No. 12-108795-A

IN THE
COURT OF APPEALS
OF THE STATE OF KANSAS

FILED
APR 21 2014
CAROL G. GREEN
CLERK OF APPELLATE COURTS

STATE OF KANSAS
Plaintiff-Appellee

vs.

MICHAEL ANDREW PAULSON
Defendant-Appellant

BRIEF OF APPELLANT

Appeal from the District Court of Saline County, Kansas
The Honorable Rene S. Young, Judge
District Court Case No. 2010 CR 804

Richard Ney #11985
Ney, Adams & Shaneyfelt
200 N. Broadway, Suite 300
Wichita, Kansas 67202
(316) 264-0100
Fax: (316) 264-1771
ney@naslaw.net

Attorneys for Defendant-Appellant
MICHAEL ANDREW PAULSON

ORAL ARGUMENT REQUESTED – 20 MINUTES

No. 12-108795-A

IN THE
COURT OF APPEALS
OF THE STATE OF KANSAS

STATE OF KANSAS
Plaintiff-Appellee

vs.

MICHAEL ANDREW PAULSON
Defendant-Appellant

BRIEF OF APPELLANT

Appeal from the District Court of Saline County, Kansas
The Honorable Rene S. Young, Judge
District Court Case No. 2010 CR 804

Richard Ney #11985
Ney, Adams & Shaneyfelt
200 N. Broadway, Suite 300
Wichita, Kansas 67202
(316) 264-0100
Fax: (316) 264-1771
ney@naslaw.net

Attorneys for Defendant-Appellant
MICHAEL ANDREW PAULSON

TABLE OF CONTENTS

No. 12-108795-A

IN THE
COURT OF APPEALS
OF THE STATE OF KANSAS

STATE OF KANSAS
Plaintiff-Appellee

vs.

MICHAEL ANDREW PAULSON
Defendant-Appellant

BRIEF OF APPELLANT

Nature of the Case

Defendant-Appellant, Michael Andrew Paulson, appeals his convictions for second-degree murder and attempted second-degree murder.

Statement of the Issues

Issue I: The district court committed reversible error when it refused to instruct the jury on the lesser included offense of voluntary manslaughter and attempted voluntary manslaughter.

Issue II: Prosecutorial misconduct that occurred during closing argument prejudiced the Defendant's right to a fair trial and requires reversal of his convictions.

Issue III: The district court committed reversible error in allowing the State to introduce irrelevant evidence of the Defendant's religious beliefs.

Issue IV: The district court committed reversible error when it admitted inadmissible hearsay statements of Valerie Paulson under various hearsay exceptions and as evidence of marital discord.

Issue V: The district court committed reversible error when it admitted into evidence statements made by the Defendant while he was incarcerated in the Saline County Jail.

Issue VI: The Defendant's waiver of his Miranda rights and subsequent statements to law enforcement were not knowing or voluntary and violated the Fifth Amendment; as a consequence, the district court erred in denying the Defendant's motion to suppress his statements to Deputy Allen.

Issue VII: The Defendant was denied his Sixth Amendment right to a fair trial by the cumulative errors committed by the court.

Issue VIII: The district court committed reversible error when it ordered the Defendant to reimburse BIDS for attorney fees and to order restitution to the Kansas Crime Victim's Compensation Board.

Statement of the Facts

The Defendant and his wife, Valerie Paulson (hereinafter "Valerie") were married for 20 years. (R. XXXI, 625). They had two children, Austin, who was 14 years of age, and Nathan, who was 10 years of age. Valerie had a daughter, Kyrsten, by her first marriage. (R. XXXII, 846). After the Defendant married Valerie, he adopted Kyrsten. (R. XXXII, 848).

The Defendant worked for Blue Beacon, International, a company that owns truck and car washes, for 20 years. By July, 2010, the Defendant was working as a field representative for the company. (R. XVIII, 76-77). Defendant's position required him to travel several nights a week, every other week. (R. XXXIII, 1066).

Valerie was a stay-at-home mother who home-schooled her children. (R. XXXIV, 1349). She also handled the family's finances. The evidence disclosed that when the Defendant was traveling, Valerie would leave the house on a regular basis, and would stay out as late as 4 a.m. (R. XXXIV, 1414; XXXIII, 1305). Austin suspected his mother was seeing someone; however, Austin never told the Defendant of his suspicions. (R. XXXIV, 1415).

Valerie confided to her friend, Danielle Norwood, that she had begun a relationship with a man named Chuck Beemer in 2007. (R. XXXV, 1720). Beemer and Defendant had been friends. (R. XXXII, 858). Kyrsten saw Valerie get into Beemer's car one night. (R. XXXIII, 1068). The Defendant, however, did not know of the relationship between Valerie and Beemer. (R. XXXIII, 1219-20).

Valerie began giving large sums of money to Beemer on a regular basis to pay for Beemer's food, rent and living expenses. (R. XXXV, 1726, 1729). By the end of 2008, Valerie had run up nearly $100,000 of debt, more than half of which was credit card debt. (XXXIX, 2495). The Defendant was under the impression that their house in Lindsborg was almost paid off and that Valerie had put away money for their retirement. (R. XXXIII, 1214). In fact, the family was nearly bankrupt due to Valerie's spending. Valerie lied to the Defendant about their financial situation and went to great efforts to cover it up. (R. XXXII, 852, 978-79).

When she could no longer hide their worsening financial situation, Valerie finally told the Defendant about the debt she had accumulated at a family meeting. (R. XXXII, 853). The Defendant was frustrated by Valerie's cover up of the debt, because it jeopardized their ability to send their sons to college or contribute to Kyrsten's upcoming wedding. (R. XXXIII, 1065).

After the financial disclosure, the Defendant and Valerie separated for two days. (R. XXXII, 1064). The Defendant accepted Valerie's explanation for the debt and the couple decided to reconcile, seeking counseling through their pastor, Chris Matthews. (R. XXXIX, 2496; XXXIII, 1064-65).

The Defendant took over the family finances, and gave Valerie $200 a week for expenses. He opened several bank accounts to which only he had access. (R. XXXV, 1855-58).

Since the family could no longer afford the large Lindsborg house, they moved to a smaller house in Assaria, Kansas, in 2009. (R. XXXII, 854; XXXIII, 1057). Kyrsten married Joshua Hoffman in August, 2009. Kyrsten and Joshua lived in McPherson, Kansas. (R. XXXIII, 1058).

In 2010, Valerie begun a sexual relationship with Daniel Fouard. Fouard had grown up with the Defendant and Valerie, in the same church. Valerie apparently had connected with Fouard via Facebook. (R. XXXII, 856). Valerie told Danielle Norwood about her affair with Fouard, (R. XXXV, 1725), and told another close friend, Dawn Kurtz, that she was "in love" with Fouard. (R. XXXV, 1794). Valerie also told her step-brother, John Heitsman, that she was seeing Fouard. (R. XXXVII, 2129-30). Neither Heitsman nor anyone else who knew about Valerie's affair told the Defendant. (R. XXXVII, 2131).

In June, 2010, Defendant, Valerie, and their two sons went on vacation. (R. XXXIII, 1085-86). Valerie did not want to go and was irritable and distant the entire time. She repeatedly made secret phone calls outside the presence of Defendant and her children. (R. XXXIX, 2512-13). Following their return from the vacation, Valerie told the Defendant that she was going to dinner with her friend, Dawn Kurtz. When it grew late and Valerie had not returned, the Defendant called Kurtz. Kurtz told him that she had not gone to dinner with Valerie. Defendant asked Kurtz if Valerie was having an affair. Kurtz denied that and told the Defendant that Valerie was only talking to people. (R. XXXV, 1785-86).

The Defendant then called his daughter, Kyrsten, and asked her to come to his house in Assaria because he could not locate Valerie. (R. XXXII, 1074). When Valerie finally came home, Defendant and Kyrsten asked her what was going on. Valerie replied: "Nothing." (R. XXXIII, 1077). Kyrsten then asked Valerie whether she was still seeing Chuck Beemer. This

was the first time the Defendant had heard about Beemer. (R. XXXIII, 1079-81). Valerie told the Defendant that Chuck was "just a friend." (R. XL, 2755). She told Kyrsten the next morning that she and the Defendant had worked things out. (R. XXXIII, 1222-23).

In the week before the July 4 holiday, Valerie and the Defendant had a reconciliation. They stayed up several nights having sex. (R. XXXIX, 2532-33). Austin testified that his parents were getting along well at that time. (R. XXXIV, 1389-90)

Over the July 4th weekend, Defendant, Valerie, and their two sons went to spend time with the Defendant's family in Augusta, Kansas. (R. XXXIV, 1350). On the morning of July 5, the Defendant found two texts from Fouard on Valerie's phone. The texts read: "Good morning beautiful. I love you, Valerie." Defendant immediately called Fouard back and told him to stay away from his wife and not to contact her again. (R. XXXIII, 1088).

The Defendant woke up Valerie and the two went for a drive around Augusta. (R. XXXIII, 1089). Valerie denied any sexual relationship, saying the texts were from someone she tried to help, but who would not leave her alone. (R. XXXIX, 2517; XL, 2820). Valerie told Kyrsten everything was okay. (R. XXXII, 1089). The Defendant told Austin that, in order for the Defendant and Valerie to stay together, she would have to give up Facebook and her phone for awhile. (R. XXXIV, 1353). A short time later, the Defendant learned that Valerie had attempted to use Austin's phone to access the internet. (R. XXXIV, 1350-51).

Later on that day, the Paulsons drove back to Assaria. Austin and Nathan slept for a short time during the drive. (R. XXXIV, 1442). Austin woke up and heard a heated conversation between the Defendant and Valerie. The Defendant told Valerie that he was dropping her off at her boyfriend's house. Valerie replied that Fouard was not her boyfriend,

that he was a stranger, and she did not want to go over there. At some point, the Defendant called Fouard and asked to drop Valerie off at his residence. Valerie asked that the Defendant lower his voice so the two boys would not hear their argument. (R. XXXIV, 1356-59, 1390).

Valerie later told Jessie Putman, her sister-in-law, that, during the drive back to Assaria, the Defendant cussed her out, accused her of having an affair and told her she should kill herself. According to Valerie's report, the Defendant said he was praying that God would kill her. (R. XXXII, 872). Austin, who was in the back seat, told law enforcement officers and testified at trial that the Defendant never said these words to Valerie. (R. XXXIV, 1391, 1443).

The Defendant drove to Jessie's house. He called Jessie and told her that they were outside and Valerie needed a place to stay. (R. XXXII, 868-69). The Defendant told Jessie that they were getting a divorce and Valerie needed to stay with her. (R. XXXII, 870). Jessie testified that Defendant was flustered and upset and Valerie was crying. (R. XXXII, 871).

Kyrsten found out Fouard's name and address. She drove to his house, knocked on the door, but received no answer. She then spoke to Fouard's son. His son confirmed that Valerie had been over to Fouard's house several times to make them dinner. (R. XXXIII, 1091-93).

Kyrsten called the Defendant and told him what she had learned from Fouard's son. The Defendant broke into tears and cried like A.P. had never seen him cry before. (R. XXXIV, 1393). Kyrsten testified that the Defendant was a "broken man" after she told him the information. He was tearful and crying. (R. XXXIII, 1231, 1234). Kyrsten then drove to Jessie's house to talk to Valerie. When she told her mother the information she had learned from Fouard's son, Valerie did not say anything. (R. XXXIII, 1094-95). Kyrsten asked Jessie if she

thought Valerie was having an affair. Jessie told Kyrsten that she believed Valerie that Valerie and Fouard were "just friends." (R. XXXII, 980-81).

