No. 12-108301-A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS
Plaintiff-Appellee

v.

STEPHEN ALAN MACOMBER
Defendant-Appellant

BRIEF OF APPELLEE

APPEAL FROM THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
HONORABLE DAVID DEBENHAM, JUDGE
DISTRICT COURT CASE NO. 10-CR-1053

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NATURE OF THE CASE

Stephen Macomber (Macomber) appeals his convictions of second degree murder and criminal possession of a firearm.

STATEMENT OF THE ISSUES

I. **Macomber's conviction for criminal possession of a firearm in Shawnee County, Kansas, does not violate the double jeopardy clause of the Fifth Amendment to the United States Constitution and Section 10 of the Kansas Constitution Bill of Rights.**

II. **The district court properly allowed Dr. Pojman to testify regarding his opinion as to the manner of death.**

III. **The district court did not abuse its discretion when it clarified the pretrial order regarding the use of Macomber's prior convictions and allowed the State to present evidence of his prior convictions.**

IV. **Deputy Salcedo's testimony about Macomber's use of the gun in Marshall County was admissible under K.S.A. 60-455 and the district court properly admitted it as rebuttal evidence.**

V. **The district court properly excluded evidence regarding Risa's prior interactions with Macomber, evidence that the residence where the crime took place was associated with drug activity, and evidence that Lofton had made previous threats.**

VI. **The exclusion of Agent Bundy's testimony regarding the exculpatory statements made by Macomber as hearsay was not reversible error.**

VII. **The district court properly instructed the jury.**

VIII. **The prosecutor's comments were not improper and did not constitute misconduct.**

IX. **Macomber was not denied his right to a fair trial by cumulative error.**

STATEMENT OF THE FACTS

Risa Lofton (Risa) and Ryan Lofton (Lofton) were married, but not living together in June 2010. (R. XXIII, 105, 175.) On June 7, 2010, Risa went over to

Lofton's house in the afternoon. (R. XXIII, 175.) Risa and Lofton were arguing because Risa stated that she was going to leave the house and Lofton did not want Risa to leave. (R. XXIII, 109, 176.)

That same day, Risa had received a text from Macomber telling her that he had one hundred dollars. (R. XXIII, 176.) Macomber also told Risa that he was heading out of town. (R. XXIII, 176; R. XXVI, 983.) Risa agreed that she would go out of town with Macomber; however, Risa stated, in reality, she never intended on going out of town with him. (R. XXIII, 176-77.) Risa simply wanted the hundred dollars. (R. XXIII, 176.) Risa testified that her plan was to go with Macomber, get the money, and then leave Macomber. (R. XXIII, 176-77.)

Risa called Macomber and asked him to pick her up from Lofton's home. (R. XXIII, 177.) While Risa and Lofton were arguing inside the house Macomber pulled into the driveway. (R. XXIII, 109, 178.) Lofton then went outside, and Risa gathered up some of her belongings that were in the house. (R. XXIII, 178.) Lofton spoke to Macomber through the passenger side window of Macomber's car. (R. XXIII, 178; R. XXV, 809.) Macomber then stated to Lofton, "it's none of your business if she leaves with me." (R. XXIV, 558.) Risa then came outside and placed her belongings behind the driver's seat of the car. (R. XXIII, 178; R. XXV, 809.) Lofton headed back toward the house, and Risa got into the passenger side of the car. (R. XXIII, 110, 179.)

Risa testified that Lofton then said something to her and headed back toward the car. (R. XXIII, 179.) Macomber then reached under his seat of the car and pulled out a Crown Royal bag. (R. XXIII, 179-180.) Risa stated that it was a gun in the bag, and that she "knew it was a gun." (R. XXIII, 180-181.) Risa believed it was a gun due to

the way Macomber was holding the bag and because she saw the bottom of the gun. (R. XXIII, 181.) Macomber's hand was inside the Crown Royal bag, and he never removed the gun from the bag. (R. XXIII, 181, 184.)

Lofton then continued walking toward the driver's side of the car, and Macomber followed him with the gun. (R. XXIII, 180, 184.) Macomber was "tracking" Lofton with the gun or pointing the gun at Lofton and following him with it. (R. XXIII, 184.) Lofton approached the driver's side of the car and the window was down about four inches. (R. XXIII, 180, 183.) Risa tried to pull Macomber's hand away from where Lofton was standing. (R. XXIII, 180, 183.)

Lofton did not have a gun with him that day, nor was there a gun inside Lofton's home. (R. XXIII, 182.) Lofton did not have a knife or weapon of any kind at that time. (R. XXIII, 183-84.) After Risa's unsuccessful attempts to take the gun away from Macomber, she exited the car so she could try to push Lofton out of the aim of Macomber. (R. XXIII, 185.) Risa got out of the car, shut the passenger door, and then heard a pop. (R. XXIII, 185.) Macomber shot Lofton in the back. (R. XXIII, 185.)

After Risa heard the pop, she saw Lofton fall face up in the driveway. (R. XXIII, 185.) Risa then went over to Lofton who told her he was shot. (R. XXIII, 185.) Risa did not remember seeing Macomber pull his car out of the driveway. (R. XXIII, 185.)

Cassandra Skirvin (Skirvin) was at Lofton's house during the shooting. (R. XXIII, 106.) Skirvin was sitting in the driveway in her green Mustang during the entire incident. (R. XXIII, 107.) Skirvin saw Risa and Lofton arguing and watched Risa get into Macomber's car. (R. XXIII, 109.) Macomber was parked behind Skirvin's car in the driveway. (R. XXIII, 109.)

Skirvin stated that once Risa was in Macomber's car, she saw Risa struggling for something. (R. XXIII, 111-13.) Skirvin then saw a spark and heard a gunshot. (R. XXIII, 111.) Skirvin testified that Lofton threw his arms up and said, "I'm shot." (R. XXIII, 111.) Macomber then drove away. Skirvin also testified that Lofton did not have a gun, a knife, or any weapon with him that day. (R. XXIII, 114-15.)

Matthew Guerrero (Guerrero) was also present at Lofton's house the afternoon of the shooting. Guerrero testified that he was doing dishes in the kitchen and heard Lofton and Risa come into the house. (R. XXIII, 91.) Risa and Lofton were arguing and then they went outside. (R. XXIII, 91.) Guerrero then heard a gunshot, went outside, and saw Lofton on the driveway, on his back. (R. XXIII, 91.) Guerrero heard Lofton say, "I can't believe he shot me." (R. XXIII, 95.) Guerrero then saw Macomber back out of the driveway and drive off southbound. (R. XXIII, 96.)

The police were called and arrived at the house. (R. XXIII, 186-87.) The fire department and AMR arrived and performed life saving measures on Lofton. (R. XXIII, 187.) Lofton died from a gunshot wound to the chest. (R. XXIII, 290.)

Macomber then fled from Topeka and eventually ended up in Marshall County, Kansas. (R. XXVI, 991.) While in Marshall County, Macomber was pulled over for speeding. (R. XXVI, 1027.) Macomber pulled into the driveway of a home and exited his vehicle. (R. XXVI, 1028.) Macomber came into contact with Deputy Salcedo (Salcedo) of the Marshall County Sheriff's Office. (R. XXVI, 1029.) Macomber took his gun and pointed it at Salcedo's head. (R. XXVI, 1029.) Salcedo did not have his gun drawn when he came into contact with Macomber. (R. XXVI, 1029, 1052.)

Macomber ordered Salcedo to give him his gun and to lay on the ground, but Salcedo refused to comply. (R. XXVI, 1030-31.) Macomber then shot at Salcedo and hit him once in the wrist and once in the back. (R. XXVI, 1032, 35.)

Macomber arrived at the home of Hedy Saville (Saville) that night. Macomber spoke with Saville for approximately four hours. (R. XXII, 54.) Macomber told Saville that he had killed a man in Topeka. (R. XXII, 52.) Macomber was arrested in Marshall County, Kansas. (R. XXIV, 470.)

The State also called Senior Special Agent Steve Bundy (Bundy) of the Kansas Bureau of Investigation to testify. Bundy interviewed Macomber following his arrest in Marshall County. Bundy interviewed Macomber about the shooting that occurred in Shawnee County. (R. XXIV, 471.) Bundy stated that Macomber never told him that the shooting was done in self-defense. (R. XXIV, 471.) Macomber also told Bundy that he "didn't mean to shoot that kid earlier today." (R. XXIV, 472.) Bundy also testified regarding Macomber's previous convictions for aggravated robbery and that Macomber had been paroled on September 9, 2009. (R. XXIV, 478, 487.)

Macomber was charged with one count of first degree murder and one count of criminal possession of a firearm in Shawnee County, Kansas. (R. I, 31-33.) Macomber represented himself during his jury trial and was assigned standby counsel to assist him.

Prior to trial, Macomber filed a Motion in Limine Regarding Manner of Death. (R. I, 81-83.) Macomber argued that Dr. Pojman should be prohibited from testifying as to Lofton's manner of death. (R. I, 81.) At a motion hearing, the district court denied Macomber's Motion in Limine Regarding Manner of Death. (R. XII, 31, R. II, 121-23.)

At trial, Dr. Pojman testified that the cause of death in this case was a gunshot wound to the chest. (R. XXIII, 282.) Macomber objected to Dr. Pojman's testimony as to the manner of death. (R. XXIII, 282.)

The district court overruled Macomber's objection and concluded that Dr. Pojman's testimony about his medical experience as a coroner, the number of autopsies he has performed, and the fact that he performed the autopsy in this case established that he based his opinion on personal knowledge. (R. XXIII, 289.) The district court also held that Dr. Pojman's opinion was within the scope of special knowledge, skill, experience, or training that is possessed by a forensic pathologist. (R. XXIII, 289.) Dr. Pojman then testified that the manner of death in this case was homicide. (R. XXIII, 291.)

As a part of his defense, Macomber offered the testimony of John Cayton (Cayton), a firearm and tool mark examiner. (R. XXV, 620-725.) Cayton testified that he did three examinations of Macomber's gun, including an internal examination, and wrote a report regarding his examinations. (R. XXV, 639.) Cayton testified that when placed in the single action position, the gun would not always hold, but would slip off. (R. XXV, 653.) In reference to his internal examination, Cayton also stated, "[e]verything that I found looks like somebody tried to make the gun work easier to less trigger pull." (R. XXV, 663.) Cayton stated that one of the coils of the gun had been removed, and the purpose of that is usually to make it easier to pull the trigger. (R. XXV, 666.)

Cayton further testified that the gun was defective and in a dangerous altered condition that would allow the hammer to fall from the full cocked position if the

revolver was bumped or a light touch on the trigger. Cayton testified that there was no way of determining when the defect happened. (R. XXV, 668.) Cayton stated that the trigger pressure of the gun was even less than a hair trigger. (R. XXV, 679.) Cayton's report was also admitted. (R. XXV, 640.)

Macomber took the stand and testified on his own behalf at trial. (R. XXVI, 977-1040.) Macomber testified that he pulled into the driveway of Lofton's home to pick up Risa. (R. XXVI, 985.) Lofton came up to the driver's side door and started asking him questions. (R. XXVI, 986.) Risa then came out to the driver's side of the car and put her things in the back seat behind the driver's seat. (R. XXVI, 987.) Macomber said Risa had three bags, one being the purple Crown Royal bag, and he knew what that was. (R. XXVI, 987.)

Macomber further testified that Lofton was at the passenger side door and got upset when Risa got in the car. (R. XXVI, 987.) Macomber then told Lofton "it's none of your business." (R. XXVI, 987.) Macomber testified that Lofton said, "I guess I'm going to have to shoot you then." (R. XXVI, 988.) Macomber then grabbed the gun he knew was in the car. (R. XXVI, 988.)

Macomber stated that Lofton then came over to the driver's side of the car and was reaching into the car. (R. XXVI, 988.) Lofton then stated, "[w]hat are you going to do, shoot me..." (R. XXVI, 988.) Macomber told Lofton, "I want you to get away from my car." (R. XXVI, 989.) Macomber testified, "I don't know if I pulled the trigger. I don't know if it hit the door. I don't know. I don't know. But I know the gun went off." (R. XXVI, 989.) Macomber stated he backed out of the driveway and got on I-70 and "got the hell out of there." (R. XXVI, 990-91, 1023.)

On cross examination, Macomber admitted that he was the only person with a gun that day and that he shot Lofton. (R. XXVI, 1010-11.) Macomber also admitted that this was the first time he had stated that the gun was Risa's gun and not his own. (R. XXVI, 1023.) In previous proceedings Macomber had only referred to the gun as being his own gun. (R. XXVI, 101-22.) Macomber also testified that he was on parole for convictions of five counts of aggravated robbery at the time he shot Lofton. (R. XXVI, 1026.) Macomber stated he knew that he was not to be in possession of a handgun during that time. (R. XXVI, 1026.)

Following Macomber's testimony, the State then made a "Motion to Admit Evidence" and argued that the evidence of Macomber's subsequent intentional shootings in Marshall County should be allowed as rebuttal evidence to rebut Macomber's evidence that the gun had a hair trigger and could have gone off accidentally. (R. XXVI, 992-93.) The State argued that the rebuttal evidence would refute Macomber's claim that the gun was defective and show that it was functioning properly two hours after the shooting. (R. XXVI, 999.) The district court went through a K.S.A. 60-455 evidence analysis and determined (1) that the evidence the State wished to present was relevant to prove a material fact, that being the absence of mistake or an accident, or the accidental discharge of the gun, (2) that the material fact was disputed, and (3) that the probative value outweighed its prejudicial effect. (R. XXVI, 1006-07.)

The State then presented rebuttal testimony of Salcedo. (R. XXV, 1047-74.) Salcedo testified that he stopped Macomber for speeding in Marshall County. (R. XXVI, 1050.) Macomber pulled over into a driveway and Salcedo walked up to Macomber's vehicle. (R. XXVI, 1052.) Macomber then got out and pointed his gun at

Salcedo. (R. XXVI, 1053.) Macomber ordered Salcedo to give him his gun and lay on his stomach face down, but Salcedo refused. (R. XXVI, 1054.) Macomber then shot at Salcedo and hit him twice. (R. XXVI, 1056.)

The jury convicted Macomber of second-degree murder and criminal possession of a firearm. (R. VII, 565-66; XXVII, 1218.) Macomber now appeals. (R. VII, 599.)

Additional facts will be discussed in the analysis as necessary. The State would also request that this court take judicial notice of Macomber's Marshall County cases, *State v. Macomber,* No. 107,205, unpublished opinion filed July 5, 2013 (*petition for review pending*) and *State v. Macomber,* No. 107,206, unpublished opinion filed July 5, 2013 (*petition for review pending*).

ARGUMENTS AND AUTHORITIES

I. Macomber's conviction for criminal possession of a firearm in Shawnee County, Kansas, does not violate the double jeopardy clause of the Fifth Amendment to the United States Constitution and Section 10 of the Kansas Constitution Bill of Rights.

Macomber first argues that his conviction for criminal possession of a firearm in Shawnee County, Kansas, is barred by the doctrine of double jeopardy due to his previous conviction for criminal possession of a firearm in Marshall County, Kansas. Whether a criminal defendant's protection against double jeopardy is violated is a question of law over which an appellate court has unlimited review. *State v. Jenkins,* 295 Kan. 431, Syl. ¶ 2, 284 P.3d 1037 (2012).

Procedural Facts

Macomber was convicted of criminal possession of a firearm in both of his Marshall County cases. (R. III, 236.) Macomber was then subsequently convicted of criminal possession of a firearm in Shawnee County on January 10, 2012. (R. VII, 566.)

Macomber's convictions were affirmed in *State v. Macomber*, No. 107,205 (*petition for review pending*). In *State v. Macomber,* No. 107,206, (*petition for review pending*), Macomber's conviction for criminal possession of a firearm was reversed based on a violation of double jeopardy and his sentence was vacated while his other convictions were affirmed.

In this case, Macomber filed a Motion to Dismiss Count 2 on September 8, 2011. (R. III, 236-243.) Macomber raised two separate grounds for dismissal. Macomber first argued, based on double jeopardy grounds, that he could not be prosecuted in Shawnee County for criminal possession of a firearm since he had already been convicted of the same offense in two cases in Marshall County, Kansas. (R. III, 237-239.) Second, Macomber argued that the State's assertion that it would not introduce evidence of prior convictions or bad acts prevented it from introducing his prior conviction, which is a required element of the crime of criminal possession of a firearm. (R. III, 239-43.)

The district court held that compulsory joinder rule was the applicable section governing Macomber's double jeopardy claim in this case. (R. V, 412.) The district court held that under the three part test used to determine whether the compulsory joinder test applies to a double jeopardy claim, Macomber failed to establish the second element of the test. Macomber provided no facts or information that would indicate that the evidence of the unlawful possession of the handgun occurring in Shawnee County was introduced as a part of the evidence in the Marshall County prosecution. (R. V, 413.)

The district court further found that the third element of the test had not been met in this case. The district court noted that compulsory joinder of crimes pursuant to

K.S.A. 22-3202 is limited to crimes involving a common scheme or plan committed solely within one jurisdiction, and Shawnee County and Marshall County are separate jurisdictions. (R. V, 414.)

Analysis

The Double Jeopardy Clause of the Fifth Amendment of the United States Constitution provides, "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. The provision was made applicable to the States by the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784, 794, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969). In Kansas, this clause is contained in Section 10 of the Kansas Constitution Bill of Rights.

The Double Jeopardy Clause of the United States Constitution protects against (1) a second prosecution for the same offense after an acquittal, (2) a second prosecution for the same offense after a conviction, and (3) multiple punishments for the same offense. In *State v. Schoonover*, 281 Kan. 453, 464, 133 P.3d 48 (2006), the issue was a double jeopardy concern "within the context of multiple punishments for the same offense (sometimes referred to as cumulative punishment) and [did] not raise a question about a successive prosecution, either after an acquittal or a conviction. 281 Kan. at 464.

Res Judicata

Macomber is raising a double jeopardy challenge in the context of a successive prosecution for criminal possession of a firearm following his convictions of that same crime in Marshall County. Macomber argues that his conviction for criminal possession of a firearm in Shawnee County was a violation of the double jeopardy clause because

he had already been convicted of the same crime in two Marshall County cases, one of which has since been vacated. *State v. Macomber*, No. 107,206, unpublished opinion filed July 5, 2013 (*petition for review pending*).

Macomber argues that because this court reversed his second conviction for criminal possession of a firearm in the Marshall County case, on grounds of a double jeopardy violation, the issue here has already been decided and is res judicata. Macomber contends that the facts in the Marshall County case are identical to the facts here and the issue has already been determined so reversal is required in this case as well. However, the State contends that the facts in this case are not identical to the facts in the Marshall County case because this issue deals with the possession of a firearm in two different counties and the issue has not already been determined based on the reversal of his conviction in *State v. Macombe*r, No. 107,206 (*petition for review pending*). Therefore, the doctrine of res judicata is not applicable in this case, and this court should reach this issue.

The Compulsory Joinder Rule

The right to be free from double jeopardy prosecution, guaranteed by the United States Constitution and Section 10 of the Kansas Constitution Bill of Rights has also been codified by statute at K.S.A. 21-5110 (formerly K.S.A. 21-3108). *State v. Schroeder,* 279 Kan. 104, 108, 105 P.3d 1237 (2005). K.S.A. 21-5110 provides in relevant part:

> (b) A prosecution is barred if the defendant was formerly prosecuted for a different crime, or for the same crime based upon different facts, if such former prosecution:
>
> (1) Resulted in either a conviction or an acquittal and the subsequent prosecution is for a crime or crimes of which evidence has been admitted

> in the former prosecution and which might have been included as other counts in the complaint, indictment or information filed in such former prosecution or upon which the state then might have elected to rely; or was for a crime which involves the same conduct, unless each prosecution requires proof of a fact not required in the other prosecution, or the crime was not consummated when the former trial began;

K.S.A. 21-5110(b)(1) incorporates the compulsory joinder rule, which is the applicable rule governing Macomber's double jeopardy claim in this case. Under the compulsory joinder rule, if evidence is admitted of an offense not contained in the charge, later prosecution of that offense is barred if it could have been included as an additional count in the first prosecution. 279 Kan. at 104.

The object of the compulsory joinder rule is simply to prevent the prosecution from substantially proving a crime in a trial in which that crime is not charged and then prosecuting the defendant in a subsequent trial using evidence presented in the earlier trial. 279 Kan. at 104. The compulsory joinder rule furthers the constitutional guarantee against multiple trials, and is not concerned with multiple convictions or multiple punishments for separate offenses. *State v. Arculeo,* 29 Kan.App.2d 962, 36 P.3d 305 (2001).

A prosecution is barred under the compulsory joinder rule if the following three requirements are met: "(1) The prior prosecution must have resulted in either a conviction or an acquittal; (2) evidence of the present crime must have been introduced in the prior prosecution; and (3) the present crime must be one which could have been charged as an additional count in the prior case." *State v. Schroeder,* 279 Kan. 104, 105 P.3d 1237 (2005). All three elements must be found to exist to substantiate a claim of double jeopardy. *State v. Barnhart*, 266 Kan. 541, 542, 972 P.2d 1106 (1999).

In order to prove that a subsequent prosecution for a second crime is barred under compulsory joinder rule by admission of evidence of that offense in prosecution for another crime, a defendant must show that the evidence presented at first trial, when viewed in a light most favorable to defendant, would lead a rational factfinder to find the defendant guilty beyond a reasonable doubt of crime being prosecuted in second trial. *State v. Wilkins,* 269 Kan. 256, 7 P.3d 252 (2000).

The State contends that the first element of the test is met in this case, as Macomber was convicted of criminal possession of a firearm in one prior prosecution in Marshall County. As to the second element, Macomber must show that evidence of the present crime, in Shawnee County, must have been introduced in the prior prosecution in Marshall County. Macomber cannot establish the second element.

The present crime that Macomber was charged and convicted of in Shawnee County was criminal possession of a firearm under K.S.A. 21-4204. The elements of the crime being that (1) Macomber knowingly had possession of a firearm, (2) Macomber had been convicted of aggravated robbery, a person felony, (3) Macomber was found to have been in possession of a firearm at the time of the prior aggravated robbery, and (4) that this act occurred on or about the 7th day of June, 2010, in Shawnee County, Kansas.

Or alternatively, that (1) Macomber knowingly had possession of a firearm, (2) Macomber had been released from prison for aggravated robbery, a person felony, within the preceding 10 years, and (3) that this act occurred on or about the 7th day of June, 2010, in Shawnee County, Kansas.

