No. 12-108795-A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

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STATE OF KANSAS
Plaintiff/Appellee

vs.

MICHAEL ANDREW PAULSON,
Defendant/Appellant

BRIEF OF APPELLEE

Appeal from the District Court of Saline County, Kansas
Honorable Rene S. Young, District Court Judge
District Court Case No. 2010 CR 804

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NATURE OF THE CASE

The defendant appeals from his convictions for second degree murder and attempted second degree murder.

STATEMENT OF THE ISSUES

ISSUE 1: VOLUNTARY MANSLAUGHTER AND ATTEMPTED VOLUNTARY MANSLAUGHTER WERE NOT LESSER INCLUDED OFFENSES UNDER THE FACTS OF THIS CASE; THEREFORE, THE DISTRICT COURT DID NOT ERR IN INSTRUCTING THE JURY.

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ISSUE 4: THE DISTRICT COURT DID NOT ERR IN ADMITTING HEARSAY STATEMENTS OF VALERIE PAULSON.

ISSUE 5: THE DISTRICT COURT DID NOT ERR IN ADMITTING STATEMENTS MADE BY THE DEFENDANT WHILE HE WAS INCARCERATED IN THE SALINE COUNTY JAIL.

ISSUE 6: THE DEFENDANT'S MIRANDA WAIVER AND STATEMENTS TO DEPUTY ALLEN WERE KNOWING AND VOLUNTARY; THEREFORE, THE DISTRICT COURT DID NOT ERR IN REFUSING TO SUPPRESS THE STATEMENTS.

ISSUE 7: AS THERE WERE NO TRIAL ERRORS, THE DEFENDANT WAS NOT DENIED HIS RIGHT TO A FAIR TRIAL AND CUMULATIVE ERROR DOES NOT APPLY.

ISSUE 8A: THE DISTRICT COURT DID NOT COMMIT REVERSIBLE ERROR WHEN IT ORDERED THE DEFENDANT TO REIMBURSE THE BOARD OF INDIGENTS' DEFENSE SERVICES FOR LEGAL REPRESENTATION PROVIDED BY AN APPOINTED ATTORNEY.

ISSUE 8B: THE DISTRICT COURT DID NOT ERR WHEN IT ORDERED RESTITUTION TO THE KANSAS CRIME VICTIM'S FUND ON BEHALF OF JESSIE PUTMAN.

STATEMENT OF FACTS

The defendant, Michael Andrew Paulson, was charged with First Degree Murder and Attempted First Degree Murder. (Vol. 1, pp. 116-119). On July 23, 2010, the defendant asked the district court to appoint him counsel as he was unable to obtain counsel due to a civil action against him, and the district court appointed the public defender. (Vol. 6, p. 2). The district court conducted a preliminary hearing on September 8, 2010, and appointed counsel, Mr. Paul Oller, represented the defendant during the hearing. (Vol. 12, p. 1). Once retained counsel entered his appearance on behalf of the defendant, the district court found that the defendant was no longer indigent but reserved until sentencing the request made by the Board of Indigent Defense Services for reimbursement of costs expended during the time the defendant was indigent. (Vol. 7, p. 5).

The defendant filed a Motion in Limine seeking to prohibit the State from introducing religious materials concerning the beliefs of the defendant's church regarding divorce and remarriage found on the defendant's computer. (Vol. 2, pp. 427-431). The district court denied the motion, finding that the materials were relevant to the allegations that the defendant killed his wife due to the fact she had been unfaithful, noting that the jury could give it the weight and credit they desired. (Vol. 25, pp. 76-77). This ruling was affirmed prior to trial commencing. (Vol. 31, pp. 608).

The defendant also filed a Motion in Lime seeking to prohibit the State from introducing any of his jail visits, phone calls or letters made while the defendant was in the custody of the Saline County jail. (Vol. 2, pp. 432-439). The State sought to introduce excerpts from a jail visit that the defendant had with his daughter, Kyrsten

Hoffman, on July 9, 2010, July 11, 2010, July 12, 2010, July 13, 2010, July 15, 2010, September 22, 2010, and June 21, 2011. (Vol. 18, pp. 207-215, 219, 221, 223, 224, 229, 236, 238, 241, 246, 247, 250, 254-255, 262-263; Vol. 19, pp. 15-16, 36, 68). The district court ruled that the excerpts were relevant as to the defendant's state of mind, motive, intent, premeditation and relationship between the parties. (Vol. 18, pp. 218-219, 220-221, 222, 224, 227; 238, 240, 242, 247, 249-250, 253, 260, 265; Vol. 19, p. 14-15, 35, 49-51, 77, 83-84).

The State also sought to introduce excerpts from a jail visit that the defendant had with his mother, Linda Paulson, on July 11, 2010, and his father, Michael Paulson, on July 12, 2010. (Vol. 18, pp. 215, 242-243). The court ruled that the excerpts were relevant to the defendant's state of mind, motive, intent, and relationship between the parties. (Vol. 18, pp. 217-218).

The district court held a hearing and found that certain passages from letters the defendant wrote from the Saline County Jail were relevant and admissible as to the defendant's state of mind and perceptions, relationship between the parties, premeditation and the defendant's intent. (Vol. 20, pp. 40, 42, 47, 50-51, 53-54, 74, 86).

The defendant filed a Motion to Suppress his statements to Ottawa County Deputy Allen alleging that the defendant did not voluntarily, knowingly, or intelligently waive his Miranda rights and that defendant's statements were not voluntary. (Vol. 2, pp. 468-477). Specifically, the defendant alleged that his emotional state and lack of sleep rendered his Miranda waiver ineffective and his statements involuntary. (Vol. 2, pp. 468-477). The district court denied the motion. (Vol. 20, p. 100). The defendant also filed Notice of Defense of Lack of Mental State. (Vol. 1, p. 182).

Jessie Putman was Valerie Paulson's sister-in-law and good friend. (Vol. 32, p. 844, 847). In late 2008, Valerie confided in Ms. Putman that there was strain in her marriage with the defendant due to some financial issues. (Vol. 32, p. 850). Valerie also shared this information with Danielle Norwood, Valerie's good friend. (Vol. 35, pp. 1711-1712, 1714). After Valerie told the defendant about the financial issues, Valerie stayed with Ms. Norwood for a short time. (Vol. 35, pp. 1715-1716). The parties reconciled and pursued counseling. (Vol. 33, pp. 1064-1065).

Kyrsten Hoffman, the biological daughter of Valerie Paulson and Allen Betts and adopted daughter of the defendant, also noticed that the relationship between her parents was not good while they lived in Lindsborg. (Vol. 33, pp. 1055-1056, 1059). Valerie Paulson started spending some time with Chuck Beemer, who had previously worked with the defendant. (Vol. 33, pp. 1067-1068). Kyrsten Hoffman started to question the relationship between Valerie and Chuck Beemer. (Vol. 33, p. 1068). As Kyrsten was growing up, the defendant told her that the family structure should be such that the man was the provider, head of the home, and discipliner, and that the woman's role was to take care of the home, children, and her husband. (Vol. 33, p. 1208).

The family later moved to Assaria, in 2009. (Vol. 32, pp. 853-854; Vol. 33, p. 1057). After the move, Valerie confided in Jessie Putman and Danielle Norwood that her relationship with the defendant had gotten worse. (Vol. 32, p. 855; Vol. 35, p. 1718). Valerie shared with Jessie Putman and Kevin Putman that she and the defendant did not get along and had even discussed divorcing. (Vol. 32, p. 855; Vol. 35, p. 1739). As 2010 progressed, Valerie continued to express her desire to leave the defendant. (Vol. 32, pp.

858-859; Vol. 35, p. 1725, 1742). Valerie also told Ms. Putman that the defendant had moved out of the bedroom and slept in the boy's bedroom. (Vol. 32, pp. 859-860, 864).

In 2010, Jessie Putman became aware that Valerie had a friendship with Daniel Fouard. Ms. Putman was also aware that Valerie had also had a relationship with Lewis "Chuck" Beemer. (Vol. 32, p. 857).

In late May to early June, 2010, the Paulsons went on vacation. Austin Paulson described that his parents really didn't get along and argued quite a bit during the vacation. (Vol. 34, p. 1417). Before leaving for vacation, Valerie told Jessie Putman that she was going to discuss divorce with the defendant. (Vol. 32, p. 865).

Valerie Paulson had some health issues, and the defendant had explained to Austin Paulson that Valerie's health issues were the result of being persecuted by the Lord and the Lord was giving her high blood pressure because she was dating other guys. (Vol. 34, p. 1433, 1448).

In June, 2010, when the boys were at church camp, the defendant contacted Kyrsten and asked her to come to the residence in Assaria. (Vol. 33, pp. 1074-1075). The defendant told Kyrsten that Valerie was not home yet and wondered where she was. (Vol. 33, p. 1075). The defendant called Valerie Paulson's friend, Dawn Kurtz, looking for Valerie. (Vol. 35, p. 1785). The defendant told Dawn Kurtz that he suspected Valerie was having an affair and asked if Dawn knew anything about it. (Vol. 35, p. 1786). Dawn Kurtz called Valerie and told her that the defendant and Kyrsten were looking for her. (Vol. 35, p. 1787).

When Valerie pulled up, the defendant went outside and got her keys. (Vol. 33, pp. 1076-1077). The three sat in the living room and the defendant confronted Valerie

about what was going on. (Vol. 33, p. 1077). When Valerie told him nothing was going on, Kyrsten brought up Chuck Beemer's name. (Vol. 33, pp. 1077-1078).

The defendant raised his voice and asked Valerie what she had been doing with Chuck Beemer. (Vol. 33, pp. 1078-1079). Valerie Paulson paled and remained quiet. The defendant called Valerie some names, and Valerie just sat there. (Vol. 33, p. 1079). At one point, Valerie told the defendant not to throw his coffee at her. Valerie also said a couple of times she would rather not continue the conversation unless there was another man present. (Vol. 33, p. 1080).

Kyrsten Hoffman told her dad to calm down and suggested several times that he go outside to calm down. (Vol. 33, pp. 1080-1081, 1221). Valerie said she was tired and wanted to go to bed. Kyrsten believed that her mom went into the bathroom. (Vol. 33, p. 1081). Valerie Paulson texted Jessie Putman and told Ms. Putman she had locked herself in the bathroom because Kyrsten and the defendant had accused her of having an affair, and Valerie and the defendant had gotten into a big argument. (Vol. 32, p. 867). Days later, Valerie told Jessie that she was scared of the defendant while she was in the bathroom. (Vol. 32, p. 868).

The Paulson family, including the boys and Kyrsten, went to the defendants' sister's home in Augusta. (Vol. 33, p. 1086). In the early morning hours of July 5, 2010, the defendant went to the bedroom where Kyrsten was sleeping and showed her two text messages he had found on Valerie's cell phone. (Vol. 33, pp. 1087-1088). One text message said "Good morning beautiful," and the other message said, "I love you Valerie." (Vol. 33, p. 1088; Vol. 47, p.1-Exhibits 464, 465).

The defendant told Kyrsten Hoffman he was going to wake Valerie up and take her for a drive to talk to her about the messages. (Vol. 33, p. 1089). While the defendant and Valerie were still in Augusta, the defendant went to Austin and asked him if Valerie had used Austin's phone. When Austin told the defendant Valerie had used it to check her email, the defendant tried to gain access to Valerie's email account. (Vol. 34, p. 1351). The defendant told Austin that when he and Valerie had gone for a drive after he discovered the text messages, Valerie admitted to previously having another guy. (Vol. 34, p. 1429, 1434).

When the defendant, Valerie, and the boys left Augusta to drive back to Assaria, Nathan and Austin slept. (Vol. 34, p. 1355, 1490). Austin didn't wake up until they were close to Salina and heard his mom and dad arguing about the guy she was having an affair with. (Vol. 34, p. 1356, 1429). The defendant told Valerie he was going to drop her off at this guy's house, and Valerie said she didn't want to be dropped off. (Vol. 34, p. 1356). The defendant commented to Valerie that this guy was her boyfriend and loved her. (Vol. 34, p. 1358). Austin said his mom begged the defendant to quiet down because she didn't want to wake the boys or have them hear the conversation. (Vol. 34, pp. 1356-1357, 1430).

