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CLERK OF THE APPELLATE COURTS
CASE NUMBER: 110234

No. 13-110234-A

IN THE
COURT OF APPEALS OF THE
STATE OF KANSAS

STATE OF KANSAS
Plaintiff-Appellee

vs.

CHRISTOPHER BROWN
Defendant-Appellant

BRIEF OF APPELLANT

Appeal from the District Court of Shawnee County, Kansas
Honorable Nancy Parrish, Judge
District Court Case No. 12 CR 1139

Michelle A. Davis, #14116
Kansas Appellate Defender Office
Jayhawk Tower
700 Jackson, Suite 900
Topeka, Kansas 66603
(785) 296-5484
(785) 296-2869 Fax
adoservice@sbids.org
Attorney for the Appellant

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Nature of the Case

Following a jury trial, the district court entered a judgment of convictions for attempted second-degree murder of Anthony Herrera, a level three felony; for aggravated assault of Herrera, a level seven felony; and for two counts of reckless discharge of a firearm at an occupied dwelling, causing bodily harm of Dimisha Williams and bodily harm of a child, M.W., level five felonies.

Statement of Issues

I. **The district court erred in failing to instruct the jury to consider voluntary manslaughter in conjunction with second-degree murder.**

II. **The prosecutor's impeachment of Mr. Brown for exercising his right to remain silent violated Mr. Brown's right to a fair trial.**

Statement of Facts

On June 11, 2012, Anthony Herrera drove to the house of Mark Webster, who lived with Dimisha Williams and their baby. (XII, 51-2, 56-8.) Herrera stopped at a light, and talked on his phone; he saw Chris Brown stopped beside him. (XII, 59-60.) Herrera "grew up with" Mr. Brown's little brother. (XII, 60-3.) Herrera kept driving. At a red light, Mr. Brown pulled up next to him and said, "You know where Travon is?" Mr. Brown, said, "No." (XII, 64-5.) They kept driving. (XII, 65, 79.) Herrera called his friend, Webster, and told him to come out of his house; that Mr. Brown was following him. (XII, 52, 81, 123.) Herrera and Webster did not have any "problems with" Mr. Brown. (XII, 62, 128.)

Herrera drove into Webster's driveway where Webster was standing. Mr. Brown stopped his car in front of Webster's house; he called Herrera over to his car. (XII, 66.) Mr. Brown said, "So you heard what happened to my cousin, Lawrence?" Herrera knew that Lawrence was "hurt pretty bad" in a car accident four days earlier. (XII, 91, 131.) Mr. Brown again asked about Travon, and he told Herrera to get in the car. Herrera said, "No." (XII, 67, 92.) Mr. Brown pulled out a black revolver and held it in his lap, and said, "I'm not playing with you." (XII, 67-8, 94-5.) Herrera put his hands up and turned and ran toward a tree in the yard. He heard a couple of gunshots go by his head and he saw one or two hit the dirt in front of him. (XII, 68, 96-9.) Herrera was shot in the back, and he crawled behind a tree. (XII, 68-71.) Herrera heard more gunshots, which he later learned was Webster firing his gun. (XII, 102, 106-07, 145, 155-56.) Webster took Herrera, Dimisha, and the baby to the hospital. (XII, 102-04.)

When Herrera was on the ground trying to get to the tree, Webster ran into his house and grabbed his pistol and loaded it with a clip. (XII, 161, 187.) Webster came out of the house, which is on a corner, and watched Mr. Brown's car as it turned the corner. (XII, 122, 190, 235.) Webster went into his backyard and fired around nine shots at Mr. Brown's car. (XII, 190-94.)

Dimisha Williams testified that she was in the bedroom, holding the baby, when she heard gunshots and she got on the ground. (XII, 249, 253, 256; XV, 11.)

Williams saw blood on her arm: at the hospital, she learned she had been shot. The baby had two scratches on her face from debris. (XII, 257-64.)

Patrol officer Michael Diehl went to the location of a parked silver vehicle. (XV, 104-06, 108-09.) The front passenger window was shattered. (XV, 110.) A witness saw a man exit the vehicle, put something in the storm drain, and run. (XV, 111-12.) Police retrieved a revolver from the storm drain. (XV, 112, 132.)

