No. 14-112270-A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS
Plaintiff-Appellee

v.

WILLIAM PAUL SPANGLER
Defendant-Appellant

BRIEF OF APPELLEE

APPEAL FROM THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
HONORABLE MARK S. BRAUN, JUDGE
DISTRICT COURT CASE NO. 13-CR-486

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NATURE OF THE CASE

William Spangler (Spangler) was convicted by a jury of second degree murder. Spangler appeals his conviction.

STATEMENT OF THE ISSUE

I. The district court correctly determined that Spangler was not entitled to a defense of another or a defense of a dwelling jury instruction.

STATEMENT OF THE FACTS

On March 23, 2014, Faustino Martinez (Faustino), Dijon Chandler-Phillips (D.J.), D.J.'s wife, Narcisa, Maria Garcia (Maria), and all their children traveled from Wichita, Kansas, to Topeka to visit Gino Martinez (Gino) and have a family birthday celebration. (R. VIII, 401-05; R. X, 567, 629.) Gino lived in an apartment at the Capitol Suites Apartment complex, on the second floor. (R. X, 627.) The complex had two sets of doors; an exterior set which was always unlocked that led to a lobby, and a set of interior doors which was always locked for the resident's safety that led to the individual apartments. (R. VIII, 352; R. X, 635-36; R. XI, 772; R. XVI, 15-17.) The family was staying in Gino's apartment during their visit. (R. VIII, 405.) Faustino and D.J. were advocates of open carry and generally had firearms openly on their person all the time. (R. VIII, 373, 409; R. X, 670.) Gino did not own a gun and was not carrying a firearm. (R. X, 646, 664.) That night, Faustino and D.J. were openly carrying their handguns, which was lawful in Kansas. (R. VIII, 372-73, 409; R. X, 670.)

Around 1:00 a.m., Maria and Narcisa went to Wal-Mart to pick up groceries for the birthday party. (R. VIII, 405; R. X, 569, 631.) Faustino's four year old son, Joshua, was still wide awake, so the women took him with them to the store. (R. VIII, 405-06; R. X, 569.) About an hour later, the women returned and Gino, Faustino, and D.J. were

outside the complex smoking cigarettes. (R. VIII, 407.) Gino had the key to the inside door of the complex and let the women in while Faustino and D.J. went to get Josh from the car. (R. X, 632, 675.)

On the way to unlock the interior door, Gino and Maria were playing around and Maria was playfully hitting Gino with a container of juice boxes. (R. X, 572-73, 609, 635, 670.) While playing around, the box broke and Maria dropped it. (R. X, 572, 599.) Gino then moved the box between the interior door of the apartment complex to prop it up so the women could come in and out without Gino having to unlock the door each time while they unloaded the groceries. (R. X, 635-36, 676.) Maria and Narcisa carried the groceries upstairs to Gino's apartment. (R. X, 572-73, 609.)

Around this time Spangler and his friend, Valerie Mentzer (Mentzer), pulled into the parking lot of the apartments. Spangler lived on the third floor of the complex. (R. IX, 469.) Spangler and Mentzer had been at the Sports Cabaret drinking and watching a basketball game. (R. IX, 465-69; R. XI, 760-61.) Gino recognized Spangler as someone who lived in the complex, but did not know him. (R. X, 638.) Spangler and Mentzer got out of the car and saw Faustino and D.J. at Maria's car close by. (R. IX, 471-72.) Spangler then said "what the fuck you looking at?" to Faustino and D.J. (R. VIII, 413, 433; R. IX, 495.) This comment upset Faustino a little, but he did not respond. (R. VIII, 416-17.) D.J. told Faustino, "let it go, let's worry about Josh." (R. VIII, 435.)

Spangler and Mentzer then made their way to the outside set of doors to the apartment where Gino held the door for them to go inside. (R. X, 637, 640, 677; R. XVI, 23-25.) Gino told them, "don't mind the juice boxes" as a heads up that a box was in the door so Spangler and Mentzer would not trip over it. (R. X, 640.) Mentzer stepped over

the box as she went through the interior door. (R. IX, 478; R. X, 641; R. XVI, 25-27.) However, Spangler kicked the box from the door, spilling the juices all over the floor. (R. X, 641; R. XVI, 25-27.) Once Spangler kicked the box from the interior door, it shut and locked behind him. (R. X, 644-45.) Spangler and Mentzer then went upstairs to Spangler's apartment. (R. IX, 480; R. X, 642.) Gino observed that neither Spangler nor Mentzer were running inside from the parking lot or moving at a fast pace to get inside. (R. X, 640.)

