No. 21-123622-A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS
Plaintiff-Appellee

vs

TOMMY J. MAY
Defendant-Appellant

REPLY BRIEF OF APPELLANT

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

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County Appealed From: Douglas
D. Ct Case No: 2018-CR-728
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Thomas J. May
Appellant
Defendant-Appellant
Felony Criminal Appeal

Appellant's Reply Brief

Nature of 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). Mr. May appealed. This is Appellant's reply brief.

Statement of Issues

Mr. May replies to the following issues. Issues One, Two, Three, Four, Five and Eight

Arguments and Authorities

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

Invited error

The state relies on the invited error doctrine to argued that Mr. May cannot raise certain instructional issues on appeal.(Appellees' brief, page 21). The doctrine's application is a question of law over which an appellate court has unlimited review. *State v. Sasser,* 305 Kan. 1231, 1235, 391 P.3d 698 (2017).

In *State v. Douglas,* 313 Kan. 704, 490 P.3d 34, 38 (2021) the Kansas Supreme Court made it clear that the invited error doctrine requires more than the defendant's mere acquiescence to the court's failure to give an instruction.

> The doctrine of invited error precludes a party from *asking a district court to rule a given way* and thereafter challenging the court's ruling on appeal. *State v. Soto,* 301 Kan. 969, 983, 349 P.3d 1256 (2015). That party's actions *inducing* a court to make the claimed error and the context in which those actions occurred must be scrutinized to decide whether to employ the doctrine. But there is no bright-line rule for its application. *Fleming,* 308 Kan. 689, 423 P.3d 506. A mere failure to request an instruction does not trigger invited error, but when a defendant *actively pursues* what that defendant later argues to be an error, the doctrine applies. *State v. Cottrell,* 310 Kan. 150, 162, 445 P.3d 1132 (2019). (Emphasis added).

Here, Mr. May did not induce or ask the district court to rule a given way regarding the instruction, but merely failed to request an instruction, or alternatively acquiesced in the court's failure to give the instruction. Further, state erroneously argued that May's defense of accidental shooting precluded a claim based on self defense. The mistake on the part of the state does not transform into invited error on the part of the defendant.

Finally, the state is attempting to replace the clear error standard of review by arguing that all the instructions either suggested by the defense or not requested by the defense are invited error. The state also has the responsibility to recognize erroneous instructions, whether submitted by the defendant or not, as does the trial court. The invited error doctrine does not apply to any of the challenged instructions in this case for the reasons above. (Appellees brief. pg. 20).

The self defense instruction was legally and factually appropriate in this case.

Mr. May did not request a self defense instruction. The state argues that because Mr. May claims the shooting was accidental that May is precluded from claiming self defense. (Appellee's brief, pg. 22-24). The state totally ignores the physical confrontation between May and

Yarbrough up to the accidental shooting as a basis for a claim of self defense. K.S.A. 21-3211, the self-defense statute, section (a) states:

> (a) A person is justified in the use of [nonlethal] force against another when and to the extent it appears to such person and such person reasonably believes that such use of force is necessary to defend such person or a third person against such other's imminent use of unlawful force.

According to this statute, self defense does not require the use of lethal force by a defendant. The "use of deadly force" does not include "[a]ny threat to cause death or great bodily harm, including, but not limited to, by the display or production of a weapon ... [if] the actor's purpose is limited to creating an apprehension that the actor will, if necessary, use deadly force in defense of such actor or another." *State v. Thomas*, 311 Kan. 403, 462 P. 3d 149, 158 (2020). K.S.A. 2019 Supp. 21-5221(a)(1)(B) ("'Use of force' means ... the presentation or display of the means of force.").

May's entire testimony is replete with his belief that he was defending himself against Yarbrough unlawful use of force from the moment she shot him, to when she struggled with May over the gun, to opening the door screaming for Jones, her backup. May testified that he struggled with Yarbrough at the door to prevent Jones from entering the apartment to harm him. Mr. May's belief in the need to restrain her was reasonable. The struggle at the door was May's use of non lethal force in self defense. The gun then went off accidentally as a direct result of May's struggle with Yarbrough. But it doesn't preclude consideration of the struggle before the gun discharged. May was entitled to an instruction of self defense based on the use of non lethal of force.

