No. 14-112728-A

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**IN THE**
**COURT OF APPEALS OF THE**
**STATE OF KANSAS**

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**STATE OF KANSAS**
Plaintiff-Appellee

vs.

**LARRY GENE SMITH, JR.**
Defendant-Appellant

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# BRIEF OF APPELLANT

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Appeal from the District Court of Saline County, Kansas
Honorable Patrick H. Thompson, Judge
District Court Case No. 10CR967

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## Nature of the Case

A jury found Larry G. Smith, Jr., guilty of battery on a corrections officer for an incident that occurred at the Saline County Jail. (R. XIV, 288.) Mr. Smith timely appealed. (R. I, 73.)

## Statement of Issues

I. **The District Court Erred by Not Instructing the Jury on Self-Defense.**
II. **The District Court Erred by Not Admitting Mr. Smith's Blood-Spattered Files Into Evidence.**
III. **The District Court Clearly Erred by Not Giving a Unanimity Instruction.**
IV. **Mr. Smith's Conviction Should Be Reversed Because of the Impact of the Cumulative Errors at His Trial.**

## Statement of Facts

The State charged Larry Gene Smith, Jr., with battery on a corrections officer on August 22, 2010, for an incident that occurred when Mr. Smith was confined at the Saline County Jail. (R. I, 18.) After various continuances to determine Mr. Smith's competency to stand trial, his case proceeded to trial on January 19, 2012. (R. I, X; XIV, 1.)

On the night in question, Corporal Travis Henry worked the control room at the Saline County Jail and said he heard pounding sounds coming from Mr. Smith in cell 4001. (R. XIV, 107-08.) Henry said two inmates called the control room and reported concern for Mr. Smith because he continued to make noise. (R. XIV, 109.) Mr. Smith and another correctional officer, Brenda Darr, left the control room to speak with Mr. Smith in his cell and to ask him to quiet down. (R. XIV, 109, 172.)

When they arrived at Mr. Smith's cell, Mr. Smith requested to speak with the FBI. (R. XIV, 110.) Henry radioed control and asked it to open Mr. Smith's cell door. (R. XIV, 110-11.) Control opened Mr. Smith's cell door, but Mr. Smith shut it again. (R. XIV, 110.) Henry radioed control to again open the cell door. (R. XIV, 111-12.) This time,

Henry pushed Mr. Smith's cell door open and asked Mr. Smith to sit on his bed. (R. XIV, 111-12.) Henry asked Mr. Smith if he felt like hurting himself and why he kept kicking the door. (R. XIV, 111-12.)

Henry described Mr. Smith's behavior as very agitated and said Mr. Smith told him that he kicked the door because he could do what he wanted. (R. XIV, 112-13.) Henry told Mr. Smith that if he didn't stop kicking the door that he would charge Mr. Smith with damaging county property and Mr. Smith asked Henry if that was a threat. (R. XIV, 113.) Henry said it was not a threat, but that he would take Mr. Smith to segregation if he didn't stop making noise. (R. XIV, 113.) Mr. Smith told Henry that he felt threatened and Henry said he also told him he would not stop kicking the door. (R. XIV, 113.)

After Henry asked Mr. Smith to pack and he refused, correctional officer Christopher Milleson entered Mr. Smith's cell and Henry grabbed Mr. Smith's arm "to help him stand up" so he could be escorted to booking. (R. XIV, 115.) Henry alleged that once he made contact with Mr. Smith, Mr. Smith began flailing, kicking, and punching, but he didn't remember if Mr. Smith made contact with anyone when he did so. (R. XIV, 115.)

Milleson said he stepped in to tell Mr. Smith that the orders were not up for discussion, but Milleson said that Mr. Smith still did not comply. (R. XIV, 142.) Milleson said that Mr. Smith flailed his arms and hit Milleson in his chest three or four times before Milleson gained control of Mr. Smith's arms. (R. XIV, 143.) Milleson wore a protective vest designed to prevent wounds from stabs and bullets. (R. XIV, 144, .) While he flailed, Mr. Smith allegedly yelled, "I won't do what you tell me to," and Milleson said

he was "swinging at everything." (R. XIV, 144.) Correctional officer Amber Black said she came into the cell at this point to assist. (R. XIV, 188.)

Henry said that he grabbed Mr. Smith's left arm and Milleson went to Mr. Smith's right side and rolled Mr. Smith onto his stomach. (R. XIV, 115.) Mr. Smith said Milleson jammed his knee into Mr. Smith's back. (R. XIV, X.) This trapped Milleson's hand beneath Mr. Smith's body. (R. XIV, 145.) Darr said during the struggle between Henry, Milleson and Mr. Smith, Black tried to handcuff Mr. Smith while Darr tried to hold down his feet. (R. XIV, 172.)

Mr. Smith says at this point in time, someone struck him on the back of the head, possibly with a metal object, or with a fist or ring. (R. XIV, 225-26.) Mr. Smith could see the blood spraying out of the sides of his eyes as he lay on his stomach and landing on his bedside table. (R. XIV, 228-31.) Because he lay on his stomach, Mr. Smith could not see which officer struck him, but he believed it was Milleson. (R. XIV, 229.)

