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CASE NUMBER: 113869

No. 15-113869-A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS
Plaintiff-Appellee

v.

STEPHEN ALLEN MACOMBER
Defendant-Appellant

BRIEF OF APPELLEE

APPEAL FROM THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
HONORABLE DAVID DEBENHAM, JUDGE
DISTRICT COURT CASE NO. 10-CR-1053

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NATURE OF THE CASE

Stephen Alan Macomber ("Macomber") appeals his conviction by jury for involuntary manslaughter. This is the State's response to both his counsel's brief and his pro se supplemental brief.

STATEMENT OF THE ISSUES

I. **The jury was appropriately instructed at trial.**

II. **The district court did not abuse its discretion in denying Macomber's motion to dismiss because there was sufficient evidence to show probable cause that the use of deadly force was not justified.**

III. **There was sufficient evidence to support Macomber's conviction for involuntary manslaughter.**

STATEMENT OF FACTS

Macomber appeals his second conviction at retrial in this case. (R. IX, 786.) His first conviction was reversed on appeal on October 17, 2014. (R. VIII, 645-667.) The case was tried a second time, and the jury found Macomber guilty of involuntary manslaughter on March 13, 2015. (R. IX, 766, 777.)

Risa Lofton (Risa) and Ryan Lofton (Lofton) were married, but not living together in June 2010. (R. XXXV, 163-64.) On June 7, 2010, Risa was at Lofton's house, when they began arguing because Risa stated that she was going to leave the house and Lofton did not want her to leave. (R. XXXV, 164, 168. 195.)

Risa asked Macomber to pick her up from Lofton's home. (R. XXXV, 185.) When Macomber arrived at the home, Lofton went outside while Risa gathered up

some of her belongings that were in the house. (R. XXXV, 172-73.) Lofton spoke to Macomber through the passenger side window of Macomber's car. (R. XXXV, 173-174, 199-200.) Risa came outside and placed her belongings behind the driver's seat of the car. (R. XXXV, 203-04.) Lofton headed back toward the house, and Risa got into the passenger side of the car. (R. XXXV, 174-75.)

Risa testified that after initially walking away, Lofton turned around and walked back toward the car. (R. XXXV, 176.) Macomber reached under his seat of the car and pulled out a Crown Royal bag. (R. XXXV, 178.) Risa stated that there was a gun in the bag, and that she "knew it was a gun" due to the way Macomber was holding the bag and because she saw the bottom of the gun. (R. XXXV, 178.)

Lofton then continued walking toward the driver's side of the car, and Macomber followed Lofton's movements with the gun as Lofton walked. (R. XXXV, 178.) Risa stated Macomber was "tracking" Lofton with the gun or pointing the gun at Lofton and following him with it. (R. XXXV, 178.) Lofton approached the driver's side of the car, and the window was down "a couple of inches." (R. XXXV, 179.) Risa tried to pull Macomber's arm away from where he was pointing the gun at Lofton, but was unsuccessful. (R. XXXV, 180, 211-12.) She then exited the car so she could try to push Lofton out of the aim of Macomber. (R. XXXV, 181.) Risa testified that she got out of the car and then heard a pop. (R. XXXV, 181.)

After Risa heard the pop, she saw Lofton laying on the ground near where the driver's side of the car had been. (R. XXXV, 182.) Risa testified that Macomber had immediately left in a white car after shooting Lofton. (R. XXXV, 182.) Risa then went over to Lofton who told her he was shot. (R. XXXV, 182.)

Dr. Donald Pojman (Dr. Pojman) performed Lofton's autopsy. (R. XXXV, 59.) Dr. Pojman testified that Lofton died from a single gunshot wound to the chest. (R. XXXV, 77-78.) Dr. Pojman stated the entrance wound of the bullet was in Lofton's back; that the bullet "entered his chest on the left side of his back beneath the shoulder blade" and traveled "predominantly from left to right" and "very slightly back to front." (R. XXXV, 73-74, 76.) Dr. Pojman testified that there was no evidence during his autopsy that Lofton was shot at extremely close range. (R. XXXV, 65-67.)

Witnesses testified that Lofton did not have a gun, knife, or any other type of weapon at the time he was killed. (R. XXXV, 176-77, 184; XXXVI, 345, 469, 510.)

Cassandra Taylor (Taylor) (formerly Cassandra Skirvin) was at Lofton's house during the shooting. (R. XXXVI, 334.) Taylor was sitting in the driveway in her green Mustang during the entire incident. (R. XXXVI, 340.) Taylor saw Risa and Lofton arguing and watched Risa get into Macomber's car. (R. XXXVI, 342-43.) Macomber was parked behind Taylor's car in the driveway. (R. XXXVI, 339.)

