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DOUGLAS T. SHIMA
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No. 113869

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS
PLAINTIFF/APPELLEE

V.

STEPHEN ALAN MACOMBER
DEFENDANT/APPELLANT

SUPPLEMENTAL BRIEF OF APPELLANT, pro se

APPEAL FROM THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
HONORABLE DAVID B. DEBENHAM, JUDGE
DISTRICT COURT CASE NO. 2010 CR 1053

Respectfully Submitted,

Stephen A. Macomber, pro se
#44362
P.O. Box 311 – EDCF
El Dorado, KS 67042

ORAL ARGUMENT REQUESTED: 30 Minutes

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SUPPLEMENTAL STATEMENT OF FACTS

Cassandra Skirvin Taylor testified that Ryan Lofton (Hereafter, "Ryan") continued to have contact with [Macomber's] white car after [Ryan's wife] Risa Lofton (Hereafter, "Risa") got in the passenger side (R. Vol.36, at 344); she couldn't hear Ryan talking while he was by the car (R. Vol.36, at 344 and 356); [Macomber] white male never gets out of car (R. Vol.36, at 346); she saw struggling before the shot, didn't know what Ryan was doing but he had his head in the car and struggle was between either Ryan and Risa or Ryan and Steve (R. Vol.36, at 348, 357, 362 and 363); and Ryan was struggling to get Risa out of the car (R. Vol.36, at 357); and stated that Ryan was trying to get into Macomber's vehicle and never mentioning that Ryan was ever trying to run away from the Defendant or his vehicle. (R. Vol. 31 at 11-12 and 15)

Joshua Kenolly stated and testified that Ryan was at the car when he heard the gunshot (R. Vol.36, at 469); he didn't see Ryan at the time of the shot (R. Vol.36, at 470); Ryan went to driver's side after he was unsuccessful preventing Risa from leaving there was a little tussle and Ryan stated what are you going to do – shoot me? Ryan was not even a foot away from Macomber's vehicle standing right over the open driver's side window (R. Vol.37, at 523-25) or (R. Vol. 10, at 11-12); he was reaching in the car at Steve where a tussle ensued. (R. Vol. 31, at 9). [Answer to the State's leading question at the as to whether or not Ryan was trying to walk away at the time of the shot?]: "He was standing by the car still." R. Vol. 10, at 13) and (R. Vol.37, at 525); that the incident lasted a total of five seconds (R. Vol. 10, at 17) Kenolly's statements and testimony were supported by the testimony of **TPD Det. Roger A. Smith** (R. Vol.36, at 506). **Defense Investigator Don Ballard** (R. Vol.36, at 482-86).

Coroner, Dr. Donald Pojman's testimony was that the he range of fire was indeterminate but that an intervening material between the barrel of the gun would prevent stippling and soot that would be indicative of a close range shot (from 18" to 36") and that he was never given information that the gun was fired through a Crown Royal Bag (R. Vol. 24, at 323); and (R. Vol. 35, at 65-66); Range of fire could have been determined to be close if there was

something between the barrel of the gun and skin (R. Vol. 35, at 101 and 106); Ryan's gunshot wound was to his chest and the report wouldn't say he was shot in the back – the wound was closer to his side than back (R. Vol. 35, at 91 and 95); A non-reactive ferrotrace test of Ryan's hands is meaningless. (R. Vol. 35, at 81); Ryan tested positive for methamphetamine at levels where deaths had been recorded and that the effects of this drug can cause people to be agitated , jittery and act erratically (R. Vol. 24, at 303-05); Dr. Pojman agreed that it was possible that Ryan's gunshot wound was consistent with physiological path that the bullet that traveled through him, as a result of reaching in a car, pulling on a firearm, or a hand that was holding a firearm, releasing it as he was pulling [i.e., the defense theory]. (R. Vol. 26, at 793); see also *Traverse / Reply* (R. Vol. 9, at 756: no. 29).

Risa Lofton testified: Ryan was angry but she couldn't remember the words Ryan spoke to Steve (R. Vol. 27, at 870); when Ryan is smoking meth and is angry that he gets agitated (R. Vol 27, at 872); that Macomber pulled out a Crown Royal bag that she knew was a gun and that the bag was never taken off the gun (R. Vol. 24, at 179-81 and 184); (R. Vol. 27, at 879) and (R. Vol. 35, at 178); she thinks that Ryan and Macomber were shouting at each other as Ryan walked to the car and couldn't remember what Ryan was doing when she was grabbing Macomber's arm but that he was standing there [referring to the driver's side door] (R. Vol. 24, at 183); she couldn't recall Ryan saying anything but he might have (R. Vol. 24, at 261); she was getting out of the car to push her husband out of the way (R. Vol. 24, at 185) and (R. Vol. 35, at 181) she didn't see Ryan fall or the gun being shot because of Crown Royal Bag. (R. Vol. 24, at 265).

Macomber's statements and testimony were documented **in** *Defendant's Traverese / Reply to State's Response to State's Motion to Dismiss* (R. Vol. 9, at 755-56): He told **Hedy Saville** (R. Vol. 35, at 228) as well as multiple law enforcement officers that Ryan threatened to shoot him (R. Vol. 23, at 52-3) and (R. Vol. 27, at 979, 986-988); he claimed Ryan tried to unlock the his door and grab the gun from him (R. Vol. 26, at 500) and (R. Vol. 27, at 988); the gun was in a Crown Royal Bag and Ryan was yanking the bag/gun out the window (R. Vol. 27,

at 1044); that he thought about firing a round to get Ryan away from the car (R. Vol. 27, at 989)

KBI Agents: Steve Bundy, testified that Macomber stated that the gun was in a Crown Royal Bag and that the bag was in Macomber's vehicle (R. Vol. 36, at 392-93); (States Exhibit 2: R. Vol. 36, at 395); and **Mark Malick**, testified that Macomber stated that Ryan said that he was going to shoot him and that he shot Ryan when he reached for the gun. Macomber stated that Ryan tried to grab the gun (R. Vol. 36, at 325, 326 and 328).

Defense Firearm Expert, John Cayton examined the Crown Royal bag and found damage consistent with a muzzle blast and a bullet tearing a hole in the end (R. Vol. 36, at 555).

I. THE JURY WAS IMPROPERLY INSTRUCTED, BOTH THE INDIVIDUAL AND CUMULATIVE AFFECT OF THESE ERRORS DENIED MACOMBER A FAIR TRIAL.

Appellate Review Standard for Instructional Error:

(1) reviewability considering preservation of the issue at trial and jurisdiction; (2) legal appropriateness of the instruction; (3) factual support in the evidence for the instruction; and (4) harmlessness of any actual error, utilizing the test and degree of certainty set forth in *State v. Ward*, 292 Kan. 541, 256 P. 3d 801 (2011), *cert denied* 132 S. Ct. 1594, L. Ed. 2d 205 (2012). See *State v. Knox*, 301 Kan. 671, 677, 347 P. 3d 656 (2015).