Gino then told Faustino and D.J., "hey these guys just kicked the juices." (R. VIII, 417-18, 436.) Faustino then sat down his drink and also removed his gun out of his holster and sat it on the ground outside. (R. VIII, 439; R. X, 643-45, 681; R. XVI, 26.) Faustino and D.J. went back into the lobby area and Gino unlocked the interior door. (R. VIII, 419; R. X, 645-46; R. XVI, 30.) Faustino and D.J. then went upstairs to talk to Spangler about his kicking the box of juices. (R. VIII, 420, 440.) During this time, Gino picked up Faustino's gun and placed it in his coat pocket. (R. X, 646.) The men got to the third floor and did not see Spangler so they went back downstairs to get Josh out of the car. (R. VIII, 421, 442.)

Gino then handed Faustino's gun to D.J. and told him to take it to Gino's apartment and put it away. (R. VIII, 422-23, 426, 443; R. X, 664.) D.J. went to the second floor to put the gun away and believed that the incident was over. (R. VIII, 447.)

Maria then came back downstairs from putting away the groceries in Gino's apartment and noticed the juices scattered all over the lobby floor. (R. X, 574.) The men told Maria that Spangler came in from the parking lot kicked the juices out from the door. (R. X, 574, 612.) Maria then saw Spangler standing on the platform of the stairs about a

half-flight upstairs. (R. X, 575.) Spangler had an AR-15 assault rifle and pointed it at Faustino. (R. VIII, 333-35; R. X, 578, 582-83, 613; State's Exhibit 24, to be added to the record.) Faustino stated "are you fucking kidding me?" and "are you really going to shoot me?" or "are you really going to kill me?" (R. X, 584-85, 615.) Neither Faustino or Gino had guns in their hands or on them. (R. X, 584.)

It was silent for a moment, and then Spangler went back upstairs. (R. X, 585.) Maria then went back to Gino's apartment on the second floor and told Narcisa to lock the doors and windows because Spangler had a gun in the building. (R. X, 592, 618.)

Faustino then went back upstairs. (R. X, 649.) Sensing something was wrong, Gino followed. (R. X, 650.) Gino opened the door to the third floor and saw Spangler with his assault rifle. (R. X, 652, 654.) Faustino had his hands down at his sides with his palms face up and open. (R. X, 655.) Gino then heard Spangler cock the assault rifle. (R. X, 656-57.) As Spangler cocked the gun, he moved toward Faustino. (R. X, 657-59.) Faustino asked Spangler, "are you going to fucking shoot me?" (R. X, 667.) Gino then turned to run back downstairs. (R. X, 659, 689.) Gino then heard a gunshot and Faustino scream. (R. X, 660.) Maria and D. J. heard the gunshots and screaming from Gino's apartment. (R. VIII, 423; R. X, 592-93, 618.) Spangler shot Faustino with the assault rifle and fled from the apartment building. Gino ran back up the stairs to help Faustino. (R. X, 660.) Gino then called 911. (R. X, 665; State's Exhibit 41, to be added to the record.) Faustino died from blood loss due to the gunshot wound to his pelvis. (R. VII, 287.)

Two gold rifle .223 shell casings were found in the hallway of the third floor. (R. VII, 264, 271, 273; R. VIII, 348; R. XVI, 6-9.) The loaded assault rifle was later found

underneath a pickup truck near the apartment complex, and was recovered. (R. VIII, 321-22, 327, 331, 333.)

Spangler was charged with one count of first-degree murder. (R. I, 11-13.) A jury trial was held and Spangler and Mentzer testified. Spangler testified that he and Mentzer were drinking at the Sports Cabaret and left around the time when the bar closed. (R. XI, 763-64.) The two pulled into the parking lot of the apartments and saw Faustino and D.J. (R. XI, 765.) Spangler thought that the men were staring at Mentzer and some words were exchanged. (R. XI, 765.) Spangler claimed that in the darkness he saw that D.J. had a gun on his person, in a holster. (R. XI, 766; R. XII, 817.) Spangler then told Mentzer, "don't turn around, just go." (R. XI, 766.) Spangler saw Faustino "speed walking" up behind them and again told Mentzer, "go, I mean go now." (R. XI, 766-67.)

