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CLERK OF THE APPELLATE COURTS
CASE NUMBER: 110234

No. 13-110234-A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS
Plaintiff-Appellee

v.

CHRISTOPHER LAMAR BROWN
Defendant-Appellant

BRIEF OF APPELLEE

APPEAL FROM THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
HONORABLE NANCY PARRISH, JUDGE
DISTRICT COURT CASE NO. 12-CR-1139

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NATURE OF THE CASE

Christopher Brown (Brown) was convicted by a jury of attempted second degree murder, aggravated assault, and two counts of reckless discharge of a firearm at an occupied dwelling and sentenced to a controlling term of 61 months in prison. Brown appeals his convictions.

STATEMENT OF THE ISSUES

I. **The jury was properly instructed on the crimes of second-degree murder and voluntary manslaughter.**

II. **The prosecutor's comments were not outside the wide latitude afforded to prosecutors and did not constitute prosecutorial misconduct.**

STATEMENT OF THE FACTS

On June 11, 2012, Anthony Herrera (Herrera) and Mark Webster (Webster) decided they were going to go fishing. (R. XII, 52-56, 163-64, 250.) Herrera drove over to Webster's house to pick him up around 5:00 p.m. (R. XII, 57, 60, 165.) Webster's girlfriend, Dimisha Williams (Williams), and their one month old baby were living with Webster and were home at that time. (R. XII, 58, 163, 166, 250.)

On the drive over, Herrera noticed a gray Pontiac was following him around 37th and Kirkland. (R. XII, 59.) The gray Pontiac pulled up next to him, and Herrera saw that the driver was Brown. (R. XII, 62-64; R. XX, 137-38, 141.) Herrera knew Brown from hanging out with Brown's younger brother, Jamichael Wilkins. (R. XII, 60, 71, 167-68.) Herrera made no contact with Brown. (R. XII, 60.) Herrera and Brown had no problems with each other. (R. XII, 61-62.)

Brown continued to follow Herrera and again pulled up next to Herrera at a stoplight and this time tried to make contact with Herrera. (R. XII, 65, 73.) Brown rolled

down his window, shouted at Herrera, and asked Herrera if he knew where Travon Praylow (Praylow) was. (R. XII, 65, 75-76, 140-41; R. XX, 142-43.) Herrera answered, "[n]o. I seen him at the QuikShop four days ago, though, that's about it." (R. XII, 65, 75-76.) Brown responded, "[a]ll right, all right." (R. XII, 65, 75, 77.) The light changed and Herrera drove on, but noticed that Brown was still following him. (R. XII, 65, 75, 79.) As Herrera got closer to Webster's house, he called Webster and told him that Brown was following him. (R. XII, 65-66, 81, 251; R. XX, 138, 143.)

When Herrera arrived at Webster's house, Webster was outside waiting for him. (R. XII, 66, 84, 172.) Herrera pulled into Webster's driveway. (R. XII, 66, 84, 174-75.) Brown then slowly passed by Webster's driveway and looked at Webster and Herrera. (R. XII, 86-87, 177, 226-27.) Brown turned around down the block and then parked in front of Webster's house. (R. XII, 87.) Brown motioned for Herrera to come over to his car. (R. XII, 66, 88, 176, 178, 228; R. XX, 138.) Webster told Herrera, "[m]an, don't go over there." (R. XII, 67, 89.) Herrera said, "[w]ell let me just see what he wants because I don't got no problem with him." (R. XII, 67, 88.) Herrera walked over to Brown's car, and Brown asked Herrera if he had heard what happened to Brown's cousin, Lawrence. (R. II, 67, 90-91.) Herrera said that he heard Lawrence was in some sort of accident. (R. XII, 67, 92.) Brown then asked Herrera again if he knew where Praylow was. (R. XII, 67, 92.) Herrera told Brown "[n]o, I don't. I don't hang around with him like that. I don't have his number or nothing." (R. XII, 67, 92.)

Brown then became agitated and demanded that Herrera get into his car. (R. XII, 67, 93; R. XX, 144.) Herrera refused and stated "[w]hat's up?" (R. XII, 67, 93.) Herrera stated that he could tell by the way Brown was talking that something was wrong. (R.

