No. 21-123622-A

N THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS
Plaintiff-Appellee

vs

TOMMY J. MAY
Defendant-Appellant

CORRECTED BRIEF OF APPELLANT

Appeal from the District Court of Douglas County, Kansas
District Court Case No. 18CR728
Honorable James McCabria, District Court judge presiding

Jessica R. Kunen
Attorney at Law #10996
Attorney for Appellant
3008 Topeka Lane
Lawrence, Kansas 66047
(785) 766-8330
JrKunen1@gmail.com

Oral argument:20 minutes

Table of Contents

Nature of the Case

Mr. May was charged with attempted first degree murder of Ms. Yarbrough, attempted second degree murder of Mr. Jeremy Jones, aggravated battery on a law enforcement officer Sergeant Neff, possession of methamphetamine, fleeing and eluding, interference with a law enforcement officer, and three counts of criminal damage to property. (R. I: 96-97). After a trial, a jury convicted him of all counts. (R.24: 1813-14). The motion for new trial was denied after an evidentiary hearing. The district court sentenced Mr. May to a controlling sentence of 679 months. (R.36: 51). Mr. May appeals.

Statement of Issues

Issue One: The District Court erred in failing to give a self-defense instruction on the attempted murder of Ms. Yarbrough.

Issue Two: Mr. May was entitled to an instruction on the lesser included offense of attempted voluntary manslaughter as to count one, attempted first degree murder of Ms. Yarbrough.

Issue Three: Prior crimes and civil wrongs were admitted in violation of K.S.A. 60-455. The cautionary instruction failed to remedy the improper admission of this evidence

Issue Four: The trial court improperly limited Mr. May's right to testify under Firth, Sixth and Fourteenth Amendment when it repeatedly shut down his testimony about his physical illness, including cancer and trauma from his military service. Further, the trial court's instruction to the jury to suggesting that the disruptions in the proceeding where due to the failure of Mr. May to comply with certain evidentiary rules was clearly erroneous.

Issue Five: The state's request to endorse Michael Jordan on the last day of the state's case in chief denied Mr. May's right to a fair trial under the Due Process Clause of the Fourteenth Amendment and the Kansas discovery statutes.

Issue Six: The jury instructions defining the charge of possession of a weapon by a felon improperly included the criminal intent of recklessness which denied Mr. May the right to have the jury to determine his guilt beyond a reasonable doubt in violation of the Fourteenth Amendment. The instruction permitted the jury to convict Mr. May based upon an illegal means, recklessness, requiring the reversal of his conviction.

Issue Seven: The trial court failed to properly define knowingly, in the instruction to the jury on the charge of battery against a police officer.

Issue Eight: The district court erred in denying the motion for new based on trial court errors and newly discovered evidence.

Issue Nine: Multiple errors in this trial require reversal because combined prejudicial effect deprived the defendant of a fair trial.

Statement of Facts

Tommy John May lived at 713 West 25th Street Apartment A on July 2nd, 2018. At the time of the charges, he was fifty-eight. He has an associate degree in psychology. Mr. May is a pilot. (R.22: 1382). He served in the military for four and a half years and was a paratrooper in the Special Forces and was honorably discharged. (R.22: 1384).

The Veterans Administrations paid 70 percent of his rent because of a disability. He also has cancer but was prohibited from talking about his diagnosis for cancer. (R.22:1351). At the time of the offence, he was receiving chemotherapy treatment from K.U. Medical Center for cancer. (R.22:1384). His hearing is also impaired. (R.22:1389). On the day in question, he was recovering from pneumonia and had just been released from the VA where he had been hospitalized for four days. He was weakened from his illness. (R.22:1578-1580). When he tried to explain that he suffered from PTSD like symptoms from his experience in the military, but the court limited his testimony. (R.22:1414).

Around January 1, 2017, Mr. May moved to Lawrence from Leavenworth to be close to the University of Kansas where he hoped to get his BA. (R.22:1384). While moving into his apartment, Mr. May's Ford Explorer was stolen. (R.22:1387). There were several incidents where individuals tried to break into the back door of his apartment, sometimes at night while he was sleeping. (R.22:1389). He called 911 on a person climbing down the attic from next door. (Id). Because he was afraid of people breaking in, he blocked the front door with butter knives. (R.22:1390). He was afraid living there. (R.22.1390).

Mr. May met Ms. Yarbrough the first day he moved into the apartment. She was standing outside. (R.22:1385). Steve Sweighart rented the next door apartment B. Several people stayed in the apartment including Jeremy Jones and his girlfriend Ryan who were squatters. (R.22:1532-1533). There was a lot of traffic going in and out, day and night. (R.22:1387) Jeremy Jones had a gun and had stolen from May before. (Id). May was robbed by Jones prior to the incidents in this case. (R.22:1546-1547).

On July the 2nd of 2018, Mr. May woke up at 10:00 a.m. (R.22:1390). He took a drive around Lawrence. At about one p.m. he drove to Michael Jordan's to take him to work. (R.22:1391). He planned to pick him up at 9:30 pm when Jordan got off work. (R.22:1391). May returned to his apartment around 9 pm. (R.22:1392). Ms. Yarbrough knocked his door and he let her in. (R.22:1391). The first thing she did was ask him for money. (Id). He was sitting in the chair, and she was sitting on the love seat. (R.22:1395). (Exhibit 130). He refused her request (Id).

> Well, I -- after I told her I wasn't gonna give her any money, she changed the conversation. She asked me if the pills that I had laying on the table, if did I take those with my chemo, my chemotherapy, and I told her that I did. And she said -- asked me if she could have some, and I told her she wasn't getting anything but out of my apartment. (R.22:1395).

Ms. Yarbrough then reached in her pocket and pulled out a small black coin purse and asked if she could use his bathroom. He told her she could not shoot up in his house. She told him she did not want to use at home. She looked in a bad way so he told her she could shoot up in his car. (R.22:1395-1397). She staggered to the door and got in the back seat of his car. (R.22:1396).

He had to pick up his friend Jordan soon. (R.22:1397). All his prescription medication were in the bottles they were dispensed in and kept in a white container. (R.22:1398). He put his medication in the cabinet over the refrigerator and sat back down for about five minutes

waiting on Yarbrough to finish. (Id). He went into the bedroom to put his shoes and socks to get ready to pick up Michael Jordan when he heard someone come into the apartment. (R.22:1399).

Yarbrough entered his bedroom and walked around where he was sitting. (R.22:1399-1400). She was holding something covered by a pink scarf which he thought was her purse. (Id). She asked him about money and his pills. He had disability money on his Direct Express card. (R.22:1400-1401). He told her he was not giving her anything. (Id).

Yarbrough unwrapped the pink scarf, pulled a handgun and shot toward May, grazing him on the inside of his left arm as he held up his arm in a defensive gesture. (R.22:1401,1418). He grabbed the gun with his right hand and hit her over the head. (R.22:1404). She yelled, ran into the living room to get her bag, and threw it at him. (R.22:1401-1402). The gun shot made a tear or hole in the bed. (R.22:1418).

Yarbrough attacked him. They struggled over the chair and the love seat. Yarbrough bled on the curtains behind him and the tissue box on the table. (R.22:1403). At trial, she denied fighting him, but her fingernail was torn off and was later recovered (R.22:1405).

She started was screaming for Jeremy Jones. (R.22:1408). May stopped briefly to get towels for her bleeding. (R.22: 1407). She fumbled with the door trying to open it. Mr. May was behind her. (R.22:1409). He was trying to stop her from throwing the door wide open, afraid that Jeremy Jones would come into the apartment and harm him. (R.22:1410). The gun he took from her belonged to Jones. (R.22:1409). The gun was in his right hand. They were struggling at the door. The ejection port of the gun was face down in his palm. (R.22:1410). The gun went off, a bullet striking Yarbrough in the left cheek. (R.22:1410). He stated he did not intentionally shoot her. (R.22:1411). The gun didn't eject the fired cartridge casing after

the bullet had gone out the cartridge. (R.23:1504). He dug the shell out and it fell to the floor where forensics found it. (R.23:1504). Yarbrough ran out of the apartment. (R.22:1412).

May was in shock. As stated before, he had just been released from the hospital for pneumonia, was on chemotherapy and was very sick. (R.22:1413). Panicking, he tried to leave. He got his keys, went to the door, and got two steps out the door of his second floor porch when he saw Jeremy Jones running at him at the bottom of the stars. (R.22:1414, 1419). Jones raised his arms and Mays saw the gleam of metal in his hand. (R.22:1419). Jones yelled, "Motherfucker, you just shot my home girl." (R.22:1419). Mays thought Jones was going to shoot him, so he shot first. (R.22:1420). He did not intend to kill him. (Id). Jones turned his body and the bullet hit in the back of his body. (R.22:1420). May went inside to call the police but panicked and felt sick. He ran back out of the apartment and drove off. (R.22:1421).

May testified that he had tunnel vision which is a loss of peripheral vision as a result of combat. (R.22:1421). The trial court instructed the jury to ignore any reference to PTSD. (R.22:1428). He ran past Jones, dropped the gun; the pistol went one way and the magazine the other. (R.22:1430). He stopped and looked around for the gun. (R.22:1431-1432). Ms. Ryan, Jones girlfriend, ran out of apartment B and checked on Jones. (R.22:1433). She picked up something from the ground. (Id). May believed it a gun belonging to Jeremy. She went back into her apartment (R.22:1432-1434).

May found the gun he dropped but not the magazine, walked by Jones on the ground and said, "You're not so tough now that I took your gun from you." (R.22, 1434). He got into his GMC Jimmy, backed up, turned to the left to avoid hitting Jones and hit the dumpster. (R.22:1436-38). It tore off back end of the GMC. (R.22:1438). He then turned southwest on West 25th street intending to go by a friend's house at Alabama and 23rd St. (R.23:1450).

Michael Jordan lived there but was not home. (R.23: 1450-1451). May told a person there, Amada Dean, that he just shot someone. Dean told him to leave. (R.23:1544).

After leaving the house, May turned right onto 23rd street and left on Louisiana heading North to the hospital. At 21st street and Louisiana he ran into a fire hydrant. (R.23:1451-1452). May hit his head, was disoriented, and ended up partially on the passenger floor. (R.23:1452). He rocked the car back and forth until it broke free. (R. (R.23: 1466). He did not see any police or lights flashing. (R. (R.23:1467). Once the car broke free, it was moving back much faster than he anticipated and struck what turned out to be a police car. (R.23: 1467). He was unaware that he hit a police car. ((R.23:1471-1472).

The collision with the hydrant damaged the steering of the car and was forcing the car to the left. ((R.23: 1471, 1475). He had hit his head and was disoriented. (R.23:1464,1468). May turned the car back south on Louisiana. Tunnel vision was affecting his vision and perceptions. (R.23:1560-1561). He was leaning on the passenger side while he drove. (R.23:1464-1466).

May did not see Sergeant Neff and did not feel the impact when the car hit Neff. (R.23:1565). Neff testified that he went partially over the car, stood up and ran after vehicle. There were bullet holes in the front windshield where Neff shot at May. (R.23:1562, 1564).

Mr. May was unable to steer the vehicle well because it was damaged by the hydrant. He to 22nd street, ran up a yard and hit a garage. He stopped the GMC and ran. (R.23: 1476-1477). He was found on Ohio street hiding in the bushes. When the police found him, he gave himself up, although he initially did not give his real name. He was taken to the hospital and treat for a gun wound. (R,23:1548-1549).

Mr. May denied the methamphetamine found in the vehicle belonged to him, suggesting it

belonged to Yarbrough. (R.23:1480-1481).

Marzetta Leezan Yarbrough, nicknamed Mimi, was living at 25th and Ousdahl. She previously lived at713 West 25th Street, the scene of the offense, with Steven Sweighart, in apartment B on the top floor until Christmas day of 2017. (R.18: 300-303). Tommy May lived next door in apt A. (R.18:304). Yarbrough did not know him before he moved in. (R.18: 304). Individuals named Micki Ryan and Jeremy Jones were crashing at apt. A which Mr. Sweighart leased. (R.18: 305). After she was kicked out of the apartment, Yarbrough continued to visit Micki Ryan and Jeremy Jones. (R.18:306). She saw Mr. May in passing. (R.18:306-307).

On July 2, 2018, Yarbrough walked to the Checkers store north on Louisiana to get groceries. (R.18: 307). She testified that on the way home, she stopped by Mr. May's apartment allegedly to get a ride home. (R.18: 317-318). She said they ate cake, until she decided to go next door to visit with her friends. (R.18: 318-319).

Yarbrough's friends asked her to buy methamphetamine from May and gave her some money. She went to the back door of May's apartment. She asked if she could buy some methamphetamine from him; he agreed and told her to estimate the correct amount because she was more familiar with use of the drug. (R.18: 319-324). She went back to her friend's apartment to give them the drug.

She testified that Mr. May called her back over. Once there, he accused her of taking too much methamphetamine. (R.18: 325-326). He was acting very differently, angrily accusing her and others of stealing from him. (R.18: 326). He came up behind her and hit her on the head with a gun. (R.18: 328-329). She thought he had blacked out and didn't know who she was. She was screaming to him that it was her, Mimi. But he kept swearing at her and hit again. (R.18: 329).

He turned away briefly, and she ran for the door. She testified that when she got to the door, he shot her in the neck. (R.18: 331). She went out the door, went around the building, and hid under the bushes. (R.18:332-334). She heard Jeremy Jones say something to May, heard a gunshot, saw Jones legs collapse and heard Micki Ryan, his girlfriend, screaming. (R.18: 335-336). She thought she was going to die, passed out in the bushes and woke up in the hospital. (R.18: 356).

During cross-examination, Yarbrough admitted she had a syringe in her bag, used to inject drugs. (R.18: 384-385). She testified that she observed drugs in May's apartment. (R.18: 406). She admitted her friends asks her if she had drugs and she told them she had some. (R.18: 409). She denied having Jones gun to rob Mr. May of drugs. (R.18: 409). She claimed she did not lose a fingernail during the struggle although one was found on the floor. (R.18:409-411).

Jeremy Cochise Jones was living with Steven Sweighart, the leaseholder, Micki Ryan, Jeremy's girlfriend, and a third squatter Julio. (R.18:443-444). On July 2, 2018, he was trying to get drugs. Ryan asked Yarbrough to get some drugs from May. (R.18:446, 457). Jones was working on his bike in the apartment when he heard a gunshot. (R.18: 447). Rushing to see what happened, he saw Yarbrough bleeding at the bottom of the stairs of May's apartment. (R.18:448). May came out the door and denied shooting Yarbrough. May and Jones ran down their respective apartments' stairs at the same time. (R.18:448-449). Jones went to the parking lot and saw Yarbrough running around the building. (R.18:449).

Somebody shot him, and he fell to the ground. He did not know who shot him and did not see May with a gun in his hand. (R.18:450, 553). Although he did not have a knife in his hand, it was probably in his pocket. (R.18:451). He testified that May went to the car, backed out of the parking lot, and left. ((R.18:452-453). He was shot in the left upper back area and is unable

to walk. (R.18:453).

Micki Ryan lived at 713 West 25th street Apt B on July 2, 2002, with her boyfriend Jeremy Jones and two other people. (R.19:552-553). Yarbrough stopped by to ask Regina for ride home. Micky Ryan and Jones wanted to buy methamphetamine and asked Yarbrough to get some (R.19:556). Ryan testified she heard a gunshot and scream. (R.19:557-559). She went to the front door and saw Tommy was standing at the bottom of his stairs. (R.19:560). Jeremy turned and the gun went off. (R.19: 560). She ran down the stairs to Jeremy who said he couldn't feel his legs. Ryan testified that May had a black gun. Jeremy had nothing in his hand. (R.19:561-562).

Regina Sailor had dropped over to Sweighart's apartment to visit. (R.18:461). She heard a gunshot. She came into the kitchen facing the door to go out and saw Jeremy outside in the parking lot at the bottom of his stairs. May had his arm extended and she saw a gunshot. (R.18:466). Jeremy was facing him in a halfway stance and fell to the ground (R.18:467, 484). Regina found Yarbrough in some bushes behind the apartment. (R.18:475, 487).

Michael Jordan was acquainted with Mr. May, Ms. Yarbrough, and Mr. Jones. (R.22: 1299-1300). At Mr. May's trial, Mr. Jordan testified on behalf of the prosecution although he originally was subpoenaed by the defense. (R.22: 1316). At the time of the trial, the Douglas County District Attorney's office was prosecuting him for possession of methamphetamine. (R.34: 12). With a criminal history of "A," Mr. Jordan was facing 37 to 42 months in prison (R.34:14).

At the trial, Mr. Jordan testified that, although he was facing that charge, and the State had approached him about getting information on May while at the jail, he was getting "Nothing…Zero" in exchange for his testimony for the prosecution. (R.22: 1327). Nonetheless,

two days after Mr. Jordan's critical testimony incriminating Mr. May, the district attorney's office "felt he deserved some acknowledgment and consideration for doing that." He pled down to misdemeanor possession of paraphernalia and was given time served. (R.34, M$NT:13-14).

Jordan testified that in June 2018, he had given $200 to May to give to Jones, so that Jones could purchase something for Jordan. Mr. May gave the money to Mr. Jones, but Mr. Jones did not purchase the item. (R.22:1301). According to Jordan, when May heard that Jordan did not get his item, he offered to kill Jones, if Jordan asked him. (R.22: 1302). Jordan also said that May had told him that he had shot his bed, leaving a hole in the bedsheet. (R.22:1304). According to Jordan, on the morning of July 2, 2018, he sold May an "eight-ball" of methamphetamine. (R.22:1308).

In December 2018, while they were both in jail Jordan met with May, who talked to him about the events of July 2, 2018. (R.22: 1312). According to Jordan, May said that Yarbrough came over to his apartment to get drugs. May had believed that she stole drugs from him. (R. 22: 1312). May said that he "grabbed his gun and shot the bitch." (R.22: 1313). May then told him that Mr. Jones came out and asked, "Did you do that?" (R.22: 1314). In response, Mr. May said, "Fuck you" and shot him in the back. (R.22: 1314). Later, Jordan and May spoke again. Mr. May said that Ms. Yarbrough and Mr. Jones were trying to rob him, and that Ms. Yarbrough shot him. (R.22: 1316).

Dr. James Howard, trauma surgeon at University of Kansas medical center, treated Jeremy Jones for a gunshot injury. (R: 18:492-493). The bullet travelled from the left back shoulder to

right, causing spinal injuries in the midback and coming to rest on the spine, leaving Jones a paraplegic. (R: 18:499-500). Dr. Nicholas Hosey treated Yarbrough at the Overland Park Regional Medical Center. (R.19:530). Yarbrough had a penetrating injury that went through the soft tissue of her cheek, traveled down, and exited her face. (R.19:543). The bullet may then have travelled through the chest and exited out the left back. (R.19:546-548).

