategy), but it could divert the jury's attention or, worse, hurt the defense's credibility. Unconcerned with arguing self-defense, though, counsel could ask jurors to focus solely on Defendant's intent and, consequently, on the evidence most favorable to him. (Tr. 259) (no evidence contradicted professed intent).

Finally, Defendant tried to use the instructional error to his advantage by waiting until his mens rea defense failed to challenge his jury instructions. *See State v. Taylor*, 238 S.W.3d 145, 151 (Mo. banc 2007) (invited error by

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defense here, which was why the self-defense instruction requested in *Plunkett* mattered. *See id.* (indicates strategic choice). Additionally, it is not clear that a strategic motivation for inviting the error is necessary. *See e.g. Miller v. State*, 558 S.W.3d 15, 17-18, 22 (Mo. banc 2018) (agreed to continue a violation hearing beyond probation expiration). It might be enough that Defendant affirmatively and voluntarily adopted the erroneous instructions. *See Myers*, 333 S.W.2d at 23-24.

waiting until trial started to object to venue, at which time double jeopardy would preclude retrial in the proper venue); *Houston v. State*, 513 S.W.3d 407, 411 (Mo. App. E.D. 2017) (invited error by waiting until after trial to disclose that defendant knew a juror). In *Houston*, the court emphasized that defendants cannot "sandbag in hopes of acquittal, and if unsuccessful, mount a post-conviction challenge to the jury selection process." 513 S.W.3d at 410. Yet, that is exactly what Defendant has done here by waiting until appeal to object to his jury instructions.

Defendant's acquiescence in the instructions conference, corroborated by his arguments affirming that position, induced the trial court's error. He cannot, after his chosen defense failed, decide to challenge those same instructions in hopes of a new trial.

C. Standard of Review

Defendant does not dispute that this issue is unpreserved and asks the Court to review it for plain error. (Def's Br. 17).

Appellate courts generally do not review unpreserved claims of error. *State v. Brandolese*, 601 S.W.3d 519, 525 (Mo. banc 2020). Plain-error review of unpreserved claims should be used "sparingly" and "may not be used to justify review of every point that has not been otherwise preserved for appellate review. *Id.*

If the court uses its discretion to review a claim for plain error, the defendant must show an "evident, obvious, and clear" error. *State v. Johnson*, 524 S.W.3d 505, 513 (Mo. banc 2017). Moreover, the defendant "must go beyond a mere showing of demonstrable prejudice" and prove that the error "affected his rights so substantially that a miscarriage of justice or manifest injustice will [in fact] occur if the error is left uncorrected." *Id.* Manifest injustice is determined by the facts and circumstances of the case, and the defendant has the burden to establish it. *Id.*

"Instructional error seldom rises to the level of plain error." *State v. Gonsalez*, 619 S.W.3d 559, 569 (Mo. App. W.D. 2021). A defendant can establish manifest injustice only if he demonstrates an ***evident*** effect on the jury's verdict. *State v. Baker*, 103 S.W.3d 711, 723 (Mo. banc 2003); *see also State v. Miller*, 372 S.W.3d 455, 470 (Mo. banc 2012) ("apparent" effect).

D. The trial court did not commit evident, obvious, and clear error by failing to sua sponte submit an instruction for a defense that Defendant did not assert or rely on at trial.

Defendants have the burden to inject the issue of justified use of force. § 563.031, RSMo. Cum. Supp. 2022. Although Defendant presented self-defense evidence, he did not request the instruction or ultimately rely on that defense at trial. In fact, Defendant declined the court's invitation to consider additional instructions and repudiated self-defense in closing argument. Under those circumstances, it is unreasonable to require the trial court to sua sponte assert

self-defense on the defendant's behalf instead of deferring to counsel's trial strategy. This Court should re-examine the trial court's purported duty to instruct the jury sua sponte, overrule *State v. Westfall*, and hold that the trial court did not commit evident, obvious, and clear error by failing to act sua sponte in this case.

1. This Court should overrule *State v. Westfall*.

The *Westfall* decision represents the proposition that the trial court must give a self-defense instruction regardless of whether it is requested and regardless of whether it is inconsistent with the defendant's defense. *See e.g. Plunkett*, 487 S.W.3d at 482 (quoting *State v. Westfall*, 75 S.W.3d 278, 280-81 (Mo. banc 2002)).[14]

The same principles of stare decisis discussed above apply to the Court's analysis here. *See supra* p. 19. This Court should depart from the *Westfall* line of cases and hold that the trial court does not have an inherent duty to sua sponte instruct on defense theories because the *Westfall* rule is clearly erroneous, and it results in recurring injustice or absurd results.

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[14] The defendant in *Westfall* requested a self-defense instruction, so the decision's comments on the duty to instruct sua sponte are dicta. *See* 75 S.W.3d at 280, 284. But *Westfall*'s declarations about sua sponte instructions still must be examined given courts' reliance on its language and the rule it has come to represent.

a. The *Westfall* rule is clearly erroneous.

