

IN THE
SUPREME COURT OF MISSOURI

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

APPEAL TO THE SUPREME COURT OF MISSOURI
FROM THE CIRCUIT COURT OF JASPER COUNTY, MISSOURI
TWENTY-NINTH JUDICIAL CIRCUIT
THE HONORABLE GAYLE L. CRANE, JUDGE

APPELLANT’S SUBSTITUTE REPLY BRIEF

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JURISDICTIONAL STATEMENT

Appellant adopts and incorporates by reference the Jurisdictional Statement from Appellant's Substitute Brief.

STATEMENT OF FACTS

Appellant adopts and incorporates by reference the Statement of Facts from Appellant's Substitute Brief.

ARGUMENT

The trial court erred in refusing to instruct the jury on self-defense, because there was substantial evidence putting that defense in issue and thus the trial court’s refusal violated Jeff’s rights to due process of law, to present a defense, and to a fair trial, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that the jury could have found that Jeff was not the initial aggressor, and he had a reasonable belief that deadly force was necessary to protect himself against an immediate danger of serious physical injury from Derek given the size disparity between them, Derek’s actions leading up to the shooting, and Jeff’s mental state.

The seminal legal issue before this Court is one of threshold – at what point does a defense codified by statute become a question for the jury?

Respondent in its brief argues that Jeff’s belief that he needed to kill Derek to save himself from immediate danger of death or serious physical injury was not reasonable (Resp. br. 23). But the reasonableness of Jeff’s belief was a question of fact for the jury to determine. *State v. Amschler*, 477 S.W.3d 10, 14 (Mo. App., E.D. 2015); *State v. Chambers*, 671 S.W.2d 781, 783 (Mo. banc 1984). In *State v. Whipple*, No. ED102962, Mo. App. (filed October 18, 2016), the Court of Appeals reversed and remanded Mr. Whipple’s convictions of assault, tampering, and unlawful use of a weapon for failure of the trial court to give self-defense

instructions. In *Whipple*, the evidence cited supporting the reasonableness of the defendant's belief was testimony that the victim was on the defendant's property uninvited, refused to leave, and threatened the defendant with bodily harm. The Court noted:

This Court is aware that, generally, insults or verbal threats alone are not sufficient to justify deadly force [citation omitted], and nothing in this opinion should be read to suggest otherwise. However, because we do not know the exact substance of [the victim's] threats and we must take the facts in the light most favorable to Defendant [citation omitted], we consider the alleged threats as one of several factors leading to Defendant's belief that the use of deadly force was necessary.

Whipple, slip op. at 13, n. 10. The *Whipple* Court continued to analyze the factors under the four-factor test, which have been discussed in the two opening briefs in this case, and concluded in each that "the determination of whether they are met lies within the sound discretion of the jury." *Id.*, slip op. at 14-17. See, *State v. Miller*, 91 S.W.3d 630, 635 (Mo. App., W.D. 2002) (when conflicting evidence existed as to one of the prerequisites of self-defense, the issue was within the sound discretion of the jury).

Respondent argues in its brief that Jeff was not prejudiced by the trial court's failure to give a self defense instruction (Resp. br. at 30ff). But once the initial question is answered in the affirmative – whether the jury should have been instructed on self-defense because sufficient evidence supported giving the

instruction – then the second question, that of prejudice, answers itself. If substantial evidence supported giving the instruction, then a reasonable jury could have found self-defense and acquitted Jeff of murder in the first degree.

Respondent even argues, citing *State v. Nathan*, 404 S.W.3d 253, 266 (Mo. banc 2013), that where the jury has found deliberation for first degree murder, there can be no prejudice in failing to give a self-defense instruction (Resp. br. 34). This is belied by this Court’s reversals in first degree murder cases for failure to give a self-defense instruction: *State v. Chambers*, 671 S.W.2d 781 (Mo. banc 1984); *State v. Weems*, 840 S.W.2d 222 (Mo. banc 1992).

Self-defense in this case was a question for the jury. Jeff was prejudiced by the trial court’s error in refusing to instruct the jury on self-defense and thereby hold the State to its burden of proving beyond a reasonable doubt that Jeff did not act in lawful self-defense.

CONCLUSION

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

Respectfully submitted,

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Certificate of Compliance and Service

I, Ellen H. Flottman, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word in Times New Roman size 13 point font. Excluding the cover page, the signature block, and this certificate of compliance and service, the brief contains 845 words, which does not exceed the 7,750 words allowed for a reply brief.

On this 20th day of October, 2016, an electronic copy of Appellant's Substitute Reply Brief was served through the Missouri e-Filing System on Rachel Flaster, Assistant Attorney General, at Rachel.Flaster@ago.mo.gov.

/s/ Ellen H. Flottman

Ellen H. Flottman