Macomber fails to show that evidence of the present crime, that he possessed a firearm in Shawnee County was introduced during either of his trials in Marshall

County. Notably, the State was prohibited from introducing evidence that Macomber possessed a firearm in Shawnee County during the Marshall County prosecutions by an order by the district court in Marshall County. Thus, the State could not introduce any evidence in either Marshall County case of Macomber's possession of a firearm in Shawnee County.

Macomber also fails to establish the third element of the compulsory joinder test. The third element requires an analysis as to whether the crime of criminal possession of a firearm in Shawnee County could have been brought as an additional charge in Marshall County.

K.S.A. 22-3202(1) provides the statutory authority for the joinder of charges. K.S.A. 22-3202(1) states,

> [t]wo or more crimes may be charged against a defendant in the same complaint, information or indictment in a separate count for each crime if the crimes charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts or a common scheme or plan.

Macomber argues that the offense of criminal possession of a firearm is a continuing charge and cannot be charged as multiple crimes occurring at discrete moments in time. Macomber further argues that the evidence presented in the pre-trial motions in this case establish that his possession of the firearm was a continuing possession that occurred in both Shawnee and Marshall Counties.

However, the operation of K.S.A. 22-3202 is limited to a common scheme or plan executed entirely within one jurisdiction. *State v. Ralls*, 213 Kan. 249, 256-57, 515 P.2d 1205 (1973) (the requirement that to be joined under K.S.A. 22-3202 the crimes must have occurred in a single jurisdiction.) Shawnee County and Marshall County are

clearly separate jurisdictions. Thus, compulsory joinder under K.S.A. 22-3202 does not trump the requirement of proper venue.

Therefore, in this case, Macomber failed to establish that all three elements of the compulsory joinder rule were met, and the district court properly held that there was no double jeopardy violation in this case.

Macomber also cites to K.S.A. 22-2608 in support of the claim that the State had concurrent jurisdiction to prosecute him in either Shawnee or Marshall County for the continuing possession of a firearm. However, K.S.A. 22-2608 provides that a venue for prosecution will lie somewhere in instances where the exact site of the crime cannot be ascertained. Here, the crime occurred in both Marshall County and Shawnee County and was properly brought in both venues.

The State submits that Macomber's claim of double jeopardy is resolved under K.S.A. 21-5110(b)(1). Under this analysis, Macomber fails to establish all the necessary elements required. Additionally, Macomber's claim fails under the analysis in *State v. Schoonover*. Though Macomber argues that this court can get to the unit of prosecution test, the State contends that the analysis ends after the first prong. Macomber's convictions do not arise out of the same conduct; therefore, his conviction for criminal possession of a firearm in this case does not violate the double jeopardy clause.

State v. Schoonover

In *Schoonover*, our Supreme Court established an analytical framework for determining multiplicity issues. Multiplicity is the charging of a single offense in several counts of a complaint or information. Black's Law Dictionary 1112 (9th ed. 2009). Multiplicitous charges create a potential for multiple punishments for one single

offense. However, "[a] double jeopardy issue is not raised when a defendant is charged, tried, and sentenced for discrete and separate acts or courses of conduct." *State v. Schoonover*, 281 Kan. 453, Syl. ¶ 3, 133 P.3d 48 (2006). The State contends that Macomber's convictions were not multiplicitous as the convictions were for discrete and separate acts or courses of conduct.

A two-prong test determines whether a defendant's convictions are for the same offense. First, "[d]o the convictions arise from the same conduct?" Second, "by statutory definition are there two offenses or only one?" 281 Kan. at 496.

In *State v. Gomez*, 36 Kan.App.2d 664, 143 P.3d 92 (2006), this court stated:

> In analyzing a double jeopardy issue, the overarching inquiry is whether the convictions are for the same offense. There are two components to this inquiry, both of which must be met for there to be a double jeopardy violation: (1) Do the convictions arise from the same conduct? and (2) By statutory definition are there two offenses or only one? Under the first component, if the conduct is discrete, *i.e.,* committed separately and severally, the convictions do not arise from the same offense and there is no double jeopardy violation. If the charges arise from the same act or transaction, the conduct is unitary and the second component must be analyzed to see if the convictions arise from the same offense. Under the second component, it must be determined whether the convictions arise from a single statute or from multiple statutes. If the double jeopardy issue arises from convictions for multiple violations of a single statute, the unit of prosecution test is applied. If the double jeopardy issue arises from multiple convictions of different statutes, in other words it is a multiple description issue, the same-elements test is applied.

The court's analysis ends if, under the first prong, the convictions are not based on the same or "unitary" conduct. Four factors guide the first prong of the multiplicity analysis:

> (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 causal relationship between the acts, in particular when there was an intervening event; and (4) whether there is a fresh impulse motivating some of the conduct. 281 Kan. at 497.

In his brief, Macomber argues that as to the first prong of the test, his possession of the firearm in Shawnee County and Marshall County was a continuing course of conduct, though he does not specifically address the factors to be considered in determining whether the conduct is unitary. Macomber focuses his argument on the second prong of the test, which is the unit of prosecution analysis. Macomber fails to brief the first prong of the test, and an issue not briefed by the appellant is deemed waived and abandoned. *State v. McCaslin*, 291 Kan. 697, 709, 245 P.3d 1030 (2011).

The State contends that Macomber cannot satisfy the first prong of the test, as the convictions are not based on unitary conduct. The first factor used to determine whether the convictions are based on the same conduct is whether the acts occur at or near the same time. Here, there was a separation of time from when Macomber possessed the firearm in Shawnee County and then drove to Marshall County and was found in possession of the firearm.

The criminal possession of a firearm charge in Shawnee County was based on Macomber's possession of the firearm around 4:47 p.m. in the afternoon on June 7, 2010, and the charges in Marshall County were based on his possession of the firearm around 8:15 p.m. in the evening on that same day. (R. XXIII, 226-28; R. XXII, 53-54.) The possession did not occur at the same time.

The next factor is whether the possession occurred at the same location. In the Shawnee County case, the possession occurred at Lofton's driveway, located at 2741 S.E. Iowa Street, in Topeka, Kansas. (R. XXII, 31.) In the Marshall County cases, the possession occurred in Blue Rapids, Kansas, during a traffic stop involving Deputy Salcedo and later at Seville's residence. (R. XXII, 52; R. XXVI, 1049.) The

possessions took place in two separate counties, separate addresses, and did not occur at the same location.

The third factor to consider is whether there is a causal relationship between the acts, in particular when there was an intervening event. There is no causal relationship between the incident in Shawnee County and the incidents in Marshall County. The possession of the firearm in Shawnee County was motivated by an incident between Macomber and Lofton in the driveway of Lofton's home. After Macomber possessed the firearm in Topeka, he left Topeka. The act of leaving Topeka and driving over an hour to Marshall County was an intervening event.

The possession conviction in Marshall County was based on Macomber's contact with Deputy Salcedo during the traffic stop. There is no logical connection between the possession in Shawnee County and the later possession in Marshall County. Macomber's conduct toward Lofton was completely distinct and discrete from his conduct toward Deputy Salcedo. Thus, there was no causal relationship between the possessions and there was an intervening event.

The last factor to consider is whether there is a fresh impulse motivating some of the conduct. Each of the charges of possession of a firearm was motivated by a fresh and different impulse. After Macomber shot Lofton in his driveway in Topeka, Macomber made the decision to "get the hell out of there." (R. XXVI, 990-91, 1023.) Macomber's decision to back out of the driveway and flee Topeka broke the chain of causality and gave Macomber the chance to reconsider whether he should keep the gun or dispose of it. Macomber's decision not to dispose of the gun was a fresh impulse to keep possession of the gun.

Additionally, when Macomber used the gun in Marshall County, it was motivated by a fresh impulse upon coming into contact with Deputy Salcedo. Therefore, the State contends that there was a fresh impulse motivating Macomber's conduct in each situation.

If the convictions do not arise out of the same conduct, then the analysis ends. *State v. Schoonover*, 281 Kan. 453, 496-97, 133 P.3d 48 (2006). The analysis should end here, as the convictions do not arise out of the same conduct. Thus, this court should not address the unit of prosecution prong of the test. The convictions are based on different times, different locations, discrete conduct, and separate victims; there was an intervening event between the possessions and they were motivated by fresh impulses. Therefore, the conviction for criminal possession of a firearm in Shawnee County is not multiplicitous to those convictions for the same crime in Marshall County.

II. The district court properly allowed Dr. Pojman to testify regarding his opinion as to the manner of death.

Macomber contends the district court erred when it admitted Dr. Pojman's testimony regarding his opinion as to the manner of death. Macomber argues Dr. Pojman's testimony exceeded the permissible scope of expert testimony, invaded the province of the jury, and was more prejudicial than probative.

The district court properly admitted Dr. Pojman's opinion testimony regarding the manner of death, but even if it was error, it was harmless error in this case. A district court's application of a statute governing the admissibility of opinion testimony is reviewed under an abuse of discretion standard. *State v. Shadden*, 290 Kan. 803, 235 P.3d 436 (2010).

Coroners are permitted to testify as to their findings at trial, if qualified by the district court as an expert. K.S.A. 60-456(b) states:

> If the witness is testifying as an expert, testimony of the witness in the form of opinions or inferences is limited to such opinions as the judge finds are (1) based on facts or data perceived by or personally known to the witness at the hearing and (2) within the scope of the special knowledge, skill, experience or training possessed by the witness.

Furthermore, K.S.A. 60-456(d) states that testimony in the form of opinions or inferences otherwise admissible under this article is not objectionable because it embraces the ultimate issue or issue to be decided by the trier of fact. *See State v. Shadden*, 290 Kan. 803, 235 P.3d 436 (2010).

Macomber first argues that Dr. Pojman's testimony exceeded the permissible scope of expert testimony under K.S.A. 60-456. However, the State contends that a proper foundation was laid, Dr. Pojman's testimony complied with the statute, and it was properly admitted at trial.

Dr. Pojman testified that in Kansas, for a person to be a coroner he or she must be a licensed physician. (R. XXIII, 270.) Dr. Pojman completed his undergraduate degree and medical school program in Illinois, completed further training in hospital based pathology, and completed a residency program in forensic pathology. (R. XXIII, 270-71.) Dr. Pojman worked as a coroner for over 15 years and had performed over 3,000 post mortem examinations. (R. XXIII, 271.) Dr. Pojman stated that the purpose of an autopsy examination is to determine the cause and manner of death and also to collect any physical evidence that may be used by law enforcement. (R. XXIII, 271-72.) Dr. Pojman performed the autopsy on Lofton on June 8, 2010. (R. XXIII, 272.)

Dr. Pojman observed an entrance gunshot wound underneath Lofton's shoulder blade. (R. XXIII, 273.) Dr. Pojman stated that the injury under Lofton's shoulder blade, on his back, was an entry wound and that there was no exit wound. (R. XXIII, 273.) The bullet struck Lofton's shoulder blade on his left side, bruised the left lung, went through the spine and lower lobe of the right lung, and then lodged into the soft tissue on the right side of his chest. (R. XXIII, 274.) Dr. Pojman testified that the bullet entered the left side of Lofton's back, inferring that Lofton was shot from behind. (R. XXIII, 280.)

Dr. Pojman also testified that there was no stippling or soot on Lofton's skin caused by gunpowder hitting the skins surface. (R. XXIII, 273.) Dr. Pojman tested Lofton's hands for the presence of iron, which can sometimes indicate that a person has handled a gun. (R. XXIII, 281.) Lofton's palms had no evidence of iron. (R. XXIII, 281.)

Dr. Pojman testified that the cause of Lofton's death was a gunshot wound to the chest. (R. XXIII, 282.) The State then asked Dr. Pojman what the manner of death was, and Macomber objected. (R. XXIII, 282.) The district court ultimately denied Macomber's objection, holding that a proper foundation had been laid for Dr. Pojman's opinion testimony and allowed him to answer. (R. XXIII, 289-90.) Dr. Pojman testified that the manner of death in this case was homicide. (R. XXIII, 291.)

Based on Dr. Pojman's testimony, the State contends that a proper foundation for Dr. Pojman's opinion was laid. Dr. Pojman's testimony regarding the cause and manner of death did not exceed the scope of K.S.A. 60-456. Determining the cause and manner of death are part of the statutory duties of the coroner and purpose of the autopsy. Dr.

Pojman testified that he had performed the autopsy in this case and personally observed the injuries and wounds of Lofton.

Dr. Pojman's based his opinion on observations that Lofton was shot in the back and had no stippling or soot on his skin. Also, the fact that there was no presence of iron on Lofton's hands also contributed to his opinion regarding the manner of death.

From the autopsy, Dr. Pojman determined that Lofton was shot in the back and concluded that the wound was not self inflicted; thus it was a homicide. Dr. Pojman used his personal observations along with his experience and training to conclude that the manner of death was a homicide. Dr. Pojman's experience, qualifications, and personal observations from the autopsy established a proper foundation for the admission of his expert opinion as to the manner of death.

Therefore, a proper foundation was laid for Dr. Pojman's testimony regarding the manner of death and that the opinion testimony met the requirement of the statute. The district court properly admitted Dr. Pojman's testimony regarding the manner of death in this case.

Macomber also argues that Dr. Pojman's testimony invaded the province of the jury and was more prejudicial than probative. However, the State submits that the testimony regarding the manner of death as a homicide did not invade the province of the jury. Additionally, under K.S.A. 60-456(d) expert testimony in the form of an opinion is not objectionable because it embraces the ultimate issue to be decided by the trier of fact. *State v. Smallwood*, 264 Kan. 69, 955 P.2d 1209 (1998).

Our Supreme Court has held that expert testimony as to the manner of death does not invade the province of the jury if the testimony does not speak to the innocence or guilt of the defendant.

In *Smallwood*, the defendant argued that the district court erred in allowing the forensic pathologist who performed the autopsy on the victim to state conclusively that the victim died from child abuse. The State asked the doctor, "based upon your... examination here... would you say that this child died from child abuse?" 264 Kan. at 79. The doctor responded, "yes." 264 Kan. at 79. Our Supreme Court held the testimony that the victim died as a result of child abuse did not invade the province of the jury. The Court noted, by stating that, based upon her medical experience, the victim "died as a result of child abuse, either shaking or a blow to the skull, [the doctor] was not testifying as to the ultimate question of Smallwood's guilt or innocence." 264 Kan. 814. Similarly, in this case Dr. Pojman was not testifying to the ultimate question of Macomber's guilt or innocence, but simply testifying that the manner of death was not accidental, natural, or suicide.

Additionally, in *State v. Struzik*, 269 Kan. 95, 5 P.3d 502 (2000), Struzik argued that the testimony of the State's expert medical witnesses invaded the province of the jury. Our Supreme Court held that the testimony by doctor that a child's death was the result of child abuse, even though it contradicted the Struzik's theory of defense, was properly admitted. The Court noted that the defining point was that the doctor's testimony was based on medical evidence involving the character and severity of the victim's injuries, not the doctor's opinion on Struzik's veracity or credibility. 269 Kan.

at 101. The Court ultimately held that the doctor's testimony did not extend beyond the limits of acceptable expert medical testimony. 269 Kan. at 101.

Again, here, Dr. Pojman's testimony regarding the manner of death was based on the character and severity of Lofton's injuries and the observations from the autopsy. The testimony was not Dr. Pojman's opinion on Macomber's veracity or credibility, but on the manner of death based on his observations and experience.

Our Supreme Court has also held that specific testimony that manner of death is homicide does not invade the province of the jury. *State v. Torres*, 280 Kan. 309, 121 P.3d 429 (2005). In *Torres*, the defendant argued that the district court erred by allowing a doctor to testify that the manner of death was homicide. The doctor testified that "the cause of death is listed as shaken impact syndrome, and the manner of death is homicide." 280 Kan. at 334. The Court held that describing the victim's manner of death as "homicide" – defined in Black's Law Dictionary simply as the killing of a person by another – does not expand our approved descriptions in *Struzik* and *Smallwood* that a child dies as a result of abuse because that clearly implies death at the hands of another. The Court held that the doctor's statement did not go to the ultimate question of Torres' guilt or innocence. 280 Kan. at 334.

Dr. Pojman's opinion testimony regarding the manner of death was not a legal conclusion reserved for the trier of fact. Homicide is defined in Black's Law Dictionary as "[t]he killing of one person by another" or "[a] person who kills another." Black's Law Dictionary 802 (9th ed. 2009). There is no crime of homicide. The use of the word "homicide" to describe the manner of death does not speak to Macomber's guilt or

innocence. Dr. Pojman's testimony that the manner of death was homicide was not equivalent to stating the Macomber was guilty of murder.

Here, it is undisputed that Macomber killed Lofton. The overwhelming evidence, including Macomber's own admission that he shot Lofton, supports this finding. (R. XXVI, 1010.) The State asked Macomber, "[a]nd you actually admit shooting Ryan, don't you?" (R. XXVI, 1010.) Macomber replied, "[y]es." (R. XXVI, 1010.) Macomber further testified that he was the only person with a gun in his hand during the incident, and when he used that gun, he shot Lofton in the back. (R. XXVI, 1011.) Therefore, the fact that a homicide occurred was never in dispute or an issue for the jury. The issue for the jury to determine was whether Macomber's shooting of Lofton was intentional or accidental. Macomber's intent was the ultimate issue for the jury in this case.

In order to convict Macomber of first degree murder, the State had to prove beyond a reasonable doubt that Macomber intentionally shot Lofton. The jury could still find that the shooting was accidental even with Dr. Pojman's testimony that the manner of death was homicide. Dr. Pojman did not testify to Macomber's intent, but merely testified that Lofton's death occurred as a result of a homicide. Thus, this court should find no merit in Macomber's contention that Dr. Pojman's testimony invaded the province of the jury.

Even if this court determines that it was error for the district court to admit Dr. Pojman's testimony regarding the manner of death, it was harmless error. In order for an error to be harmless the State must prove there was no reasonable probability that the

error affected the outcome of the trial. K.S.A. 60-261; *State v. Ward*, 292 Kan. 541, 565, 256 P.3d 801 (2011), *cert. denied* 132 S.Ct. 1594 (2012).

Here, there was no reasonable probability that the testimony affected the outcome of trial given the extensive cross examination of Dr. Pojman, in which Macomber was able to actually present and argue his defense, the fact that Macomber admitted an anatomical diagnosis that stated the manner of death as homicide, and given the overwhelming evidence against Macomber.

The State simply asked one question in its direct examination of Dr. Pojman regarding the manner of death. The State's final question of Dr. Pojman was, "[w]hat was the manner of Ryan Lofton's death?" Dr. Pojman answered, "[h]omicide." (R. XXIII, 291.) Macomber followed up on cross examination with a lengthy number of questions regarding the manner of death and how Dr. Pojman reached his opinion regarding the manner of death.

Macomber asked Dr. Pojman, "[w]hat did you base your opinion as to the manner of death on, specifically?" (R. XXIII, 312.) Dr. Pojman stated that Lofton was shot in a way that could not be self inflicted, so he ruled out suicide. (R. XXIII, 312.) Dr. Pojman further testified that it was not a natural death in this case, so that makes the only options homicide or accident. (R. XXIII, 312.) Dr. Pojman indicated that accidents from gunshot wounds are very rare and said, "pretty much all gunshot wounds if they're not suicides they're classified as homicides meaning that someone – there was someone else who had pulled the trigger." (R. XXIII, 312.)

Dr. Pojman also stated that he "discussed or talked to the – talked about the case with law enforcement prior to the autopsy, during the autopsy, and after the autopsy

examination." (R. XXIII, 314.) Dr. Pojman testified, "I had enough information at that time to say that this was a homicide after I finished the autopsy examination, again, this was not a gun that went off by itself and it was not a gun that was fired by this individual." (R. XXIII, 314.) The verbal communication from law enforcement about the incident and the injury itself was what Dr. Pojman used to form his opinion that the manner of death was homicide. (R. XXIII, 316-17.)

Macomber also asked Dr. Pojman what the classifications are for the manner of death. (R. XXIII, 317.) Dr. Pojman answered, "[m]anner of death is homicide, suicide, natural, accident and could not be determined or undetermined." (R. XXIII, 317.) Dr. Pojman further stated, "[a]ll I can say is that [Lofton] did not shoot himself and from the information I got from law enforcement, it was not a situation where the gun had went off by itself because it fell off of a table or anything like that, so by default it becomes for at least death certificate a homicide." (R. XXIII, 317.) Dr. Pojman clearly explained that the intent of the person who shot the gun does not matter for the classification of the manner of death as "homicide" on a death certificate. (R. XXIII, 318.)

Macomber then asked several questions that were at the heart of his defense.

> Q: [s]o if – what if there was a mechanical defect with the weapon, a documented mechanical defect of the weapon?
> A: If the gun was still in someone's hand when it was fired, that person is responsible for where the bullet goes. It doesn't matter if it's – the intent is to strike the individual. A hunting, what we call hunting accidents, for death certificate purpose they are still classified as homicides. That person is responsible for where that bullet goes. If it misses its target and strikes somebody else, or if it goes through its target and strikes somebody else it's still a homicide. Now what the courts want to do with that, that's another story, but for a death certificate that is considered a homicide.
> Q: [w]hat if there was an actual part on a firearm that malfunctioned. There was a mechanical failure of the firearm. Irregardless of intent, the

> trigger was never pulled and there was a mechanical failure of the firearm, would that still be a homicide or would it be an accident?
> A: It would be a homicide as long as that gun was in someone's possession or hand at that time. If it's sitting on a car or sitting on the table and it goes off, then it would be classified as an accident. (R. XXIII, 318-19.)

This line of questioning clearly helped the jury in its understanding of what the definition of homicide was and the significance of the classification of homicide as the manner of death. Dr. Pojman's testimony on cross was helpful to the jury and relevant to explaining the meaning of homicide. Furthermore, Dr. Pojman clearly explained that the classification of homicide as the manner of death did not go to the intent of the person holding the gun. The intent of the person is irrelevant and is not indicated by the classification of homicide as the manner of death.

Macomber was able to assist the jury in understanding his defense and how the classification of the manner of death as a homicide had no impact on his intent at the time. During his cross examination, Macomber was able to establish that the manner of death as homicide did not rule out the possibility that the shooter did not intend to shoot the victim. Given this testimony, it cannot be said that Macomber was prejudiced or affected the outcome of the trial.