Mr. Brown asserted that he had acted in self-defense. (XVI, 83-4.) Mr. Brown knew Herrera, Webster, and Williams from school or through family members. (XVI, 109, 112-14.) When Mr. Brown saw Herrera, he thought to ask him about Travon, because Mr. Brown had heard that Travon had caused his cousin's car accident. (XVI, 115-16, 120-21, 134-36.) In addition, Travon had sent Mr. Brown's sister a text, warning them not to go to the police. (XVI, 138.)

After Herrera stopped at the house, Mr. Brown saw him talking to another man. Mr. Brown did not recognize Webster, who stood with his hands behind his back. (XVI, 116, 122, 146-49.) Mr. Brown called Herrera over to his car, and they talked about Travon. (XVI, 117, 142.) Herrera saw that Mr. Brown had a weapon. (XVI, 117.) Mr. Brown had started carrying it for "protection." (XVI, 119.) Herrera turned and looked at Webster. (XVI, 117, 122.) Herrera ran. (XVI, 122.) Mr. Brown believed that Webster was pointing a gun at him. Mr. Brown panicked and he started shooting, "to create space," and he shot Herrera. (XVI, 123-25, 131-33,

154-57, 164-65, 168.) This was the first time Mr. Brown had fired a weapon. (XVI, 170.) The next day, Mr. Brown went to the police station. (XVI, 129-32, 161.)

On cross-examination, the prosecutor, Dan Dunbar, asked Mr. Brown what he had said to Detective Smith. Mr. Brown said, "[We] didn't really have too much conversation." He had asked Smith if anyone had died and what the charges were. (XVI, 162.) Dunbar asked, [You said] [n]othing about this Mark guy pulling a gun, nothing about that?" (XVI, 162.) Trial counsel requested a bench conference, and said that Dunbar was aware that at the police station, Mr. Brown had invoked his right to remain silent. (XVI, 162.) Counsel objected to any further inquiry by Dunbar because Dunbar knew that "nothing more had been said." The court said, "[M]ove on." (XVI, 163.)

In closing argument, Dunbar argued that the jury should not believe Mr. Brown's claim of self defense. (XVII, 28-9.) Dunbar said, "[R]emember, [the State] ha[d] no idea what his version [wa]s going to be because he didn't tell a soul. So he was free to say whatever he wanted without [being] subject to impeachment. Nobody could pull out any reports." (XVII, 29-30.) Trial counsel objected "for the record." (XVII, 30.)

Later in his argument, Dunbar stated that when Detective Smith called Mr. Brown and asked him to come in, Mr. Brown did not tell Smith that he had acted in self-defense. (XVII, 34.) Dunbar stated that at the police station, Mr. Brown's

"conversation with Detective Smith was this –." Trial counsel requested a bench conference. Counsel stated, "I believe this is the fourth time Mr. Dunbar has commented on my client's right to remain silent .... [H]e continues to make comments about what he did not say and he's not allowed to do that." (XVII, 35.) Counsel moved for a mistrial, stating, "On at least two occasions [Dunbar] said [Mr. Brown] had an opportunity to say things he didn't say." (XVII, 36.) The court stated, "I think we're getting dangerously close. I'm going to deny the motion for mistrial. Do not go there. Counsel knows that you do not comment on the fact of his silence." (VVII, 37.)

The district court instructed the jury on attempted first-degree and attempted second-degree murder, and told the jury that if it did not agree on attempted second-degree, then to consider voluntary manslaughter - an intentional killing committed in the heat of passion or upon an unreasonable but honest belief that circumstances justified deadly force. (I, 134-36; XVII, 3, 41.)

The jury convicted Mr. Brown of two counts of reckless discharge of a firearm at an occupied dwelling causing bodily harm, level five felonies; attempted second-degree murder, level three felony; aggravated battery, level four felony; and aggravated assault, level seven felony. (II, 148; XVII, 91.)