Taylor stated that once Risa was in Macomber's car, she saw Risa and Macomber "struggling" inside the car while Lofton was standing outside the car.

(R. XXXVI, 362.) Taylor then saw a "flash" or "spark." (R. XXXVI, 347, 363.) Taylor testified that Lofton threw his arms up and said he had been shot. (R. XXXVI, 347.) Taylor testified that Macomber then immediately drove away. (R. XXXVI 350.)

The State introduced jail calls into evidence to show that Macomber was acting unintentionally or recklessly when Lofton was killed. (R. XXXVI, 423-426; XXXVII, 608, 616-17.) Macomber's voice was identified in the phone calls by Sergeant Wheeles, and the calls were played for the jury. (R. XXXVII, 416; XXXVI, 423-426.)

The State also called Senior Special Agent Steve Bundy (Special Agent Bundy) of the Kansas Bureau of Investigation to testify. Special Agent Bundy interviewed Macomber following his arrest in about the shooting that occurred in Shawnee County. (R. XXXVI, 388-89.) A recording of Special Agent Bundy's interview with Macomber was played for the jury. (R. XLI, 29; XXXVI, 390.) Special Agent Bundy stated that Macomber never told him that the shooting was an accident or that the gun malfunctioned. (R. XXXVI, 392.) Macomber also told Special Agent Bundy that Lofton did not have his hands on the gun at the time he was shot. (R. XXXVI, 392; R XLI, 29.) During his interview, Macomber admitted to Special Agent Bundy that he "let a round go off." (R. XLI, 29.)

> Q. Okay. Now, did he [Macomber] say that he fired off a round?
>
> A. Yes.

Q. He didn't say it was an accidental – the gun went off accidently, he didn't say the gun malfunctioned, did he say anything like that?

A. No, not to me.

Q. He said he fired off a round?

A. Correct.

Q. And you asked him if the guy, meaning Ryan Lofton, had his hands on the gun, didn't you?

A. Yes, I did.

Q. And he said no, not at the time he was shot, that the person had been walking away from the car and coming back several times, correct?

A. Yes, that's correct. (R. XXXVI, 392.)

As a part of his defense, Macomber offered the testimony of John Cayton (Cayton), a firearm and tool mark examiner. (R. XXXVII, 530-31.) Cayton testified that he had examined the gun used to shoot Lofton. (R. XXXVII, 537.) Cayton testified that the gun had been altered so that the trigger pulled "lighter." (R. XXXVII, 549-52.) Even so, Cayton admitted that the gun would not fire a round unless the trigger was pulled. (R. XXXVII, 580-81.)

After both parties rested, an instruction conference was held. (R. XXXVII, 1, 597-649.) Macomber objected to instructions on all lesser included offenses, claiming that no evidence had been presented that the killing was unintentional. (R. XXXVII, 607-08.) The State disagreed, arguing that an instruction on involuntary manslaughter – in addition to the other lesser included instructions

which Macomber does not now appeal – was appropriate because some evidence had been presented regarding Macomber's unintentional or reckless conduct. (R. XXXVII, 616-17.) The district court reviewed its trial notes before ruling on Macomber's objection to the lesser included instructions. (R. XXXVII, 609, 642.)

> THE COURT: ...As to the lesser offenses, I have decided that – after going over my notes on the evidence that was admitted in this case that there is – there is evidence that the defendant could be convicted of those lesser offenses. The jury could find that he did not intend to kill Mr. Lofton...
> ...
> ...when I looked at that evidence and the overall evidence I find that there is evidence to support a finding of these lesser includeds, so I will give the lesser included second degree of reckless voluntary manslaughter and involuntary manslaughter. (R. XXXVII 642-43.)

Macomber also requested an instruction on use of force for his self-defense claim. (R. XXXVII, 622-23.) The State argued that there was no evidence that Lofton was "unlawfully or forcefully entering and was presently within the vehicle." (R. XXXVII, 624.) Risa testified that the window was up far enough that Lofton could not have entered the car. (R. XXXV, 179.) Dr. Pojman testified that there was no evidence during his autopsy that Lofton was shot at extremely close range. (R. XXXV, 65-67.) Further, the State argued:

> MR. KITT: ...The testimony – or, excuse me, the recording of the defendant's interview with Agent Bundy he indicated that the individual's hands were not on the gun at the time he shot, that the individual had been walking up to the car and leaving repeatedly and that his hands were not on the gun or on him when he actually shot...(R. XXXVII, 624.)

After hearing argument from both parties, the district court determined that the evidence did not establish the required elements for the presumption to apply. (R. XXXVII, 628.)

