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## NOTE

### Sound and Fury: Substantial Evidence in *State v. Bruner*

*State v. Bruner*, No. SD 33982, 2016 WL 4130831 (Mo. Ct. App. 2016) (en banc)

*Anthony J. Meyer*\*

#### I. INTRODUCTION

With facts as sensational and lurid as any seen in the practice of law, *State v. Bruner*<sup>1</sup> has made its way to the Supreme Court of Missouri, where the judges will decide what is meant by the phrase “substantial evidence” and under what circumstances a defendant in a homicide trial is entitled to a self-defense instruction. *State v. Bruner* has the potential either to clarify a standard that currently lacks a tenable definition or nudge the fact-finding process in jury trials imperceptibly, and impermissibly, outside the province of the jury.

This Note argues that the current standard for substantial evidence is both confusing and inconsistent in Missouri case law. In the instant case, the standard for substantial evidence applied by the Missouri Court of Appeals, Southern District, involved weighing the credibility of the evidence when, according to the weight of authority in Missouri case law, the substantial evidence standard is a low one and does not include making determinations of credibility.<sup>2</sup> Substantial evidence would be better defined as any evidence that is more than a mere scintilla that puts a matter in issue.

Part II provides a factual summary and the holding of the case. Part III examines Missouri case law for the quantum of evidence meant by substantial evidence in the context of self-defense instructions. Part IV outlines the reasoning behind the Southern District’s holding and summarizes Judge Scott’s concurring opinion, which focused on prejudice analysis, and Judge Lynch’s dissenting opinion, which argued that there was substantial evidence adduced to support a self-defense instruction. Part V proposes an integrated definition of substantial evidence and considers the implications of the Southern District’s standard for substantial evidence and those of this Note’s proposed alternative. In considering the implications, Part V includes a discussion of

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1. No. SD 33982, 2016 WL 4130831, at \*1 (Mo. Ct. App. Aug. 3, 2016) (en banc).

2. *Id.* at \*8 (Scott, J., concurring).

the effects of a hypothetical mandatory self-defense instruction in homicide trials. Part V ends with a discussion of prejudice analysis. Part VI provides a conclusion.

## II. FACTS AND HOLDING

Jeffrey L. Bruner (“Bruner”) appealed after he was convicted of first-degree murder and armed criminal action in the Jasper County Circuit Court.<sup>3</sup>

In November 2013, Bruner and his wife, Michelle Bruner (“Michelle”), were estranged.<sup>4</sup> Michelle had moved out approximately two weeks before, and, on the evening of November 1, she went to the movies on a date with Derek Moore (“Moore”),<sup>5</sup> an assistant football coach at Missouri Southern State University. Moore stood at 6’5”, while Bruner was 5’11” and weighed 170 pounds.<sup>6</sup> Michelle posted a picture of herself and Moore outside the movie theater on Facebook.<sup>7</sup> Bruner’s daughter showed him this picture while the two were having dinner.<sup>8</sup> Bruner was stunned; he decided to go to the theater to confront Michelle.<sup>9</sup> Bruner took his daughter home and told her that he “didn’t want [her] to see him kill a man,” that she probably would not have a mom or dad by the end of the night, and that “he would be going to jail that night[.]”<sup>10</sup>

Upon arriving home, Bruner looked at the picture again on Facebook.<sup>11</sup> Seething, he took two loaded pistols and an extra ammunition clip and drove to the theater.<sup>12</sup> After Bruner could not find Michelle’s Jeep in the parking lot, he parked facing the theater entrance and waited.<sup>13</sup>

When Michelle and Moore came out of the theater, Bruner approached them and asked what was going on.<sup>14</sup> An argument ensued.<sup>15</sup> Bruner told Moore, “This doesn’t have to do with you. I just want to talk to my wife[.]”<sup>16</sup> Moore said, “She moved out pal.”<sup>17</sup>

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3. *Id.* at \*1 (majority opinion).

4. *Id.*

5. *Id.*; see also *MSSU Assistant Football Coach Killed*, ESPN (Nov. 3, 2013), [http://www.espn.com/college-football/story/\\_/id/9915856/derek-moore-missouri-southern-state-assistant-killed-shooting](http://www.espn.com/college-football/story/_/id/9915856/derek-moore-missouri-southern-state-assistant-killed-shooting).

6. *Bruner*, 2016 WL 4130831, at \*2.

7. *Id.* at \*1.

8. *Id.*

9. *Id.*

10. *Id.* (alterations in original).

11. *Id.*

12. *Id.*

13. *Id.* at \*2.

14. *Id.*

15. *Id.*

16. *Id.* (alteration in original).

17. *Id.*

Moore approached Bruner during the argument, and Bruner took a few steps back.<sup>18</sup> The two were standing on the edge of the median by the street, which Bruner did not want to trip over, so Bruner pivoted around and faced Michelle and Moore again.<sup>19</sup> At this point, Moore said, “I’m not from here, mother fucker, I’ll have your throat slit in two hours.”<sup>20</sup> Bruner asked why Moore was threatening him.<sup>21</sup>

Bruner testified that Moore then stepped onto the median, and Bruner perceived that Moore went into a “fighting stance” and moved his arm up to grab Bruner.<sup>22</sup> While Moore’s back was turned, Bruner drew a pistol from his jacket and shot Moore several times in the back, killing him.<sup>23</sup> Bruner shot Moore several more times when Moore fell to his knees.<sup>24</sup>

Witnesses observed that there was an argument preceding the shooting in which Bruner yelled at Michelle, but that there was no physical contact among any of the three before Moore was shot.<sup>25</sup> The only physical contact was after Bruner shot Moore; after Moore had collapsed, Bruner kicked him in the stomach and head.<sup>26</sup>