The two got to the exterior doors of the apartment, and Gino held it open for them. (R. XII, 818.) Gino made no threatening comments to Spangler or gave him any reason to be alarmed. (R. XII, 819.) When they got to the interior doors, Mentzer hopped over the juice boxes, but Spangler kicked them out of the door so it would close and lock behind them. (R. XI, 767, 771; R. XII, 820-21.) Spangler and Mentzer then ran up the stairs to his apartment. (R. XI, 771.) Spangler claimed he heard people coming up the stairs, but did not see anyone chasing them at that time. (R. XI, 773; R. XII, 822.) The two went inside Spangler's apartment and locked the door. (R. XI, 784.) Neither Spangler nor Mentzer called law enforcement at that time. (R. XII, 824.) By the time Faustino and D.J. made it through the locked interior door and ran up the stairs, they did

not see Spangler or Mentzer on the third floor, so they headed back downstairs. (R. VIII, 421.)

Spangler stated he was panicked and went into his bedroom and grabbed his assault rifle. (R. XII, 786, 825.) Spangler loaded the gun. (R. XII, 825.) Spangler had never fired the gun before, never read the manual, or had any training on how to use the gun. (R. XII, 790.) Spangler returned into the hallway with the loaded gun and told Mentzer to lock the door behind him, so she would be safe. (R. XII, 786, 825.) When Spangler came back out of the apartment, he looked both directions and saw no one in the hallway. (R. XI, 791.)

Spangler had no reason to go back out into the hallway at that point. (R. XII, 826-27.) Spangler then decided to go looking for Faustino, D.J., and Gino. (R. XII, 791.) Spangler went downstairs and saw the men and Maria. (R. XII, 791.) Spangler stated that he took the gun downstairs as a "scare tactic" and wanted to make sure that the men did not come back upstairs again. (R. XII, 792.) Spangler walked down the fifty foot hallway to the stairwell and did not see anyone. (R. XII, 829-30.) Spangler walked down the first flight of stairs and saw no one on the landing or in the stairwell. (R. XII, 832.) Spangler went down another flight of stairs and did not see anyone. (R. XII, 833.) Spangler finally made it to the first floor and then saw Faustino, D.J., Gino, and Maria. (R. XII, 833-34.) No one made any threats toward Spangler at that time. (R. XII, 833.)

Spangler then pointed his assault rifle in their direction. (R. XII, 834-35.) Faustino asked Spangler, "what are you going to do shoot me?" and Spangler did not respond. (R. XII, 793, 836-37.) Spangler noticed that Faustino did not have a gun on him at that time. (R. XII, 793, 836-37.) Spangler then headed back upstairs and claimed

that Faustino chased him at full speed up the stairs. (R. XII, 793.) Spangler then claimed that a small struggle ensued at the top of the stairs, but he was able to get away from Faustino. (R. XII, 839.)

Spangler then ran down the hallway and put a bullet in the chamber of the assault rifle. (R. XII, 795, 839.) Spangler thought he should shoot a warning shot and shot to the side of Faustino while running to his apartment. (R. XII, 795-96, 839-40, 850.) When Faustino kept coming toward Spangler, he shot Faustino again. (R. XII, 795-96, 798.) Spangler stated he tried to shoot Faustino in the leg and did not intend to kill him. (R. XII, 796.) Faustino was at least 50 feet from Spangler's apartment door when he shot him. (R. VIII, 339; R. XVI, 21.)

Spangler then fled the apartment building. (R. XII, 798-801, 842, 847.) Spangler ditched the assault rifle under a truck a few blocks away. (R. XII, 801.) Spangler later learned that Faustino had died and turned himself into the law enforcement center. (R. XII, 804-05.)

In Spangler's proposed jury instructions he provided a photocopy of the PIK instructions. (R. I, 26-35.) Spangler simply put a slash mark next to the PIK instruction for defense of another. (R. I, 29.) Spangler did not put a slash mark next to the PIK instruction for defense of a dwelling. (R. I, 29.) Spangler also did not provide any text for a proposed jury instruction regarding defense of another. (R. I, 26-35.) During the jury instruction conference, Spangler requested jury instructions for defense of another and defense of a dwelling. (R. XII, 921, 925, 928-31; R. XIII, 966.) After discussion and arguments from both parties, the district court denied the request for these instructions. (R. XII, 927, 932; R. XIII, 966.) The district court did instruct the jury on self-defense

and the lesser included offenses of second-degree murder and voluntary manslaughter. (R. I, 43-60; R. XIII, 978-82.)

