No. 12-108301-A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Plaintiff - Appellee

vs.

STEPHEN ALAN MACOMBER,
Defendant – Appellant

REPLY BRIEF OF APPELLANT

Appeal from the District Court of Shawnee County
Honorable David B. Debenham
District Court Case No. 10-CR-1053

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Oral Argument: 30 Minutes

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IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
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vs.

STEPHEN ALAN MACOMBER
Defendant – Appellant

REPLY BRIEF OF APPELLANT

INTRODUCTION

Appellant Macomber reasserts all arguments and authorities raised in his brief filed September 6, 2013, and submits the following reply brief to address new material and arguments presented by the State in its brief filed January 22, 2014. Appellant will also note where it appears the State has failed to respond to claims made by the Appellant and thereby conceded the issue.

ARGUMENTS AND AUTHORITIES

Appellant first asserts that the Statement of Facts recited in the Brief of Appellant are accurate recitations to the record and does not assent to the accuracy of the State's factual citations where they are inconsistent with the record.

ISSUE I – DOUBLE JEOPARDY

A. The state's argument that one continuous possession of a firearm may be charged as multiple crimes based on use and locale must fail.

While the compulsory joinder rule is one way to analyze a double jeopardy issue, as did the district court, the overarching inquiry is still whether the convictions are for the

same offense, in this case the possession of any firearm by a [qualifying] felon. The state argues that the act of possessing a firearm (by a qualifying felon) involves separate or discrete acts when the possession spans over a period of time or passes across a county border (or multiple county borders) within the state. **The crime** prohibited by K.S.A. 2010 Supp. 21-4204 is, "...possession of any firearm by a person who has been convicted of a [qualifying] felony." The statute does not speak to use or particularized conduct with a firearm, merely possession. Other statutes specifically criminalize certain acts involving the **use** of a firearm, but they are not of concern here. The "act" prohibited here is the **possession**.

While used in context of illegal drugs, K.S.A. 2010 Supp. 21-36a01 (q) specifies the following definition:

> ''Possession'' means having joint or exclusive control over an item with knowledge of and intent to have such control or knowingly keeping some item in a place where the person has some measure of access and right of control.

In the general sense, possession is defined as, "the act of having or taking into control." Merriam Webster's Collegiate Dictionary, Pg. 968, 11th Ed., 2005. While other definitions surely exist in many contexts, in terms of an **item**, possession is control of that item.

It is a specious argument at best that one continuous possession can somehow be theoretically interrupted by a fresh impulse to USE the firearm, even more so the State's sublime argument that, "Macomber's decision not to dispose of the gun was a fresh impulse to keep possession of the gun..."; or that an intervening act of leaving one location and driving with the weapon to a different location creates the same sort of

theoretical interruption. In this case there was **one act**, that of Macomber (a "qualifying" felon) possessing a firearm, which completed the crime.

The evidence showed the crime (possession) began in Shawnee County and continued into Marshall County until Macomber (or rather Police) ended his possession of the firearm. (R.Vol. XXIV p. 470) The state has shown no break in Macomber's possession of the firearm at issue, only a break in the **use** of that firearm, and the evidence adduced at trial showed no break in possession. It is this rationale which was used by this Court in *State v. Macomber*, No. 107,206 to conclude that Macomber may be convicted of criminal possession of a firearm only once.

JURISDICTION

The state argues that Shawnee County and Marshall County are separate jurisdictions. This is simply untrue. They are merely different counties within the jurisdiction of the State of Kansas. While it must be established a district Court has jurisdiction to charge and try a crime, this does not necessarily mean it has exclusive jurisdiction over a crime based on the Court's location or the locale where the defendant was ultimately arrested, and this certainly does not mean venue for prosecution of a crime is a separate element of any crime.

> Venue is a necessary jurisdictional fact that must be proven along with the elements of the actual crime. See *State v. Rivera*, 42 Kan. App. 2d 1005, 1008-10, 219 P.3d 1231 (2009), *rev. denied* 290 Kan. 1102 (2010).

Due to venue (place of trial) rules, multiple district courts may have jurisdiction over, or the power to prosecute, a single crime. The crime was properly charged once in Marshall County, and the resulting conviction barred the charge for the same continuous act of possession in Shawnee County.

