No. WD85232

IN THE

Missouri Court of Appeals

Western District

STATE OF MISSOURI,

Respondent,

v.

ERIC DEVALKENAERE,

Appellant.

Appeal from the Jackson County Circuit Court
Sixteenth Judicial Circuit
The Honorable J. Dale Youngs, Judge

RESPONDENT'S BRIEF

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INTRODUCTION

The unfortunate facts of this case present weighty issues of law that bear upon multiple State interests. Not only does the State have an interest in seeing that wrongdoers are punished and that justice is done, but also that wrongdoers are correctly identified. The latter task is complicated when the accused is a law enforcement officer who was acting in his official capacity and who was clothed with the authority and privileges accorded to law enforcement officers. *See State v. Hunt*, 451 S.W.3d 251, 257-60 (Mo. 2014) (finding insufficient evidence of burglary and property damage where an officer could have been, or was, authorized to enter a residence and was authorized to break down a door in doing so, and discharging the defendant on those charges).

The death of Cameron Lamb was tragic; it did not need to happen. But the facts of this case raise important questions that undermine the trial court's findings of guilt. These questions include: (1) whether the officers who followed Mr. Lamb to his house acted reasonably in entering the curtilage of his home to conduct a stop supported by probable cause and reasonable suspicion; (2) whether any such unlawful entry into curtilage by an officer is relevant in determining whether Eric DeValkenaere was guilty of the charged offenses; (3) whether an unlawful entry into curtilage makes an officer an "initial aggressor," absent any attack or threatened attack on the resident of a home by the officer; (4) whether an unlawful entry into curtilage deprives an officer

of the right to act in defense of others in response to a perceived unlawful use of deadly force by the resident of a home; and (5) whether an officer's criminal negligence in failing to be aware that he has unlawfully entered curtilage gives rise to criminal liability for a homicide offense, as opposed to, for example, liability for trespass, exclusion of evidence under the Fourth Amendment, or civil liability under § 1983.

These questions are critically important to effective law enforcement, as law enforcement officers need to know whether their actions in carrying out their duties will subject them to criminal liability. These questions are also critically important to ensuring that, consistent with the law, only wrongdoers are punished and deprived of their liberty. Here, because the evidence credited by the trial court does not, as a matter of law, support the trial court's findings of guilt, the Court should reverse DeValkenaere's convictions and order him discharged or order a new trial.

STATEMENT OF FACTS[1]

Eric DeValkenaere appeals his convictions of involuntary manslaughter in the second degree and armed criminal action (*see* L.F.49:1-2). In Point I, he asserts that the court erred in convicting him of involuntary manslaughter because he was authorized by law "to enter the decedent's curtilage," i.e., he was not the initial aggressor (App.Br. 24). In Point III, he asserts that the court erred in convicting him of involuntary manslaughter because "trespassing does not summarily render an officer an 'initial aggressor' unentitled to defend third persons from a weapon-wielding suspect statutorily resisting an 'arrest, detention or stop' " (App.Br. 25). In six additional points, he asserts that the evidence was insufficient to support his convictions because the State failed to prove that he was criminally negligent, that he was the initial aggressor, and

[1] In a court-tried case, "[t]his Court views all evidence and inferences in a light most favorable to the judgment." *State v. Flores-Martinez*, 654 S.W.3d 402, 414 (Mo.App. 2022). This Court defers to factual and credibility findings made by the trial court. *See State v. Gomez*, 92 S.W.3d 253, 256-57 (Mo.App. 2002). Here, in addition to other findings, the trial court stated, "I found as I considered the evidence of the case that the defendant Eric DeValkenaere testified credibly at trial." (Tr.826). Accordingly, the facts herein include facts consistent with DeValkenaere's trial testimony.

that the shooting was not justified (App.Br. 24-27).

* * *

In December 2019, Cameron Lamb lived at 4154 College with Roberta Merritt and Shanice Reed (Tr.262). Mr. Lamb and Reed had "dated off and on" (Tr.262). On December 3, 2019, Mr. Lamb was upset with Reed because he had "found some things about her that was going on between her and her kids' dad" (Tr.266). Mr. Lamb and Reed argued, and Mr. Lamb hit Reed (Tr.267; *see* Tr.298). Mr. Lamb started packing up Reed's belongings so that they could be moved out of the house (Tr.268). Then Mr. Lamb went over to Reed's uncle's house to tell him "what had happened and let him know that it was out of control" (Tr.267, 298).

After he returned home, Mr. Lamb started moving Reed's belongings to the front of the house because he did not want her uncles and cousins to enter the house (Tr.268). Mr. Lamb mentioned to Merritt that "one of them had a gun" (Tr.269-70, 299). Nicholas King arrived at the house to help Mr. Lamb move some heavier items (Tr.269, 299).

Reed and others arrived to pick up Reed's belongings (Tr.270, 299-300). After her uncles left with some of her belongings, Reed stayed at the house (Tr.272). She and Mr. Lamb "were still bickering going back-and-forth between the two of them" (Tr.272; *see* Tr.301-02). Merritt and Reed also "had words," and Mr. Lamb "banged on the back of [Reed's] trunk" with a screwdriver or

some other tool (Tr.272-73, 303). Mr. Lamb wanted her to open the trunk so that he could pack more of her belongings in the trunk (Tr.272, 303).

Reed then left, but she stopped in the street near Mr. Lamb's truck (Tr.273-74, 305). She got out of her vehicle, and Mr. Lamb ran quickly toward his truck (Tr.274, 305). Reed went back to her car and drove away (Tr.274, 305). Mr. Lamb threw some lug nuts at her car, and then he got into his truck and took off after her (Tr.274-75, 305-07). Merritt went inside the house and called Mr. Lamb (Tr.275-76, 307).

Meanwhile, Detective Adam Hill of the Kansas City Police Department was in a nearby parking lot at 43rd and Cleveland Avenue (Tr.81). He pulled out of the parking lot and drove west on 43rd Street (Tr.81-82). As he did so, a purple Mustang pulled out from behind another vehicle and entered his lane (Tr.82). Hill "pulled over to get out of the way to keep from being potentially struck in the front" (Tr.82). The Mustang was "going really fast" (Tr.82). Hill estimated that the speed was between 60 and 90 miles per hour (Tr.83).

Hill thought about the busy intersection that was behind him, and he thought, "they're obviously not going to stop" (Tr.83). He turned around to look, and when he turned back around, he saw a red pickup truck in the middle of the road, coming toward him (Tr.83). Hill had not received any calls related to the situation, but "based on their actions and their behaviors" and based on his training and experience, he thought that "there was something very serious

going on there" (Tr.84). He felt obligated to respond (Tr.84).

Hill observed that the driver of the truck was "up on the steering wheel" and "[h]is face was really close to the windshield" (Tr.86). The driver "appeared to be fixated on chasing this Mustang" (Tr.86). The Mustang and the red truck passed through the intersection of 43rd and Cleveland, going east, at about 12:22 p.m. (Tr.86-89; State's Ex. 80).

Hill turned his vehicle around, but he did not pursue the vehicles (Tr.86).[2] Hill requested that a police helicopter respond to the scene (Tr.86; *see* Tr.112). He thought that there was a "rolling disaster going down the streets" and that he "had an obligation to try and help that person or people involved" (Tr.86). He was "concerned about pedestrian traffic and other motorists in the area" (Tr.86).

Merritt was talking to Mr. Lamb on the phone, and she told him to return home (Tr.278, 307). He eventually told her, "I am turning back around" and "I'm on the way back to the house" (Tr.278).

Shortly after the Mustang and red truck passed by Hill, a helicopter officer, Eric Valentine, reported that there was a red pickup truck heading west on 45th Street, two blocks south of where Hill had seen them (Tr.87, 112).

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[2] Hill was in an unmarked vehicle, and pursuant to KCPD policy, unmarked police vehicles were not permitted to engage in vehicular pursuits (Tr.79-80).

Valentine reported that the truck was "speeding and passing cars and ran a red light" (Tr.103). Valentine suspected that it was the same truck that Hill had seen (Tr.113-14). Valentine estimated that the truck was traveling about 60 miles per hour (Tr.113).

Although Hill heard the report about the truck, he drove east because he was concerned about the safety of the person in the Mustang, and he thought it was his job "to try and find this person and help them and get some information and then relay that information back as the investigation was unfolding" (Tr.90-91; *see* Tr.101-02).

Officers Troy Schwalm and DeValkenaere were nearby, assisting with an unrelated accident (Tr.144-46, 154-55). Schwalm had heard Hill's report of a red truck chasing a Mustang and almost causing accidents (Tr.151). When Hill requested a police helicopter and assistance, Schwalm thought that "there was something more to it versus just driving fast" (Tr.152-53; *see* Tr.184-85). When Valentine radioed that he had located the truck and that it was still traveling at a high rate of speed in the opposite direction, Schwalm thought that something had happened and that "the truck was getting out of the area at the same rate of speed that it got into the area" (Tr.153-54). Schwalm believed that they needed to investigate because there were "things happening that [were] indicative of more serious offenses occurring" (Tr.160; *see* Tr.185-86, 190-91).

DeValkenaere also heard Hill's broadcast about the red truck chasing the Mustang (Tr.519-22). DeValkenaere knew that Hill would not ordinarily report traffic violations for the Violent Offender Squad to respond to, so he believed that "this was a dangerous situation" (Tr.524).

