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CASE NUMBER: 112841

No. 15-112841-A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS
Plaintiff-Appellee

vs.

PABLO ALBERTO GONZALEZ
Defendant-Appellant

BRIEF OF APPELLEE

Appeal from the District Court of Pottawatomie County, Kansas
Honorable Jeff Elder, Judge
District Court Case No. 14-CR-01

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NATURE OF THE CASE

Pablo Gonzalez was convicted by a jury of unintentional second degree murder, and sentenced to a guidelines sentence. Gonzalez appeals, claiming numerous errors: 1) the vagueness of the unintentional second degree murder statute, 2) insufficiency of evidence, 3) failure to provide a meaningful answer to the jury's question, 4) error in the procedure used to answer a jury question, 5) failure to give a limiting instruction, and 6) cumulative error.

STATEMENT OF THE ISSUES

Issue I: **The unintentional second degree murder statute, which is presumed constitutional, does not violate due process and is not vague. *Robinson* controls.**

Issue II: **A rational factfinder could have found Gonzalez guilty beyond a reasonable doubt of unintentional second degree murder.**

Issue III: **The district court did not abuse its discretion when it responded to the jury's question by referring the jury back to the jury instructions.**

Issue IV: **Although the district court may have erred in the procedure it used to handle one of the jury's questions, the error was harmless.**

Issue V: **It was not clearly erroneous for the district court to fail to give an instruction that was not requested by Gonzalez.**

Issue VI: **Because there was no cumulative error, reversal is not required.**

STATEMENT OF THE FACTS

The State charged the Defendant Pablo Alberto Gonzalez (Gonzalez) in an Amended Complaint with one count of intentional murder in the second degree, and in the alternative, reckless murder in the second degree; and one count of aggravated assault with a firearm. (R. I, 24.)

The case proceeded to jury trial where the following evidence was presented:

On January 1, 2014, at around 4:45 a.m., Gonzalez started pounding on the entrance to the St. Marys police station. (R. V, 101-02, 104, 114.) After making contact with Officer Lamberson, Gonzalez told Lamberson he "had just shot his boy in the face." (R. V, 103, 104.) As the two proceeded towards Gonzalez's car, Lamberson noticed a gun on the ground near the driver's side door, and saw one man standing outside the car on a cell phone (Jeff Swisher) and another man crying in the back seat of the car (Zachary Cashman). (R. V, 105-06, 107, 110.) Lamberson took possession of the gun,

which had one round in the chamber, and placed Gonzalez into custody. (R. V, 106-07, 108.) Levi Bishop was slumped over dead in the passenger seat. (R. 105, 110, 119, State's Exhibit 2.)

Earlier that night, during the evening of December 31, 2013, Jeff Swisher picked up Zachary Cashman and they eventually ended up at Hunter Gunderson's place where they drank, played cards, and played beer pong. (R. V, 128-30, 158-59, 160.) About an hour later, Gonzalez and his girlfriend Bailey showed up and played games as well. (R. V, 127, 130, 160, 176; VII, 372.) Just after midnight, they heard about a larger party, so they left Hunter's house to go to the other party where they continued drinking. (R. V, 133, 134-35.) Bailey, Levi Bishop's step-sister, received a phone call from Levi stating he wanted to bring in the new year with Bailey, and Levi joined Bailey at the party. (R. V, 133, 165, 177.)

Jeff and Zachary decided to head back to Hunter's after staying at the larger party for some time, and Levi followed them out. (R. V, 135-36.) Gonzalez was going to drive them over to Hunter's, but Levi said he wanted some food and somebody wanted cigarettes. (R. V, 135, 137, 168-69.) All four of them got into Gonzalez's car, and Gonzalez began driving around. (R. V, 135-36, 137.) Zachary passed out in the back seat of the car, and remembered making a couple of stops. (R. V, 136, 137.) Jeff also passed out in the back seat of the car. (R. V, 169, 170.)

Sometime around 4:30 a.m., Gonzalez and the other three men pulled up to Andrew Schindler's house looking for some cigarettes. (R. VI, 200-02.) Gonzalez and Levi got out of the car, but the other two guys were passed out in the back seat of the car. (R. VI, 202-03.) When Gonzalez stepped out of the car, his gun fell out onto the ground.

(R. VI, 203.) While this happened, Andrew continued talking to Levi. (R. VI, 203.) Gonzalez picked up his gun, held it, put it in his pocket, then went around the car to Andrew and Levi and started pointing the gun "around and being stupid." (R. VI, 203.) He pointed the gun at Andrew's head, which scared him, and Andrew told him to stop. (R. VI, 204, 205.) He wanted Gonzalez to get out of there, and he gave them cigarettes. (R. VI, 205.) When Andrew went inside to get the cigarettes, John Syrokos was walking through the area and talked to Gonzalez. (R. VI, 206.)

John testified he left a party in St. Marys around 4:30 a.m. and started walking the four or five blocks home. (R. VI, 192.) On his way home, John was encountered by Gonzalez, who asked who John was. (R. VI, 193.) John had previously been acquaintances with Gonzalez and Levi Bishop, but they were not friends. (R. VI, 190-91.) When John saw Gonzalez, Gonzalez was standing next to his vehicle; the others were inside the car. (R, VI, 193.) Gonzalez pulled a gun out and chambered a round, which scared John. (R. VI, 193, 194.) When John got to Gonzalez, he put the gun under his coat. (R. VI, 194.) The two talked for a few minutes, and John continued home. (R. VI, 194-95.) As soon as he got home, John looked up the number to the sheriff's office and called them. (R. VI, 195.) John provided dispatch with the tag number to Gonzalez's car. (R. VI, 195.) He thought that because Gonzalez had a gun, pulled it out, and chambered a round, someone should know about it. (R. VI, 195.)

A few minutes after Gonzalez left, Andrew's buddy called him and told him about Gonzalez killing Levi. (R. VI, 205, 206, 209.) The shooting occurred only a couple of blocks from Andrew's house. (R. VI, 209.)

Zachary remembered hearing a loud noise "like a cannon going off" (R. V, 137.), and Jeff was awoken by a loud banging noise. (R. V, 169, 170.) Gonzalez began screaming, and Zachary tried to ask Levi what was wrong, but Levi did not move. (R. V, 138.) Jeff remembered climbing out of the back seat of the car when they were at the police station and telling the officer Levi needed help. (R. V, 170.) The officer asked Jeff if Levi had a pulse, and Jeff went to check, finding that Levi, his step-brother, had no pulse. (R. V, 157, 170.)

Dr. Erik Mitchell, a forensic pathologist, testified Levi was killed by a contact gunshot wound to the neck. (R. VI, 301, 304.) The bullet exited behind the lower part of the right ear. (R. VI, 310.)

The officer who processed Gonzalez's car found an ammunition clip with 12 rounds of .40 caliber ammunition in the driver's side door jam. (R. VI, 223.) There were also five spent shell casings found in the car, including one on the driver's side front floor and one in the driver's side door pocket. (R. VI, 223, 225.) The officer also noticed a bullet hole in the instrument panel directly in front of the driver's steering wheel where the speedometer is located. (R. VI, 228-29.)

Captain Schmidt interviewed Gonzalez, who initially stated he did not know who shot Levi, denying that he did. (Defendant's Exhibit 2.) Gonzalez then later stated the shooting was an accident. (R. VI, 270; Defendant's Exhibit 2.) After indicating the gun used in the shooting was borrowed, Gonzalez then stated he had the gun for protection. (R. VI, 270; Defendant's Exhibit 2.) Gonzalez blamed the shooting on hitting a bump and on the trigger safety on his gun. (R. VI, 269; Defendant's Exhibit 2.) Gonzalez was very intoxicated at the time of the interview. (R. VI, 319, 322; Defendant's Exhibit 2.)

The gun Gonzalez used to kill Levi was sent in to the Kansas Bureau of Investigation for testing. (R. VII, 328, 333.) Cole Goater tested the .40 caliber S & W pistol for functionality and trigger pull. (R. VII, 333.) The gun internally functioned properly, and the trigger pull was 6.5 pounds, which is within the standard operational specifications. (R. VII, 334, 335.) There was nothing unusual about the function of the gun when Goater fired it. (R. VII, 336.) All four of the gun's safety features functioned properly. (R. VII, 336.) Goater also testified that one would be able to tell whether a cartridge was in the chamber because the loaded chamber indicator would show this. (R. VII, 339.) Unless the trigger is pulled, some of the safety mechanisms are designed to prevent the striker from moving forward. (R. VII, 338-40.) Goater also testified that any time the chamber is loaded, the firearm would be cocked. (R. VII, 346.)

The defense expert also testified the trigger had to be pulled to the rear in order for the gun to fire. (R. VII, 360.) He testified one could see or feel that the gun had been cocked. (R. VII, 362.) Finally, he testified the four safety mechanisms were working properly, and the gun was functionally sound. (R. VII, 368.)

Gonzalez testified he liked Levi and was dating his sister Bailey. (R. VII, 371.) He testified that after they left the second party, they all went shooting and then riding around. (R. VII, 373.) At some point, he put the gun to his own head, and Levi told him not to do that. He told Levi it wasn't loaded, put it to Levi's head, and pulled the trigger. (R. VII, 374, 391.) He was shocked that the gun went off, but pulled the trigger again. (R. VII, 374.) He realized Levi was hurt, and tried dialing 911, but was too drunk. He then drove to the police station. (R. VII, 375.) Levi's last words were, "I'm dying, dude." (R. VII, 375.) Gonzalez admitted he was responsible for Levi's death. (R. VII,

377.) At the time of trial, he denied that a bump in the road or a faulty trigger caused him to shoot Levi. (R. VII, 389, 394.) Gonzalez also admitted he was familiar with guns, and had owned guns. (R. VII, 379.)

The jury found Gonzalez guilty of unintentional second degree murder. (R. VIII, 441.) The jury acquitted him of the aggravated assault against Andrew. (R. VIII, 441.)

The court sentenced Gonzalez to the mitigated number of 123 months in prison. (R. XII, 19.)

Gonzalez timely appeals. (R. I, 80.)

Additional facts will be set forth within the argument as necessary.

ARGUMENTS AND AUTHORITIES

Issue I: The unintentional second degree murder statute, which is presumed constitutional, does not violate due process and is not vague. *Robinson* controls.

Standard of Review

First, Gonzalez did not properly preserve the issue for appeal. His counsel did not raise the issue of vagueness of the unintentional second degree murder statute before the district court, and he should therefore be precluded from raising the issue for the first time on appeal. "Generally, issues not raised before a district court, including constitutional grounds for reversal, cannot be raised for the first time on appeal." *Trotter v. State*, 288 Kan. 112, 124, 200 P.3d 1236 (2009). The State does recognize, however, that there are exceptions to this general rule, and that one exception is that the "newly asserted theory involves only a question of law arising on proved or admitted facts and

the issue is finally determinative of the case." *Id.* at 125. Should this Court conclude this exception is applicable, the State's argument follows.

"'Whether a statute is unconstitutionally vague is a question of law over which appellate review is de novo and unlimited.'" *State v. Rupnick*, 280 Kan. 720, 736, 125 P.3d 541 (2005) (quoting *State v. Armstrong*, 276 Kan. 819, Syl. ¶ 1, 80 P.3d 378 (2003)). A statute is presumed constitutional, and all doubts must be resolved in favor of its validity. 280 Kan. at 736 (quoting *Armstrong*, 276 Kan. at 821-22). If the intent of the legislature can be ascertained, it must govern. *State v. Robinson*, 261 Kan. 865, 875, 934 P.2d 38 (1997) (citing *City of Wichita v. 200 South Broadway*, 253 Kan. 434, 436, 855 P.2d 956 (1993)). Before a statute is stricken, it must clearly appear the statute violates the constitution. 280 Kan. at 736 (quoting *Armstrong*, 276 Kan. at 821-22). It is the court's duty to uphold a statute, rather than defeat it. If a reasonable way exists to construe the statute as constitutionally valid, it should be done. *Id.*

Appellate courts use a two-part test to determine whether a statute is unconstitutionally vague. First, the court considers "whether the statute 'conveys a sufficiently definite warning' of the proscribed conduct 'when measured by common understanding and practice.'" Next, the court considers "'whether the statute adequately guards against arbitrary and discriminatory enforcement.' [Internal citations omitted]." 280 Kan. at 737 (quoting *Armstrong*, 276 Kan. at 821-22.) This second part of the test encompasses the requirement that a "legislature establish minimal guidelines to govern law enforcement [citations omitted]." *Id.*

Argument

Gonzalez argues the unintentional second degree murder statute is unconstitutional on vagueness grounds. *Appellant's Brief*, 3. He argues that a prior case addressing this issue, *State v. Robinson*, 261 Kan. 865, 876-77, 934 P.2d 38 (1997), is not controlling because: 1) the recklessness involved in reckless homicide refers to the risk of death, 2) the statute defining recklessness has been amended since *Robinson*, and 3) a United States Supreme Court case makes "clear that statutes that turn on an unguided finding regarding a crime being worse than another hypothetical crime are too vague to withstand a vagueness challenge." *Appellant's Brief*, 5. Gonzalez's arguments fail.

Gonzalez's vagueness argument is akin to the argument the defendant made in *Robinson*, *supra*. Moreover, the analysis by the Kansas Supreme Court from *Robinson* is applicable to the facts of this case, and *Robinson* is controlling on this issue. Additionally, as set out below, the Court's holding in *State v. Deal*, 293 Kan. 872, 885, 269 P.3d 1282 (2012), does not change *Robinson*'s precedential value; similarly, that the legislature modified the definition of "recklessness" does not change *Robinson*'s precedential value.

A. Background and relevant law

K.S.A. 2013 Supp. 21-5403(a), second degree murder, states: "Murder in the second degree is the killing of a human being committed: (2) unintentionally but recklessly under circumstances manifesting extreme indifference to the value of human life."

K.S.A. 2013 Supp. 21-5405(a), involuntary manslaughter, states: "Involuntary manslaughter is the killing of a human being committed: (1) Recklessly." The jury

instructions provided mirrored the language of the statutes. (R. I, 71-72.) Although the involuntary manslaughter statute has been slightly revised, the elements instructions of the two offenses provided to the *Robinson* jury were very similar to the instructions provided to the jury in Gonzalez's case. *Robinson*, 261 Kan. at 870; (R. I, 71-72.)

Under the recodification, a person acts recklessly "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." K.S.A. 2013 Supp. 21-5202(j).

Previously, reckless conduct was "conduct done under circumstances that show a realization of the imminence of danger to the person of another and a conscious and unjustifiable disregard of that danger. The terms 'gross negligence,' 'culpable negligence,' 'wanton negligence' and 'wantonness' are included within the term 'recklessness' as used in this code." K.S.A. 21-3201.

Following a lengthy analysis in *Robinson*, the Court concluded: "Conviction of depraved heart second-degree murder requires proof that the defendant acted recklessly under circumstances manifesting extreme indifference to the value of human life. This language describes a kind of culpability that differs in degree but not in kind from the ordinary recklessness required for manslaughter." 261 Kan. at 878.

In *Robinson*, the defendant complained the second degree murder statute was unconstitutionally vague. 261 Kan. at 867. In that case, the victim was the initial aggressor, who swung a baseball bat at four young boys, one of which was 14-year-old Robinson. *Id.* at 867-68. After altercations, Robinson struck the victim in the head with a golf club, killing him. *Id.* at 868. Robinson testified he was not trying to strike the

victim in the head, but was instead trying to hit him in the arm to make him stop hitting his friend with the bat. *Id.* at 686. The jury was instructed on both depraved heart second degree murder and involuntary manslaughter. *Id.* at 869. The jury convicted Robinson of depraved heart second degree murder. *Id.*

On appeal, Robinson contented the two crimes punished the same conduct, and that second degree murder was void for vagueness because it was not adequately distinguished from reckless involuntary manslaughter. *Id.* at 870.

The Kansas Supreme Court undertook an analysis of the statutes, noting that the Senate Judiciary Committee looked to the Judicial Council's comments regarding the proposed depraved heart murder crime:

> Depraved-heart murder is fundamentally similar to felony murder and involuntary manslaughter. ... In involuntary manslaughter cases, the commission of the underlying unlawful act or the reckless conduct provides the necessary recklessness. Depraved-heart murder, in terms of degree, falls between felony murder (first degree murder) and involuntary manslaughter. ... Adding depraved-heart murder provides a middle category to cover *extremely reckless* conduct. ... [Internal citations omitted.]

261 Kan. at 872-73.

The *Robinson* Court noted the second degree murder statute, involuntary manslaughter statute, and the definition of recklessness are all patterned after the Model Penal Code. *Id.* at 873.

Model Penal Code § 210.2(1)(b) states in part: "criminal homicide constitutes murder when: (b) it is committed recklessly under circumstances manifesting extreme indifference to the value of human life."