The district court, scoring an "I" criminal history, ordered the aggravated term of 61 months, with concurrent standard terms of 32, 32, and 12 months on

remaining counts, and 36 months postrelease. (II, 182; XIV, 4, 29.) The court did not sentence for the alternative charge of aggravated battery. (I, 75; II, 182.)

Mr. Brown appeals.

Arguments and Authorities

I. The district court erred in failing to instruct the jury to consider voluntary manslaughter in conjunction with second-degree murder.

Introduction

The district court erroneously instructed the jury to only consider attempted voluntary manslaughter – heat of passion or imperfect self defense, if the jury "d[id] not agree that the defendant was guilty of attempted second degree murder." (II, 136.) See *State v. Graham*, 275 Kan 831, 833, 837, 69 P.3d 563 (2003) (When the evidence warrants an instruction on voluntary manslaughter, the district court's "failure to instruct the jury to consider such circumstances in its determination of whether the defendant is guilty of second-degree murder, is always error - and in most cases - presents a case of clear error.")

Standard of review

This Court first conducts an unlimited review of the question of whether the instruction was legally and factually appropriate. *State v. Williams*, 295 Kan. 506, 515-16, 521, 286 P.3d 195 (2012). If the district court erred, then this Court proceeds to a reversibility inquiry. Because trial counsel did not object to the instruction, this Court reviews for clear error. (XVII, 3.) *Williams*, 295 Kan. 516.

Analysis

The district court instructed the jury with attempted first-degree premeditated murder, attempted second-degree intentional murder, and attempted voluntary manslaughter – an intentional killing committed in the heat of passion or upon an unreasonable but honest belief that circumstances justified deadly force (imperfect self defense). (II, 134-37.) See K.S.A. 2011 Supp. 21-5404. The jury convicted Mr. Brown of attempted second-degree murder.

As a threshold determination, the district court's voluntary manslaughter instruction was legally incorrect. The court prefaced its instructions on murder and manslaughter as follows:

> If you do not agree that the defendant is guilty of attempted murder in the first degree[,] you should then consider the lesser included offense of attempted murder in the second degree.
> ....
>
> If you do not agree that the defendant is guilty of attempted murder in the second degree[,] you should then consider the lesser included offense of attempted voluntary manslaughter.

(II, 135-36.)

The district court instructed the jury with the same language held to be clearly erroneous in *Graham*, 275 Kan. 832, and in *State v. Cribbs*, 29 Kan. App. 2d 919, 34 P.3d 76 (2001). The decisions in *Graham*, 275 Kan. 831, and in *Cribbs*, 29 Kan. App. 2d 919, control this issue.

In *Cribbs*, the Court stated,

> ... Cribbs' jury was told that it need not bother considering attempted voluntary manslaughter unless and until it failed to agree on his guilt of attempted second-degree murder. It may never have fully analyzed whether the shooting was the product of ... the [mitigating] factors that distinguish the greater and the lesser crimes and the reasons they require simultaneous deliberation when the evidence could support either.

29 Kan. App. 2d 924.

In *Graham*, 275 Kan 837, the Court stated, "This 'reordering' deprived the jury of the opportunity to consider the mitigating circumstances of heat of passion or sudden quarrel which reduce an intentional homicide from murder to voluntary manslaughter."

In reviewing this issue, once this Court finds error, it moves to a "reversibility inquiry." *Williams*, 295 Kan. 516. There are two standards this Court may apply.

First, the constitutional harmless error standard, because the error prejudiced Mr. Brown's right to a fair trial and to due process. See *State v. Henry*, 273 Kan. 608, 619, 44 P.3d 466 (2002) ("A misstatement of the law, whether by prosecutor or by the court, denies the defendant a fair trial where the facts are such that the jury could have been confused or misled by the misstatement.") The State must persuade this Court that there is no reasonable possibility that the

error contributed to the verdict. *State v. Ward*, 292 Kan. 541, 565-66, 256 P.3d 801 (2011).

The second standard, for an instructed error not objected to, is clearly erroneous. See *Williams*, 295 Kan. 515. In this case, there was sufficient evidence of mitigating circumstances for this Court to believe that a properly instructed jury "would have convicted" Mr. Brown of the lesser offense of voluntary manslaughter. See *Williams*, 295 Kan. 523.