> THE COURT:...I don't think there's any evidence that the defendant was attempting to remove – that Ryan Lofton was attempting to remove the defendant. Ryan Lofton, and all the evidence is, that he was attempting to remove his wife Risa from the vehicle. The simple fact of the matter is though that when the force was used in this case, the defendant – that Ryan Lofton wasn't presently within the occupied vehicle. It does not fit all the requirements that have to be made and have to be found by the Court in order to give this presumption in this case. So I am not going to give the presumption. I will give the instruction as it is with the deletion of his occupied vehicle. It will just – first sentence will read, "The defendant claims his conduct was permitted as self-defense period." (R. XXXVII, 628-29.)

The jury found Macomber guilty of involuntary manslaughter. (R. IX, 766; XXXV, 11.) Macomber now appeals. (R. IX, 786.)

ARGUMENTS AND AUTHORITIES

I. The district court properly instructed the jury at trial.

The State asserts that the jury was properly instructed as to the lesser included crimes and that the district court properly denied Macomber's request for instructions on his theory of defense.

Standard of Review

The Supreme Court summarized a four step process for jury instruction issues in *State v. Plummer*, 295 Kan. 156, 283 P.3d 202 (2012). In *Plummer*, the Court stated:

> In summary, for instruction issues, the progression of analysis and corresponding standards of review are: (1) First, the appellate court should consider the reviewability of the issue from both jurisdiction and preservation viewpoints, 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* 132 S.Ct. 1594 (2012). *State v. Plummer*, 295 Kan. 156, Syl. ¶ 1, 283 P.3d 202 (2012).

When issues concerning jury instructions are raised for the first time on appeal, an appellate court will only reverse if it determines the district court was clearly erroneous. *State v. Williams*, 295 Kan. 506, 510, 286 P.3d 195 (2012); *see also State v. Armstrong*, 299 Kan. 405, 431–32, 324 P.3d 1052 (2014). This analysis involves two steps. *Williams*, 295 Kan. at 515–16. First, this Court must determine whether there was an error in the instruction through an unlimited review of the record; an instruction is erroneously omitted if it would have been legally and factually appropriate. 295 Kan. at 515–16, 521. Second, under a de novo review, if this court finds the district court erred, then it must determine whether the error was clearly erroneous, that is, whether it are "firmly convinced

the jury would have reached a different verdict had the instruction error not occurred." 295 Kan. at 516. The burden of showing clear error is on the defendant. 295 Kan. at 516.

Preservation of the Issue

Macomber preserved the instructional issue for appeal. Macomber objected to the inclusion of instructions for lesser included crime of involuntary manslaughter. (R. XXXVII, 605.) Macomber also requested an instruction on use of force in relation to his theory of defense, which was denied. (R. XXXVII, 639-40, 642-43.)

Analysis

a. The district court did not err when it gave jury instructions on the lesser included offense of involuntary manslaughter.

Macomber argues that the district court erred when it gave the jury instruction on the lesser included offense of involuntary manslaughter. The State contends this was not error because there was evidence in support of giving the instruction.

K.S.A. 22-3414(3) states that upon the close of evidence, if "there is some evidence which would reasonably justify a conviction of some lesser included crime…the judge shall instruct the jury as to the crime charged and any such lesser included crime." K.S.A. 22-3414(3) (2011). Involuntary manslaughter is a lesser degree of second degree murder and, therefore, is an included offense. *State v.*

Gregory, 218 Kan. 180, 183, 542 P.2d 1051 (1975). When viewed both cumulatively and individually, the instructions were legally appropriate.

The instruction was supported by the particular facts of this case. Under K.S.A. 22-3414(3), a lesser included offense requirement is only required "where there is some evidence which would reasonably justify a conviction of some lesser included crime."

A defendant is entitled to an instruction on lesser-included offenses provided that "(1) the evidence, when viewed in the light most favorable to the defendant's theory, would justify a jury verdict in accord with the defendant's theory and (2) the evidence at trial does not exclude a theory of guilt on the lesser offense." *State v. Williams*, 268 Kan. 1, Syl. ¶ 5, 988 P.2d 722 (1999).

A duty to instruct arises "only where there is evidence supporting the lesser crime." *State v. Spry*, 266 Kan. 523, 528, 973 P.2d 783 (1999). On review, the evidence should be viewed in the light most favorable to the defendant. *State v. McClanahan*, 254 Kan. 104, 109, 865 P.2d 1021 (1993); *State v. Plummer*, 295 Kan. 156, Syl. ¶ 1, 283 P.3d 202 (2012). "An instruction on a lesser included offense is not required if the jury could not reasonably convict the defendant of the lesser included offense based on the evidence presented." *State v. Hoge*, 276 Kan. 801, 805, 80 P.3d 52 (2003). Deference is given to the factual findings made by the district court and jury at trial. Appellate courts generally will not reweigh the evidence or the credibility of the witnesses. 295 Kan. at 162.