DeValkenaere was about two blocks away from Hill, and he went south toward the intersection of 43rd and Cleveland Avenue (Tr.524). He then heard Valentine's report that Valentine had located "what he believed to be the same pickup truck driving erratically but now traveling in excess of 60 miles an hour westbound on 45th Street approaching Cleveland Avenue" (Tr.524). DeValkenaere stopped at 43rd and Cleveland Avenue, and he listened as Valentine reported that it looked like the red truck was "going to run the red light at 45th and Cleveland" (Tr.524-25).

DeValkenaere looked south down Cleveland Avenue, and he watched as the red truck drove "out onto Cleveland in the oncoming lanes of traffic and proceed[ed] northbound" (Tr.525). The truck ran the red light at the intersection of 45th Street and Cleveland Avenue and drove north toward DeValkenaere (Tr.525). DeValkenaer positioned himself in a parking lot on the southwest corner of the intersection of 43rd Street and Cleveland Avenue (Tr.525-26).

Instead of driving through the intersection of 43rd Street and Cleveland Avenue, the truck avoided the traffic signal by driving through the parking lot

(Tr.526). The truck passed right by DeValkenaere's vehicle (which was unmarked) and then went west on 43rd Street (Tr.526). DeValkenaere pulled out onto 43rd Street and followed the truck, but pursuant to KCPD policy, he did not engage in a vehicular pursuit (Tr.526). He saw the truck turn north, but because of the distance between himself and the truck, he could not tell what street the truck had turned onto (Tr.526).

DeValkenaere turned north on Benton Boulevard, but he could not see the truck (Tr.526). Valentine reported that the truck was at a residence near 4156 College Avenue (Tr.115-16, 526). DeValkenaere continued north on Benton Boulevard, went east on 41st Street, and drove back toward the intersection of 41st Street and College Avenue (Tr.526). He stopped just west of the intersection of 41st Street and College Avenue (Tr.526).

Valentine reported that the driver was positioning the truck behind the house (Tr.527; *see* Tr.115, 280). Valentine also reported that it appeared that the driver had exited the vehicle (Tr.527). Valentine stated, "if you guys are coming when you get back here, be careful. I last saw him in the area underneath the trees behind the house" (Tr.527). It was about 12:25 p.m. (Tr.124; State's Ex. 80).

Schwalm radioed DeValkenaere and asked, "if you're close do you want to go in there with me?" (Tr.528). DeValkenaere said that he would but that he had to put on his vest first (Tr.528). The plan was for Schwalm to respond and

for DeValkenaere "to assist him in furthering the investigation based on his actions" (Tr.528). DeValkenaere was going to ensure that Schwalm "was not there by himself" (Tr.528).

After putting on his vest, DeValkenaere followed Schwalm southbound on College, where they parked in front of the address provided by Valentine (Tr.529). Schwalm parked in front of the driveway, and DeValkenaere parked in front of the house (Tr.529). Schwalm exited his vehicle and immediately walked down the driveway into the backyard (Tr.529-30). Schwalm and DeValkenaere were both wearing their police vests (Tr.116-17; *see* Tr.147, 157).

Merritt was on the front porch (Tr.161). Schwalm made eye contact with her, but he did not speak to her (Tr.161; *see* Tr.285). Schwalm was holding his gun, and Merritt assumed that he was a police officer (Tr.285). Schwalm intended to go behind the house where the driver of the truck had gone (Tr.161-62, 193) He could see a man standing in the backyard at the end of the driveway (Tr.161-62, 193). The driveway was a shared driveway (Tr.294). The plan was to make contact with the driver of the truck (Tr.162; *see* Tr.193). Schwalm knew that DeValkenaere had the other side of the house covered (Tr.193).

Schwalm was holding his gun in a "low ready" position (Tr.166). He did not know "exactly what [they] were walking into in the back of [the] home but [they] believed it was something more serious than a traffic violation" (Tr.166).

He did not want to walk around "a blind corner" empty handed (Tr.166).

As Schwalm walked around the back corner of the house, he heard Valentine say that the truck was backing into the house (Tr.164-65). Schwalm thought that the driver was "trying to hide [the truck] from the helicopter that was overhead" (Tr.164).

In the backyard, Schwalm saw Nicholas King (Tr.168, 194). King started to raise his hands, and Schwalm told him to relax (Tr.168; *see* Tr.194). He said that they were not there for him and that they "just wanted to talk to the person in the truck" (Tr.168).

Schwalm then saw the driver (Mr. Lamb) backing the truck into a garage under the house (Tr.168). Schwalm stood at the top of the ramp that led down into the garage, and he told Mr. Lamb that he needed to talk to him (Tr.168, 170). He told Mr. Lamb to put the truck in park, and he stated that the truck was not going to fit into the garage (Tr.168). He kept his gun in a "low ready" position (Tr.178).

Schwalm gave repeated commands for Mr. Lamb to put the truck into park, but Mr. Lamb did not comply (Tr.171). Schwalm tried to explain that the truck was not going to fit into the garage (Tr.171). Mr. Lamb stared at Schwalm but did not respond (Tr.171). Schwalm was standing "off the front of his driver's side corner" (Tr.172). He could see Mr. Lamb's shoulders, and he could see Mr. Lamb's left hand on the steering wheel, but he did not "have a clear

line of sight into that driver's compartment" (Tr.197). It was dark in the garage (Tr.197).

Meanwhile, DeValkenaere exited his vehicle and walked across the front yard; he drew his gun as he got out of his vehicle or as he crossed the yard (Tr.530). He drew his gun because they "didn't know exactly what [they] were walking into" (Tr.530). They were investigating a situation that was "nature unknown," and his training was that "if we don't know what we're going to be in for, we're going to be prepared" (Tr.530). DeValkenaere did not know "the exact crime that [they] were investigating," but the information they had led him to believe that "this was a potentially dangerous situation" (Tr.530).

As he crossed the yard, DeValkenaere held his gun in a "low ready" position with the muzzle pointed at the ground (Tr.530-31). He saw Merritt on the front porch, and he asked her, "who's in the truck" (Tr.532). Merritt said, "I don't know" (Tr.532). DeValkenaere asked again, "who's driving the truck," and she said, "I don't know" (Tr.532). DeValkenaere did not stop to talk to her, and he moved past her to the north side of the house (Tr.532). He did not point his gun at her or give her any commands such as "back up," "don't move," or "put [your] hands in the air" (Tr.533-34).[3]

[3] Merritt's testimony was inconsistent with DeValkenaere's testimony, but the court found that DeValkenaere testified credibly. Merritt said that he pointed

As DeValkenaere went around to the north side of the house, he could see into the backyard, but he could not see Schwalm (Tr.534). Most of the backyard was not visible at that point because it was blocked by the house, but DeValkenaere could see some vehicles behind the house (Tr.534-35). There was a grill near the corner of the house between the house and the neighbor's fence, and it was part of "a fence-like barricade" (Tr.535, 585). DeValkenaere went around the north side of the house because he "wanted [to] take away the other possible avenue of escape," if the driver of the truck tried to run (Tr.535-36). He did not pause before going around the house because Schwalm was "back there and [Schwalm] anticipated that [DeValkenaere] was going to arrive to be in a position to assist him to further the investigation" (Tr.536).

DeValkenaere remained a short distance from the back corner of the house, but once he approached the grill, he saw a red pickup truck "in the middle of the yard beginning to back up toward underneath the carport"

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his gun at her and said, "Don't move" (Tr.286-87). She said that he then asked how many people were in the back (Tr.286-87). She said that she told him that there were two people in the back and that DeValkenaere told her to "back up to the house and stay right there" (Tr.289).

(Tr.536).[4] When DeValkenaere reached the corner of the house, he saw that Schwalm had his gun drawn and that he was giving orders to the driver of the truck to "put it in park, get out, get his hands up" (Tr.537). DeValkenaere also saw King standing in the back yard next to the cars that were parked along the back edge of the yard (Tr.537).

When DeValkenaere saw that the driver of the vehicle was not complying with Schwalm's commands, DeValkenaere decided to "kick the grill down so that [he] could get over it because there [was no] way to climb a barbecue grill to get back there quickly" (Tr.537; *see* Tr.199). DeValkenaere then moved into the backyard, near the corner of the house, and began giving commands "to stop the truck" and "get his hands up" (Tr.538; *see* Tr.199).

The truck was beginning to descend backward down the driveway (Tr.539). DeValkenaere was above the truck on a retaining wall, about eight feet away, and he could see into the interior of the truck (Tr.199, 539, 541, 591). The driver's right hand was on the steering wheel, and his fingers were "pointing straight up in the air" (Tr.539). The driver's left hand was "higher than his right hand," and it appeared to be "closer to" the driver (Tr.540).

The driver of the truck did not obey any of the commands to park the

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[4] Merritt testified that Mr. Lamb had placed the grill and a hood there as "his little way of trying to cover up" the backyard (Tr.287-90; *see* Tr.347).

truck and get out (Tr.542). The driver was focused on Schwalm (Tr.542). The driver then extended his left leg forward, moved his left hand back toward his body, and leaned to his right (Tr.543). DeValkenaere thought that the driver might be trying to grab something from his waistband and dispose of it (Tr.543-44).

