THE STOCKLEY VERDICT: AN EXPLAINER

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The purpose of this document is to help explain some of the existing Missouri law that Judge Wilson used in his opinion. It does not take a side on the opinion itself. At the end of the day, the decision Judge Wilson made was based on his call on various disputed factual questions. The law was not, for the most part, at issue. I attempt only to describe the legal framework within with Judge Wilson decided the case; not to support or to criticize his verdict. Each person will ultimately have to make his or her own judgment about whether the decision was correct.

Page numbers refer to the opinion, available here.

p. 18) The standard of proof in a trial is "proof beyond a reasonable doubt." This is the same in a bench trial as in a jury trial. The state has the burden of proof as to each element of the crime.

p. 18) There are three elements to first degree murder: the person must have 1) knowingly, 2) caused the death of another person, and 3) after deliberation upon the matter.[1] "Knowing," as it relates to a result means that you are aware of the "practical certainty" that your action will cause that result. There is no dispute, here, that Stockley caused the death of Anthony Lamar Smith, and did it aware that his actions were practically certain to cause the result. One of the key questions in the case is whether he did so with "deliberation." (The other key question was whether he acted in self-defense).

p. 18) "Deliberation" is defined by statute as "cool reflection for any

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[*] Professor of Law, Saint Louis University School of Law. This document is my best effort to explain the legal issues in the Stockley verdict. It was written quickly, so please make allowances. Corrections will be made as necessary and the article will be updated when possible. Feel free to send comments to chad.flanders@slu.edu Thanks to the staff of the law journal for making the timely posting of this article possible.

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[1] Revised Statutes of Missouri (RSMO) 565.020.

length of time, no matter how brief."[2] Missouri court cases have found deliberation to happen in a matter of seconds, or even the time it takes to snap a finger, so it may be better interpreted to mean "they acted deliberately" rather than that "they thought about it for a while."[3]

p. 18) Mental states, like deliberation, are usually inferred from the circumstances. We can't read people's minds.[4] But we can look at what they do and say to figure out what they thought.[5]

p. 19) The defendant has the burden of injecting self-defense into the proceedings,[6] but the defendant has no burden to prove that he did act in self-defense. This means there has to be *some* evidence of each element of self-defense present in the evidence before the court (the elements of self-defense are explained in more detail below), but the defense doesn't have the burden to prove beyond a reasonable doubt that he did act in self-defense (who has this burden is explained in the next paragraph). As the

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[2] RSMO 565.002.

[3] As the State notes, it appears that, in addition to claiming insufficient evidence of deliberation, Terry is raising a claim that the State improperly represented to the jury the time necessary to prove deliberation. During closing arguments, the prosecutor snapped his fingers to demonstrate the time necessary for deliberation. Terry argues that such a representation is of an "instantaneous" action. We disagree. "The shortness of time for deliberating and premeditating killing is immaterial for purposes of proving murder in the first degree." *State v. Hudson*, 154 S.W.3d 426, 429 (Mo.App.S.D.2005). Deliberation only requires a "brief moment of 'cool reflection.' " *Cole*, 71 S.W.3d at 169. In this case, Terry had not only a brief moment but a matter of minutes to decide to abandon the attack. He had multiple opportunities to abandon the robbery turned murder. He injured Schwartz, knocking him to the ground and incapacitating him, *before* he chose to shoot him directly in the head.

State v. Terry, 501 S.W.3d 456, 460 (Mo. Ct. App. 2016).

[4] "Direct proof that a person acted 'knowingly' is often unavailable and is usually inferred from evidence of the circumstances surrounding the incident." *State v. Browning*, 357 S.W.3d 229, 235 (Mo.App. S.D.2012) (quoting *State v. Fackrell*, 277 S.W.3d 859, 863–64 (Mo.App. S.D.2009)).

State v. Hibler, 422 S.W.3d 407, 409 (Mo. Ct. App. 2013)

[5] However, because it [deliberation] is a state of mind, direct proof is seldom available and the element must be inferred from the circumstances.