Here, the evidence supported giving the instruction on the lesser included offense of involuntary manslaughter. Macomber objected to all lesser included jury instructions, arguing that there was no evidence that the killing was unintentional. (R. XXXVII, 606-7.) The State disagreed, arguing that evidence had been presented regarding Macomber's reckless or unintentional conduct:

> MR. KITT: (State) Your Honor, the evidence of reckless conduct resulting in the death of Ryan Lofton in this case would be the form of the jail calls that he told the person identified as his father that the guy came in his car and he popped off a round or fired off a round in the air and that it hit the guy. The evidence that Ryan Lofton—that he said Ryan Lofton was reaching into the car, the gun was in the bag, he wasn't sure which way the gun was pointed but he squeezed the trigger and fired off a round and it hit the guy. That's extremely reckless conduct to have a gun pointed in the general direction of an individual and fire that gun even though you—he claims he didn't intend to kill the guy, and this is in his own words in those calls, he admits that he fired off the round so that is a reckless act. (R. XXXVII 608.)

The State further described the jail calls,

> MR. KITT:...the first jail call that was played occurring on June 15th of 2010. The defendant made two comments that he fired a round off in the air, the bullet struck the man, indicating it was an unintentional killing.
>
> The second call that was played was on July 3rd to an individual he identified as Theresa. The defendant made the statement to her that he fired a round off and then took off, that it wasn't an intentional killing.
>
> The defendant in the third phone call that was played, that phone call was August 8th of 2010 to the same individual identified as Theresa. He admitted that the

> gun didn't work properly, he knew it didn't work properly, he had it for a while, he practiced with it. Yet the evidence is that he chose to use that firearm anyway. And he was saying that in -- this was an unintentional killing because this was a – not a properly working firearm. So the State would believe that all of that evidence that would support an unintentional but reckless act.
>
> The defendant's interview with Agent Bundy I believe -- he said I let a round go off and I guess it hit him. I told – I told him I had a gun. He tried to snatch the gun. I was just going to fire a round off. I let a round go off and I guess it hit him. These are all – this is all evidence that is before the jury that, as I said, would support an unintentional killing through reckless conduct, Your Honor. (R. XXXVII, 616-17.)

The district court reviewed its trial notes before ruling on Macomber's objection to the lesser included instructions. (R. XXXVII, 609, 642.)

> THE COURT: ...As to the lesser offenses, I have decided that – after going over my notes on the evidence that was admitted in this case that there is – there is evidence that the defendant could be convicted of those lesser offenses. The jury could find that he did not intend to kill Mr. Lofton...
> ...
> ...when I looked at that evidence and the overall evidence I find that there is evidence to support a finding of these lesser includeds, so I will give the lesser included second degree of reckless voluntary manslaughter and involuntary manslaughter. (R. XXXVII 642-43.)

A lesser-included offense instruction is not appropriate if the trial evidence excludes guilt on that lesser offense. *See Williams*, 268 Kan. 1, Syl. ¶ 5. The standard this Court must look at is whether there was some evidence the killing was unintentional or reckless. The district court correctly found that some

evidence had been presented that the killing was unintentional or reckless and correctly gave the instruction for involuntary manslaughter.

Now on appeal, Macomber claims all evidence presented was that his acts were intentional, and therefore does not fit the elements of involuntary manslaughter. (Appellant's Supplemental Brief at 5.) The State disagrees and repeats the arguments made at the instruction conference: jail calls entered into evidence and played for the jury at trial provide evidence that Macomber was acting unintentionally or recklessly when Lofton was killed. (R. XXXVI, 423-426.) Macomber's voice was identified in the phone calls by Sergeant Wheeles. (R. XXXVII, 416.) The State then entered the CDs into evidence and played the recordings for the jury. (R. XXXVI, 423-426.)

> Q. (By Mr. Kitt) Detective Wheeles – or, excuse me, Sergeant Wheeles, on State's Exhibit 26 how many phone calls involving Stephen Macomber are on that CD?
>
> A. Two.
>
> Q. Two phone calls. And is the date of the first call June 15th of 2010?
>
> A. Yes, sir.
>
> Q. Was that a – strike that, next question. The second phone call on that CD, is that made on July 3rd of 2010?
>
> A. Yes, sir.
>
> MR.KITT: Your Honor, at this time I would move to publish State's Exhibit 26.

THE COURT: Granted.

Q. (By Mr. Kitt) Sergeant Wheeles, we're going to listen to the first phone call.

(WHEREUPON, State's Exhibit Number 26 was played for the jury.)

Q. Sergeant Wheeles, is that the total of that redacted phone call?

A. Yes, sir.

Q. Did he say he fired off a round in the air and killed a guy?

A. Yes, sir.

Q. Now, the second phone call.

(WHEREUPON, State's Exhibit Number 26 was played for the jury.)