As the driver sat back up, he was holding a pistol between his legs with his left hand (Tr.544). The gun was beneath the steering wheel, and the muzzle of the gun was "kind of pointed like at the floor of the truck" (Tr.544). DeValkenaere said, "he's got a gun, he's got a gun" (Tr.174, 200-01; *see* Tr.290, 545). DeValkenaere did not shoot the driver at that point because the driver was "posing no threat" (Tr.545). DeValkenaere thought that the driver was going to put the gun "underneath the seat or toss it in the back to try to get away from having being caught with a gun" (Tr.545).

The driver then moved his left hand up and brought the gun "up and around the left-hand side of the steering wheel" (Tr.546).[5] As he watched the driver raise the gun, DeValkenaere thought, "no, this can't happen," "I can't let this happen," meaning that he could not let the driver shoot Schwalm (Tr.546-47). DeValkenaere then brought his weapon up from the ready position and

[5] DeValkenaere's encounter with Mr. Lamb to that point in time had lasted about nine seconds (Tr.590).

pointed it toward the driver (Tr.546). DeValkenaere "discharged a round to [the driver's] center mass" and retreated back to his left to move behind the corner of the house (Tr.546, 560; *see* Tr.174, 290). As he moved to take cover behind the corner of the house, DeValkenaere fired three more shots in the direction of the driver (Tr.546). He would not have shot the driver if the driver "had not pointed that gun at [his] partner" (Tr.546). He intentionally fired his weapon in "defense of others," and he "purposely discharged the weapon four times" (Tr.559-60).

After the shooting, DeValkenaere looked for Schwalm, and he saw Schwalm and King, who was still in the backyard (Tr.547). DeValkenaere told Schwalm to "handle" King (Tr.547; *see* Tr.205-06). DeValkenaere then dropped down onto his right knee to look into the garage, and he saw that the driver of the truck was still in the driver's seat (Tr.547; *see* Tr.206). The truck had continued backward into the garage before stopping (Tr.547; *see* Tr.180-81).

Schwalm did not see anything come out of the truck, and he did not hear anything hit the ground (Tr.181). DeValkenaere also did not hear a gun drop from the driver's hand (Tr.547). After the shooting, DeValkenaere continued to command the driver, saying, "Keep your hands up" (Tr.548-49).

Other officers arrived and took up positions near him (Tr.551). An officer asked, "What are we looking for," and DeValkenaere said, "The party that I shot at as he drew a weapon is still in the truck inside the garage" (Ex. 53; *see*

Tr.550). DeValkenaere then said, "Hey somebody grab that lady in the pink that's walking eastbound she was on the front porch of this house" (Ex. 53; *see* Tr.548). DeValkenaere then thought that he needed "to improve the condition of his weapon," meaning that he did "a tactical reload" by removing the magazine that was in his weapon and inserting a full magazine (Tr.551). Shortly after that, another officer relieved DeValkenaere and said, "why don't you go, we've got it now" (Tr.551). DeValkenaere did not ever enter the garage, and he did not touch Mr. Lamb or Mr. Lamb's gun (Tr.551-52).

Two tactical officers, Christopher Blevins and Bryce Raines had arrived within about thirty seconds after the shooting (Tr.224-25; *see* Tr.290). Blevins had been on his way to the College Avenue address to potentially arrest the driver of the red truck (Tr.225). He had intended to be the "takedown car" that activated its lights and pulled over the truck (Tr.225). When they arrived at the residence, they were being directed by Valentine, and they ran toward the scene of the shooting (Tr.227). Blevins took DeValkenaere's place near the back corner of the residence (Tr.228).

Blevins could see the truck in the garage, and he could see the driver sitting in the truck (Tr.230). The driver was upright in the seat, and Blevins saw him lean forward (Tr.230-31). The driver's left arm was hanging out the window (Tr.237; *see* Tr.248). Blevins could hear the truck running (Tr.231). He kept his rifle pointed at the garage (Tr.236).

DeValkenaere went around to the front of the house, where Merritt was talking to some other officers (Tr.552). Merritt told the other officers that she had thought that DeValkenaere was one of "the people with the Mustang that had showed up earlier with guns" (Tr.553). DeValkenaere then advised other officers who were looking for the Mustang that he had heard that "the people associated with the Mustang or in the truck with the Mustang were over here with guns earlier" (Tr.553).[6]

Eventually, a group of several tactical officers entered the garage to "clear it" (Tr.232; *see* Tr.420-21, 446). The first tactical officer who entered the garage, Kyle Easley, was holding a shield with a small window that he could look through (Tr.245-48). Easley did not see a gun in the garage, but other officers, including Blevins, saw it (Tr.233, 248-50).

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[6] The transcript of the radio traffic shows that DeValkenaere stated, "We arrived here the lady in pink was telling us that the Mustang had come over here prior with guns and that's what led to the pursuit witnessed by 44 . . . 1144" (Ex. 53). At trial, DeValkenaere explained that he was not trying to say that the woman had told them about the Mustang when they first arrived; rather, he was trying to briefly summarize what had happened, i.e., that when they first arrived, the lady had been on the porch, and that she had later told them that the people with the Mustang had come over with guns (Tr.595).

As they entered the garage but while he was still outside, tactical officer Eurik Hunt, the "point man," saw the gun "just below . . . the driver's door of the vehicle just below where an arm was hanging out from the door" (Tr.421). Another tactical officer, William Hewitt, saw the gun on the ground as they cleared the garage (Tr.449, 463). Before entering the garage, Officer Mark Bentz saw a black semi-automatic handgun on the ground below the driver's arm (Tr.483-84). Officer Dillon Phillips saw the gun on the ground "directly below the driver's door" as they were clearing the garage (Tr.504). Officer Phillips used his foot "to pin the gun to the ground" until they determined that "there was no signs of life" in the driver (Tr.504).[7]

At about 5:30 p.m., crime scene technicians arrived at the scene (Tr.337). There was a gun on the floor of the garage, and a crime scene technician measured its distance from the south and west walls of the garage (Tr.348-49). The gun was on the floor beneath Mr. Lamb's hand, which was hanging out of the window of the truck (Tr.375; State's Exs. 18-20, 94). The gun was located near the front driver's side tire (State's Exs. 18-20, 94). Mr. Lamb was sitting on a cell phone (Tr.377; State's Ex. 86).[8]

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[7] Officers Hunt, Hewitt, Bentz, and Phillips were called by the defense.

[8] Merritt testified that, when Mr. Lamb left the house to chase Reed, she saw a gun on the stairs leading down into the basement (Tr.277). She said the gun

Mr. Lamb's body was photographed at the scene, and a medical examiner and investigator conducted a cursory examination of his body (Tr.350-51, 355, 366; *see* Tr.379-80). That search of Mr. Lamb's body produced several items, including a penny (Tr.350-53, 367-70). They did not find any ammunition at that time in the pockets of Mr. Lamb's jeans, but later, during a more thorough examination of the body, the medical examiner found two rounds of live ammunition in Mr. Lamb's pocket, along with other items that had not been previously found (Tr.353, 378, 381, 391).[9]

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was on the third stair from the bottom (Tr.278). Although she gave multiple statements before trial, Merritt did not mention seeing a gun on the stairs at the time Mr. Lamb chased Reed until about a month before trial (*see* Tr.318-28). Inasmuch as the court credited DeValkenaere's testimony about the incident, the court either disbelieved Merritt's testimony about the gun being on the stairs at that time, or, alternatively, the court concluded that Mr. Lamb must have retrieved the gun when he got out of his truck immediately before backing into the garage. Merritt acknowledged that Mr. Lamb generally kept his gun in his truck (Tr.278).

[9] Some of the State's presentation of evidence was designed to suggest that the gun was planted on the floor of the garage and that the two live rounds were planted on Mr. Lamb's body. Devalkenaere testified that he did not "plant

An autopsy revealed that Mr. Lamb sustained two gunshot wounds (Tr.409). One bullet entered the upper right side of his chest, and the other bullet entered his left leg (Tr.409). Mr. Lamb died as a result of his injuries (Tr.409).

The State initially charged Mr. DeValkenaere by indictment (*see* L.F.39:1). The State later filed an information in lieu of indictment, charging Mr. DeValkenaere with involuntary manslaughter in the first degree and armed criminal action (L.F.39:1-2).

The case went to trial on November 8, 2021 (Tr.28). DeValkenaere waived his right to a jury trial (Tr.12-15). In addition to his own testimony, DeValkenaere presented the testimony of several witnesses (Tr.417, 438, 481, 499, 603, 611). During the course of the trial, the court viewed the scene of the shooting (Tr.601).

One of DeValkenaere's witnesses, Dr. David Clymer testified that, on

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evidence," that he did not ask anyone to change a report, that he did not ask any of his "cop friends to put a gun on the ground in that garage," that he did not ask anyone to put Mr. Lamb's DNA on the gun or on the bullets in the gun, and that he did not go to the morgue or ask any of the crime scene technicians or anyone in the medical examiner's officer or any detective to put bullets (or any other objects) into Mr. Lamb's pocket (Tr.554-55).

January 13, 2015, Mr. Lamb was treated for a gunshot wound to his left index finger (Tr.606). He testified that, based on his review of the medical records and videos depicting Mr. Lamb using his left hand, he saw nothing to indicate that Mr. Lamb did not have functional use of his left hand (Tr.607). He said that to a reasonable degree of medical certainty, Mr. Lamb's fingertip injury would not have prevented him from using his hand and holding a gun (Tr.608).