XII, 67, 93.) Brown said "[n]o just get in the car." (R. XII, 67.) Herrera again told Brown that he was not getting in the car. (R. XII, 67.) Herrera then saw that Brown had a black revolver in his left hand. (R. XII, 67, 93, 95; R. XX, 138.) Brown told Herrera, "[g]et in the fucking car and I ain't playing with you." (R. XII, 67, 93-96.) When Brown pulled the gun out, Herrera backed up and put his hands up in the air. (R. XII, 68, 96, 183-84, 232; R. XX, 145.) Herrera told Brown, "[a]ll right, man, chill out." (R. XII, 68.) Herrera did not have a gun or any weapon. (R. XII, 93.) Webster saw the conversation getting tense between Herrera and Brown, and he went back inside the house. (R. XII, 178.) Webster told Williams that Brown was trying to make Herrera leave with him and to take their daughter and go into the other room. (R. XII, 178, 183, 229, 231, 253; R. XIII, 32, 81.)

Herrera then ran back towards Webster's house, but tripped while trying to get to a tree in the front yard. (R. XII, 68, 96, 98-102, 186; R. XX, 146.) Herrera heard gunfire and bullets buzzing by his head. (R. XII, 68, 99; R. XX, 139, 146.) Herrera also saw bullets hit the dirt in front of him. (R. XII, 99, 137; R. XX, 146.) Herrera heard six gunshots while he was running toward the tree. (R. XII, 137, 141.) Brown shot Herrera in the lower torso. (R. XII, 68, 71, 152-56, 185; R. XX, 138, 147.) Webster saw Brown hanging out the window of his car shooting "at point blank range." (R. XII, 185, 235-36, 242-43.) All the gunshots were in Herrera's direction. (R. XII, 214.) Williams heard multiple gun shots and got down on the floor with the baby. (RII, 256-57, 259; R. XIII, 19-20, 26.)

Herrera crawled the rest of the way and made it to the tree. (R. XII, 68.) Herrera saw blood all over him and yelled, "I'm shot, I'm shot." (R. XII, 68.) Webster then went inside and grabbed his .40 caliber semiautomatic handgun. (R. XII, 187-89, 233.)

Webster saw Brown's car drive southbound and turn left down 19th Street. (R. XII, 192.) Webster shot at Brown's car nine times as he drove away. (R. XII, 106, 138, 143, 192-93, 212; R. XX, 192.) Webster saw the window of Brown's car shatter. (R. XII, 194.) Webster checked on Herrera and saw that he had been shot. (R. XII, 193, 195.)

Webster then went back inside his house to check on Williams and his daughter. (R. XII, 194.) Williams had also been shot in the left arm. (R. XII, 69, 105, 143, 196-98, 264; R. XX, 98, 115.) Webster took Williams, the baby, and Herrera to St. Francis Hospital for treatment. (R. XII, 69-71, 104, 198, 200; R. XIII, 14; R. XX, 139.) The bullet eventually traveled up into Herrera's stomach. (R. XII, 71.) Herrera had to have surgery and 28 staples in his stomach. (R. XII, 70.) Herrera had a scar from the surgery. (R. XII, 71.) The bullet was later collected by law enforcement. (R. XIII, 238-39, 241, R. XX, 39-41, 99-100.)

A few minutes after the shooting, the Topeka Police Department received a call from an individual in the 200 block of Stone Street regarding gunshots and a suspicious vehicle. (R. XIII, 94-96, 98.) The caller informed law enforcement that there was a gray vehicle parked northbound the wrong way on the left side of the street. (R. XIII, 96.) The caller also stated that he saw a black male wearing a white shirt and black sweat pants exit the vehicle and run northbound. (R. XIII, 97-99, 111-12.) The vehicle had a flat front left tire and a broken front passenger window. (R. XIII, 95, 98; State's Exhibits

78, 80, to be added to the record on appeal.) The caller also stated that he saw the black male stick his hand down into the street drain. (R. XIII, 95, 97-98, 111.) In total, eight people called 911 to report the gunshots. (R. XII, 27-38; State's Exhibit 108 to be added to the record on appeal.)

Law enforcement arrived at that location and found a gray Pontiac. (R. XIII, 44, 109, 126.) The front passenger window was shattered; the front left tire was flat; and there was a bullet hole in the front bumper on the left side. (R. XIII, 110.) There was blood on the console and on the steering wheel. (R. XIII, 110.) A swab of this blood was collected. (R. XIII, 220, 223-24.) Law enforcement then went to the street drain and found a black .357 revolver with blood on the barrel. (R. XIII, 113-15, 117.) A swab of the blood on the gun was collected. (R. XIII, 117.) The blood samples were then sent to the Kansas Bureau of Investigation (KBI) for testing. (R. XIII, 232-33, 241; R. XX, 158.) The blood on the revolver and in the grey Pontiac was Brown's blood. (R. XX, 159-70.) There were six spent shell casings in the revolver. (R. XIII, 116, 128.)