A high profile, three-day jury trial followed.<sup>27</sup> At the jury instructions conference, the defense tendered a self-defense instruction<sup>28</sup> pursuant to Missouri Approved Instructions (“MAI”)-Criminal 306.06, Part A General Statement of Law, which the State opposed.<sup>29</sup> The trial court refused to grant the instruction.<sup>30</sup>

Bruner was convicted of first-degree murder and armed criminal action.<sup>31</sup> The jury recommended a sentence of life without parole on the murder charge and a sentence of five years’ imprisonment on the armed criminal

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18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.* at \*2, \*5. There is an inconsistency in Bruner’s testimony in that Bruner said Moore faced him in a fighting stance, yet uncontroverted medical proof showed that Moore was shot in the back. *Id.* at \*8 (Scott, J., concurring). As Judge Scott wrote in the concurring opinion, “I cannot do justice to the prosecutor’s certain shredding of Bruner’s credibility on cross-examination, which doubtlessly contributed to the outcome.” *Id.* at \*7 n.1.

24. *Id.* at \*5 (majority opinion).

25. *Id.* at \*2.

26. *Id.*

27. *Id.*

28. *Id.* at \*2 n.3.

29. *Id.*; MO. APPROVED JURY INSTR. (CRIMINAL) 306.06A (3D ED.).

30. *Bruner*, 2016 WL 4130831, at \*3.

31. *Id.*

action charge.<sup>32</sup> The defense moved for a new trial, citing the court's refusal to grant the self-defense instruction, but the circuit court denied the motion.<sup>33</sup>

Bruner appealed on this one point, arguing that the trial court erred in denying his motion for a new trial because he submitted evidence sufficient to receive the self-defense instruction.<sup>34</sup> He did not offer a point on his conviction for armed criminal action<sup>35</sup> or challenge the sufficiency of the evidence on that count. Compiling the facts most favorable to Bruner, the Southern District held that there was no substantial evidence from which a reasonable fact-finder could find that Bruner acted in self-defense.<sup>36</sup>

### III. LEGAL BACKGROUND

To make a submissible self-defense claim, a defendant must introduce substantial evidence of four elements: (1) absence of aggression on the defender's part, "(2) real or apparent necessity for the defender to kill to save herself from an immediate danger of serious bodily injury or death," "(3) reasonable cause for the defender's belief in such necessity[,] and (4) an attempt by the defender to do all within her power consistent with her personal safety to avoid the danger and the need to take a life."<sup>37</sup> The standard is an objective one, based on how a hypothetical reasonable and prudent person would have acted.<sup>38</sup> The evidence to support a self-defense instruction can come from the defendant's testimony alone.<sup>39</sup> Further, when substantial evidence is adduced for each element, the trial court *must* submit a self-defense instruction, and failure to do so is reversible error.<sup>40</sup> The Supreme Court of Missouri has ruled that proper jury instructions, "as to all potential convictions and defenses, [are] so essential to ensure a fair trial that if a reasonable juror could draw inferences from the evidence presented the defendant is not required to put on affirmative evidence to support a given instruction."<sup>41</sup> Finally, it should be noted that self-defense is a special affirmative defense, and, once self-defense is injected into a case by a defendant, it becomes the State's burden to disprove it.<sup>42</sup>

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32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* However, to be convicted of armed criminal action, one must have committed a criminal act. *State v. Weems*, 840 S.W.2d 222, 228 (Mo. 1992) (en banc).

36. *Bruner*, 2016 WL 4130831, at \*3.

37. *State v. Avery*, 120 S.W.3d 196, 200–01 (Mo. 2003) (en banc) (citing *Weems*, 840 S.W.2d at 226).

38. *State v. Smith*, 456 S.W.3d 849, 852 (Mo. 2015) (en banc).

39. *State v. Nunes*, 546 S.W.2d 759, 764 (Mo. Ct. App. 1977).

40. *Smith*, 456 S.W.3d at 852.

41. *State v. Westfall*, 75 S.W.3d 278, 281 (Mo. 2002) (en banc).

42. *State v. Minnis*, 486 S.W.2d 280, 284 (Mo. 1972); MO. ANN. STAT. § 563.031.5 (West 2017) (defendant has burden of injecting).

Before analyzing the specifics of self-defense instructions, it is helpful to consider the role of jury instructions in Missouri law. If an instruction from the MAI is applicable to the facts of a case, that instruction must be used.<sup>43</sup> In the *Missouri Practice Series*, the authors write that the MAI:

[T]ell the jury in language it can understand how its findings on ultimate issues of fact affect its verdict. Basically, they tell the jurors that if they believe certain propositions of fact, plaintiff wins; if they do not believe any such propositions of fact, plaintiff loses. Under this approach, the jury need not concern itself with the law and instead can concentrate on its role as the sole judge of the facts. The instructions already will have applied the law to the facts.<sup>44</sup>

Further, “[e]qually as important, the MAI approach leaves evidentiary detail to the argument of counsel and submits only the ultimate issues for the jury’s resolution by simple and concise instructions.”<sup>45</sup> In criminal cases, an instruction that is submitted to the jury must be supported by substantial evidence.<sup>46</sup>

*State v. Smith*<sup>47</sup> is the most recent Supreme Court of Missouri decision discussing when a trial court must submit a self-defense instruction. In *Smith*, the defendant fired a gun at a man he wrongly thought was accosting him and inadvertently hit a victim on a nearby playground.<sup>48</sup> In holding that the circuit court did not err in refusing to grant a self-defense instruction when there was no substantial evidence to support such an instruction, the court asserted, “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,’ and failure to do so is reversible error.”<sup>49</sup>

The most significant issue in the instant case is what quantum of evidence the term “substantial evidence” is meant to signify.<sup>50</sup> In *State v. Avery*, which the *Bruner* court quoted for its rule recitation of substantial evidence, the Supreme Court of Missouri noted substantial evidence is simply evidence “putting a matter in issue.”<sup>51</sup> The court was slightly more verbose, however,

43. MO. SUP. CT. R. 70.02(b).

44. Jeffrey A. Burns, *Methods of Practice: Litigation Guide*, 2 MO. PRAC., MAI Approach to Instructing a Jury § 15.2 (4th ed. 2016).