The jury convicted Spangler of second degree murder. (R. XIII, 1057-58; see verdict form to be added to the record.) Spangler was sentenced to 186 months in prison. (R. I, 70-77; R. XIV, 49-51.) Spangler appeals his conviction. (R. I, 91.)

ARGUMENTS AND AUTHORITIES

I. The district court correctly determined that Spangler was not entitled to a defense of another or a defense of a dwelling jury instruction.

Spangler argues that the district court erred when it refused to give the requested instructions of defense of another and defense of a dwelling.

Standard of Review

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

> In summary, for instruction issues, the progression of analysis and corresponding standards of review on appeal are: (1) First, the appellate court should consider the reviewability of the issue from both jurisdiction and preservation viewpoints, exercising an unlimited standard of review; (2) next, the court should use an unlimited review to determine whether the instruction was legally appropriate; (3) then, the court should determine whether there was sufficient evidence, viewed in the light most favorable to the defendant or the requesting party, that would have supported the instruction; and (4) finally, if the district court erred, the appellate court must determine whether the error was harmless, utilizing the test and degree of certainty set forth in *State v. Ward*, 292 Kan. 541, 256 P.3d 801 (2011), *cert. denied* ___ U.S. ___, 132 S.Ct. 1594, 182 L.Ed.2d 205 (2012).

Analysis

The State first argues that this court should not reach the merits of the case due to Spangler's failure to adequately brief the issue. Spangler fails to cite to the record when discussing facts in his argument. Spangler simply makes conclusory statements about

what he believed, with no cite to the record to facts that support his statement. The burden is on the party making a claim to designate facts in the record to support the claim; without such a record, the claim of error fails. *State v. McCullough*, 293 Kan. 970, 999, 270 P.3d 1142 (2012). (See Appellant's brief 8-15.) Spangler cites to virtually no case law in the majority of his analysis and provides one specific case in support of his harmless error analysis, which is not analogous.

Spangler cites to the statutes regarding defense of a person and defense of a dwelling but he fails to explain how the evidence here established that these defenses were applicable or legally and factually appropriate. *See State v. Garza*, 290 Kan. 1021, 1034, 236 P.3d 501 [2010] ("Issues raised in passing that are not supported by argument or cited authority are deemed waived."); *State v. Gibson*, 299 Kan. 207, 322 P.3d 389, 399 (2014) (citing *State v. Torres*, 280 Kan. 309, 331, 121 P.3d 429 [2005] [simply pressing point without pertinent authority or without showing why it is sound despite lack of supporting authority or in the face of contrary authority akin to failing to brief point; issue deemed waived or abandoned]). Spangler simply raises the issue, but does not do any legal analysis or argument. This court should therefore consider the arguments waived or abandoned and should not reach their merits. *See State v. Bowen*, 299 Kan. ___, 323 P.3d 853, 865 (2014) (arguments regarding a violation of a defendant's right to a public trial and impartial judge arguments deemed abandoned for failure to adequately brief). Nevertheless, if this court addresses the argument on the merits, the State contends that the defense of another and defense of a dwelling instructions were not legally or factually appropriate in this case.

Under the first step of the *Plummer* analysis, Spangler preserved this issue for appeal. Spangler's counsel requested the defense of another and defense of a dwelling instructions during the instructions conference. (R. XII, 921, 925, 928-31; R. XIII, 966.)

Defense of Another

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

"A person is justified in the use of force against another when and to the extent it appears to such person and such person reasonably believes that such force is necessary to defend such person or a third person against such other's imminent use of unlawful force." K.S.A. 21-5222. For a defense of another instruction to be available, the evidence, as a whole, must support an affirmative finding by a rational factfinder under both prongs of a two prong test. *See State v. Rutter*, 252 Kan. 739, 746, 850 P.2d 899 (1993). The first prong is subjective: Did Spangler sincerely believe it was necessary to use deadly force against Faustino in order to defend Mentzer? The second is objective: Was Spangler's belief reasonable?