On July 5, 2010, the defendant called Jessie Putman at 4:25 p.m. and 4:47 p.m., which was unusual as Jessie Putman had never received a phone call from the defendant before. (Vol. 32, p. 868; Vol. 47, p. 1-Exhibits 336, 338). Jessie called the defendant back at 5:10 p.m. (Vol. 32, p. 869; Vol. 47, p. 1-Exhibit 346). The defendant told Jessie he was outside her front door and Valerie needed a place to stay. When Jessie went outside, Valerie was sitting on the front porch and was shaken and withdrawn with her

head down. (Vol. 32, p. 869). The defendant was angry and upset. The defendant told Jessie that he and Valerie were divorcing and Valerie needed a place to stay. (Vol. 32, p. 870). Valerie had only her purse with her and did not have her vehicle, medication or cell phone as the defendant had her cell phone. (Vol. 32, pp. 879, 881, 889).

Once Valerie and Jessie went inside, Valerie started shaking and crying. Valerie told Jessie that the defendant had seen a text message from Daniel Fouard and was very upset. (Vol. 32, p. 871). Valerie told Ms. Putman that during the trip back, the defendant cursed Valerie, accused her of having an affair, told her she should kill herself as she wasn't worth living, and prayed openly to God to kill her. (Vol. 32, p. 872).

Kyrsten called her dad and learned that he had figured out that the other guy was Daniel Fouard. The defendant gave her Daniel Fouard's address when she asked for it. (Vol. 33, p. 1091). Kyrsten Hoffman went to Daniel Fouard's residence and talked to his son. (Vol. 33, pp. 1092-1093). Kyrsten learned that Valerie had been at the Fouard residence to make them dinner. (Vol. 33, p. 1093-1094). When Kyrsten left, she went to Jessie Putman's home to talk to Valerie. (Vol. 33, p. 1094). Valerie Paulson told Kyrsten that she loved her and her brothers and would never take the boys away from the defendant. Kyrsten had never heard her mother threaten to take the boys away. (Vol. 33, p. 1096).

Meanwhile, the defendant and the boys returned to Assaria. Kyrsten called the defendant and told him what she had learned from Nathan Fouard. (Vol. 33, p. 1094). About an hour later, the defendant told Nathan and Austin they were leaving again. (Vol. 34, p. 1361). When Austin and Nathan got into the pickup, they both saw that the defendant's gun was now in the truck. (Vol. 34, pp. 1362-1363, 1492-1493). Nathan

Paulson later admitted to Kyrsten that he had not told anyone about the gun because he didn't want to get his dad in trouble. Kyrsten Hoffman stated both boys had expressed many times about not wanting to get their dad in trouble. (Vol. 33, p. 1191).

The three went to Daniel Fouard's house but nobody was home. (Vol. 34, pp. 1363-1364). The defendant went to the Putman residence, pulled to the side of the road, and called his boss, Keenan Brown. (Vol. 34, p. 1364). The defendant told Mr. Brown that he had found out that Valerie was involved with another man after wondering about it for the past couple of weeks. (Vol. 35, pp. 1816-1818).

After talking to her mother, Kyrsten Hoffman went outside, and the defendant pulled up into the driveway. Kyrsten urged the defendant to go talk to Valerie. (Vol. 33, p. 1097). After the defendant and Valerie talked privately, the defendant walked outside and talked to Kyrsten Hoffman. The defendant was upset. (Vol. 32, p. 877). The defendant told Kyrsten Hoffman that he asked Valerie if she was physically involved with Daniel Fouard, and Valerie responded that she didn't have to tell him anything more. (Vol. 33, pp. 1192-1193). The defendant said he wanted to hear Valerie say she loved him, was remorseful, and wouldn't do it again, but Valerie didn't tell him that. (Vol. 33, pp. 1193, 1274; Vol. 34, p. 1332).

Later, Valerie told Jessie that when she and the defendant talked privately, the defendant was still very angry and upset. The defendant told Valerie that he wanted her to admit that she was remorseful and was sorry for what she had done. (Vol. 32, p. 965).

The defendant and the boys drove to Daniel Fouard's house again. (Vol. 34, p. 1365). The defendant got out of the truck and talked to Daniel Fouard. (Vol. 34, p.

1366). The defendant told Nathan that Daniel Fouard denied a physical relationship with Valerie, but the defendant didn't believe him. (Vol. 34, p. 1367, 1431, 1436).

Later in the evening, Valerie told Jessie Putman that the defendant was supposed to be filing for divorce the following day and that she hoped that he would as she wanted to divorce him. (Vol. 32, p. 880). After it got dark on July 5, 2010, the defendant came back to Jessie Putman's residence and knocked on the door. Jessie did not answer the door and the defendant left. (Vol. 32, p. 881). That evening, Valerie Paulson talked to Dawn Kurtz by phone and told her that the defendant knew everything. (Vol. 35, pp. 1799-1800).

While talking to the defendant on the phone that evening, Kyrsten Hoffman suggested that he and the boys stay with her in McPherson. (Vol. 33, pp. 1100-1101). The defendant mentioned he wanted to see a lawyer in the morning. (Vol. 33, p. 1101).

Later in the evening, the defendant talked to Austin about the defendant getting a divorce and custody. Austin said the defendant prayed much of the night. Austin said his dad may have asked Austin to join him in praying for Valerie. (Vol. 34, p. 1369). Austin told Kansas Bureau in Investigation agents that, prior to the homicide, the defendant told him and Nathan they needed to pray for their mom. (Vol. 34, p. 1433).

The morning of July 6, 2010, told Nathan that Valerie would be able to live in the house. The defendant told Nathan that his mom was sick and that it could get bad. (Vol. 34, p. 1497).

On July 6, 2010, Jessie Putman left her cell phone for Valerie while Jessie went to work. (Vol. 32, pp. 884-885). Valerie talked to Dawn Kurtz and told her that she was afraid of going back out to the house because she didn't know what the defendant might

do. (Vol. 35, p. 1791). After Jessie Putman got off work at noon, she returned home and Valerie told her that the defendant was going to move his things from the house, and Valerie could get back into the house as the defendant and the boys were staying with Kyrsten Hoffman. (Vol. 32, pp. 885-886). At 1:35 p.m., Valerie Paulson texted Kyrsten Hoffman from Jessie Putman's cell phone and asked if the defendant and the boys had come yet. (Vol. 47, p. 1-Exhibit 406). At 1:41 p.m., Valerie Paulson texted the defendant from Jessie Putman's cell phone and asked him if she could go to the house yet. (Vol. 47, p. 1-Exhibit 407). At 1:47 p.m., the defendant called Valerie Paulson on Jessie Putman's cell phone, and they talked for two and a half minutes. (Vol. 47, p. 1-Exhibit 409). The defendant told Valerie that she could have her car and the house as long as she didn't keep the boys from him. Valerie told Jessie Putman that she would never keep the boys from the defendant. (Vol. 32, p. 887).

At some point while Jessie Putman was at work, Daniel Fouard dropped off a cell phone for Valerie. (Vol. 32, p. 889).

On July 6, 2010, Kyrsten Hoffman spoke to the defendant by phone in the morning. (Vol. 33, p. 1101). The defendant said he couldn't do it when she asked him about seeing an attorney. (Vol. 33, pp. 1101-1102). Kyrsten said the defendant's views on divorce were that divorce wasn't an option. (Vol. 33, p. 1102). Kyrsten Hoffman knew that her parents spoke by phone on July 6, 2010, but it was Kyrsten's impression that they had not worked things out. (Vol. 33, p. 1275).

The defendant and the boys loaded up the defendant's guns, photo albums and file cabinets. (Vol. 34, p. 1377). Before they left the house, Nathan Paulson noticed that one of the photographs in the front room had been changed and a photograph of Daniel

Fouard had been placed over the defendant's face in that photograph. (Vol. 34, p. 1501). Before going to McPherson, the defendant withdrew $7,900.00 from his First Bank account and $6,700.00 from his Bank of America accounts. (Vol. 34, p. 1379, 1498; Vol. 35, pp. 1850, 1858).

The defendant drove to McPherson to stay with Kyrsten Hoffman. The defendant brought in a bank envelope with cash in it, and put in a drawer, and told Kyrsten he would tell her later what he wanted her to do with it. (Vol. 33, pp. 1103-1104; Vol. 34, p. 1322). The defendant said he needed to run some errands. When Kyrsten Hoffman asked the defendant if he wanted her to come with him, the defendant said no. (Vol. 33, p. 1104).

Before he left Ms. Hoffman's residence, the defendant, who had previously had a vasectomy, pulled out a calendar and started talking about how he believed that Valerie had suffered a miscarriage due to her health problems. (Vol. 33, pp. 1105, 1175). The defendant questioned whether Valerie had been pregnant with Daniel Fouard's baby at some point. (Vol. 34, p. 1333). Kyrsten Hoffman described him as depressed and angry. (Vol. 33, pp. 1277-1278). Ms. Hoffman again asked the defendant if she could go with him and he said no. (Vol. 33, p. 1105).

At 4:25 p.m., the defendant left a message with Debbie Richter whom he called earlier in the day about a rental house. (Vol. 34, pp. 1465, Vol. 47, p. 1-Exhibit 332). The defendant told Ms. Richter that he was heading toward Assaria and wanted to look at her rental house but stated he wasn't coming especially for that reason. (Vol. 47, p. 1-Exhibit 332). At approximately 6:00 p.m., the defendant looked at the Assaria rental house. (Vol. 34, pp. 1466-1467). The defendant met with the Richters, and they

described him as wearing cargo shorts, a dark blue t-shirt, baseball hat, and possibly sandals. (Vol. 34, pp. 1471, 1482).

Later, the defendant called Kyrsten Hoffman and Austin Paulson to talk to them. (Vol. 33, p. 1107). The defendant asked Kyrsten and Austin if they could keep a secret from their mother. (Vol. 33, p. 1296; Vol. 34, p. 1333, 1336, 1382). The defendant told them that he wanted to go to the residence and see if Valerie would talk to any other guys on the phone while she was in the house because he knew she would be alone. (Vol. 33, pp. 1107, 1188; Vol. 34, pp. 1336, 1382).

Kyrsten Hoffman had spoken to her mother earlier in the day, and her mother expressed that she wanted to return to the house, take a shower, and go to sleep. Kyrsten Hoffman said she had earlier shared this information with her father. (Vol. 33, p. 1108).

After telling her he was going to go to his residence in Assaria, the defendant continued to text Kyrsten. The defendant told her about his family and how his aunt had lost her parents at a young age. The defendant said he looked up to his aunt because she was so young when she was left to take care of her siblings. The defendant commented that Kyrsten should visit with this aunt. The defendant told Kyrsten not to hold supper as he probably would not be there. (Vol. 33, p. 1110).

Before Valerie and Jessie Putman headed out to Assaria, Valerie told Jessie Putman that the defendant was out of the house, and Valerie could get back in. (Vol. 32, p. 894). Valerie and Jessie Putman left in the Putman's vehicle and went to Jimmy John's to eat prior to going to Assaria. (Vol. 32, pp. 895-896). The two ladies arrived at 5:34 p.m. and left at 6:01 p.m. (Vol. 48, p. 2-Exhibit 538).

After Valerie and Jessie Putman left Jimmy John's, Valerie drove them to Assaria and parked in front of the residence. (Vol. 32, p. 898). Jessie Putman asked Valerie if the defendant was there, and Valerie said no. Jessie asked Valerie if the defendant would park in the garage, and Valerie said the defendant never parked in the garage. (Vol. 32, p. 899). Kyrsten, Austin, and Nathan all said that the defendant didn't park his truck in the garage. (Vol. 33, p. 1121; Vol. 34, 1376, 1500).

Valerie and Jessie Putman walked through the unlocked front door, and Valerie immediately noticed that some portraits in the residence were in the wrong place and some of the photographs had cut-out pictures of other men, including Allen Betts and Chuck Beemer, over the defendant's face. (Vol. 32, pp. 900-901). Nathan told Kyrsten Hoffman that on July 5 or 6, 2010, the defendant had cut out pictures of other guys and placed their heads over the defendant's head in family photographs in the residence. (Vol. 33, p. 1193).

At 6:39 p.m., Valerie Paulson texted Daniel Fouard from her new cell phone telling him that she just got home. (Vol. 49, p. 2-Exhibit 636).