45. *Id.*

46. William A. Knox, *Criminal Practice & Procedure*, 19 MO. PRAC., Trial Framework – Case for the Defense – Instruction to the Jury § 20:19 (3d ed. 2016).

47. 456 S.W.3d 849 (Mo. 2015) (en banc).

48. *Id.* at 851.

49. *Id.* at 852 (citation omitted) (quoting *State v. Westfall*, 75 S.W.3d 278, 281 (Mo. 2002) (en banc)).

50. *State v. Bruner*, No. SD 33982, 2016 WL 4130831, at \*4 (Mo. Ct. App. 2016).

51. *State v. Avery*, 120 S.W.3d 196, 200 (Mo. 2003) (en banc).

in *State v. Westfall*, which came down a year before *Avery* and was cited throughout *Bruner*; the *Westfall* court wrote, “The general rule is that an instruction must be based upon substantial evidence *and the reasonable inferences therefrom*. Substantial evidence . . . 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.”<sup>52</sup> Under the *Westfall* rule, a defendant who introduces “some” evidence of self-defense *only* through his own testimony has introduced substantial evidence.<sup>53</sup>

The *Westfall* and *Avery* courts composed what amounts to an abbreviated standard for substantial evidence. *Avery*, however, cited to *State v. Weems* in its rule recitation that substantial evidence is evidence that puts a matter in issue.<sup>54</sup> The rule in *State v. Weems* reads as follows:

This quantum of proof 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.”<sup>55</sup>

*Weems* incorporated into its analysis a 1968 case called *State v. McQueen*, which included the same fleshed-out standards and citations for cases going back to 1930.<sup>56</sup> In 2003, when *Avery* summarized this long recitation from *Weems* as simply “evidence putting a matter in issue,”<sup>57</sup> it muddled the standard for the quantum of evidence needed before a defendant receives a self-defense instruction. Over the course of decades, courts have recited and rephrased the rule so many times it has lost some of its original meaning. As an example of how substantial evidence has lost precision after *Avery*, consider *State v. Burks*, in which the court wrote that the Appellant argued “there was substantial evidence putting *that defense* in issue.”<sup>58</sup>

*Weems* defined the standard of substantial evidence in the context of self-defense instructions by throwing various quanta at the wall to see what

52. *Westfall*, 75 S.W.3d at 280 (emphases added) (footnote omitted).

53. Note that, on its face, there is no test here for whether or not the evidence adduced to support a self-defense instruction is convincing.

54. *Avery*, 120 S.W.3d at 200.

55. *State v. Weems*, 840 S.W.2d 222, 226 (Mo. 1992) (en banc) (third alteration in original) (citations omitted) (first quoting *State v. Rose*, 346 S.W.2d 54, 56 (Mo. 1961); and then quoting *State v. Ford*, 130 S.W.2d 635, 640 (Mo. 1939); *State v. Kinard*, 245 S.W.2d 890, 893 (Mo. 1952); *State v. Robinson*, 328 S.W.2d 667, 670 (Mo. 1959); *State v. Stallings*, 33 S.W.2d 914, 917 (Mo. 1930); *State v. Sumpter*, 184 S.W.2d 1005, 1006 (Mo. 1945); *State v. Shiles*, 188 S.W.2d 7, 9 (Mo. 1945)).

56. 431 S.W.2d 445, 448–49 (Mo. 1968).

57. *Avery*, 120 S.W.3d at 200.

58. 237 S.W.3d 225, 229 (Mo. Ct. App. 2007) (emphasis added).

stuck;<sup>59</sup> ostensibly, by the time *Avery* was decided eleven years later, the Supreme Court of Missouri had narrowed the language of substantial evidence to evidence putting a matter in issue.<sup>60</sup> Language, such as that in *Weems*, that substantial evidence could be any “evidence to support the theory”<sup>61</sup> – seemingly a lower standard that does not invite a determination of whether a matter is in issue – was excised from the rule recitations.<sup>62</sup> Arguably, it is more difficult to put a matter in issue than to offer *any* evidence to support a theory. The upshot is that there is a potential for unpredictable results when submitting MAI-approved instructions, depending on whether a court decides to look for “any evidence” to support the instruction or evidence that puts the matter in issue.

*State v. Smith*, the most recent Supreme Court of Missouri case on self-defense instructions, does not delve into what substantial evidence means, noting only that when a defendant submits substantial evidence of self-defense, failure of the circuit court to grant an instruction constitutes reversible error.<sup>63</sup> Because of the confused definitions in Missouri case law, however, Bruner, as a defendant and appellant, was free to challenge the issue of substantial evidence based on language in cases that, while not often cited, were not yet overturned.

