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

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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NATURE OF THE CASE

This is a criminal matter in which the defendant was charged in the District Court of Shawnee County with murder in the first degree and criminal possession of a firearm. Following a seven day jury trial in which the defendant was allowed to represent himself with stand by counsel, the defendant was convicted of murder in the second degree and possession of a firearm. Thereafter on February 21, 2012 the defendant was sentenced to a term of 653 months for the second degree murder conviction and to a term of 8 months for the criminal possession of a firearm. The sentences were ordered to run consecutively. The defendant filed his notice of appeal on March 1, 2012.

STATEMENT OF THE ISSUES

I. THE DEFENDANT'S PROSECUTION FOR CRIMINAL POSSESSION OF A FIREARM IN SHAWNEE COUNTY VIOLATES THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND SECTION 10 OF THE KANSAS CONSTITUTION BILL OF RIGHTS, AND SUBSTANTIALLY PREJUDICED THE DEFENDANT IN THE TRIAL OF THE MURDER CHARGE.

II. THE TRIAL COURT ERRED WHEN IT ALLOWED THE CORONER, DR. POJMAN, TO TESTIFY REGARDING HIS OPINION AS TO THE MANNER OF DEATH.

III. THE TRIAL COURT ERRED IN FAILING TO BIND THE STATE TO PRETRIAL ORDERS AND EXPLICIT STIPULATIONS CONCERNING PRIOR BAD ACTS OR BAD CONDUCT.

IV. THE DISTRICT COURT ERRED IN ADMITTING EVIDENCE OF MR. MACOMBER'S SHOOTING OF A LAW ENFORCEMENT OFFICER IN MARSHALL COUNTY.

V. THE DISTRICT COURT COMMITTED EVIDENTIARY ERRORS REGARDING IMPEACHMENT OF THE STATE'S WITNESSES, PRIOR CRIMINAL ACTIVITY AT THE CRIME SCENE AND SURROUNDING LOCALE, AND PRIOR ACTIVITIES OF THE VICTIM, ALL OF WHICH DENIED THE DEFENDANT A FAIR TRIAL.

VI. THE DISTRICT COURT ERRED IN THE UNEVEN APPLICATION OF THE HEARSAY RULE.

VII. THE DISTRICT COURT ERRED IN INSTRUCTING THE JURY.

VIII. THE STATE'S PROSECUTORIAL MISCONDUCT DENIED THE DEFENDANT A FAIR TRIAL.

IX. CUMULATIVE TRIAL ERRORS WERE SUBSTANTIALLY PREJUDICIAL, AND DENIED THE DEFENDANT A FAIR TRIAL.

STATEMENT OF THE FACTS

On the afternoon of June 7, 2010, Ryan K. Lofton was shot and killed in the driveway of his residence at 2741 S.E. Iowa, Topeka, KS. The following individuals were in the driveway at the time of the shooting: Risa Lofton, wife of victim; Stephen A. Macomber, defendant; Joshua Kenolly, friend of the victim (R. Vol. XXVI, 962); and Cassandra Skirvin, friend/girlfriend of victim. (R. Vol. XXIII, 105) Inside the residence during this period were: Matthew Guerrero, friend of victim (R. Vol. XXIII, 98); and Nancy Llamas, the victim's roommate. (R. Vol. XXIII, 115)

Prior to the incident, Ryan and Risa Lofton had been arguing (R. Vol. XXIII, 100, 176, R. Vol. XXIV, 544) and Risa called the defendant and requested Macomber come get her. (R. Vol. XXIII, 177, 224-28, R. Vol. XXVI, 984-85) Ryan was upset that she was leaving with Macomber (R. Vol. XXVI, 969) Shortly after Macomber pulled into the driveway Risa placed several bags in the driver's side back seat area of the vehicle (R. Vol. XXIII, 109, 120, 178) then got in the car on the passenger side front seat. (R. Vol. XXIII, 182) Ryan Lofton then went to the driver's side door of Macomber's vehicle and began arguing with Macomber. During this argument it appeared to several witnesses that Ryan Lofton and Risa Lofton engaged in a physical struggle with Macomber and that during the struggle a gunshot was heard. (R. Vol. XXIII 110-13, 121-27)

Later that same day, June 7, 2010, Macomber was pulled over by Marshall County Sheriff's Deputy Fernando Salcedo in Blue Rapids, KS. Macomber was arrested the next morning, June 8, 2010 after a shootout with the Deputy and a standoff with police at the residence of Hedy Saville. (R. Vol. XXVI, 991) Subsequently, Macomber was charged and convicted of multiple offenses in Marshall County Case No. 10 CR 59

(Appellate Case no. 107205: and in Marshall County Case No. 10 CR 60 (Appellate Case no. 107206). In part, as a result of those cases, Macomber was convicted in each case for criminal possession of a firearm, K.S.A. 2012 Supp. 21-4202, one in each case for the same firearm which is at issue in the present case. (R. Vol. XIX 35, R. Vol. XXIV, 360)

In Shawnee County a criminal complaint was filed in the present case, on June 9, 2010 charging the defendant with count 1, off-grid, premeditated and intentional first degree murder and count 2, criminal possession of a firearm. (R. Vol. I, 31)

Prior to trial in this matter, the defendant's motion in limine to prohibit evidence at trial of prior bad acts was granted. (R. Vol. II, 121-23) Several pretrial hearings were conducted with orders entered (R. Vol. II, 105-6) held on September 24, 2010; R. Vol. II, 160-61) held on June 3, 2011; (R. Vol. III, 187-88) held on February 18, 2011 and filed late on August 5, 2011; R. Vol. III, 226-27) held on September 7, 2011, and which notes the State's plea offer of a guilty plea to felony murder which confirmed that the State was not seeking to introduce statements regarding crimes that occurred in Marshall County. (R. Vol. XVII, 37) During the initial motion hearing, held **October 6, 2010** the State stipulated immediately to the defense motion in limine (R. Vol. 1, 71-74) regarding prior bad acts, (R. Vol. XII, 20-21). Later in the same hearing, addressing another motion in limine (R. Vol. 1, 75-78), the State, specifically Jacqie Spradling, stipulated and agreed: not to mischaracterize the evidence; not to advance arguments or cite facts not supported by some evidence; not to make improper attacks on defense counsel or defense techniques; not to appeal to racial or **other prejudices;** not to draw negative inferences to the defendant's exercise of a constitutional right, including the right to remain silent; not to inflame the passions or prejudices of the jury, with the agreement to a specific

paragraph of the motion in limine citing several caselaw examples, such as referring to what the victim was thinking, and creating an "imaginary script"; and lastly, not to comment or elicit comment from witnesses on the credibility of any witness, including the defendant. (R. Vol. 12, 22-26) As noted above, these stipulations were journalized as orders of the Court. (R. Vol. II, 121-23)

At a motion hearing held on September 23, 2011 the state acknowledged that it understood that the defense is an accidental discharge. (R. Vol. XIX, 14) The defendant filed a Motion to Dismiss Count 2 (R. Vol. III, 236-44) that this criminal possession charge was a double jeopardy violation because of his previous convictions in Marshall County for the same offense. The motion also claimed that the pretrial order should prevent the State from introducing evidence of prior crimes. The Court denied this motion. (R. Vol. V, 408-16)

On October 14, 2011 Mr. Macomber, as pro se counsel, filed a motion for the State to be required to instruct its witnesses not to mention prior bad acts or convictions, citing prior actions by the State's counsel Jacqie Spradling (Spradling) in the Marshall county cases. (R. Vol. V, 367-68). The Court ruled on this motion, granting the request, but with the reservation that, "...the State is not limited in its proof of the defendant's felony status or release date from imprisonment as these are necessary elements in Count 2." (R. Vol. VI, 478) On appeal of **both** Marshall County cases, Spradling was found to have made improper statements to the jury. (State v. Macomber, unpublished opinion dated July 5, 2013, Kansas Court of Appeals Docket #107, 205, 2013 Kan. App. Unpub. LEXIS 594, at pages 20, (asking jury to "send a message" to the victim); page 21, (misstating the evidence)) (State v. Macomber, unpublished opinion dated July 5, 2013,

Kansas Court of Appeals docket #107, 206, 2013 Kan. App. Unpub. LEXIS 590, at page 20, (gross and flagrant misstatement of Kansas Law). In addressing another issue, the Court took note that in the underlying case, Marshall County 10 CR 60, Spradling, when replying to a comment by defense counsel regarding the Shawnee County case, stated, **"all of us have been under the idea that these cases are going to be tried separately without reference to the others."** (#107, 206, at p.11)(Emphasis added)). In case #107, 206 the Court of Appeals reversed Macomber's conviction for criminal possession of a firearm in the second prosecution on double jeopardy grounds, specifically finding that, "Neither his possession of the pistol nor his criminal history changed between the facts of [Case #107, 205] and the present case. We conclude that Macomber may be convicted of criminal possession of a firearm only once, and since he was convicted twice, we reverse the conviction for criminal possession of a firearm in the present case and vacate that sentence." (#107, 206 at p.11)

At Trial Macomber objected to the admission of Shawnee County Coroner Dr. Donald Pojman's opinion testimony that the manner of Ryan Lofton's death was homicide (R. Vol. XXIII, 282-89, 320) and renewed previous motions (R. Vol. II, 81-83) and (R. Vol. III, 189-92) all of which went to the issues of foundation, lack of personal knowledge, experience and training, insufficient basis, lack of probative value and necessity, caused undue prejudice, ultimate question for the jury and not of technical assistance to the jury but was overruled by the court. (R. Vol. XXIII, 290)

Dr. Pojman stated in his testimony that the manner of Ryan Lofton's death was "homicide" (R. Vol. XXIII, 291); that he formed this opinion on June 8, 2010 (R. Vol. XXIII, 301); that "homicide" means that someone else besides the victim pulled the

trigger; and that he didn't rely on witness statements in arriving at his opinion (R. Vol. XXIII, 312); didn't speak with Zachary Carr –KBI (R. Vol. XXIII, 314); relied on information from the investigator and verbal communication from law enforcement to form this opinion (R. Vol. XXIII, 316); was not informed of any mechanical defect to the firearm (R. Vol. XXIII, 318); didn't hear witnesses testify (R. Vol. XXIII, 319); didn't rely on any defense evidence (R. Vol. XXIII, 321); the wound itself didn't indicate the intent of the shooter, but the gun didn't go off by itself (R. Vol. XXIII, 303-5); there was no stippling observed and the range of fire was undetermined (R. Vol. XXV, 787) the entry wound was at the left side of the shoulder blade and that the bullet bruised the left lung went through the spine and right lung traveling predominately left to (R. Vol. XXIII, 298, 307); that the classification of manner of death are natural, suicide, homicide, accident and undetermined (R. Vol. XXIII, 317); there could be circumstances where an accidental discharge with a person holding a gun could be ruled something other than homicide (R. Vol. XXV, 777-78) it would have been possible that Ryan Lofton have received this wound as a result of reaching in the car, pulling out the firearm and releasing. (R. Vol. XXV, 793)

The defendant requested Dr. Pojman be allowed to hear the witness testimony but the state objected and the court sustained. (R. Vol. XXVI, 882-83)

Cassandra Skirvin testified that Risa had more than one bag with her when going to the defendant's car (R. Vol. XXIII, 120); Risa and Ryan were still arguing and yelling at each other as Risa got into the Defendant's car (R. Vol. XXIII, 109-11); she couldn't hear the conversation and never heard the defendant say anything (R. Vol. XXIII, 111,121-22); she told police that Ryan reached in to get Risa out of the car (R.

Vol. XXIII, 124, R. Vol. XXVI, 891); Ryan was yelling when going to the driver's side (R. Vol. XXIII, 112-13); and she never saw a gun. (R. Vol. XXIII, 127)

Matthew Guerrero testified that Ryan and Risa were fighting when they walked in the door (R. Vol. XXIII, 91, 100); he was not looking out the window before the gunshot. (R. Vol. XXIII, 100)

Risa Lofton testified she was unable to remember any of the conversation (R. Vol. XXIII, 261) but that Ryan did not threaten Macomber (R. Vol. XXIII 191, 250); Steve reached under the seat or somewhere and pulled out a gun that was inside a Crown Royal Bag (R. Vol. XXIII, 179, 190); he never took the bag off the gun (R. Vol. XXIII, 181) but Risa was able to describe it to police as an older style revolver (R. Vol. XXIV, 548); the gun was not hers and she didn't know it was there until he pulled it out (R. Vol. XXVI, 879); that the window was down approximately four inches (R. Vol. XXIII, 180); that she grabbed Steve's arm but had exited the vehicle and shut the door before she heard a pop (R. Vol. XXIII, 183-85, 260-61); and that she didn't see the gun fired or the trigger pulled. (R. Vol. XXIII, 265) During cross examination the Court did not allow Macomber to pursue impeachment of this witness regarding her selective memory, interactions with him and her actions in the days prior to the incident. (R. Vol. XXIII, 195-222, 235-37) The Court did not allow Macomber to elicit testimony from this witness regarding particular violent actions of the victim. Following this, a bench conference ensued where the Prosecution suggested to Macomber that unless he testified first, he could not pursue questioning of other witnesses pertaining to a self-defense theory of the case. The State did not provide precedent for its assertion. (R. Vol. XXIII, 251) The Court eventually sustained the objection regarding the victim's prior violent

acts, but did not rule on the proposition that a defendant alleging self-defense must first testify. (R. Vol. XXIII, 256)

Joshua Kenoly was found to be unavailable at trial and his preliminary examination testimony was read into the record at trial over the State's objection (R. Vol. XXVI,961); Ryan was trying to keep Risa from leaving (R. Vol. XXVI, 963); he never saw a gun (R. Vol. XXVI, 966-67); the defendant's car window was down (R. Vol. XXVI, 970); Ryan was a foot away from the vehicle (R. Vol. XXVI, 966); Ryan and Steve were involved in a "tussle" which he described as, "a little body movement with each other" which was more than an argument but didn't hear the conversation (R. Vol. XXVI, 965, 972); he was away from car when the shot happened (R. Vol. XXVI, 967, 972); and that the incident took place in five seconds. (R. Vol. XXVI, 971)

