NO. 21-123,622-A

IN THE
COURT OF APPEALS OF THE
STATE OF KANSAS

STATE OF KANSAS
Plaintiff-Appellee

vs.

TOMMY J. MAY
Defendant-Appellant

BRIEF OF APPELLEE

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

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STATEMENT OF THE ISSUES

I. **Save one failure to properly define "knowingly," the court committed no instruction errors—and certainly none requiring reversal. (Appellant's Issues I, II, VI, & VII.)**

II. **The court's handling of May's testimony violated neither his right to testify, his right to present his defense, nor his right to a fair trial. (Appellant's Issues IV & VIII.A)**

III. **The State's at-trial endorsement of Michael Jordan was no abuse of the district court's discretion. (Appellant's Issue V)**

IV. **Neither Jordan's unobjected-to testimony about May's methamphetamine use, oxycodone sales, and gun possession, nor the district court's limiting instruction, violated K.S.A. 60-455. (Appellant's Issue III)**

V. **The district court properly denied May a new trial. (Appellant's Issue VIII.B–C)**

VI. **No errors combined to deprive May of a fair trial. (Appellant's Issue IX)**

STATEMENT OF FACTS

Around 9:30 p.m. on July 2, 2018, Tommy May shot Marzetta Yarbrough. He shot Jeremy Jones. He drove his vehicle into an officer and several items of property. And in the vehicle he abandoned just before he was arrested, methamphetamine was recovered. At May's trial, the State presented one version of these events; May presented another. The jury convicted May of ten counts as charged. (R. 1, 358–62; R. 24, 1813–16.)

The State's Evidence

Marzetta Yarbrough. Passing her former apartment building walking home from the grocery store, Yarbrough decided to stop and look for a ride. (R. 18, 301–04, 307–14, 316, 367.) Her former next-door neighbor at the 713 West 25th Street fourplex, Tommy May, saw her and invited her into his apartment. (R. 18, 300, 317–18, 268, 370–72.) He offered her some cake. She accepted. (R. 18, 318.) They spoke for a period, during which she refused May's repeated offers to join him as he smoked methamphetamine. (R. 18, 319–20, 406.) Eventually, she excused herself to see if she could find a ride next door. (R. 18, 305–06, 320–21.)

Next door, Yarbrough ultimately encountered Jeremy Jones; Jeremy Jones' girlfriend, Micki Ryan; and Micki Ryan's friend, Regina Sailor. (R. 18, 320–222; *cf.* R. 18, 443, 455, 460–61; R. 19, 553–55.) Sailor agreed to give Yarbrough a ride, but first wanted Yarbrough to "give her a minute." (R. 18, 320–22.) While there, Ryan asked Yarbrough whether she had

any methamphetamine. (R. 18, 322–23.) Yarbrough told her she did not, but she mentioned that May did. (R. 18, 322.) They discussed Yarbrough approaching May to see if he would give her a "dub"—$20 worth or .2 grams of methamphetamine—for Ryan. (R. 18, 322–23.) Yarbrough agreed and returned to May's apartment. (R. 18. 322–24.)

When Yarbrough entered, May was still smoking methamphetamine. (R. 18, 234.) She told him of Ryan's request for a "dub," and he agreed. (R. 18, 324.) She collected an amount into the napkin she had used earlier and asked May whether the amount was okay. (R. 18, 324–25.) May told her, "Whatever you think it's supposed to be." (R. 18, 324–25.) And she left her things behind to go take the methamphetamine to Ryan. (R. 18, 325–26.)

When she returned, May was "[e]xtremely different." (R. 18, 325–26, 342–43.) He "was very, very, very…upset" and "angry" at her about "the transaction of the meth." (R. 18, 326–28.) "[H]e was screaming" from his living room's high back chair, saying "he's not gonna keep going through this with bitches and people." (R. 18, 326–28, 341–42; *cf.* R. 38, State's Ex. 56.) She had seated herself on the couch to his right. (R. 18, 326, 341–42.) "[R]eally fast," May then took a gun from behind his back and "slammed it" down on her head, striking her at her hairline. (R. 18, 328–29, 428.) She started bleeding and "went down." (R. 18, 328–29.) She asked him what was going on, and he continued "screaming and kicking [her]." (R. 18, 329.) He again struck her head with his gun. (R. 18, 329–30, 341, 344.) She screamed. (R. 18, 329–30.) And that "angered him more." (R. 18, 329.) "You bitch," he told her, "you call yourself dry-snitching. I'm gonna have to finish you off now.'" (R. 18, 329–30, 344.)

May then briefly turned away, and she ran for the door. (R. 18, 330–31, 343–45.) At the door, she looked back and "could see [May]…with the gun and it popped." (R. 18, 431.) From "[v]ery close," May shot her in what she believed was her neck. (R. 18, 331–32, 345–

46, 430–31.) She "couldn't walk," fell to a "low crouch," and fled. (R. 18, 331–32, 400–01.)

May followed her as she came outside. (R. 18, 335.) As she worked her way past her former apartment and around the building, she heard Jones say something about her; she heard "May screaming something back;" she heard "a gunshot right at the same time;" and she saw "[Jones'] legs just go down, and then...heard [Ryan] screaming." (R. 18, 331–36, 417–18, 431–32.) She ultimately tried to hide from May, "just buried" in some bushes next to the apartment building. (R. 18, 331–35.) There, she saw May round the apartment building. (R. 18, 337.) He was still holding the gun. (R. 18, 337.) She could hear him yelling, "foul profanity, where you at" and feared "he'd shoot [her] again." (R. 18, 338–39.) Next thing she knew, however, first responders were there asking her questions. (R. 18, 340.)

Yarbrough suffered four penetrating injuries, a fractured clavicle, and a laceration to her head. (R. 19, 538–41, 544.) "[T]he same bullet" entered her back, exited on her upper chest's left side, and twice passed through her face. (R.19, 538–41, 544; R. 38, State's Exs. 3–5.) She emphasized May's was the only gun she saw. (R. 18, 428.) She carried no gun. (R.18, 427.) Jones gave her no gun. (R.18, 409.) And she never tried to grab May's gun. (R.18, 428.)

Jeremy Jones, Micki Ryan, & Regina Sailor. Jones (from the kitchen), and Ryan and Sailor (from Ryan's bedroom), all recalled hearing a gunshot and Yarbrough screaming (R. 18, 447–48, 464–65, 480, 490–91; R.19, 557, 559–60, 577.) Jones was the first to go outside. He saw Yarbrough at the bottom of May's stairs, bleeding, screaming, and May exiting after her. (R. 18, 448.) Once he and May had both made their way down their porches' stairs, Jones asked May why he shot Yarbrough and started turning his body to where Yarbrough went. (R. 18, 449, 466–69, 482–83; R. 19, 560.) As he did so, "[his] legs gave out," "[he] fell," and he no longer felt anything below his waist. (R.18, 449–50.) "[He] had taken a bullet." (R. 18, 450.)

Ryan and Sailor both saw May had a gun in his outstretched arm pointed at Jones. (R. 18, 466, 469–71; R. 19, 566–67, 580, 588.) Sailor saw May fire the gun, before retreating into the apartment to hide. (R. 18, 466, 469–72, 481–83, 485, 491.) She never saw Jones make any movements towards May. (R. 18, 483–84.) When Ryan heard May's gun fire, she saw Jones drop from her view. (R. 19, 566–67, 559–61, 578–80, 588.) Ryan rushed to Jones, who was screaming, "I can't feel my legs," and May stepped over Jones and headed towards the direction Yarbrough went. (R. 18, 450–51, 473; R. 19, 561–62, 564, 570, 582.) At Jones' urging, Ryan then ran inside, grabbed a phone, called 911, and hurried back to Jones' side. (R. 19, 562, 582.) May passed back by Jones and Ryan, still with the gun in his hand. (R. 19, 561–62, 569.) Only after May entered his apartment, came back outside, got in his vehicle, shattered his vehicle's rear window backing into a dumpster, and left, did she feel safe enough to name May as Jones' shooter. (R. 19, 562–64, 569, 571; R. 18, 452, 472.) When Sailor exited around that time, Jones was in the place she had last seen him. (R. 18, 473, 488–89.)

At trial, evidence showed that the bullet that struck Jones made him paraplegic. (R. 18, 453, 502.) It entered the left side of his back's shoulder area, traveled through him from left to right, impacted two of his thoracic vertebrae, and came to rest just right of his spine. (R. 18, 453, 498–99; R. 19, 565.) The State introduced a recording of Ryan's 911 call. (R. 19, 568; R. 39, State's Ex. 6.) Neither Ryan nor Sailor saw Jones or Yarbrough with any guns that day. (R. 18, 473; R. 19, 571.) And Jones, Ryan, and Sailor all denied that Jones had any tools or weapons when he was shot. (R. 18, 450–51, 472–73; R. 19, 561–62, 567.)

Adama Deen. Deen lived with a friend of May's, Michael Jordan, at an apartment building "just right by Alabama [Street]." (R.18,507; R.22,1299.) May came to the apartment, wanting in the building. (R.18, 510–11.) Inside, May mentioned something "about shooting

somebody." (R. 18, 512–14.) May told him, "he just shot some people." (R. 18, 512–14.) Deen told May he had to leave. (R. 18, 512–13.) May said nothing about being robbed, shot, or injured. (R. 18, 513.) And Deen saw no blood on or injuries to May. (R. 18, 513.)

Sgt. Robert Neff. Driving to the shooting scene, uniformed and in his marked patrol vehicle, LPD Sergeant Robert Neff learned that a male suspect of a particular description named "Tommy May" had just fled the scene driving a green SUV. (R. 20, 811–13, 823–24.) While waiting at an intersection to turn left onto Alabama Street, toward the direction of the shooting, Sgt. Neff spotted "a lone male occupant" travelling along Alabama Street away from the direction of the shooting in "a green GMC Jimmy." (R. 20, 811–14, 818–19.) Sgt. Neff noticed that as the Jimmy's driver turned right to travel the direction exactly opposite of him, the Jimmy's driver stared at him to an "unusual" and "pretty hard" degree. (R. 20, 814–15.) So, he made a three-point U-turn to follow the vehicle. (R. 20, 815, 818–19.)

The Jimmy made a "very last moment," illegal left-hand turn from the straight lane at the next intersection. (R. 20, 816, 819–20.) He followed the Jimmy left. (R. 20, 816, 819.) As he did so, the Jimmy accelerated to double the posted speed limit. (R. 20, 816, 819–20, 852.) He activated his lights and sirens. (R. 20, 820.) When he did so, the Jimmy attempted a hard right turn at the next intersection. (R. 20, 820.) But it "went off the road" into a homeowner's yard, "crashed into [a] fire hydrant," and "high-centered" itself. (R. 20, 820–21, 853.)

Sgt. Neff stopped his vehicle in the illuminated street, "about 30 feet" "directly behind" the Jimmy. (R. 20, 821, 849–50.) He used his vehicle for cover, drew his gun, and started yelling for the driver to "show…his hands" and turn the car off. (R. 20, 822–24, 829.) The Jimmy had no back window, so Sgt. Neff believed the driver should have had a "pretty clear" view of him. (R. 18, 823.) He could hear the driver shout back to him "something to the effect

of, 'I'm trying.'" (R.20, 824.) But the driver "clearly wasn't trying." (R.20, 824.) He could see the vehicle's reverse lights come on and tires spinning, as the Jimmy's driver "put[] his vehicle into forward and reverse, forward and reverse,...trying to rock it back and forth to get it unstuck from the fire hydrant." (R. 20, 823–24, 854, 868.) Because he could hear the driver at times respond "in cadence with [his]" commands, he believed that the driver heard him even over the Jimmy's revving. (R. 20, 857, 868.) And indeed, the homeowner of the yard in which the driver had high-centered the Jimmy heard, from inside his home, "what [he] thought was a police officer's voice over a loudspeaker. (R. 20, 897, 904.) But the driver continued rocking the Jimmy until it freed itself, came "full reverse...straight back," "smashed...the front end of [his patrol] car," and "then came pretty much right at [him]." (R. 20, 825, 827.) Sgt. Neff had run backwards and out into the middle of the street to avoid the Jimmy reversing over him. (R. 20, 825, 827–28.) He believed the driver intended to try and hit him. (R. 20, 856–57.)

"[A]bout 40 feet" away, the vehicle stopped. (R. 20, 829, 860.) The driver had "many options," Sgt. recalled, of directions to travel other than where he was standing. (R. 20, 833–34.) But the Jimmy's driver "drove forward, turned right" so that "the center of [the Jimmy] was...pointed directly at [him]," and drove "right at [him] at a high rate of speed." (R. 20, 829, 835, 848, 859.) He realized he could not get out of the way quickly enough and started firing his weapon. (R. 20, 830, 860–61, 870.) The Jimmy made a last moment veer right, and only "the front left headlight area," rather than the "dead center of the [Jimmy]," "hit [him] dead center." (R. 20, 830–31, 860–61.) The impact upended him, injured him, but recovered himself "pretty fast." (R. 20, 830–31, 835–38, 860–62; R. 38, State's Exs. 93–98.) The Jimmy "accelerated away...at a high right of speed" back down the opposite direction of the street they had originally traveled, and he ran after the Jimmy, firing his weapon's remaining

rounds. (R. 20, 831–32, 835, 849, 866.) At the next intersection, after radioing in everything that had happened, he and another officer ultimately found the Jimmy empty, "just stopped in the middle of the street, still running, with the door open." (R. 20, 832–33, 866–67.)

All these minutes' events were captured on video, audio, or both, by traffic camera footage and Sgt. Neff's in-car recording equipment. (R. 39, State's Exs. 89, 91.) They also were observed by two area homeowners. (R. 20, 896–99, 908–13, 915–17.)

Ofc. Ryan Robinson. Another uniformed LPD officer searching the area, Officer Ryan Robinson, spotted a suspect hiding in a bush. (R.20, 953–54, 960–62, 965–66; *see* R.39, State's Ex.102.) When Ofc. Robinson shouted, "Police, show me your hands," the suspect took off running. (R.20, 954–55, 961–62, 966–67, 972–73; *see* R.39, State's Ex.102.) The suspect continued to run until he reached and started to scale a fence. (R.20, 955, 960.) But, by time Ofc. Robinson and others caught up with him, Ofc. Robinson observed, "[the suspect] was exhausted," "just kind of let go of the fence," and laid down. (R.20, 955, 960.) Ofc. Ryan had to tell the suspect to "stop resisting" "several" times before he and other officers succeeded in placing the suspect in handcuffs. (R.20, 956, 972; *see* R.39, State's Ex.102.) When asked his name, the suspect originally told Officer Robinson his name was "James Mason." (R.20, 981; *see* R.39, State's Ex.174.) The ID located within the suspect's wallet, however, identified his as "Tommy May." (R.20, 982.) Save a scrape-wound on his arm, May had no observable injuries and wore no medical equipment. (R.20, 964–65, 969, 983; *see* R.38, State's Ex.175.)

The Investigative Evidence. Scene investigations revealed further evidence. Officers found no weapons or objects around Jones. (R. 19, 603, 613.) The "pooling of blood" found around Jones indicated that Jones bled while "stationary or motionless." (R. 19, 676–77.) In contrast, a trail of blood indicating that "whoever [was] bleeding [was] moving," led from May's living

room to where Yarbrough was found. (R. 19, 599, 605, 622–23, 664, 677.) Samples of that blood trail taken from May's living room floor near Yarbrough's belongings, the interior side of May's apartment door, May's porch stairs, and an area in the driveway, all tested positive for DNA consistent with Yarbrough's DNA. (R. 19, 765–70; R. 21, 1221–22, 1234–35.) No drugs, prescription or otherwise, were found. (R. 19, 713–14, 722, 737–38.) But cake, a "residue"-dirtied butterknife, and Yarbrough's groceries and bloodstained belongings were found. (R. 19, 679–80, 682, 686, 688–91; R. 38, State's Exs. 39, 44, 53, 56–61.) May's door "was locked;" officers "had to break the door" to gain entry. (R. 19, 620–21.)

The gun evidence collected at both scenes indicated that May left the apartments with a gun that he had fired there only twice. Two nine-millimeter cartridge casings were found at the apartments. (R. 19, 674, 680.) One was discovered in May's apartment, settled near the door where Yarbrough's blood was found. (R. 19, 680–81; R. 38, State's Exs. 40–42.) The other was found outside the apartment, settled at the bottom of the stairwell which divided May's and Jones' front porches. (R. 19, 673–76; R. 38, State's Exs. 14, 30–33.) Officers located no other bullet defects or cartridge casings at the apartments. (R. 19, 702–05.) They found a hole in May's bedroom comforter; but because the bed was made, appeared undisturbed, no blood was observed in the room, and the defect did not carry through the sheet underneath the comforter, they determined the hole was unrelated to Yarbrough's and Jones' shootings. (R. 19, 695–96, 710, 736–37; R. 38, State's Ex. 73–75.)

Away from the apartments, investigators discovered a Hi-Point, nine-millimeter semiautomatic pistol, with the magazine removed, the safety off, and one live round of nine-millimeter ammunition chambered. (R. 20, 1033–35, 1044–45.) The gun—and no other black or dark objects—was located in the area where a forensically "clarified" version of Sgt. Neff's

in-car video showed that May had discarded an object out his passenger window. (R. 20, 846, 853, 878, 887, 1032–33, 1036–37, 1044; R. 21, 1070–71; R. 38, State's Ex. 114–15; R. 39, State's Ex. 99.) Firearm testing confirmed that the pistol had fired the two nine-millimeter rounds found at the apartments. (R. 21, 1133–34, 1140, 1142–43; R. 38, State's Exs. 157, 160.) DNA testing of four blood samples taken from the weapon showed that all four contained DNA consistent with Yarbrough's DNA profile and one also contained DNA consistent with May's DNA profile. (R. 20, 1052–54; R. 21, 1090–94, 1096, 1226–34, 1258.) A gun holster sized to fit the recovered Hi-point pistol was found in May's bedroom closet. (R. 19, 697–98, 721; R. 38, State's Exs. 76–78.) And samples collected from May's hands and face all confirmed the presence of gunshot residue. (R. 20, 80 –04; R. 21, 1112–18.)

Regarding the area surrounding May's flight from Neff, a trail of fluid traced May's vehicle's path from the area it had reversed free of the fire hydrant to where officers found it abandoned. (R. 20, 1030–31, 1040–41; R. 38, State's Exs. 109–12, 117, 119–26.) That path accorded with Sgt. Neff's testimony. (R. 20, 942–43, 1030–31, 1041, 1074; R. 38, State's Exs. 105, 107–10, 117, 119–26, Def. Ex. 133.) The path showed May's vehicle at one point struck and damaged a detached garage. (R. 20, 943–47; R. 38, State's Exs. 126–28.) Both along the concrete pad extending next to the garage and atop one of the trashcans sitting nearby, investigators found drops of blood that tested positive for DNA consistent with May's profile. (R. 20, 1043–44, 1054–55; R. 21, 1079–80, 1222, 1236–37; R. 38, State's Exs. 129–32.)

Processing the interior of the vehicle itself, investigators recovered 0.55 grams of methamphetamine "in the front driver's side floorboard" (R. 21, 1154, 1164–67, 1200, 1202.) A certificate of title found identified "Tommie May" as the vehicle's registered owner. (R. 21, 1183–84.) And though investigators used various light sources to search the vehicle's "light

tan" interior for blood or tissue, they found neither. (R. 21, 1158, 1184, 1190–93.)

Michael Jordan. At trial, the State endorsed and called a witness May had formerly subpoenaed but decided not to present, Michael Jordan. (R.22,1274–77.) Jordan testified May had been "very angry" about an incident a month or less prior to the shooting, where May had served as his intermediary to buy "something" from Jones, but Jones took the $200 and gave May nothing. (R. 22, 1301–03.) May felt taken advantage of, that the incident made him look "weak," and asked Jordan "[i]f [Jordan] wanted him to kill [Jones]." (R. 22, 1302–03.)

Also "a couple weeks before the shooting," May showed him "a gunshot" "hole" "in the middle" of his bed. (R. 20, 1304–05.) May told him he did it because "he was tweekin'" and "seein' things." (R. 20, 1323.) Because Jordan at times kept the items at his apartment for May, Jordan knew May had "nine-millimeter[]" ammunition and a maybe six-inch, "[b]lack nine-millimeter handgun." (R. 22, 1303–04, 1310–11, 1322.) Because he "set up the buys for [May]," Jordan also knew that, "every month," May "immediately" sold the oxycodone he received from the Veteran's Administration (VA) "to fuel his drug habit." (R. 22, 1323–24, 1326, 1331–32.) Because May had "failed a UA" "end of June" 2018, however, Jordan thought May had no pills from the VA at that time. (R. 23, 1326, 1332.)

"[T]en, eleven o'clock" the day of the shootings, Jordan and May were at Jordan's apartment. (R.22,1305–06.) Asked by the State what happened there, Jordan said he and May "got high" and talked. (R.22,1306–07.) Unprompted, he added that "[May] was agitated" and needed "calmed down," in part because he and May "had been up a couple days getting high." (R.22,1306–07.) Jordan gave May "an eight ball" (3.75 grams) of methamphetamine. (R. 22, 1308.) And after May drove him to work, he never saw May again. (R. 22, 1308–09.)

Since that day, Jordan had twice spoken with May about the shootings. (R. 20, 1311–

12, 1316, 1324–25.) The first time, May told him that Yarbrough had come over looking for a ride, went "back and forth next door," and "[May] thought"—but was "tweaking a little bit" and so "didn't know" for sure—"she took some dope from him." (R. 22, 1312–13.) He told Jordan, "'I was pretty much tired...of people trying to get over on me.'" (R.22,1313–14.) So, in response, he "grabbed his gun" and, in his words, according to Jordan, "'shot the bitch.'" (R.22, 1313–14.) Jones came outside. And when Jones twice asked May why he shot Yarbrough, May, according to Jordan, said, "'Fuck you, man, fuck you' and...shot [Jones] in the back," "[p]retty much because of the...$200." (R. 22, 1314.) Jordan said May told him he then came to Jordan's, but "was so high he forgot he [had] dropped [him] off at work" and left after he told Deen "he just shot two motherfuckers." (R.22, 1315.) May also said the police chased him after he left, he "tr[ied] to throw the gun out the window, "when he stopped...the police had shot at him, and then he backed up to try and run the police over or something like that." (R.22, 1315.) Jordan said May mentioned nothing about Yarbrough or Jones trying to rob him. (R.22, 1314.) The second time he spoke with May, however, Jordan said May told him exactly that. (R.22, 1316.) Then, for the first time, "[May] said that [Yarbrough] had the gun;" "[she] shot him;" and "[she] and [Jones] w[ere] trying to rob him." (R.22, 1316.)

May's Evidence

May testified in his own defense. Doing so, he discussed his military background. (R. 22, 1383–84, 1418; R. 23, 1452–53, 1521.) He noted various of his claimed medical conditions and treatments, including that he had: cancer; PTSD; tunnel vision; hearing issues; the need to "consistently wear[] a back brace;" "had just had a heart attack" before the trial; and, at the time of the shootings, had just been released from the VA hospital and "was weak" and "debilitated" with pneumonia. (R. 22, 1385, 1389, 1395, 1397–98, 1413–14, 1421, 1428; R.23, 1452–53, 1472, 1478–80, 1487–90, 1551, 1527, 1560–62, 1567–68, 1578–80, 1588, 1592–93.)

He also discussed that an incident where his car had been stolen and "several" attempted break-ins had made him "afraid in [his] apartment." (R. 22, 1388–90; R. 23, 1512–13.) But specifically as to his actions on the day of the shooting, he offered the following account.

The Shootings. Sometime after 9:00p.m., Yarbrough knocked on his door carrying a purse and groceries, and he let her inside. (R.22, 1392–93; R.23, 1540.) Yarbrough immediately started "asking...for money to help them sell drugs."(R.22, 1393.) She also, once seated in his living room, asked him if she could have some of the VA-prescribed pills he took "with [his] chemo," which were "laying on the [coffee] table" near them. (R.22, 1393–95; *see* R.38, State's Ex. 53.) He "told her she wasn't getting anything but out of [his] apartment." (R.22, 1395.) She immediately asked to use his bathroom and grabbed, from her purse, "a little black coin purse" (later found to contain a hypodermic needle but no other drug paraphernalia, such as a spoon or lighter). (R.22, 1396; R.23, 1512; *see* R.38, Def. Ex. 100.) And though he told her she was "not gonna be shooting up in [his] house," he did, ultimately, "renege[]" when she asked to "sit in his car." (R.22, 1396–97.) Before he left the window to "put his medication away," he saw her sit, door open, in his car's "back seat." (R.22, 1397.)

Minutes later, from his bedroom, he heard someone enter his apartment. (R.22,1398–99.) Rather than investigate, he remained seated on his bed. (R.23,1514–16.) Yarbrough entered his room. (R.22,1399–1400.) Her hand held a scarf, and she "made a reference to the money"—a "disability check" he had received on a debit card that night—and his "pills." (R. 22,1400–01.) With his "peripheral vision," he then saw her reveal from the scarf a handgun. (R.22,1401; R.23,1516) He remained seated (though he "fe[lt] afraid"), and "she shot [him]." (R.22,1401,1418; R.23,1517.) The bullet grazed his left arm, made the hole officers discovered in his comforter, and wholly "paralyzed" his arm. (R.22,1401,1411; R.23,1517–18; *see* State's

Exs.73–75,175.) With his right hand, though, he managed to "snatch[] the gun from [Yarbrough]" and "hit her upside the head." (R.22,1401; R.23,1518.) She "yelped," started bleeding heavily, and ran into the living room. (R. 22, 1401; R. 23, 1518–19.)

Though "alarmed" when she next "ran to her [grocery] bag," "picked it up and threw it at [him]," he then followed her to the living room. (R. 22, 1402–03; R. 23, 1519–20.) Because he "didn't want to hurt her any more than [he] had to hurt her to keep her from killing him," he tried to keep her much shorter frame standing, across the living room's coffee table, opposite of his 6'4" tall frame. (R. 22, 1402–03; R. 23 1521–22.) But she "pursued him." (R. 22, 1403.) "[B]leeding profusely," she "started flailing her arms and windmilling" at him. (R. 22, 1403; R.23, 1520; *see* R.38, State's Exs. 67–69.) "Tr[ying] to knock her out," he twice more hit her head with "the frame" or "side of the gun." (R. 22, 1404–06; R. 23, 1522.) Yarbrough then "looked at [him] like a dumb brute," turned around, walked to her bag, dropped to her knees, and started "wailing at the top of her lungs for Jesus." (R. 22, 1406.) He then "turned away from her," to, as he told her, "'get a towel and stop [her] from bleeding.'" (R. 22, 1407.)

But before he could, she "jumped up," "stumbled to the door," and went from "wailing for…Jesus to screaming Jeremy Jones' name." (R. 22, 1407–08; R. 23, 1511.) He had been hoping she would run for the door." (R. 23, 1524.) By then, though, he recognized the gun he was holding as the one Jones had used a month prior to rob him of Jordan's $200. (R. 22, 1410; R. 23, 1482, 1485–86, 1488–89, 1552–53.) So, hearing Yarbrough shout Jones' name, he "assumed" Jones may be coming, and he "ran behind [Yarbrough]." (R. 22, 1408–10.)

As "[Yarbrough] was fumbling with the [door's] lock," he grabbed the door. (R. 22, 1409.) The way he had originally taken the gun from her, his right hand held the gun, not by the grip as somebody would normally carry a gun, but with his palm over the gun's ejection

port and the muzzle pointing in his hand towards, rather than away from, his body. (R. 22, 1409; R. 23, 1503–04.) He placed that hand on the door above Yarbrough, who then was "laying against the door." (R.22,1409–11.) He was "trying to keep her from throwing the door wide open," in case someone was on the other side. (R.22,1409–10; R.23,1502–03,1524–25.) But he "was weak" and "had pneumonia." (R. 23, 1578–79.) Yarbrough "manhandled [him] out of the way." (R. 22, 1410.) "The gun went off." (R. 22, 1410.) He "didn't even know she was shot." (R. 22, 1412.) But "that's how she was managed to be shot in this unusual place." (R.22,1410.) "[T]hat's why blood was all over the door."(R.22,1410.) "She couldn't have been shot in any other way." (R. 22, 1410.) "[He] could have [killed her], if that's what [he] wanted to do." (R. 22, 1412.) But at no point did he intend to shoot her. (R. 22, 1411; R. 23, 1488, 1492.) It was entirely "an accident" and "incidental to her actions." (R.22, 1411; R.23, 1526.)

Nobody rushed into his apartment after that second gunshot sent Yarbrough "bolt[ing] out the door." (R. 22, 1412; R. 23, 1525.) He "could have" shut his door, locked it, and called the police. (R. 23, 1526–28.) He "had just got[ten] out of the hospital," "was mortally sick," and the police "would have" handled the problem for him. (R. 22, 1413; R. 23, 1527–28.) But, instead, he thought "to get out of [t]here." (R. 22, 1413, 1419.)

"[T]wo steps" out the door, he saw Jones running at him "in a tunnel." (R. 22, 1413–14, 1419.) "[He] say[s] tunnel because it's post traumatic stress syndrome." (R. 22, 1414.) One of the symptoms is "no vision in your periphery, and that's how [he] saw" Jones. (R.22,1414.) Jones was approaching his porch's stairs from "the middle of the driveway." (R.22,1419; R.38, State's Ex.26.) Jones "raised his arm," said, "'Motherfucker, you just shot my home girl,'" and (though dark outside) "[he] caught the gleam of metal." (R. 22, 1419, 1433.) He thought "[Jones] has a gun…, I better shoot first." (R. 22, 1420; R. 23, 1481.) He had never

seen Jones shoot anybody. (R. 23, 1481–82.) But he "had seen [Jones] knock several people out," and Jones had "robbed [him] with a gun." (R.22,1410; R.23,1482,1485–86) So, he "shot first," not to kill, but for Jones' shoulder (R. 22, 1420; R. 23, 1492, 1533.) "The reason [Jones] got shot behind his shoulder is because…when [Jones] saw what [he] was fixing to do, [Jones] turned his body." (R.22,1420; R.23,1533.) Once shot, Jones "s[a]t down." (R. 22, 1420.)

He then went "back inside…to call the police." (R. 22, 1420–21.) But "[he] ha[s] this cancer;" he "started having flashbacks;" and "the sight and smell of all the blood" within his apartment made him "violently sick." (R.22,1420–21,1429.) So, he "fled." (R.22,1421,1429.) He left his door open—not closed, not locked. (R. 23, 1509.) Jones had moved "about 15 feet" closer to Jones' apartment and was now facing an entirely different direction. (R. 22, 1420, 1429; R. 23, 1535–36.) As he headed past Jones to his car, he "tripped and dropped the pistol." (R. 22, 1429.) The gun and its magazine separated. (R. 22, 1429–30.) He thought leaving the gun "was a threat to [him]." (R. 22, 1433.) So, he searched for it until he found it. (R. 22, 1430–34.) During that time, he saw that Ryan took Jones' weapon, found the magazine he had been searching for (which was simply "laying next to… Jones"), and ran the items inside. (R. 22, 1430–34; R. 23, 1538–40.) But he realized this only after he had walked back past Jones and—"not a[s] a gloat"—told Jones, "'You're not so tough now that I took you're gun from you.'" (R.22,1434–35; R.23,1537–38,1582,1594–95.) He then turned back, headed for his vehicle, and left. (R.22,1435–36.) Owing to an "extreme" turn that he took to avoid hitting Jones and the fact he "couldn't see," he "ran over…the blue trashcans that w[ere] along the privacy fence" (the ones that "don't" look run over in State's Ex. 12) and "tore up" his vehicle backing into a metal dumpster. (R.22,1436–38; R.23,1509–11; *see* R.38, State's Ex. 11–12.)

Flight & Arrest. He drove straight to Jordan's. (R. 23, 1450.) He "was shot," "couldn't

see," and "couldn't drive" (though he drove there without incident). (R.23, 1450–52, 1542–43.) He went there looking for a particular someone to drive him to the hospital. (R. 23, 1450, 1542–43.) But he found only Deen.(R.23,1450.) He did not tell Deen he had been robbed. (R. 23, 1543.) He did not ask Deen for help, for a ride to the hospital, or for him to call 911. (R. 23, 1543–44.) And he certainly "didn't say [to Deen] that he had shot two people[,] because [he] didn't." (R. 23, 1490.) What he told Deen, rather, was "that [he] had shots on [his] arm." (R. 23, 1490.) But he did not show Deen his arm. (R. 23, 1543.) And, actually, he *did* tell Deen he had just shot somebody (R. 23, 1543.) And "[n]o," before he "took off to the hospital alone," "[he] didn't" say that he himself had been shot. (R. 23, 1450, 1543, 1548.)

He drove normally for the hospital until he turned right off Alabama Street, onto 23rd St.; *then*, he started "speeding." (R. 23, 1549–52.) He did not see Sgt. Neff at that intersection. (R.23,1551.) He "didn't know" Sgt. Neff turned to follow him. (R. 23, 1552.) He did, however, drive recklessly. (R.23,1576,1586–87) Approaching the Louisiana St. intersection, he "couldn't see" and "couldn't see the left-hand lane, so [he] turned [left] out of the through lane...on[to] Louisiana."(R.23,1586–87.) He then accelerated. (R.23,1451,1586.) Still, he "didn't know Sergeant Neff was behind [him]." (R.23,1556,1587.) He saw no lights. He heard no sirens.(R.23,1587) Because his "vision was bad" (the experience of "hav[ing] been through a lot of military operations" had predisposed him to experience tunnel vision when faced with certain events) and he "was shot in [his] left arm," he also "couldn't see" and "couldn't drive."(R.23,1451–53,1464) And when he only last-minute noticed a crosswalk at the 21st St. intersection, he "overcompensated," "rotated the wheel," and ran into "apparently a fire hydrant."(R.23,1451–52,1464.) He wore no seatbelt.(R.23,1464.) So, the impact "threw [him] forward."(R.23,1464.) He "hit [his] head on the steering wheel" and was then thrown to floor.

(R.23,1464) "Once [he] got some of [his] wits about [him]self," he sat himself up.(R.23, 1464–65.) And though it was an important piece of evidence against Yarbrough and Jones, he "threw [the gun]...out the window." (R.23,1464–65,1485–86, 1546–47, 1577.)

When he then heard what he thought was the yard's homeowner yelling at him to back out of his yard, he started "rocking the vehicle back and forth." (R.23,1465–66.) It would have made sense to operate the vehicle normally. (R. 23, 1158–59.) But he initially worked his vehicle's pedals and gear-shifter laying across his vehicle's floor, on his back, with his head by his vehicle's passenger door, and using only his right hand. (R. 23, 1466, 1557–59.) "[Sgt. Neff's] video revealed that apparently at some point," though, he "jumped over in the driver's seat." (R.23,1466,1559) His vehicle had rearview mirrors. (R.23,1554) Its front windows were down.(R.23,1554–55) Its back window was broken out.(R.23,1555) And the area was well lit. (R.23,1554) But he never saw Sgt. Neff or any flashing red and blue emergency lights. (R. 23, 1465,1467,1554,1561.) He never heard or turned around and responded to Sgt. Neff shouting commands.(R.23,1466,1555) Nor, in his view, did Sgt. Neff's in-car video show him doing as much. (R. 23, 1555.) He was wholly unaware any patrol car or officer was behind him. (R. 23, 1466–67, 1587.) But once he freed his vehicle, it "shot back...much faster than what [he] had intended" and "hit something." (R. 23, 1467.) "[A]pparently that was a patrol car." (R. 23, 1467.) Even upon impact, he kept backing up without braking. (R. 23, 1559–60.) His car "ricocheted off." (R. 23, 1475.) It turned him "like 90 degrees." (R. 23, 1468.) And he ended up on the west side of the intersection, on 21st Street, facing east. (R. 23, 1475.)

At that point, he "heard a lot of footsteps running towards [his] vehicle," was fired upon, and so decided to "disengage[] from the confrontation." (R. 23, 1468.) He could hear Sgt. Neff's approaching footsteps. (R. 23, 1562.) But his sense of hearing was too "greatly

diminished" to hear Sgt. Neff's commands. (R. 23, 1561–62, 1564.) Still, he could see no lights flashing from Sgt. Neff's vehicle, which was directly in front of him. (R. 23, 1467, 1560–61.) Because he "had tunnel vision," though, "[he] could" see no one was in front of or near his car. (R. 23, 1472–73, 1562.) He then could have traveled many directions. (R. 23, 1563.) The fire hydrant had damaged his vehicle such that the steering wheel was stuck in a "semi-fixed" left-turning position that made turning right "real hard." (R. 23, 1470–71, 1473.) But nonetheless, laying along his right side, below the dashboard, he "accelerated away" and his "paralyzed" left arm's hand grabbed the wheel and did a "hard right" turn to "turn[] away from the police vehicle." (R. 22, 1411; R. 23, 1468, 1472–73, 1475–76, 1563–65.) He ended up traveling south along Louisiana, back the direction from which he had come. (R. 23, 1473.) And "[a]t some point," Sgt. Neff was in front of his vehicle. (R. 23, 1562–63.) But he did not feel the impact of striking Sgt. Neff. (R. 23, 1555.) He "[n]ever hit [Sgt. Neff]." (R. 23, 1577.)

His vehicle was "steering itself" as he traveled along Louisiana. (R. 23, 1476.) By the time he reached the next intersection, at 22nd Street, the car "turned left, and then it continued to turn because at that point [he] was…tak[ing] cover because [he] was being shot at." (R. 23, 1476–77, 1568–69.) Because "the car…was steering itself" left, he crashed into a garage. (R. 23, 1476–77, 1480.) To later discover that the fluid trail traceable to his car shows him turning left onto 22nd Street, driving parallel to the curb, and then turning right towards the garage, however, that was "something that[was] new to [him]." (R. 23, 1569–72, 1587.) The crash ultimately stopped the vehicle. (R. 23, 1477.) At that point, he decided to get out. (R. 23, 1477.) "[He] fled." (R. 23, 1477.) And he ended up hiding behind a bush. (R. 23, 1577.)

When police arrived and spotted him, he "stood up and ran." (R. 23, 1477–78, 1577.) "Not until after [he] ran," though, did police identify themselves as law enforcement. (R. 23,

1478.) Still, he ran and tried to climb a fence to get away from them. (R. 23, 1478, 1577.) He did falsely name himself as "James Mason." (R. 23, 1490–91, 1578.) When officers took him to the hospital, he complained about neither a head injury nor having hit his head on his vehicle's windshield. (R. 23, 1572–73.) He never complained that his left arm was paralyzed. (R. 23, 1574.) "No, [the wound to his arm] wasn't" deep. (R. 23, 1573; *see* R. 38, State's Ex. 175.) And when hospital staff asked him how he had injured his arm, though he did "tell 'em [he] was shot," he said nothing about having been robbed or shot in a robbery. (R. 23, 1548, 1573.) The officer assigned to provide security for his hospital visit, however, recalled him saying only that "he did not know" how he had injured his arm. (R. 23, 1609.)

The methamphetamine ultimately discovered in his vehicle was not his. (R. 23, 1480.) "Yes, [he] ha[s]" used methamphetamine before. (R. 23, 1530.) But Jordan had not given him methamphetamine that day. (R. 23, 1489.) And he did "have some idea" how the methamphetamine got there. (R. 23, 1480.) Two others had been in his vehicle that day: "the guy that [he] dropped off at his car" and "Marzetta Yarbrough." (R. 23, 1480–81.) As for the gun holster discovered in his closet, that was his. (R. 23, 1544–45.) He is legally prohibited from owning a gun. (R. 23, 1544.) But the holster came "from a female who had been in [his] apartment," and he kept it because you "[n]ever know if somebody needed it." (R. 23, 1583.)

ARGUMENTS AND AUTHORITIES

I. Save one failure to properly define "knowingly," the court committed no instruction errors—and certainly none requiring reversal. (Appellant's Issues I, II, VI, & VII.)

Standard of Review. Issues One, Two, Six, and Seven of May's brief claim instruction error. This Court reviews such claims asking whether any error occurred and whether any error found requires reversal. *State v. Keys*, 315 Kan. 690, 712, 510 P.3d 706 (2022). Unlimited review applies to "whether the instruction was legally and factually appropriate." *Keys*, 315 Kan. at 712. If the instructions given the jury, "considered as a whole, properly and fairly

stated the applicable law and were not reasonably likely to mislead the jury," the failure to give even a legally and factually appropriate instruction "does not constitute error." *State v. Hilyard*, 316 Kan. 326, 333, 515 P.3d 267 (2022). The standard for reversibility depends on preservation. *Keys*, 315 Kan. at 712. Where a defendant has failed to object to the alleged instruction error, this Court assesses reversibility under the clear-error standard. *State v. Jones*, 313 Kan. 917, 927, 492 P.3d 433 (2021). Under that standard, this Court reviews "the entire record" and asks whether defendant has "firmly convinced [it] that the jury *would have*"—not simply *could have*—"reached a different verdict had the...error not occurred." *Jones*, 313 Kan. at 927 (emphasis added); *see also State v. Berkstresser*, 316 Kan. 597, 725, 520 P.3d 718 (2022).

Preservation. May neither requested nor objected to the omission of either a self-defense or attempted voluntary manslaughter instruction in relation to Yarbrough's shooting. (*See* R. 23, 1627–35; Appellant's Br., 13, 18.) Nor did he object on his now-argued grounds to the court's given criminal-possession-of-a-weapon and aggravated-battery instructions. (*See* R. 23, 1659–60, 1662–66; R. 24, 1704; Appellant's Br., 45, 48.) Notwithstanding any assertion of a constitutional rights deprivation, this Court ought to review his claims for clear error. *See Jones*, 313 Kan. at 927; *State v. James*, 309 Kan. 1280, 1301, 443 P.3d 1063 (2019).

A. May invited his alleged instructional errors.

May "may not invite error and then complain of that same error on appeal." *State v. Gulley*, 315 Kan. 86, 91, 505 P.3d 354 (2022). Courts refuse to consider instruction-error claims "when the trial court gave instructions that defendant requested or agreed to." *Gulley*, 315 Kan. at 91. This includes when a defendant indicates that the court ought not give a particular instruction. *State v. Jones*, 295 Kan. 804, 812–13, 286 P.3d 562 (2012). It also includes "when a party requests the...instruction before trial, the error was as obvious [then] as when the judge gave the instruction, and the party did not present...the trial judge the same

objection...made on appeal." *State v. Pattillo*, 311 Kan. 995, 1014–15, 469 P.3d 1250 (2020).

May proposed the given instructions he now challenges and opposed (or as good as opposed) the omitted instructions he now seeks. He requested pattern instructions for criminal possession and aggravated battery. (R. 1, 300, 305, 307.) The jury received those instructions. (R. 1, 346, 348; R. 24, 272–74.) He could have determined before trial those instructions should be changed in the manner he now suggests. But he raised "[n]o objection" to the latter. (R. 23, 1659–60; R. 24, 1704.) And he objected to the former only on other grounds. (R. 23, 1662–66; R. 24, 1677–78, 1704;) *Patillo*, 311 Kan. at 1015. He invited any error arising from those instructions. *See Pattillo*, 311 Kan. at 1014–15; *Jones*, 295 Kan. at 811–12.

As for any voluntary manslaughter instruction, the court invited defense counsel's view on whether the instruction ought to be given in relation to Yarbrough's shooting; in response, defense advised, "I don't think it should be included." (R. 23, 1631–32.) The court did as it was told. May invited any error arising from the instruction's omission. *See Jones*, 295 Kan. at 812–13. And because both voluntary manslaughter (which includes imperfect self-defense) and self-defense require that May have acted under the subjectively sincere belief that his safety necessitated shooting Yarbrough, the fact he wished to keep that issue from the jury necessarily meant he did not wish to have the jury consider that issue *and* whether his belief was objectively reasonable. *Compare* K.S.A. 21-5404(a)(2) *with* K.S.A. 21-5222(a)–(b); *cf. State v. Harris*, 313 Kan. 579, 591–92, 486 P.3d 576 (2021). And underscoring the point, defense counsel: (1) voiced no disagreement with the court's and State's understanding that the defense was decidedly uninterested in raising self-defense in relation to Yarbrough's shooting; (2) expressed the self-defense instruction should come after the instructions related to Yarbrough's shooting and before the instructions related to Jones' shooting; and, (3) with his

own suggestions incorporated, approved the court instructing the jury that May raises, and the jury ought to consider, self-defense in relation to Jones' shooting only. (R. 23, 1645–55; *cf.* R. 1, 340–45.) May cannot direct the court not to give an imperfect self-defense instruction; approve the court instructing the jury that, "[a]s to the charges [regarding Jones] only, [May] raises self-defense as a defense;" and now complain that the court failed to sua sponte include a self-defense instruction concerning Yarbrough. (R. 1, 340); *see Jones*, 295 Kan. at 812.