Model Penal Code § 210.3(1)(a) states: "Criminal homicide constitutes manslaughter when: (a) it is committed recklessly." These two definitions parallel Kansas's definitions of the two crimes.

Finally, Model Penal Code § 2.02 defines recklessly as:

> A person acts recklessly with respect to a material element of an offense *when* he *consciously disregards a substantial and unjustifiable risk that* the material element *exists or will result* from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the *circumstances* known to him, its *disregard* involves *a gross deviation from the standard of* conduct that a law-abiding *person would* observe *in the* actor's *situation.* (Emphasis added.)

Kansas's definition of "reckless" differs little from the Model Penal Code's definition of reckless. In fact, very similar language is used. The italicized words are also used in Kansas's definition, and the words that do not exactly mirror each other are the same in purpose and practical effect. Therefore, if Kansas's second degree murder statute is vague, the Model Penal Code language is too.

The Model Penal Code suggested not providing additional definition of extreme indifference to the value of human life, stating:

> Ordinary recklessness ... is made sufficient for a conviction of manslaughter under Section 210.3(1)(a). In a prosecution for murder, however, the Code calls for the further judgment whether the actor's conscious disregard of the risk, under the circumstances, manifests extreme indifference to the value of human life. ... Whether recklessness is so extreme that it demonstrates similar indifference is not a question, it is submitted, that can be further clarified. It must be left directly to the trier of fact under instructions which make it clear that recklessness that can fairly be assimilated to purpose or knowledge should be treated as murder and that less extreme recklessness should be punished as manslaughter. A.L.I., Model Penal Code & Commentaries, Part II § 210.2, Comment 4, pp. 21–22 (1980).
>
> Conviction of the more serious crime requires proof that the defendant acted 'recklessly under circumstances manifesting extreme indifference to the value of human life.' This language describes a kind of culpability

> that differs in degree but not in kind from the ordinary recklessness required for manslaughter. A.L.I., Model Penal Code & Commentaries, Part II § 210.3, Comment 4, p. 53.

Robinson, 261 Kan. at 875-76.

It is clear second degree unintentional murder requires the additional element that the killing occur "under circumstances manifesting extreme indifference to the value of human life." 261 Kan. at 876. This phrase is not used in the definition of "recklessness," but instead is an additional, heightened, culpability requirement that a jury must find in order to convict a defendant of unintentional second degree murder.

Because the same principles apply to the same statutes here as in *Robinson*, and because *Robinson* conclusively settled the issue of whether second degree unintentional murder was void for vagueness, finding that it was not, *Robinson* controls and the statute must be upheld as constitutional.

Robinson cites to two other states that have modeled their statutes after the Model Penal Code, both of which have addressed the void-for-vagueness issue. 261 Kan. at 873. Arizona modeled its statutes after the Model Penal Code, and in 1982, the Arizona Court concluded that "two distinct measures of care differentiated[d] the condition of recklessness expressed in the two statutes, and an extreme indifference creating a grave risk of death to another [as required by the reckless second-degree murder statute] is a more culpable mental state than the requirement of a conscious disregard of a substantial and unjustifiable risk [as required by the reckless manslaughter statute.]" 261 Kan. at 873 (citing *State v. Walton*, 133 Ariz. 282, 650 P.2d 1264 (1982)).

The State was unable to find any negative history following this Arizona case, and in fact, the Arizona statutes are still modeled after the Model Penal Code. A.R.S. § 13-

1104(A) states in part: "A person commits second degree murder if without premeditation: (3) Under circumstances manifesting extreme indifference to human life, the person recklessly engages in conduct that creates a grave risk of death and thereby causes the death of another person...." A.R.S. § 13-1103(A) states: "A person commits manslaughter by: (1) Recklessly causing the death of another person."

The other state pointed out by the *Robinson* Court was New Hampshire, which in 1985 found that the phrase "extreme indifference to the value of human life" was easily understood and that it was not unconstitutionally vague. *State v. Dow*, 126 N.H. 205, 207-08, 489 A.2d 650 (1985). It noted that other states "uniformly held that statutes similar to the one in question [in the New Hampshire case] are not unconstitutionally vague." *Id.* at 207-08. It cited the following cases in which the issue of constitutionality of the second degree murder statute was addressed:

> *Waters v. State,* 443 A.2d 500, 506 (Del.1982) ("the words 'cruel, wicked and depraved indifference to human life' are words with a commonly accepted meaning" that is not unconstitutionally vague); *State v. Flick,* 425 A.2d 167, 173–74 (Me.1981) ("depraved indifference" murder statute not unconstitutionally vague); *State v. Primeaux,* 328 N.W.2d 256, 258 (S.D.1982) (second degree murder statute proscribing "any act imminently dangerous to others and evincing a depraved mind," not subject to uneven application and interpretation and gives fair notice of conduct forbidden); *People v. Poplis,* 30 N.Y.2d 85, 89, 330 N.Y.S.2d 365, 367–68, 281 N.E.2d 167, 169 (1972) (statute proscribing conduct "evincing a depraved indifference to human life" is sufficiently definite and the kind of conduct prescribed is sufficiently laid out to sustain a valid penal sanction); *see State v. Crocker,* 435 A.2d 58, 63–67 (Me.1981).

126 N.H. at 208.

The New Hampshire court specifically noted that the phrase "circumstances manifesting an extreme indifference to the value of human life" is something more than being aware of and consciously disregarding a substantial and unjustifiable risk. *Id.* at

207. "'If the advertence [to the risks involved] and the disregard are so blatant as to manifest extreme indifference to life, then the offense is murder....' Thus where the accused's behavior 'constitutes a gross deviation' from law abiding conduct, ... but does not manifest 'an extreme indifference to the value of human life,' ... the jury may properly find only manslaughter." *Id.* However, where the evidence shows an additional element of "extreme indifference," the jury may find second degree murder. "The existence and extent of disregard manifested is a factual determination to be made by the jury." *Id.*

The State could not find any negative history regarding this New Hampshire case either. Therefore, these cases lend support to the conclusion that the unintentional second degree murder statute is not unconstitutionally vague.

Finally, subsequent to *Robinson*, our Kansas Supreme Court reiterated in *State v. Cordray*, 277 Kan. 43, 48, 82 P.3d 503 (2004), the holding of *Robinson*, noting the *Robinson* Court rejected the contention that the unintentional second degree murder statute was so vague it needed additional instruction for the jury. The holding of *Robinson* is correct, and this Court must follow its precedent.

B. State v. Deal *does not change* Robinson*'s precedential value*

Gonzalez argues that *State v. Deal*, 293 Kan. 872, 269 P.3d 1282 (2012), blurred the line "between unintentional second-degree murder and involuntary manslaughter." *Appellant's Brief*, 5-6. However, his reliance on *Deal* is misplaced.

In *Deal*, the Kansas Supreme Court held that the second degree murder statute "focuses culpability on whether a killing is intentional, not on whether a deliberate and voluntary act leads to death." 293 Kan. at 873.

The defendant, Deal, admitted to striking the victim with a tire iron a couple of times. *Id.* at 875. He told officers he knew the victim was hurt, but he did not intend to kill the victim. *Id.* The jury convicted Deal of unintentional second degree murder. *Id.* at 877.

On appeal, Deal argued that because he intentionally hit the victim with a tire iron and that the victim died from the injuries, Deal acted intentionally under the second degree murder statute and could not be found guilty of unintentional second degree murder. *Id.* at 873, 878.

In rejecting Deal's argument, the Kansas Supreme Court noted that the language of the second degree murder statute is unambiguous. *Id.* at 883. The Court also provided somewhat of a definition of unintentional second degree murder: "a killing of a human that is not purposeful, willful, or knowing but which results from an act performed with knowledge the victim is in imminent danger, although death is not foreseen." *Id.* at 884.

The Court concluded there was sufficient evidence to show there was "a realization of danger and a conscious and unjustifiable disregard of that danger in circumstances manifesting an extreme indifference to the value of human life," when Deal hit the victim in the head with a metal bar. *Id.* at 885-86.

Therefore, what *Deal* does is require an intent to kill rather than merely an intentional act, such as the intentional firing of a weapon, to support a conviction for intentional murder. *Deal* does not stand for the proposition Gonzalez articulates, and under the facts of this case, is not applicable.

C. *The modified definition of "recklessness" does not change* Robinson*'s precedential value*

As previously set out, the definition of "reckless" was modified under the recodification. A person acts recklessly "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." K.S.A. 2013 Supp. 21-5202(j).

Previously, reckless conduct was "conduct done under circumstances that show a realization of the imminence of danger to the person of another and a conscious and unjustifiable disregard of that danger. The terms 'gross negligence,' 'culpable negligence,' 'wanton negligence' and 'wantonness' are included within the term 'recklessness' as used in this code." K.S.A. 21-3201.

Finally, Model Penal Code § 2.02 defines recklessly as:

> A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.

The Model Penal Code definition differs little from Kansas's definition, and in fact Kansas's most recent definition is not that different than the previous version.

Gonzalez seems to indicate that the inclusion of the word "result" in the modified definition of recklessness somehow makes a difference. He argues that the result is death, and because of that, the two statutes criminalize the same conduct. *Appellant's Brief*, 6. However, he misses a few key points: 1) the Model Penal Code definition also includes the word "result," and Kansas's definition of the elements of the two crimes is

nearly identical to the Model Penal Code elements and definition, 2) the modified definition of "recklessness" states a "substantial and unjustifiable risk that circumstances exist *or* that a result will follow" K.S.A. 2013 Supp. 21-5202(j) (Emphasis added.); and 3) unintentional second degree murder still requires the *additional element* of "circumstances manifesting extreme indifference to the value of human life." K.S.A. 2013 Supp. 21-5403(a). Although both statutes use the word "reckless," the unintentional second degree murder statute still requires an additional element.

Gonzalez then concludes that specific argument by implying "extreme indifference to the value of human life" needs to be qualified "in some way ... [so] a jury or a court [can] delineate the two crimes." *Appellant's Brief*, 6. However, this argument was briefly addressed above, and was addressed in *Robinson* in greater detail. As the *Robinson* Court aptly concluded, when determining whether a jury could determine what the phrase "extreme indifference to the value of human life" meant: "A jury is expected to decipher many difficult phrases without receiving specific definitions, such as the term 'reasonable doubt.'" 261 Kan. at 877. Also as stated earlier, the comments in the Model Penal Code state in part: "Given the Model Code definition of recklessness, the point involved is put adequately and succinctly by asking whether the recklessness rises to the level of 'extreme indifference to the value of human life.' As has been observed, it seems undesirable to suggest a more specific formulation." 261 Kan. at 877 (quoting A.L.I., Model Penal Code & Commentaries, Part II § 210.2, Comment 4, pp.25-26). Therefore, additional instruction need not be provided.

D. Johnson v. United States *does not change* Robinson*'s precedential value*

Gonzalez next argues the United States Supreme Court case, *Johnson v. United States*, ___U.S.___, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015), uproots the findings of the *Robinson* Court. *Appellant's Brief*, 6-8. However, Gonzalez's reliance is misplaced, and *Johnson* is distinguishable from *Robinson* and the facts of this case.

The single clause of the statute at issue in *Johnson* was part of the definition of "violent felony," which was defined, in part, as "any felony that 'involves conduct that presents a serious potential risk of physical injury to another.'" 135 S.Ct. at 2554, 2555-56. The *Johnson* Court noted that in eight years, it had four prior cases attempting to discern the clause's meaning, and that in two cases, Justices dissented, stating the clause was vague. *Id.* at 2556.

In its analysis, the Court pointed out that "combining the indeterminacy about how to measure the risk posed by a crime with the indeterminacy about how much risk it takes for the crime to qualify as a violent felony," produces unpredictability and arbitrariness. *Id.* at 2558. It also noted that in its previous decisions, the Courts had to resort to different ad hoc tests to guide its inquiry regarding the level of risk posed by a specific crime. *Id.* Finally, the Court, in responding to the dissent, noted that phrases such as "substantial risk" or "grave risk," when linked to a "confusing list of examples" was part of the problem. *Id.* at 2561.

It decided that two features made the clause unconstitutionally vague: 1) the grave uncertainty about how to estimate the risk posed by a crime created by tying the judicial assessment of risk to an imagined "ordinary case" of a crime, rather than tying it to facts or *statutory elements*, and 2) the uncertainty about the amount of risk it takes for

a crime to qualify as a "violent felony." *Id.* at Syl. ¶ (b), 2557. The Court wondered how one could decide the conduct in an ordinary case, and whether it was a statistical analysis, a survey, an expert, Google, or gut instinct. *Id.* at 2557. The "potential risk" that a court must look at in determining the "violent felony" inherently makes the judge imagine how the "idealized ordinary case of the crime subsequently plays out." *Id.* at 2557-58. Additionally, "[i]t is one thing to apply an imprecise 'serious potential risk' standard to real-world facts; it is quite another to apply it to a judge-imagined abstraction." *Id.* at 2558.

The Court concluded the clause violated the Due Process Clause because it was so vague it failed to "give ordinary people fair notice of the conduct it punishes, or [is] so standardless that it invites arbitrary enforcement." *Id.* at Syl. ¶ (a), 2556. The Court noted that a court must "picture the kind of conduct that the crime involves in 'the ordinary case,' and to judge whether that abstraction presents a serious potential risk of physical injury" when determining whether this clause covers the crime in question. *Id.* at 2557.

Johnson stands in stark contrast to the issue in *Robinson*: the unintentional second degree murder statute. In contrast to the "grave uncertainty about how to estimate the risk posed by a crime created by tying the judicial assessment of risk to an imagined 'ordinary case' of a crime, rather than tying it to facts or statutory elements," the elements are clearly set out in statute. See *id.* at 2557. These specific elements and definitions are then provided by way of instructions to the jury. The statute is clear: "Murder in the second degree is the killing of a human being committed: (2) unintentionally but recklessly under circumstances manifesting extreme indifference to

the value of human life." K.S.A. 2013 Supp. 21-5403(a). Nothing in this statute makes a court or jury compare it to an "ordinary case," there are no ambiguous terms such as "serious potential risk," and ambiguous terms are not linked to a "confusing list of examples." See *id.* at 2561.

Additionally, there is not "uncertainty about the amount of risk" involved in the unintentional second degree murder statute. See *id.* at 2557. The Armed Career Criminal Act required a determination of whether conduct involved a "serious potential risk of physical injury," which necessarily required courts to look at an "ordinary crime" to determine whether that crime would create some kind of serious risk of physical injury *Id.* at 2555-56. Even more confusing was the list included in the definition of "violent felony": "any crime ... that (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is burglary, arson, or extortion, [or] involves use of explosives..." *Id.* In the unintentional second degree murder statute, there is no such list adding confusion to the simple definitions that are set out by statute.

Gonzalez quotes from *Robinson*, trying to convince this Court that the jury must determine what an "ordinary reckless killing" is to find unintentional second degree murder. *Appellant's Brief*, 7. However, the part of the case on which Gonzalez relies is prefaced by the following:

> *If a jury is given a lesser included instruction on reckless involuntary manslaughter*, then the jury must assume that some killings fall under this crime. Thus, the jury is put on notice that it must determine whether a reckless killing involves an extreme degree of recklessness and is depraved heart murder or involves a lower degree of recklessness and is involuntary manslaughter. The jury does this by determining whether a particular reckless killing indicates an extreme indifference to the value of human life which is beyond that indifference present in all reckless killings. (Emphasis added.)

Robinson, 261 Kan. at 876-77.

The *Robinson* Court was not stating that a jury must compare the unintentional second degree murder statute to an "ordinary crime." Instead, it clearly stated, when taken in context, that if the jury is instructed on both unintentional second degree murder and involuntary manslaughter, it must look at the definitions and elements provided in the instructions to them. The jury is put on notice that there are two separate crimes with two different elements. Gonzalez simply does not properly construe the context of the *Robinson* Court's statement.

Finally, Gonzalez argues that because this issue has arisen a few times in the last 18 years, the statute must be confusing. *Appellant's Brief*, 7. This argument ignores that the same issues are raised on appeal sometimes hundreds of times, even though there is precedent on the issue. The number of times an issue is raised does not make it meritorious.

In summary, the Supreme Court's findings in *Johnson* are distinguishable from *Robinson* and the facts of this case. The vagueness in the clause of the "violent felony" definition has no similarity to the statutory elements of unintentional second degree murder.

The unintentional second degree murder statute conveys a sufficiently definite warning of the proscribed conduct, and it guards against arbitrary and discriminatory enforcement. The elements are plainly laid out in statute, and have time and again been found to be unambiguous and not capable of further explanation. The statute, which is modeled after the Model Penal Code language, is not vague. This Court should uphold its constitutionality.

Issue II: A rational factfinder could have found Gonzalez guilty beyond a reasonable doubt of unintentional second degree murder.