The ladies cleaned the kitchen and swept the floor, but did not mop it. (Vol. 32, pp. 903-904, 909-910). While she was in the residence, Jessie Putman also started looking around the residence. Jessie walked about half-way up the stairs to Austin's bedroom but turned around and came back down because it was hot. (Vol. 32, p. 905). Jessie Putman said that she was positive that there were no knives lying around in the residence, including the stairs going up to the loft and the dining room. (Vol. 40, pp. 2885-2886). Kyrsten described that her mother liked things clean and organized and in

place. Kyrsten said she had never seen things lying on the counter unless they were making dinner. (Vol. 33, p. 1120).

After she and Valerie were done cleaning the kitchen, the counters were clean and there were no knives left on the counters. (Vol. 32, p. 916; Vol. 45, p. 3-Exhibits 111, 112, 113; Vol. 48, p. 1-Exhibits 488). While Valerie was inside the residence, she spoke with Daniel Fouard by cell phone and also tried to get her medications refilled at Walgreen's as none of her medications were at the house. (Vol. 32, pp. 917-918).

At 6:47 p.m., Valerie Paulson received a phone call from Daniel Fouard which lasted two and a half minutes. (Vol. 49, p. 2-Exhibit 638). At 7:09 p.m., Daniel Fouard texted Valerie Paulson, asking her if she was okay. (Vol. 49, p. 2-Exhibit 641). At 7:10 p.m., Valerie Paulson called Daniel Fouard, and the phone call lasted two and a half minutes. (Vol. 49, p.2-Exhibit 642). At 7:21 p.m., Valerie Paulson called Walgreen's and the phone call lasted one minute, fifteen seconds. (Vol. 37, p. 2171; Vol. 49, p. 2-Exhibit 644). At 7:22 p.m., Valerie called Walgreen's again, and the phone call lasted a little over three minutes. (Vol. 49, p. 2-Exhibit 645).

While Valerie was talking to Daniel Fouard in the bedroom, Jessie Putman could not hear the conversation. (Vol. 32, p. 918). While they talked in the kitchen, Valerie told Jessie Putman that Daniel Fouard was going to lend her the money to divorce the defendant. (Vol. 32, p. 920). There was also a conversation about Valerie Paulson having Daniel Fouard's photograph on her cell phone, but these conversations had occurred earlier. (Vol. 32, p. 921, Vol. 40, pp. 2886-2887). While they were in the residence, Valerie and Jessie Putman never discussed any intimate details about Valerie's relationship with Daniel Fouard. (Vol. 32 pp. 923, 924).

After Valerie and Jessie Putman finished cleaning, Jessie got a phone call at 7:25 p.m. from her mother-in-law, which would have been Valerie's mother. (Vol. 32, pp. 925-926). Valerie told Jessie Putman to answer the phone, but Jessie missed the first phone call. Before Jessie called her mother-in-law back, she told Valerie to get her things together and Jessie would step outside to make the phone call. (Vol. 32, p. 927). At 7:26 p.m., Valerie Paulson texted Daniel Fouard that she had no refills. (Vol. 49, p. 2-Exhibit 646). At 7:27 p.m., Daniel Fouard called Valerie Paulson and the call lasted just under two minutes. (Vol. 49, p. 2-Exhibit 647). The subsequent calls to Valerie Paulson's cell phone were not answered. (Vol. 49, p. 2-Exhibits 648-654).

Jessie stepped right outside the back door but could still see into the kitchen because the inside door was open. (Vol. 32, p. 928). Jessie Putman dialed her mother-in-law's number at 7:37 p.m. and started talking to her. (Vol. 32, p. 929; Vol. 47, p. 1-Exhibit 421). Shortly after beginning the phone call, Jessie Putman saw the defendant run from the dining room, through the kitchen, and toward the back bedroom. (Vol. 32, p. 929). Jessie heard Valerie start screaming, saying, "Stop, no, Andy, oh God, no, stop." (Vol. 32, p. 930). Jessie was certain that the defendant did not stop in the kitchen and did not pick anything up while he ran through the kitchen. (Vol. 32, p. 943).

Jessie Putman attempted to disconnect her phone call and call 911 but was unsuccessful. (Vol. 32, pp. 930-931). Jessie Putman still heard Valerie screaming so she put her phone back into her pocket and started to go back inside to help. When Jessie Putman started to go inside the back door, the defendant was waiting for her and stabbed her in the abdomen. (Vol. 32, p. 931). Jessie Putman described the defendant as calm, cool, and collected. (Vol. 32, pp. 932, 934). After the defendant stabbed her, Jessie

Putman started backpedaling out of the residence and down the stairs. The defendant continued to repeatedly stab her in her chest area. (Vol. 32, p. 936). Jessie Putman started hitting, scratching, screaming for help, and blocking the defendant's attack. During their struggle, both the defendant and Jessie Putman fell to the ground. (Vol. 32, p. 937). The defendant dropped the knife and Jessie Putman tried to reach for it while she was on her stomach, but the defendant got it and stabbed Jessie in the back three times. (Vol. 32, p. 938).

Jessie Putman reached for her phone and dialed 911, all the while screaming for help. During the call, the defendant came back outside and started attacking Jessie Putman again by stabbing her in her chest and trying to get the phone away from her. (Vol. 32, p. 941). Jessie Putman asked the defendant why he was doing this and he looked at her and coherently said, "You're the reason we're getting divorced, you're the reason she is leaving me." (Vol. 32, pp. 941-942). Jessie recalled that the defendant had multiple layers of clothing on. Jessie said the defendant never raised his voice at her during the attack. (Vol. 32, p. 954). Jessie Putman said that when the defendant first ran through the kitchen toward the bathroom and when he was attacking her, he never appeared dazed or confused. (Vol. 40, p. 2891).

The defendant went back into the house, and Jessie ran away from the house to her car and drove to Lowe's. (Vol. 32, pp. 944-946, 948). Investigator Matthew Halton was off-duty when he was leaving Lowe's on July 6, 2010. Investigator Halton saw a female get out of a vehicle that was parked near the entrance of Lowe's. The female was screaming for help as she moved toward the entrance. (Vol. 32, p. 791). The female told

Investigator Halton that she had been stabbed in Assaria by the defendant. (Vol. 32, p. 793).

When Jessie Putman arrived at Salina Regional Health Center, Dr. Jody Neff noted that she was in hemorrhagic shock caused by massive blood loss and had multiple stab wounds to both sides of her chest, upper extremities and back. (Vol. 35, p. 1614, 1622). During surgery, Dr. Neff discovered that Jessie Putman had suffered three penetrating injuries to her small intestine as well as bleeding from her abdominal wall. (Vol. 35, pp. 1615-1616). Jessie survived her injuries. (Vol. 32, pp. 953-954).

Shortly after 8:00 p.m. on July 6, 2010, Saline County Deputy Kristopher Kite responded to 124 East Second in Assaria, Kansas, in reference to a possible stabbing. (Vol. 31, pp. 703, 711). When Deputy Kite arrived, he and Trooper Smith discovered a deceased white female in the bathtub of the hall bathroom. (Vol. 31, pp. 705-706). The female had what appeared to be stab wounds to her exposed right side. Deputy Kite observed a knife that was lying on the floor underneath the kitchen counter. (Vol. 31, p. 706). Deputy Kite also noticed that the garage door on the North was open, but no vehicles were located in the garage. (Vol. 31, pp. 707-708).

Lieutenant Wayne Pruitt of the Salina Police Department was the communications supervisor for Saline County on July 6, 2010. (Vol. 32, p. 801). On July 6, 2010, Jessie Putman made a 911 call at 7:38 p.m. (Vol. 32, p. 805, 807). Jessie Putman was screaming and the call cut off before the 911 operator could talk to Ms. Putman. The 911 operator tried to call Ms. Putman's cell phone back two times but the calls went to voicemail. (Vol. 46, p. 1-Exhibit 175). The 911 operators started receiving 911 phone calls from individuals at Lowe's at 7:47 p.m. (Vol. 32, p. 809).

The defendant called Kyrsten Hoffman and stated a couple of times that he had killed her. (Vol. 33, pp. 1111-1112). Kyrsten asked him what he meant, and the defendant kept saying he killed her. (Vol. 33, p. 1112). When Ms. Hoffman asked if she needed to call an ambulance, the defendant responded no and said that she was gone. (Vol. 34, p. 1336). The defendant told Austin that he was weak, and Valerie and Jessie Putman were dead and that the defendant would be dead soon. (Vol. 34, p. 1384). Meanwhile, Kyrsten called 911 at 7:53 p.m. (Vol. 33, p. 1113, 1313).

When Investigator Irv Augustine examined the crime scene, he noted that the kitchen floor had water spots. (Vol. 35, p. 1632). Investigator Augustine located a piece of black plastic in the main bathroom tub after Valerie Paulson's body was removed. (Vol. 35, p. 1655). When Investigator Augustine examined the knife that had been located on the kitchen floor, it was missing part of the plastic handle. (Vol. 35, p. 1656). The knife was located on the floor under the kitchen sink. (Vol. 48, p. 1-Exhibit 489). Investigator Augustine located Jessie Putman's cell phone inside the sink in the hall bathroom. (Vol. 35, p. 1663, 1672; Vol. 32, pp. 848-849).

Deputy Scott Allen of the Ottawa County Sheriff's Department was dispatched to the Bennington café on July 7, 2010. (Vol. 36, p. 1877). Later, when Deputy Allen asked how this all started, the defendant responded that his wife was cheating on him and was going to take his kids. (Vol. 36, p. 1882). After Saline County Sheriff Investigator Matt Fischer retrieved the defendant from Ottawa County on July 7, 2010, he photographed him. (Vol. 37, p. 2158). The defendant's right hand had cuts to the index and pinky fingers. (Vol. 37, p. 2212; Vol. 48, p. 3-Exhibit 545).

Saline County Deputy David Hamilton responded to the area where the defendant's truck was located. (Vol. 36, p. 1908). Deputy Hamilton described that the defendant appeared to have followed a field entrance into a cut wheat field and parked his truck right up against a row of trees. (Vol. 36, pp. 1908-1910). Deputy Hamilton noted that the keys were left on the floorboard, and there were numerous items inside the topper attached to the truck, including a rifle. (Vol. 36, pp. 1911-1912).

Kansas Bureau of Investigations Senior Special Agent Robert Jacobs helped process the defendant's truck. (Vol. 36, p. 1920). Agent Jacobs located a black briefcase and several notes that talked about the rocky relationship that the defendant and Valerie Paulson had as well as expressed thoughts that Valerie might leave the defendant and his resentment toward Valerie. (Vol. 45, p. 2-Exhibits 37, 40). The back of the truck contained suitcases, cardboard boxes, a filing cabinet, a firearm and ammunition. (Vol. 36, p. 1922, 1938). Agent Jacobs collected some swabs from areas that he thought could potentially be blood front the front passenger door, the rear tailgate, driver's side door, and the back window on the driver's side. (Vol. 36, pp. 1924-1926, 1967). Agent Jacobs observed no apparent stains in the interior of the truck. (Vol. 36, p. 1926). Agent Jacobs located Valerie Paulson's cell phone in the front cab of the truck between the driver's seat and passenger seat. (Vol. 36, p. 1929). Agent Jacobs also located a yellow legal pad that had some brown stains on it as well as an attorney business card that had some brown stains on it. (Vol. 36, p. 1929, 1931; Vol. 45, p. 2-Exhibits 36 and 41).

Later, Investigator Matt Fischer looked through a black nylon briefcase and found a piece of paper with a handwritten list of telephone numbers, including Daniel Fouard's number. (Vol. 37, pp. 2165-2166; Vol. 46, p. 1-Exhibit 224). Investigator Fischer found

another piece of paper in the briefcase that had Daniel Fouard's address on it and another number for Mr. Fouard. (Vol. 37, pp. 2167-2168; Vol. 46, p.1-Exhibit 221).

On July 11, 2010, Investigator Fischer seized a computer from the Assaria residence and submitted it to the Heart of America Computer Forensic Laboratory. (Vol. 37, p. 2172). The examiner located a document entitled Personal Victory that was created on September 29, 2007, and last accessed on July 5, 2009. (Vol. 37, pp. 2244-2245; Vol. 49, p.3-Exhibit 657).

The document contained a paragraph that stated: "Marriage-Love her. Divorce is not an option, unless she cheats, and then remarriage is not an option-better work it out! If she leaves in wickedness, maybe God will kill her. Honor, obey, support, do what is necessary. If I cheat, I deserve and should expect a miserable life and/or early death, and don't deserve anyones [sic] of [sic] affection." (Vol. 49, p. 3-Exhibit 657).

