

**In the
Supreme Court of Missouri**

STATE OF MISSOURI,

Respondent,

v.

JASON HURST,

Appellant.

**Appeal from Circuit Court of Newton County
Fortieth Judicial Circuit
The Honorable Kevin L. Selby, Judge**

RESPONDENT'S SUBSTITUTE BRIEF

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STATEMENT OF FACTS

Jason Hurst (Defendant) appeals his convictions for tampering in the first degree (Count I), § 569.080, and resisting an arrest (Count II), § 575.150.¹ (Def. Br. at 9). Defendant was found guilty of both counts following a jury trial. (Tr. 464-465). The court sentenced Defendant as a persistent misdemeanor offender to five years for Count I and four years for Count II with the sentences to run concurrently.² (Tr. 279, 474).

In his sole point on appeal, Defendant claims that the trial court erred in refusing his proffered instructions on the necessity defense for Counts I and II on the ground that substantial evidence was presented showing that Defendant needed to steal a police car and go on a dangerous, high-speed car chase to protect himself and his wife against possible abuse by sheriff deputies. (Def. Br. at 9).

Viewing the evidence in the light most favorable to the verdict, the following facts were established at trial:

On November 13, 2017, police officers with the Newton County Sheriff's Department went to a trailer park to assist with an eviction. (Tr. 215-217, 294). Defendant and his wife had been served with an eviction notice by their

¹ All statutory references are to RSMo 2016 unless otherwise specified.

² Defendant was also charged with property damage in the first degree; the jury found Defendant not guilty of this charge. (D9:2, Tr. 465).

landlord, but they refused to leave. (Tr. 215-217). When the police arrived, both Defendant and his wife were present and had two dogs in the trailer. (Tr. 253, 366-368). The landlord was also present and told the police that he wanted to press charges against Defendant. (Tr. 215-217, 318, 427). The police asked Defendant what he was doing on the property, and Defendant replied, “What’s it look like?” (Tr. 428). The police asked him if he had dogs, and Defendant responded, “What’s it sound like?” (Tr. 428).

The police repeatedly informed Defendant that he needed to leave, but Defendant refused. (Tr. 215-217, 318). The police told him that he would be arrested and charged for trespassing if he did not go. (Tr. 215-217). In response, Defendant grabbed the back of his pick-up truck bed and refused to let go. (Tr. 216-218). The police informed Defendant that he was being arrested for trespassing and tried to remove his hands from the truck bed but could not do so. (Tr. 217-218, 319-320). The police went to sweep Defendant’s legs out from under his body, and Defendant and the police ended up on the ground. (Tr. 217-218, 324). The police and Defendant got into a struggle during which the police tased Defendant and maced him. (Tr. 217-219, 314-315). When a police officer initially tased Defendant, Defendant tried to grab the Taser from the officer. (Tr. 315). In response, the officer holstered his Taser and another officer sprayed pepper spray directly in Defendant’s face. (Tr. 315). Both the Taser and pepper spray had no effect on Defendant, who continued to fight with the

officers while lying on his back. (Tr. 315-316). At one point, Defendant lifted an officer who weighed 220 pounds using one arm. (Tr. 251, 315). While fighting with the officers, Defendant screamed at his wife to “let the dogs out.” (Tr. 220, 253). The police could hear “really loud, aggressive sounding dogs” inside the trailer Defendant was being evicted from and were “pretty worried the dogs would be released.” (Tr. 220, 253). Defendant repeatedly jerked his hands away from the officers so that they could not handcuff him. (Tr. 219-220).

After a few minutes of fighting, the police were able to handcuff Defendant with his arms behind his back and move him into the back seat of a police vehicle. (Tr. 189, 195-196, 220). Defendant continued to fight with the police as they tried to shut the doors of the vehicle. (Tr. 220). Defendant flailed, kicked, and then made his body rigid so that the police could not shut both back doors. (Tr. 220). Eventually, the officers were able to close the doors on Defendant. (Tr. 221). Defendant then stuck his head through the open sliding window between the front and back seats of the police vehicle. (Tr. 221). A police officer shoved Defendant’s head back and locked the window. (Tr. 221).

After the police secured Defendant in the backseat of the police vehicle, the police officers went to speak with Defendant’s wife. (Tr. 221). Defendant’s wife had moved around throughout the police officers’ interaction with Defendant; at times she was right next to the officers and at times she was “a

ways away.” (Tr. 220). When Defendant was placed in the police car, Defendant’s wife was sitting in her sister-in-law’s vehicle with the doors locked. (Tr. 222). While the police were attempting to convince the women to make contact with them, Defendant maneuvered his handcuffed hands from his back to his front, hit the glass divider partition to pop the lock, slid the window open, and shimmied himself through the small opening into the front seat. (Tr. 221, 226). Defendant could see that his wife was inside the car with her sister-in-law, and the police were outside of the vehicle when he drove off in the police cruiser. (Tr. 437).

Defendant drove down the road to a nearby home and turned around rapidly, hitting a car so forcefully that the front bumper of the parked car fell off and the front end was significantly damaged. (Tr. 271, 227-229, 303). The police were in pursuit, and Defendant almost hit a chasing police cruiser when he sped back toward the trailer where police first contacted him. (Tr. 228-229). Defendant saw his sister-in-law’s car with no police around it before he left the trailer park and drove into the town of Neosho, driving between 50 and 100 miles per hour. (Tr. 229-231, 305). Defendant used the police radio and had to remove his handcuffed hands completely from the wheel of the car to operate the radio. (Tr. 231). Defendant drove the vehicle with the lights on, and the stolen police cruiser swerved back and forth across the road. (Tr. 230-231, 382). Defendant drove through multiple stop signs without stopping and came close

to striking two different pursuing police vehicles during the chase. (Tr. 232, 302). Defendant also drove an oncoming motorist completely off the road. (Tr. 302).

As Defendant and the police approached the town's main boulevard, traffic increased. (Tr. 236). The police performed a "PIT" maneuver on the final turn before Defendant reached the local high school. (Tr. 236-238). Defendant had to slow down due to the turn, and the lead chase car bumped the side of the rear bumper. (Tr. 236-238, 305). Defendant's car lost traction and spun around, hitting the curb. (Tr. 236-238). The car then flipped into a ditch. (Tr. 236-238). Defendant was not harmed by the crash. (Tr. 395). When the police went to get Defendant out of the vehicle, he moved away from them and squatted on top of a gun that had flown out of the glove compartment. (Tr. 244-245). The police were able to pull Defendant out of the overturned car and arrest him, placing him in handcuffs behind his back. (Tr. 241-243). Defendant was then taken to a nearby hospital where he tested positive for multiple controlled substances. (Tr. 426-427, Ex. 9).