B. In failing to address the claim, the State has conceded that the trial of a charge barred by double jeopardy substantially prejudiced the defendant in the murder charge, and that the murder charge must be retried.

The state has failed to address the claim made by Macomber that trial of the double jeopardy barred charged along with the murder charge was unduly prejudicial. (App. Br, p. 33) As such, the State concedes the issue, and if this Court finds the firearm charge to be barred, the Court must remand the murder charge for retrial.

ISSUE II – CORONER'S TESTIMONY REGARDING MANNER OF DEATH

A. The state's argument that Macomber's later introduction of an exhibit containing Dr. Pojman's opinion on manner of death renders the error harmless is incorrect.

After the State was allowed in error to introduce the testimony of Dr. Pojman regarding manner of death on direct, Macomber used an exhibit prepared by the witness in order to impeach his testimony regarding the same. The state claims this renders the error harmless. This use, after the testimony was let in cannot be used to make the original error harmless because no impeachment or cross examination on this testimony would have been necessary if the manner of death testimony had not been previously admitted. This Court must determine whether the error was prejudicial notwithstanding Macomber's later introduction of the exhibit. Defendant's action in admitting the exhibit was a necessary or justified response to the initial error of the court, and actions of the state, in order to achieve a fair trial. See *State v. Higgins*, 243 Kan. 48, 49-52, 755 P.2d 12 (1988), where the Court found the state's later introduction of improper evidence in response to an invited error by the defense not to be reversible error. While not directly on point, *Higgins* points out that an error may have a justified response which did not have a curative effect on party committing the original error.

ISSUE III – PRETRIAL ORDERS

B. In failing to address the claim, the State has conceded that the Court erred in allowing the state to move to admit 60-455 evidence without a finding of manifest injustice to modify the pretrial order.

The state fails to address the issue as set out in the brief of the Appellant. The district court failed to bind the state to the Court's pretrial order and order in limine with regard to prior crimes evidence, and made no determination whether the state would suffer manifest injustice if it was not allowed to introduce evidence of the Marshall County crimes. In its brief, the state ignores this issue, and instead addresses whether the state should have been allowed to introduce evidence of a prior conviction necessary to establish Macomber as a "qualified" felon who was legally barred from possessing a firearm. In failing to address this issue entirely, the state has conceded that the Court erred in allowing the state to violate the agreed pretrial orders and Court's order in limine with respect to 60-455 evidence.

ISSUE IV – K.S.A. 60-455 EVIDENCE OF OTHER CRIMES

A. The state's argument that Macomber's later introduction of the video of the Marshall County shooting renders the error harmless is incorrect.

While the state has conceded that the Court never modified its pretrial order or ruling on its order in limine, allowing for it to offer 60-455 evidence, it persists in suggesting that the district court did not err in allowing the evidence of other crimes pursuant to K.S.A. 60-455. This was not only the specific agreement of the parties as evidenced by numerous written pretrial orders, but also is conceded by the State: "It is clear, based on the record, that the State's intention was not to offer any evidence of prior convictions or bad acts specifically in regards to the charges or bad acts that occurred in

Marshall County, Kansas, or in Omaha, Nebraska." (Brief of Appellee, Pg. 34). In the prior page, the State conceded the district court found that based on the pretrial conferences and the course of this case, there was a clear implication that the State would not be seeking to introduce evidence of the defendant's prior convictions or civil wrongs pursuant to 60-455, except for the specific evidence required to meet the state's burden on Count 2.

Again the State argues that the error can somehow be cured of all prejudice due to the later introduction by Macomber of materials needed for the impeachment of the witness. The Appellant submits without the original prejudicial error, there would have been no need to impeach or further cross examine the witness, or any other reason to delve into the matter. In this case, the incurable prejudice from the testimony could not be rendered harmless by the later introduction of the actual video. Again, had the testimony been disallowed either due to the Pretrial order, lack of materiality, or undue prejudice, there would have been no need to clarify the prior testimony through cross examination, and thus, no exhibit. A copy of the State's "Motion to Admit Evidence" (R. Vol. VI, p. 516-523) is attached for reference at the appendix. See the *Higgins* rationale in Issue II.