In his brief, Spangler does not explicitly point to facts that establish his subjective belief that it was necessary to shoot Faustino in order to defend Mentzer and that it was objectively reasonable to shoot Faustino. Spangler simply argues that it was "perfectly

reasonable to believe that Faustino and his associates were headed to his apartment for the purpose of entering it and doing harm to Mentzer." (Appellant's brief, 11.)

Here, there was no evidence presented that Spangler personally or subjectively believed the use of force was necessary to defend Mentzer or that a reasonable person in his circumstances would have so believed. First, there was no evidence presented that Spangler subjectively believed it was necessary to use force to defend Mentzer. While Spangler did testify at trial, he did not testify that he believed it was necessary to use force to defend Mentzer. According to Spangler's own testimony, he and Mentzer arrived the parking lot and Spangler "exchanged words" with Faustino and D.J. (R. IX, 472, 495.) Although Spangler claimed that he saw that D.J. was armed, he did not know that Faustino was armed or that either man was intoxicated. (R. XI, 766, 817.) Mentzer testified that she never saw a gun on any of the men in the parking lot. (R. IX, 538.) Spangler and Mentzer stated, after the exchange of words, they were scared and hurried into the apartment building. (R. IX, 477.) However, they did not run into the building and no threats were ever made by Faustino, D.J., or Gino. (R. XII, 816, 819, 822.)

Spangler testified that once the two ran up to his apartment, he told Mentzer to lock the door so she would be safe inside the apartment. (R. XII, 786.) Spangler believed he heard men's voices outside in the hallway, but looked both ways and saw nothing; no one was there. (R. XII, 791, 828-30.) Spangler also agreed that no one was banging on his apartment door, or trying to break into his apartment. (R. XII, 234-24, 826-27.) Spangler stated that he did not have any reason to go back outside his apartment once he and Mentzer were inside. (R. XII, 826-27.)

Spangler testified that he thought the incident was over at that point. (R. XII, 823.) Spangler then decided to take his assault rifle and go find Faustino, D.J., and Gino because "maybe they [were] coming back up." (R. XII, 826, 829.) Spangler stated that he wanted to "tell them not to come back up there again. They had already been up there once and they didn't need to come back up there again." (R. XII, 830.) Spangler wanted to scare the men with his assault rifle. (R. XII, 830.) Spangler never testified that he went out after the men in order to protect Mentzer, who was inside his locked apartment. Once Spangler left his apartment with his assault rifle, he did not mention Mentzer's safety or his apartment again.

When describing why he shot Faustino, Spangler never stated that he believed that Faustino was coming for Mentzer and he had to shoot him in order to defend her. Spangler stated his intention when he shot his gun the first time was as a warning shot, and then the second time was to stop Faustino from coming at him. (R. XII, 795-97, 839-841.) Spangler's testimony does not establish that he honestly and sincerely believed that he had to shoot Faustino in order to defend Mentzer. Spangler did not establish the subjective prong of the test in this case.

However, even if Spangler's testimony that the men might come back up and kick his apartment door in was enough to establish that he subjectively believed that it was necessary to shoot Faustino in order to protect Mentzer, a reasonable person in the same situation as Spangler would not have believed that Spangler's actions were necessary to defend her.

Although Spangler and Mentzer claimed they were scared following the exchange of words out in the parking lot, Spangler acknowledged that they were not chased up the

stairs by Faustino. (R. XII, 822.) Spangler testified that no one chased them up the first flight of stairs, the second flight of stairs, the third flight of stairs, or even down the hallway. No one chased Spangler or Mentzer inside from the parking lot. (R. XII, 822-23; R. XVI, 23-26.) Spangler even testified that he believed that the incident was finished at that point. (R. XII, 823, 835.)

After Spangler and Mentzer ran into his apartment and locked the door, there was no reason for Spangler to go back outside the safety of his apartment. Spangler testified that there was no one banging on his door or trying to break into his apartment. (R. XII, 234-24, 826-27.) Spangler believed he heard men's voices outside in the hallway, but looked both ways and saw nothing, no one. (R. XII, 791, 828-30.) Spangler then decided to take his assault rifle and actively seek out Faustino and the other men. (R. XII, 829.) Spangler walked down the 50 foot hallway and down two floors of stairs in order to find them. Spangler then became the initial aggressor. Once Spangler went back downstairs in order to use his gun as a "scare tactic" and scare Faustino from coming back upstairs, Spangler specifically saw that Faustino did not have a gun at that time and was unarmed. (R. XII, 793, 836-37.) The prosecutor asked Spangler, "and now, you can see for sure in the light that for whatever reason, that guy doesn't have a gun, right?" (R. XII, 836.) Spangler responded, "right." (R. XII, 836.) There is no question that Spangler knew that Faustino was unarmed when he shot him with his assault rifle.