Steven Ijames offered expert testimony about "contemporary police tactics" (Tr.613). He opined that DeValkenaere's actions during the encounter with Mr. Lamb were reasonable and consistent with contemporary police tactics (Tr.634, 638-39).

On November 19, 2021, the Court found DeValkenaere guilty of the lesser offense of involuntary manslaughter in the second degree and armed criminal action (Tr.704). In finding DeValkenaere guilty, the court made several findings on the record, including that DeValkenaere and Schwalm were not lawfully present behind the home, that they were the initial aggressors in the encounter, that DeValkenaere did not act in lawful defense of others, and that DeValkenaere was criminally negligent (Tr.697-704).

On February 22, 2022, the court heard arguments on the issue of whether Mr. DeValkenaere would remain on bond (Tr.725-40). At that time, the court observed that, in finding Mr. DeValkenaere guilty, the court had found "one issue of law that . . . countermanded every other factual issue in the

case," namely, "whether or not Sergeant Schwalm and Detective DeValkenaere were lawfully present on the premises when they engaged Cameron Lamb" (Tr.743). The court stated that it had found that as a "matter of law they were not" (Tr.743).

On March 4, 2022, Mr. DeValkenaere appeared for judgment and sentencing (Tr.748). At that time, the court stated that it did not believe that DeValkenaere was guilty of murder and that DeValkenaere's trial testimony was credible (Tr.826-27). As noted above, the court stated, "I found as I considered the evidence of the case that the defendant Eric DeValkenaere testified credibly at trial." (Tr.826). The Court further observed:

> He was rushing to provide cover for Sergeant Schwalm who had rushed into the backyard with his weapon drawn prompting the defendant to do the same from the other side of the house. Although not in the Court's view, again rightly or wrongly, beginning his obligation to act with reasonable care as the Court found he has failed to do, his natural reaction to protect his partner is a factor for me to also consider.
>
> And let's also be clear and it's hard to accept this distinction. I know that. Murder and involuntary manslaughter arising from criminal negligence are two different things. They are different legal concepts. They are different things. Eric Devalkenaere is not

> Derek Chauvin who murdered George Floyd. Eric Devalkenaere is not one of the three men in Georgia convicted of running down and murdering Ahmad Arbery. This is a mitigating factor.

(Tr.826-27).

The Court sentenced Mr. DeValkenaere to three years' imprisonment for the offense of involuntary manslaughter in the second degree and six years' imprisonment for the offense of armed criminal action (Tr.828; L.F.49:1-2). The court ordered the sentences to run concurrently (Tr.828).

ARGUMENT

I.

The evidence was insufficient as a matter of law to prove that DeValkenaere was guilty of involuntary manslaughter in the second degree and, by extension, armed criminal action. (Responds to Points I-VIII of Appellant's Brief.)

In six separate points (Points II, IV-VIII), DeValkenaere asserts that the evidence was insufficient to support his convictions (*see* App.Br. 24-27). For the reasons that follow, the State agrees.

A. The standard of review

" 'When judging the sufficiency of the evidence to support a conviction, appellate courts do not weigh the evidence but accept as true all evidence tending to prove guilt together with all reasonable inferences that support the verdict and ignore all contrary evidence and inferences.' " *State v. Collins*, 648 S.W.3d 711, 718 (Mo. 2022). " 'In determining whether the evidence was sufficient to support a conviction, this Court asks only whether there was sufficient evidence from which the trier of fact reasonably could have found the defendant guilty.' " *Id.*

"Appellate courts defer to factual determinations because the trier of fact, whether a judge or jury, is 'in a better position not only to judge the credibility of the witnesses and the persons directly, but also their sincerity

and character and other trial intangibles which may not be completely revealed by the record.' " *State v. Porter*, 439 S.W.3d 208, 212 (Mo. 2014). "This Court defers to the trial court's evaluation of witness credibility and the weight of the evidence." *State v. Dunn*, 147 S.W.3d 75, 78 n. 7 (Mo. 2004).

B. The trial court's finding of guilt

The State charged DeValkenaere with two offenses: the class C felony of involuntary manslaughter in the first degree and the unclassified offense of armed criminal action (L.F.39:1-2). After considering the evidence that had been presented at trial, the court found DeValkenaere guilty of the lesser included offense of the class E felony of involuntary manslaughter in the second degree and armed criminal action (Tr.704).

In finding DeValkenaere guilty, the court made various findings on the record, including the following:

> (1) "defendant and Sgt. Schwalm had no probable cause to believe that a crime had been committed by Cameron Lamb;"
>
> (2) "defendant and Sgt. Schwalm had no arrest warrant for Cameron Lamb;"
>
> (3) defendant and Sgt. Schwalm were not "at 4154 College to arrest" Cameron Lamb;
>
> (4) defendant and Sgt. Schwalm "would not have had probable cause to [arrest Cameron Lamb] or to obtain a warrant to do so;"

(5) "defendant and Sgt. Schwalm had no search warrant for the residence at 4154 College Avenue or for Cameron Lamb's vehicle;"

(6) defendant and Sgt. Schwalm "would not have had probable cause to seek or obtain" a search warrant;

(7) "defendant and Sgt. Schwalm did not have anyone's consent to be on the property at 4154 College;"

(8) "defendant and Sgt. Schwalm were not engaged in a pursuit of Cameron Lamb, fresh, hot or otherwise;"

(9) "no exigent circumstances as that phrase has been defined by the law justified their presence on the property at 4154 College that day;"

(10) defendant was "assisting and following Sgt. Schwalm, who was engaged in an investigation into the circumstances surrounding the actions of a red pickup truck that matched the description of a pickup being driven by Cameron Lamb into the driveway of the residence and which had previously been chasing a purple Mustang, a chase that was over;"

(11) defendant and Sgt. Schwalm "had only reasonable suspicion that criminal activity was afoot;"

(12) "Sgt. Schwalm and defendant's encounter with Cameron Lamb at 4154 College took place on the curtilage of the property;"

(13) "Sgt. Schwalm was not lawfully present in the backyard-carport area of 4154 College;" and

(14) defendant was not lawfully present in the area "when he followed Sgt. Schwalm into that area and when defendant encountered Cameron Lamb and when he then shot him."

(Tr.697-702).

Having found that Sgt. Schwalm and DeValkenaere were not "lawfully present" in the backyard-carport area, the Court further found:

(1) "Sgt. Schwalm and defendant were the initial aggressors in the encounter with Cameron Lamb;"

(2) Sgt. Schwalm and defendant "had a duty to retreat from the encounter under the circumstances;"

(3) "defendant was not acting in lawful self-defense;"

(4) "defendant was not acting in lawful defense of Sgt. Schwalm;" and

(5) because defendant and Sgt. Schwalm "were not effecting an arrest of Cameron Lamb or preventing his escape after an arrest, . . . defendant did not lawfully utilize deadly force as a law enforcement officer under Missouri use of force law applicable to such officers."

(Tr.702-03).

The Court finally found that, "when defendant follow[ed] Sgt. Schwalm into the backyard of 4154 College and engaged Cameron Lamb, ultimately shooting and killing him, he did so without considering or being aware of the substantial and unjustifiable risks associated with his conduct, including but not limited to," the following:

(1) "Sgt. Schwalm and he were unlawfully on the property,"

(2) "they were both escalating a situation that previously had deescalated," and

(3) "their actions created or exacerbated the risk what ultimately occurred would."

(Tr.703). The Court found that "this conduct was a gross deviation from the standard of care that a reasonable person would exercise in the situation and constituted criminal negligence as that phrase is defined under Missouri law" (Tr.703-04).

At a subsequent hearing, the court highlighted the importance of its finding that Sgt. Schwalm and DeValkenaere were not lawfully present behind the residence. The court stated that it believed that "one issue of law . . . countermanded every other factual issue in the case," namely, "whether or not Sergeant Schwalm and Detective DeValkenaere were lawfully present on the premises when they engaged Cameron Lamb" (Tr.743). The court said that it had found that as a "matter of law they were not" lawfully present on the

premises (Tr.743).

At sentencing, when the court entered its judgment, the trial court further stated that it did not believe that DeValkenaere was guilty of murder and that DeValkenaere's trial testimony was credible (Tr.826-27). The court stated, "I found as I considered the evidence of the case that the defendant Eric DeValkenaere testified credibly at trial." (Tr.826). The Court further observed:

> He was rushing to provide cover for Sergeant Schwalm who had rushed into the backyard with his weapon drawn prompting the defendant to do the same from the other side of the house. Although not in the Court's view, again rightly or wrongly, beginning his obligation to act with reasonable care as the Court found he has failed to do, his natural reaction to protect his partner is a factor for me to also consider.
>
> And let's also be clear and it's hard to accept this distinction. I know that. Murder and involuntary manslaughter arising from criminal negligence are two different things. They are different legal concepts. They are different things. Eric Devalkenaere is not Derek Chauvin who murdered George Floyd. Eric Devalkenaere is not one of the three men in Georgia convicted of running down and murdering Ahmad Arbery. This is a mitigating factor.

(Tr.826-27).

C. As a matter of law, the evidence was not sufficient

A challenge to the sufficiency of the evidence presents a legal question for this Court's review, namely, whether the facts found by the trier of fact satisfy the legal elements of the offense. *See Musacchio v. United States*, 577 U.S. 237, 243 (2016) ("The reviewing court considers only the 'legal' question 'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' ").