Law enforcement then went to St. Francis Hospital and spoke with Webster, Williams, and Herrera about the incident. (R. XII, 107-08, 201-02; R. XIII, 39-42, 51; State's Exhibit 111, to be added to the record on appeal; R. XX, 97, 128-29, 135-39.) Webster told detectives that Brown shot Herrera and that Brown left Webster's house in a silver Pontiac. (R. XIII, 42-43.) While speaking with Williams, law enforcement collected a bullet that was found in her sweatshirt. (R. XIII, 6, 212-14; R. XX, 98-102.) When Williams was shot, the bullet passed through her wrist, and remained in her sweatshirt. (R. XIII, 6; R. XX, 7, 98.) The bullets that were found in Herrera's stomach and in Williams' sweatshirt matched Brown's revolver. (R. XIII, 207-10, 224-30.)

The State originally charged Brown with two counts of criminal discharge of a firearm at an occupied dwelling or vehicle, one count of aggravated battery, and one count of aggravated assault. (R. I, 16-18.) Later, the State amended its complaint and added one count of attempted murder in the first degree. (R. I, 75-77.)

Brown testified on his own behalf at trial. (R. XVI, 109-71.) Brown testified that he knew Herrera and Webster from high school and the community. (R. XVI, 113.) Brown had no problem with Herrera. (R. XVI, 114-15.) Brown was driving to his aunt's house on the day when he saw Herrera. (R. XVI, 114.) Brown said he saw Herrera and they just nodded to each other like "what's up." (R. XVI, 114, 142.) Brown stated that he wasn't following Herrera, but knew that he had some information regarding an accident involving his cousin and wanted to ask Herrera some questions. (R. XVI, 115-16, 144.)

Brown pulled up and parked his car when he saw Herrera park in Webster's driveway. Brown did not know it was Webster's house. (R. XVI, 116.) Brown called Herrera over to talk to him. (R. XVI, 116-17.) Brown claimed he never asked Herrera to get into his car. (R. XVI, 117.) Brown stated he asked Herrera if he knew Praylow and asked when he last saw him. (R. XVI, 117.) Brown testified that Herrera indicated he saw Praylow on June 8, the day of his cousin's accident. (R. XVI, 117.) Brown testified that Praylow was a gang member and had a reputation in the community as such. (R. XVI, 120.) Brown knew that Herrera would know how to get in touch with Praylow. (R. XVI, 120.) Brown asked if Herrera had Praylow's number, and Herrera answered in the negative. (R. XVI, 117-18.)

Brown testified they continued to talk and that Herrera looked inside his car and saw that he had a weapon. (R. XVI, 118.) Brown admitted that he had a gun in his car and that he had it for protection while he was out "riding for me and my family." (R. XVI, 118-19, 153.) Brown stated that he had never carried a gun before that day, but he had owned one. (R. XVI, 119.) Brown also stated that his sister had received a threatening text saying that if his family provided any information about the accident to law enforcement that they would be in danger. (R. XVI, 119.)

Once Herrera saw the gun, he looked back at Webster and then backed away. (R. XVI, 118, 121.) Brown stated that he had no bad intentions toward Herrera or Webster. (R. XVI, 121-22.) Brown testified he believed Webster had a gun behind him, because Webster's hands were behind his back. (R. XVI, 122.) Herrera ran from Brown's car, and Brown claimed Webster pulled out a gun. (R. XVI, 122-23, 155, 164.) Brown then pointed his gun and started shooting. (R. XVI, 123, 155-56.) Brown said, "I really just blacked out. I didn't know what was going to happen. I knew we was going to shoot, but I started shooting." (R. XVI, 123, 165.) Brown stated he fired four shots, twice at Webster and twice at Herrera. (R. XVI, 124, 168-69.) Brown stated he fired the rounds "to create space." (R. XVI, 131, 133, 157.)

Brown then drove off, and Webster shot at his car multiple times. (R. XVI, 126.) Brown had a flat tire and parked the car on Stone Street, threw the gun in a storm drain, and then called his sister to come pick him up. (R. XVI, 126, 158-59.) From Brown's sister's house, he had his girlfriend's mother pick him up. (R. XVI, 127.) Brown's girlfriend and children were with her when she picked him up. (R. XVI, 127.) Brown stayed with his girlfriend and children that night. (R. XVI, 128, 160.) Brown stated he

never told his girlfriend that he shot Herrera and Webster in self-defense. (R. XVI, 160.) Brown simply told her that there was a shooting and, "I'm sorry." (R. XVI, 160.)