Stephen Macomber testified Risa placed three bags, including a Crown Royal Bag, behind the driver's seat and that he knew what the Crown Royal Bag was (R. Vol. XXVI, 987); that Risa brought the gun in the bag when she came out of the house (R. Vol. XXVI, 1018); when Risa got into the car Ryan become really upset and was reaching into the car, after an exchange of words Ryan flipped out (R. Vol. XXVI, 987); Ryan threatened to shoot Macomber so Macomber grabbed the gun, Risa began to taunt Ryan who came to the driver's side door and was reaching through the window trying to unlock the door, he cocked the gun and Ryan stated, "what are you going to do, shoot me, mother fucker?" and then grabbed for the gun (R. Vol. XXVI, 988); at some point Risa was grabbing Steve's arm and Ryan got hold of the bag containing the gun and was pulling on it, Macomber wasn't sure if he pulled the trigger or if it hit the door but that

when the gun went off it startled him (R. Vol. XXVI, 989); he left the scene and went straight down I-70 out of Topeka. (R. Vol. XXVI, 991)

David M. Brede, KBI special agent testified that he was the first one to recover the gun depicted in the defense exhibits 15 and 16 and that it was photographed, rendered safe by opening the cylinder to ensure there were no live rounds in it, closed it up and put it in a bag and marked it. (R. Vol. XXV, 610-12)

Zachary Carr, KBI Firearm and Toolmark Examiner, testified to the following: he examined the firearm, which included performing the hammer push-off test on June 21, 2010 then, in the double action mode, test-fired it three times on June 23, 2010 (R. Vol. XXIV, 397, 455, R. Vol. XXV, 739); upon visual inspection the hammer was down when he received it and he saw nothing wrong structurally or mechanically with the firearm (R. Vol. XXIV, 416); he received the weapon in safe and proper working order (R. Vol. XXIV, 400, R. Vol. XXV, 734); he performed a hammer push-off test which places forward pressure on the hammer to determine if it will disengage and fall forward without trigger pull, using the side of his desk, he tested the hammer 5 to 7 times without it pushing off and he then applied excessive force damaging the engagement and as a result the hammer will push-off (R. Vol. XXIV, 404-05, 437-39); couldn't describe how much pressure was excessive (R. Vol. XXV, 759) it was very evident that a piece sheared off (R. Vol. XXIV, 440); he did not follow accepted or approved procedures or method when conducting this test as prescribed by Smith & Wesson Armorer's Manual which provides that this test should be performed with the thumb on the hammer not exceeding 6 lbs. of pressure (R. Vol. XXIV, 439-41, 443, R. Vol. XXV, 764); sometimes the hammer on the weapon at issue stays cocked, and sometimes it falls forward – an

intermittent condition and he never took gun apart to determine the reason for this (R. Vol. XXIV, 451); never visually confirmed which parts were damaged (R. Vol. XXV, 737); it was highly probable any metal chips from the damage would be internal (R. Vol. XXV, 741); one should use extreme caution when handling this firearm (R. Vol. XXV, 735); his report found that firearm to be functional after the defect, if the hammer is cocked or trigger is pulled it will most likely fire or is functional (R. Vol. XXV, 739); he demonstrated that the hammer would hold rearward staying cocked. (R. Vol. XXV, 761)

KBI senior special agent **Steve Bundy** testified regarding incidents which occurred in Marshall County, for the most part statements made incident to Mr. Macomber's arrest. Bundy was allowed to testify about hearsay statements in great detail, including those made by Macomber while in custody (R. Vol. XXIV, 469-72, R. Vol. XXVI, 910-19), and those of another witness, Hedy Saville (R. Vol. XXVII, 910-20). On cross examination of Bundy, and on direct in the Defendant's case, the Court sustained an objection by the State, disallowing admission of hearsay statements of the defendant arising out of the same interview with Bundy, ruling in pertinent part, "...on a confession or statement the State has the ability to bring that into evidence through the witness. You cannot bring that same information in unless you've testified first because it's hearsay if you try to bring that in, and that is the objection made by the State, and I'm going to sustain the objection at this point in time." (R. Vol. XXIV, 501-02) Bundy also testified, over numerous objections, regarding Mr. Macomber's previous convictions, prior prison sentence, initial incarceration date, and parole date. (R. Vol. XXIV, 473-79, 487)

John Cayton, firearm expert for the defense, testified to the following: the single action sear mechanism wasn't working properly and he needed to do an internal exam to

determine what caused the problem (R. Vol. XXV, 639, 654); you must take the gun apart to check the safeties (R. Vol. XXV, 695); he was able to determine the weapon was functional (R. Vol. XXV, 641); was given Zachary Carr's bench notes, lab reports and witness accounts of the incident (R. Vol. XXV, 647); when cocked the hammer would sometimes stay back and sometimes fall forward, an intermittent condition (R. Vol. XXV, 653-54, 673); internal examination revealed that the bottom side of the hammer was polished which would cause less trigger pull (R. Vol. XXV, 662-63); the rebound slide spring was cut off and one of the 17 coils had been removed which makes the trigger easier to pull with less pressure (R. Vol. XXV, 665-68); the single action notch of the hammer was in a dangerous altered condition causing the hammer to fall forward if bumped and there was no way to determine when this defect happened (R. Vol. XXV, 668); the notch was missing material and it looks like it broke off (R. Vol. XX, 670-71); he found no metal chips where he would have expected to find them inside the gun and it was possible that this intermittent condition was present and made worse by excessive pressure applied in the push-off test (R. Vol. XXV, 673-74); in its current condition the gun won't fire unless cocked or the trigger is pulled (R. Vol. XXV, 705); this condition along with contributing factors such as a struggle, an arm being grabbed, fear, tension and excitement could have led to an inadvertent or accidental discharge. (R. Vol. XXV, 677-79) Cayton testified he worked as a contractor for the Washington D.C. police laboratory in 2003 and 2004, (R. Vol. XXV, 624) that he returned to provide assistance and training to the United States Army lab in 2008 and 2009, (R. Vol. XXV, 636) that he last testified for the "state" [identifying Washington D.C.] "Last year sometime." (R. Vol. XXV, 702). Cayton testified that "Jacqie" [indicating Spradling] was there at the

Topeka Police Department (TPD) the first time he examined the gun and wouldn't allow him to disassemble it. (R. Vol. XXV, 717-18) and that he subsequently returned to TPD for a second examination, which couldn't be completed due to the lack of Zachary Carr's lab notes, (R. Vol. XXV, 718) and finally returned a third time to complete the examination with the benefit of Carr's lab notes. (R. Vol. XXV, 722)

As the conclusion of the State's case the defendant made a motion for acquittal on count 2 and to dismiss count 1 for insufficient evidence both of which the court denied. (R. Vol. XXIV, 504)

The state moved to rebut any assertion that the gun was not in working order at the time of the shooting (R. Vol. VI, 516-23); to rebut the evidence of the defense expert's testimony that the gun had a bad hair trigger and could have fired accidentally and Macomber's testimony that he didn't know if he pulled the trigger or if the gun hit the car, i.e. intent was at issue. (R. Vol. XXVI, 992) The motion requested that the State be allowed to introduce evidence of the defendant's prior conviction via a video of a shooting involving Macomber and Deputy Salcedo, the Deputy's testimony and an expert witness to prove the gun was functional. (R. Vol. XXVI, 994)

Mr. Macomber raised numerous objections to this rebuttal evidence being admitted and argued: that the motion came too late to allow him to prepare (R. Vol. XXVI, 1004); the functionality of the gun was not relevant or disputed (R. Vol. XXVI, 1005 & 1009) and that admission of this type of evidence was highly inflammatory and prejudicial and that this evidence was more prejudicial than probative since it only proved what was already known, that the gun would fire (R. Vol. XXVI, 999, 1009); he further objected based on the previous motion of limine which he had filed regarding

allegation of prior bad acts (R. Vol. 1, 71) and pretrial orders (R. Vol. II, 106, R. Vol. III, 188) in which the State unconditionally agreed not to introduce prior bad acts or convictions. (R. Vol. XXVI, 1004); Macomber further objected to Deputy Salcedo's testimony on the same grounds (R. Vol. XXVI, 1009); and made a continuing objection when the state cross examined the defendant regarding previous bad acts and further asserted that this type of evidence is not properly presented on cross examination. (R. Vol. XXVI, 1024)

The trial court recognized that the firearm was functional (R. Vol. XXIV, 463) and found that a potential accidental discharge was a disputed material fact and that if the Deputy witnessed Macomber firing the gun then the probative value of such evidence outweighed any prejudice. (R. Vol. XXVI, 1008)

At the conclusion of Deputy Salcedo's testimony Macomber argued that he had not been provided discovery from the Marshall County case and asked for a recess to prepare for cross examination. (R. Vol. XXVI, 1058-59) Macomber also moved for a mistrial on the grounds that the state had presented no evidence to indicate whether the gun was fired from either being cocked or trigger pull. (R. Vol. XXVI, 1061) The court denied the motion stating the testimony did not exceed the bounds of what the court allowed under K.S.A. 60-455. (R. Vol. XXVI, 1062) Without cross examining the Deputy, Macomber sought to introduce surrebuttal testimony (R. Vol. CCVII, 1074) stating that he had not been provided with any discovery from the Marshall County case and could not have subpoenaed the witnesses on short notice. (R. Vol. XXVII, 1075) He proffered that two witnesses: Dave Brede and Hedy Saville observed the gun after the

incident which occurred in Topeka. (R. Vol. XXVII, 1077-82) The court denied the continuance.

At the conclusion of the evidence, the defendant requested the court to give the following jury instructions:

NO. 12 (R. Vol. VI, 419) Use of Force of in Defense of an Occupied Vehicle (2010 Supp.) P.I.K.3D 54.18 (*modified):

> Defendant claims his conduct was permitted as lawful defense of his occupied vehicle.
>
> Defendant is permitted to display to another person: a weapon to the extent it appears to him and he reasonably believes that such a display is necessary to prevent the other person from unlawfully entering into his occupied (sic) vehicle. Reasonable belief by the defendant and the existence of facts that would persuade a reasonable person to that belief. When a use of force is permitted as a lawful defenses of his occupied (sic) vehicle there is no requirement to retreat. You must presume that a person had a reasonable belief that *a display of force was necessary to prevent imminent death or great bodily harm to himself if you find the following:
>
> *The person using force knew or had reason to believe that the individual against whom force was used was unlawfully or forcefully entering the occupied (sic) vehicle of the person using force; or was attempting to remove a person against that person will from the occupied (sic) vehicle of the person using force.
>
> The presumption may be overcome if you are persuaded beyond a reasonable doubt that the person did not believe * a display of force was necessary to prevent imminent death or great bodily harm.

NO. 17 (R. Vol. VI, 493 & XXVII, 1148) Special Instruction on Proximate Cause:

> The jury may consider whether the actions or state of mind of the deceased played a role in his death – including his level of intoxication, recent history of suicidal notions and his erratic behavior a the time immediately preceeding his death. The jury weigh these factors along with the Use of Force instruction in determining what is reasonable.

NO. 18 (R. Vol. VI, 494 & XXVII, 1148) Special Instructions on Presumption of an Accident:

> Ordinarily, when an accident occurs it is an unintended act. This interference may be considered by you along with all the other evidence in the case. The State has the burden to prove that Ryan K. Lofton's death was not the result of an accident, this burden never shifts to the defendant.

NO. __(R. Vol VII, 577 & XXVII, 1161) Special Instructions on Criminal Possession of a Firearm – Nature and Degree:

> The possession and use of a firearm to defend oneself against an aggressor's imminent use of unlawful force is not in itself a defense to the charge of unlawful possession of a firearm under K.S.A. 21-4204. It is the nature and degree of the possession which may furnish a defense to the charge. Where the possession of a firearm is brief and without predesign or prior possession, such possession is not prohibited by State. If you find that the nature and degree of the defendant's possession was brief and without predesign or prior possession then you must find the defendant not guilty of Count 2, criminal possession of a firearm.

The defense objected to **jury instructions no. 12, Inference of Intent** (R. Vol. XXVII 1170): **P.I.K. 54.01** Arguing that ordinarily a person intends all the usual consequences of his voluntary acts is an inconsistent presumption with the Court's jury instructions concerning burden of proof and with defendant's requested special instructions no. 18 concerning a presumption of an accident. (R. Vol. XXVII, 1110) That is, instruction no. 12 lowered the bar for specific intent since there is no presumption of deliberation and that it violated his right to due process and fair trial by invading the province of the jury (R. Vol. XXVII, 1110-11); by allowing an impermissible stacking of interferences since the State had relied on circumstantial evidence of a trigger pull and invited the jury to further presume intent (R. Vol. XXVII, 1111-12); and the scope and form of the instruction likely misled jury. (R. Vol. XXVII, 1113)

The defense also objected to the State's proposed instruction of intentional second degree murder as a lesser included offense to count 1 (R. Vol. II, 145-46), given to the jury by the court as jury instruction numbers 14 and 15. (R. Vol. XXVII, 1170-71) Objection as follows: the instruction violates due process and defendant's right to a fair trial (R. Vol. XXVII, 1114-16); it invades the province of the jury (R. Vol. CCVII, 1117); that K.S.A. 2010 Supp 21-3107(2) & 22-3414(3) should be considered directive not mandatory based on the standard of review (R. Vol. XXVII, 1117); the penalty for a level

1 crime is more severe than an off-grid crime (R. Vol. XXVII, 1118); if the court rejects the argument that the penalty for a level 1 crime is more severe than that of an off-grid crime charged, the State's position in plea negotiations was artificially enhanced (R. Vol. XXVII, 1119); and it allows the state to argue premeditation with a safety net to entice the jury into a compromise verdict (R. Vol. XXVII, 1119-20) to all lesser included offenses but that if any are given then the full-range should be given (R. Vol. XXVII, 1135) or all that are appropriate should be given (R. Vol. XXVII, 1137) but didn't believe the facts supported lesser included instructions. (R. Vol. XXVII, 1139-40) The defense also objected to any jury instruction being given on criminal possession of a firearm, count 2 (R. Vol. XXVII, 1105, 1130) Additionally, the defendant orally moved for acquittal asserting the same grounds as his previous motion to dismiss count 2.