In a jury-tried case where there is simply an unadorned verdict, or in a court-tried case where a trial court makes no express factual or credibility findings on the record, the standard of review dictates that a reviewing court simply accept all of the evidence and inferences that support the legal elements of the offense. *See State v. Zetina-Torres*, 482 S.W.3d 801, 806 (Mo. 2016) ("To determine whether the evidence presented was sufficient to support a conviction and to withstand a motion for judgment of acquittal, this Court does not weigh the evidence but, rather, 'accept[s] as true all evidence tending to prove guilt together with all reasonable inferences that support the verdict, and ignore[s] all contrary evidence and inferences.' ").

However, when a court acting as the factfinder makes factual findings and credibility determinations, an appellate court defers to those findings. *See Porter*, 439 S.W.3d at 212 ("Appellate courts defer to factual determinations

because the trier of fact, whether a judge or jury, is 'in a better position not only to judge the credibility of the witnesses and the persons directly, but also their sincerity and character and other trial intangibles which may not be completely revealed by the record.' "); *State v. Gomez*, 92 S.W.3d 253, 256-57 (Mo.App. 2002) ("We rely upon the finding of the trial judge who indicated that there was no evidence of any threats, express or implied, or testimony about physical force.").

Arguing in support of the trial court's judgment, amicus curiae cites a case reviewing a ruling on a motion to suppress and asserts that " 'gratuitous oral statements made by the trial court are to be disregarded by this Court entirely unless there is an ambiguity in the language of the written judgment or order' " (Amicus Br. 30, quoting *Avent v. State*, 432 S.W.3d 249, 256 (Mo.App. 2014), which cited *Harvey v. Director of Revenue*, 371 S.W.3d 824, 828 (Mo.App. W.D. 2012)). Amicus argues that the court's credibility finding should be disregarded entirely or, in the alternative, that it should be viewed merely as a finding that the court believed "that [DeValkenaere] was genuinely concerned with his partner's after [sic]" (Amicus Br. 31).

But review of a criminal judgment is not synonymous with reviewing a written suppression order or a written order or judgment in a civil case, where the written judgment is the court's judgment. The judgment in a criminal case occurs at sentencing, and the written judgment is merely a memorialization of

that judgment. *State v. Vandergrift*, 2023 WL 3976307, *3 (Mo. 2023). "Unlike judgments in civil cases, . . . [in criminal cases] the entry of a judgment of conviction in the record, though required, is a mere ministerial act, consistent with the fact that the terms of the Rule 29.07(c) judgment of conviction must conform with the oral judgment rendered by the circuit court." *Id*.

Thus, here, the court's oral pronouncements at sentencing cannot be "disregarded" based on a rule drawn from civil cases. Moreover, a trial court's credibility finding—as opposed to a limited comment about one aspect of the evidence, *cf. Avent*, 432 S.W.3d at 255 —is not a "gratuitous oral statement[.]" To the contrary, it is a finding that reviewing courts must give deference to in reviewing the sufficiency of the evidence. *Porter*, 439 S.W.3d at 212. As such, to conclude—contrary to DeValkenaere's credible testimony—that Mr. Lamb was unarmed, is contrary to the standard that governs this Court's review of the evidence. " 'In reviewing the sufficiency of the evidence supporting a criminal conviction, an appellate court "does not act as a 'super juror' with veto powers" but "gives great deference to the trier of fact." ' " *State v. Naylor*, 510 S.W.3d 855, 859 (Mo. 2017).

Accordingly, the legal question of whether the evidence was sufficient to support DeValkenaere's convictions must be viewed in light of the trial court's factual and credibility findings, which indicated that the court found that DeValkenaere credibly testified that Mr. Lamb pulled a gun and pointed it at

Schwalm. And, when viewed in that light, the evidence was not sufficient.

1. Involuntary manslaughter in the second degree

As outlined above, the State charged DeValkenaere with involuntary manslaughter in the first degree, alleging that he "recklessly caused the death of Cameron D. Lamb by shooting him" (L.F.39:1). Ultimately, the trial court was not convinced beyond a reasonable doubt that DeValkenaere acted recklessly; and, instead, the court found DeValkenaere guilty of the lesser included offense of involuntary manslaughter in the second degree (Tr.704).

"A person commits the offense of involuntary manslaughter in the second degree if he or she acts with criminal negligence to cause the death of any person." § 565.027. "A person **'acts with criminal negligence'** or is criminally negligent when he or she fails to be aware of a substantial and unjustifiable risk that circumstances exist or a result will follow, and such failure constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation." § 562.016.5.

At trial, DeValkenaere testified that he shot Mr. Lamb in order to defend Detective Schwalm (Tr.543-47, 559-60). As outlined above, the trial court found that DeValkenaere testified credibly (Tr.826).

With regard to the shooting, DeValkenaere testified that Mr. Lamb did not comply with commands to park the truck and get out (Tr.542). Instead, Mr. Lamb pulled a pistol out of his waistband and held it between his legs beneath

the steering wheel (Tr.543-44).

When Mr. Lamb raised the gun "up and around the left-hand side of the steering wheel" and pointed it at Schwalm, DeValkenaere brought his weapon up from the ready position and pointed it at Mr. Lamb (Tr.546). DeValkenaere then "discharged a round to [Mr. Lamb's] center mass" and retreated back to his left to move behind the corner of the house (Tr.546, 560). As he moved to take cover behind the corner of the house, DeValkenaere fired three more shots in the direction of Mr. Lamb (Tr.546). DeValkenaere testified that he would not have shot Mr. Lamb, if Mr. Lamb "had not pointed that gun at [his] partner" (Tr.546). He intentionally fired his weapon in "defense of others," and he "purposely discharged the weapon four times" (Tr.559-60).

As outlined above, the court credited this testimony and stated its belief that DeValkenaere was not guilty of murder (Tr.826-27). The court stated that DeValkenaere was not like "Derek Chauvin who murdered George Floyd" and that he was not like "the three men in Georgia convicted of running down and murdering Ahmad Arbery" (Tr.827).

Indeed, the court was not persuaded that DeValkenaere was even guilty of the charged offense of involuntary manslaughter in the first degree (*see* Tr.704). Instead, the court found that DeValkenaere—who was "rushing to provide cover for Sergeant Schwalm" and who followed his "natural reaction to protect his partner"—was guilty of involuntary manslaughter in the second

degree, concluding that he was criminally negligent (Tr.704).

To conclude that DeValkenaere was not guilty of murder (i.e., that he was not guilty of knowingly or purposely causing Mr. Lamb's death), the court would have had to conclude either that the shooting was a reasonable use of force or that DeValkenaere did not act purposely or knowingly and instead acted with a less culpable mental state.

a. DeValkenaere reasonably defended Schwalm

Inasmuch as the court credited DeValkenaere's testimony, it is evident that the court believed that DeValkenaere's use of force was objectively reasonable. [10] Indeed, the court made no findings to suggest that DeValkenaere's use of force was unreasonable, and Missouri courts have routinely held that using deadly force in response to the threat of a gun or other deadly weapon is reasonable. *See State v. Endicott*, 600 S.W.3d 818, 824-25 (Mo.App. 2020); *Stiers v. State*, 229 S.W.3d 257, 262 (Mo.App. 2007). Thus, the State failed to prove beyond a reasonable doubt that DeValkenaere did not reasonably believe that it was necessary to use deadly force to defend Schwalm from death, serious physical injury, or a forcible felony.

Nevertheless, the court found that DeValkenaere did not act in lawful

[10] DeValkenaere asserts in Points VI and VII that the State failed to prove that he did not act in lawful defense of Schwalm.

defense of others (Tr.702-03). However, rather than discount DeValkenaere's testimony, the court found that DeValkenaere and Schwalm were the "initial aggressors" (Tr.702-03)—a circumstance that legally precludes the use of force in defense of others. *See* § 563.031.1. The court found that as a matter of law, the officers were not "lawfully present in the backyard-carport area," and the court found that this made them the initial aggressors (Tr.702-03; *see* Tr.743).[11]

But this finding does not comport with the law or the facts. " 'An initial aggressor is one who first attacks or threatens to attack another.' " *State v. Morse*, 498 S.W.3d 467, 472 (Mo.App. 2016). A trespasser is not an "initial aggressor" simply by virtue of an illegal entry onto property; rather, there must be an attack or a threatened attack upon another person. *See generally Burke v. Mesniaeff*, 220 A.3d 777, 794 (Conn. 2019) (". . . although criminal trespass may pose an inherent risk of harm to property and privacy rights . . . it does not, in the absence of additional facts, pose a similar inherent risk of harm to the *physical safety* of invitees who happen to be on the property.").

[11] DeValkenaere challenges this aspect of the court's findings in Points III and IV of his brief. Point III alleges a legal error, and to the extent that the court committed only legal errors that undermine confidence in the convictions, the appropriate remedy would be a new trial.

Here, the court made no finding that Schwalm or DeValkenaere attacked or threatened to attack Mr. Lamb before Mr. Lamb pulled out his gun and pointed it at Schwalm (Tr.702-03). And the evidence would not have supported such a finding.

Schwalm testified that he was holding his gun in the "low ready" position while he gave verbal commands to Mr. Lamb to park the car and get out (Tr.178). DeValkenaere testified that he had his gun at the "low ready" while he also gave commands, and he said that he did not bring his weapon up from the ready position and point it at Mr. Lamb until after Mr. Lamb pointed his gun at Schwalm (Tr.530-31, 546).