B. The district court appropriately omitted a Yarbrough-specific instruction on self-defense. (Appellant's Issue I)

Legally Inappropriate. Self-defense is a legally valid defense to premeditated-first-degree and intentional-second-degree murder. *State v. Haygood*, 308 Kan. 1387, 1404, 430 P.3d 11 (2018). "'[I]nconsistent theories of defense are permissible.'" *State v. Simmons*, 295 Kan. 171, 176, 283 P.3d 212 (2012). And generally, "[a] defendant is entitled to an instruction on every affirmative defense that is supported by competent evidence." K.S.A. 21-5108(c). Under this case's facts, however, it was not legally appropriate for the district court to have sua sponte raised self-defense as a defense to Yarbrough's shooting on May's behalf.

May cites numerous cases for the proposition that "he can claim self defense even if he also claims the shooting was accidental." (Appellant's Br. 15–16.) The problem for May, and what distinguishes his situation from those in the cases he cites, however, is that he *never did* claim both defenses. His sole theory of defense to shooting Yarbrough was that of accident, not self-defense. While he claimed he took the gun from Yarbrough and struck her with it in self-defense, the gun discharged by "accident." (R. 22, 1411; R. 23, 1526.) At no point did he intend to shoot her. (R. 22, 1411–12; R. 23 1488, 1492.) His counsel, as just discussed in Section I.A., requested no Yarbrough-specific self-defense instruction; directed the court not to give an imperfect self-defense instruction; and approved instruction limiting any claim of

self-defense to Jones' shooting only. And not less than six times did his counsel's closing arguments emphasize that Yarbrough's shooting was an unintended "accident." (R. 24, 1776–77, 1779, 1781, 1787–88, 1796–97.) Never did his counsel argue—as he did concerning Jones' shooting—that May shot Yarbrough in self-defense. (*See* R. 24, 1774–98.)

Cases from *State v. Sappington*, 285 Kan. 158, 169 P.3d 1096 (2007), to *State v. White*, 55 Kan. App. 2d 196, 410 P.3d 153 (2017), and beyond, have recognized that "imposing a defense upon a defendant which is arguably inconsistent with the one upon which he completely relies—by providing the jury a defense instruction that neither party requests—is akin to denying the defendant the meaningful opportunity to present his chosen theory of defense." *Sappington*, 285 Kan. at 164–65 "'[S]elf-defense is the *intentional* use of reasonable force to fend off an attacker.'" *State v. Betts*, 316 Kan. 191, 198, 514 P.3d 341 (2022) (emphasis added); *see also State v. Thomas*, No. 116,111, 2017 WL 6064660, *8 (Kan. App. 2017) (unpublished opinion). May's claim "that the shooting was an accident...undermine[d] [any] assertion that he acted *intentionally* in self-defense." *State v. Bellinger*, 47 Kan. App. 2d 776, 785, 278 P.3d 975 (2012). Given the facts before the court, "it [was] not the job of the trial court to instruct [May's] jury on [the inconsistent] defense" he now advances. *State v. Brown*, 291 Kan. 646, Syl. ¶ 7, 658–59, 244 P.3d 267 (2011). His now-argued-for self-defense instruction "was not legally appropriate." *White*, 55 Kan. App. 2d at 207.

Factually Inappropriate. May's entitlement to a self-defense instruction depended on whether "[c]ompetent evidence...could [have] allow[ed] a rational factfinder to reasonably conclude that:" (1) May "honestly believe[d] the use of deadly force was necessary against the aggressor to prevent imminent death or great bodily harm to [himself];" and (2) "a reasonable person in [May's] same circumstances would...have perceived the use of lethal

force against the aggressor necessary to protect [May]." K.S.A. 21-5018(c); *Betts*, 316 Kan. at 199; *see also* K.S.A. 21-5222(a)–(b). No evidence established either prerequisite finding.

Neither Yarbrough nor May offered any account that might enable a rational factfinder to reasonably conclude that May believed defending himself against an imminent attack from Yarbrough necessitated shooting her. Yarbrough testified that May attacked her unprovoked, threatened to "finish [her] off," and then shot her as she attempted to flee. (R. 18, 325–32, 342–46, 400–01, 430–31.) May, in contrast, claimed only that he "snatched" the gun and thrice struck Yarbrough with it in self-defense; he otherwise insisted the gun discharged wholly by "accident." (R. 22, 1411; R. 23, 1526.) Once he took the gun, he at no point thought about killing Yarbrough. (R. 22, 1412.) Again, "self-defense requires the *intentional, not accidental* use of force." *Thomas*, 2017 WL 6064660 at *8 (emphasis in original); *see also Betts*, 316 Kan. at 198. "If [May] did not want to shoot [Yarbrough], he obviously did not believe it was necessary to kill in self-defense." *State v. Bell*, 276 Kan. 785, 793 –94, 80 P.3d 367 (2003).

And accident or not, May claimed no fear of imminent, lethal attack *from Yarbrough* at the time he shot her. Kansas' self-defense statute justifies an individual's use of force only as "against another…to defend…against such other's imminent use of unlawful force." K.S.A. 21-5222. This language means that the justification extends only "to the use of force against the person or thing reasonably believed to be an aggressor." *Betts*, 316 Kan. at 192, 200, 202. May's mindset, just before Yarbrough ran for the door, was not that he needed to defend himself against Yarbrough, but that he ought to aid her by "get[ting] a towel and stop[ping her] from bleeding." (R. 22, 1407.) Her then running for the door was the very thing he had been "hoping" for. (R. 23, 1524.) He perceived that she was trying to go out the door, but also, perhaps, "let someone [else] in." (R. 23, 1503, 1525–26.) He was not "try[ing] to stop

her from...leaving." (R. 23, 1524–25.) When he ran behind her and reached to "moderate" the door with the gun in his hand, his only concern was "trying to keep her from throwing the door wide open" as she left, because he "didn't know who was on the other side" and feared it might be Jones. (R. 23, 1502–03, 1524, 1527; R. 22, 1408–10.) Nothing in May's testimony, therefore, indicates that, at the time he shot Yarbrough, he believed himself to be under imminent, life-threatening attack from her. His use of force at the door was directed at the assumed threat of Jones' entry. As such, the facts disentitled him to any claim, under K.S.A. 21-5222, that Yarbrough's shooting was justifiable as an act of self-defense. *See Betts*, 316 Kan. at 200, 202. And even as against the "assumed" threat of Jones' entry, May subjectively believed the only force he needed to defend himself was that which he might apply to his door to keep Jones on the other side. (R. 22, 1410.) At that time, therefore, he held no honest belief that he needed to use deadly force against any particular person.

And even assuming May had honestly believed the situation called for deadly force, no reasonable person in May's same circumstances would agree. Even a person shot in the arm and weakened with pneumonia would not have reasonably believed their safety necessitated shooting Yarbrough. Yarbrough no longer had a gun. (R. 22, 1401; R. 23, 1518.) She had started bleeding heavily after May's first strike and continued to bleed "profusely" even before he again "hit her in the head two more times." (R. 22, 1401, 1404–05; R. 23, 1518; R. 22, 1403–05.) All that "dropped [her] down on her knees." (R. 22, 1406.) And she then "stumbled to the door," in an effort to leave. (R. 23, 1503, 1511, 1525–26.) Even if also shouting Jones' name and "manhandl[ing] [him] out of the way" to get out the door, at the point May shot Yarbrough, no reasonable person would have perceived Yarbrough to have posed any sort of imminent threat necessitating lethal force against her. (R. 22, 1408–10.)

Nor would a reasonable person who had experienced May's history with Jones have believed such force necessary. "'A history of violence between [May] and [Jones] d[id] not transform [Jones' assumed approach] into a situation of imminent danger." *Bellinger*, 47 Kan. App. 2d at 784. Any threat arising from someone outside the home, was, as May conceded, an "assumed" "speculation." (R.22, 1410; R.23, 1525.) That Jones may have breached the door threatening grave harm is exactly the sort of "hypothetical argument[]...not considered when reviewing a factual appropriateness claim." *Harris*, 313 Kan. at 594. A reasonable person would not have entertained such a hypothetical fear as justifying lethal force.

Reversal Is Not Required. May can make no convincing argument that a Yarbrough-specific self-defense instruction "*would have*"—not merely "*could have*"—changed the jury's verdict. *Berkstresser*, 316 Kan. at 725. The jury's verdicts shows that it did not accept May's testimony. In convicting May of attempting Yarbrough's premeditated murder, the jury rejected his claim that he accidentally shot Yarbrough with no intent or thought to kill her. It also rejected his claim that he shot Jones in self-defense. With respect to Jones, the jury had the option to acquit May based on perfect self-defense or convict him of the lesser-included offense of attempted voluntary manslaughter under an imperfect-self-defense theory. (R.1, 340–45.) It did neither. (R.1, 359.) Its verdict convicting May of intentionally attempting Jones' murder shows that it: (1) particularly disbelieved May's claimed fear that he needed to shoot Jones or be shot; and (2) found Jones' shooting objectively unjustified, either (i) because it altogether disbelieved May's testimony about the shooting or (ii) because it believed that even the fact that Jones ran at May, shouting threats, carrying a gun or other weapon was no justification for May to have shot Jones as he did. As such, there is scant, if any, chance the jury would have accepted May's objectively weaker claim of self-defense as to Yarbrough's

shooting. Yarbrough was, after all, unlike Jones (if the jury had chosen to accept May's account), unarmed, injured, and not charging May in a threatening manner.

Contrasting May's account of events with the State's evidence at trial, moreover, leaves no room to wonder whether a Yarbrough-specific self-defense instruction would have changed the jury's verdict. May claimed Yarbrough arrived and started asking him for his prescription pills. (R. 22, 1393–95.) With Jones' gun, she later shot his arm while he sat on his bed. (R. 22, 1401, 1410, 1418; R. 23, 1485–86, 1517.) After he took the gun from her and struck her in response, she then bled "profusely" in his room. (R. 22, 1401; R. 23, 1518–19.) Then, he accidentally fired a second shot in his apartment at the door as Yarbrough left and a third shot from his porch when Jones' rushed him. (R. 22, 1410–13, 1419–20; R. 23, 1481.)

But incontrovertible physical evidence and consistent eyewitness testimony wholly refuted May's claims. Though they would have noted finding any such items as proof of May's ownership of the apartment, officers found no prescription medications in his apartment. (R. 19, 713–14, 722, 737–38.) They found his bed in an orderly and undisturbed condition. The defect that May claimed resulted from Yarbrough shooting him appeared only in the comforter atop his made bed and not the sheet underneath. (R. 19, 695–96, 710, 736–37; R. 38, State's Ex. 73–75.) No bullet casing or defect from the shot Yarbrough allegedly fired was located in May's bedroom. (R. 19, 702–05.) Despite his and Yarbrough's injuries allegedly having first occurred there, no blood whatsoever was found in May's bedroom. (R. 23, 1518–19, 1547–48.) And Yarbrough, Jones, Ryan, and Sailor all testified that they heard or saw only two gunshots total—not three, as May claimed. (R. 18, 331–32 335–36, 430–32, 447, 450–51, 464–66, 469–71, 490–91; R. 19, 557, 559–61, 566–67.)

Further bolstering Yarbrough's account, moreover, officers found only Yarbrough's

blood at the apartments, trailing from the area Yarbrough said May attacked her and leading out to the bushes where first responders found her. (R. 19, 599, 605, 622–23, 664, 677; 765–70; R. 21, 1221–22, 1234–35.) They found only a single bullet casing inside May's apartment, in a location consistent with May firing the gun as Yarbrough claimed. (R. 19, 680–81, 702; R. 38, State's Exs. 40–42.) Deen testified May appeared at Jordan's apartment, uninjured, stating nothing about a robbery or having been shot, but rather that "he just shot some people"—which May largely corroborated. (R. 18, 512–14; R. 1543–44, 1548.) Jordan testified May owned a gun similar to that used to shoot Yarbrough and had originally told him he shot Yarbrough because he thought Yarbrough might have taken "some dope" from him and felt "tired...of people trying to get over on [him.]" (R. 22, 1313–14.) May owned a gun holster sized to fit the gun that shot Yarbrough. (R. 19, 697–98, 721; R. 38, State's Exs. 76–78.) And all this is to say nothing of the various other so obviously impossible, refuted, or contrived details of his testimony—details which, no doubt, "would make a[ny] reasonable juror view as implausible [his] story." *Haygood*, 308 Kan. at 1407.

C. The district court appropriately omitted a Yarbrough-specific voluntary manslaughter instruction. (Appellant's Issue II)

Legally Appropriate. As "voluntary manslaughter is a lesser included offense of first-degree murder, [an instruction on the offense] would have been legally appropriate." *Gulley*, 315 Kan. at 92. And unlike with affirmative defenses, "[t]he court's duty to instruct on lesser included crimes is not foreclosed or excused just because the lesser included crime may be inconsistent with the defendant's theory of defense." *Simmons*, 295 Kan. at Syl. ¶ 3, 176–77.

Factually Inappropriate. But the instruction was factually unsupported. The district court was obligated to sua sponte provide the instruction if "some evidence...reasonably justif[ied]" convicting May of attempting to "knowingly kill[]" Yarbrough either: (1) "upon a

sudden quarrel or in the heat of passion" or (2) "upon an unreasonable but honest belief that circumstances existed that justified use of deadly force under [the self-defense statute]." K.S.A. 22-3414(3); K.S.A. 21-5404(a)(1)–(2). For much the same reasons his claim to a self-defense-instruction falls short, here too no evidence supports his argued-for instruction.

May's accidental-shooting claim afforded "no evidence that during the alleged struggle, [he knowingly] shot [Yarbrough], which is a required element for voluntary manslaughter." *State v. Simkins*, 269 Kan. 84, 89–90, 3 P.3d 1274 (2000); *see also State v. Hill*, 290 Kan. 339, 355–58, 228 P.3d 1027 (2010). It thus foreclosed basing any voluntary manslaughter instruction off his testimony alone. But his claim fails for other reasons too.

Sudden-Quarrel / Heat-of-Passion. May argues that his testimony that Yarbrough tried to rob him, and Yarbrough's testimony that he "went off" on her in an enraged manner, somehow combine to show that he shot her under the provocation of a sudden quarrel or in the heat of passion. Under Yarbrough's testimony, however, May's enraged actions were entirely unprovoked. She merely entered his apartment. Then, he yelled at her, beat her, and shot her as she fled. (R. 18, 325–32, 342–46.) Even accepting that May may have believed she had wrongfully taken his methamphetamine, such is not the sort of legally required "severe provocation" which objectively might deprive an ordinary person of his or her self-control and reason. *State v. Northcutt*, 290 Kan. 224, 234, 224 P.3d 564 (2010).

Nor did May's testimony establish such provocation. "[P]rovocation must be more than mere words or gestures and, if assault or battery is involved, the defendant must have a reasonable belief that he or she is in danger of great bodily harm or risk of death." *State v. Brown*, 285 Kan. 261, Syl. 302, 173 P.3d 612 (2007). The evidence of adequate provocation also must exist "at the time the victim [is nearly] killed." *State v. Hill*, 242 Kan. 68, 75, 744

P.2d 1228 (1987). For the same Section I.B-discussed reasons that no reasonable person would view his actions in shooting Yarbrough as an act of self-defense, May's testimony established no basis for any "reasonable belief" that, at the time he shot Yarbrough, she posed him any "danger of great bodily harm or risk of death." *Brown*, 285 Kan. at 302. "Even if [May] acted out of fear, as he maintains," his account showed no "objectively sufficient provocation" at the time of Yarbrough's shooting. *State v. Ruiz-Ascencio*, 307 Kan. 138, 144, 406 P.3d 900 (2017); *see also State v. Stafford*, 213 Kan. 152, 154, 166, 515 P.2d 769 (1973).

Imperfect Self-defense. Imperfect self-defense entails perfect self-defense's same requirement that May have subjectively believed his safety necessitated shooting Yarbrough. *See Harris*, 313 Kan. at 591–92. As such, Section I.B's arguments showing he held no such belief also disentitle him to an imperfect self-defense instruction.

Reversal Is Not Required. For the same reasons any error arising from the lack of a Yarbrough-specific self-defense instruction is non-reversible, May also can make no convincing argument that a voluntary manslaughter instruction "*would have*" changed his jury's verdict. *Berkstresser*, 316 Kan. at 725. The "skip rule" further supports finding any error harmless. *State v. Robertson*, 279 Kan. 291, 306, 109 P.3d 1174 (2005); (R. 1, 336–39). "[J]urors who were convinced beyond a reasonable doubt that [May] premeditated and intended [Yarbrough's attempted] killing" necessarily "would not have rejected intentional second-degree murder only to [then] convict [May] of [any form of knowingly attempted] homicide." *State v. Gentry*, 310 Kan. 715, 730, 449 P.3d 429 (2019); *see also State v. James*, 309 Kan. 1280, 1302, 443 P.3d 1063 (2019); *State v. Longoria*, 301 Kan. 489, 515–16, 343 P.3d 1128 (2015).

D. The criminal-possession-of-a-firearm instruction was neither legally inaccurate, likely to mislead the jury, nor, if erroneous, reversible. (Appellant's Issue VI)

The jury received May's requested PIK instructions, with the language adjusted slightly

to conform to the parties' stipulation and also to include May's proposed limiting instruction that the stipulated prior crime "be considered solely in relation to this charge and not for any purpose related to any other charge." (*Compare* R.1, 300, 307; R.23, 1662–66; R.24, 1677–78, 1704 *with* R.1, 348.) May now argues the instruction's inclusion of recklessness impermissibly lowered the State's burden of proof. The court's instructions, however, did no such thing.

"An instruction that mirrors the statutory language generally is acceptable." *State v. Stotts*, No. 101,828, 2011 WL 6382737, *9 (Kan. App. 2011) (unpublished opinion). Adherence to the PIK instructions is "strongly recommended;" deviations ought not occur unless a case's particular facts require modification. *Hilyard*, 316 Kan. at 335. And the trial court need not define an instruction's every word or phrase. *State v. Armstrong*, 299 Kan. 405, Syl. ¶ 8, 440, 324 P.3d 1052 (2014). If the instructions given the jury, "considered as a whole, properly and fairly state[] the applicable law," the failure to give even a legally and factually appropriate instruction "does not constitute error." *Hilyard*, 316 Kan. at 333.

Considering these principles, the court properly instructed the jury. The court's provided instruction recited the crimes' elements as set forth in the statute, K.S.A. 2018 Supp. 21-6304(a)(2), and the then-existing pattern instructions, PIK Crim 4th 63.040 and 52.010. (R. 1, 348.) The statute "does not prescribe the mental state a defendant must have to be guilty of the crime," thus making it a general-intent crime provable by evidence "defendant intentionally, *recklessly*, or knowingly engaged in…the prohibited conduct [of] possessing the firearm." *State v. Howard*, 51 Kan. App. 2d 28, 45, 339 P.3d 809 (2014) (emphasis added). So, as discussed in the notes and comments to the then-existing PIK Crim 4th 52.300, the PIK accordingly listed all three elements. "Possession," of course, contained its own required mental state; at the time of May's offense, it meant "having joint or exclusive control over an

item with *knowledge of or intent* to have such control." K.S.A. 2018 Supp. 21-5111(v) (emphasis added). But the unlawful-possession-of-methamphetamine instruction directly preceding the at-issue instruction defined "possession" in those terms. (R. 1, 347.) As a whole, therefore, the instructions accurately stated the law and advised the jury of every consideration necessary to properly convict May. That the court did not again define "possession" in the criminal-possession instruction "does not constitute error." *Hilyard*, 316 Kan. at 333; *see also State v. Santacruz*, No. 95,354, 2007 WL 656363, *3 (Kan. App. 2007) (unpublished opinion).

Assuming the contrary, however, a jury told that May must have possessed a weapon either intentionally or knowingly only, still would have convicted him. Yarbrough, Jones, Ryan, Sailor, and May himself, all testified that May held and repeatedly used a gun. Under May's version of events, May even fired the weapon three times, dropped it, and spent time searching for it until he again found and repossessed it. (R. 22, 1430–34.) May and Deen both testified that May admitted shooting somebody. (R. 23, 1545; R. 18, 512–14.) Sgt. Neff's in-car video shows May suspiciously discarding the gun out his vehicle's window—again, something May admitted having done. (R. 39, State's Ex. 99; R. 20, 853, 878; R. 21, 1070–71; R. 23, 1464, 1485–86, 1546–47, 1577.) Gunshot residue on May's hands and face suggested he used a firearm. (R. 20, 80 –04; R. 21, 1112–18.) And on top of all that, the jury's verdicts convicting May of attempting the premediated murder of Yarbrough and the intentional murder of Jones show that it viewed May's use of the gun as intentional and not in self-defense. Here, no clear error is present. *See State v. Alvarez*, No. 110,710, 2014 WL 7566066, *7 (Kan. App. 2014) (unpublished opinion).

E. Though the district court erroneously defined the aggravated-battery-on-a-law-enforcement-officer instruction's "knowingly" element using the disjunctive "or," its error was not verdict-altering. (Appellant's Issue VII)

The court instructed May's jury that to find he "knowingly" harmed Sgt. Neff with a

motor vehicle requires proof he acted "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 by the State." (R. 1, 346.)

> "[K]nowingly," as used in [the aggravated battery statute], means that the accused acted...aware that his or that his or her conduct was reasonably certain to cause the result....[I]t is sufficient that he or she acted while knowing that any great bodily harm or disfigurement of the victim was reasonable certain to result from the action.
> *State v. Hobbs*, 301 Kan. 203, 211, 340 P.3d 1179 (2015).

Under that holding, May argues—and *State v. Tucker*, No. 117,530, 2018 WL 3946240, *8 (Kan. App. 2018) (unpublished opinion), found—that defining "knowingly" in the disjunctive as the court did here renders an instruction legally defective. That said, May still must firmly convince this Court that a properly instructed jury would have reached a different verdict.

Sgt. Neff testified that, before he ever started following May, May stared "pretty hard" at him. (R.20, 814–15.) Traffic camera footage shows that May's driving became more reckless as Sgt. Neff pursued him. (R. 39, State's Ex. 89; *see also* R. 20, 816, 819–20, 852.) May's vehicle had a rearview mirror, lowered front windows, and an entirely missing back window. (R. 18, 823; R. 23, 1554–55.) The area where he drove at Sgt. Neff was well lit. (R.23, 1554.) Sgt. Neff's vehicle was flashing lights that a nearby homeowner could see. (R. 20, 896–97.) He was recognizable to that homeowner and another driver-by as a police officer driving a patrol car. (R. 20, 896–97, 910–14.) He was shouting commands that those same individuals could hear. (R. 20, 897, 904, 910, 912, 917.) At one point prior to backing directly into Sgt. Neff's vehicle, May admitted, he "heard a shout of commands." (R. 23, 1561.) Sgt. Neff testified that May verbally responded "in cadence" with his commands. (R. 20, 857, 868.) And his in-car video and audio recording corroborated all of this. (R. 39, State's Ex. 91.)

Once May then reversed despite Sgt. Neff's commands, he collided with Sgt. Neff's vehicle without immediately stopping. (R. 20, 825–29; R. 23, 1559–60.) He reversed in such a way that Sgt. Neff had to run backwards to avoid being struck and believed May was intentionally trying to hit him. (R. 20, 825, 827–28, 856.) When May eventually did stop reversing, according to his testimony, he could hear "footsteps running towards [his] vehicle" and he "accelerated away." (R. 23, 1472; R. 23, 1562.) But, contrary to May's testimony, Sgt. Neff's video's audio shows that May accelerated at Sgt. Neff *before* Sgt. Neff started shooting. (R. 39, State's Ex. 91; R. 20, 829–30, 859–60.) By both their accounts, May had numerous options of directions to travel other than where Sgt. Neff was standing in the road. (R. 20, 833–34; R. 23, 1563.) But Sgt. Neff's testimony and the fluid trail created by May's damaged vehicle show that May "drove forward[;] turned right," so that "the center of [the Jimmy] was…pointed directly at [Sgt. Neff];" and continued "right at [Sgt. Neff]" and the area where his cartridge casings put him, even crossing the road's centerline to do so. (R. 20, 829, 835, 848, 859, 1030–31, 1074; R. 38, State's Exs. 105, 109–10, Def. Ex. 133.) As May admitted, the location and nature of the bullet holes found in his windshield indicated that, "[a]t some point," his vehicle indeed was directly facing Sgt. Neff. (R. 23, 1562–63.) And Jordan recalled that May said "he backed up to try and run the police over." (R. 22, 1315.)

Considering these facts and the jury's obvious disbelief of May's overall version of events, a properly instructed jury would have had no reasonable doubt that May drove his vehicle at Sgt. Neff aware that he was doing so and doing so in a way reasonably certain to harm Sgt. Neff. *Jones*, 313 Kan. at 927. The court's one-word error was non-reversible.

II. The court's handling of May's testimony violated neither his right to testify, his right to present his defense, nor his right to a fair trial. (Appellant's Issues IV & VIII.A)

Issue Four and, in part, Issue Eight of May's brief claims that the district court: (1) made

pretrial rulings excluding evidence of (i) May's medical diagnoses and (ii) witness' prior drug-activity and violence, which allegedly improperly limited his constitutional rights to testify and advance his chosen theory of defense; (2) at one point during his testimony, erroneously instructed the jury to "disregard any comment [he] testified to about PTSD;" and (3) prejudicially interrupted his testimony to hold frequent bench conferences.

Review Standard. Ordinarily, when a defendant claims an in limine ruling interfered with their constitutional rights, review is de novo. *State v. White*, 316 Kan. 208, 212, 514 P.3d 368 (2022). As May has neither alleged nor shown (as argued below) that the court excluded "all evidence of [his] theory" of defense, however, "a constitutional issue is not at stake." *State v. Alderson*, 260 Kan. 445, 460–61, 922 P.2d 435 (1996). Abuse-of-discretion review thus applies. *Alderson*, 260 Kan. at 461. Section I's clear-error standard applies to his instruction-error claim. And though he presents the matter as an instruction-error issue, May's third complaint constitutes a judicial-misconduct claim. *See State v. Boothby*, 310 Kan. 619, 625–26, 448 P.3d 416 (2019). That claim is reviewed de novo, and May must "establish[] that misconduct occurred" and "prejudiced [his] substantial rights." *Boothby*, 310 Kan. at 624–25.

A. The district court's evidentiary rulings appropriately balanced May's rights with its obligation to enforce the rules of evidence.

May assets the district court violated his rights by ruling: (1) "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 [any] underlying diagnos[e]s," (R. 17, 3); and (2) that it had no problem with drug evidence "as it pertains to the events of that day," but witnesses should not speak of other-date drug activity "until we get into a situation where defense believes that needs to be explored." (R. 16, 17–20.) Before May testified, defense counsel persuaded the court to

reverse its prior ruling in part and allow May to use the word "cancer" in the context of "testify[ing] that he communicated certain aspects of his condition to [the other involved] individuals." (R. 22, 1348–56.) Later, the court also clarified that "[May] can talk about stress triggers." (R. 23, 1453.) Defense counsel never, however, argued that any additional medical-condition evidence or witness' prior drug activities or violence needed to be further explored.

The Constitution guaranteed May a "right to testify in h[is] own defense," *Rock v. Arkansas*, 483 U.S. 44, 49–53 (1987), and "a meaningful opportunity to present a complete defense." *Crane v. Kentucky*, 476 U.S. 683, 690 (1996). Neither right, however, gave him license to introduce evidence inadmissible under "the rules of evidence and caselaw on the subject." *State v. Seacat*, 303 Kan. 622, 638–39, 366 P.3d 208 (2016); *State v. Gibson*, 299 Kan. 207, 220, 322 P.3d 389 (2014). Any limitations the district court placed on May's ability to testify or introduce evidence were consistent with his rights under those principles. And, as the district court observed, "May tried the case that he wanted to try." (R. 35, 11.)

May's Medical Conditions. The evidentiary principles—apart from relevance—guiding the court's ruling that May not testify about his health conditions beyond "his own physical feelings and thoughts," were derived from *State v. McFadden*, 34 Kan. App. 2d 473, 478, 122 P.3d 384 (2005). There, the judge disallowed defendant from testifying that, "after consulting numerous different individuals, labs, and research on his own," he believed he had—and, at the time of his impaired driving, "was suffering from"—the "similar to diabetes but not the same" condition of "severe adrenaline deficiency." *McFadden*, 34 Kan. App. 2d at 476–77. Defendant claimed the prohibition "violated his constitutional rights to testify on his own behalf and present a defense." *McFadden*, 34 Kan. App. 2d at 477. But the *McFadden* court found otherwise. The court explained that, "[a]s a means of ensuring reliable evidence,"

Kansas law limits medical-condition testimony from a lay witnesses. *McFadden*, 34 Kan. App. 2d at 478. Testimony about "external appearances and manifest medical conditions that a readily apparent to anyone" is acceptable. *McFadden*, 34 Kan. App. 2d at 478. Testimony about "medical matters beyond the common knowledge of lay persons, or those that are not readily apparent such as medical diagnos[e]s or the effects of possible medications," is not. *McFadden*, 34 Kan. App. 2d at 478. Because defendant's proposed, medical-condition testimony exceeded lay persons' common knowledge, its exclusion was proper. And emphasizing that defendant still "had the opportunity to offer factual testimony or to call an expert to offer medical testimony, but did not do so," its exclusion violated neither defendant's right to testify nor his right to present a defense. *McFadden*, 34 Kan. App. 2d at 478–79.

The court's ruling was in line with *McFadden*. May's cancer and PTSD —the only conditions the court actually expressed evidentiary concern over—were "readily apparent" to no layperson. Assigning those diagnoses to May, and, conversely, attributing any of May's physical sensations and thoughts to those diagnoses as symptoms, required medical expertise. They simply were not the sort of observable labor pains at issue in *Hiatt*, or battery-caused injuries at issue in *Kline*, that May likens them to. Restricting May's testimony to "his own physical feelings and thoughts," therefore, was proper. It in no way limited May's opportunity to present evidence concerning his medical conditions. It simply required that he use an expert if he wished the jury to know more. *See McFadden*, 34 Kan. App. 2d at 478–79. That the court later agreed "[May] needs to be allowed to present" what he communicated about his cancer to others, only underscores that May's rights were foremost in its mind. (R. 22, 1354–56.)

And in actuality, the jury heard everything May now claims he was prohibited from presenting. May told the jury he has "cancer" and is "mortally sick." (R.22, 1385, 1413, 1421.)

He told the jury he undergoes "chemo treatment on a monthly basis" and takes VA-prescribed oxycodone as a result. (R.22, 1385, 1395, 1397–98, 1487–88.) He told the jury he receives disability checks and has worn a back brace every day "[s]ince 2016." (R. 23, 1400–01, 1489–90.) He told the jury he had, just before the shooting, spent "[a]bout four days" with the VA hospital for a "pneumonia" condition that left him so "weak" and "debilitated" that Yarbough was able to "manhandle[]" him. (R. 22, 1413, 1421; R. 23, 1578, 1579, 1579–80, 1588.) He told the jury how "tunnel vision" left him, from the shooting to his arrest, entirely without peripheral vision. (R. 22, 1413–14, 1421, 1428; R. 23, 1452, 1472, 1479–80, 1560–61.) He told the jury that tunnel vision was "a "symptom[]" he suffers from the "post traumatic stress syndrome" "[f]our-and-a-half years" serving as "a paratrooper in the Special Forces" had caused him. (R. 22, 1383–84, 1414, 1421; R. 23, 1452–53.) He told the jury he fled his apartment after shooting Yarbrough and Jones because he could not tolerate the "violent[] sick[ness]" and "flashbacks" that seeing and smelling Yarbrough's blood caused him. (R. 22, 1420–21.) And he told the jury he then had and still has "greatly diminished," "impaired" hearing. (R. 22, 1389; R. 23, 1561–62.) If May wished to introduce information beyond this, he failed to do so and now has no claim to reversal. *See* K.S.A. 60-405.

His new-trial motion proffers add nothing to his claim. At the posttrial hearing, May offered certain medical records confirming his cancer diagnosis, medications, and pneumonia hospitalization. The court accepted them "for purposes of making a record" and ruled them "not newly discovered." (R.34, 107–15.) May has not incorporated those exhibits on appeal. *See State v. Miller*, 308 Kan. 1119, 1157, 427 P.3d 907 (2018). Beyond those records, however, he presented only materially indistinguishable medical-condition testimony. (R.34, 105–07, 115–16, 149–55; *see also* R.35, 16, 18.) May has proved no interference with his rights.

Other Witness' Drug-Involvement or Past Violence. The court tentatively excluded evidence of other witnesses' prior drug or criminal activities on grounds of relevance. Its ruling came with the express caveat, however, that, if a situation arose "where defense believe[d] that need[ed] to be explored," "[it was] going to be open to that." (R. 16, 17–20.) May claims this ruling prevented him at trial from testifying to "observed evidence of drug dealing and violence" that "was relevant to [his] perception of Jones and Yarbrough." (Appellant's Br., 38.) He points specifically to evidence he proffered posttrial, purportedly showing "Jones' extreme violence to drug clients" and Yarbrough's "exclu[sion] from the property because she assaulted [his] neighbor." (Appellant's Br., 38.) May's claim has several flaws.

First, May made no such proffer of or attempt to introduce this particular evidence before or at his trial. That he failed to avail himself of the court's expressed openness to receiving relevant past-conduct evidence does not prove the court subverted his rights. *See* K.S.A. 60-405. Second, May cites no authority establishing his proposed evidence's admissibility, thus waiving the point. *See Gibson*, 299 Kan. at 222. In contrast, as character-evidence matter, neither Yarbrough's nor Jones' specific acts of past violence were admissible. *See State v. Alderson*, 260 Kan. 445, Syl. ¶ 11, 462, 922 P.2d 435 (1996); *State v. Sola-Morales*, No. 97,011, 2008 WL 2510154, *5–*7 (Kan. App. 2008) (unpublished opinion). May's account of what Stephen Sweigart (the actual owner of the apartment Jones lived in) told him about Yarbrough attacking Sweigart was hearsay (inconsistent with Sweigart's account), and May failed to subpoena Sweigart for trial. (R. 34, 80, 86, 93–95.) And because May admitted he knew nothing about any no-contact order excluding Yarbrough from the apartments, the information was irrelevant to his state of mind and unduly prejudicial. (R. 34, 95.)

Third, the new-trial-motion evidence again shows that May *did* present the essence of

the evidence he insists his defense required. He told the jury about the "[i]n and out," "[d]ay and night" traffic "constantly coming and going out of [his neighbors'] apartment"—which, in the trial evidence's context, quite obviously referred to drug activity. (R. 22, 1387; R. 34, 150.) He told the jury about the prior theft of his SUV and the "several" break-in incidents that made him feel so unsafe and "afraid in [his] apartment" that he jammed his front door closed with butterknives. (R. 22, 1386–90; R. 23, 1512–13; R. 34, 150–51.) He told the jury how he "got suspicious" after Yarbrough approached him looking for money, drugs, and a place to be "shooting up." (R. 22, 1393–96; R. 34, 117, 151–52.) He told the jury how he "had seen [Jones] knock several people out in front on [his own] apartment." (R. 23, 1482; R. 34, 96–98, 152–53.) He told the jury that Jones had "robbed [him] with a gun." (R. 22, 1410; R. 23, 1482, 1488–89; R. 34, 153.) And he told the jury that both Yarbrough and Jones made him afraid. (R. 22, 1402, 1410, 1418–20; R. 23, 1481, 1533; R. 34, 117–18, 152–54.) As the district court found when denying May's new-trial claim, the jury "certainly...had a fair impression [of] life at the fourplex" and "the factors that gave...insight [into May's] state of mind that day and during the events." (R. 35, 14–16.) May's rights were not violated.

Any Error Harmless. Assuming otherwise, the evidentiary limitations imposed on May were harmless. Where a court limits "some evidence relating to [a defendant's] defense" as opposed to effecting "a complete denial of a defense," "the [statutory] harmless error standard...applies." *State v. Gilliland*, 294 Kan. 519, 541–42, 276 P.3d 165 (2012). Comparing the evidence reviewed in Section I.B. with the just-discussed evidence May introduced, no juror who heard the evidence he claims he was unable to present would have acquitted him. As the court found of May's new-trial-motion evidence, "much of what I have heard today is consistent with what I heard at trial[,]...which is another way of saying I believe the jury

considered most all of these things." (R. 34, 203.) The collective evidence shows there is no reasonable probability that the court's rulings affected May's convictions by "improperly exclud[ing] relevant, admissible, and noncumulative evidence that was an integral part or [his] defense theory." *State v. Lawrence*, 281 Kan. 1081, 1089, 135 P.3d 1211 (2006).

B. The district court properly admonished the jury to disregard May's comment on the court's legal ruling and otherwise appropriately conducted his testimony.

The court ruled that May not testify about his medical conditions or diagnoses beyond giving "his own physical feelings and thoughts." (R. 17, 3.) On the day May first took the witness stand (before the court reversed its ruling in part), the State advised that in a recent jail call, May expressed that he: intended to defy the court's order directing him not to mention cancer, had no concerns about contempt, and, "no matter what," would make sure the jury hears that he is terminally ill with cancer. (R. 22, 1275.) The court reiterated to May that its rulings were to be followed, or May may "end up appearing via video to testify, so [the court] can mute [his] testimony" if necessary. (R. 22, 1280–81.)

May testified the tunnel vision he had experienced when Jones ran at him was a PTSD symptom. (R. 22, 1413–14.) The State objected, argued at the bench that "we're getting into a violation of the Court's order," and the court excused the jury so it could address May. (R. 22, 1414–15.) May claimed he "forgot about" the court's order. (R. 22, 1415.) The court again explained that he could testify to what he perceived and experienced but not connect those facts to any diagnosis. (R. 22, 1415.) May affirmed he "understood that." (R. 22, 1415.)

Roughly four pages after May's testimony resumed, he was asked to describe how he personally experiences tunnel vision. He responded: "It's like a fish. I mean, any combat soldier or person in an accident—the Judge say that I can't mention the post traumatic stress syndrome." (R. 22, 1421.) The State again objected. The court excused the jury to address

May. (R. 22, 1421–22.) May quickly volunteered that he was "fumbling with [his] words." (R. 22, 1422.) But the court found that the fact he "specifically said…the Judge told me I can't mention PTSD," proved he "kn[e]w very well what [he was] not supposed to be mentioning" and was "directly not following th[e] Court's directives." (R. 22, 1422–23.) The court noted that it had given May "a great deal of liberty to talk about what [he was] seeing," "hearing," and "perceiving." (R. 22, 1423.) It "just want[ed everyone] to proceed in an orderly fashion, consistent with the Court's order." (R. 22, 1423.) But it again cautioned May that if he violates the court's order, it would adjourn and arrange for him to testify via video. (R. 22, 1422, 1426.) May confirmed that he understood. (R. 22, 1423.) The State noted that May was "doing exactly what he had said he was going to do" in his jail call. (R. 22, 1424.) And, at the State's request, when proceedings resumed, the court instructed the jury:

> Ladies and gentlemen, we're going to resume testimony here in a moment, but 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 [you in] 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, 1427–28.) At the close of the day's proceedings, it further instructed: "The Court's given you some instructions about the nature of the evidence you've heard here today. You shouldn't concern yourselves for any reasons for any evidentiary rulings." (R. 22, 1439.)

The next day the court called counsel to the bench three times. In the first instance, the court overruled a State's objection, allowing May to testify that certain life events trigger his tunnel vision. Asked what those events are, May started to answer: "I have been through a lot of military operations and I am predisposed—" (R. 23, 1452–53.) The court called counsel to the bench. It explained that, though the question invited May to discuss his triggers, May's

response veered toward "talking about causation." (R. 23, 1453.) It emphasized May's answer perpetuated its "concerns about Mr. May's willingness to follow the Court's order." (R. 23, 1454.) It gave defense counsel the option to proceed or take a recess to reemphasize the court's order, and counsel elected to recess. (R. 23, 1454.) Following the recess, defense counsel asked May what he meant when he said he "disengaged" from his confrontation with Sgt. Neff. (R. 23, 1468.) At the bench, the court clarified with defense counsel what answer he expected May to provide. The court indicated it had feared that May's use of the term "disengaged" referred to "mental disengagement" and perhaps was leading to "trying to present a mental defect or disease defect" defense. (R. 23, 1469.) Defense counsel assured that was not his intention. And the court offered that it would allow defense counsel leeway to use leading questions to "avoid these characterizations by Mr. May." (R. 23, 1469–70.) The parties were back at the bench a final time when defense counsel questioned May about what period he had spent "in an aura that [he'd] called tunnel vision." (R. 23, 1478–79.) Questioning quickly resumed after defense counsel's proffered intention satisfied the court that the question and testimony would be limited to "what [May] was personally experiencing." (R. 23, 1479.)

No (Reversible) Instruction Error. May argues the court clearly erred in instructing the jury to disregard his testimony because it "improperly focused on certain evidence," raised "doubt about [his] attempt to describe his [PTSD] symptoms," and prejudicially portrayed him as willfully violating the court's orders. (Appellant's Br., 39.) May's comment—"the Judge say that I can't mention the [PTSD]"—however, was not "evidence." "'Evidence' is the means from which inferences may be drawn as a basis of proof." K.S.A. 60-401(a). The court's evidentiary instructions to May supported no inferences probative of his guilt or innocence. Directing the jury to disregard that inadmissible nonevidence was proper. The

court also had to identify which portion of May's testimony it intended the jury disregard. So, particularizing its instruction in that respect too was proper. Appropriately, it had paused proceedings to address May's violation outside the jury's presence. So, contextualizing its admonishment by reminding the jury what had transpired was not improper. As May's comment risked misleading the jury that the court was impartially acting to subvert his testimony, reminding the jury that the limitation to which May referred in fact arose from its duty to evenhandedly enforce its orders was entirely appropriate. *Cf. State v. Miller*, 308 Kan. 1119, 1154, 427 P.3d 907 (2018). Nothing the court said was factually untrue, a misstatement of law, or told the jury how it ought to view May's *admissible* testimony. And the court's further instructions no doubt assured that the jury fairly considered May's testimony. (R. 22, 1439; R. 1, 328–30, 332.) In short, the court did not err. *See State v. Vigil*, No. 118,670, 2020 WL 741702, *5 (Kan. App. 2020) (unpublished opinion). May's case is not, as he implies, one where the court's instruction "zeroed in on" the entire premise of his defense and effectively told the jury how it ought to weigh those facts. *See State v. DeVries*, 13 Kan. App. 2d 609, 617–19, 780 P.2d 1118 (1989). And even assuming error, the evidence incriminating May proves even an error-free instruction would not have changed his trial's outcome.

No Judicial Misconduct. May also claims the "constant interruptions," "bench conferences," and "threats to...remove him" caused him intolerable unfairness and prejudice. But the "interruptions" were few—five instances across 152 pages of testimony. Only three of those instances were court-, as opposed to state-, initiated. Its "threats" too were few and occurred outside the jury's presence. Those "threats" were, in fact, a quite measured response from the court, considering: the report of May's jail call; an additional report that "[May] had asked [another trial witness] to testify a certain way...that was not accurate;" and the fact that

the court viewed May's back-to-back PTSD testimony as "contempt." (R. 22, 1274–75, 1422.) Nothing in the record shows the court's remarks to counsel or May were impatient, rude, impartial, and pervasive. *But see State v. Hayden*, 281 Kan. 112, 116–17,126, 230 P.3d 24 (2006); (*E.g.*, R. 22, 1426.) And May, as shown above, had full opportunity to testify and present his defense within the rules of evidence. Considering the gravity of the court's quite valid concern that May intended to testify as he wished irrespective of its orders, the court's actions fell comfortably within the "broad direction and leeway" afforded it to discharge its obligation to "control the proceedings" and do that which is "reasonably required for the orderly progress of the trial." *State v. Hamilton*, 240 Kan. 539, 546–47, 731 P.2d 863 (1987). "Mere possibility of prejudice" affords no basis for reversal. *Hamilton*, 240 Kan. at 546.

III. The State's at-trial endorsement of Michael Jordan was no abuse of the district court's discretion. (Appellant's Issue V)

Issue Five of May's brief challenges the court's decision to allow Jordan's endorsement. Specifically, he claims that it violated both statutory discovery rules and his fair-trial right.