#### IV. INSTANT DECISION

The Southern District heard *State v. Bruner* en banc.<sup>64</sup> The standard of review for a circuit court’s decision not to submit a self-defense instruction is *de novo*.<sup>65</sup> The court considered all evidence in the light most favorable to the defendant.<sup>66</sup>

Bruner had to meet four elements to make a submissible case for a self-defense instruction: (1) absence of aggression, (2) real or apparent immediate danger, (3) a reasonable belief in the necessity to kill to avoid the immediate danger, and (4) Bruner’s doing all within his power consistent with personal safety to avoid killing.<sup>67</sup> If Bruner failed to present substantial evidence on any one of these elements, he would lose his appeal.<sup>68</sup>

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59. *Weems*, 840 S.W.2d at 226.

60. *Avery*, 120 S.W.3d at 200.

61. *Weems*, 840 S.W.2d at 226 (quoting *State v. Shiles*, 188 S.W.2d 7, 9 (Mo. 1945)).

62. *See State v. Bruner*, No. SD 33982, 2016 WL 4130831, at \*3 (Mo. Ct. App. 2016).

63. *State v. Smith*, 456 S.W.3d 849, 852 (Mo. 2015) (en banc) (citing *State v. Westfall*, 75 S.W.3d 278, 280 (Mo. 2002) (en banc)).

64. *Bruner*, 2016 WL 4130831, at \*1.

65. *Id.* at \*3 (citing *State v. Johnson*, 470 S.W.3d 767, 768 (Mo. Ct. App. 2015)).

66. *Id.* (citing *Smith*, 456 S.W.3d at 852).

67. *Id.*

68. *Id.*

A. *Majority Opinion*

In its majority opinion, the Southern District, compiling the facts most favorable to Bruner, held “[t]here was no substantial evidence from which a reasonable fact-finder could deduce that there was a real or apparent necessity for Bruner to kill in order to save himself from an immediate danger of serious bodily harm or death.”<sup>69</sup>

The court reasoned that there was not a positive quantum of evidence to meet the immediate danger element.<sup>70</sup> Though Moore was much larger than Bruner, the only evidence offered at trial concerning immediacy was that Bruner *never thought* Moore had a knife.<sup>71</sup> Further, Moore’s threat to Bruner – to have his throat slit *in two hours* – was not immediate.<sup>72</sup> The court reasoned Moore’s statement was a “mere threat,” insufficient for self-defense, rather than a danger.<sup>73</sup> In light of these facts, the court said there was “no reasonable available inference from this evidence that would create the immediate danger underlying the right to kill in self-defense.”<sup>74</sup>

Finally, the court believed that there was no substantial evidence that Bruner did all within his power to avoid taking Moore’s life.<sup>75</sup> Although Bruner did back away, he himself testified that he should have left the scene.<sup>76</sup> Bruner shot Moore several times while Moore’s back was turned, and then when Moore fell to his knees, Bruner shot him several more times.<sup>77</sup>

In its analysis, the court quoted at length from *State v. Chambers*.<sup>78</sup> In *Chambers*, the defendant verbally confronted the victim at a bar.<sup>79</sup> Both went outside, but then the defendant hit the victim with a pistol and shot the victim when he got up with his hands in the air.<sup>80</sup> The victim did not have a weapon.<sup>81</sup> The Supreme Court of Missouri held that the circuit court did not err in refusing to give a self-defense instruction.<sup>82</sup> The court went on, “Furthermore, the evidence which defendant relies upon to support his theory of self-defense is woefully unconvincing that there existed either an apparent or real necessity for him to use deadly force to avoid serious bodily injury or death.”<sup>83</sup> The court continued,

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69. *Id.* at \*4.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* at \*5.

76. *Id.*

77. *Id.*

78. *State v. Chambers*, 714 S.W.2d 527, 529 (Mo. 1986) (en banc).

79. *Id.*

80. *Id.* at 529–30.

81. *Id.* at 530.

82. *Id.* at 531.

83. *Id.*

We have conducted a searching examination of the trial transcript and have considered the evidence in a light most favorable to defendant, and we are unable to conclude that there was sufficient evidence to support an instruction on self-defense or *to allow the trier of fact to conclude that defendant's conduct was reasonable*.<sup>84</sup>

Therefore, the Southern District, following *Chambers*, held that the circuit court did not err in failing to submit a self-defense instruction.<sup>85</sup> Using language that the Supreme Court of Missouri used in *Chambers*, the Southern District wrote that the evidence was “woefully unconvincing to support a self-defense instruction.”<sup>86</sup>

### B. Concurring Opinion

Judge Scott wrote a concurring opinion in *Bruner*.<sup>87</sup> He noted that, even if an instructional error had occurred, Bruner must prove he would have been prejudiced by the error and that the omitted instruction would have changed the verdict.<sup>88</sup> Judge Scott wrote,

Perhaps reasonable minds could differ as to error in this case, but not prejudice. If I am sure of anything, I am sure that a self-defense instruction would not have changed the verdict; that no reasonable lay or legal mind could review the whole record and disagree; and that a second trial would needlessly increase pain and grief for those on both sides of this tragedy.<sup>89</sup>

The majority opinion, by contrast, did not engage in prejudice analysis.<sup>90</sup>

### C. Dissenting Opinion

Judge Lynch dissented, arguing that the record contained evidence “putting self-defense at issue.”<sup>91</sup> Judge Lynch wrote that the standard of review is a constant, “regardless of how improbable the favorable evidence may be or how compelling the contrary evidence may be.”<sup>92</sup> Appellate courts are forbidden from acting as super jurors, and, to the extent that the majority opinion

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84. *Id.* (emphasis added).

85. *State v. Bruner*, No. SD 33982, 2016 WL 4130831, at \*6 (Mo. Ct. App. 2016).

86. *Id.*

87. *Id.* (Scott, J., concurring).

88. *Id.*

89. *Id.* at \*7.

90. *See id.* at \*1–6 (majority opinion).