On count 1, Mr. Macomber was convicted of the lesser included offense: of Murder in the Second Degree – Intentional, K.S.A. 2010 Supp. 21-3402(a), Severity Level 1, person felony. His criminal history was determined to be in the "A box" and he was given an aggravated sentence of 653 months which ran consecutive to his other previous sentences. (R. Vol. XXV, 606-7, 609) On count 2, Macomber was also convicted of the crime of Criminal Possession of a Firearm in violation of, K.S.A. 2010 Supp. 21-4204, Severity Level 9, nonperson felony and sentenced to the standard term of 8 months to run consecutive to the sentence for count 1 (R. Vol. XXV, 611) for a total prison term of 661 months. (R. Vol. XXV, 609)

Mr. Macomber filed a motion for new trial following his conviction (R. Vol. VII, 567-73) in which he raised number issues on admission of rebuttal evidence including the Court; failing to allow the coroner to be present for testimony of defense witnesses; and

failing to instruct the jury on the nature and degree of possession in count 2. At sentencing the court denied the motion. (R. Vol. IX, 1-64) So as to avoid unnecessary repetition, additional facts germane to Appellants ISSUE VIII, prosecutorial misconduct, will be presented within the argument.

ARGUMENTS AND AUTHORITIES

1. THE DEFENDANT'S PROSECUTION FOR CRIMINAL POSSESSION OF A FIREARM IN SHAWNEE COUNTY VIOLATES THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT TO THE UNITED STATE CONSTITUTION AND SECTION 10 OF THE KANSAS CONSTITUTION BILL OF RIGHTS, AND SUBSTANTIALLY PREJUDICED THE DEFENDANT IN THE TRIAL OF MURDER CHARGE.

STANDARD OF REVIEW

The issue of whether or not there is a double jeopardy violation under either the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution or Section 10 of the Kansas Constitution Bill of Rights is a question of law subject to unlimited review. *State v. Schoonover*, 281 Kan. 453, 462, 133 P.3d 48 (2006) and *State v. Morton,* 283 Kan. 464, 468, 153 P.3d 532 (2007)

ANALYSIS

Prior to proceeding to trial the defendant filed a motion to dismiss the criminal possession charge based on the doctrine of double jeopardy. (R. Vol. III, 236-43) The State filed its response to the motion on September 22, 2011 in which its only argument against double jeopardy being applicable was that the double jeopardy prohibition was not applicable to prosecutions brought by separate sovereignties. (R. Vol. IV, 320-21) The trial court denied the motion to dismiss. (R. Vol. 1, 411) However, it also noted that Shawnee and Marshall Counties were not separate sovereignties and therefore the state's argument on this is not controlling.

The Court then went on to hold that double jeopardy inquiry did not end with that determination. Instead, it indicated that the right to be free from a double jeopardy prosecution as guaranteed by the Constitution had been further codified by the provision of K.S.A. 21-3108 which requires a three part inquiry to determine (1) whether or not the prior charge resulted in a conviction; (2) whether or not evidence of that charge in the present crime charged was introduced in the prior prosecution and (3) whether or not the charge in the present prosecution was one which could have been charged as an additional count in the prior case. "Once the defendant raises a challenge of double jeopardy the state has the burden of proving that jeopardy did not attach." *State v. Lee*, 210 Kan. 753, at 756, 504 P.2d 204 (1972)

In its analysis of these three issues, the trial court found that the first element had been established in that the defendant had been convicted in Marshall County for criminal possession of a firearm. The trial court also found that the second element of the required inquiry had not been established since the defendant had not alleged nor had the Court been provided with any information or facts that evidence of the unlawful possession had been introduced as part of the Marshall County cases. This seems somewhat disingenuous given the fact that the Court had indicated in its ruling that it had been made aware of the criminal possession conviction in Marshall County. That determination is also incorrect since prior to the defendant proceeding to trial in Shawnee County, he was charged, tried and convicted in Marshall County, to wit; Case No. 10-CR-1059 and 10-CR-1060 of the criminal possession of the same firearm as well as a number of other felony offenses. Those convictions occurred well in advance of the defendant proceeding to trial in the instant matter. Additionally, the trial court also found

that the third element of the requisite inquiry had not been established that being that the charge in the second prosecution must have been one which could have been charged as a separate count in the Marshall County case.

The offense of criminal possession of a firearm is a continuing offense and cannot be charged as multiple crimes occurring at discrete moments in time. The evidence presented during the motion practice clearly established that the defendant's possession of the firearm at issue was a continuing one and occurred in both Shawnee and Marshall Counties.

The evidence which was presented at the defendant's trial in Shawnee County established that the firearm at issue was in the continuous possession of the defendant from before the time of the Topeka shooting up to and including the kidnapping of Hedy Saville a short time later. As is reflected in the record on appeal and the evidence presented in the Shawnee County trial in which he was charged with murder and the criminal possession of a firearm, Mr. Macomber was charged, tried and convicted in two separate Marshall County cases 10-CR-1059 and 10-CR-1060 with an identical criminal possession of a firearm on June 7, 2010 and was subsequently sentenced for each of those two possessions. Following those two convictions the defendant then went to trial in the Shawnee County case which is presently before the Court on appeal and he was convicted and sentenced a third time for the same continuous action of possessing that same firearm.

RES JUDICATA

In case #107, 206 the Court of Appeals reversed Macomber's conviction for criminal possession of a firearm on grounds the second prosecution on double jeopardy grounds, specifically finding that,

> "Neither his possession of the pistol nor his criminal history changed between the facts of [Case #107, 205] and the present case. We conclude that Macomber may be convicted of criminal possession of a firearm only once, and since he was convicted twice, we reverse the conviction for criminal possession of a firearm in the present case and vacate that sentence." (#107, 206 at p. 11)

Due to the sound reasoning of the Court in that case, the facts of which are identical to the applicable facts here, this issue of the present case has already been determined, and is therefore res judicata. Appellant respectfully submits this issue has already been decided and requires reversal as well.

DOUBLE JEOPARDY

The double jeopardy clause of the Fifth Amendment to the United States Constitution and section 10 of the Kansas Constitution Bill of Rights provides that no person shall be subject for the same offense to be twice put in jeopardy. The Fifth Amendment was made applicable to the states by the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784, 89 S. Ct. 2056, 23 L.Ed2 707 (1969). Additionally, the double jeopardy clause of the United States Constitution protects against (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple convictions for the same offense. *State v. Cady*, 254 Kan. 393, 396, 867 P.2d 270 (1994) and *Brown v. Ohio*, 432 U.S. 161, 164, 97 S.Ct. 2221, 53 L.Ed2 87 (1977).

In *State v. Schoonover*, 291 Kan. 453, the Kansas Supreme Court provided an exhaustive discussion of double jeopardy principles and in summarizing it analytical framework noted that the overarching inquiry is whether the convictions are for the same offense. It then goes on to note that there are two components to this inquiry, both of which must be met in order for there to be a double jeopardy violation. First, does the conviction arise from the same conduct and second, if so, by statutory definition are there two offenses or only one? *Id,* at 496.

As is also noted in *Schoonover*, at page 497, the court must consider the following factors in order to determine if the convictions arose from the same conduct.

> "Some factors to be considered in determining if conduct is unitary, in other words if it is the "same conduct," include (1) whether the acts occur at or near the same time: (2) whether the acts occur at the same location; (3) whether there is a casual relationship between the acts, in particular whether there was an intervening event; and (4) whether there is a fresh impulse motivating some of the conduct."

Since Macomber's convictions in both Marshall County and Shawnee County arose from the same statute (and the same continuous possession) the court is required to apply the unit of prosecution test which is the second component of a double jeopardy inquiry. As is indicated in *Schoonover, supra* at pages 497-498:

> "If the double jeopardy issue arises because of convictions on multiple counts for violations of a single statute, the test is: How has the legislature defined the scope of conduct which will comprise on violation of the statute? Under this test, the statutory definition of the crime determines what the legislature intended as the allowable unit of prosecution. There can be only one conviction for each allowable unit of prosecution. The unit of prosecution test applies under either the Double Jeopardy Clause of the Fifth Amendment or Section 10 of the Kansas Constitution Bill of Rights."

In the instant case, as in the two Marshall County cases, the defendant was convicted of the criminal possession of a firearm in violation of the provisions of K.S.A. 21-4204(a). That statute prohibits in part:

> "(4) possession of any firearm by a person who, within the preceding 10 years, has been convicted of..., or a crime under a law of another jurisdiction which is substantially the same as such felony, has been released from imprisonment for such felony, or was adjudicated as a juvenile offender because of the commission of an act which if done by an adult would constitute the commission of such felon, was found not to have been in possession of a firearm at the time of the commission of the offense, and had not had the conviction of such crime expunged or been pardoned for such crime..."

While the Kansas courts have not addressed the application of double jeopardy principles to multiple prosecutions for the criminal possession of a firearm charges which occur during a continuing course of conduct a number of other jurisdictions, other state and federal courts have done so. A detailed review is contained in *Hancock v. State*, 155 P.3d 796 (Okla. 2007) in which the Court noted at pages 832-834:

> The issue before us is one of first impression for an offense O.SD. 2001, § 1283. However, "(i)t appears to be a well-settled proposition in felon-in-possession cases that the element of possession implies continuity." *Simmons v. State*, 899 P.2d 931, 936 (Alaska Ct. App. 1995). **Criminal possession "may be brief, if complete, or it may extend over a period of time, if uninterrupted."** *State v. Williams*, 211 Neb. 650, 319 N.W.2d 748. 751-752 (1982) **(possession of a firearm, absent evidence of interruption was a single offense). Felonious possession of a firearm " is a course of conduct, not an act; by prohibiting possession Congress intended to punish as one offense all of the acts of dominion which demonstrated a continuing possessory interest in a firearm."** *United States v. Jones*, 533 F.2d 1387, 1391 (6th Cir. 1976). **A continuing course of conduct defined by statute as a single crime cannot be charged as multiple crimes occurring at discrete moments in time.** *Id.* When a defendant is charged "with multiple counts alleging possession of the same weapon on different occasions, the State must bear the burden of proving that the defendant's possession was not continuous...beyond a reasonable doubt" *Simmons,* 899 P.2d at 936.
>
> ¶116 In *United States v. Jones*, supra, the government charged the defendant in three counts of felonious possession of the same firearm on three different occasion over a three- year period. 633 F.2d at 1390. The Government there

argued each act of possession was punishable as a separate offense. The Court of Appeals disagreed:

> **With equal propriety the Government might have charged Jones on more than 1100 separate days and obtained convictions to imprison Jones for the rest of his life. The fact that the Government merely has proof that he possessed the same weapon on three separate occasions, rather than continuously for a three- year period, should not dictate the result that Jones could receive three times the punishment he would face if continuous possession for a three-year period were proved. There is no proof that there was any interruption in the possession by Jones of the weapon.**
> ***Id.* At 1391. The Court of Appeals found the defendant's conviction and punishment for three counts of felonious possession of the same firearm violated the Fifth Amendment prohibition against double jeopardy.**
>
> ¶117 In the District Court, the State argued that the Appellant's possession of the weapon in Oklahoma County and Logan County were separated by several months and thus separate offenses. Under these particular facts, we disagree. The evidence of the Appellant's felonious possession of the firearm in Oklahoma County in April, 2001, and again in Logan County in October, 2001, raises a sufficient inference, in the absence of any contrary evidence, the Appellant continuously exercised dominion and control over the weapon, so that his possession of it was one ongoing violation of Section 1283. Jeopardy attached upon the Appellant's conviction and punishment by the District Court. *Dyer v. State*, 2001 OK CR 31, ¶4, 34 P.3d 652, 653. The conviction and punishment by the District Court of Oklahoma County in count 4 placed Appellant twice in jeopardy for the same offense in violation of Article II, *824 Section 21 of the Oklahoma Constitution and the Fifth and Fourteenth Amendments. The conviction is reversed. (emphasis supplied)

Concurrent jurisdiction existed between Shawnee and Marshall Counties for the prosecution of the defendant for what was a continuing criminal possession of a firearm.

K.S.A. 22-2602 provides:

> "**Place of trial.** Except as otherwise provided by law, the prosecution shall be in the county where the crime was committed."

K.S.A. 22-2608 provides:

> "**Crimes committed while in transit.** If a crime is committed in, on or against any vehicle or means of conveyance passing through or above this state, and it cannot readily be determined in which county the crime was committed, the prosecution may be in any county in this state through or above which such

vehicle or means of conveyance has passed or in which such travel commenced or terminated."

In this case, the alleged crime occurred in an automobile, and neither the defendant nor the firearm left the vehicle after the possession by Macomber was established by the state. The vehicle, along with Macomber and the weapon, left Shawnee County and ended up in Marshall County. The establishment of the elements of the crime began in Shawnee County and continued on into Marshall County, where Mr. Macomber was prosecuted for the crime not once but twice. K.S.A. 22-2608 provides for only one prosecution when the crime occurs over more than one county. The State, rather than any particular county, prosecutes and the State punishes.

The interplay of these statutes allows the state to elect in which county prosecution shall occur, but not duplicate in each county, so long as the offense charged is a continuing one and there is no break in the criminal activity, which in this case is possession of a firearm.

In the instant case, the defendant could have been prosecuted and convicted in either Shawnee County or Marshall County for the continuing offense of criminal possession of a firearm. He was first prosecuted and convicted of criminal possession in Marshall County and therefore his prosecution and conviction in Shawnee County for the same crime is barred by the doctrine of double jeopardy.

The state elected, through **one unitary counsel** in **three separate cases**, to prosecute Macomber for criminal possession of a firearm in Marshall County. The prosecution for that charge was complete, and double jeopardy attached to his continuing

criminal possession of a firearm within the Jurisdiction of the State of Kansas on June 7, 2010.

This double jeopardy violation and the evidence presented about a criminal possession of a firearm prejudiced the jury against the defendant. If the state had not been allowed to present the testimony required to establish the prior conviction element of this legally superfluous charge, the jury may have been more able to focus its deliberations on the elements of the more severe charge of Murder, and the defense theory of the case. Both convictions should be reversed, and count 1 should be remanded for new trial free from the taint of prior conviction information necessitated by the firearm charge. The court approved similar remedy in *State v. Sanders*, 258 Kan. 409, 416, 904 P.2d 951 (1995), where a reversal on one count (Jury instruction issue) necessitated a reversal on a second factually intertwined charge. See also *Benton v. Maryland*, 395 U.S. 784, 89 S. Ct. 2056, 23 L.Ed2 707 (1969), where a second charge tried with a charge barred by double jeopardy was also reversed for a factual determination of whether the defendant was unduly prejudiced by the barred charge. "...The question raised by petitioner that prejudicial error resulted from the admission at his trial for both burglary and larceny of some evidence that state law made inadmissible in a trial for burglary alone was not decided by the Maryland appellate court, and should now be considered by that court..." *Benton*, at Syl. ¶ 5, at 797-798.