K.S.A 21-5221. Use of force; definitions.
(1) "Use of force" means any or all of the following directed at or upon another person or thing: (A) Words or actions that reasonably convey the threat of force, including threats to cause death or great bodily harm to a person; (B) the presentation or display of the means of force; or (C) the application of physical force, including by a weapon or through the actions of another.

Mr. May was entitled to use force against Yarbrough under all subsections because she pulled a gun, threatened May, shot him, and struggled with him over the gun. Particularly under subsection C, she fought with May at the door to let Jones inflict harm on Mr. May. Note that under subsection C, Yarbrough's attempt to get Jones to harm May allows May to rely on a claim of non lethal self defense against Yarbrough (R.22: 1410). Clearly based on the evidence and the law, May was entitled to a self defense instruction.

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.

Invited error.

Again, the state relies on the invited error doctrine to argue that this Court cannot consider this issue on appeal. Again, the state is mistaken. (Appellees brief, pg. 20). The trial court's failure to instruct on attempted voluntary manslaughter was not induced by defense counsel's conduct. *State v. Douglas,* 313 Kan. 704, 490 P.3d 34, 38 (2021).

In *State v. Walker,* 304 Kan. 441, 372 P.3d 1147 (2016), the district court decided a second-degree murder instruction was inappropriate, noting the defense counsel confirmed that the defendant was not requesting any lesser included offense instructions. On appeal, the Court held that when defense counsel neither makes an affirmative request to omit lesser included offense instructions nor declines the court's offer to give them, the defendant does not invite an error. 304 Kan. at 445, 372 P.3d 1147 (reasoning that defendant "merely acquiesced to the district court's ruling; he did not invite it").

Here, defense counsel merely acquiesced in the trial court's failure to instruct on attempted voluntary manslaughter and the error was not invited.

All or Nothing defense (Appellee's brief, pg. 21-22)

The state claims that Mr. May was relying on an all or nothing defense as support for its claim that he did not want a voluntary manslaughter instruction and the trial court's failure to give it was invited error.

Clearly Mr. May's defense was that the force used against Yarbrough was justified and his belief in the need to defend himself was objectively reasonable. But he was not going for an all or nothing defense. Defense counsel submitted an instruction of self defense. (R, I, Defendant's Proposed Jury Instructions, pg. 298-323; PIK 4th 52.200, Use of Force in Defense of a Person, pgs. 12-17). Counsel also submitted instructions for attempted second degree murder claiming the defendant killed Marzetta Yarbrough unintentionally but recklessly under circumstances that show indifference to the value of human life. (Id. PIK 4th 54.110, PIK 4th 54.150. (Instruction 3, pg. 6).).

Defense counsel argued that an instruction on aggravated battery should be given, based on his belief that there was no premeditated or specific intent to kill. (R.VII.1638). In the proffer in support of motion for new trial, Mr. May argued that excluded evidence would have supported his theory of voluntary manslaughter based on imperfect self defense (Defendant's Proffer, filed Sept 28, 2020, pgs. 2-4). These requests counter the state's claim that Mr. May's defense was all or nothing.

Even if May was relying on an all or nothing defense, Mr. May does not give up his right to lesser included instructions. *State v. Wall*, 212 Ariz. 1, 126 P. 3d 148, 152 (Ariz: Supreme Court 2006) (A defendant does not forfeit his right to a lesser-included offense instruction by asserting an all-or-nothing defense if the evidence in the record is sufficient to support the instruction). In *Wall,* defendant request a lesser instruction of attempted theft on a charge of attempted robbery. The Arizona Court noted that:

> The rule requiring instruction on lesser-included offenses is designed to prevent a jury from convicting a defendant of a crime, even if all of its elements have not been proved, simply because the jury believes the defendant committed some crime. As the Supreme Court explained: "Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of *some* offense, the jury is likely to resolve its doubts in favor of conviction." *Beck v. Alabama,* 447 U.S. 625, 634, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980) (quoting *Keeble v. United States,* 412 U.S. 205, 212-13, 93 S.Ct. 1993, 36 L.Ed.2d 844 (1973)). Giving a lesser-included offense instruction mitigates that risk. *Id.* at 637, 100 S.Ct. 2382.

