SUPREME COURT OF MISSOURI
en banc

STATE OF MISSOURI,	)	*Opinion issued January 16, 2018*
	)	
Respondent,	)	
	)	
v.	)	No. SC95877
	)	
JEFFREY L. BRUNER,	)	
	)	
Appellant.	)	

APPEAL FROM THE CIRCUIT COURT OF JASPER COUNTY, MISSOURI
The Honorable Gayle L. Crane, Judge

Defendant Jeffrey L. Bruner appeals his convictions on charges of first-degree murder and armed criminal action, alleging the circuit court erred by refusing to submit a self-defense instruction. This Court recently reaffirmed in *State v. Smith, 456 S.W.3d 849, 852 (Mo. banc 2015)*, that if substantial evidence is presented of the elements of self-defense, then the issue is injected and self-defense must be submitted by instructing the jury that the State has the burden of proving a lack of self-defense beyond a reasonable doubt. Here, the circuit court determined Mr. Bruner failed to inject the issue of self-defense because self-defense was not supported by the evidence. While the burden of producing evidence sufficient to inject self-defense is a minimal burden, this Court agrees

it was not met here. For that reason, the circuit court did not err in refusing the self-defense instruction. The judgment is affirmed.

I. PROCEDURAL AND FACTUAL BACKGROUND

Considering the evidence in the light most favorable to submission of a self-defense instruction, the record shows Mr. Bruner and his wife, Michelle Hale, were estranged. Mr. Bruner testified that to his knowledge she was not seeing anyone else, though he was aware she had met a college football coach for a lunch date. He later learned the coach was Derek Moore.

Mr. Bruner was convinced he and his wife would reconcile. They had been married more than 20 years, and she had several extramarital affairs, once filing for divorce. Following each affair, the couple reconciled and Ms. Hale pledged her fidelity to Mr. Bruner.

Although Ms. Hale moved out of their marital home two weeks earlier, Mr. Bruner sometimes visited her at her apartment, even spending the night and having sexual relations with her on occasion. The day before the shooting, Mr. Bruner met with his wife and asked if she would go out to dinner with him the next night. She declined, saying she would have to work late.

On the day of the shooting, Mr. Bruner picked up his 14-year-old daughter after she and a friend watched a movie at a local movie theater. Mr. Bruner and his daughter went to eat at a nearby McDonald's. While there, the daughter saw a Facebook posting of her mother (Ms. Hale) with another man (Mr. Moore), apparently standing in front of the movie

theater, captioned "Date Night." The daughter showed her father the picture, and the image upset him.

Mr. Bruner testified he decided to go directly to the movie theater to talk with his wife to fix his marriage and to save her from "divine punishment;" he believed "what she was doing wasn't right" and "that God is going to punish her for what she's done." While Mr. Bruner and his daughter were on the way to the movie theater, he sent Ms. Hale two texts. One said merely, "WTF," and the other, "where are you at." Mr. Bruner received no response. The daughter told her father she wanted to go home because she did not want to see her mom and dad fighting. Mr. Bruner responded jokingly, "It's not like I'm going to kill a man." He also jokingly said, "I wouldn't put it past [your mother, a police officer,] to try to put me in jail."

Nonetheless, Mr. Bruner turned around and drove his daughter home. While there, he asked his daughter to display the Facebook post on the larger home computer screen, in part so he could ascertain whether the picture was taken at the same movie theater at which he just had picked up his daughter. He also grabbed two loaded guns (one gun belonged to Ms. Hale, which she carried while jogging) and an extra clip because he knew the man in the picture was very big and, "if he tried to beat me up or something, that I would be able to back him off with it." Mr. Moore was around 6′4″ or 6′5″, and Mr. Bruner was 5′10″ and weighed about 175 pounds.

Mr. Bruner drove to the movie theater but could not find Ms. Hale's vehicle in the parking lot. He then parked in the lot near the movie theater's only exit. While waiting for the couple to exit the movie theater, he texted back and forth with his daughter. He

asked her whether there were any other Facebook posts and confirmed his wife was wearing a black dress. The record also shows Mr. Bruner attempted to call his wife, but the call went unanswered and was logged as a "missed call."

Mr. Bruner saw Ms. Hale and Mr. Moore about to exit the movie theater. He left his car and approached the couple just after they exited the building as they were standing on the concrete sidewalk. Mr. Bruner stood slightly below the curb in the asphalt driveway, facing the movie theater, and addressed comments to his wife. Mr. Moore moved in front of Ms. Hale and approached Mr. Bruner. Mr. Bruner stepped backward and made clear he was not interested in speaking to Mr. Moore. Mr. Moore stepped toward Mr. Bruner repeatedly, and each time, Mr. Bruner stepped backward. At some point, Ms. Hale interposed herself and placed a hand on Mr. Moore's chest as if to restrain him. As the three approached the concrete median (another concrete sidewalk a step higher than the asphalt driveway separating the driveway from the parking lot), Mr. Bruner stopped backing up to avoid tripping on the median.

Ms. Hale and Mr. Moore then walked past Mr. Bruner, who pivoted to remain facing them. Mr. Moore was up on the median while Mr. Bruner remained down on the asphalt driveway. Mr. Bruner testified Mr. Moore was in a "fighting stance," which he described as not facing him square on, but standing "sideways looking at [him]," with one shoulder closer to him than the other. Mr. Moore did not move toward Mr. Bruner, nor attempt to hit him, but he did say, "I'm not from around here, motherf**ker, I'll have your throat slit in two hours." Mr. Bruner responded to Mr. Moore, "Why are you threatening me?"

Mr. Moore replied, “I don’t play these redneck games,” and then said, “You don’t know who the f**k you are messing with.”