Brown watched the news the next day and saw that Williams and her son had been injured. (R. XVI, 161.) Brown's cousin also told him about the two being injured. (R. XVI, 161.) Brown stated later the next day he went down to the law enforcement center and spoke with Detective Smith. (R. XVI, 130, 162.) Brown said that he talked to Detective Smith, "but I really didn't comment much. I just asked him did anyone die." (R. XVI, 131.) On cross examination the prosecutor asked Brown the following:

> Q. What did you tell him?
>
> A. We really didn't have too much conversation, but he asked me for a DNA swab and I gave it to him. And I asked him did anyone die and I asked him what my charges is what I asked him.
>
> Q. Is that exactly what you told him?
>
> A. Yes, yes.
>
> Q. Nothing about this Mark guy pulling a gun, nothing about that?
>
> A. No.

Brown's counsel did not make a formal objection, but requested a bench conference. (R. XVI, 162.) Brown's counsel told the judge that the prosecutor was aware that Brown had invoked his *Miranda* rights, and the prosecutor agreed. (R. XVI, 162.) After a short discussion between Brown's counsel and the prosecutor, the district court stated, "[l]et's move on." (R. XVI, 163.)

The jury convicted Brown of two counts of reckless discharge of a firearm at an occupied dwelling causing bodily harm, attempted second degree murder, aggravated battery, and aggravated assault. (R. II, 148-52; R. XVII, 91-94.) Based on a criminal

history score of "I" the district court sentenced Brown to the aggravated sentence of 61 months for the attempted second degree murder, with concurring sentences for the remaining counts. (R. II, 182-95.) The district court did not sentence Brown for the alternative count of aggravated battery. (R. I, 75; R. II, 182.) Brown now appeals his convictions. (R. II, 163.)

I. The jury was properly instructed on the crimes of second-degree murder and voluntary manslaughter.

Brown argues, for the first time on appeal, that the district court erred in failing to instruct the jury to consider voluntary manslaughter in conjunction with second-degree murder.

Standard of Review

Here, Brown concedes that he did not object to the instruction. (R. XVI, 180-84; R. XVII, 3.) Brown also did not request an instruction to have the jury consider attempted voluntary manslaughter and intentional second-degree murder simultaneously. (R. XVI, 179-83.) When an instruction issue is raised for the first time on appeal this court determines whether the instruction is clearly erroneous. *State v. Williams*, 295 Kan. 506, 286 P.3d 195, 199 (2012); K.S.A. 22-3414(3). An instruction is clearly erroneous only if the reviewing court reaches a firm conviction that if the trial error had not occurred, there is a real possibility the jury would have returned a different verdict. *State v. Deavers*, 252 Kan. 149, 164-65, 843 P.2d 695 (1992), *cert. denied* 508 U.S. 978, 113 S.Ct. 2979, 125 L.Ed.2d 676 (1993); *State v. Patterson*, 243 Kan. 262, 268, 755 P.2d 551 (1988).

In *Williams*, the Court conducted a thorough and exhaustive examination of the standard of review in jury instruction challenges and made several clarifications to it.

The first step in the analysis is to determine if the issue is reviewable, i.e. whether it has been preserved by an objection at the trial court level. Normally, in the absence of an objection the appellate court is without jurisdiction to consider the issue. 295 Kan. at 515; K.S.A. 22-3414(3). An exception to the objection requirement provides jurisdiction to the appellate court to determine if the instruction was clearly erroneous. This means the instruction must contain some legal error, which is a question of law subject to unlimited review. 295 Kan. at 515.

Only after finding some error should the court engage in the reversibility analysis. The court must be firmly convinced that the jury would have reached a different verdict had the instructional error not occurred. 295 Kan. at 515. The appellate court addresses this question de novo, reviewing the entire record. 295 Kan. at 515. The defendant bears the burden of proving to the appellate court that the error is reversible. 295 Kan. at 515.

Analysis

Brown argues that the district court erroneously instructed the jury to only consider attempted voluntary manslaughter, heat of passion or imperfect self-defense if the jury did not agree that the defendant was guilty of attempted second degree murder. (R. II, 136.) The district court instructed the jury with attempted first degree premeditated murder, attempted second degree intentional murder, and attempted voluntary manslaughter, a knowing killing committed in the heat of passion or upon an unreasonable but honest belief that circumstances justified deadly force. (R. II, 134-37.) Brown first argues that under *State v. Graham*, 275 Kan. 831, 69 P.3d 563 (2003) and *State v. Cribbs*, 29 Kan.App.2d 919, 34 P.3d 76 (2001), the district court's voluntary manslaughter instruction was legally incorrect.