Preservation & Review Standard. As proof he preserved his challenge, May cites both to the trial record and his motions for a new trial. But none of May's counsel's objections, motions, or arguments addressed Jordan's endorsement as a discovery-violation issue; so, he has failed to preserve any such claim. (R. 22, 1277; R. 1, 367, 398–99; R. 34, 190–92, 94–95); *In re N.E.*, 316 Kan. 391, 407–08, 516 P.3d 586 (2022). And by not arguing any exception to preservation, he has waived the point. *See In re N.E.*, 316 Kan. at 407–08. That said, this Court reviews witness-endorsement decisions "for an abuse of discretion." *State v. Brosseit*, 308 Kan. 743, 747, 423 P.3d 1036 (2018). "An abuse of discretion occurs if the decision is arbitrary, fanciful, or unreasonable, or if it is based on an error of law or fact." *White*, 316 Kan. at 213.

Jordan's Endorsement Was Proper. K.S.A. 22-3201(g) provides that "the prosecuting

attorney may endorse...the names of other witnesses that may afterward become known to the prosecuting attorney, at times that the court may by rule or otherwise prescribe." K.S.A. 22-3201(g). The discretion a court may exercise under this provision exists to protect a defendant against "surprise" and the inability "to interview and examine the witness in advance of trial." *State v. Bloom*, 273 Kan. 291, 313, 44 P.3d 305 (2002). Permitting endorsement is the rule, denying endorsement the exception. *See, e.g.*, *State v. Coleman*, 253 Kan. 335, 349, 856 P.2d 121 (1993); *State v. Bright*, 229 Kan. 185, 192, 623 P.2d 917 (1981). Accordingly, K.S.A. 22-3201(g) prohibits endorsement "only when [the late endorsement] will result in 'actual prejudice [to the defendant's] ability to defend against the charges.'" *Brosseit*, 308 Kan. at 749. "Prejudice is not presumed." *State v. Thompson*, 232 Kan. 364, 367, 654 P.2d 453 (1982). The defendant "must...show[]" and the court must find that it exists. *State v. Ferguson*, 228 Kan. 522, 527, 618 P.2d 1186 (1980). Neither may occur unless "the late endorsement comes as a surprise 'and the testimony was critical or, in other words, of 'a climactic and highly damaging nature.'" *Brosseit*, 308 Kan. at 749. And "[t]o show reversible error on appeal, the defendant must have objected to the late endorsement, requested a continuance, and been denied that continuance." *Brosseit*, 308 Kan. at 749.

Neither the nature of Jordan's testimony nor the likelihood that the State may call him ought to have been any great surprise. May and Jordan knew each other. Twice, they had spoken to each other about May's case. (R.20, 1311–12, 1316, 1324–25; R.23, 1491.) An interview conducted with Jordan days after the shooting was provided to defense and reviewed by May. (R.34, 192, 196–97; R.22, 1274, 1277; R.23, 1574–76, 1591.) On November 6, 2019, 41 days before Jordan testified, May requested a subpoena for Jordan to appear at trial, under the belief Jordan's testimony would favor him. (R.1, 23; R.34, 122, 155.) His belief

changed, however, when he personally reviewed a report of an additional interview Jordan did. (R.34, 122–23, 192, 198–99.) The State had again interviewed Jordan after, on November 27, 2019, Jordan's subpoena had been returned served. (R.34, 192, 199.) It made that report and interview available to defense on December 6, 2019—three days before May's trial started. (R.34, 197, 198–99; R.22, 1274, 1277; R.23, 1574–76, 1591.) Based on that interview, May and defense counsel together decided not to call Jordan. (R.1, 24; R.34, 123, 190, 199.) That decision, however, was not communicated to the State and "rather than waiting" for defense to call Jordan, "the State decided to call him in its case in chief." (R.34, 192.)

When the State then raised the matter of Jordan's endorsement in court, after filing its motion, defense counsel's only response concerning any objection was:

> **Defense**: I have [Jordan's] report, Judge, so, um, I think it's last minute. I can't tell you that I didn't have... his statement. I did issue a subpoena. Later decided that [defense]...wasn't going to call him, so that's why I didn't do an order to convey, Judge. So I guess for the record I am going to object as a last minute endorsement.
>
> **Court**: But as far as unfair surprise or anything?
>
> **Defense**: Well, I'm not going to tell the Court—I have, I had his statement that he made, so...
>
> **Court**: All right. I will note [defense counsel's] objection, but given the circumstances as I have heard them, I will allow the State's endorsement.

(R. 22, 1277.) Defense counsel made no claim of prejudice. He requested no continuance. Still, the district court then "granted a substantial recess," twice allowing defense counsel time outside the courtroom to process the endorsement and morning's other developments with May. (R. 35, 20–21; *see also* R. 22, 1278–80, 1282–84, 1288, 1291–92; R. 34, 194.) And when the parties ultimately returned to resume the trial, defense counsel voiced no concerns about surprise, prejudice, or the defense's readiness to proceed. (*See* R. 22, 1292–97; R. 35, 21.)

So, to summarize, May knew the nature of his relationship with Jordan. He knew everything (good and bad) Jordan had told police. Tactically, he decided not to use Jordan.

But he knew the State was interested in Jordan days before trial. And he claimed no prejudice or need for a continuance. This was simply not a case where the State blindsided May with Jordan's existence, possible testimony, and prospective appearance. Rather this was simply a case where a witness—interviewed and first listed in defendant's defense—testified not as defendant had hoped. *See State v. Donaldson*, 279 Kan. 694, 704–05, 112 P.3d 99 (2005).

Sure, May now wishes he might have prepared to cross-examine Jordan differently. But the Confrontation Clause guarantees only "an *opportunity* for effective cross-examination," not that cross-examination prove itself "effective in whatever way, and to whatever extent, the defense might wish." *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985). Defense counsel emphasized evidence of Jordan's convictions for crimes of dishonesty and his willingness to swear to an untrue statement. (R. 22, 1325–26.) Nothing in Jordan's testimony so altered the trial's landscape that May was forced to entirely "change[] his trial strategy." *Bell*, 273 Kan. at 54. And though adverse, Jordan's 37-pages of testimony was hardly the only or even most incriminating evidence introduced over the course of May's 8-day, 1821-page transcript trial. Rather, it simply corroborated what the overwhelming eyewitness and investigative evidence showed. *See State v. Green*, 252 Kan. 548, 552–53, 847 P.2d 1208 (1993).

Overall, May was in no worse—and arguably a far better—position than the many other defendants who have failed to prove an eve-of or day-of-trial endorsement unreasonable. *See, e.g.*, *Bloom*, 273 Kan. at 54; *Bell*, 273 Kan. at 54; *Thompson*, 232 Kan. at 366–67; *Ferguson*, 228 Kan. at 526–27; *State v. Rueckert*, 221 Kan. 727, 730, 561 P.2d 850 (1977); *State v. Motor*, 220 Kan. 99, 100–01, 551 P.2d 783 (1976). And though he claims [i]t was not reasonable to expect defense counsel to request a continuance," that is what the law requires. (Appellant's Br., 42.) Having failed to do so, he can show no reversible error. *See Brosseit*, 308 Kan. at 749.

IV. Neither Jordan's unobjected-to testimony about May's methamphetamine use, oxycodone sales, and gun possession, nor the district court's limiting instruction, violated K.S.A. 60-455. (Appellant's Issue III)

Issue Three of May's brief claims that Jordan's testimony introduced inadmissible K.S.A. 60-455 evidence that the court's allegedly erroneous limiting instruction failed to cure. Prior to trial, the court ordered that witnesses "not mention any bad acts, convictions, criminal…conduct of Mr. May that preceded the…[the day of the crime]." (R. 14, 75; R. 1, 170–71.) May now seemingly argues the State violated that order when Jordan testified that:

- he gave May "an eight ball" of methamphetamine the day of the shootings; (R. 22, 1308)
- he and May "had been up a couple days getting high" leading up to the shootings; (R. 22, 1306–07)
- when "[May] get[s] high, he kind of gets whacked out a little bit;" (R. 22, 1308)
- May sold his oxycodone "to fuel his drug habit;" (R. 22, 1323–24, 1326, 1331–32)
- May had a maybe six-inch, "[b]lack nine-millimeter handgun" and "nine-millimeter[]" ammunition he sometimes kept with Jordan; (R. 22, 1303–04, 1310–11, 1322.)
- May asked Jordan "[i]f [Jordan] wanted him to kill [Jones]" (R. 22, 1302–03)
- May showed him "a gunshot" "hole" he had put "in the middle" of his bed because "he was tweekin'" and "seein' things." (R. 20, 1304–05, 1323.)

Review Standard. K.S.A. 60-455 prohibits admitting, for *propensity* purposes, "evidence that a person committed a crime or civil wrong on a specified occasion." K.S.A. 60-455(a). Prior-crime evidence "relevant to prove some other material fact including motive, opportunity, intent preparation, plan, knowledge, identity or absence of mistake or accident," however, "is admissible." K.S.A. 60-455(b). The admission or exclusion of evidence under these rules depends on four questions: (1) is the fact sought to be proven material—i.e., does it have "some real bearing on the decision in the case;" (2) if material, is the fact actually disputed; (3) if material and disputed, does the at-issue 60-455 evidence at all reasonably tend to prove the fact; and if so, (4) does the risk of "undue prejudice" from admitting the evidence "substantially outweigh[]" the evidence's probative value. *State v. Brazzle*, 311 Kan. 754, 758–59, 466 P.3d 1195 (2020). The first question an appellate court reviews de novo. *Brazzle*, 311

Kan. at 758. The remaining questions are reviewed for abuse of discretion. *Brazzle*, 311 Kan. at 758–59. If error is found, this Court assess "whether there is a reasonable probability the error affected the trial's outcome in light of the entire record." *White*, 316 Kan. at 216.

Issues Unpreserved. Defense counsel raised 10 objections during the State's 26-page examination of Jordan. (R. 22, 1297–1319, 1328–32.) None were to the evidence he now finds objectionable; none were 60-455 based. (R. 22, 1312–15, 1317, 1330–31.) As May concedes, "[d]efense counsel did not object to Jordan's testimony regarding bad acts." (Appellant's Br., 22.) May claims a handful of alleged objections at the parties' instruction conference preserved his issues. He also, through various posttrial motions, complained of Jordan's oxycodone-sale testimony, certain meth-use testimony, and, perhaps, other unspecified bad act evidence—though, he framed these issues as prosecutor errors. (R. 1, 367, 376, 399; R. 2, 21.)

But under K.S.A. 60-404, "a timely and specific objection to evidence at trial is required to preserve issues arising from that admission for appeal." *State v. King*, 288 Kan. 333, 341–42, 204 P.3d 585 (2009). "A timely interposed objection...comes *between* the introduction of the evidence at trial and its admission." *State v. Ballou*, 310 Kan. 591, 613–14, 448 P.3d 479, 482 (2019). Pretrial objections do not suffice. *Ballou*, 310 Kan. at Syl. ¶ 6, 613–14. Objections at the close of evidence do not suffice. *State v. Daniels*, 28 Kan. App. 2d 364, 365, 17 P.3d 373 (2000); *State v Houston*, 289 Kan. 252, 270, 213 P.3d 728 (2009) (citing *Daniels* with approval). Nor do posttrial objections. *State v. Brinkley*, 256 Kan. 808, 823–24, 888 P.2d 819 (1995). May's in limine, instruction-conference, and motion-for-new-trial objections did not, as required, enable the court to "rul[e] *contemporaneous* with an attempt to *introduce* the evidence at trial." *Ballou*, 310 Kan. at 614. None of his 60-455 claims are preserved.

Lack of Notice. May complains that he lacked a meaningful pretrial opportunity to

address Jordan's testimony. But his meaningful opportunity to be heard was at the time Jordan made his allegedly objectionable statements. Had he then objected (as required), the court could have taken any appropriate corrective action. It was not lack of notice but lack of objection, therefore, that permitted Jordan to testify as he did. "[T]he admission of []60-455 evidence without the explicit relevance inquiries, particularized weighing of probative value and prejudicial effect, or prophylactic limiting instruction," moreover, "is not inevitably so prejudicial as to require automatic reversal." *State v. Gunby*, 282 Kan. 39, 57, 144 P.3d 647 (2006). And for the following reasons, any lack of notice was harmless.

Methamphetamine-Use Evidence. As an initial matter, "K.S.A. 60-455 does not apply if the evidence relates to crimes or civil wrongs committed as part of the events surrounding the crimes for which [defendant] was on trial—that is the res gestae of the crime." *State v. King*, 297 Kan. 955, 964, 305 P.3d 641 (2013) (discussing the limited context in which *Gunby* applies). Nor do ambiguous or generic references to unspecific bad acts implicate 60-455. *State v. Sieq*, 315 Kan. 526, 532–33, 509 P.3d 535 (2022). Evidence that May generally "get[s] high" and has a "drug habit" points to no "*specified* occasion" of wrongdoing. K.S.A. 60-455(a); *see also State v. Richmond*, 289 Kan. 419, 426–27, 212 P.3d 165 (2009). Evidence that May had been up the preceding days getting high and received "an eight ball" of methamphetamine the day of the shootings provided "circumstantial evidence showing [May] had possession and control over [methamphetamine]" leading up to the moment methamphetamine was discovered in his vehicle. *State v. Adams*, 294 Kan. 171, 175, 183–84, 273 P.3d 718 (2012); *see also State v. Butler*, 307 Kan. 831, 861, 416 P.3d 116 (2018); *but cf. State v. Boggs*, 287 Kan. 298, 317, 197 P.3d 441 (2008). Defense counsel, in fact, agreed that admitting the "eight ball" evidence as "part and parcel of the evidence of that day" was "fine." (R. 24, 1691.) Thus, the

testimony is either too connected to the crime or too unspecific to implicate 60-455.

That said, May argues that Jordan's drug-testimony was inadmissible to prove his intent to possess or knowledge of the found methamphetamine. To prove May "possessed" that methamphetamine, the State needed to show he either had "control over [the methamphetamine] *with knowledge of and the intent to have* such control or *knowingly* ke[pt the methamphetamine] in a place where [he] ha[d] some measure of access and right of control." K.S.A. 2018 Supp. 21-5706(a), 21-5701(q) (emphasis added); (R. 1, 347.) May does not dispute his intent and knowledge were material. Rather, analogizing to *Boggs*, he claims the fact he denied the methamphetamine was his made his intent and knowledge a nonissue. *Boggs*' rule that a defendant's prior drug-involvement is irrelevant to any disputed material fact, however, applies only when a defendant does not assert his actions were innocent. *Boggs*, 287 Kan. at 314. In other words, it applies only when defendant claims "the State's allegations *concerning the presence of drugs* is factually untrue." *State v. Rosa*, 304 Kan. 429, 436, 371 P.3d 915 (2016) (emphasis added). Where a defendant instead claims he was "unaware of the presence of the drugs" or provides some other "'innocent explanation' for the[ir] presence," evidence of defendant's prior drug use "*is* relevant and probative to prove a disputed material fact—*viz.*, the truth or falsity of...defendant's 'innocent explanation.'" *Rosa*, 304 Kan. at 437.

May did not simply deny that methamphetamine was found within his vehicle. *But see Boggs*, 287 Kan. at 298. Rather, he introduced evidence that Yarbrough arrived with a syringe she used to "indulge in drugs." (R.18, 383.) He testified she had that item with her when she sat in his vehicle. (R.22, 1396–97.) He denied the drugs found were his. (R.23, 1480.) But he "ha[d] some idea" how they got there; he emphasized that Yarbrough had used his car. (R.23, 1480–81.) And his closings argued: "Yarbrough was in the jeep;" "no drug paraphernalia

[was] found at [his] apartment,...[o]ther than what they found in the black bag...that belonged to...Yarbrough;" Yarbrough "indicated to you what she used that syringe for;" and, for him to have been guilty, "you have to know that it's there." (R.24, 1792–94.) In other words, May claimed he was "unaware of the presence of the drugs" and that Yarbrough's use of his vehicle explained their presence. *Rosa*, 304 Kan. at 437. The drug evidence, therefore, was—if 60-455 evidence at all—relevant and probative to disproving his "innocent explanation." *Rosa*, 304 Kan. at 437; *State v. Graham*, 244 Kan. 194, 195–97, 768 P.2d 259 (1989). As discussed below, the "gets high" and "drug habit" evidence, like the oxycodone-sale evidence, was also probative to disproving the disputed narrative he gave to explain shooting Yarbrough and Jones. And beyond baldly asserting the evidence was "not relevant" and "prejudicial," May makes no argument it was substantially more prejudicial than probative—thus waiving the point. *State v. Weekes*, 308 Kan. 1245, 1247, 427 P.3d 861 (2018).

Oxycodone-Sale Evidence. In deciding what limiting instruction it would give, the court remarked, "We also have, in this Court's mind, rebuttal of good character evidence." (R. 24, 1696.) Though not directed at any particular evidence, May now takes the court's comment as indicating the court ruled the oxycodone-sale evidence admissible, under K.S.A. 60-447, wholly independent of 60-455. He argues *Gunby* rejected such reasoning. He argues the court was wrong to think May "cast himself as a good character." (R. 24, 1696.) And as to his core 60-455 challenge, he simply asserts, without further explanation, that Jordan's oxycodone-sale testimony "was not relevant to any[thing] material." (Appellant's Br. 27.)

Gunby clarified that "if not"—independently—"admissible as character evidence under K.S.A. 60-447," then "evidence of other crimes or civil wrongs is inadmissible *unless...relevant to proving a material fact in dispute*." *Boggs*, 287 Kan. at 305 (emphasis altered from original). To

the extent the court at all ruled on the admissibility of any of Jordan's testimony as character evidence, therefore, it need not have been right or wrong on that point for the evidence's admission to have been justified under 60-455. Only that issue, therefore, needs addressed. This is particularly true, as the State never sought to justify the oxycodone-sale evidence's admission under 60-447. (R. 24, 1693). Defense counsel never argued Jordan's testimony constituted improper character evidence. (R. 24, 1680, 1691, 1693–94.) And the court made its comment, not in deciding the evidence's admissibility, but in the context of what considerations might bear on any limiting instruction it might give. (R. 24, 1695–97.)

May's fails to sustain his 60-455 challenge. May's cursory assertion that the oxycodone-sale evidence was "[ir]relevant to any material fact" hardly amounts to a properly briefed argument, and May abandons the issue. *Weekes*, 308 Kan. at 1247. May also fails to mention that defense counsel—not the State—first introduced this evidence. (R. 22, 1323–24, 1326.) Even if Jordan originally volunteered the information, defense counsel continued questioning Jordan on the topic. By first introducing *and exploring* the very evidence he now objects to, May waived 60-455's protections, making any error invited or harmless. *See State v. Anthony*, 282 Kan. 201, 214–15, 145 P.3d 1 (2006), *decided same day as Gunby*, 282 Kan. at 57–58; *State v. Crossett*, 50 Kan. App. 2d 788, 799–800, 339 P.3d 840 (2014); *but cf. State v. Everett*, 296 Kan. 1039, 297 P.3d 292 (2013) (holding that an "open the door rule" provides no independent basis for introducing distinct bad-act rebuttal evidence independent of 60-455).

His position's greatest flaw, however, is that the oxycodone-sale evidence indeed was relevant to a material dispute. May advanced an innocent account of Yarbrough's and Jones' shootings premised on the notion that they conspired to rob him of his prescription medications. His insistence that he had possessed such medications at the time of the

shootings, therefore, was significant to his defense. Jordan's testimony that May habitually "immediately" sold his medications to fuel his drug habit and had lost his access to those medications "end of June" 2018 (right before the July 2, 2018 shootings), thus offered exceedingly probative proof that no robbery took place. (R. 22, 1323–24, 1326, 1331–32.) The State had to prove that May premeditated shooting Yarbrough and intended to shoot Jones with no self-defense mindset. Disproving that an oxycodone robbery provoked May's actions was valuable. On balance, the evidence was more probative than prejudicial.

Gun-Possession Evidence. May claims his admission he possessed a gun during the shootings made Jordan's gun-testimony "[ir]relevant to any material disputed fact." (Appellant's Br., 27.) As further support, he cites *State v. Phinis*, 199 Kan. 472, 481–82, 430 P. 251 (1967), for the proposition that ownership is nonessential to proving firearm possession. That "possession may exist entirely apart from ownership," however, does not make ownership irrelevant; "ownership," after all, "implies the right to possess." *Phinis*,199 Kan. at 482. And that May admitted handling the gun, does not mean the State had nothing to prove.

May understates the issues at play. Again, to prove May criminally possessed the firearm required evidence that he controlled the item "with knowledge of or intent to have such control." K.S.A. 2018 Supp. 21-5111(v). While possession and use of a firearm in self-defense "is not in itself a defense to the charge of unlawful possession of a firearm," "brief" possession of a firearm "without predesign or prior possession" may establish a defense. *State v. Jones*, 229 Kan. 618, 620–21, 629 P.2d 181 (1981). So, to prove May criminally possessed the firearm, and to prove its theory that May premeditated shooting Yarbrough and intentionally shot Jones, the State necessarily had to disprove May's theory that he had no gun until Yarbrough shot him (and his bed) with Jones' gun. Jordan's gun-testimony did exactly that.

It showed that May's possession of the gun was neither "brief [nor] without predesign." *Jones*, 229 Kan. 618. It undermined May's theory of events. It was admissible. *See State v. Wilkerson*, 278 Kan. 147, 156, 91 P.3d 1181 (2004); *State v. Holt*, 228 Kan. 16, 20–21, 612 P.2d 570 (1980); *State v. Rasler*, 216 Kan. 582, 585–86, 533 P.2d 1262 (1975). And it prejudiced May in the non-propensity sense that "nearly all evidence the State presents in a criminal case will be prejudicial." *State v. Thurber*, 308 Kan. 140, 202, 420 P.3d 389 (2018).

Limiting Instruction. May additionally claims the court gave a clearly erroneous limiting instruction. As a clear-error issue, this Court first asks "whether the evidence qualifies as K.S.A. 60-455 evidence" at all*; if* so, it then determines whether it is "firmly convinced the jury would have reached a different verdict had a [proper] limiting instruction been given." *Butler*, 307 Kan. at 860. As discussed above, the methamphetamine evidence, in fact, did not implicate K.S.A. 60-455. That said, May argues that the court's instruction failed to, as recommended in the comments to PIK Crim. 4th 51.030, "instruct the jury as to the specific crime and element for which the evidence of a prior crime is being admitted." (Appellant's Br., 28.) The comment, however, cites no authority for its recommendation. PIK Crim. 4th 51.030, Comment II.D. No authority cited by May shows that the failure to follow the PIK instruction's *comment* constitutes error, let alone reversible error; so, he waives the argument. *See State v. Meggerson*, 312 Kan. 238, 246, 474 P.3d 761 (2020). The court fashioned its limiting instruction—as "strongly recommended"—using the PIK's unmodified language, which includes no crime-specific pattern language. *Hilyard*, 316 Kan. at 335; *compare* PIK Crim 4th 51.030 *with* R. 1, 333. The instruction is appropriately tailored rather than "shotgun" in nature. *See State v. Magallenez*, 290 Kan. 906, Syl. ¶ 3, 919, 235 P.3d 460 (2010). And May proposes no alternative language the court ought to have used. May fails to prove error.

Reversal Is Not Required. Neither the admission of Jordan's testimony nor the court's instruction, if erroneous, require reversal. Even if it failed to limit consideration of Jordan's testimony to particular crimes or elements, the court's instruction *did* direct the jury that it may consider any other-crimes evidence only for the nonpropensity purposes specified. There is no risk that the jury's verdict was propensity-based. *See State v. Claerhout*, 310 Kan. 924, 932, 453 P.3d 855 (2019). May cannot prove clear error. And even without the at-issue testimony, the remaining evidence incriminated May to an error-overwhelming degree. *See State v. Hebert*, 277 Kan. 61, 96, 82 P.3d 470 (2004). As to the attempted-murder charges, the Section I.B-discussed evidence shows that Jordan's testimony was not what convinced the jury to credit Yarbrough and convict May. As to the weapon-possession charge, the Section I.D-discussed evidence proves the same. And as to the methamphetamine-possession charge, Yarbrough's testimony (which the jury obviously chose to credit, despite learning she too "indulge[d] in drugs") placed methamphetamine in May's possession. (R. 18, 383.) Methamphetamine was found, not just in May's vehicle, but in "the front driver's side floorboard." (R. 21, 1154.) And even under May's account, Yarbrough sat only "in the back seat." (R. 22, 1397.)

V. The district court properly denied May a new trial. (Appellant's Issue VIII)

Issue Eight of May's brief asserts three reasons why he believes the interests of justice required that the district court have ordered the State to retry him. The first reiterates his Issue Four-complaints that the court's evidentiary rules robbed him of his rights to testify and present a defense. As such, the State would direct the Court to Section II for its response. The second concerns allegedly newly discovered evidence the court ruled not credible. The third concentrates on one instance of alleged prosecutorial error in cross-examining him.

Review Standards. A court "may" order a defendant retried "if required in the interest of justice." K.S.A. 22-3501(1). That standard asks "whether the challenged event deprived

[defendant] of a fair trial." *Harris*, 313 Kan. at 585. An appellate court reviews a new trial denial for an abuse of discretion. *State v. Lyman*, 311 Kan. 1, 16, 455 P.3d 393 (2020).

Cordero Riley's "New" Evidence. In support of his new-trial motion, May called Cordero Riley. Riley claimed that he had discussed the shootings with Jones and Jones 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 [sic], 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, 34.) Conflictingly, Riley told the court this conversation occurred after May's trial (December 2019); yet, admitting he did not know when May's trial occurred, he insisted his and Jones' conversation happened the summer of 2019. (R. 32, 34, 42–43.) He also acknowledged he has at least three crimes-of-dishonesty convictions. (R. 34, 38.)

A detective sent to interview Riley also testified. In the account Riley gave the detective, Riley said: "Jones had told him that he had...run up on [] May and saw that [] May had a gun, turned his back, and was shot in the back. He further said that [] Jones told him that the reason he ran up on [] May is that [] May had shot...Yarbrough." (R.34, 163.) When asked specifically, Riley denied that Jones had told him it was a robbery or a drug deal gone bad. (R.34, 164, 167.) Riley also discussed that, "approximately a year ago" (November 2019), he had told May "what he had heard on the streets." (R.34, 164–65.) According to Riley, May then told him that what had occurred was: he gave an individual a ride; in exchange received "a small amount" of "dope," which he tossed into his vehicle's ashtray; he then drove home, laid down to sleep, awoke to someone knocking, and opened his door to find Yarbrough "there to rob him of his government check." (R.34, 165–66.) The detective also learned that May had approached Riley twice at the jail about testifying on his behalf. (R.34, 166.)

In its oral ruling denying May's new-trial motion, the court "fe[lt] compelled" to remark on Riley's testimony. (R. 35, 18.) The court had allowed Riley's testimony only to preserve it for any prospective ineffective-assistance claim. (R. 35, 18–19.) It volunteered, though, its impression that, "Frankly, [Riley] did not present as credible to this Court." (R. 34, 18.) May now argues that finding was unreasonable. He supports his assertion with no authority, however. *See Gibson*, 299 Kan. at 222. To prove the district court erred, moreover, Riley's testimony must have been "sufficiently, credible, substantial, and material to raise in the court's mind, in light of all the evidence introduced at [May's] trial, a reasonable probability of a different outcome." *State v. Thomas*, 257 Kan. 228, 235, 891 P.2d 417 (1995). The trial evidence disproving Riley's May-favoring version was overwhelming. May simply argues that the district court ought to have weighed Riley's testimony differently. But Riley was a May-approached, three-time thief who gave two different, factually sparse, secondhand accounts of the shooting. "To reverse the district court under these circumstances would be an improper reassessment of the judge's credibility determination." *Lyman*, 311 Kan. at 18.

Prosecutor Error. When questioning May about what medical equipment he does or does not use, May volunteered he had a heart attack, prompting the State to explore whether that slip was an attempt to appeal to the jury's sympathies. (R. 23, 1592, line 9–1593, line 16.) May contends the exchange was argumentative, inflammatory, and introduced the prosecutor's opinion on his credibility regarding his medical problems. A two-step, "error and prejudice" analysis applies to a prosecutorial error claim. *State v. Sherman*, 305 Kan. 88, 109, 378 P.3d 1060 (2016). May is certainly correct that "[b]eing a sympathetic witness is entirely permissible." (Appellant's Br., 57.) But he is wrong to think it impermissible to probe whether a witness' sympathetic qualities are feigned. In *Peterson*, the State was "not out-of-bounds" in

"questioning [the defendant] as to whether the presence of his baby in the courtroom and his crying on the stand were tactics to gain jury sympathy." *State v. Peterson*, No. 89,752, 2004 WL 2796395, *3 (Kan. App. 2004) (unpublished opinion). "The State," *Peterson* maintained, "should be able to explore whether a defendant is trying to play to the jury's emotions." *Peterson*, 2004 WL 2796395 at *3. Here, the prosecutor did exactly that. If error, though, there is no reasonable possibility it carried over into the jury's verdicts. The exchange spanned roughly a page and a half of testimony over the course of an eight-day trial. Ample evidence showed May's lack of credibility. This exchange was not the reason the jury convicted May.

VI. No errors combined to deprive May of a fair trial. (Appellant's Issue IX)

Issue Nine of May's brief argues that, if not individually, then collectively, the court's and prosecutor's errors combined to deny him a fair trial. But the record establishes only a single, harmless instructional error, so "there are not multiple errors to cumulate." *State v. Thomas*, 307 Kan. 733, 746, 415 P.3d 430 (2018). That said, as May has established no constitutional errors, the State need show only that there is no "reasonable probability that the cumulative errors affected the verdict." *State v. Williams*, 308 Kan. 1439, 1463, 430 P.3d 448 (2018). And the court's comments on May's ability to present a defense and his case's evidence establish exactly why no such probability exists. (R. 34, 7–23; R. 36, 20–23.)

CONCLUSION

The State respectfully requests that this Court affirm May's convictions and sentence.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that on June 28, 2023, I e-mailed a copy of the foregoing brief to Jessica R. Kunen, Attorney for Appellant, at JrKunen1@gmail.com.

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406 P.3d 923 (Table)
Unpublished Disposition
This decision without published opinion is referenced in the Pacific Reporter. See Kan. Sup. Ct. Rules, Rule 7.04.
NOT DESIGNATED FOR PUBLICATION
Court of Appeals of Kansas.

STATE of Kansas, Appellant,
v.
Freddie Alec THOMAS, Appellee.

No. 116,111
|
Opinion filed December 8, 2017
|
Review Granted August 30, 2018

Appeal from Barton District Court; RON SVATY, judge.

Attorneys and Law Firms

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Donald E. Anderson II, of Robert A. Anderson Law Office, of Ellinwood, for appellee.

Before Buser, P.J., Pierron and Standridge, JJ.

MEMORANDUM OPINION

Buser, J.:

***1** The State charged the defendant, Freddie Alec Thomas, with murder in the first degree after he shot and killed Jeremy Saldana as the victim was returning to his residence in Great Bend, Kansas. After a preliminary hearing and Thomas was bound over for trial on the charge, Thomas filed a motion to dismiss claiming he acted in self-defense and, therefore, was immune from prosecution. After an evidentiary hearing, the Barton County District Court found that Thomas was immune from prosecution due to self-defense and granted the motion to dismiss the complaint. The State appeals.

We hold the district court did not make findings resolving controverted facts that are material to analyzing the self-defense issue, and the district court also did not correctly apply the law regarding self-defense. Accordingly, we reverse the grant of immunity and dismissal of the charge and remand with directions to conduct a rehearing on the motion, and upon consideration of the evidence presented at the rehearing, to make findings of fact and conclusions of law on all matters necessary to rule on the self-defense and immunity issues.

FACTUAL AND PROCEDURAL BACKGROUND

The factual summary provided in this section is derived from the evidence presented to the district court at the hearing on the motion to dismiss which occurred on June 8, 2016. The procedural background is taken from the record on appeal.

On the morning of September 11, 2015, Marissa Reynolds and her husband, Jason, invited Sherry Muro and her boyfriend, Thomas, to their home in Great Bend. Sherry is Marrissa's mother. Of note, until 2013, Sherry had dated Saldana for about a year, but at the time of the shooting she was in a dating relationship with Thomas. Unbeknownst to Sherry and Thomas, Saldana was living at the Reynolds residence, and had been living there for the past two years. According to Marissa, Saldana was a member of the family, and she "considered him to be my father." Marissa testified that because Saldana "just didn't want to create any drama [and] didn't care to see either [Sherry or Thomas]," he left the residence in the late morning before the couple arrived, and he did not return to the home until later in the evening.

By all accounts, Saldana had never met Thomas. According to Marissa, she was unaware of any animosity between the two men. She testified, "[i]t was my belief that they had never met and never talked, and [Saldana] had always told me he wanted nothing to do with ... Thomas, so he didn't even want to talk to him ... didn't want to even see him." Sherry testified, however, that she previously had conversations with Thomas in which she advised him that Saldana made racially disparaging remarks about her dating a black man.

Thomas was employed by the Kansas Department of Corrections at the Ellsworth Correctional Facility. According to Marissa, he was a member of the SWAT team. During his stay at the Reynolds residence, as was his custom and practice, he wore a nine millimeter Ruger semiautomatic handgun as a sidearm.

***2** Sometime after 1 p.m., Sherry and Thomas arrived at the Reynolds residence. The two couples left for dinner and returned to the residence about mid-to-late afternoon. Upon

returning home, the two couples lounged about the residence and backyard. Thomas drank beer.

Marissa testified that, later in the evening, Saldana sent text messages to her expressing his intent to return home. These texts stated, "[t]hat he was tired. He wanted to come home. He asked me if I could ask Sherry and Thomas to leave." In the late evening hours, about 8 p.m., Marissa informed Sherry and Thomas of the texts. According to Marissa, "[Sherry] seemed shocked that [Saldana] lived there, and Thomas was a little upset. Don't ask me why. I don't know, but she convinced him to leave."

Sherry, on the other hand, testified that during the evening Marissa was texting Saldana and that she "was acting kind of funny." According to Sherry, Marissa eventually disclosed that Saldana was "over in the park and that he was going to come and start some shit with Mr. Thomas." Sherry testified that she and Thomas went outside to his silver Toyota 4Runner, and began packing it up with a beer cooler but they did not drive away. Instead, she stood in the front yard and spoke to her daughter because she was angry at Marissa for not telling her that Saldana lived at the residence.

According to Marissa, as she stood on her front porch, she observed her mother and Thomas leave the home. At this time, Thomas was "riled up," and "ask[ed] what [Saldana] looked like." Thomas walked to his vehicle parked in front of the residence, rummaged around, and "took out a bulletproof vest [and] put it on." The vest had a badge-like emblem with "Kansas Department of Corrections" and the name "Thomas" sewn on the front. After the shooting, it was found next to the front porch.

Marissa testified that she saw her mother and Thomas get in their vehicle and start to drive away when Saldana was walking from the park across the street and toward the residence. Marissa then observed Thomas stop his vehicle and get out as Saldana walked diagonally onto the front yard towards the front door of the Reynolds' residence. According to Marissa, Thomas then walked onto the front lawn and he "cut [Saldana] off."

Although Thomas did not testify at the motion hearing, Detective David Paden conducted two interviews with Thomas after the shooting. The first interview occurred at the sheriff's office shortly after Thomas' arrest and after he waived his rights under *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed. 2d 694 (1966). The second interview took place on September 15, 2015. During those two interviews, Thomas described his version of the events of September 11, 2015.

According to Thomas, prior to the shooting he knew that Saldana was Sherry's ex-boyfriend but he had never met or seen him. Thomas told Detective Paden, that in the afternoon, he was at the Reynolds' home watching a movie.

> "There was a point in time where he was informed that [Saldana] was going to be coming back, so they were going to leave. But he was told no, just hang on, just wait, don't leave. [Thomas] said he didn't want to be the bad guy. He was trying to kind of be a go-between between Marissa and [Sherry], so he didn't want to be the bad guy, so they decided to stay.
>
> ***3** ....
>
> "... just stay and work things out."

Thomas stated that when he left the home he entered his vehicle and retrieved a protective vest which he put on. According to the detective, Thomas advised, "He didn't know what was going to go on. It was his information that Mr. Saldana was a violent man, that had carried weapons, and he didn't know what was going to happen when Mr. Saldana got on scene." At that time, Thomas also wore the nine millimeter Ruger semiautomatic handgun as a sidearm.

As he was standing outside his vehicle, Thomas was "told basically just, here he is, look at him, look at him. He's right here." As Thomas was coming around his vehicle and walking onto the Reynolds' front yard, "[h]e said he turned to his right, and Mr. Saldana was right there in front of him."

Thomas described a "very quick encounter." He told Detective Paden

> "he wanted Saldana to know that he had a firearm on him, and he said what's—'What's the problem?' He said Saldana said something. He didn't know if it was in Spanish or what. He didn't understand it, but then Saldana kept coming at him, so he did a clearing maneuver, pushed him back, and then he stepped back and drew his weapon."

There was no testimony by Detective Paden about what Thomas meant by the term "clearing maneuver" but the detective described a clearing maneuver as an action, "taught in law enforcement training to basically separate yourself

from a suspect to—so you can gain some time to decide what your next move is going to be."

Other than the clearing maneuver, Thomas said there was never any pushing, shoving, punching, or scuffle of any kind by either him or Saldana prior to Thomas firing the first shot. According to Thomas, the first shot he fired was an accident. He informed Detective Paden, "The gun just went off. It was—he didn't mean for it to. It went off." Thomas then advised, "Mr. Saldana was still coming at him, so he fired two more shots" while his arm which held the firearm was straight out.

Thomas advised that at the time of the encounter he did not know if Saldana would go inside the residence or do anything to anybody else. Thomas indicated "[h]e was concerned for his safety and anybody else's." Thomas acknowledged, however, that during the encounter he never saw Saldana with a weapon.

Marissa provided a markedly different account. As she watched from inside her front screen door, the two men were facing each other about two feet from the front porch. Saldana was facing the front door and Thomas was facing away from the residence towards the park. Saldana was holding a large Kwik Shop cup.

As Marissa described the encounter: "The only thing I heard come from ... Thomas' mouth was, 'Do you have a beef with me?' [Saldana], to my knowledge, said nothing. I couldn't hear nothing. Mr. Thomas proceeded to grab him by his throat." As described by Marissa, "As Thomas had grabbed [Saldana] by the throat and when he had turned, [Saldana] more like violently swung him, the cup had fell [*sic*] from his hand." Marissa did not see any pushing, shoving, or hitting by Saldana, only that "he was trying to shove Mr. Thomas away so that he could get away" while Thomas had him by the throat. According to Marissa, Thomas let go of Saldana's throat then "stepped back, unholstered his weapon and shot [Saldana]." She estimated that the two men were less than an arm's length from each other at the time of the shooting.

*4 Marissa testified that after the first shot, Saldana was "like staggering from the gunshot wound, and the second to third shot he was midway down to the ground," falling backwards. Marissa unsuccessfully attempted CPR in an attempt to revive Saldana.

Sherry's version of the encounter differed from both Marissa and Thomas' accounts. Sherry denied that she and Thomas began driving from the residence as Saldana entered the front yard. Rather, at the time she saw Saldana coming into the yard, she said Thomas was "standing in the yard and [Saldana] just kept coming at him. ... [Thomas] was standing ... at the edge of the porch, and [Saldana] kept coming at him." According to Sherry, she attempted to physically separate the two men. She believed that Saldana was "going to attack [Thomas]."

Sherry saw Saldana push Thomas whereupon Thomas "put his hand out and told [Saldana] to stop" but he kept coming toward Thomas. Sherry heard Saldana say "something along the line of, 'What is your fucking problem?' " to which Thomas replied, "I don't have no problem, stop." Sherry testified that both men were asking each other what the problem was. According to Sherry, "When [Saldana] kept coming, [Thomas] used his left hand because he pulled his gun with his right hand, and he just kept coming, and I heard the first shot." Sherry saw that after being shot, Saldana's shoulder moved backward but he continued to move forward towards Thomas. Sherry then saw Thomas fire his weapon again. She only heard two shots.

In response to the prosecutor's question, "So in order to go to the porch, Mr. Saldana would have had to have gone through Mr. Thomas, correct?" Sherry responded, "He could have gone around [Thomas] without shoving him, yes." She did not see Saldana armed with any weapon.

At the hearing on the motion to dismiss, the State advised the district court that Saldana had prior misdemeanor theft convictions from San Angelo, Texas, and a 2006 conviction for misdemeanor assault with bodily injury from the same jurisdiction.

At about 8:30 p.m. on September 11, 2015, Great Bend Police Officer Mason Paden was dispatched to the Reynolds residence. Upon arrival at the scene two minutes later, the officer observed Saldana laying in the front yard surrounded by bystanders. In response to his questions, "What happened? Who did this?" Thomas replied, "I did." Thomas then placed his hands behind his back and was arrested. Thomas informed Officer Paden that the firearm was on a trunk of a car. The weapon, a nine millimeter Ruger semiautomatic handgun with one live round in the magazine was seized. Of note, three spent shell casings were found within a foot or two of Saldana's body. A large Kwik Shop cup was also found nearby.

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The report of the autopsy conducted on Saldana's body was admitted in evidence. It is noteworthy that, based on the examination of the paths of the bullet wounds at autopsy, the sequential order that the bullets penetrated Saldana's body was determined. According to Dr. Lyle Noordhoek, the deputy coroner who performed the autopsy: "The first gunshot wound passes through the right side of the shirt through the right chest ... into the right lung, out of the posterior right lung, into the right posterior chest and exits ... a through-and-through perforation." According to Dr. Noordhoek, "the wound in the right anterior chest appears to be the first wound as it is nearly level in anteroposterior penetration with slight lateral deviation and slight downward deviation."

***5** Based on Dr. Noordhoek's examination: "The second gunshot goes through the left anterior chest near the clavicle, passes through a portion of the anterior clavicle ... passing through the chest wall through the left lung, through the lateral aorta and exiting the left posterior chest in a lateral and downward direction. ... The bullet is recovered." The doctor memorialized that "[t]here is a gaping hole in the aorta." Based on his examination, Dr. Noordhoek opined that "[t]he individual appears to have been moving forward at the time of this wound tract."

The third gunshot wound "passes through the left temporal skin in a downward and medial direction anterior to the left ear." The jacket and bullet were recovered from the anterior neck skin. Dr. Noordhoek opined, that Saldana "would be leaned forward at the time of the wound."

In summary, Dr. Noordhoek determined the manner of Saldana's death was homicide with the cause of death as "hemopneumothorax and exsanguination due to, or as a consequence of gunshot wounds to the right and left chest with penetration of the right and left lungs and perforation of the lateral aorta."

On September 16, 2015, Thomas was charged with premeditated murder, an off-grid person felony, in violation of K.S.A. 2015 Supp. 21-5402(a)(1). (I, 1) After a preliminary hearing, Thomas was bound over for arraignment and trial as charged in the complaint. He was arraigned promptly after the ruling.

On May 23, 2016, Thomas filed a "Motion to Dismiss the State's Complaint/Information Due to Defendant's Immunity from Prosecution." The motion sought immunity from prosecution as provided in K.S.A. 2015 Supp. 21-5231. In particular, Thomas based his immunity claim on self-defense, as set forth in K.S.A. 2015 Supp. 21-5222.

The evidentiary hearing on Thomas' motion to dismiss occurred on June 8, 2016. At the conclusion of the hearing the district court made no factual findings. However, the district court concluded as a matter of law that immunity from prosecution was warranted because the killing of Saldana was justified by Thomas acting in self-defense. As a result, the complaint was dismissed and Thomas was discharged from prosecution.

The State filed a timely appeal.

STANDARDS OF REVIEW AND SUMMARY OF THE APPLICABLE LAW

After the filing of appellate briefs but prior to oral arguments, our Supreme Court issued its opinion in *State v. Hardy*, 305 Kan. 1001, 390 P.3d 30 (2017). In this opinion, the Supreme Court reversed our court's judgment in *State v. Hardy*, 51 Kan. App. 2d 296, 347 P.3d 222 (2015). This development is significant because at the district court hearing and in the parties' appellate briefing, our court's exposition on the law and procedure of Kansas' self-defense immunity statutes was cited and applied to the facts of this case. In the view of our Supreme Court, however, there were certain errors of law in our court's holding. As a result, in this appeal, we must follow the Supreme Court's directives regarding the proper law and procedure to be applied in self-defense immunity cases. See *State v. Meyer*, 51 Kan. App. 2d 1066, 1072, 360 P.3d 467 (2015) (The Court of Appeals is duty bound to follow Kansas Supreme Court precedent, absent some indication the Supreme Court is departing from its previous position.). Of note, shortly before oral arguments in this case, the State filed a letter of additional authority in accordance with Kansas Supreme Court Rule 6.09(b) (2017 Kan. S. Ct. R. 39) alerting our court and Thomas to the Supreme Court's opinion in *Hardy*.