Mr. Bruner did not testify that he then killed Mr. Moore in self-defense or that he did so because he feared for his life. Rather, his defense was that he did not act out of his own volition. Mr. Bruner testified that, immediately after Mr. Moore’s last statement, the stress caused him to go into a dissociative mental state he described as feeling almost like passing out. He says he experienced something like tunnel vision, darkness, and seeing and hearing everything as if from a distance. It felt as if everything was “closing in on [him].” Mr. Bruner said he then took out the gun and shot Mr. Moore multiple times.

Mr. Bruner testified, that due to his dissociative state, he did not so much choose to fire the gun; rather, it was as if he was not acting with volition: “I remember seeing the gun come out and I remember seeing one or two shots and I remember hearing three.” On cross-examination, he mentioned for the first time that he had seen Mr. Moore’s arm move just before the shooting, and he perceived Mr. Moore “was trying to grab [him],” although he says what he saw was blurry and indistinct due to his mental state, which he described as reducing his vision. Mr. Bruner described the shooting as something happening while he was in a surreal mental state: “It’s like it wasn’t even me. I don’t know how to explain it. I think I said it was kind of like your [sic] falling asleep and all of a sudden you flinch.” Mr. Bruner did not remember, but did not deny, shooting Mr. Moore an additional three times or kicking him in the head after he went down, which is what witnesses testified occurred. Mr. Bruner did not testify he saw or thought Mr. Moore had a weapon. Rather, when asked if he remembered a weapon on Mr. Moore, he replied, “No. I did not.” He

also never testified he was afraid Mr. Moore would cause him death or serious physical injury, or commit a forcible felony against him, or, indeed, that he feared Mr. Moore would punch him. He also said he did not consider leaving the scene, and testified, "I wished I had thought to leave."

Mr. Bruner testified his next lucid moment was sitting behind the wheel of his vehicle in the parking lot. He said he then saw individuals in the crowd coming toward him, left the gun in the car and went back out, told those coming toward him he was unarmed, removed his coat, dropped it to the ground to show he was unarmed, and lay there until the police came. He did not remember anything he said to anyone.

Mr. Bruner explained his conduct by presenting expert testimony that, at the time of the shooting, he suffered from acute stress disorder that caused him to experience dissociation and depersonalization in the face of trauma or life threatening situations, and this explained his confused memory of the shooting. The expert diagnosed Mr. Bruner with acute stress disorder, which he described as an early stage of post-traumatic stress disorder. Acute stress disorder is characterized by an abnormal reaction to a stressful situation, and the expert testified that one of the diagnostic criteria is exposure to a life-threatening situation. Here, the expert testified it was Ms. Hale's infidelity that caused stress for Mr. Bruner, which, if internalized, "can create a buildup that can ultimately result in an explosive reaction." On cross-examination, the expert said the diagnosis was not supported by any of the tests conducted but was based solely on Mr. Bruner's own statements and the evidence and pleadings at trial, the latter of which he admitted are normally not considered by a clinician in making a diagnosis.

Mr. Bruner's daughter also testified. Supportive of her father, she said he was angered by the Facebook post she showed him. They drove directly home from McDonald's (not toward the theater first). Her father said he was taking her home because he did not want her to see him kill a man. Her father also told her he would be going to jail that night and, by the end of the night, she would have neither a mother nor a father.

A retired police chief and homicide investigator, who was at the movie theater attending a movie, testified that, while Mr. Bruner was lying on the ground, he said, "They posted it all over Facebook. What's a guy supposed to do?" Another movie patron testified that before the police arrived and while Mr. Bruner was lying on the ground, he said, "Yeah. I did it. Twenty-one years of marriage and this is what it comes down to."

The physical evidence and medical examiner's testimony showed the gun was fired seven times, and Mr. Moore was hit six times: once on the outside of the right shoulder, once on the thumb side of his left forearm, once on the front of the left forearm, and three times in the back. Wounds on the palm of one hand were consistent with at least one shot being fired while the palm was against the pavement. Multiple witnesses testified, after the first three shots were fired, they saw Mr. Moore go down, first to his knees, then to all fours, at which point Mr. Bruner stepped closer or leaned over Mr. Moore and fired the additional shots into him. Multiple witnesses also testified, after the gun was empty, Mr. Bruner kicked or stomped on Mr. Moore in the head and face or stomach.

In accordance with the defense's opening statement and closing argument, the defense took the position that the stress of his wife's repeated infidelities and blind-siding him with the revelation that she had been dating another man caused Mr. Bruner to suffer

from acute stress disorder that led to the dissociative mental state and inability to control his impulses. The defense argued, therefore, Mr. Bruner did not act with deliberation or upon cool reflection and should be found not guilty of first-degree murder, defined in section 565.020[1] as "knowingly caus[ing] the death of another person after deliberation upon the matter." The defense focused on evidence tending to show Mr. Bruner did not form the intent to kill Mr. Moore at McDonald's, at home, while waiting in the theater parking lot, or when initiating the conversation with his wife.

The State argued at trial the only element of first-degree murder at issue was deliberation, defined as cool reflection on the matter for any length of time, and Mr. Bruner began such deliberation the moment he saw the Facebook posting. The State emphasized evidence tending to show Mr. Bruner had already decided to kill a man at that point. The court submitted a verdict director for first-degree murder with lesser-included offense instructions for second-degree murder and voluntary manslaughter, and armed criminal action associated with conviction for one of the homicide crimes. The circuit court also submitted an instruction based on MAI-CR 3d 308.03, allowing the jury to consider whether Mr. Bruner had a mental disease or defect in deciding whether he acted with the state of mind required for first-degree murder. The defense also sought a self-defense instruction. It was denied on the basis there was no evidence from the defendant's testimony or from any of the other witnesses that the defendant had any reasonable belief he was defending himself from imminent serious physical injury or death. The jury found

[1] All statutory references are to RSMo Supp. 2013, unless otherwise noted.