Defendant was charged with tampering in the first degree, resisting an arrest, and property damage. (D9:1-2). At trial, John Thurston, Defendant's brother-in-law, testified that he observed Defendant's interaction with the police officers at the trailer park. (Tr. 187-188). He said that Defendant did not do anything before the police tackled him to the ground and appeared to hit,

kick, use a Taser, and mace Defendant. (Tr. 189, 195). Defendant called out to Mr. Thurston to come help. (Tr. 195).

Defendant testified that on November 13, 2017, he was in the process of moving out of his trailer at the trailer park when four police cars arrived. (Tr. 365). Defendant said that after a brief conversation the police grabbed ahold of him and he was on the ground face first. (Tr. 367). Defendant said that the police got on all sides of him as he set an object down in his truck bed then gripped the back of the truck. (Tr. 367). Defendant demonstrated how his hands were placed on the back of the truck bed by placing his hands on the bar in front of him in the courtroom. (Tr. 367). Defendant said he was on the ground within one to two seconds and that one of the officers sprayed him in the face with mace and that he was hit with a Taser on his neck and two different places on his sides. (Tr. 368). Defendant said he started yelling, "Help me, help me" to everyone around them in the trailer park because he knew everyone there including his wife, two brothers-in-law, and a sister-in-law. (Tr. 368). Defendant said that his wife came outside and told the officers to get off of Defendant, and one officer stated, "Don't worry, we're coming for you next." (Tr. 368, 373-374). Defendant saw his wife "take off" and run over to her sister away from the police. (Tr. 368). Defendant said that he had four police officers hold his arms and legs to the ground, and the officers started saying, "Quit resisting, quit resisting." (Tr. 370). Defendant said that he could not resist. (Tr.

371). Defendant said that the officers held him down, and he started to black out because he was hyperventilating. (Tr. 371). Defendant said that he almost passed out, and he told a police officer that he could not breathe. (Tr. 371). Defendant said that the officer on his back got off and then the officers sprayed mace directly down Defendant's throat. (Tr. 371-372). Defendant believed that the police were trying to kill him and he was on the verge of losing consciousness, so he decided to "play possum" and let his body go limp, pretending to be unconscious. (Tr. 372).

Defendant said that the police officers carried Defendant to the patrol vehicle and tossed him in the back seat. (Tr. 372). Defendant was 6'4" so when the officers closed the door it pushed against his feet, moving his body so that his head was hanging out the other back door. (Tr. 372). Defendant said that a man that looked like "the Monopoly man" with a big curly mustache grabbed the door with both hands like "he was fixing to slam it." (Tr. 373). Defendant stated that when he tucked his head in to avoid getting hit by the door, the police officers began punching him in the ribs, kidneys, and back, and "the mustache guy" punched Defendant in the face causing blood to pour down his face. (Tr. 374). Defendant stated that he got the officers to stop hitting him because he "pretended once again to be unconscious" and "played possum." (Tr. 374). Defendant said he pretended that the initial punch knocked him out to get the police to stop hitting him. (Tr. 374). Defendant stated that he was belly

down while the officers were hitting him. (Tr. 375). Defendant said that it was while pretending to be unconscious, squinting at the officers with his head hanging out the door “dripping blood all down the side, back of the door, down the gravel and everywhere” that Defendant heard what “terrified [him] almost worst of all.” (Tr. 375). Defendant testified that he overheard the two officers talking about taking him to the creek. (Tr. 375). Defendant said that he did not know what that meant but he’d “heard rumors of stuff happening to people at the creeks in police incidents, but that’s neither here nor there, but that’s, I heard that at the moment.” (Tr. 375). Defendant then “heard them say, ‘let’s go get his wife over there, she’s across the road.’” (Tr. 375).

Defendant stated that he saw that his wife had gotten in the backseat of his sister-in-law’s vehicle and all four police officers went over and surrounded the vehicle. (Tr. 376). Defendant said that he saw his wife and heard her scream for help. (Tr. 376). Defendant testified that he heard the police “start screaming that they were going to bust out the window if they didn’t roll down the back window of the vehicle to get...wife in the backseat.” (Tr. 376). Defendant said that he was afraid the police were going to harm his wife because of all the things that had happened and because the same officers had come out the previous Thursday and told Defendant and his wife to leave. (Tr. 377). Defendant said that he was so terrified that he pulled the handcuffs in front of him, popped the latch on the sliding window open, and dove head-first

into the front of the police car. (Tr. 378). Defendant testified that he thought he “could distract them long enough to get my wife and make sure that she’d be okay.” (Tr. 378).

Defendant said that he pulled away in first gear and turned around at the first driveway with the police chasing him. (Tr. 378-379). Defendant got on the radio and called for help, telling the police his name and social security number so that there would be a record. (Tr. 379). Defendant said that he did not get any response and that “combined with everything that had already happened, [Defendant] felt that they were possibly trying to kill me.” (Tr. 379). Defendant said that he could have gotten out of the unlocked police door and ran away into the woods because he had lived in the area for fourteen years. (Tr. 379). Defendant was worried about what would happen if the police found him because there were no cameras. (Tr. 379-380).

Defendant testified that he decided to check on his wife, keeping the car in first gear so that he could not go over forty-five miles per hour. (Tr. 380-381). Defendant clarified that when he first drove away from the police, he saw the police chasing him and that he turned around to be sure that his wife was safe. (Tr. 437). Defendant said that when he passed by his brother-in-law, he believed he saw his wife in the backseat of the car with her sister-in-law and he “was pretty sure she was safe.” (Tr. 381, 437). Defendant said that he did not see any police officers remaining at the scene. (Tr. 437).