After the Defendant spoke to Kyrsten on the phone, he drove the boys over to Fouard's house. Before leaving, the Defendant placed a Glock pistol under the floorboard of the truck. He told Austin not to worry because he wasn't going to do anything with it. (R. XXXIV, 1362-63). Fouard did not have a very good reputation in the community. John Heitsman, Valerie's step-brother, confirmed at trial that even he had some concerns about Fouard. (R. XXXVII, 2131). When the Defendant arrived at Fouard's house, no one was home. He then drove to Jessie's house. (R. XXXIV, 1364).

While parked near Jessie's house, the Defendant called Keenan Brown, his supervisor at Blue Beacon. Defendant told Keenan that he believed his wife was involved with another man and needed to take the next week off work. Keenan testified that Defendant was "devastated" and "very, very hurt." Defendant told Keenan that he was going to be all right because of the support he was receiving. Defendant then asked Keenan for the name of a divorce attorney. Keenan suggested that Defendant and Valerie seek counseling; however, the Defendant did not seem interested in pursuing that option. Keenan told the Defendant to take the next week off and to seek some counsel from Mark Brown another Blue Beacon employee. (R. XXXV, 1814-21).

Kyrsten asked the Defendant to speak with Valerie about working things out between them. Both the Defendant and Valerie agreed to talk. (R. XXXII, 875-76; XXXIII, 1095). Defendant and Valerie talked in private at Jessie's house for a period of time. During this conversation, Valerie denied that she was having an affair with Fouard. (R. XXXII, 965).

The Defendant drove back to Fouard's house. This time Fouard was there. The conversation between the two was described by Austin as being "calm." At one point, Defendant and Fouard shook hands. Fouard told the Defendant that his relationship with Valerie was not sexual because Valerie was married. (R. XXXV, 1365-67, 1398).

Thereafter, Defendant drove back to the Assaria house. (R. XL, 2761). The Defendant and Austin talked much of the night about divorce and child custody. Austin fell asleep. When he awoke, he saw his father was praying. (R. XXXV, 1368-69). The Defendant got about 30 minutes of sleep that night. (R. XL, 2761).

On the morning of July 6, 2010, at about 8:30 a.m., Defendant called Keenan Brown. According to Keenan, Defendant sounded better than he did on July 5, and was more open to seeking counseling. Defendant told Keenan that he was still going to file for divorce only to show Valerie how serious he was. (R. XXXV, 1822-25). He also told Keenan that the divorce attorney he had recommended was not available to see him that day. (R. XXXV, 1823, 1829).

Defendant also spoke to Mark Brown at Blue Beacon who performed family counseling. Mark testified that the Defendant was stressed and nervous. (R. XXXV, 1843). Defendant told Mark that he thought Valerie was potentially involved with another man and that they might get divorced. He had questions about whether the spouse who filed first had an advantage in obtaining custody of the children. Mark told him there might be an initial advantage if Defendant filed for divorce first. When Mark suggested a very aggressive divorce attorney, the Defendant replied that he did not want to do anything that would hurt Valerie. He still had hopes that they would reconcile. (R. XXXV, 1836-38).

About 10 or 11 a.m. on July 6, Defendant called Kyrsten. She suggested that Defendant and the two boys come and stay with her and her husband in McPherson for a few days. Defendant agreed to come and stay with her. (R. XXXIII, 1101-02). Defendant also spoke with Valerie by telephone on July 6. He told her that he was going to stay with Kyrsten for a few days. They also made arrangements for Valerie to get back into the Assaria house after the Defendant and the children left. (R. XXXII, 886-87).

Thereafter, the Defendant and the two boys began loading Defendant's truck with their belongings. They loaded photograph albums, guns, clothes and file cabinets. (R. XXXIV, 1375-77). The evidence shows, that during this time, the Defendant was mentally distracted. He could not find his truck keys, even though they were right in front of him. He was clearly distressed and unable to focus his thoughts. (R. XL, 2764-65).

Defendant withdrew a total of about $14,500 from accounts in two banks. Thereafter, he drove to Kyrsten's house in McPherson and unloaded some of the items in the truck. The Defendant placed an envelope containing the money withdrawn from the banks in drawer and told Kyrsten that he would discuss it with her later. (R. XXXV, 1851-60; XXXIII, 1103-04). The Defendant left his daughter's house to go to the grocery store. (R. XXXIII, 1104).

The Defendant had located a house to rent at 205 W. First Street in Assaria. Debbie Richter, the owner of the property, called the Defendant in response to a phone message he left earlier and arranged to meet the Defendant with her husband, Douglas, at the property at 6 p.m. (R. XXXIV, 1463-65). The Defendant called Kyrsten and told her he was going back to Assaria to look at a rental house. (R. XXXIII, 1106).

Defendant called Austin and told him that he was going home and was going to find a place to hide to determine if Valerie regretted anything and whether she was talking to other men on the phone. Defendant told Austin he also wanted to listen to any discussion between Jessie and Valerie. (R. XXXIV, 1408-09). He asked Austin not to say anything about him going to the house. (R. XXXIV, 1382).

The Defendant also told Kyrsten that he was going to the home in Assaria to learn whether Valerie was talking to anyone on the phone. (R. XXXIII, 1107). He told Kyrsten that he needed to hear it for himself. (R. XXXIII, 1242). The Defendant asked her not to tell anyone that he was going to the house. (R. XXXIII, 1109).

Before the Defendant went to his home, he met Debbie and Douglas Richter at their rental property. He told them that he and his wife were having marital difficulties, and a counselor had suggested they separate for three to six months. The Defendant told them that he wanted to rent a place that was within walking distance of his Assaria home so it would be easy for his children to visit him. (R. XXXIV, 1468, 1482).

Defendant inspected the rental with the Richters for about 25 minutes. Defendant told them that, because he hoped to reconcile with his wife, he wanted a short-term lease. Although the Richters normally rented the property for a longer term, they decided to give the Defendant an application. (R. XXXIV, 1469-72, 1478). Both the Richters testified that the Defendant repeatedly blinked his eyes while speaking with them. Debbie described it as a "nervous twitch." (R. XXXIV, 1477-78, 1486). After looking a the rental house, the Defendant texted Kyrsten. He wrote that the rental house was an answer to prayer. (R. XXXIII, 1240).

The Defendant subsequently drove to the family home in Assaria and parked his truck in the garage. Defendant then hid himself in Austin's attic bedroom. (R. XXXIX, 2522). Due to the smallness of the Assaria home, conversations taking place in the kitchen can be heard from the attic. (R. XXXIII, 1117-18).

Valerie had spent the night at Jessie's house. Jessie went to work on July 6 until about 12:30 p.m., leaving her cell phone with Valerie. (R. XXXII, 885). On the afternoon of July 6, Fouard dropped off a new cell phone and a package of underwear for Valerie. (R. XXXII, 889-90, 894). Valerie told Jessie that Defendant was out of the Assaria house; consequently, they decided to drive to the house in the evening of July 6. (R. XXXII, 894). When they arrived at the Assaria house they noticed that pictures of Allen Betts (Valerie's first husband) and Chuck Beemer had been cut out and placed over Defendant's face in family pictures. (R. XXXII, 900-01). When she saw Beemer's face on the photographs, Valerie commented: "Andy must have found out more information about Chuck." (R. XXXII, 954, 993).

Valerie began to do some laundry, the dishes, and wipe down the kitchen counters. According to Jessie, no knives were left on top of the counters. (R. XXXII, 903-04, 916). Jessie looked in every room of the house on the first level and went half way up the stairs towards the attic; however, she turned back because it was so hot up there. (R. XXXII, 905-07).

Jessie and Valerie discussed a photo of Fouard that was on Valerie's new phone. Jessie suggested Valerie to remove it, since she was claiming she had no relationship with Fouard. They also discussed an earlier statement that Valerie made that Fouard was going to pay for her divorce. (R. XXXII, 897, 920).

Valerie spoke on the phone with Fouard after arriving at the house with Jessie. Jessie said she knew Valerie was speaking with Fouard, but was attempting to give Valerie privacy and did not hear what was said. (R. XXXII, 917-18, 996; XL, 2893-94).

Jessie testified that she had previously missed a call from her mother-in-law, Barbara Heitsman, so she stepped outside to call her back. After speaking with Barbara for just a few seconds, Jessie testified she saw the Defendant running from the dining room to the kitchen and towards the back bedroom. (R. XXXII, 927-29). According to Jessie, the Defendant did not stop or pick up anything in the kitchen. (R. XXXII, 943). She heard Valerie cry out: "Stop! No. Andy, oh God. No. Stop." (R. XXXII, 930).

Jessie tried to call 911. When she went back into the house, the Defendant met her at the door. He stabbed her in the abdomen. According to Jessie's preliminary hearing testimony, Defendant looked angry. (R. XXXII, 970). Jessie back peddled down the stairs outside the house, while the Defendant stabbed her chest area again. They both fell into the yard, and the knife flew out of the Defendant's hand. The Defendant picked up the knife and stabbed her three more times in the back. She turned over on her back and kicked at the Defendant. Defendant then stopped and went back into the house. (R. XXXII, 937-39).

Jessie got to her feet and dialed 911 again. (R. XXXII, 941). The Defendant came back out of the door and stabbed her again. He also took her cell phone. Jessie testified that she asked: "Why are you doing this?" According to Jessie, the Defendant replied: "You're the reason we are getting divorced. You're the reason she is leaving me." Jessie stated: "I have never done anything to you." (R. XXXII, 941-42). The Defendant then stopped attacking Jessie and went back in the house. (R. XL, 2945).

Jessie then ran to her car and drove away. She was having difficulty breathing and was starting to black out. Jessie drove into the parking lot of Lowe's store and ran inside. Employees of the store called an ambulance. (R. XXXII, 946-49).

Defendant would later tell mental health professionals that, from his hiding place in the attic, he first heard from Valerie that her relationship with Fouard was sexual. This revelation came either from hearing Valerie's telephone conversation with Fouard or hearing Valerie's conversation with Jessie. (R. XXXIX, 2523). From that point, everything happened in "flashes" and the Defendant felt completely disconnected from his activities. (R. XL, 2770-72). He was, in effect, a "spectator" to what happened next. (R. XXXIX, 2683).

The Defendant recounted that he flew down the steps. He then remembered meeting Valerie in the hallway outside of the bathroom. (R. XXXIX, 2637). He described it as "exploding" into Valerie, and he only remembered her saying, "No, babe." His next memory was that Jessie was behind him. Then he was on the ground with Jessie. When Jessie spoke to him, he "came to" and realized that something terrible had happened. (R. XXXIX, 2523). The Defendant's next memory is standing in the kitchen and seeing blood on his hands. In the next moment, the Defendant was standing over Valerie, who was lying in the bathtub and not looking "right." At that point, the Defendant believed that Valerie was gone. (R. XXXIX, 2684). The autopsy revealed that Valerie had been stabbed 17 times. (R. XXXIX, 2639).

The Defendant said, at that point, he wanted to kill himself and be with Valerie. (R. XL, 2773). He called Kyrsten and told her that he had killed Valerie and told her he was going to Kingman to say good-bye to his parents. Kyrsten called 911. (R. XXXIII, 1111-13).

In the same call, the Defendant spoke to Austin, crying, he told him that Valerie and Jessie were both dead and that he thought he could have saved Jessie. Austin told his father not to do anything. (R. XXXIV, 1384-86). The Defendant also talked to Nathan. The Defendant was crying so hard that Nathan could not understand what he was saying. (R. XXXIV, 1504).

The Defendant was so disoriented that he drove his truck in the opposite direction of his parents' house in Kingman. He was extremely thirsty and jumped from a bridge to drink from a river. He continued driving, ending up in a cornfield somewhere north of Bennington, Kansas. Afterwards he got a drink from a nearby creek and laid in the water. (R. XXXIX, 2524-27).