During Mr. Smith's direct examination, he attempted to admit some papers on which his blood had spattered during the fight so the jury could get a sense of the scope of his injury. (R. XIV, 229.) He remembered the papers being on his table when the blood hit, and he got the papers back the day after the incident, though the papers were in the custody of the jail while Mr. Smith remained in the segregated cell. (R. XIV, 230-33.) After getting them back, Mr. Smith did not tamper with them and showed them only to his attorney. (R. XIV, 230-33.) But the court refused to admit the papers because of problems with chain of custody relating to whether the blood on the files was his and how the blood got on the files because he didn't have possession of them for those 24 hours he remained in segregation. (R. XIV, 235-36.)

Milleson couldn't recall Mr. Smith getting hit on the head or Mr. Smith hitting his head, but he did see blood around the scene and admitted the blood did not come from him. (R. XIV, 160.) Likewise, Darr could not recall if the confrontation injured Mr. Smith. (R. XIV, 174.) But Henry *did* remember seeing Mr. Smith bleed during the confrontation. (R. XIV, 134.)

Milleson said Mr. Smith then bit his hand, putting enough pressure on the bite to break the skin. (R. XIV, 145-147.) Milleson told Henry that Mr. Smith was biting him, so Henry pushed on a pressure point on the back of Mr. Smith's neck and Milleson pulled Mr. Smith's head up with his other hand, and these two things made Mr. Smith's mouth release. (R. XIV, 116, 146.) Henry said he did not see Mr. Smith bite Milleson, but the officers and the nurse did see a bite mark on Milleson's hand. (R. XIV, 134, 191, 205.) Mr. Smith admitted it was possible that *after* his head began to bleed from the strike wound, he made incidental contact with Milleson's hand. (R. XIV, 237-38, 252-53.) Mr. Smith said he was trying to scream that he wasn't suicidal and did not need to go to booking to be placed on supervised watch. While he talked, he said it was possible that his teeth came into contact with Milleson's hand, but he denied intentionally trying to bite Milleson. (R. XIV, 237-38, 241, 252-53.)

Milleson and Henry then flipped Mr. Smith off the cot and onto the tile floor where Henry tased him once with the prongs and once without in a drive-stun and the four officers handcuffed and ankle-cuffed him. (R. XIV, 117-19, 147-50, 190-91.) They then carried Mr. Smith to booking where he could be placed in a segregated cell for closer observation. (R. XIV, 120.) Mr. Smith says they carried him because he was shaking from being hit in the head. (R. XIV, 243.) Henry believes the struggle with Mr.

Smith lasted about 5 minutes. (R. XIV, 120.)

In the booking cell, Henry examined Mr. Smith for injuries and found marks left by the taser and a cut to the back of Mr. Smith's head, so he called the nurse. (R. XIV, 120.) The nurse identified a laceration on the back of Mr. Smith's head that had stopped bleeding, but noted that dried blood remained in his hair. (R. XIV, 203-04.) The nurse said the wound had likely bled profusely during the confrontation because scalp wounds are highly vascular, so they bleed easily. (R. XIV, 207.) And after the confrontation ended, Henry noticed some blood spatter around Mr. Smith's former jail cell. (R. XIV, 136.) Specifically, he recalled a 2-inch puddle of blood. (R. XIV, 137.) The nurse also identified a bite mark on Milleson. (R. XIV, 205.)

Mr. Smith asked the correctional officers how they were trained to handle an uncooperative individual. Henry explained generally that their training taught them to avoid using force. (R. XIV, 106.) Rather, they were taught to use "verbal judo," pressure points, arm locks, the taser, and pepper spray and to move up between these methods as the situation called for it. (R. XIV, 106, 152-53, 175-77.)

At the close of evidence, Mr. Smith requested that the jury instructed that it could acquit him if it found he acted in self-defense. (R. XIV, 258-59.) But the district court refused because it found that such an instruction would not be consistent with Mr. Smith's testimony that he did not make contact with the officers on purpose. (R. XIV, 259.) Moreover, the State told the jury it could find Mr. Smith guilty of battery against a correctional officer if it believed he'd bit Milleson or hit Milleson, but it did not elect which act it relied on for the charge, nor did the district court provide a unanimity instruction. (R. XIV, 258-62.)

The jury found Mr. Smith guilty of battery on a corrections officer. (R. XIV, 288.) Mr. Smith moved for a judgment of acquittal and for a new trial on the grounds that the verdict contradicted the evidence, the district court erred by suppressing the blood-splattered papers, and the district court erred by not instructing the jury on self-defense. (R. I, 56, 58.) Mr. Smith also moved pro se for a dismissal of the charges against him on double jeopardy and speedy-trial grounds. (R. I, 60.)

The district court denied all of Mr. Smith's post-trial motions. (R. I, 86; XV, 7-9, 11-12, 19-20.) Specifically, the court said about the self-defense instruction:

> "[T]he Court's recollection is that Mr. Smith's testimony and defense was that it never-- it didn't happen. He didn't batter the officer. It wasn't that he claimed he acted in self-defense, he said it didn't happen, so a self-defense instruction would be inconsistent with the defense presented and the Court believes it was correct . . . in denying the requested instruction." (R. XV, 8.)

Before sentencing, Mr. Smith moved for a dispositional departure to probation, and noted that at the time of the crime, he lacked the mental capacity for judgment. (R. I, 66-67.) The court granted his departure motion and sentenced him to 36 months' probation with an underlying 52-month prison sentence and 24 months' post-release supervision. (R. I, 83-84.) Mr. Smith timely appealed. (R. I, 73.)