Mr. Bruner guilty of first-degree murder and armed criminal action. Mr. Bruner appealed. Following an opinion by the court of appeals, the case was transferred to this Court under Rule 83.04. *Mo. Const. art. V, § 9.*

II. STANDARD OF REVIEW

The defendant claims error in failing to give a self-defense instruction. "This Court reviews *de novo* a trial court's decision whether to give a requested jury instruction." *State v. Jackson, 433 S.W.3d 390, 395 (Mo. banc 2014)*; *accord State v. Comstock, 492 S.W.3d 204, 205-06 (Mo. App. 2016).* "The circuit court must submit a self-defense instruction 'when substantial evidence is adduced to support it, even when that evidence is inconsistent with the defendant's testimony,' [*State v. Westfall, 75 S.W.3d 278, 281 (Mo. banc 2002)*], and failure to do so is reversible error." *Smith, 456 S.W.3d at 852* (citation omitted). "In determining whether the circuit court erred in refusing to submit an instruction on self-defense, the evidence is viewed in the light most favorable to the defendant."[2] *Id.*

III. THE CIRCUIT COURT DID NOT ERR IN REFUSING TO SUBMIT SELF-DEFENSE BECAUSE INSUFFICIENT EVIDENCE WAS PRESENTED TO INJECT SELF-DEFENSE

At the time of trial, section 563.031.5 provided, "The defendant shall have the

[2] The dissent argues that, in viewing the evidence in the light most favorable to the defendant, this Court must both give the defendant all reasonable inferences and disregard all evidence contrary to giving the self-defense instruction. It cites to *Westfall*, which simply holds, "Moreover, an instruction on self-defense must be given when substantial evidence is adduced to support it, even when that evidence is inconsistent with the defendant's testimony." *75 S.W.3d at 281*. That quote does not support the proposition that this Court must disregard all evidence contrary to the giving of the self-defense instruction but rather simply reflects what this Court held in *State v. Avery, 120 S.W.3d 196, 201 (Mo. banc 2003)*, that "self-defense is submissible, even where the defendant testifies that the killing was an accident, if the inconsistent evidence of self-defense is

burden of injecting the issue of justification under this section" and "injecting the issue" was defined in section 556.051 as follows:

> When the phrase "**The defendant shall have the burden of injecting the issue**" is used in the code, it means
>
> (1) *The issue referred to is not submitted to the trier of fact unless supported by evidence*; and
>
> (2) If the issue is submitted to the trier of fact any reasonable doubt on the issue requires a finding for the defendant on that issue.

(Emphasis in original and added).[3]

The statute, therefore, requires the defendant to bear the burden of showing self-defense is "supported by evidence" to inject self-defense, at which point the burden shifts to the State to prove a lack of self-defense beyond a reasonable doubt.[4] Through the

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offered by the State or by defendant through the testimony of a third party." Contrary to the dissent's argument in favor of submitting a self-defense instruction, this does not either authorize or require the courts to supply speculative or missing inferences, nor does it transform mere words or threats or simple assaults into justification for using deadly force. *See, e.g., State v. Lammers, 479 S.W.3d 624, 632 (Mo. banc 2016); Dorsey v. State, 113 S.W.3d 311, 317 (Mo. App. 2003).*

[3] Under the revisions to the criminal code effective January 1, 2017, this provision was repealed and moved to section 556.061, RSMo Supp. 2016, which now comparably provides:

> In this code, unless the context requires a different definition, the following terms shall mean:
> ….
> (3) "Burden of injecting the issue":
> (a) The issue referred to is not submitted to the trier of fact unless supported by evidence; and
> (b) If the issue is submitted to the trier of fact any reasonable doubt on the issue requires a finding for the defendant on that issue ….

[4] This contrasts with the requirement for submitting a nested lesser-included offense. *Jackson, 433 S.W.3d at 401*, held that no additional evidence must be introduced to be

years, Missouri courts have used various terms to describe what quantum of evidence satisfies the burden of injecting self-defense. This Court summarized the history of these terms and clarified their meaning in *Westfall*:

> The quantum of proof necessary to require the giving of a self-defense instruction has been variously defined as "substantial evidence," "evidence putting it in issue," "any theory of innocence ... however improbable that theory may seem, so long as the most favorable construction of the evidence supports it," "supported by evidence," "any theory of the case which his evidence tended to establish," "established defense," and "evidence to support the theory." (Citations Omitted); *State v. McQueen*, 431 S.W.2d 445, 448–49 (Mo. 1968).

75 S.W.3d at 280 n.7; *accord, State v. Weems, 840 S.W.2d 222, 226 (Mo. banc 1992).*

Since *Westfall*, this Court has settled on describing the quantum of proof required as "substantial evidence." *See, e.g., Smith, 456 S.W.3d at 852*; *State v. Bolden, 371 S.W.3d 802, 805 (Mo. banc 2012)*. In so doing, this Court has not suggested it intended to increase the burden of injecting the issue of self-defense beyond what otherwise has been required. Sufficient "substantial" evidence is provided if there is "evidence putting a matter in issue." *Avery, 120 S.W.3d at 200.*[5] "If the evidence tends to establish the defendant's theory, or

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entitled to an instruction on a nested lesser-included offense because the evidence required to allow submission of the greater offense necessarily is sufficient to include a nested lesser-included offense, as the lesser-included offense has no elements not contained in the greater offense. By contrast, when the offense is not a nested lesser-included offense, then some evidence must support it. *State v. Brown, 524 S.W.3d 44, 48 (Mo. banc 2017)* ("[T]he determination of whether there is a basis in the evidence obligating the court to instruct [on a non-nested lesser-included offense] is based on the evidence in the case."); *accord, State v. Payne, 488 S.W.3d 161, 164 (Mo. App. 2016)* ("Because voluntary manslaughter is not a nested lesser included offense of either first- or second-degree murder, *Jackson* is distinguishable from this case and provides no support to [defendant].").