Macomber cites to *State v. Dixon*, 279 Kan. 563, 112 P.3d 883 (2005), but *Dixon* does not directly support his argument. Macomber argues the error in this case cannot be harmless as it was in *Dixon* because here the death certificate was not admitted into evidence. However, Macomber admitted Defense Exhibit 8 through Dr. Pojman. (Defense Exhibit 8, R. XXVIII, 9; XXIII, 298.) Defense Exhibit 8 was an anatomic diagnosis written by Dr. Pojman at the conclusion of the autopsy. In that diagnosis, there was a section that addressed the manner of death. The manner of death listed on

the document was homicide. Even if the testimony of regarding the manner of death would have been excluded, Macomber admitted this document which indicated the manner of death was homicide. If admission of Dr. Pojman's testimony as to the manner of death was error for any reason, the error would be harmless because the testimony merely restated the contents of the anatomic diagnosis, which Macomber admitted into evidence. There was no abuse of discretion in permitting Dr. Pojman to testify as to the manner of death.

III. The district court did not abuse its discretion when it clarified the pretrial order regarding the use of Macomber's prior convictions and allowed the State to present evidence of his prior convictions.

Macomber next argues the district court erred when it modified the pretrial order and allowed the State to present evidence of his prior convictions for aggravated robbery. The district court did not abuse its discretion when it clarified the pretrial orders and allowed evidence of his prior conviction to be presented at trial.

The district court has discretion to allow or refuse modification of a pretrial order, and its ruling should be upheld absent an abuse of discretion. *Tillotson v. Abbott*, 205 Kan. 706, 472 P.2d 240 (1970). Additionally,

> The admission of evidence lies in the sound discretion of the trial court. An appellate court's standard of review regarding a trial court's admission of evidence, subject to exclusionary rules, is abuse of discretion. Judicial discretion is abused when judicial action is arbitrary, fanciful, or unreasonable. If reasonable persons could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion. One who asserts that the court abused its discretion bears the burden of showing such abuse of discretion. [Citations omitted.]

State v. Whitesell, 270 Kan. 259, 276-77, 13 P.3d 887 (2000).

Procedural Facts

On August 3, 2010, Macomber filed a "Motion in Limine Regarding Allegations of Prior Bad Acts." (R. I, 71-74.) Macomber specifically requested that the district court "issue an order barring any mention of allegations stemming from Marshall County on or about the same date of the allegations in the instant case, the complete ban of any mention of an allegation of bank robbery, and any mention that the Defendant was on parole, or had a parole officer." (R. I, 71-73.) Macomber further argued that his other pending charges were inadmissible under K.S.A. 60-455 because they were not relevant to prove a material fact. (R. I, 72.)

At that hearing, Macomber added no additional argument and the State stipulated to the motion. (R. XII, 20-21.) The district court stated,

> As I understand, there may be out there charges that are pending against the defendant in Marshall County as well as Omaha, Nebraska, and he is also currently on – was on parole, I believe, or had a parole officer. And the request is that none of those – the facts of any of those situations come out during the course of the trial, and the State has agreed to that motion in limine; is that correct? (R. XII, 21.)

The State replied, "[y]es, Your Honor." (R. XII, 21.) The district court then granted the motion. (R. XII, 21.) The journal entry stated "The State does not object to the Defendant's motion in limine regarding allegations of prior bad acts; that motion is therefore granted." (R. II, 122.)

Another pre-trial hearing was held on June 3, 2011. At this hearing the State requested to make a record on the issue of the admission of prior convictions. The State informed the district court that it had offered to stipulate that Macomber had prior felony convictions such that he was not lawfully in possession of a firearm on the date of the offense. (R. XV, 5.) Macomber would not agree to that stipulation. (R. XV, 5.)

Because Macomber would not stipulate, the State would have to put in his priors in order to establish that element of criminal possession of a firearm. (R. XV, 5.)

Macomber claimed that he was reluctant to stipulate due to the fact that the State did not object to his motion in limine regarding his alleged prior bad acts, and the district court had granted it. (R. XV, 5.) Macomber claimed that due to the fact that the district court granted his motion in limine, the State would be prevented from admitting evidence of his prior conviction. (R. XV, 6.)

The district court stated,

> There's not going to be any evidence of prior bad acts. The prior felony convictions that supports the charge of unlawful possession of a firearm, that would be an element of the crime itself and that is, that is outside the realm of 60-455 evidence so that – two ways to go about that. The State can present evidence as to what that felony was, or pursuant to a stipulation between the parties, there can be a stipulation that the defendant was convicted of a felony without stating what that felony was on a prior date which forms the basis of that element. (R. XV, 6.)

Macomber's counsel at that time stated that he would discuss this with Macomber and make a decision about a stipulation. No further argument was made at the hearing. (R. XV, 7.)

At a motion hearing on September 7, 2011, the district court again addressed the issue of the prior convictions, or K.S.A. 60-455 evidence. The district court noted that the State was not using any prior convictions or K.S.A. 60-455 evidence, except for the prior conviction necessary to prove an element of the criminal possession of a firearm charge. (R. XVIII, 35-36.) Macomber was then asked if he would stipulate that he had been convicted of a prior felony. (R. XVIII, 36.) Macomber stated that he was still undecided as to whether he would stipulate and told the district court he would be filing a motion regarding this issue. (R. XVIII, 36.)

Macomber filed a "Motion to Dismiss Count 2" on September 8, 2011. (R. III, 236-243.) Macomber argued that count 2 should be dismissed based on the pre-trial forms signed by the State, indicating that it would not seek the introduction of evidence of prior convictions or bad acts. (R. III, 240.) Macomber stated:

> The defendant believes that by the State not qualifying anything in their hand written notation as to why they wouldn't introduce evidence of prior convictions or bad acts that it becomes all encompassing and precludes the State from introducing such evidence even if its elemental of a crime charged. This is not to be confused with the courts order granting defendants motion of October 6, 2010 regarding prior bad acts which would still allow the state to prove elements of a crime with prior bad acts. (R. III, 241.)

The district court issued a written order concerning this motion. (R. V, 397-417.) The district court noted that there was authority that held "if the pretrial order could result in manifest injustice, the trial court has authority to modify the order." *State v. Coleman*, 253 Kan. 335, 347, 856 P.2d 12 (1993). The district court held that based on the prior pretrial conferences and course of this case, there was a clear implication that the State would not be seeking to introduce evidence of the defendant's prior convictions or civil wrongs pursuant to K.S.A. 60-455, except for the specific evidence required to meet the State's burden on Count 2. (R. V, 416.) The district court then denied the motion. (R. V, 416.)

Analysis

K.S.A. 22-3217 authorizes the use of pretrial conferences in criminal cases. If pretrial conferences are held in a criminal case, both parties are bound by the agreement made at the conference and included by the judge in the order. *State v. Bright*, 229 Kan. 185, 623 P.2d 917 (1981). If the pretrial order could result in manifest injustice, the trial court has the authority to modify the order. 229 Kan. at 192; K.S.A. 22-3217.

Macomber argues that the State and the district court were bound to the pretrial orders stating that the State would not offer any evidence of his prior convictions or bad acts. *See State v. Coleman*, 253 Kan. 335, 347, 856 P.2d 12 (1993). Thus, based on this agreement, the State should not have been allowed to present evidence of Macomber's prior conviction in order to satisfy one of the elements of count 2, criminal possession of a firearm.

It is clear, based on the record, that the State's intention was not to offer any evidence of prior convictions or bad acts specifically in regards to the charges or bad acts that occurred in Marshall County, Kansas, or in Omaha, Nebraska.

Prior to any pretrial conferences, the State agreed to the "Motion in Limine Regarding Allegations of Prior Bad Acts" filed by Macomber, and the district court granted it. That motion specifically refers to the prior convictions and bad acts arising from Marshall County, Kansas, and Omaha, Nebraska. The State stipulated to the motion early on during the case and made it clear that it would not seek to admit any evidence regarding these specific prior bad acts. The State signed off on each pretrial order with this previous stipulation in mind. The pretrial orders that were subsequently filed must be put into context with the prior motion in limine.

Section nine of the pretrial orders confirmed the State's agreement that it would not admit any evidence of the specific prior bad acts from Marshall County or Nebraska. Macomber argues that the pretrial orders clearly and unequivocally provide that the State would not be offering any evidence of any of his prior convictions. Macomber further argues that he was misled and unfairly taken advantage of due to the pretrial orders. However, again, in looking at the record, there was a clear agreement not to

offer any evidence of his prior convictions or charges from Marshall County or Nebraska, not all of his prior convictions.

Furthermore, Macomber was not misled or unfairly taken advantage of in this case. In his own pro se "Motion to Dismiss Count 2," he acknowledges that the pretrial orders were not to be confused with the order granting his motion in limine regarding prior bad acts. Macomber specifically acknowledges that the order granting his motion in limine regarding prior bad acts would still allow the State to prove elements of a crime with prior bad acts. (R. III, 241.) Macomber cannot now claim that he was misled, as he had a clear understanding that the State could offer prior bad acts to prove an element of criminal possession of a firearm.

The State made it a point to make a record on this issue when Macomber indicated that he may not agree to the State's offer to stipulate to his prior conviction for aggravated robbery. Had Macomber agreed to stipulate to his prior conviction, the State would not have had to present any evidence regarding his prior conviction at trial. When the State became aware of the possibility that Macomber may not stipulate to his prior conviction, it notified the district court that the State would necessarily have to introduce his prior conviction in order to satisfy an element of the crime of criminal possession of a firearm. However, this evidence would not be K.S.A. 60-455 evidence, as it would be introduced to establish an element of the crime of criminal possession of a firearm.

If this discussion on the record is considered a modification of the previous pretrial orders, the State contends that the district court did not abuse its discretion in modifying the order. Had the district court interpreted the previous pretrial orders as to

prohibit the State from presenting any evidence of any of Macomber's prior convictions, not modifying the order to allow the State to present the prior conviction as to establish an element of the crime would have resulted in manifest injustice. If the district court had prohibited the State from presenting Macomber's prior conviction for aggravated robbery, it would have been "obviously unfair" to the State in this case. Thus, if this discussion was considered a modification of the previous pretrial orders, the district court properly modified the orders so as to prevent manifest injustice. *State v. Bright*, 229 Kan. 185, 192, 623 P.2d 917 (1981).

Therefore, district court did not abuse its discretion in clarifying or modifying the pretrial orders allowing the State to present evidence of Macomber's prior conviction for aggravated robbery in this case.

IV. Deputy Salcedo's testimony about Macomber's use of the gun in Marshall County was admissible under K.S.A. 60-455, and the district court properly admitted it as rebuttal evidence.

Macomber argues that the district court committed reversible error in the admission of rebuttal evidence of Deputy Salcedo because it violated K.S.A. 60-455. This court reviews the admission of rebuttal evidence for an abuse of discretion. *State v. Sitlington*, 291 Kan. 458, 464, 241 P.3d 1003 (2010). A district judge has broad discretion in determining the use and extent of relevant evidence in rebuttal, and such a ruling will not be ground for reversal absent abuse of that discretion that unduly prejudices the defendant. *State v. Cosby*, 285 Kan. 230, 250, 169 P.3d 1128 (2007). Generally, admission of rebuttal evidence intended to contradict facts put into evidence during the defense case is not error. *State v. Blue*, 221 Kan. 185, 188, 558 P.2d 136 (1976); *State v. Cosby*, 285 Kan. 230, 250, 169 P.3d 1128 (2007).

Additionally, K.S.A. 60-455 allows the admission of otherwise inadmissible evidence when the district court determines that its evidentiary value outweighs the potential for undue prejudice. *See State v. Richmond,* 289 Kan. 419, 435-36, 212 P.3d 165 (2009). Our Supreme Court has established a three-part test for the district court to use in determining whether evidence about a person's prior crimes or civil wrongs may be admitted under K.S.A. 60-455, and for an appellate court to apply when reviewing these matters on appeal. These steps were recently summarized in *State v. Inkelaar,* 293 Kan. 414, 424, 264 P.3d 81 (2011):

> First, the district court must determine whether the fact to be proven is material, meaning that this fact has some real bearing on the decision in the case. The appellate court reviews this determination independently, without any required deference to the district court.
>
> Second, the district court must determine whether the material fact is disputed and, if so, whether the evidence is relevant to prove the disputed material fact. In making this determination, the district court considers whether the evidence has any tendency in reason to prove the disputed material fact. The appellate court reviews this determination only for abuse of discretion.
>
> Third, if the fact to be proven was material and the evidence was relevant to prove a disputed material fact, then the district court must determine whether the probative value of the evidence outweighs the potential for undue prejudice against the defendant. The appellate court also reviews this determination only for abuse of discretion. 293 Kan. at 424.

If the evidence meets all of these requirements, it is admitted, but in a jury trial the district court must give the jury a limiting instruction telling the jury the specific purpose for which the evidence has been admitted (and reminding them that it may only be considered for that purpose). 293 Kan. at 424; *State v. Torres*, 294 Kan. 135, 139-40, 273 P.3d 729 (2012). As Macomber notes, K.S.A. 60-455(e) states that the State shall disclose this evidence to the defendant at least 10 days prior to trial. However, the

statute goes on to say "or at such later time as the court may allow for good cause." Thus, there is an exception to that 10 day rule.

The State contends that this evidence was admissible under K.S.A. 60-455, and the district court properly allowed the rebuttal evidence in this case. K.S.A. 60-455 states in part:

> (b) Subject to K.S.A. 60-445 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.

Macomber's defense was that Lofton's death occurred due to an accidental discharge of the gun and that Macomber did not intend to shoot Lofton. Cayton testified that the gun had a "hair trigger" and was in a dangerous altered condition. (R. XXV, 663-66.) Cayton's written report also specifically indicated that the gun could have been shot accidentally. (R. XXVI, 996.) Macomber testified that he was not sure whether the gun hit the door, or whether he pulled the trigger. (R. XXVI, 989.)

The district court found that the evidence was relevant to prove a material fact. (R. XXVI, 1006.) Macomber placed the condition of the gun at issue. Macomber's defense that the firing of the gun was an accident or mistake made the working order of the gun a material fact. K.S.A. 60-455 allows the admission of evidence when it is relevant to prove some a material fact, including absence of mistake or accident. The material fact of whether the gun was defective and shot by accident or whether the gun was properly working and shot intentionally had a real bearing on the decision in this case.

The evidence that Macomber reloaded the gun and shot Salcedo twice later that night was relevant to prove that the gun was not defective and that the earlier shooting

was not accidental. The material fact of whether the shooting was accidental or intentional was undoubtedly disputed in this case. Again, Salcedo's testimony was relevant to show that the gun was not defective and the shooting of Lofton was not due to a hair trigger on the gun, or an accidental discharge. The evidence that Macomber shot the gun two more times that same night is relevant to show that the gun was functional and did not accidentally discharge.

Finally, the probative value of Salcedo's testimony outweighed any prejudicial effect in this case. Salcedo's testimony that Macomber used that same gun to intentionally shoot him that same evening is probative as Salcedo witnessed Macomber using the gun and the gun being functional. Notably, the district court did not allow the video of the shooting to be admitted because it was more prejudicial than probative. (R. XXVI, 1008.) However, Macomber then admitted this video himself and played it for the jury. (R. XXVII, 1090; Defendant's Exhibit 78, R, XXIX, 4.) Macomber requested the video be admitted despite the district court's earlier ruling. Macomber cannot now complain on appeal that Salcedo's testimony was prejudicial when he requested the jury watch the video that was previously determined as prejudicial to him.

Macomber made the working order of the gun a critical piece of his defense and asserted that the shooting was an accident or a mistake. The working condition of the gun was a highly contested issue at trial, and the evidence that Macomber shot the gun at least two more times after he shot Lofton had significant probative value to that issue.

The State contends that the evidence that Macomber shot at Salcedo in Marshall County later that evening was admissible to prove the absence of mistake or accidental shooting of Lofton earlier that day. The evidence that Macomber shot Salcedo with the

same gun later that day was properly admitted and rebutted Macomber's defense that the gun was defective and was accidentally discharged.

Additionally, in considering prejudice, this court cannot ignore the limiting instruction to the jury to consider the evidence solely for the purpose of a lack of accidental discharge due to a defect in the gun. (R. XXVII, 1168-69.) *See State v. Becker*, 290 Kan. 842, 856, 235 P.3d 424 (2010) (appellate courts presume a jury followed jury instructions). Given the highly probative nature of the evidence and the issuance of a limiting instruction, the district court did not abuse its discretion in determining that the probative value of the evidence that Macomber shot the gun after he shot Lofton was not outweighed by the potential for undue prejudice and properly admitted the rebuttal evidence.

Even if it was error to allow Salcedo's testimony, the error was harmless. The jury was specifically instructed to use the testimony solely for the purpose of a lack of accidental discharge. Also, the jury saw the video of the shooting, which was admitted by Macomber. The jury saw Macomber with the gun, pointing it at Salcedo, though it is off to the left hand side, the jury is able to figure out that Macomber shot Salcedo and then watched him drive off. (Defendant's Exhibit 78, R, XXIX, 4.) Therefore, if this is error, the error is harmless as the jury still received evidence of the shooting admitted by Macomber.

V. The district court properly excluded evidence regarding Risa's prior interactions with Macomber, evidence that the residence where the crime took place was associated with drug activity, and evidence that Lofton had made previous threats.

Macomber argues the district court denied his fundamental right to a fair trial by excluding certain evidence establishing his state of mind and that his actions were done

in self-defense. Under the state and federal constitutions, a defendant is entitled to present the theory of his defense, and the exclusion of evidence that is an integral part of that theory violates a defendant's fundamental right to a fair trial. *State v. White*, 279 Kan. 326, 331, 109 P.3d 1199 (2005). However, the right to present a defense is subject to statutory rules and case law interpretation of the rules of evidence and procedure. *State v. Thomas*, 252 Kan. 564, 573, 847 P.2d 1219 (1993).

When reviewing a district court's decision concerning the admission of evidence, an appellate court first determines whether the evidence is relevant. All relevant evidence is admissible unless statutorily prohibited. *State v. Riojas*, 288 Kan. 379, 382, 204 P.3d 578 (2009). Once relevance is established, the district court must then apply the statutory rules controlling the admission and exclusion of evidence. These statutory rules are treated either as a matter of law or as an exercise of the district court's discretion, depending upon the rule in question. Therefore, the standard of review that is applicable on appeal will depend upon which rule the court applies to determine the admissibility of the evidence at issue. 288 Kan. at 383.

Macomber claims that the district court erred in excluding evidence "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," "that the locale of the crime scene was a drug house," and "that the victim had a turbulent and violent disposition." (Appellant's Brief, 50.)

Macomber does not challenge each piece of testimony or evidence he attempted to get in and assert how the district court erred in the determination that the evidence

should not have be admitted, but simply claims that all of this evidence affected his state of mind that day and all of this evidence should have been admitted. Macomber makes a conclusory argument that not allowing this evidence in at trial deprived him of his ability to present his defense. As such, Macomber has waived this argument. *See State v. Raskie*, 293 Kan. 906, 296 P.3d 1268 (2012) (failing to assert supporting arguments constitutes a waiver of the argument). However, if this court addresses this issue, the district court properly excluded all of the evidence Macomber claims should have been allowed.

In regards to Risa's testimony, the citations to the record provided by Macomber refer to testimony that was objected to on the basis of relevancy, speculation, and that the question had been asked and answered. Macomber fails to argue why the district court's exclusion of the testimony on these bases was incorrect and fails to provide any support for his contentions that this evidence supported his theory of self-defense.

The district court also determined that the evidence regarding the drug activity associated with the residence was not relevant to his claim of self-defense. (R. XXIII, 83.) Again, Macomber provides no argument as to why this was error. In fact, it is hard to imagine how the fact that the residence where the shooting occurred at was associated with drug activity, alone, would support his claim of self-defense or was relevant. Macomber further argues that because a juror was removed due to her knowledge of the drug activity associated with the house, this indicated that the jury would have found the evidence useful as to his state of mind. However, the removal of the juror was because the juror could not make a decision solely on the evidence and that she would be considering information other than what was presented at trial. (R. XXIII, 150.) If

anything, the removal of the juror indicated how the district court wanted to ensure a fair and impartial jury and that any outside information should not be considered. The removal of the juror does not support Macomber's argument that the drug activity associated with the house was connected to his state of mind. The removal of the juror supports the contention that the drug activity associated with the residence was not relevant and that the jury should not be considering this in its decision.

Macomber also contends that the district court excluded evidence that Lofton had a turbulent and violent disposition. Macomber attempted to get in evidence of Lofton's violent disposition by asking Risa if she had ever heard Lofton threaten to shoot anyone else. (R. XXIII, 250-56.) Where self-defense is an issue in a homicide case, evidence of the turbulent character of the victim is admissible. Such evidence may consist of the general reputation of the victim in the community, but specific instances of misconduct may be shown only by evidence of a conviction of a crime. *State v. Mason*, 208 Kan. 39, Syl. ¶ 1, 490 P.2d 418 (1971). The district court properly excluded this testimony as it was not one of the ways in which Macomber could present evidence of Lofton's turbulent character.

Therefore, the district court properly excluded the evidence Macomber alleges should have been admitted. Macomber's conclusory argument that the evidence should have been allowed because it went to his state of mind is not persuasive and he was not deprived of his ability to present his defense.

VI. The exclusion of Agent Bundy's testimony regarding the exculpatory statements made by Macomber as hearsay was not reversible error.

Macomber next argues that the exclusion of Bundy's testimony regarding the exculpatory statements he made during their interview as hearsay was incorrect and

reversible error. The admission or exclusion of hearsay evidence is within the sound discretion of the district court. *See State v. Thomas*, 252 Kan. 564, 572, 847 P. 2d 1219 (1993). The abuse of discretion standard includes review to determine that the discretion was not guided by erroneous legal conclusions. *State v. White*, 279 Kan. 326, 332, 109 P.3d 1119 (2005). Nevertheless, "[w]here constitutional rights directly affecting the ascertainment of guilty are implicated, the hearsay rule may not be applied mechanically to defeat the ends of justice." *State v. Hills*, 264 Kan. 437, 957 P.2d 496 (1998). In some instances, 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, 503, 890 P.2d 353 (1995).

Here, Macomber asserts that he was denied a fair trial when the district court did not allow Bundy to testify about certain exculpatory statements he made during their interview. However, in looking at the record, it appears that the exculpatory evidence that Macomber wanted to be admitted was in fact admitted through Bundy.

Macomber takes issue with the district court's determination that Bundy could not testify that Macomber told him during the interview that "he was not exactly sure what all happened in Topeka." But, Bundy testified to other exculpatory statements that were made by Macomber. Bundy stated that Macomber said he "never intended to do shit in Topeka" and that "there's several statements throughout there where you made some statement similar to that, that you didn't intend to kill him on that day while you were in route over there, I believe." (R. XXVI, 911, 914-15.) Bundy further stated that there were several self-serving statements within the interview and the CD recording of

the interview would provide an accurate recording of what was said, word for word. (R. XXVI, 915.) Although Bundy did not state that Macomber told him he was unsure about what happened in Topeka, he was allowed to testify about other exculpatory statements Macomber told him during the interview. Therefore, the State contends that Bundy was allowed to testify as to the exculpatory statements that Macomber said in his interview and was allowed to present statements that supported his theory of defense.