ISSUE VI – UNEVEVEN APPLICATION OF THE HEARSAY RULE.

B. The state's argument that Macomber's later introduction of the audio recording of the interview and his own testimony renders the error harmless is incorrect.

The state contends the error of the court was rendered harmless by the reaction of the defendant in admitting the audio recording of the interview. This is incorrect as the resulting admission would not likely have happened had the error not been made. The state also suggests the defendant testified, and in this way he was allowed to the get the

evidence in. Appellant would submit that the error forced him to testify in order to admit his exculpatory statements made during the same interview.

Had the district court allowed the defendant to introduce evidence of the exculpatory statements during cross examination of Agent Bundy, there would have been no need to introduce the recording later to clarify the defendant's statements allowed through Bundy's testimony. Further the defendant may have chosen not to testify. The reasoning of the district court regarding hearsay was in contravention of the *Brickhouse* decision. The introduction of the recording was the direct result of the Court's error. See the *Higgins* rationale in Issue II.

ISSUE VII – JURY INSTRUCTIONS

The state mistakenly suggests that Macomber withdrew his objection to instruction number 8. (Br. Of Appellee, p. 46) Macomber never withdrew the objection, but the record does reflect that no **other** objections were made to that instruction. (R. Vol. XXVII, p. 1107).

The state asserts that Macomber did not object to instruction 10. (Br. Appellee, p. 50). In actuality, Macomber asked for and argued for the correct version of the same instruction based on the K.S.A. 2010 Supp. 21-3211. Requesting the correct instruction based on current law is the equivalent to an objection to the outdated instruction given. Macomber was entitled to the instruction based on current law. The giving of the outdated instruction is plain error. The state also suggests that Macomber's special instruction regarding nature and degree of possession of a firearm was never requested. This request and denial by the district court clearly appears in the record. (R. Vol. XXVII, 1163).

ISSUE VIII - PROSECUTORIAL MISCONDUCT

IN CONTEXT

The state argues that most of the improper comments of the prosecutor must be taken in context to explain why they are within the wide latitude allowed to prosecutors, however, the very reason for longstanding rules on this subject are to avoid discussions of context. Prosecutors must not do certain things, such as comment on the credibility of witnesses, make comments about matters not in evidence, make comments calculated to inflame the passions or prejudices of the jury, or misstate the law. These prohibitions on improper commentary are all based on longstanding rules of law. Misconduct can be determined to be flagrant based solely on the rule which it violates. While taking comments in context is simple for those trained in the law, jury members are to be shielded from making that kind of distinction. Juries are sworn to apply the facts, as they find from the evidence, to the law as it is given to them and render a verdict. Excessive or extraneous unsworn improper commentary should not be interjected into the mix, no matter the context. Asking the jury members to determine in what context improper comments are made is unduly confusing to the jury and unfair to the defendant. If the statement is out of bounds, it is improper, and then the potential for prejudice must be evaluated. The state is asking this Court to reevaluate the boundaries so as to avoid a review of prejudice, which does consider context. Jury instructions cannot always be the sole remedy for remarks made in some context which is unknown to the jury. We rely on prosecutors to behave in an ethical and professional manner so as to avoid the need for "curative" instructions.

> A prosecutor is not just an advocate. See *Pabst*, 268 Kan. at 510. As we stated in *State v. Gonzales*, 290 Kan. 747, 760, 234 P.3d 1 (2010):

> "The prosecutor's role in our criminal justice system is unique, and it carries concomitant responsibilities. The prosecutor is a representative of the government in an adversary criminal proceeding, which means he or she must be held to a standard not expected of attorneys who represent 'ordinary' parties to litigation."
>
> We went on to say in *Gonzales*: "The comments to KRPC 3.8, Comment [1] (2010 Kan. Ct. R. Annot. 565) make this explicit: 'A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.'" 290 Kan. at 761; see also *Berger v. United States*, 295 U.S. 78, 87-88, 55 S. Ct. 629, 79 L. Ed. 1314 (1934), *overruled on other grounds Stirone v. United States*, 361 U.S. 212, 80 S. Ct. 270, 4 L. Ed. 2d 252 (1960) ("Because the prosecutor "is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer [,] . . . [i]t is as much his duty is to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.")