Standard of Review

When a defendant challenges the sufficiency of evidence on appeal, the standard of review is "whether, after reviewing all the evidence in a light most favorable to the prosecution, the appellate court is convinced a rational factfinder could have found the defendant guilty beyond a reasonable doubt. Appellate courts do not reweigh evidence, resolve evidentiary conflicts, or make witness credibility determinations." *State v. Qualls*, 297 Kan. 61, 66, 298 P.3d 311 (2013).

Argument

Gonzalez argues that the sufficiency of the evidence issue comes down to whether the facts support a conviction for recklessness that "exceeded the 'indifference present in all reckless killings.'" *Appellant's Brief*, 9. He argues the State should have put on evidence of other unintentional second degree murder cases so that the jury could compare this case with the facts of the other cases, or the State should have put on expert testimony regarding "ordinary" unintentional second degree murder cases. However, it makes little sense to confuse the jury with facts of other cases. It also makes little sense for the parties to have trials within trials. The State is unclear about how outside, unrelated information would even survive a relevance challenge, and Gonzalez does not explain how this new procedure he proposes would practically play out in court. Moreover, the district court did not have an opportunity to rule on such an argument regarding the admissibility of Gonzalez's proposed evidence. His argument must fail.

Many cases discussing the type of evidence necessary for a conviction of unintentional second degree murder to be upheld exist. For example, in *State v. Deal*, 293 Kan. 872, 269 P.3d 1282 (2012), the defendant went over to the victim's house to confront him about the defendant's girlfriend. *Id.* at 874. Deal and the victim argued, and Deal admitted to striking the victim in the head with a metal tire iron. *Id.* at 875. When the victim fell to the floor, Deal kicked the victim. When he and his friend left the victim's house, the victim was moaning on the floor. *Id.* He said he did not mean to kill the victim and that he did not deserve to die. *Id.* The jury was instructed on unintentional second degree murder, voluntary manslaughter, and involuntary manslaughter. *Id.* at 877. The jury convicted Deal of unintentional second degree murder. *Id.* On appeal, Deal argued the State failed to present sufficient evidence. *Id.* The Kansas Supreme Court found the evidence was sufficient. *Id.* at 886. It noted the defendant acted deliberately, and denied he intended to kill the victim. *Id.* at 885. It concluded that there "were circumstances that showed a realization of danger and a conscious and unjustifiable disregard of that danger in circumstances manifesting an extreme indifference to the value of human life." *Id.* at 885-86.

More recent decisions also establish the culpability necessary to sustain a conviction for unintentional second degree murder when involving firearms. Although unpublished, these cases can be used as persuasive authority. Supreme Court Rule 7.04(g)(2).

The most recent decision is *State v. Harner*, No. 110,605, 2015 WL 4879012 (Kan.App. Aug. 7, 2015) (unpublished opinion), in which the defendant fatally shot his girlfriend in the head. He claimed it was an accident that happened when he was

attempting to unload his revolver. *Id.* at *1. The victim's daughter called 911 to report a shooting, and when law enforcement arrived, Harner was outside, looked emotional and as if he had been crying, and stated he did not mean to shoot his wife. *Id.* Officers did not observe any signs of a struggle. They found one spent shell casing in the revolver and four live rounds on the floor. *Id.* at *2. Officers found open and empty containers of beer inside and outside of the home. *Id.* An expert firearms examiner testified the gun was functioning properly. *Id.* On the way to the police station to be interviewed, Harner stated things such as: "'I didn't do it on purpose.' ...'My girlfriend of three years. '... 'I'll never be the same. '... 'I loved her with every bit of my heart.' ...'Her kids, oh, my God. '... 'You might as well just shoot me. I'll never be the same.' ...'It was a stupid accident.'... 'Oh, my God. No.' ...'It was an accident.'...'I'm never going to see her again.' ...'My God. My kids. Her kids .' ...'I would never hurt Jolie ever." *Id.* at *3.

Earlier in the day, Harner had been arrested for DUI. After his arrest, he continued drinking some. *Id.* at *4, 5. The State charged Harner with one count of second degree intentional murder and one count of unintentional second degree murder. *Id.* at *7. The jury found him guilty on the lesser count. *Id.*

On appeal Harner contended the evidence was insufficient, arguing that although he may have been negligent, the evidence did not meet the standard for unintentional second degree murder. *Id.* at *7. In its analysis, the Court of Appeals panel noted that the recodified reckless statute is based on the "definition set forth in the Model Penal Code." *Id.* at *8. The panel found the following factors to be relevant to Harner's conduct being grossly negligent: he was tired and recently consumed alcohol, he unloaded bullets without checking that a live round was not left in the chamber, he

pointed the revolver at Jolie's head, and he pulled the trigger while manually uncocking the hammer and while pointed at Jolie's head. *Id.* The panel also noted Harner's gun safety training and experience handling guns. *Id.* at *8-9. It noted Harner did not follow basic gun safety rules, mishandled the revolver, and caused it to discharge. *Id.* at *9. The panel held that there was substantial competent evidence to find Harner guilty of unintentional second degree murder. *Id.* at *10.

In another unintentional second degree murder case involving a gun, four people were hanging out at an apartment watching television. One person left to go to work, and an additional person arrived. *State v. Jones*, No. 104,985, 2012 WL 2045347 (Kan.App. June 1, 2012) (unpublished opinion). Jones brought a bolt action rifle with him and was handling or playing with it, pointing it at Willie Washington. *Id.* at *1. The bullet discharged, striking Washington in the neck and shoulder. A witness testified she heard Jones say it was an accident. *Id.* Jones fled the scene and told a witness not to call 911. *Id.* All witnesses testified the two were not arguing before the gun discharged. *Id.*

Jones testified at trial, stating he was playing with the rifle before it discharged, and said he was under the influence of marijuana. *Id.* at *2. He also testified he did not know how the rifle worked. Other witness contradicted that testimony. Jones testified he knew the rifle was loaded, but did not believe he pulled the trigger. *Id.* An expert firearms examiner testified the rifle would not have fired unexpectedly or without pulling the trigger, and that the trigger required 4.25 pounds of pressure to discharge the firearm. *Id.* The district court found him guilty of unintentional second degree murder.

On appeal, Jones argued the evidence was not sufficient to convict him of unintentional second degree murder, specifically arguing he did not intend to commit a

malicious act that resulted in the death of Washington, and that he was just playing with the gun. He argued he did not intentionally point the gun at the victim and did not intentionally pull the trigger. *Id.* at *3. Like in this case, Jones also argued that *State v. Deal* favored his position. The Court of Appeals panel rejected this claim, stating: "The Supreme Court stated that the risk of hitting someone in the head with a tire iron may not mean certain death, but it certainly indicated Deal acted under circumstances that showed a realization of danger and a conscious disregard of that danger, manifesting an extreme indifference to the value of human life." 277 P.3d 447, *4 (citing *Deal*, 293 Kan. at 885-86.)

The panel found that Jones's actions were sufficient to support the conviction. *Id.* at *4. Specifically, the panel found he knew enough about rifles to attach a loaded magazine to the firearm, manipulate the bolt to eject a cartridge, and reload the gun. *Id.* It noted Jones knew the rifle was loaded, and the victim recognized the danger and told Jones to "stop playing," but Jones continued. *Id.* "The risk of pointing a loaded gun at a person shows a realization of the danger and conscious disregard of that danger." *Id.* The panel affirmed Jones's conviction.

In a final unintentional second degree murder case, the defendant admitted to drinking six beers before driving his pickup into the rear of a Cadillac, killing a passenger. *State v. Doub*, 32 Kan.App.2d 1087, 1088, 95 P.3d 116 (2004). Doub also admitted to a witness he had been drinking alcohol and smoking crack. *Id.* A jury convicted him of unintentional second degree murder. *Id.* at 1089. He appealed, arguing insufficiency of evidence. *Id.* On appeal, the Court of Appeals noted that regarding

automobile cases, a persuasive factor regarding state of mind was intoxication. *Id.* at 1091. The court affirmed his convictions. *Id.* at 1094.

This case has significant parallels to the other cases in which the Court has upheld the sufficiency of the evidence for the jury's or court's verdicts finding the defendant guilty of unintentional second degree murder.

A number of factors weigh heavily against Gonzalez's argument that the facts do not support a conviction for unintentional second degree murder: first, Gonzalez's heavy drinking that night; second, his experience with firearms; third, his decision to ignore other people's warnings about his behavior with his gun; and fourth, his memory of that evening. The State will address each of these in turn.

First, Gonzalez was drinking heavily that night, which is a factor that weighs against him, not for him. He decided to combine his significant alcohol consumption with playing with a gun, even after others – including the victim – told him not to point the gun at them. (R. VI, 204, 205; R. VII, 374.) Gonzalez admitted he went to the liquor store after work and he started drinking around 8:30 or 9:00. He bought a 30-pack of Coors and a bottle of champagne. (R. VII, 372.) He admitted to getting "pretty drunk" at the second party. (R. VII, 373.) Yet after all of this drinking, he decided to go shooting and drive around. (R. VII, 373.) After he shot Levi, he was so drunk he could not even dial 911. (R. VII, 375.) At the time of his interview with law enforcement, he was a .25. (R. VI, 284). Gonzalez had consumed a significant amount of alcohol that night. Additionally, Gonzalez chose to work on the 31st and then go out and party, staying up until the early morning hours. Not only was he heavily intoxicated, he was also tired. These factors weigh in favor of the jury's verdict.

Second, Gonzalez admitted to owning guns and being familiar with firearms. (R. VII, 379.) He admitted that on the night he killed Levi, he and his friends went out of town to go shoot his gun after leaving the second party. (R. VII, 382, 385.) Gonzalez believed they fired one magazine. (R. VII, 382.)

Third, Gonzalez chose to ignore other people's warnings about his behavior with how he handled his gun. Gonzalez knew that they went over to Andrew Schindler's house after shooting his gun. (R. VII, 386.) On cross-examination, Gonzalez testified he "d[id]n't doubt" he chambered his gun as he came around the vehicle and saw John Syrokos. (R. VII, 387.) Andrew testified that when Gonzalez got out of the car, his gun fell onto the ground. (R. VI, 203.) He picked up his gun, held it, and put it in his pocket. He then started pointing the gun around and "being stupid." (R. VI, 203.) When Gonzalez pointed the gun at Andrew's head, Andrew told him to stop. (R. VI, 204, 205.) In fact, according to Gonzalez's testimony, the victim himself told Gonzalez not to point the gun at Gonzalez's own head. (R. VII, 374.) Instead of heeding the victim's warning, Gonzalez decided to point the gun at the victim's head and then take the extra step of pulling the trigger. (R. VII, 374.) Although he was supposedly shocked the gun discharged, he pulled the trigger again, shooting somewhere in front of him. (R. VII, 374.)

Gonzalez ignored Andrew's warnings about the gun, and ignored the victim's warnings. These factors weigh in favor of the jury's verdict.

Finally, Gonzalez had a decent memory of the evening and early morning that he killed Levi. He remembered buying alcohol that evening and going to Hunter Gunderson's house for a party. (R. VII, 372.) He remembered going to the second party.

(R. VII, 372.) He remembered going shooting after they left the second party. (R. VII, 382, 385.) After shooting, they went to Andrew's. (R. VII, 386.) Gonzalez remembered talking to Andrew for a few minutes. (R. VII, 388.) Gonzalez testified he had his gun tucked in his pants and that he remembered driving. (R. VII, 388.) Gonzalez told the detective that when they left Andrew's, they went eastbound on Maple. (R. VII, 388.) He knew which direction he continued to drive. (R. VII, 390.)

At some point, Gonzalez remembered putting the gun to his head and Levi looking over and saying, "Don't do that, Pac." (R. VII, 374.) He remembered he was about to pull the trigger. (R. VII, 391.) Gonzalez looked over at him and said, "What? It's not loaded," and pulled the trigger. (R. VII, 374.) He heard a loud bang, and was shocked. He pulled the trigger again and the bullet "went somewhere in front of" him. (R. VII, 374.) He remembered that he looked at Levi, who initially looked fine, but when he looked back at him, he was bleeding and coughing. (R. VII, 374-75.) Gonzalez remembered picking up his phone and trying to dial 911. He then drove toward the police station and he remembered going around the corner and glass shattering. (R. VII, 375.) The last words he heard Levi say were, "I'm dying, dude." (R. VII, 375.) Gonzalez grabbed his hand and Levi held Gonzalez's hand really tight. (R. VII, 375.)

Gonzalez remembered pulling up to the police station, running to the door, and asking for help. (R. VII, 375.) He went to three different doors, and finally an officer came out. (R. VII, 376.)

Clearly, Gonzalez had a pretty good and specific memory of many of the events from that night. Out of all of the details he remembers, he claims he did not remember

chambering a round. A jury can determine credibility of witnesses and can weigh the evidence. The jury found Gonzalez guilty of unintentional second degree murder.

All of these facts help establish sufficient evidence, when viewed in the light most favorable to the State, that a rational factfinder could have found the defendant guilty beyond a reasonable doubt. This Court should affirm his conviction.

Issue III: The district court did not abuse its discretion when it responded to the jury's question by referring the jury back to the jury instructions.

Standard of Review

The standard of review for a court's response to a jury question during deliberations is an abuse of discretion. *State v. Lewis,* 299 Kan. 828, 856, 326 P.3d 387 (2014). To the extent the appellate court needs to determine whether the district court's response was a correct statement of law, the issue is subject to unlimited review. *Id.* (quoting *State v. Wade*, 295 Kan. 916, 920, 287 P.3d 237 (2012)). When determining which legally appropriate response should have been made, the appellate court accords the trial court with deference of looking to whether no reasonable person would have given the response provided by the trial court. *Id.*

Argument

In Issue III, Gonzalez asserts the district court did not provide a meaningful answer to the jury's question regarding the difference between unintentional second degree murder and involuntary manslaughter. *Appellant's Brief*, 12. It is important to note that Gonzalez did not object to the elements instruction for either of these two crimes, nor did he request any additional definition or instruction regarding either of these two crimes. (R. I, 61; R. VIII, 400-06.)

The jury asked: "Can you provide more clarification of the differences between the murder in the second degree, committed unintentionally and the Involuntary Manslaughter?" (R. IX.) The typed response signed by the district court judge states: "Your question is whether I can provide more clarification of the differences between the murder in the second degree, committed unintentionally and the Involuntary Manslaughter. Please refer to the instructions provided to you." (R. IX.)

As an initial matter, it is generally not proper for an appellate court to speculate about a jury's deliberations, or delve into the mental process of a jury. *State v. King*, 297 Kan. 955, 969, 305 P.3d 641 (2013).

The problem with Gonzalez's argument is that both unintentional second degree murder and involuntary manslaughter are defined, and a further definition would not have aided the jury. Gonzalez's proposed response in his brief is merely restating what is apparent from the instructions. Clearly both the murder and the manslaughter charge involve a killing that is reckless. The unintentional second degree murder, as the jury was instructed, has the additional element of "under circumstances that show extreme indifference to the value of human life." (R. I, 71.)

Similar issues have been addressed previously, as pointed out by Gonzalez. In *Robinson*, *supra*, one of the issues was whether the jury could determine what "extreme indifference to the value of human life" was, or whether it was so vague that it needed an additional instruction to explain its meaning. 261 Kan. at 877. The Kansas Supreme Court cited the comments in the Model Penal Code: "Given the Model Code definition of recklessness, the point involved is put adequately and succinctly by asking whether the recklessness rises to the level of 'extreme indifference to the value of human life.' As has

been observed, it seems undesirable to suggest a more specific formulation. ... The virtue of the Model Penal Code language is that it is a simpler and more direct method by which this function can be performed." 261 Kan. at 877 (quoting A.L.I., Model Penal Code & Commentaries, Part II § 210.2, Comment 4, pp. 25–26 (1980)).

The Court, again citing from a comment in the Model Penal Code, noted that a conviction for the more serious crime of unintentional second degree murder "requires proof that the defendant acted 'recklessly under circumstances manifesting extreme indifference to the value of human life.' This language describes a kind of culpability that differs in degree but not in kind from the ordinary reckless required for manslaughter.'" 261 Kan. at 876 (quoting A.L.I., Model Penal Code & Commentaries, Part II § 210.3, Comment 4, p. 53.)

The *Robinson* Court continued that a jury is "expected to decipher many difficult phrases without receiving specific definitions, such as the term 'reasonable doubt.'" *Id.* at 877. The Court concluded that the phrase "extreme indifference to the value of human life" is not vague. *Id.*

In *Cordray*, *supra*, the jury asked for "'an interpretation or clarification' of the phrase 'under circumstances showing extreme indifference to the value of human life.'" 277 Kan. at 49. The trial court responded by informing the jury that no further clarification was necessary. *Id.* at 50. Noting that the defendant acquiesced to the response, the Kansas Supreme Court affirmed the district court's response. *Id.*

"The trial court's referring the jury to an instruction that defines the term in question is approved standard procedure for responding to a jury's request for a

definition." *State v. Brown*, 272 Kan. 809, 812, 37 P.3d 31 (2001). Arguably, based on *Robinson* and *Cordray*, this is what the district court did in this case.