Id. 126 P. 3d 148, 151. Here, the element in doubt is the defendant's specific intent.

The state's claim that there was no evidence to support an imperfect self defense voluntary manslaughter instruction must be rejected.

Evidence from either the defense and the state, or both can support a request for a lesser included instruction. [W]here there is some evidence which would reasonably justify a conviction of some lesser included crime..., the judge *shall* instruct the jury as to the crime charged and any lesser included crime.'" *State v. Armstrong,* 299 Kan. 405, Kan. 405, 432, 324 P.3d 1052 (1999). See also *State v. Carson*, 410 P.3d 1230, 1234 (Ariz. 2018). ("Just as juries sift through incompatible witness accounts to unearth the truth, they can sort the truth of conflicting defenses. *State v. Wall* , 212 Ariz. 1, 6 ¶ 30, 126 P.3d 148, 153 (2006) (finding evidence sufficient for a lesser-included offense instruction where the "facts were such that the jury could reasonably believe portions of the [witness's] story and portions of the defendant's story"); *State v. Dugan*, 125 Ariz. 194, 196, 608 P.2d 771, 773 (1980) (allowing an instruction for a lesser-included offense where "the jury may weigh contradictory testimonies and believe parts of each.").

Voluntary Manslaughter is a general intent crime. Voluntary manslaughter based upon imperfect self-defense requires evidence of a subjective belief in the necessity of self-defense. To determine that an attempted voluntary manslaughter instruction was factually appropriate, the court must detect in the record evidence to support the existence of [May's] subjective, honest

belief that force was necessary to defend himself against [Yarbrough], as well as evidence demonstrating that May's belief was objectively unreasonable. *State v. Fisher*, 304 Kan. 242, 373 P. 3d 781, 795-796 (2016).

Yarbrough testified that May, suddenly went crazy, and attacked her for no reason, hitting her with the gun. According to the state, May had the specific intent to shoot her. May claims he was defending himself against her and Jones. A combination of the state's and defendant's evidence, supported an instruction on attempted voluntary manslaughter because the shooting occurred during an ongoing violent fight and while Yarbrough was opening the door to let Jones inside. Voluntary manslaughter would reduce that specific intent to general intent and allow the jury to consider May's claim of imperfect self defense and in the heat of passion or during a sudden quarrel.

If the jury had been instructed to consider attempted voluntary manslaughter based upon May's unreasonable, but subjective belief in the need to defend himself (or in the heat of passion or upon a sudden quarrel) it could have found him guilty of the lesser offense of attempted voluntary manslaughter. It was error not to give an instruction on imperfect self defense and (heat of passion or sudden quarrel).

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.

The state claims that Mr. May failed to argue that the admission of alleged May's prior drug evidence was prejudicial. (Appellee's brief, pg. 53). Appellant argued the evidence was prejudicial because dealing drugs and drug addiction is obviously not looked upon favorably by a jury. Its admission as well as other alleged crimes and civil wrong denied him the right to a fair trial. (Appellant's brief, pg. 26-29) .

Issues Four and Eight: The trial court improperly limited evidence in support of May's defense and erred in overruling the motion for new trial.

During trial, the court excluded evidence of other witnesses' prior drug or criminal activities on grounds of relevance. (R.I, 170-71; R.14, 75; R.16, 17-20.) The state claims neither Yarbrough's nor Jones' specific acts of past violence were admissible. (Appellee's brief, page 39). At the hearing on the motion for new trial, Mr. May proffered evidence showing "Jones' extreme violence to drug clients" including a beating that occurred in front of him and Yarbrough's vicious on her roommate (Appellant's Br., 38.). The state incorrectly describes Yarbrough's and Jones' specific acts of past violence as character evidence and inadmissible.

In *State v. Walters*, 284 Kan. 1, 159 P. 3d 174 ,181-182 (2007) the defendant argued that the excluded specific instances of conduct of the victim were admissible. They were not being offered to prove a trait of the victim, as contemplated by K.S.A. 60-446, K.S.A. 60-447. Rather, they were offered to establish Walters' state of mind. *Walters* discusses cases, including *Saylor v. Kentucky,* 144 S.W.3d 812, 815-16 (Ky.2004) which held "when evidence of the victim's prior acts of violence, threats, and even hearsay evidence of such acts and threats, is offered to prove that the defendant so feared the victim that he believed it was necessary to use physical force [or deadly physical force] in self-protection."