The *Westfall* rule is erroneous because statutory and rule amendments have abrogated the trial court's sua sponte duty to instruct the jury, and the *Westfall* court relied on authority pre-dating those amendments when it concluded that the trial court must instruct on self-defense whether requested or not.

As an initial matter, courts are generally discouraged from intervening sua sponte because a party's failure to object may be strategic, and uninvited interference could inject trial error. *State v. Sanchez*, 186 S.W.3d 260, 265 (Mo. banc 2006); *State v. Messer*, 207 S.W.3d 671, 675 (Mo. App. S.D. 2006). Thus, in most contexts, failing to act sua sponte is not plain error except in "the most unusual circumstances." *State v. Roper*, 136 S.W.3d 891, 902 (Mo. App. W.D. 2004); *see also State v. Baumruk*, 280 S.W.3d 600, 616 (Mo. banc 2009) (no obligation to interfere with defense counsel's trial strategy).

Historically, Missouri had an exception, codified by statute, that imposed a sua sponte duty on trial courts to instruct the jury on relevant law. *See* § 546.070(4), RSMo. Cum. Supp. 1982. But the statute was amended in 1983 to remove language mandating sua sponte action:

Amended § 546.070(4) (1983)

> (4) In every trial for a criminal offense the court shall instruct the jury in writing upon all questions of law arising in the case which are necessary for their information in giving the verdict, which

instructions shall include a definition of the term reasonable doubt;

Original § 546.070(4) (1982)

(4) ***Whether requested or not***, the court must instruct the jury in writing upon all questions of law arising in the case which are necessary for their information in giving their verdict; which instructions shall include whenever necessary, the subjects of good character and reasonable doubt; ***and a failure to so instruct in cases of felony shall be good cause, when the defendant is found guilty, for setting aside the verdict of the jury and granting a new trial***;

§ 546.070(4), RSMo. Cum. Supp. 1983; § 546.070(4) (1982) (emphasis added).

Amended statutes "should be construed on the theory that the legislature intended to accomplish a substantive change in the law," and "[c]ourts may not interpret statutes to render any provision a nullity." *State v. Knox*, 604 S.W.3d 316, 322 (Mo. banc 2020) (internal quotations omitted). Presumably, the language "whether requested or not" was not superfluous. By removing it from the statute, the legislature changed the meaning of the statute. It abrogated the sua sponte element of the trial court's duty to instruct the jury. Consistent with that intent, the legislature indicated that failing to instruct was no longer per se grounds for a new trial. *See State v. Isbell*, 524 S.W.3d 90, 93, n. 4 (Mo. App. E.D. 2017) (statutory history appears to have

abrogated the court's sua sponte duty, "*per se* as a matter of law," to submit a self-defense instruction).[15]

Moreover, the Supreme Court of Missouri amended its rules in 1986 and 1994 to reflect a similar shift in responsibility for jury instructions. First, like the legislature, this Court removed references to giving instructions "whether requested or not." *See cf.* Rules 28.02(a) & (f) (1986); Rules 28.02(a) & (e). Second, the court eliminated the trial court's responsibility for preparing verdict forms. *See* Rule 28.02(f) (1986) ("Whether requested or not, the court shall see that a set of all necessary verdict forms is ready for submission to the jury."); *see cf.* Rule 28.02(e) (language removed). Third, the court imposed a new duty on parties to raise ***specific*** objections to jury instructions ***before*** the jury began deliberating. Rule 28.03; *see cf.* Rule 28.03 (1994) (objections not required until the motion for new trial). The amended rule emphasized the new obligation to object by adding, "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 . . . ." *Id.*

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[15] *See also State v. Kendrick*, 550 S.W.3d 117, 122 (Mo. App. W.D. 2018) (need not decide whether trial court is required to submit self-defense instruction sua sponte). *But see State v. Endicott*, 600 S.W.3d 818, 827 (Mo. App. E.D. 2020) (rejecting argument because the note in *Isbell* was dicta, and it conflicts with *Westfall* and the MAI-CR). *But see State v. Yount*, 642 S.W.3d 298, (Mo. banc 2022) (MAI-CR are not binding to the extent they conflict with substantive law—so statutory interpretation takes precedence.)