The following morning, the Defendant wandered up to the residence of Zach Douglas, a 14-year-old boy who lived with his uncle near Bennington. Defendant told Zach that he needed to use his phone to call the police. Zach told him that his cell phone did not have minutes on it; however, Zach believed that a police officer lived nearby. The two walked to the officer's home, but no one was there. Zach told the Defendant that he would go get his truck and drive the Defendant into Bennington and the Defendant agreed. (R. XL, 2713-16).

Zach testified that the Defendant was acting lost, dazed and confused. The Defendant told Zach that he was feeling weak and would wait for him to get the truck. Zach drove the Defendant to a café in Bennington. (R. XL, 2716). Scott Allen, an Ottawa County deputy sheriff, was dispatched to the café after the Defendant requested the police be called. (R. XXXVI, 1878).

The Defendant was initially charged with first-degree murder of Valerie Paulson and attempted first-degree murder of Jessie Putman. (R. I, 116-17). An Amended Complaint was later filed adding a charge of Aggravated Robbery for the Defendant taking Jessie's cell phone.

(R. I, 167-69). The State file a Notice of Intent to Seek the Hard 50. (R. I, 161-62). In addition, the State filed a motion for an upward durational departure, alleging the victims were particularly vulnerable and the Defendant's conduct manifested excessive brutality. (R. II, 465-66).

The jury trial in the case lasted from June 17 through July 2, 2012. One of the key themes of the prosecution in this case focused on the religious beliefs of the Defendant regarding his church's doctrinal stance against divorce. The State introduced, over objection, a paragraph from a Sunday school lesson that had been prepared by the Defendant three years before the homicide. (R. XXV, 49-50; XXXI, 659-60). The State argued that the Defendant's actions in killing Valerie stemmed from his religious beliefs and the "creed the defendant lived by." (R. XLI, 3046-47).

Another significant piece of the State's case was the introduction into evidence, over objection, of minor marital disagreements under the guise of a purportedly discordant relationship between the Defendant and Valerie. The State introduced this evidence through hearsay statements made by Valerie and through recordings of jail visits and telephone calls made while the Defendant was in the Saline County Jail.

At the close of the State's case, the district court granted the Defendant's motion for judgment of acquittal on the aggravated robbery charge. The court ruled that there was no evidence that Defendant took Jessie's cell phone with the intent to keep the property. (R. XXXIX, 2483-84).

Defendant presented the testimony of Dr. Marilyn Hutchinson, a psychologist who has performed forensic evaluations for 29 years. (R. XXXIX, 2485). Dr. Hutchinson testified that, given their recent intimacy, Valerie's denials of infidelity, the Defendant's declining inability

to think rationally due to sleep deprivation, and the Defendant's desire to believe his wife had been faithful, the Defendant accepted Valerie's statements as the truth. (R. XXXIX, 2532-33, 2520-21). Dr. Hutchinson testified that the Defendant went to the attic expecting to hear a confirmation of his wife's sexual fidelity. Instead, he heard the opposite. (R. XXXIX, 2522, 2606, 2620, 2677, 2695).

Presented with the revelation of the sexual nature of his wife's ongoing sexual relationship with Fouard, the Defendant experienced the "proverbial mental breakdown," according to Dr. Hutchinson. (R. XXXIX, 2523). Dr. Hutchinson testified that the Defendant had a "complete break in his normal, rationale thinking function, and became biologically, emotionally, and cognitively overwhelmed." (R. XXXIX, 2526, 2532). She concluded that the Defendant had no ability to premeditate or form a specific intent to kill. (R. XXXIX, 2538-39).

In rebuttal, the State called Dr. William Logan. (R. XL, 2730-38). Although Dr. Logan testified that the Defendant had the ability to form intent and premeditation, (R. XL, 2799-2804), he agreed that an extreme emotional reaction was triggered when the Defendant learned of Valerie's infidelity. (R. XL, 2812). He further testified that the Defendant was quite angry and distressed and his attack on Valerie was done in the heat of anger and passion. (R. XL, 2840). Dr. Logan described it as a "rage episode." He also testified that the Defendant's attack was not disproportionate, considering the degree of his emotion over Valerie's infidelity. (R. XL, 2837).

The Defendant requested a voluntary manslaughter instruction based upon heat of passion. (R. XL, 2900). After hearing arguments from both sides, the district court ruled, on two occasions, that there was sufficient evidence in the record to support the giving of a voluntary manslaughter instruction. (R. XL, 2933, 2960).

The following day, just prior to closing arguments, the district court informed counsel that she had reversed herself and would not give a voluntary manslaughter instruction because there was not legally sufficient provocation to warrant the instruction. (R. XLI, 2993).

The jury returned a verdict finding the Defendant guilty of second-degree murder of Valerie Paulson and attempted second-degree murder of Jessie Putman. (R. XLII, 3150). After a separate sentencing proceeding, the jury returned verdicts indicating they were unable to reach unanimous verdicts as to the two aggravating factors set forth in the State's motion for departure. (R. XLII, 3200-01).

The district court subsequently sentenced the Defendant to 165 months on the second-degree murder count and 61 months on the attempted second-degree murder count. The sentences for the two counts were run consecutive to one another for a controlling term of 226 months. (R. XLIII, 77).

The Defendant filed a timely notice of appeal. (R. IV, 807). Additional facts will be related below in the discussion of the issues that are being raised on appeal.

Arguments and Authorities

Issue I: The district court committed reversible error when it refused to instruct the jury on the lesser included offense of voluntary manslaughter and attempted voluntary manslaughter.

In State v. Wade, 295 Kan. 916, 923-24, 287 P.3d 237 (2012), the Kansas Supreme Court set forth the applicable standard of review for jury instruction issues as follows:

> For jury instruction issues, the progression of analysis and corresponding standards of review on appeal are: (1) First, the appellate court should consider the reviewability of the issue from both jurisdiction and preservation viewpoints, exercising an unlimited standard of review; (2) next, the court should use an unlimited review to determine whether the instruction was legally appropriate;

> (3) then, the court should determine whether there was sufficient evidence, viewed in the light most favorable to the defendant or the requesting party, that would have supported the instruction; and (4) finally, if the district court erred, the appellate court must determine whether the error was harmless, utilizing the test and degree of certainty set forth in State v. Ward, 292 Kan. 541, 256 P.3d 801 (2011), *cert. denied* [—— U.S. ——,] 132 S.Ct. 1594 [182 L.Ed.2d 205] (2012)." State v. Plummer, 295 Kan. ——, Syl. ¶ 1, 283 P.3d 202 (2012).

In the present case, the Defendant submitted a proposed instruction on heat of passion voluntary manslaughter. (R. IV, 672). During the instructions conference, the district court found that the evidence in the record supported giving this instruction. (R. XL, 2933, 2960). The following day, the district court reversed itself and found there was not legally sufficient provocation to warrant the voluntary manslaughter instruction. (R. XLI, 2992-93). Counsel for the Defendant objected to excluding the voluntary manslaughter instruction prior to closing arguments. (R. XLI, 3015-16).

Since the Defendant submitted a voluntary manslaughter instruction and objected to its omission prior to the jury retiring to consider the verdict, this issue is fully preserved for review. Wade, 295 Kan. at 924. Further, because voluntary manslaughter is a lesser included offense of first-degree murder, the requested instruction was legally appropriate. *Id.* Finally, there was "some evidence which would reasonably justify a conviction" of voluntary manslaughter when the evidence is viewed in light most favorable to the defendant. *Id.*

In State v. McClanahan, 254 Kan. 104, 114, 865 P.2d 1021 (1993), the Kansas Supreme Court discussed the concepts of heat of passion and sufficient provocation:

> "(1) Voluntary manslaughter is the intentional killing in the heat of passion as a result of sever provocation. . .
>
> "(2) 'Heat of passion' means any intense or vehement emotional excitement of the kind prompting violent and aggressive action, such as rage, anger, hatred, furious resentment, fright, or terror. Such emotional state of mind must be of

such a degree as would cause an ordinary man to act on impulse without reflection. [Citations omitted.]

"(3) In order to reduce a homicide from murder to voluntary manslaughter, there must be provocation, and such provocation must be recognized by the law as adequate. A provocation is adequate if it is calculated to deprive a reasonable man of self-control and to cause him to act out of passion rather than reason. [Citation omitted.] *In order for a defendant to be entitled to a reduced charge because he acted in the heat of passion, his emotional state of mind must exist at the time of the act and it must have arisen from circumstances constituting sufficient provocation.* [Citations omitted.]

"(4) The test of the sufficiency of the provocation is objective, not subjective. The provocation, whether it be 'sudden quarrel' or some other form of provocation, must be sufficient to cause an ordinary man to lose control of his actions and his reason. [Citations omitted.] In applying the objective standard for measuring the sufficiency of the provocation, the standard precludes consideration of the innate peculiarities of the individual defendant. The fact that his intelligence is not high and his passion is easily aroused will not be considered in this connection. [Citation omitted.]

"(5) Mere words or gestures, however insulting, do not constitute adequate provocation, but insulting words when accompanied by other conduct, such as assault, may be considered. [Citations omitted.]"

[Emphasis added.]

In the present case, the district court held that neither Valerie nor Jessie intended to provoke the Defendant. (R. XLI, 2992-93, 3001-02). Further, the court reasoned that overhearing Valerie's confession to adultery, in the form of a conversation with her lover, did not constitute legally sufficient provocation because the confession consisted of "mere words." (R. XLI, 3005).

First, there is nothing in Kansas law that requires the provocation to be intended by the victim. In State v. Johnson, 290 Kan. 1038, 1048, 236 P.3d 517 (2010), the Kansas Supreme Court cited with approval the standard PIK instruction on heat of passion:

> In the instant case, Instruction No. 8 defined "heat of passion" as "any intense or vehement emotional excitement *which was spontaneously provoked from circumstances*. Such emotional state of mind must be of such degree as would cause an ordinary person to act on impulse without reflection."

[Emphasis added.]

Under Johnson and McClanahan, the intense emotional excitement must be "provoked from the circumstances" and is viewed from the perspective of an objective person in the defendant's position. The intent of the victim simply plays no role in this analysis.

Further, a homicide committed by one spouse when finding the other spouse engaged in the act of adultery is the quintessential example of a legally sufficient provocation to warrant a voluntary manslaughter instruction. *See generally* Davis v. State, 28 S.W.2d 993 (Tenn. 1930). In addition, "[h]omicide may be reduced to manslaughter if committed in the heat of passion on *being informed of a spouse's adultery* if the jury could find the circumstances were such as reasonably to cause heat of passion." State v. Johnsen, 364 N.W.2d 494, 496 (Minn.App.,1985) [Emphasis added.]

Likewise, in Commonwealth v. Schnopps, 383 Mass. 178, 417 N.E.2d 1213 (1981), the Supreme Judicial Court of Massachusetts reversed a defendant's first-degree murder conviction of his estranged wife, when the trial court refused to give a voluntary manslaughter instruction. The Massachusetts Court held:

> "The existence of sufficient provocation is not foreclosed absolutely because a defendant learns of a fact from oral statements rather than from personal observation," and that a sudden admission of adultery is equivalent to a discovery of the act itself, and is sufficient evidence of provocation.

383 Mass. at 181 [Citations omitted.]

The Schnopps Court held the wife's statements constituted a "peculiarly immediate and intense offense to a spouse's sensitivities." Despite the fact that there was evidence the defendant knew of his wife's infidelities for some months, the Massachusetts Court held that this was a factual dispute between the Commonwealth and the defendant that should have been resolved by the jury and not the trial judge. 383 Mass. at 181.

In Bays v. State, 50 Tex.Crim. 548, 99 S.W. 561 (1907), the Texas Court of Criminal Appeals reversed the defendant's murder conviction for the failure to give a voluntary manslaughter instruction. In that case, the defendant's wife told him that the decedent had gotten into her bed and threatened her. Thereafter, when the defendant met the decedent and killed him, the Texas Court of Appeals held that "the jury should have been instructed that, if they believed the wife communicated the insults, and defendant believed the same, and that, on first meeting decedent, slew him on account of passion engendered on that account, the offense would be no more than manslaughter." 50 Tex.Crim. at 550-51.