> *State v. Appleby*, 289 Kan. 1017, 221 P. 3d 525 (2009): "When a party has objected to an instruction at trial, the instruction will be examined on appeal to determine if it properly and fairly states the law as applied to the facts of the case and could not have reasonably misled the jury. In making this determination an appellate court is required to consider the instructions as a whole and not isolate any one instruction." 289 Kan. at 1059.
>
> *State v. Barber*, 302 Kan. 367, 353 P. 3d 1108 (2015): "[a] party fails to preserve an objection to the jury instructions by not raising the argument before the trial court, we will still review whether the instruction was legally and factually appropriate but will reverse only for 'clear error.' (Citation omitted.) An instruction is clearly erroneous when "'the reviewing court is firmly convinced that the jury would have reached a different verdict had the instruction error not occurred.'" 302 Kan. at 377.

a. Trial Court erred by giving jury instruction on lesser included offense of involuntary manslaughter.

> K.S.A. 22-3414(3) states: [I]n cases where there is some evidence which would reasonably justify a convictionof some lesser included crime as provided for in subsection (b) of K.S.A. 21-5109, and amendments thereto, the judge *shall* instruct the jury as to the crime charged and any such lesser included crime. (Emphasis added.)

The Defendant objected to lesser included offense instruction of involuntary manslaughter, stating that there was only evidence of an intentional shooting. At the first trial, evidence was presented that the firearm discharged accidentally. However, at the second trial no accidental discharge evidence was presented. (R. Vol. 36, at 605-08, and 612). Consider the factual findings by trial court at first trial:

> "My view of the evidence at this point in time is either there is an intentional act or there is an accidental discharge of this weapon. If there is an accidental discharge of this weapon and the jury so finds, then the defendant is not guilty of either premeditated first-degree murder or second-degree murder intentional either because he didn't have the intent to commit those offenses. (R. Vol. 28, at 1138).
> "My view of the evidence in this case that I agree with Mr. Macomber, that there is not sufficient evidence that was introduced by the State or defense in this matter that would support the Court giving or the jury finding that the defendant was guilty of either voluntary manslaughter or second degree reckless in this case." (*Id.*,at 1140).

The State stipulated that their evidence would not change, *Response to Motion to Dismiss*, filed 01/15/ 2015 (R. Vol. 9, at 725). Without specificity, the trial court found evidence supports the lesser included offense instructions. (R. Vol. 36, at 642-43). At closing, the defense conceded the act was intentional; a fact the State also relied upon. (R. Vol. 37, at 663-64, 679, and 688).

Ignoring K.S.A. 22-3414(3), the trial court gave the State's favored lesser included offense instruction at each trial. First, the State requested a sole lesser included offense instruction of intentional, second-degree murder, a strategy allowing for a comparably severe sentence in the event of a compromise verdict. At the second trial , the State got a double dip at favorable instructions. The evidence was the same – only the State's interest changed, now to salvage any conviction they hedged by asking for the full-range of homicide instructions.

The use of deadly force is not defined by an intent to kill, rather, the use of deadly force is defined by the underlying act of applying physical force which is likely to cause death or great bodily harm. See K.S.A. 21-5221(a) , Use of force; definitions:

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

the actions of another.
(2) "Use of deadly force" means the application of any physical force described in paragraph (1) which is likely to cause death or great bodily harm to a person. Any threat to cause death or great bodily harm, including, but not limited to, by the display or production of a weapon, shall not constitute the use of deadly force, so long as the actor's purpose is limited to creating an apprehension that the actor will, if necessary, use deadly force in defense of such actor or another or to affect a lawful arrest.

No evidence was presented of unintentional conduct, rather there was a display of force followed by an application of force likely to cause death or great bodily harm. The instruction was factually inappropriate and likely misled the jury denying the Defendant a fair trial.

b. Trial Court erred by not giving Defendant's requested instructions regarding his theory of defense, including:

i. failing to give jury use of force presumption regarding an occupied vehicle as required by K.S.A. 21-5224;

State v. Andrew, 301 Kan. 36, 340 P. 3d 476 (2014):"[w]e recognize that the purpose of jury instructions is to state the law as applied to the facts of the case. *State v. Torres*, 294 Kan. 135, 273 P. 3d 729 (2012) (jury instructions fail their purpose if they 'omit[] words that may be essential to a clear statement of the law'). This leads to the question of whether the jury could fully understand the law that dictates the outcome of this case without understanding whether Garlach acted lawfully when he incited a reaction from Andrew. The trial judge and the Court of Appeals majority concluded that both instructions—defense of a dwelling and defense of self—were necessary to a full understanding of the law." 301 Kan. at 42-43.

State v. Knox, 301 Kan. 671, 347 P. 3d 656 (2015): "A requested instruction relating to a theory of defense, such as self-defense, is factually appropriate if there is sufficient evidence, when viewed in the light most favorable to the defendant, for a rational factfinder to find for the defendant on that theory." 301 Kan. at 678; *State v. Farley*, 225 Kan. 127, 587 P. 2d 337 (1978): (Instructions relating to the appellant's theories of defense were clearly erroneous based on the factual circumstances where *Farley* presented evidence showing he was justified in attempting to terminate an unlawful entry). *State v. Scobee*, 242 Kan. 421, 429, 748 P. 2d 862 (1988): (the court reversed the defendant's involuntary manslaughter conviction based on the trial court's failure to give the no duty to retreat instruction as a supplement to the general self-defense instruction.) and K.S.A. 21-5231, in relevant part, provides:

(a) For the purposes of ... K.S.A. 21-5222 and 21-5223, and amendments thereto,

a person is presumed to have a reasonable belief that deadly force is necessary to prevent imminent death or great bodily harm to such a person or another if:

(1) The person against whom the force is used, at the time force is used:

(A) Is unlawfully or forcefully entering, or has unlawfully or forcefully entered, and is present within, the dwelling, place of work or occupied vehicle of the person using force; or

(B) has removed or is attempting to remove another person against such other person's will from the dwelling, place of work or occupied vehicle of the person using force; and

(2) the person using force knows or has reason to believe that any of the conditions set forth in paragraph (1) is occurring or has occurred....

Defendant proposed jury a modified version of the use of force in defense of an occupied vehicle instruction as stated in PIK 4th 52.210 (R. Vol. 40, at 3, 5-6); later defense counsel requested PIK 4th 52.200 Use of force in defense of a person – including the presumption described in the final bracketed paragraphs of the instruction based on K.S.A. 21-5224. (R. Vol. 37, at 621). The trial court denied presumption portion of the instruction, stating that the facts didn't establish that Ryan was attempting to remove his wife from the vehicle and that Ryan wasn't presently within the occupied vehicle. (R. Vol. 37, at 628).