Courts do not read rules in isolation, but rather consider them in context, harmonizing them with related rules (or statutes) on the same subject. *See Fox v. State*, 640 S.W.3d 744, 757 (Mo. banc 2022); *State ex rel. Richardson v. May*, 565 S.W.3d 191, 193 (Mo. banc 2019) (same principles as statutory interpretation). This Court's decision to remove all references to trial-court obligations without requests must be understood to substantively change the existing rule, *see Knox*, 604 S.W.3d at 322,[16] in a manner consistent with the § 546.070(4) amendment. The new rules reduced the trial court's burden (Rule 28.02) and shifted some of that burden onto the parties (Rule 28.03). Read in context with the § 546.070(4) amendment, the nature of that change is clear: the trial court is responsible for instructing the jury, but it is not necessarily responsible for catching errors that are not brought to its attention.[17]

Despite these amendments, *State v. Westfall* re-asserted a trial court's duty to sua sponte instruct the jury. The opinion did not acknowledge the

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[16] *But see State v. Blurton*, 484 S.W.3d 758, n. 7 (Mo. banc 2016) (Rule 28.02(a) applies to mandatory instructions even if not requested, whereas Rule 28.02(b) applies to non-mandatory instructions.). The *Blurton* opinion's interpretation of Rule 28.02 does not take into account the 1986 amendment, which removed references to instructing "whether requested or not" from subsection (a) but left subsection (b) untouched, or the 1983 statutory amendment.

[17] This does not mean that the trial court could never error by failing to sua sponte correct an instructional error. It simply means that sua sponte action is discretionary and fact-specific, like in all other contexts, rather than being automatically required.

statutory and rule changes and relied on case law and analysis that pre-dated the amendments. *See Westfall*, 75 S.W.3d at 281, n. 8, 9 (citing *State v. Albanese*, 920 S.W.2d 917, 922 (Mo. App. W.D. 1996), *State v. Meeks*, 619 S.W.2d 830, 832 (Mo. App. W.D. 1981), and *State v. Wright*, 175 S.W.2d 866, 870-71 (Mo. banc 1943)).[18] That decision was clearly erroneous.

b. The *Westfall* rule results in recurring injustice and absurd results.

The duty to sua sponte instruct has produced recurring injustice and absurd results by putting the onus on the State and the trial court to identify and raise defense theories in anticipation of plain-error review. This is problematic for several reasons.

First, it renders the defendant's burden to inject special negative defenses virtually meaningless. Defendants do not have to produce the evidence supporting self-defense, *State v. Endicott*, 600 S.W.3d 818, 823 (Mo. App. E.D. 2020), present a theory consistent with self-defense, *State v. Barnett*, 577 S.W.3d 124, 131 (Mo. banc 2019), or request the self-defense instruction, *Westfall*, 75 S.W.3d at n. 9. They can stay silent on the issue at trial and still receive plain-error relief for the trial court's failure to assert self-defense on

[18] The *Albanese* court cited *State v. Ehlers*, 685 S.W.2d 942, 948 (Mo. App. S.D. 1985) (pre-amendment trial; relies on 1970s cases), and *State v. Blackman*, 875 S.W.2d 122, 132 (Mo. App. E.D. 1994), which likewise relied on *Ehlers*. Neither *Albanese* nor *Blackman* addressed the statutory and rule amendments.

their behalf. This runs contrary to the basic distinction between elements and defenses, *see State v. Garoutte*, 694 S.W.3d 624, 629, n. 6 (Mo. App. W.D. 2024); *Defense*, BLACK'S LAW DICTIONARY (12th ed. 2024) ("defendant's stated reason" why prosecutor has no valid case), and to the legislature's stated intent, § 563.031.5 ("defendant shall have the burden of injecting the issue"); *Burden*, BLACK'S LAW DICTIONARY (duty or responsibility); *Inject*, AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (3rd ed. 1992) (to introduce into consideration).

The statutory language is further divested of meaning when courts apply varying burdens to defenses for which the legislature designated the ***same*** burden. Over a dozen statutory defenses impose a burden on defendants to "inject the issue." *See* §§ 562.014, 562.031, 562.066, 562.076, 563.021, 563.070, 565.010, 565.023, 565.052, 565.140, 568.010, 568.040, 569.050, 570.060, 570.070, 572.060, 575.040, 575.050, 575.060, 575.080, 577.100, RSMo.[19] (and other offenses for which sudden passion is a defense). Yet, courts have imposed a higher burden to assert some of these defenses than others. *See cf.* § 562.031 (ignorance/mistake – must request, MAI-CR 408.16); § 563.031 (defense of

[19] All statutory citations are to the current version of the Missouri Revised Statutes unless otherwise specified.

persons – need not request, MAI-CR 406.06); § 565.010 (consent – unspecified, MAI-CR 419.10).

Section 556.061(3), RSMo., defines the "burden of injecting the issue" by stating that it must be "supported by evidence" and by placing the burden of persuasion on the State. It does not say whether the defendant has to assert the defense (*e.g.* by requesting an instruction). But neither does the definition for affirmative defenses. § 556.061(2); *see cf.* § 562.071 (duress – must request, MAI-CR 410.24). The definitions statute simply does not speak to how defenses should be asserted.