Spangler left the safety of his apartment, did not call law enforcement, went in search of the men with his assault rifle, saw that Faustino was unarmed, claimed he was chased back upstairs by the unarmed Faustino, and shot Faustino twice once they were on the third floor. A reasonable person in the same situation would have stayed inside the

apartment and called law enforcement if necessary. Upon seeing that there was no one in the hallway, a reasonable person would have gone back inside the apartment. A reasonable person would not have left the apartment and went back downstairs with the assault rifle in order to reengage with Faustino and the other men. How can Spangler claim that he was defending Mentzer when he left her alone to go find the supposed threat? Even when the evidence is viewed in the light most favorable to Spangler, there was not sufficient evidence from which a rational factfinder could find that Spangler acted in defense of Mentzer under K.S.A. 21-5222.

If there is no evidence at trial that the defendant defended another person, then the instruction is not legally or factually appropriate. *See State v. Martin*, 234 Kan. 115, 670 P.2d 1331 (1983) (defendant was not entitled to jury instruction regarding use of force in defense of others when there was no evidence at trial that the defendant used deadly force to defend his wife.); *State v. Rutter*, 252 Kan. 739, 850 P.2d 899 (1993) (holding there was not sufficient evidence from which a rational factfinder could have found that the defendant acted in defense of another under the statute.)

In *State v. Hernandez*, 253 Kan. 705, 713, 861 P.2d 814 (1993), our Supreme Court found that a defense of others jury instruction was not warranted when Hernandez testified that he shot the victim in order to protect his sister. Hernandez established a history of domestic violence between his sister and the victim. The Court rejected a finding of imminence even though Hernandez testified that the victim had threatened to kill his sister the morning of the day Hernandez shot the victim and that his sister was working in an area nearby when the shooting took place. Here, there was no evidence of any violent history, any threats by Faustino or any of the men against Mentzer, or even

knew that Mentzer was inside Spangler's apartment. No rational person would reasonably belief that deadly force was needed to protect Mentzer in this case.

Self-defense and defense of another does not provide justification when a person hunts down another person when there is no immediate danger. Spangler's actions were neither objectively nor subjectively justified and did not merit a defense of another instruction. Therefore the district court had no duty to instruct the jury on defense of another under the facts presented in this case.

Defense of a Dwelling

Spangler also argues the district court erred in failing to grant his request for a defense of a dwelling jury instruction. Again, Spangler provides no specific argument or cite to the record as to what evidence supports his subjective belief that it was necessary to shoot Faustino in order to protect his apartment or that a reasonable person would belief that the use of force was necessary to protect his dwelling. Spangler appears to argue that the entire apartment building is Spangler's dwelling and that Faustino was unlawfully on the third floor of the building. Again, this instruction was not legally or factually appropriate.

"A person is justified in the use of deadly force to prevent or terminate unlawful entry into or attack upon any dwelling, place of work, or occupied vehicle 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 another." K.S.A. 21-5223. The justifiable use of force involves both a subjective and objective element of reasonableness. *McCracken v. Kohl*, 286 Kan. 1114, 1121, 191 P.3d 313 (2008). "He not only had to believe that the victims posed a threat to himself, his dwelling, or his property, but also that a reasonable

person under the same circumstances would have perceived the use of force to be necessary." 286 Kan. at 1121. Spangler does not argue that Faustino posed a threat to his apartment or that he believed it was necessary to shoot Faustino in order to defend his dwelling. Moreover, Spangler does not argue that a reasonable person in this same situation would have believed that it was necessary to use deadly force again Faustino in order to defend his dwelling.