The Court of Appeals addressed a trial court's failure to give an instruction based on the use of force presumption pursuant to K.S.A. 2010 Supp. 21-3212a. [recodified as K.S.A. 21-5224] finding it does not substantially change how juries consider the law of self-defense in Kansas. *Pennington v. State*, (no. 108,236) 310 P. 3d 1078; 2013 Kan. App. Unpub. LEXIS 897. **<Attachment A>** The panel found the statutory presumption was factually inapplicable to *Pennington*, *at 11, offering no view whether the statute actually requires instructing jurors on the presumption but recognizing that the committee on criminal pattern instructions fashioned PIK Crim 4th 52.210 to be used now when the presumption is factually applicable in a given case *at 14-15. This panel went beyond the plain language of K.S.A. 2010 Supp. 21-3212a in its analysis, considering that the statue was drawn from a model of this legislation various organizations have promoted across the country and considering the impact the presumption would have in jurisdictions treating self-defense as a true affirmative defense, *at 15.

State v. Holt, 298 Kan. 469, 313 P. 3d 826 (2013): Statutory interpretation is a question of law, and this court's review is unlimited... When interpreting statutes,

we are mindful that ""[t]he fundamental rule to which all other rules are subordinate is that the intent of the legislature governs if that intent can be ascertained. When language is plain and unambiguous, there is no need to resort to statutory construction. An appellate court merely interprets the language as it appears; it is not free to speculate and cannot read into the statute language not readily found there.""[Citations omitted.] 298 Kan. at 474.

State v. Englund, 50 Kan. App. 2d 123, 329 P. 3d 502 (2014): "[W]e must construe statutes to avoid unreasonable or absurd results and *presume the legislature does not intend to enact meaningless legislation. State v. Turner*, 293 Kan. 1085, 1088, 272 P. 3d 19 (2012). In addition, *when the legislature revises an existing law, we presume the legislature intended to change the law as it existed prior to the amendment and acted with full knowledge of the existing law.* [Citations omitted.] Finally we are mindful of the rule of lenity under which criminal statutes are generally construed strictly in favor of the accused. This rule is constrained by the principle that the interpretation of a statute must be reasonable and sensible to effect the legislative design and intent of law. The rule of lenity arises only when there is a reasonable doubt of the statute's meaning. *State v. Cameron*, 294 Kan . 884, 899, 281 P. 3d 143 (2012)." (Emphasis added.) 50 Kan. App. 2d at 126.

"[w]e have a conflict between a general principle of law (K.S.A. 20-3001a) and a more specific enactment dealing with the overall jurisdiction of judges, but their specific jurisdiction on issuing search warrants (K.S.A. 22-2205). In this situation, the more specific statute controls. *Turner*, 293 Kan. at 1088 Further, when seeking to determine legislative intent, we must consider various provisions in pari materia with a view to reconciling and bringing the provisions into workable harmony if possible. *Coman*, 294 Kan. at 93." 50 Kan. App. 2d at 135.

The burden of proof, pursuant to K.S.A. 21-5108 (a general principle of law) and a use of force presumption, pursuant to K.S.A. 21-5224 (a more specific enactment) are not conflicting principles. The *Pennington* Court reasoned: "[T]he jury instruction reflecting the presumption merely highlights a portion of what has been the law of self-defense and does not alter the substance of the law." 310 P. 3d 1078, *at 16. However, a legally sufficient claim of self-defense requires both a subjective belief on the part of the defendant that the use of force was necessary and an objective determination that a reasonable person would have come to the same conclusion. *State v. Walters*, 284 Kan. 1, 9, 159 P. 3d 174 (2007) . K.S.A. 21-5224 instructs the jury to presume the defendant's actions are objectively reasonable if certain predicate facts exist.

Even when viewing the evidence in the light most favorable to the Defendant, the trial court's factual findings and legal conclusions can't be reconciled with the plethora of evidence supporting the defense theory, making the instruction factually appropriate. The profound impact this instruction would likely have on the verdict demonstrates Macomber was denied a fail trial.

ii. failing to give jury statutory definitions of "use of force" per K.S.A. 21-5221.

Defendant requested K.S.A. 21-5221(a) use of force definitions: [*Supp. Br.*, Issue I(a); at pg 3, supra.] were necessary to explain to the jury that Ryan's conduct could be legally defined as either forceful and unlawful. The court declined to give the instruction erroneously concluding that giving the use-of-force definitions would minimize the rationalization of the Defendant and a reasonable person ... It lowers the standard of force. (R. Vol. 37, at 639-40). This likely misled the jury by preventing the jury from having enough information to weigh the facts with the law regarding this case and denying the Defendant a fair trial.

c. It was a clear error not to give the jury PIK Crim. 4Th, Inference of Intent Instruction.

PIK Crim 4th 54.01, was omitted without objection by the Defendant due to a clerical oversight as the Defendant anticipated the State's Proposed Jury Instruction # 9, (R. Vol. 40, at 9) would be given. Currently, Pattern Instructions for Kansas, Principles for Criminal Liability are now listed in Chapter 52.000. In PIK Crim 4th 52.290, Inference of Intent, the committee recommends that no instruction be given because the concept is now incorporated in the definition of intentional conduct in PIK 4th 52.010 and K.S.A. 21-5202(h), which states:

> "A person acts 'intentionally,' or 'with intent,' with respect to the nature of such person's conduct or to a result of such person's conduct when it is such person's conscious objective or desire to *engage in the conduct or cause the result*. All crimes defined in this code which the mental culpability requirement is expressed as 'intentionally' or 'with intent' are specific intent crimes. A crime may provide that any other culpability requirement is specific intent." (Emphasis added.)

However, PIK Crim 4th 54.01coincides with how K.S.A. 1993 Supp. 21-3201(b)) defined intentional conduct, at trial, but was not incorporated in the instruction given :

> "Intentional conduct is conduct that is purposeful and willful and not accidental. As used in this code, the terms 'knowing,' 'willful,' 'purposeful,' and 'on purpose'". (*Instruction #13*, R. Vol. 37, at 654)

> PIK Crim 4th 54.01 which states: "Ordinarily, a person intends all of the usual consequences of (his)(her) voluntary acts. This inference may be considered by you along with all the other evidence in the case You may accept or reject it in determining whether the State has met itsburden to prove the required criminal intent of the defendant. The burden never shifts to the defendant."