To be sure, the fact that Schwalm and DeValkenaere had their guns drawn is a circumstance that could lead a person to believe that the officers were prepared to use force. But police officers are not "initial aggressors" simply because they draw their weapons as a protective measure. Reasonable people know that police officers are authorized to use force if necessary, and the law recognizes that police officers are granted greater leeway than ordinary citizens when they are acting in their official capacity.

Indeed, officers are expected to be aggressive (although not excessive) in carrying out their duties—both to protect themselves and to protect the citizens they are sworn to protect. " 'An officer is expected to be the aggressor, and is not to be placed on the same level as ordinary individuals having a

private quarrel or denied that protection commensurate with the public duty exacted.' " *Fisher v. State*, 359 S.W.3d 115, 120 (Mo.App. 2011) (omitting internal quotes and quoting *State v. Thomas*, 625 S.W.2d 115, 122 (Mo. 1981)). "Our Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." *Graham v. Connor*, 490 U.S. 386, 396 (1989).

In other words, even if Schwalm and DeValkenaere were aggressive and "escalated" the situation by having their guns drawn, they were acting in a manner that was consistent with their duties as law enforcement officers. Such conduct by law enforcement officers did not give Mr. Lamb a license to shoot them,[12] and it did not deprive DeValkenaere of the right to defend Schwalm when Mr. Lamb pointed his gun at Schwalm.[13] Put simply, officers are not

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[12] To the contrary, a person can be criminally liable for resisting an arrest or an attempted stop or detention. § 575.150.1.

[13] The trial court did not find that Mr. Lamb lawfully used deadly force against Schwalm. The court did not find, for instance, that Mr. Lamb was justified in using deadly force under the Castle Doctrine (Tr.697-704). And there was no evidence that Mr. Lamb "reasonably believe[d]" that he needed to use force to defend himself from the "use or imminent use of unlawful force" by the officers.

initial aggressors simply by virtue of the fact that they draw their weapons in the course of their duties.

While a person can legitimately complain when a police officer makes a mistake and unlawfully enters the curtilage of her or his home, a person cannot respond to such a constitutional violation with violence. *See generally State v. Golodner*, 46 A.3d 71, 80 (Conn. 2012) ("The law does not afford a privilege to challenge, by means of criminal conduct directed toward the police, an unlawful entry into one's home or curtilage.").

Moreover, when an officer makes such a mistake, an officer is not stripped of her or his right to act in lawful self-defense or defense of others if they are subjected to a perceived use of unlawful deadly force. Law enforcement officers must not be subjected to such additional perils in the course of their duties. Rather, the potential remedy for such Fourth Amendment violations is the exclusion of unlawfully obtained evidence or civil liability for the officer.

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§ 563.031.1. Moreover, even if there were a basis to conclude that Mr. Lamb acted reasonably in defending himself against Schwalm, that would not preclude a finding that DeValkenaere also acted reasonably in defending Schwalm, as the use of force depends upon a person's reasonable belief that force is necessary. § 563.031.1.

In sum, because the court credited DeValkenaere's testimony that he shot Mr. Lamb to defend Schwalm from deadly force, because the court found that DeValkenaere was not guilty of murder, and because the court's finding that Schwalm and DeValkenaere were the initial aggressors was not supported by the law or the evidence, the State failed to prove that DeValkenaere—to the extent that he acted knowingly or purposely—did not act in lawful defense of others.[14] Accordingly, inasmuch as the State bore the burden of proving that DeValkenaere did not act in lawful defense of others, § 563.031.5, the Court should reverse DeValkenaere's convictions and order him discharged or, in the alternative, order a new trial.

b. DeValkenaere did not act with criminal negligence to cause Mr. Lamb's death

In finding that DeValkenaere was not guilty of murder but nevertheless guilty of a lesser homicide, the trial court found that he acted with criminal negligence (instead of acting purposely or knowingly) (Tr.703-04). As outlined

[14] Under Missouri law, "If the definition of an offense prescribes criminal negligence as the culpable mental state, it is also established if a person acts purposely or knowingly or recklessly." § 562.021.4. However, when a person acts in lawful defense of others, that person cannot be found guilty of a knowing or purposeful murder or any included homicide offense.

above, the court found that, when DeValkenaere followed Schwalm into the backyard, he did so "without considering or being aware of the substantial and unjustifiable risks associated with his conduct," including, (1) that he and Schwalm were "unlawfully on the property," (2) that they were "escalating a situation that previously had deescalated," and (3) that "their actions created or exacerbated the risk what ultimately occurred would" (Tr.703).[15]

These findings do not support a conviction for involuntary manslaughter in the second degree. As discussed above, "what ultimately occurred" was that DeValkenaere shot Mr. Lamb in response to Mr. Lamb's perceived unlawful use of deadly force against Schwalm. To find that DeValkenaere was criminally negligent for failing to be aware of the fact that Mr. Lamb would use unlawful force in response to an alleged trespass and attempted stop of Mr. Lamb—and to then hold DeValkenaere criminally liable for protecting his partner from Mr. Lamb's unlawful use of force—is a perverse application of the law.

Even if DeValkenaere failed to be aware that he had not lawfully entered the curtilage, and even if his failure was a gross deviation from the standard of care that a reasonable person would have employed, that would not make him guilty of involuntary manslaughter in the second-degree. Rather, it would

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[15] DeValkenaere asserts in Point V that the State failed to prove that his "presence on the curtilage was the cause of [Mr. Lamb's] death."

make him criminally negligent as to trespassing.

Moreover, even if DeValkenaere failed to be aware that his conduct was "escalating" a situation and exacerbating the risk that Mr. Lamb would pull out his gun and point it at Schwalm (although there was no evidence to even suggest that Mr. Lamb saw DeValkenaere (*see* Tr.171, 542)), DeValkenaere cannot be held criminally liable for failing to be aware that Mr. Lamb would use unlawful force against Schwalm. Mr. Lamb's use of deadly force was unlawful conduct that was committed by Mr. Lamb; it cannot be used to impose criminal liability on DeValkenaere.

In short, even if he trespassed or committed a constitutional violation by unlawfully entering the curtilage, DeValkenaere did not act with criminal negligence in shooting Mr. Lamb. To the contrary, DeValkenaere lawfully used force to defend Schwalm from Mr. Lamb's use of unlawful, deadly force. The Court should reverse DeValkenaere's convictions and order him discharged. *See State v. Hunt*, 451 S.W.3d 251, 257 n. 8 (Mo. 2014) ("If there was insufficient evidence of Deputy Hunt's mens rea, the convictions cannot stand even if he committed a constitutional violation.").

c. DeValkenaere was not guilty of "imperfect self-defense"

The Missouri Supreme Court has recognized that, in limited situations, a person who intentionally acts in self-defense can be guilty of recklessly causing another's death. *See State v. Beeler*, 12 S.W.2d 294 (Mo. 2000). This

narrow category of cases arises when a person claims to shoot another in self-defense but "the shooting resulted from an unreasonable belief in the necessity of using force." *Id*. at 298.

In *Beeler*, the defendant was a city marshal, and he pulled over the victim for driving with a headlight out. *Id*. at 295. During the stop, defendant shot and killed the victim, and he subsequently made statements indicating that he shot the victim in self-defense, after the victim wielded a hammer. *Id*. at 295-97.

Defendant was charged with second degree murder. The second-degree murder instruction included a reference to self-defense, but the involuntary manslaughter instruction contained no reference to self-defense. *Id*. The jury found defendant guilty of involuntary manslaughter. *Id*.

On appeal, the Missouri Supreme Court examined the defendant's claim that, because there was no evidence that he acted recklessly, it was error for the trial court to instruct the jury on the offense of involuntary manslaughter. *Id*. The defendant asserted that it was "inconsistent to be acquitted of second degree murder where the evidence support[ed] submission of self-defense and to be convicted of the lesser included offense of involuntary manslaughter." *Id*.

In rejecting the defendant's claim, the Court observed that, in the context of that case, "the statutory definition of 'reckless' would include the conscious discharging of a firearm with disregard for a substantial and unjustifiable risk

that death will result and that the conscious firing of the weapon constitutes a gross deviation from what a reasonable person would do to protect himself." *Id*. The Court cited to a comment from the model penal code that affirmed that "a killing may be classified with purposeful homicide if the defendant acted in an unreasonable belief that the conduct was necessary to save his own life." *Id*. The Court observed that "[t]his circumstance is often referred to as 'imperfect self-defense.' " *Id*. The Court concluded that "reckless conduct is not inconsistent with the intentional act of defending one's self, if in doing so one uses unreasonable force." *Id*.

The Court then hypothesized that a jury could acquit of murder in the second degree and still find the defendant guilty of involuntary manslaughter in the first degree. The Court explained: "The jury could believe the defendant acted unreasonably in defending himself, but not believe defendant had the requisite intent for second degree murder; that is, he did not knowingly cause the victim's death or have a purpose to do great harm to the victim." *Id*. at 300. The Court continued, "At the same time, the jury could consistently find that the homicide involved a conscious disregard of a substantial and unjustifiable risk of death to the victim and that the force used was a gross deviation from that force reasonably necessary for defendant to protect himself." *Id*.