[5] The dissent opts to create a new standard for injection of self-defense: "whether there is a basis in the evidence for a reasonable doubt regarding the issue on which the state bears the burden of proof, i.e., that self-defense was not present." *Slip op. at 4*. But the dissent

supports differing conclusions, the defendant is entitled to an instruction on it." *Westfall, 75 S.W.3d at 280*. Moreover, "[s]ubstantial evidence of self-defense requiring instruction may come from the defendant's testimony alone as long as the testimony contains some evidence tending to show that he acted in self-defense." *Id*.

The elements of self-defense that must be shown by substantial evidence are set out in the self-defense statute, section 563.031, which at the time of trial provided in relevant part:

> 1. A person may, subject to the provisions of subsection 2 of this section, use physical force upon another person when and to the extent he or she reasonably believes such force to be necessary to defend himself or herself or a third person from what he or she reasonably believes to be the use or imminent use of unlawful force by such other person, unless:
>
> (1) The actor was the initial aggressor; …
>
> ….
>
> 2. A person may not use *deadly force* upon another person under the circumstances specified in subsection 1 of this section unless:
>
> (1) *He or she reasonably believes that such deadly force is necessary to protect himself, or herself or her unborn child, or another against death, serious physical injury, or any forcible felony*;
>
> ….
>
> 3. A person does not have a duty to retreat from a dwelling, residence, or vehicle where the person is not unlawfully entering or unlawfully remaining. A person does not have a duty to retreat from private property that is owned or leased by such individual.[6]

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fails to cite any authority for this standard, nor could it, for there is no such authority. This standard ignores the requirement of section 556.051(1) that self-defense must be "supported by the evidence." *§ 556.051(1)*. In other words, subsection (1) provides that only once the defendant has injected the issue through presenting evidence in support of self-defense does the State have the burden of proving beyond a reasonable doubt under subsection (2) that the defendant did not act in self-defense. *§ 556.051(1), (2)*.

[6] The revised version of section 563.031, enacted after the events at issue here, differs only in the duty to retreat. *§ 563.031, RSMo Supp. 2016.* The legislature has repeatedly modified the requirements of the duty to retreat, specifying an increasing list of places where the use of force in self-defense may be "necessary" even when safe retreat is available. *See, e.g., § 563.031, RSMo 2000* (no language stating the actor has no duty to

This Court recently noted in *Smith* that under section 563.031, to inject self-defense, before any use of force can be justified, the defendant must "reasonably believe[] such force is necessary to defend himself from what he reasonably believes to be the use or imminent use of unlawful force by another." *Smith, 456 S.W.3d at 852.* Further, *deadly* force is justified only if the defendant "reasonably believes that such deadly force is necessary to protect himself, or herself … against death, serious physical injury, or any forcible felony." *§ 563.031.2(1).*

> "Reasonably believe" means "a belief based on reasonable grounds, that is, grounds that could lead a reasonable person in the same situation to the same belief. This depends upon how the facts reasonably appeared. It does not depend upon whether the belief turned out to be true or false." MAI–CR 3d 306.06A[6]. "Deadly force" means "physical force which is used with the purpose of causing or which a person knows to create a substantial risk of causing death or serious physical injury." MAI–CR 3d 306.06A[5].

Smith, 456 S.W.3d at 852. Section 563.031.1(1) also provides that force may not be used in self-defense if the defendant "was the initial aggressor."

Although the State recognizes section 563.031 governs the elements of self-defense, the State and the defendant nonetheless repeatedly quote from cases that set out a slightly different common law formulation of self-defense, and then argue back and forth as to whether this common law test is met here.[7] While the parties are correct that these are the

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retreat); *§ 563.031.3, RSMo Supp. 2013* (there is no duty to retreat while lawfully on one's private property or in one's vehicle); *§ 563.031, RSMo Supp. 2016* (no duty to retreat from any location the person has a right to be).

[7] The common law test requires proof of four elements: (1) the absence of aggression or provocation; (2) real or apparent necessity to use deadly force to save defendant from immediate danger; (3) a reasonable cause for belief that deadly force was necessary; and (4) an attempt to do all within defendant's power consistent with personal safety to avoid

elements of self-defense under the common law, and while they largely, but not completely, parallel the elements of self-defense under the statute, it is the statute that necessarily must govern what is required to inject self-defense. Reliance on cases addressing what is required under a different test, therefore, is not helpful, and should no longer be followed.

This appeal turns on whether the three elements set out in section 563.031 were injected. *Smith* is instructive on this question. In *Smith*, this Court found the circuit court "did not err in its refusal to submit a self-defense instruction" because the evidence taken in the light most favorable to the defendant did "not establish that [defendant] reasonably believed the use of deadly force was necessary." *456 S.W.3d at 852*. The defendant in *Smith* argued there was substantial evidence to warrant a self-defense instruction because "he was 'not the initial aggressor[,] ... he tried to avoid further confrontation with [the victim] by backing away and declining to fight him, and when this was unsuccessful, he began to fear imminent serious physical injury or death.'" *Id*.

This Court held in *Smith*, that although the record showed the victim "threatened to fight, yelled at, and came within inches of [the defendant]" and the defendant at first "tried to avoid further confrontation … by backing away and declining to fight," there was no evidence the defendant reasonably believed the use of deadly force was necessary because the victim "neither hit nor exhibited a weapon to [the defendant]." *Id*. The defendant "'figured' that [the victim] was looking for a gun" when the victim ran away and stopped

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the danger. *See, e.g., State v. Thomas, 161 S.W.3d 377, 379 (Mo. banc 2005); State v. Chambers, 671 S.W.2d 781, 783 (Mo. banc 1984).*

between two dumpsters, but "[n]o one, including [the defendant], saw a weapon on [the victim] during the incident." *Id*. Therefore, the defendant in *Smith* failed to meet his burden of injecting self-defense by proffering substantial evidence of the elements of self-defense under the statute. *Id*.