The burden to "inject" a defense should mean, at least, that a defendant must seek to rely on the defense. This was the position taken by the court in *In the Interest of S.B.A.*, 530 S.W.3d 615, 626 (Mo. App. E.D. 2017): "In order to meet his burden of injecting the issue of consent, an accused must raise the issue to the trial court ***and*** must produce evidence of consent." (citing *State v. Churchill*, 454 S.W.3d 328, 341 (Mo. banc 2015) (never raised retraction issue)); *see also State v. Lewis*, 124 S.W.3d 525, 527 (Mo. App. S.D. 2004) (never sought to inject good-cause; relied on different defense); *State v. Sloan*, 664 S.W.2d 41, 43 (Mo. App. W.D. 1984) ("[T]he defendant can hardly have injected the issue if he does not tender such an instruction."). *But see State v. January*, 176 S.W.3d 187, 197 (Mo. App. W.D. 2005) (plain error despite not requesting or relying on claim-of-right). Accordingly, this Court's case law says that a

defendant is entitled to an instruction if the evidence "tends to establish ***the defendant's theory***" or supports differing conclusions. *State v. Straughter*, 643 S.W.3d 317, 321 (Mo. banc 2022) (citing *Westfall*, 75 S.W.3d at 280).

Second, relieving defendants of the burden to assert self-defense puts an unreasonable and unnecessary burden on the trial court. Instructions conferences are a lot to manage, and it can be difficult to know exactly what positions a defendant is, or is not, taking. *Thompson*, 711 S.W.3d at 348. Adding an obligation to recall the evidence for any reference to self-defense places a "substantial burden" on the court. *State v. Hiltibidal*, 292 S.W.3d 488, 493, 494 (Mo. App. W.D. 2009). "A trial judge may not immediately recognize the need for a self-defense instruction in a case where no notice had been given . . . that self-defense would be an issue." *Id.* (defendant testified against counsel's advice, he subtly implied self-defense, and counsel did not rely on the theory). In contrast, it is difficult to excuse a defendant's failure to request an instruction if he is relying on self-defense, and it is difficult to see how a defendant could suffer manifest injustice from the instruction's absence if he was not relying on the defense. If anything, the omission of an instruction in cases where the defense does not assert self-defense is an issue for postconviction proceedings. *See State v. Snyder*, 592 S.W.3d 375, 380 (Mo. App. S.D. 2019) (error that was evident to the trial court should also have been evident to trial counsel).

Third, the trial court's sua sponte duty encourages sandbagging and promotes overreliance on plain-error review. Plain error is supposed to be reserved for rare cases of manifest injustice. *Brandolese*, 601 S.W.3d at 526. But if defendants are not responsible for seeking defense instructions, they are likely to gamble with a verdict and assert the defense as error later, especially if the self-defense evidence is weak or unconvincing or if they have raised dual or alternative theories at trial. *See supra* p. 29. When instructions present potential trial strategy, the court's sua sponte duty to instruct forces the burden onto the State to prove that strategy on direct appeal. *See Slip op.* n. 3; *Beerbower*, 619 S.W.3d at 126; *Davidson*, 599 S.W.3d at 263; *Snyder*, 592 S.W.3d at 381 (no plain error when the record "clearly indicates" decision was strategic); *see cf. Watson v. State*, 520 S.W.3d 423, 435 (Mo. banc 2017) (on postconviction review, presume failure to request instruction was strategic). And the State must prove the defense strategy without the opportunity to create a record at a hearing. *See Ess*, 453 S.W.3d at n. 6 (Wilson, J., concurring in part and dissenting in part). This is why Judge Wilson noted in *State v. Ess*: "Claims of instructional error are particularly ill-suited for plain error analysis when the decision not to object . . . may have been motivated by reasonable trial strategy." *Id.* Thus, instead of promoting judicial policies to create an adequate record for appeal, make timely objections, and properly prepare jury

instructions, the trial court's sua sponte duty to instruct encourages defendants to do the opposite.

Finally, the duty to sua sponte instruct obligates the trial court—without the defendant's request or consent—to inject an argument predicated on the defendant's admission but justification for committing the charged offense. *Justification*, *Excuse*, BLACK'S LAW DICTIONARY (12th ed. 2024). The defense is inconsistent with a denial of the charge's elements. *See State v. Bruner*, 541 S.W.3d 529, 538-39 (Mo. banc 2018); *State v. Simmons*, 751 S.W.2d 85, 92 (Mo. App. E.D. 1988), *overruled on other grounds*, (inconsistent with argument that defendant acted recklessly, not knowingly). Thus, submitting a self-defense instruction sua sponte not only injects the trial court into the role of participant, *Roper*, 136 S.W.3d at 902 (may interfere with trial strategy), but, in doing so, it highlights evidence that the defendant committed the charged act. *See* § 546.380, RSMo. (court shall not comment upon the evidence). This is especially concerning if the self-defense evidence conflicts with the defendant's statements and theory at trial. Meanwhile, though, the trial court's sua sponte duty precludes relief if the court submits the instruction over the defendant's objection. *State v. Cummings*, 514 S.W.3d 110, 117 (Mo. App. W.D. 2017); *see also State v. Stone*, 188 S.W.2d 20, 22 (Mo. 1945).