The Court then examined how the jury had been instructed, and the Court observed that, because the jury had only been instructed on self-defense

as to murder in the second degree, the jury could have concluded both that the defendant acted in lawful self-defense (i.e., that he was not guilty of murder) *and* that he acted unreasonably in defending himself (i.e., that he was guilty of involuntary manslaughter). *Id*. at 300. This error was further compounded by the prosecutor's closing argument, which stated that the jury could still find the defendant guilty of a lesser offense if he acted in lawful self-defense. *Id*. at 300-01. Then, because "[n]either the state nor defendant argued that the real issue for the jury to decide was the nuance in difference between a homicide involving a knowing state of mind and a homicide resulting from a conscious disregard of risk," the Court found that it was "clear that the jury's acquittal of defendant on the second degree murder charge was based on the theory of self-defense." *Id*. at 301. Accordingly, the Court ordered the defendant discharged, as the jury's "verdict foreclose[d] any further trial on the question of whether defendant acted reasonably." *Id*.

DeValkenaere's case presents a somewhat similar scenario; however, *Beeler* is not directly on point, in that the concept of imperfect self-defense is predicated upon a "conscious disregard of a substantial and unjustifiable risk of death to the victim" and an unreasonable use of force that is a "gross deviation from that force reasonably necessary for defendant to protect himself." *Id*. at 300. In other words, in *Beeler*, the concept of imperfect self-defense was recognized in the context of a reckless offense. Here, by contrast,

DeValkenaere was found guilty of an offense involving criminal negligence.

In any event, even if the concept of imperfect self-defense applies to offenses involving criminal negligence, the trial court's findings do not support a conviction for involuntary manslaughter in the second degree. Here, the trial court found that DeValkenaere was not guilty of murder (Tr.827). But, as discussed above, the court made no finding that DeValkenaere "acted unreasonably in defending" Schwalm. Instead, on the issue of defense of others, the court found—incorrectly—that Schwalm and DeValkenaere were the "initial aggressors" (Tr.702).

Additionally, the court made no finding that DeValkenaere "did not knowingly cause [Mr. Lamb's] death or have a purpose to do great harm to [Mr. Lamb]." To the contrary, the court found that DeValkenaere testified credibly at trial (Tr.826), and DeValkenaere testified that he intentionally fired his weapon in "defense of others" and that he "purposely discharged the weapon four times" at Mr. Lamb's center mass (Tr.559-60).

Finally, the court did not find "a substantial and unjustifiable risk of death to the victim and that the force used was a gross deviation from that force reasonably necessary for defendant to protect" Schwalm. Indeed, rather than make any finding along those lines, the court found that DeValkenaere acted "without considering or being aware" that he was not "lawfully present" on the property, that he was "escalating the situation," and that he was

"creat[ing] or exacerbate[ing] the risk" that Mr. Lamb would be shot after Mr. Lamb used deadly force against Schwalm (Tr.703). However, these findings do not suggest that the force that DeValkenaere used in response to Mr. Lamb's use of deadly force was "a gross deviation from that force reasonably necessary to protect" Schwalm.

Thus, even assuming that the concept of imperfect self-defense can be extended to a homicide involving criminal negligence, the trial court did not find any facts that support a conviction under that theory. Rather, it appears that the trial court credited DeValkenaere's testimony, and that, but for the court's erroneous finding that the officers were the initial aggressors, the court would have found that DeValkenaere acted in lawful defense of others. There was no evidence that DeValkenaere acted with criminal negligence in shooting Mr. Lamb, and, thus, the Court should reverse DeValkenaere's convictions and order him discharged.

d. Limited intrusion into the curtilage of a home is permitted for legitimate police business

In addition, as a matter of law, the court erred in finding that Schwalm and DeValkenaere were not "lawfully present in the backyard-carport area." The court found that Schwalm and DeValkenaere were within the curtilage of Mr. Lamb's house when DeValkenaere shot Mr. Lamb (Tr.699). But the court's view of what the officers were permitted to do under the Fourth Amendment

was incorrect, insofar as it unduly limited what an officer is permitted to do when engaged in legitimate police business.[16]

The evidence showed that Mr. Lamb engaged in a high-speed chase of his girlfriend which endangered other motorists (Tr.81-86, 264-75, 305-07). Officer Hill observed part of the chase on 43rd Street, and he immediately requested assistance from an overhead police helicopter (Tr.81-82, 86, 112). A police helicopter identified a red truck speeding on 45th Street (Tr.87, 112).

Schwalm heard Hill's report over the radio, and he subsequently heard the helicopter officer report that he had located a red truck speeding west on 45th Street (Tr.151-53). Schwalm believed that they needed to investigate because there were "things happening that [were] indicative of more serious offenses occurring" (Tr.160; *see* Tr.185-86, 190-91). DeValkenaere also heard these reports, and he observed the red truck run a red light at the intersection of 45th Street and Cleveland Avenue (Tr.524-25). DeValkenaere positioned himself in a parking lot at the intersection of 43rd Street and Cleveland Avenue, and he waited for the red truck to approach (Tr.525-26).

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[16] Whether DeValkenaere and Schwalm violated the Fourth Amendment does not alter the analysis on whether DeValkenaere used reasonable force to protect Schwalm. But to the extent that the trial court premised its conclusions on incorrect legal principles, the court's findings are further undermined.

Instead of proceeding through the traffic signal at 43rd Street, the truck cut through the parking lot where DeValkenaere was sitting in his unmarked vehicle, and then the truck drove west on 43rd Street (Tr.526). Pursuant to KCPD policy—which required pursuit to be conducted by marked vehicles—DeValkenaere did not engage in a vehicular pursuit (Tr.526; *see* Tr.79-80). Instead, he turned onto 43rd Street and followed the truck at a distance (Tr.526). The truck turned north, but DeValkenaere was unable to discern which street the truck turned onto (Tr.526). DeValkenaere turned north on Benton Boulevard, but he did not see the truck (Tr.526). Valentine reported that the truck had turned north on College Avenue, and he provided an address where the truck had pulled in behind a residence (Tr.115-16, 526).

Schwalm radioed DeValkenaere and asked him if he wanted to go to the residence with him (Tr.528). DeValkenaere agreed, but he stated that he needed to put on his police vest (Tr.528). Schwalm and DeValkenaere then drove to the residence and got out of their vehicles; both of them were wearing their police vests and badges (Tr.116-17; *see* Tr.147, 157). Schwalm arrived first, and he immediately walked down a shared driveway to the backyard area, holding his gun in "low ready" position (Tr.166, 529-30).

DeValkenaere arrived at about the same time, and he walked across the front yard (Tr.530). As he walked across the yard, DeValkenaere made contact with a woman in a pink robe, who was on the front porch, and she twice stated

that she did not know who was in the truck (Tr.532). DeValkenaere went around the north side of the house to provide backup for Schwalm and to cut off a potential escape route by the driver, if the driver decided to flee on foot (Tr.530, 536-36). DeValkenaere had also drawn his gun, and he was holding it at the "low ready" position (Tr.530-31).

Consistent with the information that had been relayed to them by the helicopter officer, Schwalm and DeValkenaere observed Mr. Lamb in the backyard, backing the truck into a garage that was under the house (Tr.168, 536). After Mr. Lamb refused to comply with verbal commands to park the truck and get out—and after Mr. Lamb pulled out a gun and pointed it at Schwalm—DeValkenaere shot Mr. Lamb (Tr.171, 542-46, 559-60).

The State does not contest the trial court's conclusion that the "backyard-carport area" was within the curtilage of Mr. Lamb's home.[17] However, the State does not agree that the actions of Schwalm and DeValkenaere in entering the curtilage were unreasonable.

The trial court found that Schwalm and DeValkenaere "had no probable

[17] To the extent that the trial court indicated that the shared driveway was also within the curtilage, it was not. *See United States v. Coleman*, 923 F.3d 450, 455-57 (6th Cir. 2019) (holding that a shared driveway was not within the curtilage); *United States v. Jones*, 893 F.3d 66, 72-73 (2nd Cir. 2018) (same).

cause to believe that a crime had been committed by" Mr. Lamb (Tr.697).[18] But while the officers generally agreed that there was no probable cause to believe that a "crime" had been committed, it was undisputed that the officers observed multiple traffic violations and, thus, that they had probable cause to believe that Mr. Lamb had committed traffic offenses that warranted a stop (*see* Tr.578). Thus, their efforts to track down the truck and conduct a stop of the driver were reasonable and supported by probable cause. *See Whren v. United States*, 517 U.S. 806, 810 (1996) ("As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred.").

Additionally, while the officers agreed that there was no "pursuit" as set forth in the KCPD policy (Tr.572), there was also no delay in attempting to track down the red truck. After seeing the truck chasing the Mustang at a high speed through a residential area, Hill immediately requested support from the police helicopter, and DeValkenaere observed the truck shortly thereafter and followed the truck at a distance. Then, within minutes, both he and Schwalm went to the location of the truck to investigate the incident. In short, DeValkenaere and Schwalm (who were in unmarked police vehicles) abided by

[18] The question of whether there was probable cause is a legal determination. *See State v. McElroy*, 551 S.W.3d 660, 632 (Mo.App. 2018).

KCPD policy by not engaging in a vehicular pursuit, and that was reasonable.