Also, in Haley v. State, 123 Miss. 87, 85 So. 129 (1920), the evidence showed that the defendant was informed by his wife that she had been having an adulterous affair on Monday. On Wednesday, the defendant met the paramour and killed him. The Mississippi Supreme Court held that it was not error, based on these facts, to instruct the jury on voluntary manslaughter, and affirmed the defendant's voluntary manslaughter conviction.

The factual situation in State v. Johnson, 290 Kan. 1038, 236 P.3d 517 (2010), indicates that Kansas law is consistent with the above-cited persuasive authority on this issue. In Johnson, the defendant was charged with the first-degree murder of his common-law wife. During trial, the defendant testified that, on the day of the murder, his wife confirmed his suspicions that she

was having an affair and that she was moving out of the house. The defendant testified that everything went black and he did not remember getting a shotgun and shooting his wife. The district court instructed the jury on first-degree murder, second-degree murder, and heat of passion voluntary manslaughter. The defendant's request to instruct on "sudden quarrel" voluntary manslaughter was denied. The defendant was ultimately convicted of first-degree murder. 290 Kan. at 1040-41.

On appeal, the defendant argued that the district court erred in failing to instruct the jury on "sudden quarrel" voluntary manslaughter. The Kansas Supreme Court disagreed and held that the instruction given was sufficiently broad to include sudden quarrel as one form of heat of passion. 290 Kan. at 1048.

The defendant in Johnson did not catch his wife in the "act." Rather, as in the above-cited cases, a heat of passion voluntary manslaughter instruction was deemed warranted where there was a confession by the defendant's wife of her infidelity. Defendant acknowledges that the precise issue raised in this appeal was not before the Court in Johnson. Nevertheless, Johnson is consistent with the law that a spouse's confession of adultery may be legally sufficient provocation to warrant a voluntary manslaughter instruction.

The trial court followed the red herring argument of the prosecutor that Valerie's admission was "mere words" that could not constitute sufficient provocation. That misses the point. While Valerie's admission of adultery was oral, in the sense that she used words to communicate it, her admission of the underlying *conduct* is deemed "equivalent to a discovery of the act itself, and is sufficient evidence of provocation." Schnopps, 383 Mass. at 181.

It must be remembered that the disclosure here were words the Defendant overheard between his wife and her lover, after she had convinced him no affair had taken place. Calling these "mere words" is similar to saying that a pedophile's statement to a father that he raped the father's six-year-old daughter are "mere words" and insufficient provocation.

McClanahan talks about "mere words . . . however insulting . . ." 254 Kan. at 114. Insulting words are a far cry from words that reveal an adulterous act by a spouse or a crime against a loved one.

Clearly, there was sufficient evidence, viewed in the light most favorable to the Defendant, that would have supported the instruction. Dr. Hutchinson testified that Valerie's telephone conversation with Fouard that revealed adultery was the trigger that led to the Defendant's "mental breakdown." (R. XXXIX, 2523). Dr. Logan, the State's own expert, agreed that an extreme emotional reaction was triggered when the Defendant learned of Valerie's infidelity. (R. XL, 2812). Further, Dr. Logan testified that the Defendant's attack on Valerie was done in the heat of anger and passion. (R. XL, 2840). He also testified that the Defendant's attack was not disproportionate, considering the degree of the emotion generated by the revelation of Valerie's infidelity. (R. XL, 2837).

The expert psychiatric evidence from both the defense and prosecution experts supports not only that the Defendant was experiencing an intense, emotional excitement, provoked from Valerie's admission, but also that his emotional state was such that it would "cause an ordinary person to act on impulse without reflection." When this evidence is viewed in the light most favorable to the Defendant, there was clearly sufficient evidence to warrant a voluntary manslaughter instruction.

Finally, the failure to give the voluntary manslaughter instruction here was not harmless error. Under the state and federal constitutions, a defendant is entitled to present his or her theory of defense. State v. Lawrence, 281 Kan. 1081, 1085, 135 P.3d 1211 (2006). The failure to give instructions on the law applicable to the theory of defense denies the criminal defendant his due process right to a fair trial. State v. Wade, 45 Kan. App. 2d 128, 135, 245 P.3d 1083 (2010).

Under the constitutional harmless error test, the State cannot demonstrate, beyond a reasonable doubt, that the failure of the trial court to instruct the jury on one of the Defendant's theories of defense did not affect the outcome of the trial in light of the entire record. Ward, 292 Kan. at 569. As argued previously herein, the record in this case establishes sufficient evidence that the Defendant suffered from an intense emotional state of mind, sufficiently provoked by Valerie's revelation of her infidelity in her phone call to her lover. Under the facts of this case, this Court cannot conclude that the outcome of the trial was not affected by the failure to give the voluntary manslaughter instruction.

Further, even if this Court determines that the failure to give the instruction was not constitutional error, the harmless error test of K.S.A. 60-261 is met, i.e.. there is a reasonable probability that the error affected the outcome of the trial in light of the entire record. *Id.* The jury rejected the State's argument that this was a premeditated killing. While they concluded that the Defendant intentionally killed Valerie and intentionally attempted to kill Jessie, there is a reasonable probability, under the circumstances of this case, that the jury would have returned a voluntary manslaughter conviction had they been given that option. Voluntary manslaughter is, of course, an intentional killing that is committed under heat of passion. Since

there was sufficient evidence to support a heat of passion voluntary manslaughter instruction, this Court cannot conclude the failure to give the instruction was harmless under K.S.A. 60-261.

Issue II: Prosecutorial misconduct that occurred during closing argument prejudiced the Defendant's right to a fair trial and requires reversal of his convictions.

In State v. Marshall, 294 Kan. 850, 856, 281 P.3d 1112 (2012), the Kansas Supreme Court set forth the applicable standard of review for a claim of prosecutorial misconduct:

> Appellate review of an allegation of prosecutorial misconduct requires a two-step analysis. First, an appellate court decides whether the comments were outside the wide latitude that a prosecutor is allowed in discussing the evidence. Second, if misconduct is found, an appellate court must determine whether the improper comments prejudiced the jury against the defendant and denied the defendant a fair trial.

In this case, the prosecutor repeatedly misstated the evidence or referred to facts not in evidence during closing argument. Defense counsel made four contemporaneous objections. (R. XLI, 3046, 3047, 3051, 3114). Additionally, defense counsel, on two occasions, moved for a mistrial based on the prosecutor's misconduct. (R. XLI, 3051-52; 3123). The district court denied the motions for mistrial. (R. XLI, 3053, 3126). The district court, however, admonished the jury to disregard the prosecutor's misstatement on one occasion. (R. XLI, 3053).

A. The prosecutor repeatedly referred to facts not in evidence.

In State v. Morris, 40 Kan.App.2d 769, 791-92, 196 P.3d 422 (2008), this Court reversed a defendant's aggravated indecent liberties conviction because the prosecutor committed misconduct during closing argument by referring to facts not in evidence:

> It is well established that the fundamental rule in closing arguments is that a prosecutor must confine his or her comments to matters in evidence. When the prosecutor argues facts that are not in evidence, misconduct occurs, and the first prong of the test for prosecutorial misconduct has been met.

In the present case, the prosecutor argued that Valerie denied her affair with Fouard "perhaps out of fear." Defense counsel's objection to this statement was sustained. (R. XLI, 3046). There was absolutely no evidence that Valerie denied the affair based upon fear of the Defendant.

In addition, the prosecutor argued that the material taken from the Defendant's computer was not a "Bible study." Defense counsel objected because there was nothing in evidence to support the State's argument. The district court did not rule on the objection; rather, it instructed the jury to disregard any statements not supported by the evidence. (R. XLI, 3047). In fact, the prosecutor was aware this material had been prepared as part of a Sunday school lesson three years before the homicide, based upon the pre-trial finding by the district court that this was a statement of religious tenants consistent with the teaching of Defendant's church. (R. XXV, 74).

Next, the prosecutor referred to the Defendant praying the night before the homicide for God to kill Valerie. (R. XLI, 3051). Defense counsel objected and moved for mistrial since there was absolutely no evidence the Defendant prayed for Valerie to die. (R. XLI, 3052-53). The district court denied the motion for mistrial but instructed the jury to disregard the prosecutor's statement. (R. XLI, 3053).

Finally, in making the argument that Valerie was attacked a second time by the Defendant, the prosecutor told the jury: "And why do we know she was the last person who was attacked? It is predominantly her DNA on that knife blade." (R. XLI, 3114). Defense counsel objected that there was no scientific evidence to support that argument. The court instructed the jury to disregard any statements not supported by the evidence. (R. XLI, 3114-15). The prosecutor, undeterred by the court's rulings, argued that it was "common sense" based upon the

DNA evidence that Valerie was the last person to be stabbed. (R. XLI, 3115). Defense counsel's motion for mistrial based upon this misconduct was denied. (R. XLI, 3126).

In fact, the State's own forensic expert, James Newman, testified during a pre-trial Frye hearing, on this very issue, that, based on DNA science or testing, he could not determine within a reasonable scientific certainty, who was stabbed last. (R. XVIII, 145, 150). Newman also testified that such a determination is not generally accepted in the scientific community and there is nothing in the scientific literature on that issue. (R. XVIII, 151, 155). Counsel cited Newman's previous testimony at the Frye hearing in support of his motion for mistrial. Despite that, the trial court denied the motion. (R. XLI, 3123-26).

This was an important issue for the State, since a second attack on Valerie, after the assault on Jessie, would aid the State's argument on intent to kill. There was no proof of a second attack, however, absent the State's deceptive argument, which contradicted the State's own expert in regard to the science of DNA analysis. The prosecutor committed misconduct when she repeatedly argued facts not in evidence and "facts" she knew were patently false. The first prong of the prosecutorial misconduct analysis has been met in this case.

B. The prosecutorial misconduct prejudiced Defendant's right to a fair trial.

The Marshall Court discussed the second prong of the misconduct analysis as follows:

> When a prosecutor makes an improper comment during closing arguments, an appellate court conducts a harmlessness inquiry, determining whether the misconduct was so prejudicial that it denied the defendant a fair trial. Three factors are considered in making this determination. First, was the misconduct gross and flagrant? Second, was the misconduct motivated by ill will? Third, was the evidence of such a direct and overwhelming nature that the misconduct would likely have had little weight in the mind of a juror. None of these three factors is individually controlling.

294 Kan. at 857.

In determining whether misconduct was "gross and flagrant," the Kansas Supreme Court looks to whether the conduct was emphasized or repeated. Marshall, 294 Kan. at 861. Other factors include whether the comments were calculated as opposed to "spur-of-the-moment" comments. *Id.* For instance, in State v. Kemble, 291 Kan. 109, 121–25, 238 P.3d 251 (2010), the prosecutor's comments on the defendant's post-Miranda silence was calculated and not spur-of-the-moment because they were included on a PowerPoint slide shown to the jury.

In the present case, the prosecutor repeatedly referred to facts not in evidence. The prosecutor's improper DNA argument continued after an objection from the defense and an admonishment from the court that the jury disregard any statements not supported by the evidence. Further, the prosecutor's comments were not spur-of-the-moment; rather, they were made in a calculated manner to the jury. The prosecutor was well aware, based on their own forensic expert's testimony during the Frye hearing, that the DNA evidence could not show who was stabbed last. Further, the Defendant filed a pre-trial motion in limine seeking to prevent just such an argument by the prosecutor. (R. XXV, 96-97).