Q. Sergeant Wheeles, that phone call or that portion of the call came from July 3rd of 2010; was that correct?

A. Yes, sir.

Q. Did he say that the guy didn't think it was a real gun so I fired off a round?

A. Yes, sir. (R. XXXVI, 423-424.)

The State acknowledges that there was ample evidence presented at trial that the killing was intentional, but disagrees with Macomber's assertion that there was no evidence presented that he was acting recklessly or unintentionally. It is left to the factfinder to determine the weight and credibility of the evidence. Here, the district court correctly determined that the instruction for involuntary

manslaughter should be given because there was some evidence provided to support the instruction. The district court did not err by giving the lesser included offenses instructions.

b. The district court did not commit error by denying Macomber's requested instructions regarding his theory of defense.

Macomber argues that the district court erred when it did not give instructions on use of force presumption and inference of intent to the jury. The State disagrees.

A defendant is generally "entitled to instructions on the law applicable to his or her defense theory if there is sufficient evidence for a rational factfinder to find for the defendant on that theory." *State v. McCullough*, 293 Kan. 970, 974, 270 P.3d 1142 (2012). Evidence of the defendant's theory of defense can be supported solely by the defendant's own testimony as long as a rational finder of fact—viewing the testimony in a light most favorable to the defendant—would be justified in finding in accordance with that theory. *State v. Anderson*, 287 Kan. 325, 334, 197 P.3d 409 (2008).

At the instruction conference, the State argued that there was no evidence that Lofton was "unlawfully or forcefully entering and was presently within the vehicle." (R. XXXVII, 624.) Risa testified that the window was up far enough that Lofton could not have entered the car. (R. XXXV, 179.) Dr. Pojman testified that there was no evidence during his autopsy that Lofton was shot at extremely close range. (R. XXXV, 65-67.) Further, the State argued:

> MR. KITT: ...The testimony – or, excuse me, the recording of the defendant's interview with Agent Bundy he indicated that the individual's hands were not on the gun at the time he shot, that the individual had been walking up to the car and leaving repeatedly and that his hands were not on the gun or on him when he actually shot...(R. XXXVII, 624.)

After hearing argument from both parties, the district court determined that the evidence did not establish the required elements for the presumption to apply. (R. XXXVII, 628.)

> THE COURT:...I don't think there's any evidence that the defendant was attempting to remove – that Ryan Lofton was attempting to remove the defendant. Ryan Lofton, and all the evidence is, that he was attempting to remove his wife Risa from the vehicle. The simple fact of the matter is though that when the force was used in this case, the defendant – that Ryan Lofton wasn't presently within the occupied vehicle. It does not fit all the requirements that have to be made and have to be found by the Court in order to give this presumption in this case. So I am not going to give the presumption. I will give the instruction as it is with the deletion of his occupied vehicle. It will just – first sentence will read, "The defendant claims his conduct was permitted as self-defense period." (R. XXXVII, 628-29.)

The district court correctly denied Macomber's request for a use of force instruction. There was no evidence presented that Macomber believed that force was necessary to protect himself or others. There was little evidence that Lofton and Macomber engaged in a "tussle," but even so, witness testimony showed that Lofton was standing next to the vehicle and was not within the vehicle at the time he was shot. (R. XXXVI, 362.) Dr. Pojman's testimony that the entrance wound

was in his back provided evidence that he was shot as he walked away, indicating that the use of force was not necessary. Macomber's claim on appeal that Lofton threatened to shoot him is not supported by the record. (Appellant's Brief at 10.) In addition, there is no indication – and Macomber does not argue in his brief – how the outcome would have been different if the use of force presumption instruction had been given at trial.

Therefore, the district court correctly denied Macomber's request to include a use of force instruction to the jury.

c. The effect of these issues did not deprive Macomber a fair trial.

Macomber argues that the above issues constitute cumulative error and deprived him of a fair trial. The State contends that Macomber's argument is without merit.

Cumulative errors, when considered collectively, may be so great as to require reversal of a defendant's conviction. "The test is whether the totality of the circumstances substantially prejudiced the defendant and denied [the defendant] a fair trial. No prejudicial error may be found under the cumulative error rule however, if the evidence is overwhelming against a defendant. [Citation omitted.]" *State v. Ellmaker*, 289 Kan. 1132, 1156, 221 P.3d 1105 (2009). Furthermore, one trial error is insufficient to support reversal under the cumulative error rule. 289 Kan. at 1156.

Macomber argues that the district court's denial of certain jury instructions and inclusion of others violated his constitutional rights. The State contends Macomber received a fair trial and his rights were not violated.