However, even if the district court erred when it excluded the exculpatory statements made to Bundy from Macomber, it was harmless error. Under the harmless error standard of K.S.A. 60-261, the test is whether the error affected a party's substantial rights; in other words, whether the error affected the outcome of the trial. *State v. Ward*, 292 Kan. 541, 565, 256 P.3d 801 (2011), *cert. denied* 132 S.Ct. 1594 (2012). The burden of proof is on the State, since it is the party benefitting from the error in this case.

The exclusion of Bundy's testimony of what Macomber told him was harmless because Macomber actually admitted the CD recording of the interview and played it twice for the jury following the State's rebuttal evidence. (R. XXVII, 1086-87.) Macomber specifically pointed out for the jury that he stated, "I don't know exactly what happened." (R. XXVII, 1087.) Macomber further stated that this information was not included in Bundy's report. (R. XXVII, 1087.) The evidence that Bundy was not allowed to testify about was presented directly to the jury and was admitted by Macomber. The exclusion of Bundy's hearsay statements did not affect the outcome of the trial because Macomber presented direct evidence of what he told Bundy during the interview. Therefore, even if Macomber's exculpatory statements should have been

allowed as evidence through Bundy, the error was harmless in this case. Additionally, here, Macomber testified on his own behalf. Macomber could have directly testified as to what he told Bundy during the interview. Simply because Macomber chose not to testify about what he told Bundy in the interview does not make it reversible error.

VII. The district court properly instructed the jury.

Macomber argues that the district court erred in its consideration of several jury instructions. The Kansas Supreme Court summarized a four step process for jury instruction issues in *State v. Plummer*, 295 Kan. 156, 283 P.3d 202 (2012). In *Plummer*, this Court stated:

> In summary, for instruction issues, the progression of analysis and corresponding standards of review on appeal are: (1) First, the appellate court should consider the reviewability of the issue from both jurisdiction and preservation viewpoints, exercising an unlimited standard of review; (2) next, the court should use an unlimited review to determine whether the instruction was legally appropriate; (3) then, the court should determine whether there was sufficient evidence, viewed in the light most favorable to the defendant or the requesting party, that would have supported the instruction; and (4) finally, if the district court erred, the appellate court must determine whether the error was harmless, utilizing the test and degree of certainty set forth in *Ward*.

Macomber first argues that Instruction 8, based off of PIK Crim.3d. 52.06, should not have been given because no limiting instruction could cure the prejudice he faced by the introduction of the rebuttal evidence and that the instruction could have misled the jury. At the jury instruction conference, Macomber did initially object to this instruction, on different grounds. (R. XXVII, 1105.)

However, Macomber later withdrew that objection. (R. XXVII, 1107.) Because Macomber withdrew his objection, this court must determine, first, whether the instruction was error and only if it is, whether it qualifies for the label "clearly erroneous." K.S.A. 22-3414(3). An instruction is clearly erroneous only if this court is

"firmly convinced that the jury would have reached a different verdict had the instruction error not occurred." *State v. Williams*, 295 Kan. 506, Syl. ¶ 5, 286 P.3d 195 (2012); *see State v. Washington*, 293 Kan. 732, 740-41, 268 P.3d 475 (2012).

Instruction 8 was not clearly erroneous. The instruction was consistent with Kansas law. It informed the jury that the evidence of Macomber's prior conviction and commission of a crime in Marshall County were to be considered for specific and limited purposes. Although the instruction did not track the language of the pattern instruction verbatim, it was factually and legally appropriate in light of the entire record. *See State v. Williams*, 295 Kan. 506, Syl. ¶ 4, 286 P.3d 195 (2012). Macomber is entitled to no relief on this claim of error.

Macomber next argues that Instruction 12, the inference of intent instruction, PIK Crim.3d. 54.01, was improperly given by the district court over his objection because it was inconsistent with several other jury instructions and invaded the province of the jury by allowing impermissible inference stacking. (R. XXVII, 1109.)

The comment section of the PIK on the inference of intent instruction notes that the instruction is designed to "make it crystal clear that the 'presumption' is only a permissive inference, leaving the trier of fact to consider it or reject it." PIK Crim.3d 54.01 Comment. That one is presumed to intend all the natural consequences of his acts is a well established rule in Kansas. *State v. Warbritton*, 211 Kan. 506, 506 P.2d 1152 (1973); *State v. Gander,* 220 Kan. 88, 551 P.2d 797 (1976). Furthermore, intent, like any element of a crime, may be shown by circumstantial evidence. *State v. Townsend*, 201 Kan. 122, 439 P.2d 70 (1968).

Our Supreme Court has consistently upheld the challenged instruction, and in *State v. Lassley*, 218 Kan. 752, 545 P.2d 379 (1976), the Court contrasted presumptions with inferences and explained that an instruction allowing the jury to infer intent "is consistent with the requirement that the prosecution prove the criminal intent. Intent is difficult, if not impossible, to show by definite and substantive proof. Thus, it is agreed that criminal intent may be shown by proof of the acts and conduct of the accused and inferences reasonably drawn therefrom." 218 Kan. at 762-63; *see State v. Woods*, 222 Kan. 179, 185, 563 P.2d 1061 (1977) (reaffirming *Lassley*).

Also, in *State v. Harkness*, 252 Kan. 510, 525-27, 847 P.2d 1191 (1993), the Court explained that an instruction containing a permissive inference does not relieve the State of its burden because it still requires the State to convince the jury that an element, such as intent, should be inferred on the facts proved. *See State v. Martinez*, 288 Kan. 443, 452, 204 P.3d 601 (2009).

Jury Instruction 12 did not mislead or invade the province of the jury by allowing impermissible inference stacking in this case. The presumption that a person intends all the natural and probable consequences of his voluntary acts is rebuttable, and may be overcome by evidence to the contrary. *State v. Warbritton*, 211 Kan. 506, 506 P.2d 1152 (1973). The jury was able to either accept or reject this inference based on the evidence and facts that were presented.

Additionally, Instruction 12 did not lessen the State's burden to prove that Macomber intended to shoot Lofton or establish that premeditation was presumed. *See State v. Ellmaker*, 289 Kan. 1132, 221 P.3d 1105 (2009). And, when the jury instructions are read as a whole, they properly instruct the jury that the intent to kill and

premeditation are separate elements that both must be met in order to convict Macomber of first degree murder.

Instruction 13 stated the elements of first degree murder, which indicated that the first element was that Macomber intentionally killed Lofton and that the second element was that the killing was done with premeditation. (R. XXVII, 1170.) Instruction 16 provided the definition of premeditation and reiterated that premeditation was a separate element from the intentional killing. (R. XXVII, 1172.) Instruction 7 informed the jury of the State's burden to prove every element. (R. XXVII, 1168.) Instruction 12 was consistent with these instructions and did not alter the State's burden of proof as to each element, including the intentional killing.

Moreover, the jury did not convict Macomber of premeditated first degree murder; thus, the instruction could not have presumed premeditation. Because the jury did not find Macomber guilty of first degree murder, it necessarily found that the State did not prove the element of premeditation. Therefore, Macomber's argument that Instruction 12 presumed premeditation must fail.

Macomber also briefly mentions that Instruction 12 was inconsistent with his requested special Instruction 18, which should have been submitted to the jury. Macomber simply makes a conclusory argument as to this issue and fails to show why the instruction should have been given and why the district court was incorrect in failing to give this special instruction. Therefore, this court should not address this claim. *See State v. McCaslin*, 291 Kan. 697, 709, 245 P.3d 1030 (2011) (an issue not briefed by the appellant is deemed waived and abandoned).

Also in passing, Macomber argues that Instruction 12 was inconsistent with Instruction 10 and the district court erred in giving the outdated version of Instruction 10. Macomber requested a modified version of this instruction, which included all of the language that was given in the instruction. (R. VI, 491.) Also, Macomber did not object to Instruction 10 during the instructions conference. (R. XXVII, 1108.) Macomber cannot now claim error on appeal to an instruction he requested and did not object to during the instructions conference. *State v. Bailey*, 292 Kan. 449, 459, 255 P.3d 19 (2011).

Lastly, Macomber argues the district court should not have instructed the jury on the lesser included offense of intentional second degree murder. Macomber argues that intentional second degree murder is not a lesser included offense of first degree murder, as it carries a more stringent penalty than the crime of first degree murder. Notably, Macomber does not argue that the intentional second degree murder instruction was not factually appropriate or unsupported by the evidence in this case.

It is well established that intentional second degree murder is a lesser included offense of first degree premeditated murder because all the elements of second-degree murder are included within first degree murder. K.S.A. 21-3107(2)(b); *See State v. Armstrong*, 240 Kan. 446, 459, 731 P.2d 249, *cert. denied* 482 U.S. 929, 107 S.Ct. 3215, 96 L.Ed.2d 702 (1987); *State v. Pierce*, 260 Kan. 859, 864, 927 P.2d 929 (1996); *State v. Amos*, 271 Kan. 565, 23 P.3d 883 (2001).

Furthermore, given the evidence presented, the lesser included instruction of intentional second degree murder was legally and factually appropriate. The evidence established that the jury could have found that Macomber shot Lofton intentionally, but

without premeditation. Therefore, the district court did not err in instructing the jury on intentional second degree murder.

Macomber also claims that the district court erred when it did not give his requested Instructions 17 and 18. (R. XXVII, 1144-49.) The district court properly denied Instruction 17 on the basis that it was not appropriate under the facts of the case and that the PIK instructions adequately defined the elements of the charges and defenses in the case. (R. XXVII, 1147.) Instruction 18 was also properly denied. The district court denied this instruction because Instructions 7 and 12 defined the State's burden. (R. XXVII, 1149.) Macomber also argues his special instruction regarding the nature and degree of criminal possession of a firearm. (R. VII, 577.) However, the State is unable to find where during the jury instructions conference Macomber actually requested this instruction. The document appears to be filed after the conclusion of the trial. Thus, it appears from the record that this instruction was never requested at trial.

The district court properly instructed the jury, and the instructions given were legally and factually appropriate in this case. Therefore, this court should find no reversible error in the jury instructions that were provided to the jury.

VIII. The prosecutor's comments were not improper and did not constitute misconduct.

Macomber argues that the prosecutor committed numerous instances of misconduct that denied him a fair trial. The State contends that the prosecutor committed no misconduct in this case, and to the extent that there was any misconduct, it was harmless error.

Review of alleged prosecutorial misconduct involves a two-step process. An appellate court first determines whether the comments were outside the wide latitude

that a prosecutor is allowed in discussing the evidence. If the comments are found to be improper and therefore misconduct, the court next determines whether the comments prejudiced the jury against the defendant and denied the defendant a fair trial. *State v. Marshall*, 294 Kan. 850, 856, 281 P.3d 1112 (2012). In this step of the process, this court considers three factors: First, was the conduct gross and flagrant? Second, was the misconduct motivated by ill will? Third, was the evidence of such a direct and overwhelming nature that the misconduct would likely have had little weight in the mind of a juror? None of these three factors is individually controlling. 294 Kan. at 857.

In assessing this third factor, this court requires that any prosecutorial misconduct error meet the "dual standard" of both constitutional harmlessness and statutory harmlessness to uphold a conviction. *See State v. Tosh*, 278 Kan. 83, 97, 91 P.3d 1204 (2004) (before third factor can override 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.) Under both standards, the party benefitting from the error, here, the State, bears the burden of demonstrating harmlessness. *State v. Bridges*, 297 Kan. 989, 306 P.3d 244 (2013). That burden is more rigorous when the error is of constitutional magnitude. *See State v. Herbel*, 296 Kan. 1101, 1110, 299 P.3d 929 (2013). In other words, if the State has met the higher *Chapman* constitutional harmless error standard it necessarily has met the lower standard under K.S.A. 60-261. Under the *Chapman* harmless error standard:

> The error may be declared harmless where the party benefitting from the error proves beyond a reasonable doubt that the error complained of will not or did not affect the outcome of the trial in light of the entire record, *i.e.*, where there is no reasonable possibility that the error contributed to

the verdict. *State v. Ward*, 292 Kan. 541, 256 P.3d 801 (2011), *cert. denied* 132 S.Ct. 1594 (2012).

Macomber claims that several statements constitute misconduct and necessitate reversal in this case. The State will address these comments in four sections, the alleged misconduct that occurred during voir dire, opening statement, the State's case in chief, and in closing argument.

Voir Dire

Macomber argues that the prosecutor's comments regarding his pro se status was an improper attack on him and was an implicit plea for sympathy for the State. However, the prosecutor was simply explaining to the jury that Macomber chose to represent himself in this case, and that he will be held to the same standard as any other defense attorney. The comment was brief and the prosecutor was informing the jury that although Macomber was representing himself, he was not going to be treated any differently than any other defense attorney. The prosecutor was not making an improper attack on Macomber, but explaining the unique situation involving Macomber representing himself, along with help from his stand-by counsel. (R. X, 41-42.) The comment was not improper and was not misconduct.

Macomber next claims that a question asked by the prosecutor was a misstatement of the law regarding the inference of intent. The prosecutor asked: "Would you agree with me when I ask the statement do you believe that generally people intend the consequences of their voluntary actions, meaning that you would agree that if you chose to do something you intend the consequences of that act too?" (R. X, 71.) This was not a misstatement of the law. The prosecutor's question mirrors the jury instruction that was later given regarding intent nearly word for word. The instruction

that was given later stated, "[o]rdinarily, a person intends all the usual consequences of his voluntary acts." (R. XXVII, 1170.) This was a correct and well established statement of the law and was not an improper comment.

Macomber further claims that the prosecutor's comment that "[e]very defendant has no responsibilities, no burden, only rights" was made in error. Again, this statement is not a misstatement of the law, but accurately reflects that the State has the burden to prove the defendant is guilty. This comment, when read in context, was made while the prosecutor was explaining that when a defendant exercises their right to a trial, the defendant is not required to put on any evidence and it is the State's burden to prove that the defendant is guilty. (R. XXVII, 74-76.) The prosecutor goes on to tell the jury that if the defendant chooses not to testify, it cannot be held against him and that the State does not know exactly what defenses and witnesses the defendant will present at trial. (R. XXVII, 75.) The comments made by the prosecutor correctly informed the jury about Macomber's rights and the State's burden to prove that he is guilty. While the State may be aware of a possible defense that may be raised, the prosecutor accurately stated that the State does not know exactly what witnesses will be called and what evidence will be presented until the actual trial. These comments were neither improper nor inflammatory.

Macomber also contends that the prosecutor's question, "who here has ever been lied to before?" was impermissible, infers that some witness will lie during trial, and was an improper comment on the credibility of a witness. The prosecutor's statement was made to the jury in explaining that they can use their experience to determine what evidence is credible and what evidence is not. (R. XXVII, 74.) There is nothing in the

record that supports Macomber's contention that this statement infers that some witness will lie during the trial. The prosecutor made no comment of the credibility of any of the witnesses, but made a general statement that the jury must determine what witnesses they believe and what witnesses they do not believe. None of the statements made by the prosecutor during voir dire were improper or constituted misconduct.

Opening Statement

Macomber next argues that the prosecutor's opening statement emphasized his criminal history and improperly commented about where Macomber was arrested. Here, taken in context, these comments were not improper. The prosecutor mentioned the fact that Macomber had only been released from prison for nine months prior to committing this crime in the context of the criminal possession of a firearm charge. (R. XXII, 27.) The prosecutor told the jury Macomber was charged with criminal possession of a firearm and that he was not allowed to have a handgun because he had been previously convicted of aggravated robbery and was released from prison just nine months earlier. (R. XXII, 27.) The prosecutor's comment was made in order to show the evidence of this crime and not emphasize Macomber's criminal history. The comment was brief and isolated. In looking at the opening statement as a whole, the prosecutor's statement was not improper and did not go outside the wide latitude given to prosecutors.

Moreover, this was not a violation of any pre-trial orders as Macomber did not stipulate to the fact that he had a prior conviction. Had Macomber stipulated to this element of the crime, the State would not have had to present his criminal history to the jury. However, the State had to prove the element of the crime that Macomber had a prior conviction and was properly allowed to comment on it during opening statement.

State's Case in Chief

Macomber also argues that, during its examination of Bundy, the State intentionally elicited improper testimony about Macomber's criminal history in order to prejudice him. The testimony regarding Macomber's release from parole that was elicited from Bundy during the State's direct examination was properly allowed in as evidence of the second element of criminal possession of a firearm. The question was asked by the prosecutor in order to establish that Macomber had been released from prison within ten years prior to the possession of the firearm. The question was not asked by the prosecutor in order to create any prejudice or place Macomber in a negative light in front of the jury. The prosecutor asked one isolated and necessary question in order to provide evidence for one of the elements of the criminal possession of a firearm charge. (R. XXIV, 487; R. XXVII, 1172-73.) *See* K.S.A. 21-4204.

Again, because Macomber did not stipulate to the element of having a prior conviction or being released within the preceding ten years, it was necessary for the State to put on this evidence in order to establish that element of the crime of criminal possession of a firearm.

Macomber also claims that the State intentionally and deliberately misled him to believe he would have to testify in his own defense before offering evidence of self-defense. There is nothing in the record to support this contention. Macomber was allowed to present his defense, and it was his own choice to take the stand at trial.

Closing Argument

Macomber claims the reference to his parole status during the questioning of Bundy, in combination with the references from closing argument amounted to repeated

and improper conduct. In closing the prosecutor stated, "you may remember Special Agent Steve Bundy's testimony that the defendant was paroled from prison after more than 23 years on 9-99 (sic), and it was nine months later that he shot and killed Ryan." (R. XXVII, 1181.) The prosecutor made this statement in the context of the criminal possession of a firearm charge and the elements required to prove that charge. The prosecutor began by stating the charge and listing the two ways in which the jury could convict Macomber of this crime. (R. XXVII, 1180-81.) Then the prosecutor went over the evidence that establishes the elements of the crime, Macomber's previous convictions for five counts of aggravated robbery or Bundy's testimony that Macomber was released from prison and then nine months later was in possession of a firearm that he used to shoot Lofton. The prosecution is afforded wide latitude in arguing inferences from the evidence presented. *State v. Martinez*, 290 Kan. 992, 1013, 236 P.3d 481 (2010). This statement was well within the wide latitude afforded to prosecutors in discussing the evidence during closing argument.

Additionally, a limiting instruction was given in regards to the exact evidence, and the jury was instructed to consider this evidence solely for the purposes of proving the second element in the criminal possession of a firearm charge. (R. XXVII, 1168.) A jury is presumed to follow the instructions given to it and that presumption applies here. *State v. Kunellis*, 276 Kan. 461, 484, 78 P.3d 776 (2003).

Macomber also takes issue with the following statement by the prosecutor:

> 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. Not because of an accident, but because of somebody making a decision he would not drive out of the driveway and go down the road. That didn't have to happen. That happened because he intentionally pulled the trigger and robbed

> Ryan of his life. 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. XXVII, 1187.)

Macomber argues this statement by the prosecutor renders the limiting instruction, Instruction 8 meaningless, inflammatory, and was meant to evoke sympathy for Lofton and Salcedo. Because "[i]t is the duty of the prosecutor in a criminal matter to see that the State's case is properly presented with earnestness and vigor and to use every legitimate means to bring about a just conviction," prosecutors are given wide latitude in arguing the cases before them. *State v. Ruff*, 252 Kan. 625, 634, 847 P.2d 1258 (1993). "Inherent in this wide latitude is the freedom to craft an argument that includes reasonable inferences based on the evidence." *State v. Pabst*, 268 Kan. 501, 507, 996 P.2d 321 (2000).

Here, this statement by the prosecutor was not made in order to evoke sympathy, but was a reasonable inference and argument based on the evidence presented. Macomber testified that he intentionally shot Salcedo, and the prosecutor was making a reasonable inference that Macomber intentionally shot Salcedo, then he intentionally shot Lofton prior to that. The issue of whether the shooting of Lofton was intentional was the central issue in this case and the prosecutor based her argument off of evidence presented during trial and made a reasonable inference that Macomber's shooting of Lofton was intentional. This statement did not go outside the wide latitude afforded to prosecutors during closing argument.

Macomber next claims that the final statements of the prosecutor in closing argument were improper. In the final paragraph of closing argument, the prosecutor stated:

> Now, the defendant told you yesterday when he testified that your verdict doesn't mean anything to him. That your verdict doesn't matter. It does. Your verdict matters to a lot of people. ***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. XXVII, 1213.) (emphasis added)

Macomber argues the emphasized portion of the statement was a call for the jury to do something more than render a verdict. Macomber compares this statement to one of the prosecutor's statements made in one of his Marshall County cases, which was found to be improper. In one of Macomber's Marshall County cases *State v. Macomber*, No. 107,205, unpublished opinion filed July 5, 2013, (*petition for review pending*) the prosecutor made the statement, "tell Fernando that there's enough evidence in this case to find the defendant guilty." (Slip. Op. at 11.) In that case, Macomber argued that this statement was a call to send a message to the victim rather than decide the case based on the evidence and the law. This court held that the prosecutor did tell the jury to send a message to Salcedo and encouraged the jury to do something more than it was sworn to do, but ultimately held that it was not reversible error. (Slip. Op. at 12-13.)

However, the statement by the prosecutor in this case is distinguishable. The prosecutor correctly focused on the jury's duty to render a verdict. The prosecutor did not ask the jury to base its deliberation on sympathy for the victim or the impact of the crime on the victim. The statement did not divert the jury's attention from its duty to decide the case on the evidence and the controlling law. The prosecutor's reference to "what you've learned" is regarding the evidence that was presented in the case. The prosecutor did not tell the jury to send a message to Lofton by convicting Macomber of murder, but to look at the evidence and based on this evidence return a guilty verdict. *See State v. Hall*, 292 Kan. 841, 257 P.3d 272 (2011) (prosecutor's statement to jurors in

closing argument that it was their responsibility to "view that evidence, not forget what happened, but expose what happened, and tell this man exactly what he's guilty of" did not inflame the passions of the jury in a murder prosecution). Therefore, this statement was also not improper.