Defendant said that he remembered there were several store cameras in downtown Neosho and he drove there so that he could get the police officers' actions on camera. (Tr. 382, 438-439). Defendant proceeded to Neosho, making rolling stops with seven or eight police vehicles chasing him. (Tr. 382-386). Defendant stated that he saw a news crew set up on the side of the road, and Defendant slowed to 10-12 mph when the car spun and the police did the PIT maneuver. (Tr. 388-389). Defendant said that he stopped the car and put his hands up, screaming to the cameras, "They're trying to kill me, they beat me[.]" (Tr. 390). Defendant said that he heard a loud crash, and the vehicle flipped so that Defendant was squatting on the inside of the roof. (Tr. 391-392). Defendant said that the police pulled Defendant from the car, saying they were trying to save Defendant, but instead they beat Defendant's head with a baton multiple times. (Tr. 393). Defendant testified that he kept screaming, "Help, they're still trying to kill me" in front of the camera crew. (Tr. 393). He testified that his body was blocked from the camera's view by the vehicle. (Tr. 394). He stated that the police got him out on the ground and resumed beating him. (Tr. 393-394). Defendant said that with his "last remaining strength" he was able to lift his head so that a picture could be taken of his facial injuries that made the news. (Tr. 396).

During the jury instructions conference, Defendant proffered two instructions based on MAI-CR 4th 408.20 Justification: Emergency Measures.

(D13:1-2). Defense counsel did not offer separate verdict directions with proposed language anticipating the necessity instruction as required. (D13:1-9). *See* MAI-CR 4th 408.20 (note 5).

After listening to argument from the parties and reviewing case law, the court determined that there was no substantial evidence presented that supported the necessity instruction for either tampering or resisting. (Tr. 412-423). The court then refused to give Defendant's proffered instructions. (Tr. 423).

The jury deliberated for one hour and eight minutes and returned a guilty verdict for tampering and resisting arrest and a not guilty verdict for property damage. (Tr. 464-465). The court sentenced Defendant as a persistent misdemeanor offender to five years for tampering and four for resisting an arrest. (Tr. 474).

ARGUMENT

The trial court did not err in refusing Defendant's necessity instructions because there was no substantial evidence to support the instructions.

Defendant claims that the trial court erred in refusing Defendant's proffered instructions on necessity because Defendant presented sufficient evidence to support giving the instructions. The trial court did not err in denying Defendant's proffered instructions because there was insufficient evidence in the record to satisfy the statutory prerequisites outlined in § 563.026, RSMo, which defines the necessity defense.

A. Standard of Review

An appellate court “reviews de novo a trial court's decision whether to give a requested jury instruction.” *State v. Bruner*, 541 S.W.3d 529, 534 (Mo. 2018). When determining whether the trial court erred in refusing to instruct a jury on the necessity defense, a reviewing court views the defendant's claimed facts and circumstances as true and determines whether they are legally sufficient to support the instruction. *State v. Zuidema*, 552 S.W.3d 186, 187 n. 1 (Mo. App. W.D. 2018).

The necessity defense is an affirmative defense and it is the defendant's burden to both inject the issue and introduce sufficient evidence to the jury to support giving the instruction. § 563.026; § 556.061(2). Where a defendant does not present probative evidence supporting all required elements for which he

bears the burden of proof, the trial court does not err in denying the instruction. *State v. Moore*, 904 S.W.2d 365, 369 (Mo. App. E.D. 1995). A defendant's self-serving testimony and subjective beliefs are insufficient to support the necessity instruction. *Id.* See *State v. Vandiver*, 757 S.W.2d 308, 312 (Mo. App. W.D. 1988).

Entrapment is a similar affirmative defense that must be raised by the defendant and exempts acts "which would otherwise constitute an offense" as not criminal if the defendant presents "proof of both inducement to engage in unlawful conduct and an absence of a willingness to engage in such conduct.'" *State v. James*, 271 S.W.3d 638, 640 (Mo. App. S.D. 2008) (quoting *State v. Willis*, 662 S.W.2d 252, 255 (Mo. banc 1983)). In *State v. Moore*, the Court held that "a defendant is entitled to an entrapment instruction only when there is probative evidence favorable to the defense." 904 S.W.2d at 365 (citing *State v. Wells*, 731 S.W.2d 250, 251 (Mo. banc 1987)). "Where defendant's acts are consistent with a pre-existing willingness to commit the charged crime, the self-serving denial of willingness is not sufficient to require the instruction." *Id.* Even for special-negative defenses like a claim of right defense, which also operates in a similar way to excuse a defendant's criminal conduct, a trial court "does not err in not instructing on the claim-of-right defense if the only evidence supporting its submission is the testimony of the defendant concerning his subjective belief as to his right to take the property

in question.” *State v. January*, 176 S.W.3d 187, 195-195 (Mo. App. W.D. 2005) (citing *State v. Quisenberry*, 639 S.W.2d 579, 583, (Mo. banc 1982)). Because a claim of right defense is a special negative defense, the appellant bears the burden of injecting the issue, as opposed to the additional burden of proving the statutory elements. *Id.* Even though the state ultimately bears the burden of proof in these cases, a trial court is not required to give the instruction unless it was supported by the evidence “that would demonstrate [appellant] had an honest belief that she had a right to take the property[.]” *Id.*

Specifically, regarding the necessity defense, a “[t]he trial court is required to instruct the jury on the defense of justification by emergency or necessity under § 563.026 ‘when the claimed facts and circumstances, if true, are legally sufficient to support the instruction.’” *State v. Karr*, 968 S.W.2d 712, 715 (Mo. App. W.D. 1998) (quoting *State v. Owen*, 748 S.W.2d 893, 895 (Mo. App. W.D. 1988)). “[F]or a defendant to be entitled to an instruction on this affirmative defense, the defendant has the burden of producing substantial evidence that he performed the criminal act to avoid a significant harm, that there was no adequate alternative to this illegal conduct and that the harm caused was not disproportionate to the harm avoided.” *Id.*

B. History of Necessity Defense

Section 563.026 defines the necessity defense and states:

1. Unless inconsistent with other provisions of this chapter defining justifiable use of physical force, or with some other provision of law, conduct which would otherwise constitute any offense other than a class A felony or murder is justifiable and not criminal when it is necessary as an emergency measure to avoid an imminent public or private injury which is about to occur by reason of a situation occasioned or developed through no fault of the actor, and which is of such gravity that, according to ordinary standards of intelligence and morality, the desirability of avoiding the injury outweighs the desirability of avoiding the injury sought to be prevented by the statute defining the offense charged.
2. The necessity and justifiability of conduct under subsection 1 of this section 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. Whenever evidence relating to the defense of justification under this section is offered, the court shall rule as a matter of law whether the claimed facts and circumstances would, if established, constitute a justification.
3. The defense of justification under this section is an affirmative defense.

