

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

KENNETH HEMPHILL

**v.
JOSEPH POLLINA**

APPELLANT,

RESPONDENT.

DOCKET NUMBER WD75110

DATE: March 26, 2013

Appeal From:

Jackson County Circuit Court
The Honorable Marco A. Roldan, Judge

Appellate Judges:

Division Three: Cynthia L. Martin, Presiding Judge, Joseph M. Ellis, Judge and Gary D. Witt,
Judge

Attorneys:

Robert A. Clarke, Blue Springs, MO, for appellant.

P. David Wylie, Independence, MO, for respondent.

MISSOURI APPELLATE COURT OPINION SUMMARY

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WESTERN DISTRICT**

KENNETH HEMPHILL,

APPELLANT,

v.

JOSEPH POLLINA,

RESPONDENT.

No. WD75110

Jackson County

Before Division Three: Cynthia L. Martin, Presiding Judge, Joseph M. Ellis, Judge and Gary D. Witt, Judge

Kenneth Hemphill appeals from a jury verdict in favor of Joseph Pollina in Hemphill's case seeking damages as a result of a bar fight that culminated in gunfire. Hemphill argues that the trial court erred in: (1) excluding evidence of Pollina's silence during his interview with detectives; (2) excluding evidence of Pollina's *Alford* plea to the charge of assault in the second degree; and (3) submitting a self-defense instruction to the jury because there was no substantial evidence to support the instruction.

AFFIRMED

Division Three holds:

(1) Generally, an out-of-court statement offered to prove the truth of the matter asserted is hearsay and inadmissible at trial. However, silence by a party opponent may be admissible as an admission against interest if the circumstances called for the party to speak. *Miranda v. Arizona*, 384 U.S. 436 (1966), holds that a person has a right to remain silent during police questioning. The exercise of the right to remain silent during police questioning is not a circumstance where a party's silence can be viewed as an admission in a subsequent civil case. The trial court did not abuse its discretion in excluding evidence of Pollina's silence during his interview with detectives.

(2) An admission against interest has three characteristics: a conscious and voluntary acknowledgement of certain facts, those facts are relevant to the offering party's cause, and the facts are either unfavorable or inconsistent with the position taken at trial by the party-opponent. In an *Alford* plea, a criminal defendant does not admit guilt; instead, the criminal defendant admits that the evidence against him is extensive and would likely result in a conviction. Pollina's *Alford* plea to assault in the second degree was an assertion of his innocence, a position that is not inconsistent with his assertion of non-liability at the civil trial. The trial court did not abuse its discretion in excluding evidence of Pollina's *Alford* plea offered to prove that Pollina admitted liability.

(3) Missouri Approved Instruction No. 32.11 sets forth four requirements for a finding of self defense: (a) the defendant had reasonable cause to apprehend and did apprehend imminent danger of death or great bodily harm from the plaintiff; (b) the defendant did not create the situation that caused the apprehension; (c) the action taken by the defendant was in defense against the apprehended imminent danger of death or great bodily harm; and (d) the defendant only used such force as was reasonable and necessary. Hemphill argued that there was insufficient evidence to support the first and fourth requirements. Whether a person has reasonable cause to apprehend the danger is resolved based on the facts that appeared to the defendant at the time he committed acts of self defense. Pollina's description of the physical altercation was sufficient evidence to support the first requirement. Whether the force used was reasonable and necessary is a question of fact for the jury. Here, the entirety of the evidence presented at trial was sufficient evidence for the jury to conclude that Pollina's firing of the gun constituted reasonable and necessary force. The trial court did not err in submitting the self-defense instruction to the jury.

Opinion by Cynthia L. Martin, Judge

March 26, 2013

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