The officers found Yarbrough on the south side of the building. She was shot in the face and had lost a lot of blood. There was blood on apt A stairs, parking lot, and on the ground toward the bushes. (R.19: 599-600. Yarbrough had her clothing including a bra, scarf, and cell phone with her. (R.19: 606-608).

Detective George Baker lead the crime scene investigation. In the bushes was a pink bra, a black bra, and a pink tank top with blood on it. (R.19: 670). There was also a puma tennis shoe. (R.19: 670). The blood on the stairs, leading to the bushes belonged to Yarbrough. (R.19: 671-672). At the base of the steps was a cartridge identified as a TulAmo nine-millimeter Lugar shell. (R.19: 673-674). He couldn't rule out the fact that somebody else's blood was inside the apartment or down the steps. (R.19: 709). Inside the apartment, there were blood stains on the wall and the door. A cartridge casing that was located at the base of the door on the tiled floor. (R.19: 679). The cartridge was different from the cartridge found outside. (R.19: 680-681).

There was cake, a partially consumed box of donuts from Krispy Kreme, and bloodstains on the table. (R.19: 681). A black trash can under the north window had blood stains on it. (R.19:743). There was a bag, a purse, and two pink scarves on the floor, and bloodstains on the hardwood floor. (R.19: 686). A fake fingernail was on the floor and an applicator for fake fingernails in the backpack. (R.19: 691-693). A hypodermic needle was in Yarbrough's bag. (R.19:713-714). The blood spatter in the apartment suggested a struggle. (R.19: 734).

On the bed, the officer saw a hole in the comforter. (R.19: 696). There was a holster in the closet for a weapon, which could fit many guns (R.19: 697,721). He did not locate any bullets in the apartment, or near Yarbrough. The bullet shot at Jeremy Jones remained inside him. (R.19:704). There was no ammunition in Mr. May's apartment. (R.19: 720).

Sergeant Robert Neff was dispatched to the apartment complex to respond to the shooting. (R.20: 810). He was told the suspect was driving a green Chevy Blazer. (R.20: 812). Sgt. Neff then saw a green GMC and followed it. (R.20: 812-16). Neff testified that the GMC sped up on 23rd street, made a hard turn and crashed into a fire hydrant on Louisiana (R.20: 820). Neff parked behind the GMC, got out of his car, and ordered the driver to get out. (R.20: 821).

The driver was stuck on the fire hydrant and was rocking the car back and forth to get unstuck. (R.20: 822). Suddenly, it dislodged from the fire hydrant and shot back towards Sgt. Neff. (R.20: 825). Neff moved back behind his car as the GMC hit the patrol car. (R.20: 825).

Neff testified that the GMC drove forward toward him. He fired several shots. (R.20: 829). The GMC turned right, and the front headlight area hit Sgt. Neff, who went up over the hood and rolled off the car. (R.20: 830-31). He got up, and continued to shoot at the car, which drove away from him. (R.20: 831). Neff followed on foot until he came upon the GMC, stopped in the middle of the street, running with the door open. (R.20: 833).

Corey Turner lived nearby, was driving home and saw part of the events on Louisiana. His windows were down. It looked like the vehicle was backing up straight into police car, not the officer. (R.20: 912, 920). The vehicle headed South on Louisiana and he heard the officer unload his gun. (R.20: 913). Mr. Conwell, another neighbor nearby was looking out the windows of his home noticed a gun laying on the ground. (R.20:339). He also saw that his garage had been damaged. (R.20:940- 941). The next morning, he went outside to looked at the GMC

and he noticed of line of fluid that had not been there yesterday. It looked like transmission fluid. (R.20:943).

Mr. May was convicted of all charges. The motion for new trial was denied by the District Court after an evidentiary hearing. (R.34; 35). Mr. May was sentenced to 679 months. (R.2:29). He appeals his convictions and sentence.

Arguments and Authorities

Issue One: The District Court erred in failing to give a self-defense instruction on the attempted murder of Ms. Yarbrough.

In this case, Mr. May was charged with attempted first degree murder of Ms. Yarbrough. The trial court instructed the jury on attempted second degree intentional murder. Mr. May testified that, during a struggle at the door, caused the gun to accidentally discharge, striking Ms. Yarbrough. (R.22: 1410). An instruction on self defense was discussed but not given, because the state erroneously argued that the instruction was precluded because Mr. May claimed the shooting was accidental (R.24: 1700-1701). The failure to give a self defense instruction regarding Yarbrough was based upon a mistake of law and denied the defendant his right to present his theory of defense in violation of the Due Process Clause of Fourteenth Amendment recognized in *Chambers v. Mississippi*, 410 U.S. 284, 302-303, 93 S. Ct. 1038, 35 L.Ed.2d 297] (1973) and the right to present a complete defense under the Sixth Amendment as recognized in *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S,Ct. 2142 (1986).

Preservation and Standard of Review

Mr. May did not request that the district court instruct the jury on self defense on the charge of attempted first degree murder of Ms. Yarbrough. He did, however, argue that he was entitled to a self defense instruction in the motion for new trial against the state's claim that self defense was precluded from a claim of an accidental shooting (R.34:77,172). "For the

record, what was your theory of defense at trial? A. Self-defense." (R.34, 92). In reviewing a jury instruction issue, the court has unlimited review to determine whether the instruction was legally appropriate. Then, the court should determine whether there was sufficient evidence, viewed in the light most favorable to the defendant or the requesting party, which would have supported the instruction. *State v. Simmons,* 295 Kan. 171, 283 P.3d 212 (2012).

Legally appropriate

The legal requirement of self defense are as follows: The first is subjective and requires a showing that [the defendant] sincerely and honestly believed it was necessary to injure or kill to defend herself or others. The second prong is an objective standard and requires a showing that a reasonable person in [the defendant's] circumstances would have perceived the use of deadly force in self-defense as necessary. *State v. Keyes*, 312 Kan. 103, 109, 472 P.3d 78 (2020). There is no duty to retreat when the assailant is in the home. Both prongs of the test are met in this case.

Mr. May testified that Ms. Yarbrough attempted to rob him with a gun, and in fact shot him. (R.22: 1400-1410). He was able to take the gun away from her, but, as they struggled, Mr. May accidentally shot Ms. Yarbrough. (R.22: 1410). The core of his defense was that, while he was in a struggle for his life with Ms. Yarbrough, the gun went off. (R.22: 110). Whether the gun went off accidentally, as the defense claims or whether, during the struggle, Mr. May intentionally fired the gun, as the state claims, is immaterial to the key defense theory that Ms. Yarbrough was the aggressor and Mr. May was attempting to defend himself from her. (R.22: 1410).

In *Matthews v. United States*, 485 U.S. 58, 63, 99 L.Ed.2d 54,108 S.Ct. 883 (1988) the Supreme Court held "… that even if the defendant denies one or more elements of the crime,

he is entitled to an entrapment instruction whenever there is sufficient evidence from which a reasonable jury could find entrapment." The Court in *Mathews* also noted that state cases support the proposition that a homicide defendant may be entitled to an instruction on both accident and self-defense, two inconsistent affirmative defenses. 485 U.S. at 64.

While Mr. May does not concede that an accidental shooting is inconsistent with a claim of self defense, in Kansas, it has long been recognized that ordinarily a defendant in a criminal case may rely upon inconsistent defenses. In *State v. Hunter*, 241 Kan. 629, 740 P.2d 559 (1987), the court held that a defendant is not precluded from asserting compulsion as a defense even though he denies commission of the crime. In *State v. Sheehan*, 242 Kan. 127, 744 P.2d 824(1987), the Kansas Supreme Court held that a defendant in a criminal case may rely upon voluntary intoxication to show a lack of specific intent even though he also denies committing the crime, an inconsistent defense. These two cases clearly support Mr. May's argument that he can claim self defense even if he also claims the shooting was accidental.

Rulings from other states recognize that the two are not mutually exclusive. See *State v. Gallegos,* 130 N.M. 221, 22 P.3d 689 (2001). In *Gallegos,* an altercation began after a group of friends had been drinking. The defendant's husband was stabbed, and the defendant retrieved her pistol, intending to fire a warning shot into the air. Instead, the gun fired, and the shot hit the victim in the head. The trial court refused to instruct the jury on self-defense, in part because the defendant's testimony that the shooting was accidental was inconsistent with the theory of defense of another which presupposes an intentional act. The appellate court disagreed with the trial court. "It is entirely plausible that a person could act intentionally in self-defense and at the same time achieve an unintended result. Numerous other jurisdictions agree with our conclusion." See *People v. Robinson,* 163 Ill.App.3d 754, 516 N.E.2d 1292

(1987) (Defendant grabbed for the gun which fell to the ground and discharged, striking the victim.) The *Robinson* court reversed the trial court's decision that self defense was inconsistent with an accidental shooting, holding that defendant was entitled to a self-defense instruction. 516 N.E.2d at 1305. *See also Jordan v. State,* 782 S.W.2d 524(Tex.Ct.App.1989) (Right of self-defense is not lost simply because the accused claims the gun discharged accidentally.); *Valentine* v. *Commonwealth,* 187 Va. 946, 954, 48 S.E.2d 264, 268 (1948) (Self defense is purposely made, but the killing is not purposely done); *Nebraska v. Drew*, 216 Neb. 685, 689, 344 N.W.2d 923, 926 (1984) ("[S]elf-defense is available to the accused who accidentally kills his assailant while properly exerting force to assure his own safety."); *McClure v. State,* 834 SE 2d 96, 101 (Ga: Supreme Court, 2019) ("By asserting the alternative defenses of accident and justification in this scenario, the defendant in essence tells the jury, "I didn't mean to shoot the victim. But if you find that I shot him intentionally, I was justified in doing so, because it was the only way to stop him from seriously injuring me.") In the present case, an instruction of self defense was legally appropriate.

Factually Appropriate

There was sufficient evidence viewed in favor of Mr. May to support the giving of the instruction. In this case, the evidence supported both a subjective and objectively reasonable belief by Mr. May that he needed to use deadly force to defend himself. Mr. May was reasonably in fear of his life. Mr. May testified that Ms. Yarbrough attempted to rob and shot him. (R.22:1401). He took the gun from her and hit her. She screamed for Mr. Jones, who had actually robbed Mr. May only a month before. She ran to the door to, in Mr. May's mind, open the door and allow Mr. Jones inside. (R.22:1409). Mr. May was significantly weakened because he had cancer, had been discharged from a four day stay from the Veterans Administration for pneumonia and suffered from trauma.

A jury could reasonably find that Mr. May's fear for his life and his need to defend himself and his home, to be objectively and subjectively reasonable. (R.22: 1403).

The failure to give the self defense instruction was error because it was based on a mistake of law, and clearly there were facts to support it. Given the substantial facts to support the instruction "the jury would have reached a different verdict had the instruction error not occurred." *State v. Williams*, 295 Kan. 506, 517, 286 P.3d 195 (20120). Further, the failure to instruct on self defense violated Mr. May's constitutional right to present a defense. *Chambers v. Mississippi*, 410 U.S. 284, 302-303; *Crane v. Kentucky*, 476 U.S. 683, 690 (1986). The court must be persuaded beyond a reasonable doubt that there was no impact on the trial's outcome, *i.e.*, there is no reasonable possibility that the error contributed to the verdict. Given Mr. May's testimony, the evidence of drug activity and violence by Yarbrough and Jones, there is a reasonable probability that the error affected the verdict.

Issue Two: Mr. May was entitled to an instruction on the lesser included offense of attempted voluntary manslaughter as to count one, attempted first degree murder of Ms. Yarbrough.

Mr. May was charged with attempted first degree murder of Ms. Yarbrough. An instruction on attempted second degree murder was given. An instruction on attempted voluntary manslaughter was discussed but not given. (R.23:1630-1632). The state argued that it was incompatible with a claim of an accidental shooting.

In the supplemental motion for new, newly appointed trial counsel argued that the lesser included charge of attempted voluntary manslaughter based on imperfect self-defense, would have made the defendant's subjective fear even more important. (R.2: 21); (Defendant's Supplementer Proffer, Filed September 28, 2020.P.1-3). Mr. May also argues on appeal that an instruction of attempted voluntary manslaughter based upon a sudden quarrel of heat of

passion should have been given.

Issue Reviewable

A defendant may argue for the first time on appeal that the failure to give a jury instruction was clearly erroneous. See K.S.A. 22-3414(3).

Legally appropriate

An instruction should have been given on voluntary manslaughter under both sections (1) a sudden quarrel or in the heat of passion and 2) upon an unreasonable, yet honest, belief that deadly force was justified, commonly called imperfect self defense. K.S.A. 21-5404. "A sudden quarrel can be one form of heat of passion." *State v. Johnson,* 290 Kan. 1038, 1048, 236 P.3d 517 (2010). `[A]n unforeseen angry altercation, dispute, taunt, or accusation could fall within th[e] definition [of heat of passion] as sufficient provocation.' (Id). In the present case, the facts of the case support both sections. There was a sudden quarrel over drugs, an attempted robbery and shooting by Yarbrough. The struggle with Yarbrough over the weapons and her continuing physical aggression led up to the accidental shooting at the door. The facts support an instruction on attempted voluntary manslaughter based on imperfect self defense and/or sudden quarrel and heat of passion.

Again, the parties assumed that an instruction on the lesser included offense of attempted voluntary manslaughter was precluded by Mr. May's claim of an accidental shooting. This is incorrect. Assuming an accidental shooting and attempted voluntary manslaughter are inconsistent defenses, a criminal defendant is entitled to inconsistent defenses. *State v. Simmons,* 295 Kan. 171, 283 P.3d 212 (2012). See *Trevino v. State,* 60 S.W.3d 188, 192 (Tex. App. Fort Worth 2001), aff d, 100 S.W.3d 232, 239 (Tex. Crim. App. 2003) (Shooting of wife occurred in self-defense after a heated argument, struggle over weapons and was accidental; defendant entitled receive a charge on sudden passion at punishment.); See also *State v.*

Powell, 84 N.J. 305, 321, 419 A. 2d 406 (1980) (Defendant claimed shooting was accidental; entitled to instruction on imperfect self defense/voluntary manslaughter); *State v. Sloan,* 129 Ill. App.3d 242, 472 N.E.2d 93 (1984) (A voluntary manslaughter or self-defense instruction may be proper even when defendant testified the death resulted from an accident.)

Defense counsel's failure to object or submit a claim of attempted voluntary manslaughter does not excuse the trial court court's failure submit the instruction. Clearly, the parties assumed the that attempted manslaughter was not possible as a possible lesser based on an incorrect rational. Therefore, the failure to give the instruction was error and the evidence in support of voluntary manslaughter should be viewed in a light most favorable to the defendant.

Sufficient evidence to support instruction on imperfect self defense

The evidence at trial, primarily through Mr. May's testimony, and corroboration, supports an instruction of attempted voluntary manslaughter. Kansas caselaw holds that a defendant's statements may be sufficient by themselves to require issuing a lesser included offense instruction. See *State v. Berry,* 292 Kan. 493, 515, 254 P.3d 1276 (2011); see also *State v. Tahah,* 293 Kan. 267, 273, 262 P.3d 1045 (2011) (defendant's confession could reasonably support lesser included offense instructions). Here, there were only two witnesses to what happened in the apartment when the shooting occupied. Mr. May's testimony contradicts Yarbrough's version and supports his theory of defense. However, she admitted she came to his house uninvited, she was trying to buy drugs on behalf of Jones, and the police found needles in her purse. There was also corroborating evidence of Jones' violence and Yarbrough's drug dealing in support of his testimony. (R.22: 1400-1410). Jones had robbed May of $200.00 dollars and had weapons. Finally, any combination of evidence from the state

and the defense, supports a lesser included instruction.

Mr. May's age (58), pneumonia, cancer, and stress from military service contributed to his reaction. Further, Jones had robbed him before of Jordan's money. Jones and Yarbrough were significantly younger. In reaction to Yarbrough's aggression, Mr. May defended himself.

Sudden quarrel or heat of passion

There was a sudden quarrel and fight committed in the heat of passion. Yarbrough pulled out a weapon demanding drugs and money. He testified that he took the gun and hit her with it. Yarbrough testified that May went off, accused her of "dry snitching," and hit her multiple times with gun. She testified that he acted like he didn't recognize her he was so enraged. He accused her of stealing his medicine. She was screaming and calling for help.

Both May's and Yarbrough's testimony supported an instruction on attempted voluntary manslaughter based on either 1) Upon a sudden quarrel or in the heat of passion (K.S.A. 21-3403(a) or (2) upon an unreasonable but honest belief that circumstances existed that justified use of deadly force.

Harmless error

When an instruction issue is being raised for the first time on appeal or has not been properly preserved with an appropriate objection in the trial court, pursuant to K.S.A. 22-3414(3) the standard of review is whether the instruction is clearly erroneous. 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). Given the facts, there is overwhelming evidence supporting a voluntary manslaughter instruction based imperfect self defense or upon a heat of passion or sudden

quarrel. Further, Tommy May's testimony made out an imperfect self defense claim, which whether alone or combined with a self defense instruction would have caused the jury to reach a difference verdict.

Even if the defendant had proffered an instruction of attempted voluntary manslaughter, it would have been rejected based on incorrect rationale that voluntary manslaughter was inconsistent with a defense of accident. Under that standard, the court should review that evidence in a light most favorable to the defendant for that purpose. K.S.A. 22-3414(3); *State v. Simmons,* 282 Kan. 728, 741-42, 148 P.3d 525 (2006). An instruction should be given even if the evidence supporting that lesser offense is "weak or inconclusive." *State v. Nelson,* 291 Kan. 475, 243 P.3d 343 (2010).

Finally, under the federal constitutional harmless error rule, given the facts in the case, the state cannot show beyond a reasonable doubt the failure to instruct did not affect the outcome of the trial. The failure to instruct on attempted voluntary manslaughter denied the defendant his constitutional right to present a defense under the Due Process Clause of the Fourteenth Amendment. Therefore, a Kansas court must be persuaded beyond a reasonable doubt that there was no impact on the trial's outcome, *i.e.*, there is no reasonable possibility that the error contributed to the verdict. *State v. Ward*, 292 Kan. 541, 256 P.3d 801 (2011). Clearly the facts supported a voluntary manslaughter instruction. Mr. May's conviction must be set aside.

Issue Three: Prior crimes and civil wrongs were admitted in violation of K.S.A. 60-455. The cautionary instruction failed to remedy the improper admission of this evidence.

Evidence of prior crimes and bad acts by Mr. May arose during the testimony of the State's star witness, Mr. Jordan. Jordan testified that he sold or gave methamphetamine to Mr. May. (R.VI.1308). He testified that he and Mr. May "had been up a couple days getting high and everything" and that May got paranoid and dangerous when he got high on methamphetamine.