Given the importance of our Supreme Court's guidance in *Hardy*, we begin by citing two syllabi in that opinion that pertain to the law and procedure that district courts and appellate courts, respectively, should follow in self-defense immunity cases:

*6 "Upon a motion for immunity pursuant to K.S.A. 2016 Supp. 21-5231, the district court must consider the totality of the circumstances, weigh the evidence before it without deference to the State, and determine whether the State has carried its burden to establish probable cause that the defendant's use of force was not statutorily justified."

....

"An appellate court will apply a bifurcated standard of review to a district court's determination of probable cause pursuant to K.S.A. 2016 Supp. 21-5231. When a district court's ruling entails factual findings arising out of disputed evidence, a reviewing court will not reweigh the evidence and will review those factual findings for supporting substantial competent evidence only. The ultimate legal conclusion drawn from those facts is reviewed de novo. When there are no disputed material facts, a pure question of law is presented over which an appellate court exercises unlimited review." 305 Kan. 1001, Syl. ¶¶ 1, 5.

Having summarized the standards of review which guide Kansas district courts and appellate courts, we next set forth the applicable statutes relating to self-defense and immunity from prosecution.

An individual's right to use deadly force in defense of that person is provided in K.S.A. 2016 Supp. 21-5222:

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

"(b) A person is justified in the use of deadly force under circumstances described in subsection (a) if such person reasonably believes that such use of deadly force is necessary to prevent imminent death or great bodily harm to such person or a third person.

"(c) Nothing in this section shall require a person to retreat if such person is using force to protect such person or a third person."

Of particular relevance to this appeal, is subsection (b) relating to the use of deadly force in those circumstances wherein an individual *reasonably believes* that the use of deadly force is necessary to prevent *imminent death or great bodily harm* to that person.

Our Supreme Court has developed a two-prong test to determine whether a defendant's conduct was reasonable. The first, *subjective* prong of this test "requires a showing that [the defendant] sincerely and honestly believed it was necessary to kill [or cause great bodily harm] to defend [himself]." *State v. McCullough*, 293 Kan. 970, 975, 270 P.3d 1142 (2012). The second, *objective* prong of this test "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." 293 Kan. at 975. In other words, the critical consideration regarding the objective prong is "the reasonableness of [the defendant's] belief that self-defense was necessary." *State v. Walters*, 284 Kan. 1, 16, 159 P.3d 174 (2007).

Self-defense is limited by K.S.A. 2016 Supp. 21-5226, which provides, in part, that the justification is not available to a defendant who

"(a) Is attempting to commit, committing or escaping from the commission of a forcible felony;

"(b) initially provokes the use of any force against such person or another, with intent to use such force as an excuse to inflict bodily harm upon the assailant; or

*7 "(c) otherwise initially provokes the use of any force against such person or another, unless:

"(1) Such person has reasonable grounds to believe that such person is in imminent danger of death or great bodily harm, and has exhausted every reasonable means to escape such danger other than the use of deadly force; or

"(2) in good faith, such person withdraws from physical contact with the assailant and indicates clearly to the assailant that such person desires to withdraw and terminate the use of such force, but the assailant continues or resumes the use of such force."

Moreover, a defendant does not need to initiate physical contact with the victim for an initial aggressor finding to be appropriate. See *State v. Salary*, 301 Kan. 586, 593-94, 343 P.3d 1165 (2015).

Kansas' immunity statute, K.S.A. 2016 Supp. 21-5231, among other provisions, provides immunity from prosecution for any individual, pursuant to K.S.A. 2016 Supp. 21-5222, who uses deadly force in defense of the person upon the belief that use of deadly force is necessary to prevent imminent death or great bodily harm. That statute provides:

> "(a) A person who uses force which ... is justified pursuant to K.S.A. 2016 Supp. 21-5222, ... and amendments thereto, is immune from criminal prosecution and civil action for the use of such force .... As used in this subsection, 'criminal prosecution' includes arrest, detention in custody and charging or prosecution of the defendant.
>
> "(b) A law enforcement agency may use standard procedures for investigating the use of force as described in subsection (a), but the agency shall not arrest the person for using force unless it determines that there is probable cause for arrest.
>
> "(c) A prosecutor may commence a criminal prosecution upon a determination of probable cause." K.S.A. 2016 Supp. 21-5231.

Considered together in this case, the self-defense and immunity statutes would afford Thomas immunity from prosecution if he was not the initial aggressor and only used deadly force upon a reasonable belief that such force was necessary to prevent imminent death or great bodily harm to his person as a result of Saldana's actions. See K.S.A. 2016 Supp. 21-5226; K.S.A. 2016 Supp. 21-5222(a), (b); K.S.A. 2016 Supp. 21-5231(a). Because Thomas sought self-defense immunity for his use of deadly force in killing Saldana, the State had the "burden to establish probable cause that the defendant's use of force was not statutorily justified." *Hardy*, 305 Kan. 1001, Syl. ¶ 1.

THE ABSENCE OF FACTUAL FINDINGS BY THE DISTRICT COURT

On appeal, the State and Thomas are in agreement on one thing: The material facts relevant to the issue of self-defense are undisputed and the district court made sufficient findings regarding those facts. According to the State: "There are no disputed material facts from the trial court hearings. This honorable Court can consider this case to be a matter of a question of law and exercise unlimited review." For his part, Thomas asserts: "The court made a detailed ruling of its findings on the record." Thomas does acknowledge: "Though there were certainly discrepancies in the testimony between Mr. Saldana's friend/roommate, [Marissa], and the defendant's girlfriend, [Sherry], the court still made the ruling it did based on the evidence presented to it that was not in conflict ...."

***8** We could not disagree more. At the outset, our review of the district court's ruling at the conclusion of the evidence and the later filed journal entry, reveals the district court made *no findings* regarding any of the facts presented at the evidentiary hearing. While this circumstance frustrates appellate review, in this particular case the absence of judicial fact-finding is especially troubling because there was considerable disputed evidence critical to a determination of the self-defense issue. A few examples:

- The evidence was disputed regarding whether Thomas stopped his vehicle, got out, and walked into the yard to intercept and confront Saldana who was walking towards the front door of his residence; or whether Saldana arrived home while Thomas was merely standing in the front yard waiting to leave.
- The evidence was disputed regarding whether—other than Thomas' clearing maneuver—there was any physical contact prior to the shooting by either Saldana or Thomas. In this regard, Marissa and Sherry's testimony was not only at odds with each other, but also at variance with Thomas' statements to Detective Paden denying any physical contact—other than the clearing maneuver—by the two men prior to the shooting. Additionally, it is unclear whether the clearing maneuver admitted to by Thomas was observed by Marissa to be Thomas grabbing Saldana by the throat.
- The evidence was disputed regarding what, if anything (including fighting words), Saldana or Thomas said to each other prior to the shooting. Once again, the controverted testimony came from Marissa, Sherry, and Thomas' statements to Detective Paden.
- The evidence was disputed regarding the circumstance leading up to and including the shooting of Saldana. While Marissa testified that three shots were fired—a number corroborated by autopsy—Sherry heard only two shots. Moreover, in Thomas' motion to dismiss he asserted that he had fired an initial warning shot, although Thomas twice told Detective Paden that his first shot was not intentional but accidental.

We pause to emphasize the importance of judicially determining the truth of these aforementioned disputed facts which immediately preceded the shooting. For example, in the State's view, Thomas "must be seen as the aggressor, since he was already armed, donned the vest, refused to leave the area when given an opportunity to do so, and re-entered the yard in order to approach [Saldana]." In short, the State views Thomas as the initial aggressor. And, as noted earlier, if Thomas was the initial aggressor, he may not claim self-defense.

In sum, given the controverted facts leading up to the shooting, the importance of the district court's factual findings regarding what actually occurred is critical to determining whether Thomas was the initial aggressor or whether he was able to lawfully claim self-defense.

With regard to the manner of the shooting, whether the first shot was a warning shot intended to scare Saldana, an accident, or an intentional act is a material fact that is relevant to the self-defense analysis. Our court has stated that self-defense requires the *intentional, not accidental* use of force. See *State v. Bradford*, 27 Kan. App. 2d 597, Syl. ¶ 4, 3 P.3d 104 (2000) ("Self-defense is the intentional use of reasonable force to fend off an attacker."); *State v. Jones*, No. 113,044, 2016 WL 852865, at *6 (Kan. App. 2016) (unpublished opinion) (same). On the present record, we can only speculate regarding how the district court resolved these conflicting shooting scenarios.

***9** Finally, it is understatement to observe that resolution of the aforementioned disputed facts is also important to the analysis of whether there was a subjective and objective basis for Thomas to have a reasonable belief in the necessity of using deadly force to prevent imminent death or great bodily harm at the hands of Saldana. See K.S.A. 2016 Supp. 21-5222(b).

The failure of the district court to make any factual findings in ruling on Thomas' motion to dismiss is consequential. Supreme Court Rule 165 (2017 Kan. S. Ct. R. 214) imposes on the district court the primary duty to provide adequate findings of fact and conclusions of law on the record to explain the court's decision on contested matters. *State v. Herbel*, 296 Kan. 1101, 1119-20, 299 P.3d 292 (2013). When, as in this case, no objection is made to a district court's inadequate findings of fact or conclusions of law, an appellate court may presume the district court found all facts necessary to support its judgment. *State v. Dern*, 303 Kan. 384, 394, 362 P.3d 566 (2015). Where, however, the record does not support such a presumption and the lack of specific findings precludes meaningful review, an appellate court can consider a remand. *State v. Neighbors*, 299 Kan. 234, 240, 328 P.3d 1081 (2014).

We are unwilling as an appellate court to act as a fact-finder in this matter. It is not our role to weigh conflicting evidence, evaluate from afar witness credibility, ascertain which witness has a better memory or simply decide which testimony was more convincing. See *State v. Jones*, 300 Kan. 630, 646, 333 P.3d 886 (2014) ("We agree with Judge Buser's view that it would be inappropriate for us or any appellate court to make the factual finding and resolve a disputed point."); *State v. Berriozabal*, 291 Kan. 568, 591, 243 P.3d 352 (2010) (appellate court only reviews factual findings made by district court; it does not make findings).

Given the importance and large number of disputed facts which have not been judicially determined but are critical to a proper resolution of the self-defense question, we have no hesitancy in remanding this matter to the district court for compliance with Supreme Court Rule 165.

THE DISTRICT COURT'S CONCLUSIONS OF LAW

Next, we exercise unlimited review over whether the district court rendered proper conclusions of law when it ruled that the State had not carried its burden to establish probable cause that Thomas' use of force was not statutorily justified. See *Hardy*, 305 Kan. 1001, Syl. ¶¶ 1, 5.

As previously discussed, K.S.A. 2016 Supp. 21-5222(b) generally provides that a person is justified in the use of deadly force against another when and to the extent it appears to that person and the person reasonably believes that use of deadly force is necessary to prevent imminent death or great bodily harm. In this case, although the circumstances leading up to and involving the shooting were controverted, it was undisputed that Thomas used his deadly weapon to shoot and kill an unarmed Saldana. As a result, the essential legal question before the district court was whether Thomas' use of deadly force was based on a reasonable belief that his use of the firearm was necessary to prevent imminent death or great bodily harm.

As summarized earlier, we apply a two-prong test, comprised of a subjective component and an objective component,

to evaluate whether a defendant's use of deadly force was reasonable under the totality of circumstances.

***10** With regard to Thomas' subjective belief in the need to defend himself with deadly force, in the district court Thomas argued:

> "Mr. Thomas felt threatened by the conduct of the victim. Mr. Thomas knew of threats that Mr. Saldana had previously made against him and had been told that he had a violent criminal history. During that actual incident Mr. Thomas tried on multiple occasions to push the victim back and keep the victim from his person, but the victim kept coming at Mr. Thomas."

As to the first prong—Thomas' subjective belief that the use of deadly force was necessary—the district court found Thomas had a subjectively reasonable belief that deadly force was necessary. According to the district court, this conclusion of law was based on one important fact:

> "[C]ontrary to the State's argument that putting on a vest is somehow an affirmative action for going after somebody, in this case particularly, it showed that the defendant was—sincerely and honestly believed the use of deadly force was necessary because he had a gun on from the time he went to visit his wife's—or his girlfriend's family. He wore it all the time. The only thing he goes to the car for is the bulletproof vest, which is not an affirmative action to go do something to somebody else. It's an action to defend yourself. Now so the subjective test I don't think the State could overcome."

The State contests this ruling and argues there was not enough evidence for the district court to find that Thomas had "reason to believe that the use of deadly force was necessary to prevent great bodily harm or death to either himself or anyone else." The State highlights the evidence that Thomas "did not see Saldana with a weapon [and] did not physically fight with him," and suggests that these facts alone "defeat[ed] the defendant's subjective beliefs."

For his part, Thomas emphasizes that Sherry testified that Saldana had made a prior threat about Thomas to her, saying "he was going to kick [Thomas'] black ass." Additionally, Thomas points to a disparaging statement that Saldana communicated to Sherry, which included a derogatory reference to Thomas' race. Sherry apparently passed these statements along to Thomas. Additionally, Thomas told Detective Paden that he knew Saldana was "a violent man" who carried weapons, that he was concerned for his safety, and that he shot Saldana when he "kept coming at him."

We question the district court's legal conclusion that Thomas had a subjective belief that deadly force was necessary under the circumstances. First, the district court based its legal conclusion on the single fact that Thomas put on a protective vest when he heard that Saldana was coming to the Reynolds' residence. We find this action is ambiguous and susceptible to several interpretations other than an expression of Thomas' subjective belief that Saldana posed a threat of imminent death or great bodily harm on that occasion.

While, as Thomas points out on appeal, there was other evidence that tended to show Saldana may have had ill will toward Thomas, or had told Sherry that he was going to strike Thomas on a prior occasion, or that Sherry testified that Saldana was "charging" Thomas prior to the shooting, we have no indication from the district court that any of these facts were true and, if so, whether they played any role in the district court's evaluation of Thomas' subjective belief. Moreover, as detailed in the previous section, there were numerous other facts presented which, depending on their truth, impacted the analysis of Thomas' subjective intent. Once again, we are left to speculate whether these facts influenced the district court's legal conclusion.

***11** In short, we find there was substantial competent and undisputed evidence that Thomas put on a protective vest a short time prior to Saldana's arrival. However, this evidence, standing alone, was not sufficient to support the district court's ultimate legal conclusion that Thomas had a reasonable subjective belief that his use of a deadly weapon in shooting and killing Saldana was necessary to prevent imminent death or great bodily harm.

As to the objective standard of whether a reasonable person in the same situation would have perceived the need to use deadly force, in the district court Thomas argued that the "situation posed a serious threat to Mr. Thomas and [Sherry] and ... the use of force would be justified to extinguish that threat." In particular, Thomas asserted:

> "Mr. Thomas attempted to not use excessive force in the current case when he brandished his weapon, but the victim still kept coming at Mr. Thomas. The allegation ... that Mr. Thomas *fired one shot prior to actually shooting the victim* shows that Mr. Thomas attempted to use a reasonable show of force prior to using deadly force. This one shot was necessary to attempt to stop the threat of

> danger and physical injuries to Mr. Thomas, and possibly to [Sherry]." (Emphasis added.)

In response, in the district court the State primarily focused on two arguments. First, the State argued there was no need for Thomas to exert force against Saldana because "[t]here was no indication that Saldana ever posed any real threat to [Thomas]." Indeed, citing K.S.A. 2015 Supp. 21-5221(b), and assuming that an unarmed Saldana posed a threat, the State pointed out that "[a]n individual is only justified in using deadly force ... 'if such person reasonably believes that such use of deadly force is necessary to prevent imminent death or great bodily harm to such person or a third person.' " According to the State, no such deadly force situation was presented under the circumstances. Second, the State argued in the alternative that if an altercation occurred at the time of the shooting it was because Thomas was the initial aggressor or that both men were engaged in mutual combat for which self-defense was not applicable under K.S.A. 2015 Supp. 21-5226 and *McCullough*, 293 Kan. at 975-76.

With regard to the second prong of the reasonableness test, the district court also found Thomas' use of deadly force against Saldana was objectively reasonable. Once again, the district court arrived at this conclusion of law based on one factor—the testimony of Detective Paden.

During cross-examination by defense counsel, Detective Paden was asked, "Would it be ... objectively unreasonable at that point if somebody was coming at you to pull your weapon and fire it?" The detective responded, "Depending on the circumstances. There's a lot of things you have to take into consideration. The size of the person, their demeanor. It just kind of depends. I couldn't say one way or another for sure what one officer might find life threatening and another one might not."

During redirect examination, the prosecutor followed up on this testimony with Detective Paden, and the following colloquy occurred:

> "Q. [MR. MATHEWS:] ... [T]aking into consideration what you have already spoken about regarding training and experience, what does your training tell you about the employment of deadly force against somebody who is perhaps just using force?
>
> "A. [DETECTIVE PADEN:] Like I said, you have to take the whole situation at hand. I don't know that drawing his weapon was a wrong act. The information that he had had before with the fact that Saldana was a violent man, always carried a weapon, you have to take that into consideration. I don't know that him drawing the weapon was a wrong act."

> ***12** "Q. [MR. MATHEWS:] What about firing the weapon?
>
> "A. [DETECTIVE PADEN:] That I said that was kind of have to be—I would have to be there in that situation to determine whether I would fire or not."

In finding that Thomas' shooting of Saldana was objectively reasonable, the district court relied exclusively on Detective Paden's testimony:

> "[Detective] David Paden's testimony on direct examination by the State's attorney said he was of the opinion that, at the time, [Thomas] was justified in drawing his weapon. That was his direct testimony. If you're justified in drawing your weapon, that's an objective test. That's what the [detective]—that's what a [detective] thought, the [detective] that investigated the case. Well, if he's justified in drawing his weapon, an objective person would think that he's justified in firing it, because if you're justified in drawing it, you're justified in using it."

There are several problems with the district court's analysis of the objective component of Thomas' belief in the need to use deadly force. In cross-examination, Detective Paden testified that he could not say whether it would be objectively reasonable for a particular *law enforcement officer* to draw and shoot his firearm because "[t]here's a lot of things you have to take into consideration" under the particular circumstances. With regard to the detective's response, it is apparent that his answer related specifically to a law enforcement officer's view of what is "life threatening," and the officer's use of a deadly weapon in the course of his employment. We know of no legal authority that equates a law

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enforcement officer's view under these circumstances with a reasonable person's objective view. Regardless, Detective Paden said he was unable to opine regarding this question.

In response to redirect examination, Detective Paden testified on two occasions in one response, "I don't know that *drawing* [Thomas'] weapon was a wrong act." (Emphasis added.) First, whether the displaying of a deadly weapon by Thomas under the circumstances was a right or wrong act is not an element of the objectively reasonable standard. Second, as before, the detective testified that he did not have knowledge sufficient to answer the question about Thomas displaying the firearm during the encounter.

In the third testimonial instance, Detective Paden did not express an opinion regarding whether he would *shoot* an individual under particular circumstances, noting that he would have to personally experience that situation before making a determination as to whether it was appropriate. Moreover, the relevance of this testimony in assessing the second prong of the reasonableness test is unclear.

Upon our review of the entirety of Detective Paden's testimony, we find first, there was no basis for the district court's conclusion that the detective believed it was objectively reasonable for Thomas to draw or fire his weapon during the encounter with Saldana. Second, we do not find any legal authority that provides that a law enforcement officer's opinion regarding use of deadly force necessarily constitutes a reasonable person's objective view.

***13** Third, we find no legal basis for the district court's conclusion of law that if an individual is justified in drawing a deadly weapon that individual is justified in firing it. We are aware, however, of law that indicates otherwise. Kansas courts have found "the self-defense statutes permit a person to defend himself or herself by drawing a handgun and pointing it in a threatening manner even to resist nonlethal force." *State v. Sanders*, No. 103,171, 2011 WL 3276191, at *5 (Kan. App. 2011) (unpublished opinion). However, it does not follow that a person facing the threat of nonlethal force may defend himself with lethal force simply because he drew a weapon. See 2 LaFave, Substantive Criminal Law § 10.4(a) ("But merely to threaten death or serious bodily harm, without any intention to carry out the threat, is not to use deadly force, so that one may be justified in pointing a gun at his attacker when he would not be justified in pulling the trigger.").

Fourth, by solely focusing on Detective Paden's testimony, the district court disregarded our Supreme Court's admonition that the objective prong should be determined "in light of the totality of the circumstances." *Walters*, 284 Kan. at 16. The district court's sole reliance on Detective Paden's testimony in support of the district court's legal conclusion ignored the many important circumstances surrounding the death of Saldana.

In summary, we conclude there was not sufficient competent evidence to support the district court's conclusion of law that a reasonable person in Thomas' circumstances would have perceived the use of deadly force in self-defense as necessary. Moreover, the district court erred in concluding that Kansas law provides that a person who rightfully draws a deadly weapon may necessarily fire that weapon in lawful self-defense. In short, the district court erroneously found Thomas' use of deadly force was objectively reasonable.

As discussed in this opinion, we hold the district court erred in failing to make findings of fact in support of its legal conclusions. We also hold the district court erred in making its conclusions of law. Accordingly, we reverse the grant of immunity and dismissal of the charge and remand with directions to conduct a rehearing on the motion, and upon consideration of the evidence presented at the rehearing, to make findings of fact and conclusions of law on all matters necessary to rule on the self-defense and immunity issues.

In order to implement our court's judgment, we take judicial notice of the fact that Judge Ron Svaty, the district judge who conducted the evidentiary hearing and ruled on this matter, retired on October 1, 2017. See K.S.A. 60-409(a) (stating facts which may be proven by judicial notice). As a result, we are unable to direct that the district judge who conducted the motion hearing simply reconsider the facts and law and inform us of the appropriate findings and conclusions. Under these unique circumstances, and given the fact-intensive inquiry of self-defense immunity motions, and the importance of credibility determinations in fact-finding, the district judge assigned this case shall conduct another evidentiary hearing on Thomas' motion, and make the requisite findings of fact and conclusions of law.

At this evidentiary hearing the district court must consider the totality of the circumstances, weighing the evidence before it without deference to the State, and determine whether the State has met its burden to establish probable cause to believe that Thomas initially provoked the use of force against

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Saldana, as described in K.S.A. 2016 Supp. 21-5226(b) and (c), which would render both the justification and immunity defenses unavailable to Thomas. If the district court finds that Thomas did not initially provoke the use of force, the court must consider the totality of the circumstances, weighing the evidence before it without deference to the State, and determine whether the State has met its burden to establish probable cause to believe that Thomas' use of deadly force was not statutorily justified because Thomas did not have a sincere and honest belief that it was necessary to use deadly force and/or that a reasonable person in Thomas' situation would not have perceived the use of deadly force was necessary as required by K.S.A. 2016 Supp. 21-5222.

***14** Reversed and remanded with directions.

All Citations

406 P.3d 923 (Table), 2017 WL 6064660

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KeyCite Yellow Flag - Negative Treatment
Grant of Habeas Corpus Affirmed by Stotts v. State, Kan.App., November 21, 2018

KeyCite Overruling Risk - Negative Treatment
Overruling Risk State v. Snellings, Kan., April 6, 2012

264 P.3d 1059 (Table)
Unpublished Disposition
This decision without published opinion is referenced in the Pacific Reporter. See Kan. Sup. Ct. Rules, Rule 7.04.
Court of Appeals of Kansas.

STATE of Kansas, Appellee,
v.
Paul STOTTS, Appellant.

No.
101,828
.
|
Dec. 16, 2011.

Synopsis
Background: Defendant was convicted in the District Court, Reno County, Richard J. Rome, J., of attempted second-degree murder, attempted manufacture of methamphetamine, fleeing and eluding police, and several other offenses. Defendant appealed.

Holdings: The Court of Appeals, Leben, J., held that:

prosecutor's comments during closing argument on defendant's prearrest silence were not improper;

trial court's error in conducting private conferences with jurors without defendant personally waiving his right to be present was harmless;

failure to identify the controlled substance in the jury instruction for possession of drug paraphernalia was not reversible error;

possession of multiple items of drug paraphernalia did not constitute multiple acts requiring a unanimity instruction;

offenses of possession of drug paraphernalia with the intent to manufacture methamphetamine and possession of ephedrine with the intent to produce a controlled substance were not identical for the purposes of sentencing;

offenses of attempted manufacture of methamphetamine and possession of drug paraphernalia with the intent to manufacture methamphetamine were not identical offenses for sentencing purposes; and

sentencing court could reserve jurisdiction to set the restitution amount after sentencing.

Affirmed.

Appeal from Reno District Court; Richard J. Rome, Judge.

Attorneys and Law Firms

Thomas J. Bath and Tricia A. Bath, of Bath & Edmonds, P.A., of Overland Park, for appellant.

Thomas R. Stanton, deputy district attorney, Keith E. Schroeder, district attorney, and Derek Schmidt, attorney general, for appellee.

Before BUSER, P.J., MARQUARDT and LEBEN, JJ.

MEMORANDUM OPINION

LEBEN, J.

***1** A jury convicted Paul Stotts of attempted second-degree murder, attempted manufacture of methamphetamine, fleeing and eluding police, and several other offenses after he led Hutchinson police on a 24–minute car chase before his car crashed into another vehicle. On appeal, he complains that the prosecutor unfairly commented on his postarrest silence—a constitutionally protected right—when the prosecutor noted during closing argument that Stotts had never shared his explanation of why he fled from police until the trial. But there is no showing here that Stotts had been given *Miranda* warnings, the trigger to the court-made rule forbidding prosecutorial comment on a suspect's silence, so the comments on Stotts' postarrest silence did not constitute prosecutorial misconduct.

Stotts separately complains that the trial judge violated his constitutional right to be present during all trial proceedings when the judge—essentially in response to the defense

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lawyer's suggestions—spoke to jurors privately to be sure that a nontestimonial incident they had observed in the courtroom wasn't going to impede their ability to render a fair verdict. While Stotts is right that a judge can't speak directly to jurors about the case without first getting a defendant's explicit waiver of the right to be present, the error here was harmless, a conclusion underscored by the defense lawyer's initial agreement with the procedure used by the judge. And a harmless error does not require reversal.

Stotts also raises issues about the jury instructions given and the sentences he received, but we have not found any error. Before we fully discuss the issues on appeal, we will set out the necessary factual background.

FACTUAL BACKGROUND

On March 25, 2007, then–18–year–old Paul Stotts led police on a 24–minute car chase through South Hutchinson, The chase ended when Stotts crashed his car into an oncoming car driven by Robert Cook.

The incident began when police stopped Stotts and his passenger, Jason Thiel, after a report of suspicious activity and the observation of a nonworking headlight. The officer smelled anhydrous ammonia and saw coffee filters and aluminum foil in a bag in the back seat. He suspected a methamphetamine lab in the car. The officer asked Stotts to exit the car, but instead Stotts started it and drove away.

The officer pursued Stotts with lights and sirens and observed a white cloud consistent with anhydrous ammonia being discarded from the car on the side of the road. The officer later saw coffee filters thrown from the passenger side of the car. The passenger also threw out muriatic acid, a chemical used to make meth. Later, Stotts slowed down, the passenger jumped from the moving car, and Stotts continued driving alone. More items were thrown from the car. Stotts ran over stop sticks, continued for about a mile, and drove into an oncoming car. Cook, the other driver, was badly injured and was taken away by helicopter. Cook was hospitalized for almost 3 weeks and incurred about $80,000 of medical expenses. An officer testified that he didn't see brake lights or anything to indicate that Stotts attempted to avoid the collision. Portions of the chase and the collision were videotaped and presented at trial.

*2 Stotts refused to identify his passenger when asked by an officer, both at the scene and during an ambulance ride to the hospital. Stotts' car was searched and aluminum foil, coffee filters, and a clear glass jar—items commonly used to manufacture meth—were seized. Police found marijuana and a multicolored glass pipe in the car, along with a BB gun on the floorboard. Police arrested Stotts at his home 3 days after the car chase.

At trial, Stotts' opening statement alleged he fled from police because Thiel pulled a gun and threatened to kill him. Stotts testified that the items in the car belonged to Thiel and that Thiel showed him the butt of a gun and threatened to shoot him if he didn't flee from the police. Stotts said that he continued driving after Thiel jumped out of the car because he wanted to make it home so he could tell his story to police with his parents present.

But an officer testified that Stotts, the driver, gave no indication after the chase that he had been in peril. And Stotts' father, Larry Stotts, testified that his son never told him anything about Thiel threatening him with a gun. Stotts admitted that he didn't tell his father or any hospital staff about the gun, explaining that he didn't tell anyone until he had an attorney. Stotts also testified that he blacked out before colliding with Cook's car.

Thiel testified that on the day of the car chase, he and Stotts together crushed pseudoephedrine pills in Stotts' garage and acquired muriatic acid and anhydrous ammonia. Thiel testified that Stotts tried to strip batteries to obtain lithium metal. Thiel admitted throwing anhydrous ammonia and muriatic acid out the window. An officer observed coffee filters thrown from the passenger-side window, and he also found pill containers that may have been thrown from Stotts' car. Thiel testified that Stotts intended to crash the car and that Stotts moved the BB gun from the glove box to the floorboard. Thiel denied he ever threatened Stotts and or touched the gun.

There was one unusual event during the trial: A juror approached the court after some jurors saw a woman they recognized as a spectator who had been taking notes in the gallery speaking with Stotts' parents—both defense witnesses —during breaks. The jurors, aware that witnesses weren't supposed to talk to each during the trial, apparently thought they should let the court know of this potential violation of trial rules. The defense asked for a mistrial because a juror reporting this incident to the court indicated the jury's prejudice against Stotts due to perceived wrongdoing by defense witnesses. Defense counsel suggested that the court might avoid a mistrial by talking with each juror to determine

whether any prejudice existed. The judge met with each juror by himself in the absence of any party or a court reporter. The court found no prejudice, summarized the results to the parties, and denied Stotts' motion for a mistrial. Stotts made no objection to the way this was handled until he filed a posttrial motion for a new trial; Stotts then argued that the court violated his rights by talking to jurors outside his presence.

***3** We note one other aspect of the trial in this background section because it factors into one of Stotts' major arguments. During the State's closing argument, the prosecutor pointed out that Stotts didn't tell anyone about Thiel threatening him with a gun either at the scene or at the hospital. The prosecutor said that the first anyone heard that Thiel had threatened Stotts with a gun was during the defense's opening statement. Similarly, the prosecutor said the first anyone heard about Stotts blacking out before the collision was when Stotts testified at trial. Defense counsel didn't object to this at trial but argues on appeal that this argument constituted an improper comment on Stotts' exercise of his constitutional right to remain silent.

The jury found Stotts guilty of attempted second-degree murder, intentional aggravated battery, reckless aggravated battery, attempted manufacture of methamphetamine, possession of pseudoephedrine with the intent to manufacture methamphetamine, possession of lithium metal with the intent to manufacture methamphetamine, possession of drug paraphernalia with the intent to manufacture methamphetamine, possession of propoxyphene, possession of marijuana, possession of drug paraphernalia, and five counts of fleeing and eluding a police officer. Stotts ultimately received a controlling sentence of 292 months in prison. The court also ordered Stotts to pay restitution for Cook's medical bills but didn't specify the amount. Stotts then filed this appeal.

ANALYSIS

I. *The Prosecutor's Comments on Stotts' Silence Were Not Improper.*

Stotts contends that the State committed prosecutorial misconduct in its closing argument by commenting on his postarrest silence. Specifically, Stotts alleges that the State improperly commented on his failure to tell anyone before trial about Thiel threatening him with a gun. The State counters that the prosecutor commented only on Stotts' prearrest silence and that it isn't prosecutorial misconduct to do so.

Allegations of prosecutorial misconduct are analyzed in two steps. First, we must determine whether the comments were outside the wide latitude given to attorneys in discussing the evidence. Second, if improper, we must determine whether the comments constituted plain error by prejudicing the jury against the defendant and denying a fair trial. See *State v. Chanthaseng,* 293 Kan. 140, —— 261 P.3d 889, 894 (2011). Here, we only take the first step because Stotts has not shown any improper argument.

It is well established that a prosecutor may not try to impeach a defendant's exculpatory story—or explanation of his innocence—told for the first time at trial, by cross-examining the defendant about his not telling the story *after* he received *Miranda* warnings. *Doyle v. Ohio,* 426 U.S. 610, 611, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976). The *Doyle* Court concluded that the defendant's due-process rights are violated when a prosecutor comments during closing argument on postarrest silence induced by *Miranda* warnings. 426 U.S. at 618. But there's no due-process violation when a prosecutor comments on a defendant's *prearrest* silence because no governmental action has induced the silence, as explained in *Jenkins v. Anderson,* 447 U.S. 231, 239–40, 100 S.Ct. 2124, 65 L.Ed.2d 86 (1980), and *State v. Hernandez,* 284 Kan. 74, Syl. ¶ 5, 159 P.3d 950 (2007) ("A prosecutor *may* use a defendant's prearrest silence to impeach the defendant at trial.").

***4** Prosecutors may even impeach a defendant with his postarrest silence when there have been no *Miranda* warnings. *Fletcher v. Weir,* 455 U.S. 603, 607, 102 S.Ct. 1309, 71 L.Ed.2d 490 (1982). "Generally, a *Miranda/Doyle* constitutional argument is defeated by the failure to establish that *Miranda* warnings have been given, meaning the *Doyle* protections do not apply." *State v. Tully,* 293 Kan. 176, ——, 262 P.3d 314, 326 (2011); see also *Fletcher,* 455 U.S. at 605 (distinguishing Doyle because record didn't establish defendant "received any *Miranda* warnings during the period in which he remained silent"). The idea behind *Doyle* is that a police officer giving *Miranda* rights induces the defendant's silence by promising that his silence won't be used against him. *State v. Carter,* 30 Kan.App.2d 1247, 1250, 57 P.3d 825 (2002), *rev. denied* 275 Kan. 966 (2003). Thus, the protections offered by Doyle never attach if *Miranda* rights are never given. *Carter,* 30 Kan.App.2d at 1250–51, 57 P.3d 825.

Here, the prosecutor's closing argument commented on Stotts' silence by noting that certain claims weren't made until trial:

> "He saw that car coming and he got on the stand today or yesterday and he said, well, I didn't, I didn't, you know, I think I blacked out. That was the first time anybody heard that he blacked out. Look at his records. He didn't tell the attending physicians that, because if he says he hit his brakes, it doesn't make any sense.
>
> ....
>
> "... Ladies and Gentlemen, when was the first time anybody heard that this gun had been used against the defendant, or claimed to have been used? It was the defendant's opening statement. This gun was immaterial to this case until Monday afternoon. Did this defendant ever tell anybody about this gun and how afraid he was of it? And how scared he was, and how he was going to get shot? Did he tell his mother? No. Did he tell his father? No. This 18–year–old boy didn't tell anyone. He didn't tell the people at the hospital. He was so scared somebody might kill him, that he didn't tell anybody. He didn't tell the officers at the scene. He didn't tell anybody. Does that make sense to you? See, if you don't believe that this person had a gun held to him to do this, then he's got no defense, and he's got no excuse, so he had to say that."

The prosecutor was using Stotts' failure to tell his story against him, but the legal question we must answer is whether this is a *Doyle* violation. Stotts certainly had an obvious chance to make his coercion claim immediately after he was stopped, during the ambulance ride to the hospital, while being treated, or shortly thereafter to his father. The prosecutor commented on Stotts' silence at those times, and nothing in our record shows either that he had been arrested or had been given *Miranda* warnings by then. Our record shows that Stotts was arrested at his home 3 days after the car chase and crash, with nothing apparent to indicate that Stotts had previously received *Miranda* warnings.

> ***5** Where a defendant asserts a *Doyle* violation, the defendant ordinarily bears the burden of showing that *Miranda* warnings were given before the postarrest silence used against the defendant by the State. See 3 LaFave, Israel, King & Kerr, Criminal Procedure § 9.6(a), p. 497 n. 47 (3d ed.2007). This is an application of the normal rule on appeal that a party claiming error has the burden to point to something in the record that directly shows the error. See *Carter,* 30 Kan.App.2d at 1250–51, 57 P.3d 825.

Most of the prosecutor's statements are directed at Stotts not telling his story either at the crash site or at the hospital. As far as we can tell from our record, this was prearrest silence, which is permissible for the prosecutor to comment on under *Jenkins,* The prosecutor also commented on Stotts' postarrest silence about the gun until the time of his opening statement at trial. This could be a *Doyle* violation if *Miranda* rights were given or if Stotts invoked his Miranda rights during or after the arrest. But because there is no presumption that *Miranda* rights were given or invoked and our record doesn't tell us that Stotts had received *Miranda* warnings, the defendant has not shown a *Doyle* violation. See *Tully,* 293 Kan. at —— (262 P.3d at 326). We find no prosecutorial misconduct.

II. *The District Court's Off–the–Record Conferences with Jurors Outside the Presence of the Defendant Were in Error, But Harmless.*

Stotts next argues that his constitutional right to due process was violated when the district court communicated with jurors without the defendant present. The State contends that the issue wasn't preserved for review, but if there was error it was invited error, harmless error, or both. The State argues for invited error because defense counsel requested that the court talk to the jurors.

The party alleging judicial misconduct bears the burden of showing both that misconduct occurred and that it caused prejudice, and we review the matter independently, without any required deference to the district court. *State v. Kirkpatrick,* 286 Kan. 329, 348, 184 P.3d 247 (2008). An allegation of judicial misconduct is reviewable on appeal despite the lack of a contemporaneous—or timely—objection when the defendant claims his right to a fair trial was violated. *State v. Kemble,* 291 Kan. 109, 113, 238 P.3d 251 (2010). A defendant's claim that he was deprived of his constitutional right to be present during trial subjects judicial action to unlimited review on appeal. *State v. Martinez,* 288 Kan. 443, 449, 204 P.3d 601 (2009).

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A Kansas statute provides that "[t]he defendant in a felony case shall be present at the arraignment, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by law." K.S.A. 22–3405(1). This statutory requirement of the defendant's presence at any critical stage of the proceeding is the same mandate required by the Confrontation Clause and the Due Process Clause to the United States Constitution. *Martinez,* 288 Kan. at 449–450, 204 P.3d 601.

***6** This right applies whenever a trial court communicates with a jury about the case. *State v. Brown,* 272 Kan. 809, Syl. ¶ 4, 37 P.3d 31 (2001). " 'It is well settled that a conference between a trial judge and a juror is a critical stage of the trial at which a criminal defendant has a constitutional right to be present.' " *State v. Davis,* 284 Kan. 728, 731, 163 P.3d 1224 (2007) (quoting *State v. Mann,* 274 Kan. 670, 682, 56 P.3d 212 [2002]). If the judge is to talk to jurors without the defendant present, the judge must go through the same procedures required to waive constitutional rights generally —asking the defendant personally whether he or she waives the right to be present at such a conference with a juror; failing to do so is error. *State v. High,* 260 Kan. 480, 486, 922 P.2d 430 (1996). An attorney can't waive a defendant's right to be present at such at conference without discussing it with the defendant. *Mann,* 274 Kan. at 682, 56 P.3d 212.

The State argues that this issue wasn't preserved for appeal because defense counsel didn't object to the court's plan to speak to jurors without the defendant's presence. But we may review this issue despite the lack of a contemporaneous objection because Stotts claims his right to a fair trial was violated due to judicial misconduct. See *Kemble,* 291 Kan. at 113, 238 P.3d 251. Further, defense counsel's failing to object doesn't override Stotts' right to be present and defense counsel's inability to waive this right without first discussing it with Stotts. See *Mann,* 274 Kan. at 682, 56 P.3d 212. Thus, this issue is reviewable on appeal.

It was error for the trial court to conduct private conferences with jurors without Stotts personally waiving his right to be present. The issue arose when a juror reported to the court that some jurors had observed a gallery spectator talking with Stotts' parents, who were witnesses, in the hallway. The defense moved for a mistrial on the basis that the jury was prejudiced against Stotts because of the appearance that his defense witnesses were improperly getting information about the trial from a spectator. During the discussion, the defense counsel suggested:

> "The only way I think the Judge can avoid the mistrial is to talk individually with each of the jurors to ask them if that has tainted them in some respect as to what they have observed, and why it bothered them to the point they would hold it against one side or the other."

The State argues that this constitutes invited error. A defendant may not invite error and then complain of the error on appeal. *State v. Divine,* 291 Kan. 738, 742, 246 P.3d 692 (2011). It's true that the defense first suggested that the court talk with the jurors individually, but defense counsel didn't specifically suggest that the court do so without the defendant being present or without a record. Those aspects of the trial judge's procedure came about through his discussion with counsel:

> "[Prosecutor]: ... And I would much rather have the Court individually voir dire each juror in chambers.
>
> ***7** "THE COURT: By myself?
>
> "[Prosecutor]: By yourself to [ensure] there, that there's no prejudice; than to throw up our hands and do this all over again. So I do not have an objection to [defense counsel's] suggestion that you do that.
>
> "THE COURT: Is that agreeable?
>
> "[Defense counsel]: That's agreeable.
>
> "THE COURT: All right. I will call them in one at a time. I don't need a record unless something comes up, then I can —"

But we need not decide whether it was invited error because —whatever the case—the error caused no prejudice to Stotts and thus doesn't give us reason to set aside the jury's verdicts.

An unrecorded ex parte communication between a judge and a juror is subject to the harmless-error analysis. *Rushen v. Spain,* 464 U.S. 114, 118–19, 104 S.Ct. 453, 78 L.Ed.2d 267 (1983); *State v. McGinnes,* 266 Kan. 121, 130, 967 P.2d 763 (1998). If this were not so, a great many jury verdicts would be set aside because, as the United States Supreme Court

recognized in *Rushen,* "There is scarcely a lengthy trial in which one or more jurors do not have occasion to speak to the trial judge about something, whether it relates to a matter of personal comfort or to some aspect of the trial." 464 U.S. at 118. Thus, even when an unrecorded contact has taken place between the trial judge and a juror—without the defendant's presence—we still apply harmless-error analysis.

To show harmless error, the State must prove beyond a reasonable doubt that the error didn't affect the outcome of the trial in light of the entire record. *State v. Ward,* 292 Kan. 541, Syl. ¶ 6, 256 P.3d 801 (2011). This court may consider several factors to determine whether the communication between a judge and juror was harmless, including: "(1) the overall strength of the prosecution's case; (2) whether an objection was lodged; (3) whether the ex parte communication concerned a critical aspect of the trial or involved an innocuous and insignificant matter; and (4) the ability of the posttrial remedy to mitigate the constitutional error." *Martinez,* 288 Kan. at 450, 204 P.3d 601. Ultimately, to find that the error was harmless, the appellate court must be persuaded beyond a reasonable doubt that "there is no reasonable possibility that the error contributed to the verdict." *Ward,* 292 Kan. 541, Syl. ¶ 6, 256 P.3d 801; see also *McGinnes,* 266 Kan. at 132–133, 967 P.2d 763. That's the case here.

The overall strength of the prosecution's case was great, there was no objection lodged, the conferences didn't concern a critical aspect of the trial, and the court considered and denied Stotts' motions for a mistrial and for a new trial before and after the juror conferences. The prosecution's case centered on video evidence of the chase and crash, the passenger's testimony, and physical evidence of components of a meth lab found after they were thrown from the car. At issue is whether the jurors were prejudiced by witnessing what could have been construed as defense-witness wrongdoing in getting information about the trial from a spectator carrying a notebook. The trial court mitigated the potential damage by asking the jurors whether they had seen the incident and whether they could still be fair and impartial. The court reported that some jurors didn't see it and that all of the jurors told the court they weren't prejudiced by it. Defense witnesses talking to a spectator in the hallway during a recess certainly isn't a critical aspect of the trial; this incident is closer on the scale to an innocuous or insignificant matter. Even if the spectator was relaying trial information to Stotts' parents, the record indicates that the incident was reported after they had testified and been released from witness-sequestration orders. While Stotts makes a valid argument that his ability to review the ex parte communication is hampered because there is no record of it, *Rushen* and other cases make clear that even an unrecorded ex parte communication between a judge and juror may be declared harmless error. See *Rushen,* 464 U.S. at 118–19; *McGinnes,* 266 Kan. at 130, 132–33, 967 P.2d 763. Here, we conclude beyond a reasonable doubt that there is no reasonable possibility that the trial judge's off-the-record meeting with jurors contributed to Stotts' convictions. Therefore, it was harmless error.

III. *The Failure to Identify the Controlled Substance in the Jury Instruction for Possession of Drug Paraphernalia Was Not Reversible Error.*

***8** Stotts next argues that the jury instruction for possession of drug paraphernalia was clearly erroneous, requiring reversal, because it failed to identify the controlled substance. The State contends that the failure to specifically identify the controlled substance isn't fatal to the conviction. It argues that the jury instruction wasn't clearly erroneous because there isn't a real possibility that the jury would have returned a different verdict if the controlled substance had been identified.