## Argument & Authorities

### I. The District Court Erred by Not Instructing the Jury on Self-Defense.

#### *Introduction*

The district court refused to give the self-defense instruction Mr. Smith requested because it concluded he could not claim the alleged battery was both accidental and motivated by self-defense. (R. XIV, 259; XV, 8, 11-12.) The district court erred when it made this conclusion because defendants have a due process right to allege contradictory

defense theories and have instructions given on those theories so long as any evidence supports them. Because the State cannot prove beyond a reasonable doubt that the failure to give a self-defense instruction at Mr. Smith's trial would not have had any reasonable possibility of altering the verdict, this court must remand Mr. Smith's case for a new trial.

***Standard of Review***

Appellate courts use a stair-step process for analyzing jury-instruction issues on appeal. *State v. Salary*, 301 Kan. 586, 592, 343 P.3d 1165 (2015). First, the court exercises unlimited review over whether the issue is properly before it, examining the matter from both an issue-preservation and a jurisdictional standpoint. 301 Kan. at 592. Second, the court exercises unlimited review to determine whether the jury instruction the party alleges the district court should have given would have been legally appropriate to give. 301 Kan. at 592. Third, the court determines whether sufficient evidence existed to support the instruction after viewing the evidence in the light most favorable to the requesting party. 301 Kan. at 592. If the law and the evidence presented at trial—even if weak—supported giving the instruction, then the district court erred. *State v. Plummer*, 295 Kan. 156, 162, 283 P.3d 202 (2012).

Fourth, if the district court erred under the third step, this court determines whether the error requires reversal by applying the harmless-error test applicable to the rights impacted by the error: statutory or constitutional, with a constitutional error requiring a stronger showing that the error had no impact on the trial. See *Plummer*, 295 Kan. at 163. When the omitted instruction went to a defendant's theory of defense, this court applies the constitutional harmless-error test and reverses a defendant's conviction unless the State can prove that even if the instruction had been given, it would not have

had any reasonable possibility of impacting the jury's verdict. *State v. Andrew*, 301 Kan. 36, 46, 340 P.3d 476 (2014).

***Issue Preservation***

Under K.S.A. 22-3414, to fully preserve a jury-instruction issue for appellate review, the party who requested an instruction that the district court ultimately refused to give may propose the instruction before trial and must object to its omission from the proposed jury-instructions before those instructions are given to the jury. *State v. Brammer*, 301 Kan. 333, 340-41, 343 P.3d 75 (2015). Here, Mr. Smith proposed a self-defense instruction and objected to its omission from the instructions the court planned to submit to the jury before the instructions were submitted to the jury. (R. XIV, 258-59.) Thus, this court may review whether the district court erred by not giving Mr. Smith's requested self-defense instruction.

***Analysis***

Because this court may reach the merits of whether the district court erred by not giving the self-defense instruction Mr. Smith requested, it must now determine whether the instruction was legally appropriate, whether evidence supported giving the instruction, and, if so, whether not giving the instruction amounted to constitutionally prejudicial error. See *Salary*, 301 Kan. at 592.

1. *A Self-Defense Instruction Is Legally Appropriate in a Battery-Against-a-Corrections-Officer Case.*

A self-defense instruction was legally appropriate in Mr. Smith's case. First, self-defense is a complete defense to battery and Kansas law permits using force or threatening to use force when doing so is necessary to protect oneself against another's imminent use of unlawful force. K.S.A. 21-5222(a). While this doctrine does not always

justify the use of responsive force against law enforcement or correctional officers, a citizen may use reasonable force to protect himself from law enforcement when unlawful force is being used against the citizen. *State v. Smith*, No. 108,408, 2014 WL 642037, at *2 (Kan. App. 2014) (unpublished opinion), *rev. denied* December 30, 2014.

A law enforcement officer uses unlawful force when he or she commits a crime or tort against a citizen and/or uses excessive force against a citizen. *State v. Andrew*, 301 Kan. 36, 46, 340 P.3d 476 (2014); *State v. Franz,* 9 Kan.App.2d 319, 320, 676 P.2d 157 (1984); *State v. Heiskell,* 8 Kan.App.2d 667, 672, 666 P.2d 207 (1983); *Dauffenbach v. City of Wichita,* 8 Kan.App.2d 303, 308, 657 P.2d 582, *aff'd* 233 Kan. 1028, 667 P.2d 380 (1983). K.A.R. 44-5-106 states that K.S.A. 21-3215, now codified at 21-5227, applies to correctional officers when "maintaining security, control, and discipline in the correctional situation." K.S.A. 21-5227 mandates that law enforcement officers use only *reasonable* force when carrying out law enforcement duties and precludes the use of *excessive* force. See also *Dauffenbach*, 233 Kan.1028, Syl. ¶ 1, 1035-36.

Here, photographs showed that Mr. Smith sustained a head wound, which multiple witnesses confirmed bled. (R. XIV, 134, 136, 160, 191, 202, 207, 228-31.) Mr. Smith testified that this wound bled profusely and that the blood spattered. (R. XIV, 228-31.) Henry testified that a small pool of blood from Mr. Smith's wound remained in Mr. Smith's cell after the altercation. (R. XIV, 137.) Henry also admitted that he "drive-stunned" Mr. Smith, which is more painful than standard tasing because it involves direct contact between the taser and the victim's skin. (R. XIV, 119, 190-91.)

Also, testimony showed four officers physically manipulated Mr. Smith and flipped him onto the tile floor of his cell. (R. XIV, 117-18, 172.) The officers were taught

to use "verbal judo," pressure points, arm locks, the taser, and pepper spray and to move up between these methods as the situation called for it. (R. XIV, 106, 152-53, 175-77.) Generally, their training taught them to avoid using force. (R. XIV, 106.) But in Mr. Smith's case, some evidence showed that the officers did not rely on the approved techniques for subduing an agitated individual, and instead hit him on the head, wrestled him to the ground as a group of four against only Mr. Smith, using force before trying other techniques.