The affirmative necessity defense is defined by § 563.026 and “is based on [a] social policy which recognizes that individuals should at times be free from legal restraints in order to avoid certain imminent harms.” *State v. O’Brien*, 784 S.W.2d 187, 189 (Mo. App. E.D. 1989) (citing *United State v. Bailey*, 444 U.S. 394, 409 (1980)). This defense recognizes that “under unusual and imminent circumstances” conduct that would otherwise be criminal is not because the law prefers that a person avoid the greater harm by choosing to “bring[] about the lesser evil.” *Id.* Historically, “the defense must be one of absolute and uncontrollable necessity and this must be established beyond a

reasonable doubt.” *Id.* “Nothing less than an uncontrollable necessity, which admits of no compromise and cannot be resisted will be held a justification of the offense. Any rule less stringent than this would open the door to all sorts of fraud.” *Id.* (citing *United States v. The Diana*, 74 U.S. 354, 360-361 (1869)). The defense is “extremely limited” and will fail if the defendant was at fault in developing the harmful situation (*State v. Stewart*, 186 S.W.3d 832, 834-836 (Mo. App. S.D. 2006)) or “if there was a reasonable, legal alternative to violating the law.” *Bailey*, 444 U.S. at 410. A trial court does not err in refusing the instruction when the sole evidence supporting the instruction is based on a defendant’s subjective beliefs. *See Vandiver*, 757 S.W.2d at 312 (explaining that the trial court did not err in refusing the necessity instruction where the only reason for the defendant’s failure to seek a lawful remedy “was his own subjective belief that it would be to no avail.”)

C. Underlying Facts

Viewing the evidence in the light most favorable to giving the requested instruction, Defendant testified that while he was on the ground, he was “scared for [his] safety and [his] wife’s” because Defendant stated that the police tased him, hit him in his side or back, and maced him. (Tr. 373). Defendant said he was “freaking out” because he was in fear for his and his wife’s safety after the police allegedly said, “Don’t worry, you’re next” when his wife “took off.” (Tr. 374). Defendant stated that the police continued to beat

him when placing him in the police car and while he was injured and bleeding he claimed to have heard the officers discuss taking him to a creek and this terrified him even though he did not know what that meant. (Tr. 374-375). Defendant then said he heard the officers say, "Let's go get his wife, she's over there," and saw the officers surround the vehicle his wife was in and heard his wife screaming for help and an officer reaching in the vehicle trying to pull wife out of the car. (Tr. 374-377).

Defendant was charged with resisting arrest and tampering, and the verdict directors for these counts stated:

Instruction No. 5

As to Count I, if you find and believe from the evidence beyond a reasonable doubt:

First, that on or about November 13, 2017, in the State of Missouri the defendant knowingly operated a Chevy Tahoe automobile owned by the Newton County Sheriff's Office, and

Second, that defendant operated the automobile without the consent of the owner, and

Third, that defendant operated it, knowing that defendant did so without the consent of the owner,

Then you will find the defendant guilty under Count I of tampering in the first degree.

However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of that offense.

(D11:2)

Instruction 6 stated:

As to Count II, if you find and believe from the evidence beyond a reasonable doubt:

First, that on or about November 13, 2017, in the State of Missouri, Chad Duehring and Rico Engberg were law enforcement officers, and

Second, that Chad Duehring and Rico Engberg were making an arrest of the defendant for trespassing, and

Third, that defendant knew or reasonably should have known that one or more law enforcement officers were making an arrest of the defendant, and

Fourth, that for the purpose of preventing the law enforcement officers from making the arrest the defendant resisted by fleeing from the officers, and

Fifth, that defendant fled in such a manner that created a substantial risk of serious physical injury or death to other persons in that defendant operated an automobile at speeds in excess of ninety miles an hour, failed to maintain a single lane, and failed to obey multiple traffic control devices,

Then you will find defendant guilty under Count II of resisting arrest.

However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of that offense.

(D11:4).

Defendant proffered two necessity instructions patterned after MAI-CR 4th 408.20. These instructions stated:

PART A - GENERAL INSTRUCTIONS

One of the issues as to Count I³ in this case is whether the conduct of the defendant was justified as an emergency measure. In this state, conduct which would otherwise be an offense can be lawful in certain circumstances.

³ The second proffered jury instruction stated “Count II” in lieu of “Count I.” (D9:2). This was the only difference between the two instructions.

In order for conduct which would otherwise be an offense to be lawful, it must be necessary as an emergency measure to avoid an imminent public or private injury which is about to occur through no fault of the defendant and this injury must be so serious that, according to ordinary standards of intelligence and morality, the desirability of avoiding the injury outweighs the harm or injury sought to be prevented by the statute making the conduct an offense.

The necessity and justification for the conduct, however, cannot be based only on the morality or advisability of the statute making such conduct an offense.

PART B - SPECIFIC INSTRUCTIONS

As to Count I, if you find and believe from the evidence beyond a reasonable doubt that the defendant engaged in the conduct submitted in Instruction No. _____, you will then decide whether that conduct was lawful as an emergency measure.

If you find and believe from the evidence that it is more probably true than not true:

First, that through no fault of defendant imminent danger of serious bodily harm or death was about to occur, and

Second, that the conduct of defendant, as submitted in Instruction No. _____, was necessary as an emergency measure to avoid such injury, and

Third, that such injury, then imminent, was of such gravity that, according to ordinary standards of intelligence and morality, the desirability of avoiding the injury outweighed the harm caused or threatened by defendant's conduct as submitted in Instruction No. _____,

then you must find the defendant not guilty under Count [I or II] by reason of justifiable emergency measures.

(D13:1-2). The State objected to the instructions, arguing that the evidence demonstrated both that Defendant was no longer in imminent danger when he stole the car, that Defendant was at fault as he was the reason for the officers'

use of force on him, that Defendant's stealing the police car and going on a high-speed car chase was unnecessary as he could have remained inside the police cruiser since the harm was over at the time he fled, and that Defendant was charged with his actions from the time of his stealing the police cruiser until he was taken into custody in downtown Neosho and that Defendant's use of force in driving into town at reckless speeds and endangering the lives of many innocent people was not a lesser injury than the risk of harm he faced from the police's use of force. (Tr. 412-424).

Defense counsel argued that Defendant believed he needed to resist arrest and steal the police car to protect himself. (Tr. 413-318). Defense counsel argued that Defendant's brother-in-law testified that the police swept Defendant's legs out from under him when Defendant placed his hands on the truck bed and that this was an excessive use of force. (Tr. 413-318). Defense counsel cited this evidence as evidence that was not Defendant's subjective belief that supported giving the instruction. (Tr. 413-418). Defendant testified that his conduct in driving the police cruiser to downtown Neosho was not to escape any danger but was instead to get to a place where his arrest would be recorded. (Tr. 421-424, 437-438).