It was also reasonable to continue to track the truck from the air and on the ground, and to proceed without delay to the location of the truck once it pulled behind the house on College Avenue. As the trial court found, the officers had reasonable suspicion to believe that the driver of the truck had been involved in criminal activity (Tr.698-99). Accordingly, it was imminently reasonable for the officers to track the truck, go to its location, and attempt to make an investigative stop.

Finally, to the extent that Schwalm and DeValkenaere entered the curtilage to make contact with the driver of the truck, their entry into the curtilage was reasonable.[19] "The Fourth Amendment guarantees '[t]he right of the people to be secure in their . . . houses . . . against unreasonable searches and seizures[.]' " *United States v. Bennett*, 972 F.3d 966, 970 (8th Cir. 2020). " 'At the Amendment's "very core" stands "the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." ' " *Id.* (quoting *Florida v. Jardines*, 569 U.S. 1, 6 (2013)).

"The Fourth Amendment does not, however, prevent all investigations on private property." *Id.* Courts have recognized that " '[w]here a legitimate

[19] DeValkenaere asserts in Points I and II of his brief that he and Schwalm lawfully entered the curtilage.

law enforcement objective exists, a warrantless entry into the curtilage is not unreasonable under the Fourth Amendment, provided that the intrusion upon one's privacy is limited.' " *Id*. at 971.

In many cases, this sort of limited intrusion occurs when " '. . . police officers who enter private property restrict their movements to those areas generally made accessible to visitors—such as driveway, walkways, or similar passageways.' " *Id*. " '[A] police officer not armed with a warrant may approach a home and knock, precisely because that is no more than any private citizen might do.' " *Id*. (quoting *Jardines*, 569 U.S. at 8); *see State v. Edwards*, 36 S.W.3d 22, 26 (Mo.App. 2000) ("While the Fourth Amendment's protections do extend to curtilage areas appurtenant to or associated with a dwelling, this does not mean that police cannot enter a curtilage area without a warrant. To the contrary, 'it is altogether proper for police with legitimate business to enter the areas of curtilage open to the public.' ").

However, officers are not required in all circumstances to knock on the front door before entering a backyard. In *Bennett*, law enforcement officers had a warrant for the defendant's arrest, and the defendant asserted that the officers improperly intruded upon the curtilage of his home because "the officers, under the 'knock-and-talk' rule, were required to first check at the front door rather than entering the backyard." 972 F.3d at 972. The court observed that it had previously "declined 'to extend the "knock-and-talk" rule

to situations in which the police forgo the knock at the front door and, *without any reason to believe the homeowner will be found there*, proceed directly to the backyard.' " *Id*. at 972-73 (emphasis in original).

However, inasmuch as the officer "already *knew* [the defendant] was in the backyard" (because the officer had seen him standing there before he ever entered the yard), the court held that, "on these facts, the officers were not required to make a pointless trip to the front door." *Id*. at 973. The court held that because the officer "recognized [the defendant] before entering the property, any incursion onto the curtilage was a 'limited intrusion' for a 'legitimate law enforcement objective.' " *Id*.

Here, similarly, Schwalm and DeValkenaere were conducting legitimate police business when they made contact with Mr. Lamb. They had probable cause to believe that the driver of the vehicle had committed multiple traffic violations, and they had reasonable suspicion that other criminal activity might be afoot. Accordingly, a stop of Mr. Lamb in his vehicle was warranted. *See State v. Kelly*, 119 S.W.3d 587, 593-94 (Mo.App. 2003) (". . . if an officer has reasonable suspicion to conduct an investigative stop under *Terry v. Ohio*, 392 U.S. 1[] (1968), then entry onto curtilage open to the public in furtherance of that investigation must be legitimate business.").

It is true that Schwalm did not approach the front door and knock, but under the circumstances, his decision to proceed immediately to the backyard

was reasonable. As outlined above, the helicopter officer had already seen the driver of the truck in the backyard, and he told the officers on the ground that the driver was in the truck was in the backyard.[20] Thus, as in *Bennett*, the officers were not "required to make a pointless trip to the front door."

Moreover, any need for a trip to the front door was further obviated when DeValkenaere encountered an apparent resident of the home on the front porch, and the resident twice told DeValkenaere that she did not know who was driving the truck. That circumstance made it even more reasonable for the officers to make contact with the driver of the truck, as it would have appeared to a reasonable officer that the driver might be trying to conceal the truck or "ditch" the truck behind the house and flee—concerns that motivated Schwalm and DeValkenaere (Tr.164-65, 535-36).

Finally, the officers' intrusion into the curtilage was limited. Schwalm went down a shared driveway to the backyard, and he did not conduct a search of the curtilage. He also did not seize any evidence or any person, and he did not enter Mr. Lamb's home.[21] Instead, he gave verbal commands to Mr. Lamb

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[20] It was permissible for the officer to fly over Mr. Lamb's backyard and observe the truck there. *See California v. Ciraolo*, 476 U.S. 207, 212-15 (1986).

[21] Because Schwalm and DeValkenaere did not enter the garage or seize Mr. Lamb, this case differs significantly from *Lange v. California*, 141 S.Ct. 2011,

in an attempt to conduct an investigative stop. Those actions were reasonable, and DeValkenaere's use of force to protect Schwalm under those circumstances must be viewed with regard to whether Schwalm was lawfully carrying out his duties as a law enforcement officer.

DeValkenaere was also reasonable. He did not conduct a search or seize any evidence, and he only gave verbal commands to Mr. Lamb. And, again, while DeValkenaere did knock over a grill during his entry, and while he ultimately used deadly force in response to Mr. Lamb's use of deadly force, the reasonableness of DeValkenaere's use of force against Mr. Lamb must be considered in the context of the need for DeValkenaere to provide protection for Schwalm.

It is tempting to view the officers' actions with the benefit of hindsight and to hypothesize other reasonable actions that the officers might have

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2016 (2021), where officers entered the suspect's garage and questioned him and performed field sobriety tests. Here, the officers were outside of the garage, attempting to detain Mr. Lamb, but Mr. Lamb did not submit to their authority. *See State v. Hernandez*, 954 S.W.2d 639, 644 (Mo.App. 1997) (". . . because Hernandez never submitted to the assertion of lawful authority prior to drawing his knife, there was no Fourth Amendment seizure until Officer Fletcher exerted physical force upon Hernandez by tackling him.").

taken—actions that might have led to a different end. But as the United States Supreme Court has made plain, that is not a proper method of analyzing officer conduct under the Fourth Amendment.

In analyzing an officer's use of force, the Court has stated, "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham*, 490 U.S. at 396. "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Id.* at 396-97.

Here, when DeValkenaere used force to knock over the grill, that degree of force was reasonable under the circumstances. He could see that the driver of the truck was not complying with Schwalm's verbal commands, and he felt that he needed to be in a better position to assist Schwalm. A grill can be easily restored to its place, and it can be replaced if necessary; a police officer's life or health is not so easily restored or replaced.

The fact that both officers were prepared to use force and took steps to guard against attack (i.e., that they put on their police vests and drew their weapons before entering the backyard), was also reasonable, as the officers had a reasonable belief that criminal activity was afoot. The officers' vests, badges,

and guns gave notice that they were police officers, and, in light of the unknown nature of the driver's motives, it was reasonable for the officers to take steps to protect themselves against potential danger. Indeed, the officers' actions turned out to be prudent and necessary, as, shortly after they made contact with Mr. Lamb, Mr. Lamb pulled out a gun and pointed it at Schwalm.

And, finally, as discussed above, DeValkenaere's use of deadly force in response to Mr. Lamb's use of force was reasonable. Schwalm was under an immediate threat of death, and it was, thus, reasonable for DeValkenaere to act in defense of Schwalm.

In sum, while it was reasonable for the trial court to find that Schwalm and DeValkenaere entered the curtilage of the home, the court incorrectly concluded that their limited intrusion into the curtilage was a Fourth Amendment violation. Moreover, whether a Fourth Amendment violation or not, the officers' limited entry onto the curtilage did not give Mr. Lamb a license to shoot Schwalm, and it did not strip DeValkenaere of his right to act in defense of Schwalm.

2. Armed criminal action

Because the evidence was insufficient to prove that DeVakenaere was guilty of involuntary manslaughter in the second degree, the conviction for armed criminal action must also be reversed. "A conviction for armed criminal action requires the commission of an underlying felony." *State v. Weems*, 840

S.W.2d 222, 228 (Mo. 1992).[22]

D. Conclusion

The evidence credited by the trial court did not support the convictions entered by the trial court. DeValkenaere's use of force was reasonable in light of Mr. Lamb's use of deadly force against Schwalm, and the court erred as a matter of fact and law in determining that Schwalm and DeValkenaere were the initial aggressors. DeValkenaere also was not criminally negligent—both because he did not act with criminal negligence in causing Mr. Lamb's death and because he reasonably used deadly force in defense of Schwalm. The Court should reverse DeValkenaere's convictions and order him discharged or order a new trial.

[22] DeValkenaere challenges the sufficiency of the evidence to support his conviction of armed criminal action in Point VIII.

CONCLUSION

The Court should reverse DeValkenaere's convictions and order that he be discharged or order a new trial.

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CERTIFICATE OF COMPLIANCE

I certify that the attached brief complies with Rule 84.06(b) and Western District Rule 41 and contains 13,945 words, excluding the cover, the table of contents, the table of authorities, this certification, and the signature block, as counted by Microsoft Word; and that pursuant to Rule 103.08, the brief was served upon all other parties through the electronic filing system.

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