The district court instructed the jury:

> If you do not agree that the defendant is guilty of attempted murder in the first degree you should then consider the lesser included offense of attempted murder the second degree.
>
> If you do not agree that the defendant is guilty of attempted murder in the second degree you should then consider the lesser included offense of attempted voluntary manslaughter. (R. II, 135-36.)

The State contends that the district court properly instructed the jury in this case. The cases cited by Brown on appeal, requiring a simultaneous consideration instruction, addressed the voluntary manslaughter statute before it was amended by the legislature. This logically explains the deletion of the instruction requirement in the latest version of PIK 56.05. As of July 2011, K.S.A. 21-5404 declares, "voluntary manslaughter is knowingly killing a human being," and describes the circumstances of the killing. Previously, K.S.A. 21-3403 stated, "voluntary manslaughter is the intentional killing of a human being." By contrast, K.S.A. 21-5403(a)(1) and its former K.S.A. 21-3403(a) stated "murder in the second degree is the killing of a human being committed...intentionally."

Brown's claim is supported by attempts to merge intentional and knowing conduct into the same classification. However, the legislature's change to the elements of voluntary manslaughter before this case is clear. Voluntary manslaughter involves a killing that is knowingly committed and no longer involves a specific intent to kill. When determining the construction of a statute, ordinary words are to be given their ordinary meaning and courts are not justified in disregarding the unambiguous meaning. *State v. Hackler*, 21 Kan.App.2d 289, 292, 898 P.2d 1175, 1177 (1995). Even a penal statute subject to strict construction should not be read so as to add that which is not

readily found therein, or to read out what, as a matter of ordinary language, is in it. *Boatright v. Kansas Racing Comm'n*, 251 Kan. 240, Syl ¶ 7, 834 P.2d 368 (1992). Furthermore, it is presumed the legislature understood the meaning of the words it used and intended to use them. *State v. Hackler*, 21 Kan.App.2d 289, 292, 898 P.2d 1175, 1177 (1995).

K.S.A. 21-5202 specifically states:

> (a) except as otherwise provided, a culpable mental state is an essential element of every crime defined by this code. A culpable mental state may be established by proof that the conduct of the accused person was committed "intentionally," "knowingly" or "recklessly."
>
> (b) Culpable mental states are classified according to relative degrees, from highest to lowest, as follows:
>
> (1) Intentionally
> (2) knowingly
> (3) recklessly
>
> (c) Proof of a higher degree of culpability than that charged constitutes proof of the culpability charged. If recklessness suffices to establish an element, that element is also established if a person acts knowingly or intentionally. If acting knowingly suffices to establish an element, that element also is established if a person acts intentionally.
>
> (d) If the definition of a crime does not prescribe a culpable mental state, a culpable mental state is nevertheless required unless the definition plainly dispenses with any mental element.
>
> (e) If the definition of a crime does not prescribe a culpable mental state, but one is nevertheless required under subsection (d), "intent," "knowledge" or "recklessness" suffices to establish criminal responsibility.
>
> (f) If the definition of a crime prescribes a culpable mental state that is sufficient for the commission of a crime, without distinguishing among the material elements thereof, such provision shall apply to all the material elements of the crime, unless a contrary purpose plainly appears.
>
> (g) If the definition of a crime prescribes a culpable mental state with regard to a particular element or elements of that crime, the prescribed

> culpable mental state shall be required only as to specified element or elements, and a culpable mental state shall not be required as to any other element of the crime unless otherwise provided.
>
> (h) A person acts "intentionally," or "with intent," with respect to the nature of such person's conduct or to a result of such person's conduct when it is such person's conscious objective to desire or engage in the conduct or cause the result. All crimes defined in this code in which the mental culpability requirement is expressed as "intentionally" or "with intent" are specific intent crimes. A crime may provide that any other culpability requirement is a specific intent.
>
> (i) A person acts "knowingly," or "with knowledge," with respect to the nature of such person's conduct or to circumstances surrounding such person's conduct when such person is aware of the nature of such person's conduct or that the circumstances exist. A person acts "knowingly," or "with knowledge," with respect to a result of such person's conduct when such person is aware that such person's conduct is reasonably certain to cause the result. All crimes defined in this code in which the mental culpability requirement is expressed as "knowingly," or "with knowledge" are general intent crimes.
>
> (j) A person acts "recklessly" or is "reckless," when such person consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation.