In summary, the trial counsel's sua sponte duty to instruct was abrogated by statute, the *Westfall* rule is clearly erroneous, and it produces

unjust results inconsistent with judicial policies. This Court should overrule *State v. Westfall* and hold that the trial court is not per se obligated to instruct on special negative defenses that are not raised by the defense.

2. Failing to sua sponte instruct was not evident, obvious, and clear error.

This Court should find that Defendant was not entitled to a self-defense instruction because he did not request one or object to its omission. *See S.B.A.*, 530 S.W.3d at 626; *Sloan*, 664 S.W.2d at 43. But even if the Court does not go that far, the trial court's decision's not to interfere in Defendant's apparent trial strategy was not evident, obvious, and clear error.

As discussed above, sua sponte intervention to correct trial errors risks interfering with defense strategy and is generally disfavored. *See Messer*, 207 S.W.3d at 675; *Roper*, 136 S.W.3d at 902. Here, the circumstances indicated that defense counsel's decision not to request a self-defense instruction was strategic. Counsel relied on Defendant's lack of intent, not self-defense, throughout the proceedings. (Tr. 214-15) (motion for judgment of acquittal at close of State's evidence); (Tr. 246) (motion for judgment of acquittal at close of all evidence); (Tr. 258-62) (closing argument); (D9) (motion for new trial). When Defendant volunteered testimony of self-defense, counsel did not follow up (Tr. 220-25) and did not rehabilitate the testimony after it was attacked on cross-examination. The trial court directly asked if it should consider any additional

instructions, and defense counsel said no. Then, during closing argument, counsel emphasized Defendant's credibility regarding his intent and an unloaded gun, while minimizing Defendant's other stories (*i.e.* the self-defense story) (Tr. 259-61), and explicitly told the jury that self-defense was "not as relevant." (Tr. 258). The trial court acted well within reason to determine that the choice was strategic and to decline sua sponte intervention.

Moreover, the trial court was in the best position to evaluate the risk of prejudice from intervening versus deferring to counsel's decision. *See State v. Drewel*, 835 S.W.2d 494, 498 (Mo. App. E.D. 1992). A self-defense instruction was unlikely to affect the verdict; defendant had all-but admitted his self-defense story was a lie on the stand. (Tr. 229). Meanwhile, the court could thwart defense counsel's efforts to recover credibility by drawing attention back to Defendant's self-defense claim. The trial court also had greater insight on the defense strategy than is available on appeal. Off-the-record discussions, the informal instructions conference, and demeanor observations may have further evinced Defendant's desire not to submit a self-defense instruction.

Because Defendant chose not to request a self-defense instruction and submitting an instruction anyway may have interfered with his defense strategy, the trial court did not evidently, obviously, and clearly err by failing to sua sponte instruct on self-defense.

E. Defendant did not suffer a manifest injustice or miscarriage of justice.

This Court's case law is well-settled that all errors require an affirmative, fact-specific showing of manifest injustice to warrant reversal on plain-error review. *Brandolese*, 601 S.W.3d at 529. The defendant has the burden to show not only that the alleged error is of the type from which a manifest injustice ***could*** result, but also that, under the facts and circumstances of his case, a manifest injustice will ***in fact*** result if the error is not corrected. *Johnson*, 524 S.W.3d at 513. For instructional error, a defendant can establish manifest injustice only if he demonstrates an ***evident*** effect on the jury's verdict. *Baker*, 103 S.W.3d at 723; *see also Miller*, 372 S.W.3d at 470 ("apparent" effect); *Evident*, *Apparent*, BLACK'S LAW DICTIONARY (12th ed. 2024) (both meaning "obvious"). Unlike analyzing the defendant's entitlement to an instruction, the court does not view the evidence in the light most favorable to the defendant when reviewing for prejudice. *See Straughter*, 643 S.W.3d at 321.

Much of Defendant's argument goes to whether the failure to give a self-defense instruction is the type of error that ***could*** result in manifest injustice, *i.e.* one that should be reviewed for plain error at all. (Def's Br. 28-31) (structure of self-defense). But Defendant also has to establish that the facts and circumstances of this case would ***in fact*** result in manifest injustice, and

that he cannot do. The omission of a self-defense instruction did not have an evident effect on the verdict, and any potential effect would not be unjust.

Giving a self-defense instruction would not have made a difference in Defendant's case. Defendant did not ultimately rely on self-defense, so it is hard to imagine that the jury would have acquitted on that basis. Additionally, Defendant's self-defense evidence was incredible. He essentially admitted to the jury that it was a lie. (Tr. 229). This Court will not grant unreasonable, forced, or speculative inferences on appeal, *see Bruner*, 541 S.W.3d at 538, and concluding that the jury would have acquitted Defendant on that evidence is far from reasonable.