The defendant's clothes were sent to the Kansas Bureau of Investigation for testing. (Vol. 36, p. 1979). When the biologist, James Newman, tested several different areas of the defendant's shirt and shorts, he found no detectable areas of blood. (Vol. 36, pp. 2014-2015; Vol. 37, pp. 2097-2098, 2103-2103; Vol. 49, p. 1-Exhibit 580). Mr. Newman tested the legal pad found in the defendant's truck and detected blood on the pad. (Vol. 36, p. 2016; Vol. 49, p. 1-Exhibit 580). Mr. Newman also tested the attorney business card and detected blood on the card but could not obtain a DNA profile. (Vol. 36, p. 2017; Vol. 49, p. 1-Exhibit 581).

When Mr. Newman tested two swabs from the inside west wall of the bathtub where Valerie Paulson was located, he detected blood from both and determined that one matched the DNA profile of Valerie Paulson and one matched the DNA profile of Jessie

Putman. (Vol. 36, pp. 2049-2050; Vol. 49, p. 1-Exhibits 580, 581). When Mr. Newman tested the swab from the west wall between the hall closet and bathroom as well as the swab from the front of the bathroom door, he detected blood on both and determined that the swabs presented a mixed DNA profile with the major DNA profile being consistent with Jessie Putman and insufficient information to compare the partial minor DNA profile. (Vol. 36, pp. 2055-2056; Vol. 49, p. 1-Exhibits 580, 581).

Mr. Newman further tested swabs that Agent Jacobs submitted after processing the defendant's truck. (Vol. 36, p. 2037). Mr. Newman did not find any indication of blood on any of the swabs. (Vol. 36, p. 2038; Vol. 49, p. 1-Exhibit 580). Mr. Newman examined the knife that was found on the kitchen floor. (Vol. 36, p. 2039). Mr. Newman noted that the most prominent staining was toward the handle of the knife, and indicated the area was about two inches from the handle up the blade. (Vol. 36, pp. 2039-2040). Mr. Newman tested for the presence of blood on the knife handle. He also tested the area closest to the handle on the side of the blade without the broken handle. (Vol. 36, p. 2042). Mr. Newman also tested some an area on the side of the blade where the handle was broken toward the handle as well as about half-way down the blade. (Vol. 36, pp. 2042- 2043). Blood was indicated on all four areas of the knife that Mr. Newman tested. (Vol. 36, p. 2044).

All of the areas on the blade that Mr. Newman tested matched the known DNA profile of Valerie Paulson. (Vol. 36, p. 2050; Vol. 49, p. 1-Exhibit 582). The swabs from the handle of the knife were a mixture of two individuals, with the major DNA profile being consistent with Jessie Putman's known DNA profile. There was insufficient

information for comparison of the partial minor DNA profile. (Vol. 36, p. 2054; Vol. 49, p. 1-Exhibit 582).

Dr. Altaf Hossain, a forensic pathologist, autopsied Valerie Paulson. (Vol. 37, p. 2286). Valerie Paulson had been stabbed six times in the chest area. (Vol. 37, p. 2300; Vol. 48, p. 3-Exhibits 551). As a result of the stab wounds to her chest, Valerie Paulson's esophagus, lung, and heart were damaged and the wound to the heart was the most significant. (Vol. 37, pp. 2302, 2303, 2311). There was also significant blood loss to the left chest cavity. (Vol. 37, p. 2312). Valerie Paulson suffered seven stab wounds to the right side of her trunk area. (Vol. 37, p. 2304; Vol. 48, p. 3-Exhibit 559). The wound on Valerie Paulson's upper right abdomen, and three other stab wounds to her right side hit the liver and the diaphragm. (Vol. 37, pp. 2304-2305). There was a minimal amount of blood loss located in the area of the liver suggesting that Valerie Paulson's heart was pumping less efficiently when these injuries were inflicted. (Vol. 37, pp. 2312-2313, 2316).

Dr. Hossain said that in reviewing the photographs from the scene and comparing it to the autopsy photographs, it would be consistent that Valerie Paulson was lying in the bath tub on her right side when she was stabbed in her trunk area. (Vol. 38, pp. 2377-2378). In total, Dr. Hossain documented 18 stab wounds on Valerie Paulson. (Vol. 37, p. 2306).

Dr. Hossain stated that the left side injuries were inflicted first due to the most significant blood loss occurring in this area compared to the right side. (Vol. 37, p. 2313). Dr. Hossain said that Valerie Paulson would not have died right away after the chest injuries were inflicted upon her. (Vol. 37, pp. 2314-2315). Valerie Paulson's cause of

death was determined to be multiple stab wounds to the chest with the resulting blood loss and the manner of death was found to be homicide. (Vol. 37, p. 2319).

Agent Robert Jacobs conducted bloodstain pattern analysis. (Vol. 38, p. 2409). In the kitchen, Agent Jacobs noted bloodstains on the countertop next to the sink that had the appearance of being diluted. (Vol. 38, pp. 2430-2431; Vol. 46, p. 2-Exhibit 254). Jessie Putman washed the counters but left no standing water on the counters or around the sink. (Vol. 38, p. 2465). By the time Jessie Putman walked outside to call her mother-in-law, the counters were completely dry. (Vol. 38, pp. 2465-2466).

In the bathtub area of the hallway bath, there were several different bloodstain patterns. There was an impact pattern, a transfer pattern and a swipe pattern. (Vol. 38, pp. 2432-2433; Vol. 46, p. 2-Exhibits 258, 259, 260). The swipe pattern appeared to be moving downward and matched the known DNA profile of Jessie Putman. (Vol. 38, pp. 2433-2434). The impact pattern and the void within it were consistent with Valerie Paulson lying in a prone position in the bathtub when at least one stab wound occurred to her right side. (Vol. 38, pp. 2434-2435). The impact pattern marked as "II" was consistent with the known DNA profile of Valerie Paulson. (Vol. 38, p. 2454).

Kyrsten Hoffman spoke with the defendant on July 9, 2010, while he was incarcerated in the Saline County Jail, and the defendant asked about photographs of Valerie that were in the attic. (Vol. 33, pp. 1126-1129, 1140; Volume 47, p. 2-Exhibit 472). Ms. Hoffman stated she did not know why those photographs had been placed in the attic as they had always before been hanging on her parent's bedroom wall. (Vol. 33, pp. 1141-1142).

On July 11, 2010, the defendant, spoke with Kyrsten Hoffman, and stated, "I'm okay in here. I can take this. That was a fear. I can take it as long as there's hope out there." (Vol. 33, pp. 1127-1128, 1145; Volume 47, p. 2-Exhibit 473). During this same phone call, Kyrsten Hoffman asked the defendant if the internet and phone were shut off, and the defendant responded that he had canceled the internet and phone. (Vol. 47, p. 2-Exhibit 474).

On July 15, 2010, the defendant spoke to Kyrsten Hoffman and told her that two weeks prior, he felt it was all falling apart with the boys and the defendant felt like he was losing them. The defendant said that God took over everything and kicked the defendant and Valerie out of it. The defendant said he wanted the boys to have opportunities, and stated that he and Valerie didn't deserve the kids anymore. The defendant said he prayed that if he was damaging his children, he wanted God to take him out and said he prayed that not too many months prior. (Vol. 33, pp. 1131-1132, 1148; Vol. 47, p. 1-Exhibit 477).

On September 22, 2010, Kyrsten Hoffman visited the defendant in the jail and told him she was upset with an excerpt in the letter from him where the defendant told Kyrsten that she and her brothers had failed their mom. (Vol. 33, p. 1150). The defendant said that they all failed each other, but he failed Valerie more than anyone and she failed herself and he failed himself. The defendant said he had a lot for which to answer. (Vol. 33, pp. 1133-1134, 1150-1151, 1171-1172; Vol. 47, p. 2-Exhibits 479, 480, 481).

On June 21, 2011, the defendant spoke with Kyrsten Hoffman and made the statement, "Kyrst, you're doing fine. Okay. As long as you never do to Josh….as long as

you never do to Josh, then you're doing fine. Don't destroy your own family." (Vol. 33, pp. 1134-1135, 1172; Vol. 47, p. 2-Exhibit 483).

Kyrsten Hoffman received a letter from the defendant shortly after his arrest. (Vol. 33, pp. 1194-1195; Vol. 47, p. 2-Exhibit 470). In the letter, the defendant talked about his actions coming across as controlling but compared that control to a "lion protecting his pride from the hyenas and savages who try to take what doesn't belong to them." (Vol. 33, p. 1202; Vol. 47, p. 2-Exhibit 470). The defendant wrote that Kyrsten needed to allow her husband to be the lion and when others described it as controlling, to remember that those people were in rebellion against God's structure for the family. (Vol. 33, pp. 1203-1204; Vol. 47, p. 2-Exhibit 470).

In another letter sent out on June 23, 2011, the defendant wrote to Kyrsten Hoffman and stated that Valerie had disappointed him and hurt him. The defendant also wrote that the people who participated in or helped Valerie in what she was doing had no excuse for their decisions in being complicit. Vol. 47, p. 2-Exhibit 470).

On July 11, 2010, the defendant spoke with his mother, Linda Paulson, and the two spoke about the viewing of Valerie that had occurred that day. The defendant asked his mother, "Were any of those creeps there?" (Vol. 47, p. 2-Exhibit 484). On July 12, 2010, the defendant spoke with his father, Michael A. Paulson, and asked him about Valerie's funeral. The defendant said, "This may sound like a weird question-Were there any strange men paying extra attention to Val?" (Vol. 47, p. 2-Exhibit 485).

The defendant was evaluated by his expert, Dr. Marilyn Hutchinson, and admitted that the problems in his relationship with Valerie had started to escalate in May when Valerie Paulson didn't want to go on the family vacation. (Vol. 39, p. 2512).

The defendant admitted that he told his children that he was going to spy on their mother because he wanted to hear that Valerie regretted what she had done. The defendant went to the house when he knew Valerie would be there and parked in the garage. The defendant went upstairs to the loft area and waited. (Vol. 39, p. 2522). After Valerie and Jessie Putman arrived, the defendant continued to wait upstairs. (Vol. 39, pp. 2522-2523).

Dr. Hutchinson said the defendant either heard a phone call or conversation between Valerie and Jessie Putman in which Valerie supposedly said that she was having a sexual relationship with Daniel Fouard. The defendant said that he "flew down the stairs and exploded into her."

The defendant said that during the afternoon of July 6, 2010, the defendant told Valerie that she could go home if she didn't take the boys away and he wouldn't be there. (Vol. 39, pp. 2590, 2592).

The defendant told Dr. Hutchinson that after Valerie and Jessie Putman arrived at the residence on July 6, 2010, he didn't think Jessie would stay. (Vol. 39, p. 2620). The defendant described that Valerie was in the area of the hallway when he exploded into her. (Vol. 39, pp. 2636-2637). The defendant almost immediately called Kyrsten after the attack. (Vol. 39, p. 2648).

The defense forensic scientist examined the knife that was found in the kitchen. (Vol. 39, p. 2700). He concluded that the blood staining on the tip of the blade and the center of the blade on side B, was consistent with the known DNA profile of Valerie Paulson. (Vol. 39, pp. 2703-2704). He further concluded that the blood staining on the

tip of side A was a mixture of at least two individuals with the major contributor was Valerie Paulson and the secondary donor could be Jessie Putman. (Vol. 39, p. 2704).

The defendant admitted to Dr. William Logan that he had periodic suspicions about Valerie have extramarital activity and the suspicions increased around March, 2010. (Vol. 40, p. 2749). After the family moved to Assaria in April, 2009, the defendant had begun to question Valerie's friends and whether she had boyfriends outside the marriage. (Vol. 40, pp. 2750-2751).

The defendant told Dr. Logan that on July 6, 2010, he was going through photographs and found pictures of Chuck Beemer. (Vol. 40, p. 2764). The defendant never told Dr. Logan what he heard that triggered the attack. (Vol. 40, p. 2802). The defendant never mentioned to Dr. Logan that he ever heard anything while in the house that suggested that Valerie had been sexual with Daniel Fouard. (Vol. 40, p. 2769).

The district court instructed the jury on first degree murder, and also included an instruction for the lesser crime of Second Degree Murder. (Vol. 4, pp. 706-708; Vol. 40, pp. 2932-2933; 2947-2948; Vol. 41, pp. 2993, 3032-3034). The district court instructed the jury on attempted first degree murder as well as the lesser included offense of attempted second degree murder for the attempted murder of Jessie Putman. (Vol. 4, pp. 709-713).