Mr. Brown testified that he believed that Webster was pointing a gun at him. Mr. Brown panicked and he started shooting, "to create space," and he shot Herrera. (XVI, 123-25, 131-33, 154-57, 164-65, 168.) The district court found sufficient evidence to instruct the jury on the mitigating factors of heat of passion and imperfect self defense.

In *Cribbs*, the Court rejected the State's argument that the reasonable doubt instruction ("When there is a reasonable doubt as to which of two or more offenses the defendant is guilty, he may be convicted of the lesser offense only") was sufficient to cure the error, "because it still made any consideration of attempted voluntary manslaughter contingent on the jury's prior inability to convict on attempted second-degree murder." 29 Kan. App. 2d 924.

In *Graham*, the Court stated, "[I]n both *Cribbs* and this case there was some evidence of 'heat of passion' or 'sudden quarrel.' Thus, in each case the defendant

was entitled to have the jury consider such evidence during its consideration of the elements of attempted second-degree murder." *Graham*, 275 Kan. 839-40.

The rulings of *Cribbs* and *Graham* have been followed in subsequent cases. See *State v. Miller*, 293 Kan. 46, Syl. 5, 259 P.3d 701 (2011) (Finding clear error for district court to instruct jury to consider second-degree and voluntary manslaughter sequentially rather than simultaneously); *State v. Bates*, 231 P. 3d 588, 100,681, 5 (2010) (Presumed clear error in the court's failure to give the "simultaneous instruction"); *State v. Espinales*, 196 P.3d 958, No. 98,193, 4 (2008) (same).

Accordingly, this Court must reverse Mr. Brown's attempted second-degree murder conviction, a level three felony, and remand to the district court to either conduct a new trial or to sentence Mr. Brown for the alternative conviction of aggravated battery, a level four felony.

II. The prosecutor's attempted impeachment of Mr. Brown for exercising his right to remain silent violated Mr. Brown's right to a fair trial.

Introduction

The prosecutor erroneously attacked Mr. Brown for failing to tell the detective during the investigation that he had acted in self-defense. Trial counsel objected to the prosecutor's questions and comments. (XVI, 163; XVII, 30, 34-7.) It is constitutionally impermissible for the State to shift the burden of proof, *State v. Tosh*, 278 Kan. 92, 85, 91 P.3d 1204 (2004), and to make inferences of guilt based

upon post-*Miranda* silence, *Doyle v. Ohio*, 426 U.S. 610, 619, 96 S. Ct. 2240 (1976). The error violated Mr. Brown's right to a fair trial, warranting reversal.

Standard of review

With a claim of prosecutorial misconduct, this Court analyzes: (1) whether the conduct was outside the wide latitude allowed prosecutors when arguing cases; and, (2) if so, whether it deprived the defendant of a fair trial. *State v. King*, 288 Kan. 333, 334, 204 P.3d 585, 588 (2009).

Analysis

A defendant is presumed innocent and the burden is on the prosecution to establish guilt beyond a reasonable doubt. See K.S.A. 21-5108; *Taylor v. Kentucky*, 436 U.S. 478, 483, 98 S. Ct. 1930 (1978). It is constitutionally impermissible for the State to shift the burden of proof to the defendant. *State v. Gibbons*, 256 Kan. 951, 964-65, 889 P.2d 772 (1995). Prosecutorial statements that improperly shift the burden of proof to the defendant to produce evidence of innocence constitute misconduct. *Tosh*, 278 Kan. 92-3 (The objectionable comments were: "[I]s there any evidence that it didn't happen?" "Is there any evidence that the things she told you didn't happen?") In *Tosh*, the Court ruled that the comments were "improper attempts to shift the burden of proof to Tosh." 278 Kan. 92.

It is constitutionally impermissible for the State to make inferences of guilt based upon an accused's post-*Miranda* silence. *Doyle*, 426 U.S. 619. A *Doyle*

violation occurs when the State attempts to impeach a defendant's credibility at trial by arguing or by introducing evidence that the defendant did not avail himself or herself of the first opportunity to clear his or her name when confronted by police officers, but instead invoked his or her constitutional right to remain silent. *State v. Edwards*, 264 Kan. 177, 195, 955 P.2d 1276 (1998).