II. THE TRIAL COURT ERRED WHEN IT ALLOWED THE CORONER, DR. POJMAN, TO TESTIFY REGARDING HIS OPINION AS TO THE MANNER OF DEATH.

STANDARD OF REVIEW

The standard of review for admission of expert testimony is an abuse of discretion. *State v. Dixon*, 279 Kan. 563,615, 112 P.3d 883 (2005).

ANALYSIS

Here the first step of the evidentiary analysis which is the question of relevance is unnecessary. The manner of Ryan Lofton's death was the ultimate question for the jury and the coroner testified that the term homicide means that someone besides the victim pulled the trigger. Step two is to determine the applicable rules and legal principles. In this regard, K.S.A. 60-456 provides in relevant part:

> "(b) If the witness is testifying as an expert, testimony of the witness in the form of opinions or inferences is limited to such opinions the judges finds are (1) based on facts or data perceived by or personally known or made known to the witness at the hearing and (2) within the scope of the special knowledge, skill, experience or training possessed by the witness."
>
> (d) Testimony in the form of opinions or inferences otherwise admissible under this article is not objectionable because it embraces the ultimate issue or issues to be decided by the trier of fact";
>
> "It is necessary that the facts upon which an expert relies for his or her opinion should afford a reasonably accurate basis for his or her conclusions as distinguished from mere guess or conjecture. **Expert witnesses are to confine their opinions to relevant matters which are certain or probable, not those which are merely possible.** ***Nunez v. Wilson,*** **211 Kan. 443, 445-446, 507 P.2d 320-9 (1973)**
> Although an expert may give an opinion on an ultimate issue as provided in K.S.A. 60-456(d), such witness may do so only insofar as the witness aids the jury in the interpretation of technical facts or assists the jury in understanding the material evidence. An expert witness may not pass on the weight or credibility of evidence, for those matters are strictly within the province of the jury."(emphasis supplied) *State v. Struzick*, 269, Kan. 95, 99 5P.3d 502 (2000)
>
> "...The basis for the admission of expert testimony is necessity arising out of the particular circumstances of the case...There was nothing technical that Dr. Miller needed to interpret for the jury nor did the jury need his assistance in understanding the evidence. Where...the normal experience and qualifications of the jurors would allow them to draw proper conclusion from the evidence, expert testimony was not necessary." *State v. Brice*, 276 Kan. 758, 775, 80 P.3d 1113 (2003)

During the trial and over the objection of the defendant, the Court allowed opinion testimony from the coroner, Dr. Pojman, that the manner of Ryan Lofton's death was a homicide rather than the result of an accidental discharge of a firearm. That opinion was formed on June 8, 2010 just one day after the incident, however, at trial Dr. Pojman was unable to relate what evidence he relied on to form the opinion other than unidentified information that he claimed to have received from law enforcement. He further indicated that he never interviewed any witness or observed or reviewed the interviews of any witnesses. He also testified that he was not made aware of any witness' testimony at the trial of this matter nor had he been made aware of the fact that there was evidence or a claim that there had been an accidental discharge of the weapon. Dr. Pojman's testimony exceeded the permissible scope of expert testimony under provisions of K.S.A. 60-456.

The Kansas Supreme Court addressed a similar challenge to a coroner's testimony in *State v. Dixon*, 279 Kan. at 563. In Dixon, the district attorney allowed the coroner, Dr. Erik Mitchell, to testify over defense objection that the manner of the victims' death was homicide. On appeal, the defendant argued that Dr. Mitchell was not qualified to determine the cause of the explosion and fire that resulted in the death of an individual in order to form the opinion that deaths were homicides. The Court in Dixon found that if admission of Dr. Mitchell's testimony as to the manner of death was erroneous, such error was harmless because the testimony merely restated the contents of the death certificate. *Id.* at 617. Unlike *Dixon*, the death certificate was not admitted into evidence in Macomber's trial, and Macomber objected specifically to Dr. Pojman's testimony as to the manner of death.

While Dr. Pojman conducted an autopsy of Ryan Lofton's body and claims that said examination provided him the foundation to testify as to the cause of Lofton's death, he never interviewed or reviewed interviews of any of the witnesses. He did not consider the possibility that the gunshot wound could have resulted from the accidental discharge of the gun. Dr. Pojman's testimony regarding the manner of death did not aid the jury in deciding this ultimate issue – whether Ryan Lofton's death was a homicide rather than an accidental discharge. Thus, admission of Dr. Pojman's testimony on this point was an abuse of discretion.

The probative value of the coroners' opinion that homicide was the manner of Ryan Lofton's death was at best suspect and was far outweighed by is prejudicial effect. Dr. Pojman's conclusions were based on insufficient knowledge of the facts as previously outlined herein. The trial court's admission of this opinion was highly prejudicial and created not only the potential to, but most likely did, mislead the jury to believe that his opinion was conclusive proof of an element of an act of intentional second degree murder and that it was legal and binding conclusion, rather than factor to be considered by the jury in determining Macomber's intent at the time of the shooting.

Even after the coroner conceded that a death could be classified as accidental if the gun was in someone else's had when it discharged, the court would not permit the defendant's request that Dr. Pojman be present during witness testimony. (R. Vol. XXVI, 882-83)

The Doctor's special skill set stemmed from medical training which allowed him to examine, evaluate and characterize the nature of Mr. Lofton's wound, correctly ruling out suicide and natural causes as manner of death, but gave him no special insight as to

whether this injury was inflicted accidentally or intentionally. Doctor Pojman's conclusion as to the manner of death was not based on any degree of medical certainty. The trial court abused its discretion failing to exclude this portion of the coroner's opinion testimony, which prejudicially invaded the province of the jury, requiring Macomber's convictions to be reversed.

III. THE TRIAL COURT ERRED FAILING TO BIND THE STATE TO PRETRIAL ORDERS AND EXPLICIT STIPULATIONS CONCERNING PRIOR BAD ACTS OR BAD CONDUCT.

STANDARD OF REVIEW

The standard of review here is de novo. See *State v. Reid,* 286 Kan. 494, 507 -509, 186 P.3d 713 (2008).

ANAYLYSIS

Initially, during the course of the pretrial proceedings in this matter the State agreed unconditionally to not use or offer into evidence at trial the defendant's prior conviction or bad acts and explicitly waived any statutory right that the State had to introduce such evidence. This waiver initially occurred during two separate pretrial conferences between the Court, counsel and the defendant. Those conferences were held on September 27, 2010 (R. Vol. II 105-06, ¶9) AND February 18, 2011 (R. Vol. III 187-88, ¶9). It was not until the June 3, 2011 pretrial hearing when Mr. Macomber refused to stipulate to any prior convictions that the State and the Court added the disclaimers regarding elements necessary prove the Criminal possession charge to the previous agreement and pretrial orders (R. Vol. XV, 5-6). No disclaimers were memorialized in the written pretrial order. (R. Vol. II, 160-61)

> A pretrial order has the full force of other orders entered by the court and controls the subsequent course of litigation unless modified to prevent manifest injustice.

> See K.S.A. 60-216(e); *Sampson v. Hunt*, 233 Kan. 572, 578, 665 P.2d 743 (1983). In the absence of an attempt to modify the pretrial order, such order is binding and controls the subsequent course of trial. *Sieben v. Sieben*, 231 Kan. 372, 377, 646 P.2d 1036 (1982).

If a pretrial is held in either a civil or a criminal case both parties are bound by the agreements made at the conference and included in the order entered by the Court at the conclusion of the conference. However, if the pretrial order could result in manifest injustice, the trial Court has the authority to modify the order. *State v. Coleman*, 253 Kan. 335, 347, 856 P.2d 12 (1993) and as noted in *Herrell v. Maddux*, 217 Kan 192, 194, 535 P.2d 935 (1975).

> "...the trial court has discretion to allow or refuse modification of the pretrial order and its ruling should be upheld absent an abuse of discretion..."

This is what occurred on June 3, 2011, when the Court added disclaimers to the previous pretrial orders which were entered on September 27, 2010 and February 18, 2011 (R. Vol. XV 5-6). However, the inquiry does not end here. Subsequent to the June 3, 2011 order the Court held yet another pretrial conference on September 7, 2011 and once again entered an order which included a provision in paragraph 9 of that order which stated that the State would not offer any evidence during the trial relating to defendant's prior convictions or bad acts. That provision did not contain any modification or caveat that it did not apply to defendant's prior convictions similar to the Courts ruling in the June 3, 2011 hearing (R. Vol. III, 226-27, ¶9). The State made no objection to the inclusion of paragraph 9 in the pretrial order nor did it request any modification to the paragraph so that it conformed to the Court's ruling on June 3, 2011. In this case the State either feigned or actually made a conscious and reasoned decision not to present 60-455 evidence, the intention of which it made clear no less than 4 times in writing and several

additional times on the record in this case and two others involving this defendant. This particular agent of the State of Kansas was directly involved in all three cases.

The state never moved to modify the Court's pretrial order, but rather bulldozed over the issue, moving to admit evidence pursuant to 60-455. The state's Motion to admit evidence (60-455) was filed 11:44 A.M., January 5, 2012, BEFORE THE STATE RESTED ITS CASE IN CHIEF...

Because the motion was deemed to be a 60-455 motion and not a motion to modify pretrial orders, the wrong standard was used resulting in a ruling which altered the entire course of the trial and the defendant's case, keeping in mind that the State had chosen to rest its case, knowing it would get a second bite at the apple, whether the evidence was actual rebuttal or not. What the Court failed to address was that the actual pretrial order contained was an agreement and order not to take advantage of K.S.A. 60-455. The Court allowed the prosecution to skip the step of asking that the pretrial order be amended, resulting in an unfair and prejudicial shift.

Essentially, the Court's standard was reversed, from requiring a showing of manifest injustice to the State if the Court's order should stand, to requiring the Court make a finding of undue prejudice against the defendant, which is a 180 degree swing in the burden, from the State to the defendant. To put it simply, was it obviously unfair to the state to keep the evidence out, or was it obviously unfair to the defendant to let it in? The different standards are on completely opposite ends of the evidentiary spectrum.

It is clear the State never had any intention to follow the pretrial order or keep the promise it made no less than eight times, which is unmistakably evidenced by the filing of its motion before it rested its case in chief. This is the equivalent of a "stacked" deck

in a game of cards. The scenario is all too familiar: Promise a fair game time and time again, play while the odds favor the house, and when it seems the house advantage is weakening, break the promise **and** change the rules. While this is commonplace in illegal gambling, it should be nonexistent in our system of justice. The State's decision to make this move was deliberate, calculated and planned well before trial, but not revealed until the trial of its case was nearly complete. The reasoning of the state, suggesting it did not know the nature of the defense, or that information was revealed in the course of trial by defendant's cross examination, is an outright fraud. The pattern of conduct by the state is at once unfathomable and irrefutable:

First, **repeatedly** agree not to offer any evidence of prior crimes or bad acts (spanning three different cases in two counties); Second, conduct a nearly compete trial wherein the defense strategy relies throughout on the State's promise and Court's order; Third, make **no** appropriate motion to modify pretrial orders, violate the pretrial orders by filing a specious "emergency" motion to admit evidence you agreed repeatedly not to use; Fourth, introduce evidence inconsistent with what was included in the 60-455 motion; Finally, argue in closing statement in complete juxtaposition with the Court's limiting instruction.

At the time of the Court's order (prior to trial) denying the defendant's motion to dismiss and based on the States previous indication in the pretrial orders that it did not intend to offer evidence of the defendant's prior convictions or bad acts, the Court relied on the manifest injustice standard for modifying pretrial orders set forth in *Coleman.* However, it did not articulate for the parties or the record what the manifest injustice consisted of. There is nothing in the record which reflects that the Court determined that

manifest injustice would occur, had occurred and/or of what that manifest injustice would exist. The manifest injustice standard set a very high bar, as certainly is required when a defendant moves to withdraw a plea post-sentence.

While there are no readily apparent cases which address the term "manifest injustice" in the context of modifying a pretrial order, such a occurred here, it would appear that in other contexts it has been defined as "obviously unfair or shocking to the conscience" *State v Barahona* 35 Kan. App.2d 605, 608-09, 132 P.3d 959 *rev. denied* 282 K. 791 (2006). Furthermore, in *State v. Adams*, 284 Kan. 109, 114, 158 P.3d 977 (2007), the Court has indicated that in evaluating a claim of manifest injustice, a court must determine:

> "...whether the defendant was misled, coerced, mistreated, or unfairly taken advantage of..."

Black's Law Dictionary, 7th Ed. (1999), defines manifest injustice as,

> " An error in the trial court that is direct, obvious, and observable, such as a defendant's guilty plea that is involuntary or that is based on a plea agreement that the prosecution rescinds."

Here, the defendant relied on the previous pretrial orders of the Court entered on September 27, 2010 and February 18, 2011 and even more significantly on the September 7, 2011 order which was entered after the Courts indication on June 3, 2011 that Mr. Macomber's prior convictions would be admissible in preparing for a trial in which he would be representing himself. Was this a direct, obvious, and observable error by the state? No, it was a **strategic** move by the State, which, when the time was right, was changed. The State made no showing that it suffered a manifest injustice in making its pretrial decision. In order to properly modify the pretrial order, the state would have to have made a bona fide showing it suffered an injustice, which it could not and did not.

Instead, at the very end of its case in chief, it deliberately and consciously chose to ignore its prior agreement and the pretrial orders and moved to admit the evidence under the statute which it agreed **not to use**.