Because, viewed in the light most favorable to Mr. Smith, this constitutes evidence of excessive force, or force unreasonable or wanton in light of the circumstances, the district court should have given the jury the legally appropriate self-defense instruction.

2. *Evidence Supported Giving a Self-Defense Instruction in Mr. Smith's Case Because Evidence Showed the Officers Used Excessive Force and That Mr. Smith Acted to Protect Himself from Serious Harm.*

Likewise, the evidence supported giving a self-defense instruction at the close of Mr. Smith's trial. Once this court determines that a jury instruction would have been legally appropriate, it must next determine if evidence supported the instruction. *Salary*, 301 Kan. at 592. A defendant is entitled to an instruction on his theory of the case even when the evidence supporting that theory is slight and supported only by the defendant's own testimony. *State v. McCullough,* 293 Kan. 970, 974, 270 P.3d 1142 (2012). Conversely, there is no requirement that a defendant *must* rely on his own testimony to merit a particular instruction. *Heiskell*, 8 Kan. App. 2d at 675 (citing 1 Wharton's Criminal Evidence § 27 [13th ed. 1972]).

For instance, a defendant can claim that he did not commit a battery or murder and nonetheless be entitled to a self-defense instruction if *any evidence* raises that issue. 8 Kan. App. 2d at 673; see also *State v. Hargis,* 5 Kan.App.2d 608, 609, 620 P.2d 1181 (1980), *rev. denied* 229 Kan. 671 (1981) (noting "any evidence whatsoever" of self-defense necessitates giving of instruction). Accordingly, there is no rule that prevents a defendant from relying on contrary theories of defense and a defendant can therefore claim—and be entitled to jury instructions if the evidence warrants them—on disparate defense theories of accident, self-defense, and mistaken identity. See *Heiskell*, 8 Kan. App. 2d at 672-75.

In such cases, an accused is entitled to a self-defense instruction if any evidence exists that, despite the accused's denial, a defendant committed an act, but did so in self-defense. *Heiskell*, 8 Kan. App. 2d at 675. An individual is entitled to a self-defense instruction when both the individual and an objectively reasonable person would believe the use of force was necessary for self-protection from unlawful force. *City of Wichita v. Cook,* 32 Kan.App.2d 798, Syl. ¶ 1, 89 P.3d 934, *rev. denied* 278 Kan. 843 (2004) (battery charges).

Here, evidence existed that multiple officers came to confront Mr. Smith in his small jail cell and that immediately after he flipped onto his stomach, one of them put his knee into Mr. Smith's back and hit him on the head, causing a painful, bloody wound. (R. XIV, 228-31.) Hitting Mr. Smith on the head was not among one the approved techniques for dealing with an inmate and would cause both Mr. Smith and a reasonable person to believe that responding with force was necessary for self-protection.

Moreover, the only act that the State presented *any* evidence that Mr. Smith did intentionally was biting Milleson's hand, and Mr. Smith's timeline establishes that this did not occur until *after* Mr. Smith's head had been cut open by a punch from one of the officers, possibly Milleson. (R. XIV, 237-38, 252-53.) Thus, while Mr. Smith's testimony suggested that his physical touching of the officers was by accident, in the light most favorable to Mr. Smith, the timeline evidence still suggests the possibility that Mr. Smith acted in self-defense *after* the officers injured his head.

Moreover, when the district court concluded that Mr. Smith could not rely on two contradictory theories of defense—accident and self-defense—it erred as a matter of law. (R. XIV, 259.) Its conclusion that Mr. Smith's claim that the alleged battery happened by accident prevented him from also relying on self-defense is directly contradicted by controlling appellate case law. *State v. Smith,* 161 Kan. 230, 167 P.2d 594 (1946); *Heiskell*, 8 Kan. App. 2d at 674. Even if *more* evidence supported the accidental-battery theory than the battery-resulting-from-self-defense theory, Mr. Smith had a constitutional due-process right to rely on both theories. While these theories are contradictory, Mr. Smith was permitted to rely on both of them because some evidence supported finding that Mr. Smith acted in self-defense. See 8 Kan. App. 2d at 674-75.

3. *The Failure to Give Mr. Smith's Self-Defense Instruction Deprived Him of His Constitutional Right to Present a Defense, Requiring a Reversal of His Conviction.*

The district court's failure to instruct the jury on Mr. Smith's theory of self-defense also deprived Mr. Smith of due process and necessitates the reversal of his conviction. When a district court fails to instruct on a defendant's theory of a case, where the evidence and law supported giving the instruction, the district court has violated the

defendant's constitutional due process rights. *State v. Car*, 300 Kan. 1, 152, 331 P.3d 544 (2014). This is because few rights are more fundamental to a defendant than a defendant's right to present his or her own defense. *Chambers v. Mississippi,* 410 U.S. 284, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). Therefore, the failure to give an appropriate instruction on a criminal defendant's theory of defense may only be declared harmless when the State proves beyond a reasonable doubt that omitting the instruction did not impact the trial's outcome in light of the entire record, which is the test for a constitutional error. *State v. Ward,* 292 Kan. 541, Syl. ¶ 6, 256 P.3d 801 (2011), *cert. denied* —— U.S. ——, 132 S.Ct. 1594, 182 L.Ed.2d 205 (2012). There must therefore be no reasonable possibility that the error contributed to the jury's verdict. *State v. Akins*, 298 Kan. 592, 599, 315 P.3d 868 (2014).