Similarly, in *Dorsey*, *113 S.W.3d at 317*, the court of appeals affirmed the circuit court's decision that the defendant was not entitled to a self-defense instruction as a matter of law. In that case, the defendant "introduced a … deadly instrument into what had been[,] at most[,] a simple battery and significantly raised the level of violence." *Id*. There was no evidence the victim ever possessed or threatened the defendant with a weapon or that the defendant ever "considered himself at risk of serious physical injury or death." *Id*.

As in *Dorsey*, Mr. Bruner escalated what would at most have been a simple assault – an attempt by Mr. Moore to "grab" him – into a deadly confrontation. Mr. Moore used the same kind of language found insufficient in *Smith*, yelling and threatening to fight.[8] The evidence further showed Mr. Bruner and Mr. Moore came into close contact with one another, taking "fighting" poses, but the men never touched. Mr. Bruner said only that he saw some movement of Mr. Moore's right arm and thought perhaps Mr. Moore was going to "grab" him. On redirect, Mr. Bruner again said he did not see Mr. Moore step toward him or move his arm toward him, but just that he saw "some kind of arm motion" and "things were kind of closing in, so what the motion was isn't real clear to me."

[8] Mr. Moore threatened Mr. Bruner, saying "I'm not from around here, motherf**ker, I'll have your throat slit in two hours." Mr. Moore also yelled at Mr. Bruner: "I don't play these redneck games," and "You don't know who the f**k you are messing with."

No other evidence was offered that would support submitting self-defense. In fact, Mr. Bruner did not testify that he acted in self-defense. Although he testified and described his mental state before shooting Mr. Moore, Mr. Bruner never testified he thought Mr. Moore was going to hit him or that he was in fear of death, serious physical injury, or any forcible felony. None of the many eyewitnesses saw a weapon in Mr. Moore's possession or saw him try to attack Mr. Bruner, and the evidence was that Mr. Moore did not either hit or exhibit a weapon to Mr. Bruner.[9] Mr. Bruner testified he did not remember seeing a weapon on Mr. Moore.

Mr. Bruner has not met his burden of injecting self-defense in his case. *See § 563.031.5*; *§ 556.051*. Mr. Bruner failed to inject sufficient evidence that he reasonably believed deadly force was necessary to protect himself from death, serious physical injury, or any forcible felony. *§ 563.031.2(1)*. The dissent asks this Court to supply missing evidence by speculating that Mr. Bruner thought Mr. Moore had a knife in his hand and was fearful Mr. Moore was going to slit his throat. Not only was there no testimony that Mr. Bruner feared Mr. Moore was going to slit his throat before he could escape, but Mr. Bruner affirmatively testified he did not think Mr. Moore had a weapon. This Court cannot "supply missing evidence" or grant Mr. Bruner the type of "unreasonable, speculative, or forced inferences" the dissent proposes. *See Lammers, 479 S.W.3d at 632*.

[9] In fact, the only physical contact between them occurred after Mr. Moore was shot, as Mr. Bruner kicked Mr. Moore while he was lying on the ground. Mr. Bruner suffered no physical injury. *See State v. Drisdel, 417 S.W.3d 773,784 (Mo. App. 2013)* (acknowledging severity of victim's injury and lack of injury to defendant were factors to consider in determining no substantial evidence to support a self-defense instruction) (citation omitted).

What the Court must do, and has done, is view the evidence in the light most favorable to Mr. Bruner. Doing so, without granting him unreasonable, speculative, or forced inferences, the only relevant evidence on Mr. Bruner's objective and subjective state of mind is that Mr. Moore was swearing and threatening him and he believed Mr. Moore was about to make unwanted or offensive contact by grabbing him. Such evidence is not sufficient to justify deadly force. *§ 563.031.2(1).* Words alone are insufficient to support a claim of self-defense. *Avery, 120 S.W.3d at 206.* Neither is deadly force justified in response to fear of being grabbed or even punched. *State v. Wiley, 337 S.W.3d 41, 45 (Mo. App. 2011).* At best, Mr. Bruner showed a fear of a simple assault or battery, but "[d]eadly force cannot be used to repel a simple assault and battery." *Dorsey, 113 S.W.3d at 316.* Deadly force is only justifiable when the defendant reasonably believes that such deadly force is necessary to protect himself from death, serious physical injury, or any forcible felony.[10] *§ 563.031*; *accord, State v. Burks, 237 S.W.3d 225, 229 (Mo. App. 2007)* (finding self-defense was not injected because "[a]t no time did [defendant] testify he was aware of certain and imminent *serious* bodily injury") (emphasis added).

Neither is Mr. Bruner's argument helped by his testimony that he suffered from acute stress disorder which rendered his conduct in shooting Mr. Moore unintentional and as if it occurred "in a dream." That defense is inconsistent with self-defense, which "constitutes an intentional but justified killing, whereas accident connotes an unintentional

[10] Section 563.011(3) defines "[f]orcible felony" as "any felony involving the use or threat of physical force or violence against any individual, including but not limited to murder, robbery, burglary, arson, kidnapping, assault, and any forcible sexual offense."

killing. Self-defense and accident are therefore inconsistent." *Avery, 120 S.W.3d at 201*. For this reason, an unintentional act, such as Mr. Bruner's description of the shooting "like it wasn't even me," is not consistent with self-defense. Of course, the fact Mr. Bruner testified he did not deliberately shoot at the victim would not preclude the submission of self-defense if other evidence had injected the defense. *Id.* But no other evidence was offered supportive of self-defense. Rather, the other evidence tends to show Mr. Bruner decided he was going to "kill a man" shortly after seeing the Facebook post, and he deliberately did so.

IV. CONCLUSION

Section 563.031 clearly provides that before a self-defense instruction is necessary, there must be *evidence* from which a reasonable inference could be drawn that the defendant acted on the reasonable belief deadly force was necessary to protect from death, serious physical injury, or a forcible felony. Because the record does not contain substantial evidence supporting self-defense, Mr. Bruner was not entitled to a self-defense instruction. The circuit court did not err in refusing to submit a self-defense instruction. The judgment is affirmed.