> "A county attorney or district attorney is the representative of the State in criminal prosecutions. As such, he or she controls criminal prosecutions. It is the county or district attorney who has the authority to dismiss any charges or reduce any charge. The prosecuting attorney has broad discretion in discharging his or her duty.... The prosecuting attorney has discretion to dismiss charges and the court cannot refuse to allow dismissal..." (internal citations omitted) see, *State v. Williamson* 253 Kan. 163, 165, 853 P.2d 56 (1993); also see, K.S.A. 2010 Supp. 21-4713, (prosecutors powers regarding plea negotiations).

The trial court first made an error of law in applying the wrong standard for modifying the pretrial order, and secondly abused its discretion by not making a finding on the record or articulating what constituted a manifest injustice prior to modifying the pretrial order. As such the Court's decision allowing the state to make such a motion for evidence to be admitted under 60-455 was reversible error.

IV. THE DISTRICT COURT ERRED IN ADMITTING EVIDENCE OF MR. MACOMBER'S SHOOTING OF A LAW ENFORCEMENT OFFICER IN MARSHALL COUNTY.

STANDARD OF REVIEW

The standard of review for this issue is a multistep analysis, as outlined in *State v. Shadden*, 290 Kan. 803, 817-818, 235 P.3d 436 (2010). For purposes of this issue, the Standard of review is de novo on materiality and statutory interpretation, and abuse of discretion on failure to require compliance with the statute and finding the evidence not to be unduly prejudicial.

ANALYSIS

Mr. Macomber's defense to the murder charge was that Lofton's death occurred due to an accidental discharge of the gun in Macomber's car. The testimony at trial established that there was a struggle going on in the car prior to the shooting and that it was during that struggle that the weapon discharged. Macomber presented the expert testimony of John Cayton, a former firearm examiner for both the Kansas City, Missouri Police Department and the Kansas Bureau of Investigation, who testified that Macomber's gun had a defective trigger mechanism which allowed it to discharge with only a fraction of the normal force necessary to operate it. The State's firearm expert testified that as a result of the firearm's condition extreme caution should be exercised when handling the weapon the inference being that it would easily fire with little or no pressure being applied to the trigger.

Over Macomber's objection, the trial court allowed the State to introduce in rebuttal the testimony of Marshall County Deputy Sheriff Fernando Salcedo if the deputy actually witnessed Macomber actually firing the gun." The Court ruled also that the State was allowed to cross examine the defendant on the issue. (R. Vol. XXVI, 1008) That testimony established that several hours after the Lofton shooting, Deputy Salcedo stopped Macomber's car in Marshall County and that during the stop, Macomber pulled the same gun that had been involved in the Lofton shooting and fired shots from the weapon, two of which struck Deputy Salcedo. Salcedo did not testify that he witnessed Macomber actually firing the gun. The State did not pose any question to Salcedo on this crucial issue for which the Court allowed his testimony, but the state did inquire as to Salcedo's service gun; the directions or commands given him by the defendant; Salcedo's injuries; and his bullet proof vest, and such vests in general; Salcedo's surgeries, how

many surgeries, and whether he knew the guy who shot him twice. (R. Vol. XXVI, 1053-58) Macomber asserts that the introduction of this testimony violates K.S.A. 60-455 and constitutes reversible error.

K.S.A. 60-455 provides in relevant part:

> (a) Subject to K.S.A. 60-447, and amendments thereto, evidence that a person committed a crime or civil wrong on a specified occasion, is inadmissible to prove such person's disposition to commit crime or civil wrong as the basis for an inference that the person committed another crime or civil wrong on another specified occasion.
> (b) Subject to K.S.A. 60-455 and 60-448, and amendments thereto, such evidence is admissible when relevant to prove some other material fact including motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.

The State asserted at trial and in its written motion filed near the close of its evidence that the purpose of introducing rebuttal evidence was to prove that the gun was functional before and after the Shawnee County shooting. Macomber's accidental discharge theory was based on expert testimony that the gun was defective. If the jury credited that testimony, the jury could have found reasonable doubt as to his intent to shoot Lofton and acquit Macomber of the 1st degree murder charge and its lesser included charge of murder in the 2nd degree.

Specifically, the state alleged in its written motion that it needed to use evidence, "..that the defendant fired the gun approximately two hours after he killed Mr. Lofton and that the gun was functioning without defect at all times relevant hereto." (R. Vol. VI, 516, 157) "The state merely seeks to rebut any assertion that that the gun was not in working order at the time of the murder." (R. Vol. VI, 517) "The state intends to limit itself to the operation of the gun at the time of the subsequent shooting and not delve into potentially inflammatory issues that are necessarily connected to the defendant's

conduct." (R. Vol. VI, 518). The state provided no excuse for filing its motion at the end of its case, instead suggesting an "emergency" brought about by the course of the defendant's case. Counsel for the State was present during each examination made by the defense's expert witness Cayton, in which he was examining the gun for defects. This occurred months before trial, and certainly more than 10 days prior and the level of detail in the state's motion itself belies the sincerity in its "emergency" filing.

The procedural "safeguards" touted in the *Gunby* decision (heavily cited in the State's motion) were cast aside in favor of expediency. See *State v. Gunby*, 282 Kan. 39 (2006). Essentially, *Gunby* stands for the proposition that if the procedural requirements of 60-455 are met, then all relevant evidence may be admitted if the meets the requirements of relevance and is not unduly prejudicial. In this case, the procedural requirements of K.SA. 2010 Supp. 60-455 were not met, in that the state did **not** file the motion 10 days before trial had begun, and did not provide the specific information to which the deputy would testify in this case 10 days before trial.

The introduction of prior or subsequent acts was not necessary or proper for rebuttal where the state indicated its intent to offer 60-455 evidence prior to the close of its case **before the defense began**, and simply was an impermissible extension of its case in chief, as it did not rebut the defense, the actual testimony being outside the scope of the defense case.

Even if the gun was defective and had a hair trigger, such a condition would not preclude Macomber from intentionally shooting the gun. In either defective or non-defective condition, there is no dispute that the gun actually worked. In any event, the Marshall County shooting had no bearing on whether the gun was actually defective or

not. Thus, introduction of the evidence surrounding the Marshall County shooting was an abuse of discretion.

Even if the court were to determine that the Marshall County shooting is relevant to prove Macomber's intent, the unfair prejudice resulting from such evidence greatly outweighs it probative value. *Cf. State v. Prine*, 287 Kan. 713, 736, 200 P.3d 1 (2009) (holding that admission of evidence of child sexual abuse by defendant was prejudicial in the extreme and mandated reversal of the defendant's convictions). Police officers carry a special status in our society as guardians of law and order. Evidence that a law enforcement officer has been shot while in the line of duty carries a powerful emotional appeal. Juries can be expected to view a defendant who has shot and wounded a police officer in the line of duty with particular revulsion and distrust. When the particular shooting itself is at issue and forms the basis of the charges against the defendant, the emotional appeal is proper. But in this case, the rebuttal evidence concerns a different shooting for which Macomber was not on trial. The rebuttal evidence raised the very specter that K.S.A. 60-455 was designed to prevent – convicting a defendant based on the defendant's bad character, rather than whether the defendant committed the crime for which he has been charged.

The legal basis for the Court's decision was based on the State's motion, which outlined a specific purpose for the use of the evidence. The State abandoned that purpose in its use and final arguments, resulting in unfair prejudice to the defendant.

> "Rebuttal evidence is that which contradicts evidence introduced by an opposing party..." see *State v. Sitlington*, 291 Kan. 458 at 464, 241 P.3d 1003 (2010)

Both the State's and Macomber's firearm experts agreed that there was damage i.e. a defect to the gun in evidence which caused a dangerous and intermittent condition:

when the firearm was cocked (single action mode) the hammer, at time would fall forward with little or no applied pressure to either the trigger or hammer; and that the weapon was functional. The defense expert gave the opinion that an accidental discharge may have occurred when the condition of the gun was considered in combination with the witness accounts at the time of the shooting. The defendant testified that it all happened so fast that he wasn't sure what caused the gun to discharge.

The first objection at trial was relevance or improper rebuttal and at no time was the functionality of the gun disputed. The court was fully aware that the defendant never claimed the gun was non-functional. It was unreasonable to allow Deputy Salcedo's tragic and provocative but irrelevant testimony, which neither rebutted nor explained the circumstances of the shooting in Topeka. When the State went well beyond the parameters of the Court's order allowing specific testimony regarding the functionality of the gun, Macomber moved for a mistrial, which was denied, the Court finding that the testimony did not exceed the bounds of what the court allowed. (R. Vol. XXVI, 1061-62)

The standard of review of the probative element of K.S.A. 60-455 is abuse of discretion. *State v. Riojas*, 288 Kan. 379, 383, 204 P.3d 578 (2009); and Macomber objected that the probative value, if any, would be vastly outweighed by the potential for undue prejudice.

The court specifically ruled that if the Deputy witnessed Macomber firing the weapon that his testimony would be more probative than prejudicial (R. Vol. XXVI, 1008) but in the actual testimony the State failed to ask Salcedo if he saw the gun being discharged, he merely stated what was already known, he was shot.

Macomber's second objection at trial was the potential for undue prejudice from this testimony was so disproportionate to its probative value that the weighing of these factors by the trial court constituted an abuse of discretion. This point is further illustrated because the state also failed to call their expert witness to rebut John Cayton's opinion for the potential of an accidental discharge. It would be difficult to find more extreme example of undue prejudice and regardless of any limiting instruction, the jury likely considered Macomber's character, and the State **ensured** it would with its closing argument.

In his third objection, Macomber objected that the state had unconditionally agreed at **pretrial** not to present evidence of his prior conviction and bad acts and that the court should have bound the state to that agreement based on the same legal authority and rationale in issue III. The court had previously ruled that no prior bad acts evidence would be allowed under K.S.A. 60-455 (R. Vol. XV, 6) but failed to address this objection at trial. In ignoring the pretrial order prohibiting 60-455 evidence, and failing to find a manifest injustice prior to considering the undue prejudice of this evidence was an abuse of discretion and should have prohibited Deputy Salcedo's testimony before any other analysis. For these reasons Macomber's convictions should be reversed and remanded.

V. THE DISTRICT COURT COMMITTED EVIDENTIARY ERRORS REGARDING IMPEACHMENT OF THE STATE'S WITNESSES, PRIOR CRIMINAL ACTIVITY AT THE CRIME SCENE AND SURROUNDING LOCALE, AND PRIOR ACTIVITIES OF THE VICTIM, ALL OF WHICH DENIED THE DEFENDANT A FAIR TRIAL.

STANDARD OF REVIEW

The standard of review for this issue is the same as that of issues II, III, and IV. See also *State v. Reid*, 286 Kan. 494, 504-09, 186 P.3d 713 (2008).

ANALYSIS

When a defendant raises a claim of self-defense, evidence of the victim's violent or turbulent character may be relevant to establish the defendant's state of mind. *State v. Walters*, 284 Kan. 1 at 10-11, 159 P.3d 174 (2007). However, to establish relevance, *i.e.*, probativity, there must be some logical connection between the asserted facts and the inference or result they are intended to establish. See *State v. Reid*, 286 Kan. 494, 502-03, 186 P.3d 713 (2008). The definition of "relevance" as described in K.S.A. 60-401(b) ("'[R]elevant evidence' means evidence having any tendency in reason to prove any material fact."), like Federal Rule of Evidence 401, contains both a probative element and a materiality element. The appellate Court reviews trial court determinations of the probativity prong of relevance for an abuse of discretion, and determinations of materiality are reviewed de novo. 286 Kan. at 508-09. See *Walters* and *State v. Mays*, 254 Kan. 479, 866 P.2d 1037 (1994). In *Walters*, the defendant was charged with and convicted of second-degree murder. He argued that the trial court erred in excluding evidence establishing his actions were in self-defense. This court explained that evidence tending to prove the defendant's state of mind prior to the shooting, *i.e.*, that "he was induced to believe in good faith that he was in imminent danger of death or great bodily harm at the hands of the person killed," is admissible. 284 Kan. at 10 (quoting *State v. Burton*, 63 Kan. 602, Syl. ¶ 3, 66 P. 633 [1901]).

In *Mays*, the defendant was charged with rape and aggravated robbery. He argued that the trial court denied him a fair trial by excluding evidence that supported his theory of defense. This court agreed because the excluded evidence was "key to and an integral

part of the defendant's defense." 254 Kan. at 486. The only evidence supporting the conviction was the victim's testimony; therefore, the excluded evidence bearing on the victim's credibility was key to Mays' defense. The *Mays* court noted that if the jury believed the victim's testimony, "it necessarily would convict the defendant." 254 Kan. at 486.

This case, without a doubt, centered around the defendant's intent in the shooting of Ryan Lofton. His state of mind at the time before and at the time of the shooting would certainly be relevant as to whether he intended to shoot Lofton. Macomber attempted, by the use of testimony and evidence prior to himself testifying: that Risa Lofton was not being truthful or complete in her testimony regarding her prior interactions with him, her selective memory and her relationship with her husband as she'd related to Macomber, and her general tendency to be untruthful (R. Vol. XXIII, 196, 205, 230, 236) (R. Vol. XXV, 816-22); that the locale of the crime scene was a drug house (R. Vol. XXIII, 80-84) and that the victim had a turbulent and violent disposition (R. Vol. XXIII, 250-56) (R. Vol. XXVI, 886-89) All these factors affected his state of mind in the course of his actions that day. Upon Macomber's proffer, the district court specifically ruled that evidence tending to show the crimes scene was in an inherently dangerous area was inadmissible, and made an extensive general commentary on what would or what would not be admissible, and that he would sustain the State's objection if a witness tried to testify in a manner that was not relevant to self-defense itself. The same scenario happened again shortly thereafter. (R. Vol. XXIV, 506-07, 527-32) The Court essentially (and effectively) ruled preemptively on this evidence prior to its offer, relieving the state from making its own contemporaneous objections, and saving itself

the effort of ruling on individual objections. During the Defense case, when the defendant the district Court again made a "blanket" ruling regarding the use of evidence to show the victim's turbulent and violent character, suggesting that the court's prior ruling applied to all witnesses, and suggested he should approach with a proffer before any such questions were asked. (R. Vol. XXVI, 888-90) As noted before, this evidence should have been allowed to show the defendant's state of mind when he was engaged by the victim. The district Court erred not only in excluding the evidence, but also in requiring a "Mother, May I" approach to the conduct of the defense case.