Next, Macomber challenges the following statements made by the prosecutor:

> Jury instruction number 12 tells you that ordinarily a person intends the natural consequences of their voluntary actions. There's not one person who made the defendant pick this gun up and squeeze off a round into Ryan. 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 the death. (R. XXVII, 1182.)
>
> And second-degree murder, which is a lesser included, removes premeditation. It's simply the killing of Ryan Lofton on this date in this place. He's already admitted that he killed him. (R. XXVII, 1185.)

Macomber claims these comments were improper and misstated the law on second-degree murder. This statement regarding second-degree murder was not an intentional misstatement of the law. Look at this statement in context, during this portion of the closing argument the prosecutor was informing the jury on the difference between first-degree murder and second-degree murder. The prosecutor correctly informed the jury that the determinations it must make were whether the shooting was intentional or an accident and if it was intentional was it premeditated. (R. XXVII, 1182-86.) The prosecutor then properly went through the evidence of premeditation. (R. XXVII, 1183-85.)

Then the prosecutor moved on to the lesser included offense of second-degree murder. (R. XXVII, 1185.) The prosecutor's statement "He's already admitted that he

killed him" was likely a reference to Macomber's admission that he shot Lofton. The prosecutor had already mentioned this admission during closing argument and it accurately reflected the evidence presented. (R. XXVII, 1182.) The prosecutor made this comment in the context that the jury had to determine whether the shooting was intentional or not. That was a correct statement of the law on second-degree murder. The prosecutor was not intentionally misleading the jury to find that Macomber had intentionally killed Lofton, but explaining that the jury had to make this determination. This statement came at the end of the closing argument that included proper statements of the law and inferences from the evidence presented. The statement was not a blatant misstatement of the law and was not improper.

Additionally, the jury was properly instructed on the elements of second-degree murder and also instructed that the statements and arguments of the attorneys were not evidence and any statements that were not supported by the evidence should be disregarded. (R. XXVII, 1168, 1171.) Again, this court presumes the jury followed the instructions it was given and any confusion was cured by these instructions. *See State v. Becker*, 290 Kan. 842, 856, 235 P.3d 424 (2010).

Macomber next argues the prosecutor misstated the law regarding the credibility of witnesses and the jury's ability to use common sense in its deliberation. (Appellant's Brief, 71.) The prosecutor accurately informed the jury that it could use common sense in determining the credibility of the witnesses. Macomber also claims the prosecutor made an improper call for sympathy when she stated, "[h]is 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. XXVII, 1211.)

Again, this was a proper statement in which the prosecutor told the jury that the evidence presented established that Macomber intentionally shot Lofton. There was no call to sympathy for Risa or Lofton. The prosecutor then went on to again talk about the evidence that supported the conclusion that this shooting was intentional. The prosecutor further mentioned the prior shooting in Marshall County as evidence that the shooting was intentional. (R. XXVII, 1212-23.) The evidence that Macomber reloaded his gun following the shooting in this case and shot it several times at Salcedo was a reasonable inference that the gun was not defective and the shooting of Lofton was intentional. The prosecutor further ended the comments with the statement, "[a]nd we know he's guilty because of the credibility and the importance of the evidence in this case." (R. XXVII, 1213.) This is a direct call for the jury to base its verdict on the evidence presented.

Macomber also argues that the prosecutor mischaracterized the evidence on two occasions during closing argument. Once when she stated that the window of the Macomber's car was up and Lofton could not reach him. (R. XXVII, 1176.) This was a reasonable inference made from the evidence that was presented. The evidence established that the window was down approximately four inches. (R. XXIII, 180, 183.) The prosecutor's statement that the window was up was referencing the fact that the window was not down far enough for Lofton to reach into the car. This was not an improper statement based on the evidence that was presented.

Additionally, the prosecutor's statements regarding the credibility of Macomber's expert witness were also not outside the wide latitude allowed during

closing argument. The prosecutor urged the jury to determine who was more credible, Cayton or Carr, which the jury is allowed to do. There is no evidence that the prosecutor's statement that Cayton had "not worked for a governmental agency since" he was fired was an intentional misstatement of the evidence. The prosecutor was simply commenting on the evidence that Cayton had been fired from several employers and that they jury should take that into consideration when determining his credibility.

Macomber claims the prosecutor's statement that he "chose to use his car not to leave but as a weapon coupled with this gun" was improper. (R. XXVII, 1175.) Again, put in context this statement was not improper and is referencing the fact that Macomber did not simply back out of Lofton's driveway, but stayed in his car and shot Lofton. This was not a misstatement of evidence, but a proper comment on the evidence as presented.

Overall, the State contends that none of the sixteen claims of improper statements were outside of the wide latitude afforded to the prosecutor and did not amount to misconduct. However, even if the prosecutor's statements were outside the wide latitude allowed, it was harmless error and not reversible. If the prosecutor's conduct is deemed misconduct, then this court must conduct the harmlessness inquiry under the second prong of the prosecutorial misconduct analysis. Within the second prong of the prosecutorial misconduct analysis, there are three additional factors this court must analyze: (1) whether the prosecutor's conduct was gross and flagrant; (2) whether the conduct was motivated by ill will; and (3) whether the evidence was so direct and overwhelming that the conduct would likely have had little weight in the

jury's mind. No one factor is controlling. *State v. Marshall*, 294 Kan. 850, 857, 281 P.3d 1112 (2012).

The prosecutor's conduct was not gross and flagrant in this case. When determining whether a prosecutor's conduct is gross and flagrant, this court consider whether the prosecutor "repeated or emphasized the misconduct." *State v. Simmons*, 292 Kan. 406, 417-18, 254 P.3d 97 (2011). A statement made in passing is not gross and flagrant. *State v. Adams*, 292 Kan. 60, 68-69, 253 P.3d 5 (2011).

The comments were not deliberate, repeated, or emphasized by the prosecutor. There is no indication in the record that any of these isolated statements were calculated. Furthermore, although some of the comments may have commented on the credibility of the witnesses, it is not improper for a prosecutor to argue that, of two conflicting versions of an event, one version is more likely to be credible based on the evidence. *State v. Anthony*, 282 Kan. 201, 210, 145 P.3d 1 (2006).

Moreover, to the extent that Macomber argues that the prosecutor's pattern of improper comments started in the Marshall County cases, this argument has no merit. This court should not consider any statements or arguments from the Marshall County cases in making its determination regarding the claimed improper statements in this case.

There was also no evidence of ill will by the prosecutor. Ill will may be found "when the prosecutor's comments were 'intentional and not done in good faith.' [Citation omitted.]" *State v. Miller*, 284 Kan. 682, 719, 163 P.3d 267 (2007). The isolated and brief comments made by the prosecutor were not calculated or made in bad faith. Macomber never objected to any of these statements made by the prosecutor in

voir dire, opening statement, or closing argument. The district court never admonished the prosecutor for any of the other comments nor did the prosecutor ignore any orders from the district court.

Additionally, some of the complained statements were made in rebuttal closing and in response to Macomber's closing argument. The spur-of-the-moment nature of a prosecutor's comment delivered extemporaneously under the stress of rebutting a defense argument is a mitigating factor countering a conclusion that a prosecutor acted with ill will. *State v. Marshall*, 294 Kan. 850, 862, 281 P.3d 1112 (2012). Also, there is no evidence in the record that the prosecutor intentionally made these comments in bad faith or against the order of the district court. Therefore, the prosecutor's comments did not exhibit ill will.

Lastly, when considering whether the evidence was direct and overwhelming so much so that the misconduct would likely have had little weight in the jury's mind, it is the State's responsibility to establish beyond a reasonable doubt that the error did not affect the defendant's substantial rights. In addition, this court should consider the prosecutor's comments in light of the circumstances and the entire record. 294 Kan. at 864.

It cannot be said that these comments diverted the attention of the jury away from the evidence in this case. There is no likelihood that the verdict would be different had the prosecutor not made the comments. There was an overwhelming amount of evidence presented to find Macomber guilty beyond a reasonable doubt. Thus, based on the witnesses' testimony and the physical evidence, there was overwhelming evidence so that the misconduct would likely have had little weight in the minds of the jury.

Therefore, even if the prosecutor's statements constituted misconduct, it was harmless and did not deny Macomber a fair trial.

IX. Macomber was not denied his right to a fair trial by cumulative error.

Lastly, Macomber argues that the above issues constitute cumulative error. Cumulative errors, when considered collectively, may be so great as to require reversal of a 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 under the cumulative error rule however, if the evidence is overwhelming against a defendant. [Citation omitted.]" *State v. Ellmaker*, 289 Kan. 1132, 1156, 221 P.3d 1105 (2009). Furthermore, one trial error is insufficient to support reversal under the cumulative error rule. 289 Kan. at 1156.

Here, to the extent that there were any errors, their cumulative effect still does not require reversal because Macomber's right to a fair trial was not violated.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that service of the above and foregoing **Brief of Appellee** was made by mailing **two (2) true and correct copies**, postage prepaid, on this 8th day of January, 2014, to:

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

Jodi Litfin, #24638
Assistant District Attorney

303 P.3d 726 (Table)
Unpublished Disposition
(Pursuant to Kansas Supreme Court Rule 7.04(f), unpublished opinions are not precedential and are not favored for citation. They may be cited for persuasive authority on a material issue not addressed by a published Kansas appellate court opinion.)
Court of Appeals of Kansas.

STATE of Kansas, Appellee,
v.
Stephen Alan MACOMBER, Appellant,

No. 107,205. | July 5, 2013.

Appeal from Marshall District Court; John L. Weingart, Judge.

Attorneys and Law Firms

Stephen Alan Macomber, appellant pro se.

Michael J. Bartee, of Michael J. Bartee, PA., of Olathe, for appellant.

Laura E. Johnson–McNish, county attorney, and Derek Schmidt, attorney general, for appellee.

Before MALONE, C.J., BUSER, J., and ERNEST L. JOHNSON, District Judge Retired, assigned.

Opinion

MEMORANDUM OPINION

PER CURIAM.

***1** Stephen Alan Macomber appeals his convictions and sentence in Marshall County District Court case number 2010 CR 59. Macomber committed additional crimes in Marshall County shortly after the crimes committed in this case. These later crimes were charged in Marshall County District Court case number 2010 CR 60, and separately appealed in a related case. See *State v. Macomber,* No. 107,206, unpublished opinion filed July 5, 2013. Having reviewed the record and considered the arguments of Macomber and the State, we affirm the convictions and sentence in case number 2010 CR 59.

FACTUAL AND PROCEDURAL BACKGROUND

On June 7, 2010, Marshall County Sheriff's Deputy Fernando Salcedo was driving a marked patrol vehicle on U.S. 77. A vehicle traveling towards him was speeding, so Deputy Salcedo turned around, activated his emergency lights, and went in pursuit. In response, the speeding vehicle, driven by Macomber, accelerated.

At trial, Macomber testified that at the time the deputy pursued him he was fleeing from Topeka, where he was wanted for other crimes, and was scheduled for a parole hearing the next day. Macomber "was planning on leaving the state." Macomber thought he "was in a lot of trouble" when Deputy Salcedo turned around. Macomber believed "the cops probably everywhere wanted me," and "they had an APB out on my car. And I thought that's why I was being pulled over."

Macomber drove into the driveway of a house in Blue Rapids, stopping in front of the garage door. Deputy Salcedo pulled behind Macomber's vehicle, called in the license plate number, and left his patrol vehicle to speak with Macomber.

Macomber testified that he was "astonished ... the [deputy] didn't have his weapon drawn. And I guess he wasn't aware ... I was wanted for another crime." At the time, Macomber was holding a loaded .357 revolver. Macomber testified to being "overwhelmed by the situation." As Deputy Salcedo approached, Macomber opened the driver's side door but remained seated in the driver's seat.

Deputy Salcedo testified that Macomber "told me he didn't know what to do. And then he pulled a gun and held it to himself." Macomber testified that he did think about shooting himself. He explained that he thought there was another deputy in the car, but when Deputy Salcedo told him he was just going to give him a warning, Macomber stepped out of the vehicle and "realized ... I had a chance to get away. I was hoping to get away."

Macomber told Deputy Salcedo that he knew he had a bulletproof vest on, pointed the pistol at the deputy's head, and demanded the deputy's handgun. According to Macomber, "I knew that I had to get his pistol before I could get away, or otherwise he'd try to shoot me." Deputy Salcedo refused to surrender his handgun, and Macomber was unable to pull it from the deputy's holster.

A video camera in Deputy Salcedo's patrol vehicle recorded this portion of the encounter. The video shows that after Macomber failed to take Deputy Salcedo's handgun, he edged the deputy back towards the driver's side of the patrol vehicle. Macomber testified to opening the door "to hear his radio to see if other units were responding, if they were calling his, his unit to ask him what was going on."

*2 Macomber testified that he told Deputy Salcedo to lie down "and let me get his pistol, because I got behind the [patrol] car door, thinking that he wouldn't be able to shoot me if he got his pistol out ... that I would be able to safely have him throw it to the side." But the deputy refused and crouched down, facing Macomber. Macomber testified to firing a warning shot into the ground to convince Deputy Salcedo he was serious, but the deputy denied this at trial. Regardless, Deputy Salcedo arose from his crouched position and ran in front his patrol vehicle to the far side of Macomber's vehicle.

The evidence was conflicting regarding whether Deputy Salcedo reached for his handgun before Macomber started shooting. The deputy denied it at trial. However, Deputy Salcedo told Kansas Bureau of Investigation (KBI) Special Agent Steve Bundy while in the hospital that he had reached for his handgun. Macomber recalled the deputy "tried to get out of my sight and go for his [pistol] at the same time, ... which told me that he was going to come up firing ."

Macomber testified that "[a]s soon as [the deputy] started to crawl away, I lowered my pistol, and I fired twice, hoping to hit him somewhere in the vest area and maybe disable him long enough for me to get away." Deputy Salcedo testified that Macomber fired as he started to move, striking him in the left wrist and the back. Both injuries required surgery.

Deputy Salcedo went to the front of Macomber's vehicle and returned fire with his .45 pistol, striking Macomber in the arm. Macomber ducked behind the patrol vehicle's dash and, according to him, fired once randomly over the dash to show Deputy Salcedo he still had ammunition. The deputy then ran from the front of Macomber's vehicle to Macomber's left, in front of a garage door, in full view of Macomber, who was seated in the driver's seat of the patrol vehicle with the door open.

About 15 seconds passed from Deputy Salcedo's first attempt to escape until he disappeared around the corner of the garage. A later forensic investigation would show two shots went through the garage door windows at about the height of Deputy Salcedo's head, and when Macomber's pistol was retrieved all six cartridges were spent.

Macomber drove from the scene in Deputy Salcedo's patrol vehicle. He was arrested the next day at a nearby residence and taken to a hospital. On the way from the hospital to the jail, Macomber told an officer: " 'If I had known you [expletive deleted] were going to treat me this way, I would have popped the officer in the head right off." '

On June 10, 2010, the State filed charges against Macomber in Marshall County. On June 11, 2010, Macomber made his first appearance in Marshall County, and William C. O'Keefe was appointed to represent him. A preliminary examination was scheduled for June 21, 2010.

On June 18, 2010, the State moved to continue the preliminary examination, claiming a "conflict." On appeal, the State alleges that Macomber "initially agreed to a continuance that he did not revoke until September 1, 2010," but the State does not cite the record.

*3 The record contains several letters from O?eefe to Macomber or the county attorney regarding negotiations over the date of the preliminary examination and a possible reduction in the charges. The record also shows O'Keefe was on vacation during part of August 2010, and the Marshall County Attorney resigned at the end of the month. On September 1, 2010, O'Keefe filed a motion for preliminary hearing which was followed 14 days later by the filing of a motion to dismiss. He argued Macomber "has not been given a preliminary examination within 10 days of demanding a preliminary examination pursuant to K.S.A. 22–2902(2)."

On September 22, 2010, the district court appointed Jacqueline J. Spradling, from the Shawnee County District Attorney's office, as a Special Prosecutor for Marshall County. Two days later, the State responded to O'Keefe's motion to dismiss. Laura E. Johnson–McNish, the new Marshall County Attorney, alleged that Macomber had been charged with first-degree murder in Shawnee County and was in custody there. She asserted that "[g]ood cause exists to continue the preliminary hearing in the current matter until the Shawnee County case is resolved."

About 2 months later, on November 19, 2010, O'Keefe filed a second motion to dismiss. In response, Johnson–McNish argued the charges in Shawnee County were "more severe"

and "preceded the Defendant's flight and actions leading to charges in Marshall County ." Under these circumstances, she contended, "it makes sense to address the Shawnee County charges first, and Marshall County second," adding that a "logical, sequential approach to these cases as opposed to simultaneous prosecution of them does not prejudice the rights of the Defendant." She argued further that the Shawnee County prosecution was currently underway, with a trial setting for December 13, 2010. Johnson–McNish stated it "would be disruptive to transport the Defendant back to Marshall County for a preliminary hearing when a trial against him in Shawnee County is imminent," and that the preliminary examination in Marshall County should be delayed until after the trial in Shawnee County. She also claimed Macomber was a "flight risk," and transporting him between Shawnee County and Marshall County increased the chances he would "escape and flee again."

A hearing on Macomber's motion was held in Marshall County on December 8, 2010. (A transcript of the hearing is not found in the record on appeal.) The journal entry records the magistrate judge's denial of the motions to dismiss but provides no analysis. The preliminary examination was continued to January 10, 2011.

On January 7, 2011, the State filed its First Amended Complaint. It charged Macomber with attempted first-degree murder (K.S.A.21–3401[a]–[b]), aggravated battery on a law enforcement officer (K.S.A.21–3415[a][1]), aggravated robbery (K.S.A.21–3427), aggravated assault on a law enforcement officer (K.S.A.21–3411[b]), and criminal possession of a firearm (K.S.A. 21–4204[a][2] and K.S.A. 21–4204[a][4]). A transportation order for Macomber to appear for the preliminary examination was issued, but the return shows Macomber was not transported due to bad weather. As a result, the magistrate continued the preliminary examination to February 14, 2011.

*4 On February 14, 2011, the preliminary examination was held and Macomber was bound over on all counts. He was arraigned on March 8, 2011, and jury trial was scheduled for May 31, 2011. Although the magistrate's journal entry of the December 8, 2010, hearing indicated that she had denied O'Keefe's motions to dismiss, O'Keefe's comments at the preliminary examination suggested the issue would ultimately be decided by the district judge. On March 31, 2011, O'Keefe filed a motion with the district court to consider outstanding motions, including the motions to dismiss.

On May 27, 2011, O'Keefe filed another motion to dismiss for "failing to provide a timely preliminary hearing." O'Keefe now argued that the delay violated Macomber's constitutional rights, which distinguished this motion from the earlier ones, which had alleged a violation of statutory rights. On May 31, 2011, the first day of trial, the State filed a lengthy response. When the motion to dismiss arose at trial, the trial court allowed Macomber to personally argue for an evidentiary hearing on the issue. The trial court agreed to an evidentiary hearing, but it was unwilling to interrupt the trial. Macomber agreed to a delay.

During the trial, Macomber testified regarding his views about the individual charges against him. Macomber admitted guilt to aggravated assault on a law enforcement officer and criminal possession of a firearm. He claimed he was not guilty of the aggravated robbery of Deputy Salcedo's patrol vehicle for two reasons. First, he denied taking the patrol vehicle with threat of bodily harm because he had already shot the deputy: "[T]hat is bodily harm. That's not a threat." Second, he asserted that he had not taken the patrol vehicle from the deputy's presence because the officer had already fled.

Macomber testified he was "not sure" of his guilt for aggravated battery on a law enforcement officer: "I know I caused the harm. I don't know what's considered great. I don't know, you know, what the judgment on that is. I guess that's for a jury, not for me."

Finally, regarding the charge of attempted first-degree murder, Macomber agreed that his defense was that he shot the deputy but did not intend to kill him. Although Macomber admitted that he initially pointed his pistol at Deputy Salcedo's head because he "knew he had a bulletproof vest on," he claimed he had not fired the weapon because "[t]hat wasn't what I was attempting to do that day. I wasn't trying to kill a law enforcement officer." Instead, Macomber testified he "wanted to get away. That was my motivation."

During the jury instructions conference, Macomber asked for an instruction on theft as a lesser-included offense to the aggravated robbery charge. O'Keefe argued "the person who owned the vehicle was not present at the time he drove off." The trial court denied the instruction. The jury found Macomber guilty on all of the charges.

On July 1, 2011, the trial court allowed Macomber to present evidence on the preliminary examination issue. In a

colloquy with the trial court, O'Keefe agreed that Macomber's complaint about the delay was constitutional and not statutory in nature.

*5 The trial judge summarized the argument: "As I understand the Motion to Dismiss, the complaint ... is that [Macomber's] constitutional right to a speedy trial was violated by the delay between the time of arrest and time of preliminary examination. My understanding of the argument is there was no statutory violation of speedy trial provisions." The trial judge concluded: "I don't think there's a constitutional violation, just because the preliminary hearing was not held until February of this last year. Therefore, the Court denies the defendant's Motion to Dismiss."

Macomber was sentenced for Count I, attempted first-degree murder, to 620 months' imprisonment; for Count II, aggravated battery on a law enforcement officer, 59 months; for Count III, aggravated robbery, 59 months; for Count IV, aggravated assault of a law enforcement officer, 18 months; and for Count V, criminal possession of a firearm, 8 months. The trial court then stated:

> "The Court orders that Counts III, IV, and V be served concurrently. The Court orders that Counts III, IV, and V be served consecutively to—excuse me, III, IV, and V—yes, III, IV, and V be served consecutively to Counts II and [Count] I.
>
> "The Court orders that the sentence also be consecutive to Sedgwick County Case No. 85 CR 1405 and Reno County Case No. 92 CR 549."

At the end of the hearing, after the trial court had imposed sentence in the companion case, 2010 CR 60, the trial court had the following exchange with O'Keefe:

> "MR. O'KEEFE: Judge, I didn't understand one thing. III, IV, and V in your first case, 59?
>
> "THE COURT: Yes.
>
> "MR. O'KEEFE: Would run concurrently?
>
> "THE COURT: Yes.
>
> "MR. O'KEEFE: Then they're consecutively to I and II?
>
> "THE COURT: Yes. I and II are consecutive, and III, IV, and V are consecutive to I and II. But III—
>
> "MR. O'KEEFE: I and II are consecutive to each other?
>
> "THE COURT: Right. And III, IV, and V are concurrent.
>
> "MR. O'KEEFE: Okay. Okay.
>
> "THE COURT: Do you have any questions about the sentencing?
>
> "(No one responded.)
>
> "THE COURT: Okay, you're excused."

Macomber filed a timely appeal.