Had the district court instructed the jury on a simultaneous consideration instruction, there was a high probability that the jury would have been confused since crimes of intentional murder in the second degree and voluntary manslaughter have different degrees of culpable mental states. Previous appellate cases requiring a simultaneous consideration instruction, including *Graham* and *Cribbs*, had not dealt with the legislature's change to the voluntary manslaughter statute, and therefore are not dispositive of the issue. The district court properly instructed the jury given the culpable mental states of each crime. In order to prove clear error, there must be a real possibility that the jury's verdict would have been affected by such an instruction. Brown fails to

prove clear error. There was no reversible error for failing to give a simultaneous consideration instruction in this case.

II. The prosecutor's comments were not outside the wide latitude afforded to prosecutors and did not constitute prosecutorial misconduct.

Brown next argues that several statements by the prosecutor impermissibly shifted the burden of proof and commented on his Fifth Amendment right to remain silent, in violation of *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976).

Historically, our appellate courts have required a contemporaneous objection to preserve a *Doyle* violation for appeal. *See State v. Fisher*, 222 Kan. 76, Syl. ¶ 7, 563 P.2d 1012 (1977). However, in *State v. King*, 288 Kan. 333, 349, 204 P.3d 585 (2009), the Court stated that it would continue to review a prosecutor's comments to a jury during voir dire, opening statement, or closing argument which are not evidence on the basis of prosecutorial misconduct even when no objection was lodged at the trial level, although the presence or absence of an objection may figure into its analysis of the alleged misconduct. *See also State v. Miller*, 284 Kan. 682, 719-20, 163 P.3d 267 (2007). Here, Brown's counsel objected to or requested bench conferences regarding the prosecutor's comments. (R. XVI, 162-63; XVII, 30.)

Standard of Review

Review of alleged prosecutorial misconduct involves a two-step process. An appellate court first determines whether the comments were outside the wide latitude that prosecutors have historically been allowed in discussing the evidence. If the comments fall outside this wide latitude, the court labels this "misconduct" and next determines whether the comments unduly prejudiced the jury against the defendant and denied the

defendant a fair trial. *State v. Marshall*, 294 Kan. 850, 856, 281 P.3d 1112 (2012). In this step of the process, this court considers (1) whether the conduct was gross and flagrant; (2) whether the misconduct was motivated by ill will; and then if both these pre-conditions are met, (3) whether the evidence was of such a direct and overwhelming nature that the misconduct would likely have had little weight in the mind of a juror. 294 Kan. at 856. None of these three factors is individually controlling. 294 Kan. at 857.

In assessing this third factor, this court requires that any prosecutorial misconduct error meet the "dual standard" of both constitutional harmlessness and statutory harmlessness to uphold a conviction. *See State v. Tosh*, 278 Kan. 83, 97, 91 P.3d 1204 (2004). The error may be declared harmless where the party benefitting from the error proves beyond a reasonable doubt that there is no reasonable possibility that the error contributed to the verdict. *State v. Ward*, 292 Kan. 541, 256 P.3d 801 (2011), *cert. denied* 132 S.Ct. 1594 (2012).

Analysis

The prosecutor did not commit misconduct during the cross-examination of Brown

Brown first argues that the prosecutor committed misconduct during cross-examination when he asked the defendant what he said to Detective Smith. Brown answered, "[we] really didn't have too much conversation." (R. XVI, 162.) The prosecutor followed with, "[you said] [n]othing about this Mark guy pulling a gun, nothing about that?" (R. XVI, 162.) Brown's counsel then requested a bench conference, and stated that the prosecutor was aware the Brown had invoked his *Miranda* rights and that asking what Brown told Detective Smith was improper. (R. XVI, 163.) The district court responded, "[l]et's move on." (R. XVI, 163.)

Here, the prosecutor did not make an improper reference to Brown's Fifth Amendment right to remain silent in violation of *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976). The general rule is a prosecutor may not use a defendant's post-arrest silence to impeach the credibility of his trial testimony. *State v. Nott*, 234 Kan. 34, 41, 669 P.2d 660 (1983). However, the prosecutor was simply asking what Brown told Detective Smith or at least what their conversation was about. Brown had just testified that he spoke with Detective Smith after he turned himself into law enforcement. (R. XVI, 163.) The prosecutor was not making an improper reference to Brown's right to remain silent, but asking a follow up question about the nature of the conversation between Brown and Detective Smith, which is proper on cross examination as it did not deal with post-invocation silence. *Anderson v. Charles*, 447 U.S. 404, 408, 100 S.Ct. 2180, 65 L.Ed.2d 222 (1098) (1980), *Berghuis v. Thompkins*, 560 U.S. 370, 130 S.Ct. 2250, 176 L.Ed.2d 1098 (2010). The prosecutor made no direct or indirect comment about the invocation of Brown's *Miranda* rights. This question was not improper cross-examination based on the questions and testimony from Brown's direct examination.