The trial court considered the arguments of both sides, reviewed the case law, and determined that viewing the evidence in the light most favorable to the instruction, the evidence did not support the justification instruction. (Tr.

417-425). Specifically, the court found that for the tampering charge Defendant's actions in fleeing in the police car were not justified because there was no imminent risk of harm to himself when he fled and Defendant's argument that he believed it was necessary to defend a third party by driving away was not going to be successful. (Tr. 417-418). After listening to additional arguments from the parties, the court found that there was also not sufficient evidence to support giving the necessity instruction for resisting an arrest because not one of the four required factors was present. (Tr. 418-425). The court found that Defendant was not faced with a present and imminent danger that would have justified his behavior and manner of escape, he was not free from fault in using force to resist the officer's effort's to arrest him, and it was clear that the risk of harm caused by Defendant's actions was not limited by any sense of necessity but was instead extremely dangerous and disproportionate to the risk of injury Defendant was seeking to avoid. (Tr. 420-423).

The court also found that Defendant had alternative remedies available to him in the form of friends and family present "who were clearly intent on observing and making sure that he was properly handled and those individuals had the ability to report and witness the event. And so I do not find that his attempt to resist was frankly justifiable in that situation." (Tr. 422-423). The court found that the force used by Defendant in fleeing was clearly harmful to

innocent motorists because Defendant was driving at a high rate of speed and forced individuals off the road. (Tr. 423). The court further found that the route Defendant took to get to Neosho Boulevard was drawn out beyond where the threatened danger had been avoided and was not justified. (Tr. 422-423). The parties stipulated that the route taken by Defendant was 10.6 miles from start to finish. (Tr. 424-425).

D. Analysis

Defendant's proffered instructions were based on the affirmative defense of necessity which is codified in Section 563.026 set forth above. "The application of the defense of justification by necessity under section 563.026 is extremely limited." *Stewart*, 186 S.W.3d at 834. "Under the statute, a person is legally justified in committing a crime (other than a class A felony or murder) when it is necessary as an emergency measure to avoid an imminent injury that is about to occur." *Id.* The defense is limited to the following circumstances: (1) the defendant is faced with a clear and imminent danger, not one which is debatable or speculative; (2) the defendant can reasonably expect that his action will be effective as the direct cause of abating the danger; (3) there is no legal alternative which will be effective in abating the danger; and (4) the legislature has not acted to preclude the defense by a clear and deliberate choice regarding the values at issue. *Id.*; *See Zuidema*, 552 S.W.3d at 190; *State v. Cox*, 248 S.W.3d 1, 7 (Mo. App. W.D. 2008) (quoting

Stewart, 186 S.W.3d at 834); *State v. Burkemper*, 882 S.W.2d 193, 199 (Mo. App. E.D. 1994); and *State v. O'Brien*, 784 S.W.2d 187, 189-190 (Mo. App. E.D. 1989)). “Under the common law, the defense must be one of absolute and uncontrollable necessity and this must be established beyond a reasonable doubt. Nothing less than an uncontrollable necessity, which admits of no compromise and cannot be resisted will be held a justification of the offense. Any rule less stringent than this would open the door to all sorts of fraud.” *O'Brien*, 784 S.W.2d at 189-190.⁴

To have erred in failing to instruct the jury on necessity, the evidence, viewed objectively in the light most favorable to giving the instruction, must have supported all the required statutory factors. In other words, there must have been a version of events which if true demonstrated that throughout the charged period of time when Defendant was resisting arrest by fleeing the police in a stolen police car, the jury could have determined that Defendant’s actions were necessary to avoid an imminent risk of injury to himself that was real and not speculative, that this need arose through no fault of Defendant,

⁴ Missouri courts have relied on similar factors in cases of escape from confinement. See *State v. Baker*, 598 S.W.2d 540 (Mo. App. W.D. 1980); *State v. Daniels*, 641 S.W.2d 488 (Mo. App. S.D. 1982); *State v. Kirkland*, 684 S.W.2d 402 (Mo. App. W.D. 1984); *State v. Simmons*, 861 S.W.2d 128 (Mo. App. E.D. 1993). These factors come from *State v. Baker*, which analyzed whether the defense of necessity was available under common law prior to the adoption of Section 563.026.

that Defendant reasonably expected that his actions would be effective to abate the danger, and that there was not a legal alternative which would have effectively abated the danger. The instruction is not warranted when the “necessity” for the action is based on the defendant’s subjective, self-serving beliefs.

- 1. The trial court did not err in denying Defendant’s necessity instructions because when viewed in the light most favorable to the instruction, the claimed facts and circumstances were not legally sufficient to support the instruction.**

A trial court should only give an affirmative defense instruction, when the court determines that “the claimed facts and circumstances, if true, are legally sufficient to support the instruction.” *State v. Simmons*, 861 S.W.2d 128, 131 (Mo. App. E.D. 1993) (citing *Owen*, 748 S.W.2d at 893. In reviewing the trial court’s decision to deny the instruction, an appellate court “need only look to whether substantial evidence was contained in the record to warrant the instruction.” *Id.* (citing *State v. Robinson*, 710 S.W.2d 14, 16 (Mo. App. 1986)). A defendant’s self-serving testimony about his subjective beliefs is insufficient to support the necessity instruction. “Further, the claimed facts and circumstances upon which appellant relies to support the instruction must not be occasioned through his own fault. *Simmons*, 861 S.W.2d at 131.

Here, the necessity defense was not warranted because the evidence did not support any of the required statutory factors. While Respondent outlines

below the multiple reasons the evidence did not support each statutory factor, any one of these reasons would be sufficient to demonstrate that the trial court did not err in failing to give the instruction.

a. The evidence demonstrated only Defendant's subjective, self-serving beliefs that his actions were necessary to avoid harm.

Defendant's actions were not necessary to avoid a risk of imminent harm that was real and not speculative. Defendant's stated purpose of driving the vehicle to Neosho was so that there would be camera footage of the police's actions when they took Defendant into custody, not so that he could escape from any harm by the police. (Tr. 437-438). Defendant testified that he drove to Neosho not to escape harm from the police but to ensure that it was recorded. (Tr. 437-438).