This evidence should have come in within the parameters of setting the stage for the events that occurred after he arrived, whether to show state of mind of Macomber or his intentions or belief he was justified in making a show or threat of force. Not allowing this evidence to go to the jury deprived him the ability to present his defense of accident and/or self-defense (Or defense of another). K.S.A. 2010 Supp. 21-3211.

During the trial of this case a seated juror asked to be removed from the jury in the middle of trial due to her personal knowledge of known drug activity at residence, and was in fact removed *sua sponte*. (R. Vol. XXIII, 145-150) This, in and of itself, indicates that the jury would have found the evidence useful as to the defendant's state of mind. Certainly the removed juror's perception of the case changed enough to warrant her removal. The proffered evidence was relevant and probative.

So if Macomber had been allowed to fully present its theory of the case, the defense would likely have been more successful. The State was allowed to set the stage in a light favorable to its case, and the defense was not. While the State in theory bears the burden of proving its case beyond a reasonable doubt, in this case, its burden was

artificially lightened by the exclusion of unfavorable, but very relevant, facts. The defendant was denied the ability to present relevant evidence tending to show reasonable doubt as to the element of intent to kill, and the Court's limitation of this testimony unfairly strengthened the ordinary acts inference instruction.

VI. THE DISTRICT COURT ERRED IN THE UNEVEN APPLICATION OF THE HEARSAY RULE.

STANDARD OF REVIEW

The standard of review for this issue is *de novo. State v. Reid*, 286 Kan. 494, 504-09, 186 P.3d 713 (2008).

ANALYSIS

> "The admission of an incriminating hearsay statement, coupled with the refusal to admit an exculpatory hearsay statement by the same declarant, is so fundamentally unfair as to be an abuse of discretion and a denial of due process. . . ." *State v. Brickhouse*, 20 Kan. App. 2d 495, 500-03, 890 P.2d 353, *rev. denied* 257 Kan. 1093 (1995).
>
> ". . . Application of the hearsay rule in this manner offends our sense of justice and fair play and affects the jury process in an unacceptable manner. The question of whether the exculpatory statement is reliable is overridden by the inherent unfairness that will occur if that statement is excluded while a similar hearsay statement that is incriminating is admitted." 20 Kan. App. 2d at 503.
>
> "We hold that if an incriminating hearsay statement is admitted in an effort to convict a defendant, an exculpatory hearsay statement by the same declarant which tends to exonerate that defendant or which supports the theory of defense may not be denied admission into evidence on the grounds that it is unreliable. Application of the hearsay rule in this manner offends our sense of justice and fair play and affects the jury process in an unacceptable manner. The question of whether the exculpatory statement is reliable is overridden by the inherent unfairness that will occur if that statement is excluded while a similar hearsay statement that is incriminating is admitted." 20 Kan. App. 2d at 503.

During the testimony of Steve Bundy, the state was allowed to inquire about several hearsay statements made by both the defendant and Hedy Saville, including some double hearsay statements. The statements, as noted in the Statement of Facts, centered

around Macomber's statements to Steve Bundy, which are legally a hearsay exception under the premise of either confession or statement against interest. A confession or statement against interest is simply inculpatory hearsay, allowed under an evidentiary exception.

Bundy testified regarding inculpatory hearsay statements made by the defendant during his interview with the defendant, but the Court would not allow defendant's questioning of the witness to account for exculpatory statements made during the same confession (or statement against interest). The Court ruled the State could use inculpatory parts of the confession (hearsay statement), but the defendant could not use exculpatory parts of the confession, ruling it was inadmissible hearsay unless he testified first. (R. Vol. XXIV, 470, 501-502) This is exactly the situation *Brickhouse* intended to prohibit due to its "inherent unfairness."

Macomber was attempting to elicit portions of the statement made at the same time to the same witness (or witnesses) which were supportive of his theory of the case. The judge erred in excluding this testimony, and applied the hearsay rule in an uneven manner. Later in the trial, the Judge made the same ruling with the same witness in the Defendant's case. (R. Vol. XXVI, 921) Steve Bundy should have been allowed to testify about both inculpatory and exculpatory statements of the defendant which occurred in the same interview, without necessitating the defendant be forced to testify to get the exculpatory statements into evidence. This blatant violation of *Brickhouse* alone is a violation of due process constituting reversible error.

VII. THE DISTRICT COURT ERRED IN INSTRUCTING THE JURY.

STANDARD OF REVIEW

For instruction issues, the progression of analysis and corresponding standard of review on appeal are: (1) First, the appellate court should consider the reviewability of the issue from both jurisdiction and preservation viewpoints, exercising an unlimited standard of review; (2) next, the court should use an unlimited review to determine whether the instruction was legally appropriate; (3) then, the court should determine whether there was sufficient evidence, viewed in the light most favorable to the defendant or the requesting part, that would have supported the instruction; and (4) finally, if the district court erred, the appellate court must determine whether the error was harmless, utilizing the test and degree of certainty set forth in *State v. Ward*, 292 Kan. 541, 565, 256 P.3d 801 (2011). *State v. Plummer*, 295 Kan. 156, 163, 283 P.3d 202 (2012).

ANALYSIS

Macomber objected to Jury Instruction No. 8 (R. Vol. XXVII, 1170), which stated:

> Evidence has been admitted tending to prove that the defendant committed a crime other than the present crime charged. This evidence may be considered solely for the purpose of proving the defendant's prior conviction as an element of Count 2 and lack of accidental discharge due to a defect in the gun.

In support of his objection to Instruction No. 8, Mr. Macomber asserts that the instruction is erroneous for the reason that no limiting instruction could cure the prejudice that he faced by the introduction of rebuttal evidence regarding the shooting of Deputy Salcedo in Marshall County while at the same time allowing the jury to consider Mr. Macomber's prior 1987 and 1992 convictions while it considered and determined the issue of an accidental discharge at the time of the Shawnee County shooting.

The jury could have been easily misled by the language of the instruction. It combined limitations on the prior conviction evidence while at the same time permitting the jury to consider the prior convictions on the issue of there having been an accidental discharge and the rebuttal evidence presented by the State in regard to Count 2 which charged the defendant with criminal possession of a firearm.

With regard to the Court's Instruction No. 12. (R. Vol. XXVII, 1170), which stated:

> Ordinarily a person intends all the usual consequences of his 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 its burden to prove the required criminal intent of the defendant. This burden never shifts to the defendant.

Mr. Macomber contends that this instruction was erroneous for a variety of reasons. First, the instruction contains an inconsistent presumption under the provisions of K.S.A. 60-415. While the first sentence of the instruction seems to ask the jury to overlook the possibility of an accidental discharge, the last sentence of the instruction is clearly a disclaimer and therefore conflicts with jury instruction 7 (R. Vol. XXVII, 1168), which in part states: "You must presume that he is not guilty unless you are convinced from the evidence that he is guilty". At a minimum the challenged instruction dilutes the weightier instruction regarding the presumption of innocence unless convinced by evidence and not by inference.

Second, the Courts instruction No. 12 is inconsistent with PIK 3rd 54.18 which addresses the use of force in defense of an occupied vehicle which was requested by the defendant (R. Vol. VI, 491) which instructs the jury to presume that a use of force is necessary under certain circumstances. In the instant case, the Court gave an outdated

version of this instruction (R. Vol. XXVII, 1169-Inst. #10), which omitted the requisite presumption that a use of force is necessary under certain circumstances. Thus, the trial court erred in failing to give the current version of PIK 54.18 to the jury for use in their deliberations and the defendant was prejudiced as a result thereof.

K.S.A. 2010 Supp. 21-3211, the self-defense statute, states:

> "(a) A person is justified in the use of force against another when and to the extent it appears to such person and *such person reasonably* believes that such use of force is necessary to defend such person or a third person *against such other's imminent* use of unlawful force.
>
> "(b) A person is justified in the use of deadly force under circumstances described in subsection (a) if such person reasonably believes that such use of deadly force is *necessary to prevent imminent death or great bodily harm* to such person or a third person.
>
> "(c) Nothing in this section shall require a person to retreat if such person is using force to protect such person or a third person." (Emphasis added.)

When the trial court refuses to give a requested instruction, an appellate court must review the evidence in the light most favorable to the party requesting the instruction. *State v. Ransom*, 288 Kan. 697, 713, 207 P.3d 208 (2009).

A defendant is entitled to instructions on the law applicable to his or her theory of defense if there is evidence to support the theory. *State v. Hendrix*, 289 Kan. 859, 861, 218 P.3d 40 (2009). However, there must be evidence which, viewed in the light most favorable to the defendant, is sufficient to justify a rational factfinder finding in accordance with the defendant's theory. 289 Kan. at 861.

Next, the defendant asserts that the Courts Instruction No. 12 was inconsistent with the defendant's requested special Instruction No. 18 (R. Vol. VI, 494), which the defendant contends should have been submitted to the jury given the evidence which had been presented during the trial of this matter.

Finally, Mr. Macomber objected to the submission of jury instruction 12 on the basis that it would mislead and invade the province of the jury by allowing an impermissible stacking of inferences as criticized in *State v. Doyle*, 201 Kan. 469, 441 P.2d 486 (1968) wherein it was stated:

> "We need not further detail the circumstantial evidence or lengthen this opinion by discussion of the testimony of other witnesses. Any finding in this case of deliberation, premeditation, willfulness or any of the other ingredients of either first or second degree murder could be based only on suspicion as a foundation for a presumption and then finally on another presumption based upon on the primary presumption. Presumptions and inferences may be drawn only from the facts established, and presumption may not rest on presumption or inference on inference." 201 Kan. at 488

In Macomber's trial there was no direct evidence as to what actually caused the firearm to discharge. None of the numerous witnesses to the shooting indicated that they observed the defendant pull the trigger. There were, however, numerous witnesses that testified there was a three way struggle going on over the gun between the defendant, Ryan Lofton and Risa Lofton at or about the time the gun discharged.

The coroner presumed that the person who shot Mr. Lofton had deliberately and intentionally pulled the trigger and this is an improper presumption. The witness accounts varied but there was substantial corroborated evidence of a struggle for the weapon and clearly a potential for an accidental discharge due to the struggle and the flawed mechanical condition of the weapon. See Cassandra Skirvin testimony (R. Vol. XXVI, 110-11), Joshua Kenoly testimony (R. Vol. XXVI, 965) and Macomber's testimony (R. Vol. XXVI, 988-89).

During the trial and in final arguments, the state relied on jury instruction No. 12 to infer proof that the defendant intentionally, not accidentally, pulled the trigger and further relied on the jury instruction to infer that it was Macomber's specific intent to kill

Ryan Lofton, thus allowing the jury to improperly stack inferences to establish that Macomber's specific intent was to kill Ryan Lofton, i.e. first, infer this was a voluntary act and second, infer the intended consequences of the act.

> "The law does not presume premeditation or deliberation form any state of circumstances." *State v. Holmes*, 272 Kan. 91, 33 P.3d 856 (2001).

Instruction No. 12 misled and invaded the province of the jury by allowing an impermissible stacking of inferences. See *State v. Doyle*, 201 Kan. 469, 488, 441 P.2d 846 (1968) Here, there was no direct evidence as to the cause of the firearm discharging. Cassandra Skirvin's testimony depicted that a struggle occurred. (R. Vol. XXVI, 110-11) Joshua Kenoly's testimony described a "tussle" taking place. (R. Vol. XXVI, 965) and Macomber testified that the victim grabbed the gun and he was not sure what caused the gun to discharge, since it happened so fast. (R. XXVI, 988-89) Thus, the State relied on the presumption that Macomber pulled the trigger. The trial court's allowance of such a procedure was improper and the defendant's conviction for second degree murder should be reversed.

The final objection of the defendant to the instructions given by the Court relates to the Court having submitted to the jury its instruction Number 15 with regard to the lesser included offense of intentional second degree murder.

K.S.A. 21-5109 provides in part:

> "(2) Upon prosecution for a come, the defendant may be convicted of either the crime charged or a lesser included crime but not both, a lesser included crime is:
>
> (a) a lesser degree of the same crime;
> (b) a crime where all of the elements of the lesser crime are identical to some of the elements of the crime charged."

As has been noted in *State v. Herbert*, 277 Kan. 61, 104, 82 P.3d 517 (2004):

"Whether a crime is a lesser included offense of another is purely a question of law which this court has unlimited review".

During the trial, Mr. Macomber objected to the submission of an intentional second degree murder alternative for the jury's consideration noting that intentional second degree murder was a severity level one person felony and that it carried a penalty that was in practicality more severe than the off grid crime of murder in the first degree initially charged. Thus, it could not be considered as a lesser included crime of the crime of intentional first degree murder with which he had been charged. K.S.A. 21-5109 presumes that a lesser included offense will have a less severe penalty than the crime charged. Thus the Courts have held, as noted in *State v. Trujillo*, 225 Kan. 320, 324, 590 P.2d 1022 (1979) that:

"(a)s a matter of practice the trial court should instruct on a lesser included offense in order of severity beginning with the offense with the most severe penalty..."

In this case, the penalty that Mr. Macomber faced for the level one crime of intentional murder in the second degree ranged from 592 months (49 years and 4 months) to 653 months (54 years and 5 months), which, in effect, amounted to life without parole given his age, life expectancy and prior sentences. However, while the sentence for the off grid crime of murder in the first degree is life imprisonment, it also the defendant an opportunity for lenity which is not possible for one convicted of a level one crime as the defendant was in the instant case. Pursuant to K.S.A. 22-3717(b) an inmate sentenced for the crime of murder in the first degree shall be eligible for parole after serving 25 years of confinement.

"(F)ew would dispute that a lesser include offense should not be punished more severely than the greater offense..." *Solem v. Helm*, 463 U.S. 277, 293, 77 L.Ed. 2d 637, 103 S.Ct 3001 (1983); *Emery v State*, 261 Ind. 211, 213, 301

N.E.2d 369 (1973) (noting the penalty for the lesser included offense cannot exceed the penalty for the greater offense).

In reality and in light of the provisions in K.S.A. 22-3717(b), which allows a defendant convicted of murder in the first degree to be eligible for parole in 25 years and the provisions of the statute which would prohibit Mr. Macomber from becoming eligible for release upon completion of 25 years imprisonment can lead one to but one conclusion. A second degree murder conviction is not and cannot be a lesser included offense of Macomber's first degree murder charge when it carries a more stringent penalty and denies him of the opportunity for parole upon the completion of 25 years of imprisonment.