The jury was misled because they weren't given the option of presuming the Defendant's

underlying conduct, legally, constitutes an intentional act. It is reasonably certain the jury would have presumed the Defendant intended the consequences of his voluntary act (applying deadly force), which would have excluded a finding of an unintentional death.

d. It was a clear error to not instruct the jury pursuant to K.S.A. 2010 Supp. 21-3404(c)

Defendant didn't object that PIK 3d 56.06 (f) "during the commission of a lawful act in an unlawful manner" of the involuntary manslaughter instruction was not given. Instruction #17:

> "If you do not agree that the defendant is guilty of voluntary manslaughter, you should then consider the lesser included offense of involuntary manslaughter. To establish this charge, each of the following claims must be proved:
> 1. That the defendant unintentionally killed Ryan Keith Lofton;
> 2. That it was done recklessly; and
> 3. That this act occurred on or about the 7th day of June, 2010, in Shawnee County, KS
>
> Reckless conduct means conduct done under circumstances that show a realization of the imminence of danger to the person of another and conscious and unjustifiable disregard of that danger. The terms 'gross negligence', 'culpable negligence', 'wanton negligence', and 'wantonness' are included within 'reckless'." (R. Vol. 37, at 656-67).
>
> K.S.A. 2010 Supp. 21-3404: "Involuntary manslaughter is the unintentional killing of a human being committed:
> (a) Recklessly;
> (b) in the commission of, or attempt to commit, or flight from any felony, other than an inherently dangerous felony as defined in K.S.A. 21-3436 and amendments thereto, that is enacted for the protection of human life or safety or a misdemeanor that is enacted for the protection of human life or safety, including acts described in K.S.A.8-1567 and amendments thereto; or
> (c) during the commission of a lawful act in an unlawful manner."
>
> K.S.A. 1993 Supp. 21-3201(c) in relevant part, defines: "**Reckless conduct** is conduct under circumstances that show a realization of the imminence of danger to the person of another and a conscious and unjustifiable disregard of that danger...." **Intentional conduct** was previously defined (Supp. Br, Issue I(d), supra.)

No evidence suggested that the Defendant acted unintentionally or recklessly and failing to instruct the jury as to the only alternative means applicable, defined in K.S.A. 2010 Supp. 21-3404(c), is a clear error. See also Issue II. Insufficient evidence, *infra.*

II. THERE WAS INSUFFICIENT EVIDENCE TO SHOW PROBABLE CAUSE THAT THE DEFENDANT'S USE-OF-DEADLY-FORCE WAS NOT JUSTIFIED (THUS IMMUNE FROM PROSECUTION); AND INSUFFICIENT EVIDENCE TO SUPPORT MACOMBER'S CONVICTION FOR INVOLUNTARY MANSLAUGHTER.

Appellate Review Standards

District Court's denial of use-of-force, immunity, based on sufficiency of evidence is not

established. The standard for a similar to a claim under K.S.A. 60-1507 seems appropriate here. *State v. Adams*, 297 Kan. 665, 669, 304 P. 3d 311 (2013): (Appellate court's review the district court's factual findings for substantial competent evidence and determine whether the factual findings support the district court's conclusions of law. With a *de novo* standard to the conclusions of law.); likewise, the standard for when the State appeals the dismissal of a complaint, an appellate court's review of an order discharging the defendant for lack of probable cause is *de novo*. *State v. Evans*, 51 Kan. App. 2d 1043, 1048, 360 P. 3d 1086 (2015).

When sufficiency of the evidence is challenged on appeal this court reviews all the evidence in the light most favorable to the prosecution and determines whether a rational factfinder could have found the defendant guilty beyond a reasonable doubt, *State v. Williams*, 299 Kan. 509, 525, 324 P. 3d 1078 (2014). In determining whether there is sufficient evidence to support a conviction, the appellate court generally will not reweigh the evidence or assess the credibility of witnesses. 299 Kan. at 525. Only in rare cases where the testimony is so incredible that a guilty verdict is reversed. *State v. Matlock*, 233 Kan. 1, 4-6, 660 P. 2d 945 (1983).

Factual and Procedural History

Defendant filed a *Motion to Dismiss* based on use-of-force immunity pursuant to K.S.A. 21-5231 (R. Vol. 8, at 673-77). The State responded (R. Vol. 8, at 720-27), followed by the *Defendant's Traverse / Reply to State's Response to Motion to Dismiss* (R. Vol. 8, at 750-59). In denying the *Motion to Dismiss*, the district court considered the State's response, the Defendant's traverse, everything listed that tied to both the preliminary hearing and trial transcripts, as well as the testimony from the Defendant's witnesses presented at the evidentiary hearing held on 02/26/2015 (R. Vol. 32, at 4-5) making the following factual findings and legal conclusions:

> "I find that the use of force was not necessary under the factual circumstances that were before the Court. It's beyond what a reasonable person under the circumstances would have believed was necessary. I also found that the defendant's statement during the point in time of the trial that he testified that Ryan Lofton had had threatened to shoot him was not a credible statement. That doesn't mean it doesn't come in for the jury to weigh at that point in time. I weighed it for a specific purpose, and that was the purpose on the motion to dismiss based on immunity at this point in time. The defendant's version that Ryan Lofton was reaching into the car when the

gun went off is not supported by the scientific evidence or the factual evidence in this case. There is quite simply a break in time between when Mr. Lofton was reaching in the car to when the victim, Mr. Lofton was shot in this case. There is no evidence that Mr. Lofton had a gun. In fact, the defendant admits that, and he was pretty sure he didn't have a gun at one point in time and later he testified that he did not have a gun, referring to Mr. Lofton." (R. Vol. 32, at 5-6).

"Any way, what I find is that the State has met its burden in this particular case and that was they had to establish that the force was not justified as part of the probable cause determination. And I find that they have met that burden and I'm dismissing - - or denying, I should say, the defendant's motion to dismiss based on immunity grounds in this case." (R. Vol. 32, at 6).

Argument and Authority

State v. Hardy, 51 Kan. App. 2d 296, 347 P. 3d 222 (2015):"By statute, Kansas extends immunity from criminal prosecution to persons acting in self-defense. K.S.A. 2014 Supp. 21-5231. the statute, however, fails to describe how district courts should go about deciding a request for that protection. The Kansas Supreme Court has held the State must establish probable cause to show that a defendant has not acted in lawful self-defense. *State v. Ultreras*, 296 Kan. 828, 845, 295 P. 3d 1020 (2013). But the court expressly declined to outline the procedures for presenting or resolving immunity claims. This case requires us to fill that void. Drawing from cues from *Ultreras*, we find a district court should conduct an evidentiary hearing procedurally comparable to a preliminary examination, to the rules of evidence apply and conflicting evidence should be resolved in favor of the State...." 51 Kan. App. 2d at 296.

K.S.A. 2014 Supp. 21-5231 in relevant part provides: "(a) A person who uses force which, subject to the provisions of K.S.A. 2014 Supp. 21-5226,and amendments thereto, is justified pursuant to K.S.A. 2014 Supp. 21-5222, 21-5223, or 21-5225, 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."

"(c) A prosecutor may commence a criminal prosecution upon a determination of probable cause."

State v. Smith, 299 Kan. 962, 327 P. 3d 441 (2014): "A district court abuses its discretion when: (1) no reasonable person would take the view adopted by the judge; (2) a ruling is based on an error of law; or (3) substantial competent evidence does not support a finding of fact on which the exercise of discretion is based." 299 Kan. at 970. Substantial competent evidence is defined as: "such legal and relevant evidence as a reasonable person might accept as being sufficient to support a conclusion." See *State v. Luna*, 271 Kan. 573, 575, 24 P. 3d 125 (2001); or evidence that exhibits both relevance and substance and provides a substantial factual basis to reasonably resolve the issues. See *Wilkins v. State*, 286 Kan. 971, 980, 190 P. 3d 957 (2008).