He testified that May owned the gun and used it in a threatening manner at Jordan's apartment. (R.22: 1307- 1308). He also said that Mr. May had sold oxycodone pills "to fuel his drug habit." (R.22: 1323- 24). He testified that May offered to kill Jones for stealing from Jordan. (R.22: 1307-08)

Preservation

Mr. May's filed a request for a pretrial hearing pursuant to K.S.A 60-455. (R.I,74-86; 127, 129), and a motion in limine (R.I, 170). A hearing was held on several of the defendant's motions. The prosecutor assured counsel and the court that it would comply with the 60-455 request. (R.14: 1-100). No other K.S.A. 60-455 hearing was requested by the state prior to trial and no prior crimes and civil wrongs were disclosed prior to the defendant prior to trial.

The state filed a late motion to endorse Mr. Jordan during the afternoon prior to Jordan's testimony (R. I: 326). Defense counsel objected to the request to endorse, but the request to endorse was granted. (R.22:1274-1277). The next day, Michael Jordan, who was the last witness for the state, testified. (R.22: 1297). Defense counsel did not object to Jordan's testimony regarding bad acts.

After testimony and during the instructions conference, the trial court held a belated K.S.A 60-455 hearing. (R.24: 1679-1697). Defense counsel argued that the state violated the order requiring notice and a pretrial hearing on the admissibility of prior crimes and bad acts as testified to by Michael Jordan. Counsel also requested an instruction to the jury that this evidence be disregarded. (R.24: 1699).

Defense attorney raised the objection during the belated 60-455 conference held during the instructions conference. (R.:1693-1694, 1695-1696,1697). The court considered the issues on the merits, admitting the prior crimes evidence. This error is preserved for appeal. Finally, because the 60-455 hearing was not held until after testimony, the request for

modification to the instruction has been preserved. *State v. Barber*, 302 Kan 367, 35 P. 3d 1108, 1115 (2015).

Standard of Review

In *State v. Brazzle*, 311 Kan. 754, 758-759, 466 P.3d 15 (2020), the court summarized the standard of review over the admissibility of other crimes and civil wrongs. K.S.A. 60-455. The district court must determine whether the fact to be proven is material and disputed. Materiality is a question of law and relevancy is reviewed under an abuse of discretion standard. *State v. Boggs*, 287 Kan. 298, 308, 197 P.3d 441 (2008). Finally, the court must decide whether prejudice of the evidences out weights its probative value. An appellate court reviews this for abuse of discretion. *Boggs*, 287 Kan. at 308.

Instructions conference

During the instructions conference, at the belated K.S.A 60-455 hearing, defense counsel argued that the state violated the order requiring notice and a pretrial hearing when it elicited prior crimes evidence during the testimony of Michael Jordan and requested an instruction be given to the jury that this evidence be disregarded. (R.23: 1620-1627).

According to the state, the evidence was admitted to prove the intent to possess methamphetamine and possession of a weapon, two charges. (R.23: 1627). The court gave the standard 60-455 instruction. "Evidence has been admitted alleging that the defendant committed crimes other than the present crime charged. It may be considered as evidence of the defendant's intent and knowledge." (R.24: 1718). The instruction did not limit which prior crimes or bad acts were material for which factor. (R. 24: 1696; 1718).

Lack of notice

Defense counsel requested an instruction be given to the jury that the prior crimes evidence be disregarded because the state had failed to request a hearing pursuant to 60-455 and the

discovery statutes to justify admission of this evidence. (R.23: 1620-1627). Lack of a meaningful opportunity to heard pre trial on these issues or even prior to Michael Jordan's testimony violated procedural due process of law which requires notice and opportunity to be heard. *Cole v. Arkansas*, 333 US 196, 202, 68 S.Ct. 514. 92 L.Ed. 644 (1948) (No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal.) The trial court's failure to give the requested instruction requiring the jury to disregard the prior crimes evidence was error. The lack of notice permitted Jordan's to testify about a broad range of conduct allegedly committed by May resulting in a fundamentally unfair trial.

Prior use of methamphetamine

After Mr. May was arrested the state conducted a search of his vehicle and found a small quantity of methamphetamine (R.22: 1489). May denied it was his. (R.22: 1480). He was charged with possession of methamphetamine. (R:1. 218).

Mr. Jordan testified that he and Mr. May "had been up a couple days getting high and everything." (R. 22:1307). He also said he gave methamphetamine to May. May denied that Jordan sold or gave him methamphetamine. (R.II:1489). He also denied he retrieved a bag of methamphetamine from his apartment after shooting Yarbrough and Jones. (R.22:1508-1509). Additionally, Mr. Jordan said that Mr. May had sold pills (oxycodone) "to fuel his drug habit," involving methamphetamine. (R.22: 1323-24). According to the State, the evidence was admitted to prove that Mr. May had the intent to prove possession of methamphetamine based upon what was found in the car. (R.22: 1627).

"An evidential fact [may] be relevant under the rules of logic, it is not material unless it has a legitimate and effective bearing on the decision of the ultimate facts in issue." *State v. Faulkner*,

220 Kan.153, 156, 551 P.2d 1247 (1976). Mr. May denied that Jordan had given him an 8 ball of methamphetamine. (R.23: 1530). Mr. May testified that the methamphetamine found in the car after the crash was not his. He did even know it was in the car.

Mr. May's alleged use of methamphetamine was not relevant to a material fact, nor was the fact that Jordan allegedly gave him methamphetamine, both of which May denied. Mr. May already admitted he used methamphetamine in the past.

In *State v. Boggs*, 287 Kan. 298, 314, 197 P.3d 441 (2008), the defendant denied possessing the glass pipe found under the passenger seat in his friend's father's pickup truck. Boggs argued that the evidence of his prior marijuana usage was evidence of prior criminal acts governed by K.S.A. 60-455 and that the evidence was being admitted solely for the purpose of showing he had a propensity toward using drugs in violation of the statute. The court held that because Boggs' only defense was that he did not possess the glass pipe, the element of intent and the related element of knowledge were not at issue.

In the present case, the only conceivable connection between the two events is an assumption that because Mr. May used methamphetamine in the past, it was probable that he would use it again in the future. This is propensity evidence precisely what K.S.A. 60-455 was designed to prevent and should have been excluded. See *State v. Gunby,* 282 Kan. 39, 47-48, 144 P.3d 647 (2006).

To the extent that the possession of methamphetamine was based on Jordan's statement that he gave May methamphetamine, the evidence was inadmissible because May denied the event ever occurred. *State v. Davidson,* 31 Kan.App.2d 372, 383, 65 P.3d 1078, *rev. denied* 276 Kan. 971 (2003) (evidence of other crimes or civil wrongs inadmissible to prove intent when the defendant provides a blanket denial that an event ever occurred). Further, the

testimony of Jordan that he and May would get high at days at a times was too remote or insufficiently tied to a specific time range relevant to the day of the shooting, was irrelevant. *Gunby*, 282 Kan. 39, 60. (Res gestae is no longer an independent basis for admission of evidence in Kansas.)

The admission of alleged prior use of methamphetamine through Jordan's testimony and during cross examination, was prejudicial error. It suggested May was a drug addict, unstable, and drug dealer. Drug dealers are perceived as dangerous, violent people. *State v. Beltz*, 305 Kan. 773, 781, 388 P.3d 93 (2017) ("threat of physical force or violence inherent in" selling drugs). Finally, the trial court failed to instruct the jury to disregard the testimony from Jordan that he and May binged on meth for days. (R.22: 1307). The failure to do so was erroneous. None of this was relevant material evidence. Mr. May's convictions must be reversed, and the case remanded for a new trial.

Sale of Oxycodone

The trial court ruled that the evidence of sale of oxycodone through the testimony of Michael Jordan was admitted as a counterweight to Mr. May's statements regarding his good character. (R. 24: 1696, 1718). This was error. Mr. May did not put on evidence of his good character. An introduction to the jury of his past employment with the military, his education, marital status and why he recently moved to Lawrence is not evidence of good character. Denial that he committed the crimes charged is not evidence of good character.

In *State v. Stokes,* 215 Kan. 5, 7, 523 P.2d 364, (1974) the court noted that the policy underlying K.S.A. 60-447 and K.S.A. 60-421 is that a defendant should be permitted to testify in his own behalf without having his history of past misconduct paraded before the jury. The court pointed out that "testimony concerning background information and biographical data

such as place of birth, education, length of residence in the community, length of marriage, size of family, occupation, place of employment, service in armed forces and receipt of honorable discharge is not deemed to be evidence of good character. "(Id. at 7). As a matter of law, the trial court's reasoning justifying the admission of this evidence was error.

Defendant renewed his objection to admission of evidence of the alleged use and sale of Oxycodone in the supplemental proffer to the motion for new trial. (R.2: 21, Filed November 5, 2020). During the hearing on the motion for new trial, in responding to a defendant's argument that it was error to allow the admission of this evidence, the trial court recognized it would have been better to have given a limiting instruction telling the jury to disregard the evidence. (R.35:20).

The Kansas Supreme Court has made it clear that evidence of prior crimes or bad acts, are not admissible independent of K.S.A. 60-455. *State v. Gunby*, 282 Kan. 39, 47-48. The alleged sale of oxycodone was not relevant to any material fact of the crime's charges. It was error to admit the evidence.

Possession of a weapon.

Jordan's testified that Mr. May owned the weapon used in the incident and the ammunition which he kept in his apartment. He also claimed that May was dangerously playing around with a gun in his apartment. None of this was relevant to any material disputed fact. May admitted that he possessed a gun during his fight with Yarbrough and Jones and said he threw it out of the car.

Jordan's testimony about May's ownership of the gun was irrelevant to the crime of possession. *State v. Phinis*, 199 Kan. 472, 481-482, 430 P. 2d 251 (1967) (in cases of unlawful possession of a firearm ownership of the weapon is not an essential element of the offense and may even be immaterial). The evidence only served to prejudice the jury against Mr. May. It

suggests that Mr. May was in constant possession of a weapon ever since his release from prison, which was not a material fact essential to prove possession on the day of the shooting.

The trial court failed to properly limit the 60-455 instruction given to specific prior crimes.

The prior crimes were admitted to prove that Mr. May that he possessed methamphetamine or possession of a weapon. (R. XXIII: 1627; XXIV: 1696). The instruction given does nothing to direct the jury to using this extremely powerful evidence for only that limited purpose. For example, the evidence of Mr. May's sale of pain pills was never intended to prove, nor could it prove, Mr. May's intent or knowledge of any of the charged crimes. Even the trial court admitted that a limiting instruction should have been given. (R.35:20).

The PIK Committee, in its comments to this limiting instruction, noted that if the prior crimes evidence is admissible to less than all the crimes charged, "the trial court should instruct the jury as to the specific crime and element for which the evidence of a prior crime is being admitted." Comment to PIK 4th 51.030, at 51-18). The district court acknowledged that very language, but then gave a instruction with no limitations on the use of the prior crime. (R. XXIV: 1695-96). The failure to give the 60-455 limiting instruction was clearly erroneous. *State v. Breeden*, 297 Kan. 567, 584, 304 P.3d 660 (2013); *State v. Gunby* 282 Kan. at 57, (there is always error when a district court "neglect[s] to apply the safeguards ... outlined to any other crimes or civil wrongs evidence."). As a matter of law, none of these alleged prior crimes of civil wrong were relevant to all of the seven charges and were extremely prejudicial.

Finally, testimony that May was selling oxycodone to buy methamphetamine, brandishing a weapon against his friend allegedly over a woman, binging on methamphetamine, allegedly offering to kill Jones when that was not even the state's theory of the case, (he was charged with attempted second degree murder) and putting on evidence that the VA suspended his

prescription for oxycodone, was not sufficiently probative to outweigh the prejudicial effect on the jury.

Jordan's testimony, if believed, supplied alleged evidence of May's bad character of drug dealing, drug using and dangerous use of a weapon. His credibility versus the credibility of Yarbrough was center to the case. The trial court's failure to give requested curative instructions during the belated post testimony 60-455 hearing was inconsistent with substantial justice. Mr. May's requests that his convictions being set aside.

Issue Four: The trial court improperly limited Mr. May's right to testify under Firth, Sixth and Fourteenth Amendment when it repeatedly shut down his testimony about his physical illness, including cancer and trauma from his military service. Further, the trial court's instruction to the jury to suggesting that the disruptions in the proceeding where due to the failure of Mr. May to comply with certain evidentiary rules was clearly erroneous.

The right of a criminally accused to testify or not to testify is fundamental. *Rock v. Arkansas*, 483 U.S. 44, 52, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987) ("[F]undamental to a personal defense … is an accused's right to present his own version of the events in his own words." (emphasis added)). "It is one of the rights that `are essential to due process of law in a fair adversary process.'" Id. *State v. Evans*, 275 Kan. 95, 62 P.3d 220 (2003) (The exclusion of evidence that is an integral part of that theory violates a defendant's fundamental right to a fair trial.). The right to testify is also found in the Compulsory Process Clause of the Sixth Amendment, which grants a defendant the right to call "witnesses in his favor," a right that is guaranteed in the criminal courts of the States by the Fourteenth Amendment. *Washington v. Texas,* 388 U.S. 14, 17-19, 87 S.Ct. 1920, 1922-1923, 18 L.Ed.2d 1019 (1967).

Preservation and Standard of Review

K.S.A. 60-404 dictates that evidentiary errors shall not be reviewed on appeal unless a party has lodged a timely and specific objection to the alleged error at trial. Mr. May argues that the

issue has been preserved for appeal through the defense response to the motion in limine, during the hearing on the motion, during trial when the trial court limited Mr. May's ability to fully testify about his theory of defense and by Mr. May's testimony at the hearing on the motion for new trial. (R:34, 91-158).

"When the adequacy of the legal basis of a district judge's decision on admission or exclusion of evidence is questioned, the court reviews the decision de novo." *State v. Gunby,* 282 Kan. 39, 47-48, 144 P.3d 647 (2006). In the present case, the propriety of the trial court's exclusion of portions of Mr. May's testimony is a question of law. Mr. May's right to present his theory of defense was improperly limited by the trial court's rulings. This is a constitutional claim. The state may not apply a rule of evidence, which permits a witness to take the stand, but arbitrarily excludes material portions of his testimony. *Rock v. Arkansas*, 483 U.S. 44, 52, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987); *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038 (1973).

State's Motion in Limine and Court ruling

Prior to trial the state filed a motion in limine on December 2nd, 2019, which was heard on December 6th, 2019. (R.I: 212). In it, the state sought to exclude: 1) Mr. May's response to threats based upon his trauma engendered by his service; 2) May's cancer diagnosis or treatments; 3) Drug dealing or drug usage of any involved victims or witnesses on any date other than the date of the alleged offenses.

Mr. May filed a response on December 4, 2019, that the diagnosis of cancer and his cancer treatment was relevant to his physical ability to defend himself and his perception of the threat from the state's witnesses. (R.I:223). The oxycodone was prescribed to him for his cancer pain. Yarbrough wanted the painkillers and money. Additionally, the drug activity of

the state's witnesses was relevant to Mr. May's defense that they were trying to rob him.

During the hearing on December 6, 2019, the state argued that Mr. May's cancer diagnosis and treatment, including the oxycodone, lacked any relevance to the case. (R.15: 8-9). The defense argued that Mr. May's health was relevant because his weakened physical state and his perception and state of mind. (R.15: 9). The prosecutor also objected to Mr. May testifying on his medical conditions without supporting expert testimony. (R.15: 12).

The state also sought to limit testimony of drug dealing and usage of any of the involved witnesses. Defense counsel suggested that drug activity of the parties prior to and including the date of the shootings, including the behavior and conversations of the parties were relevant to Mr. May's perceptions of their behavior toward him, and to provide context for their activities. (R.15:14-15, 16-17). Counsel argued the probative value outweighed any prejudicial effect. (R.15: 16). The trial court reserved his ruling but stated that the drug activity should be kept to a minimum. (R.15:17-18.)

Counsel argued that Mr. May medical conditions significantly weakened him and affected his perception of danger. Expert testimony would not be helpful because they were facts which he experienced, and which a jury could easily understand. Finally, this evidence was relevant to his defense. (R.15:23). Defense counsel noted that Mr. May was claiming self defense and needed to testify about his perceptions. The fact that his illness might be create sympathy in jury was not sufficiently prejudicial to justify excluding essential parts of his testimony prior to trial. (R.15:24).

The morning of the trial, the trial court ruled that:

> My ruling is that Mr. May can certainly testify as to his own physical feelings and thoughts, and can testify that he had prescription medication and what that medication was. But I don't see where it's necessary to tie that into the basis for the underlying diagnosis of cancer. (R.17, 2-3).

Limitation of Mr. May's testimony at trial.

Mr. May described running out the apartment in a panic after the accidental shooting of Yarbrough, when the prosecutor objected:

> I got two steps outside of the door, and I saw Jeremy Jones running at me in a tunnel. I say a tunnel because it's post traumatic stress syndrome. This is, the -- the symptoms, this is what happens. There is no vision in your periphery, and that's how I saw Jeremy Jones.
>
> MR. MELTON: Objection, Judge, I think this is –

(R.22, 1413-1414).

The court admonished Mr. May not to tell the juror about his diagnosis. For example, he could state he has tunnel vision but not tell them why or connect to his trauma from his experience in the military. (R.22:1415).

Later, when counsel asked May about his tunnel vision, the defendant said it was like a fish. He stopped, saying he couldn't talk about post traumatic stress disorder. (R.22:1421). The prosecutor objected. The trial court called a brief recess. The trial court stated:

> THE COURT: Mr. May, hang on. You specifically said to the jury, the Judge told me I can't mention the PTSD, which tells me that you know very well what you're not supposed to be mentioning, which tells me that you are directly not following this Court's directives to you. And my inclination is going to be that if that happens one more time, we'll recess for the day. You will continue your testimony via a video screen, so that when I can see that you're about to run off track, like I saw coming just now, I can black you out. And we'll stop this nonsense of you saying to the jury things that I have instructed you not to say. So it's not a matter of contempt, it's not -- which I believe you're in contempt of Court. I think you did that intentionally.
>
> THE DEFENDANT: No, sir, I didn't. No, sir, I didn't.
>
> THE COURT: And if it continues, we'll just adjust the proceedings to work around it, because I'm not gonna have that occur. Sir, I have given you a great deal of liberty to talk about what you're seeing, what you're hearing, what you're perceiving. This other nonsense, I believe you understand full well why I have ruled that way. Whether you agree with it or not, it's not my concern. I just want us to proceed in an orderly fashion, consistent with the Court's order. You

understand all of that?

THE DEFENDANT: Yes, sir.

THE COURT: All right.

THE DEFENDANT: I might have to slow down in my explanations.

(R.22:1422-24). (It should be noted that a post trial report on Mr. May's competency reflected that he had rapid speech which he had difficulty controlling). (R.2: 9-12). (Post Trial Competency evaluation).

The state asked the court to instruct the jury that they are to disregard the last question and answer. (R.22: 1427). The trial court instructed the jury as follows:

> I want to address the last comment that you heard Mr. May indicate, and the reason for the Court calling the recess as Mr. May said the Judge has told him he can't mention certain things. And as I told in you orientation, there is rules of evidence and rulings have been made and this Court has pronounced them, and I am just assuring that everybody is following along with the Court's order. So I am specifically directing you to disregard any comment Mr. May testified to about PTSD.