In determining whether ill will is shown by the prosecutor "an appellate court typically examines several factors, including whether the conduct was deliberate, repeated, or in apparent indifference to a court's ruling." Marshall, 294 Kan. at 862. The prosecutor repeatedly referred to facts not in evidence. Especially with the DNA evidence, the prosecutor's conduct was deliberate because she knew accepted DNA science did not support her assertions to the jury. Further, the district court sustained one of defense counsel's objections, instructed the jury to disregard one comment of the prosecutor, and twice instructed the jury to disregard any

statements not consistent with the evidence. In apparent indifference to the court's rulings, the prosecutor continued to blatantly misstate or assert facts not in evidence.

In State v. Simmons, 292 Kan. 406, 254 P.3d 97 (2011), the Kansas Supreme Court reversed the defendant's rape convictions based upon prosecutorial misconduct. During voir dire, the prosecutor discussed the Stockholm Syndrome, and implied that he was an authority on the syndrome and was capable of diagnosing an individual as suffering from this condition. The State did not present any evidence, however, of the syndrome at trial. 292 Kan. at 414. The Kansas Supreme Court held that this constituted misconduct because the prosecutor was improperly referring to facts that were never in evidence.

Likewise, in State v. Chanthaseng, 293 Kan. 140, 261 P.3d 889 (2011), the Kansas Supreme Court, following its decision in Simmons, found the prosecutor committed misconduct during closing argument when she argued that delayed or piecemeal disclosure of sexual abuse by a child is "typical of child sexual abuse victims" when there was no such evidence presented to the jury. 261 P.3d at 894. See also, State v. Akins, 298 Kan. 592, 315 P.3d 868 (2014).

In the present case, as in Simmons, Chanthaseng and Akins, the prosecutor repeatedly argued facts not in evidence, and made a calculated argument directly contrary to the scientific evidence in this case. The burden is on the State to prove, beyond a reasonable doubt, that there is no reasonable possibility that the misconduct committed during closing argument did not contribute to the verdict. State v. Ward, 292 Kan. 541, 569, 256 P.3d 801 (2011). The State cannot meet that burden in this case; consequently, the Defendant's convictions must be reversed.

Issue III: The district court committed reversible error in allowing the State to introduce irrelevant evidence of the Defendant's religious beliefs.

The standard of review when challenging a district court's evidentiary ruling was set forth by the Kansas Supreme Court in State v.. Dixon, 289 Kan. 46, 69-70, 209 P.3d 675 (2009):

> Evidence is relevant if it has any tendency in reason to prove any material fact. K.S.A. 60–401(b). To establish relevance, there must be some material or logical connection between the asserted facts and the inference or result they are intended to establish.
>
> > "The concept of relevance under Kansas law includes both whether evidence is probative and whether it is material. On appeal, the question of whether evidence is probative is judged under an abuse of discretion standard; materiality is judged under a de novo standard."
>
> Furthermore, "'[o]nce relevance is established, evidentiary rules governing admission and exclusion may be applied either as a matter of law or in the exercise of the district judge's discretion, depending on the contours of the rule in question.'" If the adequacy of the legal basis of a district judge's decision on admission or exclusion of evidence is questioned, this court reviews the decision de novo.

The Defendant filed a pre-trial motion in limine to prevent the State from introducing a portion of a three-year old Sunday school lesson that was obtained by law enforcement from the Defendant's computer. (R. II, 427-31). During that hearing, the Defendant introduced documents from the Southern Baptist church, the Defendant's denomination, that almost word-for-word parroted the material in the Defendant's Sunday school lesson, arguing that the Defendant was teaching the tenants of his religion, not creating a statement of his personal beliefs. (R. XXV, 69-73). Despite these arguments, the district court ruled that the lesson was relevant and admissible. (R. XXV, 75-77). The Defendant renewed his motion prior to trial and the district court again found the lesson was relevant to the issues of premeditation and intent.

(R. XXXI, 610-15). When the State moved to admit the lesson as State's Exhibit 578, the Defendant objected to its admission on the grounds previously raised. (R. XXXVII, 2243, 2245).

In State v. Leitner, 272 Kan. 398, 34 P.3d 42 (2001), the Kansas Supreme Court found that the district court abused its discretion when it allowed into evidence the prosecutor's cross-examination of the defendant concerning her involvement with Wicca, a pagan religion. In reaching this conclusion, the Leitner Court relied upon the holding of the United States Supreme Court in Dawson v. Delaware, 503 U.S. 159, 112 S.Ct. 1093, 117 L.Ed.2d 309 (1992):

> The *Dawson* Court, extending the protection of the First Amendment to evidence introduced at a sentencing hearing, concluded:
>
> > "[T]he Constitution does not erect a per se barrier to the admission of evidence concerning one's beliefs and associations . . . simply because those beliefs and associations are protected by the First Amendment.
> >
> > "[W]e nevertheless agree [that]. . .the receipt into evidence. . . regarding his membership in the Aryan Brotherhood was constitutional error." *Dawson*, 503 U.S. at 165, 112 S.Ct. 1093.
>
> The *Dawson* Court reasoned that even if the Aryan Brotherhood espoused racist beliefs, those beliefs had no relevance to the defendant's sentencing. 503 U.S. at 166, 112 S.Ct. 1093. The *Dawson* Court concluded that the defendant's "First Amendment rights were violated by the admission of the Aryan Brotherhood evidence in this case, because the evidence proved nothing more than Dawson's abstract beliefs." . . .
>
> Thus, although there is no per se barrier to the introduction of evidence of a person's membership or participation in a religious group or association, to be admissible such evidence should be related to the commission of the crime charged or should be used to show a person's possible bias or motive.
>
> """The determination of relevancy is a matter of logic and experience, not a matter of law."""" To establish relevancy to the fact of the crimes charged, this court has stated there must be "some natural or logical connection between [the witness']testimony and the inference or result [the witness'] testimony is designed to establish. Here, the evidence showing that Leitner participated in Wicca bears no relevance to the crimes charged against her. The record contains

> no hint or innuendo that her abstract beliefs had any connection to Leitner killing Michael.

272 Kan. at 414-15, 416.

In the present case, the Sunday school lesson was prepared in 2007, nearly three years before Valerie's homicide. The lesson had last been accessed on Defendant's computer more than a year before the homicide. (R. XXV, 49-50). The portion of the lesson introduced by the State read as follows: "Love her, divorce is not an option unless she cheats and then re-marriage is not an option, better work it out. If she leaves in wickedness maybe God will kill her. Honor, obey, support, do what is necessary. If I cheat I deserve and should expect a miserable life and or early death and don't deserve anyone's respect or affection." (R. XXV, 55-56).

The district court initially found that this lesson was a statement of the Defendant's religious tenants and consistent with the teaching of his church. (R. XXV, 74). Further, the court found that, because of Valerie's infidelity, there was a logical connection between the lesson and the issues of intent and premeditation. (R. XXV, 75; XXXI, 610-15). Finally, the district court found that this evidence was not unduly prejudicial because the Defendant never indicated that he would individually act on the religious tenant, although the court acknowledged that this evidence opened potential floodgates which could lead to "red herrings" that would serve to detract the jury from the underlying issues. (R. XV, 76-77).

Contrary to the district court's ruling, there was no logical connection between the lesson and the elements of premeditation and intent. First, the lesson was prepared three years before the homicide, which was long before the Defendant was aware of Valerie's infidelity. In addition to having nothing specifically to do with Valerie's indiscretions, the lesson stated that God would cause the premature death, not a human being, and certainly not the Defendant.

The district court found that the lesson was not prejudicial because there was nothing in it that indicated the Defendant would individually act on this tenant, which begs the question of its relevancy. This court's finding, however, did not go to the *prejudicial nature* of the lesson; rather, it went directly to its *probative value* and *materiality* in this case. As in Leitner, the religious beliefs set forth in the lesson were not tied to and did not relate in any way to the commission of the crimes charged.

The Leitner Court cited with approval the following articulation of the holding in Dawson: "Evidence of a constitutionally protected activity is admissible *only if it is used for something more than general character evidence*." 272 Kan. at 413 (emphasis added). In the present case, the only use the State made of the Defendant's constitutionally protected religious beliefs was as general character evidence. During her opening statement, the prosecutor referred to the lesson as the "defendant's belief." (R. XXXI, 659-60). During closing argument, the prosecutor again referred to the lesson as the "creed the defendant lived by." (R. XLI, 3047). This was nothing more than the prosecution using the Defendant's beliefs to paint him as a religious fanatic.

This is illustrated further when Kyrsten was allowed to testify, over objection, about the Defendant's religious views regarding the proper family structure. According to Kyrsten, the Defendant believed that the man is the head of the household and the discipliner. The woman's role was to take care of the home, the children and her husband. (R. XXXIII, 1208). The prosecution also was allowed to introduce a letter from the Defendant to his son-in-law, Joshua Hoffman, that recounted the Defendant's religious views and Bible verses he used to support those views. (R. X, 44; XXXIII, 1302). These are yet further examples of the State using

irrelevant religious beliefs to paint the Defendant, a Southern Baptist, as a religious extremist in the eyes of the jury. The use of this irrelevant evidence violated the First Amendment.

Once again, the burden is on the State to prove, beyond a reasonable doubt, that there is no reasonable possibility that the introduction of the irrelevant evidence of the Defendant's religious beliefs did not contribute to the verdict in this case. State v. Ward, 292 Kan. 541, 569, 256 P.3d 801 (2011). The district court itself noted that this evidence had the likely potential to mislead the jury and detract them from the issues. The erroneous admission of the Defendant's religious views into evidence requires this Court to reverse his convictions.

Issue IV: The district court committed reversible error when it admitted inadmissible hearsay statements of Valerie Paulson under various hearsay exceptions and as evidence of marital discord.

In State v. Cosby, 293 Kan. 121, 262 P.3d 285 (2011), the Kansas Supreme Court set forth the applicable standard of review applicable when an appellate court reviews the admission or exclusion of evidence:

> [W]hen the "legal basis" of the district court's decision is raised on appeal, appellate courts review such questions de novo. If the decision at issue is one where the district court is afforded greater discretion, such as the balancing of a piece of evidence's probative value versus the risk of undue prejudice under K.S.A. 60–445, then the district court's decision will not be overturned on appeal if reasonable minds could disagree as to the court's decision.

293 Kan. at 126-27 (citations omitted).

The State filed a pre-trial motion in limine seeking admission of various hearsay statements of Valerie Paulson. (R. III, 622-645). The Defendant filed a response to that motion. (R. III, 662-669). The district court found that many of Valerie's hearsay statements were admissible pursuant to various hearsay exceptions. (R. XXI, 111-256). During trial, the Defendant entered contemporaneous objections to the hearsay statements, and was granted a

continuing objection by the district court. (R. XXXII, 850-51; XXXIII, 1072-73; XXXV, 1712, 1731, 1778; XXXVII, 2109, 2119).

In Cosby, the Kansas Supreme Court discussed, in general terms, Kansas hearsay law:

> K.S.A. 60–460 defines hearsay as "[e]vidence of a statement which is made other than by a witness while testifying at the hearing, offered to prove the truth of the matter stated." "The theory behind the hearsay rule is that when a statement is offered as evidence of the truth of the matter stated, the credibility of the declarant is the basis for its reliability and the declarant must therefore be subject to cross-examination."

293 Kan. at 127.

I. Statements to Jessie Putman.

Jessie testified that, on July 5, 2010, Valerie told her about an argument that had occurred that day between Valerie and the Defendant as they drove to Jessie's house. According to Valerie, the Defendant cussed her out, accused her of having an affair, said that she should kill herself, and prayed that God would kill her. (R. XXXII, 872). The district court found these statements were hearsay; however, the court further found they were admissible under K.S.A. 60-460(d)(2) and (d)(3). (R. XXI, 154).