Defendant argues that no fact is proven until the jury finds it. (Def's Br. 30, 31). *See State v. Jackson*, 433 S.W.3d 390, 400 (Mo. banc 2014) (trial court cannot refuse instruction supported by evidence on a belief that no reasonable juror would believe the evidence). But that principle has no place in a prejudice analysis. On appeal, Defendant must prove outcome-determinative prejudice. *See Baker*, 103 S.W.3d at 723 (evident effect on the verdict). Even preserved error requires a reasonable probability of a different outcome. *State v. Barriner*, 34 S.W.3d 139, 150 (Mo. banc 2000). While Defendant suggests alternative facts on which he would concede manifest injustice (Def's Br. 34), he does not explain why the jury would find self-defense in this case when every witness, including Defendant himself, contradicted that theory. Nor does

Defendant explain why the jury would believe his continually shifting self-defense stories when it did not believe his claim that the gun was unloaded (on which he never wavered).

Additionally, any effect on the jury's verdict is not a "manifest injustice" because Defendant made a strategic decision not to submit a self-defense instruction. *See supra* pp. 23-24, 38-39. Strategic decisions do not support a finding of manifest injustice or miscarriage of justice. *See Bolden*, 371 S.W.3d at 806 (cannot take advantage of invited errors); *Vitale*, 688 S.W.3d at 750 (no manifest injustice). The burden for manifest injustice is on the defendant, not the State.[20] Yet, Defendant's analysis overlooks trial counsel's strategy. He makes no attempt to counter the evidence of strategy in the record or to explain why holding Defendant to that strategy on direct appeal would be unjust.

Finally, Defendant's reliance on broad statements about "reversible" plain error for self-defense instructions is misplaced. (Def's Br. 30-31). Neither *State v. Bolden* nor *State v. Westfall* analyzed or decided a manifest injustice issue. And this Court has since added a caveat to the assertions of "reversible plain error" made in *Westfall* and *Bolden*: "Failure to submit a mandatory

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[20] Courts should not require the State to show "clear trial strategy" to overcome plain error. *See contra Slip op.* n. 3; *Beerbower*, 619 S.W.3d at 125; *Davidson*, 599 S.W.3d at 262; *Snyder*, 592 S.W.3d at 381. Such a burden misapplies the plain-error standard. *See* Rule 30.20; *Brandolese*, 601 S.W.3d at 526.

instruction is reversible error under plain error review ***when the instruction is requested by the defendant and refused by the circuit court***." *Brandolese*, 601 S.W.3d at 531 (citing *Westfall*, 75 S.W.3d at 281, n. 9) (emphasis added). In *State v. Hiltibidal*, defense counsel did not repudiate the defense in closing argument as Defendant's attorney did here. 292 S.W.3d at 494. Further, *Hiltibidal*'s incorrect application of law gives it little persuasive value: the opinion recited the preserved-error prejudice standard before declaring that "manifest injustice will generally be found," *id.* at 494-95, and it disregarded the implausibility of self-defense evidence from its prejudice analysis, declaring that credibility must be left to the jury. *Id.* In *State v. Seals*, 487 S.W.3d 18 (Mo. App. S.D. 2016), the opinion provided no analysis of manifest injustice at all.[21] And the facts in *State v. Endicott* showed that it would be reasonable for the jury to acquit the defendant based on defense-of-others even though it rejected his self-defense argument. 600 S.W.3d at 826 (State's argument about defendant's opportunity to withdraw undermined self-defense but not defense-of-others.). There also was not a question of trial strategy in *Endicott*. *Id.*

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[21] Respondent's previous comment that no prior self-defense cases had relied solely on overbroad language assigning manifest injustice without case-specific analysis was mistaken. *See* Application for Transfer, p. 10; *see contra Seals*, 487 S.W.3d at 24.

Instead, this Court should look to *State v. Plunkett* and *State v. Beerbower* for guidance on whether Defendant has established manifest injustice. In *Plunkett*, the defendant declined to offer a self-defense instruction under circumstances that demonstrated counsel was aware of and had considered the self-defense evidence. 487 S.W.3d at 490 (supports strategic choice not to instruct). The same is true here. Meanwhile, the court found no manifest injustice in *Beerbower* because submitting a self-defense instruction would not have served the chosen defense theory. 619 S.W.3d at 126. The record in that case reflected an overall strategy to discredit the victim's allegations for an outright acquittal; seeking separate verdict directors for multiple acts would not serve that theory. *Id.* Here, the record shows an overall defense strategy to convince the jury that Defendant's gun was unloaded and he lacked intent to cause serious physical injury. Not only would a self-defense instruction not serve that theory, but it risked undermining the stronger defense by emphasizing and holding fast to Defendant's incredible claims.

In sum, Defendant has failed to prove that a manifest injustice or miscarriage of justice will result if the alleged error is not corrected because it is highly unlikely that the verdict would have been different with a self-defense instruction and because the failure to instruct was a result of Defendant's selected trial strategy.