Similar to *Robinson* and *Cordray*, in this case, the trial court did not abuse its discretion by referring the jury back to the instructions. *Robinson* made clear that no further definition was necessary in the unintentional second degree murder statute. The trial court could not have provided a response that would have given the jury more direction than what they already had in the instructions, and in fact, Gonzalez's proposed response on appeal really does not provide much more guidance than the instructions themselves provide. The differences in the two crimes is clear: the unintentional second degree murder statute has an additional, heightened element, of a killing committed "under circumstances that show extreme indifference to the value of human life." (R. I, 71.) Additionally, it is well settled law that, when considering whether the jury could have been misled by an error in the jury instructions, an appellate court considers the instructions as a whole, and does not isolate any one instruction. *King*, 297 Kan. at 968-69.

Contrary to Gonzalez's assertion that reversal is required because there "is at least a real possibility that [the jury] would have returned a different verdict" if one "juror would have formed a reasonable doubt regarding whether the conduct in this case 'indicates an extreme indifference to the value of human life which is beyond that indifference present in all reckless killings,' and returned a verdict for the lesser offense," is fatally flawed. *Appellant's Brief*, 14-15. The instructions that were provided to the jury specifically instruct the jury on the correct procedure to follow if any one juror formed a reasonable doubt regarding any element of an offense. First, the jury is

instructed that it is its duty to consider and follow all instructions. (R. I, 68.) Second, it is instructed the verdict must be unanimous. (R. I, 73.) Third, it is instructed that "[w]hen there is a reasonable doubt as to which of two or more offenses defendant is guilty, he may be convicted of the lesser offense only." (R. I, 70.) And finally, in the involuntary manslaughter instruction it states: "*If you do not agree* that the defendant is guilty of Murder in the Second Degree, committed Unintentionally, *you should then* consider the lesser included offense of Involuntary Manslaughter." (R. I, 72.) (Emphasis added.) Gonzalez's argument disregards all of these specific instructions provided to the jury, and disregards the safeguards that the instructions put into place to ensure a defendant is only convicted of the offense on which all of the jurors agree. "It is presumed on appeal that jurors follow the instructions that they receive from the district court." *State v. Sisson*, 302 Kan. 123, Syl. ¶ 6, 351 P.3d 1235 (2015).

As it relates to the trial court's specific answer to the jury's question, because the trial court could not have provided a clearer answer than what was already provided to the jury by way of written jury instructions, there was no error. The district court took the safest route possible by referring the jury back to the instructions. It did not attempt to construct its own explanation of the differences in the two crimes. Even if this Court would find that it would somehow constitute error, the error is harmless. As discussed in Issue II, the prosecution's evidence was strong that Gonzalez acting recklessly and under circumstances manifesting extreme indifference to the value of human life. Moreover, because Gonzalez did not object to the district court's response, it is his burden to show the error was clearly erroneous. *State v. Williams*, 295 Kan. 506, 516, 286 P.3d 195 (2012). He has not met this burden. No error by the court or a party is grounds for a new

trial or setting aside a verdict or disturbing a judgment, unless justice requires. K.S.A. 60-261. Justice, in this case, requires that the conviction stand.

Issue IV: Although the district court may have erred in the procedure it used to handle one of the jury's questions, the error was harmless.

Standard of Review

Gonzalez argues his constitutional rights were violated when the record does not reflect his presence for a discussion on the jury's question and for the district court's answer. He argues his right to be present at every critical stage of the proceedings was violated, and his right to a public trial was violated. On appeal, a defendant's argument about the right to be present at every critical stage is an issue of law over which the court has unlimited review. *State v. Verser*, 299 Kan. 776, 787, 326 P.3d 1046 (2014). Similarly, regarding his claim that his right to a public trial was violated, this Court has unlimited review over alleged constitutional violations. See *State v. Hilt*, 299 Kan. 176, 200, 202, 322 P.3d 367 (2014).

Argument

During deliberations, the jury asked: "Can you provide more clarification of the differences between the murder in the second degree, committed unintentionally and the Involuntary Manslaughter?" (R. IX.) The typed response signed by the district court judge states: "Your question is whether I can provide more clarification of the differences between the murder in the second degree, committed unintentionally and the Involuntary Manslaughter. Please refer to the instructions provided to you." (R. IX.) There does not appear to be a record of a discussion with counsel or Gonzalez regarding the proper answer for the question.

Gonzalez raises two different procedural issues in his Issue IV – he first complains that there is no record of Gonzalez's presence for any discussion regarding the question, nor does the record reflect a waiver of his presence. The second issue he raises is that the jury's question was presumably not answered in open court and on the record, which he argues violated his right to a public trial. The State will address each of these issues in turn.

Generally, constitutional grounds for reversal will not be considered for the first time on appeal. *State v. Bowen*, 299 Kan. 339, 354, 323 P.3d 853 (2014). Though Gonzalez did not object to the procedure used by the district court in answering the jury's question, the State acknowledges this Court has nevertheless considered issues such as this for the first time on appeal. *State v. Ramirez*, 50 Kan.App.2d 922, 930, 334 P.3d 324 (2014) (citing *Bowen*, 299 Kan. at 354-55; *State v. Bell*, 266 Kan. 896, 918-20, 975 P.2d 239, *cert.denied* 528 U.S. 905, 120 S.Ct. 247, 145 L.Ed.2d 207 (1999)).

A. The record does not reflect Gonzalez's presence for a discussion on the jury's question

A defendant has a constitutional and statutory right to be present at all critical stages of trial, including conferences between the district court and jurors. *State v. Coyote*, 268 Kan. 726, 731, 1 P.3d 836 (2000). If the record does not disclose the presence of a defendant, it is presumed he was not present and his statutory and constitutional rights were violated. *State v. Bell*, 266 Kan. 896, 920, 975 P.2d 239 (1999).

The Court in *State v. King*, 297 Kan. 955, 967, 305 P.3d 641 (2013), after analysis, concluded that "any question from the jury concerning the law or evidence pertaining to the case must be answered in open court in the defendant's presence unless

the defendant is voluntarily absent." In reaching this conclusion, the Court discussed both K.S.A. 22-3420(3) and K.S.A. 22-3405(1).

The version of K.S.A. 22-3420(3) in effect at the time of Gonzalez's trial stated: "After the jury has retired for deliberation, if they desire to be informed as to any part of the law or evidence arising in the case, they may request the officer to conduct them to the court, where the information on the point of the law shall be given, or the evidence shall be read or exhibited to them in the presence of the defendant, unless he voluntarily absents himself, and his counsel and after notice to the prosecuting attorney."

K.S.A. 22-3405(a) states: "The defendant in a felony case shall be present ... at every stage of the trial... except as otherwise provided by law."

Because the record does not establish that Gonzalez was present, the next step is for this court to conduct a harmless error analysis.

The *King* Court, citing to *State v. Herbel*, 296 Kan. 1101, 299 P.3d 292 (2013), noted that acts or omissions violating K.S.A. 22-3420(3) also violate K.S.A. 22-3405(1) and the Sixth Amendment. 297 Kan. at 968. When there are both statutory and federal constitutional rights affected from the same acts or omissions, only the federal constitutional harmless error standard need be applied. *Id.* Using this standard, "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." *Id.* (quoting *State v. Ward*, 292 Kan. 541, Syl. ¶ 6, 256 P.3d 801 (2011)).

Four factors help evaluate whether a district court's communication with the jury, outside the presence of the defendant, is harmless under the constitutional standard: "(1) the overall strength of the prosecution's case; (2) whether an objection was lodged; (3) whether the ex parte communication concerned a critical aspect of the trial or rather involved an innocuous and insignificant matter, and the manner in which it was conveyed to the jury; and (4) the ability of a posttrial remedy to mitigate the constitutional error." *State v. Verser*, 299 Kan. 776, 789-90, 326 P.3d 1046 (2014).

In *State v. Coyote*, the Kansas Supreme Court undertook a harmless error analysis and found that the district court's answer was a correct statement of law, and that the court's discussion with Coyote's trial counsel, outside of his presence, was brief. It concluded the error had little, if any, likelihood of having changed the result of the trial. 268 Kan. at 735.

Applying the four factors to this case, the State's analysis follows. First, the prosecution's case of unintentional second degree murder, the count on which the jury convicted Gonzalez, was strong. The State has previously argued the sufficiency of the evidence, so will not now take time to reiterate all of its assertions from Issue II. However, based on previous arguments, the prosecution's case was strong. This factor weighs in favor of the State.

Second, the record does not reflect that an objection was lodged. However, K.S.A. 22-3414(3) states in part: "The court reporter shall record all objections to the instructions given or refused by the court, together with modifications made, and the rulings of the court." While one could assume that had an objection been made, there would have been a record made, the State would agree that a record of a conversation

does not appear anywhere in the transcripts. The State would agree with Gonzalez that this factor may weigh equally, or in the alternative, this Court "cannot particularly evaluate the second factor." *Appellant's Brief*, 18. At worst, this factor would not weigh against Gonzalez, as there is not a clear record.

Third, as to the critical or innocuous aspect and the manner in which it was conveyed to the jury, this factor weighs in favor of the State. While the question requested clarification of two of the crimes – an issue of law – the district court followed case law and did not provide additional definition. Instead, the district court referred the jury back to the previously agreed-upon instructions. The district court did not provide incorrect information, but instead took the safest route possible, and referred the jury back to the instructions. This factor weighs in the State's favor.

Finally, Gonzalez had the opportunity to file a Motion for New Trial or similar such motion post trial, had he believed such motion was necessary based on the jury's question and the district court's answer. This would have been a remedy available to him that he declined to use. It seems clear that he did not believe any such motion was necessary. This factor also weighs in favor of the State.

In conclusion, based on the weighing of the factors, the error in this case is harmless.

B. The record does not reflect that the jury's question and answer were read in open court

Gonzalez also complains that his right to a public trial was violated by the district court's procedure of not putting the communication with the jury on the record, which was presumably also not done in open court. Specifically, he complains the judge did not read the jury question on the record, and the transcript does not reflect that the judge

discussed the question with counsel. He further argues that the record does not reflect the discussions were open to the public. *Appellant's Brief*, 21. The State recognizes that there is no record of the question, discussions, or answer in the transcript, and that the only record of the jury's question and district court's answer is in the record on appeal. (R. IX.) However, the State argues that the right to a public trial does not extend beyond the actual proof phase of trial. Furthermore, because the district court did not provide any new information to the jury, and because the jury's question and district court's answer are now available to the public, Gonzalez's right to a public trial was not violated.

"The requirement of a public trial assures that the judge and prosecutor act responsibly. It also discourages witnesses from committing perjury when testifying." *State v. Ramirez*, 50 Kan.App.2d 922, 933, 334 P.3d 324 (2014). And if, in fact, this is the purpose of a public trial, Gonzalez's rights were not violated when the district court did not read the question into the record or answer the question on the record. As the Court of Appeals panel in *State v. Womelsdorf*, 47 Kan.App.2d 307, 325, 274 P.3d 662 (2012), pointed out, the court's answer is now part of the public court file. It is not hidden from the public's view.

Gonzalez tries to analogize his case to *Waller v. Georgia*, 467 U.S. 39, 47 (1984). However, this same argument has been raised and rejected by the Court of Appeals. In *Ramirez*, the panel noted that the issue in *Waller* was whether the defendant's right was infringed when the entire suppression hearing, including the presentation of evidence, was closed to the public. *Ramirez*, 50 Kan.App.2d at 930. The *Ramirez* Court noted that the United States Supreme Court found that "'suppression hearings often are as important as the trial itself,'" and that they often resemble a bench trial with witnesses testifying

and counsel arguing. *Id.* at 930 (citing *Waller*, 467 U.S. at 46, 47). The *Ramirez* Court rejected the defendant's contention that the *Waller* case had anything to do with the procedure of answering the jury's question. *Id.* at 930. Moreover, the *Ramirez* Court found that Waller "'never considered the extent to which that right [to a public trial] extends beyond the actual proof at trial.'" *Id.* at 933 (citing *Waller*, 467 U.S. at 44). The *Ramirez* Court also noted the district court's response to the jury's first question was substantively meaningless, and that the answer to the jury's second question provided no new facts or legal principles. *Id.* It found no violation of the right to a public trial. *Id.* at 934.

Such is the circumstance in this case as well. The district court's answer referring the jury to the instructions – which had previously been read in open court – presented no new facts or legal principles. This Court should reach the same conclusion here as in *Ramirez*.

The State acknowledges this case is somewhat different from *Ramirez* and *Womelsdorf*, in that in both of those cases, there is a record of discussion among the parties regarding the jury's question. *Ramirez*, 50 Kan.App.2d at 927-28; *State v. Womelsdorf*, 47 Kan.App.2d 307, 319, 274 P.3d 662 (2012). However, the State argues that based on *Ramirez* and *Waller*, a defendant's right to a public trial does not necessarily extend beyond the evidence phase of the trial. *Ramirez*, 50 Kan.App.2d at 933; *Waller*, 467 U.S. at 44.

This Court should not find a violation of Gonzalez's right to a public trial, as the district court's response to the jury's question did not present any new facts or new law. It simply referred the jury back to the instructions, which was in accordance with Kansas

case law. Further, the jury's question and the district court's answer are now available to the public, as they are part of the record. Finally, the prosecution's case was strong, as discussed in Issue II. Therefore, the conviction must stand.

Issue V: It was not clearly erroneous for the district court to fail to give an instruction that was not requested by Gonzalez.

Standard of Review

"'If a defendant did not request the district court to give a particular jury instruction and did not object to its omission from the court's instructions, the defendant's claim of error for the failure to give the challenged instruction is reviewed under the clearly erroneous standard.'" *State v. Holman*, 295 Kan. 116, 128, 284 P.3d 251 (2012) (quoting *State v. Cook*, 286 Kan. 1098, Syl. ¶ 4, 191 P.3d 294 (2008)). "'Instructions are clearly erroneous if there is a real possibility the jury would have rendered a different verdict had the instruction error not occurred.'" *Holman*, 295 Kan. at 128 (quoting *State v. Brown*, 291 Kan. 646, 654, 244 P.3d 267 (2011)). The burden to show clear error remains on the defendant. *State v. Williams*, 295 Kan. 506, 516, 286 P.3d 195 (2012).

Argument

Gonzalez complains that the testimony of John Syrokos should have prompted a limiting instruction. *Appellant's Brief*, 22. Specifically, he complains about the evidence that Gonzalez chambered a round, that Syrokos and Gonzalez had a conversation, and that Syrokos walked home and called the sheriff.

K.S.A. 60-455 states:

> (a) Subject to K.S.A. 60-447, and amendments thereto, evidence that a person committed a *crime or civil wrong* on a specified occasion, is inadmissible to prove such person's disposition to commit crime or civil

> wrong as the basis for an inference that the person committed another crime or civil wrong on another specified occasion.
>
> (b) Subject to K.S.A. 60-445 and 60-448, and amendments thereto, such evidence is admissible when relevant to prove some other material fact including motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.

(Emphasis added.)

Gonzalez notes the evidence was admitted independent of K.S.A. 60-455, yet complains an "uncharged crime" may still require a limiting instruction. *Appellant's Brief*, 22.

Gonzalez fails to establish how chambering a round, Gonzalez asking the identity of Syrokos, Gonzalez having a conversation with Syrokos, Gonzalez putting the gun away, Syrokos walking home, and Syrokos calling the sheriff, is a crime, civil wrong, or even a bad act. The State is unaware of any crime or civil wrong Gonzalez would have committed in these complained of actions, and therefore, Gonzalez has failed to establish the reason the instruction was legally and factually warranted. See *State v. Betancourt*, 301 Kan. 282, 301, 342 P.3d 916 (2015) (defendant's argument failed because he did not establish that the instruction was legally and factually warranted). The State is unclear on how a limiting instruction on acts that were not crimes and not civil wrongs would have been appropriate. The evidence was relevant to show intent and lack of mistake, but that does not mean it was a crime or civil wrong.

Even if this Court would somehow find a crime or civil wrong in Gonzalez's conduct as it relates to Syrokos, there was no error in the district court failing to *sua sponte* provide a limiting instruction. The jury clearly did not consider any prior "crime or civil wrong" in its decision regarding the unintentional second degree murder charge.