K.S.A. 60-460(d)(2) is the excited utterance exception to the hearsay rule. There are four elements to that exception: "1. An event or condition occurred; 2. it was startlingly sufficient to cause nervous excitement; 3. the declarant perceived it; and, 4. the declarant made the statement while under stress of nervous excitement." State v. Boldridge, 274 Kan. 795, 804-05, 57 P.3d 8 (2002). The exception has the "*characteristic of spontaneity* arising either from the reaction to *contemporary perception* or from the excitement which carries over from the event." 274 Kan. at 805 [Emphasis added.] Finally, "reliability can be inferred when hearsay statements

are admitted under the excited utterance exception, but such hearsay statements might be excluded if reliability is found not to exist." *Id.*

In the present case, there was clear evidence that this story was a fabrication. Valerie had related a nearly identical story to her brother two weeks before July 5. (R. XXXV, 1747-48). Thus, her statements to Jessie two weeks later was either a false account, or would not fall under the excited utterance exception, because Valerie would not have been under the stress or excitement of the event. *See* State v. Giles, 27 Kan.App.2d 340, 346, 4 P.3d 630 (2000) (holding battery victim's statement to detective was inadmissible under "excited utterance" hearsay exception, since the statement was given approximately two days after victim was beaten and was thus not made while victim was under stress of nervous excitement caused by beating).

Further, apart from the timing issue, there were sufficient reasons to question the reliability of Valerie's statement. Both of the Paulson's sons were in the back seat of the car when Defendant purportedly made these statements. Austin told law enforcement officers and testified at trial that his father never made these statements to Valerie. (R. XXXIV, 1391, 1443). Although Austin and his brother slept for a short time during the July 5 trip, Austin heard the argument between his parents. (R. XXXIV, 1442). Two weeks earlier, Valerie told her brother Kevin that the Defendant directly told the children that they should pray for Valerie because she needed to die. (R. XXXV, 1747). Austin was adamant that the Defendant never said the things Valerie relayed to Jessie or Kevin Putman. (R. XXXIV, 1391, 1443).

In addition, Jessie testified concerning what Valerie told her about another argument between herself and the Defendant when Defendant and Kyrsten confronted her about having an affair. Jessie testified that Valerie told her she was scared of the Defendant during this

incident. (R. XXXII, 867-68). Jessie specifically testified that Valerie told her about this argument days after it happened. (R. XXXII, 868). Again, Valerie's hearsay statement was not admissible under the excited hearsay exception, since she was not still under nervous excitement, days after the argument. *See* State v. Giles, 27 Kan.App.2d 340, 346, 4 P.3d 630 (2000).

Valerie's statements were likewise not admissible under K.S.A. 60-460(d)(3). In order for hearsay to be admissible under this exception, the trial court must find that the declarant is unavailable and the statement was made "at a time when the matter had been recently perceived by the declarant and while the declarant's recollection was clear and was made in good faith prior to the commencement of the action and with no incentive to falsify or to distort." In State v. Love, 267 Kan. 600, 609, 986 P.2d 358 (1999), the Kansas Supreme Court held that "the presence or absence of an incentive to falsify or distort is a question of fact to be determined by the trial judge in light of all the circumstances."

The circumstances of this case clearly indicate not only the unreliability of Valerie's statements, but also the presence of an incentive for Valerie to falsify or distort events that happened between herself and the Defendant. Valerie was carrying on an adulterous relationship at the time these hearsay statements were made. She was also contemplating a divorce from the Defendant. It was in her interest to distort the true nature of her relationship with the Defendant and events that happened during this time period.

Further, there is a strong indication that Valerie, in fact, falsified or severely distorted what actually occurred between her and Defendant on July 5. She told Jessie the "praying to God that she would die" happened on July 5. Valerie told her brother the same story two weeks before. The other two witnesses to this incident both denied that Defendant said anything of the

sort to Valerie on July 5 or any other occasion. There was ample basis for the district court to exclude this hearsay as unreliable and its failure to do so constituted an abuse of discretion.

2. Testimony regarding discordant marital relationship.

Testimony regarding the purported "discordant" relationship between the Defendant and Valerie was repeatedly elicited by the State from several witnesses. Jessie testified that Valerie was scared for the Defendant to find out about her spending habits that nearly bankrupted the Paulson family. (R. XXXII, 852). Valerie told Jessie that the Defendant did not love her anymore and the Defendant had moved out of the bedroom. (R. XXXII, 860). According to Valerie, there was tension in the house and many arguments between herself and the Defendant. She did not want to be in the house when the Defendant was there. (R. XXXII, 864).

Kyrsten Hoffman testified that Valerie described the Defendant as being "controlling." Valerie said the Defendant made her feel like a Blue Beacon employee and never treated her as an equal. (R. XXXIII, 1176).

Danielle Norwood testified that Valerie told her about the "difficult" relationship between Valerie and the Defendant. (R. XXXV, 1713-14). According to Norwood, the Defendant and Valerie had an argument when Defendant found out about Valerie's mishandling of the family finances. When the Paulsons moved to Assaria, Valerie told Danielle that their relationship did not get better and she wanted out of the marriage. (R. XXXV, 1715-19).

Kevin Putman testified that Valerie told him the Defendant did not love her anymore. She wanted to protect her children from learning of their "troubled" relationship that was precipitated by Valerie's poor financial choices. In 2010, Valerie told Kevin that her relationship with the Defendant was "worse." (R. XXXV, 1731-43).

Dawn Kurtz testified that Valerie told her the Defendant insulted Valerie. (R. XXXV, 1778). Valerie told Dawn that Valerie was "worried" the Defendant would find out about her financial deceptions. (R. XXXV, 1780-81).

John Heitsman testified that Valerie told him that she and the Defendant did not "communicate" well. (R. XXXVII, 2120). Valerie told John that she felt like a servant around the house, instead of a wife. Valerie told him that there was not much affection between her and the Defendant and she spoke often of separation and divorce. (R. XXXVII, 2125).

The district court found that these statements were relevant to Valerie's state of mind and evidence of a discordant marital relationship. (R. XXI, 165-66, 177, 239, 244-45).

In State v. Rice, 261 Kan. 567, 585, 932 P.2d 981 (1997), the Kansas Supreme Court recognized that for more than 100 years, Kansas law has allowed "evidence of previous cruel and brutal assaults to be used in a marital homicide case on the question of motive and intent for the purpose of showing malice and hatred on the part of the defendant, as well as to show the relationship of the parties or a continuing course of conduct, or to corroborate the testimony of witnesses as to the act charged." Although marital discord does not necessarily have to rise to a violent level to be admissible, the type of marital discord evidence that is typically found to be admissible consists of 1) statements by the deceased spouse regarding abuse; 2) physical evidence of abuse, 3) testimony of witnesses who observed the couple fighting or in conflict; and 4) threats by the defendant that he or she would kill their spouse. State v. Patton, 280 Kan. 146, 171, 120 P.3d 760 (2005).

In the prescnt case, there was no evidence of any physical violence between the Defendant and Valerie. Jessie testified that Valerie never alleged that the Defendant physically

abused her in any way. (R. XXXII, 987). Kyrsten testified that the Defendant never physically attacked Valerie and never threatened her. (R. XXXIII, 1215, 1221). Dawn Kurtz testified that she never had any concerns that the Defendant was violent towards Valerie. (R. XXXV, 1792).

The vast majority of the alleged "marital discord" testimony in this case consisted of hearsay statements from Valerie Paulson. She told family and friends that her relationship with Defendant was "difficult," that there was "tension" in the home, that Defendant did not love her anymore, and that the Defendant was "controlling" and did not treat her as an equal. It bears repeating that Valerie's representation of her relationship with the Defendant often occurred in the context of explaining her extramarital affairs, which, the Appellant submits, undermines the probative value and reliability of these statements. It is a cliche that the unfaithful spouse bemoans the fact that "my wife (husband) just doesn't understand me" to explain infidelity.

In any case, Valerie's largely uncorroborated, often vague representations of the marital problems between herself and Defendant fall far short of the type of marital discord evidence that has been found to be admissible in marital homicide cases. This testimony served only to portray the Defendant as a "bad" husband, not a violent one.

In addition, the court found Valerie's statements were admissible to show her state of mind pursuant to K.S.A. 60-460(l)(1). That statute provides: "a statement of the declarant's (1) then existing state of mind, emotion or physical sensation, including statements of intent, plan, motive, design, mental feeling, pain and bodily health, but not including memory or belief to prove the fact remembered or believed, *when such mental or physical condition is in issue or is relevant to prove or explain acts or conduct of the declarant.*" [Emphasis added.]

Valerie's statements are not admissible pursuant to this exception because Valerie's state of mind was not an element under the substantive law of this case. Judge Barbara states:

> [E]vidence of discordant marital relations is admissible in marital homicide cases, caution should be exercised in permitting the prosecution to offer this evidence as state of mind of the deceased victim. If the victim's state of mind is not an issue in the case, the trial court should not allow this testimony presented to a jury, even with a limiting instruction.

Barbara, Lawyer's Guide to Kansas Evidence § 7:1 Hearsay, p. 218.

Valerie Paulson's state of mind was not at issue in this case. As a consequence, her hearsay statements were not admissible pursuant to K.S.A. 60-460(l)(1), and the district court abused its discretion in admitting them pursuant to this hearsay exception.

The burden is on the State to prove that there is no reasonable probability that the erroneous admission of Valerie's hearsay statements affected the outcome of the trial in light of the entire record. K.S.A. 60-261. During opening statements, the prosecutor related Valerie's story about the argument between her and the Defendant as they drove back to Assaria. The prosecutor told the jury that the Defendant called her names, told her she should kill herself and then prayed that God would kill her. (R. XXXI, 631). In addition, the prosecutor told the jury that the Defendant demeaned Valerie and called her a whore. (R. XXXI, 631).

The theme was revisited by the prosecutor during closing argument. She told the jury that the Defendant chastised and berated Valerie, and that Valerie was not "happy" in her marriage. (R. XLI, 3042-43).

The State's continual emphasis upon the inadmissible and patently unreliable hearsay statements of Valerie Paulson requires this Court to reverse Defendant's convictions.

Issue V: The district court committed reversible error when it admitted into evidence statements made by the Defendant while he was incarcerated in the Saline County Jail.

The standard for appellate review of the district court's admission of evidence is set forth in Issue IV and is incorporated herein by reference.

The Defendant filed a pre-trial motion in limine seeking to exclude statements made by Defendant during jail visits, phone calls and letters. (R. II, 432-39). The State responded to the motion in limine. (R. II, 456-59). The district court concluded that much of this evidence was relevant to the Defendant's state of mind, his intent, and his relationship with Valerie. (R. XVIII, 217, 220, 222, 223, 242, 246 247, 260, 265; XIX, 35, 49, 51, 77, 82; XX, 47, 53-54, 86). The Defendant entered contemporaneous objections when these tapes were entered during the testimony of Kyrsten Hoffman. (R. XXXIII, 1128-1135). The Defendant also objected to two letters from the Defendant to Kyrsten. (R. XXXIII, 1195, 1209). The Defendant also objected when tapes were entered into evidence during the testimony of Linda Paulson, (R. XXXV, 1864), and Michael Paulson (R. XXV, 1867), the Defendant's parents. Finally, the Defendant objected to the introduction of a letter from the Defendant to his son-in-law, Joshua Hoffman. (R. XXXIII, 1302-03).

Evidence of a criminal defendant's post-offense conduct or statements may be relevant as establishing the defendant's consciousness of guilt, because such evidence tends to establish the defendant's guilt of the charged crime. Admissible post-offense conduct may include flight, concealment, fabrication of evidence or the giving of false information. State v. Cathey, 241 Kan. 715, 730, 741 P.2d 738 (1987).

For instance, in State v. Bornholdt, 261 Kan. 644, 932 P.2d 964 (1997), the defendant wrote a letter, after his arrest, whereby he attempted to obtain an alibi on the day of the

homicide. This letter was admitted into evidence over the defendant's objection. The Kansas Supreme Court found admission of this letter proper because it provided additional evidence of the matter in issue, "and it indicated an attempt to fabricate an alibi for the time of the killing." The Supreme Court concluded that the letter was "clearly relevant and probative to the issues in the case." 261 Kan. at 667. See also State v. Davidson, 242 S.W.3d 409, 415 (Mo.App. 2007)(holding a letter a defendant wrote from the jail was relevant and admissible because it tended to show the defendant's consciousness of guilt and a desire to conceal the offenses).