Here, there was no evidence of Spangler's subjective belief that it was necessary to shoot Faustino to defend his apartment. Faustino was from Wichita, had never met Spangler before, and did not know where he lived inside the apartment complex. There was no evidence that Faustino had any idea which apartment was Spangler's or that he asked Gino where Spangler lived. Spangler never testified that he shot Faustino in order to defend his dwelling. There was no evidence that could even indirectly establish that Spangler had a subjective belief that the use of force was necessary to protect his dwelling. While Mentzer testified that she knew there was a lot of money in Spangler's apartment; this was irrelevant and clearly did not establish that Spangler believed it was necessary to defend his dwelling by shooting Faustino. (R. IX, 489.) Moreover, no reasonable person would have believed it was necessary to shoot Faustino, who was unarmed, and at least 50 feet away from the apartment at the time he was shot.

Throughout Spangler's argument he relies on facts that he simply did not know at the time he used the deadly force. Spangler repeatedly refers to the fact that Faustino was armed and intoxicated. However, Spangler testified that he knew that Faustino was not armed at the time he allegedly chased him back up the stairs. There was also no evidence that Spangler knew Faustino had been drinking, or was drunk. The fact that the coroner

testified about Faustino's blood alcohol level does not establish that Spangler knew he was drunk at the time he used deadly force. In fact, there was no testimony from Spangler regarding any of the men were drinking alcohol, stumbling, or any indication that they were drunk. Therefore, Spangler cannot establish that he had a subjective belief that it was necessary to use deadly force to protect his dwelling. *See State v. Bellinger*, 47 Kan.App.2d 776, 278 P.3d 975 (2012) (holding the district court did not err in denying the defendant's request for a defense of property jury instruction when there was no evidence that the victim did any act to interfere with any of the defendant's property or posed an imminent threat to his property).

When looking at the objective prong of the analysis for either defense of another or defense of a dwelling, a person must place themselves in Spangler's position at the time deadly force was used and only use the information he was aware of at that time to consider whether his actions were reasonable. At the time Spangler shot Faustino, all he knew was that Faustino was unarmed and made steps toward him. Spangler did not know that Faustino had been drinking. Spangler also did not know that Mentzer was scared to death inside the apartment. Once Spangler left the apartment with his assault rifle, he never came back. Again, Spangler cannot establish that a rational factfinder believed that it was necessary to use deadly force to protect his dwelling.

Under these facts, a reasonable person would not believe that deadly force was necessary to protect Spangler's dwelling. Spangler's use of force was neither subjectively or objectively justified and did not warrant a defense of a dwelling instruction. Therefore, the district court did not err when it did not instruct the jury on defense of a dwelling.

Harmless Error

However, if this court determines that the requested instructions were factually supported in this case and it was error not to give them, the error was harmless. In order for an error to be harmless the State must prove there was no reasonable probability that the error affected the outcome of the trial. K.S.A. 60-261; *State v. Ward*, 292 Kan. 541, 565, 256 P.3d 801 (2011), *cert. denied* 132 S.Ct. 1594 (2012).

Notably, Spangler does not argue that there was insufficient evidence to support his conviction, and agrees that there was sufficient evidence that he intentionally shot Faustino.

Additionally, the jury was instructed on self-defense in this case and did not find that self-defense applied under these facts, even considering Spangler's testimony that there was a struggle between he and Faustino at the top of the stairs. If the jury rejected Spangler's claim of self-defense, that was supported by his own testimony, how could there be any reasonable probability that the jury would have found that either the defense of another or defense of a dwelling, which was unsupported by his testimony, applied in this case?

Spangler cites to the dissent in *State v. Bellinger*, 47 Kan.App.2d 776, 278 P.3d 975 (2012), as support for his harmless error argument. As noted by Spangler, *Bellinger* is not analogous and the dissent is not binding authority on his court. In fact, *Bellinger* supports the State's contention that a defense of a dwelling was not warranted because there was no evidence of the defendant's subjective belief that it was necessary to use such force. Under *Bellinger*, the district court did not err in refusing to instruct the jury on defense of property. The jury in this case was instructed on the relevant law.

Therefore, even if the instructions were legally and factually appropriate, there was no real possibility that the verdict would have been different had these instructions been given.

CONCLUSION

For the above and foregoing reasons, the State respectfully requests that the Kansas Court of Appeals affirm Spangler's conviction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that service of the above and foregoing **Brief of Appellee** was made by mailing **two (2) true and correct copies**, postage prepaid, on this 23rd day of December, 2014, to:

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and on that date **sixteen (16) copies** were hand delivered to the Clerk of the Appellate Courts.

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