SPEEDY PRELIMINARY EXAMINATION/SPEEDY TRIAL

Macomber's appellate counsel contends that Macomber's "convictions should be reversed" for "violation of [his] right to a speedy preliminary examination" under the factors set out in *Barker v. Wingo,* 407 U.S. 514, 530, 33 L.Ed.2d 101, 92 S.Ct. 2182 (1972). *Barker* considered the right to "a speedy trial ... guaranteed the accused by the Sixth Amendment to the [United States] Constitution," not a right to a speedy preliminary examination. 407 U.S. at 515. Indeed, our research revealed no published Kansas case has mentioned a constitutional right to a speedy preliminary examination. Our Supreme Court has "repeatedly declared that an adult's right to a preliminary hearing is simply a statutory right; a right neither mandated by general constitutional privileges nor implicating due process concerns. [Citations omitted .]" *In re D.E.R.,* 290 Kan. 306, 312–13, 225 P.3d 1187 (2010).

*6 Macomber has also filed a pro se brief, and he argues his "right to a speedy trial" was violated by the delay in holding the preliminary examination beyond the 10 days after arrest or personal appearance allowed by K.S.A. 22–2902(2). This appears to be the issue raised in the district court at the time of trial.

In support of his argument, Macomber cites *State v. Rivera,* 277 Kan. 109, 120, 83 P.3d 169 (2004), wherein our Supreme Court applied *Barker* to determine whether a defendant's "constitutional right to a speedy trial" was violated by a "failure to hold a timely preliminary hearing." *Rivera* teaches:

> "Instead of dismissing criminal charges when the 10–day period in K.S.A.2002 Supp. 22–2902(2) is not technically met, the court must consider the totality of the circumstances to determine whether a defendant's

> constitutional right to a speedy trial has been violated. If the court concludes that the defendant's constitutional right to a speedy trial has been violated, it must dismiss the charges against him or her." 277 Kan. 109, Syl.
>
> "To evaluate whether a defendant's Sixth Amendment right to speedy trial has been violated, Kansas applies the following four factors set out by the United States Supreme Court in *Barker* ...:(1) length of delay, (2) reason for the delay, (3) defendant's assertion of his or her right, and (4) prejudice to the defendant. None of these four factors, standing alone, is sufficient for finding a violation. Instead, the court must consider them together along with any other relevant circumstances." 277 Kan. 109, Syl. ¶ 3.

Our review of these legal questions is unlimited. 277 Kan. 109, Syl. ¶ 2.

Length of delay

Macomber's counsel calculates 254 days between the arrest and preliminary examination, while Macomber personally calculates 251 days, and the State calculates 249 days. In *Rivera,* our Supreme Court held a delay of 244 days between service of an arrest warrant and the preliminary examination was "presumptively prejudicial." 277 Kan. at 114. Given the delay of about 250 days, we will "consider all of the remaining *Barker* factors." 277 Kan. 109, Syl. ¶ 4.

Reason for the Delay

Macomber argues the reasons the State gave below were not "good cause" for the delay in his preliminary examination. While the Kansas statute permits continuance of the preliminary examination beyond 10 days for "good cause shown," K.S.A. 22–2902(2), that is not the test for constitutional violations of the right to a speedy trial. The United States Supreme Court described a sliding scale of reasons for delay in *Barker,* with some weighing more heavily against the State than others:

> "Closely related to length of delay is the reason the government assigns to justify the delay. Here, too, different weights should be assigned to different reasons. A deliberate attempt to delay the trial in order to hamper the defense should be weighed heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighed less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay." 407 U .S. at 531.

*7 *Rivera* contains a similar statement. See 277 Kan. at 114.

The first reason for the delay in the present case was plea negotiations between O'Keefe and the county attorney, which were drawn out by O'Keefe's vacation on the one hand and a change in county attorneys on the other. That delay does not weigh against the State. The negotiations ultimately failed, and the State clarified its intention to proceed with the Shawnee County case, which in our opinion was at least a neutral reason to delay the preliminary examination in Marshall County.

Macomber attacks the State's reasons, but there is no evidence the State delayed the preliminary examination to hamper Macomber's defense. On the contrary, this case was one of three ongoing, serious criminal cases pending against Macomber in two counties. These circumstances resulted in understandable delays unrelated to any improper intent by the State to compromise Macomber's defense. See *State v. Smith & Miller,* 224 Kan. 662, 663, 670–72, 585 P.2d 1006 (1978) (7–month delay between arrest and arraignment due to federal trial in Oklahoma did "not indicate the delay was due to a deliberate attempt on the part of the state to undermine defendant's theory of defense"). Certainly, the final delay due to inclement weather was a valid reason. We conclude the reasons for the delay "weigh equally" for Macomber and the State. See *Rivera,* 277 Kan. at 117.

Assertion of the right

The parties agree that Macomber asserted his right to a preliminary examination on September 1, 2010. Thus, as Macomber also acknowledges on appeal, there was "acquiescence by counsel" for the almost 3 months between his arrest on June 8, 2010, and September 1, 2010. Macomber asserted his right after that point in time which the State does not dispute.

Prejudice

"Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect." *Barker,* 407 U.S. at 532. The first interest is to "prevent oppressive pretrial incarceration." 407 U.S. at 532. Macomber, who was incarcerated on the Shawnee County charges while awaiting his preliminary hearing in this case, does not argue this interest on appeal.

Macomber does argue the second interest, "to minimize anxiety and concern of the accused." 407 U.S. at 532. Macomber alleges, for example, that the State held his property, including a cell phone, and also recorded his telephone calls while in the Shawnee County jail. This concern is of little weight, however, since Macomber was incarcerated anyway, and these issues had nothing to do with the delay in the Marshall County preliminary examination.

Macomber also argues the third interest, "to limit the possibility that the defense will be impaired." 407 U.S. at 532. The evidence against Macomber was overwhelming, but he points out that Deputy Salcedo had a different recollection at trial about reaching for his pistol than when he was interviewed in the hospital. Macomber argues the deputy's memory "faded," but that is speculation. Deputy Salcedo was being treated with pain medication when interviewed at the hospital. The State speculates this fact could account for the discrepancy. Regardless, it is unknown what Deputy Salcedo would have said had the preliminary hearing been held within 10 days after Macomber's arrest or personal appearance. As it was, the discrepancy was fully aired at trial, and we conclude that the inconsistency in Deputy Salcedo's accounts regarding reaching for his handgun was of little importance and could only have worked in favor of the defense, not in impairment of it.

***8** Finally, because Macomber was being prosecuted in Shawnee County simultaneously with the Marshall County prosecutions, he has not shown that the delay in the preliminary hearing in this case was the cause of any delay in the actual trial itself. We conclude that Macomber has not shown he was denied his constitutional right to a speedy trial because of the delay in his preliminary examination.

PROSECUTORIAL MISCONDUCT

Macomber argues he was denied a fair trial by prosecutorial misconduct. Macomber raises several instances, which we set out below. After considering the possible misconduct in each instance, we will then examine whether any prejudice occurred. See, *e.g., State v. Hall,* 292 Kan. 841, 846–854, 257 P.3d 272 (2011).

> "Appellate review of an allegation concerning prosecutorial misconduct requires a two-step analysis. First, the court determines whether the prosecutor's comments were outside the wide latitude allowed in discussing the evidence. Second, the appellate court determines whether those comments prejudiced the jury against the defendant and denied the defendant a fair trial. This second step requires determining whether: (a) the misconduct was gross and flagrant; (b) the misconduct showed ill will on the prosecutor's part; and (c) the evidence was of such a direct and overwhelming nature that the misconduct would likely have had little weight in the minds of the jurors." *State v. Phillips,* 295 Kan. 929, Syl. ¶ 4, 287 P.3d 245 (2012).

Closing Arguments Regarding Premeditation

Macomber argues Spradling's closing argument "equate[d] premeditation with intent and remove[d] any requirement of the essence of premeditation—that the matter be thought over 'beforehand." ' "A defendant is denied a fair trial when a prosecutor misstates the law and the facts are such that the jury could have been confused or misled by the statement." *Phillips,* 295 Kan. 929, Syl. ¶ 5.

The trial court instructed the jury on premeditation:

> "Premeditation means to have thought the matter over beforehand, in other words, to have formed the design or intent to kill before the act. Although there is no specific time period required for premeditation, the concept of premeditation requires more than the instantaneous intentional act of taking another's life ."

Spradling then argued premeditation as follows:

> "Well ... what's premeditation? In [the] instruction ... that the Judge has read to you, here's what you got to decide. If the defendant intended to kill Fernando so he could get away, did he think about the killing beforehand? Because if he thought about it beforehand, that's premeditation. And under the law, premeditation means to have thought the matter over beforehand. In other words, to have formed the desire or intent to kill. Doesn't have to be deciding to kill before he fired the first one. At any time while he's firing, if he decides he's trying to kill, that's premeditation.
>
> ***9** "Premeditation requires more than the instantaneous intent, intentional act.

"Think how long that videotape is. In State's Exhibit No. 1 that you've seen, you can watch it again if you want to. Send out a note that you need the equipment, and we'll send you in the TV. This was not instantaneous. It was more than instantaneous."

O'Keefe addressed premeditation in his response:

"They talk about premeditation. [Macomber] could have killed that officer at any time. He knew where to shoot that officer. At any time. He didn't do that....

"No, that wasn't his intent, to kill that officer, at all. His intent was to make an escape. His intent was to leave. His intent was to disarm that officer. There's no question about it."

O'Keefe returned to premeditation later:

"Now, if you want to accept the prosecutor ... [j]ust all it takes is a second, and you're done. You know, you committed murder at that point. That's all it takes, is a second. Just right like that.

"It doesn't when you haven't planned to. When you had not planned to from the start. Ever done that. That's not what it takes. It takes some planning to do it. It takes some planning to, to want to kill."

In the State's rebuttal, Spradling contended it was unnecessary for premeditation that Macomber possessed an intent to kill "from the very beginning." She suggested that Macomber did not shoot Deputy Salcedo initially because "[h]e's still thinking what to do. He's forming his premeditation. He's still figuring out what his options are. And what he decided his best option was, was to kill." The prosecutor pointed out that when Macomber did exchange fire with the deputy, he eventually shot at head level as shown by the bullet holes in the garage door windows.

Spradling read the trial judge's instruction to the jury regarding premeditation. Moreover, she properly told the jury that Macomber had to think the matter over beforehand to constitute premediation. The question here is Spradling's further statement: "At any time while he's firing, if he decides he's trying to kill, that's premeditation." We acknowledge "[i]n discussing premeditation, prosecutors must avoid forms of the word 'instant' or any synonym conveying that premeditation can develop instantaneously ." *State v. Crosby*, 285 Kan. 230, Syl. ¶ 7, 169 P.3d 1128 (2007). In context, however, Spradling's argument that Macomber could have considered and decided to kill Deputy Salcedo "at any time" meant he could have decided to kill "at some point" during the 15 seconds that elapsed during the exchange of gunfire.

Macomber relies on *Hall,* where the defendant approached the victim and shot her four times in the back. In closing argument the prosecutor argued: " 'You can even form premeditation after the pull of the first trigger, because remember, he pulls four times." ' 292 Kan. at 849. Stating it had "repeatedly disapproved" any suggestion that

***10** premeditation can occur instantaneously," our Supreme Court concluded the prosecutor had "misstated the law." 292 Kan. at 849, 852. The "rapid succession" of the shots was very important in *Hall,* with our Supreme Court essentially treating the shots as a single act. 292 Kan. at 851–52.

The present case, however, is factually distinguishable from *Hall* and provides some support for Spradling's argument. The video confirms that the shots here were intermittent, with Macomber alternatively firing at Deputy Salcedo, taking cover, and then firing again. In short, we would not characterize the shots as coming in rapid succession. Moreover, the exchange of gunfire also distinguishes the present case from *Hall.*

Most importantly, there was evidence from which a jury could find that Macomber premeditated killing Deputy Salcedo after his initial shots. This premeditation was not instantaneous but was shown by the escalation in Macomber's targeting. Macomber testified that he initially shot Deputy Salcedo only to wound him and facilitate his escape. A rational jury could have accepted this testimony as true. Macomber also claimed that he took one shot over the dash at random, which the jury similarly could conclude was truthful testimony.

But the jury had before it photographs showing bullet holes in the garage door windows at about the height of a person's head. The photographs and the video taken together confirm that one of these holes was in a window near the edge of the garage door which Deputy Salcedo ran past just before rounding the corner. A rational factfinder could conclude beyond a reasonable doubt that during the initial exchange of gunfire it became evident to Macomber that merely wounding the deputy was not sufficient. This realization could have caused Macomber to formulate the design or intent to kill prior to later shooting his last bullets in the direction of

Deputy Salcedo's head as he ran from cover and past the garage doors. Given this unique evidentiary context, we are persuaded that Spradling did not misstate the law regarding premeditation.

Mocking of Macomber's Testimony During Closing Argument

Next, Macomber contends Spradling "mocked [his] testimony" during her closing argument. The transcript shows Spradling stated: "Otherwise, to believe the defendant, you have to believe it went like this: (Pulling out gun.) Bam. Whoops. Bam. Pardon me. Bam. Excuse me. Bam. My bad. And a couple more bams in there." Macomber contends this "mischaracterized the testimony and ridiculed [him]."

Macomber cites *State v. Abu–Fakher,* 274 Kan. 584, 615, 56 P.3d 166 (2002), where a prosecutor "overstepped the bound of propriety by mimicking Abu–Fakher's foreign accent" during cross-examination. That was a different form of mockery, more akin to calling a defendant "little," which is also improper. *State v. Donaldson,* 279 Kan. 694, 709–10, 112 P.3d 99 (2005) ("Making an argument based on height, weight, or other physical characteristic is not proper."). Spradling's mockery was less personal and more relevant to the arguments before the jury. Compare *State v. Anderson,* 294 Kan. 450, 463, 276 P.3d 200 (2012) (where prosecutor called defendant " 'a little, little man" ').

***11** "A prosecutor is given wide latitude in the language and manner of presenting argument and may even use picturesque speech as long as he or she does not refer to facts not disclosed by the evidence." *State v. McCaslin,* 291 Kan. 697, Syl. ¶ 14, 245 P .3d 1030 (2011). Spradling's meaning was unclear. Her comments were obviously exaggerated and perhaps designed to challenge Macomber's rather understated exculpatory testimony regarding his reasons for repeatedly firing a lethal weapon at Deputy Salcedo at close range—especially in the direction of his head. Though it was picturesque, the argument did not personally attack Macomber or O'Keefe. Rather, the overstated characterization of Macomber's testimony did address a point in contention at trial—Macomber's intent at repeatedly firing his handgun at Deputy Salcedo. We are persuaded that this argument was still within the outer bounds of the wide latitude given prosecutors in closing arguments.

Evoking Prejudice and Sympathy During Closing Argument

Spradling concluded her closing argument by telling the jury Macomber "gave it all he had to do the killing. Don't let him pull this over on you now. Tell Fernando that there's enough evidence in this case to find the defendant guilty.... You know why? Cause the defendant's guilty." Macomber first characterizes the "pull this over on you now" statement as a "fog, smoke and mirrors argument."

While the prosecutor in the case Macomber cites, *State v. Lockhart,* 24 Kan. 488, 490, 947 P.2d 461, *rev. denied* 263 Kan. 889 (1997), did use the words " 'fog, smoke and mirrors," ' the panel did not address them specifically. The issue in *Lockhart* was the prosecutor's repeated description of the defendant and defense counsel as liars, with which " 'fog, smoke, or mirrors" ' could be synonymous. 24 Kan.App.2d at 490–92; see *State v. Elnicki,* 279 Kan. 47, 62, 105 P.3d 1222 (2005). Macomber does not make such an argument here, and we conclude Macomber has abandoned the point by raising it incidentally. See *State v. Anderson,* 291 Kan. 849, 858, 249 P.3d 425 (2011).

Macomber's argument on Spradling's statement, " '[t]ell Fernando that there's enough evidence in this case to find the defendant guilty," ' is more substantive. Macomber argues Spradling's statement was "a call to send a message to the victim rather than decide the case based on the evidence and the law." Macomber cites *State v. Ruff,* 252 Kan. 625, 631, 847 P.2d 1258 (1993), where a prosecutor stated, " 'Ladies and gentlemen of the jury, do not allow this conduct to be tolerated in our country," ' and " '[s]end that message, ladies and gentlemen, come back with a verdict of guilty." '

In rejecting the propriety of this argument, our Supreme Court observed:

> "The prosecutor's last statement to the jurors prior to their determination as to Ruffs guilt was that the jury had a duty to send a message to the community that certain conduct will not be tolerated. The prosecutor's statement implied that if the jury found Ruff not guilty, her conduct would be tolerated." 252 Kan. at 636.

***12** Spradling did not refer to the community or to community values, so *Ruff* is not directly on point. But she did, as did the prosecutor in *Ruff,* tell the jury to send a message, in this instance to Deputy Salcedo. The message, however, was to tell the deputy "there's enough evidence in this case to find the defendant guilty," which was essentially a request to render guilty verdicts. Unlike *Ruff,* this message did not include a request to, apart from the evidence, take a stand

against crime in the community. Still, as in *Ruff,* the problem is that Spradling encouraged the jury to do something more than it was sworn to do—render a verdict.

"[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 a victim." *State v. Simmons,* 292 Kan. 406, 419, 254 P.3d 97 (2011). Moreover, "a prosecutor crosses the line of appropriate argument when that argument is intended to inflame the jury's passions or prejudices or when the argument diverts the jury's attention from its duty to decide the case on the evidence and controlling law. [Citation omitted.]" *State v. Adams,* 292 Kan. 60, 67, 253 P.3d 5 (2011). While not as egregious as the argument in *Ruff* we conclude that Spradling's comment was an attempt to appeal to the jury's sympathy for the victim and to divert its attention to extraneous matters rather than to simply render a verdict. It was, therefore, improper.

Misstating Evidence In Closing Argument

Macomber raises two instances wherein he contests that Spradling misstated evidence during closing argument. During closing arguments, Spradling addressed at some length the "great bodily harm" element of aggravated battery on a law enforcement officer. Of course, the elements instruction for aggravated robbery also mentioned "great bodily harm." Spradling argued:

> "[Macomber] told you that he did all, committed all of the elements of aggravated robbery ... if it's great bodily harm. So if you find that Fernando's injuries were pretty, pretty significant, great bodily harm. Then not only is the defendant guilty of aggravated battery, great bodily harm; he's also guilty of aggravated robbery."

Spradling later stated: "Now, the defendant says—I think what he's saying is, I'm guilty of everything but the first charge [attempted premeditated murder]. That might shorten up your deliberations. It's still going to be an important one. And it's important because there's a big difference on that first charge."

Macomber argues Spradling "misstated the evidence, telling the jury that Macomber told it he committed all the elements of robbery, when he specifically denied that he committed a robbery during his testimony; and telling the jury that she thought he was saying he was guilty of everything but the first charge." Macomber is correct, and the State makes little response beyond a simple denial. Misstating evidence is improper because the prosecutor thereby argues from facts not in evidence. See *State v. Tahah,* 293 Kan. 267, 276–78, 262 P.3d 1045 (2011). This misstatement was improper.

***13** Macomber argues in his pro se brief that Spradling also misstated the evidence on the number of times he fired his pistol. Macomber points to places in Spradling's closing arguments where she stated he shot six times at Deputy Salcedo. Spradling made the allegation in support of her argument that Macomber intended to kill Deputy Salcedo. Macomber maintains the evidence showed only four shots, with "some controversy as to a possible fifth shot ... but never a sixth shot."

Macomber does not deny that all six cartridges had been fired when his pistol was eventually recovered. He argues, however, that he fired the remaining round or two during the stand-off with police at issue in the related case. Macomber cites evidence from this case in support, but that evidence is not in the record on appeal. Absent a record affirmatively showing error, the claim of error fails. See *State v. McCullough,* 293 Kan. 970, 999, 270 P.3d 1142 (2012). Considering the evidence admitted here, along with the "considerable latitude in discussing the evidence and drawing reasonable inferences from that evidence," Spradling's argument was not improper. *McCaslin,* 291 Kan. 697, Syl. ¶ 14.

Interception of Confidential Communications

Macomber makes additional arguments for prosecutorial misconduct in his pro se brief. The State does not respond to these arguments.

First, Macomber contends the State intercepted his confidential communications with O'Keefe. At sentencing on July 1, 2011, the trial court allowed Macomber to present evidence regarding this alleged violation of his attorney-client privilege. Macomber called Spradling, who testified her office had subpoenaed calls Macomber made while in the Shawnee County Jail. Spradling said that under a prior policy, the jail would not have produced any attorney-client communications. Beginning in October 2010, however, the jail began providing all calls, including attorney-client communications, in response to subpoenas. Spradling

testified that her office was not notified of this change in policy but that "[o]nce I heard the defendant asking for Bill, I stopped listening." Spradling testified that she had never listened to any "jailhouse calls between legal counsel and a client."

Macomber argues on appeal that Spradling received recordings of the calls, but he does not address her testimony explaining that she did not listen to any privileged communications. Macomber has raised this point incidentally, thereby waiving it on appeal. See *Anderson,* 291 Kan. at 858. On this record, we do not find any prosecutorial misconduct.

Prejudice

As mentioned earlier, in evaluating prosecutorial misconduct claims an appellate court must consider the second step of the analysis which consists of three factors. These are whether: "(a) the misconduct was gross and flagrant; (b) the misconduct showed ill will on the prosecutor's part; and (c) the evidence was of such a direct and overwhelming nature that the misconduct would likely have had little weight in the minds of the jurors." *Phillips,* 295 Kan. 929, Syl. ¶ 4.

***14** None of the three factors is controlling. *State v. Burns,* 295 Kan. 951, 287 P.3d 261 (2012). " 'Further, the third factor can never override the first two factors until the harmlessness tests of both K.S.A. 60–261 (prosecutor's statements were inconsistent with substantial justice) and *Chapman v. California,* 386 U.S. 18, 22, 17 L.Ed.2d 705, 87 S.Ct. 824, *reh. denied* 386 U.S. 987 (1967) ... have been met.' [Citations omitted.]" 295 Kan. at 958–59. With respect to *Chapman,* "[i]f a defendant establishes error of a constitutional magnitude, the State—as the party benefitting from the error—has the burden to prove beyond a reasonable doubt that the error did not affect the defendant's substantial rights." *Phillips,* 295 Kan. 929, Syl. ¶ 6.