The trial court abused its discretion in finding: first, that Macomber's version of events

weren't compatible the factual and scientific evidence – this finding is unreasonable in light of the eyewitness testimony and that of Dr. Pojman; and second, a break in time occurred between when Ryan reached in the car and when he was shot. "A break in time" is only accomplished by the court improperly filling a void or gap in the evidence. No evidence was presented regarding the dimension of the timing of the events in relation to each other, suggesting that Ryan's actions immediately preceding the shooting were not virtually simultaneous.

The district court fell into a trap of filling in the evidentiary gap of relating to the timing of the events surrounding the shooting. The only prior suggestion of a "break in time" occurred at the preliminary examination, where the State misrepresented facts in response to a defense objection that the State failed to show evidence of premeditation. Referring to Joshua Kenolly's testimony (R. Vol. 10, at 13) the State argued, when the victim says what are you going to do now, shoot me, and turns around and walks away, that is sufficient evidence for premeditation. (R. Vol. 10, at 58-60). The fallacy of this argument seems to have perpetuated itself into the District Court's decision denying him immunity from prosecution, as no evidence remotely supports the district court's findings.

Finally, the district court abused its discretion because the immunity determination was to be made in regard to his prosecution for intentional, second-degree murder or, i.e. use-of-deadly-force. The court found that the Defendant's statement during the point in time of the trial that he testified that Ryan Lofton had threatened to shoot him was not a credible statement. This was an error of law as this determination related to the Defendant's initial *display of force*, and not the purpose of the immunity hearing. The immunity determination was for a use-of- deadly-force, which is accomplished only with a predicate *application of physical force*. Even with deference given to the court's credibility determination – its conclusion is absurd, no reasonable person would find the Defendant's statement not credible regarding Ryan threatening to shoot him. No other theory or motive was ever presented. Ryan was under the influence of a large amount of methamphetamine. Prior to the Defendant arriving, Ryan had been reported to be

angry and fighting with his wife. Ryan was upset that his wife was leaving and was displaying aggressive behavior. Before receiving discovery and arguably before having a motive to lie based on his belief that he would die in a stand-off with police, Macomber made multiple consistent statements claiming that Ryan threatened to shoot him. Without conflicting evidence, the court's findings are unreasonable.

State v. Ultreras, 296 Kan. 828, 845, 295 P. 3d 1020 (2013): (Established that the State bears the burden of establishing proof that the force used by the defendant was not justified as part of the probable cause determination under the immunity statute.) The State failed to meet their burden because it cannot be discerned from the evidence presented if there was "a break in time" in relation to any of Ryan's immediate actions prior to his death.

The district court considered K.S.A. 21-5224, the Use-of-Force Presumption (Occupied Vehicle) and K.S.A. 21-5222 (c) Defense of a Person – No Duty to Retreat Clause in considering the *Motion to Dismiss*, though it did not apply these concepts properly. *State v. Hardy*, 51 Kan. App. 2d 296, 303-04 , 347 P. 3d 222 (2015) came out after the Defendant was denied immunity. *Hardy* confirms it was correct to consider both these concepts as they weren't inapplicable under any version of the facts. The presumption that Macomber's use-of-deadly-force was reasonable raises the bar to show probable cause that his use-of-deadly-force was unlawful. Ryan had forcefully and unlawfully entered or was attempting entering the vehicle occupied by Macomber by reaching inside the vehicle, attempting to unlock the door, tussling or struggling with the defendant and grabbing the gun. However, the district court lowered the State's burden to show that probable cause the Defendant's use-of-deadly-force was not justified because the evidence, in the light most favorable to the State, overwhelmingly supports the Defendant's version of events and void of evidence showing Ryan was not reaching into the Defendant's car or inside it car at the time he was shot.

In regard to making a use-of-force immunity determination, more traction should be given to the dissenting opinion in *State v. Evans*, 51 Kan. App. 2d 1043, 1048, 360 P. 3d 1086

(2015) (Dissent by Arnold-Burger, J.):

> "Viewing evidence in light most favorable to State does not mean disregarding all evidence that detracts from the State's position. It also does not require the elimination of all factual disputes as a matter of law. Instead the totality of the circumstances must be considered. A defendant has the right to be present and to introduce evidence on his or her own behalf. K.S.A. 2014 Supp. 22-2902(3); see *State v. Jones*, 290 Kan. 373, 379, 228 P. 3d 394 (2010). These rights imply that the defendant has a right to present a defense at the preliminary hearing, and this right has little meaning if the judge is not allowed to consider the evidence presented." *at 28-29
>
> "...Even in *Ultreras*, the Supreme Court noted that '[e]vidence of justification . . . becomes a consideration in deciding whether the State has met that burden' to show that the defendant's action were unlawful." 296 Kan. at 844. * at 29.
>
> Because the statute and the Supreme Court have failed to provide guidanceon the manner in which the district court is to consider the evidence of immunity, we are left to our own devices. The majority believes that the situation is analogous to a preliminary hearing. But there is merit to Evans' position that such an approach renders the statute meaningless as the State will always be able to present *some evidence* that the defendant failed to act justifiably, usually in the form of the victim's statement. This is certainly one reason to question whether the current standard is the correct one. It is presumed that the legislature does not intend to adopt useless or meaningless legislation. See *State v. Van Hoet*, 277 Kan. 815, 826, 89 P. 3d 606 (2004).
>
> Moreover, the majority concedes that if the district court was not required to view the conflicting evidence in the a light favoring the State, there was sufficient evidence presented to the district court to support its finding that the State failed to establish probable cause that Evans' use of force was unlawful. In other words, the defendant's absolute immunity from prosecution in this case rests solely on whether the district court is allowed to weigh conflicting evidence. This is the second reason that it is important to determine whether the standard used by the majority is the correct one.
>
> Immunity, as defined by Black's Law Dictionary 867 (10th ed. 2014), is "[a]ny exemption from a duty, liability, or service of process." ... Self-defense and immunity are clearly distinct concepts. If immunity were the same as self-defense, there would have been no need to adopt a specific immunity statute because K.S.A. 2014 Supp. 21-5222 would have sufficed. Perhaps most importantly, because K.S.A. 2014 Supp. 21-5231(b) grants immunity from arrest and prosecution rather than a mere defense to a liability, 'it is effectively lost if a case is erroneously permitted to go to trial.' *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985).

Regardless of which standard is used for viewing the evidence presented at an immunity hearing, under either standard, the State has failed to show probable cause that the Defendant's use-of-deadly-force was unlawful, making the Defendant immune from prosecution.