Gonzalez was also charged with aggravated assault for, around the same timeframe as the Syrokos incident, picking up his gun, holding it, and pointing the gun at Andrew. (R. VI, 203.) Gonzalez was pointing the gun "around and being stupid." (R. VI, 203.) He pointed the gun at Andrew's head. Gonzalez's actions scared Andrew and Andrew told Gonzalez to stop. (R. VI, 204, 205.) All of this was within a few minutes of Gonzalez shooting and killing Levi. (R. VI, 205, 206, 209.) For Gonzalez's behavior of pointing the gun at Andrew's head, the State charged Gonzalez with aggravated assault. However, the jury acquitted Gonzalez of this count. (R. I, 76.) Certainly pointing a loaded gun at someone's head, which is a crime, is much worse than chambering a round, which is not a crime, civil wrong, or bad act. The jury clearly did not consider evidence of other crimes in making its determination, since it acquitted Gonzalez of pointing his gun at Andrew's head and putting Andrew in fear.

Additionally, the evidence was relevant. All relevant evidence is admissible, except as otherwise provided by statute. K.S.A. 60-407. In this case, the evidence of Gonzalez chambering a round just minutes before shooting and killing Levi was relevant because after killing Levi, Gonzalez claimed he did not know the gun was loaded. The evidence was relevant to show Gonzalez's reckless behavior and his indifference to the value of human life.

Therefore, this Court should find that the district court failing to *sua sponte* issue a limiting instruction was not error. Even if an instruction had been given, it would not have affected the result of the trial.

Issue VI: Because there was no cumulative error, reversal is not required.

Standard of Review

Finally, Gonzalez argues cumulative errors require reversal of the case and a remand for a new trial. The standard to determine whether reversal is required is whether the cumulative errors, under the totality of circumstances, substantially prejudiced the defendant and denied him a fair trial. Prejudicial error cannot be found under the cumulative effect rule if the evidence is overwhelming against the defendant. *State v. Williams*, 299 Kan. 1039, 1050, 329 P.3d 420 (2014). The appellate court reviews the entire record, and has unlimited review. *Id.* If any errors being aggregated are constitutional, their cumulative effect must be harmless beyond a reasonable doubt. *State v. Santos-Vega*, 299 Kan. 11, 27, 321 P.3d 1 (2014). "In conducting this analysis, an appellate court examines the errors in the context of the record as a whole, considering: (1) how the district court dealt with the errors as they arose, including the efficacy, or lack of efficacy, of any remedial efforts; (2) the nature and number of errors committed and their interrelationship, if any; and (3) the strength of the evidence." *Id.*

Argument

The first step is to count the errors, because the doctrine does not apply if there is no error or only one error. *Williams*, 299 Kan. at 1050. In this case, Gonzalez alleges error in five issues: 1) the constitutionality of the unintentional second degree murder statute; 2) sufficiency of the evidence; 3) the district court's answer to the jury's question; 4) the lack of record regarding the jury's question and his presence or absence during discussion, the right to a public trial regarding the jury instruction; and 5) the failure of the district court to *sua sponte* provide a limiting instruction.

First, the State has demonstrated that through prior case law and through reliance on the Model Penal Code, the unintentional second degree murder statute is not unconstitutionally vague. Second, the State set out the reasons the evidence was sufficient for the unintentional second degree murder conviction. Third, the district court followed case law when it refused to provide the jury with a more specific instruction, and instead referred the jury back to the instructions, in which the elements are clearly set out. Fourth, the record does not reflect Gonzalez's presence for the discussion of the jury's question, nor the district court's answer of the jury instruction. The State acknowledges this was error, but the error was harmless. Also regarding the fourth issue, the State does not believe the right to a public trial extends beyond the evidence phase of the jury trial, and that even if it does, the jury's question and district court's answer is available as part of the record and open for public viewing. Further, no error occurred here because the response merely had the jury re-read instructions that were publicly given. Finally, because there was no crime or civil wrong committed by Gonzalez for asking someone's name, having a conversation with a person, and chambering a round, no limiting instruction was necessary. Only one error is present (which was harmless), and under the cumulative error doctrine, the doctrine does not apply if there is only one error.

Finally, even if this Court would find there is more than one error, the prosecution's evidence was strong. Gonzalez was drinking heavily on New Year's Eve and morning. Gonzalez had experience with guns, and had owned many guns. Nevertheless, he decided to carry around a gun, shoot a gun, point a gun at someone's head and ignore that person's warning to stop, and play with a gun that evening while

drinking alcohol. Gonzalez recalled going shooting with his buddies that night. He knew they went through a magazine when they went shooting. He recalled driving around with Levi and the other passengers. He recalled pointing his gun at his own head, and instead of heeding Levi's warning to stop playing around with the gun, pointed the gun at Levi's head and pulled the trigger. After supposedly being shocked that a round discharged, Gonzalez then decided to discharge yet another round. The evidence was strong that Gonzalez acted in a manner that was reckless and that displayed an extreme indifference to the value of human life.

For these reasons, the cumulative error test does not support Gonzalez's contention that this case should be reversed and remanded.

CONCLUSION

WHEREFORE, the State respectfully requests this Court affirm the district court's rulings and jury's conviction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that service of the above and foregoing Brief of Appellee was made by emailing a copy to Randall L. Hodgkinson, Kansas Appellate Defender Office, adoservice@sbids.org, on this 29th day of December, 2015, and the original was electronically filed with:

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NOT DESIGNATED FOR PUBLICATION
Court of Appeals of Kansas.

STATE of Kansas, Appellee,
v.
RONALD E. Harner, Appellant.

No. 110,605. | Aug. 7, 2015.

Appeal from Sedgwick District Court; Joseph Bribiesca, Judge.

Attorneys and Law Firms

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Before BRUNS, P.J., BUSER and POWELL, JJ.

MEMORANDUM OPINION

BUSER, J.

*1 A jury convicted Ronald Harner of unintentional but reckless second-degree murder after he fatally shot his girlfriend, Jolie Crosby, in the head. Harner claimed the shooting was accidental and it occurred when he was attempting to unload a revolver.

Harner raises four issues on appeal. First, he contends the trial evidence was insufficient to prove his guilt of unintentional but reckless second-degree murder. Second, Harner claims reversible error because the trial court admitted irrelevant and prejudicial evidence. Third, he argues that he was deprived of his constitutional right to present a defense when the trial court declined to admit statements made by detectives during his interrogations, which indicated they believed the shooting was accidental. Finally, Harner maintains that the cumulative effect of these errors deprived him of the right to a fair trial. Having carefully reviewed the record and the parties' briefs and listened to oral arguments, we find no reversible error and affirm the conviction.

FACTUAL AND PROCEDURAL BACKGROUND

Harner and Jolie began a romantic relationship in 2009. Harner, a father of two children, Logan and Bailey, lived in Hutchinson, while Jolie, a mother of three children, Caroline, Elizabeth, and Sara Jane, lived in Wichita. Harner would frequently bring his children to Wichita so they could visit Jolie's girls while he and Jolie spent time together. Harner, Jolie, and their children participated in numerous activities together, including sports, cookouts, and family outings.

Harner and Jolie ended their 3–year relationship in late March 2012. But several weeks later, the couple began a reconciliation. Towards that end, the couple made plans to attend the Wichita River Festival with their children during the first weekend in June.

In preparation for this outing, on Thursday, May 31, 2012, Harner borrowed a Taurus .38 caliber Special revolver from a friend because his .45 caliber semiautomatic handgun, which he usually carried, was too bulky for the waistband of the shorts he planned to wear to the event. Harner had borrowed the revolver only once before for the prior year's River Festival. After acquiring the revolver, Harner and his 10–year–old daughter, Bailey, travelled to Jolie's house, where he planned to spend the night for the first time since the couple's breakup.

Two days later, on Saturday, June 2, 2012, at about 5:31 a.m., Officer Robert Adams of the Wichita Police Department responded to a 911 call—placed by Jolie's eldest daughter, 14–year–old Caroline—indicating that a shooting had occurred at Jolie's residence. Upon arrival, Officer Adams went inside to assist any injured persons, while another officer encountered Harner who was "standing[, with his hands down at his side,] just adjacent to the garage on the sidewalk."According to Officer Adams, as he ran towards the residence, he noticed that Harner "appeared to be emotional"—it looked as if he had been crying—and he heard Harner say, "I didn't mean to shoot my wife."

*2 Once inside, Officer Adams observed Jolie's body, covered entirely with a blanket and reclined on a couch with her feet resting on a nearby coffee table. There was some blood and apparent brain matter on the outside of the blanket. She was pronounced dead at the scene.

According to Dr. Scott Kipper, the deputy coroner/medical examiner for Sedgwick County, the cause of Jolie's death was "a gunshot wound of the head that entered on the right side of [her] head near the temporal region, the temple, and then exited out through the left side of the head."Dr. Kipper opined that due to the stippling—the "little dots" caused by unbumed or partially burned gunpowder deposited underneath the skin —on Jolie's face, she had sustained an "intermediate range wound." In other words, the firearm was fired from a distance between a few centimeters to a few feet away from her. The doctor also described the trajectory of the bullet that entered Jolie's head as follows: "[The bullet] went from her right to left, back—front to back, and slightly upwards."Dr. Kipper did not observe any other wounds to the body, defensive or otherwise. At the time of her death, Jolie had between a .03 and .06 blood-alcohol level. Dr. Kipper ruled that the manner of Jolie's death was homicide.

Investigating officers did not observe any signs of a "fight, a struggle, [or] a disturbance."A Taurus .38 caliber Special five-shot revolver was on a coffee table directly in front of the couch. The revolver had one spent casing in the cylinder immediately under the hammer position, which was forward. Four live .38 caliber rounds were on the floor in the immediate vicinity of the revolver. The bullet that passed through Jolie's head was lodged in a pillow on the couch.

Officers searched the home and discovered a BB gun in a utility room; a pistol case and some live ammunition in a foil basket in a kitchen cupboard; a black holster capable of holding a revolver in a wooden bowl on the island in the kitchen; and a pellet gun in the dining room. On the deck in the backyard was a fire pit that contained very warm ashes. Officers also found opened and empty containers of beer on the deck, in the surrounding yard, and inside the home.

Justin Rankin, a forensic scientist employed by the Sedgwick County Regional Forensic Science Center, testified as an expert firearms examiner at trial. After conducting forensic tests, Rankin opined that the bullet which struck Jolie's head had been fired from the Taurus .38 Special revolver. Rankin also determined that the revolver was functioning properly. As described by Rankin, the revolver was a double action firearm, meaning the gun undertakes two actions when the trigger is pulled; specifically, the hammer is cocked and then the hammer is released. The revolver could also be operated as a single-action firearm by manually cocking the hammer; when the trigger is then pulled, the firearm releases the hammer. Rankin explained that the only way to release the hammer after manually cocking it is to depress the trigger, which according to Rankin can be done safely without discharging a bullet. This task is performed by controlling the hammer so it falls forward slowly: "I grip the firearm, and then with my other hand I basically support the hammer, then I depress the trigger, and then I allow [the hammer] to go forward slowly."

*3 Rankin explained that the revolver is designed to be unloaded by opening the cylinder, tipping it up, and pressing the plunger. Although gravity often causes the bullets to fall out when the cylinder is tipped upwards, the plunger is designed to bring both the fired and unfired cartridges upward so they can be extracted. The plunger only operates properly, however, if the cylinder is fully open. If the cylinder is not fully open, the plunger will catch on the side of the frame. Rankin further noted that when the cylinder is open, the hammer cannot be pulled back manually, nor can the trigger be pulled; likewise, when the hammer is pulled back, the cylinder will not open. Rankin acknowledged, however, that certain variables, for example, how clean the firearm is, the type of ammunition used, and the dimensions of the ammunition could potentially cause a non-fired cartridge to "stick in a revolver." Rankin opined that if the cylinder is open, one should be able to see ammunition inside the revolver and he would not expect ammunition to remain in the cylinder if the plunger were pressed multiple times.

Officer Bradley Boyd, the first police officer to encounter Harner at the scene, testified that upon his approach Harner walked out of the garage, with his hands in the air, and said, ' "Here I am." ' Officer Boyd determined that Harner was unarmed and noted he had blood on his right thumb and index finger. Officer Boyd transported Harner to the investigations department so he could speak with detectives.

According to Officer Boyd, while he and Harner were walking towards his patrol car, Harner repeatedly stated, " 'Oh, my God. Oh, my God. Oh, my God.' " While Officer Boyd was driving Harner to the police station, Harner was "emotionally upset," and "just started talking." Officer Boyd memorialized Harner's quoted statements in his casebook:

> "Once inside my patrol vehicle, Mr. Harner stated, ... 'Oh, fuck, I fucked up.'...He also stated, ... 'She was trying to get it from me.'...'I emptied the gun.'...'She kept fucking with me.'...'I didn't do it on purpose.' ...'My girlfriend of three years. '... 'It was just a fuck.' ...'She told me.' ...'I'll never be the same. '... 'I loved her with every bit of my heart.' ...'Her kids, oh, my God. '... 'You might as well just shoot me. I'll never be the same.' ...'It was a stupid accident.' ...'I loved her so much. It should have been me.' ...'We just drove back from Hutch.' ...'You got me handcuffed like this, like I did it on purpose. '... 'Oh, my God. No. Oh, my God. Oh, my God. Oh, my God.' ...'This is not fucking happening.' ...'Oh, my God. I didn't do anything.' ...'It was an accident.' ...'My life is never going to be the same.' ...'I'm never going to see her again.' ...'Oh, my God.' ...'Fuck.' ... 'There's no fucking way that just happened.' ...'My God. My kids. Her kids .' ...'This is not fucking happening.' ...'I would never hurt Jolie ever.' "

*4 After Harner arrived at the investigations unit, he waived his Miranda rights and participated in two interviews; the first took place on June 2 and the second, following Harner's formal arrest, occurred on June 4.

Harner made extensive statements to detectives regarding his relationship with Jolie and the events leading up to and including her death. He related that the couple broke up for about 3 to 5 weeks, but they had recently reconciled because Jolie called him "quite a bit wanting to get back together."Harner attributed the breakup to Jolie's belief that "the only reason [he] was coming over to her house was so [he] could be with [his] kids."He also acknowledged an occasion when he had made negative comments about the University of Kansas during a Final Four basketball game which had angered Jolie. When asked if his failure to use self-discipline when drinking was a factor in the breakup, Harner responded affirmatively. Harner also admitted dating another woman, Connie, who Jolie did not like, during the couple's separation. Nevertheless, Harner insisted that at the time of the shooting, he and Jolie "were getting along better than [they] had before."

According to Harner, on Friday, June 1, 2012, he and Jolie spent the afternoon together with some of their children and had dinner together. After that, the couple spent a quiet evening with Elizabeth, Bailey, and Sara Jane. About 9 p.m., Harner and Jolie left Wichita for Hutchinson to pick up Harner's boat, while Elizabeth, Bailey, and Sara Jane remained at home. According to Harner, prior to leaving the children alone, he advised them that his .45 caliber firearm was above the refrigerator and the loaded .38 caliber revolver was in a breadbasket on the kitchen island.

Upon the couple's arrival in Hutchinson, they stopped by Harner's father's house to pick up Harner's boat. En route to return to Wichita, however, the Reno County Sheriff's Department stopped Harner at a DUI checkpoint. A breath test revealed Harner had a blood-alcohol level of .115, which resulted in Harner's arrest and booking into the Reno County jail. According to Harner, his DUI arrest did not anger Jolie, although "she was crying after my DUI because of the consequences that I'll have to face at work.... Not because we were having any kind of a quarrel or anything."Harner estimated that between 4 p.m. and 10:30 p.m. he had about 8 beers which was not "out of the ordinary" for him to drink when he was off work.

After Harner's DUI arrest, Jolie contacted Harner's friend, Mitch Rome, because she needed help backing Harner's boat into his driveway, and the two of them then picked Harner up at the jail at about 2 a.m. Harner indicated that Rome drove him and Jolie back to his house and Jolie then drove the couple back to Wichita. After arriving at Jolie's house, the couple went outside to the backyard, started a fire in the fire pit, talked, and drank beer.

Later, Harner and Jolie came inside, sat down on the living room couch, and watched television. Harner removed the revolver from the breadbasket and brought it into the living room. When asked why he decided to take the revolver into the living room, Harner stated it was his habit to take a gun with him and indicated, "I do that whenever we're, wherever we're sitting usually I bring the gun with me or like if I go to her bed. Or if I go downstairs to sleep I take the gun."Harner acknowledged, however, that he did not bring a firearm to

Hutchinson, nor did he take a firearm outside when he and Jolie were talking by the fire pit.

*5 Harner commented to the detectives, "I've never, that's only the second time I've ever had that gun. I don't like revolvers. I usually have my gun with me and I don't hardly ever have one in the chamber. I have them in the clip."Harner did not explain why he grabbed the revolver rather than his .45 semiautomatic firearm which apparently was also in the kitchen.

According to Harner, when the two of them started "dozing off," Jolie asked him to unload the revolver in case Sara Jane got up after he fell asleep. In response, upon feeling sleepy, Harner began unloading the revolver. While seated on the couch to the right of Jolie, Harner proceeded to unload the revolver by opening the cylinder, pushing the plunger down, most likely several times, and shaking the bullets out of the chamber. Harner saw bullets fall from the cylinder, and he assumed the weapon was no longer loaded. He then closed the cylinder.