Because Stotts did not object to the court's jury instructions, we reverse only if the instructions are clearly in error. See K.S.A. 22–3414(3); *State v. Miller,* 293 Kan. 46, Syl. ¶ 1, 259 P.3d 701 (2011). To find an instruction clearly erroneous, this court must be convinced there is a real possibility the jury would reached a different outcome had the jury instructions been proper. *Miller,* 293 Kan. 46, Syl. ¶ 1. There's no reversible error, even if the instructions were in some way erroneous, if they properly and fairly state the law as applied to the facts of the case and the jury couldn't reasonably be misled by them. *State v. Berry,* 292 Kan. 493, 515, 254 P.3d 1276 (2011).

Stotts' argument is based in part on some usage notes provided by a committee of judges and lawyers in our state's pattern jury instructions. The use of those pattern instructions is encouraged but not mandatory, so it's not necessarily an error when the trial judge deviates from a pattern instruction. *State v. Adams,* 292 Kan. 151, 165, 254 P.3d 515 (2011). On the other hand, trial courts are cautioned that deviating from a pattern instruction risks including erroneous language or omitting words that may be essential to a clear statement of the law. *Tully,* 293 Kan. at ——, (262 P.3d at 330). But even the failure to instruct a jury on an essential element may be harmless error if this court concludes beyond a reasonable

doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error. *Neder v. United States,* 527 U.S. 1, 17–19, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999); *State v. Garza,* 290 Kan. 1021, 1031, 236 P.3d 501 (2010). Since the pattern instructions are not binding on the trial court, it follows that the usage notes provided with them are not binding, either. See *Douglas v. Lombardino,* 236 Kan. 471, 479, 693 P.2d 1138 (1985).

With that background, now let's review the statutory definition of the crime at hand, possession of drug paraphernalia, as well as the pattern jury instruction for that crime and the instruction given in Stotts' case. At the time of Stotts' offense, a Kansas statute, K.S.A.2006 Supp. 65–4152(a)(2), made it illegal to possess drug paraphernalia for personal use; "(a) No person shall use or possess with intent to use: ... (2) any drug paraphernalia to use, store, contain, conceal, inject, ingest, inhale or otherwise introduce into the human body a controlled substance in violation of the uniform controlled substances act." (As part of a recodification of the Kansas Criminal Code, that statute was repealed effective July 1, 2009, and replaced with substantially similar language; see K.S.A.2010 Supp. 21–36a09.)

***9** The Pattern Instructions for Kansas (PIK) provide a model jury instruction with various options and directions that let the court tailor the instruction to the individual case (with options indicated in parentheses and brackets):

> "The defendant is charged with the crime of unlawfully (using) (possessing with intent to use) [insert name of simulated controlled substance, drug paraphernalia, anhydrous ammonia or pressurized ammonia]. The defendant pleads not guilty.
>
> "To establish this charge, each of the following claims must be proved:
>
> "1. That the defendant knowingly (used) (possessed with the intent to use)
>
> ....
>
> "(b) drug paraphernalia to (use, store, contain, conceal [insert name of controlled substance]) (inject, ingest, inhale, or otherwise introduce [insert name of controlled substance] into the human body; and
>
> ....
>
> "2. That this act occurred on or about the —— day of, ——, in ——County, Kansas." PIK Crim.3d 67.17.

Here, although the pattern instruction suggests "insert[ing the] name of the controlled substance" at issue, the court's instruction did not do so. Instead, it simply referenced the generic introduction of "a controlled substance" into the body:

> "In Count Eleven, the defendant is charged with the crime of unlawfully possessing with intent to use drug paraphernalia. The defendant pleads not guilty.
>
> "To establish this charge, each of the following claims must be proved:
>
> "1. That the defendant knowingly possessed with the intent to use drug paraphernalia to introduce a controlled substance into the human body; and
>
> 1"2. That this act occurred on or about the 25th day of March, 2007, in Reno County, Kansas."

To be sure, a district court would take a safer approach by following the usage note on this instruction and specifically listing the controlled substance the State alleges the defendant intended to ingest with the paraphernalia he possessed. But in Stotts' case, the prosecutor made that quite clear during closing argument when he directed the jury's attention to the marijuana and the pipe, both found in the car: "Then there was the marijuana. The marijuana that was found, I think it's [Exhibit] No. 3 here, marijuana found on the floorboard in his car. All right. Then you had the pipe. That's the paraphernalia used to ingest [it]." A police officer testified that he found the multi-colored glass pipe on the passenger-side floorboard of Stotts' car. The officer also testified that such a pipe is normally used to smoke marijuana and that there was burnt residue inside of the pipe. Marijuana is a listed controlled substance, the use or possession of which violates the Uniform Controlled Substances Act. See K.S.A. 65–4105(d)(16).

Even in the abstract, it's hard to see how the court's jury instruction was in error—it mirrored the statutory provision,

K.S.A. 65–4152(a)(2), which prohibits possession of drug paraphernalia to introduce "a controlled substance" into the body. An instruction that mirrors the statutory language generally is acceptable, and it can't be said that identifying the substance as marijuana was an essential element of the crime. See *State v. Richardson,* 290 Kan. 176, 181, 224 P.3d 553 (2010) ("A trial court has the duty to define the offense charged in the jury instructions, either in the language of the statute or in appropriate and accurate language of the court."). Thus, a jury instruction that requires proof of possession of drug paraphernalia to introduce "a controlled substance" into the human body does properly and fairly state the law. See *Berry,* 292 Kan. at 515, 254 P.3d 1276.

***10** But even if we assume that the instruction should have specifically identified marijuana as the controlled substance at issue, the State's closing argument provided adequate guidance to the jury on this issue. To find that the instruction was clearly erroneous—thus requiring reversal of the jury's verdict—we would have to find that there was a real possibility that the jury would have rendered a different verdict if the instruction had specifically listed marijuana as the controlled substance at issue. See *Miller,* 293 Kan. 46, Syl. ¶ 1. Moreover, the addition to the instruction would have made no difference: as the record clearly shows, and as was uncontested, the substance that would have been ingested was marijuana.

We find no error in this instruction.

IV. *The Failure to Give a Unanimity Instruction Was Not Error.*

Stotts next argues that the conviction for possession of drug paraphernalia with the intent to manufacture a controlled substance should be reversed because the jury wasn't instructed that it must unanimously agree on the specific criminal act to convict. Specifically, Stotts argues that the jury instruction didn't identify the paraphernalia. The State contends that the unanimity instruction wasn't required because the evidence suggested that there were alternate means, each sufficient to support the conviction.

Once again, because there was no objection the instruction, we review only to determine whether the instruction was clearly in error; even if there's an instruction error, we reverse only if there is a real possibility that the jury would have rendered a different verdict had it been correctly instructed. See *Miller,* 293 Kan. 46, Syl. ¶ 1; *State v. Bailey,* 292 Kan. 449, 455, 255 P.3d 19 (2011). When the State relies on multiple acts to support one charge, a unanimity instruction is generally required to make sure that all jurors have indeed agreed that the defendant committed one of the specific acts alleged, *State v. Sanborn,* 281 Kan. 568, 569, 132 P.3d 1277 (2006), although a unanimity instruction is not required if the State adequately elects which act it is relying on. 281 Kan. at 569, 132 P.3d 1277.

When the issue is jury unanimity, the appellate court first must determine whether the case truly involves multiple acts. *State v. Voyles,* 284 Kan. 239, 244, 160 P.3d 794 (2007). A multiple-acts case exists when several acts are alleged and any of them could constitute the crime charged. *Bailey,* 292 Kan. at 458, 255 P.3d 19. An alternate-means case exists where a single offense may be committed in more than one way. 292 Kan. at 458, 255 P.3d 19. A unanimity instruction isn't required in an alternative-means case. See *Sanborn,* 281 Kan. at 570–71, 132 P.3d 1277. Whether a case involves multiple acts is a question of law an appellate court must review independently, without any required deference to the district court. *State v. Schoonover,* 281 Kan. 453, 506, 133 P.3d 48 (2006).

Here, Stotts was found guilty of two counts of possession of drug paraphernalia. One count, as previously discussed, was for possession of drug paraphernalia with intent to introduce a controlled substance into the human body in violation of K.S.A.2006 Supp. 65–4152(a)(2), a misdemeanor. A separate count was for possession of drug paraphernalia with the intent to manufacture a controlled substance in violation of K.S.A.2006 Supp. 65–4152(a)(3), a felony. This issue concerns the count for possession of drug paraphernalia with the intent to manufacture a controlled substance.

***11** During closing argument, the prosecutor only mentioned Starts' possession of a glass container and aluminum foil in support of the charge of possession of drug paraphernalia with the intent to manufacture a controlled substance. At trial, a police officer testified he found the foil in a duffle bag in the back seat of Stotts' car and that "[a]luminum foil is commonly used in the manufacture of methamphetamine." The officer also testified that coffee filters and a clear glass jar were found in the car and that they too are items commonly used to make meth. Stotts argues that the jury must be unanimous as to which items constituted possession of drug paraphernalia with the intent to manufacture a controlled substance.

This issue is controlled by *Sanborn:* "Possession of multiple items of drug paraphernalia does not constitute multiple acts

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requiring a unanimity instruction." 281 Kan. 568, 132 P.3d 1277, Syl. In *Sanborn,* multiple items were used as evidence to establish the act of possession of drug paraphernalia for use and for sale—two separate offenses. The court concluded that a unanimity instruction wasn't necessary because the multiple items weren't factually distinct and weren't multiple acts. 281 Kan. at 570–71, 132 P.3d 1277. See *Schoonover,* 281 Kan. at 508, 133 P.3d 48 ("Thus, there was no need for the State to specify which particular piece of paraphernalia it was relying upon and no need for the trial court to give a unanimity instruction; it was possession of all of the drug paraphernalia which was at issue."). In this case, the aluminum foil, coffee filters, and glass jar were alternate means to prove a single charge of possession of drug paraphernalia for the purpose of drug manufacture. See *Bailey,* 292 Kan. at 458, 255 P.3d 19. The jury was properly instructed that the possession had to be for the intent of drug manufacture, but all of the items at issue could be used together for that purpose. Therefore, a unanimity instruction wasn't required, and the district court didn't err by failing to give one.

V. *The District Court Didn't Err in Sentencing Because Possession of Ephedrine and Possession of Drug Paraphernalia Aren't Identical Offenses.*

Stotts argues that the offenses of possession of drug paraphernalia with the intent to manufacture methamphetamine and possession of ephedrine with the intent to produce a controlled substance are identical for the purposes of sentencing. Based on that claim, he argues that he should have been sentenced only for the offense that carried the lesser penalty, so the sentence for possession of ephedrine should be vacated. The State contends that the convictions aren't for identical offenses and that both sentences should be upheld.

Interpretation of a sentencing statute presents a question of law, and we review the matter independently, without any required deference to the district court. *State v. Jolly,* 291 Kan. 842, 845–46, 249 P.3d 421 (2011). Stotts correctly notes that Kansas recognizes what's called the identical-offense doctrine: Where two criminal offenses have the same elements but different penalties, a defendant convicted of either crime may only be sentenced under the lesser penalty provision. *State v. Cooper,* 285 Kan. 964, 966–67, 179 P.3d 439 (2008). In determining whether the identical-offense doctrine is applicable, the court must compare the elements of the charged crime and the elements of the purported identical offense to determine whether, in each case, the State is required to present proof of the same elements to obtain a conviction. 285 Kan. at 967, 179 P.3d 439; see also *State v. Sandberg,* 290 Kan. 980, 985–88, 235 P.3d 476 (2010) (discussing policy and purpose of identical-offense doctrine in concluding it doesn't apply to severity levels of same offense).

***12** Stotts argues that this issue is controlled by *State v. Campbell,* 279 Kan. 1, 106 P.3d 1129 (2005). In *Campbell,* the court held that a charge for possessing ephedrine with the intent to use it to manufacture a controlled substance under K.S.A. 65–7006(a) was identical to a charge of possessing drug paraphernalia with the intent to use it to manufacture a controlled substance under K.S.A. 65–4152(a)(3). *Campbell,* 279 Kan. 1, Syl. ¶ 4, 106 P.3d 1129. This holding was based on a statutory definition that, at the time, deemed drug paraphernalia to include "products and materials of any kind" used to make a controlled substance. 279 Kan. at 16, 106 P.3d 1129. Meanwhile, K.S.A. 65–7006(a) referred to ephedrine as a "product." *Campbell,* 279 Kan. at 16, 106 P.3d 1129 (The conduct prohibited is "knowingly possessing ephedrine ... with intent to use the product to manufacture a controlled substance."). Because ephedrine was labeled a "product," it was considered to be drug paraphernalia, which by definition included all "products" of any kind used to manufacture a controlled substance. 279 Kan. at 16, 106 P.3d 1129. Thus, *Campbell* held that the elements were identical under both statutes and that the defendant must be sentenced under the statute with the lesser penalty. 279 Kan. at 16–17, 106 P.3d 1129.

But the holding of *Campbell* has been superseded by a legislative amendment. See *State v. Adams,* 43 Kan.App.2d 842, 855, 232 P.3d 347, *rev. granted* 290 Kan. 1095 (2010) (pending). In 2006, the legislature amended K.S.A. 65–4150(c) to remove "products" from the definition of drug paraphernalia. See K.S.A.2006 Supp. 65–4150(c); *Adams,* 43 Kan.App.2d at 855, 232 P.3d 347. Our court has concluded that the legislative intent was to remove the "products" listed in K.S.A.2006 Supp. 65–7006(a)—ephedrine, pseudoephedrine, red phosphorus, lithium metal, sodium metal, iodine, anhydrous ammonia, pressurized ammonia, or phenylpropanolamine—from the definition of drug paraphernalia. *State v. Dalton,* 41 Kan.App.2d 792, 795, 207 P.3d 257 (2008), *rev. denied* 287 Kan. 767 (2009). Since the amendment, our court has agreed in 10 separate opinions that the removal of "products" from K.S.A. 65–4150(c) means that a charge of possessing ephedrine or other products listed in K.S.A. 65–7006(a) no longer has identical elements as a charge of

possession of drug paraphernalia. See *Adams,* 43 Kan.App.2d 842, 232 P.3d 347; *Dalton,* 41 Kan.App.2d 792, 207 P.3d 257; *State v. Savage,* No. 104,012, 2011 WL 420727 (Kan.App.2011) (unpublished opinion); *State v. Holland,* No. 102,795, 2011 WL 135022 (Kan.App.2011) (unpublished opinion); *State v. Busse,* No. 101,703, 2010 WL 5490725 (Kan.App.2010) (unpublished opinion); *State v. Montgomery,* Nos. 101,507, 102,393, 2010 WL 2502875 (Kan.App.2010) (unpublished opinion); *State v. Snellings,* No. 101,378, 2010 WL 2216900 (Kan.App.2010) (unpublished opinion), *rev. granted* 290 Kan. 1103 (2010) (pending); *State v. Moon,* No. 101,556, 2010 WL 445924 (Kan.App.2010) (unpublished opinion); *State v. Claussen,* No. 100,899, 2009 WL 4035202 (Kan.App.2009) (unpublished opinion); *State v. Sutton,* No. 101,522, 2009 WL 3428670 (Kan.App.2009) (unpublished opinion). While we recognize that this issue is still subject to further review by the Kansas Supreme Court, which has accepted petitions for review in *Adams* and *Snellings,* we consider the matter well settled unless and until that court charts a different course.

***13** After the 2006 amendment, drug paraphernalia was defined as " 'all equipment and materials of any kind which are used, or primarily intended or designed for use in ... manufacturing ... a controlled substance and in violation of the uniform controlled substances act.' " *Adams,* 43 Kan.App.2d at 855, 232 P.3d 347 (quoting K.S.A.2007 Supp. 65–4150[c]). The argument has been made that ephedrine should be considered drug paraphernalia because it is included among "materials of any kind" used to make meth. *Holland,* 2011 WL 135022, at *6. This court rejected that argument, held that possession of ephedrine isn't identical to possession of drug paraphernalia, and upheld separate sentences for both crimes. *Savage,* 2011 WL 420727, at *3; *Holland,* 2011 WL 135022, at *7.

Here, Stotts committed his offenses in 2007, after the 2006 amendment removed "products" from the definition of drug paraphernalia under K.S.A.2006 Supp. 65–4150(c). He was charged, convicted, and sentenced separately for both crimes under K.S.A.2006 Supp. 65–4152(a)(3) and K.S.A.2006 Supp. 65–7006. Because *Campbell* was based on the word "product" existing in both statutes, it doesn't control here where the statutory definition of drug paraphernalia when Stotts committed his offense no longer included "products" in its definition. See *Dalton,* 41 Kan.App.2d at 795, 207 P.3d 257.

VI. *The District Court Didn't Err in Sentencing Because Attempted Manufacture of Methamphetamine and Possession of Drug Paraphernalia Aren't Identical Offenses.*

Stotts makes a similar argument that attempted manufacture of methamphetamine and possession of drug paraphernalia with the intent to manufacture methamphetamine are identical offenses. Again based on the identical-offense doctrine, Stotts argues that because the elements of both offenses overlap, the sentence for attempted manufacture of methamphetamine (which was the harsher penalty) should be vacated. The State contends that the Kansas Supreme Court has decided this issue against Stotts' position in *State v. Fanning,* 281 Kan. 1176, 1184, 135 P.3d 1067 (2006).

In *Fanning,* the court held that attempted manufacture of methamphetamine and possession of drug paraphernalia with intent to manufacture a controlled substance weren't identical offenses for sentencing purposes. The court noted that the elements of the two crimes weren't completely identical because attempted manufacture of methamphetamine required that the State prove that the defendant "[w]as prevented or intercepted in actually manufacturing methamphetamine," an additional element not found in the statute for possession of drug paraphernalia. 281 Kan. at 1182–83, 135 P.3d 1067.

Stotts offers that the *Fanning* analysis was disapproved by *State v. Thompson,* 287 Kan. 238, 200 P.3d 22 (2009). Stotts argues in this case that *Thompson* says that the additional element needed to prove attempted manufacture (that the defendant was prevented or intercepted and thus didn't complete manufacture) shouldn't be considered and that the identical-offense sentencing doctrine applies if the elements in overlapping provisions are identical. Because there are *some* overlapping elements, Stotts argues that the identical-offense doctrine should be applied so that the sentence for attempted manufacture of methamphetamine should be vacated. Stotts relies on the court's rejection of the State's position "that the identical elements test is applied to the entire statute rather than the overlapping provisions." See *Thompson,* 287 Kan. at 258, 200 P.3d 22. But that statement came in a discussion clarifying when "double jeopardy concerns arise," 287 Kan. at 258, 200 P.3d 22, and does not appear to control the outcome here, especially because the next section of the *Thompson* opinion reaffirmed *State v. Cooper,* 285 Kan. 964, 967, 179 P.3d 439 (2008). *Cooper* had applied the *Fanning* test and held that the offenses of manufacture of methamphetamine and possession of drug paraphernalia to manufacture methamphetamine were

not identical for sentencing purposes because "nothing in the former statute requires the State to prove, as does the latter statute, that a defendant used drug paraphernalia to manufacture methamphetamine." See *Thompson,* 287 Kan. at 260, 200 P.3d 22. This was so even though the court recognized that "paraphernalia must have been used to manufacture methamphetamine," yet the State isn't required to prove that to convict a defendant for manufacture of methamphetamine. 287 Kan. at 260, 200 P.3d 22. The *Thompson* opinion cites *Cooper* on these points with approval, reaffirming that the manufacture of methamphetamine was not identical for sentencing purposes to the possession of drug paraphernalia to manufacture methamphetamine. *Thompson,* 287 Kan. at 260–61, 200 P.3d 22. Thus, a defendant could be sentenced for both offenses.

***14** In this case, the jury instructions for the two charges set forth the elements the jury needed to find to convict:

> "In Count Four the defendant is charged with the crime of an attempt to manufacture methamphetamine. The defendant pleads not guilty.
>
> "To establish this charge, each of the following claims must be proved:
>
> "1. That the defendant performed an overt act toward the commission of the crime of manufacture of methamphetamine;
>
> "2. That the defendant did so with the intent to commit the crime of manufacture of methamphetamine;
>
> "3. That the defendant failed to complete commission of the crime of manufacture of methamphetamine; and
>
> "4. That this act occurred on or about the 25th day of March, 2007, in Reno County, Kansas."
>
> "In Count Eight, the defendant is charged with the crime of unlawfully possessing with intent to use drug paraphernalia. The defendant pleads not guilty.
>
> "To establish this charge, each of the following claims must be proved:
>
> "1. That the defendant knowingly possessed with the intent to use drug paraphernalia to manufacture methamphetamine; and
>
> "2. That this act occurred on or about the 25th day of March, 2007, in Reno County, Kansas."

The jury instruction representing the elements of attempt to manufacture methamphetamine doesn't require proof that the defendant possessed drug paraphernalia. See *Cooper,* 285 Kan. at 967, 179 P.3d 439. Nor does possession of drug paraphernalia require an overt act toward manufacturing meth. Thus, as in *Cooper,* the overlapping elements aren't identical. In any event, *Thompson* discussed *Cooper* and cited *Fanning* with approval in holding that manufacturing meth isn't identical to using drug paraphernalia to manufacture meth. *Thompson,* 287 Kan. at 260–61, 200 P.3d 22.

Fanning controls the issue in this case. The *Fanning* precedent is only 5 years old, and we are, of course, bound to follow Kansas Supreme Court precedents absent some indication that it is departing from its earlier position. *State v. Ottinger,* 46 Kan.App.2d 647, Syl. ¶ 8, ––– P.3d ––––, 2011 WL 4862441 (2011). We find no indication that the court has departed from *Fanning,* which held that the charges at issue here weren't identical for sentencing purposes. And *Thompson's* holding—that convictions for manufacture of methamphetamine and possession of paraphernalia for the purpose of manufacturing methamphetamine weren't identical for sentencing purposes—also supports the continued viability of *Fanning.* Stotts was sentenced under K.S.A. 65–4159 (attempt to manufacture methamphetamine) and K.S.A. 65–4152(a)(3) (possession of drug paraphernalia with intent to manufacture methamphetamine), the same charges under the same statutory language as in *Fanning.* 281 Kan. at 1176. The offenses were not identical for sentencing purposes.

VII. *The Cumulative Effect of Trial Errors Didn't Deny Stotts a Fair Trial.*

Stotts next argues that the cumulative effect of trial errors substantially prejudiced him and denied his right to a fair trial. When more than one trial error is found, even though each may have been harmless individually, reversal may still be appropriate if the cumulative effect of the errors has damaged the defendant's right to a fair trial. See *State v. Tully,* 293 Kan. 176, Syl. ¶¶ 16–19, 262 P.3d 314 (2011). Here, we have found only one error—the judge's failure to obtain a waiver from Stotts personally before the judge met individually with the jurors. We found that error to be harmless, and with no other errors, there can be no cumulative effect.

VIII. *This Court Lacks Jurisdiction to Consider a Challenge to Aggravated Sentences.*

*15 Stotts argues that it was error for the trial court to sentence Stotts to the aggravated sentence for each count without the jury finding that aggravating factors were proven beyond a reasonable doubt. The Kansas sentencing guidelines provide three potential sentences for each offense based on the defendant's criminal history and the severity of the offense—a mitigated (or lesser) sentence, a standard (or middle) sentence, and an aggravated (or greater) sentence. The district court has the discretion to make that choice, and the legislature has provided in K.S.A. 21–4721(c)(1) that the district court's choice is not reviewable on appeal. Stotts concedes this issue was decided against him in *State v. Johnson,* 286 Kan. 824, Syl. ¶ 6, 190 P.3d 207 (2008), but he says that he has included it here to preserve the issue for possible federal appeals. Again, we are bound to follow *Johnson* unless our Supreme Court has given some indication that it is departing from it, and court has reaffirmed *Johnson* as recently as this July. See *State v. Hernandez,* 292 Kan. 598, 608, 257 P.3d (2011). We conclude that we do not have jurisdiction to consider Stotts' challenge to the district court's selection of aggravated sentences.

IX. *The Sentencing Court Did Not Err by Reserving Jurisdiction to Set the Restitution Amount after Sentencing.*

Stotts also argues that a Kansas Supreme Court precedent that allows restitution to be set after sentencing should be overturned—again, to preserve the issue for possible federal appeals. Once again, our Supreme Court's position on the issue is clear: "[A] sentencing court may later set the exact amount of restitution to be paid after it has completed pronouncing sentence from the bench." *State v. Jackson,* 291 Kan. 34, 36, 238 P.3d 246 (2010) (citing *State v. Cooper,* 267 Kan. 15, 18–19, 977 P.2d 960 [1999]).

Here, at sentencing the district court ordered Stotts "to pay the restitution, the entire bill for Mr. Cook" without specifying the exact amount. That's proper under *Jackson* and *Cooper,* and there's no indication that our Supreme Court is departing from those precedents. See *State v. Phillips,* 45 Kan.App.2d 788, 791–93, 253 P.3d 372 (2011). We find no error in the district court's discretionary decision to determine the amount of restitution at a separate hearing to be held after Stotts had been sentenced.

The defendant's challenge to the district court's choice of aggravated sentences is dismissed for lack of jurisdiction. The judgment of the district court is otherwise affirmed.

All Citations

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Unpublished Disposition
(Pursuant to Kansas Supreme Court Rule 7.04(f), unpublished opinions are not precedential and are not favored for citation. They may be cited for persuasive authority on a material issue not addressed by a published Kansas appellate court opinion.)
Court of Appeals of Kansas.

STATE of Kansas, Appellee,
v.
Liliana SANTACRUZ, Appellant.

No.
95,354
.
|
March 2, 2007.
|
Review Denied June 21, 2007.

Appeal from Finney District Court, Philip C. Vieux, judge. Opinion filed March 2, 2007. Affirmed.

Attorneys and Law Firms

Nathan B. Webb, of Kansas Appellate Defender Office, and Charles F. Kitt, legal intern, for appellant.

Brian R. Sherwood, assistant county attorney, John P. Wheeler, county attorney, and Phill Kline, attorney general, for appellee.

Before GREEN, P.J., ELLIOTT and MALONE, JJ.

MEMORANDUM OPINION

PER CURIAM.

*1 Liliana Santacruz appeals her conviction of possession of cocaine. Santacruz claims the district court erred in refusing to give an instruction on general criminal intent and in failing to give a unanimity instruction. She also claims prosecutorial misconduct denied her a fair trial. We affirm.

On November 16, 2003, at 1 a.m., Garden City Police Officers Scott Ptacek, Ben Barbo, and Captain Michael Utz were dispatched to the El Presidente bar for a fight in progress. When they arrived, there was no evidence of a fight, but they decided to conduct a business check of the bar. They checked the restrooms on the east side of the bar, and as they were walking to the west side of the bar, a man told them they should check the restrooms on the west side.

The officers went to the first restroom, which they thought was the men's room, and saw nothing illegal. They went to the next restroom, which they assumed was the women's room, and Ptacek knocked on the door. After waiting 10 to 15 seconds with no answer, Ptacek started to leave. At that point he heard the door open and shut.

Ptacek checked the door with his flashlight and determined it was a men's restroom, so he immediately opened the door. Inside he saw Santacruz and a male, later identified as Hector Castillo, standing face to face in the middle of the restroom. Ptacek testified he noticed a white powdery substance on one of Santacruz' nostrils. Utz also noticed a white residue on the base of Santacruz' nose between her nostrils. As Santacruz was exiting the restroom, Barbo observed her "take a swipe, a wipe on her nose," although he never saw anything on her nose. Ptacek also observed Castillo had what he believed to be powder cocaine on his left nostril. As Barbo was placing Castillo under his control, he found a rolled up $20 bill in Castillo's hand.

After Santacruz and Castillo were escorted out of the restroom, Ptacek went back in and observed an open small cellophane baggie of white powdery substance on the floor about a foot from where both Santacruz and Castillo had been standing. Neither Ptacek nor Barbo ever saw Santacruz in physical possession of the baggie. The white powder substance in the baggie was sent for lab testing, which revealed it contained cocaine. The substance seen on Santacruz' nose was not tested.

Santacruz was charged with one count of possession of cocaine. At trial, Santacruz testified she arrived at the El Presidente bar at approximately 12:30 a.m. She was sitting at the bar and had begun to drink a beer when she left to use the restroom. She did not see any signs on the doors and had seen men and women entering both restrooms, so she just went into one. Santacruz testified that as she was leaving the restroom, she met Castillo at the door. She testified she knew Castillo from work, but she had never spoken to him. According to Santacruz, Castillo asked if he could kiss her, and she allowed him to come into the restroom where they kissed for about 2 or 3 seconds. She testified she was on her way out of the restroom when the police knocked on the door.

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*2 Santacruz stated she had nothing on her face that night that could have been mistaken for white powder. She testified she did not wipe her nose, but had her hand up to her forehead because she was embarrassed that the police had found her in the restroom with a man. Santacruz indicated the baggie on the floor of the restroom was not hers, and she had never see it before. She also indicated she had not ingested any drugs that night, and she had asked the police to give her a urine test, but they declined.

During the State's rebuttal, Ptacek testified about his interview with Santacruz the night of her arrest. He stated Santacruz had told him she did not know Castillo. Santacruz did not tell Ptacek that she and Castillo had been kissing. Santacruz told Ptacek she was in the restroom approximately 30 seconds before she walked out and saw the police. Ptacek indicated he never heard Santacruz request a urine test.

The jury found Santacruz guilty of possession of cocaine. Santacruz received an underlying prison sentence of 12 months and was placed on probation. She timely appeals.

General criminal intent instruction

Santacruz first claims the district court erred in denying her request to instruct the jury on general criminal intent pursuant to PIK Crim.3d 54.01-A. Both Santacruz and the State had initially requested the jury instruction as part of their proposed instructions, but the State later withdrew the proposed instruction claiming it was unnecessary.

When reviewing challenges to jury instructions, an appellate court must consider the instructions as a whole and not isolate any one instruction. " "If the instructions properly and fairly state the law as applied to the facts of the case, and a jury could not reasonably have been misled by them, the instructions do not constitute reversible error even if they are in some way erroneous. [Citations omitted.]" " ' *State v. Mays,* 277 Kan. 359, 379, 85 P .3d 1208 (2004).

PIK Crim.3d 54.01-A states:

> "In order for the defendant to be guilty of the crime charged, the State must prove that (his)(her) conduct was intentional. Intentional means willful and purposeful and not accidental.
>
> "Intent or lack of intent is to be determined or inferred from all of the evidence in the case"

The Notes on Use for PIK Crim.3d 54.01-A state that the instruction is not recommended for general use and should be used only when the crime requires a general intent and the defendant's state of mind is substantially in issue. Here, according to the evidence, Santacruz' state of mind was not substantially in issue. Santacruz' testimony made it clear she was claiming that she never possessed the cocaine, never ingested or snorted cocaine, never had anything on her nose, and never attempted to wipe her nose. This was not a situation where Santacruz admitted to possessing the cocaine, but claimed that the possession was accidental or unintended. Based upon Santacruz' testimony, it was unnecessary for the district court to give the instruction on general criminal intent at PIK Crim.3d 54-01-A.

*3 The only time "accidental possession" was mentioned as a defense was after the instruction conference, during the closing arguments, when defense counsel suggested that perhaps Santacruz had cocaine on her face from kissing Castillo in the restroom. Although this explanation may have been plausible, it was contrary to Santacruz' direct testimony that she did not have anything on her nose. Furthermore, the State never attempted to argue that Santacruz should be found guilty of possession of cocaine based solely upon the substance observed on her nostrils, which was never tested. The State's theory of the case was that Santacruz jointly and constructively possessed the cocaine found in the baggie on the floor of the bathroom. Santacruz consistently denied that she had any possession or control over this cocaine.

Our Supreme Court has stated: "Failure to give a defendant's requested instruction is not error where the substance of the instruction is in the other instructions given." *State v. Yardley,* 267 Kan. 37, 43, 978 P.2d 886 (1999). Here, Instruction No. 2 informed the jury that in order for Santacruz to be guilty, the State must prove that Santacruz possessed cocaine and that she "did so intentionally." Furthermore, possession was defined in Instruction No. 3 as requiring that Santacruz "must have knowledge of the presence of the controlled substance with the intent to exercise control over it."

Based upon Santacruz' testimony, her state of mind regarding possession of the cocaine was not substantially in issue. In any event, the substance of her requested instruction was given to the jury in other instructions. The district court's instructions properly and fairly stated the law as applied to the

facts, and the jury could not reasonably have been misled by them. Accordingly, we conclude the district court did not err in failing to give Santacruz' requested instruction on general criminal intent.

Unanimity instruction

Santacruz next contends the district court erred in failing to instruct the jury that its verdict must be unanimous. Santacruz argues a unanimity instruction was required because it is uncertain whether the jury convicted her for possession of the cocaine on her nose or the cocaine found in the baggie on the floor of the bathroom. Because Santacruz did not request the instruction, this court reviews for clear error and should reverse only if we are firmly convinced there is a real possibility that a unanimity instruction would have changed the verdict. K.S.A.2006 Supp. 22-3414(3); *State v. Shirley,* 277 Kan. 659, 666, 89 P.3d 649 (2004).

A criminal defendant in Kansas has a fundamental right to a unanimous jury. K.S.A. 22-3421 and K.S.A. 22-3423(1)(d). In *State v. Hill,* 271 Kan. 929, 939, 26 P.3d 1267 (2001), our Supreme Court adopted a two-part analysis to determine whether a unanimity instruction should have been given.

> "[T]he first step is to determine whether there is a possibility of jury confusion from the record or if the evidence showed either legally or factually separate incidents. Incidents are legally separate when the defendant presents different defenses to separate sets of facts or when the court's instructions are ambiguous but tend to shift the legal theory from a single incident to two separate incidents. Incidents are factually separate when independent criminal acts have occurred at different times or when a later criminal act is motived by 'a fresh impulse.' When jury confusion is not shown under the first step, the second step is to determine if the error in failing to give a unanimity instruction was harmless beyond a reasonable doubt with respect to all acts."

***4** In *State v. Schoonover,* 281 Kan. 453, 506, 133 P.3d 48 (2006), our Supreme Court stated: "Whether a case presents a multiple acts issue is a question of law over which this court has unlimited review. [Citation omitted.]" The harmless error test from *Hill* is used to make this determination, and "the question of whether there were factually separate incidents should be a threshold question, not part of a harmless error analysis.... If the incidents are not factually separate, there are not multiple acts." 281 Kan. at 506. The *Schoonover* court then explained:

> " " 'Incidents are factually separate when independent criminal acts have occurred at different times or when a later criminal act is motivated by a 'fresh impulse." " [Citation omitted.] In addition, the other factors we have identified as factors for determining if there is unitary conduct can be applied as well. Thus, the considerations would include: (1) whether the acts occur at or near the same time; (2) whether the acts occur at the same location; (3) whether there is a causal relationship between the acts, in particular whether there was an intervening event; and (4) whether there is a fresh impulse motivating some of the conduct." 281 Kan. at 506-07.

In arguing that the district court should have given a unanimity instruction, Santacruz relies on *State v. Kinmon,* 26 Kan.App.2d 677, 995 P.2d 876 (1999), *abrogated by State v. Hill,* 271 Kan. 929, Syl. ¶ 3, 26 P.3d 1267 (2001). In *Kinmon,* the defendant was charged with possession of cocaine with intent to sell based on discovery of cocaine in two places: inside his pocket and underneath the couch on which he was sitting. This court determined that the jury could have found the defendant guilty based on either possession of the cocaine in his pocket or the cocaine under the couch, and the lack of instruction informing the jurors that all of them had to agree was clear error. 26 Kan.App.2d at 678-79.

However, this court's decision in *Kinmon* should be given little weight, as the court never analyzed the unanimity issue in terms of factually or legally separate acts. In fact, *Kinmon* applied the structural error approach, which required reversal once it was determined there were multiple acts and no unanimity instruction was given. 26 Kan.App.2d at 678-79. This approach was expressly rejected in *Hill,* 271 Kan. 929.

Here, the evidence of Santacruz' separate acts of possession does not pass the threshold question of being factually separate. The possession of cocaine on Santacruz' nose and the possession of the baggie of cocaine occurred at the same time and location. There were no intervening events between the acts. Finally, one act was not motivated by a fresh impulse separate from the other act.

Although our analysis could end here, we also note the acts were not legally separate. Acts "are legally separate when the defendant presents different defenses to separate sets of facts or when the court's instructions are ambiguous but tend to shift the legal theory from a single incident to two separate incidents." *Hill,* 271 Kan. at 939. Santacruz argues she presented separate defenses to the possession of cocaine on her nose and possession of the baggie of cocaine. However, as previously stated, Santacruz' testimony unequivocally stated a general denial of possessing any cocaine. Also, the State never argued that the jury could find Santacruz guilty based upon the cocaine observed on her nose even if the jury did not believe she possessed the cocaine in the baggie. In fact, the powder on her nose was never even tested. The State's theory was that Santacruz was guilty of jointly and constructively possessing the cocaine in the baggie, and Santacruz generally denied any possession.

***5** The evidence in Santacruz' case did not show either factually or legally separate acts and there was no real possibility of jury confusion. This was not a multiple acts case, and accordingly the district court did not err in failing to give a unanimity instruction.

Prosecutorial misconduct

Finally, Santacruz claims the prosecutor committed reversible misconduct by eliciting statements from a witness regarding Santacruz' credibility and by attacking Santacruz' credibility during closing arguments. Although Santacruz did not object to this conduct at trial, such objection is not required to preserve the issue for appeal. Appellate courts apply the same standard of review regardless of whether the defendant lodged an objection. *State v. Swinney,* 280 Kan. 768, 779, 127 P.3d 261 (2006).

The appellate court applies a two-step analysis when reviewing an allegation of prosecutorial misconduct. First, the appellate court decides whether the comments were outside the wide latitude a prosecutor is allowed in discussing the evidence. Second, the appellate court decides whether those comments constitute plain error; that is, whether the statements prejudice the jury against the defendant and deny the defendant a fair trial. 280 Kan. at 779. At the second step, the appellate court considers the following to determine whether a new trial should be granted:

> "(1) whether the misconduct is gross and flagrant; (2) whether the misconduct shows ill will on the prosecutor's part; and (3) whether the evidence is of such a direct and overwhelming nature that the misconduct would likely have had little weight in the minds of jurors. None of these three factors is individually controlling. Moreover, the third factor may not override the first two factors, unless the harmless error tests of both K.S.A. 60-261 [refusal to grant new trial is inconsistent with substantial justice] and *Chapman[v. California],* 386 U.S. 18, [17 L.Ed.2d 705, 87 S.Ct. 824, (1967) (conclusion beyond a reasonable doubt that the error had little, if any, likelihood of having changed the result of the trial)] have been met. [Citation omitted.]" *Swinney,* 280 Kan. at 780.

The first conduct Santacruz complains about is the following testimony when the prosecutor was questioning Ptacek about Santacruz' statements to the police:

> "Q. [Prosecutor:] Okay. What did she say about Mr. Castillo during this time, what was he doing?
>
> "A. [Ptacek:] She didn't really make any statements as to what he was doing.
>
> "Q. Did you question her about her statement?
>
> "A. About her statement?
>
> "Q. Yeah, did you question her story or-
>
> "A. *Yes, I told her that I didn't believe her story, there were several holes in it, and she needed to tell me truth."* (Emphasis added.)

Santacruz argues this conduct is analogous to the conduct in *State v. Elnicki,* 279 Kan. 47, 48, 105 P.3d 1222 (2005), in which our Supreme Court found it was reversible error for the jury to view a taped interrogation of the defendant in which the police interrogator commented on the defendant's credibility. The police officer's comments in *Elnicki* included, "[Y]ou just told me a flat out lie," and seven other comments in which the officer called the defendant a liar or its equivalent. 279 Kan. at 51-52.

*6 We note that the prosecutor's question occurred during the State's rebuttal, in which the State attempted to point out the inconsistencies between Santacruz' trial testimony and her statements to the police on the night she was arrested. The prosecutor did not directly ask Ptacek to give his opinion of whether Santacruz was telling the truth. Also, Ptacek's statement did not directly call Santacruz a liar and it was a single comment, unlike the statements in *Elnicki.*

Even assuming the question was outside the wide latitude provided to a prosecutor, the misconduct was not gross and flagrant and did not show ill will on the prosecutor's part. The question was not necessarily crafted to provoke the response Ptacek gave, and the prosecutor did not repeat his conduct or continue questioning Ptacek in order to elicit inadmissible evidence. The evidence in this case was not necessarily direct and overwhelming; however, the isolated comment by Ptacek likely had little weight in the minds of the jurors.

Santacruz also objects to two statements made by the prosecutor during closing arguments. In the first statement, the prosecutor remarked, "And I would submit to you that her testimony was very inconsistent, was-the weight of that should be much lower than what it is with the other witnesses." In the second statement, the prosecutor indicated, "And her story is really curious.... There is-I would submit to you folks that her story was not plausible to the officers. It is not plausible here today."

Santacruz argues these are improper statements such as those in *State v. Pabst,* 268 Kan. 501, 996 P.2d 321 (2000). In *Pabst,* the prosecutor accused the defendant of lying at least 11 times. The *Pabst* court determined the prosecutor's comments amounted to reversible error and stated, "When a case develops that turns on which of two conflicting stories is true, it may be reasonable to argue, based on evidence, that certain testimony is not believable. However, the ultimate conclusion as to any witness' veracity rests solely with the jury." 268 Kan. at 507.

In *State v. Donaldson,* 279 Kan. 694, 112 P.3d 99 (2005), the defendant objected to the prosecutor's statement that the defendant's testimony should not be given any credibility. The court noted that this statement came right after the prosecutor had discussed the instruction on the weight and credit to be given by the jury to a witness' testimony. The comment was followed by a discussion of why the defendant's trial testimony was not credible. The court in *Donaldson* found the statement was not improper. 279 Kan. at 707.

Similarly, the prosecutor's first statement that Santacruz' testimony was inconsistent came right after the prosecutor discussed the instruction on the weight and credit to be given by the jury to a witness' testimony. The full statement included:

> "First of all, there is Instruction Number 1, paragraph three. It says weight and credit to be given to each witness. That includes the defendant. The defendant testified; she is a witness. You can examine and give what weight and credit you wish to what her testimony is. And I would submit to you that her testimony was very inconsistent, was-the weight of that should be much lower than what it is with the other witnesses. The officers in this case were very consistent."

*7 The prosecutor then pointed out the inconsistencies between Santacruz' testimony at trial and the statement she made to Ptacek on the night she was arrested. The prosecutor's statement was not improper.

The prosecutor's second statement that Santacruz' story was "not plausible" was made right after the prosecutor pointed out the inconsistencies in Santacruz' testimony. The prosecutor never called Santacruz a liar. He was not commenting on Santacruz' testimony as a whole, but was commenting on a particular inconsistency. The prosecutor's comments were not outside the wide latitude prosecutors are allowed in discussing the evidence. We conclude there was no reversible error in the prosecutor's actions at trial.

Affirmed.

All Citations

152 P.3d 688 (Table), 2007 WL 656363

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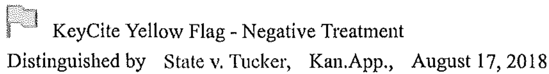
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340 P.3d 1235 (Table)
Unpublished Disposition
(Pursuant to Kansas Supreme Court Rule 7.04(f), unpublished opinions are not precedential and are not favored for citation. They may be cited for persuasive authority on a material issue not addressed by a published Kansas appellate court opinion.)
Court of Appeals of Kansas.

STATE of Kansas, Appellee,
v.
Gilbert C. ALVAREZ, Appellant.

No.
110,710
.
|
Dec. 19, 2014.
|
Review Denied April 21, 2016.

Appeal from Sedgwick District Court; Benjamin L. Burgess, Judge.

Attorneys and Law Firms

Randall L. Hodgkinson, of Kansas Appellate Defender Office, for appellant.

Lance J. Gillett, assistant district attorney, Marc Bennett, district attorney, and Derek Schmidt, attorney general, for appellee.

Before BUSER, P.J., LEBEN and STANDRIDGE, JJ.

MEMORANDUM OPINION

PER CURIAM.

***1** Gilbert C. Alvarez appeals his conviction for criminal possession of a firearm, which was illegal based on his previous felony conviction. He argues that the gun found on him shouldn't be considered a firearm because it had a faulty firing pin and couldn't have been fired.

But the statute defining "firearm" provides that a weapon is a firearm if it *either* was designed to propel a projectile or is currently able to do so. No evidence suggests that this gun was designed to have a faulty firing pin and thus be incapable of firing a shot. Accordingly, it was a firearm, and the district court correctly ruled that evidence about the operability of the gun wasn't relevant.