Here, the State cannot meet its burden of proving that there is "*no reasonable possibility*" that the omitted instruction would not have altered the verdict. The violence perpetrated on Mr. Smith by the officers in this case was unreasonable—and caused Mr. Smith to bleed profusely from his head. (R. XIV, 134, 136, 160, 191, 202, 207, 228-31.) Mr. Smith only bit Mr. Milleson's hand *after* he'd been struck on the back of the head. (R. 237-38, 252-53.)

Despite Mr. Smith's claims that he only reacted on accident and didn't intend to bite Milleson or hit anyone, a reasonable person might also have used force or physical contact to protect oneself from the aggressive tactics of multiple officers in a confined space. A jury might have agreed with this, but no instruction allowed the jury to acquit Mr. Smith of battery based on this theory. As such, a reasonable possibility exists that had the jury had this instruction, a different verdict could have resulted. Because the State

can't show *beyond a reasonable doubt* that this instruction would not have impacted the trial, this court must reverse Mr. Smith's conviction and remand his case for a new trial.

## II. The District Court Erred by Not Admitting Mr. Smith's Blood-Spattered Files Into Evidence.

### *Introduction*

During the takedown of Mr. Smith in his jail cell, blood from his head wound spattered on to some files he had lying near his bed. (R. XIV, 228-31.) Mr. Smith could not access these files immediately after the guards removed him from his cell, but once he was released from the booking cell, he had them entirely within his possession and testified he showed them to no one but his attorney. (R. XIV, 230-33.) No one else's blood spattered during the altercation between the guards and Mr. Smith. (R. XIV, 160.) Mr. Smith sought to admit these files to show that he'd bled during the altercation with the officers and that the blood had spattered. (R. XIV, 229.) The State objected on chain-of-custody and foundation grounds, and the district court sustained the objection. (R. XIV, 236.) But the district court erred because breaks in the chain-of-custody go to the weight of evidence, not its admissibility.

### *Issue Preservation*

To preserve a district court's failure to admit evidence for appellate review, K.S.A. 60-405 requires parties to make the district court aware of the substance or form of the evidence in a method approved by the district court. Here, Mr. Smith proffered the evidence for admission, but the district court refused to admit it based on the State's objection to its foundation. (R. XIV, 229, 236.) Accordingly, this court may consider whether the district court erred by refusing to admit Mr. Smith's blood-spattered files on foundational grounds.

### *Standard of Review*

The district court excluded Mr. Smith's physical evidence—the blood-spattered files—on the grounds he'd failed to establish perfect chain of custody, and therefore failed to establish a sufficient foundation for their admission as evidence. This court reviews the question of whether a party met the evidentiary foundation requirements with respect to particular evidence for an abuse of the district court's discretion. *State v. Ernesti,* 291 Kan. 54, 64–65, 239 P.3d 40 (2010). A district court abuses its discretion when it bases its conclusion on an error or misunderstanding of the law. *Carr*, 300 Kan. at 197. And, to determine if the district court erred in applying the law, even under the deferential abuse of discretion standard of review, an appellate court exercises unlimited review over the legal conclusions upon which it based its discretion. *Ernesti*, 291 Kan. at 64–65.

If this court determines the district court erred by excluding evidence, it then must determine whether the error mandates reversal. See *State v. Leitner,* 272 Kan. 398, Syl. ¶ 6, 34 P.3d 42 (2001). Where, as here, the evidence excluded related to a defendant's theory of defense, the error alleged is a constitutional one and the constitutional-harmless-error rule applies. *State v. Pruitt*, 42 Kan.App.2d 166, 176, 211 P.3d 166 (2009). This court must reverse the defendant's conviction and remand the case for a new trial unless the State can show that beyond a reasonable doubt, the error had little no reasonable possibility of impacting the trial's outcome. *State v. Henderson,* 284 Kan. 267, 294, 160 P.3d 776 (2007).

### *Analysis*

The district court erred by refusing to admit Mr. Smith's blood-spattered files. The State noted that Mr. Smith couldn't account for the whereabouts of his files when

those files were in the custody of the State, which led to questions about how the blood got onto the files and if the splatters were blood. (R. XIV, 235-36.) Because Mr. Smith had a break in the chain of custody, the court excluded the files. (R. XIV, 236.)

But the law does not exclude evidence when breaks in the chain of custody occur. Rather, while chain of custody is part of laying the foundation for physical evidence, any deficiency in the chain of custody goes to the weight of the evidence rather than its admissibility. *State v. Horton,* 283 Kan. 44, Syl. ¶ 12, 151 P.3d 9 (2007). Accordingly, a party need only show with reasonable certainty that the object has not been materially altered since the object was taken into his or her custody. 283 Kan. 44, Syl. ¶ 12. It is therefore sufficient if a party can say with reasonable certainty that the object being shown to the jury was the same object taken from him or her at a given point in time and that it has the same characteristics. *State v. Horton,* 283 Kan. 44, 62, 151 P.3d 9 (2007). A district court therefore abuses its discretion and misapplies the law when it excludes evidence based on chain-of-custody objections because how much weight to give the evidence in light of those objections is for the jury, and evidence is admissible if it is otherwise relevant and not prohibited by statute. See K.S.A. 60–407(f); *Horton*, 283 Kan. at 62; *State v. Riojas*, 288 Kan. 379, 382, 204 P.3d 578 (2009).