During the State's closing argument, the State referenced that Valerie Paulson had denied her affair with Daniel Fouard perhaps out of fear. (Vol. 41, p. 3046). The State also spoke about the July 5, 2010, trip back to Salina when the defendant told Valerie Paulson that she should kill herself or God should kill her. The State referenced the document entitled "Personal Victory," arguing these were words the defendant lived by

and started to state, "This wasn't a Bible study about the defendant's" before defense counsel objected without the State finishing its statement. (Vol. 41, pp. 3046-3047). The State followed up by referencing specific statements that the defendant made to Valerie Paulson in the car on July 5, 2010, that mirrored the beliefs stated in the defendant's document entitled, "Personal Victory." (Vol. 41, p. 3047).

The State asked a rhetorical question in closing about the defendant's period of prayer the night before the homicide. Leading up to this, the State spoke about the defendant's document entitled "Personal Victory" as well as the comments in the car. The State also discussed what the defendant did the evening of July 5, 2010, including his statements to the boys that they needed to pray for their mother. The next statement was, "He prayed all night for God to kill Valerie?" (Vol. 41, pp. 3050-3052). The State proffered that its next sentence was going to be telling Nathan the next morning that Valerie was sick. (Vol. 41, p. 3052). The Court sustained the objection by defense counsel and admonished the jury to disregard the statement. (Vol. 41, p. 3053).

In his closing argument, defense counsel argued that there was no evidence of two attacks on Valerie. The defense further suggested that after the defendant stabbed Valerie Paulson in the chest, he fell into the tub at a different angle, while still stabbing her in the midsection. (Vol. 41, p. 3097). The defense asserted in closing that the defendant thought about Valerie again and wanted to see her so he went back into the bathroom, dropping Jessie Putman's phone in the sink. The defense repeated again that there was no second attack and said, "How do we know from the evidence that there isn't a second attack with the knife on Valerie after Jessie was stabbed?" The defense argued there was

none of Jessie's blood on Valerie and no cast off of Jessie's blood in the tub. (Vol. 41, p. 3099).

In rebuttal argument, the State addressed the defense argument that there were not two attacks on Valerie Paulson. The State argued that the defendant hadn't simply come back into the bathroom to look at Valerie Paulson because if he had, there would be none of Jessie Putman's blood in the bathtub. (Vol. 41, pp. 3113-3114). The State's next statement was, "And why do we know she was the last person to be attacked? It is predominately her DNA on that knife blade." The defense counsel then got up and stated in front of the jury that there was no science behind that argument and referenced pretrial testimony. None of this was in the trial record. (Vol. 41, p. 3114). After the defense objection and testimony to the jury, the State argued that even the part of the knife blade that had Jessie Putman's DNA on it was only as the minor contributor and further pointed out that Valerie Paulson was the major contributor to the blood on the knife blade. The State asked the rhetorical question, "Is this consistent with Jessie Putman being the last one stabbed with that knife?" The State continued by stating, "No, it's not," and concluded that portion of the rebuttal argument by saying, "Common sense tells you it was Valerie Paulson who was the last person stabbed with that knife because Valerie Paulson was the person the defendant was most angry with." (Vol. 41, p. 3115).

The jury convicted the defendant of second degree murder and attempted second degree murder. (Vol. 4, pp. 727-728; Vol. 42, p. 3150).

At sentencing, the district court denied the defendant's motion for new trial and specifically found that although the Court had admonished the jury to disregard the comment made by the State in closing argument regarding the defendant praying for God

to kill Valerie, upon reconsideration of the evidence, the comments were not necessarily improper based upon the evidence presented at trial. (Vol. 43, pp. 17-18). The district court sentenced the defendant to 165 months for second degree murder and a consecutive sentence of 61 months for attempted second degree murder. (Vol. 43, pp. 76-77). The Court reserved the issues of restitution, and reimbursement to the Board of Indigents' Defense Services (hereinafter BIDS). (Vol. 43, p. 78).

The district court ordered the defendant to reimburse BIDS $8,236.16, after finding the fees were reasonable for the work that Mr. Oller put forth and after consideration of the defendant's financial resources, and his future earning abilities. (Vol. 4, pp. 865-866; Vol. 44, pp. 35-36). In imposing BIDS reimbursement, the district court specifically found that the defendant was thirty-eight years old at the time of the offenses, had a long history of being gainfully employed, had no drug or alcohol issues, did not suffer from any physical or mental impairments that would prevent him from being gainfully employed once he was released, and would have no children to support upon his release. (Vol. 40, pp. 35-36).

The district court ordered the defendant to reimburse the Crime Victim's fund $18,091.25, finding that the Crime Victims' Fund was not a party to the civil settlement between Jessie Putman and the defendant. (Vol. 4, pp. 865-866; Vol. 44, p. 57).

<u>ARGUMENT AND AUTHORITIES</u>

ISSUE 1: VOLUNTARY MANSLAUGHTER AND ATTEMPTED VOLUNTARY MANSLAUGHTER WERE NOT LESSER INCLUDED OFFENSES UNDER THE FACTS OF THIS CASE; THEREFORE, THE DISTRICT COURT DID NOT ERR IN INSTRUCTING THE JURY.

The standard of review for reviewing jury instruction claims is as follows:

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

State v. Plummer, 295 Kan. 156, Syl. ¶ 1, 283 P.3d 202 (2012).

Here, the defendant requested the lesser included instructions; therefore, he properly preserved the issue. In determining whether an instruction is legally appropriate, this Court must determine whether the lesser included instruction is "legally an included offense of the charged crime." *Plummer*, 295 Kan. at 161. K.S.A. 22-3414(3), states that "where there is some evidence which would reasonably justify a conviction of some lesser included crime….., the judge shall instruct the jury as to the crime charged and any such lesser included crime."

In determining whether the instruction is factually appropriate, this Court has held that the analysis is similar to the sufficiency of the evidence consideration where this Court reviews the evidence in the light most favorable to the State in determining whether a rational factfinder could have found the defendant guilty beyond a reasonable doubt. *State v. McCaslin*, 291 Kan. 697, 710, 245 P.3d 1030 (citing *State v. Drayton*, 285 Kan. 689, 710, 175 P.3d 861 (2008). If this Court finds that the requested instructions were legally and factually appropriate, this Court must make a de novo determination of whether it is "firmly convinced that the jury would have reached a different verdict had the instructional error not occurred." *State v. Armstrong*, ___ Kan. ___, 324 P.3d. 1052,

1070 (May 23, 2014), citing *State v. Williams*, 295 Kan. 506, 515-16, 286 P.3d 195 (2012).

Voluntary Manslaughter and Attempted Voluntary Manslaughter are legally appropriate lesser included offenses of First Degree Murder and Attempted First Degree Murder. However, the requested instructions were not factually appropriate. In reviewing this, this Court must extend deference to the findings of fact made by the district court and it is inappropriate for this Court to reweigh the evidence or opine on the credibility of the witnesses. *Plummer*, 295 Kan. at 162.

Pursuant to K.S.A. 21-3403(a), Voluntary Manslaughter is the "intentional killing of a human being committed upon a sudden quarrel or in the heat of passion." The key components of voluntary manslaughter are an intentional killing and legally sufficient provocation. *State v. Mitchell*, 269 Kan. 349, 352, 7 P.3d 1135 (2000). Here, the defendant essentially argues that words he claims were spoken prior to him killing Valerie Paulson and attempting to kill Jessie Putman were sufficient legal provocation. The provocation that the defendant must demonstrate for a sudden quarrel or heat of passion manslaughter "must be of such a degree as would cause an ordinary man to act on impulse without reflection. [Citations omitted]." *State v. Guebara*, 236 Kan. 791, 796, 696 P.2d 381 (1985).

Whether provocation is legally sufficient requires an objective as opposed to a subjective inquiry. "The provocation, whether it be 'sudden quarrel' or some other form of provocation, must be sufficient to cause an ordinary man to lose control of his actions and his reason. [Citations omitted]. In applying the objective standard for measuring the sufficiency of the provocation, the standard precludes consideration of the innate

peculiarities of the individual defendant. [Citations omitted]." *Guebara*, 236 Kan. at 796. In fact, the provocation must be severe in order to constitute voluntary manslaughter. *State v. Drennan*, 278 Kan. 704, 713, 101 P.3d 1218 (2004).

"Mere words or gestures, however insulting, do not constitute adequate provocation, but insulting words when accompanied by other conduct, such as assault, may be considered. [Citations omitted]." *Guebara*, 236 Kan. at 797.

In *State v. McClanahan*, 254 Kan. 104, 865 P.2d 1021 (1993), the defendant was convicted of first-degree murder in the shooting death of his estranged wife's boyfriend. While the defendant and his wife were separated, he broke into the house where she was staying and when he saw her leave the bedroom where she had been with her boyfriend, he pushed her out of the way and entered the room, shooting the victim. The defendant testified that "he flipped" when he saw his naked wife come out the bedroom and get into a robe. The Court found that under the facts of the case, a lesser included instruction was not required. *McClanahan*, 254 Kan. at 115.

In *State v. Follin*, 263 Kan. 28, 947 P.2d 8 (1997), the Court upheld the district court's refusal to give a lesser included instruction of voluntary manslaughter. Follin, who was distraught over learning about his wife's infidelity and fearful of losing his family, stabbed and killed his two infant daughters. This Court affirmed the objective standard for determining provocation and found no legally sufficient provocation. *Follin*, 263 Kan. at 40.

The defendant cites *State v. Johnson*, 290 Kan. 1038, 1048, 236 P.3d 517 (2010), to support his position that the defendant need only be provoked by the circumstances. Specifically, the defendant cites the jury instruction given on heat of passion. However,

the *Johnson* Court was only called upon to determine whether the instruction which defined "heat of passion" was sufficiently broad enough to cover the term "sudden quarrel." *Johnson*, 290 Kan. at 1048. The Court was not, however, reviewing the issue of whether the instruction for "heat of passion" voluntary manslaughter was appropriate under the facts of the case because the issue was not before the court; therefore, *Johnson* is not particularly instructive.

Had the trial court instructed on voluntary manslaughter and attempted voluntary manslaughter, it would have been error. In *State v. Gooding*, 2010 Kan.App. LEXIS 75, [21]-[22] (October 3, 2014) , the Court of Appeals reversed a conviction for voluntary manslaughter, finding that because there was insufficient evidence of a sudden quarrel, there was no legal basis to uphold her conviction after the district court instructed the jury that voluntary manslaughter was a lesser included offense of first degree murder.

The only thing that happened prior to the killing Valerie Paulson and attempted killing of Jessie Putman in this case, even according to the defendant's statements to Dr. Hutchinson and Dr. Logan, was a conversation between Valerie Paulson and Jessie Putman. There was no confrontation with the defendant, and the ladies didn't even know the defendant was in the house. An ordinary man would not act on impulse without reflection based upon the circumstances that existed before the defendant ran downstairs with a knife and stabbed his wife to death and almost stabbed Jessie Putman to death. What happened prior to the defendant running downstairs was him hearing a door close. The defendant claims he just got confirmation of his wife's infidelity but that assertion is not supported by the record. The defendant had suspected for weeks that Valerie was involved with another person and had told his boss the previous day that it was

confirmed. Like *Follin*, the defendant had ample opportunity to calm himself after he learned of the affair.

Additionally, Jessie Putman stated emphatically that there was little discussion of Daniel Fouard in the residence and what discussion they did have was earlier during the time she and Valerie were in the residence. The telephone records also demonstrated that when the defendant ran downstairs and stabbed Valerie Paulson, at least eight minutes had passed since Valerie disconnected her last phone call with Daniel Fouard.

ISSUE 2: THE PROSECUTOR DID NOT COMMIT PROSECUTOR MISCONDUCT DURING CLOSING.

Appellate review of prosecutorial misconduct claims involves a two-step process. This Court must first decide whether the comments were outside the wide latitude a prosecutor is allowed, *e.g.*, in discussing the evidence. If so, there was misconduct. Secondly, if there is misconduct, this Court must determine whether the improper comments prejudiced the jury and denied the defendant a fair trial. *State v. Marshall*, 294 Kan. 850, 857, 281 P.3d 1112 (2012).