Alvarez points on appeal to two trial errors, but neither warrants reversal. The district court erred in not giving a culpable-mental-state instruction for criminal possession of a firearm, but the error was harmless because overwhelming evidence showed that Alvarez possessed the firearm knowingly or intentionally. The district court also erred in giving a written response to a jury question with the defendant's express waiver of his right to be present when the jury received that answer, violating Alvarez' right to be present for trial under the Sixth Amendment. But the error was also harmless because there was strong evidence against Alvarez and because he didn't challenge the content of the district court's written response. And even though the court made two errors, the cumulative effect of these errors does not warrant a new trial: The errors bore no relationship to each other, and any prejudicial effect was overcome by the strong evidence against Alvarez. We therefore affirm the district court's judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Gilbert C. Alvarez had been on drugs for 5 straight days when he went to the Shot Time bar in Wichita on December 5, 2012. Alvarez later testified that he had entered the bar wearing a coat and had managed to put on someone else's coat with a gun in the pocket while inside the bar. He said that when he had stuck his hand in the coat pocket and felt the gun, it had "freaked [him] out," and he had taken it out of his pocket to find out where it had come from. He said that because he had known he didn't bring a handgun into the bar and because his recent drug use had made him paranoid, he had asked a female patron if she was trying to kill him. He initially told the court that while he was in the bar, he had tried to figure out who the coat belonged to, but he later said that he had not realized he had the wrong coat until after he had been arrested.

Eric Stilwell, who was at the bar that night, provided a different version of events. He said that Alvarez had walked in the door holding a gun in his hand and that he had immediately approached Alvarez and had gotten him to leave. Stilwell also

testified that he had consumed two beers that night, in the hour before Alvarez entered the bar.

The police arrived at the bar after someone reported a suspicious character with a weapon. Alvarez had left on foot, and they approached him about a block from the bar. They immediately noticed that he had a knife in his back pocket, and when handcuffing him, they also found a handgun in the pocket of the coat he was wearing. Because Alvarez had previously been convicted of a felony, the State charged Alvarez with criminal possession of a firearm.

***2** Before his trial, the State filed a motion in limine seeking to prevent Alvarez' attorney from introducing expert testimony or other evidence that the handgun found in his pocket had a broken firing pin and was not operational. Alvarez' attorney objected, arguing that granting the motion would prevent Alvarez from presenting a jury-nullification defense, meaning that Alvarez would not be able to ask the jury to choose not to convict him even though he was guilty as charged. She renewed the objection at trial and proffered that an expert witness could testify that the gun wasn't operational. The judge granted the motion in limine, stating that the statute defining criminal possession of a firearm did not require that the firearm be operational and that he wasn't sure jury nullification was a proper defense.

At trial, the parties stipulated that Alvarez had a prior felony conviction within the preceding 10 years. Officer Chad Spaulding, a police officer with 9 years of experience and training on how to identify firearms, testified that the object the police found in Alvarez' coat pocket was a firearm designed to fire a projectile by force. In addition, some evidence that the weapon wasn't operational was inadvertently presented to the jury. The handgun was admitted into evidence for the jury to view during deliberations, and the evidence tag on the handgun noted that it had a "broken firing pin." Also, before closing arguments, the defendant interrupted the proceedings and said in front of the jury, "Your Honor, I can't go through with it because you all withholding evidence with the jury ... [Y]ou know ... the fire pin is broken."

During jury deliberations, the jury sent a question to the court asking for the legal definition of a firearm. The court discussed the question with counsel in chambers and then gave a summary of their discussion and explained its answer in the presence of the defendant in open court. The court sent a written answer to the jury. The answer provided the statutory definition of a firearm found at K.S.A.2013 Supp. 21–5111(m)–that a firearm is "any weapon designed or having the capacity to propel a projectile by force of an explosion or combustion."

The jury found Alvarez guilty of criminal possession of a firearm, and the district court imposed a 19–month prison sentence. Alvarez has appealed to this court.

ANALYSIS

I. *The District Court Did Not Violate Alvarez' Right to a Fair Trial When It Excluded Evidence that the Handgun Was Inoperable.*

Alvarez argues that the district court should have denied the State's motion in limine and admitted evidence that the handgun was inoperable. He claims that without the evidence, he was denied his right to present the theory of his defense-that the handgun was not a firearm.

Defendants are entitled to present their defenses, and a defendant's fundamental right to a fair trial is violated if the district court excludes evidence that is integral to his or her theory. *State v. Gaither,* 283 Kan. 671, 689, 156 P.3d 602 (2007). " 'The exclusion of relevant, admissible, and noncumulative evidence, which is an integral part of the theory of defense, violates the defendant's fundamental right to a fair trial.' " 283 Kan. at 689 (quoting *State v. Baker,* 281 Kan. 997, 1008, 135 P.3d 1098 [2006]). But the right to present a defense is limited by the statutory rules of evidence and the caselaw interpreting those rules. 283 Kan. at 689.

***3** A district court may grant a motion in limine when (1) the evidence in question will be inadmissible at a trial and (2) a pretrial ruling is justified as opposed to a ruling during trial. *State v. Shadden,* 290 Kan. 803, 816, 235 P.3d 436 (2010). When reviewing the first factor—admissibility—an appellate court applies a multistep analysis. 290 Kan. at 817. It first considers whether the evidence is relevant—meaning it has a tendency to prove a material fact—by looking at whether it is material and probative. *State v. Marks,* 297 Kan. 131, 142, 298 P.3d 1102 (2013).

Before the trial court, Alvarez argued that he wanted to admit evidence that the handgun was inoperable to encourage jury nullification; on appeal, he says it should have been admitted to show the handgun was not a firearm. He is arguably raising a new issue on appeal, which is generally not permitted, but because the district court based its decision to exclude the

evidence in part on the fact that it considered the handgun a firearm, we will consider his argument. See *State v. Kelly,* 298 Kan. 965, 971, 318 P.3d 987 (2014).

As for jury nullification, however, Alvarez has not raised that claim on appeal, and we therefore consider that issue waived and abandoned. See *State v. Boleyn,* 297 Kan. 610, 633, 303 P.3d 680 (2013). Even if it had not been waived, the jury saw and heard evidence showing that the gun was inoperable. The evidence tag on the handgun noted that it had a "broken firing pin," and Alvarez said as much in open court. The jury appeared to have understood that the broken firing pin rendered the handgun inoperable because it asked the court what qualified as a firearm.

Under K.S.A.2013 Supp. 21–5111(m), a "firearm" is "any weapon designed or having the capacity to propel a projectile by force of an explosion or combustion." Under the plain language of the statute, a weapon is a firearm in two circumstances—if it was either *designed to* or currently *has the capacity to* propel a projectile. Both parties agree that the handgun at issue here did not have the capacity to propel projectiles when Alvarez had possession of it. Alvarez argues on appeal that he should have been able to argue as a defense that the handgun was also not designed to propel projectiles because it was in such disrepair that it had essentially been redesigned.

When interpreting K.S.A.2013 Supp. 21–511 l(m), this court should first determine the legislature's intent through the statute's language, by giving words their ordinary meaning. *State v. Brooks,* 298 Kan. 672, 685, 317 P.3d 54 (2014); *Northern Natural Gas Co. v. ONEOK Field Services Co.,* 296 Kan. 906, 918, 296 P.3d 1106, *cert. denied* 134 S.Ct. 162 (2013). Only if the language is unclear should it use canons of construction, legislative history, or other background considerations to determine what the statute means. 296 Kan. at 918.

Our Supreme Court has previously said that the definition of "firearm" includes inoperable weapons that were designed to fire projectiles. See *State v. Pelzer,* 230 Kan. 780, 782, 640 P.2d 1261 (1982). In *Pelzer,* the court interpreted the caselaw definition of "firearm" from *State v. Davis,* 227 Kan. 174, 177–78, 605 P.2d 572 (1980), which is nearly identical to the statutory definition codified at K.S.A.2013 Supp. 21–511 l(m). 230 Kan. at 781. The caselaw definition provided that a "firearm" was an object having the "design or capacity to propel a projectile by force of an explosion, gas or other combustion." *Davis,* 227 Kan. at 177. The current statutory definition doesn't include weapons that propel projectiles by force of gas, but that doesn't affect the analysis here because the parties don't contend that the weapon in Alvarez' possession operated through the expansion of compressed gas. See K.S.A.2013 Supp. 21–5111(m); *State v. Craddick,* 49 Kan.App.2d 580, 585, 311 P.3d 1157 (2013).

***4** The *Pelzer* court determined that where a statute required mandatory minimum sentences for crimes committed with firearms, the mandatory minimum sentences applied when the firearm used in the crime was inoperable. 230 Kan. at 782. The court held that a weapon that was designed to propel a projectile was not excluded from the definition of "firearm" when it was no longer able to propel a projectile: "Any handgun which is designed to propel a projectile is a firearm. Any present disrepair which might render it inoperable does not make it any less a firearm." 230 Kan. at 782.

Alvarez makes no argument that the handgun at issue here was not designed to propel projectiles, only that it should be considered to have been redesigned *not* to project them. But the mere failure of one part of a designed object through damage or disrepair is not a redesign. To "design" means to "create ... for a particular purpose or effect." See American Heritage Dictionary 491 (5th ed.2011) (defining "design"). No evidence suggests that the firing pin no longer works because someone intended to make this gun inoperable. See *Pelzer,* 230 Kan. at 782 ("Any present disrepair which might render it inoperable does not make it any less a firearm.").

Accordingly, evidence that the firearm didn't work was not relevant to whether the handgun was a firearm under K.S.A.2013 Supp. 21–5111(m) and was therefore properly excluded with the motion in limine. See *State v. Gaither,* 283 Kan. 671, 689, 156 P.3d 602 (2007); *State v. Baker,* 281 Kan. 997, 1008–09, 135 P.3d 1098 (2006) (excluding testimony that the victim in a murder case had been on suicide watch 3 years before his death did not deny the defendant the right to present a suicide defense because the evidence was too remote to be relevant to the defense).

We should note that evidence that the firing pin didn't work might have been relevant under one theory *not* argued on appeal by Alvarez. As we've already noted, a weapon can qualify as a firearm in two different ways—it must either be designed to fire a projectile or be capable of doing so. Evidence that the firing pin didn't work would negate that second option. The court's initial instructions to the jury didn't

define the term "firearm," but the court answered the jury's request for a definition by providing an answer that included both options: "A 'firearm' is any weapon designed or having the capacity to propel a projectile by force of an explosion or combustion."

Under that instruction, evidence that the firing pin didn't work would have been relevant to disprove one of two ways the jury could find the weapon to be a firearm. Alvarez did not argue in the trial court that his evidence should have been admitted for this purpose. Nor does he make that argument on appeal. Rather, his argument is that this evidence would have shown that the weapon was *not* a firearm at all based on his claim that the weapon was "redesigned" not to fire. And that would not be a defense on the facts of this case.

***5** Even if the evidence should have been admitted (to negate the capacity-to-fire method for finding a weapon to be a firearm), the failure to allow that evidence would be harmless error. The weapon in this case still was a firearm because it was designed to fire a projectile.

II. *The District Court's Failure to Give a Culpable–Mental–State Instruction Was Harmless Error.*

Alvarez' next argument is that the district court should have read the jury a culpable-mental-state instruction. On appeal, Alvarez discusses pattern instruction 52.010, which says: "The State must prove that the defendant (committed the crime)(*insert defendant's act that is the element of the crime which requires a particular culpable mental state) insert one of the following:* intentionally, or knowingly, or recklessly." PIK Crim. 4th 52.010. It then tells the court to define the particular mental state appropriate for the crime charged —intentionally, knowingly, or recklessly. The State argues that this court does not even need to consider the merits of this issue because Alvarez abandoned the argument by not specifying which culpable-mental-state degree listed in PIK Crim. 4th 52.010—intentionally, knowingly, recklessly—the court should have used when instructing the jury.

But at trial, Alvarez' attorney did not request PIK Crim. 4th 52.010. She asked for a "general criminal intent instruction." The court brought up PIK Crim. 4th 52.010 based on the Notes on Use for that instruction, which say that the PIK–Criminal Advisory Committee believed the instruction must be given in every case where a culpable mental state is not clearly excluded. The court denied the request for a "general criminal intent" instruction, saying that PIK Crim. 4th 52.010 was not appropriate because the statute defining criminal possession of a firearm dispenses with a culpable mental state:

> "[DEFENSE COUNSEL:] I would request a general criminal intent instruction.
>
> "THE COURT: Just to note in the record, the general criminal intent instruction is 52.010. I did print that instruction out. I provided copies to both counsel. And I would note on the second page on the Notes of Use there is in the middle of that discussion the following commentary:
>
> " 'The committee believes this instruction must be given in every case, unless, one, the definition of the crime charged plainly dispenses with a culpable mental state. Or two, a culpable mental state is otherwise excluded under K.S.A. 21–5203.'
>
> "I would note that in this matter the charge is criminal possession of a firearm. And in that statute and in the PIK instruction that corresponds to the statue there is no culpable mental state that's required. And in the Notes of Use is a definition of the crime charged plainly dispenses with a culpable mental state, the instruction is not necessary. So I will not give that instruction based on that PIK commentary in 52.010."

But the Notes on Use for PIK Crim. 4th 52.010 are misleading because the instruction should not be given in every case where a culpable mental state is not clearly excluded. In cases where a statute defining a crime requires proof of a culpable mental state but one is not listed in the statute, the proper mental-culpability instruction would encompass K.S.A.2013 Supp. 21–5202(d) and (e), which provide that when a culpable mental state is not listed in a statute but one is nevertheless required, "intent," "knowledge," or "recklessness" will establish criminal responsibility. The pattern instruction that addresses this situation is PIK Crim. 4th 52.300, which says: "The State must prove that the defendant *insert specific act committed by defendant* intentionally, knowingly, or recklessly."

***6** The firearm-possession criminal statute that Alvarez was charged under does not list a mental-culpability term:

> "Criminal possession of a firearm by a convicted felon is possession of any firearm by a person who: ... within the preceding 10 years, has been convicted of a: Felony under ... subsection (b) of [K.S.A.] 21–5807, [the statute defining aggravated burglary] ... was not found to have been in possession of a firearm at the time of the

commission of the crime, and has not had the conviction of such crime expunged or been pardoned for such crime." K.S.A.2012 Supp. 21–6304(a)(3)(A).

So if the firearm-possession statute requires a culpable mental state, the appropriate instruction would have been PIK Crim. 4th 52.300 or a similar instruction.

We must therefore consider whether the district court should have applied PIK Crim. 4th 52.300 or a similar instruction. Alvarez preserved the issue for appeal because he asked the trial court for a "general criminal intent" instruction, which encompasses PIK Crim. 4th 52.300 and similar instructions. Moreover, his appellate brief did not abandon his original request for a "general criminal intent" instruction. On appeal, he still argues that the State should have been required to prove that he had the required culpable mental state to commit criminal possession of a firearm.

Our next step is to determine whether PIK Crim. 4th 52.300 or a similar instruction was legally appropriate—a question over which this court has unlimited review. *State v. Plummer,* 295 Kan. 156, 161, 283 P.3d 202 (2012). Then, if the instruction was legally appropriate and the district court erred in refusing to give it, this court must determine whether the error calls for a new trial or was merely a harmless error. *Plummer,* 295 Kan. at 162–63. An error is harmless if it does not affect a party's substantial rights. *State v. Ward,* 292 Kan. 541, 565, 256 P.3d 801 (2011). To find that substantial rights have not been affected, this court must be persuaded that there is no reasonable probability that the error will or did affect the outcome of the trial. *Ward,* 292 Kan. at 565.

Here the parties agree that the instruction would have been legally appropriate and that the district court erred in refusing to give it. Under the present criminal code, a culpable mental state is an essential element of every crime unless the statute defining the crime clearly indicates that the legislature did not intend to require a mental element. K.S.A.2013 Supp. 21–5202(a). Two statutory provisions require that the legislature be explicit if a crime is to have no required mental culpability. K.S.A.2013 Supp. 21–5202(d) provides that "[i]f the definition of a crime does not prescribe a culpable mental state, a culpable mental state is nevertheless required *unless the definition plainly dispenses with any mental element.*" (Emphasis added.) K.S.A.2013 Supp. 21–5203(b) provides that "[a] person may be guilty of a crime without having a culpable mental state if the crime is ... a felony and the statute defining the crime *clearly indicates a legislative purpose to impose absolute liability for the conduct described* ....“ (Emphasis added.)

*7 As stated previously, the firearm-possession criminal statute Alvarez was charged with does not prescribe the mental state a defendant must have to be guilty of the crime. It merely says that the State must prove two elements —possessing a firearm and being convicted of a felony committed without a firearm. Since the statute doesn't clearly state that it is defining an absolute-liability crime, a culpable mental state is required.

The next step in this analysis is determining whether there is a reasonable probability that the district court's error in refusing to read the instruction affected the outcome of the trial.

In *State v. Howard,* —— Kan.App.2d ——, —— P.3d —— (No. 110,439, filed ——, 2014), this court recently held that criminal possession of a firearm is a general-intent crime and that the State is only required to prove a culpable mental state for the possession element of the crime. This is because K.S.A.2013 Supp. 21–5202(a) requires only that the State prove the *conduct* of the accused person was committed "intentionally," "knowingly," or "recklessly" and because under K.S.A.2013 Supp. 21–5204(a), a defendant is not required to know that his legal status makes the possession of a firearm illegal in Kansas. K.S.A.2013 Supp. 21–5204(a) ("Proof of a culpable mental state does not require proof: Of knowledge of the existence or constitutionality of the statute under which the accused is prosecuted, or the scope or meaning of the terms used in that statute.").

In Alvarez' case, the trial's outcome would not have been different if the court had told the jury that the State had to prove Alvarez possessed the handgun intentionally, knowingly, or recklessly. Overwhelming evidence indicated that Alvarez had a general intent to possess the handgun. Here Stilwell's testimony—that Alvarez walked into the bar holding the gun in his hand—contradicted Alvarez' testimony —that he found the gun in someone else's coat pocket—and indicated that Alvarez had a general intent to possess the firearm. And while Stilwell admitted that he had consumed two beers that night, he likely appeared more credible to the jury than Alvarez, who admitted to having been under the influence of drugs for the 5 days before the incident and said he did not even realize he was wearing someone else's coat until he had been arrested.

Furthermore, even if the jury had believed Alvarez' version of the events, evidence also suggested he had a general intent to possess the firearm because the police found it on his person. After he found the handgun in the coat pocket, he kept it in his possession when he exited the bar and began walking down the street. He did not leave the handgun in the bar or discard it outside the bar. Thus, there was ample evidence that Alvarez possessed the handgun intentionally, knowingly, or recklessly. Even if the jury had been informed that Alvarez needed a culpable mental state to be convicted of criminal possession of a firearm, that knowledge would not have affected the outcome of the trial. We therefore conclude that the district court's error in failing to give the mental-culpability instruction was not reversible error.

III. *The District Court's Written Answer to the Jury's Question Was Harmless Error.*

***8** Alvarez also takes issue with the procedure the district court used to answer the jury's question about the legal definition of "firearm." He contends that the court should have read its response to the jury in his presence in open court and that the written response violated both his statutory right to have a jury question answered in his presence and his constitutional rights to a public trial and to be present at every critical stage of his trial. His arguments raise an issue of law over which this court has unlimited review. *State v. Verser,* 299 Kan. 776, 787, 326 P.3d 1046 (2014). He does not take issue with the court's answer to the jury's question.

Regarding his statutory rights, Alvarez argues that the written answer violated K.S.A. 22–3420(3), which at the time of his offense provided:

> "After the jury has retired for deliberation, if they desire to be informed as to any part of the law or evidence arising in the case ... the information on the point of the law shall be given, or the evidence shall be read or exhibited to them *in the presence of the defendant,* unless he voluntarily absents himself, and his counsel and after notice to the prosecuting attorney." (Emphasis added.)

The statute was amended this year, however. Subsection (d) of the statute now provides that the court may give written answers to jury questions:

> "The jury shall be instructed that any question it wishes to ask the court about the instructions or evidence should be signed, dated and submitted in writing to the bailiff. The court shall notify the parties of the contents of the questions and provide them an opportunity to discuss an appropriate response. The defendant must be present during the discussion of such written questions, unless such presence is waived. The court shall respond to all questions from a deliberating jury in open court *or in writing.*" (Emphasis added.) L.2014, ch. 102, sec. 7.

The amendment is applicable to Alvarez' case because the legislature also provided that the amendments were to apply retroactively: "The amendments to this section by this act establish a procedural rule, and as such shall be construed and applied retroactively." L.2014, ch. 102, sec. 7. Accordingly, we conclude that the court did not violate Alvarez' statutory rights.

But the statutory changes do not affect Alvarez' constitutional arguments-that the district court violated his rights to be present and to a public trial.

A. *Right to Be Present*

The Kansas Supreme Court recently considered a court's written answer to a jury question in *Verser,* 326 P.3d at 1054–57. The court held that a defendant can argue for the first time on appeal that a written response to a jury question violated his or her right to be present because the right is personal to the defendant and cannot be waived by counsel's failure to object at trial. 326 P.3d at 1055. The court then held that a written answer to a jury question violates the defendant's right to be present under the Sixth Amendment. 326 Kan. at 1055. Thus, under *Verser,* the way the court delivered its answer to the jury in Alvarez' case violated his constitutional and statutory rights to be present at every critical stage of his trial. Like other constitutional rights, the defendant could knowingly waive this right, in which case a written answer could be sent to the jury. But Alvarez did not waive his right to be present when this answer was read to (or by) the jury.

***9** Although the court made an error here, the State contends that the error was harmless and thus does not require reversal of Alvarez' conviction. The federal constitutional harmless-

error standard applies to violations of federal constitutional rights. *Verser,* 326 P.3d at 1055. Under that standard, the written answer is harmless error if the State proves beyond a reasonable doubt that it did not affect the outcome of the trial in light of the entire record—that there is " 'no reasonable possibility that [it] contributed to the verdict.' " 326 P.3d at 1055–56 (quoting *State v. Ward,* 292 Kan. 541, Syl. ¶ 6, 256 P.3d 801 [2011], *cert, denied* — U.S. ——, 132 S.Ct. 1594, 182 L.Ed.2d 205 [2012]). Appellate courts apply four factors to determine whether a judge's written answer is harmless under the constitutional standard:

> " '(1) the overall strength of the prosecution's case; (2) whether an objection was lodged; (3) whether the ex parte communication concerned a critical aspect of the trial or rather involved an innocuous and insignificant matter, and the manner in which it was conveyed to the jury; and (4) the ability of a posttrial remedy to mitigate the constitutional error.' " *Verser,* 326 P.3d at 1056; *State v. McGinnes,* 266 Kan. 121, 132, 967 P.2d 763 (1998) (setting out the four factors for considering whether a court's communication with the jury outside the presence of the defendant is harmless error).

Here only the third factor could favor Alvarez. The jury's question about the definition of "firearm" concerned a critical aspect of the trial for criminal possession of a firearm. But Alvarez doesn't contest the content of the court's answer—the correct legal definition of "firearm"—and our Supreme Court has found that failing to contest the content of the answer indicates harmless error in other cases. See *State v. Clay,* 300 Kan. ——, 329 P.3d 484, 495–96 (2014); *State v. Bowen,* 299 Kan. 339, 358, 323 P.3d 853 (2014).

Even if the third factor weighs in Alvarez' favor, considering the other three factors would lead this court to characterize the error as harmless. The State had a strong case against Alvarez. Alvarez stipulated that he had a prior felony, making it illegal for him to possess a firearm. Stilwell testified that Alvarez had entered the bar holding the gun, and Alvarez had the gun in his pocket when the police approached him. Alvarez also failed to object to the written answer at trial and did not address it with his posttrial motions, preventing the district court and this court from fully exploring any actual harm. We conclude that this error did not affect the trial's outcome.

We note that while Alvarez does not challenge the in-chambers discussion of the answer on appeal, the record did not clearly show whether Alvarez was present when the court and counsel initially discussed possible responses. We must assume he wasn't. See *State v. Betts,* 272 Kan. 369, 391, 33 P.3d 575 (2001), *overruled on other grounds by State v. Davis,* 283 Kan. 569, 158 P.3d 317 (2006). But that does not change our analysis because the in-chambers discussion didn't affect the outcome of the trial either: Alvarez doesn't suggest that the ultimate answer to the jury's question should have been different. See *Clay,* 329 P.3d at 495–96; *Bowen,* 299 Kan. at 358; *State v. Rhyne,* No. 106,313, 2012 WL 5205570, at *7 (Kan.App.2012) (unpublished opinion), *rev. denied* 297 Kan. 1254 (2013).

B. *Right to a Public Trial*

***10** Alvarez also argues that the court's written response to the jury's question was structural error (not subject to the harmless-error analysis) because it violated his right to a public trial, which is guaranteed by the Sixth Amendment to the United States Constitution and § 10 of the Kansas Constitution Bill of Rights. He contends that the public wasn't present at a critical stage of his trial—when the jury received an answer to its question.

Alvarez relies on *Waller v. Georgia,* 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984), to support his contention that the denial of a public trial cannot be harmless. But as a panel of this court explained in *State v. Ramirez,* —— Kan.App.2d ——, 334 P.3d 324, 331 (2014), *petition for rev. filed* October 27, 2014, in *Waller,* the issue was whether the defendant's right to a public trail was infringed when an entire hearing on the suppression of evidence was closed to the public. 334 P.3d at 331. Neither *Waller* nor the Kansas Supreme Court's decisions have ever stood for the proposition that giving a written response to a jury question resulted in a structural error with respect to the right to a public trial. The *Ramirez* court stated that such a public-trial error, if any, would be subject to a harmless-error analysis. 334 P.3d at 332.

In *State v. Womelsdorf,* 47 Kan.App.2d 307, 323–25, 274 P.3d 662 (2012), *rev. denied* 297 Kan. 1256 (2013), this court analyzed a similar procedure to that used in Alvarez' case and found that the district court's written response to a

jury question didn't violate the defendant's right to a public trial because the parties' discussion with the court about the answer was held in open court and the written answer was available to the public as part of the record. The *Ramirez* court found *Womelsdorf* persuasive and also noted that the right to a public trial does not necessarily extend beyond the evidence phase of the trial. 334 P.3d at 333. It stated that the reasons for public trials—insuring judge and prosecutor responsibility and discouraging perjury—are not impacted by written answers to jury questions that are discussed in open court and made part of the record. 334 P.3d at 333.

In Alvarez' case, the court also read the jury question in open court, explained its answer in open court, and made its answer available to the public as part of the court file. Arguably, Alvarez' case is different from *Womelsdorf* and *Ramirez* because in his case, the court discussed possible responses with counsel privately outside of the courtroom before thoroughly explaining the reasons for its response and reading the response in open court. But Alvarez has not raised this procedural difference on appeal, and it should not lead to a different outcome in his case. As our court has noted in *State v. Juarez–Jimenez,* No. 106,206, 2013 WL 3155779, at *7–8 (Kan.App.2013) (unpublished opinion), *rev. denied* December 27, 2013, and *Rhyme,* 2012 WL 5205570, at *7–8, in-chambers discussions of jury questions are nonevidentiary hearings that do not involve factfinding, and the right to a public trial likely doesn't reach them. See *United States v. Norris,* 780 F.2d 1207, 1209–11 (5th Cir.1986) (right to public trial was not violated by in-chambers exchanges between counsel and the court on technical legal issues); *Ramirez,* 334 P .3d at 333; *State v. Pullen,* 266 A.2d 222, 227–28 (Me.1970), *overruled on other grounds by State v. Brewer,* 505 A.2d 774 (Me.1985). In addition, in this case, the district court's explanation of its answer and even a summary of the discussion in chambers were made a part of the public record.

***11** Because the question and response were available to the public, we conclude that the written response to a jury question did not violate the defendant's right to a public trial. See, *e.g., Ramirez,* 334 P.3d at 333; *State v. Whitmore,* No. 109,924, 2014 WL 4435858, at *9–10 (Kan.App.2014) (unpublished opinion), *petition for rev. filed* October 6, 2014; *State v. Maherry,* No. 110,088, 2014 WL 2871370, at *5 (Kan.App.2014) (unpublished opinion), *petition for rev. filed* July 21, 2014; *State v. Owens,* No. 109,369, 2014 WL 1612457, at *4–5 (Kan.App.2014) (unpublished opinion), *petition for rev. filed* May 9, 2014; *State v. Armstead,* No. 108,533, 2014 WL 349561, at *11–12 (Kan.App.2014) (unpublished opinion), *petition for rev. filed* February 28, 2014; *State v. Wells,* No. 108,165, 2013 WL 3455798, at *9–10 (Kan.App.2013) (unpublished opinion), *rev. denied* 298 Kan. —— (2014); *State v. Bolze–Sann,* No. 105,297, 2012 WL 3135701, at *6–7 (Kan.App.2012) (unpublished opinion), *rev. granted* 298 Kan. —— (2013).

IV. *Cumulative Error Did Not Deprive Alvarez of a Fair Trial.*

Alvarez also argues that the cumulative effect of trial errors —the failure to give a jury instruction regarding a culpable mental state and the written answer to the jury question— warrants reversal, even though the errors may be individually insufficient to require it. For a cumulative-error analysis, we must consider the errors together and analyze whether "their cumulative effect on the outcome of the trial is such that collectively they cannot be determined to be harmless." *State v. Tully,* 293 Kan. 176, 205, 262 P.3d 314 (2011). Because the district court's written answer affected a constitutional right, the cumulative effect of the errors must be harmless beyond a reasonable doubt. 293 Kan. at 205.

We examine the errors in the context of the record as a whole, considering how the district court dealt with the errors as they arose, the nature and number of errors committed and their interrelationship, and the strength of the evidence. 293 Kan. at 206. If the evidence against the defendant is overwhelming, the cumulative effect of the errors does not require a new trial. 293 Kan. at 206.

In this case, the errors were not dealt with during the trial. As to the number and interrelationship of the errors, the errors bore no relationship to each other. The district court's failure to give a culpable-mental-state instruction dealt with the State's burden of proof. The error regarding the written response to the jury question was unrelated—it dealt with Alvarez' right to be present at trial. Any prejudice caused by one error didn't exacerbate prejudice caused by the other.

As to the final factor—the strength of the evidence—we have already noted the strong evidence against Alvarez. He stipulated that he was a felon prohibited from possessing a firearm, and the State presented evidence that he possessed a firearm when he entered the bar and after he left it. We are satisfied beyond a reasonable doubt that any cumulative impact from the errors in this case was harmless and does not require a new trial.

***12** The district court's judgment is affirmed.

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423 P.3d 567 (Table)
Unpublished Disposition
This decision without published opinion is referenced in the Pacific Reporter. See Kan. Sup. Ct. Rules, Rule 7.04.
NOT DESIGNATED FOR PUBLICATION
Court of Appeals of Kansas.

STATE of Kansas, Appellee,
v.
Dyllon Alan TUCKER, Appellant.

No.
117,530
|
Opinion filed August 17, 2018.
|
Review Dismissed October 11, 2018

Appeal from Shawnee District Court; MARK S. BRAUN, judge.

Attorneys and Law Firms

Michelle A. Davis, of Kansas Appellate Defender Office, for appellant.

Rachel L. Pickering, assistant solicitor general, and Derek Schmidt, attorney general, for appellee.

Before Arnold-Burger, C.J., Hill and Buser, JJ.

MEMORANDUM OPINION

Per Curiam:

*1 The law requires a trial court to grant a defendant's request to instruct a jury on lesser crimes when there is sufficient evidence, viewed in the light most favorable to the defendant, that would have supported the instruction. Because the trial court refused to give the two requested jury instructions here, and there is sufficient evidence in the record to support giving the instructions, we reverse Dyllon Alan Tucker's conviction for aggravated battery on a law enforcement officer and remand for a new trial. We affirm all other convictions.

Circumstances can quickly become dangerous.

The police-citizen encounter here involves four Topeka Police officers—two riding bicycles and two in patrol cars—meeting up with one man asleep in a car with its engine running and music playing so loudly it could be heard several blocks away. Once the driver awakened, the situation deteriorated rapidly and the scene suddenly became dangerous, almost deadly. The police officers' body cameras recorded the encounter.

Two Topeka bicycle patrol officers, Officer Luke Jones and Officer Joe Ralston, were investigating the source of some loud music. They soon discovered its source: an SUV with its engine running parked on the side of the road. In the driver's seat, the lone occupant—Tucker—was asleep.

The officers turned off the music and the engine. They tried to wake Tucker but could not. Two more officers arrived—Officer Cassandra Caviness and Officer Brian Mooney came in their patrol cars. Upon arriving, Mooney tried to wake up Tucker.

Slowly, Tucker began to return to consciousness. Officer Jones asked Tucker for identification. Tucker said he had no driving license with him, but he gave his name, address, and date of birth to Jones. Officer Jones left the vehicle to check if Tucker was wanted for any crime.

Jones left the driver's side door open and Officer Caviness stepped up to where Jones had been standing. She put one foot on the running board on the outside of the vehicle. She talked with Tucker about why the police were there and asked why he was there. Noting that Tucker's pupils were pinpoints, Caviness asked him when he last smoked methamphetamine. Tucker gave her no understandable answer, so she asked again. This time, Tucker mumbled something and started the vehicle and put it in gear. Caviness tried to stop him. She reached through the steering wheel with her left hand and tried to turn off the ignition. She could not.

As Tucker began to pull away, Caviness jumped with both feet onto the running board because her arm was stuck in the steering wheel. She was unable to dislodge herself. Tucker swerved to the left and almost hit a parked car. He then straightened out the vehicle and kept driving. Caviness ordered Tucker to stop the vehicle and said that she would shoot him if he did not stop. Just before she pulled her weapon, she felt intense pain in her left wrist and arm. She did manage to pull her weapon and fired at Tucker, but her weapon malfunctioned when she tried to fire a second time. The first shot, however, struck Tucker in his upper arm.

*2 Tucker slowed the car and drove over a curb. The steering wheel turned sufficiently that it allowed Caviness to free her arm. She jumped down and dropped to her knees, trying to find out why her weapon jammed. She appeared to the other officers to be in significant pain. Meanwhile, Tucker continued his flight until he ran into a telephone pole.

Officer Jones, on his bicycle, followed Tucker and Caviness. He heard the shot. He saw Caviness free herself from the SUV and saw Tucker run the vehicle into a telephone pole. As Tucker was reversing from the telephone pole, Jones drew his weapon and yelled "don't, don't do it, don't you fucking. ..." But Tucker drove away, anyway. Jones tried to follow Tucker's vehicle, but lost sight of him. Jones went on to Tucker's home, instead.

Officer Mooney, in his police car, tried to chase Tucker as soon as he fled, but he had to turn his car around first. Mooney saw Tucker on the grassy area and saw that Officer Caviness was no longer on the vehicle. He activated the car's emergency lights and siren. During his flight, Tucker failed to stop at several stop signs and did not yield to traffic. Tucker finally stopped his vehicle in the driveway in front of his home. When he got out, Mooney ordered him to get on the ground. He did so and Mooney placed Tucker in handcuffs. They took Tucker to a hospital for treatment.

While this was going on, Officer Ralston stayed with Officer Caviness and began to treat her injuries. She was taken to an emergency room, where the doctor diagnosed a fractured wrist. She was placed in a splint to immobilize the fracture, and later the wrist was fully immobilized with a cast for five or six weeks. After the cast was removed, she underwent physical therapy for about a month before she returned to full duty.

Criminal charges and a jury trial followed the encounter.

The State charged Tucker with aggravated kidnapping under K.S.A. 2015 Supp. 21-5408(b); aggravated battery on a law enforcement officer under K.S.A. 2015 Supp. 21-5413(d); interference with a law enforcement officer under K.S.A. 2015 Supp. 21-5904(a)(3); and eluding the police under K.S.A. 2015 Supp. 8-1568(b)(1).

The State presented testimony of the officers along with body camera footage from Officers Jones, Caviness, and Mooney.

Because of the contentions made in this appeal, the jury instructions are significant. At the instruction conference, Tucker and the State agreed to the instruction on the elements of aggravated battery, which included the two definitions of "knowingly" that Tucker now complains about.

Tucker also requested two lesser included offense instructions for aggravated battery. He asked for a lesser included offense of battery on a law enforcement officer, arguing that there was evidence of bodily harm and not great bodily harm. He also wanted the lesser offense instruction for *reckless* battery on a law enforcement officer in the alternative to a *knowing* battery on a law enforcement officer. The district court denied both requests. The district court specifically found that there was no evidence of mere bodily harm. Instead, there was only evidence of great bodily harm because of Officer Caviness' fractured wrist. It is not clear in the record why the district court denied the request for a jury instruction on reckless battery on a law enforcement officer.

Two more subjects were addressed at the instruction conference.

*3 First, Tucker requested, and was granted, a lesser included offense instruction for criminal restraint for the aggravated kidnapping charge. Second, during this conference, the State explained its choice about how Tucker committed interference with a law enforcement officer. The basis for this charge was Tucker, after he hit the telephone pole, left the scene when Officer Jones yelled at him not to.

The jury found Tucker guilty of criminal restraint, aggravated battery on a law enforcement officer, interference with a law enforcement officer, and eluding the police. The court sentenced Tucker to a controlling 79-month prison sentence for the aggravated battery on a law enforcement officer charge with all other sentences concurrent with the controlling sentence and with each other.

Tucker pursues appellate relief along three avenues. First, he argues the court's jury instruction on aggravated battery of a law enforcement officer was clearly erroneous. Secondly, Tucker maintains the court erred when it refused to give the two lesser-included offense instructions he had requested. Finally, he contends there is insufficient evidence that he knowingly obstructed a police officer when he drove away after the officer had yelled "Don't do it!" We consider his argument on the lesser included instructions first, then we examine his claims about the aggravated battery of a law enforcement officer instruction, and finally we look at the

sufficiency of the evidence on the obstruction of a police officer.

The evidence compels giving the two lesser instructions.
Tucker requested a lesser included instruction for the offense of battery on a law enforcement officer based on a theory that he only knowingly caused bodily harm, not great bodily harm. He also asked for a lesser included instruction for the crime of reckless battery based on a theory that he acted recklessly and not knowingly. Based on our review of the record and our analysis of the law, we hold that he was entitled to both.

For this analysis we answer four questions:

- Do we have jurisdiction and has the issue been preserved?
- Was the proposed instruction legally appropriate?
- Viewing the evidence in the light most favorable to the defendant or the requesting party, was there sufficient evidence that supported giving the instruction?
- If the district court erred, was the error harmless? See *State v. Fisher*, 304 Kan. 242, 256-57, 373 P.3d 781 (2016).

Tucker preserved this issue by requesting the lesser included offenses at the instruction conference. See *State v. Roeder*, 300 Kan. 901, 920, 336 P.3d 831 (2014).

The Kansas battery statute, found at K.S.A. 2017 Supp. 21-5413, is neither an example of clarity nor concision. The Legislature has seen fit to pack the crimes of battery, aggravated battery, and aggravated battery against certain persons into one statute. We must unpack that law to see if the trial court here should have given the two requested instructions.

A fair reading of the battery law in effect at the time of Tucker's arrest reveals that aggravated battery can be committed either knowingly or recklessly. The statute begins with battery. Battery was defined as knowingly or recklessly causing bodily harm to another person. K.S.A. 2015 Supp. 21-5413(a)(1). An aggravated battery can be committed in various ways. Subsection (1) of K.S.A. 2015 Supp. 21-5413(b) covers *knowing* aggravated batteries. Then, subsection (2) of K.S.A. 2015 Supp. 21-5413(b) defines *reckless* aggravated batteries.

*4 Moving on, the statute provides that a battery on a law enforcement officer occurs when a battery as defined under subsection (a)(1) is committed against certain people identified in the statute, such as law enforcement officers. See K.S.A. 2015 Supp. 21-5413(c)(2)(A)-(E). Since a battery can be committed either knowingly or recklessly, this means that a battery on a law enforcement officer can be committed either knowingly or recklessly.

But for an *aggravated* battery on a law enforcement officer, the Legislature has only defined crimes where the defendant acts *knowingly*. See K.S.A. 2015 Supp. 21-5413(d). An aggravated battery on a law enforcement officer occurs when an aggravated battery occurs under K.S.A. 2015 Supp. 21-5413(b)(1)(A), (B), or (C). The statute does not define a crime of reckless aggravated battery on a law enforcement officer—meaning, there is no crime of reckless aggravated battery on a law enforcement officer. Thus, if a person recklessly—but not knowingly—caused great bodily harm to a law enforcement officer, that person could either be convicted of battery on a law enforcement officer or an aggravated battery without the increase in punishment because the victim was a law enforcement officer.

But the most important law here is the definition of lesser offenses and lesser included offenses. For an offense to be a lesser included offense it must either be:

- a lesser degree of the same crime that was charged;
- a crime where all elements of the lesser crime are identical to some of the elements of the crime charged;
- an attempt to commit the crime charged; or
- an attempt to commit a lesser degree of the crime charged or an attempt to commit a lesser offense with all elements identical to some of the elements of the more severe crime. K.S.A. 2015 Supp. 21-5109.

Subsections (3) and (4) of K.S.A. 2015 Supp. 21-5109 dealing with attempted crimes clearly do not apply to this issue.

A defendant is entitled to jury instructions for lesser included offenses when (1) the evidence, viewed in the light most favorable to the defense, would justify a jury verdict in accordance with that theory, and (2) the evidence at trial does not exclude a theory of guilt on the lesser offense. *State v. Simmons*, 282 Kan. 728, 741-42, 148 P.3d 525 (2006).

The remaining question is whether a reckless battery is a lesser degree of the crime of aggravated battery on a law enforcement officer, which requires a knowing mens rea. Battery is clearly a lesser degree of aggravated battery. But the cases analyzing this issue do not analyze the statutes concerning battery on a law enforcement officer. See, e.g., *State v. Simmons*, 295 Kan. 171, 175, 283 P.3d 212 (2012).

Even though there is no crime of reckless aggravated battery on a law enforcement officer, a battery on a law enforcement officer is still a lesser degree of aggravated battery on a law enforcement officer. This is similar to involuntary manslaughter being a lesser included offense of murder. See *State v. Gregory*, 218 Kan. 180, 182-83, 542 P.2d 1051 (1975). Involuntary manslaughter is a lesser included offense of murder because both involve the crime of homicide. 218 Kan. at 182-83. Generally, a reckless battery on a law enforcement officer and a knowing aggravated battery on a law enforcement officer involve the same underlying crime —causing harm to another through violence. Under this theory, a reckless battery on a law enforcement officer is a lesser included offense of aggravated battery on a law enforcement officer because it is a lesser degree of the same crime. Assuming the jury is presented evidence which would support a conclusion that Tucker acted recklessly, the jury should be instructed on a theory of reckless battery on a law enforcement officer. Similarly, the jury should be instructed on a theory of a reckless aggravated battery as a lesser included offense of a knowing aggravated battery on a law enforcement officer, because it is a lesser degree of the same crime. We conclude that the requested instructions were legally appropriate.

***5** We next see if the requested instructions are factually appropriate. K.S.A. 2017 Supp. 22-3414(3) requires the district court to instruct the jury on any lesser included offenses when there is some evidence that would reasonably justify a conviction of the lesser included offense. *State v. Armstrong*, 299 Kan. 405, 432, 324 P.3d 1052 (2014). The duty to instruct on lesser included offenses is triggered by the defense's request for a lesser included offense and must be done even if the evidence for the lesser included offense is weak or inconclusive. *State v. Maestas*, 298 Kan. 765, Syl. ¶ 6, 316 P.3d 724 (2014).

For the lesser included offense of a knowing battery on a law enforcement officer, the essential question is whether there is evidence of bodily harm or great bodily harm. Ordinarily this is a question for the jury. *Simmons*, 295 Kan. at 177-78. Along this line, a panel of this court has held that twisting a person's arm with enough force to break the arm is not a circumstance where the factual question of whether bodily harm or great bodily harm has occurred should be removed from the province of the jury. See *State v. Vessels*, No. 96,421, 2008 WL 1847374, at *1-3, 7 (Kan. App. 2008) (unpublished opinion).

Here, the State presented evidence about the severity of Officer Caviness' fractured wrist. But the doctor testified that it was minimally displaced and required less intervention than other types of fractures. And Officer Caviness testified that she had fully recovered from her injuries and returned to full duty for the Topeka police. This appears to be an example in which the jury should have been given the opportunity to decide whether the injury that resulted from Tucker's actions constituted either great bodily harm or bodily harm.

Taking all of this into account, we hold that the trial court erred by determining that there was only evidence of great bodily harm. The court took the question away from the jury and ruled as a matter of law. This ruling is in error.