91. *Id.* at \*8 (Lynch, J., dissenting).

92. *Id.* at \*9.

disregarded or ignored evidence that supported Bruner's contention of self-defense, the majority fell into a super juror role.<sup>93</sup>

Judge Lynch recounted the evidence adduced and noted that at trial Bruner said, "[T]hat's any time there," after Moore threatened to have Bruner's throat slit, meaning Bruner feared an immediate threat.<sup>94</sup> Bruner sensed that he was immediately in danger after Moore's threat.<sup>95</sup> Also, Bruner said he took the firearms to the theater because of how big Moore was and that if Moore "tried to beat [him] up[,] . . . [Bruner] would be able to back him off."<sup>96</sup> Finally, Judge Lynch wrote that the jury could consider the notable size difference between Bruner and Moore when assessing the danger a reasonable person would have felt in Bruner's situation.<sup>97</sup>

Judge Lynch argued, "Viewing the evidence in the light most favorable to giving the requested self-defense instruction[,] . . . substantial evidence – evidence putting these matters in issue – supports all four [self-defense] elements."<sup>98</sup> First, there was evidence that Bruner was not the aggressor in that, even though Bruner was the one to seek out Michelle and Moore, Moore repeatedly moved toward Bruner, threatened to slit Bruner's throat, assumed a fighting stance, and raised his hand toward Bruner in a threatening manner.<sup>99</sup> Second, there was evidence of a real or apparently real necessity for Bruner to kill in order to save himself from immediate danger of death or serious bodily harm because Bruner believed Moore intended to slit his throat and Moore made a movement toward Bruner from a fighting stance.<sup>100</sup> Third, there was evidence of a reasonable cause for Bruner's belief in such a necessity because of the size difference between the two men.<sup>101</sup> Finally, "there was evidence of 'an attempt by [Bruner] to do all within his power consistent with his personal safety to avoid the danger and the need to take a life'" because Bruner said he backed up "countless times" and that he was close to tripping over the sidewalk.<sup>102</sup>

Judge Lynch wrote, "By definition, therefore, substantial evidence supported Defendant's self-defense theory."<sup>103</sup> As such, he believed the circuit court erred in refusing to give the self-defense instruction.<sup>104</sup>

93. *Id.* at \*9 n.2.

94. *Id.* at \*10.

95. *Id.*

96. *Id.* at \*9 (first alteration in original).

97. *Id.* at \*13.

98. *Id.* at \*14.

99. *Id.*

100. *Id.*

101. *Id.* Judge Lynch notes that, of course, "whether shooting Moore was a *reasonable* action given Moore's size and conduct was for the jury to determine." *Id.*

102. *Id.* (quoting *State v. Chambers*, 671 S.W.2d 781, 783 (Mo. 1984) (en banc)). Again, Judge Lynch notes that whether this evidence amounted to Bruner doing "all" within his power to avoid taking Moore's life would be a question for the jury. *Id.* (emphasis omitted).

103. *Id.* at \*16.

The majority opinion, written by Judge Francis, however, characterized the dissent's reasoning as ignoring the "fundamental requirement that there be *substantial* evidence to support the self-defense instruction."<sup>105</sup>

The Supreme Court of Missouri granted rehearing. Oral argument in the case took place on January 11, 2017.<sup>106</sup>

## V. COMMENT

The Supreme Court of Missouri must decide how substantial evidence should be defined in Missouri courts and to what extent the definitions already present in Missouri case law need clarification. In deciding, the court will elucidate the standard applied by circuit courts in granting self-defense instructions in homicide trials, the need for which the *Bruner* case makes clear. Relatedly, the Supreme Court of Missouri must decide whether, at any level, a court should say that evidence adduced to support a self-defense instruction in a homicide trial is "woefully unconvincing." Finally, the Supreme Court of Missouri will decide whether the defendant Bruner should be awarded a new trial. Helpful in the Supreme Court of Missouri's analysis will be that it has three opinions from the Southern District to review, each with markedly different reasoning.

### A. *The Substantial Evidence Standard*

First, the Southern District's holding fails to clarify the varied language in Missouri case law as to what substantial evidence is. Probably the most confusing facet of substantial evidence is that the standard is ostensibly mislabeled. In its characterization of Judge Lynch's dissent, the majority opinion supported its holding by relying on the fact that the standard calls for "*substantial*" evidence, suggesting that the evidence must be weighty.<sup>107</sup> However, the term substantial evidence by itself implies something greater than the actual legal standard, which, according to *Westfall*, could be as little as "some" evidence from the defendant's own testimony.<sup>108</sup> In this sense, the standard substantial evidence is mislabeled and might lead judges astray merely by its name.

The *Bruner* majority opinion is written in the *Avery/Smith* mold and adopts the standard that substantial evidence means "putting a matter in is-

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104. *Id.*

105. *Id.* at \*4 (majority opinion).

106. *See generally* Oral Argument, State v. Bruner, SC95877 (Jan. 11, 2017), <http://www.courts.mo.gov/SUP/index.nsf/fe8feff4659e0b7b8625699f0079eddf/3aa079d29e3da9ca8625806f007db81f?OpenDocument>.

107. *Bruner*, 2016 WL 4130831, at \*4.