LAURA DENVIR STITH, JUDGE

Draper, Russell, Powell and Breckenridge, JJ,
concur; Wilson, J ., dissents in separate opinion
filed; Fischer, C.J., concurs in opinion of Wilson, J

SUPREME COURT OF MISSOURI
en banc

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
v.	)	No. SC95877
	)	
JEFFREY L. BRUNER,	)	
	)	
Appellant.	)	

DISSENTING OPINION

How little is too little? This question is devilishly difficult when raised, as it is here, in the context of whether the evidence in a criminal case supports the giving of a self-defense instruction requested by the defendant. To be sure, there was very little evidence of self-defense in this case, and Bruner's version of the facts is distinctly unconvincing. But the question of what is believable and what is not is for the jury, not for the trial court or for this Court. It is difficult to articulate precisely where the line is in these cases, but I believe the Court's decision in this case steps across it. Accordingly, I respectfully dissent.

Section 563.031.5, RSMo,[1] provides, "The defendant shall have the burden of injecting the issue" of self-defense. Section 556.051 explains:

> When the phrase "**The defendant shall have the burden of injecting the issue**" is used in the code, it means
>
> (1) The issue referred to is not submitted to the trier of fact unless supported by evidence; and
>
> (2) If the issue is submitted to the trier of fact any reasonable doubt on the issue requires a finding for the defendant on that issue.

§ 556.051 (emphasis in original).

Two readings of section 556.051(1) are plausible. First, it is possible to conclude the requirement in section 556.051(1) that the issue of self-defense should not be submitted to the jury unless it is "supported by the evidence" means only what the phrase "supported by the evidence" usually means, i.e., that the evidence must be sufficient for a reasonable juror to believe the defendant acted in self-defense. In other words, section 556.051(1) could be construed so that the question of submissibility is decided ***as if*** the defendant had the burden of proof on self-defense. But this Court has never construed section 556.051(1) this way and does not purport to do so now.

Even though it is clear this Court does not now construe (and never has construed) section 556.051(1) as though – for purposes of submissibility only – the defendant had the burden of proving self-defense, this Court's decisions construing section 556.051(1) are far less clear about what the phrase "supported by the evidence" actually means and, more importantly, how it is to be applied. The answer given by the Court today (and in

[1] All statutory references are to RSMo Supp. 2013, unless otherwise noted.

its recent cases on the subject) is that there must be "substantial evidence" of self-defense. *State v. Smith* 456 S.W. 3d 849, 852 (Mo. banc 2015). Substantial evidence means "any theory of innocence … however improbable that theory may seem, so long as the most favorable construction of the evidence supports it." *State v. Kinard*, 245 S.W.2d 890, 893 (Mo. 1952); *see also State v. Avery*, 120 S.W.3d 196, 200 (Mo. banc 2003) ("'Substantial evidence' is evidence putting a matter in issue."); *State v. Stallings*, 33 S.W.2d 914, 917 (Mo. 1930) (defendant is entitled to an instruction on "any theory of the case which his evidence tended to establish"). In determining whether a refusal to submit an instruction was error, "the evidence is viewed in the light most favorable to the defendant and 'the theory propounded by the defendant.'" *State v. Westfall*, 75 S.W.3d 278, 280 (Mo banc 2002). As part of viewing the evidence in the light most favorable to the defendant, courts must disregard all contrary evidence and reject all inferences that do not support the claim of lawful self-defense. *Id.* at 281.

If this "substantial evidence" test sounds familiar, it should. It is the same test that would be applied if section 556.051(1) were interpreted – at least for purposes of determining whether a self-defense instruction should be given – as though the defendant had the burden of proof on whether he acted in self-defense. Qualifying the word "evidence" with the word "substantial" does not change the analysis any more than the qualified standards of "any evidence" or "a scintilla of evidence." As long as the focus of the analysis is on whether the evidence establishes the ***presence*** of self-defense, the Court ***in effect*** is applying a construction of section 556.051(1) that it has never adopted.

The other – and I believe proper – reading is to keep section 556.051(2) in mind when construing and applying section 556.051(1). Section 556.051(2) requires the state to prove beyond a reasonable doubt that self-defense ***was not present***. Therefore, when applying section 556.051(1), the question should be whether there is a basis in the evidence for a ***reasonable doubt*** regarding the issue on which the state bears the burden of proof, i.e., that self-defense was not present. This construction, alone, is faithful to the language of section 556.051(1) ***and*** section 556.051(2).

Admittedly, this is a fine distinction, but it is one that can and should be drawn.[2] Doing so emphasizes that doubts as to whether to instruct on self-defense "should be resolved in favor of including the instruction, leaving it to the jury to decide." *State v. Derenzy*, 89 S.W.3d 472, 474-75 (Mo. banc 2002) (addressing requests for lesser included offense instructions). Failing to do so, on the other hand, risks having trial and appellate courts usurp the jury's role as factfinder.

This does not mean a self-defense instruction should be given every time the defendant requests it. Section 556.051(1) – even construed and applied in light of section 556.051(2) – neither requires nor allows this. No matter how favorably the

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[2] In *State v. Jackson*, 433 S.W.3d 390 (Mo. banc 2014), this Court held there always is a basis in the evidence to acquit a defendant because the state bears the burden of proof beyond a reasonable doubt. *Id.* at 400 ("no evidence ***ever*** proves an element of a criminal case until all 12 jurors believe it, and no inference ***ever*** is drawn in a criminal case until all 12 jurors draw it") (emphasis in original). But *Jackson* does not apply here. *Jackson* dealt with the elements of a crime and the absence of self-defense (or other justification) is not an element of the crime of first-degree murder set forth in section 565.020. Neither due process nor the right to jury trial forbids placing the burden of production (and, perhaps, even proof) on the defendant regarding special negatives such as self-defense. *Patterson v. New York*, 432 U.S. 197, 212-14 (1977).

evidence is viewed, there will be cases in which there simply is no evidence of self-defense at all.[3] For example, if the only evidence is that the defendant and the victim were unacquainted and the defendant – acting for hire – shot the victim in the back of the head with a rifle at long range, there is no suggestion of self-defense and certainly no basis in the evidence for a reasonable doubt that the defendant might have acted in self-defense.[4] As a result, the instruction should not be given in such a case.