The State claims the record does not support the Appellant's claim that the prosecutor misled the defense that he must testify before self-defense can be alleged. (Br. Of Appellee, p. 56) Ms. Spradling stated to the district court in a bench conference, "...And I will tell you that – that before self-defense can be alleged and instances are the basis of self-defense, the defendant must testify- -". (R. Vol. XXIII, p. 252, lines 7-10) As previously noted, Spradling offered to bring caselaw to support this false premise, but when court re-convened, the district court sustained the state's objection to the self-defense testimony on other grounds, and failed to address Spradling's false notion. In failing to specifically rule, the Court allowed the planted seed to grow in Macomber's mind. Without a doubt, Ms. Spradling fell well short of being a servant of the law.

The state suggests that in all the instances of alleged, either there was no misconduct, the misconduct was harmless due to other factors, or in the alternative, that the evidence of guilt was overwhelming against the defendant.

HARMLESS ERROR

> K.S.A. 60-261 provides that no error "is ground for granting a new trial or for setting aside a verdict . . . unless refusal to take such action appears inconsistent with substantial justice." The *Chapman* formula for harmlessness of constitutional error frequently recited by this court requires reversal unless we are willing to declare a belief that it was harmless beyond a reasonable doubt. 386 U.S. at 24. Stated another way, the court must be able to declare beyond a reasonable doubt that the error had little, if any, likelihood of having changed the result of the trial. *State v. Thompkins*, 271 Kan. 324, 335, 21 P.3d 997 (2001).
>
> This formulation of the federal constitutional harmless error rule has been recognized as synonymous with that set forth by the United States Supreme Court in *Fahy v. Connecticut*, 375 U.S. 85, 11 L. Ed. 2d 171, 84 S. Ct. 229 (1963). In *Fahy*, the Court said: "The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." 375 U.S. at 86-87; see *Chapman*, 386 U.S. at 23.

In this case the effect of the prosecutor's commentary on the credibility of the evidence, unsworn testimony, misstatements of law, and mischaracterization of the evidence cannot possibly be considered to have been harmless under either of the standards set out above.

OVERWHELMING EVIDENCE

"Overwhelming" is not defined by Kansas law. It's much like the old saying, "...we'll know it when we see it."

> "Overwhelm", in this context, is defined as, "...to overpower in thought or feeling," and
>
> "overwhelming" is defined as, "...tending or serving to overwhelm...also, "EXTREME, GREAT." Merriam Webster's Collegiate Dictionary, Pg. 886, 11th Ed., 2005.

The evidence in this case of the only contested issue on the murder charge, intent, was anything but overwhelming, by any definition. Conflicting testimony regarding how the gun discharged, the physical position of the victim, and the testimony regarding a

struggle occurring when the gun discharged all serve to make the defendant's intent a reasonably contested issue. The State relied heavily on the inference of intent instruction, rather than overwhelming evidence, and argued in closing that the credible evidence established something more than the inference.

The appellant would submit that absent the trial errors, all evidence as to intent was based merely on the stacked inferences of intent allowed to the state, and the legitimate supporting evidence was at best weak. At trial all eyewitnesses to the (Lofton) shooting indicated there was a struggle before the gun discharged. (See Appellant's Brief, p. 14-16) In light of this evidence, the prosecutor's comment was "the evidence in this case is only credible as to an intentional shooting." To what evidence was the prosecutor referring? The only way the state was able to **infer** intent was to draw a picture of the defendant's character with inadmissible and highly prejudicial evidence from **another case** or to make provocative comments which amounted to misconduct. In reality there was no **evidence** of intent, merely an inference.

GROSS AND FLAGRANT / ILL WILL

The state's analysis of gross and flagrant nature of the misconduct does not consider the fact that many of the instances violated well established or unequivocal rules, such as commenting on a witnesses credibility and grossly misstating the law.