108. State v. Westfall, 75 S.W.3d 278, 280 (Mo. 2002) (en banc).

sue.”<sup>109</sup> Although this language is elegant, the reasoning the *Bruner* court gives to support its holding – essentially a weighing of the evidence adduced that cuts *against* self-defense rather than examining the record for evidence *to support* self-defense – does not support this rule.<sup>110</sup>

The *Bruner* court possibly applied the substantial evidence standard incorrectly. The standard of review was *de novo*, and the court was to review the evidence in the light most favorable to the defendant.<sup>111</sup> The facts most favorable to Bruner are the size difference between himself and Moore; that Moore threatened to have Bruner’s throat slit; that Moore advanced on Bruner, who had to back up; and that Moore assumed a fighting stance and raised an arm immediately before Bruner drew and fired.<sup>112</sup> Furthermore, although some of Bruner’s testimony contradicts this point, such as what Bruner said to his daughter before leaving for the theater,<sup>113</sup> Bruner said at trial that he only went to the theater to talk to Michelle.<sup>114</sup> If substantial evidence merely means putting a matter in issue, Bruner’s testimony may freely contradict itself. It goes without saying that Bruner’s testimony may also contradict that of other witnesses. One can argue that Bruner made a colorable argument that he put self-defense in issue because of the evidence he produced. However, one can only make this argument if one precisely applies the standard of review, viewing the evidence in the light most favorable to the defendant. It does not appear the *Bruner* court did that.

Most troubling about the holding in *Bruner* is its reliance on *Chambers*. The analysis in *Chambers*, which allows a court to evaluate whether evidence to support a self-defense instruction is “woefully unconvincing,”<sup>115</sup> does not comport with the legal standard of substantial evidence. Such analysis is analogous to allowing a trial court to direct a verdict for the State in a criminal trial by preventing a defendant from presenting what is possibly his best argument. Instructions exist to guide the jurors in their verdict. When a trial court refuses a self-defense instruction, the jury is left with the choice to convict or acquit because the State did not meet its burden. The circuit court should have tendered the instruction and let the jury determine the credibility of the evidence. However, in holding that there was no substantial evidence, the *Bruner* court evaluated what evidence was reasonable rather than simply evaluating whether the evidence Bruner offered put self-defense in issue.<sup>116</sup> Indeed, *Bruner*’s holding suggests that substantial evidence is not evidence

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109. *Bruner*, 2016 WL 4130831, at \*3 (quoting *State v. Avery*, 120 S.W.3d 196, 200 (Mo. 2003) (en banc)).

110. *See generally id.*

111. *Id.*

112. *See id.* at \*10 (Lynch, J., dissenting).

113. *See id.* at \*1 (majority opinion).

114. *See id.* at \*9 (Lynch, J., dissenting).

115. *State v. Chambers*, 714 S.W.2d 527, 531 (Mo. 1986) (en banc).

116. *See Bruner*, 2016 WL 4130831, at \*3.

that puts a matter in issue but evidence *by which a fact-finder could reasonably find* a matter in issue.<sup>117</sup>

Although the circuit court retains a gatekeeper function for jury instructions, the real thrust of substantial evidence is “putting a matter in issue,” which might be defined as whether reasonable minds could disagree on whether a defendant acted in self-defense.<sup>118</sup> Judge Lynch’s dissent correctly illustrates how reasonable minds could come to such a disagreement in the instant case.<sup>119</sup> The *Bruner* and *Chambers* courts seem to be starting their analyses of whether defendants are entitled to self-defense instructions based on whether the inferences from the evidence adduced are reasonable.<sup>120</sup> The question facing appellate courts, however, is narrower: it is whether the four elements of self-defense are in issue. The standard *Bruner* and *Chambers* employed is too concerned with the weight of the evidence, when, according to Missouri case law, substantial evidence should be a generous standard for the defendant.

The problem courts face in composing their rule recitations for substantial evidence is where to put the modifier “reasonably.”<sup>121</sup> This Note argues that the *Bruner* court conflated a jury’s being able to reasonably find that Bruner acted in self-defense with whether the inferences from the small amount of evidence that Bruner did act in self-defense were reasonable. The distinction is critical. No one argues that a jury should be allowed to make unreasonable inferences; courts can protect against them by evaluating the reasonableness of the inferences from the direct evidence. However, a court should not evaluate whether a jury could reasonably find self-defense; putting the modifier “reasonably” before the verb “find” is not an analysis permitted by the rule articulated in *Westfall*.<sup>122</sup> This Note thus proposes that the most tenable solution is a definition for substantial evidence that dispenses with a reasonableness requirement. Substantial evidence should be defined as evidence that is more than a mere scintilla that puts a matter in issue. This standard, as argued below, is compatible with the fundamental protections afforded to criminal defendants and safeguards the adversarial system.<sup>123</sup>

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117. *See id.*

118. *State v. Avery*, 120 S.W.3d 196, 200 (Mo. 2003) (en banc); *see also Bruner*, 2016 WL 4130831, at \*7 (Scott, J., concurring).

119. *See Bruner*, 2016 WL 4130831, at \*12 (Lynch, J., dissenting).

120. *See id.* at \*4 (majority opinion); *see also Chambers*, 714 S.W.2d at 531.

121. *See State v. Westfall*, 75 S.W.3d 278, 280 (Mo. 2002) (en banc).

122. *Id.* (“Substantial 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.”).

123. This Note reluctantly puts forward a definition using the quantum scintilla. Missouri courts are reticent in using scintilla as a quantum of evidence. *See Strauss v. Am. Chewing Gum Co.*, 114 S.W.73, 74 (Mo. 1908). However, a scintilla most accurately reflects the notion of “substantial” as defined in *State v. Westfall*. 75 S.W.3d at 280.

### B. Implications

Language in *Bruner* and *Chambers* allowing a judge to evaluate whether certain evidence is unconvincing is troublesome. In deciding that certain pieces of evidence are “woefully unconvincing” in supporting a self-defense theory, the appellate court usurps a traditional jury function and acts as a super juror.<sup>124</sup> The analysis in *Bruner*’s case should have stopped when *Bruner* put forth some evidence, regardless of the credibility of that evidence, of all four elements for self-defense – *Bruner* should have received the instruction.