These "no evidence" cases, however, are not the only (or even the primary) source of difficulty in this area. There is a second category of cases, i.e., the "very little evidence" cases. Focusing on whether there is a basis in the evidence for the jury to entertain a reasonable doubt as to the state's burden to prove the defendant did not act in self-defense helps resolve this second category of cases because the applicable standard of review permits the court to consider only the evidence and inferences that support such

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[3] *See State v. Hyland*, 46 S.W. 195, 197 (1898) (trial court correctly denied defendant's request for self-defense instruction because there "was not a scintilla of evidence tending to show any assault on defendant by deceased, nor the slightest reason why defendant should have apprehended any design upon the part of deceased to kill him, or inflict any bodily harm, previous to the deadly assault which caused his death"); *see also State v. Hicks*, 77 S.W. 539, 542 (Mo. banc 1903) (trial court properly denied defendant's request for self-defense instruction because "[t]here was no evidence whatever of a difficulty or controversy between defendant and deceased at the time of the homicide, or that defendant was acting in the defense of his person when he shot and killed deceased, or anything else that would have authorized such an instruction as contended for").

[4] There also are cases in which the only evidence of self-defense seems to negate that defense. For example, if the only evidence on the question of self-defense is that the victim threatened "to cut defendant's throat two weeks from Thursday," one could view that evidence as precluding any reasonable belief of imminent harm. But, if the standard of review is faithfully applied, such cases are simply "no evidence" cases like those above. The victim's threat that he would kill the defendant two weeks later does not support self-defense and, like all other contrary evidence, must be ignored. Once ignored, there is no evidence of an imminent threat and, therefore, no basis in the evidence for any reasonable doubt on that issue and the instruction should not be given.

doubt and instructs the court to ignore all evidence and inferences that do not. In such cases, the requirements of section 556.051(1) are satisfied – especially when construed in light of section 556.051(2) – and the instruction must be given. The present case belongs in this latter category.

There can be little doubt in this case that a juror could entertain a reasonable doubt as to self-defense if the only evidence and only reasonable inferences were: (a) Bruner was attempting to address his wife; (b) Moore (significantly larger and stronger than Bruner) repeatedly confronted Bruner and (with a concrete step exacerbating his height advantage) repeatedly backed Bruner away until Bruner could back away no further; (c) Moore threatened to cut Bruner's throat; (d) Moore then moved his arm toward Bruner in an effort to grab him and could carry out the threat to cut Bruner's throat; and (e) Bruner pulled his gun, which he brought solely to defend himself if necessary, and shot Moore. Of course, as the principal opinion points out, this is not all the evidence in the case and there are other reasonable – perhaps far more reasonable – inferences to be drawn. But the standard of review requires that all of the contrary evidence and inferences must be ignored, and that only the evidence and reasonable inferences supporting the giving of the instruction may be considered.

For example, the principal opinion lingers on the inconsistencies between Bruner's claim of acute stress disorder and his claim of self-defense. This inconsistency, however, disappears when such contrary evidence is ignored, as the standard of review instructs it must be. More importantly, the principal opinion holds the evidence supports a finding that Bruner – subjectively and reasonably – feared only Moore's "unwanted or offensive

contact," not that Moore was about to employ sufficient force to cause serious injury or death. This conclusion ignores – or at least minimizes – the threat Moore had just made.

Moore stated: "I'm not from here mother f**ker, I'll have your throat slit in two hours." When Bruner asked why Moore was threatening him, Moore replied: "I don't play these redneck games. … You don't know who the f**k you are messing with." If Moore meant he would find some third party to cut Bruner's throat two hours in the future, the principal opinion is correct because – like the hypothetical in footnote 4 above – there is no basis in the evidence for any reasonable doubt as to whether Bruner subjectively and reasonably believed Moore's use of deadly force was imminent.

But why must the jury understand Moore's threat this way? A faithful application of the standard of review requires this Court to draw the inference that Moore meant he, personally, was going to cut Bruner's throat[5] and would do so sometime within the next two hours, including immediately.[6] This is not the only reasonable inference the

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[5] Further evidence that the principal opinion fails to apply the standard of review faithfully is found in the principal opinion's reliance on Mr. Bruner's affirmative testimony that "he did not think Mr. Moore had a weapon." *Slip op*. at 16. But *Westfall* clearly provides that "an instruction on self-defense must be given when substantial evidence is adduced to support it, even when that evidence ***is inconsistent with the defendant's testimony***." *Westfall*, 75 S.W.3d at 281 (emphasis added). The principal opinion claims this statement in *Westfall* "simply reflects what this Court held in *Avery*, that 'self-defense is submissible, even where the defendant testifies that the killing was an accident, if the inconsistent evidence of self-defense is offered by the State or by defendant through the testimony of a third party.'" *Slip op.* at 9 n.2. Notably, however, the defendant in *Westfall* did not testify that the killing was an accident and then request a self-defense instruction, and nothing in *Westfall* suggests that the requirement to disregard contrary evidence even when offered by the defendant applies only to such situations.