Prosecutors have wide latitude in fashioning its closing arguments. *State v. Scott*, 271 Kan. 103, 114, 21 P.3d 516 (2001) (citing *State v. Miller*, 268 Kan. 517, Syl. ¶ 4, 997 P.2d 90 (2000), *cert. denied* 534 U.S. 1047, 122 S.Ct. 630, 151 L.Ed.2d 550 (2001). In its closing argument, a prosecutor is permitted to draw reasonable inferences based upon the evidence presented. *State v. Tahah*, 293 Kan. 267, 277, 262 P.3d 1045 (2011). If the prosecutor's argument is not consistent with the evidence, the first step of the analysis is met. *State v. Bridges*, 297 Kan. 989, 1012, 306 P.3d 244 (2013).

The defendant has failed to meet the first prong in establishing prosecutorial misconduct, and the inquiry should end here. The State did not misstate evidence. The

defendant first alleges that the statement of the prosecutor that perhaps Valerie denied her affair with Daniel Fouard due to fear was not supported by the evidence. However, the evidence showed that when the defendant and Kyrsten Hoffman confronted Valerie in June, 2010, about her being out and Chuck Beemer's name was mentioned, Valerie paled and got very quiet. The defendant started calling her names and at one point, Valerie told the defendant not to throw his coffee on her and said she would not continue the conversation without another adult male present. Certainly, a reasonable inference can be drawn from this that Valerie Paulson was afraid of what would happen if she admitted to the affair with Daniel Fouard based on the defendant's reaction in June, 2010.

The defendant next contends that the prosecutor's statement about the document from the defendant's computer being a bible study was not supported by the evidence. Again, the State is allowed to draw reasonable inferences from the evidence. The title of the document was "Personal Victory."

The defendant also alleges that the State's rhetorical question concerning whether the defendant prayed for God to kill Valerie was not supported by the evidence in the record. On July 5, 2010, while in the car, the defendant told Valerie that he prayed for God to kill her. This is consistent with the defendant's letter to Kyrsten that he prayed for God to take him out if he was doing anything to damage his children. The defendant believed that Valerie was damaging the children by carrying on her affair and prayed to God to kill her. This evidences the defendant's intent and desire that Valerie Paulson die. This is also consistent with the document found on the defendant's computer which states that "If she leaves in wickedness, maybe God will kill her." The defendant points out that the trial court upheld the defendant's objection, but it should also be noted that

during post-trial motions, the district court stated that the prosecutor's statements weren't necessarily inconsistent with the evidence.

Finally, the defendant alleges that the prosecutor's statement that Valerie was attacked last and pointed out that it was predominantly her DNA on the knife blade. The defendant further asserts that the prosecutor continued in this vain by arguing that it was common sense based on the DNA evidence that Valerie was stabbed last. This is a misstatement of the record. The prosecutor continued her argument by stating, "Common sense tells you it was Valerie Paulson who was the last person stabbed with that knife because Valerie Paulson was the person the defendant was most angry with." The prosecutor is permitted to draw reasonable inferences from the record. The prosecutor did not violate any order in limine in this respect and based her argument on the evidence presented at trial. None of these statements were outside the wide latitude the prosecutor is allowed in discussing the evidence.

If this Court finds that it should proceed to the second step in the analysis, the State would submit that its comments did not prejudice the jury and did not deny the defendant a fair trial.

For years this Court has considered several factors in analyzing this second step: (1) whether the misconduct was gross and flagrant; (2) whether it was motivated by prosecutorial ill will; and (3) whether the evidence was of such a direct and overwhelming nature that the misconduct would likely have had little weight in the minds of jurors. None of these three factors has been individually controlling. *Marshall*, 294 Kan. at 857.

Since 2004, this court has also demanded 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 the third factor can ever override the first two factors, an appellate court must be able to say that both the K.S.A. 60-261 and *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967), harmlessness tests have been met.").

The Court has said that under the constitutional harmless error analysis defined in *Chapman v. California*,"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, Syl. ¶ 6, 256 P.3d 801 (2011), *cert. denied* 132 S. Ct. 1594, 182 L. Ed. 2d 205 (2012).

Under the harmless error analysis defined in K.S.A. 60-261, the test is equally clear. The court "determine[s] if there is a reasonable probability that the error did or will affect the outcome of the trial in light of the entire record." *Ward*, 292 Kan. 541, 256 P.3d 801, Syl. ¶ 6.

Under both standards, the party benefiting from the error here, allegedly the State, bears the burden of demonstrating harmlessness. *State v. Herbel*, 296 Kan. 1101, 299 P.3d 292 (2013). That burden is higher when the error is of constitutional magnitude. See *Herbel*, 296 Kan. at 1109-10 ("Clearly, the party benefiting from the constitutional error must meet a higher standard to show harmlessness than the standard required in nonconstitutional error.").

In determining whether prosecutorial misconduct was gross and flagrant, among the things considered are whether the comments were repeated, emphasized improper points, were planned or calculated, or violated well-established or unequivocal rules. *State v. Brown*, 295 Kan. 181, 214, 284 P.3d 977 (2012). In determining whether prosecutorial misconduct was motivated by ill will, among the things considered are whether the conduct was deliberate or in apparent indifference to a court's ruling. *Marshall*, 294 Kan. at 862. None of these considerations apply.

For the same reasons, there was no ill will on the part of the prosecutor. The prosecutor based her arguments on the evidence presented at trial. None of the points were improper and none violated any rules. Furthermore, there was no indifference to any court rulings to the contrary.

The jury was properly instructed that it was their job to weigh the evidence. (Vol. Vol. 4, p. 705). If this Court finds error, it was harmless as there is no reasonable probability that the error affected the outcome of the trial in light of the entire record; therefore, any error would not have impacted the verdict. The evidence against the defendant was overwhelming. Jessie Putman witnessed much of the events of July 6, 2010, and the defendant confessed to his children that he had killed their mother and mentioned that Jessie Putman was also likely dead.

A review of the entire record supports the conclusion that any error did not affect the outcome; therefore, the defendant's convictions should be upheld.

ISSUE 3: THE DISTRICT COURT DID NOT ERR WHEN IT PERMITTED THE STATE TO INTRODUCE RELEVANT EVIDENCE REGARDING THE DEFENDANT'S BELIEFS ON MARRIAGE AND DIVORCE.

When there is a challenge to evidence the trial court excludes or admits, the standard of review is as follows:

> "When considering a challenge to the admission of evidence, the first step is to determine whether the evidence is relevant. Relevant evidence is evidence having any tendency in reason to prove any material fact. Relevance is established by a material or logical connection between the asserted facts and the inference or result they are intended to establish. Once relevance is established, the second step requires the court to apply the statutory rules governing admission and exclusion of evidence. These rules are applied either as a matter of law or in the exercise of the trial court's discretion."

State v. Smith, ___ Kan. ___, 327 P.3d 441, Syl. ¶ 1 (June 27, 2014).

"Whether the probative value of otherwise relevant evidence outweighs its potential for undue prejudice is reviewed for abuse of discretion." *Smith*, 327 P.3d at 449, citing *State v. Phillips*, 295 Kan. 929, 949, 287 P.3d 245 (2012); and *State v. Wilson*, 295 Kan. 605, 621, 289 P.3d 1082 (2012).

A court abuses its discretion: "(1) When no reasonable person would take the view adopted by the trial judge; (2) when a ruling is based on an error of law; and (3) when substantial competent evidence does not support a trial judge's finding of fact on which the exercise of discretion is based." *State v. Huddleston*, 298 Kan. 941, 318 P.3d 140 (2014).

The defendant cites *State v. Leitner*, 272 Kan. 398, 34 P.3d 42 (2001), in support of his position that the document on the defendant's computer were not tied to the crimes charged against the defendant. In *Leitner*, the prosecutor cross-examined the defendant about her involvement with the Wicca religion. The *Leitner* Court ultimately held that the appellate record contained nothing to suggest that the defendant's abstract beliefs had any connection to her killing her husband. The Court held that because the evidence of the

defendant's practice of witchcraft was more prejudicial than probative, was not directly relevant to the crime charged, and served no purpose in impeaching the defendant, no reasonable person would take the view adopted by the trial court in admitting the evidence. *Leitner*, 272 Kan. at 416. Here, the document deals with the defendant's views on divorce and infidelity, which are issues directly relevant to issues of his motive, intent and premeditation. The defendant learned that Valerie had been unfaithful in their marriage. Additionally, the evidence presented at trial also established that Valerie Paulson was leaving the defendant and planned to pursue a divorce if the defendant did not pursue one himself. Furthermore, Valerie Paulson relayed to Jessie Putman the comments that the defendant made in the car prior to dropping Valerie off at the Putman residence on July 5, 2010, which mirrored the statements contained within the document. None of this evidence involves the practice of witchcraft to make the evidence more prejudicial than probative.

Even if the evidence was erroneously admitted, the admission was harmless. The statutory harmless error standard set forth in K.S.A. 60-261 and K.S.A. 60-2105 apply in determining whether there is a "reasonable probability the error affected the outcome of the trial in light of the record as a whole." *State v. Warrior*, 294 Kan. 484, 277 P.3d 1111 (2012). As the State was the party that benefitted from the admission of the evidence, it has the burden of demonstrating that the error was harmless. *State v. McCullough*, 293 Kan. 970, 983, 270 P.3d 1142 (2012).

Here, the defendant admitted to his children that he killed their mother and further told Austin Paulson that Jessie Putman was dead and he could have saved her. Jessie Putman's testimony establishes that the defendant attacked and killed Valerie Paulson

and tried to kill Ms. Putman. Any erroneous admission of the document regarding the defendant's religious beliefs is overcome by the strength of the State's evidence in this case.

ISSUE 4: THE DISTRICT COURT DID NOT ERR IN ADMITTING HEARSAY STATEMENTS OF VALERIE PAULSON.

As in the previous issues,

> "When considering a challenge to the admission of evidence, the first step is to determine whether the evidence is relevant. Relevant evidence is evidence having any tendency in reason to prove any material fact. Relevance is established by a material or logical connection between the asserted facts and the inference or result they are intended to establish. Once relevance is established, the second step requires the court to apply the statutory rules governing admission and exclusion of evidence. These rules are applied either as a matter of law or in the exercise of the trial court's discretion."

State v. Smith, ___ Kan. ___, 327 P.3d 441, Syl. ¶ 1 (June 27, 2014).

"When the adequacy of the legal basis of a district judge's decision on admission or exclusion of evidence is questioned, we review the decision de novo. [Citations omitted.]" *State v. Magallanez*, 290 Kan. 906, 920-21, 235 P.3d 460 (2010). See *State v. Shadden*, 290 Kan. 803, Syl. ¶ 4, 235 P.3d 436 (2010).

The district court found that the statements that Valerie Paulson made to Jessie Putman after Ms. Paulson was dropped off by the defendant on July 5, 2010, were admissible pursuant to K.S.A. 60-460(d)(2) and K.S.A. 60-460(d)(3). (Vol. 21, pp. 154-155).

K.S.A. 60-460(d)(2), permits the admission of contemporaneous statements if the court finds that the statement was made "while the declarant was under the stress of a nervous excitement caused by such perception." The trial court specifically found that

Valerie Paulson was still under the stress of the nervous excitement when she relayed the defendant's comments to Jessie Putman. (Vol. 21, pp. 154-155).

Pursuant to K.S.A. 60-460(d)(3), the Court may admit a statement on the grounds of necessity if "the declarant is unavailable as a witness, by the declarant at a time when the matter had been recently perceived by the declarant and while the declarant's recollection was clear and was made in good faith prior to the commencement of the action and with no incentive to falsify or to distort." The district court properly concluded that Valerie Paulson was unavailable, and that Valerie Paulson made the statements to Jessie Putman after she had just gotten out of the car where she had been subjected to the statements made by the defendant. The Court properly found these statements were made in good faith prior to the commencement of the action and properly concluded that Valerie Paulson had no incentive to falsify or to distort. (Vol. 21, pp. 154-155).

The defendant challenges the district court's ruling in this regard but the State submits the court's ruling is supported by the appellate record. When Valerie Paulson made the statements to Jessie Putman, Valerie was still shaken and upset. She didn't make any statements that she intended to pursue any type of vindictive action against the defendant. In fact, Valerie Paulson told Ms. Putman that she would never take the children away from the defendant in a divorce and characterized the defendant as a good dad. There was no ulterior agenda being furthered by Valerie Paulson when she made the statements to Ms. Putman; therefore, the district court's decision was supported by the record and should be upheld.