Alternatively, with no evidence of unintentional or reckless conduct, there was insufficient evidence to support a conviction as the essential element necessary to prove involuntary manslaughter was omitted. See (*Supp. Br.*, Issue I(d) at 9, supra.).

III. CUMULATIVE EFFECT OF ERRORS DENIED DEFENDANT A FAIR TRIAL.

Cumulative error test: "Whether the totality of the 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. Edwards*, 291 Kan 532, 553, 243 P. 3d 683 (2010). "This Court uses a de novo standard for determining whether the totality of the circumstances prejudice a defendant and denied the defendant a fair trial based on cumulative error." *State v. Brown*, 298 Kan. 1040, 1056, 318 P. 3d 1005 (2014). If not individually the trial errors collectively denied the Defendant a fair trial.

CONCLUSION

WHEREFORE the reasons stated HEREIN the Appellant prays this Court will reverse his conviction for involuntary manslaughter declaring him immune from prosecution, or in alternative, remand back to the district court for a new trial with appropriate orders.

Respectfully Submitted,

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CERTIFICATE OF MAILING AND SERVICE

I hereby certify that on the 28th day of **March ,2016,** that the original and 15 copies of the above and foregoing Supplemental Brief of the Appellant was sent to the Clerk of the Appellate Courts and that 2 copies were served on the Shawnee County District Attorney and the Attorney General of Kansas, all by following EDCF and KDOC policy regarding legal mail and thus depositing the same in the United States Mail, first class postage prepaid, addressed to:

Clerk of the Appellate Courts
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Topeka, KS 66612-1507

Shawnee Co. District Attorney
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Stephen A. Macomber, pro se

RANDALL PENNINGTON, Appellant, v. STATE OF KANSAS, Appellee.

No. 108,236

COURT OF APPEALS OF KANSAS

310 P.3d 1078; 2013 Kan. App. Unpub. LEXIS 897

October 4, 2013, Opinion Filed

NOTICE: NOT DESIGNATED FOR PUBLICATION.

PLEASE CONSULT THE KANSAS RULES FOR CITATION OF UNPUBLISHED OPINIONS.

PUBLISHED IN TABLE FORMAT IN THE PACIFIC REPORTER.

SUBSEQUENT HISTORY: Review denied by Pennington v. State, 2014 Kan. LEXIS 518 (Kan., Aug. 28, 2014)

PRIOR HISTORY: [*1]
Appeal from Wyandotte District Court; ROBERT P. BURNS, judge.
State v. Pennington, 43 Kan. App. 2d 446, 227 P.3d 978, 2010 Kan. App. LEXIS 30 (2010)

DISPOSITION: Affirmed.

CORE TERMS: self-defense, reasonable doubt, jurors, jury instructions, statutory presumption, unlawfully, presume, use of force, factual circumstances, living room, affirmative defense, forcefully, factually, objectively reasonable, deadly force, direct appeal, retroactive, detectives, use of deadly force, use of force, reasonable belief, person using, necessary to prevent, imminent death, bodily harm, substantively, correctly, presumed, killing, murder

COUNSEL: Jean K. Gilles Phillips, supervising attorney, and Alice Craig, of Paul E. Wilson Project for Innocence And Post-Conviction Remedies, of Lawrence, for appellant.

Casey Meyer and Sheryl L. Lidtke, assistant district attorneys, Jerome E. Gorman, district attorney, and Derek Schmidt, attorney general, for appellee.

JUDGES: Before MALONE, C.J., ATCHESON, J., and LARSON, S.J.

OPINION

MEMORANDUM OPINION

Per Curiam: Randall Pennington appeals the Wyandotte County District Court's denial of his motion under K.S.A. 60-1507 challenging his conviction for intentional second-degree murder. Pennington contends the jury should have been instructed on **self-defense** in conformity with a retroactive statutory change creating a presumption that the use of force is objectively reasonable in certain factual circumstances. Pennington was not entitled to the benefit of the presumption given the facts in his case. Even if he were, the presumption does not substantively change how juries consider the law of **self-defense** in Kansas, so Pennington suffered no legal prejudice. We, therefore, affirm

juries consider the law of **self-defense** in Kansas, so Pennington suffered no legal prejudice. We, therefore, affirm the district court.

The district court held a nonevidentiary hearing **[*2]** on Pennington's 60-1507 motion, at which both he and the State were represented by counsel. Because the district court heard argument only and otherwise relied on the record in the criminal case for any pertinent facts, it neither made credibility determinations nor resolved other evidentiary conflicts that independently rested on the hearing itself. We exercise unlimited review over the district court's denial of the motion, since we can review the existing record equally well and the ultimate determination reflects a legal conclusion. See *Barr v. State*, 287 Kan. 190, 196, 196 P.3d 357 (2008); *Bellamy v. State*, 285 Kan. 346, 354, 172 P.3d 10 (2007).

The jury convicted Pennington of the 2006 killing of Lavirgil DeShawn Jones. Pennington struck Jones with an aluminum baseball bat while Jones sat in the living room of a house Pennington shared with Monica James and Allan Soverns, Jr. After Jones slumped to the floor, Pennington struck him at least several more times. James and Soverns were present. The State charged Pennington with first-degree murder. At trial in September 2007, Pennington argued that he acted in **self-defense** and in defense of his two housemates because he thought Jones **[*3]** was making threatening statements and might have had a handgun in his pocket. The district court instructed the jury on **self-defense**, defense of another, and lesser included homicide offenses. The jury convicted Pennington of intentional second-degree murder. The district court imposed a 155-month sentence on him. Pennington appealed, and this court affirmed in a published decision, *State v. Pennington*, 43 Kan. App. 2d 446, 227 P.3d 978, *rev. denied* 290 Kan. ___, 2010 Kan. LEXIS 673 (2010).

While Pennington's petition for review was pending in the Kansas Supreme Court, new **self-defense** statutes went into effect. Pertinent here, those statutes mandate that the use of force, including deadly force, should be presumed objectively reasonable in certain factual circumstances and make that presumption retroactive. Pennington filed a motion with the Kansas Supreme Court requesting his case be remanded to this court to consider the legal impact of those statutory revisions. The court summarily denied the remand motion and denied the petition for review on September 7, 2010.

Pennington filed his 60-1507 motion in the district court just before the 1-year limitation period expired. Pennington argued that he was entitled **[*4]** to the legal benefit of new **self-defense** statutes and, therefore, should be given a new trial. He also constitutionalized his claim, arguing his counsel on direct appeal had been ineffective by relying on the motion to remand to raise the changes in **self-defense** law. As we have indicated, the district court denied the 60-1507 motion after hearing argument of counsel. That denial is what we have before us.

At the time Pennington was tried, Kansas **self-defense** law generally was embodied in K.S.A. 21-3211 and provided:

> "(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 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."

The district court instructed **[*5]** the jury consistent with K.S.A. 21-3211, and nobody complains that the substance of those instructions incorrectly captured the law at the time of the trial. The district court used a slightly modified version of PIK Crim. 3d 54.17.