> "Factors to be considered in determining if a prosecutor's misconduct was so gross and flagrant as to deny the defendant a fair trial include whether the misconduct was repeated, was emphasized, violated a long-standing rule, violated a clear and unequivocal rule, or violated a rule designed to protect a constitutional right." *State v. Marshall,* 294 Kan. 850, Syl. ¶ 6, 281 P.3d 1112 (2012).

The statement which Macomber complains of regarding premeditation was accompanied by correct statements and arguments of the law, including Spradling's effort to direct the jury to the trial court's instructions. See *State v. Naputi,* 293 Kan. 55, 62, 260 P.3d 86 (2011) ("Where a prosecutor makes both a misstatement of the law and a correct recitation of the applicable law in closing argument, we have been loathe to characterize the misstatement as gross and flagrant misconduct."). With regard to Spradling's closing argument using ironic exclamations between "bams" this was responsive to the arguments of the trial and did not raise an objection or admonishment.

Spradling's improper statements were not repeated to any degree or emphasized. Although improper, Spradling's violations were not gross and flagrant. In the argument for sympathy, for example, Spradling directed the jurors to the evidence, as the State points out, in the same sentence that she invoked Deputy Salcedo's name. Spradling's mischaracterization of Macomber's testimony was made in passing, and Spradling alerted the jury to her uncertainty by telling the jury, "I think what he's saying is...."

As for evidence of ill will, Spradling did not persist in her statements over objections or trial court admonishments, which are often present in cases where ill will is found. See *McCaslin,* 291 Kan. at 721–22; *Elnicki,* 279 Kan. at 66. Nothing else here shows ill will.

Finally, with regard to the third factor of the second part of the analysis, the evidence was so substantial that any prosecutorial misconduct was harmless. Macomber admitted to most of the elements of the crimes, and most of the material facts were captured on video. We conclude Macomber was not deprived of substantial justice, and the State has shown beyond a reasonable doubt that any prosecutorial misconduct did not affect Macomber's substantial rights.

FAILURE TO GIVE A LESSER–INCLUDED OFFENSE INSTRUCTION ON THEFT

***15** Macomber renews his argument for an instruction on theft as a lesser included offense of aggravated robbery. Macomber argues "he obtained control over the [patrol] vehicle after [Deputy] Salcedo had left the area." The State responds that "[n]o rational juror" could have convicted on theft.

> "When requested, a district judge has a duty to instruct a jury on any lesser included offense established by the evidence, regardless if that evidence is weak or inconclusive. But there is no duty to instruct on a lesser included offense if the jury could not reasonably convict

> the defendant of the lesser included offense based on the evidence presented. When reviewing a district judge's refusal to give a requested instruction, this court must view the evidence in the light most favorable to the requesting party. [Citation omitted.]" *State v. Harris,* 293 Kan. 798, 803, 269 P.3d 820 (2012).

"To determine whether a robbery has occurred as opposed to a theft with attendant violence, the individual factual circumstances must be carefully reviewed." *State v. Bosby,* 29 Kan.App.2d 197, Syl. ¶ 1, 24 P.3d 193, *rev. denied* 271 Kan. 1038 (2001). "When a victim's possession and control of property is severed by force or threat of bodily harm, the taking is from the victim's 'presence' as that term is used in statutes defining robbery, although the taking is not within the victim's immediate view." *State v. Hays,* 256 Kan. 48, Syl. ¶ 9, 883 P.2d 1093 (1994).

In *Hays,* four men entered a house, forcibly held a resident in one room, and removed items from other rooms. After the men left, the resident discovered the items were missing. Our Supreme Court began by observing, " '[t]o constitute the crime of robbery, it is necessary that the violence ... must either precede or be contemporaneous with the taking of the property." ' 256 Kan. at 64 (quoting *State v. Dean,* 250 Kan, 257, Syl. ¶ 2, 824 P.2d 978 [1992]). That was the case in *Hays,* the victim's separation from the items taken notwithstanding, and in support our Supreme Court cited two prior aggravated robbery cases. The key was whether the "possession and control" of the property was "severed" by the violence, not whether the victim could see the property as it was taken. 256 Kan. at 65.

In the present case, Macomber's violence preceded or was contemporaneous with the taking and severed Deputy Salcedo's possession and control of the patrol vehicle. Thus, even construing the facts in Macomber's favor, he forcibly took the patrol vehicle from the deputy's presence. The trial court did not err by failing to give a lesser included offense instruction on theft.

SENTENCING

Macomber asserts that at sentencing the tiral court failed to state whether his sentences for Count I (attempted first-degree murder) and Count II (aggravated battery of a law enforcement officer), were concurrent with or consecutive to each other. Since the journal entry shows they were ordered to run consecutively, Macomber concludes a disparity exists by operation of K.S.A. 21–4608(a), which provides that silence at the sentencing hearing means concurrent sentences were imposed.

***16** As the facts set out in the Factual and Procedural Background showed, the trial court clarified this point at the end of the sentencing hearing. Following a question by O'Keefe, the district court stated in open court, in Macomber's presence, that his sentences in Counts I and II were consecutive to each other. There is, therefore, no disparity between the journal entry and the pronouncement of sentence.

INEFFECTIVE ASSISTANCE OF COUNSEL

Finally, Macomber argues in his pro se brief that O'Keefe provided ineffective assistance of counsel. Macomber asks this court to either reverse the convictions or remand for a hearing pursuant to *State v. Van Cleave,* 239 Kan. 117, 716 P.2d 580 (1986). The State argues the "issue of ineffective counsel was not raised below and therefore should not be considered by this court."

Appellate courts generally do not consider ineffectiveness claims raised for the first time on appeal. *Wimbley v. State,* 292 Kan. 796, 807, 275 P.3d 35 (2011).

> "Only under extraordinary circumstances, *i.e.,* where there are no factual issues and the two-pronged ineffective assistance of counsel test can be applied as a matter of law based upon the appellate record, may an appellate court consider an ineffective assistance of counsel claim without a district court determination of the issue. [Citation omitted.]" 292 Kan. at 807.

We do not find extraordinary circumstances here.

Macomber also has not shown that he did "more than read the record and then determine that he ... would have handled things differently." *Van Cleave,* 239 Kan. at 120. "Except in the most unusual cases, to assert a claim of ineffective assistance of counsel without any independent inquiry and investigation apart from reading the record is questionable to say the least." 239 Kan. at 120–21. Accordingly, we decline to remand for a *Van Cleave* hearing, which is only "an alternative remedy to K.S.A. 60–1507." 239 Kan. at 121.

Affirmed.

Parallel Citations

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303 P.3d 726 (Table)
Unpublished Disposition
(Pursuant to Kansas Supreme Court Rule 7.04(f), unpublished opinions are not precedential and are not favored for citation. They may be cited for persuasive authority on a material issue not addressed by a published Kansas appellate court opinion.)
Court of Appeals of Kansas.

STATE of Kansas, Appellee,
v.
Stephen Alan MACOMBER, Appellant.

No. 107,206. | July 5, 2013.

Appeal from Marshall District Court; John L. Weingart, Judge.

Attorneys and Law Firms

Stephen Alan Macomber, appellant pro se.

Michael J. Bartee, of Michael J. Bartee, P.A., of Olathe, for appellant.

Laura E. Johnson–McNisk, county attorney, Derek Schmidt, attorney general, for appellee.

Before MALONE, C.J., BUSER, J., and ERNEST L. JOHNSON, District Judge Retired, assigned.

Opinion

MEMORANDUM OPINION

PER CURIAM.

*1 Stephen Alan Macomber appeals his convictions and sentence in Marshall County District Court, case number 2010 CR 60. Macomber committed other crimes in Marshall County shortly before the crimes committed in this case. These earlier crimes were separately charged and tried in 2010 CR 59, and separately appealed in *State v. Macomber,* Case No. 107,205, unpublished opinion filed July 5, 2013. Having reviewed the record and considered the arguments of Macomber and the State, we affirm case number 2010 CR 60 in part, reverse and vacate in part, and remand with directions.

FACTUAL AND PROCEDURAL BACKGROUND

After committing the crimes described in *Macomber,* Case No. 107,205, Macomber drove the sheriffs patrol vehicle to the edge of Blue Rapids, encountering 67–year–old Hedy Saville, who testified she was "walking my cats" without a leash. Saville was puzzled to see a slow moving patrol vehicle with its lights flashing. When the vehicle pulled into her driveway, Saville approached it because "[w]e had a cat ordinance in Blue Rapids, and I assumed somebody had called the police because I had my cats out."

Macomber stepped from the patrol vehicle and, according to Saville, pointed his pistol at her. Saville had already set the cats down, and when she wished to pick one up again, Macomber told her: " 'If you go for the cat, I'll shoot the cats.' " Saville's vehicle was in the driveway, and Macomber wished to move it so he could park the patrol vehicle in the garage of Saville's residence. Saville told Macomber to take her car and go, but Macomber refused, saying she would call the police. Macomber also told Saville that "as long as I did what he said, he wouldn't rough me—he didn't want to have to rough me up."

Macomber took Saville inside the residence to retrieve the keys to her vehicle, and he then made her stand close by the patrol vehicle as he backed it into the garage. The record contains a video of some of these events, shot by a camera in the patrol vehicle. Macomber's coercive and threatening manner is evident on the video.

Macomber forced Saville to help him cover the garage windows. Macomber then led Saville into the basement. At some point, Macomber told Saville: " 'If they don't find us in three or four days, I'll just have you drive me to Oklahoma.' " Macomber said he would " 'just lay down in the backseat, and we'll take the back roads, and I'll tell you how to get there. We'll be fine.' "

Saville said she did not want Macomber in her basement but that she did not oppose him "because he had a gun pointed at me." Saville also said she did not try to escape for fear that Macomber would shoot her. At one point Macomber told Saville: " 'I have two bullets, and one is for me.' " Saville understood this to mean the other bullet was for her.

Telling Saville she was the last person he would ever see, Macomber asked to recount his life story. While he did so,

several persons called, some of whom were checking on Saville's welfare based on news reports of the earlier shooting in Blue Rapids. Macomber spoke to one of the callers and eventually conversed with Marshall County Sheriff Dan Hargrave. This began a lengthy negotiation by telephone between law enforcement officers and Macomber.

*2 Macomber released Saville just after midnight, but he remained inside the residence. A standoff ensued for several hours. Law enforcement officers eventually sent 60 canisters of tear gas through the windows of Saville's residence before Macomber finally emerged at 6:48 in the morning and was taken into custody.

The State brought the following charges against Macomber: Count I, kidnapping, (K.S.A.21–3420[a]–[c]); Count II, aggravated burglary, (K.S.A.21–3716); Count III, aggravated assault, (K.S.A.21–3410[a]); Count IV, criminal possession of a firearm, (K.S .A. 21–4204[a][2]; K.S.A. 21–4204[a][4]); and Count V, criminal threat, (K.S.A.21–3419[a] [l]). The jury returned guilty verdicts on all of the charged crimes.

The trial court imposed the following sentences in open court: Count I, 233 months; Count II, 32 months; Count III, 12 months; Count IV, 8 months; and Count V, 6 months. The trial court then stated: "The Court orders that Counts II, III, IV, and V be served concurrently. The Court orders that Counts II, III, IV, and V be served consecutively to Count I."

When the trial court filed the sentencing guidelines journal entry of judgment, however, the trial court ran Counts I and II consecutive to each other, and Counts III, IV, and V consecutive to Counts I and II. The trial court did not indicate in the journal entry that any of the counts were concurrent with each other. Macomber filed a timely appeal.

SPEEDY PRELIMINARY EXAMINATION/SPEEDY TRIAL

Although Case No. 107,205 and the present case were tried separately, some pretrial matters were considered jointly. One example was Macomber's challenges to a delay in the preliminary examination. As described in Case No. 107,205, Macomber filed a motion for preliminary examination in both cases on September 1, 2010, and renewed the motion several times thereafter. See *Macomber,* Case No. 107,205. The joint preliminary examination was not held until February 14, 2011.

In this appeal, Macomber's arguments regarding the delay are identical to his arguments in *Macomber,* Case No. 107,205. His appellate counsel argues for "a violation of Macomber's right to a *speedy preliminary examination* " and Macomber argues in a pro se brief that his "right to a speedy *trial* has been violated." (Emphasis added.) For the reasons set out in *Macomber,* Case No. 107,205, we conclude there was no violation of Macomber's constitutional rights under either theory.

DOUBLE JEOPARDY

Macomber was first convicted of criminal possession of a firearm in Case No. 107,205. See *Macomber,* Case No. 107,205. The trial in the present case was then held, and at an instructions conference, William C. O'Keefe, Macomber's court-appointed defense counsel, argued that Macomber was being subjected to double jeopardy by having to stand trial once again for criminal possession of a firearm. O'Keefe pointed out that Macomber had "already been found guilty of possession of a gun in Marshall County." The trial court disagreed and instructed the jury to consider the crime of criminal possession of a firearm.

*3 Macomber reprises his double jeopardy argument on appeal. The convictions in both cases were under K.S.A. 21–4204(a)(2) and K.S.A. 21–4204(a)(4), which defined "[c]riminal possession of a firearm" in relevant part as "possession of any firearm by a person" with a qualifying criminal history. The State argues that Macomber accomplished two separate possessions of a firearm in the two cases, "separated by time, distance and fresh impulse."

Macomber relies upon the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, which applies to the states through the Fourteenth Amendment. See *Hudson v. State,* 273 Kan. 251, 253, 42 P.3d 150 (2002). The clause provides: "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. Amend. V. Macomber also cites § 10 of the Kansas Constitution Bill of Rights in his pro se brief, but "the underlying protection contained in the Double Jeopardy Clause of the United States Constitution is contained in § 10 of the Kansas Constitution Bill of Rights. [Citation omitted.]" *State v. Thompkins,* 271 Kan. 324, 336, 21 P.3d 997 (2001). "When an appellate court reviews a ruling on a double jeopardy ... issue, an unlimited scope of appellate

review applies." *State v. Appleby,* 289 Kan. 1017, 1026, 221 P.3d 525 (2009).

Both parties cite *State v. Schoonover,* 281 Kan. 453, 496, 133 P.3d 48 (2006), where the issue was "cumulative punishments imposed in one case." *Schoonover's* facts did not "raise a question about a successive prosecution," but our Supreme Court surveyed the law, nevertheless. 281 Kan. at 464. In its summary, our Supreme Court recognized the category at issue here, "a unit of prosecution case arising from successive prosecutions." 281 Kan. at 478.

In a unit of prosecution case, "the defendant is charged with multiple violations of the same statute." 281 Kan. at 464. A double jeopardy issue is raised in these cases when the alleged multiple violations are based on a "unitary" act or course of conduct, as opposed to "discrete and separate acts or courses of conduct." 281 Kan. at 464. If the act or course of conduct is unitary, the next step is to identify the " 'allowable unit of prosecution,' " meaning "the minimum scope of the conduct proscribed by the statute." 281 Kan. at 464, 471.

"The determination of the appropriate unit of prosecution is not necessarily dependent upon whether there is a single physical action or a single victim. Rather, the key is the nature of the conduct proscribed." 281 Kan. at 472. Since the "statutory definition of the crime determines the minimum scope of the [act or] conduct proscribed," the "key ... is legislative intent." 281 Kan. at 471. Finally, courts apply a rule of lenity in favor of defendants when the legislative intent is unclear. See 281 Kan. at 470–72; see also *State v. Holman,* 295 Kan. 116, Syl. ¶ 23, 284 P.3d 251 (2012) (stating more fully the rule of lenity).

Unitary Act or Course of Conduct

***4** Was Macomber's criminal possession of a firearm on June 7, 2010, in Marshall County a unitary act or course of conduct, as opposed to discrete and separate acts or courses of conduct? As detailed in our opinion, *Macomber,* Case No. 107,205, Macomber used his pistol to shoot and wound Deputy Salcedo after a traffic stop in Marshall County. Immediately after this shooting, Macomber drove away in the deputy's patrol vehicle with the in-car video recording Macomber's movements. The video shows Macomber traveled about 1 mile to the edge of Blue Rapids, curled back around on a dirt road, and stopped in Saville's driveway. The trip took only a few minutes. Macomber then used the same pistol that he had used in shooting Deputy Salcedo to confront Saville.

The State disputes the unitary nature of Macomber's conduct, arguing that he "kept his firearm and drove the patrol vehicle across town to Ms. Saville's residence, where he engaged in a new reign of terror." In support, the State cites *State v. Fillman,* 43 Kan.App.2d 244, 254, 223 P.3d 827 (2010), *rev. denied* 291 Kan. —— (2011), where a defendant was convicted of two counts of aggravated assault after taking a rifle and shooting into a wall to dissuade the victim from reaching for a pistol, and then shooting the rifle 10 minutes later when he thought the victim was reaching for the pistol a second time. Our court found that the two shootings, 10 minutes apart, manifested individual acts separated by a fresh impulse to commit the second aggravated assault.

Fillman is distinguishable. The offenses in *Fillman* involved the *use* of a firearm on both occasions. See K.S.A. 21–3408; K.S.A. 21–3410. The statute at issue here, K.S.A. 21–4204, criminalizes the *simple possession* of a firearm without any requirement that it be *used.* The parties have not cited a Kansas case discussing criminal possession of a firearm in the context of double jeopardy, but Macomber cites a Kansas case in his pro se brief which provides some guidance.

In *State v. Rosier,* 216 Kan. 582, 582–83, 533 P.2d 1262 (1975), Rasler pointed a pistol at individuals in a vehicle and then, "[a]bout an hour" later in the same city, allegedly shot a bar patron in the leg. The defendant was charged with aggravated assault, aggravated battery, and unlawful possession of a firearm. The jury convicted on aggravated assault and unlawful possession of a firearm, but it acquitted Rasler of aggravated battery. On appeal, Rasler argued that the State had failed "to elect which charge (aggravated assault or aggravated battery) it was relying upon to prove the firearm possession charge." 216 Kan. at 584. Our Supreme Court concluded:

> "The firearm charge challenged was both specific and self-sustaining. It properly charged the commission of a separate and distinct crime which neither depended upon nor duplicated any other charge. An election was not necessary. Even though the two incidents in which the defendant used the pistol were separate offenses they were, nevertheless, parts of another single separate transaction, *i.e.,* the single continuing possession of a firearm ." 216 Kan. at 584.

***5** The present facts are similar to the facts our Supreme Court characterized as a "single continuing possession of a firearm" in *Rasler.* Macomber committed separate crimes, but

he did so with the same firearm in the same municipality on the same day. *Rasler* supports the conclusion that the act or course of conduct here was unitary.

We also find some guidance from caselaw interpreting a federal statute, 18 U.S.C. § 922(g)(1) (2006), which makes it unlawful for any person "who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year, ... to ... possess in or affecting commerce, any firearm." The United States Court of Appeals for the Seventh Circuit has held that "to charge and punish a defendant for more than one § 922(g)(1) offense for separate 'possessions' of the same gun, there must be a relinquishment of both actual *and* constructive possession of the gun before it is reacquired." *United States v. Ellis,* 622 F.3d 784, 794 (7th Cir.2010).

There was no evidence that Macomber relinquished possession of his pistol between the shooting of Deputy Salcedo and the crimes at issue here. As Macomber argues in his the pro se brief: "Both convictions were a single, [continuous] possession of the same [pistol] a few blocks apart." We agree and conclude that Macomber's act or course of conduct was unitary.

Unit of Prosecution

We turn, therefore, to the second step of the analysis—the unit of prosecution question. The State argues "[t]he purpose of the statute prohibiting felons from possessing a firearm is to promote public safety.... Here, [Macomber] placed himself in two separate and distinct situations where his use of a firearm was instrumental in committing crimes against the public safety."

The State once again emphasizes Macomber's use of the firearm, but the conviction turned on his possession of it. The parties have not favored us with a Kansas case discussing the unit of prosecution for criminal possession of a firearm. Beyond the borders of Kansas, however, "there is a division among courts in addressing possession of a firearm, and whether the appropriate unit of prosecution is a single continuous act or separate proven occasions of possession." *Baker v. Com.,* 59 Va.App. 146, 153 n.4, 717 S.E.2d 442 (2011).

A case in the first category is *Webb v. State,* 311 Md. 610, 613, 536 A.2d 1161 (1988), where a defendant held a pistol at his side during a robbery and then, about 3 hours later in the same city, was found in possession of the pistol. The second incident was tried first, in a Maryland district court, where the defendant was convicted of "unlawfully wearing, carrying and transporting a handgun upon or about his person," the title of which describes the relevant elements. 311 Md. at 613, 615; see Md. Crimes and Punishments Code Ann. Art. 27, § 36B(b) (1957, 1982 Repl.Vol.). The first incident was then tried in the Circuit Court for Baltimore City, where the defendant was convicted of the same crime in connection with the robbery. The Maryland Court of Appeals held the defendant had been subjected to double jeopardy:

> ***6** "The unit of prosecution ... is the wearing, carrying or transporting of any handgun, whether concealed or open, upon or about the person. There is no requirement as to time, use, person at risk or incident. We cannot read into the plain language of the section the intent that a lapse of time or more than one person put at risk or multiple incidents would initiate separate offenses. To construe the statute as the State would have us do would require us to doff our judicial robes and don a legislative hat. We cannot indulge in such judicial legislation; we must take the statute as it reads, not rewrite it.
>
> "It may be that were the wearing, carrying, or transporting of the handgun by [defendant] interrupted by some lawful possession of it ... a subsequent unlawful wearing, carrying, or transporting of it would constitute another violation of the statute. And it may be that had [defendant] removed the weapon from his actual or constructive possession, it would be a separate violation when he retrieved it and wore it again on his person. And it may be that if it was shown that the handgun involved in the first incident was a different weapon from that involved in the second incident, there would be two violations. But if any of these circumstances were in fact so, it was incumbent upon the State at trial to prove the circumstance beyond a reasonable doubt." 311 Md. at 617–18.

A Rhode Island case, *State v. Morejon,* 675 A.2d 410 (R.I.1996), is similar to *Webb.* There, a defendant pled guilty to carrying a pistol without a license, and he was later charged with the same crime for carrying the pistol 2 days later. The district court dismissed the second charge because of double jeopardy, and the Supreme Court of Rhode Island affirmed, noting "the possession of a pistol without a license was not divided by the Rhode Island Legislature into a separate offense for each day of possession." 675 A.2d at 412.