> In determining whether prosecutorial misconduct was gross and flagrant, among the things we have considered are whether the comments were repeated, emphasized improper points, were planned or calculated, or violated well-established or unequivocal rules. *State v. Ochs*, 297 Kan. 1094, 1103, 306 P.3d 294 (2013) (citing *State v. Brown*, 295 Kan. 181, 214, 284 P.3d 977 [2012]). We have also considered the long-standing nature of the rule violated. *Brown*, 295

> Kan. at 214 (citing *State v. Kemble*, 291 Kan. 109, 121-25, 238 P.3d 251 [2010]). (*State v. Akins*, Ks. Sup. Ct., Slip Op. January 10, 2014, No. 105,809)
>
> Ill will is defined as, "an unfriendly feeling" Merriam Webster's Collegiate Dictionary, Pg. 619, 11th Ed., 2005.

Ill will is projected from one person or group to another. In this case it is one prosecutor towards one defendant. It matters not whether the ill will spans through one case or several. The State's argument fails to explain why ill will cannot extend from one trial to another. This situation is somewhat unique, but certainly not novel by any means. A single defendant may be prosecuted numerous times by the same county or district attorney, and the actual feelings between the two may or may not decline over time. In this case, Ms. Spradling tried three cases against one defendant arising from events that occurred on a single day. It is not insignificant that Marshall County used a Shawnee County prosecutor rather than a representative of the Attorney General to prosecute the case. Spradling's role as Macomber's personal prosecutor was unique and a matter of design. As such, her misconduct in all three trials of this defendant is certainly a matter within this Court's purview. While the state asks this Court to consider **evidence** from all three trials, it wants the **prosecutor's conduct** in each case to be considered in isolation.

Our Supreme Court dealt with this very subject, in analyzing a particular prosecutor's behavior over a number of cases,

> "...In essence, the prosecutor did not just bolster the victim's testimony but declared that "the truth" virtually mandated a guilty verdict for her rape. See *State v. Raskie*, 293 Kan. 906, Syl. ¶ 3, 269 P.3d 1268 (2012) (closing argument cannot inflame the jury's passions or prejudices or divert the jury from its duty to decide the case based on the evidence and controlling law).
>
> As we recognized in *Smith*, the rule that forbids a prosecutor from claiming the truth is on his or her side is a long-standing one. *Smith*, 296 Kan. at 133 ("Moreover, *Elnicki* was not news on the impropriety of such an invocation."). *Elnicki* was decided in 2005, nearly 5 years before the prosecutor uttered her

> comments in Ochs' trial. Violation of a long-standing rule is indicative of gross and flagrant conduct. See *Brown*, 295 Kan. 181.
>
> Additionally, the close parallels between the language used by the same prosecutor—in Ochs' case and in *Smith*—suggest that her closing comments here were not extemporaneous. See also *State v. Anderson*, 294 Kan. at 464 (holding that it was a close call whether the same prosecutor's similar "truth" comments in closing argument, *e.g.*, "the truth will be his redemption here in this courtroom" were gross or flagrant or demonstrated ill will). In short, similar closing arguments have been used by the same prosecutor in at least three jury trials resulting in convictions appealed to this court the last few years. Their continual use by her after *Elnicki* causes us to seriously doubt prosecutorial inadvertence or spontaneity and to instead approach deliberateness. Deliberate misconduct is indicative of ill will. See *Marshall*, 294 Kan. at 862." *State v. Ochs*, 297 Kan. 1094, 306 P.3d 294 (2013)

In the overarching inquiry of *Tosh*, which deals with whether the misconduct so prejudiced the jury against a defendant that a new trial should be granted, identified and discussed three factors to consider, but not to the exclusion of all other factors. If considering the actual prejudice caused, ill will or the gross and flagrant intent of the prosecutor may be irrelevant. Appellant would pose the question as simply this: First: Was the comment outside the wide latitude a prosecutor is allowed as noted in previous decisions? If so, could the comment have been construed by members of the jury to create a prejudicial effect against the defendant?