The district court also found that the statements that Valerie Paulson made to Jessie Putman in June, 2010, were admissible under K.S.A. 60-460(d)(1), as the

statements were made while Valerie Paulson was perceiving the event. (Vol. 21, pp. 159-165). The court also found the statements admissible under K.S.A. 60-460(d)(2), finding that Valerie Paulson was under the stress of nervous excitement while making the statements. The court further found the statements admissible pursuant to K.S.A. 60-460(d)(3), finding that Valerie Paulson was unavailable and had made the statements during a time when the matter had been recently perceived by Valerie Paulson and while her recollection was clear. The court also found that Valerie Paulson's statements were made in good faith prior to the commencement of an action and with no incentive to falsify or distort. The court further found the evidence relevant to show a discordant relationship. (Vol. 21, p. 165).

The defense further submits that the trial court erred in admitting testimony regarding the discordant marital relationship between Valerie and the defendant, and Valerie's state of mind but Kansas courts have routinely admitted marital discord evidence in cases involving marital homicide. *State v. Drach*, 268 Kan. 636, 649, 1 P.3d 864 (2000). Admissible evidence of marital discord can take many forms, including testimony by others who saw the couple fighting, arguing, or otherwise in conflict. *Drach*, 268 Kan. at 649. In *State v. Taylor*, the Court upheld the trial court's admission of the deceased wife's notebook in which she wrote about marital counseling and how the defendant's anger made her feel. The *Taylor* Court stated that the victim's discordant relationship with the defendant and fear of the defendant's temper was competent evidence because it had bearing on the defendant's motive and intent. *Taylor*, 234 Kan. 401, 408, 673 P.2d 1140 (1983).

As noted in *State v. Vasquez*, 287 Kan. 40, 53, 194 P.3d 563 (2008), "anger and jealousy in troubled romantic relationships are not necessarily logical or linear. Neither are they strictly time-bound. Rather, these volatile emotions may wax and wane; they may build over time or be tamped down by sudden or slow reconciliation."

The court found that statements made by Valerie Paulson to Jessie Putman concerning the financial situation in Lindsborg, in 2008, leading up to July, 2010, were admissible to show the nature of the parties' relationship and the discordant relationship. The court further concluded that the statements were admissible under K.S.A. 60-460(d)(3). (Vol. 21, pp. 167-177). The district court found that statements that Valerie Paulson made to Jessie Putman about the defendant's temper were admissible pursuant to K.S.A. 60-460(d)(3), and relevant to the relationship between the parties, marital discord, and the defendant's motive. (Vol. 21, pp. 189-190).

The district court found that the statements that Valerie Paulson made to Dawn Kurtz on July 6, 2010, were relevant to Valerie Paulson's state of mind and to show the events leading up to the homicide. The court further found that the statements were admissible pursuant to K.S.A. 60-460(d)(1) and (d)(3). (Vol. 21, pp. 234-239).

The district court found that statements that Valerie Paulson made to Danielle Norwood about the defendant's controlling and demeaning behavior toward her were relevant to Ms. Paulson's state of mind as well as the relationship between the parties. (Vol. 21, pp. 240-245). The district court found that the statements were admissible pursuant to K.S.A. 60-460(d)(3). (Vol. 21, p. 245). Additionally, the district court found that statements that Valerie Paulson made to Danielle Norwood shortly before July 6, 2010, about wanting a divorce from the defendant and that Valerie and the defendant

were sleeping in separate rooms, were relevant to the relationship between the parties and discordant relationship. The court further found that the statements were admissible pursuant to K.S.A. 60-460(d)(3). (Vol. 21, p. 249).

The court found that statements that Valerie Paulson made to her brother, Kevin Putman, in the months prior to her death in which Valerie stated things were not going well between her and the defendant were relevant to the relationship between the parties and admissible pursuant to K.S.A. 65-460(d)(3). (Vol. 21, pp. 249-253).

Here, the relationship between Valerie and the defendant started to deteriorate in 2008, when Valerie expressed her fear over telling the defendant about the financial situation. The parties separated briefly and reconciled but Valerie shared with those closest to her that her relationship with the defendant was troubled and that eventually compelled her to discuss pursing a divorce. When the parties moved to Assaria, the relationship between Valerie and the defendant got more tense and strained. As 2010 progressed, Valerie shared with her friends and family that things were worse between her and the defendant and she began to talk about divorce more frequently. The discordant relationship between Valerie and the defendant is a central factor of what led to the events of July 6, 2010. When the defendant learned that Valerie had been involved with other individuals, he was angry. When the defendant learned that Valerie intended to pursue a divorce, he became angrier. This evidence was properly introduced as the discordant marital relationship that existed between the defendant and Valerie Paulson prior to the divorce.

Even if the evidence was erroneously admitted, the admission was harmless. The statutory harmless error standard set forth in K.S.A. 60-261 and K.S.A. 60-2105 apply in

determining whether there is a "reasonable probability the error affected the outcome of the trial in light of the record as a whole." *State v. Warrior*, 294 Kan. 484, 277 P.3d 1111 (2012). As the State was the party that benefitted from the admission of the evidence, it has the burden of demonstrating that the error was harmless. *State v. McCullough*, 293 Kan. 970, 983, 270 P.3d 1142 (2012).

Here, the defendant admitted to his children that he killed their mother and further told Austin Paulson that Jessie Putman was dead and he could have saved her. Jessie Putman's testimony establishes that the defendant attacked and killed Valerie Paulson and tried to kill Ms. Putman. Any erroneous admission of hearsay statements of Valerie Paulson doesn't impact the strength of the State's evidence against the defendant.

ISSUE 5: THE DISTRICT COURT DID NOT ERR IN ADMITTING STATEMENTS MADE BY THE DEFENDANT WHILE HE WAS INCARCERATED IN THE SALINE COUNTY JAIL.

When there is a challenge to evidence the trial court excludes or admits, the standard of review is as follows:

> "When considering a challenge to the admission of evidence, the first step is to determine whether the evidence is relevant. Relevant evidence is evidence having any tendency in reason to prove any material fact. Relevance is established by a material or logical connection between the asserted facts and the inference or result they are intended to establish. Once relevance is established, the second step requires the court to apply the statutory rules governing admission and exclusion of evidence. These rules are applied either as a matter of law or in the exercise of the trial court's discretion."

State v. Smith, ___ Kan. ___, 327 P.3d 441, Syl. ¶ 1 (June 27, 2014).

All relevant evidence is admissible unless prohibited by statute. K.S.A. 60-407(f). K.S.A. 60-401(b) provides that evidence is relevant when it has "any tendency in reason to prove any material fact."

"Whether the probative value of otherwise relevant evidence outweighs its potential for undue prejudice is reviewed for abuse of discretion." *Smith*, 327 P.3d at 449, citing *State v. Phillips*, 295 Kan. 929, 949, 287 P.3d 245 (2012); and *State v. Wilson*, 295 Kan. 605, 621, 289 P.3d 1082 (2012).

A court abuses its discretion: "(1) When no reasonable person would take the view adopted by the trial judge; (2) when a ruling is based on an error of law; and (3) when substantial competent evidence does not support a trial judge's finding of fact on which the exercise of discretion is based." *State v. Huddleston*, 298 Kan. 941, 318 P.3d 140 (2014).

In discussing relevancy, courts have ruled that for evidence to be admissible in a trial, it must be limited to the issues but doesn't have to bear directly upon them. There must be some natural, necessary or logical connection between them and the inference or result which they are used to establish. *State v. Brown*, 217 Kan. 595, 599, 538 P.2d 631 (1975).

The defendant asserts that in order for post-arrest comments to be introduced, the State must show that the statements show consciousness of guilt. The State submits that the district court is not limited to admitting evidence of post-arrest statements and conduct only when it demonstrates consciousness of guilt. The analysis for admission of the evidence centers around relevancy and probativeness. The district court ruled that the excerpts were relevant as to the defendant's state of mind, motive, intent, the defendant's state of mind and perceptions, premeditation and relationship between the parties. These are relevant and material issues for the jury to consider.

On July 9, 2010, the defendant spoke to Kyrsten Hoffman about photographs of Valerie that were in the attic. (Vol. 33, pp. 1126-1129, 1140; Volume 47, p. 2-Exhibit 472). Ms. Hoffman stated she did not know why those photographs had been placed in the attic as they had always before been hanging on her parent's bedroom wall. (Vol. 33, pp. 1141-1142). This demonstrates the actions that the defendant took prior to the homicide, which showed his state of mind, motive, and intent.

When the defendant spoke to his parents, he asked them if any of those creeps were at Valerie's funeral and asked his father if any strange men were paying extra attention to Valerie during the funeral. This had direct bearing on the defendant's state of mind, and his intent. Valerie's infidelities were at the heart of this case. The defendant, just days after killing Valerie, is still focused on the other men in Valerie's life. Additionally, the defendant filed a Notice of Intent to Rely on a Mental Disease or Defect; therefore his intent was placed at issue.

On July 11, 2010, the defendant, spoke with Kyrsten Hoffman, and stated, "I'm okay in here. I can take this. That was a fear. I can take it as long as there's hope out there." The district court noted that the State had the burden to prove premeditated murder. (Vol. 19, p. 14). Certainly, the fact that the jury could infer from the defendant's statement that he had thought about killing Valerie which would bear upon the element of premeditation. It was the jury's prerogative to determine how much weight it would give that particular piece of evidence. During this same phone call, Kyrsten Hoffman asked the defendant if the internet and phone were shut off and the defendant responded that he had canceled the internet and phone. The defendant said he sent the modem back on Tuesday so that was already done. The district court noted that

this was relevant to what the defendant did during the morning prior to the homicide as well as his intent and state of mind. (Vol. 18, p. 240). Certainly, the defendant's actions could be construed as premeditating and planning. Perhaps, the defendant wanted to ensure Valerie had no avenues of communication once she returned to the residence. He had already taken her cell phone. Again, it was the function of the jury to give whatever weight it wanted to this piece of evidence.

On July 15, 2010, the defendant spoke to Kyrsten Hoffman and told her that two weeks prior, he felt it was all falling apart with the boys and the defendant felt like he was losing them. The defendant said that God took over everything and kicked the defendant and Valerie out of it. The defendant said he wanted the boys to have opportunities, and stated that he and Valerie didn't deserve the kids anymore. The defendant said he prayed that if he was damaging his children, he wanted God to take him out and said he prayed that not too many months prior. Again, this is certainly relevant to the defendant's intent and premeditation.

On September 22, 2010, Kyrsten Hoffman visited the defendant in the jail and asked him about a letter she had received from him. Kyrsten Hoffman was upset with an excerpt in the letter where the defendant told Kyrsten that she and her brothers had failed their mom. The defendant said that they all failed each other but he failed Valerie more than anyone and she failed herself and he failed himself. The defendant said he had a lot for which to answer. This was relevant as to the defendant's state of mind and the relationship between the parties.

In his letter to Kyrsten Hoffman shortly after his arrest, the defendant talked about his actions coming across as controlling but compared that control to a "lion protecting

his pride from the hyenas and savages who try to take what doesn't belong to them." The defendant wrote that Kyrsten needed to allow her husband to be the lion and when others described it as controlling, to remember that those people were in rebellion against God's structure for the family. This was relevant to the relationship between the parties and the controlling aspect of that relationship and the defendant's intent.

In the second letter to Kyrsten Hoffman, the defendant wrote about not trusting other creeps to take care of Kyrsten and Valerie. The defendant wrote referenced Valerie disappointing and hurting him as well as the other people who participated or helped Valerie cover it up. The defendant stated to Jessie Putman, you are the reason we are getting a divorce. This statement certainly provides motive for the defendant's attack on Jessie Putman.

As all of the passages from the calls and letters were relevant, the district court did not err in admitting the same. Even if this Court finds that the evidence was erroneously admitted, the admission was harmless. The statutory harmless error standard set forth in K.S.A. 60-261 and K.S.A. 60-2105 apply in determining whether there is a "reasonable probability the error affected the outcome of the trial in light of the record as a whole." *State v. Warrior*, 294 Kan. 484, 277 P.3d 1111 (2012). As the State was the party that benefitted from the admission of the evidence, it has the burden of demonstrating that the error was harmless. *State v. McCullough*, 293 Kan. 970, 983, 270 P.3d 1142 (2012).