However, in State v. Harkness, 252 Kan. 510, 847 P.2d 1191 (1993) the Kansas Supreme Court found that the district court did not err in excluding, on relevancy grounds, letters the defendant wrote to his family while in Larned State Hospital. The Kansas Supreme Court held that these letters were not relevant because they did not establish his state of mind at the time the crimes were committed. The Supreme Court concluded that there was a danger that, if the letters were admitted, the jury could have mistaken the defendant's state of mind at the time he wrote the letters for his state of mind at the time the crimes were committed. 252 Kan. at 529.

State's Exhibit 472 were excerpts from a conversation between the Defendant and Kyrsten in the Saline County Jail on July 9, 2010. (R. XXXIII, 1125). In that conversation, the Defendant said he wanted the funeral to be videotaped, (R. XVIII, 208), that he wanted certain pictures of Valerie to be saved, (R. XVIII, 210), and that he did not hate Valerie. (R. XVIII, 213). He asked if certain items had been taken from the home. (R. XXXIII, 1140). The court found these statements relevant to Defendant's state of mind, motive and intent. (R. XVIII, 217).

State's Exhibit 484 were excerpts from a conversation between Defendant and his mother who visited him in the jail on July 11, 2010. (R. XXXV, 1863-64). Defendant asked his mother

whether "any creeps" were at Valerie's funeral. (R. XXXV, 1865). The court ruled this statement was relevant to Defendant's state of mind, motive and intent. (R. XVIII, 217).

State's Exhibit 473 contained the recorded conversation between Defendant and Kyrsten during a jail visit on July 11, 2010. (R. XXXIII, 1128-29). During that conversation, the Defendant stated that he did not know what had happened to Jessie. (R. XVIII, 219-20). Defendant asked Kyrsten about who was going to be at the funeral. (R. XVIII, 229). He asked if any "creeps" showed up at the funeral, and commented that they did not deserve to be there. (R. XVIII, 246).

At one point during the conversation, Defendant said: "I'm okay in here. I can take this. Yeah. That was a fear." (R. XVIII, 231). The State interpreted that to mean that he had thought about jail before the offense. Defense counsel argued that the Defendant was talking about his soul, not jail. Defense counsel argued he was tapping his chest, saying, "I'm okay in here. I can take this." Additionally, the Defendant's statement "that was a fear" came directly after Kyrsten responded to his concern about that would happen to his sons while he was in jail. She reassured him the boys were fine and he responded, "That was a fear." (R. XVIII, 231-32).

The Defendant told Kyrsten that he had shut off the cable and other utilities at the house earlier on the day of the homicide. (R. XVIII, 237-38). Defendant questioned whether Valerie loved him and that he was afraid of losing Valerie and the boys. (R. XVIII, 241-42). Finally, Defendant asked Kyrsten how much the funeral cost, and made some reference to using the money he had taken from the bank to pay for it. (R. XVIII, 247-48). The court found all of these statements relevant to Defendant's intent and state of mind. (R. XVIII, 219, 220, 222, 224, 238, 240, 242, 247, 250).

State's Exhibit 485 was a recorded conversation between Defendant and his father. (R. XXXV, 1866-67). Defendant asked his father about Valerie's funeral, and whether any "strange men" paid extra attention to Valerie. (R. XVIII, 243). The court found this conversation was relevant to Defendant's intent, state of mind, and his relationship with Valerie. (R. XVIII, 246).

State's Exhibit 476 was a recording of a telephone conversation between Defendant and Kyrsten on July 15, 2010. (R. XXXIII, 1132). The Defendant said that God had taken everything over and that he prayed that if he is damaging his children, he wanted God to take him out. (R. XVIII, 255-56). Then Kyrsten asked Defendant if he planned it. The Defendant paused and stated that everything he said on the phone is recorded. (R. XVIII, 256). The State wanted to end the recording at that point; however, the State excised the portion of the recording where the Defendant asked Kyrsten, "What do you believe in your heart?" Kyrsten responded that she did not think he had planned it. The Defendant then stated that he did not plan the homicide. (R. XVIII, 257). Defense counsel argued that the entire portion of the tape should be played for the jury so they would not be misled by the State's redacted version of the conversation. The court agreed with defense counsel; however, the court went on to hold that, if the entire portion of the tape were played, the State would be allowed to ask Kyrsten if she still believed that the Defendant did not plan it. Defense counsel objected to the court allowing such an improper question of the witness. (R. XVIII, 260-61).

State's Exhibit 478 was a portion of a recorded conversation between the Defendant and Kyrsten on September 22, 2010. (R. XXXIII, 1134). In that conversation, they spoke of a letter Defendant had written to Kyrsten wherein he stated that "people failed your Mom. You failed your Mom. We all fail." (R. XVIII, 37-38). The Defendant also made reference to the boys

being left alone when Valerie left the house. (R. XVIII, 40). The court ruled these statements were relevant to the Defendant's state of mind and his relationship with Valerie. (R. XVIII, 51).

Exhibit 483 contained excerpts from a recorded conversation between the Defendant and Kyrsten on June 21, 2011. (R. XXXIII, 1135). The Defendant commented that he found it difficult to trust people, in part, because people who knew things did not say anything to him. (R. XVIII, 68-69). Defendant then told her not to destroy her own family. (R. XVIII, 73). He also stated that his "truster" is broke. (R. XVIII, 83). The court found these statements were relevant to motive, state of mind and intent. (R. XVIII, 77, 82, 83).

Exhibit 470 was a letter from the Defendant to Kyrsten written on July 16, 2010. (R. XXXIII, 1195). The Defendant wrote that he was the "lion" of the family and it was his job to protect his family as a lion protects the pride. He also wrote that people who say things like "he's so controlling" are in rebellion against God's structure for the family, for men and women in their roles as spouses and parents. (R. XX, 51-52). The court found the letter was relevant to the relationship of the parties and Defendant's intent. (R. XX, 54).

State's Exhibit 471 was a letter written on June 21, 2011, from the Defendant to Kyrsten. (R. XXXIII, 1209). Defendant remarked how he gladly took on the responsibility of raising Kyrsten after Valerie's first marriage ended. He wrote that Valerie hurt him and disappointed him, and all the excuses in the world could not make up for that, and it did not excuse the decisions of those who participated in covering up Valerie's affairs. The Defendant went on to write that he loved Valerie and still loved her. He wrote that it was hard for him to trust because his life partner betrayed his trust for a long period of time. Defense counsel objected to the letter on relevancy grounds because the State was using a letter written a year after the incident to

somehow prove the Defendant's state of mind on July 6, 2010. (R. XX, 81). Nevertheless, the court ruled that the letter was relevant to the relationship of the parties, the Defendants' state of mind, his intent and premeditation. (R. XX, 86).

None of the statements the Defendant made in recorded conversations or through his letters showed any intent to conceal the crime or fabricate evidence, as was the case in Bornholdt and Davidson. Many of Defendant's statements had nothing to do with the charged crimes. Many were vague, and susceptible of more than one interpretation, which allowed the State to twist the statements in an attempt to make them relevant. Further, the statements did not reflect on the Defendant's state of mind at the time the homicide occurred. Some of the statements were made a full year after the homicide. While they may have reflected Defendant's state of mind at the time they were made, that was not a material fact in issue.

These statements were irrelevant, as they were not probative of any material fact in issue; consequently, their admission into evidence constituted error. In addition, as noted by the Court in Harkness, the statements likely misled the jury to believe that Defendant's statements reflected his state of mind at the time of the homicide. Therein lies the prejudice to Defendant.

As with the evidentiary issues previously raised, the State cannot meet its burden to show that the erroneous admission of the recorded conversations and letters were harmless error. K.S.A. 60-261. Defendant's convictions must be reversed.

Issue VI: The Defendant's waiver of his Miranda rights and subsequent statements to law enforcement were not knowing or voluntary and violated the Fifth Amendment; as a consequence, the district court erred in denying the Defendant's motion to suppress his statements to Deputy Allen.

In State v. Swanigan, 279 Kan. 18, 23-24, 106 P.3d 39 (2005), the Kansas Supreme Court set forth the appropriate standard of review on a motion to suppress:

> In reviewing a district court's decision regarding suppression, this court reviews the factual underpinnings of the decision by a substantial competent evidence standard and the ultimate legal conclusion by a de novo standard with independent judgment. [Citation omitted.] This court does not reweigh evidence, pass on the credibility of witnesses, or resolve conflicts in the evidence. . .
>
> In determining whether a confession is voluntary, a court is to look at the totality of the circumstances. The burden of proving that a confession or admission is admissible is on the prosecution, and the required proof is by a preponderance of the evidence. Factors bearing on the voluntariness of a statement by an accused include the duration and manner of the interrogation; the ability of the accused on request to communicate with the outside world; the accused's age, intellect, and background; and the fairness of the officers in conducting the interrogation. The essential inquiry in determining the voluntariness of a statement is whether the statement was the product of the free and independent will of the accused.

The Defendant filed a pre-trial motion to suppress Defendant's statement to Deputy Scott Allen. (R. II, 468-77). The district court denied the motion and found that no express waiver of Miranda is required under Kansas law. (R. XX, 97). Defense counsel entered a contemporaneous objection when Deputy Allen began to testify and was granted a continuing objection to any testimony regarding the Defendant's statements. (R. XXXV, 1880).

In State v. Kirtdoll, 281 Kan. 1138, 136 P.3d 417 (2006), the Kansas Supreme Court, citing North Carolina v. Butler, 441 U.S. 369, 99 S.Ct. 1755, 60 L.Ed.2d 286 (1979), held that mere silence after the giving of Miranda warnings is insufficient to establish a knowing and voluntary waiver. "That does not mean that the defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver, may never support a conclusion that a defendant has waived his rights." 281 Kan. at 1146.

In the present case, Sheriff Keith Coleman read Defendant Miranda from a card. He did not stop after reading each right; rather, he read them as an entire series. The sheriff asked Defendant if he understood the rights. The Defendant nodded one time. Coleman did not ask

the Defendant anything further after he nodded his head. (R. XVIII, 71-72). Thus, Defendant was never asked whether he agreed to waive his rights and talk to law enforcement.

Under Kirtdoll, the Defendant's mere silence cannot be interpreted as a valid waiver of Miranda. Although he nodded his head once after being read his Miranda rights, the nod was, at best, an acknowledgment that he understood them. He was never asked if he waived his rights. Accordingly, when Allen began to interrogate Defendant during their drive to the county jail, he did so without a valid, knowing or voluntary waiver, indeed without any waiver at all.

In addition, Defendant was acting dazed and confused, (R. XL, 2720), and was suffering from severe sleep deprivation. (R. XXXIX, 2516). Given the totality of the circumstances, Defendant's statements to Deputy Allen were in violation of Miranda and involuntary. The court erred in admitting the statements during trial.

Issue VII: The Defendant was denied his Sixth Amendment right to a fair trial by the cumulative errors that were committed below.

The Kansas Supreme Court has held that "[c]umulative trial errors, when considered collectively, may be so great as to require reversal of the defendant's conviction. The test is whether the totality of circumstances substantially prejudiced the defendant and denied the defendant a fair trial. No prejudicial error may be found upon this cumulative effect rule, however, if the evidence is overwhelming against the defendant. [Citation omitted.]" State v. Plaskett, 271 Kan. 995, 1022, 27 P.3d 890 (2001).

The Defendant submits that the cumulative effect of the errors by the trial court and the prosecutorial misconduct as set forth in the above issues, deprived him of his Sixth Amendment right to a fair trial. Based on this cumulative error, the Defendant's conviction must be vacated.