(R.22: 1427-1428).

Further on, Mr. May testified about driving into the fire hydrant. (R.23; 1452). Defense counsel asked the Mr. May about his tunnel vision. The prosecutor objected on grounds of relevance. The court overruled the objection. (R.23:1452). In response to counsel's questions, May stated he had been through military operations and was predisposed to it, at which point the prosecutor objected again. (R.23:1453).

Counsel was called to the bench. Defense counsel believed he was trying to elicit what triggers his stress, which the trial court approved. (R.23:1453). The court then said if Mr. May did not tailor his response, and avoid mentioning PTSD from the military, he would not be testifying from the stand. (R.23:1454). The trial court warned Mr. May as follows:

So, Mr. May, I have a--chair set up in another courtroom, and if you start talking

> and you violate my order, I am going to do this, and you're going to be blacked out and the jury is not going to hear these statements that, in my opinion, you are clearly intending to engender sympathy for yourself with this jury. We had a hearing on it, discussed it with you yesterday. Mr. Conwell assures me that he has discussed this with you. You're looking at me very calmly and plainly. I believe you understand everything that's going on.
>
> ***
>
> Sir, you need to be mindful of how you are going to present yourself to this jury, and the more I take these recesses and the more I admonish you in front of the jury, the more you're working against your interests. So, you can cut your nose off to spite your face, if that's what you choose to do, but I'm not gonna have that happening. And you will only be working against yourself, if you continue down this path. (R.23:1456).

The court threatened to set up a chair in another room from where May could testify.

(R.23:1457).

Defense argued that Mr. May's was just testifying about the facts and his experiences.

> W"hat he said is just facts, but they're facts that you have asked him not to talk about in that he -- he has a disability for PTSD, and he does have cancer. So those are facts, but the facts that the Court has ordered him not to talk about. So, that's Mr. May's problem is that it's -- it's factual and it is intertwined with some of the things that occurred to him, diagnosis, etcetera. So, that's -- that's -- he's not telling it to try to elicit sympathy from anybody. It's just part of his story. It's part of Tommy May's story with regard to this whole incident. (R.22:1460).

The court recessed. Sometime later it had a discussion at the bench. (R.22:1461).

> THE COURT: Mr. Conwell, I really don't know what to make of what you just told the Court, to say that it's part of his story and it's relevant, when there is a Court Order on this. (R.22:1461).
>
> ***
>
> I have it set up so that Mr. May could be in Division 6 on the screen, be questioned from this courtroom. If he starts to talk about things that are outside the Court's Order I could both video and audio-mute him. It would be a very cumbersome process. (R.22:1462).
>
> ***
>
> I think it is evident that Mr. May is simply trying to engender sympathy with his comments and nonresponsive answers to the questions. (R.22:1463).

Mr. May continued to testify in front of the jury about hitting the fire hydrant and arrest.

(R.22:1465). When May testified that he was trying to "disengage" from the conflict with the police, the trial court stopped the testimony and accuse him of suggesting he was experiencing some kind of dissociative response to being shot at, when he only meant that he was trying to get away. (R.22:1468-1469). The state accused Mr. May of using a military term and accused defense counsel of using open ended questions on direct examination. (R.II:1469). The court instructed defense counsel to use more directed questions. (Id.)

After Mr. May testified about his arrest, defense counsel asked him the following question:

> Now, during this time from the time that you were -- from the time that the gun was shot, and I am going to go back to inside your apartment, do you -- you were in an aura that you've called tunnel vision? (R.22:1478).

The trial court interrupted and asked counsel to approach the bench. (R.22:1479). Counsel told the court that May was going to answer that he was experiencing tunnel vision from the time of the struggle and shooting at the apartment to the time he was taken to the jail. (R.22:1479). Mr. May concluded his testimony.

Argument and authorities

The trial court's ruling on the state's motion in limine ordering May to not testify as to medical conditions, like cancer, trauma, or the drug activity of the witnesses limited his right to testify and present a defense. The trial court's threat to place Mr. May in another room, when he was not misbehaving in court and mute his testimony were inappropriate. The constant interruptions by the prosecutor and the trial court inhibited his right to testify and possible biased the jury against Mr. May.

Kansas law favors the admission of otherwise relevant evidence, and the exclusion of relevant evidence is an extraordinary remedy that should be used sparingly. [Citation omitted.]" *State v. Seacat*, 303 Kan. 622, 640, 366 P.3d 208 (2016). K.S.A. 60-456(a) limits the opinion testimony given by lay witnesses to opinions which "may be rationally based on

the perception of the witness.

Medical conditions

In Kansas, a lay witness may testify about the external appearances and manifest medical conditions that are readily apparent to anyone. *Hiatt v .Groce*, 215 Kan. 14, 21, 523 P.2d 320 (1974). Mr. May claimed that the shooting of Jones (and Yarbrough) was self defense. He described seeing Jeremy Jones as if in a tunnel. (R.II:1414). His weakened state du56e to cancer, chemotherapy and pneumonia was relevant to his claim that he had some difficulty in fighting Yarbrough off. This is very important because the state challenged his claim he had difficulty fighting her off because of his size and weight. (R.VII:1521-1525). Further, the state did not contest that he had cancer.

May's tunnel vision, cancer and chemo treatment, hearing problems, and trauma from the war were relevant to the shootings, his reckless driving, leading to damage to property, fleeing and eluding and to the charge of aggravated battery of a law enforcement officer in that he was not aware the officer was behind his car.

In its motion in limine filed prior to trial on December 4, 2019, and at the hearing on the motion, the state relied on *State v. McFadden*, 34 Kan. App. 2d 473, 478, 122 P.3d 384 (2005) to exclude the medical evidence. In *McFadden*, appealing his DUI conviction, the defendant attempted to testify that "his belief and after consulting numerous different individuals, labs, and research of his own… his ultimate conclusion is that he has what is called severe adrenaline deficiency. On appeal, the Court of Appeals held that McFadden's proffer of testimony about his medical condition goes beyond the common knowledge of lay persons. (Id. at 478.). In dissent, Judge Malone stated he "would find that the trial court erred in not allowing Carl W. McFadden to testify about his understanding of his own medical condition."

(Id. at 480).

In *State v. Kline*, 337 P.3d 71 (Unpublished decision attached; No. 109900) (Kan. Ct. App. (2014). Kline argued that the victim, his wife, should not be permitted to testify as to her own injuries and conditions after she was attacked by the defendant. The victim testified that she was hospitalized for 6 days and had to have her jaw wired shut for eight weeks. Her jaw was broken in two pieces. She also testified she had bruising of her brain. She testified where and how her teeth were broken. She testified about her scars, that she lost her sense of smell and that she got dizzy and unsteady.

The Court of Appeals held that the victim was a lay witness who had personal knowledge of her injuries and training, experience, or education to communicate about her injuries. The trier of fact could reasonably believe that the witness did perceive the matter of her injuries, both internal and external. K.S.A. 60-419. She did not refer to medical matters beyond the common knowledge of a jury. See also *Hiatt v. Groce,* 215 Kan. at 21.

Mr. May wished to testify that he was diagnosed with cancer, the treatment he was given (chemotherapy) and how it weakened him. Further, he sought to testify that he had trauma from battle so that in a stressful situation he would feel threatened, defend himself and have physical symptoms like tunnel vision. This is not research, but his description of his physical and mental conditions.

Drug activity and violent behavior of witnesses

The state sought to limit evidence of drug dealing or drug usage of any involved victims or witnesses on any date other than the date of the alleged offenses. (R.I: 212). In the defendant's response, Mr. May argued that the witnesses knew each other and were all involved in drug activity. This was relevant to Mr. May's claim that Yarbrough, at Jones behest, went to May's

house to rob him of drugs and money and would use violence to achieve it. The trial court ruled that evidence of drug activity of witnesses must be kept minimum.

When Mr. May attempted testify to that his neighbor's apartment had been taken over by Jones and Yarbrough for drug dealing purposes, the trial court upheld the state's objection.

> Q. Was there a lot of traffic going in and out of that apartment?
> A. In and out. All night. Day and night, yeah.
> Q. At some time did Mr. Sweighart move out of that apartment? That you know of?
> A. Well, no. Most of the time he was barricaded in a room, you know, I didn't know -

The state's objection was sustained. (R.22:1387-1388). This was observed evidence of drug dealing and violence in the apartment next to Mr. May and was relevant to Mr. May's perception of Jones and Yarbrough. This was later expanded upon during the hearing on the motion for new trial which is included as an issue in the appeal. At that hearing, Yarbrough was excluded from the property because she assaulted May's neighbor, Steve Sweighart, injuring him severely and robbed him of thousands of dollars and Jones' extreme violence to drug clients.

Instruction to the jury was prejudicial

Finally, the trial court's instruction to the jury to disregard Mr. May's testimony was clearly erroneous. (R.22: 1427-1428). The trial court instructed the jury:

> I told in you orientation, there is rules of evidence and rulings have been made and this Court has pronounced them, and I am just assuring that everybody is following along with the Court's order. So I am specifically directing you to disregard any comment Mr. May testified to about PTSD.

When an instruction issue is being raised for the first time on appeal or has not been properly preserved with an appropriate objection in the trial court, the court generally refers to K.S.A. 22- 3414(3) which states that "the standard of review is whether the instruction is clearly erroneous." *State v. Adams,* 294 Kan. 171, 183, 273 P.3d 718 (2012). However, because the instruction unconstitutionally limited the defendant's right to testify, it violated

the Due Process Clause of the Fourteenth Amendment right to testify and present a defense. The instruction punishes the defendant for using the term "PTSD" and by directing the jury to disregard it, instructs them to disregard the symptoms of the trauma, impairing his defense.

Further, the instruction improperly focused on certain evidence, created doubt about Mr. May's attempt to describe his symptoms of the PTSD and his theory of defense and portrayed him as willfully violating the trial court's orders. The instruction necessarily biased the jury, when combined with the frequent trips to the bench and recesses based on his testimony. Therefore, the instruction was clearly erroneous. *State v. DeVries,* 13 Kan. App.2d 609, 617-19, 780 P.2d 1118 (1989) (Expanded witness credibility instruction unfairly impeached defendant by directing the jurors to be skeptical of his testimony due to his interest in avoiding criminal penalties and on his inability to recall what happened.)

Finally, the constant interruptions to Mr. May's testimony, bench conferences, and court threats to Mr. May to remove him from the courtroom when he testified undermined his ability to testify and prejudiced the jury. A defendant has the right, under the Sixth Amendment of the federal Constitution, to be present at trial during the taking of evidence. *United States v. Gagnon*, 470 U.S. 522, 526 [84 L.Ed.2d 486, 490, 105 S. Ct. 1482 (1985). Further, criminal defendant generally has the right to appear before the court "`with the appearance, dignity, and self-respect of a free and innocent man....'" *People v. Shaw,* 381 Mich. 467, 474, 164 N.W.2d 7 (1969) (citation omitted). The trial court's threat to remove Mr. May from the courtroom, in addition to the constant interruption of his testimony violated his right to fair trial and the presumption of innocence under the due process clause of the Fourteenth Amendment.

The limitations on the Mr. May's testimony violated his right to present his theory of

defense. It was next to impossible to walk through the mine field of inconsistent objections and rulings for the defendant to tell his side of the story. This combined with the trial court's instruction to the jury denied Mr. May his constitutional right to testify under the Fifth, Sixth and Fourteenth Amendments. *Rock v. Arkansas*, 483 U.S. 44, 52. The state must show that instruction did not violate Mr. May's right to a fair trial beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705, (1967). Given the limitations on Mr. May's testimony and the prejudicial instruction to the jury coupled with the lack of evidence of premeditation or even an intent to kill, Mr. May's convictions must be reversed.

Issue Five: The state's request to endorse Michael Jordan on the last day of the state's case in chief denied Mr. May's right to a fair trial under the Due Process Clause of the Fourteenth Amendment and the Kansas discovery statutes.

Preservation and Standard of Review

The state sought to endorse Michael Jordan on Dec.17, the morning of his proposed testimony. A hearing was held on the request. Mr. May objected to the late endorsement. The court granted the motion to endorse. (R.22:1274-1277). The objection to the endorsement was renewed in the motion for new trial. (R.I: 398) (Amended motion for new trial, Prosecutorial Errors, pg. 2, claim 25c, Pro se # 6, filed March 2, 2020) and argued at the hearing on the motion for new trial. (R.34:178).

Pursuant to K.S.A. 22-3201(g), the prosecutor is required to endorse the names of all witnesses on the complaint, information, or indictment at the time it is filed. The district court may allow the prosecutor to endorse the names of other witnesses, who later became known, after the complaint, information, or indictment has been filed. Appellate courts generally review the district court's decision to permit the late endorsement of a State's witness for an

abuse of discretion. *State v. Snow,* 282 Kan. 323, 335, 144 P.3d 729 (2006), *disapproved on other grounds by State v. Guder*, 293 Kan. 763, 267 P.3d 751 (2012).

In *Snow* 282 Kan. at 335-336, the Kansas Supreme Court defined the purpose of the endorsement rule.

> The purpose of the endorsement rule is to prevent the defendant from being surprised and allow the defendant an opportunity to interview the witnesses before trial. 273 Kan. at 313, 44 P.3d 305. The main question is whether the endorsement of the witness prejudiced the defendant's rights. The court must consider whether the defendant was surprised by the witness and whether the testimony was critical. 273 Kan. at 311, 44 P.3d 305. Before we will reverse the district court, the defendant must show actual prejudice his ability to defend against the charges. *State v. Thompson*, 232 Kan. 364, 367, 654 P.2d 453 (1982).

Facts and arguments

Prior to trial on July 31, 2018, defendant filed a for motion for discovery and production of records pursuant to K.S.A. 22-3212 et seq requesting discovery of any statements made in the case, including any oral confession made by the defendant and a list of the witnesses to such confession. Further, the motion requested all witness statements, interviews of any and all witnesses, including written, taped or oral interviews to be put in writing. (R.I: 74-85 Pages 1-3).

Michael Jordan was in custody in the Douglas County jail on drug charges in November 2019. Mr. May requested service of Jordan on November 6, 2019, believing his testimony was going to be favorable. (R.I: D.Ct. case summary; See 3.02 Addition to Record). Service was returned on November 27. (R.I: See 3.02 Additions to Record.) Unbeknownst to the defense, the state had approached Jordan in jail to testify against Mr. May. (R.22: 1327-1328).

The state filed a subpoena for Michael Jordan's appearance on December 16, 2019, at 4:47 near the end of the state's case. (R.I, See 3.02). The state filed a motion to endorse Mr. Jordan. (R.I, 326). Defense counsel objected but the request to endorse was granted. (R.22:1274-1277).

Soon thereafter, Jordan, who was the last witness for the state, testified. (R.22: 1297). Two days later, on December 19, 2019, immediately after the guilty verdict, Mr. Jordan pled down from the felony drug charge for which he was facing 37-40 months to a class b misdemeanor and received time served. (R.34: M4NT,13-14). The state and Jordan denied there was any agreement to reduce his charge and sentence. (R.22;1327).

During a hearing of the motion for new trial, Debra Moody, who prosecuted Jordan on the felony drug case testified that the prosecutors approached Ms. Moody about giving him a deal for his testimony after the verdict. (R. 34, 18-20). She testified that that the reason for giving Mr. Jordan this deal was because of his favorable testimony in Mr. May's case. (R.34: 14). She denied that was any prior agreement to reduce charges based on his testimony against Mr. May. (R.34: 14-15).

The late endorsement denied Mr. May the right to a fair trial under the Due Process Clause of the Fourteenth Amendment and violated the discovery statutes. The state failed to comply with the defendant's discovery request and the discovery statute by failing to give the defense timely notice of Jordan's proposed testimony. K.S.A. 22-3213. Michael Jordan was the state's star witness. Clearly, the state had time to endorse Jordan prior to trial or at least before the afternoon of the day before his testimony. According to Ms. Moody who was prosecuting him on the drug case, he was in jail October 10, 2019, at which time she was discussing plea deals with his attorney. (R.34 M4NT: 15). The state requested to endorse Jordan immediately prior to his testimony on December 17 over two months later.

Defense counsel had no opportunity to prepare for Jordan's testimony. It was not reasonable to expect defense counsel to request a continuance to prepare for Jordan's testimony. *State v. Brosseit*, 308 Kan. 743, 748, 423 P.3d 1036 (2018) (Defendant's remedy is

to request a continuance). The state had already put on its entire case, except for Jordan's testimony. The state should have to justify this delay; the burden should not be placed on defense counsel to stop the trial to investigate this surprise witness.

For example, defense counsel did not have time to investigate whether Jordan was offered a deal on his pending charges. While Jordan denied he had a deal, defense counsel could have explored the timing of when the prosecutors approached him regarding his testimony, and the substance of those conversations. Defense counsel could have inquired if Jordan understood that any action on his case would be delayed until he testified favorably for the state at May's trial, even if a plea deal was not expressly guaranteed. Defense counsel could have hired an investigator to inquire if Jordan told anyone else about his conversations with the state. This would have undermined Jordan's unbelievable claim he was doing this because it was the right thing to do. (R.34:194-196). Counsel did not have adequate time to send an investigator to speak with Jordan after the late endorsement, undermining his ability to impeach Jordan. (R.34: M4NT,190-191).

Further, counsel could have been better prepared to compare Jordan's testimony regarding the description of the gun in a police report which contradicted his description at trial. (R.22:1320-1323). There was some question whether Jordan told the state's investigators that May said he would kill Jones if he wanted him too. (Id). Counsel did not have time to subpoena the police officer who interviewed him to contradict Jordan's statements. Finally, as it turned out, Jordan had a third theft that was undisclosed. (Id).

Jordan's testimony was damaging because he stated May confessed to the crimes. Further, other than May's and Yarbrough's conflicting testimony, there was no other direct evidence of what happened in the apartment. Blood spatter evidence, including the bloody towels could be

seen by the jury as corroborating either side. A confession was essential to the state's case. The same applies to the May's testimony about the shooting of Jones. May testifies that it was in self defense, but May's alleged statement to Jordan contradicted his testimony.

Jordan's testimony was often gratuitous, and nonresponsive. He blurted out allegations that May sold Oxycodone, stated that May had used methamphetamine seven days in a row and portrayed May as bragging about the shootings. He testified that May offered to kill Jones for stealing from Jordan. He said everything May claimed happened was made up. Mr. Jordan testified Mr. May gave him a small quantity of methamphetamine and got high with him. (R.22: 1307-08). When asked about the July 2 incident, he confirmed Ms. Yarbrough's story, testifying that Mr. May had told him that he thought she had stolen drugs from him. (R.22: 1312). He also testified that Mr. May told him that the police had shot at him and so "he backed up to try and run the police over." (R.22: 1316).