[6] The principal opinion is distracted, in my view, by a misconception that Bruner did not testify he understood Moore's threat this way. In fact, Bruner testified he "didn't know when [Moore] was going to cut my throat" because "within two hours that's any time there." But even if Bruner had testified that he understood Moore to be threatening harm remote in time and uncertain to occur, that evidence must be disregarded under the applicable standard of

evidence would support, but it is one of them – and the only one permitted by the applicable standard of review. With that inference, there is a basis in the evidence for the jury to entertain a reasonable doubt as to whether the state succeeded in proving Bruner did not act in self-defense. Therefore, under section 556.051(1), the instruction should have been given. That there are other inferences – even more compelling inferences – negating such doubts is irrelevant under the applicable standard of review.[7]

The principal opinion holds, for the first time ever, that the standard of viewing the evidence in the "light most favorable to the defendant" does not – in the circumstance of determining whether a self-defense instruction should be given – require the court to give the defendant the benefit of all reasonable inferences and to disregard all contrary evidence. *Slip op*. at 9 n.2. The principal opinion offers no support for this, nor justifies why the phrase "light most favorable to the defendant" means less in the context of whether a self-defense instruction should be given than it does when deciding other

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review. *Westfall*, 75 S.W.3d at 281; s*ee also Jackson*, 433 S.W.3d at 399 ("jury may accept part of a witness's testimony, but disbelieve other parts"). The result is not a complete absence of evidence on the question of whether Bruner had a subjective fear of imminent deadly force, however, as such a belief can be inferred from his actions. The fact that the jury is not likely to pick and choose from among the evidence in this way is irrelevant to the question of submissibility. The applicable standard of review requires courts to employ precisely that approach when deciding which questions the jury will be given to decide.

[7] The facts in *Smith* are similar to those in this case, but distinguishable. 456 S.W.3d 849. There, the defendant admitted it was not until the victim had "run away and stopped between two dumpsters did he [(Smith)] 'figure' [the victim] was looking for a gun." *Id.* at 852. As explained above, a faithful application of the standard of review should have led the Court to ignore that evidence. Nevertheless, the Court reached the proper result because once that evidence is ignored, as it should have been, there simply was no basis in the evidence for any reasonable doubt that Smith was the initial aggressor or that Smith had no subjective and reasonable belief that the victim's use of deadly force was imminent. Here, there was a basis in the evidence (if, but only if, all contrary evidence and inferences are ignored) for reasonable doubt as to these issues.

questions of submissibility,[8] determining whether the evidence is sufficient to support a verdict,[9] and reviewing the denial of a motion for directed verdict or JNOV.[10]

If, when viewing the evidence in the "light most favorable to the defendant," courts are not required to ignore all evidence to the contrary, then courts inevitably will begin to weigh the evidence and engage in credibility determinations as the principal opinion does in this case. Doing so runs afoul of the well-settled principle that courts "cannot weigh the evidence in a criminal case." *State v. Hill*, 328 S.W.2d 656, 659 (Mo. 1959). If the jury truly is entitled to "disbelieve all or any part of the evidence and refuse to draw needed inferences," as this Court stated in *Jackson*, 433 S.W.3d at 399, and

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[8] *See, e.g.*, *Howard v. City of Kansas City*, 332 S.W.3d 772, 788 (Mo. banc 2011) (in determining whether to submit the question of punitive damages in a civil case, "we view the evidence and all reasonable inferences in the light most favorable to submissibility") (quotation marks and citations omitted).

[9] The standard of review for a sufficiency of the evidence claim necessitates that all evidence be viewed "in the light most favorable to the verdict." *State v. Weems*, 840 S.W.2d 222, 228 (Mo. banc 1992). "All evidence supporting the verdict is regarded as true and all contrary evidence disregarded. *Id*.; *see also State v. Adkins*, 800 S.W.2d 28, 30 (Mo. App. 1990) ("In a determination of the sufficiency of the evidence to support a conviction, all evidence tending to support the verdict must be considered as true, contrary evidence disregarded, and every reasonable inference supporting the verdict indulged."); *State v. Belton*, 153 S.W.3d 307, 309 (Mo. banc 2005) ("The evidence and all reasonable inferences therefrom are viewed in the light most favorable to the verdict, disregarding any evidence and inferences contrary to the verdict.").

[10] The same standard of review is also used when an appellate court reviews the overruling of motions for a directed verdict and JNOV. In determining whether the trial court erred in overruling a motion for a directed verdict or motion for JNOV, "this Court must determine whether the plaintiff presented a submissible case by offering evidence to support every element necessary for liability." *Fleshner v. Pepose Vision Inst., P.C.*, 304 S.W.3d 81, 95 (Mo. banc 2010). In doing so, the "[e]vidence is viewed in the light most favorable to the jury's verdict, giving the plaintiff all reasonable inferences and disregarding all conflicting evidence and inferences." *Id*.; *see also Keveney v. Mo. Military Acad*., 304 S.W.3d 98, 104 (Mo. 2010) ("Conflicting evidence and inferences are disregarded."); *Sollenberger v. Kansas City Pub. Serv. Co.*, 202 S.W.2d 25, 29 (Mo. banc 1947) ("But when a verdict is for the plaintiff we take the plaintiff's evidence as true when not entirely unreasonable or opposed to physical laws and give plaintiff the benefit of all favorable inferences arising from all the evidence, and disregard defendant's evidence where it conflicts with plaintiff's or fails to strengthen plaintiff's case.").

numerous other cases, then legal determinations as to what questions should and should not be submitted to the jury must be made without usurping that prerogative. Instead, they must be made only by viewing the evidence in "the light most favorable to the defendant," and this requires granting the defendant all reasonable inferences and disregarding all contrary evidence. That is what the "light most favorable to the defendant" means. This Court has never held that "viewing the evidence in the light most favorable to the defendant" was a standard of review separate and distinct from "ignoring all reasonable inferences and evidence to the contrary," and it is error for the principal opinion to do so now.

Conclusion

It is easy to conclude, when viewing all of the evidence and drawing only the most likely and compelling inferences, that no reasonable juror would entertain a reasonable doubt as to whether Bruner acted in lawful self-defense in this case. But that is not the question. Instead, even (and, perhaps, especially) in the thinnest of cases, section 556.051(1) and the applicable standard of review leave such questions to the jury. Accordingly, I would vacate Bruner's convictions and remand for a new trial.

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Paul C. Wilson, Judge