ISSUE IX – CUMULATIVE ERROR

The state again argues that the evidence against the Appellant was overwhelming. In the charge of murder, the only contested matter was Macomber's intent to actually shoot the victim and his inferred intent to kill Lofton. In this respect, the evidence was very close. There was no direct evidence of intent to kill or even shoot, and the prosecutor's dogged insistence on personally testifying regarding the credibility of evidence of intent and Macomber's guilt furthered the state's case far more than the evidence could. In a factually similar case, involving a cumulative error analysis

regarding prosecutorial misconduct and a single contested element issue, our Supreme Court determined that,

> "...the lack of overwhelming evidence undercutting the defense-of-another theory, when both K.S.A. 60-261 and *Chapman* are taken into account, further persuades us that this case must be reversed and remanded for new trial. "*State v. Cosby*, 285 Kan. 230, 169 P.3d 1128 (2007)

Appellant submits that in this case, just this type of circumstance exists. The state failed to produce overwhelming evidence of intent. While the prosecutor was convinced, and shared this with the jury on more than one occasion, the actual evidence was unrevealing as to how the gun discharged. Absent the number of trial errors and clear instances of misconduct, the evidence of intent could only be described, at best, as weak. The record belies any suggestion that direct evidence of Macomber's intent to kill Lofton, or even shoot him, was overwhelming.

CONCLUSION

The State's brief fails to sufficiently rebut the claims of Mr. Macomber, and as such he is entitled to the relief requested in this appeal of his convictions, a reversal and remand for new trial and any other further proceedings appropriate with this Court's decision.

Respectfully Submitted,

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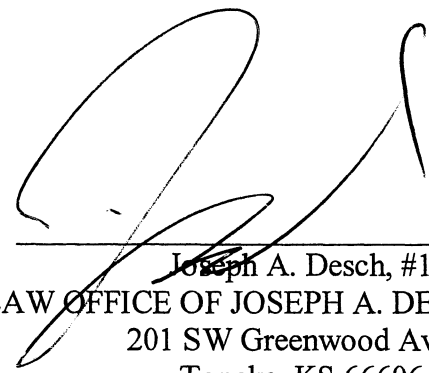
CERTIFICATE OF SERVICE

I hereby certify that on February 6, 2014 the original and 15 copies of Appellant's Brief were filed with the Clerk of the Appellate Court and 2 copies of the Appellant's Brief were hand delivered to:

Shawnee County District Attorney's Office
Shawnee County Courthouse
200 SE 7th Avenue
Topeka, KS 66603

With one copy to:

Kansas Attorney General's Office
120 SW 10th Street, 2nd Flr.
Topeka, Kansas 66603



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APPENDIX

1. States Motion to Admit Evidence (R. Vol. VI, p. 516-523)

IN THE KANSAS DISTRICT COURT
THIRD JUDICIAL DISTRICT, SHAWNEE COUNTY, KANSAS
CRIMINAL LAW DIVISION

STATE OF KANSAS,
Plaintiff,

vs.

Case No. 10CR001053
Division No. 13

STEPHEN ALAN MACOMBER,
Defendant.

MOTION TO ADMIT EVIDENCE

COMES NOW the State of Kansas, by and through Jacqie J. Spradling and requests that the Court admit evidence that the defendant fired the gun used to kill Mr. Lofton approximately two hours after he killed Mr. Lofton and the gun was functioning without defect at all times relevant hereto. In support of this motion, the State offers the following memorandum:

Memorandum of Law

A. Brief Statement of Facts in Support

The defendant has made statements during the course of the State's case-in-chief alluding to allegations the gun used to kill Mr. Lofton was defective. He has also implied that the defect in the gun caused the gun to accidently discharge. From his questioning, the defendant has predicated his defense, at least in part, on the accidental or mistaken discharge of his firearm. The State has witnesses who can testify that the defendant fired the gun at them approximately two hours after he killed Mr. Lofton and the gun functioned properly, appeared to function as intended, and did not appear to be suffering from any sort of defect.

B. Issue for the Court

1. The State seeks the admission of evidence that the defendant fired a gun subsequent to killing Mr. Lofton and that the gun functioned properly and without apparent defect.