The trial court found that Defendant's actions were not necessary as an emergency measure to prevent unlawful harm; they were instead additional criminal actions, which created additional harm to both Defendant and the public. (Tr. 421-423). *See State v. Wyatt*, 800 S.W.2d 480, 481 (Mo. App. S.D. 1990) ("It is most obvious there was no necessity for the defendant to drive while intoxicated on his way home from the tavern."). The evidence did not support the necessity instruction because Defendant's actions in stealing the police car and going on a high-speed chase while under the influence of multiple illicit substances were to avoid a subjective risk of harm that

Defendant believed would occur. An appellant cannot rely solely on his subjective, self-serving belief that the criminal conduct was necessary. *See Vandiver*, 757 S.W.2d at 312 (“The only reason for defendant’s failure to seek such remedy was his own subjective belief that it would be to no avail.”); *See generally U.S. v. Dorrell*, 758 F.2d 427, 431 (9th Cir. 1985) (“Those who wish to protest [unlawfully] frequently are impatient with less visible and more time consuming alternatives. Their impatience does not constitute the ‘necessity’ that the defense of necessity requires[.]” *O’Brien*, 784 S.W.2d at 190 n. 3.

b. Defendant’s actions were not necessary to avoid imminent harm at the time of the offenses; instead Defendant greatly increased the risk of harm to the general public with an extended high-speed car chase.

First, Defendant’s actions of tampering with a vehicle and how he resisted his arrest by driving a stolen police car on a ten-mile, high-speed car chase were not necessary to prevent imminent harm to himself or his wife. Viewing the evidence in the light most favorable to the instruction, Defendant and his wife were not facing a risk of imminent harm at the time Defendant fled in the police car. Defendant testified that the police used excessive force in initially trying to arrest him, but that the police were not continuing to use any force on him after they believed he was secured in the back seat of the police cruiser. (Tr. 432-435). Defendant also testified that at the time he initially fled in the police car, the police were not near the vehicle, but were instead by his

brother and sister-in-law's vehicle ordering Defendant's wife and sister-in-law to open the vehicle. (Tr. 433-435). Defendant further testified that after fleeing out of sight of the officers to a remote driveway, he stopped the vehicle and radioed for help. (Tr. 378-379, 436-437, 440-441). Instead of remaining in this location or waiting for a response, Defendant then decided to drive back to the trailer park to see if his wife was safe. (Tr. 379-381). Defendant fled back past the police, who then turned around and began following him. (Tr. 380). Defendant drove past his brother and sister-in-law in their vehicle at the trailer park, and he believed that his wife was still in the backseat of their car. (Tr. 381, 437-439). There were no police around them at that time. (Tr. 438-439). Defendant then decided to drive into downtown Neosho to capture the police officers' actions in arresting him a second time on one of the store cameras on the main boulevard. (Tr. 381-382, 437-439). Defendant was under the influence of multiple controlled substances at the time. (Tr. 427). Voluntary intoxication does not relieve a person of criminal responsibility for their conduct. § 562.076. *See State v. Erwin*, 848 S.W.2d 476, 481 (Mo. banc 1993). To the extent Defendant's proffered necessity instructions were an effort to avoid the restriction that voluntary intoxication does not excuse criminal conduct by shoehorning this situation into a necessity defense, they should be ignored by this Court.

c. Defendant was at fault in causing the situation by resisting arrest.

Additionally, Defendant caused the situation giving rise to a claimed necessity defense when he resisted as the officers arrested him. The police simply told Defendant that he was trespassing and that they were going to arrest him. (Tr. 319-320). Defendant responded by grabbing the back of his truck bed with both hands, forcing the officers to use force to arrest him for trespassing. (Tr. 215-217, 247, 319-320, 365-367). Defendant testified that when the police asked him to leave, he gave sarcastic responses and then demonstrated how he gripped the back of his truck bed with both hands and refused to leave. (Tr. 365-367). The necessity instruction is “extremely limited” and unavailable to actors who were at fault in developing or occasioning the harmful situation. § 563.026; *Stewart*, 186 S.W.3d at 836.

In *State v. Owen*, the Court upheld the trial court’s denial of the necessity instruction for a felony resisting arrest. 748 S.W.3d at 895. Viewing the evidence in the light most favorable to the instruction, the Court stated that the defendant pulled into a gas station and stopped his car and a police officer stopped his patrol car nearby. *Id.* The defendant got out of his vehicle and approached the police officer, who instructed him to return to his vehicle. *Id.* After the defendant returned to his vehicle, the police officer spoke on the radio for a few moments, then approached the defendant and said, “I am going to

have to take you in. You are under arrest for driving under the influence and almost rear-ending a patrol car.” *Id.* The defendant admitted that he might have used profanity, and the officer testified that the defendant said, “F*** you.” *Id.* “The officer at this point reached in the open window of [the defendant]’s car and took hold of his neck or throat, breaking a gold necklace [the defendant] was wearing.” *Id.* The defendant testified “that he had been beaten by a police officer in California four or five years before” and the memory of that event caused him to panic and flee. *Id.* The Court found that even taking the defendant’s testimony as true, it did not establish a ground for the necessity instruction. *Id.* (citing *State v. Thomas*, 625 S.W.2d 115, 122 (Mo. banc 1981); *State v. Cole*, 377 S.W.2d 306, 307 (Mo. 1964)). “It cannot be said that he was free from fault in setting up what he now claims was an emergency or a necessity justifying his flight without making the requisite reports.” *Id.* The Court found that “[t]he defense is predicated upon the defendant’s freedom from fault in creating the emergency or necessity.” (citing § 563.026, RSMo 1986). “Therefore, defendant was not entitled to the instruction and the court was correct in refusing it.” *Id.*

Similarly, in *State v. Simmons*, the Court found that the proffered necessity instructions were not warranted for the defendant’s resistance to the use of force by the police because the defendant’s “evidence, even if true, [was] not legally sufficient to support a present and imminent danger under the

circumstances.” 861 S.W.3d at 132 (*Simmons* is an escape from confinement case, in which the court used similar factors as those described in § 563.026. These factors come from *State v. Baker*, which analyzed whether the defense was available under common law prior to the adoption of Section 563.026. 598 S.W.2d 540 (Mo. App. W.D. 1980)). The Court noted that “[t]he alleged beating took place at the scene of the arrest occasioned by [the defendant] resisting arrest and his destroying of evidence[.]” *Id.* at 132. The Court held that the defendant “was not entitled to either instruction and the trial court did not err in refusing them.” *Id.*

In the present case, it was Defendant’s resistance to his arrest the precipitated his subjective belief it was necessary to continue to resist by stealing a car and going on a high-speed chase. In other words, Defendant created the “necessity” by his own actions. The trial court did not err in failing to give the necessity instruction for these reasons.

d. Defendant did not have a reasonable expectation that his actions would be effective to abate the danger.