A legally sufficient claim of **self-defense** requires evidence supporting both a subjective belief on the part of the defendant that the use of force was necessary and an objective determination that a reasonable person would have come to the same conclusion. See *State v. Walters*, 284 Kan. 1, 9, 159 P.3d 174 (2007); *City of Wichita v. Cook*, 32 Kan. App. 2d 798, Syl. ¶ 1, 89 P.3d 934, *rev. denied* 278 Kan. 843 (2004). In 2010, the Kansas Legislature augmented the basic **self-defense** statute with K.S.A. 2010 Supp. 21-3212a, establishing a presumption that the use of force is objectively reasonable in particular situations. In pertinent part, K.S.A. 2010 Supp. 21-3212a provides:

> "(a) For the purposes of K.S.A. 21-3211 and 21-3212, and amendments thereto, a person is presumed to have a reasonable belief that deadly force is necessary to prevent imminent death or great bodily harm to such person or another person if:
>
> "(1) The person against whom the force is used, **[*6]** at the time the force is used:
>
> (A) Is unlawfully or forcefully entering, or has unlawfully or forcefully entered, and is present within, the dwelling, place of work or occupied vehicle of the person using force; or
>
> . . . .
>
> "(2) the person using force knows or has reason to believe that any of the conditions set forth in paragraph (1) is occurring or has occurred.

In addition, the legislature declared that K.S.A. 2010 Supp. 21-3212a should be "construed and applied retroactively." K.S.A. 2010 Supp. 21-3220. As we have noted, when K.S.A. 2010 Supp. 21-3212a went into effect, the Kansas Supreme Court had yet to rule on Pennington's petition for review in his direct appeal.

We address two preliminary points. First, we presume but do not formally decide that the retroactivity language in K.S.A. 2010 Supp. 21-3220 affords Pennington the right to claim any benefit of the presumption in K.S.A. 2010 Supp. 21-3212a. See *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 226, 115 S. Ct. 1447, 131 L. Ed. 2d 328 (1995) ("When a new law makes clear that it is retroactive, an appellate court must apply that law in reviewing judgments still on appeal that were rendered before the law was enacted, and must **[*7]** alter the outcome accordingly."); *Landgrafv. USI Film Products*, 511 U.S. 244, 272, 280, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994) (statutes typically will not be given retroactive application unless their language so requires); *State v. Messer*, 49 Kan. App. 2d 313, 307 P.3d 255, 260-62 (2013). Second, we discount the State's argument that Pennington cannot raise the application of K.S.A. 2010 Supp. 21-3212a in his 60-1507 motion because he asserted it on direct appeal in the motion seeking remand from the Kansas Supreme Court to this court. The State suggests that renders his claim impermissibly successive. We think not, since the issue was never formally ruled on in the direct appeal—the motion to remand didn't argue the merits and was summarily dismissed without discussion.

Because K.S.A. 2010 Supp. 21-3212a is to be applied retroactively, Pennington contends the jury should have been instructed on the presumption in his case and the failure to do so created reversible error. His contention fails both factually and legally.

Filtered through the retroactivity requirement, the issue, looked at in the context of factual circumstances alone, seems paradoxical because it asks whether the **[*8]** district court should have instructed a jury in a 2007 trial regarding a statutory presumption that didn't exist until 3 years later. Even so, the facts taken in the best light for Pennington don't support the presumption. And our analysis of the legal effect of the presumption more or less solves the time-warp puzzle. Assuming Pennington were entitled to the presumption, he received its substantive legal benefit when the district court instructed the jury on **self-defense**. Accordingly, Pennington has suffered no legal harm—an independent basis to affirm the district court's ruling on his 60-1507 motion.

By its terms, the statutory presumption that the use of force is reasonable applies when the person using force

knows or has reason to believe that another person is unlawfully or forcefully entering a residence or has entered in that manner. That's a problem for Pennington because nothing in the trial evidence supports the notion he reasonably could have believed Jones unlawfully, or forcefully had entered the house.

The evidence showed that Pennington, Soverns, and James had a running dispute with Jones about a food-stamp debit card. James testified that the morning of the incident **[*9]** she told Jones he was not welcome at her house and Jones suggested he could arrange for a drive-by shooting of the place. James testified that Pennington was in earshot and could have heard that exchange. Jones then departed, and the three left the house for the day. When they returned late in the day, they quickly realized the house had been burglarized. All three of them suspected Jones had something to do with the break-in. James called the police.

James testified that Jones then came over to see what was going on. So the three of them—she, Soverns, and Pennington—agreed they would try to engage Jones in the hope he would stay until the police arrived. Soverns confirmed that version of events and testified he told Pennington he wanted to keep Jones there, so the police could interrogate him about the burglary. According to Soverns, they wanted Jones to come in the house while they waited for the police.

Pennington did not testify in his own defense. But the prosecutor introduced a tape-recorded statement he gave two police detectives the morning after the killing. In that statement, Pennington said nothing to indicate Jones had forced his way into the house or otherwise unlawfully **[*10]** entered before he sat down in the living room. Pennington told the detectives that he intended to "start being nice to [Jones] and keep him around cause the cops [were] com[ing] over." Pennington then described to the detectives how James, Soverns, and Jones were seated in the living room. Pennington said he then left the room. According to what Pennington told the detectives, he heard Soverns suggest that Jones leave and go back to his own house. Pennington said that Jones "was getting all mad [and] talking about shooting again." Just after that, Pennington came back into the living room and hit Jones with the bat.

In their trial testimony, both James and Soverns disputed that either of them asked Jones to leave or that he had become angry. The discrepancies between their versions and Pennington's version are immaterial to the applicability of the statutory presumption.

In nobody's account of the events leading up to the killing did Jones unlawfully or forcefully enter the house. Even giving Pennington's narrative the most generous interpretation reasonably possible, he was trying to keep Jones around until the police arrived. Only *after* Jones and the others had been sitting in the **[*11]** living room for awhile did Pennington purport to perceive Jones as angry and threatening. In light of that evidence, the statutory presumption in K.S.A. 2010 Supp. 21-3212a was factually inapplicable. Under no version, disputed or otherwise, would it have been appropriate. The district court would have had no obligation to consider the presumption or to have instructed the jury on it. In turn, Pennington could not have been prejudiced at trial in that regard.

In addition, Pennington suffered no legal detriment because the statutory presumption does not materially alter how jurors should consider **self-defense** evidence in arriving at a verdict.