This finding, however, does not stop our inquiry. Was this error reversible? In making this determination we look to whether there was a "reasonable probability that the error [affected] the outcome of the trial in light of the entire record." *State v. Ward*, 292 Kan. 541, 569, 256 P.3d 801 (2011). Here, there is a reasonable probability that the jury would have found Tucker guilty of battery of a law enforcement officer had it been instructed on the offense. Great bodily harm is bodily harm that is more than trivial, minor, or moderate harm. *State v. Robinson*, 306 Kan. 1012, 1027, 399 P.3d 194 (2017).

Here, a reasonable juror could have found Officer Caviness' fractured wrist was minimally displaced and she fully recovered after a few months, and that she suffered only moderate harm and not great bodily harm. See *Vessels*, 2008 WL 1847374, at *5. The reasonable probability that the jury could have found mere bodily harm occurred prevents us from finding that the failure to give the instruction was harmless error.

Because the error is not harmless, Tucker's conviction for aggravated battery on a law enforcement officer must be reversed.

But there is another consideration—reckless battery instead of a knowing battery could have been committed here. A

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reckless battery on a law enforcement officer would be a battery on a law enforcement officer, unaffected by the degree of harm suffered, because there is no specific crime called reckless battery on a law enforcement officer. When the victim of such a crime is a law enforcement officer and suffers great bodily harm but the defendant acted recklessly and not knowingly, the State could only charge reckless aggravated battery.

***6** Tucker argues the court should have given a reckless battery instruction as he requested. For our purposes here, recklessness is consciously disregarding a substantial and unjustifiable risk that circumstances exist or that a result will follow, and this disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation. See K.S.A. 2017 Supp. 21-5202(j). The question for this court is whether there is some evidence that a reasonable juror could find that Tucker acted recklessly.

Based on the evidence a reasonable juror could find Tucker's actions were reckless rather than knowing. The act that caused the harm here was Tucker turning the steering wheel with enough force to fracture Officer Caviness' wrist when her arm was inside the steering wheel. When Tucker began to flee from the scene, Officer Caviness got onto the running board of the vehicle because her left arm was stuck in the steering wheel when she tried to turn off the engine. At some point, Tucker moved the wheel and that fractured her wrist. The order of events leading up to Officer Caviness' wrist fracturing is important. First, Officer Caviness ordered Tucker to stop. Next, she removed the hood securing her weapon in the holster, but did not draw her weapon. Next, her wrist fractured. Finally, she drew her weapon and shot Tucker.

The State argues only a jury instruction for knowing aggravated battery on a law enforcement officer was needed because the State produced only evidence that Tucker acted knowingly. The State's evidence that Tucker's actions were knowing is based solely on inference. We are not convinced.

The only evidence on Tucker's mental state at the time of Officer Caviness' injury comes from Detective Daniel Davies' testimony. While in the hospital recuperating from the gunshot wound, Tucker stated that he fled because he was worried about not having a driving license. Officer Caviness' body cam footage shows that Tucker fled after she questioned him about methamphetamine use. Officer Caviness also told Tucker to stop or she would shoot him before her wrist broke. Based on this evidence, a reasonable juror could conclude that Tucker either acted knowingly or recklessly when he turned the steering wheel while making his escape.

One possible conclusion from this evidence is that Tucker was afraid of being punished for the lack of a driving license —or potential methamphetamine use—and consciously disregarded the risk of harm to Officer Caviness in his attempt to flee. Alternatively, a reasonable conclusion is that Tucker was trying to force Officer Caviness off his vehicle by using force to avoid being shot—meaning he knew there was a reasonable certainty that Officer Caviness would be harmed by his actions. The evidence that supports an inference that Tucker acted knowingly does not preclude a conclusion that he acted recklessly. The determination of Tucker's mental state based on the evidence presented is a question of fact that the jury should have been allowed to answer. Thus, we conclude that the court's refusal to give the reckless battery instruction was erroneous.

Next, we turn to whether the error was harmless. The error is not harmless if there is a reasonable probability that it affected the outcome of the trial. The State argues the error is harmless because the evidence was overwhelming on Tucker's mental state. See *Ward*, 292 Kan. at 569. The State cites two unpublished cases for this proposition—*State v. Alvarez*, No. 110,710, 2014 WL 7566066 (Kan. App. 2014) (unpublished opinion), and *State v. Olivares*, No. 110,313, 2014 WL 6676063 (Kan App. 2014) (unpublished opinion). Neither are persuasive.

***7** In *Alvarez*, the police went to a bar based on a report that there was a suspicious person with a weapon. The defendant was later arrested and had a weapon on his person, which was a criminal violation because of a previous felony conviction. One patron of the bar stated that the defendant had entered the bar holding a gun. The defendant stated that he was at the bar and put on someone else's jacket that had a gun in a pocket. At the very least, the fact that the police found the weapon on the defendant's person showed that he had a culpable general intent to possess the weapon. Even believing the defendant's series of events, he must have left the bar after discovering the weapon and kept the weapon with him until he was arrested. The failure to define a culpable mental state was harmless. See 2014 WL 7566066, at *7. Here, the case is factually different. The evidence is not overwhelming on Tucker's mental state. Instead, a jury would necessarily have to infer his mental state from the facts. An inference of either reckless or knowing is possible from the facts. Because of the necessity that the inference would have to be made on two different possible

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mental states and evidence supports either conclusion, there is a real probability that the error affected the outcome of the trial, meaning it is not harmless.

Similarly, the panel's decision in *Olivares* is of little use. In *Olivares,* the panel determined whether the failure to include the required culpable mental state in a jury instruction was clear error. 2014 WL 6676063, at * 4-6. The harmlessness inquiry for clear error and error from the denial of a requested instruction is different. Under the clear error test we uphold the conviction unless the defendant firmly convinces this court that had the error not occurred, the outcome of the trial would have been different. *State v. Williams*, 295 Kan. 506, 516, 286 P.3d 195 (2012). Under the harmlessness test arising from the erroneous denial of a requested instruction, we look to whether there is a real probability that the error affected the outcome of the trial. *Ward*, 292 Kan. at 569. Because of the different standards, *Olivares* provides no support for the State's position. Based on the evidence presented at trial a reasonable juror could have found that Tucker was merely reckless rather than acting knowingly.

A properly instructed jury here would have to make two essential determinations—Tucker's mental state and the degree of harm. Based on the evidence, the jury should have been afforded the opportunity to determine whether Tucker acted knowingly, recklessly, or without a culpable mental state. Additionally, the jury should have been afforded the opportunity to determine the factual question of whether Officer Caviness suffered bodily harm or great bodily harm because of her fractured wrist.

Based on the conflicting evidence on the severity of Officer Caviness' fractured wrist and the need for inferences on Tucker's mental state, there is a real possibility that the jury could have reached a different result had it been instructed on the lesser included offenses. This is another reason why we must reverse Tucker's conviction for aggravated battery and remand for a new trial.

The error in the jury instruction is not clearly erroneous.
In this issue, Tucker focuses on the definition of "knowingly" that is set out in the instruction. He contends that it does not comply with our Supreme Court's holding in *State v. Hobbs*, 301 Kan. 203, 340 P.3d 1179 (2015). Since Tucker did not object to this instruction at trial, we must review for clear error. K.S.A. 2017 Supp. 22-3414(3); see *State v. Adams*, 294 Kan. 171, 183, 273 P.3d 718 (2012).

This is a two-part inquiry. First, we check to see whether there is any error in the given instruction. Obviously, this is a question of law subject to unlimited review. In the second step, we look to see whether the error requires reversal. An error requires reversal if this court is convinced that the jury would have reached a different verdict had the error not occurred. For this analysis, we review the entire record and use an unlimited standard of review. But the defendant bears the burden of showing the error is reversible. *Williams*, 295 Kan. at 515-16.

The jury instruction here used two definitions of knowingly:

***8** • "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 by the State." (Emphasis added.)

Tucker validly argues that under *Hobbs*, an aggravated battery does not occur when the defendant is merely "aware of the nature of his conduct that the State complains about"; thus, the inclusion of this language is erroneous.

The Supreme Court in *Hobbs* ruled that for crimes of aggravated battery the Legislature intended to define "knowingly" as "the accused acted when he or she was aware that his or her conduct *was reasonably certain to cause the result.*" (Emphasis added.) 301 Kan. at 211. Thus, under *Hobbs*, a person being "aware of the nature of his conduct that the State complains about" cannot support a conviction for aggravated battery because it *does not* include knowledge that the act could result in great bodily harm. A panel of this court has recently followed the *Hobbs* ruling in *State v. Kline*, No. 109,900, 2016 WL 97844, at *1-2 (Kan. App. 2016) (unpublished opinion).

But the jury instruction used here differed from the instruction in *Kline*. For reasons that are unclear in the record, the court here used both definitions. This is not a practice that we approve. The two different definitions here were separated by the disjunctive "or." By giving both, the court allowed the jury to rely solely on the "aware of the nature of his conduct" part of the definition to find Tucker guilty of aggravated battery on a law enforcement officer. The inclusion of this language in the instruction would allow a conviction based on a lower mental state, meaning that the defendant was "aware of the nature of his conduct." This inclusion means the instruction given here violates the ruling in *Hobbs*. Again,

in prosecutions for aggravated battery, the State must produce evidence, and the jury must find, that the defendant acted with reasonable certainty that great bodily harm or disfigurement could result from the action. See 301 Kan. at 210-11.

But does this error call for reversal of the conviction? We will reverse a conviction only if we are firmly convinced that the jury would have reached a different verdict had the correct instruction been given. The defendant bears the burden to prove reversibility. *Williams*, 295 Kan. at 516. In making this determination, it is not whether the jury *could* have reached a different result. Instead, we must decide, based on the whole record, if Tucker has firmly convinced us whether the jury *would* have reached a different result.

Tucker fails to convince us. He provides no evidence that the jury would have reached a different result. If we use the correct standard, the question for the jury was whether Tucker knowingly turned the steering wheel in a way reasonably certain to cause great bodily harm to Officer Caviness, whose arm was trapped in the steering wheel. While it is certainly possible that the jury may not have found that Tucker acted with reasonable certainty of the possibility of great bodily harm, Tucker presents no argument to us, based on the record, that supports a finding that the jury *would* have reached a different result had it been instructed on the proper standard. Considering this lack of argument, Tucker has failed to satisfy his burden of showing reversibility under the clear error standard. We find no clearly erroneous error calling for reversal.

There is sufficient evidence that Tucker obstructed the officer.

***9** In Tucker's final issue, he claims there is insufficient evidence to convict him of interference with a law enforcement officer. In his view, there was no evidence that he heard or observed any commands from Officer Jones that would show he was under arrest. Thus, there was no evidence that he knowingly obstructed Officer Jones.

In cases such as this, we review the evidence in the light most favorable to the State. We uphold the conviction if we are convinced that a rational fact-finder could have found the defendant guilty beyond a reasonable doubt based on the evidence. *State v. Laborde*, 303 Kan. 1, 6, 360 P.3d 1080 (2015). When determining whether there is sufficient evidence to support a conviction we do not reweigh the evidence or reassess credibility of witnesses. *State v. Daws*, 303 Kan. 785, 789, 368 P.3d 1074 (2016).

For the crime of interference with a law enforcement officer, the State must prove four elements.

1) There was an identified law enforcement officer carrying out some official duty.

2) The defendant knowingly or willfully obstructed or opposed the officer.

3) The defendant knew or should have known the person he opposed was a law enforcement officer.

4) The obstruction or opposition substantially hindered or increased the burden of the officer in carrying out his official duty. *State v. Brown*, 305 Kan. 674, 690, 387 P.3d 835 (2017).

Officer Jones was an identified law enforcement officer engaged in an investigation when Tucker fled. Tucker had talked to Jones and knew or should have known he was a law enforcement officer. Tucker fleeing after hitting the pole substantially hindered Officer Jones because he could not effectuate an arrest after Tucker began to flee from the scene. The only question that remains is whether Tucker knowingly or willfully obstructed or opposed Officer Jones.

Tucker's main argument is that the State proved no obstruction was knowing. Knowing has two meanings. When talking about a person's conduct or circumstances surrounding that person's conduct, a person acts knowingly "when such person is aware of the nature of such person's conduct or that the circumstances exist." K.S.A. 2017 Supp. 21-5202(i). When considering the results of a person's conduct, a person acts knowingly when they are "aware that such person's conduct is reasonably certain to cause the result." K.S.A. 2017 Supp. 21-5202(i). Whether an act is done knowingly can be inferred from the evidence and Tucker ignores this. See, e.g., *State v. Thach*, 305 Kan. 72, 84, 378 P.3d 522 (2016).

Tucker had begun to flee from a police investigation. A police officer was on his running board when he began to flee. The officer shot him in the arm after telling him to stop or she would shoot. After being shot, the officer was no longer on the vehicle, and Tucker drove into a telephone pole. As Tucker was beginning to drive away from the telephone pole, Officer Jones yelled "don't, don't do it, don't you fucking ..." and stopped yelling as Tucker left the scene. Officer Jones' yelling was audible on Officer Caviness' body camera footage. The windows of the vehicle were down, and the loud music had

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been turned off. A rational juror could infer that Tucker heard Officer Jones' command not to do it. A rational juror could infer that "do it" referred to driving away from the location. Based on these reasonable inferences a rational juror could conclude that Tucker was aware of his conduct and he acted with reasonable certainty that his conduct would obstruct or oppose Officer Jones.

***10** When we view this evidence in the light most favorable to the State, we hold a reasonable juror could find all elements of interference with a law enforcement officer were present based on Tucker leaving the scene after Officer Jones yelled for him not to leave. There is sufficient evidence in the record to convict Tucker of interference with a law enforcement officer.

We affirm Tucker's convictions for criminal restraint, interference with a law enforcement officer, and eluding police. We reverse his conviction for aggravated battery on a law enforcement officer and remand for a new trial on this charge.

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Unpublished Disposition
(Pursuant to Kansas Supreme Court Rule 7.04(f), unpublished opinions are not precedential and are not favored for citation. They may be cited for persuasive authority on a material issue not addressed by a published Kansas appellate court opinion.)
Court of Appeals of Kansas.

STATE of Kansas, Appellee,
v.
Santiago SOLA–MORALES, Appellant.

No. **97,011**
.
|
June 20, 2008.
|
Review Denied Nov. 4, 2008.

Appeal from Sedgwick District Court; Anthony J. Powell, Judge.

Attorneys and Law Firms

Christina Waugh, of Kansas Appellate Defender Office, for appellant.

Lesley A. Isherwood, assistant district attorney, Nola Tedesco Foulston, district attorney, and Paul J. Morrison, attorney general, for appellee.

Before McANANY, P.J., GREEN and CAPLINGER, JJ.

MEMORANDUM OPINION

PER CURIAM.

***1** Santiago Sola–Morales appeals from his conviction by a jury of one count of voluntary manslaughter and his resulting sentence. First, Sola–Morales argues that the trial court denied him his constitutional right to present his defense when it refused to allow him to introduce evidence of specific instances of the victim's violent character. Next, Sola–Morales contends that the trial court erred in refusing his request to give a "no duty to retreat" instruction to the jury. Finally, Sola–Morales maintains that the trial court erred in ordering him to reimburse the Board of Indigents' Defense Services (BIDS) for attorney fees without considering his financial resources or the nature of the burden that payment of the fees would impose on him. We find no reversible error in the trial court's denial of Sola–Morales' request to introduce evidence of specific instances of the victim's violent character or in the denial of the request for a "no duty to retreat" instruction. On the BIDS issue, however, the case must be remanded for the trial court to consider Sola–Morales' ability to pay the attorney fees in accordance with *State v. Robinson,* 281 Kan. 538, 132 P.3d 934 (2006). Accordingly, we affirm in part; vacate the order for BIDS's attorney fees; and remand with directions.

Law enforcement officers found Frank "Foyaka" Sibat dead in his home shortly after 9:30 p.m. on March 30, 2005. When Sibat's body was found, it was apparent that there had been a struggle in his living room. A television had been knocked askew; a lampshade was smashed; a couch, coffee table, and chairs appeared to have been out of their usual location; an aquarium was resting against the living room wall on two of the four legs of its stand and the floor was wet underneath it; and blood was found along the carpet, the wall, and on a lampshade. A bloody palm print on the living room wall was later discovered to be Sola–Morales' palm print. In addition, a credit card with white powder was found on the counter in the kitchen. The powder field tested positive for cocaine.

The cause of Sibat's death was a gunshot wound to the chest. The coroner conducting the autopsy opined that Sibat did not suffer a close impact gunshot wound. According to the coroner, because there was no soot or stippling found on Sibat, the gun was probably fired from a distance of more than an arm's length. The coroner indicated that Sibat possibly retained consciousness for some period of time after he was shot but that he died from internal bleeding from the gunshot wound.

The coroner identified several recent injuries on Sibat's body, including a T-shaped laceration from blunt force trauma on the top of Sibat's head; bruises on Sibat's arms; multiple scrapes to Sibat's elbow, arm, hands, wrist, and knee; a burn on the inside of Sibat's arm; a broken fingernail on Sibat's third finger; and a 1/2–inch long by 1/8–inch–wide by 1–inch–deep tear to the webbing between the base of Sibat's thumb and first finger. Sibat tested positive for cocaine and a metabolite of cocaine. Based on the levels of cocaine present in his body, the coroner indicated that Sibat had consumed cocaine shortly before his death. Alcohol was also detected

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in Sibat's blood, although the coroner indicated that Sibat had not been drinking for some period before his death.

***2** On the morning of March 31, 2005, a man came to the Wichita Police Department and reported that Daisy Duarte had told him that Sola–Morales had shot Sibat and then had left Wichita on a bus headed to Miami, Florida, the previous evening. Based on this information, Wichita detectives arranged to have Sola–Morales taken off the bus at a stop in Nashville, Tennessee, and taken into custody by Nashville police officers.

Pedro Medina worked with Sola–Morales and gave him a ride to the bus station on the evening of March 30, 2005. According to Medina, Sola–Morales said that he had been involved in a fight and had killed someone. Sola–Morales later said that he had only injured the person. Medina testified that Sola–Morales told him that there had been a fight over a gun and that the other person got shot.

Homicide detective Heather Bachman, the lead investigator in this case, and another detective flew to Nashville to interview Sola–Morales after he had been taken into custody. The two detectives interviewed Sola–Morales on April 1, 2005, at the Nashville Police Department. Sola–Morales waived his *Miranda* rights and agreed to speak with the detectives. During his interview, Sola–Morales admitted that he had been at Sibat's home on the evening of March 29, 2005, and the early morning hours of March 30, 2005. Sola–Morales cried several times throughout the interview and said that he was afraid he was going away for a long time.

In his first version of events, Sola–Morales told the detectives that Sibat had called him and asked to borrow $20. Sola–Morales took the $20 to Sibat and then went home. After Sibat again called him, Sola–Morales returned to Sibat's home and drank beer and rum with Sibat. Sola–Morales indicated that he and Sibat talked and drank for several hours until around 2 a.m.

According to Sola–Morales, while he was using Sibat's bathroom, he heard another male voice in the house. When Sola–Morales came out of the bathroom, he saw a Hispanic male by the name of Rubin standing in the living room pointing a gun at Sibat. Sola–Morales told the detectives that Rubin fired the gun at Sibat and then attempted to fire the gun at Sola–Morales. When the gun failed to fire at Sola–Morales, Rubin ran out of Sibat's house. Sola–Morales then ran out of Sibat's home and down the street because he was so upset. Sola–Morales eventually returned to Sibat's home and left in his car because he saw that Sibat's lights were on and thought that Sibat was okay.

During the interview, the detectives noticed a scratch approximately 4 inches long on Sola–Morales' neck. Sola–Morales explained that after the shooting, he had checked on Sibat and that Sibat had fought with him and scratched him as Sibat attempted to get up and go after Rubin. Sola–Morales said that he had not sustained any injuries other than the scratch.

Sola–Morales told the detectives that after he left Sibat's residence, he went home and told his common-law wife, Jackie Duarte, that he was in big trouble. Sola–Morales stated that he put his clothes in a grocery sack and threw them in a dumpster in a parking lot of a business. The next morning, Sola–Morales went to work and told his friend what had happened. That evening, Sola–Morales' friend took him to the bus station.

***3** After receiving this first version of events, the detectives called back to Wichita and received updates on how the case was progressing. During the next part of the interview, the detectives told Sola–Morales that his story was not matching with the other information and physical evidence in the case. After insisting that he was telling the truth, Sola–Morales gave a second version of events. Sola–Morales said that while he was at Sibat's home, he and Sibat had gotten into an argument over a girl named Cindy. Apparently, Sibat had a romantic interest in Cindy. Previously, Sola–Morales had been romantically involved with Cindy and had lived with her for several months.

Sola–Morales told the detectives that while he was in the bathroom, he heard Sibat talking about Cindy. When Sola–Morales came out of the bathroom, Sibat was standing in the doorway and had a gun stuck in his pants. Sibat told Sola–Morales that he was not going anywhere. Sibat then came at Sola–Morales, and the two became involved in a scuffle. While they were wrestling on the floor, Sibat reached for his gun. Sola–Morales said that the gun went off while he and Sibat were struggling over it. Sibat then fell to the ground, and Sola–Morales left Sibat's house with the gun. Sola–Morales stated that he threw the gun into a river. The rest of Sola–Morales' story was consistent with his first version of events. The detectives questioned Sola–Morales about how Sibat got all of his injuries, but Sola–Morales was unable to provide an explanation.

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Upon returning to Wichita, the detectives had divers search the river where Sola–Morales said he had discarded the gun. Nevertheless, the gun was never found. Moreover, the dumpster in which Sibat had thrown his bloody clothing had been emptied by the time it was checked.

The detectives flew back to Nashville on April 11, 2005, and brought Sola–Morales back to Kansas. During the plane ride, Sola–Morales gave the detectives a third version of events. Sola–Morales said that when Sibat pulled the gun on him, he was able to wrestle the gun away from Sibat. Sola–Morales then stepped away from Sibat. Sibat told Sola–Morales that he was going to kill him and came towards him. At that point, Sola–Morales shot Sibat. Sibat was unarmed when he was shot.

As in his previous version of events, Sola–Morales told the officers that he left Sibat's home with the gun and threw it in the river, Officers searched both Sibat's and Sola–Morales' homes but were unable to find any evidence that either owned a gun. Officers did discover what appeared to be a blood stain on the doorpost in Sola–Morales' car and also what appeared to be blood stains on the door and in the bathroom of Sola–Morales' residence.

Detectives interviewed Daisy Duarte, the mother of Sola–Morales' common-law wife, on March 31, 2005, and April 1, 2005. During her initial interview, Daisy denied any knowledge of the homicide and denied seeing Sola–Morales that night. Nevertheless, Daisy later told the detectives that she had been at Sola–Morales' home when he had arrived home during the early morning hours of March 30, 2005. Daisy testified that when Sola–Morales came home, he had blood on him. Daisy overheard Sola–Morales say, "I had to do what I had to do. I just got into a fight and I just had to do what I had to do. I got into a fight."

*4 Sola–Morales was charged with second-degree murder under K.S.A. 21–3402(a). The jury convicted Sola–Morales of the lesser offense of voluntary manslaughter under K.S.A. 21–3403(a). Sola–Morales was sentenced to 216 months in prison.

I. Specific Instances of the Victim's Violent Character

First, Sola–Morales argues that the trial court erred when it refused to allow him to introduce evidence of Sibat's violent character, thereby denying him his constitutional right to present his defense. "Under the Kansas and United States Constitutions, a criminal defendant is entitled to present the theory of his or defense. The exclusion of evidence that is an integral part of that theory violates a defendant's fundamental right to a fair trial." *State v. White,* 279 Kan. 326, Syl. ¶ 3, 109 P.3d 1199 (2005). "The right to present a defense is, however, subject to statutory rules and case law interpretation of rules of evidence and procedure. [Citations omitted.]" *State v. Evans,* 275 Kan. 95, 102, 62 P.3d 220 (2003).

Here, the record is clear that Sola–Morales was allowed to present and argue his theory of self-defense to the jury. The trial court instructed the jury on the self-defense theory. In denying Sola–Morales' request to present specific instances of Sibat's violent character, the trial court only excluded one part of the evidence which, according to Sola–Morales, pertained to his self-defense theory. The trial court did not exclude all evidence of Sola–Morales' self-defense theory. Therefore, a constitutional issue is not at stake. See *State v. Alderson,* 260 Kan. 445, 461, 922 P.2d 435 (1996) (holding that constitutional issue not at stake where trial court only excluded one piece of evidence relating to self-defense theory and defendant still allowed to present theory to jury). Therefore, the analysis turns to whether the trial court appropriately excluded the evidence under evidentiary rules.

When reviewing a trial court's decision to admit evidence, an appellate court first determines whether the evidence is relevant. Once relevance is established, an appellate court must apply the evidentiary rules governing the admission and exclusion of evidence as a matter of law or in the exercise of the trial court's discretion, depending on the contours of the evidentiary rule question. When the issue involves the adequacy of the legal basis for the trial court's decision, the issue is reviewed using a de novo standard. *State v. Gunby,* 282 Kan. 39, 47–48, 144 P.3d 647 (2006).

Sola–Morales' argument requires interpretation of K.S.A. 60–446 and K.S.A. 60–447. Interpretation of a statute presents a question of law over which an appellate court has unlimited review. An appellate court is not bound by the trial court's interpretation of the statute. *State v. Bryan,* 281 Kan. 157, 159, 130 P.3d 85 (2006).

A. Were specific instances of Sibat's violent character admissible evidence?

Here, Sola–Morales requested to introduce testimony from a witness who could offer evidence of specific instances of Sibat's violent conduct in situations involving Cindy. Sola–Morales proffered that Stephen Peterson, who used to be

roommates with Sola–Morales and Cindy, would testify about an incident where Sibat, after consuming both alcohol and cocaine, held a knife to Peterson's throat and threatened to kill him because Sibat did not like that Peterson was spending time with Cindy. Sola–Morales further proffered that Peterson would testify that whenever Peterson and his wife and Cindy and Sibat would go out, Sibat would become jealous and very upset when Cindy would talk to another man. In addition, Sola–Morales proffered that another witness would testify about specific instances where Sibat had become extremely violent. Apparently, this second witness knew both Sibat and Sola–Morales and considered Sibat to be more aggressive.

***5** Because Sola–Morales was alleging that he acted in self-defense, these specific instances of Sibat's conduct were relevant to show Sibat's violent nature. The next question under this court's standard of review is whether the evidence was admissible under evidentiary rules. The trial court determined that the specific instances of Sibat's violent conduct were not admissible into evidence. Relying on *Alderson,* 260 Kan. 445, 922 P.2d 435, the trial court noted that evidence of the general reputation of the turbulent character of the deceased is admissible when self-defense is at issue in a homicide case. Nevertheless, specific instances of misconduct may be shown only by evidence of conviction of a crime. The trial court cited other cases where evidence of the cruel and violent nature of the deceased towards the defendant was held to be admissible when self-defense was asserted. See *State v. Lumley,* 266 Kan. 939, 976 P.2d 486 (1999); *State v. Hundley,* 236 Kan. 461, 693 P.2d 475 (1985). Those cases are distinguishable, however, because the evidence showed a history of violent conduct between the defendant and the victim.

The trial court was correct in its analysis. K.S.A. 60–446 sets forth the manner in which evidence may be introduced when a person's character or a trait of his or her character is in issue:

> "When a person's character or a trait of his or her character is in issue, it may be proved by testimony in the form of opinion, evidence of reputation, or evidence of specific instances of the person's conduct, subject, however, to the limitations of K.S.A. 60–447 and 60–448."

Under K.S.A. 60–447, when a trait of person's character is relevant as tending to prove conduct on a specified occasion, the admission of specific instances of misconduct is limited to those situations where there has been a conviction for a crime:

> "Subject to K.S.A. 60–448 when a trait of a person's character is relevant as tending to prove conduct on a specified occasion, such trait may be proved in the same manner as provided by K.S.A. 60–446, except that:
>
> "(a) evidence of specific instances of conduct other than evidence of conviction of a crime which tends to prove the trait to be bad shall be inadmissible...."

Sola–Morales concedes that our Supreme Court has held that where self-defense is an issue in a homicide case, specific instances of conduct to show the deceased's violent character are limited to criminal convictions. Specifically, in *Alderson,* our Supreme Court held:

> " 'Where self-defense is an issue in a homicide case, evidence of the turbulent character of the deceased is admissible. Such evidence may consist of the general reputation of the deceased in the community, but specific instances of misconduct may be shown only by evidence of a conviction of a crime.' [Citations omitted.]" 260 Kan. at 461, 922 P.2d 435.

This evidentiary rule has been consistently followed in Kansas. See *State v. Davidson,* 264 Kan. 44, 56, 954 P.2d 702 (1998).

***6** Nevertheless, Sola–Morales argues that this holding should be overruled in light of our Supreme Court's decision in *State v. Price,* 275 Kan. 78, 61 P.3d 676 (2003). In *Price,* our Supreme Court held that the evidentiary rule in K.S.A. 60–447(a) extends to specific instances of a person's good character:

> "K.S.A. 60–447, as contrasted with K.S.A. 60–446 (character in issue), does not permit the admission of evidence of specific instances of conduct to prove a character trait except evidence of conviction of a crime. K.S.A. 60–447(a) does not permit evidence of specific instances of conduct where a party offers evidence of a person's good character to prove his or her conduct was in accord with the person's character." 275 Kan. 78, Syl. ¶ 5, 61 P.3d 676.

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Thus, under *Price,* the rule is that where a party seeks to admit evidence of a person's character to prove his or her conduct was in accord with the person's character, it may only be admitted in the form of reputation or opinion testimony, not specific instances of conduct. This is consistent with the rule previously set forth by our Supreme Court in *Alderson* and *Davidson.*

Sola–Morales seems to contend, however, that he should have been allowed to present evidence of specific instances of Sibat's misconduct under K.S.A. 60–446 (instead of K.S.A. 6047) because Sibat's character for violence was at issue in the case. Our Supreme Court has held that "K.S.A. 60–446 permits evidence of specific instances of a person's conduct where the character or a trait of his or her character is in issue." *State v. Arteaga,* 257 Kan. 874, 894, 896 P.2d 1035 (1995).

In *Price,* our Supreme Court recognized a distinction between the admission of evidence under K.S.A. 60–446 and K.S.A. 60–447. Noting that the legislature had adopted verbatim Rules 46 and 47 of the Uniform Rules of Evidence, our Supreme Court looked to the official comments to the rules for insight into their intended meaning. The official comments stated that Rule 46 (K.S.A.60–446) deals with the rather rare situations where character is an ultimate issue in the case. For example, Rule 46 (K.S.A.60–446) would apply to the issue of character for chastity in seduction cases and character for competence in wrongful discharge actions. These situations are in contrast to cases where character is offered to show that the person probably acted in accord with that person's character on a particular occasion. 275 Kan. at 91, 61 P.3d 676. These latter cases would come within K.S.A. 60–447.

The State points out that our Supreme Court in *State v. Mader,* 261 Kan. 280, 283, 931 P.2d 1247 (1997), held that "[w]here a defendant relies upon self-defense, his or her attempt to prove that the victim was the aggressor in the incident giving rise to the criminal charge does not, standing alone, place the character of the victim in issue under K.S.A. 60–446." In this case, Sibat's character was not an ultimate issue in the case, as in the examples outlined in the official comments to Rule 46 of the Uniform Rules of Evidence. Rather, Sola–Morales was attempting to introduce evidence of specific instances of Sibat's violent nature, particularly in situations involving alcohol and Cindy, to show that Sibat acted in accord with his character on the night of his shooting. K.S.A. 60–447 and the rule set forth in *Alderson* governs the introduction of this type of evidence. As a result, the specific instances of Sibat's misconduct, which were not evidence of a conviction of a crime, were inadmissible evidence.

B. Should State v. Hundley be extended to this case?

*7 Sola–Morales seems to argue that *Hundley,* 236 Kan. 461, 693 P.2d 475, where our Supreme Court recognized that previous instances of abuse showing battered wife syndrome were admissible evidence, should be extended to the facts of this case. *Hundley* involved a defendant wife who had killed her husband after experiencing years of abuse by him. At trial, numerous witnesses testified about the violent nature of the deceased husband and the numerous occasions on which he brutalized the defendant. Recognizing that this type of evidence was admissible, our Supreme Court set forth the well-settled rule in Kansas that "when self-defense is asserted, evidence of the cruel and violent nature of the deceased towards the defendant is admissible.... [Citation omitted.]" 236 Kan. at 464, 693 P.2d 475.

In this case, however, the specific instances of Sibat's misconduct that Sola–Morales sought to introduce did not show a history of Sibat's cruel and violent nature towards Sola–Morales. Sola–Morales does not point to any decision where our Supreme Court has extended the rule in *Hundley* to a case similar to the circumstances here. In the absence of such authority, we must follow the rule from *Alderson:* Where self-defense is an issue in a homicide case, specific instances of the deceased's misconduct may be shown only by evidence of a conviction of a crime. This court is duty bound to follow our Supreme Court precedent, absent some indication the court is departing from its previous position. *State v. Singleton,* 33 Kan.App.2d 478, 488, 104 P.3d 424 (2005). As a result, Sola–Morales' argument fails.

C. Did the State open the door to specific instances of Sibat's violent character?

Sola–Morales also argues that the State opened the door to him offering specific instances of Sibat's violent conduct when Sibat consumed alcohol by eliciting testimony about Sibat's allegedly calm nature when he drank. Generally, the State cannot show the peaceful reputation of the deceased until the character of the deceased is under attack. *State v. Bradley,* 223 Kan. 710, 711–12, 576 P.2d 647 (1978).

When a party opens an otherwise inadmissible area of evidence during the examination of witnesses, the opposing party may then present evidence in that formerly forbidden sphere. See *State v. McClanahan,* 259 Kan. 86, 94, 910 P.2d

193 (1996); *State v. Johnson,* 258 Kan. 475, 481, 905 P.2d 94 (1995).

When attempting to introduce specific instances of Sibat's violent character, Sola–Morales never raised the ground that the State had opened the door to the admission of such evidence. Generally, issues not raised before the trial court cannot be raised on appeal. *State v. Shopteese,* 283 Kan. 331, 339, 153 P.3d 1208 (2007). Nevertheless, an appellate court may consider an argument for the first time on appeal in exceptional circumstances in order to serve the interests of justice or to prevent a denial of fundamental rights. *State v. Willis,* 254 Kan. 119, Syl. ¶ 3, 864 P.2d 1198 (1993).

***8** Sola–Morales contends that the State opened the door for him to present specific instances of Sibat's misconduct when it questioned Penny Martinez about the instances in which she had seen Sibat drunk. On the other hand, the State argues that the questions posed by the prosecutor were not specifically designed to elicit testimony regarding the victim's peaceable character. During direct examination, the prosecutor elicited the following testimony from Martinez:

"[Prosecutor:] And at the time of his death had you seen him in an intoxicated state on more than one occasion?

"[Martinez:] Yes.

"[Prosecutor:] How many times do you think you saw him drunk?

"[Martinez:] Real, real drunk on New Year's Eve when my daughter came home from Florida and for his birthday at Ramon's house.

....

"[Prosecutor:] Other than the two times he had been real, real drunk, had you seen him drink in other social settings?

"[Martinez:] Yes.

"[Prosecutor:] You said he had a problem with passing out. Was that unusual? What was the effect alcohol would have on him?

"[Martinez:] I don't know. His medication would make him be level and the alcohol gave him a down, but he was a very calm person. Like some people with Valium stay up all the time and some people knocks them out right away.

"[Prosecutor:] He was more on the down, the calm side is your word?

"[Martinez:] Yes."

Although Sola–Morales elicited testimony during cross-examination about how Sibat acted on the two occasions when Martinez saw him really drunk, this testimony is not relevant to whether the door had been opened for Sola–Morales to introduce evidence of Sibat's misconduct. See *McClanahan,* 259 Kan. at 94, 910 P.2d 193 (A party cannot open the door for itself to present inadmissible evidence.).

Based on the questions posed to Martinez on direct examination, it seems that the prosecutor was attempting to elicit testimony concerning Sibat's conduct or character when he would drink alcohol. Although Martinez' testimony related to Sibat's general calm nature when he would drink alcohol, the prosecutor tied Martinez' testimony concerning Sibat's violent character into specific instances when Martinez had seen Sibat drink alcohol. As a result, the State opened the door for Sola–Morales to introduce evidence of specific instances of Sibat's conduct when he would drink alcohol.

D. Was the exclusion of specific instances of Sibat's misconduct harmless?

" 'Normally, the admission or exclusion of evidence is measured by the harmless error rule. In determining if the erroneous admission or exclusion of evidence is harmless, the appellate court must consider if it is inconsistent with substantial justice, *i.e.,* affects the substantial rights of a defendant and, if not, whether this court can declare beyond a reasonable doubt that the error had little, if any, likelihood of having changed the result of the trial.' " *State v. Jones,* 277 Kan. 413, 423, 85 P.3d 1226 (2004) (citing *State v. Henry,* 273 Kan. 608, Syl. ¶ 7, 44 P.3d 466 [2002]).

***9** Here, the trial court only excluded specific instances of Sibat's previous misconduct. Sola–Morales could still have presented evidence of Sibat's violent character through general reputation or opinion evidence. Although defense counsel indicated that he had a witness who could provide opinion evidence concerning Sibat's violent character when Sibat drank alcohol or used cocaine that would be admissible under K.S.A. 60–447, he never attempted to introduce this evidence. As discussed previously, Sola–Morales was allowed to present and argue his theory of self-defense to the jury. The jury heard Sola–Morales' version of events, as told

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to the detectives, that Sibat had become angry over Cindy and had pulled a gun on Sola–Morales. As a result, the trial court's exclusion of specific instances of Sibat's violent character was not inconsistent with substantial justice.

Moreover, it appears that this evidence would not have affected the outcome at trial. The undisputed evidence in this case established that Sola–Morales was the only person armed with a deadly weapon when he shot Sibat. By Sola–Morales' own admission, he had the gun in his hand and had stepped back from Sibat when he fired the lethal shot. The evidence failed to show that Sibat had any weapons when he was shot. Moreover, the evidence showed that Sibat had multiple injuries, indicating that Sibat had been badly beaten by Sola–Morales during their struggle. On the other hand, the only injury to Sola–Morales was a 3–to 4–inch scratch on his neck. Any evidence of specific instances of Sibat's violent character would not have changed the fact that Sola–Morales, who was armed with a deadly weapon, fired a lethal shot at an unarmed man who was badly beaten. Under the facts of this case, we determine beyond a reasonable doubt that the error had little, if any, likelihood of having changed the result of the trial.

II. "No Duty to Retreat" Jury Instruction

Next, Sola–Morales argues that the trial court erred in refusing to give a requested "no duty to retreat" jury instruction. When a defendant objects to instructions, an appellate court is required to consider the instructions as a whole and not isolate any one instruction. Even if erroneous in some way, instructions are not reversible error if they property and fairly state the law as applied to the facts of the case and could not have reasonably misled the jury. *State v. Edgar,* 281 Kan. 47, 54, 127 P.3d 1016 (2006).

In reviewing Sola–Morales' argument, we bear in mind that in a criminal case, a trial court must instruct the jury on the law applicable to the defendant's theories for which there is supporting evidence. In considering the trial court's refusal to give a specific instruction, we must view the evidence in the light most favorable to the party requesting the instruction. *State v. Hayden,* 281 Kan. 112, 131–32, 130 P.3d 24 (2006). ' "A defendant is entitled to an instruction on his or her theory of the case even though the evidence thereon is slight and supported only by the defendant's own testimony. [Citation omitted.]' [Citation omitted.]" *State v. Gonzalez,* 282 Kan. 73, 107, 145 P.3d 18 (2006).

***10** Here, Sola–Morales requested that the following instruction be given to the jury at trial: "A person is not required to retreat from an aggressor, but may stand his ground and use such force to defend himself as he believes, and a reasonable person would believe, necessary." This was a modification of the version of PIK Crim.3d 54.17–A (2001 Supp.) that was applicable when the trial occurred in this case.

When the trial occurred in this case, the "no duty to retreat" pattern instruction read as follows: "When on his home ground, a person is not required to retreat from an aggressor, but may stand his ground and use such force to defend himself as he believes, and a reasonable person would believe necessary." PIK Crim.3d 54.17–A (2001 Supp.). The Notes on Use for this pattern instruction recognized such an instruction was to be given only in rare situations where the defendant is attacked on his or her home ground:

> "The 'no duty to retreat' instruction is required only in infrequent factual situations, such as that found in *State v. Scobee,* 242 Kan. 421, 748 P.2d 862 (1988), with such elements as a nonaggressor defendant being followed to and menaced on home ground. *State v. Ricks,* 257 Kan. 435, 894 P.2d 191 (1995); *State v. Saleem,* 267 Kan. 100, 977 P.2d 921 (1999)." See PIK Crim.3d 54.17–A (2001 Supp.).

"Trial courts are not required to use PIK instructions, but it is strongly recommended because the instructions were developed in order to bring accuracy, clarity, and uniformity to jury instructions. Modifications or additions should only be made if the particular facts of a case require it. [Citation omitted.]" *State v. Hebert,* 277 Kan. 61, 87, 82 P.3d 470 (2004).

Nevertheless, Sola–Morales argues that his requested modified instruction was warranted in this case because the plain language of K.S.A. 21–3211 (Furse 1995) and Kansas case law supports the conclusion that there is no duty to retreat from an aggressor before using force to defend oneself. K.S.A. 21–3211 (Furse 1995) states: "A person is justified in the use of force against an aggressor when and to the extent it appears to him and he reasonably believes that such conduct is necessary to defend himself or another against such aggressor's imminent use of unlawful force." K.S.A. 21–3211 (Furse 1995) is silent as to the defendant's duty to retreat.

In this case, the jury was instructed in accordance with K.S.A. 21–3211 (Furse 1995) in Instruction 12:

> "The defendant raises self defense as a defense to the crime charged. Evidence in support of this defense should be considered by you in determining whether the State has met its burden of proving that the defendant is guilty. The State's burden of proof does not shift to the defendant.

The defendant has claimed his conduct was justified as self defense.

> "*A person is justified in the use of force against an aggressor when and to the extent it appears to him and he reasonably believes that such conduct is necessary to defend himself against such aggressor's imminent use of unlawful force.* Such justification requires both a belief on the part of defendant and the existence of facts that would persuade a reasonable person to that belief." (Emphasis added.)

***11** Nevertheless, arguing that an additional "no duty to retreat" instruction should have been given, Sola–Morales cites *State v. Scobee,* 242 Kan. 421, 748 P.2d 862 (1988). There, our Supreme Court reversed the defendant's conviction and remanded for a new trial after holding that a no duty to retreat instruction was required. In that case, two aggressors followed the defendant to his home. While the defendant was parked in his driveway, the aggressors approached the defendant with one of them waving an iron pipe. Based on the trial court's finding, the aggressors' attack was not provoked by the defendant. The defendant shot and killed one of the aggressors. The State had built its case around the theory that the defendant had a duty to retreat, such as by driving to the police station. Defense counsel, however, was not allowed to argue that the defendant had no duty to retreat from his driveway.

Explaining its decision in *Scobee,* our Supreme Court in *Ricks,* 257 Kan. at 437, 894 P.2d 191, stated: "The no duty to retreat instruction is required, as indicated in *Scobee,* in infrequent factual situations such as found therein with such elements as a nonaggressor defendant being followed to and menaced on home ground." In *Ricks,* the defendant was approached in a public parking lot by two individuals. One of the individuals drove up beside the defendant's car, and a conversation ensued. Before approaching the defendant, one of the individuals had said that he would like to beat the defendant's ' "ass." ' The defendant took out his gun and shot each of the individuals three times. Our Supreme Court held that a "no duty to retreat" instruction was not required under the facts of that case.

The determination in *Ricks* that the "no duty to retreat" instruction was limited to infrequent factual situations was cited and followed in *State v. Saleem,* 267 Kan. 100, 977 P.3d 921 (1999). In that case, the defendant was at a drinking party at his sister's home when he got into an argument with Schmidt. The defendant and Schmidt stepped outside and became involved in a shoving and pushing match. During the altercation, the defendant pulled out a gun and shot Schmidt four times. The defendant's testimony at trial was that he had been told that Schmidt was "talking shit on me.. said he was going to fuck me up." 267 Kan. at 102, 977 P.2d 921. Although there was testimony to the contrary from other witnesses, the defendant testified that Schmidt was pushing him and hitting him on the head with a liquor bottle and that when Schmidt came after him with the liquor bottle, he shot Schmidt. The defendant further testified that Schmidt continued to attack him even after being shot. Determining that the facts were distinguishable from *Scobee* and more similar to *Ricks,* our Supreme Court upheld the trial court's denial of a requested "no duty to retreat" jury instruction. *Saleem,* 267 Kan. at 115, 977 P.2d 921.