The trial court seemed to recognize that that it was error to permit Jordan to testify on such short notice but basically ruled the error was harmless. (R.34: 17). Clearly, given Jordan's testimony as summarized above, its admission was not harmless error. The state's failure to give notice of his testimony violated the rules of discovery, and the right to a fair trial under the Fourteenth Amendment to the constitution. Before a constitutional error can be held to be harmless, the court must be able to declare its belief that it was harmless beyond a reasonable doubt. *Chapman v, California,* 386 U. S. 18, 21-24 (1967). The admission of Jordan's testimony was not harmless beyond a reasonable doubt. Mr. May's convictions must be reversed, and the case remanded for a new trial.

Issue Six: The jury instructions defining the charge of possession of a weapon by a felon improperly included the criminal intent of recklessness which denied Mr. May the right to have the jury to determine his guilt beyond a reasonable doubt in violation of the Fourteenth Amendment. The instruction permitted the jury to convict Mr. May based

upon an illegal means, recklessness, requiring the reversal of his conviction.

Count Five charged Mr. May with unlawful possession of a weapon within five years of being released from prison that he did then and there unlawfully and feloniously possess any weapon and the defendant has within the preceding five years been released from imprisonment for a felony. K.S.A. 21-6304(a)(2). (R. I, 218) (Fourth amended information). During the instructions conference, regarding the possession of a weapon the charge, the court stated it was instructing on all culpable mental states. (Vol. VII. 1666).

The next day, regarding the possessions of a weapon charge, defense counsel requested that the jury only consider the issue of possession. The trial court stated:

> Mr. Conwell made a request for a limiting instruction in connection with Instruction No. 19. "That is the instruction on the charge concerning the possession, criminal possession of a weapon by a convicted felon. The parties have entered into a stipulation that the only issue for the jury to determine will be whether defendant had possession of a weapon."

(R.24:1678). However, prior to deliberation the jury was instructed that the above offense may be committed intentionally, knowingly, and recklessly. (R.I. 328. Instruction 19) (R.24:1730). This violated the court's duty to instruct the jury on the mental state required for possession of a weapon which is *knowing possession*. (Emphasis added).

Preservation and Standard of Review

Counsel did not object to the instruction defining the mental state as intentional or knowingly or recklessly. However, counsel did request that the definition of the offense by limited to possession. (R.24:1678). Therefore, the appellate court should apply the standard which requires the court to review the evidence in the light most favorable to the defendant. In the alternative, in the absence of an objection, the clearly erroneous standard applies and a court will only reverse the conviction if an error occurred, and the court is firmly convinced that the jury would have reached a different verdict if the instructional error had not happened.

See K.S.A. 22-3414(3). *State v. McLinn,* 307 Kan. 307, 317, 409 P.3d 1 (2018).

However, for an instruction to be legally appropriate, it must fairly and accurately state the applicable law. *State v. McDaniel*, 306 Kan. 595, 615, 395 P.3d 429 (2017). The court exercises unlimited review in determining whether an instruction was legally appropriate. *State v. Johnson,* 304 Kan. 924, 931-32, 379 P.3d 70 (2016). If it was not legally appropriate, the conviction must be reversed. "The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship,* 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).

In *State v. Butler*, 307 Kan. 831, 416 P. 3d 116 (2018), the Kansas Supreme Court stated that a trial court must "define the offense charged in the jury instructions, either in the language of the statute or in appropriate and accurate language of the court" and "inform the jury of every essential element of the crime that is charged" quoting *State v. Richardson,* 290 Kan. 176, 181, 224 P.3d 553 (2010). This duty arises from the right to public trial guaranteed by the state and federal constitutions. See *United States v. Gaudin*, 515 U.S. 506, 509-10, 115 S.Ct. 2310, 132 L.Ed. 2d 444 (1995) (stating that the Fifth and Sixth Amendments "require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt"); Kan. Const. Bill of Rights, §§ 5, 10 ("The right of trial by jury shall be inviolate.").

Pursuant to K.S.A. 21-5202(a), (d)-(e), section (e) states that "If the definition of a crime does not prescribe a culpable mental state, but one is nevertheless required under subsection (d), intent," "knowledge" or "recklessness" suffices to establish criminal responsibility." The use of the conjunctive "or" means a choice must be made between the culpable states, in this case "intent." Here, the trial court erred by instructing the jury on all three culpable mental

states. However, recklessness is not sufficient to establish the culpable mental state for possession of a weapon. It lowers the burden of proof for the state; it can convict Mr. May of unlawful possession of a weapon based on a reckless intent. Therefore, the instruction violated the Mr. May's right to have the state prove all the elements of the offense beyond a reasonable doubt.

Further, the trial court did not instruct on a definition of possession for the weapons' charge. See PIK Crim. 4th 63.040 defining possession states: "Possession" means having joint or exclusive control over an item with knowledge of or intent to have such control or knowingly keeping some item in a place where the person has some measure of access and right of control. In *State v. Neal* 215 Kan. 737, 529 P.2d 114 (1974), the court held:

> Phinis and Runnels fashion the rule that the possession proscribed by the statute is not the innocent handling of the weapon but a willful or knowing possession with the intent to control the use and management thereof. See State v. Runnels, 203 an. 513, 456 P.2d 16 (1969); State v. Phinis, 199 Kan. 472, 430 P.2d 251.

In the present case, the court's oral instruction and the written instruction o the jury, in the absence of a definition of possession allowed the jury to convict Mr. May on a lesser culpable mental state, reckless possession is unconstitutional.

Harmless error

Recklessness is not an element of the crime of possession of a weapon, yet the state was permitted to convict Mr. May based on a lower mental culpability. This, coupled with the failure to instruct the jury on the definition of possession requires that conviction must be reversed. Where one of the possible bases of conviction is unconstitutional or illegal, there is a constitutional problem. *Griffin v. United States*, 502 U.S. 46, 60, 116 L. Ed.2d 371, 112 S. Ct. 466 (1991). Because the conviction of possession of weapon was based on an illegal ground, Mr. May's conviction must be reversed.

The substantial right affected is the right to not be convicted of a non existent crime.

Because the trial court failed to properly instruct the jury on the legal intent required to convict a defendant of possession of weapon, the state failed to convict the defendant of the crime beyond a reasonable doubt. *In Re Winship*, 397 U.S. at 364.

Issue Seven: The trial court failed to properly define knowingly, in the instruction to the jury on the charge of battery against a police officer.

Standard of Review

Mr. May did not object to the instruction and the clear error standard found in K.S.A. 22-3414(3) applies. Under this standard, an erroneous jury instruction requires reversal only if the appellate court is firmly convinced the jury would have reached a different verdict had the error not occurred. *State v. McLinn,* 307 Kan. 307, 318, 409 P.3d 1 (2018). Tommy May was charged in count three with:

> That on or about the 2nd day of July, 2018, in Douglas County, Kansas, one Tommy J May, did then and there unlawfully, feloniously, and knowingly cause, with a motor vehicle, bodily harm to a uniformed or properly identified state, county or city law enforcement officer, to-wit: Robert Neff, while the officer is engaged in the performance of the officer's duty, all in violation of K.S.A. 21-5413(d)(3)(A). (Aggravated battery against a law enforcement officer, Level 3/Person/Felony

(R.I, 215-218).

The PIK Crim 4th 54.330 defines the offense of aggravated battery against a law enforcement officer with a motor vehicle as follows:

1. The defendant knowingly caused bodily harm to: insert name with a motor vehicle.
2. Insert name was a uniformed or properly identified ([state] [county] [city] [federal] law enforcement officer) ([university] [campus] police officer).

Jury instruction no.17 states in part:

> 1. The defendant knowingly caused bodily harm to Robert Neff with a motor vehicle.
> 2. Robert Neff was a uniformed or properly identified city law enforcement officer.
> 3. Robert Neff was engaged in the performance of his duty.
> 4.The State must prove the defendant committed the crime knowingly.
>
> "A defendant acts knowingly when the defendant is aware of the nature of his conduct

that the State complains about *or* that his conduct was reasonably certain to cause the result complained about be the State."

(Emphasis added) (R.I: 328, instruction 17).

This instruction is incorrect. The definition of term knowingly pursuant to K.S.A. 21-5202 requires two findings. The instruction failed to inform the jury that it must find that Mr. May had both knowledge of his conduct and additionally, and that he was reasonably certain to cause the result complained about be the State. The first part requires knowledge of his conduct or to the circumstances of surrounding his conduct. The second part requires knowing that the result of the conduct is reasonably certain. The trial court's instruction permitted the jury to find one or the other but not both.

In *State vs. Thomas* 311 Kan 905, 908, 468 P.3d 323 (2020), the Kansas Supreme Court held that that the district court erred by giving jury instructions that allowed the jury to convict Thomas of aggravated battery if it found that he intended the conduct but not the harm. See also *State v. Hobbs,* 301 Kan. 203, 211, 340 P.3d 1179 (2015). The court found that that the trial court erred by giving an instruction that defined "knowingly" with three alternative definitions, only one of which required the jury to find that Thomas was aware his conduct was reasonably certain to cause the harm to the child. The other alternatives allowed the jury to convict Thomas only if it found he was aware of the nature of his conduct or the circumstances in which he was acting.

Harmless error

The instruction given was clearly erroneous. The appellate court must be firmly convinced the jury would have reached a different verdict had the error not occurred. The instruction permitted the jury to convict Mr. May, even if he was unaware that his conduct in driving was reasonably certain to cause harm to Sergeant Neff. Mr. Thomas testified that he backed into a metal dumpster, damaging the truck, was speeding to get to the hospital, had tunnel vision,

drove into a fire hydrant, messed up his transmission, lost control of the steering, and backed the car up in an uncontrolled manner. His hearing is significantly diminished as was evident by his problems hearing in the courtroom and his diagnosis of tinnitus. He was aware of his conduct although he denied it was intentional. However, he clearly denied that he knew his conduct was reasonably certain to cause the result of hitting Sergeant harm. He testified he did not see Sergeant Neff, and he did not know that he hit him. There was a significant possibility that the jury could have reached a different verdict had the error not occurred. *State v. McLinn,* 307 Kan. 318. Mr. May's conviction for aggravated battery must be reversed.

Finally, because the court's instruction to not require the jury to find all the elements of the offense, the conviction is unconstitutional or illegal and must be set aside. *Griffin v. United States*, 502 U.S. 46, 60, 116 L. Ed.2d 371, 112 S. Ct. 466 (1991).

Issue Eight: The district court erred in denying the motion for new based on trial court errors and newly discovered evidence.

Standard of Review

K.S.A. 22-3501(1), the statute governing motions for new trial, states that the Court may grant a new trial to the defendant if required in the interests of justice. Review of the denial of a motion for new trial is based upon an abuse of discretion. Judicial discretion is abused if judicial action is either: (1) arbitrary, fanciful, or unreasonable; (2) based on an error of law; or (3) based on an error of fact. *State v. Williams,* 303 Kan. 585, 595-96, 363 P.3d 1101 (2016).

Facts

After the guilty verdict but before sentencing, trial defense counsel filed a motion for a new trial, citing a violation of the defendant's right to present his theory of defense, and prosecutorial misconduct. (R.I:364). Mr. May also filed a pro se motion, listing sixteen issues which fall generally into the categories of ineffective assistance of counsel, prosecutorial errors, and trial

court errors. (R.I: 375). Newly appointed counsel, Carol Cline, filed an amended motion for new trial on March 3, 2020. (R.I: 398). The new motion incorporated trial counsel's motion a new trial, and Mr. May's additional claims. Counsel then file a Supplemental Proffer Based on Trial Transcripts on November 5, 2020 (R.3: 21).

Hearing on November 10, 2020. (R. 34)

Defense counsel stated that she had informed Mr. May that the ineffective assistance of counsel claims could be raised post conviction in a K.S.A. 60-1507 petition. Both the prosecutors and defense counsel agreed that the ineffective assistance of counsel claims would be reserved for a future post appeal K.S.A. 60-1507 post conviction petition. (R. 34:7-8).

Several witnesses testified in support of the claims being raised below.

Cordero Riley testified on behalf of Mr. May. (R.34:24). At the time of the hearing, he was incarcerated in the Douglas County jail. (Id.) Riley talked to Jones during the summer of 2019 prior to the trial when he saw him at the jail library. (R.34:48-49). Riley, who was in and out of the jail, talked to the investigator for May before the motion for new trial hearing but after the verdict. (R.34: 28, 32-34).

Cordero Riley testified:

> I asked him (Jones) well what -- what the situation was. He was, like, it was a robbery went south. I said, "What do you mean south?" He says that the robbery went bad, you know what I'm saying. They were over there just trying to get some money out of Mr. Thomas's (sic) -- Mr. Thomas's for shake, and he said we plan on the robbery and –
>
> THE REPORTER: I'm sorry, would you please –
>
> THE COURT: Slow down a little bit, Mr. Riley.
>
> He said it was a robbery going south. And I said, "What does south mean?" And he said, "It was a robbery going bad." And he was like Mimi just -- Mimi entered Mr. Thomas's house and once she did that, they had to throw application, gonna say, and I guess he was trying to shut the door on her or something, was hard to. They had just pulled a gun and the gun went off. He said Mimi was shot in the face, and Jeremy said he took off running up there. And Tommy came out the house and pointed the gun at him and fired at him.

(R.34:33-34).

After the trial and while he was in custody, Riley told May about his conversation with Jones and indicated he was willing to testify at the motion for new trial. About two weeks prior the hearing, he talked to May's investigator about Jones' statement. (R.34:43-44, 49-50).

Stephan Sweigart was Mr. May's neighbor and the renter of the next door apartment. (R.34:73). He described Jeremy Jones, Micki Ryan, and Julio Garcia as freeloaders in his apartment who he could not get out. (R.34:74-76). Yarbrough had been his girlfriend until December 2017. (R.34:76).

Sweigart testified that Yarbrough beat him up, struck him with a florescent tube and the police were called. Charges were brought, and a no contact order was placed against her. (R.34:80). Sweigart also testified that Jeremy Jones and Yarbrough were dishonest and violent. (R.34:83-84).

Tommy May testified. (R.34:90). He stated he was denied the opportunity to thoroughly present his theory of defense. (R.34:92). He testified that around Christmas after he had moved in December 2017, he saw Yarbrough "going berserk" beating something on the porch, like she was "demented." (R.34:93, 96). The next day, he talked to Mr. Sweigart about what happened. ((R.34:94). Sweigart told him she attacked him and stabbed him with a knife. ((R.34:95). She also robbed him. (R.34:96). Mr. May also saw and heard about violent actions by Jeremy Jones. (R.34, 97). Jeremy Jones knocked out a guy who ended up bleeding on May's porch over a heroin dispute. (Id: 97). Jones also broke his girlfriend's nose. (Id: 97). On the morning of the shooting, Jones bragged to him about beating up a "customer" by stomping him and kicking him in the head. (R.34:98). Mr. May called 911 several times while he was living in the apartment. (Exhibits K, L, M., R.34: 99).

Mr. May next testified about his health at the time of the shootings. (R.34:105). Right

before the shootings, he was released from the VA hospital in Kansas city for pneumonia and that he was debilitated. (R.34:105-107). Defense counsel moved to admit Exhibit J showing Mr. May was admitted to the VA hospital for pneumonia and his diagnosis. (R.34:108, 115). Counsel argued that the court had improperly limited May's ability to discuss and prove his medical conditions at trial in support of his mental state and his physical ability to defend himself. (R.34:110). Mr. May also testified that he received disability checks from social security, from the VA and one for his hearing impairment. (R.34:115-116).

Detective Lance Flachsbarth testified for the state. (R.34:160). He interviewed Cordero Riley at the jail on November 9, the afternoon prior to testifying at this hearing. (R.34:162). It was recorded by audio and visual, but he did not bring either to the hearing or write a report. (R.34:162). Riley stated that Jones told him he had run up on Mr. May, saw May had a gun, turned, and was shot in the back. (R.34:163). Riley told the detective that he asked Jones what Yarbrough was doing over at May's apartment, Jones replied, "you already know." (R.34:164). According to the detective, Riley pieced that together, based upon his time in the street, and what he knew about Jeremy Jones and Mimi Yarbrough. (R.34:169).

Trial court's decision

As to Mr. May's medical condition, the court ruled that it did allow Mr. May to present evidence that was relevant. (R.34:17-18). The trial court went into further detail during a zoom meeting held on November 30, 2020. The court stated it was not going to consider the ineffective assistance of counsel claims because it was not the proper place to raise them. (R.35:17-18). Regarding Mr. Riley, the court found that the although the evidence could not have been discovered prior to trial, the trial court found Mr. Riley not credible. (R.35: 18-19). Regarding the admission of oxycodone, the trial court agreed that it came out during

cross examination of Michael Jordan by defense counsel, but that Jordan's comment was nonresponsive. The court stated:

> And perhaps the Court could have admonished the jury strictly at that time, they will think that occurred, but I did give the limiting instruction that certainly in the scheme of the overall evidence here there is -- the Court would view that as a harmless error to the extent there was error that occurred. Again, given the totality of the evidence here, and the impact of that did not affect the jury's ultimate verdict.

(R.35:20). Regarding the endorsement claim the trial court found that defense counsel did not ask for a continuance and that there wasn't any error or harm or prejudice from that endorsement. (R.35:21). Finally, the trial court ruled there was no limitation of impeachment of Jeremy Jones. (R.35:22).

A. The trial court's limitation on Mr. May's testimony violated his right to present his theory of defense undermining his right to a fair trial as guaranteed by the Due Process Clause of Fourteenth Amendment.

This claim has been partially raised in Issue Four based upon trial counsel's objections and the trial court's ruling on the state's motion in limine. As argued in Issue Four, during the hearing on the motion in limine, the trial court ruled that no drug activity prior to the incident was admissible. The state's objections and trial court's rulings prevented May from going into detail about prior incidents of violence which accompanied drug dealing and drug use by Jones and May. (R.7: 5-7, 14, 17, 19). Further, pursuant to the state's motion in limine, Mr. May was prohibited from introducing evidence that Yarbrough had been ordered to stay away from the property by the landlord for violence and drug dealing and that she was convicted of aggravated battery.

The trial court ruled that Mr. May had an opportunity to present testimony on factors regarding his medical conditions and mental state during trial. However, Mr. May was very limited in what he could testify about because it might engender sympathy from the jury. Prior

to Mr. May's testimony at trial, defense counsel renewed Mr. May's request to testify about his diagnosis of cancer. (R.22: 1341, 1348-1349). The trial court ruled that May could only testify about it to show that Jones and Yarbrough were trying to take advantage of him. (R.22: 1351). This limited purpose for admission of his cancer treatment, violated his right to present a defense because he wanted to show that he was weakened by cancer and chemotherapy and had difficulty defending himself again Yarbrough in particular.