At this point, Harner stated that he noticed the hammer was cocked; although he had no explanation regarding how or why the hammer was positioned in this way. Using both hands, Harner attempted to manually release the hammer, but as he was attempting to pull the trigger while pushing the hammer forward, the gun "just went off."

Upon discovering that he shot Jolie "somewhere in her face," Harner "freaked out," and, hearing the children, he turned Jolie's head and covered her up with the blanket because he did not want the children to see her. Harner attempted to check for a pulse in Jolie's neck, but he was "too freaked out." Harner told Caroline to call 911, and when all of the children were downstairs, he took them outside and told them what happened. Harner explained, "Oh my God, oh my God. Sara Jane ran right up to me and she grabbed a hold of me. Oh my god, talk about feeling like shit."Although Harner emphatically maintained he was not intoxicated when he attempted to unload the revolver, he acknowledged that he continued drinking one or two beers after his DUI arrest.

Detective Craig asked Harner if Jolie ever attempted to take the firearm from him. Harner replied, "No. Not at all.... No, she never tried to take the gun from me. She would never do that."Detective Craig also asked Harner if he remembered making a statement to Officer Boyd that he was "emptying the gun and [Jolie] kept fucking with [him] ... [a]nd ... trying to get [the gun] from [him]." Harner claimed that he did not remember making such statements, and he assured the detectives that at the time of the shooting Jolie was not attempting to take the revolver from him.

At Harner's jury trial, Caroline testified that about midnight, on the day of the incident, Jolie called Caroline and informed her that Harner "had gotten pulled over and not to go to sleep yet, 'cause she didn't know how she was going to get home.... She said ... [Harner] was probably going to go to jail, and she just didn't know how to get home."According to Caroline, Jolie sounded "scared" and Caroline thought she had been crying. Consequently, Caroline stayed awake as her mother had instructed.

*6 Jolie also made a distraught phone call to Harner's good friend Rome. According to Rome, Jolie informed him that " '[Harner] is so fucked, he's so fucked.' " Once Rome was able to calm Jolie down, he assisted her by helping her park the boat in Harner's driveway and drive her to the jail to post Harner's bail.

When Rome and Jolie arrived at the jail sometime between 1 and 2 a.m., they learned that Harner's father had already bonded him out. Rome drove Harner and Jolie back to Harner's house, and during this trip, it was clear to Rome that Jolie was "pretty mad" at Harner:

> "Jolie just really kept going on and on about why [Harner] didn't call to get—why—why [Harner] didn't call her to get him out. And, you know, [Harner] was just sitting next to me, really hadn't said anything, and she just kept on. That's what she was angry about. And [Harner] finally said, 'I didn't have your fucking number. I don't have my cell phone. The only number I remembered was my dad's. That's why I called my dad." '

Rome also acknowledged that Harner made the following statement to Jolie, " 'Well, you know, I'm losing my job, I don't really need this right now.' "

According to Rome, when he dropped the couple off at Harner's house, they were no longer "bickering" and "it didn't appear to [Rome] that there was some big angry match that was going to continue on once they left [his] car."Although Rome said he was aware that Harner and Jolie had separated,

he believed that as of June 1 they had fully resumed their relationship.

At about 2:30 a.m., Jolie placed another call to Caroline telling her to go to bed. According to Caroline, Jolie sounded "pretty normal" during this conversation and while she seemed "a little scared, ... she wasn't crying anymore."Caroline went to bed at about 3 a.m., and after sleeping for about 2 hours, she awoke to a noise that "sounded like the top coming off a bottle and [Harner]'s screams." Caroline remained in bed, but when she then heard Sara Jane heading towards the living room and Harner order her to "go back in [her] mom's room," she went downstairs.

Once on the first floor, Caroline saw Harner at the bottom of the stairs and her mother seated on the couch. At first, Caroline thought that her mother was asleep because her feet were lying out in front of her on the coffee table, she was covered up "to her chest area" with a blue blanket, and her mouth was open. Caroline attempted to question Harner as to what had happened, but he merely "gave [her] a really weird look" and continued "screaming, yelling, oh, my God, and the F word a lot."Caroline described Harner as "freaking out."

Caroline noticed that Jolie had a gunshot wound on the right side of her head, and shortly thereafter, Harner instructed her to call 911. Caroline ran into the kitchen, grabbed the family's home phone, and after she dialed 911 all of the children went outside. According to Caroline, after remaining inside for "a little while," Harner came outside and sat down on the steps in front of the house. But Caroline presumed that Harner later went back inside because the next time she saw him, he was walking out of the garage.

*7 The State charged Harner with a single count of intentional second-degree murder (K.S.A.2014 Supp. 21–5403[a][1]); and an alternative count of unintentional but reckless second-degree murder (K.S.A.2014 Supp. 21–5403[a] [2]). At the conclusion of the trial, the jury found Harner guilty of unintentional but reckless second-degree murder. Later, Harner filed a motion for new trial, see K.S.A.2014 Supp. 22–3501, that was denied. On July 31, 2013, the district court sentenced Harner to a prison term of 123 months' followed by 36 months' postrelease supervision. Harner filed this timely appeal.

SUFFICIENCY OF EVIDENCE TO ESTABLISH RECKLESS SECOND–DEGREE MURDER

Harner contends the evidence presented at trial was insufficient to prove his guilt, beyond a reasonable doubt, of reckless second-degree murder. He argues the State "failed to prove the required mental state for reckless criminal conduct: that [he] realized the imminence of danger to another person and consciously disregard[ed] that danger."In a nutshell, Harner complains that "[w]hile the State's evidence may have supported that Mr. Harner's conduct was negligent, the evidence did not meet the standard for criminally reckless conduct; i.e. gross negligence."

The State counters:

> "Here, defendant was trained extensively in the use and safety of firearms, but following the consumption of a fair amount of alcohol, he opted to take the loaded .38 when he went to sit on the couch with Jolie; a gun with which he was not familiar and he was aware posed a risk for accidental shootings.... Despite the fact he was well aware that guns should not be pointed at others in the absence of extreme circumstances, and that a handler should not touch the trigger until his or her eyes are fixed firmly on the target, he pointed the gun directly at Jolie as she sat next to him on the couch....
>
> "This evidence ... showed defendant's realization of danger and his conscious and unjustifiable ... indifference to the value of human life."

Appellate courts review a defendant's challenge to the sufficiency of the evidence in a criminal case by determining whether, after reviewing all of the evidence in a light most favorable to the prosecution, the court is convinced that a rational factfinder could have found the defendant guilty beyond a reasonable doubt. *State v. Williams,* 299 Kan. 509, 525, 324 P.3d 1078 (2014). When determining the sufficiency of evidence, appellate courts do not reweigh evidence, resolve evidentiary conflicts, or make determinations regarding witness credibility. 299 Kan. at 525.

In order to convict Harner of reckless second-degree murder, the State was required to prove that Harner killed Jolie "unintentionally but recklessly under circumstances manifesting extreme indifference to the value of human life" under K.S.A.2014 Supp. 21–5403(a)(2). Of particular relevance to this issue, our legislature established a

new statutory definition of recklessness with the 2010 recodification of the Kansas Criminal Code, effective July 1, 2011. Under K.S.A.2014 Supp. 21–5202(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."

***8** The recodified statute, K.S.A.2014 Supp. 21–5202(j), is based on the definition set forth in the Model Penal Code:

> " 'A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.' 10A, U.L.A., Model Penal Code, § 2.02(c) (2001)."*State v. Hazlett,* No. 109,999, 2014 WL 4916558, at *5 (Kan.App.2014) (unpublished opinion).

Reviewing all of the trial evidence in a light most favorable to the prosecution, we find the following facts are material and relevant to whether Harner's conduct was grossly negligent:

- Harner was tired, and he recently had consumed alcohol;
- he unloaded bullets from the chamber of the revolver without checking that a live round was not left in the chamber;
- while handling the revolver, the muzzle was pointed at Jolie's head a short distance away; and
- while the muzzle of the revolver was pointed at Jolie's head, Harner pulled the trigger while manually uncocking the hammer, causing it to discharge.

According to Harner, these facts merely showed negligence or "that Mr. Harner failed to perceive a risk he should have perceived ."Harner complains that the evidence "did not show the required mental state for a reckless actor—that Mr. Harner perceived or was conscious of the risk, but disregarded it."We disagree.

A review of the trial evidence shows that—by Harner's own admission—he was aware of the particular dangers of his actions in mishandling the firearm. During his police interviews, Harner described himself as a self-professed gun enthusiast, an avid hunter, and a concealed carry permit holder, who has used firearms for "probably [15 to] 20 years." Moreover, while Harner indicated that he was not as familiar with revolvers as other types of guns, he acknowledged that he had used a revolver and understood "the concept of them and how they work" and stated, "I like to shoot, I'm just a semiautomatic guy that's what I like to shoot, I don't like revolvers."Harner further explained that he has always been "real particular about having the guns out with the kids around," and, thus, he taught Jolie's entire family, including "[h]er dad, her brother, ... all of her kids, and her" how to properly handle and use firearms. Indeed, when asked what Harner taught her about guns, Caroline stated, "Just, like, don't put your finger on the trigger, but keep the safety on. Just, like, how to be around guns and be safe with 'em."

Rankin testified that, as part of his job duties, he often teaches people about gun safety and, in his opinion, the most important rules to remember include always "treat[ing] every firearm as if it's loaded [and] ... control [ling] where the muzzle of the firearm is pointed."Harner essentially acknowledged that he violated these basic rules and, thereby, undertook an unjustifiable risk showing an extreme indifference to the value of human life when he unloaded the revolver.

***9** While attempting to describe his effort to unload the revolver, the following colloquy occurred between Detective Craig and Harner:

> "[HARNER:] See this is what's so ..., why I would even, why the gun would even be facing [towards Jolie]. Is what, I just *I've had so much gun safety training that why that gun was even in that direction is beyond me.* You know?
>
> "[DETECTIVE CRAIG:] To, to unload it.
>
> "[HARNER:] Meaning it should have been down or I was just sitting there and I pushed the button and pushed it over like that.
>
> ....
>
> "[HARNER]: I swear to God on a million bibles there's, Oh my God *I know more about guns than most people do.*

"[DETECTIVE CRAIG:] And saying from the kids you know they say that same thing. You were very nice to them, you helped them with gun safety[.]

"[HARNER:] School and everything. I just—

"[DETECTIVE CRAIG:] Showed them how to do properly, not to mess with it unless you were around, not to put your finger on the trigger[.]

"[HARNER:] Ever.

[DETECTIVE CRAIG:] Unless you were on target.

....

> "[HARNER:] *I don't remember* [the revolver] *was like, it was like uh I was sitting like this, why in the fuck was, should have had it pointing at me or on the floor.*

....

"[HARNER:] I swear to God. I would never mess around with a gun. Ask my kids, ask my son, ask any one of my friends. I do not mess around with guns. Ever. Period. *That's why I don't understand why I would even [have] pointed [the revolver] that fricking direction.*" (Emphasis added.)

Additionally, Harner explained that he was aware the revolver posed a risk for accidental shootings because a person's thumb can slip while attempting to release the hammer and cause the gun to fire. In fact, once while Harner was target practicing with Jolie's father, the revolver Jolie's father was using accidentally discharged in the same manner Harner claimed the revolver did on the night of Jolie's death:

"[HARNER:] I've only seen it happen one other time before in my life.

"[DETECTIVE CRAIG:] And what time was that?

"[HARNER:] With um, Jolie's dad.

"[DETECTIVE CRAIG:] What happened with Jolie's dad?

"[HARNER:] We were out just target practicing.

"[DETECTIVE CRAIG:] And what happened?

"[HARNER:] Same thing happened. I mean I shouldn't even [say because] that has nothing to do with what's going on. That's the only other time I've ever seen it happen though.

"[DETECTIVE CRAIG:] On a revolver?

"[HARNER:] Yeah on a revolver.

"[DETECTIVE CRAIG:] Did you do it or did he....

"[HARNER:] Um no.

"[DETECTIVE CRAIG:] What and [*sic*] when he was trying to let the hammer go down?

"[HARNER:] Mm hm (positive).

The totality of the circumstances show that Harner, a gun enthusiast, who was very knowledgeable about the safe handling of firearms (including how a revolver can discharge unintentionally in a similar manner as what caused Jolie's death) nevertheless did not follow very basic gun safety rules and, as a result, mishandled the revolver, causing it to discharge and kill Jolie.

***10** We are convinced these circumstances, considered collectively, could have convinced a rational factfinder that Harner consciously disregarded a substantial and unjustifiable risk which constituted a gross deviation from the standard of conduct that a reasonable law-abiding person would have observed in a similar situation. See K.S.A.2014 Supp. 21–5202(j); 10A U.L.A., Model Penal Code § 2.02(c) (2001); *Hazlett,* 2014 WL 4916558, at *4–5. In short, we hold there is substantial competent evidence upon which a rational factfinder could have found Harner guilty, beyond a reasonable doubt, of unintentional but reckless second-degree murder under K.S.A.2014 Supp. 21–5403(a)(2).

ADMISSION OF EVIDENCE RELATING TO A DISCORDANT RELATIONSHIP

Prior to trial, the State moved to admit, under K.S.A.2014 Supp. 60–455 and *State v. Gunby,* 282 Kan. 39, 144 P.3d 647 (2000), evidence of the discordant relationship between Harner and Jolie—including the events leading up to Jolie's death and the relationship problems caused by Harner's alcohol usage and involvement with another woman. The State's motion offered this testimony to prove (1) motive, (2)

intent, (3) lack of mistake or accident, and (4) the relationship of the parties. The State explained: "Without a complete understanding of the relationship between [Harner] and Jolie Crosby, there is no context to the acts which occurred in June 2012. The relationship helps prove the intent, plan, motive and preparation by [Harner] and to help explain otherwise inexplicable acts."

At the pretrial hearing on the State's motion, the State clarified that the evidence "just goes to show that there was a constant conflict between [*sic*] the relationship and that this [shooting] was just one more incident that built on the fact that there was always—already a discordant relationship. It goes to the fact that the defendant had intent in pointing a gun at the victim in this case."

Harner's counsel, on the other hand, argued that while he objected to all of the State's purported evidence, he was "not worried about the 12 hours [preceding Jolie's death].... [W]hat happened, happened."He was, however, opposed to the admission of any evidence relating to events that occurred prior to this 12–hour window because such evidence was immaterial, irrelevant, and highly prejudicial. Defense counsel contended:

> "Their argument is he was drinking, they got in an argument. Okay. That's the argument. That's their case, but to go back and start bringing people in to say that they argued constantly or they didn't get along, I think it —it prejudices the defendant. It's not relevant or material to any fact that's going to be before this jury, those previous arguments, and the 12–hour window is all that really matters, and I think they are again trying to bootstrap and put in that evidence to prejudice this jury against this defendant, and it's not relevant, it's not material, and it doesn't even withstand any of the three elements of the *Gunby* test."

***11** The district court granted the State's motion admitting the evidence. The district judge explained:

> "Now, as far as the 12–hour window, I think there is just absolutely no question there, what happened between the parties during that 12 hours is relevant. It—it does go to a material fact that's definitely an issue. In light of the charging, in light of the arguments, it does have a tendency in reason to show motive, intent, lack of mistake or accident, and it does go to relationship of the parties. The probative value, in the Court's opinion, outweighs its prejudicial effect and, obviously, a limiting instruction should be given.
>
> "**Now, as far as the actual relationship of the parties, what happened prior,** Court's given that a lot of thought. The jury, in the Court's opinion, definitely in these type of cases, they wonder, you know, what led up to—led up to this? Why did it happen? You have a situation here where a man was pulled over for a DUI. He was charged with DUI. Then these circumstances transpire that lead up to the shooting. People get DUIs every day, but the overwhelming majority of people don't go home and end up shooting their significant other or their spouse as a result of a DUI.
>
> "Also, one of the statements that [Harner] made to—in the presence of Officer Boyd was, quote, 'She kept fucking with me.' Well, a statement like that has many meanings. The jury is going to wonder, what did he mean by that? Is it restricted to what happened immediately prior to the shooting? Did it include this 12–hour window? And if there's evidence of a discordant relationship, does it mean this is just the straw that broke the camel's back, and it, unfortunately, led to this shooting.
>
> "I'm left with the opinion that the jury has a right to know what type of relationship these two had. I'm of the opinion that the evidence is relevant. It does have a tendency in reason to show how they had a discordant relationship, and there was definitely, the argument can be made, a build-up to what occurred, and as I stated, this is the straw that broke the camel's back, and it definitely goes to the other issues that I mentioned, mainly, the relationship, and I find that the probative value outweighs its prejudicial effect, and if we can fashion a limiting instruction on it, which definitely —definitely we can, and we'll do that."