Defendant’s perceived danger was the risk of potential future harm he and his wife faced from the arresting police officers. Setting aside the reasons this argument failed under factor one (that Defendant’s actions were unnecessary to avoid imminent harm, that the harm was speculative, that the harm arose due to Defendant’s fault in initially resisting the arrest), Defendant

did not believe that his actions in going on a high-speed, ten-mile car chase through a populated area would effectively prevent the police from causing him additional injury.

Defendant testified that he did not believe his actions would abate the danger to himself from the police. (Tr. 437-438). Instead, he testified that he believed that the police would continue to use excessive force and physically assault him while taking him into custody and that his actions were not to avoid this perceived risk but to make sure that was recorded when it happened. (Tr. 437-438).

The trial court found that Defendant's chosen actions were not to avoid harm or abate the perceived danger but were instead to record the harm that he speculated the police might inflict on him when they caught him. (Tr. 420-423). The court found that this choice of conduct did not meet the requirements of the statutory factors supporting the necessity defense. (Tr. 420-423). The trial court did not err in failing to give the necessity instructions for this reason.

e. There were legal alternatives that would have been effective in abating the danger Defendant perceived.

Defendant had legal alternatives that would have effectively abated the alleged harm he faced. Initially, to avoid resisting arrest and the officers' alleged harm against him, Defendant could have voluntarily left the premises

on which he was trespassing or acquiesced to the officers' arrest. The police were there to escort the couple from the property and only arrested Defendant and his wife after they refused to leave. (Tr. 215-217, 319-320). After resisting arrest and being physically subdued by the police, Defendant was placed into the backseat of the police cruiser in handcuffs; the police did not continue to physically subdue Defendant after they believed he was secure. (Tr. 432-435). After he was placed in the police cruiser, Defendant could have locked himself inside the police cruiser and radioed for help to the Neosho Police Department or some other law enforcement agency without driving away. (Tr. 379). Defendant was able to operate the police radio while fleeing and call for help, demonstrating that this legal alternative to tampering was available to him. (Tr. 379). Defendant could have also waited inside the patrol vehicle to see if his wife's sister drove his wife away from the scene, which would have obviated the need to steal the police vehicle as a "necessary" measure to protect his wife from the risk of harm by the police.

In *O'Brien*, the Court noted that: "Under any definition of [the necessity defense] one principle remains constant: if there was a reasonable legal alternative to violating the law 'a chance both to refuse to do the criminal act and also to avoid the threatened harm,' the defense will fail[.]" *O'Brien*, 784 S.W.2d at 190 n. 3. (quoting *United States v. Bailey*, 444 U.S. 394 (1980) (a prison escape case)).

In *State v. Stewart*, the defendant, who was on trial for driving while intoxicated, claimed that he was entitled to a necessity instruction because he took over driving a truck after his friend, who initially drove the truck, became so intoxicated that he could no longer drive. 186 S.W.3d at 833-834. The defendant claimed that he did not have a phone to call for help and that he wanted to prevent his friend from driving or wandering from the truck. *Id.* The Court rejected this claim. *Id.* The Court found that the defendant was at least in part at fault because he left with his friend who was intoxicated and did not ask other people to drive the two home. *Id.* The court further found that there were alternatives available, such as waiting in the car until the morning or waiting on the side of the road for help. *Id.*

Similarly, in the present case, Defendant had other alternatives. After initially fleeing, Defendant could have remained hidden in the police car in his first remote location and waited for help or radioed more than one channel to call for help to the Neosho Police Department, the Missouri State Highway Patrol, or other agencies separate from the Newton County Sheriff's Department. (Tr. 379). Defendant could have also fled on foot after driving away from the police. Defendant testified:

I was – at this point the officers didn't know where I was, they were flying down Old Scenic looking for me. I'm sitting there trying to determine what to do. If I was trying to run from the officers, I'd lived in the area for 14 years, I'd lived at that trailer, I could have

easily hopped out the unlocked door and went running off in the woods if I was trying to flee from these officers.

(Tr. 379). Defendant said he did not do so because he was scared and knew there were no cameras there. He also was concerned that the police were still getting his wife. Defendant said that he decided to go check to see where his wife was “regardless.” (Tr. 380). A defendant cannot rely solely on his subjective belief that alternative lawful conduct would not be availing. *See Vandiver*, 757 S.W.2d at 312. At the time Defendant made this decision, the evidence demonstrated that Defendant’s sister-in-law could have driven Defendant’s wife away to safety in the sister-in-law’s vehicle. The evidence further demonstrated that Defendant was not at risk from any imminent danger because the police did not know where he was. Defendant’s belief that he needed to steal a car and go on a dangerous car chase in order to avoid the potential risk of harm if the police were to find him and harm him while taking him into custody or if the police were to harm his wife while taking her into custody is insufficient to warrant the instruction because it is speculative.

Furthermore, Defendant’s choice to go on a ten-mile, high-speed car chase greatly increased the risk of injury to himself and many innocent bystanders, including the civilian motorist that Defendant ran off the road. Defendant stated that there was a news crew standing by the high school when the police performed the PIT maneuver, flipping the vehicle Defendant was in

and causing it to come to a rest upside-down close to the reporters. Defendant's manner of fleeing substantially increased the risk of injury to others because he was driving while under the influence of multiple controlled substances.

For the foregoing reasons, the trial court did not err in rejecting the proposed instruction. The court only needed to find that one factor was not present at one point in the charged period to reject the instruction.

2. Defendant was not prejudiced by the trial court's failure to instruct the jury on the necessity defense.

Alternatively, even if this Court were to find that the trial court erred in refusing to submit a necessity instruction, "there must be prejudice to [Defendant] before the jury's verdict is overturned." *State v. Starr*, 998 S.W.2d 61, 65 (Mo. App. W.D. 1999); *see also State v. Jackson*, 433 S.W.3d 390, 396 n.4 (Mo. banc 2014) ("An appellate court will not remand for a new trial on the basis of [instructional] error... unless there is a reasonable probability that the trial court's error affected the outcome of the trial.").