May was not permitted to talk about how his experience in battle made him have tunnel vision, made him hyper vigilant and other symptoms. (R.22:1414-1416, 1421-1423). The court admonished the jury to disregard May's statement about PTSD which was error. (R.22:1428). He tried to testify that because of his service in the military, he had developed tunnel vision, or lacking peripheral vision, which was relevant how to he was driving, like hitting the fire hydrant, backing into the police car, and running into the garage on 22nd and Louisiana. (R.23:1452-1463). The prosecutor objected, and May was admonished by the court. (Id). Again, both the court and the prosecutor believed May had a strategy to engender sympathy with the jury. (R.23:1457-1463).

The prosecutor's insistence and the trial court's agreement that Mr. May's reliance on his medical conditions as part of his defense was simply a tactic to elicit sympathy was inappropriate. Particularly regarding trauma, tunnel vision, and stress, how can a defendant explain why he has these problems if does not relate to his experience in the war, even if he doesn't mention PTSD. The evidence was relevant and probative and not prejudicial to the state. The trial court's limitations on Mr. May's testimony violated his right to testify and present a defense. *State v. Evans*, 275 Kan. 95, 62 P.3d 220 (2003) (The exclusion of evidence that is an integral part of that theory violates a defendant's fundamental right to a

fair trial.).

B. A newly discovered witness testified that Jeremy Jones admitted that he and Yarbrough tried to rob Tommy May and that it went bad, resulting in the shootings. The trial court's ruling that the testimony was not believable was error.

Cordero Riley testimony was credible. The only person who knows what happened in the apartment, apart from May, is Yarbrough, who was herself unbelievable. She stopped by May's house to get drugs and/or money. Her testimony was extremely difficult to follow, constantly changing and nonresponsive. Riley's testimony was extremely important to Mr. May's theory of defense. It confirmed that Jones and Yarbrough had planned to rob Mr. May. The detective who interviewed him failed to bring in the video interview of Riley which undermines his own testimony. Judicial discretion is abused if judicial action is either: (1) arbitrary, fanciful, or unreasonable. The trial court's decision that Riley's testimony was not credible was unreasonable.

C. Prosecutorial misconduct

The prosecutor's committed misconduct during cross examination of Mr. May. This was raised in the supplemental Defendant's Supplemental Proffer Based on Trial Transcripts 11/5/2020 21 (R.2, 21). During cross examination, the prosecutor accused Mr. May of trying to create sympathy for himself when the prosecutor in fact elicited his responses. The prosecutor asked why Mr. May was wearing an arm brace. When Mr. May explained that he just had a heart attack and the doctor's put a pacemaker in his chest. He had to wear an arm brace to keep him from pulling the wires in his chest. Then, the prosecutor accused Mr. May of trying to get the juries sympathy.

3. Q. Okay. But you just had to get in that bit about having a heart attack, correct?
4. A. No, you asked me.
5. Q. I didn't ask you anything about a heart attack, sir, did I? Yes or no, sir. Did I ask you about a heart attack?
6. A. No, no, you didn't.

7. Q. I asked you about an arm brace, didn't I?
8. A. Yes.
9. Q. But you had to slip that in about a heart attack, correct?
10. A. I mentioned I had a heart attack is the reason that I was wearing the brace.
11. Q. But you want to appeal to the sympathies of the jury, don't you?
12. A. No, no, sir. I'm not looking for your sympathy.
13. Q. Well, you sure talked about your problems a whole lot, haven't you?
14. A. I have them.

(R. 23: 1591-1592).

In the present case, the prosecutor opened the door to Mr. May's response and then blamed him for it. Being a sympathetic witness is entirely permissible. Mr. May's medical problems were relevant to his defense. The prosecutor's misconduct during cross examination was intended to erase Mr. May's credibility in front of the jury and undermined the fairness of the trial. It was argumentative, inflammatory, and without any basis in fact. The prosecutor placed before the jury unsworn testimony: his personal opinion on May's credibility regarding his medical problems. Stating facts not in evidence is clearly improper. See *State v. Bradford,* 219 Kan. 336, 548 P.2d 812 (1976).

There was no objection to state's cross examination. The contemporaneous-objection requirement of K.S.A. 60-404 specifically applies to the admission or exclusion of evidence. *State v. King*, 288 Kan. 333, 204 P. 3d 585, 595 (2009). However, here, the prosecutor was injecting his opinion that the defendant was trying to manipulate the jury, a closing argument tactic. This was not simply a violation of an in limine order concerning the admission of evidence but an expression of the prosecutor's opinion that Mr. May's defense was to seek the jury's sympathy. The prosecutor's conduct requires that Mr. May be granted a new trial.

Interests of justice

K.S.A. 22-3501(1), the statute governing motions for new trial, states that the court may

grant a new trial to the defendant if required in the interests of justice. The trial court abused its discretion in denying the motion for new trial. The limitations on defendant's testimony were based on an error of law. *State v. Williams,* 303 Kan. 585, 595-96, 363 P.3d 1101 (2016).

The failure to recognize the importance of Cordero Riley's newly discovered testimony regarding Jones' admissions to him about the robbery was unreasonable. May was limited in his testimony about prior drug dealing and criminal behavior of the witnesses by the various ruling of the court and the prosecutor's objections. Stephan Sweigart, Mr. May's neighbor, gave compelling testified about Yarbrough's extreme violence against him, and that she stole his money right before attacking May. Jones bragged about beating up his drug clients, one in front of front of May, and broke his girlfriend's nose.

The court's order allowing the late endorsement of Jordan prevented a proper cross examination of Jordan, the main impeachment witness against May. The state's failure to disclose the extent of the deal he was expecting and that he was effectively an informant for the state in the jail, should have been disclosed prior to his testimony to allow for effective investigation and impeachment. Mr. May's was denied the right to a fair trial under the Fifth, Sixth and Fourteenth Amendment based. *Chambers v. Mississippi*, 410 U.S. 284, 302-303, 93 S. Ct. 1038, 35 L.Ed.2d 297 (1973). He should be granted a new trial in the interests of justice.

Issue Nine: Multiple errors in this trial require reversal because combined prejudicial effect deprived the defendant of a fair trial.

Multiple errors may require reversal if the combined prejudicial effect deprives the defendant of a fair trial. *State v. Tully,* 293 Kan. 176, 205, 262 P.3d 314 (2011). The test for cumulative error is whether the errors substantially prejudiced the defendant and denied the defendant a fair trial given the totality of the circumstances.

The limitations on Mr. May's right to testify as to his theory of defense, and the erroneous admission of prior crimes and civil wrongs largely admitted through the witness Michael Jordan violated Mr. May's right to a fair trial. The trial court erred in permitting the late endorsement of Jordan at the end of the state's case which prevented Mr. May's time to prepare his cross examine of Jordan and to investigate Jordan's inaccurate, inflammatory statements and the claim that he did not have a deal.

Mr. May's testimony on his medical conditions and the drug activity of the witnesses against him which involved the use of violence, was limited by the trial court's order granting the state's motion in limine. Witnesses testified at the hearing on the motion for new trial supported Mr. May's claims that Yarbrough and Jones were extremely violent people. This evidence combined with newly discovered evidence that Jones told a former inmate in the jail that Jones and Yarbrough had tried to rob May would have affected the outcome of the case. These errors were compounded by the prosecutor's misconduct during cross examination of Mr. May in which he sought to attack May's credibility by commenting that all his medical problems were a ploy to gain sympathy with the jury. (R. 23: 1591-1592).

Both the instructional errors in the charges of Aggravated Battery of a Law Enforcement and Possession of a Weapon allowed the jury to find Mr. May guilty of both offenses on less proof required by the statutes and PIK instruction. Finally, the failure to give a self defense instruction and voluntary manslaughter instruction as to Count I, attempted first degree murder charge of Yarbrough prevent the jury from considering Mr. May's defense. Applying the *Chapman* constitutional harmlessness test, the aggregate impact of the errors denied the defendant a fair trial, and the State cannot prove beyond a reasonable doubt that the errors did not affect the verdict. *State v. Santos-Vega,* 299 Kan. 11, 21, 321 P.3d 1 (2014).

Conclusion

For the foregoing reasons, Mr. May requests that his convictions be reversed and that the case be remanded for a new trial.

Respectfully Submitted,

/S/Jessica R. Kunen
Jessica R. Kunen #10996
Attorney for Appellant
3008 Topeka Lane
Lawrence, Kansas 66047
(785) 766-8330; jrkunen1@gmail.com

Certificate of Service

The undersigned hereby certifies that service of the above and foregoing Appellant's Brief was sent by emailing a copy to the Douglas County District Attorney, at daappeals@douglascountyks.org and by e-mailing a copy to Derek Schmidt, Attorney General, at ksagappealsoffice@ag.ks.gov on the 13th day of March, 2023.

/s/Jessica R Kunen

Jessica R. Kunen #10996

ATTACHMENT
No. 109,900

Court of Appeals of Kansas.

State v. Kline

337 P.3d 71 (Kan. Ct. App. 2014)
Decided Oct 10, 2014

No. 109,900.

2014-10-10

STATE of Kansas, Appellee, v. Clifton S. KLINE, Appellant.

Appeal from Bourbon District Court; Mark Alan Ward, Judge.Michelle A. Davis, of Kansas Appellate Defender Office, for appellant.Terri L. Johnson, county attorney, and Derek Schmidt, attorney general, for appellee.

PER CURIAM.

Appeal from Bourbon District Court; Mark Alan Ward, Judge.
Michelle A. Davis, of Kansas Appellate Defender Office, for appellant. Terri L. Johnson, county attorney, and Derek Schmidt, attorney general, for appellee.
Before LEBEN, P.J., PIERRON and STEGALL, JJ.

MEMORANDUM OPINION

PER CURIAM.

Clifton S. Kline appeals his convictions for aggravated battery and aggravated assault. The jury acquitted Kline of attempted second-degree murder and the lesser included crime of attempted voluntary manslaughter. Kline raises several issues concerning the jury instructions or lack thereof, denial of his motion of acquittal for aggravated assault, erroneous admission of expert testimony

by a lay witness, insufficient evidence of aggravated battery, and cumulative error. We affirm.

Kline and his wife Kelli were in the process of a divorce on August 19, 2011. Kline was living with his brother Robert at the time. Kline had been at Kelli's house all day fixing her car with his tools in the barn. Kelli's friend, Nancy White, had picked up their children at school and had brought them back to Kelli's house. Kelli and White then sat on the front porch talking.

Kline testified that after he finished the work on Kelli's car at around 4:30 p.m., he drove his car back to Robert's house. He said he finished off a pint of vodka he found in his car. Kline said he drove his car into a concrete culvert just north of Kelli's house because he was reading a text. He was able to drive the car in reverse to Kelli's house where he had his tools. Kelli and White were still on the front porch. Kline threw his keys at Kelli and told her she could have his car because she getting everything else in the divorce. Kline began walking north towards Robert's house. Kline called Robert and told him to pick him up.

As he walked down the road, Kline realized he had forgotten his cigarette lighter and wallet in his car and headed back toward Kelli's house. He found three beers in his car and drank those as well. Kline testified he was drunk because he had not had anything else to eat or drink all day. Kelli met Kline at his car. White was sitting in a chair on the porch. Kline said he walked up to the front door and as he got close to White he made a comment about the chair having a weight limit.

White cursed at Kline. Kline testified he also told White he thought they had agreed that she and her husband Chad would not come to Kelli's house. White again cursed at Kline.

Kline testified he saw White on her cell phone and he assumed she was calling the police. He became extremely upset, picked up a baseball bat that was on the ground, and swung it at White. Kline claimed he had no intention of hitting White in the head and was only trying to prevent her from completing the phone call. Kline testified he had been drinking and had been in a car wreck and did not want the police around.

Kelli testified at trial that Kline was very angry on the day of the incident. She met Kline at his car when he came back the second time. She was concerned about him going into the house because he had broken things when he was mad. Kelli and Kline pushed and shoved each other as Kelli tried to keep him from going in the front door. Kelli testified they were screaming at each other. She saw Kline pick up the bat but did not see him hit White because she was looking down at the time. Kelli started screaming and stepped between Kline and White. She testified Kline swung the bat at her, but she caught it and held on "with everything [she] had." Kline threw her and the bat to the ground and then headed north down the road.

Bourbon County Deputy Sheriff Michael Feagins responded to the scene. He saw Kelli kneeing on the ground next to White. Kelli told Deputy Feagins that Kline had struck White in the head with a bat. Deputy Feagins could see White had been vomiting and she had injuries on the left side of her jaw and ear. Once medical personnel arrived, Deputy Feagins photographed the scene and attempted to locate Kline. The bat used to strike White had White's blood on it. Deputy Feagins testified he did not go more than 1/4 mile looking for Kline because when he arrived at the scene Kelli told him Kline said he was going to kill them all and the deputy did not want Kline to return while he was gone.

Kelli had told Deputy Feagins that Kline said "he was going to kill them all and shoot himself." Kelli said Kline "hit her with the bat, and she blocked it," Deputy Feagins had Kelli fill out a witness statement. In her statement, Kelli reiterated that Kline was going to kill all of them and then shoot himself. She also said he hit White with a baseball bat and then "went for me," but she blocked it. Kline went to the front door, threw the bat down, and then started walking north down the road.

Deputy Feagins also spoke with Bri Crossen, Kline's half-sister. Crossen was inside the house during the incident. She told Deputy Feagins she heard a loud scream from Kelli and when she looked outside she saw Kelli holding Kline back and White on the ground. Crossen called 911. Deputy Feagins was unable to locate Kline that day. However, during the search, Robert approached Deputy Feagins with his vehicle. Robert told Deputy Feagins he was trying to contact Kline on the phone, but he would not pick up the call. Robert also told Deputy Feagins he had spoken with Kelli earlier in the day and Robert told her Kline was very upset, she needed to get out of the house, and Kline was going to kill them. At trial, Robert denied telling Kelli that Kline was going to kill someone.

The next day, August 20, 2011, Kline turned himself in at the sheriff's office. He waived his *Miranda* rights and spoke with Deputy Feagins. Deputy Feagins recorded Kline's statement.

Deputy Feagins later interviewed White. She stated she had picked up her son and Kelli's son from school and went to Kelli's house. When she arrived at Kelli's property, she saw Kline walking down the road. She and Kelli talked outside, and Kline returned to the property twice. White remembered Kelli telling her that Robert had called and said they needed to get out of the house because Kline was going to kill them. The second time Kline came back to the house, he approached White and told her to mind her own business and

then he struck her with a bat. She did not remember anything after being hit. Deputy Feagins identified the photographs showing White's injuries.

Several witnesses testified to phone calls between Kline and Kelli after Kline had been taken into custody. Those phone calls were played for the jury. In a call on Feburary 3, 2012, Kline told Kelli, "I raised the bat to you" and "[Kelli] stepped in front of the second swing" and then said "You should have stuck with, 'I can't remember shit.' Saying nothing would have been better." In a call on February 23, 2012, Kline told Kelli that he hit her with the bat, that she grabbed it, and they fought over it. In another call, on September 17, 2011, Kline told Kelli, "That fucking bitch being there made me furious" and also said "If I was trying to kill her, I would have hit her twice."

On August 22, 2011, the State charged Kline with attempted murder in the second degree, a severity level 3 person felony, in violation of K.S.A.2011 Supp. 21–5301 and K.S.A.2011 Supp. 21–5403; aggravated battery, a severity level 4 person felony, in violation of K.S.A.2011 Supp. 21– 5413(b)(1)(A); aggravated assault, a severity level 7 person felony, in violation of K.S.A.2011 Supp. 21–5412(b)(1); and violation of a protection from abuse order, a class A person misdemeanor, in violation of K.S.A.2011 Supp; 21–5924(a)(1). Prior to trial, Kline pled no contest to the violation of the protection from abuse order.

After a 3–day trial, the jury acquitted Kline of attempted murder in the second degree and the lesser included offense of attempted voluntary manslaughter. However, the jury convicted Kline of severity level 4 aggravated battery and aggravated assault. At sentencing, the trial court denied Kline's motion for acquittal of the aggravated assault conviction, finding there was substantial competent evidence to support the conviction. The trial court entered a presumptive sentence of 56 months' incarceration—43 months'

incarceration for aggravated battery and a consecutive sentence of 13 months' incarceration for aggravated assault. The court also ordered a consecutive period of 12 months in the county jail for violating the protection from abuse order.

Kline appeals.

Kline first argues the trial court's instructions and explanations regarding the jury's consideration of the lesser degrees of aggravated battery, including the prosecutor's comments on them, misstated the law and denied his due process right to a fair trial. He also argues the trial court erred in failing to give the explanatory instruction for lesser included crimes in PIK Crim. 4th 68.080.

When this court reviews appellate claims on jury instructions,

"[t]he 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. 156, Syl. ¶ 1, 283 P.3d 202 (2012).

In reviewing a claim of erroneous jury instructions, we must first determine the reviewability of the issue using an unlimited standard of review. Kline's current objections were not raised in the trial court. Defense counsel did not object to the written jury instructions, verdict instructions, or the court's failure to give PIK

Crim. 4th 68.080 or PIK Crim. 4th 68.110. Reviewability of jury instructions is defined in K.S.A.2011 Supp. 22–3414(3), which states a party cannot assign error to the giving or failure to give an instruction unless the party made a specific objection to the instruction. See also *State v. Peppers*, 294 Kan. 377, 393, 276 P.3d 148 (2012) ("[A] defendant cannot challenge an instruction, even as clearly erroneous under K.S.A. 22–3414(3), when there has been on-the- record agreement to the wording of the instruction at trial.").

Alternatively, however, under K.S.A.2011 Supp. 22–3414(3), even when a defendant fails to object to or request an instruction, we may examine the issue using the clearly erroneous standard of review. The clearly erroneous standard of review employs a two-step process as provided in *State v. Smyser*, 297 Kan. 199, 204, 299 P.3d 309 (2013):

"First, the appellate court must 'determine whether there was any error at all. To make that determination, the appellate court must consider whether the subject instruction was legally and factually appropriate, employing an unlimited review of the entire record.' *Williams*, 295 Kan. 506, Syl. ¶ 4, 286 P.3d 195. If the court finds error, it moves to the second step and 'assesses whether it is firmly convinced that the jury would have reached a different verdict had the instruction error not occurred. The party claiming a clearly erroneous instruction maintains the burden to establish the degree of prejudice necessary for reversal.' *Williams*, 295 Kan. 506, Syl. ¶ 5, 286 P.3d 195."

Here, the trial court did not give the PIK Crim. 4th 54.310 version of the aggravated battery jury instruction which lists all the various levels of aggravated battery in the same instruction. Instead, the trial court gave three separate aggravated battery instructions. The severity level four aggravated battery instruction (No. 14) stated:

"In Count II, the defendant is charged with the crime of Aggravated Battery. The defendant pleads not guilty.

"To establish this charge, each of the following claims must be proved:

1. The defendant knowingly caused great bodily harm to or disfigurement of Nancy Lee White; and

2. This act occurred on or about the 19th day of August, 2011, in Bourbon County, Kansas.

"Knowingly or With Knowledge means:

A defendant acts knowingly when the defendant is aware of the nature of his conduct that the State complains about."