State v. Bridges, 810 S.W.2d 682, 684 (Mo. Ct. App. 1991)

[6] This is part of the self-defense statute. RSMO. 563.031.5.

court notes, either side can show this evidence, but it is usually the defense that does this, as it is in their interest in do so. Once the evidence is out there, then--in a jury case--there will be a basis for the judge to instruct the jury on the instruction. If it is a bench trial (only a judge), it will be up to the judge to consider the defense.

p. 19) If there is some evidence supporting self-defense--enough so that it goes to the trier of fact (the judge or the jury) to decide on it, then the state gets a new burden. This is something in the law that is very helpful to Stockley: it is as if the state has a new burden to prove *beyond a reasonable doubt* that Stockley *did not* act in self-defense.[7] In a way, the introduction of self-defense, adds a new element to the crime. Now, the state has to prove beyond a reasonable doubt that Stockley 1) knowingly, 2) caused the death of another, 3) after deliberation *and* 4) he did not act in self-defense.

p. 19) Law enforcement officer's use of force. At the time, Missouri's self-defense statute did not include a "stand your ground" provision. That meant that if someone threatened force on you, and you could avoid using force by running way, *you had a duty to do so*. This does not apply (and never did apply) to law enforcement officers, per Missouri statute. They do not have to run away in the face of a threat of force.[8] This exception is explicitly noted in the self-defense statute.[9]

p. 19) The verdict also mentions that law enforcement officers can use force to effect the arrest of a person who is fleeing, who is trying to escape by means of a deadly weapon, and the officer reasonably believes force is necessary to make the arrest.[10] This may seem to apply in this case, but it doesn't really. As the defense's written submission makes clear, Stockley was arguing self-defense, not that he was using force in order to arrest Smith. (This provision may, apply, however, to the shots Stockley fired at

[7] RSMO 556.035 ("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.")

[8] "A law enforcement officer need not retreat or desist from efforts to effect the arrest, or from efforts to prevent the escape from custody, of a person he or she reasonably believes to have committed an offense because of resistance or threatened resistance of the arrestee." RSMO. 563.046.

[9] RSMO. 563.031.1(c) (law enforcement officer can permissibly be the "initial aggressor").

[10] Although the law enforcement officer use of force statute has changed recently, this was always part of it. See RSMO. 563.046.3.

the car, or when the police vehicle rammed the vehicle Smith was driving.)

pp. 19-20) The statement by Stockley as evidence of deliberation. Evidence of someone "planning" to kill someone is relevant to inferring deliberation.[11]

p. 20) A "fifth shot." Multiple gunshots,[12] shots at close range,[13] and shots to vital parts of the body,[14] can be used to show deliberation. An execution style shot or a "kill shot" can be part of evidence used to show deliberation.[15]

pp. 20-21). The fact that Smith and Stockley did not know one another-

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[11] Evidence of conduct that is relevant to the issue of deliberation in a first degree murder case falls into a least four broad categories. First, there may be direct evidence that the defendant did or said certain things in advance of the act to facilitate the crime. This is "planning evidence."

State v. Roberts, 948 S.W.2d 577, 589 (Mo. 1997)

[12] Evidence of a prolonged struggle, multiple wounds, or repeated blows may also support an inference of deliberation.

State v. Ervin, 979 S.W.2d 149, 159 (Mo. 1998).

[13] Even further, assuming the jury believed that Terry shot Schwartz from the distance of a few inches—a fact upon which there was conflicting evidence—there is yet another basis for finding deliberation. *See Tisius*, 92 S.W.3d at 764 (repeated shooting at close-range supported finding of deliberation); *State v. Branch*, 757 S.W.2d 595, 598 (Mo.App.E.D.1988) (shooting at close range was some evidence of deliberation).

State v. Terry, 501 S.W.3d 456, 460 (Mo. Ct. App. 2016), reh'g and/or transfer denied (Aug. 30, 2016), transfer denied (Nov. 1, 2016)

[14] Rejecting a contention that the evidence was insufficient to support a finding of the element of deliberation, this Court held that the number, severity and location of the wounds provided such a basis and that the inference of deliberation was made more apparent by the fact that the assailant had procured and concealed a knife.