"When a trial court refuses to give a requested instruction, an appellate court must view the evidence in a light most favorable to the party requesting the instruction...(A)n appellate court cannot consider the requested instruction in isolation. Rather, the court must consider all of the instructions together as a whole. If the instructions as a whole properly and fairly state the law as applied to the facts of the case, and the jury could not reasonable be misled by them, the instructions are not reversible error even if they are in some way erroneous." (citation omitted) *State v. Jackson*, 280 Kan. 541. 549-50, 124 P.3d 460 (2005)

The trial court failed to give the following instructions requested by the defense:

(A) Requested Instruction No. 12, (R. Vol. VI, 491) (2010 Supp.) P.I.K 3D 54.18 "Use of force in defense of an occupied vehicle"

The use of the outdated instruction given could have misled the jury into not making the proper presumption and at the very least is an inconsistent presumption with the actual inference of intent jury instruction No. 12 P.I.K. 3D 54.01

In *State v. Bellinger*, 47 K.A. 2d 776, at 782, 278 P.3d 975 (2012) in discussing this very issue, noted that the K.S.A. 2010 Supp. 21-3220, is to be applied retroactively and it states:

> "(a) A person is justified in the use of force against another when and to the extent it appears to such person and *such person reasonably* believes that such use of force is necessary to defend such person or a third person *against such other's imminent* use of unlawful force.
> "(b) A person is justified in the use of deadly force under circumstances described in subsection (a) if such person reasonably believes that such use of deadly force is *necessary to prevent imminent death or great bodily harm* to such person or a third person.
> "(c) Nothing in this section shall require a person to retreat if such person is using force to protect such person or a third person." (Emphasis added.)

While in *Bellinger*, the defendant was denied the instruction because the facts did not support its use, in this case Macomber was allowed to argue self-defense, but was given the wrong, outdated instruction. This is clearly reversible error.

(B) Requested Special Instruction No. 17, (R. Vol. VI, 493) on "proximate cause."

The use of force instruction was limited to a display of force. The defense theory was that Macomber had the right to display a weapon and that Ryan Lofton's subsequent actions was the proximate cause of his death. Without this instruction the jury may have been misled by reasoning that Macomber was justified in displaying force but never considering the role Mr. Lofton's actions played in causing the gun to discharge, ultimately causing his death. These actions include: his use of large amount of methamphetamine just prior to his death leading to erratic and aggressive behavior described likely by the coroner and observed by witnesses at the time of the shooting; and that he sought the confrontation where he might die because he might be suicidal. (R. Vol. XXVII, 1146-47)

(C) Requested Special Instruction No. 18, (R. Vol. VI, 494): "Presumption of an Accident" (see Issue VI(b) of this brief).

Without this instruction combined with the given jury instruction No. 12 on intended consequences of voluntary acts the jury may have been misled to presume there was no accident.

(D) Requested Instruction No. ____(R. Vol. VII, 577) "Nature & Degree of Possession of a Firearm".

At the instruction conference the defendant requested this instruction based on : *State v. Pondexter*, 231 Kan. 208, 214, 671 P.2d 539 (1983); and *State v. Jones*, 229 Kan. 618, 620-21, 629 P.2d 181 (1981):

> "The possession and use of a firearm to defend oneself against an aggressor's imminent use of unlawful force is not itself a defense to the charge of unlawful possession of a firearm under K.S.A. 21-4204. It is the nature and degree of the possession which may furnish a defense to the charge. Where the possession of the firearm is brief and without predesign or prior possession such possession is not prohibited by statutes.
>
> If you find the nature and degree of the defendant's possession was brief, without predesign or without prior possession then you must find the defendant not guilty of count 2, criminal possession of a firearm."

There was substantial evidence admitted at trial that the defendant briefly, without predesign or prior possession displayed this weapon in defense of an occupied vehicle. The court's order (R. Vol. V, 418-19) concerning the defendant's motion to dismiss count 2 separates the possession of this firearm when the defendant left Shawnee County immediately following the shooting. The jury was misled by not being given this instruction.

For the reasons stated herein, the jury could have been misled by the district court's failure to give the defendant's requested instructions when viewing the

instructions as a whole and Macomber was denied a fair trial guaranteed by the Sixth Amendment to the United States Constitution. His convictions should be reversed and remanded for a new trial.

VIII. THE STATE'S PROSECUTORIAL MISCONDUCT DENIED THE DEFENDANT A FAIR TRIAL.

STANDARD OF REVIEW

Appellate review of an allegation of prosecutorial misconduct requires a two-step analysis. First, the appellate court decides whether the comments were outside the wide latitude that the prosecutor is allowed in discussing the evidence. Second, if misconduct is found, the appellate court must determine whether the misconduct prejudiced the jury against the defendant and denied the defendant a fair trial. *State v. Bennington*, 293 Kan. 503, 530, 264 P.3d 440 (2011).

ANALYSIS

> After determining that a prosecutor's statements were improper, an appellate court considers whether the statements were harmless and whether the prosecutor's statements were so prejudicial that the defendant was denied his or her right to a fair trial. In analyzing this issue, a court considers three factors: (1) whether the misconduct was gross and flagrant; (2) whether the misconduct was motivated by ill will; and (3) whether the evidence was of such a direct and overwhelming nature that the misconduct would likely have had little weight in the mind of a juror. *State v. Marshall*, 294 Kan. 850, Syl. ¶ 3, 281 P.3d 1112 (2012); *State v. Sprung*, 294 Kan. 300, 313, 277 P.3d 1100 (2012).
>
> Under *State v. Tosh*, 278 Kan. 83, 97, 91 P.3d 1204 (2004), none of these three factors is individually controlling. And before the third factor can ever override the first two factors, an appellate court must be able to say that the harmlessness tests of both K.S.A. 60-261 and *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705, *reh. denied* 386 U.S. 987 (1967), have been met.
>
> A contemporaneous objection is not required to review a prosecutorial misconduct claim based on comments made during voir dire, opening argument, or closing argument. *State v. Anderson*, 294 Kan. 450, 461, 276 P.3d 200 (2012). If the defendant demonstrates that the State committed an error of constitutional magnitude, then the State must prove beyond a reasonable doubt that the error did not affect the defendant's substantial rights. *Anderson*, 294 Kan. at 461.
>
> But in *State v. Marshall*, 294 Kan. 850, 858-61, 281 P.3d 1112 (2012), we disavowed any language in our previous cases indicating that defense provocation can justify prosecutorial misconduct: "[W]e hold that a prosecutor's improper

comment or argument can be prejudicial, even if the misconduct was extemporaneous and made under the stress of rebutting argument made by defense counsel." 294 Kan. at 861. In short, defendants do not open the door to prosecutorial misconduct. See *State v. Manning*, 270 Kan. 674, 697, 19 P.3d 84 (2001), *disapproved of on other grounds by State v. King*, 288 Kan. 333, 204 P.3d 585 (2009).

The defendant respectfully asks this Court be mindful not only that State in this case is bound by the rule of Law and a prosecutors duty, as noted below, but also is bound by its agreements made prior to trial, and that any deviation from its stipulations, agreements and orders of the Court should be considered in its analysis of the behavior and propriety of the state's actions in the conduct of his trial. A thorough recitation of the State's explicit pretrial agreements, and stipulations is contained in the statement of facts, and will not be repeated verbatim here, although one specific point bears repeating here.

Counsel for the state acknowledged that she was, "well aware of [her] ethical duties and will stipulate to those parameters." (R. Vol. XII, 22) The ethical principles specifically discussed herein are codified in Kansas Supreme Court Rule 226 - Kansas Rules of Professional Conduct, which state, in pertinent part:

3.3 Advocate: Candor Toward the Tribunal

(a) A lawyer shall not knowingly...
(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;..."

3.4 Advocate: Fairness to Opposing Party and Counsel

"A lawyer shall not...(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;...(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused;..."

Shawnee County DCR 3.113 Professional Courtesy, at Section 9, states,

> "A lawyer shall not intentionally mislead or deceive an adversary and should honor promises or commitments made. "

Counsel for the state made a representation to the Court it possessed case law which ruled that a defendant must testify before presenting any evidence of self-defense. This was of course unfounded, and the cases subsequently brought to the court's attention in support of the false proposition stood for nothing of the sort. (R. Vol. XXIII, 252, 254-55) Prior to trial, Deputy District Attorney Spradling intentionally misled the defendant, as opposing counsel, into the false belief that first, he would not be required to defend his conduct in Marshall County for a third trial, and second, that the State would honor its ethical obligations and agreements. The local rule also requires a lawyer to honor its promises and commitment, something the State did in no way, shape or form when dealing with this defendant.

During trial the State consciously and deliberately misled the defendant to believe he would have to testify in his own defense before offering evidence of self-defense. The district Court's failure to address this issue directly perpetuated the false pretense, resulting in a complete shift in the defense's trial strategy. This necessary shift unduly prejudiced the defendant, and prolonged the trial due to repetition of witnesses.

> Prosecutorial misconduct to which there was no objection at trial may nonetheless be reviewed on appeal where the prosecutor's misconduct is so prejudicial or constitutes a constitutional violation which, if not corrected, will result in injustice or a miscarriage of justice. *State v. Puckett*, 230 Kan. 596, Syl. ¶ 1, 640 P.2d 1198 (1982). If a claimed error implicates a defendant's right to a fair trial, the appellate standard of review is the same regardless of whether the issue of prosecutorial misconduct is preserved by an objection at trial. *State v. Doyle*, 272 Kan. 1157, 1164, 38 P.3d 650 (2002).

> This court has repeatedly emphasized that it is improper for a prosecutor to comment on facts not in evidence, to divert the jury's attention from its role as factfinder, or to make comments that serve no purpose other than to inflame the passions and prejudices of the jury. See, *e.g.*, *State v. Hall*, 292 Kan. 841, 848, 257 P.3d 272 (2011) (citing cases holding prosecutors commit misconduct by commenting on facts outside of evidence); *State v. Baker*, 281 Kan. 997, 1016, 135 P.3d 1098 (2006) (reaffirming that prosecutors are not permitted to make statements that inflame the passions or prejudices of the jury or distract the jury from its duty to make decisions based on evidence and controlling law); *State v. Villanueva*, 274 Kan. 20, 33-36, 49 P.3d 481 (2002) (finding prosecutor committed misconduct by suggesting rape victims essentially would be raped a second time through questions and arguments at trial related to victim's credibility); *State v. Henry*, 273 Kan. 608, 640-41, 44 P.3d 466 (2002) (finding prosecutor committed reversible misconduct when prosecutor urged the jury to consider how the victim's mother must have felt on Mother's Day); see also *State v. Majors*, 182 Kan. 644, 648, 323 P.2d 917 (1958) ("Although an attorney may indulge in impassioned bursts of oratory or may use picturesque language as long as he introduces no facts not disclosed by the evidence, he is bound to remember that he is an officer of the court, that his liberty of argument must not degenerate into license, and that he should always be decorous in his remarks to the extent that they do not impair administration of justice.").

INFLAMMATORY STATEMENTS

During **VOIR DIRE,** the prosecutor for the State, Jacqie Spradling (Spradling), made comments regarding the defendant's pro se status, that he would have to follow the rules, that she might have to object if he goes outside the rules, and that she was concerned if she objected a lot, the jury would think she was picking on the defendant, and that she just wanted to make sure she followed the rules, and that the defendant follows the rules. (R. Vol. X, 42) This commentary violated the agreement of the parties not to make improper attacks on defense counsel or trial strategy. This not only was an attack on counsel, albeit a pro se defendant, but was completely unnecessary given the court's longstanding policy and responsibility to instruct on the matter of attorney arguments. It placed the defendant in a negative light from the start, and was an implicit plea for sympathy towards the state.

In the State's **opening statement**, Spradling directly told the jury a scripted story of the State's rendition of the events which resulted in the death of the victim. She did not couch this in terms of what the evidence would show, but rather a statement of facts. She suggested what the victim was thinking, wanting or not wanting, and all the time speaking in omniscient voice. Spradling emphasized that Mr. Macomber, " ...had only been released from prison for nine months when he killed [the victim]..." Lastly Spradling (inaccurately) commented the locale (Marysville) "...where [Mr. Macomber] was finally arrested." (R. Vol. XXII, 24-27) (As noted above, Macomber was arrested in Blue Rapids). This entire statement violates the prohibition against inflaming the passions and prejudices of the jury, and incidentally was prohibited by pretrial stipulations and agreements. It unnecessarily emphasized the defendant's criminal record, and the comment regarding Macomber's arrest improperly suggests there is more to this story but the State is not allowed to tell.

During the State's case, the State intentionally elicited testimony completely unnecessary for the prosecution of its case regarding Mr. Macomber's prison record through Steve Bundy, which was designed to evoke (non-legal) prejudice against the character of the defendant. The state explicitly agreed not to appeal to racial or other prejudices, and not to draw negative inferences to the defendant's exercise of a constitutional right. A contemporaneous objection was made to the prison testimony which was overruled. The repeated commentary regarding the defendant's parole status, and limited amount of time since he was paroled is nothing more than a direct appeal to the inherent societal bias and prejudice against ex-convicts.