The trial court did not plainly err by failing to sua sponte instruct on self-defense, and, regardless, the alleged error did not result in manifest injustice.

II. The trial court did not plainly err by failing to sua sponte intervene in the State's closing argument because the argument was not improper, and it did not have a decisive effect on the trial.

Viewed in context, the State's closing argument did not affirmatively misstate the law, it did not mislead the jury, and jurors were properly instructed on the applicable law.

A. Relevant Facts

In opening statements, the State told the jury it would hear evidence that Defendant tried to kill or seriously injure Victim by pulling the trigger on a gun. (Tr. 157-158). The prosecutor said that Defendant tried to clear the jammed gun "to make it happen." (Tr. 159).

The trial court read final jury instructions before closing arguments. (Tr. 249-55). Jury Instruction 3 told the jury that the law applicable to the case was stated in the instructions. (D7 p. 4). Instruction 5 defined assault in the first degree as follows:

> First, that on or about November 7, 2022, in the State of Missouri, the defendant ***attempted to cause*** serious physical injury to [Victim] by pointing a pistol at him and pulling the trigger.

(D7 p.6) (emphasis added). The instruction then defined "attempt":

> As used in this instruction, a person attempts to cause serious physical injury if, ***with the purpose of causing serious physical injury***, he does an act that is a substantial step toward causing that serious physical injury. . . .

(D7 p. 6) (emphasis added). Instruction 9 advised the jury, "It is your duty, and yours alone, to render such verdict under the law and the evidence as in your reason and conscience is true and just." (D7 p. 10). Jurors were instructed to "be governed in your deliberations by . . . the law as given in these instructions." (D7 p. 10).

In its initial closing argument, the prosecutor stated: "Three people heard the defendant and saw the defendant pull the gun, pull the trigger. Click. He tried to seriously physically injury [Victim]. He tried to kill him." (Tr. 256). The prosecutor emphasized that Defendant pulled the trigger, tried to manipulate the gun, and fled the county afterward. (Tr. 257). Defense counsel argued that the gun was unloaded and gave the following comments:

> But this charge, to find him guilty, is based on [Defendant]'s action. Not what everybody believes, it's based on his intent. What did he intend to do? Did he intend to cause serious physical injury by pulling the trigger of a gun? How do you cause serious physical injury to somebody by pulling the trigger of an unloaded gun? You can't.

(Tr. 259-60).

In rebuttal, the State countered defense counsel's "it's-based-on-his-intent" argument:

> [N]owhere in these instructions does intent matter. ***Read that instruction.*** The defendant, No. 5, . . . ***attempted*** to cause serious physical injury to [Victim] by pointing a pistol at him and pulling the trigger. That's uncontroverted. Where does it say his intent matters? It doesn't.

(Tr. 265-66) (emphasis added). He argued that impossibility was not a defense:

> [I]t is no defense that under the circumstances it is impossible to commit the offense if the offense could have been committed had the circumstances been as the person believed them to be. That's no defense. You can't use that defense. You can't say his intent matters. That's wrong. That's a misstatement of what this instruction says. ***Read that instruction, ladies and gentlemen***.

(Tr. 265-66) (emphasis added). The prosecutor immediately followed this argument by asking: "Why do you aim a gun at something? We talked about it earlier today, to kill him, to harm him. That's what he was doing." (Tr. 266). Three more times, the State argued that Defendant tried to harm Victim:

> The defendant knew what he was doing. He was attempting to harm him, attempting to cause serious physical injury.
>
> . . . .
>
> Why pull the trigger unless you're intending to kill or harm somebody? He even admitted to the deputy he did that, I was trying to load it after.
>
> . . . .
>
> You don't pull a gun and pull the trigger unless you know what you're doing. If you're trying to scare someone you brandish a gun. You don't pull the trigger. You know what you're doing. You don't aim it at their head. He knew what he was doing. We are just lucky it was a dud.

(Tr. 267-68).

Defense counsel did not object. (Tr. 265-68). Defendant did not claim the argument as error in his motion for new trial. (D9).

B. Standard of Review

Defendant concedes that he did not object to the State's closing argument at trial, so plain error is the only available review. (Def's Br. 21).

The plain-error standard is set out above in Point I. *See supra* pp. 34-35.

Plain error for claims of improper closing argument is rare and disfavored. *State v. Wood*, 580 S.W.3d 566, 579 (Mo. banc 2019). The trial court is in the best position to judge the effect of the State's remarks and has "wide latitude" in controlling counsel's argument. *State v. Roberts*, 709 S.W.2d 857, 866 (Mo. banc 1986); *State v. Bolden*, 799 S.W.2d 122, 123 (Mo. App. W.D. 1990). Reversal on appeal is warranted only if an improper argument had a "decisive effect" on the jury's verdict. *Wood*, 580 S.W.3d at 579. A decisive effect means there is a reasonable probability that the jury verdict would have been different absent the improper argument. *State v. Blue*, 655 S.W.396, 400 (Mo. App. E.D. 2022). The defendant bears the burden to demonstrate the argument's decisive effect. *State v. McFadden*, 369 S.W.3d 727, 747 (Mo. banc 2012). When interpreting a closing argument, "[t]he entire record is considered," not just an isolated segment. *Wood*, 580 S.W.3d at 579.