State v. Dickson, 691 S.W.2d 334, 339 (Mo. Ct. App. 1985)

[15] The evidence, however, also supports the conclusion that the fatal wounds were inflicted at the Blue Valley Park in an execution style killing which would clearly establish deliberation. The manner of Ms. Walker's death, therefore, supported an inference of deliberation, but did not conclusively establish deliberation.

State v. Maynard, 954 S.W.2d 624, 631 (Mo. Ct. App. 1997)

-had no "prior history"--is highlighted by the Judge as "significant." "Bad blood" between two parties can be evidence to show deliberation.[16] However, it seems possible that a basis for "bad blood" could be found in a) Smith's ramming the police vehicle, and b) leading the officers on a chase. Moreover, deliberation can be found even if there is no prior hostile relationship.[17]

p. 21n.10) The court suggests that in situations that are "dangerous," "stressful" and "frenetic" show lack of "cool" deliberation. However, cases involving similar dangerous, stressful, and frenetic circumstances have not barred a finding of deliberation--especially given that deliberation can arise in a matter of seconds.[18] As the Missouri Supreme Court put it in a 2013 opinion, "Deliberation is not a question of time—an instant is sufficient—and the reference to 'cool reflection' does not require that the defendant be detached or disinterested. Instead, the element of deliberation serves to ensure that the jury believes the defendant acted deliberately, consciously and not reflexively."[19]

p. 24) Self-defense. As noted above, the statute has undergone some changes. But the core has remained the same, and the basics are this: if you fear imminent use of deadly force against you, and reasonably believe that *only* deadly force is sufficient to remove the threat to your life/physical safety, you are justified in using deadly force to remove the threat. Thus the elements of self-defense when deadly force is used are roughly: 1) the defendant didn't start it, 2) there was a real necessity for the defendant to use deadly force in order to save himself/herself from danger, 3) the

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[16] Second, there may be evidence of a pre-existing relationship between the victim and the defendant prior to the murder that provides a motive for the killing. This is "bad-blood evidence."

State v. Miller, 220 S.W.3d 862, 868 (Mo. Ct. App. 2007)

[17] As one treatise explains:

Even when there is no prior relationship between victim and defendant and the time for deliberation is brief, the particular facts of a case can lead to a finding that premeditation has been sufficiently proved.

§ 95:18.Premeditation, 3 Crim. Prac. Manual § 95:18

[18] *See, e.g.*, State v. Bridges, 810 S.W.2d 682, 684 (Mo. Ct. App. 1991) (deliberation found to have occurred during a struggle for a purse during a robbery).

[19] State v. Nathan, 404 S.W.3d 253, 266 (Mo. 2013).

defendant's belief in the necessity was reasonable, and 4) the defendant did all within his power to avoid the danger and the need to take a life.[20] As explained above, while a police officer does have to use less than deadly force if that would be enough to prevent the danger, the officer does not have to retreat--and in fact, can pursue a person he or she believes is dangerous (so in some sense, they may be the "initial aggressor").

p. 24) Judge Wilson sees the key factual question as whether Smith had a gun; someone pointing a deadly weapon at you is a rather common basis for asserting self-defense, and one can win on self-defense even if the weapon is not found (or did not exist), provided that the belief that the weapon was there was reasonable.[21]

p. 26) The court's observation based on "thirty years on the bench" about urban heroin dealers and guns. Judges--in jury trials--usually can only find "facts" if they are uncontroversial and widely known (something known as taking "judicial notice" of facts).[22] But things are different in a bench trial. Here, the judge acts as the jury. Jurors are not confined to the facts at the trial, but can use facts from their experience as a basis for a judgment. So there is less of a constraint on the kinds of facts that can be

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[20] These are from a case called *Chambers:*

Deadly force may be used in self-defense only when there is (1) an absence of aggression or provocation on the part of the defender, (2) a real or apparently real necessity for the defender to kill in order to save himself from an immediate danger of serious bodily injury or death, (3) a reasonable cause for the defender's belief in such necessity, and (4) an attempt by the defender to do all within his power consistent with his personal safety to avoid the danger and the need to take a life.

State v. Chambers, 671 S.W.2d 781, 783 (Mo. 1984)

[21] The appearances doctrine operates to justify a person to act in self-defense although it later proves the appearances were false.