Under Kansas criminal law, **self-defense** is labeled an affirmative defense in the sense the trial evidence must provide some minimal factual basis that would allow a jury to consider it. The district court then must give appropriate jury instructions, as happened here. *State v. Hill*, 242 Kan. 68, Syl. ¶ 4, 744 P.2d 1228 (1987) ("The trial court must instruct the jury on **self-defense** if there is any evidence tending to establish **self-defense** even though the evidence may be slight. . . ."). The State must prove all of the elements of the charged crime. **[*12]** If the **self-defense** evidence causes the jurors to have a reasonable doubt about any one of those elements, they are to find the defendant not guilty. *State v. Johnson*, 258 Kan. 61, 66, 899 P.2d 1050 (1995) (correct standard is whether **self-defense** evidence "causes the trier of fact to have a reasonable doubt about the defendant's guilt"); *State v. Bellinger*, 47 Kan. App. 2d 776, 789, 278 P.3d 975 (2012) (Atcheson ▾, J., dissenting) (jury need only conclude evidence of **self-defense** creates a reasonable doubt as to guilt to render an acquittal), *petition for rev.*

filed July 23, 2012. By contrast, in a civil case, a defendant bears the burden of proving an affirmative defense, typically by a preponderance of evidence.

In this case, the jurors were properly instructed that they had to presume Pennington to be not guilty and should convict only if they were persuaded beyond a reasonable doubt the State had proven the elements of the charged offense (or a lesser offense) beyond a reasonable doubt. The district court used PIK Crim. 3d 52.02 for that purpose.

For our analysis, we assume Pennington was factually entitled to the benefit of the presumption in K.S.A. 2010 Supp. 21-3212a, although **[*13]** we have already determined he was not. To the extent the statutory presumption in K.S.A. 2010 Supp. 21-3212a would have relieved Pennington of the minimal obligation to show that some evidence introduced at trial supported the notion that an objectively reasonable person would have believed force was necessary to defend against any threat Jones posed, that purpose was satisfied. The district court instructed the jury on **self-defense**.

The State and Pennington tacitly agree K.S.A. 2010 Supp. 21-3212a requires that a jury be instructed to presume the use of deadly force is objectively reasonable in the listed circumstances. They similarly acknowledge the presumption is a rebuttable one. The committee on criminal pattern instructions agrees and has fashioned an additional paragraph to PIK Crim. 4th 52.210, the **self-defense** instruction, to be used now when the presumption is factually applicable in a given case. The instruction includes language informing the jurors they "must presume that a person had a reasonable belief" deadly force "was necessary to prevent imminent death or great bodily harm" if they find any of the factual circumstances in K.S.A. 2010 Supp. 21-3212a existed, including **[*14]** the forcible or unlawful entry of a home. The instruction, however, also informs the jurors: "This presumption may be overcome if you are persuaded beyond a reasonable doubt that the person did not reasonably believe that the use of [deadly] force was necessary ...."[*]

[*]We agree that the statutory language creates a rebuttable presumption. It does not state the presumption is irrebuttable or conclusive, *e.g.*, 20 C.F.R. § 718.304 (2013) (regulation provides for "an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis" or has died as a result of pneumoconiosis in specified circumstances); Cal. Fam. Code § 7540 (West 2013) ("[T]he child of a wife cohabitating with her husband ... is conclusively presumed to be a child of the marriage."). Nor does it use language associated with such presumptions, *e.g.*, if A is true, then B "shall be deemed" true. See *Butts v. Bysiewicz*, 298 Conn. 665, 683-84, 5 A.3d 932 (2010); *Hutchinson Technology v. Com'r of Revenue*, 698 N.W.2d 1, 13 (Minn. 2005).

We offer no particular view on whether the statute actually requires instructing jurors on the presumption. That issue has not been briefed and is not before us. As we discuss, **[*15]** however, the presumption does not substantively change Kansas law on **self-defense**. The text of K.S.A. 2010 Supp. 21-3212a is drawn from model legislation various organizations have promoted across the country. The presumption would have a significant impact in those jurisdictions treating **self-defense** as a true affirmative defense, imposing the burden of proof on the defendant. See *State v. Valverde*, 220 Ariz. 582, 583, 208 P.3d 233 & n.1 (2009) (**self-defense** treated as affirmative defense before legislative changes); Ariz. Rev. Stat. Ann. § 13-205 (2010) (requiring State to negate justification defenses, including **self-defense**); Ariz. Rev. Stat. Ann. § 13-411 (2010) (presumption similar to K.S.A. 2010 Supp. 21-3212a applicable to use of force to resist commission of particular crimes, including burglary); *State v. Bundy*, Ohio App. 3d , 2012 Ohio 3934, 974 N.E.2d 139, 151-52 (2012) (discussing how statutory presumption modified defendant's burden of proving **self-defense**); Ohio Rev. Code Ann. § 2901.05 (Page 2010) (**self-defense** treated as affirmative defense subject to presumption legally comparable to K.S.A. 2010 Supp. 21-3212a(a)(1)(A)).

Pennington essentially contends the jury in his case **[*16]** should have been instructed using the equivalent of that supplemental language to PIK Crim. 4th 52.210. Ultimately, however, the additional language does not substantively change the law reflected in the standard **self-defense** and burden-of-proof instructions used in Pennington's case.

Under the new language, jurors must presume deadly force was appropriate in the stated factual circumstances until they are persuaded otherwise beyond a reasonable doubt by the evidence admitted at trial. That determination reflects a subset of the decision-making jurors would go through in evaluating the law of **self-defense** and reasonable doubt in any event. That is, jurors must presume a defendant to be not guilty and may not conclude otherwise unless they are persuaded beyond a reasonable doubt. The same holds true in a **self-defense** case. The State has the obligation to prove the elements of the crime beyond a reasonable doubt notwithstanding the evidence of **self-defense**. Jurors, therefore, may not find a defendant guilty unless they are persuaded beyond a reasonable doubt he or she did not act in **self-defense**. To do so, they must then be persuaded beyond a reasonable doubt—overcoming the presumption **[*17]** of innocence—that the defendant did not hold an objectively reasonable belief that force was necessary to defend himself or herself or a third person. That conclusion is the same one described in the new presumption language in PIK Crim. 4th 52.210.

The jury instructions given in Pennington's case, therefore, accurately stated the law even as it now stands with the statutory presumption in K.S.A. 2010 Supp. 21-3212a. The jury instruction reflecting the presumption merely highlights a portion of what has been the law of **self-defense** and does not alter the substance of that law. In other words, the jury instructions given in Pennington's case correctly stated the law of **self-defense** then and now. Reversible error cannot be predicated on jury instructions that correctly state the law, and that is true even if other instructions would be better. See *State v. Herbel*, 296 Kan. 1101, 1124, 299 P.3d 292 (2013) (While an updated jury instruction may be better than what it replaces, that doesn't make the earlier instruction erroneous.); *State v. Wilkerson*, 278 Kan. 147, 158, 91 P.3d 1181 (2004) (Although several of the jury instructions could have been "improved," the instructions, taken as a **[*18]** whole, correctly state the law and, thus, did not prejudice the defendant.).

The district court properly denied Pennington's 60-1507 motion. Pennington has failed to demonstrate that he was factually entitled to the benefit of the presumption in K.S.A. 2010 Supp. 21-3212a or that the presumption would have made any legal difference if it had been applied to his case.

Affirmed.