On the other hand, a Delaware case featuring a different unit of prosecution is *Williamson v. State,* 707 A.2d 350

(Del.1998). In *Williamson,* the defendant was convicted of first-degree assault, attempted extortion, and "two counts of possession of a deadly weapon during the commission of a felony," all in connection with a single stabbing. 707 A.2d 352. The title of the possession statute again described the relevant elements. See Del.Code Ann. tit. 11, § 1447 (2007). The defendant argued the "two counts of possession of a deadly weapon during the commission of a felony should merge because he used only one knife." 707 A.2d at 363. The Delaware Supreme Court disagreed, holding the plain language of the statute and its goal of deterrence supported " 'separate convictions for a deadly weapon offense, for each felony the defendant committed while in possession of a deadly weapon.' [Citation omitted.]" 707 A.2d at 363. Thus "the two sentences do not subject [defendant] to double punishment for the same offense." 707 A.2d at 363.

*7 We are persuaded that K.S.A. 21–4204 is more like the statute at issue in *Webb* than the statute at issue in *Williamson.* The Kansas statute similarly has "no requirement as to time, use, person at risk or incident" in addition to simple possession. *Webb,* 311 Md. at 617–18. The statute in *Williamson* added a coordinating fact-that the possession occurred during the commission of a felony. Thus each felony committed would demarcate a unit of prosecution.

Macomber committed multiple felonies in Blue Rapids on June 7, 2010, but the Kansas statute did not link his possession with the commission of a felony or any other fact apart from Macomber having a qualifying criminal history. Neither his possession of the pistol nor his criminal history changed between the facts of *State v. Macomber,* Case No. 107,205, unpublished opinion filed July 5, 2013, 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.

Because Macomber's sentence for criminal possession of a firearm was concurrent with longer sentences imposed for other crimes, resentencing is not required. See *State v. Coleman,* 47 Kan.App.2d 658, 671, 277 P.3d 435 (2012), *rev. denied* 296 Kan. —— (2013).

DENIAL OF MISTRIAL

During Saville's direct examination, she was asked: "At the time, did you know why the defendant wanted you to help him cover all the [garage] windows?" Saville replied: "Well, I mean, he—he had told me he killed someone, and—and had shot our deputy." This referred to a homicide in Shawnee County from which Macomber was fleeing and which led to the shooting of Deputy Salcedo.

O'Keefe objected to the answer. In a bench conference, O'Keefe told the trial court: "I thought we were not going to get into previous death, and previous shootings, and everything else. And that's what I had understood, we weren't going to get into that." Spradling replied that she did not expect Saville's answer, adding "all of us have been under the idea that these cases are going to be tried separately without reference to the others." The trial court responded: "The State was told. The State was told to have their witnesses ready. The State was told it would be their responsibility." Spradling maintained "the witnesses have been told that, your Honor."

O'Keefe sought a mistrial, but the trial judge admonished the jury instead: "Ladies and gentlemen of the jury, I must give you an admonition that you are to disregard the answer that is given by the witness at the last—as answer to the last question being unresponsive, and you are to disregard the answer that she gave."

On appeal, Macomber contends the trial court should have declared a mistrial when Saville mentioned his other violent crimes. Macomber maintains the "admonition to ignore the testimony was not simply not sufficient [*sic*] to undo the damage." The State, characterizing Saville's testimony as "unsolicited and unresponsive," counters that it was "harmless error under the circumstances."

*8 The record does not contain a motion in limine regarding this issue, but it does reference an agreement between the parties, apparently approved by the trial court, to omit evidence of Macomber's prior crimes. Under these circumstances we ask "whether the conduct resulted in prejudice that could not be cured or mitigated through jury admonition or instruction, resulting in injustice." *State v. McCullough,* 293 Kan. 970, Syl. ¶ 6, 270 P.3d 1142 (2012); see K.S.A. 22–3423(1)(c). The trial court's decision that an admonition was sufficient is reviewed for abuse of discretion. See *State v. Warrior,* 294 Kan. 484, 505, 277 P.3d 1111 (2012).

> "Judicial discretion is abused if judicial action (1) is arbitrary, fanciful, or unreasonable, in other words, if no reasonable person would have taken the view adopted by the trial court; (2) is based on an error of law, in other

words, if the discretion is guided by an erroneous legal conclusion; or (3) is based on an error of fact, in other words, if substantial competent evidence does not support a factual finding on which a prerequisite conclusion of law or the exercise of discretion is based. [Citation omitted.]" *Warrior,* 294 Kan. at 505.

"Appellate courts reviewing ... for an injustice may take a broader view than the trial court because appellate courts may examine the entire record. The degree of certainty required to conclude an injustice did not occur varies depending on whether the fundamental failure infringes on a constitutional right or not. To declare a non-constitutional error harmless the appellate court must apply K.S.A. 60–261 and K.S.A. 60–2105 to determine if there is a reasonable probability that the error will or did affect the trial's outcome. And if the fundamental failure infringes on a right guaranteed by the United States Constitution, the appellate court applies the constitutional harmless error analysis defined in *Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705, *reh. denied* 386 U.S. 987 (1967). [Citation omitted.]" *McCullough,* 293 Kan. at 981.

Whether the lower, statutory degree of certainty, or the higher, constitutional degree of certainty is applicable, it remains the burden of the party benefiting from the error to show harmlessness. See *McCullough,* 293 Kan. at 983. As a result, the State bears the burden in this case.

" 'Where the trial court sustains an objection and admonishes the jury to disregard the objectionable testimony, reversal is not required unless the remarks are so prejudicial as to in incurable.' [Citations omitted.]" *State v. Parks,* 294 Kan. 785, 796, 280 P.3d 766 (2012). Considerations include the extensiveness of the testimony, its specificity, and the seriousness of the actions alleged, especially in comparison with the crimes charged. See 294 Kan. at 796.

Saville's challenged testimony was very brief, fairly specific, and serious, although the charges for which he was standing trial were also serious. In Macomber's view, Saville's statement that he told her he had he killed someone and had shot "our deputy" was "shocking, inflammatory information that cast [him] in the worst light possible."

***9** We must consider Saville's statements in context. First, Saville testified to what Macomber had *told* her, not to what she *knew* was true. In another example, Saville said Macomber told her the patrol vehicle contained a human body. There was no objection to this testimony, and no evidence of a body at trial. Moreover, Macomber also told the sheriff during negotiations that he held the pistol to Saville's head, though again, it appears he did not. In short, the jury heard several instances of bluster from Macomber, giving his unproven statements to Saville about prior violent crimes less significance.

Second, the impact of Saville's unfavorable testimony was mitigated by other damaging evidence about Macomber that was admitted without objection at trial and which Macomber does not challenge on appeal. For example:

1. In his negotiations with Sheriff Hargrave, Macomber warned that "if anybody came in the house, that somebody was probably going to get hurt." At one point, when the sheriff did not call back precisely at the time agreed, Macomber told him "if I was not more prompt, that he was going to harm [Saville]."

2. Macomber told Andrew Newsum, a Senior Special Agent with the Kansas Bureau of Investigation (KBI), that "he might just shoot a round off, and we'd have to come in and find him. He might be in there waiting for us, or he might be dead."

3. Testimonial and documentary evidence regarding Macomber's 1987 convictions for one count of aggravated battery and four counts of aggravated robbery to support the criminal possession of a firearm charge was admitted.

4. Macomber admitted at trial that he had previously served over 20 years for crimes committed in Sedgwick County, Kansas, before being released from prison on parole on September 9, 2009.

The facts of this case, coupled with Marcomber's admitted criminal history of violent crimes were known to the jury. In context, then, the fact that Macomber *said* he had killed someone and had shot the local deputy was not as shocking and inflammatory as it otherwise might have affected the jury.

The high quality and abundance of the State's incriminating evidence should also be considered. See *Parks,* 294 Kan. at 796. There was no question about Macomber's identity. Some of his criminal conduct was recorded and shown to the jury while Macomber candidly admitted to many aspects of some of it.

Considering the evidence together with the curative instruction, we conclude that the State has met its burden to show Saville's testimony did not work an injustice at trial. This conclusion is true under both K.S.A. 60–261 and K.S.A. 60–2105, and also under *Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705, *reh. denied* 386 U.S. 987 (1967). The trial court did not abuse its discretion in denying the motion for mistrial, and reversal is not required because the remarks were not so prejudicial as to be incurable given the court's admonition. See *Parks,* 294 Kan. at 796.

ADMISSION OF EVIDENCE OF SUBSEQUENT EVENTS

***10** Macomber was not charged with any act which occurred after Saville was released, and he objected at trial to evidence of subsequent events in the hours after Saville's release and his arrest. Macomber renews his objection on appeal, focusing on the materiality of the evidence rather than its probative value. The State contends the evidence "admitted [was] to show [Macomber] did not want to leave Ms. Saville's home.... This evidence, combined with Macomber's statement that he was a 'chump' for letting Ms. Saville go was relevant" to the kidnapping charge.

The materiality of the events after Saville's release is reviewed de novo. To the degree we must decide whether the evidence was probative, review is for abuse of discretion. See *State v. Berriozabal,* 291 Kan. 568, 586, 243 P.3d 352 (2010). In his brief, Macomber mentions "fair trial" in the heading to this issue, but he does not brief an error of constitutional magnitude, thus waiving or abandoning any such issue on appeal. See *State v. Anderson,* 291 Kan. 849, 858, 249 P.3d 425 (2011). If the evidence was wrongly admitted, "we must be persuaded by the State ... that there is no reasonable probability that the error affected the trial's outcome." *State v. Torres,* 294 Kan. 135, 144, 273 P.3d 729 (2012) (citing K.S.A. 60–261).

> "K.S.A. 60–401(b) defines relevant evidence as evidence that is material and probative. In determining whether the evidence is material, the analysis focuses on whether the fact to be proved is a fact that has a legitimate and effective bearing on the decision of the case and is in dispute. Evidence is probative if it has any tendency to prove any material fact." *State v. Gilliland,* 294 Kan. 519, Syl. ¶ 9, 276 P.3d 165 (2012).

The trial court instructed the jury that to prove kidnapping, the State was required to prove Macomber took or confined Saville "with the intent to hold such person as a shield or hostage or to facilitate flight or the commission of any crime or to terrorize the victim or another." Importantly, "[c]onduct, including flight, of an accused following the commission of an alleged crime may be circumstantially relevant to prove both the commission of the acts charged and the intent and purpose for which those acts were committed." *State v. Webber,* 260 Kan. 263, Syl. ¶ 1, 918 P.2d 609 (1996), *cert. denied* 519 U.S. 1090 (1997).

Macomber's standoff with law enforcement was material to his intent. The evidence, including Macomber's statements regretting Saville's release, showed he had held her as a shield or hostage. With respect to facilitating flight, Spradling argued as follows:

> "Well, why didn't the defendant and [Saville] wind up in Oklahoma? There were four things that stood in their way. Four hostage negotiators, eight law enforcement agencies, 100 law enforcement officers, an armored car, and PS [*sic*] 60 rounds of gas. That's the reason why the defendant is not in Oklahoma, not because he decided that he'd do the right thing, because we've not seen the right thing from him."

***11** We are persuaded that the trial court properly admitted the evidence.

Moreover, assuming some of the evidence was not material or probative, we do not find prejudice. Macomber asserts "the outcome of the trial would have been different" without addressing the overwhelming evidence against him. We are convinced that the evidence of Macomber's intent and actions before Saville's release were sufficiently strong that there is not a reasonable probability that excluding evidence of the events after Saville's release would have resulted in different verdicts.

PROSECUTORIAL MISCONDUCT

The trial court instructed the jury on criminal restraint as a lesser included offense of kidnapping. In closing arguments, Spradling told the jury it could not consider criminal restraint unless it first unanimously acquitted Macomber

of kidnapping. Defense counsel did not contemporaneously object to Spradling's statements, but on appeal Macomber now contends this argument was prosecutorial misconduct. The State suggests Spradling "inadvertently misspoke the instruction for choosing between kidnapping, and its lesser included offense of criminal restraint."

> "An appellate court's review of an allegation of prosecutorial misconduct requires application of the familiar two-step analysis. First, the appellate court decides whether the prosecutor's comments exceed the wide latitude of language and manner afforded the prosecutor when discussing the evidence. Second, the court determines whether the prosecutor's comments constitute plain error." *State v. Brown,* 295 Kan. 181, 210,284 P.3d 977 (2012).

Misconduct

The parties assume Spradling misstated the law, but they cite no authorities. The trial court instructed the jury: "If you do not agree that the defendant is guilty of the crime of kidnapping, you should then consider the lesser included offense of criminal restraint." The trial court instructed the jury to consider the offenses sequentially. That is not error here, although it is in certain homicide cases. See *State v. Miller,* 293 Kan. 46, 53–54, 259 P.3d 701 (2011); *State v. Carter,* 284 Kan. 312, 331, 160 P.3d 457 (2007); *State v. Hurt,* 278 Kan. 676, 682–83, 101 P.3d 1249 (2004).

Spradling, however, argued as if the trial court had given an " 'acquit-first' or 'hard-transition' instruction that force[s the jury] to reach a unanimous decision *not* to convict" before moving to the lesser included offense. *Carter,* 284 Kan. at 331. In *Hurt,* a homicide case, our Supreme Court held it was error for a prosecutor to tell a jury, " '[i]t's only if you're not convinced, all 12 of ya, that he's guilty of premeditated, and then you move your way down....' " 278 Kan. at 682. The Supreme Court's rationale:

> "K.S.A. 21–3109 states: 'When there is a reasonable doubt as to which of two or more degrees of an offense [the defendant] is guilty, [the defendant] may be convicted of the lowest degree only.' Thus, it would be improper to state that all 12 jurors had to agree that there was a reasonable doubt before the jury could consider a lesser included offense. It is not clear that this was the meaning conveyed by the prosecutor's statement. However, the remark is ambiguous and at least potentially subject to this interpretation." *Hurt,* 278 Kan. at 682.

***12** Our Supreme Court applied this principle again in *Carter,* albeit another homicide case. See 284 Kan. at 327. But it is unclear whether it would apply here given the different rule on sequential consideration in homicide cases. Moreover, the statutory provision cited in *Hurt* referred to "degrees" of an offense. See K.S.A. 21–3109. The crimes in the present case, kidnapping and criminal restraint, are not degrees of the same offense. Criminal restraint is a lesser-included offense of kidnapping because it shares all of its elements with some of those for kidnapping. See K .S.A.2012 Supp. 21–5109(b)(1), (2); K.S.A. 21–3107(2)(b); *State v. Timms,* 29 Kan.App.2d 770, Syl. ¶ 4, 31 P.3d 323 (2001).

Nevertheless, the jury in the present case was instructed under PIK Crim.3d 68.09, which states: "When there is a reasonable doubt as to which of the two offenses defendant is guilty, the defendant may be convicted of the lesser offense only." This instruction was based on K.S.A. 21–3107(2). See PIK Crim.3d 68.09, Notes on Use. Kidnapping has elements not found in criminal restraint, and given reasonable doubt about the elements specific to kidnapping, a jury presumably would acquit on that charge. The issue with "acquit-first" voting is different—that jurors inclined to vote for a lesser included offense might vote for a charged crime rather than create a mistrial if the panel cannot agree on the charged crime. See *United States v. Jackson,* 726 F.2d 1466, 1469–70 (9th Cir.1984).

Whatever the rationale, the State does not dispute the error in the present case. We will, therefore, assume for purposes of our analysis that Spradling exceeded the wide latitude of language and manner afforded the prosecutor in closing argument.

Harmlessness

> "Having found that there was misconduct, we next consider whether the prosecutor's misconduct was so prejudicial that it denied the defendant a fair trial. This requires a harmlessness inquiry. Three factors are considered: (1) Is the misconduct so gross and flagrant it denied the accused a fair trial; (2) Do the remarks show ill will by the prosecutor; and (3) Is the evidence against the defendant of such a direct and overwhelming nature that the prosecutor's statements would not have much weight in the jurors' minds? No individual factor controls. [Citation omitted.]" *Brown,* 295 Kan. at 213.

"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, 17 L.Ed.2d 705, 87 S.Ct. 824 (1967) ... have been met." *State v. McCaslin,* 291 Kan. 697, Syl. ¶ 11, 245 P.3d 1030 (2011). This "necessarily means the State, as the party who has benefitted from the prosecutorial misconduct, bears the burden to establish beyond a reasonable doubt that the error did not affect the defendant's substantial rights, *i.e.,* there is no reasonable possibility the error affected the verdict." *State v. Inkelaar,* 293 Kan. 414, 431, 264 P.3d 81 (2011). "This ... simply means the third factor cannot override the first two factors unless we are able to say the *Chapman* constitutional error standard has been met. [Citations omitted.]" 293 Kan. at 431.

***13** Beginning with the gross and flagrant question, "appellate courts should look to whether the prosecutor 'repeatedly emphasized the conduct.' [Citations omitted.]" 293 Kan. at 430. The State argues Spradling's misstatements were "isolated" and "not repeated or emphasized," but Spradling repeated her statement. To the degree she misstated Kansas law, her misstatement was gross and flagrant.

We find, however, there was no evidence of ill will. "[A] prosecutor's ill will is usually 'reflected through deliberate and repeated misconduct or indifference to court's rulings.' [Citations omitted.]" 293 Kan. at 430. Spradling's argument raised no objections by defense counsel or admonishments by the trial court. On appeal, Macomber does not cite to any authority establishing that this argument evidenced ill will.

Finally, we must consider whether Spradling's argument could have affected the verdict. Macomber argues Spradling's statements "unfairly cut off the jury's consideration of the lesser offense that the defense sought." To decide how unfair this might have been, we consider the probability of a verdict for kidnapping.

As mentioned earlier, the trial court instructed the jury that to prove kidnapping, the State had to prove Macomber took or confined Saville "with the intent to hold such person as a shield or hostage or to facilitate flight or the commission of any crime or to terrorize the victim or another." See K.S.A. 21–3420. Testimony by law enforcement officers regarding the negotiations with Macomber to obtain Saville's release clearly established that she was being held as a shield or hostage. Macomber even admitted to telling Sheriff Hargrave that he held a pistol to Saville's head in order to keep law enforcement officers from entering the residence.

The evidence also proved that Macomber took and confined Saville to facilitate his flight from Shawnee and Marshall county authorities. Macomber told Saville, " 'If they don't find us in three or four days, I'll just have you drive me to Oklahoma.... [W]e'll take the back roads, and I'll tell you how to get there. We'll be fine.' " Macomber also admitted that he did not want law enforcement to know where he was because he did not want to be arrested.

Finally, with regard to proving that Macomber intended to terrorize Saville, the videotape of the initial encounter between Macomber and Saville memorialized his threatening behavior to compel Saville's compliance with his demands. Macomber also admitted that Saville said she was frightened by his pistol but that he still kept it nearby. Saville also said she did not try to escape for fear that Macomber would shoot her. When Macomber told Saville: " 'I have two bullets, and one is for me,' " Saville understandably took this to mean the other bullet was for her.

Taken together, the evidence supporting kidnapping was both strong and plentiful. It is difficult to see how a rational juror could have doubted that Macomber acted with the requisite intent for kidnapping. We conclude under both statutory and constitutional harmlessness standards that the error did not affect the verdict. Macomber was not denied a fair trial by Spradling's argument.

INEFFECTIVE ASSISTANCE OF COUNSEL

***14** As in his other case on appeal, *State v. Macomber,* Case No. 107,205, unpublished case filed July 5, 2013, Macomber argues in his pro se brief that O'Keefe provided ineffective assistance of counsel. For the reasons stated in that opinion, we are unable to review the issue on the present record, and we also decline to remand for a hearing under *State v. Van Cleave,* 239 Kan. 117, 716 P.2d 580 (1986); see *Macomber,* Case No. 107,205.

MULTIPLICITY

Macomber argues in an amendment to his pro se brief that his kidnapping and criminal threat convictions were multiplicitous. "The issue of multiplicity is a question of law,

and this court's review is unlimited. [Citation omitted.]" *State v. Sellers,* 292 Kan. 346, 356, 253 P.3d 20 (2011). "If the convictions are based upon different statutes, the convictions are multiplicitous only when the statutes upon which the convictions are based contain an identity of elements." *State v. Thompson,* 287 Kan. 238, 244, 200 P.3d 22 (2009). The relevant provisions of the kidnapping and criminal threat statutes did not contain an identity of elements. See K.S.A. 21–3419(a)(1); K.S.A. 21–3420(a)–(b). This argument is without merit.

CUMULATIVE ERROR

Next, Macomber argues he was denied a fair trial by cumulative error. "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. [Citations omitted.]" *State v. Backus,* 295 Kan. 1003, 1016–17, 287 P.3d 894 (2012). "By necessity, if this court must apply a totality of the circumstances test, we will have to review the entire record and engage in an unlimited review. [Citation omitted.]" 295 Kan. at 1017.

Although this trial was not free from errors, the evidence was overwhelming. Macomber admitted to most of the crimes or their elements, and those in dispute were amply supported by the evidence. We conclude that the trial errors, considered cumulatively, did not violate Macomber's right to a fair trial.

SENTENCING

In his pro se brief, Macomber identifies a disparity between his sentencing and the sentencing guidelines journal entry of judgment. The journal entry of judgment shows Macomber's total prison term is 291 months, which would be the correct total if all of Macomber's sentences were run consecutively. But in open court the trial court sentenced Macomber to 233 months for Count I (kidnapping) and ran that sentence consecutively to the sentences for Counts II–V, which were run concurrently with each other. Because the maximum sentence in the latter group was 32 months for Count II (aggravated burglary), the total prison sentence imposed was 265 months, not 291 months. See *State v. Arrocha,* 42 Kan.App.2d 796, 798, 217 P.3d 467 (2009) (oral pronouncement of sentence controls over the journal entry).

***15** The journal entry of judgment contains other errors. For Count I (kidnapping) it cites "K.S.A. 21–3402(a)(b)(c)" as the statute violated, but that statute relates to second-degree murder. This error has been corrected by an order nunc pro tunc. However, the journal entry also identifies Count II as "aggravated battery," instead of aggravated burglary, though it provides the correct statutory citation. The record does not show this error has been corrected. On remand, the trial court should issue an order nunc pro tunc conforming the sentence to that imposed in open court, correcting the error misidentifying the crime of aggravated burglary, and showing that the sentence for Count IV (criminal possession of a firearm) is vacated. See *State v. Beaman,* 295 Kan. 853, 870, 286 P.3d 876 (2012).

The conviction on Count IV (criminal possession of a firearm) is reversed, and that sentence is vacated. The convictions are otherwise affirmed. The matter is remanded for an order nunc pro tunc showing that the conviction for criminal possession of a firearm is reversed and the sentence is vacated, conforming the total sentence to that announced in open court, 265 months, while showing Counts II, III, and V concurrent with each other and consecutive to Count I, and properly identifying the crime in Count II as aggravated burglary.

Affirmed in part, reversed in part, vacated in part, and remanded with directions.

Parallel Citations

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