Issue VIII: The district court committed reversible error when it ordered the Defendant to reimburse BIDS for attorney fees and to order restitution to the Kansas Crime Victim's Compensation Board.

The district court's failure to explicitly make the statutory findings required by K.S.A. 22-4513 requires an interpretation of the statute which calls for unlimited review by this Court. State v. Robinson, 281 Kan. 538, 539, 132 P.3d 934 (2006). Likewise, the propriety of the district court's restitution award to the Kansas Crime Victim's Compensation Board (KCVCB) requires the interpretation of K.S.A. 4603d(b)(1) and K.S.A. 74-7301 *et. seq.*, and is also subject to unlimited review. State v. Hand, 297 Kan. 734, 736-37, 304 P.3d 1234 (2013).

The district court ordered Defendant to reimburse SBIDS for attorney fees in the amount of $8,236.16 over Defendant's objection. (R. XLIV, 37-39). The court also ordered Defendant to pay restitution to KCVCB in the amount of $18,091.25, over Defendant's objection. (R. XLIV, 57).

A. Attorney fees under K.S.A. 22-4513.

K.S.A. 22-4513(b), as interpreted by the Kansas Supreme Court in State v. Robinson, 281 Kan. 538, 548, 132 P.3d 934 (2006), requires the sentencing court, at the time of the assessment of BIDS attorney fees, to consider the validity of the fees, the financial resources of the defendant and the nature of the burden that payment will impose, "*explicitly*, stating on the record how those factors have been weighed in the court's decision." (Emphasis added).

Within days of the events that gave rise to the criminal charges in this case, Jessie Putnam filed a civil tort suit against Defendant in Saline County District Court, case number 10-CV-351. On July 15, 2010, Judge Hellmer ordered that all of Defendant's assets, including a retirement fund held by his employer Blue Beacon International, be subject to pre-judgment

attachment pursuant to K.S.A. 60-703. (R. XLIV, 28). At the time the attachment order was entered, the Defendant was attempting to hire counsel to represent him in the criminal case. (R. XLIV, 28). With all of his assets frozen, the Defendant was unable to hire counsel of his choice.

Judge Hebert then appointed Paul Oller to represent the Defendant in the criminal case in August, 2010. (R. XLIV, 6). Defendant never voluntarily asked for Oller to be appointed. (R. XLIV, 11, 28). The only reason Oller was appointed was because Defendant's assets were frozen. (R. XLIV, 11). Patricia Scalia, the State Director of SBIDS, was aware that Defendant was involved in litigation to unfreeze his assets. Although she arranged to have Oller appointed to represent the Defendant, she later urged Judge Hebert to reconsider his decision because Defendant had "sizeable assets." Judge Hebert deferred that decision and on November 2, 2010, found there were exceptional circumstances to override the spending caps for Oller's representation of Defendant. Eventually, Oller was paid $8,236.16 from BIDS. (R. XLIV, 6-7).

In October, 2010, the Defendant was successful in having the attachment orders rescinded. According to his civil attorneys, the attachment orders were "illegal" under Kansas law. (R. XLIV, 28). This was because K.S.A. 60-703 prohibits pre-judgment attachment of a defendant's property that is within the possession of a third party and in the form of earnings due and owing to the defendant. As soon as Defendant's assets were unfrozen, he immediately hired counsel of his choice. (R. XLIV, 11).

An essential element of the Sixth Amendment right to counsel is that a criminal defendant "must be afforded a reasonable opportunity to secure counsel of his or her choosing." State v. Anthony, 257 Kan. 1003, 1019, 898 P.2d 1109 (1995).

In the present case, Defendant was attempting to hire counsel of his choice when the State, via the district court judge in the civil case, froze all of Defendant's assets in direct violation of K.S.A. 60-703. The improper attachment order effectively interfered with Defendant's Sixth Amendment right to secure counsel of his choice. When the State improperly froze Defendant's assets, it stripped him of his counsel of choice, protected by the Sixth Amendment, and forced him to accept appointed counsel. The State then sought and obtained an order requiring the Defendant to reimburse attorney fees to BIDS for an attorney he never voluntarily asked for and for expenses that would never have been expended, but for the State's improper attachment order. Under these circumstances, the Defendant should not be required to reimburse BIDS and the district court committed reversible error in ordering him to do so.

In addition, the district court acknowledged that all of Defendant's assets had been depleted at the time of the restitution hearing due to the settlement reached in the civil suit. (R. XLIV, 36). In fact, Defendant had been found to be indigent and entitled to appointed counsel on appeal. (R. XLIV, 20-21). Nevertheless, the district court found that because Defendant had been gainfully employed in the past, and did not abuse drugs or suffer from mental illness, that he could be gainfully employed in the future. (R. XLIV, 37).

These are not the explicit findings with respect to the burden that payment will impose that was required by the Supreme Court in Robinson. Defendant will be incarcerated for the next 18 years of his life. He will be 56 years old when he is released, and will have a felony criminal record. Simply because Defendant had been gainfully employed in the past is no measure of the burden that payment will impose on him under these circumstances nearly 20 years from now. Accordingly, the order to reimburse BIDS attorney fees must be reversed.

B. Restitution to the KCVCB.

K.S.A. 74-7312(a) provides that, if compensation is awarded under the Crime Victims Compensation Act, the KCVCB has subrogation rights if the victim or claimant receives or recovers benefits for economic loss from a collateral source. A "collateral source" is defined by K.S.A. 74-7301(d) as "a source of benefits or advantages for economic loss otherwise reparable under this act which the victim or claimant has received . . . from [t]he offender."

Furthermore, under general principles of insurance law, "[w]here a tortfeasor, acting in good faith and without knowledge or notice of an insurer's payment and subrogation rights, settled with and obtained a full or general release from the insured, such settlement and release constitutes a defense to the insurer's action against the tortfeasor for reimbursement and bars the insurer's right to subrogation against the tortfeasor." 16 Couch on Ins. § 224:117 (2013).

This general statement of the law by Couch appears to be the law in Kansas. In American Automobile Ins. Co. v. Clark, 122 Kan. 445, 252 P. 215 (1927), the insurer (American) paid the insured (Robinson) for damage resulting from a collision caused by one of the defendant's employees. The insurance policy provided subrogation rights to American. Robinson meanwhile entered into a settlement agreement with the defendant. The defendant had no knowledge of American's claim or subrogation rights. In a subsequent action between American and the defendant, the defendant disclaimed liability. In affirming a judgment in favor of the defendant, the Kansas Supreme Court held:

> It seems to have been plaintiff's theory of the case that defendant's settlement with Richardson had no bearing on plaintiff's subrogated claim against defendant. If such indeed was plaintiff's theory of the case, it was in error. Its claim against defendant drew its only virtue, if any it had, from its contract with Richardson. It received from Richardson by subrogation, by express or implied assignment, whatever right of action for damages Richardson had against Parker's employer,

> this defendant. If Richardson settled with defendant whatever claim he had against the latter, there was an end of defendant's liability. We might have an altogether different case to consider if defendant had known of plaintiff's claim through subrogation to the rights of Richardson before defendant settled with Richardson.

122 Kan. at 217.

In the present case, once the KCVCB awarded compensation to Jessie Putman, it had statutory subrogation rights to any benefits recovered by Putman in her civil lawsuit against the Defendant. In effect, the KCVCB stood in the shoes of Putman. Defendant made a full settlement with Putman in the civil suit for any and all "claims, actions, demands, costs, losses, damages, expenses for bodily or personal injury or property damage." (R. XLIV, 40). The persons and entities covered by the release included all of Putman's "agents, representatives, attorneys, attorneys-in-fact, insurers, employees, successors, heirs, executors, administrators, *assignees of any person or entity*." (R. XLIV, 40-41) (Emphasis added).

Defendant executed this settlement agreement and release in good faith with no knowledge of KCVCB's subrogation rights. (R. XLVI, 50). Under the law cited previously herein, the release bars KCVCB's right to subrogation against Defendant via restitution in the criminal case.

This conclusion is at least implicitly supported by the decision in Herron v. Gabby's Goodies, 29 Kan.App.2d 42, 24 P.3d 747 (2001). Herron was injured when a vehicle driven by Frazee struck him. Frazee was driving under the influence of alcohol. Herron was awarded $25,000 from the KCVCB. Herron later sued Frazee and subsequently settled the case for $178,925. The KCVCB then sought reimbursement from Herron based on the proceeds of the settlement. 29 Kan.App.2d at 42-43. The issue in that case was whether Herron could reduce

the amount he paid to the KCVCB by the amount of his attorney fees. The Court of Appeals held that he could not because Herron did not advise the Board of the lawsuit and the Board did not participate in the civil action. 29 Kan.App.2d at 44-45. It should be noted that, after Herron and Frazee's settlement in the civil case, the Board did not seek restitution against the criminal defendant, Frazee; rather, it sought reimbursement from Herron.

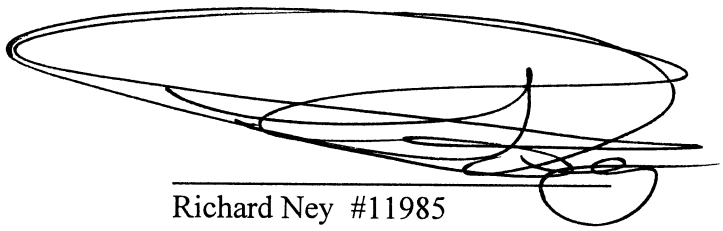
There is no record in the present case whether Jessie Putman notified the KCVCB of her civil lawsuit against Defendant, as she was required to do by K.S.A. 74-7312(b). Had notice been given, the KCVCB could have been made a party to the lawsuit, had Putman bring the lawsuit as trustee for the State, or reserve its rights and do nothing. 29 Kan.App.2d at 44-45. Under the rationale of Herron, whatever happened between Putman and the KCVCB is an issue between them, not between KCVCB and Defendant.

Defendant made a good-faith settlement and release with Putman without any knowledge of KCVCB's claim or subrogation rights. That release bars KCVCB asserting its subrogation claim against Defendant in the form of restitution. As in Herron, the KCVCB can seek reimbursement from Putman, and thereby make that money available to another crime victim in need. 29 Kan.App.2d at 45. The attempt to obtain reimbursement from Defendant was foreclosed by the settlement and release he entered into with Putman. The district court's order of restitution must be set aside.

CONCLUSION

For all of the foregoing reasons, the Defendant asks that this Court reverse his convictions and order a new trial. Additionally, the Defendant asks that this Court set aside the order of the court below regarding attorney's fees and restitution in this case.

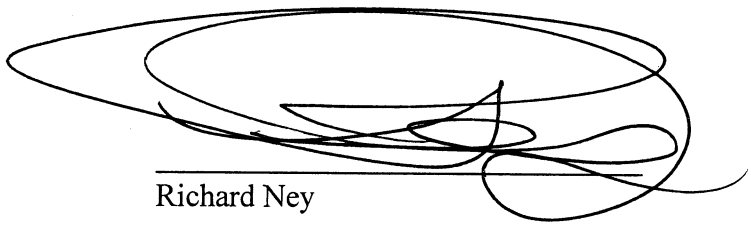
Respectfully submitted,



Richard Ney #11985
Ney, Adams & Shaneyfelt
200 N. Broadway, Suite 100
Wichita, Kansas 67202
(316) 264-0100
Fax: (316) 264-1771
ney@naslaw.net
Attorney for Defendant-Appellant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that service of this brief was made by mailing two copies, postage prepaid, to Ellen Mitchell, Saline County Attorney, 300 W. Ash, Suite 302, Salina, Kansas, 67401, and mailing one copy, postage prepaid, to the Attorney General, Kansas Judicial Center, Topeka, Kansas, 66612, on this 17th day of April, 2014.



Richard Ney