State v. Minnis, 486 S.W.2d 280, 283 (Mo. 1972)

[22] The application of the doctrine of judicial notice, either as a rule of evidence or as an instrument of judicial reasoning, is subject to well recognized limits. The basic operative condition of judicial notice is the notoriety of the fact to be noticed. It must be part of the common knowledge of every person of ordinary understanding and intelligence; only then does it become proper to assume the existence of that fact without proof. It follows, therefore, that judicial notice must be exercised cautiously, and if there is doubt as to the notoriety of such fact, judicial recognition of it must be declined.

English v. Old Am. Ins. Co., 426 S.W.2d 33, 40–41 (Mo. 1968)

considered: jurors can use their own common sense and their experience to bring to bear on a case. Still, that experience must be "common."[23]

A Supreme Court case from earlier this year may be worth mentioning in light of some recent commentary on the verdict.[24] In *Pena-Rodriguez v. California*, the Court held that racially charged statements made by a juror could be the basis for vacating a death sentence.[25] This however is an acquittal, not a conviction, so there does not appear to be any basis for the state to challenge the verdict on the grounds that the Judge demonstrated bias.[26]

The Judge also, presumably, imputed this (to him) commonsense observation to Stockley. In footnote 9 (p. 21), Judge Wilson notes he rejected the defense's request to introduce evidence of Smith's prior criminal record, because Stockley did not know it. But perhaps Stockley would have a similar record of experience as the Judge, and so be aware of the probability of a gun. It is also possible that the Judge's observation is used merely to enhance, in the Judge's eyes, the credibility of Stockley as to whether the gun was found or planted. In fact, this seems the safest assumption.

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[23] In the words of one old Missouri case:

> Jurors may sometimes draw on knowledge that comes from the common experience of mankind to assist them in reaching a conclusion, but that is knowledge that men in general have, not a few in particular. If it is knowledge that comes by the experience of a class in a particular business it must be proven by evidence.

Bowman v. Am. Car & Foundry Co., 226 Mo. 53, 125 S.W. 1120, 1122 (1910)

[24] See, e.g., the recently published op-ed, *Judge Wilson is guilty – as hell – of explicit bias*, The St. Louis American (Sept. 15, 2017).

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[25] [T]he Court now holds that where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee.

Pena-Rodriguez v. Colorado, 137 S. Ct. 855, 869, 197 L. Ed. 2d 107 (2017)

[26] This goes to the fundamental asymmetry in a criminal trial, as embodied in the rule against putting a criminal defendant in "double jeopardy." A defendant who loses can appeal, and usually does. When the state loses--and the defendant is acquitted--it is only in very rare circumstances that the state can challenge the verdict and ask for a do-over.

p. 29) In a case where first degree murder is charged, other homicide charges are "lesser included offenses." In theory, the judge could have found Stockley guilty of a lesser, homicide charge. The state wanted him to do this, if he found Stockley innocent of first degree murder. The defense did not--they wanted first degree murder or nothing. This strategically may make some sense, especially if they thought they were especially strong on self-defense.

pp. 29-30) In a case called *State v. Beeler*, the Missouri Supreme Court held that even in a case where self-defense was successful against first degree murder, it could be that a lesser homicide charge was supported.[27] If you shot in justified self-defense, but used more force than was necessary, you might still be guilty of *recklessly* causing the death of another, even if you did not *intentionally* kill another.[28] Nonetheless, because Judge Wilson found that Stockley's use of force was justified, he felt that Stockley was not guilty of any homicide crime, and declined to consider the possible lesser charges in any detail.

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[27] As a later case explained:

We acknowledge that, under *Beeler*, the fact that Pulley intentionally shot Coleburg, does not, as a matter of law, foreclose the possibility that he could be acquitted of second-degree murder, and found guilty of involuntary manslaughter.

State v. Pulley, 356 S.W.3d 187, 193 (Mo. Ct. App. 2011)

[28] [R]eckless conduct is not inconsistent with the intentional act of defending one's self, if in doing so one uses unreasonable force.

State v. Beeler, 12 S.W.3d 294, 299 (Mo. 2000)