C. The State's closing argument was not improper and had no decisive effect on the jury's verdict.

The State's closing remarks, even if ill-phrased and imprecise, were not improper. *See State v. Bennett*, 201 S.W.3d 86, 90 (Mo. App. W.D. 2006). The

court in *Bennett* found that the prosecutor's rebuttal comments were ambiguous and incomplete, but that they were "reasonably responsive" to the defense's closing argument, there were no affirmative misstatements of law, and they did not mislead the jury. *Id.*; *see also State v. Twenter*, 818 S.W.2d 628, 634 (Mo. banc 1991) (discussion incomplete but not false or misleading). Here, the prosecutor's insistence that "intent" did not appear in the jury instructions may have been quibbling, but he did not affirmatively misstate the law, and the basic argument—that the jury should follow the language in the jury instructions—was proper.

Even if the argument was arguably improper, it did not have a decisive effect because it did not mislead the jury and the jury was properly instructed.

While the State cannot mislead the jury as to the law, *State v. Holmsley*, 554 S.W.3d 406, 410 (Mo. banc 2018), comments that are "arguably" misleading without clearly misstating the law do not have a decisive effect under plain error review. *See State v. Hinsa*, 976 S.W.2d 69, 74 (Mo. App. S.D. 1998) (no plain error when arguably misstated law); *see also Roberts*, 709 S.W.2d at 866 ("somewhat circuitous" but not plain error); *State v. Kearnes*, 467 S.W.3d 824, 831 (Mo. App. S.D. 2015) (did not show jury actually interpreted argument to negate element of offense); *State v. Bescher*, 247 S.W.3d 135, 142-43 (Mo. App. S.D. 2008) (stating must "first reject" first-degree murder was ambiguous, not explicitly an acquittal-first argument).

Moreover, misstatements of law in closing argument do not have a decisive effect when the jury was otherwise properly instructed on the law. *State v. Mueller*, 568 S.W.3d 62, 76 (Mo. App. S.D. 2019). Defendant cites *Holmsley* and *State v. Walter*, 479 S.W.3d 118 (Mo. banc 2016), to support his claim of reversible error, but neither applies to Defendant's case. *Holmsley* was reviewed for an abuse of discretion, not plain error. 554 S.W.3d at 410. And *Walter* involved an inflammatory exhibit, not a misstatement of law. 479 S.W.3d at 125. For alleged misstatements of law, "we assume the jury followed the law as stated in the instructions." *Mueller*, 568 S.W.3d at 76.

Defendant's case falls squarely under the circumstances of *Roberts* and *Kearnes*. In *Roberts*, the prosecutor argued: "[The verdict director] *doesn't say he has to intend to kill him*. It says 'with the purpose of promoting or furthering the death.'" 709 S.W.2d at 866. The court concluded that no plain error occurred because opposing attorneys "vigorously argued their respective theories," no objections were made, and the jury was properly instructed. *Id.* In *Kearnes*, the prosecutor argued that the jury instructions did not "say anywhere" that being "out of your mind or unconscious" was a defense. 467 S.W.3d at 831. The court held that the argument was not misleading because it was an isolated statement, the parties had previously framed the issue properly, and the jury was properly instructed to follow the instructions. *Id.*

While the State's isolated comments could be interpreted to misstate the law, context shows that the prosecutor was not saying that the jury could convict absent a purpose to cause harm. *See Wood*, 580 S.W.3d at 579. He repeatedly argued that Defendant was attempting to injure or kill Victim. Jurors are free to assign different meanings to "purpose" and "intent" under the instructions. The prosecutor urged them to be led by the instructions' language and their plain understanding, not by defense counsel's characterization. That was precisely the argument made in *Roberts*, and the court held that it was not so obviously improper to require trial-court intervention absent an objection. Moreover, like in *Kearnes*, the parties framed the issue properly for the jury throughout trial. They presented evidence and arguments disputing whether the gun was loaded and whether Defendant's purpose was to shoot Victim or to scare him. And the jury was instructed to follow the law as stated in the jury instructions, which correctly recited the applicable standard. There is no indication, given the context of the State's argument, proper framing of the factual issue, and accurate jury instructions, that the prosecutor's statements actually misled the jury. *See Kearnes*, 467 S.W.3d at 831 (no proof jury interpreted comment to negate mens rea element).

The trial court did not plainly err in failing to sua sponte correct the State's closing argument.

CONCLUSION

The circuit court committed no reversible error, and Defendant's conviction and sentence 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 13,672 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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