In this case, prosecutor Dunbar asked Mr. Brown what he had said to Detective Smith? Mr. Brown said, "[We] didn't really have too much conversation." (XVI, 162.) Dunbar asked, "[You said] [n]othing about this Mark guy pulling a gun, nothing about that?" (XVI, 162.) Trial counsel requested a bench conference, and stated that Dunbar was aware that at the police station, Mr. Brown had invoked his right to remain silent. (XVI, 162.) Counsel stated that Dunbar knew that "nothing more had been said." (XVI, 163.)

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The prosecutor's statements to the jury were outside the latitude allowed to a prosecutor for two impermissible reasons: (1) burden shifting; and (2) impeachment based upon the exercise of the right to remain silent. The prosecutor asked the jury to consider Mr. Brown's failure to step forward prior to trial to disprove the accusation, shifting the burden to Mr. Brown. The prosecutor's statements were an impeachment of Mr. Brown for exercising his right to remain silent.

The State may not imply that if Mr. Brown had been innocent, he would have gone and spoken to law enforcement. See *State v. Satterfield*, 3 Kan. App. 2d 212, 219-20, 592 P.2d 135 (1979) (The State is prohibited from impeaching the

defendant by commenting on the defendant's election to remain silent). It was improper for the prosecutor to attack Mr. Brown for exercising his Fifth Amendment right to remain silent prior to trial. See *State v. Nott*, 234 Kan. 34, 41, 669 P.2d 660 (1983), citing *Doyle*, 426 U.S. 610 ("The general rule is a prosecutor may not use a defendant's post-arrest silence to impeach the credibility of his trial testimony.")

The first step of the analysis has been met because the prosecutor made improper comments in closing.

In the second step, this Court considers three factors, none of which are individually controlling, to determine whether the error merits reversal and a new trial: (1) whether the misconduct is gross and flagrant; (2) whether the misconduct shows ill will; and (3) whether the evidence is of such a direct and overwhelming nature that the misconduct would likely have little weight in the minds of the jurors. The third factor may not override the first two unless both state and federal harmless error tests are met. *State v. Swinney*, 280 Kan. 768, 780, 127 P.3d 261 (2006); *State v. Elnicki*, 279 Kan. 47, 64-5, 105 P.3d 1222 (2005).

The conduct described above, was, by definition, gross and flagrant. As the trial court stated at the bench conference, the prosecutor knew that such comments were impermissible. (VVII, 37.) Such behavior was not accidental, but intentional, and from this intention, ill-will can be presumed.

The evidence was not so direct and overwhelming that the misconduct would have had little weight in the jurors' minds. This Court may only declare a constitutional error harmless if it is persuaded by the party benefiting from the error that there is no reasonable possibility that the error contributed to the verdict. *State v. Ward*, 292 Kan. 541, 565-66, 256 P.3d 801 (2011).

The prosecutor's improper impeachment of Mr. Brown's claim of self-defense prejudiced the jury against Mr. Brown's version of events. The State cannot prove that the error was harmless, because from the evidence, there was a reasonable possibility of a voluntary manslaughter verdict. This Court must remand for a new trial.

Conclusion

Wherefore, appellant requests that this Court vacate his convictions.

Respectfully submitted,

/s/ Michelle A. Davis
Michelle A. Davis, #14116
Kansas Appellate Defender Office
Jayhawk Tower
700 Jackson, Suite 900
Topeka, Kansas 66603
(785) 296-5484
(785) 296-2869 Fax
adoservice@sbids.org
Attorney for Appellant

Certificate of Service

The undersigned hereby certifies that service of the above and foregoing brief was made sent by e-mailing a copy to Chad Taylor, Shawnee County District Attorney, at Da_appeals@snco.us; and by e-mailing a copy to Derek Schmidt, Attorney General, at ksagappealsoffice@ag.ks.gov on the 9 day of May, 2014.

/s/ Michelle A. Davis
Michelle A. Davis, #14116