Here, the State did not object to the files' relevance or suggest another statute prohibited its admission, it only objected to the fact that for a brief period, the jail guards, not Mr. Smith, had custody over the files, which called into question the reliability of some of the assertions Mr. Smith made about the evidence. (R. XIV, 236.) Thus, the only issue is chain of custody. Moreover, Mr. Smith met the threshold chain-of-custody test because he testified with reasonable certainty that the files he sought to introduce into evidence were the exact files that the guards took from his room, put in a plastic bag, and

returned to him. (R. XIV, 230-35.) The district court therefore should have admitted the files and left their weight as evidence for the jury to determine. See *Horton*, 283 Kan. at 62.

Moreover, the State cannot prove beyond a reasonable doubt that had this evidence been admitted, the outcome of the trial would not have changed so as to pass the harmlessness test. The blood-spattered files indicated the severity of the wounds inflicted on Mr. Smith and the degree of panic and fear that must have stricken him at the time of the assault on him by the guards. The files therefore corroborated Mr. Smith's claim of self-defense, even while his own testimony contradicted it. In fact, this evidence was some of the only physical evidence of Mr. Smith's self-defense claim, and had the jury been able to consider it—especially in conjunction with a self-defense instruction—a different verdict may have resulted.

Further, this evidence also had probative value for Mr. Smith's accident defense. It showed the blood loss and the chaos inevitably following his head wound, and could have provided physical proof to the jury that he reacted on a base level and without intention when he allegedly made contact with one of the guard's hands during the struggle. Accordingly, preventing the jury from considering this evidence deprived Mr. Smith of a fair trial and its exclusion mandates a reversal of his conviction.

## III. The District Court Clearly Erred By Not Giving the Jury a Unanimity Instruction.

### *Overview*

The State alleged Mr. Smith committed *at least* two discrete acts that could constitute the crime of battery on a corrections officer: that he struck Milleson in the chest when Milleson attempted to restrain him; and that after Milleson hit him, he bit

Milleson's hand. (R. XIV, 271, 273-73.) Because these acts were motivated by different impulses, and separated by an intervening event—the blow to Mr. Smith's head—the district court should have instructed the jury that it had to agree on which of these events, if either of them, the State proved beyond a reasonable doubt. Because the jury did not receive a unanimity instruction, this court must reverse Mr. Smith's conviction.

***Issue Preservation***

Even in the absence of a defendant's request for a unanimity instruction, an appellate court may nonetheless review a district court's failure to give such an instruction or the State's failure to elect a single underlying act to constitute the charged crime for clear error. See K.S.A. 22–3414(3); *State v. Crossett,* 50 Kan.App.2d 788, 794, 332 P.3d 840 (2014) (citing *State v. Smyser,* 297 Kan. 199, 204, 299 P.3d 309 [2013]). Here, Mr. Smith did not propose a unanimity instruction, but this court may nonetheless review its omission from the jury instructions for clear error.

***Standard of Review***

In reviewing a district court's failure to give an instruction for clear error, an appellate court first determines whether any error occurred by examining whether the omitted instruction was both legally and factually appropriate in light of the entire record. *State v. Littlejohn,* 298 Kan. 632, 646, 316 P.3d 136 (2014). If the district court should have instructed the jury as the requesting party claims, the appellate court next determines whether the error requires reversing the district court's decision. 298 Kan. at 646. An error requires reversal in this context if the requesting party firmly convinces this court that a real possibility exists that omitting the instruction changed the jury's verdict. 298 Kan. at 646. Because courts dislike uncertainty in juror verdicts, this last step is met

in all cases where the defendant does *not* present a single, unified theory of defense. *State v. Voyles,* 284 Kan. 239, 253, 160 P.3d 794 (2007).

***Analysis***

Because the State alleged that Mr. Smith both hit Milleson in the chest when he walked into assist and bit Milleson's hand after Milleson flipped him onto his stomach, because an intervening event and a fresh impulse motivated those alleged events, the district court should have instructed the jurors they all had to agree on which underlying act they relied on to convict Mr. Smith of the charged crime. In a multiple acts case, the State alleges several acts and any one of them could constitute the crime charged. *State v. Davis,* 275 Kan. 107, 115, 61 P.3d 701 (2003). In order to ensure jury unanimity as to the specific act for which the defendant is charged, the district court must either require the State to elect the particular underlying act upon which it will rely for the conviction or instruct the jury that all jurors must agree that the State proved the same underlying act beyond a reasonable doubt and that act constitutes the charged crime. *State v. Ultreras*, 296 Kan. 828, 854-57, 295 P.3d 1020 (2013).

The Kansas Supreme Court has identified four factors that help to determine whether a defendant's conduct comprised multiple acts necessitating a unanimity instruction: (1) whether the acts occurred at or near the same time; (2) whether the acts occurred at the same location; (3) whether the acts have a causal relationship, in particular whether there was an intervening event; and (4) whether a fresh impulse motivated some of the conduct. *King,* 297 Kan. at 981. Ultimately, however, a case is comprised of multiple acts if different, separate, and factually distinct acts occurred. *State v. King*, 299 Kan. 372, 379, 323 P.3d 1277 (2014).

Mr. Smith concedes that the two acts of battery the State accused him of—the hitting and the biting—occurred at or near the same time and in the same general location of his jail cell, and that, therefore, the first two factors of the multiple-acts analysis weigh against him. But, more importantly, the other two factors—whether the acts were separated by an intervening event or motivated by a fresh impulse—favor finding that Mr. Smith's case constituted a multiple-acts case.