"A defendant is entitled to present the theory of his defense. The exclusion of evidence, which is an integral part of the theory of defense, violates the defendant's fundamental right to a fair trial." *State v. Bradley*, 223 Kan. 710, Syl. ¶ 2, 576 P.2d 647 (1978). Here, Macomber confuses his right to present evidence with a right to receive a jury instruction. The State acknowledges that a defendant is generally "entitled to instructions on the law applicable to his or her defense theory if there is sufficient evidence for a rational factfinder to find for the defendant on that theory." *State v. McCullough*, 293 Kan. 970, 974, 270 P.3d 1142 (2012). If Macomber had been prevented from presenting evidence in relation to his theory of defense, his argument might have merit. However, Macomber was only denied a request for a jury instruction, not a request to present evidence to the jury. There was no evidence that Lofton was within the vehicle at the time of the shooting and there was no evidence that Macomber sincerely believed force was necessary to protect himself or others. Macomber was given the opportunity to present evidence in line with his theory of defense. Upon the close of evidence, though, the district court found that the evidence presented at trial did not support certain requested jury instructions.

In addition, Macomber does not address in his brief how "each instructional error was compounded by the next," and how these alleged errors denied him a

fair trial. (Appellant's brief at 12.) "To preserve an issue for appellate review, a party must do more than incidentally raise the issue in an appellate brief." *State v. Gomez*, 290 Kan. 858, Syl. ¶ 8, 235 P.3d 1203 (2010). Because Macomber simply incidentally raises the issue, it should be deemed waived and abandoned.

Because Macomber was given the opportunity to present evidence, his constitutional rights were not violated and he received a fair trial.

d. Failure to strictly follow PIK language was not clearly erroneous.

Macomber now argues that the failure to include the phrase "during the commission of a lawful act in a lawful manner" in Instruction #17 was clear error. (Supplemental Brief of Appellant, at 9.) However, Macomber admits that he did not object that this language was not included in the instruction. (Supplemental Brief of Appellant, at 9.) Macomber merely states that this was clear error and does not support his claim with case law or argument. A conclusory statement only incidentally raises the issue. "To preserve an issue for appellate review, a party must do more than incidentally raise the issue in an appellate brief." 290 Kan. at Syl. ¶ 8. This argument should be deemed waived and abandoned.

"Jury instructions are clearly erroneous only if the reviewing court is firmly convinced that the jury would have reached a different verdict had the error not occurred." *State v. Tully*, 293 Kan. 176, 196, 262 P.3d 314 (2011). "If the instructions properly and fairly state the law as applied to the facts of the case, and a jury could not reasonably have been misled by them, the instructions do not constitute reversible error even if they are in some way erroneous. *State v.*

Mitchell, 269 Kan. 349, 7 P.3d 1135 (2000), *citing State v. Mims*, 264 Kan. 506, 514, 956 P.2d 1337 (1998).

Macomber requested a definition of the phrase "use of force" during the instruction conference. (R. XXXVII, 639.) The district court denied this request. (R. XXXVII, 640.) The State asserts that the jury could not reasonably have been misled by the phrase "use of force," requiring reversal for clear error. If the jury could not reasonably have been misled by the instructions, then there is no reversible error. *See State v. Moncla*, 262 Kan. 58, Syl. ¶ 4, 936 P.2d 727 (1997). In addition, the district court appears to have denied the definition because it had already denied the instruction on use of force presumption. (R. XXXVII 639-40.)

Macomber asserts in his brief that the district court erred by not including the phrase "during the commission of a lawful act in an unlawful manner" in Instruction #17. (Appellant's Supplemental Brief at 9.)

Beyond quoting statutory language, Macomber makes no argument by this alternative means of committing involuntary manslaughter applies to his case. He merely contends that there was no evidence suggesting he acted unintentionally or recklessly. The State disagrees and reiterates arguments above that there was evidence presented sufficient to support a jury instruction based on reckless conduct. *See* Issue I(a) *Supra.* "The use of PIK instructions is not mandatory but is strongly recommended....If the particular facts in a given case require modification of the applicable pattern instruction,...the trial court should not hesitate to make such modification." 262 Kan. Syl. at ¶ 5. There was no real

possibility that the jury would have reached a different verdict if the definition of "use of force" and the phrase, "during the commission of a lawful act in a lawful manner," was instructed.

The jury instructions as provided did not contain clear error requiring reversal.

II. The district court did not abuse its discretion in denying Macomber's motion to dismiss because there was sufficient evidence to show probable cause that the use of deadly force was not justified.

Macomber claims he was immune from prosecution because his use of deadly force was justified. The State disagrees and asserts that the district court correctly denied his motion to dismiss. Macomber now asks this Court to reweigh evidence and ignore findings made by the district court. This Court should decline to do so.