However, if this court finds that the prosecutor's question was improper it was harmless error. The prosecutor's question was not gross or flagrant. The question or topic was not repeated, emphasized, or touched on again during cross-examination. Despite Brown's contention that the prosecutor demonstrated ill will, there is no evidence of ill will supported by the record. Ill will may be found "when the prosecutor's comments were 'intentional and not done in good faith.' [Citation omitted.]" *State v. Miller*, 284 Kan. 682, 719, 163 P.3d 267 (2007). There is no evidence in the record that

the prosecutor intentionally asked this question in bad faith or against the order of the district court. In fact, the prosecutor did not ignore the district court's instruction to "move on," and promptly complied with the district court's order. (R. XVI, 163.)

Lastly, and out of an abundance of caution, the State acknowledges that it has the burden to establish beyond a reasonable doubt that any instances of established misconduct did not affect a substantial right held by the defendant. In its deliberation, this court should consider the prosecutor's comments in light of the circumstances and the entire record. *State v. Marshall*, 294 Kan. 850, 862, 281 P.3d 1112 (2012). When considering whether the evidence was direct and overwhelming so much so that the any of the claimed instances of misconduct would likely have had little weight in the jury's mind, one should start with the overwhelming amount of evidence presented to the jury that found Brown guilty beyond a reasonable doubt.

Here the evidence presented established that Brown saw Herrera while driving, and followed him to Webster's house. (R. XII, 59, 65, 73-77.) Once at Webster's house, Brown parked his car and called Herrera over to him. (R. XII, 66, 88, 176, 178, 228.) Brown questioned Herrera about Praylow and told him to get in the car. (R. XII, 67, 93.) Herrera refused to do so, and Brown showed Herrera his black revolver and demanded that he get into the car. (R. 67, 93-96.) Herrera then put his hands up, backed away, and ran toward the tree in Webster's front yard. (R. XII, 68, 96, 98-102, 183-84, 232.) Brown shot Herrera as he was running away from the car. Brown shot six times, with one shot hitting Herrera and one hitting Williams in the arm inside the house. (R. XII, 68-71, 105, 143, 152-56, 185, 196-98.) Williams was holding her six day old newborn baby, who sustained injuries to her face from the glass breaking as the bullet traveled into

the home. (R. XII, 264-66.) Webster saw Brown lean over and shot his gun only in the direction of Herrera and heard at least three or four shots being fired. (R. XII, 185, 214, 235-36; R. XIII, 42-43.)

Webster then shot back as Brown was driving away, shattering the window of Brown's car. (R. XII, 138, 143, 192-93, 212.) Brown dumped his car in a nearby neighborhood and threw his gun down a storm drain. (R. XVI, 126, 158-59.) Following the shooting, Brown told his girlfriend that there was a shooting and that he was sorry. (R. XVI, 160.) Brown did not tell his girlfriend that the shooting was done in self-defense. (R. XVI, 160.)

Also, defense counsel arguably opened the door to the line of questioning conducted by the State. "A defendant cannot open up an issue at the trial and use unrestricted statements to his or her advantage and then on appeal, after an unfavorable result is obtained, contend the trial court's ruling to be erroneous." *State v. Saleem*, 267 Kan. 100, 109, 977 P.2d 921 (1999). Brown testified that he did not tell his girlfriend that he shot Herrera or Webster in self-defense. (R. XVI, 160.) Thus, even if the questions regarding Detective Smith were improper, despite what was arguably his opening the door to such questions, because there was other evidence showing that Brown did not tell anyone that the shooting was done in self-defense, any error was harmless.

It cannot be said that given this overwhelming evidence, the prosecutor's questions diverted the attention of the jury away from the evidence or the jury's ultimate decision in this case. Therefore, even if the questions were error, it was harmless error and did not deny Brown a fair trial.

The prosecutor's statements during closing argument did not improperly shift the burden to Brown

Brown also argues that the following comments made by the prosecutor in closing argument improperly shifted the burden of proof from the State to him. Brown complains of the following statement: "Really couldn't play the wasn't me card because, remember, we have no idea what his version is going to be because he didn't tell a [soul]. So he was free to say whatever he wanted without subject to impeachment. Nobody could pull out any reports." (R. XVII, 29-30.) Brown's attorney objected for the record at that point. (R. XVII, 30.) The prosecutor went on, "[h]e didn't tell the mother of his children, he did tell his mom, his sister, not a [soul]." (R. XVII, 30.)