At trial, some of Jolie's family members and several friends testified regarding their knowledge of Jolie's discordant relationship with Harner, his excessive drinking, and conversations they shared with Jolie in the weeks preceding her death about these subjects. In sum, these witnesses testified that Jolie had complained that she was reluctant to reconcile with Harner because he drank excessively and had allegedly been unfaithful on one occasion. Several times during trial, defense counsel lodged objections to

this evidence based on relevance, materiality, hearsay, and prejudice.

The State generally responded that the evidence was admissible to prove the couple's discordant relationship and Jolie's state of mind at the time she made the statements. As explained by the State on appeal:

> *12 "The testimony was designed to serve as a foundation for, and circumstantial evidence of, the State's theory that the murder was *an intentional act;* a tragic end to a relationship weakened by the stress of [Harner's] infidelity and alcohol abuse; the latter of which was an issue the two argued about just a few short hours before the murder.... Under the State's theory, the alcohol and infidelity ate away at the relationship and continued to be a raw wound for Jolie as the two contemplated reconciling. On the evening in question, [Harner's] DUI marked yet another incident where his drinking resulted in problems for the couple, and their argument regarding that issue continued upon their return to Jolie's Wichita home. The fight escalated, eventually culminating in [Harner] *intentionally shooting Jolie* in the head, killing her. (Emphasis added.).

On appeal, Harner contends the district court erred on three grounds when it allowed the State to introduce evidence of the couple's discordant relationship, including evidence that prior to her death Jolie made statements to her friends and family which expressed her reluctance to reconcile with him due to her alleged belief that he drank excessively and had been unfaithful. Specifically, Harner claims that some of this evidence was inadmissible hearsay and, even if a hearsay exception applies, it was irrelevant and the potential for undue prejudice outweighed its probative value. We note that on appeal Harner has not reprised his objection to the challenged evidence as being in violation of K.S.A.2014 Supp. 60–455, nor has he raised a violation of the Confrontation Clause of the Sixth Amendment to the United States Constitution. As a result, those issues are not before us. See *State v. Boleyn,* 297 Kan. 610, 633, 303 P.3d 680 (2013).

Multiple inquiries are involved when a party challenges the admission or exclusion of evidence on appeal:

> "First, the court addresses whether the evidence in question is relevant. [Citation omitted.] Relevant evidence is that which has 'any tendency in reason to prove any material fact.'K.S.A. 60–401(b).
>
> "Relevance has two elements: probative value and materiality. [Citation omitted.] Evidence is probative if it furnishes, establishes, or contributes toward proof. Probativity is reviewed for abuse of discretion. Evidence is material if it tends to establish a fact that is at issue and is significant under the substantive law of the case. Materiality is reviewed de novo. [Citation omitted.] Second, the court reviews de novo what rules of evidence or other legal principles apply. Finally, the court applies the appropriate evidentiaiy rule or principle. Review of the district court's application of evidentiary rules depends on the rule applied. [Citation omitted.]"*State v. Coones,* 301 Kan. 64, 77–78, 339 P.3d 375 (2014).

Relevance

According to Harner, the evidence set forth above was not relevant because "it was not probative of a material fact in dispute"; instead, its admission merely enabled the State to try Harner based upon "conjecture and innuendo." The State counters that this evidence was clearly relevant to prove motive, intent, lack of mistake or accident, and the relationship of the parties:

> *13 "Evidence of the long-term complications that alcohol and infidelity created for the couple, and the fact the issue reared its head again by virtue of [Harner]'s DUI that evening and resulted in yet another argument, had the potential to impact how the jury interpreted the explanation for the shooting, as well as the statements [Harner] made to Officer Boyd in the immediate aftermath of the murder. The couple's relationship was a material fact."

We have no difficulty in finding relevance in the evidence of Harner's excessive drinking within hours of the shooting. Moreover, the argument which ensued between Jolie and Harner as a result of his DUI arrest suggests a discordant relationship which manifested itself shortly before Jolie's death. Harner's remarks to Officer Boyd that " '[s]he was trying to get it from me.' " and " '[s]he kept fucking with me'

" were evidence of an argument from which the jury could have inferred an intentional killing resulted.

Similarly, the evidence of Harner's excessive drinking and the couple's discordant relationship which occurred in the recent months leading up to the hours before Jolie's death provided some context for the couple's argument which ensued after Harner's DUI arrest. From this evidence of the couple's recent discordant relationship, the jury had a context in which to consider Harner's statement that the couple was not "having any kind of a quarrel or anything" prior to the shooting. On the other hand, the jury with an understanding of Jolie's statements of her mental state regarding that relationship could have concluded—as characterized by the trial judge—that the argument which preceded the shooting was "the straw that broke the camel's back."This evidence of prior conduct, therefore, had a tendency to show how the couple's argument following Harner's arrest for DUI resulted, according to the State's theory, in an argument and a reason for Harner to have an intent or motive to kill Jolie.

Admissibility

Next, Harner claims the district court erred in admitting certain testimony of Jolie's family and friends because it was inadmissible hearsay and, despite the district court's findings to the contrary, the State failed to establish that Jolie's out-of-court statements fell within one of the hearsay exceptions outlined in K.S.A.2014 Supp. 60–460. The State, however, argues that Jolie's statements were admissible because they were not hearsay, as they were admitted to "show the existence of a rift between [Jolie] and [Harner]." Moreover, the State argues that the statements fell within K.S.A.2014 Supp. 60–460(1), the hearsay exception allowing admission of statements relating to the declarant's "state of mind."

Hearsay, "a statement which is made other than by a witness while testifying at the hearing, offered to prove the truth of the matter stated," is inadmissible into evidence unless it falls under one of the recognized hearsay exceptions set forth in K.S.A.2014 Supp. 60–460. Appellate courts review a district court's determination that hearsay is admissible under a statutory exception for an abuse of discretion. *Coones,* 301 Kan. at 80.

***14** We are persuaded that Jolie's statements were not admitted for the truth of the matter asserted, but rather as evidence showing her state of mind in the months leading up to the shooting. See K.S.A.2014 Supp. 60–460(1). Whether it was true that Harner drank excessively, was unfaithful on one occasion, or was part of a discordant relationship was not the basis to admit Jolie's statements about these subjects. Jolie's statements were admissible as evidence of her mental state. What that mental state conveyed to family and friends in the months leading up to her death was that Jolie believed there were serious problems in the couple's relationship due to Harner's drinking and unfaithfulness. Under the State's theory, this ongoing belief on Jolie's part led to the argument which resulted in Harner's intentional killing of Jolie.

Although *Gunby,* 282 Kan. at 56–57, has rejected the practice of admitting other crimes and civil wrongs evidence independent of K .S.A. 60–455 and now requires the application of safeguards to the admission of such evidence including explicit inquiries into relevancy, particularized weighing of its probative value and prejudicial effect, and the giving of an appropriate prophylactic limiting jury instruction, Kansas appellate courts have approved the admission of statements by a decedent which demonstrate the deceased's state of mind prior to the murder and to show the existence of discord between the deceased and the defendant to prove motive and intent under K.S.A. 60–455. See, *e.g., State v. Thompkins,* 271 Kan. 324, 335, 21 P.3d 997 (2001), *disapproved in part on other grounds byGunby,* 282 Kan. 39; *State v. Drach,* 268 Kan. 636, 648–51, 1 P.3d 864 (2000), *disapproved in part on other grounds byGunby,* 282 Kan. 39; *State v. Alford,* 257 Kan. 830, 840–41, 896 P.2d 1059 (1995); *State v. Young,* 253 Kan. 28, 34–37, 852 P.2d 510 (1993), *disapproved in part on other grounds byGunby,* 282 Kan. 39; *State v. Mayberry,* 248 Kan. 369, 384–85, 807 P.2d 86 (1991), *disapproved in part on other grounds byGunby,* 282 Kan. 39; *State v. Taylor,* 234 Kan. 401, 407–08, 673 P.2d 1140 (1983), *disapproved in part on other grounds byGunby,* 282 Kan. 39.

In Alfordi our Supreme Court indicated:

> "The State sought to introduce the evidence of the prior aggravated battery to show discord rather than to prove the truth of the matter asserted. Evidence of a discordant marital relationship and a wife's fear of her husband's temper is competent as bearing on the defendant's motive and intent. [Citation omitted.] This rule is equally applicable to a live-in relationship. [Citation omitted.]" 257 Kan. at 840.

Likewise, in *Taylor,* our Supreme Court made the following comments:

> "The statements in the [deceased wife's] notebook were not inadmissible hearsay because they were not introduced

to prove the truth of the matters stated, such as whether the defendant had a bad temper. [Citation omitted.] The significance of the statements lies in the fact that they were made. [Citation omitted.] They show Mrs. Taylor believed the marriage had problems, that there was indeed marital discord. [Citation omitted.]" 234 Kan. at 408.

***15** Because the admission of Jolie's comments to friends and relatives established her mental state, rather than the truth of the matters asserted, and tended to show her belief that the couple was involved in a discordant relationship due to her perception of Harner's drinking and being unfaithful, the trial court did not err in the admission of her statements.

Undue Process

Harner also asserts the trial court should have excluded this evidence due to its potential for causing undue prejudice which outweighed its probative value. In Harner's estimation, this evidence encouraged the jury to find that he "must be guilty of a criminal act because he drank too much alcohol and Jolie did not trust him."Even if evidence is relevant, a trial court has discretion to exclude it where the court finds its potential for producing undue prejudice substantially outweighs its probative value. An appellate court reviews any such determination for an abuse of discretion. *State v. Lowrance,* 298 Kan. 274, 291, 312 P .3d 328 (2013).

Harner does not explain how the challenged evidence might have provoked the jury to ignore the instructions provided by the court and premise its verdict on an improper basis. Especially given the jury's acquittal of Harner for the intentional killing of Jolie—which was the crime the State sought to prove Harner committed, in part, through the admission of the challenged evidence—there is simply "no indication [the evidence] would 'elicit a response from the jury that might cause it to base its decision on emotion rather than reason.'[Citation omitted.]" See *Coones,* 301 Kan. at 82.

Harmless Error

For the sake of completeness, we will also analyze, assuming arguendo the admission of the challenged evidence was error, whether reversible error occurred as a result. The erroneous admission of evidence is subject to review for harmless error under K.S.A.2014 Supp. 60–261. *State v.Greene,* 299 Kan. 1087, 1095, 329 P.3d 450 (2014).

The harmless error standard provides:

"Unless justice requires otherwise, no error in admitting or excluding evidence, or any other error by the court or a party, is ground for granting a new trial, for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order. At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights."K.S .A.2014 Supp. 60–261.

When conducting a harmless error analysis, appellate courts are required to "determine whether there is a reasonable probability that the error affected the outcome of the trial in light of the entire record. [Citation omitted.]"*Greene,* 299 Kan. at 1095. In this case, the State, as the party benefiting from the error, bears the burden of demonstrating harmlessness. See 299 Kan. at 1096.

Harner contends the district court's evidentiary error was not harmless because the evidence was "clearly harmful to the defense," as "[t]he State relied upon the evidence that [he] was a problem drinker, and that Jolie did not trust him, to establish that [he] was a wrong-doer and to convince the jury to find him criminally negligent."As the State points out, however, the jury's verdict shows that, if any evidentiary error occurred, it was harmless.

***16** We think the State has the better argument. The State's motion to admit K.S.A.2014 Supp. 60–455 evidence was, in part, to prove Harner's intent, an important element critical to the charge of murder in the second-degree in violation of K.S.A.2014 Supp. 21–5403(a)(l). As argued by the prosecutor at the hearing on the motion, this evidence supported the State's theory that "the defendant *had intent in pointing a gun at the victim* in this case."(Emphasis added.) Similarly, in closing argument, the prosecutor highlighted the argument that preceded the shooting and Harner's drinking in an effort to prove that Jolie's death was the result of an intentional killing.

On appeal, the State clarifies:

"The theory advanced by the State was that [Harner] shot and killed Jolie intentionally; the relationship of the parties evidence was designed to buttress that proposition. Following careful deliberations, however, the jury returned a verdict finding the shooting was a result of [Harner's] unintentional, reckless

> conduct. Accordingly, any error in admitting the relationship evidence did not have an adverse effect on the outcome of the trial or deny [Harner] substantial justice."

We agree. As detailed earlier, there was considerable evidence of Harner's gross negligence, unrelated to the evidence of a discordant relationship or Harner's custom of excessive drinking. On the other hand, this challenged evidence was critical to the State's theory of an intentional killing. By its verdict, the jury was not persuaded that the challenged evidence, in whole or in part, supported the State's intentional second-degree murder theory. Assuming *arguendo* the challenged evidence was improperly admitted, we conclude there was not a reasonable probability that the error affected the outcome of the trial in light of the entire record. See *Greene,* 299 Kan. at 1095. We discern no reversible error.

EXCLUSION OF DETECTIVES' INTERVIEW COMMENTS THAT JOLIE'S KILLING WAS ACCIDENTAL

At trial, the parties were able to agree regarding what information should be redacted from Harner's videotaped interviews, but they disagreed as to whether the jury should hear statements by the detectives to the effect of "[Harner], we know this was an accident. Basically, we know you didn't mean to do this."

The State contended these statements were inadmissible because regardless of whether the detectives honestly believed the shooting was an accident or were merely feigning such a belief to exhort the truth from Harner, the jury would interpret such statements as opinion testimony on Harner's credibility. The State asserted such testimony was "obviously inadmissible" under *State v. Elnicki,* 279 Kan. 47, 105 P.3d 1222 (2005), and *State v. Johnson,* 32 Kan.App.2d 619, 86 P.3d 551 (2004), because, as a matter of law, a witness may not express an opinion on the credibility of another witness. As applied by the State to this case, "[n]o witness can invade the province of the jury and give their ultimate opinion as to whether or not this was an accident."

***17** Harner's counsel, on the other hand, contended that *Elnicki* and *Johnson* were distinguishable because, unlike the statements at issue in those cases, the detectives' statements to Harner were not "directly addressing the truthfulness of [Harner]'s statements. They [were] instead more broad, more based on kind of all the surrounding facts" garnered over the course of the investigation.

After a hearing, the district court determined that all comments by the detectives which suggested the detectives' belief that the shooting was an accident must be redacted from the Harner's videotaped police interviews. The trial judge explained:

> "Well, over the noon hour the Court did review the statements at issue. The Court reviewed the case law. Court re-read *State v.. Elnicki.*I'm very familiar with that case because these issues come up.
>
> "For purposes of the record, in this case, [Harner] has maintained the shooting was an accident. The Court has read the statements at issue in context. The Court is of the opinion that the interrogator was utilizing a police tactic to gain rapport with [Harner]. In *Elnicki,* the officer was utilizing the opposite police tactic. In a nutshell, the officer was telling Elnicki he did not believe him, as opposed to letting him know that he agreed with him.
>
> "The Kansas Supreme Court had this to say about the admission of the officer's statement in the *Elnicki* case. At page 57 of the opinion, and I quote: 'A jury is clearly prohibited from hearing such statements from the witness stand in Kansas and likewise should be prohibited from hearing them in a videotape, even if the statements are recommended and effective police interrogation tactics.'
>
> "In the Court's opinion, it makes no difference whatsoever which approach the law enforcement interrogator takes. Whether the officer tells a suspect he agrees with his version of the events or disagrees with his version of the events, under either approach, the officer's comment is an impermissible comment on the credibility of the suspect's statement and a violation of *Elnicki.*Therefore, all references by law enforcement that they believe the shooting was an accident should be redacted from the statement."

After the trial judge ruled, Harner's counsel asked for reconsideration. In denying this motion the trial judge reiterated and explained his reasons for the ruling:

> "In the Court's opinion, the Court would be compounding the *Elnicki* violation if the Court let in the statements of law enforcement that the shooting was an accident. First

of all, this would be an impermissible comment on the credibility of [Harner]'s statement that the shooting was an accident; and secondly, if law enforcement statements were allowed to come in without explanation, it would be a complete distortion of the truth. Therefore, the Court would have no choice but to allow the State to ask Detective Craig if, in fact, he believed [Harner]'s version of events, in other words, that it was an accident. This would lead to a second *Elnicki* violation because, as [the prosecutor] told us yesterday, Detective Craig would testify he did not believe [Harner]; he was simply utilizing a law enforcement interrogation technique to obtain the truth from [Harner].

***18** "For all these reasons, the statements in question will not be allowed to come into evidence."

On appeal, Harner contends the trial court denied his constitutional right to present his defense by excluding this testimony. Under the Kansas and United States Constitutions, a criminal defendant is entitled to the opportunity to present his or her theory of defense. *State v. Evans,* 275 Kan. 95, 102, 62 P.3d 220 (2003)."The defendant's fundamental right to a fair trial is violated if relevant, admissible, and noncumulative evidence which is an integral part of the theory of the defense is excluded. [Citation omitted.]"*State v. Patton,* 280 Kan. 146, 156, 120 P.3d 760 (2005), *disapproved in part on other grounds byState v. Gunby,* 282 Kan. 39, 144 P.3d 647 (2006).