This case is more similar to *Ricks* and *Saleem.* It is undisputed that Sola–Morales was not followed to and menaced on his home ground. Rather, Sola–Morales was a guest in Sibat's home. When the shooting occurred, Sola–Morales had obtained control of the weapon that Sibat had on him and had stepped away from Sibat. At that point, Sola–Morales had control over the only deadly weapon involved in the situation. There were no other aggressors involved in the situation. Under the facts of this case, a "no duty to retreat" instruction was not warranted, and the trial court property denied the requested instruction.

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***12** It should be pointed out that in 2006, the Kansas Legislature enacted K.S.A. 21–3218, which seems to expand the circumstances under which the "no duty to retreat" rule is applicable in Kansas. K.S.A. 21–3218(a), which took effect May 25, 2006, states:

> "A person who is not engaged in an unlawful activity and who is attacked in a place where such person has a right to be has no duty to retreat and has the right to stand such person's ground and meet force with force."

This "no duty to retreat" rule was incorporated in the 2006 supplement to PIK Crim.3d 54.17–A. The Notes on Use to PIK Crim.3d 54.17–A state that this "no duty to retreat" instruction is now appropriate when there is evidence that the attacker first used force against the defendant.

The legislature had not yet enacted K.S.A. 21–3218 when the trial occurred in this case nor had PIK Crim.3d 54.17–A been supplemented accordingly. As a result, the trial court did not have the opportunity to consider this instruction. It appears that to the extent that K.S.A. 21–3218 expanded the "no duty to retreat" rule in Kansas, the statute would be a substantive change and would have only prospective application to offenses committed after May 25, 2006. See *State v. Shore,* No. 97,833, unpublished opinion filed December 21, 2007 (holding that to extent 2006 amendment to K.S.A. 21–3211 expanded circumstances in which lethal force would be justified by self-defense, amendment would be substantive and would apply only prospectively to offense committed after its effective date); see also *Smiley v. State,* 966 So.2d 330 (Fla.2007) (finding that statutory change in self-defense duty to retreat to be given prospective application under constitutional mandate); *People v. Myers,* 35 Ill.2d 311, 220 N.E.2d 297 (1966), *cert. denied* 385 U.S. 1019, 87 S.Ct. 752, 17 L.Ed.2d 557 (1967) (concluding district court did not err in failing to give insanity instruction based upon newly promulgated statute in case in which crime was committed before effective date of new statute).

Nevertheless, even if K.S.A. 21–3218 had been effective when Sola–Morales committed the crime in this case, the statute was inapplicable to the circumstances in this case because the evidence failed to show that Sola–Morales had met "force with force." While Sola–Morales indicated that Sibat was the initial aggressor by pulling a gun on him, Sola–Morales was able to wrestle the gun away from Sibat and step away from Sibat. At that point, Sola–Morales was the only one with a deadly weapon. Moreover, the evidence showed that Sibat had been badly beaten. Sola–Morales did not reasonably meet "force with force" when he fired the lethal shot into Sibat's chest. As a result, the "no duty to retreat" instruction contained in the 2006 Supp. of PIK Crim.3d 54.17–A would not have been warranted under the facts of this case.

III. Reimbursement of BIDS Attorney Fees

Finally, Sola–Morales argues that the trial court erred in ordering him to reimburse the Board of Indigents' Defense Services (BIDS) for $3,500 in attorney fees when it failed to consider his financial resources or the nature of the burden that payment of the fees would impose. Sola–Morales' argument on appeal concerns the reimbursement of attorney fees under K.S.A. 22–4513 and does not extend to the application fee under K.S.A. 22–4529.

***13** In *State v. Robinson,* 281 Kan. 538, Syl. ¶ 1, 132 P.3d 934 (2006), our Supreme Court held: "A sentencing court assessing fees to reimburse the Board of Indigents' Defense Services under K.S.A.2005 Supp. 22–4513 must consider on the record at the time of assessment the financial resources of the defendant and the nature of the burden that payment of the fees will impose."

This court is duty bound to follow our Supreme Court precedent, absent some indication the court is departing from its previous position. *State v. Beck,* 32 Kan.App.2d 784, 788, 88 P.3d 1233, *rev. denied* 278 Kan. 847 (2004). Here, the trial court never considered on the record at the time of assessing the BIDS fees the financial resources of Sola–Morales and the nature of the burden that payment of the fees would impose. The State concedes that under *Robinson,* this case should be remanded for the trial court to consider Sola–Morales' ability to pay the BIDS attorney fees. Accordingly, we vacate the order for reimbursement of BIDS attorney fees, and we remand for resentencing with directions for the trial court to comply with K.S.A. 22–4513 regarding the assessment of BIDS fees.

Affirmed in part, vacated in part, and remanded with directions.

All Citations

185 P.3d 972 (Table), 2008 WL 2510154

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457 P.3d 214 (Table)
Unpublished Disposition
This decision without published opinion is referenced in the Pacific Reporter. See Kan. Sup. Ct. Rules, Rule 7.04.
NOT DESIGNATED FOR PUBLICATION
Court of Appeals of Kansas.

STATE of Kansas, Appellee,
v.
Venancio VIGIL, Jr., Appellant.

No.
118,670
|
Opinion filed February 14, 2020.
|
Review Denied August 31, 2020

Appeal from Reno District Court; JOSEPH L. MCCARVILLE III, judge.

Attorneys and Law Firms

Kristen B. Patty, of Wichita, for appellant.

Keith E. Schroeder, district attorney, and Derek Schmidt, attorney general, for appellee.

Before Buser, P.J., Atcheson, J., and Walker, S.J.

MEMORANDUM OPINION

Per Curiam:

***1** In 2017, a jury found Venancio Vigil Jr. guilty of attempted second-degree murder and aggravated battery. He was sentenced to a controlling term of 247 months in prison. District Judge Joseph L. McCarville III presided over the preliminary hearing, seven-day jury trial, and sentencing. Vigil was represented by Lynn Burke and Christine Jones.

Vigil appeals the convictions, contending that three instances of judicial comment error by the district judge violated his right to a fair trial. Upon our review, while we find that judicial comment error did occur, we are convinced the comments did not result in reversible error. Accordingly, we affirm Vigil's convictions.

ANALYSIS

On appeal, Vigil points to three instances where he asserts the district judge made improper comments about defense counsel in this criminal proceeding. In the first instance, Vigil complains that during the preliminary hearing the judge said he would "smack" defense counsel if she did not stop talking over a witness' responses to her questions. The second remark occurred during the jury trial when the judge referred to defense counsel's request to recess the trial early because she needed to attend an event involving her daughter. The judge told the jury: "It's one of those mother things." The third group of comments relates to the judge's lengthy admonition to defense counsel regarding cross-examination questions and admission of evidence which, in the judge's opinion, were improper impeachment and contrary to his preferred practice for admitting evidence of out-of-court statements. Based on these three comments, Vigil claims a violation of his right to a fair trial.

A brief summary of the law pertaining to judicial comment error and our standard of review is necessary. First, our Supreme Court has recently distinguished between judicial misconduct and judicial comment error. "[A]n erroneous judicial comment made in front of the jury that is not a jury instruction or legal ruling will be reviewed as 'judicial comment error' under the ... constitutional harmlessness test." *State v. Boothby*, 310 Kan. 619, 620, 448 P.3d 416 (2019). This distinction places the burden on the party benefitting from the error to show that the error did not affect the outcome in light of the entire record: "We found that erroneous remarks in the form of 'judicial comment error' resemble prosecutorial error. Thus, the 'logic behind [*State v.*] *Sherman* [305 Kan. 88, 109, 378 P.3d 1060 (2016)]'s "error and prejudice" rubric for prosecutorial error applies with equal force to judicial comment error.' [Citation omitted.]" *State v. Johnson*, 310 Kan. 909, 917, 453 P.3d 281 (2019).

Second, our standard of review provides that appellate courts exercise " 'unlimited review over judicial misconduct claims, and review them in light of the particular facts and circumstances surrounding the allegation.' [Citation omitted.]" *Boothby*, 310 Kan. at 624. A judicial comment error inquiry "must be conducted on a case-by-case basis, always informed by existing caselaw concerning when judicial comments fall outside a permissible latitude." 310 Kan. at 627.

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*2 Third, and of particular relevance to this appeal where there were no contemporaneous objections to the district judge's comments, " '[w]hen a defendant's right to a fair trial is alleged to have been violated, the judicial comments are reviewable on appeal despite the lack of a contemporaneous objection.' [Citations omitted.]" 310 Kan. at 628.

Finally, to the extent this court reaches a harmless error analysis, the State must show harmless error under the constitutional harmless error standard provided in *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967), and *State v. Ward*, 292 Kan. 541, 568-69, 256 P.3d 801 (2011). Each of the claimed errors will be addressed individually.

Comments Made During the Preliminary Hearing
Vigil first complains of comments made by Judge McCarville during the preliminary hearing. Burke was cross-examining the complaining witness, Francisco Gracia Jr., when the court reporter interjected and asked Burke to stop talking over the witness in order to preserve an accurate record. The judge said to Burke, "You've been in court before, maybe he has but not as much as you before so you need to be sure we have a clean record because you're a professional." Burke replied, "We will work together."

The district judge then said to Gracia, "I'll try and stop you for a minute to clarify. Mr. Gracia, if she interrupts your answer *I'm going to smack her, okay*? She's been doing, been interrupting your answers a lot because you're not saying exactly what she hopes you say." (Emphasis added.) Burke countered, telling Gracia, "I don't know that I want you to say something as much as I want to just be able to clarify." The judge then observed, "Miss Burke, when you interrupt him I guess I don't know why you're interrupting him because if you want an answer you should just let him answer."

Burke did not contemporaneously object to the district judge's remarks. After the preliminary hearing, however, Vigil filed a motion requesting that the judge recuse himself from presiding over the upcoming trial based on his comment made during the preliminary hearing.

In considering Vigil's recusal motion, Judge McCarville explained that he expected Burke to keep an accurate record because she is the professional and, when Burke responded with "[w]e will work together," he believed that Burke did not understand what he was admonishing her for, or that she did not want to admit that she was interrupting the witness. The judge advised that he also wanted to insure the witness understood that he was not going to hold him responsible for Burke's behavior. The judge found there was not a valid basis for recusal and stated that he intended to afford Vigil a fair trial.

Vigil presented the recusal motion to Chief Judge Patricia Macke Dick who held a hearing in accordance with K.S.A. 20-311d(a). In a written order denying the recusal motion, the chief judge wrote:

> "The Attorney had consistently, during her examination of the witness, interrupted and talked over the witness's answers. The Court should have corrected her before the court reporter had to take steps to preserve the record. When the Attorney chose not to acknowledge her responsibility in creating the problem and failed to make any commitment to change, the Court was left with the likelihood that the witness would be confused or discouraged from giving full answers. The Court had observed that the witness had actually been very responsive to the questions put to him and had not given unresponsive answers but rather answers that quite fairly responded to the questions propounded. Therefore, the Court advised the witness that the Attorney would receive a response from the judge if she continued to interrupt and talk over the witness."
>
> *3 "A reasonable person would not believe that the assigned judge is unable to decide the issues in this case fairly and equitably without bias or prejudice."

Although on appeal Vigil complains of the district judge's comments made during the preliminary hearing, he does not appeal the denial of the recusal motion. Without any substantive argument, Vigil simply complains: "Judge McCarville, who is male, first expressed hostility toward Burke by threatening her with physical violence during the preliminary hearing."

In response, the State asserts the district judge's comments

> "could be interpreted as his effort to control [Burke's] behavior in the courtroom through his rulings from the bench. There is nothing to suggest he was seriously talking about committing physical violence. ... Nonetheless, the State concedes the comment was error, however it did not affect the outcome of the trial."

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We agree with the State. Viewed in context, the district judge's improper comment was a glib remark intended to emphasize the importance of defense counsel not interrupting the witness rather than an actual threat to do bodily harm. Still, the Code of Judicial Conduct specifically requires that a judge "be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, court staff, court officials, and others with whom the judge deals in an official capacity." (Supreme Court Rule 601B, Canon 2, Rule 2.8(B) (2019 Kan. S. Ct. R. 447)); see *State v. Hayden*, 281 Kan. 112, 125, 130 P.3d 24 (2006). Judges should refrain from disrespectful and demeaning remarks in carrying out their official duties since these comments are unnecessary, easily misconstrued as biased, and they distract from proper judicial decorum in the courtroom.

While the district judge's impertinent comments were clearly improper, no jury was present, the comments were brief, and, as found by the chief judge, we discern no bias against Vigil in the content of the remarks. Accordingly, employing the constitutional harmless error test, we are convinced there was no prejudice to Vigil's right to a fair trial.

Comment Regarding Family Obligation

During the jury trial, Vigil contends the district judge made a "sexist and disparaging" comment towards Jones. Earlier in the day, out of the presence of the jury, Jones informed the judge that her daughter, a high school senior, was getting recognized at an awards ceremony. Jones asked for "one tiny favor," that the court recess about 10 to 15 minutes early in the evening so she could attend the event. The judge replied, "We'll try as hard as we can." Jones thanked the judge.

At the end of the day, the judge advised the jury, "And for everybody's edification Miss Jones has got a child who has a commitment; she wants to go to that. It's one of those mother things, I guess." The prosecutor then requested a bench conference, after which the judge advised the jury that due to the State's inability to present any further witnesses that day, "the good news is I'm going to let you go early tonight. So we'll be excusing you now, 4:30, or whatever." Jones did not contemporaneously object to the judge's comment.

Once again, Vigil's appellate argument is brief. Vigil contends the remark "was just as sexist and disparaging as the one made by the trial judge in *Plunkett* that he was glad the female defense counsel got married because he could not pronounce her former last name." See *State v. Plunkett*, 257 Kan. 135, 138, 891 P.2d 370 (1995).

*4 *Plunkett* provides scant support for Vigil's argument. Although our Supreme Court noted that the trial judge in *Plunkett* made the comment during jury orientation, the basis for finding prejudicial judicial misconduct was:

> "The potential combined effect of Judge Watson's stated suspicion of defense counsel's motive for sitting away from the bench, his praise for the prosecutor, his lack of praise for defense counsel, and his suggestion that he knew something he could not reveal about one of the defense attorneys put Plunkett's credibility in question from the start, before the jury was even selected. The credibility of witnesses was paramount in deciding the outcome of the instant case." 257 Kan. at 139.

In short, the glib reference in *Plunkett* regarding defense counsel's maiden name was not a determining factor in finding reversible error. The judge's other improper comments which implied both partiality to the State and prejudice to defense counsel constituted the more serious judicial misconduct.

Returning to this appeal, the State acknowledges the district judge's comment was in "poor taste" and "not the best use of words by Judge McCarville." Nevertheless, the State argues that the remark did not affect the verdict considering the entire record.

We agree that the remark about maternal obligations was unnecessary, insensitive, and improper. This comment added nothing to the orderly progress of the trial, and the district judge should have dismissed the jury for the day without mentioning Jones' family matter. We reprise the prior legal authority we cited with regards to the judge's preliminary hearing remarks. Additionally, we point to our Supreme Court's guidance that "[t]he judge's comments and rulings should be limited to what is reasonably required for the orderly progress of the trial and should refrain from unnecessary disparagement of persons or issues." *State v. Miller*, 308 Kan. 1119, 1155, 427 P.3d 907 (2018).

Was this error reversible? Applying the constitutional harmless error test, we are convinced the error did not affect the outcome of the trial in light of the entire record. See *Ward*, 292 Kan. at 568-69. First, although flippant, the remark was not necessarily disparaging of Jones. It could have been positively viewed by the jury as an indication that Jones was not just a lawyer but a devoted mother to her daughter. Second, the jury was informed that the reason for the early

evening recess was not due to Jones but the State's inability to procure the next witness. Third, no bias against Vigil was shown, as the record indicates that earlier in the day the judge was agreeable to accommodating Jones' request. The judge's passing comment did not adversely impact Vigil's right to a fair trial.

Comments Made in Ruling on State's Objections and Admission of Defense Evidence

Finally, prior to trial and out of the presence of the jury, the district court informed the parties of the procedure they should follow when questioning witnesses. This procedure related to the manner of impeaching witnesses, avoiding hearsay, and the use of evidence from law enforcement bodycam footage. On several occasions, in response to the prosecutor's objections, the district court explained to Burke the reasons for sustaining the prosecutor's objections or not admitting evidence offered by the defense.

*5 The district judge's comments at issue relate to legal rulings he made in response to the prosecutor's objections or the offer of evidence by the defense. However, on appeal, Vigil does not object to the district court's rulings as judicial misconduct. Rather, Vigil objects to the remarks made by the judge in explaining his rulings to defense counsel. As a result, we evaluate whether these comments were judicial comment error.

First, Vigil complains of comments made by the district judge in sustaining the State's objections to defense counsel's cross-examination of Officer Bryan Carey. After Burke played video footage from Officer Carey's bodycam the following colloquy occurred:

> "Q. (By Ms. Burke) At a certain point in the video we hear someone approaching screaming.
>
> "A. Yes.
>
> "Q. Did you hear that?
>
> "A. I did.
>
> "Q. Who was that person?
>
> "A. I, I do not know who that person was. I believe it was a family member, though.
>
> "Q. Wasn't it, in fact, the alleged victim's niece?
>
> "[THE STATE]: Objection, he just said he doesn't know.
>
> "THE COURT: Miss Burke, I'm—
>
> "MS. BURKE: Judge, I'm just trying—
>
> "THE COURT: I tried to explain it to you, okay. When he says I don't know then *you can't make up facts* and ask him to agree with that. Because if he agreed with that that would be a lie.
>
> "MS. BURKE: I understand, judge. I'm trying to refresh his memory.
>
> "THE COURT: Well, when he says, when he says he doesn't know there is no memory to refresh. You're trying to get him to agree to something that he doesn't know which would not be true. So that's why we have an objection called assumes facts not in evidence.
>
> "MS. BURKE: Thank you, judge." (Emphasis added.)

On appeal, Vigil complains that the district judge's reference to "mak[ing] up facts" amounted to a "chastisement" of Burke in front of the jury.

Viewed in context, we question whether the five words complained of constituted a chastisement of Burke. The district judge's explanation did not tend to discredit defense counsel. The reasons put forth by the judge clarified a rather basic rule of questioning a witness—if the witness testifies that he or she does not know the answer to the question, it is improper to then suggest a particular fact is the witness' answer. The judge's explanation made clear that he was sustaining the objection because a rule of evidence or procedure was not followed, not that Burke was dishonest.

The second judicial comment which Vigil complains of relates to the district judge's use of the term "turncoat witness" in advising Burke as to his rulings on impeaching a witness and admission of the bodycam footage of Officer Carey. During cross-examination of Officer Carey, the State objected to Burke's question based on the officer's bodycam video footage. The judge sustained the objection whereupon Burke sought guidance from the judge:

> "MS. BURKE: So, judge, I don't want [the State] to have to continue objecting. So for clarification, if I have a witness subpoenaed I cannot ask the officer he was talking to what he said?

"THE COURT: Correct. Until after the witness testifies. As I explained before we brought the jury in this morning, we're going to use the procedure suggested by Professor and Judge Barbara in his book about how you put the witness on and then *find out if they're a turncoat* and then you can confront them with their prior inconsistent statement.

"MS. BURKE: Thank you, judge. (Emphasis added.)"

Shortly thereafter the State objected again to Burke's questions based on hearsay, and the following exchange occurred:

*6 "THE COURT: Sustained. Miss Burke, this is exactly what I just talked to you about. Okay. You're saying, you're asking for substantive evidence about what stuff was in the video. I've explained to you I don't know how many times so Mr. Schroeder's probably going to just need to kind of assume an athletic stance there and just object so he can object to every one of your questions unless you assume another basis for your questions other than asking this officer to testify to the, to facts asserted by other people in that video.

"MS. BURKE: Well, then, judge, I think I'll just need to recall Officer Gates—I'm sorry, Officer Carey after we've had the witnesses testify what they said.

"THE COURT: You may have to do that, yes."

Later, Burke offered Officer Cory Schmidt's bodycam footage into evidence as an exhibit, and the district judge declined to admit it. The judge pointed out:

"THE COURT: All right. As I explained to you last week, Miss Burke, we're not going to do trial by video. This falls under KSA 60-460(a) and in reading the treatise of then Professor or Judge Barbara, he had a couple of careers, he talks about the use of this statute and whether or not the court should in its discretion allow prior out of court statements of witnesses who are present for cross-examination. And he says it is a matter which the trial court must determine on the facts of each case by careful exercise of judicial discretion. Generally the court should declare a witness a hostile witness before allowing evidence under 60-460(a) and it goes on to cite some other case, cases.

"On the previous page he talks about how this, we should have—*this provision is aimed at the turncoat witness who recants prior testimony*. Based upon the available evidence *I have no reason to believe that Officer Schmidt is a turncoat* witness or that he is a hostile witness. In fact, it's my observation he has attempted to respond to each and every one of your questions and therefore there's no reason to admit prior out of court statements.

....

"MS. BURKE: Thank you, judge." (Emphases added.)

Vigil argues that the remarks italicized above were improper. He emphasizes that "[b]y explicitly stating that Officer Schmidt was not a 'turncoat', [the judge] endorsed that witness' credibility." On the other hand, the State contends the comments were necessary in light of Burke's failure to comply with the judge's rulings.

Burke did not contemporaneously object to the district court's rulings, instructions, or comments. The following day, however, Vigil moved for a mistrial due to the district court's *evidentiary* rulings. Jones informed the judge that the evidence rules allow a party to introduce prior inconsistent statements before a subpoenaed witness has testified. In response, Judge McCarville acknowledged that Jones was correct, but that the procedure he employed during trial was the better practice. The judge thoroughly explained his reasons for the rulings on hearsay, turncoat witnesses, prior inconsistent statements, and denied the motion.

Of note, Vigil does not appeal the denial of the motion for mistrial or the propriety of the judge's evidentiary rulings at trial. As a result, we will not consider those issues because the appellate issue before us has nothing to do with the substance of the district judge's evidentiary rulings. We express no opinion on the substance of the district judge's views about hearsay, turncoat witnesses, and prior inconsistent statements. Rather, we focus our attention on the manner in which the district judge communicated those rulings at some length to the lawyers in front of the jury.

*7 The narrow question presented by Vigil as to the district judge's comments on turncoat witnesses is whether the judge erred in making these comments because they improperly bolstered the credibility of Officer Schmidt. Vigil argues the judge's comments endorsed the officer's credibility by stating that he was not a turncoat witness.

Judges should exercise caution when speaking in front of a jury because juries have a natural tendency to look to a judge

for guidance. *State v. Hamilton*, 240 Kan. 539, 547, 731 P.2d 863 (1987). These duties are especially important when a witness' credibility is involved:

> " 'The same rule applies with respect to the credibility of a witness and a judge should exercise great care and caution to say nothing within the hearing of the jury which would give them an indication of what he thought about the truth or falsity of any part of the testimony. ... The judge's attitude and the result he supposedly desires may be inferred by the jury from a look, a lifted eyebrow, an inflection of the voice —in many cases without warrant in fact.' " 240 Kan. at 547.

In Vigil's case, it is apparent that Burke had difficulty complying with the procedures that the district judge outlined prior to trial regarding evidentiary matters. In response, the judge made extended remarks in an effort to explain his rulings to Burke. During these remarks, the judge stated that he did not consider Officer Schmidt a turncoat witness. A turncoat witness is a legal designation describing "[a] witness whose testimony was expected to be favorable but who becomes (usually during the trial) a hostile witness." Black's Law Dictionary 1921 (11th ed. 2019).

The crux of Vigil's argument is the assumption that because the district judge said the officer was *not* a turncoat or hostile witness, the jury would conclude that the judge believed Officer Schmidt was a credible witness. While Vigil's argument is speculative, we are persuaded that the lengthy comments made by the judge on this evidentiary topic were in error because they were communicated in front of the jury. Consequently, a jury might misinterpret the judge's remarks on the meaning of a turncoat witness or surmise the judge believed defense counsel was an ineffective advocate for the defense. The risks of using the legal term in an extended explanation in front of the jury outweighed any potential benefits. When it became apparent that defense counsel was having difficulty complying with the judge's trial procedures, the better practice provides that a judge's lengthy remarks to counsel should be made outside of the jury's presence.

Were the district judge's comments made in these two instances reversible error? No. Applying the constitutional standard, we are convinced they were harmless. The judge did not comment on the credibility of the officers or otherwise suggest bias against Vigil or defense counsel. The judge did not comment on the merits of the defense as Vigil suggests, but he made clear that the witness could not yet be considered a turncoat witness—a legal designation—based on the testimony provided at that point in the trial. The judge also indicated his willingness to recall the officers after impeaching witnesses testified. In explaining his rulings and admonishing defense counsel, the judge did not engage in rude, offensive, or derogatory language, and there is no indication from the record that the judge's demeanor was not judicial. Rather, the judge's reference to a legal treatise to explain his rulings shows his intent was educational rather than denigrating. The "[m]ere possibility of prejudice from a judge's remark is not sufficient to overturn a verdict or judgment." *State v. Miller*, 274 Kan. 113, 118, 49 P.3d 458 (2002).

***8** Although we have discussed the reasons why, in each instance cited by Vigil, we are convinced the judicial comment error did not affect the trial outcome in light of the entire record, there are two additional reasons to conclude that no error, either individually or collectively, was reversible.

First, the district court issued a limiting instruction directing the jury to examine only the facts and law, and not the district judge's reasons in making evidentiary rulings:

> "At times during the trial I have ruled on the admissibility of evidence. You must not concern yourselves with the reasons for these rulings. I have not meant to indicate any opinion as to what your verdict should be by any ruling that I have made or anything I have said or done."

Our Supreme Court has recognized that jury instructions may mitigate prejudice from improper judicial comments. See *Boothby*, 310 Kan. at 629 (finding harmless error when the comments were attenuated by "the rest of voir dire, the evidence at trial, and the jury instructions, which told the jury to 'decide this case only on the evidence admitted' ... and [told] to base the verdict 'entirely upon the evidence admitted and the law as given in these instructions' ").

Second, in addition to this jury instruction, the jury considered the substantial incriminating evidence presented over the seven-day trial. In brief, the jury heard eyewitness testimony from the victim, Gracia, who identified Vigil as the person who stabbed him. Gracia and Vigil were cousins and, as a result, Gracia was certain of his attacker's identity. Gracia testified that Vigil walked into the kitchen, pulled out a knife, and began stabbing him. After Vigil stabbed Gracia, they wrestled and fought in the living room until Gracia could escape outside.

Gracia testified that Vigil confronted him during the week prior to the stabbing and accused him of being a confidential informant for the Garden City Police Department, which involved providing names of individuals engaged in criminal activity. One of those individuals was named Gabriel Salinas who allegedly was in the same gang as Vigil and had put "a hit out" on Gracia for turning him into the police. Detective Dustin Loepp confirmed that Gracia worked as a confidential informant for the law enforcement agency and was familiar with Salinas.

There was no dispute that Gracia was stabbed and seriously injured. The defense argued that one of Vigil's companions, Tony Berends or Matthew Currie, could have stabbed Gracia while fighting over the knife. But in addition to Gracia's eyewitness testimony, forensic evidence also tied Vigil to the attack because Gracia's blood was found on Vigil's shoe.

Currie, who had accompanied Vigil to the house that day, confirmed Vigil was at the scene and fought with Gracia. Currie testified that he went to the bathroom and when he came out, he saw Vigil and Gracia wrestling in the kitchen and living room. Currie recalled seeing "a lot of blood." Currie pled guilty to aggravated burglary for his involvement in the crime.

Given the jury instruction to disregard the judge's reasons for ruling on evidentiary matters, the substantial evidence of Vigil's guilt, and the individual reasons discussed earlier with regard to each specific claim of judicial comment error, we conclude that Vigil received a fair trial and that the errors did not affect the outcome of the trial in light of the entire record. See *Chapman*, 386 U.S. at 24; *Ward*, 292 Kan. at 568-69.

***9** Affirmed.

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Unpublished Disposition
(Pursuant to Kansas Supreme Court Rule 7.04(f), unpublished opinions are not precedential and are not favored for citation. They may be cited for persuasive authority on a material issue not addressed by a published Kansas appellate court opinion.)
Court of Appeals of Kansas.

STATE of Kansas, Appellee,
v.
David G. PETERSON, Appellant.

No. 89752.
|
Dec. 3, 2004.
|
Review Denied May 4, 2005.

Appeal from Johnson District Court; John P. Bennett, judge. Opinion filed December 3, 2004. Affirmed.

Attorneys and Law Firms

Sandra Carr, assistant appellate defender, for appellant.

Steven J. Obermeier, assistant district attorney, Paul J. Morrison, district attorney, and Phill Kline, attorney general, for appellee.

Before HILL, P.J., MARQUARDT and JOHNSON, JJ.

MEMORANDUM OPINION

PER CURIAM.

***1** David G. Peterson appeals his jury trial conviction for attempted second-degree murder, claiming: (1) the prosecutor committed numerous instances of misconduct; (2) the trial court failed to admonish the jury to disregard certain law enforcement testimony which violated an order in limine; (3) the trial court erroneously refused to give a requested instruction on the reliability of eyewitness testimony; (4) the trial court erroneously admitted a videotape of a firearm demonstration; (5) cumulative error denied him a fair trial; (6) the evidence was insufficient to support the conviction; and (7) the trial court erroneously applied a criminal history which had not been presented and proved to a jury beyond a reasonable doubt. We affirm.

On the evening of December 4, 2001, the Overland Park Police Department executed a search warrant at the apartment of Marcus Brown in connection with an investigation of a forgery operation. No one was present at the apartment, so the police effected a forcible entry. Upon completion of the search, the police changed the apartment locks and set up a surveillance; Sergeant Robert Kolenda and Detective Terry Schmidt of the Criminal Intelligence Division were assigned to arrest Brown upon his return. The police learned from Brown's girlfriend that he might be accompanied by Peterson. Further investigation revealed that Peterson was wanted on a murder warrant out of the State of Washington.

What the police did not know was that Peterson was carrying a substantial amount of cash and a .38 caliber handgun. Earlier, Peterson had purchased marijuana, revealing his cash to the dealers. Ostensibly, Peterson believed that the dealers might try to rob him. Peterson and Brown smoked marijuana, before returning to the apartment about 10:30 p.m., where they discovered the splintered door and new locks. Peterson retreated back down the stairs and crouched behind the door which provided entry to the apartment building. Peterson could see outside through windows at the side of the door.

Outside, Kolenda and Schmidt were preparing to arrest both Brown and Peterson. While Schmidt was on the radio, Kolenda approached the left side of the entry door, with gun drawn. Peterson testified that he saw a man approaching with a gun, which he believed to be a robber. The entry door was opened, although the question of who opened the door was a disputed fact. It is undisputed, however, that Peterson shot Kolenda in the face, causing serious and permanent damage. Kolenda fired two triple-taps through the open door, hitting Peterson with three of the six rounds. He also fired an unsuccessful round through the window at Brown, who had hit the floor at the top of the stairs.

The State charged Peterson with attempted first-degree murder. A jury convicted him of attempted second-degree murder.

PROSECUTORIAL MISCONDUCT

Peterson contends he was deprived of a fair trial by the manner in which the prosecutor conducted Peterson's cross-examination and by improper closing argument. Peterson's overarching theme is that the prosecutor's sarcasm and mockery manifested contempt and ill will toward the

defendant. While Peterson's criticism of the prosecutor's style has merit, reversal of the jury's verdict is not warranted.

> ***2** " 'If a claimed error of prosecutorial misconduct implicates a defendant's right to a fair trial, the appellate standard of review is the same regardless of whether the issue of prosecutorial misconduct is preserved by an objection at trial.' *State v. Doyle,* 272 Kan. 1157, Syl. ¶ 4, 38 P.3d 650 (2002).
>
> " 'If a claimed error of prosecutorial misconduct rises to the level of a denial of the Fourteenth Amendment right to due process, the issue of prosecutorial misconduct will be addressed. The analysis of the effect of a prosecutor's allegedly improper remarks in closing argument is a two-step process. First, an appellate court determines whether the remarks were outside the considerable latitude the prosecutor is allowed in discussing the evidence. Second, an appellate court must determine whether the remarks constitute plain error; that is, whether they are so gross and flagrant as to prejudice the jury against the accused and deny a fair trial, requiring reversal.' *Doyle,* 272 Kan. 1157, Syl. ¶ 5." *State v. Abu–Fakher,* 274 Kan. 584, 609, 56 P.3d 166 (2002).

Recently, our Supreme Court declared:

> "In the second step of the two-step analysis for alleged prosecutorial misconduct the appellate court considers three factors to determine if the prosecutorial misconduct so prejudiced the jury against the defendant that a new trial should be granted: (1) whether the misconduct is gross and flagrant; (2) whether the misconduct shows ill will on the prosecutor's part; and (3) whether the evidence against the defendant is of such a direct and overwhelming nature that the misconduct would likely have little weight in the minds of the jurors. None of these three factors is individually controlling. Before the third factor can ever override the first two factors, an appellate court must be able to say that the harmlessness tests of both K.S.A. 60–261 and *Chapman v. California,* 386 U.S. 18, 17 L.Ed.2d 705, 87 S.Ct. 824 (1967), have been met." *State v. Tosh,* 278 Kan. 83, Syl. ¶ 2, 91 P.3d 1204 (2004).

K.S.A. 60–261 provides:

> "No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

Chapman declared the federal harmless error rule "which requires a court to determine that an error was harmless beyond a reasonable doubt in that it had little, if any, likelihood of having changed the result of the trial." *Tosh,* 278 Kan. at 96.

Cross–Examination

Peterson complains that the prosecutor began his cross-examination "by asking one argumentative question after another." Cross-examination, by its very nature, is argumentative insofar as it seeks to contradict or discredit the witness' direct testimony. A confrontational style of cross-examination is not misconduct, unless the prosecutor's methods are " 'calculated to produce a wrongful conviction." ' *Abu–Fakher,* 274 Kan. at 615 (quoting *Berger v. United States,* 295 U.S. 78, 88, 79 L.Ed.2d 1314, 55 S.Ct. 629 [1935]).

***3** Specifically, Peterson complains about the prosecutor's question as to whether Peterson was looking for a centipede in the bushes outside the apartment. The question was designed to refute Peterson's suggestion that he was looking for someone hiding in the bushes, when the bushes were obviously too small to conceal a human. The point was well taken, albeit the manner in which it was made may not be the most desirable or even the most effective.

Likewise, questioning Peterson as to whether the presence of his baby in the courtroom and his crying on the stand were tactics to gain jury sympathy was not out-of-bounds. The State should be able to explore whether a defendant is trying to play to the jury's emotions. It is noteworthy that no objection was interjected. Indeed, one might surmise the failure of the defense counsel to object could have been

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intentional if the attorney, who could observe the jurors, perceived the prosecutor's methodology was engendering, rather than dispelling, sympathy for the defendant.

Peterson also complains of the question, "would you agree with me that if somebody intentionally pulls a gun and shoots somebody in the face, they intend to kill them?" Peterson argues that the jury's determination of his degree of intent was crucial, because the jury was instructed on lesser degrees of homicide and he had presented a defense of self-defense. The argument is somewhat confusing. Peterson states that he does not deny shooting the man outside the door nor does he deny that the shooting was intentional. To utilize self-defense, Peterson did not need to convince the jury that he was trying to wound the alleged aggressor, *i.e.,* shooting to kill does not preclude self-defense, if the deadly force was justified. Perhaps the prosecutor should have simply asked whether Peterson intended to kill the alleged robber. Nevertheless, we find no error.

Similarly, we find the subject matter of the other questioning of which Peterson complains to be within the latitude afforded prosecutors, except for the following:

> "Q: So what's with Marcus? Is he lying about that?
>
> "A: I don't recall saying anything."

Asking a witness to comment on the credibility of another witness is clearly erroneous and indefensible. Besides invading the province of the jury, the question sought Peterson's opinion as to Brown's state of mind, which the prosecutor had to know was without foundation. Nevertheless, as a practical matter, the jury was well aware that Brown and Peterson were giving conflicting testimony as to whether Peterson said something to Kolenda prior to shooting him. The question did not plant any idea in the jurors' heads that was not already there. Peterson handled the question admirably, and we believe, beyond a reasonable doubt, the question did not change the outcome of the trial.

Closing Argument

In closing, the prosecutor on occasion worded his argument in such a manner as to suggest that he was giving his personal opinion on the weight to give certain testimony. Those comments were clearly outside the considerable latitude allowed to prosecutors, because they invade the province of the jury. See *Abu–Fakher,* 274 Kan. at 611–13.

*4 However, as a practical matter, the prosecutor's points could have legitimately been made by a simple rephrasing of his comments. For example, the statement, "I would say give it no [weight]," could have been rephrased as "The evidence dictates against giving the evidence any weight." One would not expect the jury to be shocked to learn the prosecutor believed in his case. On the other hand, it is not too much to ask an experienced prosecutor to remove the phrases "I believe," "I would say," and comparable expressions of personal opinion from closing argument. Nevertheless, considering the three factors, as instructed in *Tosh,* 278 Kan. 83, Syl. ¶ 2, we declare that had the prosecutor phrased his closing arguments in a permissible manner, the outcome of the trial would have been the same.

ORDER IN LIMINE

Prior to trial, the State sought authority to introduce evidence of the Washington warrant for Peterson's arrest for a homicide charge. The State's theory was that Peterson shot Kolenda to avoid arrest, rather than in self-defense. The trial court ordered that the State could present evidence of the outstanding warrant's existence but could not elicit evidence of the crime for which the warrant was issued. At trial, a detective testified as follows:

> "Q. Did you receive any other information involving Mr. Peterson that made you do certain things or act in certain ways?
>
> "A. Yes, I did.
>
> "Q. Tell us about that?
>
> "A. Once I obtained David Peterson's first name, last name, I contacted the King Cove County Sheriffs Department in Washington State.
>
> "Q. Did you find out whether or not he was wanted by the authorities in Washington?
>
> "A. Yes. I did.
>
> "Q. Was that for a felony matter?
>
> "A. It was.
>
> "Q. Did you believe that to be a safety factor for you and your officers that might be serving the warrant?
>
> "A. We thought it was a *huge* safety factor." (Emphasis added.)

Peterson's attorney objected to the use of the word "huge" and a side bar discussion was conducted. Although the trial judge intimated the hyperbole was not appropriate, no admonition was given to the jury.

Peterson's argument on appeal is loosely framed as a violation of the order in limine, although no such objection or motion for mistrial was lodged in trial court. The trial court may declare a mistrial if it finds a violation of an order in limine has made it impossible to proceed with trial without injustice to one of the parties. See K.S.A. 22–3423(c). Apparently, the court below did not believe that a fair trial had been jeopardized by the detective's answer. We agree.

Peterson's argument is based on the premise that the use of the word "huge" suggested to the jury that Peterson was wanted for a violent crime, thus violating the spirit of the order in limine. We disagree.

Peterson admittedly fled the state of Washington and assumed a new identity to avoid prosecution for a felony. The reasonable inference to be drawn is that he did not want to go to prison. A person in that circumstance should, indeed, present an extraordinary safety concern to the law enforcement officers attempting to execute the arrest warrant, because of the risk that the absconder will vigorously resist arrest. The danger is not dependent upon the underlying crime. The detective's answer did not violate the order in limine.

EYEWITNESS INSTRUCTION

***5** Peterson proffered an instruction on eyewitness testimony, which he tailored by modifying the eyewitness identification instruction of PIK Crim.3d 52.20. The proposed instruction read as follows:

> "In weighing the reliability of witnesses to this incident, you first should determine whether any of the following factors existed and, if so, the extent of which they would affect the accuracy of the witnesses' observations. Factors you may consider are:
>
> "1. The opportunity the witness had to observe. This includes any physical condition which could affect the ability of the witness to observe, the length of the time of observation, and any limitations on observation or poor lighting;
>
> "2. The emotional state of the witness at the time including that which might be caused by the use of a weapon or a threat of violence;
>
> "3. The degree of certainty demonstrated by the witness at the time of any identification of the accused; and
>
> "4. Whether there are any other circumstances that may have affected the accuracy of the eyewitness identification."

Eyewitness identification was not an issue in this case; Peterson admitted shooting Kolenda. Peterson attempts to apply the law applicable to eyewitness identification to the testimony of a person who witnessed and described the events. While the attempt is creative, we have no precedent for expanding PIK Crim.3d 52.20 into the general area of eyewitness testimony. Contrary to his arguments, Peterson's theory of defense was adequately addressed by the instruction advising the jurors to determine the weight and credit to be given each witness' testimony and their right to use common knowledge and experience in doing so.

VIDEOTAPED WEAPON DEMONSTRATION

A potential issue arose as to the amount of time it would take for the entry door to close after being swung open. That question was relevant to whether Kolenda had time to discharge six rounds through the open door without it being held open. The State presented the testimony of an Overland Park Police Department firearms instructor as to the characteristics of the .40 caliber Glock handgun used by Kolenda. Over defense objection, the instructor was permitted to present a videotape of a demonstration showing the weapon was capable of firing seven rounds within the time period required for the entry door to close on its own. Peterson contends the trial court erred in admitting the videotape.

> "The admission of evidence lies within the sound discretion of the trial court. [Citation omitted.] An appellate court's standard of review regarding a trial court's admission of evidence, subject to exclusionary rules, is abuse of discretion. Judicial discretion is abused when judicial action is arbitrary, fanciful, or unreasonable. If reasonable persons could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trail court abused its discretion. One who asserts that the court abused its discretion bears the burden of showing such abuse of discretion. [Citation omitted.]" *State v. Jenkins,* 272 Kan. 1366, 1378, 39 P.3d 47 (2002).

*6 The defense's objections to the videotape focused on the premise that the demonstration's controlled environment did not replicate the heat of battle circumstance at the apartment. The trial court concluded that the evidence was relevant to the factual issue of whether the weapon could be fired as rapidly as the State's theory required. Therefore, the trial judge opined that the defense's arguments went to the weight to be afforded the videotape, rather than to its admissibility. We agree.

The videotape was germane to the firing capability of the Glock .40 caliber handgun. It demonstrated that the rounds could have been discharged as rapidly as Kolenda testified that they were. The defense was free to point out to the jury that the demonstration was in a controlled environment and did not prove that Kolenda actually handled the weapon as efficiently under duress. The trial court did not abuse its discretion in admitting the videotape.

CUMULATIVE ERROR

Peterson argues that, even if no single error constitutes reversible error, the cumulative effect of all of the errors denied Peterson a fair trial.

> " 'Cumulative trial errors, when considered collectively, may be so great as to require reversal of the defendant's conviction. The test is whether the totality of circumstances substantially prejudiced the defendant and denied the defendant a fair trial. No prejudicial error may be found upon this cumulative effect rule, however, if the evidence is overwhelming against the defendant.' *State v. Lumbrera,* 252 Kan. 54, Syl. ¶ 1, 845 P.2d 609 (1992)." *State v. Plaskett,* 271 Kan. 995, 1022, 27 P.3d 890 (2001).

In his brief, Peterson does not deny intentionally shooting a human figure standing outside the entry door. He relied on self-defense, and the jury was so instructed. To carry the day with that defense, he had to convince the jury that he reasonably believed he had to use deadly force to protect himself. In support of his defense, he said he thought the drug dealers who had observed his large roll of cash were coming to rob him. To accept that premise, one would have to believe that the drug dealers knew where Brown lived, broke into Brown's apartment to change the locks, left the apartment building to await Peterson's return, and then waited to make their move until Peterson entered the apartment building. A rational jury might well have thought it more logical that the drug dealers would simply ambush Peterson, if they wanted to kill him for his money. In short, the evidence does not suggest that the trial outcome was impacted by cumulative error.

SUFFICIENCY OF THE EVIDENCE

Next, Peterson argues that the evidence clearly established he was justified in the use of his weapon and, therefore, the evidence could only support a conviction for attempted voluntary manslaughter. Although framed as a challenge to the sufficiency of the evidence to support attempted second-degree murder conviction, Peterson argues his justification for using deadly force. Obviously, the jury performed its function of weighing the evidence and assessing witness credibility and determined that factual question adversely to Peterson. We decline the invitation to redetermine that factual question. See *State v. Moore,* 269 Kan. 27, 30, 4 P.3d 1141 (2000).

CRIMINAL HISTORY

*7 Finally, Peterson argues the sentencing court violated the principles in *Apprendi v. New Jersey,* 530 U.S. 466, 147 L.Ed.2d 435, 120 S.Ct. 2348 (2000), by sentencing him using a criminal history that included prior convictions which had not been presented to a jury and found beyond a reasonable doubt. We may summarily dispose of this issue by citing to the mandatory authority of *State v. Ivory,* 273 Kan. 44, 41 P.3d 781 (2002).

Affirmed.

All Citations

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