First, an intervening event separated the two alleged instances of battery—the hitting and the biting. The State alleged that Mr. Smith hit the officers when they first approached him in his cell to keep them from restraining him. (R. XIV, 115, 142-44, 273-74.) But the State alleged that Mr. Smith *bit* Milleson *after* Mr. Smith testified that someone had hit him on the head causing him to bleed. (R. XIV, 237-38, 252-53, 271.) Thus, the head wound to Mr. Smith constituted an intervening event between the first alleged instance of battery (the hitting) and the second (the biting).

Second, the head injury also created a fresh impulse for Mr. Smith's behavior. At trial, Mr. Smith testified that he initially resisted the corrections officers to make a point, but not to injure. (R. XIV, 227.) After his head wound, however, it would be reasonable that Mr. Smith might have *intended to injure* to protect himself from further injury, because the head wound created an impulse for self-protection that had not existed when the encounter first began.

The second two factors of the multiple-acts analysis therefore demonstrate that Mr. Smith's case constituted a multiple-acts case. Moreover, the underlying test for whether a case is comprised of multiple acts is whether the acts alleged by the State are separate and factually distinct. See *King*, 299 Kan. at 379. Here, the State didn't allege

that Mr. Smith bit Milleson multiple times, it alleged factually distinguishable types of physical contact—hitting versus biting—each of which could constitute the underlying crime of battery.

In fact, it covered each type of battery separately in closing arguments—covering each instance as if it presented a separate claim of battery. (R. XIV, 271, 273-74.) First, it went through the elements of battery using the bite as the underlying act: "Mr. Smith himself told you . . . that there was contact between Mr. Smith's mouth and Deputy Milleson's hand." (R. XIV, 271.) Then, the State highlighted the "hitting" as a separate incident: "On top of this bite that you've seen, you also heard from Deputy Milleson and saw him demonstrate how Mr. Smith was pinwheeling his arms and striking him in the chest three or four times." (R. XIV, 274.)

Hitting Milleson with his "striking at everything" and "flailing" arms may clearly be factually distinguished from when Mr. Smith "bit" Milleson *after* his head had been struck so as to render these two batteries distinct acts between which the State should have elected. Thus, even though the four factor test resulted in a split amongst the factors, the underlying test reveals that Mr. Smith's case required a unanimity instruction.

Because the district court failed to give a unanimity instruction when it should have done so, this court must next evaluate whether that failure requires reversing Mr. Smith's conviction. See *Ulteras*, 296 Kan. at 854-57. It does. As noted above, under the clearly erroneous standard of review, where a defendant does *not* present a unified theory of defense, and the district court failed to give a necessary unanimity instruction in a multiple acts case, the defendant has established the reversibility of the error. *Voyles*, 284 Kan. at 253. As the *Voyles* court explained:

> "If there is no unified defense, we do not tolerate verdict uncertainty in these cases. Stated in the language of the clearly erroneous standard of review applicable when no unanimity instruction has been requested, cases not containing a unified defense are reversed because the reviewing court is firmly convinced that there is a real possibility the jury would have returned a different verdict if the instruction had been given." 284 Kan. at 253.

Here, Mr. Smith did *not* rely on a unified defense theory. He claimed the batteries did not occur, occurred by accident, and resulted from self-defense. (R. XIV, 241, 258-59, X.) The jury therefore could have found some of these defenses justified absolving him of one of the alleged batteries, but not the other. For instance, some jurors may have decided that Mr. Smith had no defense for hitting any officer when the officers first confronted him, and based their guilty verdict on this battery, but others may have decided that the State did not prove that this battery occurred beyond a reasonable doubt. Conversely, some jurors may have concluded that Mr. Smith bit Milleson, but that he was justified in doing so because of self-defense, or because he lacked the requisite mens rea, while others may have determined this battery formed the basis for their guilty verdict.

Because there is no way to know after the fact, Mr. Smith's conviction was not based on a unanimous verdict and, as in *Voyles*, there can be no certainty the jurors would have returned the same verdict had they been instructed that they had to agree on the same underlying act that constituted the charged crime. Accordingly, this court must reverse Mr. Smith's conviction.

## IV. Mr. Smith's Conviction Should Be Reversed Because of the Impact of the Cumulative Errors at His Trial.

### *Overview*

The district court committed three serious errors in this case—two of those errors impacted how the jury was instructed to decide the case. For instance, the jury was not

informed that it could consider if Mr. Smith acted in self-defense, nor was it told it had to agree on a single underlying act that constituted the battery. As a result, the jury did not receive proper instruction and Mr. Smith likely was not convicted based on a unanimous verdict or after fair consideration of all applicable defenses. Moreover, even if the jury *did* consider Mr. Smith's self-defense defense, two of the district court's errors impacted his ability to present this defense: its exclusion of the blood-spattered files on erroneous grounds and its failure to give a self-defense instruction at his request. This impaired his due-process right to present a defense at trial. As such, even if these errors alone did not individually warrant reversing his conviction, the cumulative effect of them does.

***Standard of Review***

Because the cumulative-error test requires the appellate courts to apply a totality-of-the circumstances test, this court must necessarily engage in unlimited review of the entire record. *State v. Williams*, 299 Kan. 1039, 1050, 329 P.3d 420 (2014) (citing *State v. Cruz*, 297 Kan. 1048, 1074-75, 307 P.3d 199 [2013]).