C. Argument and Authorities

The defendant must have a good faith basis that such facts either are in evidence or will be admitted into evidence before alleging such facts in cross-examination. Absent such a basis, the defendant should be precluded from asserting facts that have not come from a sworn witness in this trial. While the state contends that the defendant has already placed the defense of accidental or mistaken discharge before the jury, the State also assumes that the defendant will either testify or provide an expert to testify to present facts in support of his defense to the jury. In any case, to the extent that the defendant has suggested or will present facts to the jury asserting that the gun was defective, the State has evidence to rebut the claim. Specifically, the State has a witness who will testify that the defendant fired the gun at him approximately two hours after the defendant claims the gun accidently discharged due to a defect in the gun. It also has a video of that shooting where the defendant can be seen to be firing the gun. Finally, it has an expert witness who is prepared to testify that the gun was in proper working order when he tested in several days after the incident and that he was the one he was in possession of the gun when it broke. He can also testify that based on the video of the shooting the gun appeared to be in the same working order on the day of the shooting s it was when he first tested it. The evidence offered through these two witnesses and the video is relevant to the crimes charged, but also necessarily includes assertions of fact subject to K.S.A. 60-455

K.S.A 60-455 allows for the admission of evidence of other crimes or civil wrongs when relevant to prove *any* disputed material fact. *State v. Gunby*,282 Kan. 39, 57 (2006). Exemplars offered by the statute include "absence of mistake or accident." Before admission, such evidence must be analyzed under the scheme set forth by the Kansas Supreme Court in *Gunby*, which requires the court to first determine whether the evidence is relevant to prove *any* disputed, material fact and, second, balance the probative value of the evidence against its tendency to prejudice the jury. On allowing the evidence, the Court needs to provide the jury a prophylactic limiting instruction address the evidence admitted pursuant to K.S.A. 60-455.

In this case, the State intends to offer evidence that the defendant used the gun hours after claiming it was defective and the gun was not defective at that time. Although the State need not and does not intend to expound on all the details of the defendant's subsequent criminal conduct, this evidence will include facts that will show the defendant's criminal conduct did not end with the killing of Mr. Lofton. Absent the defendant asserting a defense of accident or mistake, this evidence would not be particularly relevant to this case; however, the defendant has made the working order of the gun to be a critical piece of his defense. The State merely seeks to rebut any assertion that the gun was not in working order at the time of the murder.

Procedurally, there are three ways in which this type of evidence may be properly placed before the jury: first, in the State's case in chief; second, through cross-examination; and third, through rebuttal testimony. The State will address each in turn.

The State's Case in Chief

During his examinations of the State's witnesses, the defendant has asserted that the gun used to kill Mr. Lofton was defective and malfunctioned thereby causing the defendant to kill Mr. Lofton. With these assertions the defendant has placed the condition of the gun at issue.

Whether the gun was in proper working order at the time of the killing is now a disputed, material fact. The state has relevant evidence suggesting that the gun was in perfect working order at the time of the killing

For the Court to apply the *Gunby* test and suppress otherwise relevant evidence, it must first find that any prejudice created by the admission of the evidence is undue. *State v. Rojas,* 288 Kan. 379, 383 (2009). All evidence that is derogatory to the defendant is by its nature prejudicial to the defendant's claim of not guilty. *State v. Clark,* 261 Kan. 460, 477-478 (2007). But it is only evidence that actually or probably brings about a wrong result under the circumstances of the case that may be found to be "unduly prejudicial." *Id.* With the limiting instructions required by K.S.A. 60-455, no undue prejudice will be produced by the admission of the evidence proffered by the State. However, even in cases where undue prejudice may arise from the admission of relevant evidence, the court must then find that such undue prejudice outweighs its probative value. *State v. Rojas,* 288 Kan. 379, 383 (2009).

In this matter, the probative value of the proffered evidence is substantial. Where the defendant has contended that he is not guilty of murder because of a defect in the firearm used to kill Mr. Lofton, the State has evidence that there is no such defect and the defendant's asserted defense lacks a factual basis. This is a principal piece of evidence from a very limited pool of evidence available to rebut that defense. The weight of the prejudicial affect of this evidence is variable. Certainly, the State could expound on the criminal conduct of the defendant and he fled across county lines, kidnapping people, and shooting at law enforcement. However, the State intends to limit itself to the operation of the gun at the time of the subsequent shooting and not delve in to the potentially inflammatory issues that are necessarily connected to the defendant's conduct.

Based on this, the State requests that the evidence outlined above be admitted into evidence when presented by the State in its case-in-chief.