"Failure to give a required instruction is presumed to prejudice the defendant unless the state clearly establishes otherwise." *State v. Vanlue*, 577 S.W.3d 834, 838 (Mo. App. S.D. 2019) (emphasis in original) (citing *State v. Westfall*, 75 S.W.3d 278, 284 (Mo. 2002)). Here, any prejudice from the failure to give the necessity instruction was rebutted because the record clearly establishes 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. (Tr. 477).

The necessity defense is an affirmative defense, meaning the defendant must prove that it is more likely than not that the statutory elements are true. § 563.026. *See* § 556.061 (An “affirmative defense” means both: “The defense referred to is not submitted to the trier of fact unless supported by evidence; and...If the defense is submitted to the trier of fact the defendant has the burden of persuasion that the defense is more probably true than not[.]” § 556.061(2)).

Here, Defendant’s testimony was the only evidence that attempted to establish the elements of necessity. When Defendant testified that his actions in stealing the police car were necessary, the jury “chuckled” and the trial court made a record following Defendant’s trial that it was clear the jury found Defendant’s testimony “absurd” and “found the story given by the defendant when he testified to be nonsense.” (Tr. 477). Additionally, the jury deliberated for one hour and eight minutes. (Tr. 464). A short deliberation time is a factor that courts may consider when determining whether the failure to instruct the jury resulted in prejudice to the defendant. *See Vanlue*, 577 S.W.3d at 838-839 (“The jury plainly believed Officer Sellers and disbelieved Vanlue as evidenced by the 16-minute verdict. It seems a stretch to think that instructing down...would have changed anything.”). Because it was clear that the jury did

not find Defendant's testimony supporting the necessity instruction credible, the court's failure to include a necessity instruction did not result in a reasonable probability of a different outcome. *See State v. Litterell*, 800 S.W.2d 7, 12 (Mo. App. W.D. 1990) ("[T]he risk of non-persuasion rests on the defendant" in establishing the elements of an affirmative defense); *See generally Vanlue*, 577 S.W.3d at 838; *State v. Jensen*, 524 S.W.3d 33, 38 (Mo. banc 2017).

Defendant cites several cases from this Court for the proposition that substantial evidence may come from a defendant's testimony alone. (Def. Br. at 13) (*State v. Barnett*, 577 S.W.3d 124, 132 (Mo. banc 2019); *State v. Westfall*, 75 S.W.3d 278, 280-281 (Mo. banc 2002); and *State v. Bruner*, 541 S.W.3d 529, 535 (Mo. banc 2018)). This Court found in *Bruner*, that "substantial evidence" does not "increase the burden of injecting the issue of self-defense beyond what otherwise has been required." *See Bruner*, 541 S.W.3d at 535.

However, a trial court does not err in failing to give a defense instruction "if the only evidence supporting its submission is the testimony of the defendant concerning his subjective belief[.]" *January*, 176 S.W.3d at 195. For any defense, either an affirmative or a special negative, the reviewing court does not reverse a trial court's failure to give the defendant's requested instruction if defendant did not meet his burden of adducing probative evidence that would demonstrate the elements for which he bears the burden

of proof. *State v. Kirkland*, 684 S.W.2d 402, (Mo. App. W.D. 1984); *Bruner*, 541 S.W.3d at 535; *Moore*, 904 S.W.2d at 369. For both affirmative and special negative defenses a defendant does not meet his varying burden of either probative evidence or injection “if the only evidence is the defendant’s uncorroborated “subjective conclusion” that he had such a belief.” *January*, 176 S.W.3d at 196 (discussing special negative defense) (citing *Quisenberry*, 639 S.W.2d at 582-583; *State v. Hontz*, 655 S.W.2d 590, 592-593 (Mo. App. W.D. 1983); *State v. Kramer*, 809 S.W.2d 50, 52 (Mo. App. E.D. 1991)); *Moore*, 904 S.W.2d at 369 (discussing affirmative defense).

Defendant is correct that in cases of self-defense substantial evidence to support giving the instruction may come from a defendant’s testimony. *Bruner*, 541 S.W.3d at 535. However, the evidence that *may* be true for self-defense is different than the evidence that *must* be more likely true than not for affirmative defenses like necessity and duress, where such evidence must be proved by the defendant.

Moreover, the standard of review for failure to give a self-defense instruction is not applicable to the failure to give any other justification defense because of self-defense’s unique categorization. Self-defense as a legal theory is an affirmative defense. See *Litterell*, 800 S.W.2d at 12 (“The few affirmative defenses included in the Criminal code involve excuse or justification, although not all types of justification are affirmative defenses in the code...self-defense

is not an affirmative defense.”). The legislature specifically categorized self-defense as a special negative defense, the practical result of which is that the State bears the burden of proof to show that a defendant did not act in self-defense beyond a reasonable doubt. § 556.061(3).

Unlike self-defense, the legislature chose to define the necessity defense as an affirmative defense, meaning the defendant bears the burden of proving that it is more likely than not that the statutory elements are true. Compare § 563.026 with § 563.031; § 556.061(2); *Litterell*, 800 S.W.2d at 12 (discussing the difference between an affirmative defense and the burden of injecting the issue and which party bears the risk of non-persuasion).

This reflects the importance of self-defense in our criminal justice system in that the legislature determined self-defense is a critical defense by giving it both the highest burden and making the State bear the burden of proof. It also reflects that the legislature did not assign the same importance to the necessity defense—which may be used to potentially excuse any criminal act except murder. § 563.026. Self-defense will always be limited to scenarios where the use of force against another person is at issue. In contrast, necessity is nearly limitless in that it can apply to any crime except murder. § 563.026. Allowing the necessity defense to be given on the mere basis of a defendant’s subjective belief that the criminal conduct was necessary would have an extensive impact on criminal cases.

Therefore, the application of when to give a self-defense instruction, which maintains a special categorization under the law, should be limited to other self-defense cases. Cases involving a trial court's refusal to instruct on similar justification defenses such as duress or claim of right are more instructive for when a trial court errs in refusing to instruct on necessity. *See Moore*, 904 S.W.2d at 369; *January*, 176 S.W.3d at 195-195.

Turning back to prejudice, when a defendant's evidence is clearly disbelieved by the jury, there is not a reasonable probability that the defendant was prejudiced by the trial court's failure to give an affirmative defense instruction because the defendant bore the risk of non-persuasion. Defendant was not prejudiced by the court's failure to submit Defendant's proffered instructions based on the necessity defense.

CONCLUSION

For the foregoing reasons, this Court should affirm Defendant's convictions and sentence.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 10,769 words, excluding the cover, certification and appendix, 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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