However, the prosecutor's comments must be evaluated in context and can be mitigated by jury instructions regarding the burden of proof. *State v. Cosby*, 293 Kan. 121, 137, 262 P.3d 285 (2011). When these comments are placed in context, the prosecutor is commenting on the evidence that in the hours following the shooting; Brown never told his sister, his mother, his girlfriend, or anyone that he shot Herrera and Webster in self-defense or that Webster had a gun. (R. XVI, 160; R. XVII, 31.)

Attorneys have wide latitude to make arguments that suggest reasonable inferences from the evidence. *State v. Martinez*, 290 Kan. 992, 1013, 236 P.3d 481 (2010). This latitude includes explaining to juries what they should look for in assessing witness credibility, as long as the jury is left to draw the ultimate conclusions on witness credibility. *See State v. Hart*, 297 Kan. 494, 505-06, 301 P.3d 1279 (2013). "'When a case develops that turns on which of two conflicting stories is true, it may be reasonable to argue, based on the evidence, that certain testimony is not believable.'" *State v. Douglas*, 274 Kan. 96, 107, 49 P.3d 446 (2002) (quoting *State v. Pabst*, 268 Kan. 501,

507, 996 P.2d 321 [2000]); *see State v. Scott*, 286 Kan. 54, 83, 183 P.3d 801 (2008) ("It is improper for a prosecutor to 'vouch' for the credibility of a witness," but "it is not improper for a prosecutor to argue that of two conflicting versions of an event, one version is more likely to be credible based on the evidence.") The prosecutor's comments about what Brown failed to tell his friends and family members were all proper comments on the evidence presented and clearly within the wide latitude of what a prosecutor may comment on during closing argument.

The prosecutor also did not improperly comment on what Brown told Detective Smith when he went down to the law enforcement center. Brown testified that the conversation was short, and he only asked Detective Smith if anyone had died. (R. XVI, 131.) Brown never testified that he told Detective Smith that he shot Herrera in self-defense. Again, the prosecutor's comment was a proper comment on the evidence presented and not outside the wide latitude afforded to prosecutors in closing argument.

Furthermore, the district court also properly instructed the jury on the burden of proof and reasonable doubt, and the jury is presumed to have followed the instructions. *See State v. Mitchell*, 294 Kan. 469, 482, 275 P.3d 905 (2012). Generally, a prosecutor's misstatement regarding the burden of proof can be ameliorated by correct jury instructions. *State v. Cosby*, 293 Kan. 121, 262 P.3d 285 (2011). The district court instructed the jury:

> The State has the burden to prove the defendant is guilty. The defendant is not required to prove he is not guilty. You must presume that he is not guilty unless you are convinced from the evidence that he is guilty.
>
> The test you must use in determining whether the defendant is guilty or not guilty is this: If you have a reasonable doubt as to the truth of any of the claims required to be proved by the State, you must find the defendant not guilty. If you have no reasonable doubt as to the truth of each of the

claims required to be proved by the State, you should find the defendant guilty. (R. II, 118-147; R. XVII, 3.)

This jury instruction was a proper statement of the law and should have averted any confusion regarding the burden of proof. *See State v. Stone*, 291 Kan. 13, 18-19, 237 P.3d 1229 (2010). When placed in context, the prosecutor was not attempting to shift the burden to Brown, but to infer that because Brown did not tell anyone he saw after the shooting, including law enforcement, about the fact that Webster had a gun or that he shot the men in self-defense, his testimony was not credible.

However, if this court finds that the prosecutor's comments during closing argument were improper, it was harmless error. The prosecutor's comments were not gross or flagrant. The topic was not repeated or emphasized throughout the closing argument. These comments were embedded in a closing argument that was largely evidence based and focused on the evidence presented and how that evidence applied to the jury instructions. The prosecutor repeatedly told the jury that it must consider all of the evidence in reaching its verdict and made proper inferences that the evidence supported a guilty verdict in this case.

Additionally, the record does not support a finding of ill will. The isolated and brief comments made by the prosecutor were not calculated or made in bad faith. After Brown made his objections and ultimately moved for a mistrial, the district court told the prosecutor not to make any further comments on this topic, and the prosecutor followed the court's instruction. The prosecutor did not ignore the order from the district court. (R. XVI, 37.)

Moreover, as argued above, there was overwhelming evidence to establish Brown's guilt beyond a reasonable doubt. Therefore, if either of these comments were improper, they were harmless error in this case.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 24th, 2014, a copy of this Appellee's Brief was served on Michelle Davis, #14116, by email to adoservice@sibds.org.

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