Here, the defendant admitted to his children that he killed their mother and further told Austin Paulson that Jessie Putman was dead and he could have saved her. Jessie Putman's testimony establishes that the defendant attacked and killed Valerie Paulson

and tried to kill Ms. Putman. Any erroneous admission of the above challenged evidence doesn't impact the strength of the State's evidence against the defendant.

ISSUE 6: THE DEFENDANT'S MIRANDA WAIVER AND STATEMENTS TO DEPUTY ALLEN WERE KNOWING AND VOLUNTARY; THEREFORE, THE DISTRICT COURT DID NOT ERR IN REFUSING TO SUPPRESS THE STATEMENTS.

> "When reviewing a district court ruling on a motion to suppress a confession, an appellate court reviews the factual underpinnings of the decision under a substantial competent evidence standard. The ultimate legal conclusion drawn from those facts is reviewed de novo. The appellate court does not reweigh the evidence, assess the credibility of the witnesses, or resolve conflicting evidence."

State v. Littlejohn, 298 Kan. 632, 316 P.3d 136 (January 17, 2014) (quoting *State v. Ransom*, 288 Kan. 697, Syl. ¶ 1, 207 P.3d 208 (2009).

The prosecution must prove that the statement of the defendant was voluntary by a preponderance of the evidence. In order to determine whether a statement is voluntary and the product of the defendant's free and independent will, the district court must look at the totality of the circumstances surrounding the confession by looking at a list of nonexclusive factors including

> "(1) the accused's mental condition; (2) the manner and duration of the interrogation; (3) the ability of the accused to communicate on request with the outside world; (4) the accused's age, intellect, and background; (5) the fairness of the officers in conducting the interrogation; and (6) the accused's fluency with the English language." [Citation omitted.]

State v. Stone, 291 Kan. 13, 21, 237 P.3d 1229 (2010) (quoting *State v. Johnson*, 286 Kan. 824, 836, 190 P.3d 207 (2008)).

An appellate court uses the same standard of review for determining the voluntaries of the Miranda waiver as it does for assessing the voluntariness of a defendant's statement. *State v. Mattox*, 280 Kan. 473, Syl. ¶ 3, 124 P.3d 6 (2005).

"A waiver of Miranda rights may be implied through the defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver." *North Carolina v. Butler*, 441 U.S. 369, 373, 99 S.Ct. 1755, 60 L.Ed.2d 286 (1979).

Ottawa County Deputy Sheriff Timothy Allen responded to the Bennington Café at 6:46 a.m. on July 7, 2010, in reference to a possible homicide suspect being in the cafe. (Vol. 18, p. 34). Deputy Allen allowed the defendant to finish his coffee until backup arrived. (Vol. 18, pp. 36-37). When Sheriff Coleman arrived to assist, the officers asked the defendant to step outside and the defendant complied. (Vol. 18, pp. 37, 65).

Once outside, the Sheriff read the defendant his Miranda rights, to which the defendant nodded affirmatively that he understood them, and the defendant was then placed in handcuffs. (Vol. 18, pp. 38, 50, 66, 68-69). The defendant was placed in the passenger side front seat of Deputy Allen's patrol vehicle. (Vol. 18, p. 38). During the ride to Minneapolis, Deputy Allen asked the defendant how this all got started and the defendant responded, "she was cheating on me and was going to take the kids." (Vol. 18, p. 40). During Deputy Allen's conversation with the defendant, the defendant was coherent, awake, and did not appear to be under the influence of drugs or alcohol. (Vol. 18, pp. 41-42). Deputy Allen never yelled at the defendant, didn't make any threats or use any physical force on the defendant and offered the defendant no promises. (Vol. 18, pp. 42, 44). It took 11 to 12 minutes to get to the Sheriff's Office. (Vol. 18, p. 43). Deputy Allen saw no signs that the defendant may be suffering from any type of mental illness. (Vol. 18, pp. 43-44).

The district court found that under the totality of the circumstances, the defendant's statements were freely and voluntarily made after the defendant waived his

Miranda rights. (Vol. 3, pp. 655-656; Vol. 20, p. 100). The district court further found that an express waiver of Miranda rights was not necessary and noted that the defendant indicated he understood his rights by nodding his head. (Vol. 20, p. 100). The district court further found that there was no indication the defendant was under the influence of alcohol or drugs, the defendant did not fall asleep in the café or during the ride to the jail, the deputy only asked one question during a ride that took only twelve minutes, the defendant was at least of average if not above average intellect, there was no threatening conduct or promises made by Deputy Allen, and the defendant was treated fairly by Deputy Allen. (Vol. 20, pp. 98-100).

These findings are supported by substantial competent evidence in the record and the district court properly found that the defendant's waiver of Miranda and his statements were voluntary.

ISSUE 7: AS THERE WERE NO TRIAL ERRORS, THE DEFENDANT WAS NOT DENIED HIS RIGHT TO A FAIR TRIAL.

"Cumulative error, 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 him or her a fair trial. No prejudicial error may be found under the cumulative error doctrine if the evidence against the defendant is overwhelming." *State v. Hilt*, 299 Kan. 176, 200, 322 P.3d 367 (April 18, 2014), (quoting State *v. Hart*, 297 Kan. 494, 513-14, 301 P.3d 1279 (2013)).

The cumulative error doctrine is inapplicable without two or more trial errors that are not individually reversible. *Hilt*, 299 Kan. 176, Syl. ¶, 322 P.3d 367 (April 2, 2014).

Because the defendant has not demonstrated two or more trial errors that are individually reversible, cumulative error does not apply. Even if this Court finds that it

does apply, there can be no prejudicial error found because the evidence against the defendant is overwhelming. Jessie Putman described the defendant's actions on July 6, 2010, including the attack on her. The defendant told his children that he had killed their mother and mentioned that he thought Jessie Putman was also dead.

ISSUE 8A: THE DISTRICT COURT DID NOT COMMIT REVERSIBLE ERROR WHEN IT ORDERED THE DEFENDANT TO REIMBURSE THE BOARD OF INDIGENTS' DEFENSE SERVICES FOR LEGAL REPRESENTATION PROVIDED BY AN APPOINTED ATTORNEY.

Because the defendant's challenge involves the interpretation of K.S.A. 22-4513 and, therefore is a question of law, this Court's review is unlimited. *State v. Robinson*, 281 Kan. 538, 539, 132 P.3d 934 (2006). When an indigent defendant is convicted, the expenditures for counsel and other defense services "shall be taxed against the defendant and shall be enforced as judgments for payment of money in civil cases." K.S.A. 22-4513(a). "[T]he sentencing court, at the time of the initial assessment, must consider the financial resources of the defendant and the nature of the burden that payment will impose *explicitly*, stating on the record how these factors have been weighed in the court's decision." *Robinson*, 281 Kan. at 546; K.S.A. 22-4513(b). Both of these provisions are mandatory. *Robinson*, 281 Kan. at 543, 546.

The defendant's assertion that the district court erred in imposing reimbursement to BIDS because the defendant's assets were initially frozen in a civil action is unsupported. K.S.A. 22-4513(a) imposes a mandatory duty upon the sentencing court to assess attorney fees and other defense services against the defendant; therefore, the sentencing court did not err in requiring reimbursement to BIDS.

The defendant also argues that the sentencing court did not make a sufficient record to support her assessment of BIDS fees as required by *Robinson*. The district

court explicitly considered the defendant's financial resources and the nature of the burden that repayment would impose upon the defendant. The court specially found that the defendant was thirty-eight years old at the time of the offenses, had a long history of being gainfully employed, had no drug or alcohol issues, did not suffer from any physical or mental impairments that would prevent him from being gainfully employed once he was released, and would have no children to support upon his release.

The defendant's claim that the sentencing court's findings were insufficient is without merit, and this Court should uphold the sentencing court's assessment of BIDS fees.

ISSUE 8B: THE DISTRICT COURT DID NOT ERR WHEN IT ORDERED RESTITUTION TO THE KANSAS CRIME VICTIM'S FUND ON BEHALF OF JESSIE PUTMAN.

Because the defendant's challenge involves the interpretation of K.S.A. 21-4603d(b)(1) and K.S.A. 74-7312, and, therefore is a question of law, this Court's review is unlimited. *State v. Maass*, 275 Kan. 328, 330, 64 P.3d 382 (2003). Pursuant to K.S.A. 21-4603d(b)(1), when a person has been convicted of a crime, "the court shall order the defendant to pay restitution, which shall include, but not be limited to, damage or loss caused by the defendant's crimes, unless the court finds compelling circumstances which would render a plan of restitution unworkable."

K.S.A. 74-7312(a), states, "If compensation is awarded, the state shall be subrogated to all the claimant's rights to receive or recover benefits or advantages for economic loss for which, and only to the extent that, compensation is awarded, from a source which is or, if readily available to the victim or claimant would be, a collateral source." A collateral source is defined by K.S.A. 74-7301(d)(1) as "a source of benefits

or advantages for economic loss otherwise reparable under this act which the victim or claimant has received, or which is readily available to the victim or claimant, from: the offender."

K.S.A. 74-7312(b) requires the claimant to give written notification to the Crime Victims Compensation Board prior to bringing action to recover damages related to the criminal conduct that provides the basis for crime victim compensation.

Once notification is given by the claimant, the board shall promptly: "(1) Join in the action as a party plaintiff to recover compensation awarded; (2) require the claimant to bring the action in the claimant's individual name, as a trustee in behalf of the state, to recover compensation awarded; or (3) reserve its rights and do neither in the proposed action." K.S.A. 74-7312(b).

The defendant cites *Herron v. Gabby's Goodies*, 29 Kan.App.2d 42, 24 P.3d 747 (2001), as support for his position that the release that the defendant executed in the civil proceeding filed by Jessie Putman rendered the Kansas Crime Victims Compensation Board unable to pursue restitution from the defendant. In *Herron*, the Crime Victims Compensation Board awarded Herron, who was the victim of a drunk driver, $25,000.00 and took a lien for any future settlement. Herron sued the business that owned the vehicle driven by the drunk driver and later settled the suit. *Herron*, 29 Kan.App.2d at 42-43. When the Board made a demand for a portion of the defendant's recovered amount, Herron demanded that the Board's lien be reduced to take into account the attorney fees. The Court found that because Herron did not give the Board notice before filing suit, the Board did not participate in the action; therefore, there was no statutory authority to allocate attorney fees. *Herron*, 29 Kan.App.2d at 44-45.

The State first submits that the defendant has not provided an adequate record on this issue as there is not a copy of the civil petition or civil agreement and release in the record. Additionally, the record is silent as to whether the defendant had knowledge of Jessie Putman's application to the Crime Victims Compensation Board at the time of the civil settlement. The only assertion made in this regard was a statement made by the defendant's attorney, but there was no evidence presented on the issue. (Vol. 44, p. 50). An appellant "has the burden of furnishing a record which affirmatively shows that prejudicial error occurred in the trial court. In the absence of such a record, an appellate court presumes that the action of the trial court was proper." *State v. Moncla*, 262 Kan. 58, 68, 936 P.2d 727 (1997).

Secondly, the State submits that *Herron* can be distinguished from the facts of this case. In *Herron*, the Court was only asked to determine the legal authority for the district court to order allocation of attorney fees when the Crime Victims Board did not participate in the civil action. Here, the subrogation rights set forth in K.S.A. 74-7312(a), entitles the Board to pursue action against a crime victim who has recovered benefits for economic loss from a collateral source but it does not prevent them from requesting restitution against a defendant pursuant to K.S.A. 21-4603d(b)(1), as long as there is not a double recoupment of monies paid out.

CONCLUSION

As there were no errors committed during the defendant's trial and sentencing, this Court should uphold the defendant's conviction and sentence.

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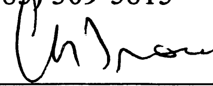

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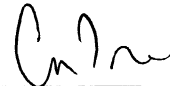
CERTIFICATE OF SERVICE

I, Christina Trocheck, Assistant Saline County Attorney, hereby certify that I mailed two (2) copies of this Brief of Appellee to Richard Ney, Ney, Adams & Shaneyfelt, 200 N. Broadway, Suite 300, Wichita, Kansas 67202, Attorney for Appellant, by U.S. mail, postage prepaid on the 16th day of October, 2014; and delivered the original and sixteen (16) copies to Derek Schmidt, Attorney General, Criminal Litigation Division, 120 S.W. Tenth, 2nd Floor, Topeka, Kansas 66612, on the 16th day of October, 2014.



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