It would be far easier for circuit courts, running fewer risks of reversals, to allow instructions in cases similar to *Bruner*. Ironically for both the *Chambers* and *Bruner* courts, the cases in which the evidence supporting self-defense *really is* woefully unconvincing are precisely the cases in which circuit courts should be *least* concerned about tendering the instruction, as the juries in those cases are not likely to be convinced by the weak evidence of a self-defense claim.

Judge Lynch’s dissent should play a crucial role in the Supreme Court of Missouri’s analysis. His dissent shows that, even though there is significant credible evidence to negate self-defense as a theory,<sup>125</sup> there was enough evidence to put all four elements of self-defense in issue. If the Supreme Court of Missouri chooses to follow Judge Lynch’s dissent, one policy issue that might arise would be that of the legally savvy but unscrupulous defendant who injects self-defense into the case through his own testimony or that of a third party. As argued in 2002 by Professor William A. Schroeder, character evidence, especially in self-defense cases, can make it into evidence despite protections in place under Missouri evidence law.<sup>126</sup> Professor Schroeder writes, “No doubt, in trial settings, evidence of character and other acts can sometimes [obfuscate] and confuse more than it helps. Even the worst person can probably find someone who will say good things about him, and even the best people have detractors.”<sup>127</sup> Thus, if substantial evidence is defined as evidence that is more than a mere scintilla that puts a matter in issue, and not as a positive quantum of *reasonable* evidence, future defendants could attempt to receive self-defense instructions merely by introducing character evidence.

124. See *Chambers*, 714 S.W.2d at 531; *Bruner*, 2016 WL 4130831, at \*9 n.2 (Lynch, J., dissenting).

125. See *Bruner*, 2016 WL 4130831, at \*8 (Lynch, J., dissenting). Because there was sufficient evidence to support a self-defense instruction, but no evidence sufficient to support a self-defense theory, *Bruner* might not have been prejudiced by the circuit court’s error.

126. See William A. Schroeder, *Evidence Issues in Assault and Homicide Cases Where Self-Defense Is Claimed*, 58 J. Mo. B. 70, 75 (2002).

127. *Id.*

This defense strategy is not necessarily a game-changer. Defendants themselves will avoid testifying,<sup>128</sup> but if a defendant could call a witness capable of testifying as to the elements of a self-defense claim, that defendant would be entitled to an instruction. Over the long run, a proliferation of self-defense instructions might result, with at least a few defendants being acquitted on self-defense grounds. Moreover, not only will there be an influx of spurious self-defense instructions, but there will also be a subsequent misallocation of judicial resources. As Professor Schroeder noted,

Where the acts in question are disputed, there is more of a problem. If extrinsic evidence is offered, there will be direct examination, cross-examination, and possibly rebuttal witnesses. The result is the consumption of a great deal of time to prove something that may not be especially important.<sup>129</sup>

Even more problematic for the State is that the ultimate defense strategy will become defendants attempting to prevent circuit courts from tendering self-defense instructions. In accordance with Missouri law, a circuit court plainly errs (even if the issue is not preserved for appellate review) if it fails to instruct the jury on an issue it should have.<sup>130</sup> Thus, defendants have a commensurate incentive to seek a new trial by injecting even the flimsiest self-defense evidence into a case with the hope that the circuit court *refuses* to grant the instruction.

Such an incentive structure presents at least two questions: first, should there actually be some sort of a reasonableness safeguard on self-defense evidence? Or are the few unscrupulous defendants' acquittals balanced out by the overall increased fairness of the criminal justice system and the additional benefit of ensuring that fact-finding in criminal trials is more completely left to the province of the jury? Second, in homicide cases, is there anything wrong with a mandatory or automatic self-defense instruction?

First, even though this Note previously argued against it, consider a reasonableness standard for the evaluation of self-defense evidence before an instruction is tendered. There is a danger in allowing a jury to hear spurious self-defense evidence. Parsing the legal standard for substantial evidence, however, is critical. Judges are allowed to rule as a matter of law under *Avery*<sup>131</sup> what *inferences* from evidence proffered are reasonable in deciding whether or not to allow a self-defense instruction; however, judges cannot rule on whether or not the *direct evidence* itself is reasonable.<sup>132</sup> This means

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128. *Beal v. State*, 209 S.W.3d 542, 544 (Mo. Ct. App. 2006) (“There is no requirement that a defendant testify in order for a self-defense instruction to be given. The instruction is required if there is substantial evidence of self-defense even when the defendant does not testify or otherwise offer any evidence at trial.”).

129. Schroeder, *supra* note 126, at 76.

130. *Knox*, *supra* note 46, § 20:19.

131. *See State v. Avery*, 120 S.W.3d 196, 200–201 (Mo. 2003) (en banc).

132. *See State v. Westfall*, 75 S.W.3d 278, 280–81 (Mo. 2002) (en banc).

that if there is direct evidence of self-defense, from which no inferences need to be drawn, the judge should be precluded from determining whether the evidence is reasonable.<sup>133</sup> Allowing judges to assess the reasonableness of all evidence before tendering a self-defense instruction is too similar to a directed verdict in that if a judge rules based on this reasoning, a jury will not have the option to acquit based on a self-defense instruction. Motions for directed verdicts are abolished in Missouri.<sup>134</sup> Therefore, any reasonableness test incorporated into the substantial evidence doctrine must be met with a great deal of skepticism. In the end, avoiding what looks like a directed verdict and allowing the jury alone to assess the credibility of direct evidence showing self-defense likely outweighs the danger posed by allowing flimsy evidence into a trial.