Standard of Review

The State asserts that a district court's denial of a motion to dismiss based on immunity should be reviewed on appeal for abuse of discretion. A standard of review for this fact pattern has yet to be established. *See State v. Garcia*, 282 Kan. 252, 259, 144 P.3d 684 (2006). ("Common sense suggests that when reviewing a trial court's denial of a motion to dismiss criminal charges, the applicable standard of review is determined by the ground on which dismissal was sought rather than a blanket standard for motions to dismiss.") An appellate court may conclude there has been an abuse of discretion on one or more of three bases: (1) the judicial

action is arbitrary, fanciful, or unreasonable, i.e., no reasonable person would have taken the view adopted by the trial court; (2) the judicial action is based on an error of law, i.e. the discretion is guided by an erroneous legal conclusion; or (3) the judicial action is based on an error of fact, i.e., substantial competent evidence does not support a factual finding on which a prerequisite conclusion of law or the exercise of discretion is based. *See State v. Ward*, 292 Kan. 541, 550, 256 P.3d 801 (2011), *cert. denied,* 132 S. Ct. 1594, 182 L. Ed. 2d 205 (2012). A district court decision denying a motion to dismiss for insufficient evidence "asks whether the evidence, viewed in the light most favorable to the prosecution, convinces the appellate court that a rational factfinder could have found the defendant guilty beyond a reasonable doubt." 282 Kan. at 259-260.

Procedural History

Macomber filed a *pro se* Motion to Dismiss, claiming the State had failed to demonstrate probable cause that the use of force was not justified and therefore he was immune from prosecution. (R. VIII, 173-176.) The State filed a Response to Motion to Dismiss, first asserting that Macomber had waived his right to assert the defense under K.S.A. 21-3219 (2007); and failing that, arguing that dismissal was improper because the appropriate remedy was to set a hearing since the burden of probable cause is only triggered after a Defendant has asserted immunity under the Statute. (R. IX, 720-26.) Macomber filed a Traverse/Reply providing additional argument. (R. IX, 750-759.) At the Final Motion Hearing on March 3, 2015, the Court denied Macomber's Motion to Dismiss. (R. IX, 761.)

The district court first found that Macomber has not waived the ability to assert immunity. (R. IX, 761.) Additionally, the district court stated that it had considered sworn testimony presented by Macomber, as well as prior sworn testimony cited by the parties. (R. IX, 761.) The district court found that Macomber was not entitled to immunity from prosecution. (R. IX, 761.)

Analysis

"A person is justified in the use of force against another when and to the extent it appears to such person and such person reasonably believes that such force is necessary to defend such person or a third person against such other's imminent use of unlawful force." K.S.A. 21-5222 (2011). *See also State v. Rutter*, 252 Kan. 739, 746, 850 P.2d 899 (1993). The district court must first determine that Macomber sincerely believed it was necessary to use deadly force against Lofton to defend himself or someone else and then it must determine that this belief was reasonable. 252 Kan. at 746, *citing State v. Jordan*, 250 Kan. 180, 185, 825 P.2d 157 (1992), and *State v. Childers*, 222 Kan. 32, 48, 563 P.2d 999 (1977). Probable cause is "evidence sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the accused's guilt." *State v. Berg*, 270 Kan. 237, 238, 13 P.3d 914 (2000), *citing State v. Puckett*, 240 Kan. 393, Syl. ¶ 1, 729 P.2d 458 (1986).

Here, the district court determined that Macomber's version of events was not supported by the evidence and that probable cause existed to deny Macomber's motion to dismiss and bind him over for trial:

> THE COURT: ...The long and short of it is at this point in time I find that the use of force was not necessary under the factual circumstances that were before the Court. It's beyond what a reasonable person under the circumstances would have believed was necessary. I also found that the defendant's statement during the point in time of the trial that he testified that Ryan Lofton had had threatened to shoot him was not a credible statement. That doesn't mean it doesn't come in for the jury to weigh at that point in time. I weighted it for a specific purpose and that was the purpose on the motion to dismiss based on immunity at this point in time. The defendant's version that Ryan Lofton was reaching into the car when the gun went off is not supported by the scientific evidence or the factual evidence in this case. There is quite simply a break in time between when Mr. Lofton was reaching in the car to when the victim, Mr. Lofton, was shot in this case. There is no evidence that Mr. Lofton had a gun. In fact, the defendant admits that, and he was pretty sure he didn't have a gun at one point in time and later he testified that he did not have a gun, referring to Mr. Lofton.
>
> Anyway, what I find is that the State has met its burden in this particular case and that was they had to establish that the force was not justified as part of the probable cause determination. And I find that they have met that burden and I'm dismissing – or denying, I should say, the defendant's motion to dismiss based on immunity grounds in this case...(R. XXXII, 5-6.)