***Issue Preservation***

While parties need not raise the doctrine of cumulative error at trial to raise it on appeal, to preserve the issue for review on the merits, parties must necessarily have established multiple trial errors or else there are no errors to accumulate. *State v. Dixon*, 289 Kan. 46, 71, 209 P.3d 675 (2009). If the party alleging cumulative errors has alleged no errors, then the issue fails before it may even be considered. *Williams*, 299 Kan. at 1050-51. Here, Mr. Smith has alleged three distinct trial errors that may be aggregated and considered cumulatively.

### *Analysis*

The combined effect of the three errors in this case—the failure to instruct the jury to agree on a single underlying act that constituted the charged crime, the failure to instruct the jury to acquit Mr. Smith if it believed he acted in self defense, and the failure to admit admissible evidence that buttressed Mr. Smith's defenses of self-defense and accident—prejudiced Mr. Smith and deprived him of a fair trial. Cumulative trial errors, when considered collectively, may be so great as to require reversal of the defendant's conviction. *State v. Magallanez*, 290 Kan. 906, 907, 235 P.3d 460, (2010). This is true even when each error alone would have been considered harmless because the cumulative effect of all of the errors combined can prejudice defendant and alter the outcome of a trial. *State v. Tully,* 293 Kan. 176, 205, 262 P.3d 314 (2011).

To determine if this court should reverse a defendant's conviction for cumulative errors, it examines whether the totality of the circumstances prejudiced the defendant and denied him or her a fair trial. *State v. Smith-Parker,* 301 Kan. 132, 167-68, 340 P.3d 485 (2014). In examining the totality of the circumstances, this court considers the aggregate errors in the context of the entire record and considers: (1) how the district court handled the errors as the errors arose—for example, the efficacy, or lack thereof, of any remedial efforts; (2) the nature and the number of errors and their interrelationship; and (3) the strength of the evidence. 301 Kan. 167-68. While overwhelming evidence against a defendant reversing based on cumulative error, circumstantial evidence of guilt is not considered overwhelming when serious procedural defects tainted the trial that resulted in the initial conviction. See generally, 301 Kan. at 168-69.

The cumulative errors resulted in a trial unfair to Mr. Smith. First, the district court took no remedial efforts to correct any of the errors in this case. It refused to admit the files, instruct the jury on self-defense, and it did not give a unanimity instruction or ask the State to elect a single, underlying act on which it would rely. Thus, the errors permeated the entire trial.

Second, three errors occurred. Additionally, these three errors impacted two substantive rights. Two errors impacted how the district court instructed the jury, which impaired Mr. Smith's constitutional right to be convicted by a unanimous jury after that jury considered all applicable defenses Mr. Smith was entitled to present. Also, two errors impacted Mr. Smith's ability to present his applicable defenses—particularly his defense of self-defense and his right to present evidence that corroborated that defense and have the jury instructed on that defense—which denied him due process. Thus, these errors were interrelated and impacted *how* the jury was told to decide the case.

Third, while some of the evidence against Mr. Smith *was* strong—he admitted it was possible he'd bitten or come into contact with Milleson, there was *only* inferential evidence that he acted with the intent to hit or bite. Mr. Smith testified that he never intended to bite anyone, and that if he did bite someone, it must have been the result of accidental contact between his teeth when he spoke and Milleson's hand beneath his head. (R. XIV, 237-38, 241, 252-53.) Further, other evidence showed that the bite only occurred after Mr. Smith's head had been hit on the head, from which this court may infer that Mr. Smith bit Milleson in self-defense to protect himself from being hit again. (R. XIV, 237-38, 241, 252-53.) Thus, the evidence of Mr. Smith's *mens rea* to touch, and therefore, batter, Milleson was weak. This court should therefore find the State did not

have overwhelming evidence against Mr. Smith that would preclude this court from reversing his conviction based on the cumulative errors that occurred at his trial.

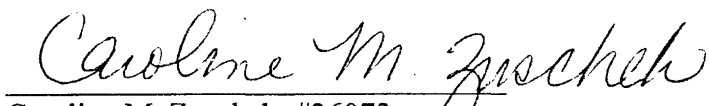
Moreover, even if the State's evidence *were* overwhelming, this case presents a unique scenario because one of the errors was that Mr. Smith's defense of self-defense was not presented to the jury. Even if the State had a strong case, if a self-defense instruction were presented, the jury could nonetheless have acquitted Mr. Smith because everything the State said could have been true, but the jury could nonetheless also have believed that Mr. Smith bit Milleson because he acted in self-protection. Thus, unlike in other cases where the strength of the evidence is of primary importance, here, it shouldn't be, because a strong case does not necessarily mean that Mr. Smith would not have been acquitted had the jury had the option of acquitting him based on self-defense.

Accordingly, cumulative error provides this court an additional basis on which to reverse Mr. Smith's conviction and grant him a new, fair trial.

## Conclusion

For the foregoing reasons, Mr. Smith respectfully requests that this court vacate his conviction and remand his case to the district court for a new, fair trial.

Respectfully submitted,



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Certificate of Service

The undersigned hereby certifies that service of the above and foregoing brief was made by mailing two copies, postage prepaid, to Ellen Mitchell, Saline County Attorney, 300 W. Ash, Salina, KS 67401-5040; and by e-mailing a copy to Derek Schmidt, Attorney General, at ksagappealsoffice@ag.ks.gov on the 2nd day of September, 2015.

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