The second and third aggravated battery instructions (Nos. 15 and 16) stated respectively in relevant part:

"If you do not agree that the defendant is guilty of the Aggravated Battery charged as instructed in instruction *14*, you should then consider the lesser included offense of Aggravated Battery....

1. The defendant knowingly caused bodily harm to Nancy Lee White with deadly weapon: to-wit, a bat in any manner whereby great bodily harm, disfigurement or death can be inflicted;

...

"[definitions of deadly weapon and Knowingly or With Knowledge] ."

"If you do not agree that the defendant is guilty of the Aggravated Battery charged as instructed in instruction *15*, you should then consider the lesser included offense of Aggravated Battery....

....

1. The defendant knowingly caused physical contact with Nancy Lee White in a rude, insulting or angry manner with a deadly weapon, to-wit; a bat, in any manner whereby great bodily harm, disfigurement or death can be inflicted; ...

"[definitions of deadly weapon and Knowingly or With Knowledge] ."

PIK Crim. 4th 54.310 lists the various forms of aggravated battery (those relevant this case) in the same instruction:

"The defendant is charged with aggravated battery. The defendant pleads not guilty.

"To establish this charge, each of the following claims must be proved:

1. The defendant knowingly caused (great bodily harm to) (disfigurement of) *insert name.*

OR

1. The defendant knowingly caused bodily harm to *insert name* (with a deadly weapon) (in any manner whereby great bodily harm, disfigurement or death can be inflicted).

OR

1. The defendant knowingly caused physical contact with *insert name* in a rude, insulting or angry manner (with a deadly weapon)(in any manner whereby great bodily harm, disfigurement or death can be inflicted)."

After reading Instruction No. 16 to the jury, the trial judge *sua sponte* informed the jury:

"Let me stop there for a minute. I just read you three instructions that dealt with aggravated battery in Count 2. Instructions that you need to go through and you need to go through in that order. You start with the first aggravated battery charge. You go through those elements. If you find that the State has not proved those elements, then you move on to the next instruction that talks about the elements of another aggravated battery. You go though those elements. If for some reason you find that the State did not prove those elements, you move to that next instruction, which is another form of aggravated battery.

"As I could see as I was reading those, you all look kind of puzzled. They're all three aggravated battery offenses, different versions. But you have to follow that order."

In discussing the verdict instructions with the jury, the trial judge stated:

"The third verdict form is the aggravated battery, the initial aggravated charge-the first aggravated battery instruction that I gave. And on the verdict form, if you find the defendant guilty of that aggravated battery, the presiding juror signs at the top; if you find him not guilty, you sign at the bottom.

"The next verdict form is the aggravated battery charge, lesser included, option No. 1, as I called it. I already instructed you earlier. If you don't find that the State's met [its] burden on the initial aggravated battery, you are to consider the second version, option 1, then, of aggravated battery, and here's the verdict form for that. Presiding juror signs based on your verdict.

"The next verdict form, which will be the fifth verdict form, is the lesser included aggravated battery option No. 2. Remember, we have three aggravated batteries—I guess you can call them all options, but you have the aggravated battery charge. If you don't find him guilty on that, you are to consider the second one, the lesser, which I'm calling option 1. If you don't find him guilty on that, you're to consider option No. 2, which would be the third of the aggravated batteries. And on that verdict form you'd sign—the presiding juror signs based on your verdict."

During the State's closing argument, the prosecutor directed the jury's deliberations similar to statements made by the trial court. The prosecutor stated:

"I'll real quickly go through this. This is the alternative charge of attempted murder. What you do if—for example, if you believe that the State has proven attempt to commit murder in the second degree beyond a reasonable doubt, you don't even look at this one. It's—only look at the alternative if you don't believe we sufficiently proved the first one. Okay. So the same thing, only aggravated battery. The first charge, you go

through it—the aggravated battery. If you believe the State beyond a reasonable doubt proved that charge, then you stop; you don't go to the next one. It's only if you do not believe the State has proven beyond a reasonable doubt that you go to the next one."

After both the State and the defense finished with closing arguments, the trial judge gave one last *sua sponte* explanation of the lesser included offenses:

"One more time, because this is kind of confusing: On the verdict forms-there are six of the verdict forms. You've heard from me and you've heard from the attorneys that Count 1, the attempted murder in the second degree has a lesser included offense of attempted voluntary manslaughter. And, again, as an example, you deliberate, you're discussing the attempted murder in the second degree and let's say you decide the State didn't meet its burden. That verdict form you would fill out now, the attempted murder in the second degree, would be not guilty. And then you would look at the lesser included offense of attempted voluntary manslaughter, and you would go through the elements of that offense and discuss the evidence that's been submitted. And on that let's say you find that there wasn't sufficient evidence. You would find not guilty on it. However, going back to the Count 1, attempted murder in the second degree, if you find sufficient evidence that's been shown by the State beyond a reasonable doubt and your vote is unanimous for guilty, you then, with the presiding juror, would sign that form in the appropriate spot, and you do not, then, go on and discuss the lesser included offense of attempted voluntary manslaughter; you're through with that one.

"And you move on, then, to Count 2, which started with the third of the verdict forms, aggravated battery. You discussed it. Let's say you find the defendant guilty of that first aggravated battery. You would fill out the appropriate spot,

presiding juror signs on that verdict form, and you would not, then, go on and discuss Option 1 and Option 2 of the aggravated battery,

"I can't make it any clearer than that. It sounds confusing. Hopefully, when you get back there and you read the instructions again it will make it clear to you."

After the jury left the courtroom to begin deliberations, defense counsel objected to the trial court's final *sua sponte* explanation to the jury of the lesser included offenses for aggravated battery. Defense counsel requested a mistrial because the judge's final comments discussed the jury's potential deliberations of whether Kline was guilty or not guilty on the attempted murder charge (which defense counsel said was fine), but he only discussed a possible situation of what the jury should do if Kline was guilty on the first alleged version (the highest version) of aggravated battery. The judge denied a mistrial, finding his examples were correct and hopefully helped the jury in its deliberations.

Kline contends the trial court erred in breaking up the three aggravated battery choices and treating them comparable to first-degree murder and its lesser offenses. He states the language "If you do not agree" is not PIK language for an aggravated battery instruction. He also argued the trial court erred in not giving the PIK instruction on lesser included instructions (PIK Crim. 4th 68.080), thus depriving the jury of full and accurate information for considering lesser included offenses. Kline also points out the two lower degrees of aggravated battery in this case (Instruction Nos. 15 and 16) are both severity level 7 offenses so neither one of those could be considered a lesser offense of the other.

The Kansas Supreme Court has previously approved the PIK method of ordering the jury's deliberation on lesser included offenses in *State v. Roberson*, 272 Kan. 1143, 1154, 38 P.3d 715, *cert. denied* 537 U.S. 829, 123 S.Ct. 127, 154 L.Ed.2d 44 (2002), *overruled on other grounds by state v.*

Gunby, 282 Kan. 39, 144 P.3d 647 (2006), stating: "The pattern instructions offer an orderly method of considering possible verdicts. The pattern instructions offer a transitional statement that can be inserted at the beginning of the elements instructions of lesser offenses."

Kline's apparent complaint is that the jury supposedly could not consider the lesser offenses for aggravated battery until after rejecting a conviction on the greatest aggravated battery offense. In *State v. Korbel*, 231 Kan. 657, 661, 647 P.2d 1301 (1982), the court rejected a challenge to the words " 'if you cannot agree' " when used to preface an instruction on a lesser charge. The court stated that the words

"are not coercive and do not require the members of a jury to unanimously find the accused innocent of the greater charge before proceeding to consider a lesser charge. The words 'if you cannot agree' presuppose less than a unanimous decision and no inference arises that an acquittal of the greater charge is required before considering the lesser." 231 Kan. at 661, 647 P.2d 1301.

Consequently, since the Kansas Supreme Court has previously approved of ordering jury deliberations in the manner set forth in this case, these alternative wordings are not coercive and correctly state the law. See *State v. Scott–Herring*, 284 Kan. 172, 178, 159 P.3d 1028 (2007); *Gunby*, 282 Kan. at 65–66, 144 P.3d 647; *State v. Hurt*, 278 Kan. 676, 682–86, 101 P.3d 1249 (2004); *State v. Davis*, 275 Kan. 107, 126–27, 61 P.3d 701 (2003); *Roberson*, 272 Kan. at 1154–55, 38 P.3d 715. The fact that all of the lesser forms of aggravated battery are listed in the same instruction (PIK Crim. 4th 54.310) in the pattern instructions does not change the fact those forms are still lesser included offenses. See *State v. McCarley*, 287 Kan. 167, Syl. ¶ 10, 195 P.3d 230 (2008) (severity levels 5 and 8 aggravated battery are both lesser included offenses of severity level 4 aggravated battery); *State v. Winters*, 276 Kan. 34, Syl. ¶ 2, 72 P.3d 564 (2003) (severity level 7

aggravated battery is a lesser included offense of severity level 4 aggravated battery). On this point raised by Kline, there was no error.

Even if we consider the merits of Kline's claim regarding this jury instruction, we find no error. Kline claims the trial court erred in failing to instruct the jury with PIK Crim. 4th 68.080. However, the State points out that defense counsel specifically rejected that instruction. During the instructions conference, defense counsel stated, "[F]or the record, I do not request 68.08 [0]." See *Peppers*, 294 Kan. at 393, 276 P.3d 148 ("[A] defendant cannot challenge an instruction, even as clearly erroneous under K.S.A. 22–3414(3), when there has been on-the-record agreement to the wording of the instruction at trial."). Consequently, this argument is not properly raised on appeal due to invited error. See *Peppers*, 294 Kan. at 393, 276 P.3d 148 (when a defendant has invited error, he or she cannot complain of the error on appeal).

However, since review is possible, we will address the question.

PIK Crim. 4th 68.080 provides:

"LESSER INCLUDED OFFENSES

"The offense of *insert principal offense charged* with which defendant is charged includes the lesser offense(s) of *insert lesser included offense or offenses.*

"You may find the defendant guilty of *insert principal offense charged, insert first lesser included offense, insert second lesser included offense,* or not guilty.

"When there is a reasonable doubt as to which of two or more offenses defendant is guilty, (he)(she) may be convicted of the lesser offense only.

"Your Presiding Juror should mark the appropriate verdict."

> The jury should be instructed that when there is a reasonable doubt as to which of two or more degrees of an offense the defendant is guilty, the defendant may be convicted of the lowest degree only. K.S.A.2011 Supp. 21–5108(b); *State v. Trujillo*, 225 Kan. 320, 323, 590 P.2d 1027 (1979).
> While the trial court's *sua sponte* oral comments in this case substantially complied with the purposes of PIK Crim. 4th 68.080, the trial court still failed to instruct the jury that if there was a reasonable doubt of which of two or more offense Kline was guilty, he could only be convicted of the lesser offense.
>
> Recently, in *State v. Hall*, 292 Kan. 841, 257 P.3d
> 272 (2011), the district court, after providing instructions on lesser included crimes, failed to instruct the jury in accordance with PIK Crim.3d
> 68.09 (now PIK Crim. 4th 68.0800. Similar to this case, Hall did not request the instruction, and our Supreme Court applied the clearly erroneous standard of review. The court found that although the district court erred by not providing the *instruction*, it *was not reversible error.* Our *Supreme Court reasoned that based on* the evidence presented at trial, there was "no real possibility the jury would have rendered a different verdict had the district court instructed the jury in accordance with PIK Crim.3d 68.09." 292 Kan. at 858, 257 P.3d 272.
>
> It was error when the trial court failed to give the PIK Crim. 4th 68.080 jury instruction here. However, it was harmless error because the jury found Kline guilty of aggravated battery-great bodily harm. Kline's actions with the bat and White's resulting injuries provided sufficient evidence of great bodily harm. Applying a clearly erroneous standard, there is no real possibility the jury would have rendered a different verdict had the trial court instructed the jury with PIK Crim. 4th 68.080. Thus, while the trial court did err in failing to give the PIK Crim. 4th 080 instruction, it did not constitute reversible error.

Next, Kline challenges the jury instruction defining "knowingly." He contends the trial court failed to give the definition of knowingly that a defendant is knowingly aware that his or her conduct *was reasonably certain to cause the result* complained of by the State. In a subsequent argument, Kline claims the failure to include this instruction prohibited the jury from finding him guilty beyond a reasonable doubt on each element of the crime of aggravated battery.

As noted above, our first concerns in evaluating jury instruction are jurisdiction and preservation. Here, Kline did not object to the definition of "knowingly" used in the jury instruction. Therefore, we review for clear error. See K.S.A.2011 Supp. 22–3414(3); *Plummer*, 295 Kan. 156, Syl. ¶ 1, 283 P.3d 202.

K.S.A.2011 Supp. 21–5202(i) provides the applicable culpability definitions for this case:

"(i) A person acts 'knowingly,' or 'with knowledge,' with respect to the nature of such person's conduct or to circumstances surrounding such person's conduct when such person is aware of the nature of such person's conduct or that the circumstances exist. A person acts 'knowingly,' or 'with knowledge,' with respect to a result of such person's conduct when such person is aware that such person's conduct is reasonably certain to cause the result. All crimes defined in this code in which the mental culpability requirement is expressed as 'knowingly,' 'known,' or 'with knowledge' are general intent crimes."

Kline argues since the jury was only instructed that he be aware of the nature of his conduct, the jury could interpret this to mean that Kline need only be aware that he was swinging a bat. Kline argues the aggravated battery statute requires that he was aware that his conduct was reasonably certain to cause great bodily harm, bodily harm, or physical contact. Kline claims this constitutes reversible error because the jury could have concluded he did not knowingly cause great bodily harm because he only swung the bat at

White to prevent her from completing a call to the police. Consequently, the jury could have returned a verdict on a lesser offense that he knowingly caused physical contact.

The jury in this case was instructed in each individual aggravated battery instruction: "Knowingly or With Knowledge means: A defendant acts knowingly when the defendant is aware of the nature of his conduct that the State complains about." Aggravated battery is a general intent crime. See K.S.A.2011 Supp. 21–5202(i); *State v. Makthepharak*, 276 Kan. 563, 572, 78 P.3d 412 (2003). Several cases have rejected the theory behind Kline's argument.

The State cites *In re W.S.E.*, No. 108,976, 2013 WL 3970208 (Kan.App.2013) (unpublished opinion), where W.S.E. challenged his felony conviction for interference with a law enforcement officer. W .S.E. challenged the definition of "knowingly" and requested the trial court give the "knowingly" instruction that a person's conduct is reasonably certain to cause the results, *i.e.*, his conduct knowingly obstructed, resisted, or opposed the officer. The court rejected his claim, finding the sole determination was whether W.S.E. knew he was running from law enforcement officers, *i.e.*, the nature of his conduct, and there was substantial evidence W.S.E. was fleeing from officers. 2013 WL 3970208, at *3–5.

The court in *State v. Johnson*, 46 Kan.App.2d 870, 880, 265 P.3d 585 (2011), also explained that aggravated battery is a general intent crime and the requisite general intent is "merely the intent to engage in the underlying conduct. The State is not required to prove that the defendant intend the precise harm or result that occurred."

Here, the trial court correctly determined what must be proven to support a conviction of intentional aggravated battery. The State need not prove the defendant intended or meant to cause great bodily harm or disfigurement. Rather, the State must show that the defendant acted "intentionally" and that intentional conduct

resulted in great bodily harm or disfigurement. Whether the defendant wanted to inflict that degree of harm is beside the point. Most crimes require only that the perpetrator have a general criminal intent. That is, the person intends to do what the law prohibits. *In re C.P.W.*, 289 Kan. 448, Syl. ¶ 4, 213 P.3d 413 (2009). The person must simply act on purpose or intentionally thereby causing a result that violates the law, as opposed to doing so accidently or inadvertently. K.S.A.2011 Supp. 21–5202(c) ("If acting knowingly suffices to establish an element, that element also is established if a person acts intentionally.").

The State charged Kline with aggravated battery for knowingly causing great bodily harm or disfigurement to another person. That requires only that Kline deliberately, rather than accidentally, come into contact with the victim in some manner that results in the requisite degree of harm. Kline need not mean to cause such harm or any harm for that matter. Had the legislature wanted aggravated battery to be a specific intent crime, it would have proscribed the physical contact the defendant intended to result in great bodily harm or disfigurement. The legislature did not use such language. Consequently, after examining the jury instructions as a whole, we do not find them clearly erroneous for failing to instruct the jury that Kline had to be knowingly aware that his conduct was reasonably certain to cause the result complained of by the State.

Next, Kline challenges the instruction requiring the jury to convict on the lesser offenses of aggravated battery by use of a deadly weapon *and* in a manner whereby great bodily harm, disfigurement, or death can be inflicted. Kline argues this requirement made a finding of a lesser included offense more stringent than required by the aggravated battery statute.

As directed above, our first concerns in evaluating jury instruction are jurisdiction and preservation. Here, Kline did not object to this instruction at trial and in fact requested the instruction.

Therefore, we review for clear error. See K.S.A.2011 supp. 22–3414(3); *State v. Plummer*, 295 Kan. 156, Syl. ¶ 1, 283 P.3d 202 (2012).

K.S.A.2011 Supp. 21–5413(b)(1)(B) defines aggravated battery as: "knowingly causing bodily harm to another person with a deadly weapon, *or* in any manner whereby great bodily harm, disfigurement or death can be inflicted." (Emphasis added.) Instruction Nos. 15 and 16 instructed the jury in a similar manner regarding the "deadly weapon" element, namely causing bodily harm or physical contact to White "with a deadly weapon; to-wit, a bat in any manner whereby great bodily harm, disfigurement or death can be inflicted." The jury instruction did not include the conjunction "or" as found in K.S.A.2011 Supp. 21–5413(b)(1)(B).

Kline argues the trial court did not instruct the jury on the elements in accordance with the statute and therefore erred. He contends that in order for the jury to find him guilty of the lesser offenses, it was necessary for the jury to find both means instead of just one. This extra element created a more stringent standard for the lesser offenses than required by the statute. Consequently, Kline maintains there is a real possibility that a properly instructed jury could have found him guilty of aggravated battery resulting in bodily harm or physical contact under either means.

In the context of alternative means, our Supreme Court recently addressed an alternative means challenge to K.S.A. 21–3414(a)(2)(B) (former aggravated battery statute) and found that "the phrase 'causing bodily harm to another person with a deadly weapon' is synonymous with the phrase 'causing bodily harm to another person ... in any manner whereby great bodily harm, disfigurement or death can be inflicted.' " *State v. Ultreras*, 296 Kan. 828, 853, 295 P.3d 1020 (2013). The court reasoned that "a deadly weapon is an instrument that can inflict death or great bodily harm, which includes disfigurement." 296 Kan. at 853, 295 P.3d 1020. Thus, "the phrase

'with a deadly weapon' describes a factual circumstance that proves bodily harm was caused in a 'manner whereby great bodily harm, disfigurement or death can be inflicted' and, as such, is an option within a means rather than an alternative means." 296 Kan. at 854, 295 P.3d 1020. Moreover, in rejecting the alternative means challenge to K.S.A. 21–3414(a)(2)(A), which defined aggravated battery as "recklessly causing great bodily harm to another person or disfigurement of another person," the *Ultreras* court held that the term "disfigurement" is merely a factual circumstance by which "great bodily harm" can be proved and is therefore an option within a means and not an alternative means. 296 Kan. at 850–52, 295 P.3d 1020.