"Prejudice", when used in the (non-legal) context to which the state stipulated (R. Vol. XII, 24) is defined as,

"...A preconceived judgment formed without a factual basis; a strong bias." Black's Law Dictionary, p. 1198, 7th Ed. (1999); and

"...an irrational attitude of hostility directed against an individual, a group, a race, or their supposed characteristics." Merriam-Webster's Collegiate Dictionary, p. 979, 11th Ed. (2005)

While there was a legitimate reason to use the defendant's prior criminal history at some point, there was no need to emphasize it either. The unnecessary repetition amounted to an improper statement. The point was made, and the State took advantage to unfairly inflame the passions and prejudice of the jury. The intent of the state was clearly to attack the character of the defendant. "

In closing arguments, Spradling made the comment...you may remember Special Agent Steve Bundy's testimony that the defendant was paroled from prison after more than 23 years...and it was nine months later that he shot and killed [the victim]. There's no question that the defendant is guilty of Count 2." (R. Vol. XXVII, 1181) This statement is inflammatory and merely states the opinion of the Prosecutor, which invades the province of the jury and is an improper commentary on the evidence. In closing arguments, Spradling commented:

> "You'll remember that when Ryan was taken away, what was left is that flip-flop. You'll remember that it was in the driveway. In State's 266, this flip-flop and memories are all that's left of Ryan...This defendant intentionally shot Ryan in the back just like he shot Fernando Salcedo in the back. It was intentional in Topeka just like it was intentional in Marysville..." (R. Vol. XXVII, 1186-1187) (Marshall County incidents actually occurred in Blue Rapids (R. Vol. XXII, 52 Vol. XXV, 613), defendant was arrested in Blue Rapids)

The limiting instruction the Court gave related to prior bad acts (#8) was rendered meaningless by the prosecution's closing argument, regarding the intent to shoot the victim and the deputy in Marysville (actually Blue Rapids). This wholly inflammatory

statement was meant to evoke a cumulative sympathy for the victim and Deputy Salcedo in the Marshall County case. Lastly, Spradling stated:

> "You have an opportunity, you have the privilege of righting a wrong. Take the time that you need and come back and tell the defendant what you've learned in this case is that he murdered Ryan Lofton." (R. Vol. XXVII, 1213).

This is an improper call for the jury to make to do something more than, or other than, render a verdict, to make a statement. This is exactly the situation where this Court found Spradling to have made an improper statement in Macomber's appeal in Marshall County case 2010 CR 59, (#107,205), as noted in the Statement of Facts.

"A prosecutor commits misconduct during closing argument when, in effect, he or she asks the jury to base its deliberations on sympathy for the victim, or to otherwise argue the impact of a crime on the victim." *State v. Simmons*, 292 Kan. 406, 419, 254 P.3d 97 (2011) See also *State v. Adams,* 292 Kan. 60, 67, 253 P.3d 5 (2011).

MISSTATEMENTS OF LAW

During Voir Dire, Spradling asked the jury venire the following question, based on a misstatement of law regarding the inference of intent, which in her statement allowed the stacking of inferences.

> "Would you agree with me when I ask the statement do you believe that generally people intend the consequences of their voluntary actions, meaning would you agree that if you chose to do something you intend the consequences of that act too?" (R. Vol. X, 71)

Clearly this misstates the law which was to be the primary issue in this case. While inference of intent is allowed in the law, the statement, as made by the prosecutor was compound, when using the word "too." The actual law provides, as the jury was later instructed, "Ordinarily, a person intends all the usual consequences of his voluntary acts." This was a misstatement of the law that set the stage for the improper stacking of the inference that the shooting was intentional therefore and the killing was also.

Also during Voir Dire, Spradling described the defendant (in general terms) as having no responsibilities, no burden, only rights. Later in the same commentary regarding defendants, said [the defendant] does not have to give the state any evidence, does not have to tell her who's going to testify, what the evidence might be, what his defense is, and the reason is because the law allows him to tell the state that for the first time as he's telling you guys that...The defendant also has the right to bring up whatever defenses he might think would benefit him in this case..." (R. Vol. X 74-75) The same general commentary from Spradling surfaces in the questioning of a second jury panel. (R. Vol. X, 158-150) This is both a misstatement of the law and an inflammatory comment. This is simply not true within the framework of the policies and procedures of the district Court, is a misstatement of the law, and again was an implicit plea for sympathy towards the state. While defendants do have some latitude in their defense, there are statutory requirements, district Court rules, and **pretrial orders** which dictate the course of trial for both the State and the defendant. The defense was known to the state well before trial, just as the exhibits were listed, and the witnesses were known to the state, and the Court well knows that at least two defenses (mental disease or defect and alibi) must by statute be declared well in advance of trial. See K.S.A. 22-3218 and 22- 3219.

In the ultimate gross and flagrant misstatement of the law in trial, Spradling stated,

> "You shoot somebody, the natural consequence to that is they may die. Ordinarily, you intend the natural consequences of your actions. You don't shoot in the back to wing it. You don't shoot in the back to make a point. You shoot in the back meaning the person's running away from you to kill. And **what you have to find is that he intentionally shot** which resulted in death." (R. Vol. XXVII, 1182, Emphasis added)); "And second degree murder, which is a lesser included, removed premeditation. It's simply the killing of Ryan Lofton on this date in this place. He's already admitted that he killed him." (R. Vol. XXVII, 1185)

This is an intentional, blatant, and clearly prejudicial misstatement of the law on 2nd degree murder. There can be absolutely no excuse for this. What Spradling described at the end of this commentary is the legal equivalent of any circumstance involving a death of one at the hands of another, whether it be an accident, justifiable homicide, or even involuntary or voluntary manslaughter. It is **not by any stretch** an accurate statement of the elements of 2nd degree murder. Since the elements of 2nd degree murder require either intent or recklessness, this commentary is completely false, absolutely was calculated to mislead the jury, and very well could have led to a verdict based on an improper legal conclusion.

In Closing, Spradling later stated "Thankfully you're asked to, invited and encouraged to use common sense in your deliberations. And what you'll likely find when you use common sense is that that argument lacks merit because it lacks common sense." (R. Vol. XXVII, 1176) This is another clear misstatement of the law, and as improper comment on the credibility of the evidence. The Court's instruction #11, clearly states jurors have a right to use common knowledge and experience in regard to the matter about which the witness has testified, but this is not to be equated with common sense, which suggests that the jury need not be burdened with the explicit instructions they have been given. The thrice reiteration of the phrase "common sense" shows its deliberate use.

COMMENTS ON WITNESS CREDIBILITY

Our Supreme Court has held that a prosecutor is not permitted to comment on the credibility of a witness. *State v. Elnicki*, 279 Kan. 47, 60-64, 105 P.3d 1222 (2005).

Perhaps the most crucial statement in voir dire was the State asked the jury panel, "who here has ever been lied to before?" (R. Vol. X, 74) This impermissible statement plants the seed that at some point in this trial, a witness will lie, and flies in the face of the prohibition against commenting on the credibility of a witness, whether the witness is specifically mentioned or not. *Voir dire* is the first chance a prosecutor can set the stage for a case, and she certainly did so with this comment.

In closing argument, Spradling comments, "[Defendant's] skin might crawl if Risa's name is mispronounced, but that didn't keep him from killing her husband intentionally and with premeditation. And we know that he killed Ryan intentionally because **the evidence in this case is credible only as to an intentional shooting.**" (R. Vol. XXVII, 1211) The statement about the victim's wife is nothing but self-serving mockery of the defendant, and is an improper call for sympathy towards her.

Later in the closing, Spradling comments,

> "Now we know that the gun was intentionally shot in this case, and we know that for some important reasons. Primarily, that the defendant said the first time he shot that gun was into Ryan Lofton's body. The defendant told you that after he shot Ryan he took that spent cartridge out and reloaded. Took his now fully loaded revolver with him to Marysville, and when he confronted Deputy Salcedo, he fired the first round at him. The defendant pulled the trigger again and fired the second round. The defendant fired the third round. The defendant fired the fourth round. The defendant fired the sixth round which makes the defendant guilty as charged. And we know he's guilty because of the credibility and the importance of the evidence in this case." (R. Vol. XXVII, 1212-1213)

Whether this comment is improper for its credibility comment or its inflammatory nature, the commentary is improper as it places improper and **repeated emphasis** on the prior bad acts of the defendant and credibility of the state's evidence, and completely belies the State's stated intentions and use for the 60-455 evidence; and this emphasis

cannot be overcome with the limiting instruction given by the Court (#8) which was to limit the State's use to, "...lack of incidental discharge due to a defect in the gun."

MISCHARACTERIZATION OF THE EVIDENCE

In closing argument, Spradling commented that,

> "the victim] couldn't get to the defendant ...The defendant's window was up. [The victim] couldn't reach him...the defendant kept [gun] in his hand and used it after making a decision to kill." (R. Vol. XXVII, 1176)

The evidence established that the window was not entirely closed, and not entirely open. There was a discrepancy between the testimony of Risa Lofton, who stated it was open four inches, and all the other witnesses, which testified generally the window was open enough for the victim to reach in.

And later,

> "Ask yourself who is believable, Zach Carr, John Cayton. Mr. Cayton after being fired from the KBI in 1999 went to the Johnson County laboratory, was fired there one year later, and **has not worked for a governmental agency since**." (R. Vol. XXVII, 1182, (Emphasis added))

This statement is completely false, and is directly in conflict with the testimony of John Cayton. The Statement of Facts refers to the testimony in question, but it was clear the Spradling was attempting to discredit the witness with her statement beyond what she could do in actual cross examination. The witness testified he had worked for several other government agencies since the time he left Johnson County. This was, in effect, impeachment by improper argument unsupported by the evidence. While this was certainly a mischaracterization of the evidence, it probably could fall under the category of commenting on the credibility of the witness as well.

FACTS NOT IN EVIDENCE

> A prosecutor is not permitted to argue facts not in evidence during closing argument because such statements tend to make the prosecutor his or her own witness, offering unsworn testimony not subject to cross-examination. *State v. Huerta-Alvarez*, 291 Kan. 247, 263, 243 P.3d 326 (2010).

During **closing arguments**, the State's Counsel, Jacqie Spradling, stated that, "...when [the victim] didn't want [Macomber] to be there, ... the defendant chose to use his car ... as a weapon..." (R. Vol. XXVII, 1175-76) There was no evidence whatsoever that the defendant's car was used in any fashion other than a vehicle, and the normal use associated with a vehicle. In other words, this was a complete fabrication by Spradling. This commentary also improper as there was no testimony whatsoever on whether Ryan Lofton made any request to Macomber to leave or what he (Ryan) wanted, and the State is not allowed to speak to what the victim thought or wanted, when there is no evidence to support the comment.

GROSS AND FLAGRANT

> 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. Brown*, 295 Kan. 181, 214, 284 P.3d 977 (2012).

Considering the record above, its clear that a number of the improper comments were repeated, calculated, and this prosecutor tried all three cases against Mr. Macomber arising out of the incidents of June 7, 2010. Taken as a whole, the improper comments, misstatements of law, and general conduct of the State in this case shows a pattern of misconduct from the very beginning of the case to the end. This prosecutor handled the Marshall county cases, and the pattern of improper statements, as noted by this Court, actually began there, and continued throughout her involvement with Mr. Macomber's cases.

ILL WILL

> In determining whether prosecutorial misconduct was motivated by ill will, among the things we have considered are whether the conduct was deliberate or in apparent indifference to a court's ruling. *Marshall*, 294 Kan. at 862; see also Gershman, Prosecutorial Misconduct § 14.5, pp. 602-03 (2d ed. 2012) ("Other factors considered by courts in determining harmfulness are whether the prosecutor's misconduct was deliberate, related to a crucial issue in the trial, or was followed by a prosecutorial apology."); *cf.* Prosecutorial Misconduct, §51, p. 458 (a prosecutor's failure to obey court rulings increases the likelihood of reversal).

While ill will is somewhat esoteric in nature, the deliberateness of Spradling's action in this case lies in the pattern of conduct. The district Court was not inclined to rule on the matters at hand here, with the exception of some very narrow instances, such as the use of the prior bad acts for a limited purpose only. When Spradling went above and beyond the approved use of prior bad acts evidence, it was an implicit showing of indifference to the ruling of the Court. In the one clear instance where this might have been shown, (the false suggestion that the defendant must testify prior to making a self-defense case) the district Court made no ruling on the matter. The most deliberate and flagrant improper commentary was done during closing arguments, where most prosecutorial misconduct occurs, and goes unchecked (absent a mistrial) until the Appellate Court reviews the case. There is no question that the majority of improper commentary focused on the most crucial issue in the trial. The record does not reflect any prosecutorial apology to the Court from Deputy District Attorney Jacqie Spradling.

Whether by a relentless pattern of action and improper comments, or a single catastrophic prejudicial act or statement, the defendant was denied a fair trial by the prosecutorial misconduct of the State.

IX. CUMULATIVE TRIAL ERRORS WERE SUBSTANTIALLY PREJUDICIAL, AND DENIED THE DEFENDANT A FAIR TRIAL.

STANDARD OF REVIEW

> "In a cumulative error analysis, an appellate court aggregates all errors and, even though those errors would individually be considered harmless, analyzes whether their cumulative effect on the outcome of the trial is such that collectively they cannot be determined to be harmless. [Citation omitted.] In other words, was the defendant's right to a fair trial violated because the combined errors affected the outcome of the trial?" *State v. Tully*, 293 Kan. 176, 205, 262 P.3d 314 (2011). The standard of review when reviewing for cumulative error is de novo

ANALYSIS

> "'Cumulative trial errors, when considered collectively, may be so great as to require reversal of the defendant's conviction. The test is whether the totality of 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.' [Citation omitted.]" *State v. Plaskett*, 271 Kan. 995, 1022, 27 P.3d 890 (2001).
>
> The purpose of the cumulative error rule is to empower an appellate court to grant relief when the quantity of errors or the totality of the circumstances have denied the defendant a fair trial. *Plaskett*, 271 Kan. at 1022.

Considering all of the foregoing issues presented, the Court's errors, when combined with the numerous clear instances of prosecutorial misconduct, the totality of the circumstances have clearly denied Mr. Macomber a fair trial, necessitating a reversal.

CONCLUSION

WHEREFORE, for the above and foregoing reasons, the district Court erred, whether in part or in parcel, and the prosecution committed a pattern of misconduct so deliberate and prejudicial to the defendant's case that he was denied a fair trial. Therefore the Appellant requests and prays the Court reverse his convictions, remand to the trial court for a new trial on the charge of murder, and that this Court instruct the

district Court to dismiss the charge of criminal possession of a firearm on the ground of double jeopardy, and for any other appropriate relief from the judgment of the district court this Court deems proper under the circumstances and the law.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on 9-6, 2013 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
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With one copy to:

Kansas Attorney General's Office
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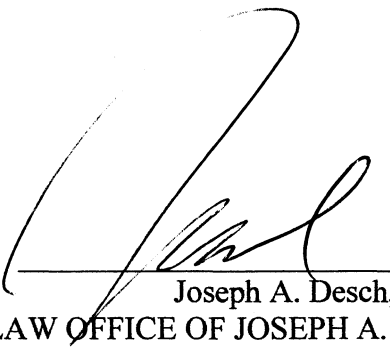

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