The district's court's decision at trial to limit evidence of acts of violence and drug activity to the day of the shooting impaired Mr. May ability to present evidence in support of his theory of defense, whether self defense or accidental shooting and requires a new trial. Evidence of Yarbrough's extreme violence to her roommate and Jones' violence to his drug clients is not harmless error under the constitutional harmless error standard or the statutory standard because it directly goes to May's state of mind at the time of the confrontation with both of them. *Chapman v. California,* 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705, *reh. denied* 386 U.S. 987

(1967) (Error is harmless "if the State can show "`beyond a reasonable doubt that the error complained of will not or did not affect the outcome of the trial in light of the entire record, i.e., where there is no reasonable possibility that the error contributed to the verdict.' [Citations omitted.]"

If this claim was not sufficiently preserved as claimed by the state, appellate courts may consider constitutional issues raised for the first time on appeal if the issue falls within one of three recognized exceptions: (1) The newly asserted claim involves only a question of law arising on proved or admitted facts and is determinative of the case; (2) consideration of the claim is necessary to serve the ends of justice or to prevent the denial of fundamental rights; or (3) the district court is right for the wrong reason. *State v. Dukes*, 290 Kan. 485, 488, 231 P.3d 558 (2010). Here, both the first and second exceptions apply. The claim involves a question of law and the facts of prior misconduct by the state's witnesses are not disputed, consideration of this issue is necessary to prevent the denial of Mr. May's fundamental right to a defense. *Chambers v. Mississippi*, 410 U.S. 284 (1973) (Application of evidentiary rule rendered his trial fundamentally unfair and deprived him of due process of law.)

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.

The state argues that Mr. May failed to preserve this claim as a discovery violation. (Appellee's brief, 45). 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, pgs. 1-3). The motion was granted.

In *State v. Rogers,* 217 Kan. 462, 537 P. 2d 222 (1975) the Kansas Supreme Court stated: "We have emphasized that once a pretrial discovery order has been issued, it is to be complied with "in spirit as well as in letter." (Citations omitted). The trial court's order in this case was continuing. It was the state's burden to justify its violation of the discovery order. When defense counsel objected to the endorsement it was necessarily based on the order for discovery.

The objection to the endorsement was renewed in the motion for new trial. According to Ms. Moody who was prosecuting Jordan 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 pg. 15). The state requested to endorse Jordan immediately prior to his testimony on December 17, over two months later than the plea deal discussion. The state's failure to endorse Jordan earlier prevented Mr. May from preparing adequately for his testimony, either through cross-examination or the presentation of rebuttal evidence.

Although, Mr. May believes the objection to the late endorsement preserves the issue. Kansas Courts provide exceptions to the rule that an issue must be raised for the first time on appeal. Appellate courts may consider constitutional issues raised for the first time on appeal if the issue falls within one of three recognized exceptions: (1) The newly asserted claim involves only a question of law arising on proved or admitted facts and is determinative of the case; (2) consideration of the claim is necessary to serve the ends of justice or to prevent the denial of fundamental rights; or (3) the district court is right for the wrong reason. *State v. Dukes*, 290 Kan. 485, 488, 231 P.3d 558 (2010). Here, both the first and second exceptions apply. The claim only involves a question of law, and the facts are not disputed. Mr. May's right to a fair trial under the Due Process Clause of the Fourteenth Amendment due to unfair surprise due to the

prejudicial nature of Jordan's testimony, interference with defendant's right to confrontation and cross-examination, and the right to a fair trial. *Davis v. Alaska* 15 US 308 (1974).

Conclusion

May was denied the right to a fair trial based on the numerous prejudicial errors and omissions that undermined his right to a fair trial. His convictions should be set aside, and the case remanded for a new trial.

Respectfully submitted,

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Certificate of Service

The undersigned certifies that service of the above and foregoing request for extension was made by emailing a copy to daappeals@douglascountyks.org. on this 28 day of July, 2023.

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Jessica R Kunen