Kline requested the lesser included offense instructions found in Instruction Nos. 15 and 16. This fact alone conjures up an invited error conclusion. Further, defense counsel requested the instruction include the "in any manner" language without ever mentioning to the trial court that the conjunction "or" should be included in the instructions. See *State v. Divine,* 291 Kan. 738, 742, 246 P.3d 692 (2011) (a litigant may not invite error and then complain of the error on appeal). The State correctly points out that in closing argument, defense counsel also patterned his comments using the lesser included offense instruction without the "or" conjunction, "[Pleading with the jury to find Kline guilty of the lesser offense.] You must find him guilty, that he caused bodily harm to Nancy White with a deadly weapon, bat, whereby great bodily harm, disfigurement, or death could be inflicted. You must do that."

Even if Instruction Nos. 15 and 16 were erroneous, we find the error to be harmless. See *State v. Ward,* 292 Kan. 541, 569, 256 P.3d 801
(2011) (error may be declared harmless where the party benefitting from the error proves beyond a reasonable doubt there is no reasonable possibility that the error affected the verdict), *cert. denied* —— U.S. ——, 132 S.Ct. 1594, 182 L.Ed.2d 205

(2012). As the court stated in *Ultreras,* the phrase "with a deadly weapon" describes a factual circumstance that proves bodily harm was caused in a manner whereby great bodily harm, disfigurement, or death can be inflicted and, as such, is an option within a means rather than an alternative means. 296 Kan. at 854, 295 P.3d 1020. Since the questioned phrases in this case are synonymous, the outcome would have been the same and no reasonable possibility exists the verdict would have been different.

Next, Kline argues the trial court erred in denying his motion for acquittal of the aggravated assault charge. Kline contends there is insufficient evidence that Kelli was in reasonable apprehension of immediate bodily harm and the trial court violated his right to due process under the Fourteenth Amendment of the United States Constitution and the Kansas Constitution by entering a conviction based on insufficient evidence.

An appellate court will affirm the denial of a motion for a judgment of acquittal if after reviewing all the evidence in the light most favorable to the State, it is convinced that a rational factfinder could have found the defendant guilty beyond a reasonable doubt. *State v. Ta,* 296 Kan. 230, 236, 290 P.3d 652 (2012). "A motion for directed verdict at the close of the State's case is essentially a motion for judgment of acquittal and is judged by the standards of sufficiency of the evidence. [Citation omitted.]" *State v. Wilkins,* 267 Kan. 355, 365, 985 P.2d 690 (1999).

Kline cites several cases for the general concept that the crime of assault cannot occur without apprehension by the victim of bodily harm. See *State v. Dixon,* 248 Kan. 776, 785, 811 P.2d 1153 (1991); *Spencer v. State,* 264 Kan. 4, 6, 954 P.2d 1088 (1988); *State v. Bishop,* 240 Kan. 647, 651–52, 732 P.2d 765 (1987); *Zapata v. State,* 14 Kan.App.2d 94, Syl. ¶ 3, 782 P.2d 1251 (1989). He also cites *State v. Warbritton,* 215 Kan. 534, 527 P.2d 1050 (1974), where Warbritton shot his

wife in the neck and then pointed a gun at his mother-in-law (Bailey) who was holding the couple's baby. The court reversed Warbritton's conviction of aggravated assault against Bailey. The court held:

"We might agree that the atmosphere was heavily fraught with danger and was threatening enough to have induced apprehension on the part of Mrs. Bailey for her personal safety. However, Mrs. Bailey consistently denied while she was on the stand that she had any fear for herself; that she thought Mr. Warbritton would not harm her. She testified she was not scared for herself because she knew the way she was holding the baby, that the defendant would hit it instead of herself, if he pulled the trigger. In the face of positive testimony such as this we cannot say, as urged by the district attorney, that the circumstances were such that, as a matter of law, Mrs. Bailey had fear for herself." 215 Kan. at 537–38, 527 P.2d 1050.

The State points out the *Warbritton* court did not discuss other circumstantial evidence regarding the victim's actions at the time. In cases after *Warbritton* in which there was independent evidence of the victim's fear, a conviction was upheld even though the victim testified and denied having been afraid. See *State v. Lessley*, 271 Kan. 780, 789–90, 26 P.3d 620 (2001) (upholding conviction where victim testified she did not believe defendant would shoot her but additional testimony from victim and victim's husband supported conviction); see also *State v. Stafford*, No. 100,441, 2009 WL 1591677, at *1–3 (Kan.App.2009) (unpublished opinion) (upholding domestic battery and aggravated-assault convictions where victim denied having been hit but testimony of victim's 8–year–old daughter and other witnesses supported conviction), *rev. denied* *290* Kan. 1103 (2010). Foreshadowing the decision in *Lessley*, the dissent in *Warbritton*, 215 Kan. at 538, 527 P.2d 1050, authored by Justice Fromme and joined by Justice Schroeder, stated:

> "The defendant was charged with aggravated assault against his mother-in-law by the use of a pistol. During the altercation he not only shot his wife with this pistol but proceeded to threaten his mother-in-law. Whether the mother-in-law was in immediate apprehension of personal bodily harm was a question for the jury to decide. What a person says about his fear or apprehension long after the incident occurred is not controlling. Actions may speak louder than words. On appeal if there is any sound basis in the evidence for a reasonable inference that Mrs. Bailey had fear and apprehension when the incident occurred it is our appellate duty to affirm the conviction and I would do so."
> See *Lessley*, 271 Kan. at 788--90, 26 P.3d 620.

Kline argues Kelli never testified at trial that she had been place in reasonable apprehension of immediate bodily harm. However, the State points to substantial evidence that Kelli was placed in fear of immediate bodily harm. Kelli told Deputy Feagins that Kline told her and White that "he was going to kill them all." Kelli also wrote out a statement the day of the incident, where she stated:

> "[Kline] left wrecked his car, came back, left on foot, his brother called & said get out of house less than 5 minutes [Kline] came back, said he was going to kill us all & shoot himself. He hit [White] with baseball bat, went for me, I stopped the bat, he went for door, threw bat down & walked out gate North, [arrow pointing to last sentence] Kids had locked door & called 911 already."

Kline's written statement also provided evidence in support of the assault. Kline stated in relevant part:

> "I headed down the road an had forgot my wallet an or lighter an so as I was headen back an heard [White] laughn an had hit my breaken point an I walked to my car a then to the porch were Kelli an [White] was sitting an saved what are you laughn at an I told [White] that I though[t] I told you to stay away from my family an I grabed the bat that

was at the front porch an swung it an it hit [White] in the head an Kelli sayed what are you doing I said I should hit you to an look down at [White], I went into shoke an droped the bat an ran up the river."

Kelli testified at trial that Kline was very mad on the day of the incident. She and Kline pushed and shoved each other as Kelli tried to keep him from going in the front door. Kelli testified they were screaming at each other, but she could not remember what they said. Kelli said Kline swung the bat at her, but she caught it and held on "with everything [she] had,"

Kelli testified she was not in fear when Kline picked up the bat because she thought he was going to go beat up the trucks. However, she testified as follows:

"Q. [PROSECUTOR:] Okay. When you were standing in front of [White] and he swung the bat, were you in fear at that point?"

"A. [KELLI:] Yes.

"Q. Okay. Were you in fear for your

children? "A. Yes.

"Q. Okay. Were you in fear for

[White]? "A. Yes."

On cross-examination by defense counsel, Kelli expressly testified she was not in immediate apprehension of the potential for bodily harm. She also denied that Robert told her Kline said he was going to kill someone. Instead, she testified Robert just told her she needed to leave. On redirect by the State, the prosecutor asked Kelli whether she was afraid when Kline swung the bat. She testified she was not afraid because she thought he was swinging again at White.

Amy Gorman testified she knew both Kelli and White. Gorman lived a couple miles from Kelli. Gorman visited Kelli a few days after the incident to check on her. Kelli told Gorman that Kline was

> mad that day and was going to kill everyone and then himself. She was still visibly upset, shaking, and crying hysterically.
>
> The State also questioned Kline about phone conversations he had with his wife after the incident. On Feburary 3, 2012, Kline told Kelli, "I raised the bat to you" and "[Kelli] stepped in front of the second swing" and the said "You should have stuck with, 'I can't remember shit.' Saying nothing would have been better." On February 23, 2012, Kline told Kelli that he hit her with the bat, that she grabbed it, and they fought over it. On September 17, 2011, Kline told Kelli, "That fucking bitch being there made me furious" and also said "If I was trying to kill her, I would have hit her twice."
>
> After reviewing the entirety of the evidence in the light most favorable to the State, we conclude there was sufficient evidence to support a finding that Kelli was in reasonable apprehension of immediate bodily harm. In a more recent opinion, our Supreme Court found that inconsistent testimony from the victim as to his or her apprehension was sufficient to support such a conviction. *State v. Hurt*, 278 Kan. 676, 688–89, 101 P.3d 1249 (2004). Certainly one could argue Deputy Feagins' and Kelli's statements never confirmed a threat was "of immediate bodily harm," but this would be illogical given a sense of threat from someone swinging a bat, striking White, and then coming at Kelli with the bat forcing her to block it. By the time of trial, Kelli was no longer willing to support her prior statements of that evening, but the evidence and statements from officers and friends were still for the jury's consideration. We are not in a position to reweigh that evidence on appeal. The trial court did not err in denying Kline's motion for acquittal.

Next, Kline argues the trial court abused its discretion by allowing White, as a lay witness, to offer expert medical conclusions about the injuries she suffered after being hit with the bat.

In Kansas, a lay witness may testify about the external appearances and manifest medical conditions that are readily apparent to anyone. See *State v. McFadden*, 34 Kan.App.2d 473, 478, 122 P.3d 384 (2005). However, lay witnesses are not competent to provide reliable testimony about medical matters beyond the common knowledge of lay persons or those that are not readily apparent such as medical diagnosis or the effects of possible medical conditions. *Smith v. Prudential Ins. Co.*, 136 Kan. 120, 124, 12 P.2d 793 (1932).
We review a trial judge's determination of whether a lay or expert witness is qualified to testify under an abuse of discretion standard. *Pullen v. West*, 278 Kan. 183, 210, 92 P.3d 584 (2004).

At trial, White testified she was hospitalized for 6 days after the incident. She had surgery on her jaw, and it was wired shut for 8 weeks. Defense counsel objected to this testimony as expert medical testimony. The trial court overruled the objection. White testified her jaw was broken in two pieces and also had a hairline fracture. Defense counsel objected again to this testimony as expert medical testimony. Defense counsel argues White's testimony was hearsay from what the doctors told her and:

"[a]ny injury that she may have sustained has to be [testified to] by a medical expert. She is a lay witness and doesn't have the information available from prior expert testimony about what happened. She can provide what she can see in the mirror and that's it. Beyond that, it's expert testimony and it calls for hearsay because she's heard it from her doctor."

The trial court again overruled the objection. White testified about the bruising down her neck. Defense counsel also objected to White's testimony that she had bleeding on her brain and jaw. White described the injuries to her teeth—one tooth was knocked inward and two breaks were on either side of that one. The trial court sustained defense counsel's objection when White began to testify to what the dentist told her. White also

testified to the scars she suffered from her injuries and that she has no sense of smell and still gets dizzy and unsteady.

As a means of ensuring reliable evidence, K.S.A. 60–456(a) limits the opinion testimony given by lay witnesses to opinions which "may be rationally based on the perception of the witness." The statute limits opinion testimony offered by experts to opinions based on facts perceived by or personally known to the witness and "within the scope of the special knowledge, skill, experience or training possessed by the witness." K.S.A. 60–456(b). In addition,

"[a]s a prerequisite for the testimony of a witness on a relevant or material matter, there must be evidence that he or she has personal knowledge thereof, or experience, training or education if such be required. Such evidence may be by the testimony of the witness himself or herself. The judge may reject the testimony of a witness that the witness perceived a matter if the judge finds that no trier of fact could reasonably believe that the witness did perceive the matter." K.S.A. 60–419.

White did not testify as an expert witness. She is intimately familiar with and has personal knowledge of the injuries she suffered from the bat wielded by Kline. White's testimony meets the conditions of K.S.A. 60–419 and K.S.A. 60–456(a). As a lay witness, White is competent to provide reliable testimony concerning the external appearances and manifest medical conditions that are readily apparent to anyone. See *McFadden*, 34 Kan.App.2d at 478, 122 P.3d 384. White's testimony did not provide any expert opinion or causation of her injuries. She did not testify to medical matters beyond the common knowledge of lay persons. Additionally, Kline never challenged the causation of White's injuries. White was competent to testify to the fact that she was hospitalized for 6 days and her jaw was wired shut for 8 weeks because Kline had broken or fractured in it three places. She also testified to the

concussion she suffered, the broken teeth she had, and the bruises caused by being struck in the head with a bat. We find no abuse of discretion in the trial court's admission of this testimony by White.

Next, Kline argues the trial court erred in failing to instruct the jury on reckless aggravated battery as a lesser included offense.

As directed above, our first concerns in evaluating jury instructions, or a trial court's failure to give a certain instruction, are jurisdiction and preservation. Here, Kline did not request a lesser included offense instruction on reckless aggravated battery. Therefore, we review for clear error. *Ward*, 292 Kan. 541, Syl. ¶ 6, 256 P.3d 801 (A Kansas court must be persuaded beyond a reasonable doubt that there was no impact on the trial's outcome, *i.e.*, there is no reasonable possibility that the error contributed to the verdict.).

A criminal defendant has a right to an instruction on all lesser included offenses supported by the evidence at trial as long as: (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 any of the lesser offenses. However, if the jury could not reasonably convict the accused of a lesser offense based on the evidence at trial, then an instruction on the lesser included offense is not proper. *State v. Simmons*, 282 Kan. 728, 741–42, 148 P.3d 525 (2006).

Here, Kline contends the evidence was sufficient to support a conviction for reckless aggravated battery pursuant to K.S.A.2011 Supp. 21–5413(b) (2)(A), a severity level 5 person felony. Reckless aggravated battery is a lesser included offense of intentional aggravated battery. *State v. McCarley*, 287 Kan. 167, 177–78, 195 P.3d 230 (2008). K.S.A.2011 Supp. 21–5413(b)(2)(A) defines reckless aggravated battery as "recklessly causing great bodily harm to another person or disfigurement of another person." The Kansas

Criminal Code states that a person acts recklessly or is reckless when such person: "consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation." K.S.A.2011 Supp. 21–5202(j).

Initially, the State points out the trial court asked defense counsel whether he wanted any additional lesser included offenses, specifically reckless lesser offenses. Defense counsel agreed with the trial court that none of the reckless aggravated battery offenses fit the facts of this case. See *State v. Peppers*, 294 Kan. 377, 393, 276 P.3d 148 (2012) ("[A] defendant cannot challenge an instruction, even as clearly erroneous under K.S.A. 22–3414(3), when there has been on-the- record agreement to the wording of the instruction at trial."). Again, we are faced with an invited error situation.

In any event, the State's theory at trial was that Kline intentionally struck White with the bat to cause great bodily harm. On the other hand, Kline argues he picked up the bat and swung at White only intending to hit the phone and prevent her from completing the phone call to the police. Kline argues on appeal that the jury could have concluded his actions were reckless, namely that he consciously disregarded a substantial and unjustifiable risk that the result would follow. We disagree.

Even if the jury believed Kline's story, it was still not reckless behavior. Kline did not consciously and unjustifiably disregard the substantial danger involved in attempting to hit the phone away from White's ear using a baseball bat. Here, any conflicting evidence presented at trial established that Kline was either guilty of some form of intentional battery or he was guilty of nothing at all. As previously discussed, Kline intentionally swung the bat at White and that intentional conduct resulted in great bodily harm. The fact

Kline claims he did not intend that result does not negate the fact he acted intentionally. There was no evidence presented at trial by which the jury could reasonably have convicted Kline of reckless aggravated battery. Even if Kline's attempt to just hit White's phone could somehow be viewed as reckless conduct, we are not firmly convinced there was a real possibility the jury would have returned a different verdict had an instruction been given on reckless aggravated battery. Accordingly, we conclude the trial court's failure to instruct the jury on reckless aggravated battery as a lesser included offense of intentional aggravated battery was not clearly erroneous.

Finally, Kline argues cumulative error prevented him from receiving a fair trial. The reversibility test for cumulative error is whether the totality of circumstances substantially prejudiced the defendant and denied the defendant a fair trial. No prejudicial error may be found under this cumulative effect rule, however, if the evidence is overwhelming against the defendant. See *State v. Edwards*, 291 Kan. 532, 553, 243 P.3d 683(2010).

Given that the reversibility test for cumulative error utilizes a totality of the circumstances approach, an appellate court must necessarily "review the entire record and engage in an unlimited review." *State v. Cruz*, 297 Kan. 1048, 1075, 307 P.3d 199 (2013).

The first task in the cumulative error analysis is to count up the errors because the doctrine "does not apply if no error or only one error supports reversal." *State v. Dixon*, 289 Kan. 46, 71, 209 P.3d 675 (2009). Reviewing our decisions, we found the trial court properly handled the aggravated battery lesser included offense instructions. It was harmless error by the trial court in failing to include PIK Crim. 4th 68.080 to explain how the jury should properly consider the lesser included offenses and in not instructing the jury completely in line with the statutory language concerning the lesser included crimes. We found the trial court properly instructed the jury whether

Kline "knowingly" committed the crimes. We also found the trial court did not err in failing to instruct on the reckless forms of aggravated battery or allowing White to testify to the extent of her physical injuries.

Likewise, we decline to second guess the trial court's denial of Kline's motion of acquittal where there was sufficient evidence for the jury to convict Kline of aggravated assault. We also find Kline invited error on the issues including PIK Crim. 4th 68.080, proper language in the aggravated battery lesser included instructions, and rejecting the offer of reckless aggravated battery instructions.

While the trial court erred in two regards (PIK Crim. 4th 68.080 and the statutory language concerning lesser included offenses), we found both of those errors were harmless. Both of those errors were invited as well. In this case, the identified, or assumed, errors do not overtake the strength of the evidence against Kline. There was overwhelming evidence as to Kline's guilt. Kline was not denied the right to a fair trial because the combined errors did not affect the verdict. Consequently, there was no reversible cumulative error.

While we find no reversible error, we believe the facts of this trial demonstrate the problems that can arise when PIK instructions are not followed.

Affirmed.