Impeachment

For purposes of impeachment, evidence otherwise inadmissible in the State's case-in-chief may be admissible during the defendant's presentation of his case. For example, evidence suppressed under *Miranda* can nonetheless be admitted for impeachment, evidence otherwise inadmissible regarding proof of character can be admitted under certain circumstances in the defendant's case pursuant to K.S.A. 60-446 through 60-448, and evidence of other crimes or civil wrongs can be admitted for to establish any material fact once the defendant has placed that fact in dispute. In this case, the State foresees that it may introduce such evidence during its cross-examination of the defendant or the defendant's designated expert witness.

More specifically, there are two types of impeachment that are at issue in this case should a witness take the stand and testify about defects in the firearm. The first type impeachment attacks the credibility of a witness and includes evidence of prior convictions of dishonesty and evidence of character traits when such traits have been placed at issue. There are limits as to when and how this form of impeachment can be performed on a defendant who chooses to testify. While it is often said that credibility is always at issue, Kansas case law is clear that a "criminal defendant does not place his or her credibility in issue merely by taking the witness stand." See *State v. Macomber,* 241 Kan. 154, 157–58, 734 P.2d 1148 (1987). The State does not intend to offer evidence of the subsequent shooting for that purpose and therefore there is no reason for analyzing the proffered testimony using such a measure.

The second form of impeachment is meant to contradict, challenge, or refute statements or conclusions offered by a witness at trial. It can include evidence of prior inconsistent

statements and evidence of additional facts or conclusions that are contrary to those offered by the witness. This evidence is not meant to impeach the witness' character, but is meant to challenge the witness' statement of fact or reasonable inferences suggested by such statements. There are no specific limits placed on this type of impeachment other than those found generally in the Kansas Rules of Evidence. In this case, should a witness for the defendant testify that the gun accidently or mistakenly discharged due to a defect in the gun, the State intends to impeach the defendant using evidence of the functionality of the gun later that same day. The evidence is subject to the analysis of K.S.A. 60-455 as discussed above, but otherwise is admissible without limitation.

One example of this legal reasoning at work can be found in *State v. Graham*, 244 Kan. 194 (1989), where a criminal defendant was impeached by evidence of two prior convictions for drug possession following his asserting that he innocently possessed narcotics. While the use of his two prior convictions would have otherwise been inadmissible once the defendant claimed an innocent explanation, those two convictions became relevant and admissible to show criminal intent.

In this case, should the defendant or the defendant's witnesses offer an innocent explanation for the defendant's killing of Mr. Lofton impeachment evidence is admissible notwithstanding the prohibitions contained in K.S.A. 60-455.

Rebuttal Evidence

Rebuttal evidence is that which contradicts evidence introduced by an opposing party. *State v. Sitlington,* 291 Kan. 458, 464 (2010) (citing *State v. Willis*, 240 Kan. 580, 583 (1987)). It may tend to corroborate evidence of a party who first presented evidence on the particular issue, or it may refute or deny some affirmative fact which an opposing party has attempted to prove.

Id. It may be used to explain, repel, counteract, or disprove testimony or facts introduced by or on behalf of the adverse party. *Id.* Such evidence includes not only testimony which contradicts witnesses on the opposite side, but also corroborates previous testimony. *Id.* The full scope of admissible rebuttal evidence will not be known until the end of the defendant's case; however, the State would simply bring to the court's attention to the possibility that the State's rebuttal evidence may require a hearing to determine the impact, if any, of K.S.A. 60-455.

Conclusion

WHEREFORE, based on the above and foregoing, the State respectfully requests that the court admit evidence that the defendant fired the gun used to kill Mr. Lofton approximately two hours later and that the gun was operating without defect at all times relevant to the crimes charged.

Respectfully submitted,

Office of the District Attorney
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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a copy of the above and foregoing Motion to Admit Evidence was served on Stephen Alan Macomber by hand-delivery to:

Mark L Bennett Jr
Stand-By Attorney for Defendant

as attorney of record for Stephen Alan Macomber, on the 5th day of January 2012, and a chamber copy was delivered to the Honorable David B Debenham, Judge of the District Court, Division 13.

By: _____
Jacqie J. Spradling, #15259
Chief Deputy District Attorney