Regarding the second issue, Missouri courts could adopt a mandatory or automatic self-defense instruction in homicide cases.<sup>135</sup> An automatic self-defense instruction in homicide cases would protect against disputes about jury instructions from occurring at both the trial and appellate levels. Further, an automatic self-defense instruction in homicide cases has the added benefit of not incentivizing those unscrupulous defendants to inject the issue of self-defense into the case in the hopes of not getting an instruction and then overturning the verdict on appeal.<sup>136</sup> That spurious testimony can stay out of evidence altogether.

To allow defendants in homicide trials to have the added protection of a mandatory instruction would be incredibly unpopular. Similarly, there would certainly be debate as to whether this protection is even necessary to ensure a fair trial. However, one need look no further than the *Bruner* case to see the possible benefits of an automatic instruction – or at least instructions that are given as soon as the defense meets the low threshold of adducing more than a mere scintilla of evidence. The *Bruner* case might well have been resolved already, saving both parties from the pain and grief of ongoing litigation.<sup>137</sup> All in all, an automatic self-defense instruction, although potentially problematic in some situations, stands a good chance of improving the overall quality of justice in homicide trials.

### C. Prejudice Analysis

Finally, the Supreme Court of Missouri will have to address whether *Bruner* should be awarded a new trial. Here, Judge Scott's concurrence is most useful. Judge Scott noted that, even if an instructional error had oc-

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133. *See id.*

134. MO. SUP. CT. R. 27.07(a).

135. *See State v. White*, 92 S.W.3d 183, 191 (Mo. Ct. App. 2002), *modified* (Nov. 26, 2002).

136. *See id.*

137. *State v. Bruner*, No. SD 33982, 2016 WL 4130831, at \*7 (Mo. Ct. App. 2016) (Scott, J., concurring).

curred, the appellant must prove he would have been prejudiced by the error and that the omitted instruction would have changed the verdict.<sup>138</sup>

Given the facts, particularly that Bruner went to the theater armed and with passions inflamed,<sup>139</sup> all who have written about the case seem to agree that Bruner acted with premeditation to kill Moore.<sup>140</sup> Although Bruner was likely entitled to a self-defense instruction, the error could not have been so serious as to prejudice him.

## VI. CONCLUSION

“Substantial evidence” need not be a source of obfuscation. Even if Bruner’s conviction is affirmed through prejudice analysis, the Supreme Court of Missouri should seek a completely integrated definition of substantial evidence to incorporate into Missouri law. This Note argues that substantial evidence would be better defined as evidence that is more than a mere scintilla that puts a matter in issue. This test would ensure that juries retain the role of fact finders in jury trials. Moreover, this test more clearly reflects the notion that in Missouri case law substantial evidence is a generous standard.

The Supreme Court of Missouri must also decide when defendants in the future should receive a self-defense instruction. Whether it be through an automatic self-defense instruction in homicide cases, or through clearly establishing a low bar for substantial evidence, allowing more defendants to receive a self-defense instruction would result in fairer trials and would more clearly separate the role of judges from that of juries.

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138. *Id.* at \*6.

139. *See id.* at \*1–2 (majority opinion).

140. Even in Judge Lynch’s dissent, he qualifies his argument by insisting that the standard for receiving a self-defense instruction “is constant, regardless of how improbable the favorable evidence may be or how compelling the contrary evidence may be.” *Id.* at \*9 (Lynch, J., dissenting).

## APPENDIX A

The tendered self-defense instruction read as follows:

INSTRUCTION NUMBER [A]

## PART A – GENERAL INSTRUCTIONS

One of the issues in this case is whether the use of force by the defendant against Derek Moore was lawful. In this state, the use of force, including the use of deadly force, to protect oneself is lawful in certain situations.

In order for a person lawfully to use force in self-defense, he must reasonably believe such force is necessary to defend himself from what he reasonably believes to be the imminent use of unlawful force.

But, a person is not permitted to use deadly force unless he reasonably believes that the use of deadly force is necessary to protect himself against death or serious physical injury.

As used in this instruction “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.

As used in this instruction, the term “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.

## PART B – CASE-SPECIFIC STATEMENT OF LAW

On the issue of self-defense as to Count I you are instructed as follows: First, if the defendant reasonably believed that the use of force was necessary to defend himself from what he reasonably believed to be the imminent use of unlawful force by Derek Moore, and

Second, the defendant reasonably believed that the use of deadly force was necessary to protect himself from death or serious physical injury from the acts of Derek Moore, then his use of deadly force is justifiable and he acted in lawful self-defense.

The state has the burden of proving beyond a reasonable doubt that the defendant did not act in lawful self-defense. Unless you find beyond a reasonable doubt that the defendant did not act in lawful self-defense under this instruction, you must find the defendant not guilty under Count I.

As used in the instruction, the term “serious physical injury” means physical injury that creates a substantial risk of death or that causes serious disfigurement or protracted loss or impairment of the function of any part of the body.

#### PART C – EVIDENTIARY MATTERS

Evidence has been introduced of threats made by Derek Moore against defendant. You may consider the evidence in determining who was the initial aggressor in the encounter.

If any threats against defendant were made by Derek Moore and were known by or had been communicated to the defendant, you may consider this evidence in determining whether the defendant reasonably believed that the use of force was necessary to defend himself from what he reasonably believed to be the imminent use of unlawful force by Derek Moore.

You, however, should consider all of the evidence in the case in determining whether the defendant acted in lawful self-defense.

MAI-CR306.06A

Submitted by Defendant.<sup>141</sup>

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141. *Id.* at \*2 n.3 (majority opinion).