No evidence was presented at the motion hearing that Macomber believed that deadly force was necessary to protect himself or others. Macomber argued that witness testimony at the first trial demonstrated that Lofton had entered his vehicle or was trying to enter his vehicle when he was killed. (R. XXXI, 21.) However, the State argued that those same witnesses testified that no threats were made and scientific evidence presented previously showed that Lofton was not

inside the car when the gun was fired. (R. XXXI, 23-24.) There was no stippling on the body, indicating the gun was not fired at point-blank range, and the bullet entered Lofton's back, conflicting evidence about where Lofton was standing. (R. XXXI, 24.) Where there is conflicting evidence at a probable cause hearing, conflicts must be resolved in favor of the State and the case allowed to go to trial for the fact finder to determine the weight and credibility of the conflicting evidence. *See State v. Wilson*, 267 Kan. 530, 536, 986 P.2d 365 (1999).

Based on prior testimony and arguments of the parties, the district court correctly determined that there was probable cause that the use of force was not justified. The district court correctly denied Macomber's motion.

III. There was sufficient evidence to support Macomber's conviction for involuntary manslaughter.

Lastly, Macomber argues that the State presented insufficient evidence to convict him of involuntary manslaughter. The State contends that there was sufficient evidence to support Macomber's conviction for involuntary manslaughter.

Standard of Review

Sufficiency of the evidence is challenged on appeal only after the factfinder—here, the jury—has determined the facts in the State's favor and convicted the defendant of a charge. Since the jury is charged with determining the facts, this court must look at the evidence on appeal in the light most favorable to the State. In that light, this Court then determines whether a rational factfinder

could have found the defendant guilty beyond a reasonable doubt. *State v. Bolze-Sann*, 302 Kan. 198, 203, 352 P.3d 511 (2015). This Court does not reweigh the evidence, assess the credibility of the witnesses, or resolve conflicts in the evidence. *State v. Lowrance*, 298 Kan. 274, 296, 312 P.3d 328 (2013). Moreover, a guilty verdict will only be reversed in the "rare cases in which trial testimony is so incredible that no reasonable factfinder could find guilt beyond a reasonable doubt." *State v. Ramirez*, 50 Kan.App.2d 922, 936, 334 P.3d 324 (2014).

Analysis

In order to convict Macomber of involuntary manslaughter under K.S.A. 2010 Supp. 21-3404, the State had to prove:1) that Macomber unintentionally killed Ryan Lofton; 2) that the killing occurred through Macomber's reckless act or during the commission of a lawful act in an unlawful manner, and 3) this act occurred on or about the 7th day of June, 2010, in Shawnee County, Kansas.

A conviction of even the gravest offense can be based entirely on circumstantial evidence and reasonable inferences deducible from that evidence. *State v. Drayton,* 285 Kan. 689, 711, 175 P.3d 861 (2008), *quoting State v. Bird*, 240 Kan. 288, 299, 729 P.2d 1136 (1986). Circumstantial evidence is evidence of events or circumstances from which a reasonable fact finder may infer the existence of a material fact in issue. *State v. Lopez*, 36 Kan. App. 2d 723, 143 P.3d 695 (2006). As long as the "inference is a reasonable one, the jury has the right to make the inference." 291 Kan. at 710-11. This is so even if there might be other reasonable conclusions or inferences that could be envisioned, given the

constraints of the standard of appellate review. *State v. Scaife*, 286 Kan. 614, 618-19, 186 P.3d 755 (2008).

Macomber asks this Court to reweigh the evidence. But, that is the duty of the jury, not this reviewing Court. When looking at the evidence in the light most favorable to the State, rational jurors could have believed Macomber acted in a reckless manner. As argued above, the State presented evidence that Macomber stated in phone calls from jail that he had fired the gun into the air. (R. XXXVI, 423-24.) In another call, Macomber claimed there was uncertainty as to whether the gun was real. (R. XXXVI, 423-24.) The uncontroverted evidence was that Ryan Lofton was killed from a gunshot wound that originated from the gun that Macomber was holding. There was conflicting testimony and exhibits regarding whether Lofton's death was intentional or unintentional, so it was left to the jury to determine the weight of the evidence and credibility of the witnesses. Here, the jury determined that the weight of the evidence supported a conviction beyond a reasonable doubt for involuntary manslaughter. The record shows that this evidence was not so incredible that no reasonable factfinder could find guilt beyond a reasonable doubt.

The jury has the responsibility of weighing the evidence presented. This Court does not reassess the weight and credibility of the evidence presented at trial because the weighing of the credibility of the evidence is solely the job of the factfinder. 285 Kan. at 711. There was sufficient evidence to convict Macomber of involuntary manslaughter.

CONCLUSION

The State respectfully requests that this Court affirm Macomber's conviction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that service of the above and foregoing **Brief of Appellee** was made by email on this 2nd day of November, 2016, to:

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