The right to present a defense, however, is not without limits. See *State v. Alexander,* 268 Kan. 610, 616, 1 P.3d 875 (2000), *disapproved on other grounds byState v. Andrew,* 301 Kan. 36, 340 P.3d 476 (2014). A defendant does not have the right to "introduce irrelevant and immaterial evidence under the guise of 'presenting a defense,' " and the right to present a defense is " 'subject to statutory rules and case law interpretation of rules of evidence and procedure.' [Citation omitted.]" 268 Kan. at 616.

While Harner claims that the detectives' statements were integral to his defense, he never elaborates as to how the statements would have supported his defense, nor does he address their relevancy. It is reasonable to assume that Harner wanted to have the statements admitted to bolster his claim that the shooting was accidental; yet, the proffered testimony of Detectives Craig and Hummell revealed that neither detective actually believed the shooting was an accident. Significantly, the following exchange occurred between defense counsel and Detective Craig:

"[DEFENSE COUNSEL:] Okay. And so when you told him, [Harner], I told my supervisor, and I'm telling you, I think this is an accident, you're telling us under oath that you—you were purposely telling that to lie to him?

"[DETECTIVE CRAIG:] I don't know if I was purposely lying to him. I was trying to get him to think that no matter what he thinks, he can tell me what happened. There's several times where I told him not to be embarrassed, because he's always repeating how gun safety he is, he probably knows more about guns than most people. I'm just trying to get him to understand that the story that he has told isn't making sense. So, you know, [Harner], I know this is an accident, but what about these statements that you said to her. [Harner], I know this is an accident, but, you know, how do you explain that hammer getting back when, you know, they field tested it out at the scene.

"[DEFENSE COUNSEL:] And can I assume by you lying to him or telling him that it was an accident is a way to get him to tell the truth?

"[DETECTIVE CRAIG:] Well, it's a technique, I can go in—and the opposite of that was telling him, [Harner], I think this is premeditated, I think you did this on purpose. I need to know exactly how this went off. Well, instead of being a—a—a hard-ass, you know, I took the—trying to build a rapport with him and say, hey, I understand this was an accident, but we got to explain the accident. 'Cause going in, it didn't make sense if it was an accident, if he's saying that she's fucking with him, grabbing for the gun, you know, why the gun was even pointed at her, what's going on.

***19** ....

"[DEFENSE COUNSEL:] So every time that you told him that it was an accident, the other seven, I've only talked about one, every time that you were saying, [Harner], it was an accident, or, [Harner], I know it was an accident, or words to that effect, those were not your beliefs, you were just telling him that to gain his confidence or his rapport?

"[DETECTIVE CRAIG:] Or trying to gain knowledge from him, for him to explain to me how it would happen, what—the two different stories that we had did not make sense.

"[DEFENSE COUNSEL:] Okay.

"[DETECTIVE CRAIG:] It could not have happened the way that he said it could happen."

Similarly, when Detective Hummell was asked, as part of the proffered testimony, if she thought Detective Craig actually believed the shooting was an accident, Detective Hummell replied, "Very common in interviews for us to not be truthful to the people that we're interviewing, so just because Detective Craig said something that he believed did not necessarily I believe that he believed that himself."Although Detective Hummell then conceded that she also told Harner she believed the shooting was accidental, she indicated that her statement was merely an interview tactic intended to elicit the truth.

On their face, the detectives' opinions regarding the cause of the shooting were impermissible comments on Harner's credibility and prohibited opinion testimony which invaded the province of the jury. As established by the detectives' testimony, however, their comments were, in fact, a technique to ingratiate themselves to Harner and gain his confidence in order to ascertain the true facts of the shooting, which they believed was intentional. We conclude the trial court did not violate Harner's right to present a defense when it redacted the detectives' comments from Harner's videotaped police interrogations because Harner does not have the right to "introduce irrelevant and immaterial evidence under the guise of 'presenting a defense.' " See *Alexander,* 268 Kan. at 616.

CUMULATIVE TRIAL ERRORS

For his final issue, Harner argues that cumulative trial errors require the reversal of his conviction, as these errors deprived him of the right to a fair trial. The State, on the other hand, claims that none of the issues raised by Harner reveal cumulative trial error.

When conducting a cumulative error analysis, appellate courts aggregate "all errors and, even though those errors would individually be considered harmless, analyzes whether their cumulative effect on the outcome of the trial is such that collectively they cannot be determined to be harmless."*State v. Tully,* 293 Kan. 176, 205, 262 P.3d 314 (2011). In other words, the question becomes whether the totality of the circumstances substantially prejudiced the defendant and deprived him or her of a fair trial. *State v. Parks,* 294 Kan. 785, 804, 280 P.3d 766 (2012)." '[I]f any of the errors being aggregated are constitutional in nature, the cumulative error must be harmless beyond a reasonable doubt.'[Citation omitted.]"*Tully,* 293 Kan. at 205. Where the errors are not constitutional in nature, however, appellate courts "examine whether there is a reasonable probability the aggregated errors would have affected the outcome of the trial."*State v. Gilliland,* 294 Kan. 519, 550, 276 P.3d 165 (2012), *cert. denied*133 S.Ct. 1274 (2013).

***20** "In making the assessment of whether the cumulative errors are harmless, an appellate court examines the errors in the context of the record as a whole considering how the trial court dealt with the errors as they arose (including the efficacy, or lack of efficacy, of any remedial efforts); the nature and number of errors committed and their interrelationship, if any; and the strength of the evidence. [Citations omitted.]" 294 Kan. at 550.

See *Tully,* 293 Kan. at 205–06. Finally, "[n]o prejudicial error may be found under the cumulative error doctrine if the evidence against the defendant is overwhelming. [Citation omitted.]"*State v. Dixon,* 289 Kan. 46, 71, 209 P.3d 675 (2009).

We conclude that no errors of any substance occurred during the course of Harner's trial. When the record fails to support the errors raised on appeal by the defendant, cumulative error will not be found. *State v.McBroom,* 299 Kan. 731, 759, 325 P.3d 1174 (2014). Accordingly, cumulative error did not deny Harner the right to a fair trial.

Affirmed.

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277 P.3d 447 (Table)
Unpublished Disposition
(Pursuant to Kansas Supreme Court Rule 7.04(f), unpublished opinions are not precedential and are not favored for citation. They may be cited for persuasive authority on a material issue not addressed by a published Kansas appellate court opinion.)
Court of Appeals of Kansas.

STATE of Kansas, Appellee,
v.
Denzel JONES, Appellant.

No. 104,985. | June 1, 2012.
| Review Denied Mar. 26, 2013.

Appeal from Wyandotte District Court; Robert P. Burns, Judge.

Attorneys and Law Firms

Joanna Labastida, of Kansas Appellate Defender Office, for appellant.

Jennifer S. Tatum, assistant district attorney, Jerome A. Gorman, district attorney, and Derek Schmidt, attorney general, for appellee.

Before STANDRIDGE, P.J., MARQUARDT and ARNOLD-BURGER, JJ.

MEMORANDUM OPINION

PER CURIAM.

*1 Denzel Jones was convicted of reckless second-degree murder. On appeal, he contends (1) the evidence was insufficient to convict him, and (2) his juvenile adjudications were used to increase his sentence without proving them to a jury beyond a reasonable doubt. We find that the evidence was sufficient to conclude that although Jones did not intentionally kill Willie Washington, he acted recklessly under circumstances manifesting extreme indifference to the value of human life. Jones was, by his own admission, playing with a loaded gun while under the influence of marijuana, in a small area with three people present. Furthermore, whether intentional or not, Jones aimed the rifle in the direction of Washington and applied at least 4 1/4 pounds of pressure to the trigger, discharging the rifle and killing Washington. We also find that under our Supreme Court's ruling in *State v. Hitt,* 273 Kan. 224, 236, 42 P.3d 732 (2002), *cert. denied*537 U.S. 1104 (2003), the use of Jones' juvenile adjudications to increase his sentence without proving them to a jury beyond a reasonable doubt was not error. Accordingly, Jones' conviction and sentence are affirmed.

FACTUAL AND PROCEDURAL HISTORY

Jones was charged with reckless second-degree murder in the death of Washington and intimidation of a witness. After a trial to the bench, the district judge found Jones guilty of reckless second-degree murder and not guilty of intimidation of a witness. The district judge concluded Jones shot Washington under circumstances manifesting extreme indifference to human life after hearing the following evidence.

The morning of August 27, 2009, Trisla Haywood, Janee Brown, Irvan Nunnally and Jones were hanging out, watching television at Haywood's apartment in Kansas City, Kansas. Haywood had to leave for work at noon, but she let the others remain at her apartment. Shortly after Haywood's departure, Washington arrived at the apartment and joined Nunnally and Jones in the kitchen. Jones had brought an older model bolt action rifle with him and was handling or playing with the rifle and pointing it at Washington. Washington moved to the front door to leave and told Jones to "stop playing." Jones pointed the rifle at Washington. The gun went off, striking Washington in the neck and shoulder. Brown testified she heard Jones say it was an accident.

Everyone fled the scene, running out the back door and leaving Washington on the floor. Nunnally testified Jones told him not to say anything. Brown testified she told Jones that she was going to call police, and Jones said "no." Shortly after the shooting, a bystander heard a woman screaming "it was an accident, it was an accident."When paramedics arrive at the scene, Washington was dead.

Brown immediately returned to the apartment and was interviewed by officers who responded to the scene of the shooting. Nunnally went to the police station the next day and spoke with detectives. Jones reportedly fled to Illinois. Two months later, Jones turned himself in. There were minor variations in the witnesses' stories, but all the witnesses testified that Jones and Washington were not arguing before the gun went off.

*2 Jones testified on his own behalf. He admitted he was playing with the rifle before it went off and stated he was under the influence of marijuana. Jones further claimed he did not own the rifle, had never handled it before and, indeed, did not know how it worked. Despite these claims, Jones testified he pointed the rifle toward the floor and pulled the bolt back, ejecting a live round. He then pushed the bolt back in and pointed the rifle at Washington. Jones testified he knew the rifle was loaded when he pointed it at Washington and that his hand or finger was on the trigger. Nevertheless, Jones testified that he did not believe he pulled the trigger. During his interview with detectives, Jones stated he pulled the bolt back and ejected a round to intimidate Washington and that it made Washington back up. At trial, Jones had no explanation for that statement. Jones testified he fled after the shooting because he was scared.

The other witnesses present that day contradicted Jones' testimony that he had never handled the rifle. Nunnally admitted telling detectives that Jones brought the rifle to Haywood's apartment. Haywood identified the rifle as the one she saw being handled by Jones and Nunnally a few days before the shooting. Further, the State introduced the following transcript of a telephone call Jones placed while in prison, indicating his knowledge of the rifle.

> "UNIDENTIFIED FEMALE VOICE: For real. And what did I tell you? What did I tell you about that gun? Didn't I tell you that gun was going to get you in trouble the day before it happened?
>
> "MR. JONES: No.
>
> "UNIDENTIFIED FEMALE VOICE: I didn't tell you that?
>
> "MR. JONES: I don't know if you said that.
>
> "UNIDENTIFIED FEMALE VOICE: I did say that.
>
> "MR. JONES: I don't know if you said that, but you told me some shit about playing with some shit."

Officer Ross Hatfield testified that when he responded to the shooting, he found a body in the entryway of the apartment. He recovered a rifle from near the backdoor of the apartment. A fully loaded magazine was attached to the rifle, minus one spent cartridge that was in the chamber and one live cartridge that was found on the living room floor.

A firearms examiner with the Kansas Bureau of Investigation examined the rifle and ammunition used in the shooting. He testified the firearm was "safe." In other words, it would not fire unexpectedly or without pulling the trigger. On testing, he determined the rifle's trigger required 4 1/4 pounds of pressure to discharge the firearm; typical for this particular rifle and not considered an exceptionally light or hair trigger.

After considering all of the evidence, the district judge found that Jones had exhibited a "conscious disregard of the risk sufficient under the circumstances to manifest an extreme indifference to the value of human life, and that these circumstances went beyond recklessness."The district judge based this conclusion on the fact that Jones was, by his own admission, playing with a loaded gun while under the influence of marijuana, in a small area with three people present. Furthermore, whether intentional or not, Jones aimed the rifle in the direction of Washington and applied at least 4 1/4 pounds of pressure to the trigger, discharging the rifle and killing Washington.

*3 The court sentenced Jones to 131 months in prison. Jones timely appealed.

SUFFICIENCY OF THE EVIDENCE TO CONVICT JONES OF RECKLESS SECOND–DEGREE MURDER

It was undisputed that Jones shot and killed Washington. But Jones argues the evidence was insufficient to prove he acted under circumstances manifesting extreme indifference to human life in order to support his conviction for reckless second-degree murder. According to Jones, caselaw addressing reckless second-degree murder convictions generally involve circumstances where the defendant exhibits deliberate behavior; the defendant intends to commit a malicious act and that act resulted in the death of the victim. But in his case, Jones claims he was just playing with the gun; he did not intentionally point the gun at Washington, and he did not intentionally pull the trigger. Therefore, at best, he argues he is guilty of involuntary manslaughter, which only requires a showing of ordinary or simple recklessness.

Standard of Review

When examining the sufficiency of the evidence in a criminal case, the standard of review is whether, after reviewing all the evidence in the light most favorable to the prosecution, the

appellate court is convinced that a rational factfinder could have found the defendant guilty beyond a reasonable doubt. *State v. Ward,* 292 Kan. 541, 581, 256 P.3d 801 (2011), *cert. denied*132 S.Ct. 1594 (2012). The appellate court does not reweigh the evidence, reassess the credibility of the witnesses, or resolve conflicting evidence. 292 Kan. at 581.

Analysis

In order to convict Jones of reckless second-degree murder, the State was required to prove that Jones killed Washington "unintentionally but recklessly under circumstances manifesting extreme indifference to the value of human life."K.S.A. 21–3402(b).

The Kansas Supreme Court in *State v. Robinson,* 261 Kan. 865, 877–78, 934 P.2d 38 (1997), explained the particular degree of recklessness required under K.S.A. 21–3402(b) as follows:

> "[D]epraved heart second-degree murder requires a conscious disregard of the risk, sufficient under the circumstances, to manifest extreme indifference to the value of human life. Recklessness that can be assimilated to purpose or knowledge is treated as depraved heart second-degree murder, and less extreme recklessness is punished as manslaughter. Conviction of depraved heart second-degree murder requires proof that the defendant acted recklessly under circumstances manifesting extreme indifference to the value of human life. This language describes a kind of culpability that differs in degree but not in kind from the ordinary recklessness required for manslaughter."

The cases cited by Jones do not indicate that reckless second-degree murder requires an intent to commit a malicious act that results in a death. In *Robinson,* the victim initiated the aggression by swinging a baseball bat at a group of boys. The boys used golf clubs in defense. When the victim began hitting one of Robinson's friends, Robinson swung his golf club and hit the victim's head, killing him. Robinson testified he was not trying to hit the victim's head; he was trying to hit his arms to get him to stop hitting his friend with the bat. Robinson testified he could not remember if his eyes were open or shut. A finding of malicious behavior or intent did not play a part in the Supreme Court's conclusion that there was sufficient evidence to convict Robinson of reckless second-degree murder. It was sufficient that Robinson struck the victim despite the fact his friend was not in danger and that Robinson either intentionally aimed for the victim's head or was blindly swinging a golf club at a person with such force that it constituted extreme recklessness. 261 Kan. at 881.

*4 Jones also cites to *State v. Deal,* 41 Kan.App.2d 866, 206 P .3d 529 (2009), *aff'd*293 Kan. 872, 269 P.3d 1282 (2012), as an example of a reckless second-degree murder conviction that occurred under circumstances where the defendant intended to commit a malicious act that ended in a death. In that case, Deal repeatedly hit the victim with a tire iron. On appeal, Deal argued in part that his conviction should be reversed because the State failed to show he acted recklessly in beating the victim to death; the evidence showed his actions were intentional. The Court of Appeals affirmed Deal's conviction, finding that, similar to the evidence in *Robinson,* Deal repeatedly swung a tire iron at the victim with great force, intending to hit the victim. 41 Kan.App.2d at 878.On review, the Supreme Court affirmed the Court of Appeals' decision, but clarified that K.S.A. 21–3402 focuses culpability on whether the killing is intentional or unintentional, "*not on whether a deliberate and voluntary act leads to death.*" (Emphasis added.) *State v. Deal,* 293 Kan. 872, 885, 269 P.3d 1282 (2012). Deal acted deliberately, but the key was his denial that he intended to kill the victim. The Supreme Court stated that the risk of hitting someone in the head with a tire iron may not mean certain death, but it certainly indicated Deal acted under circumstances that showed a realization of danger and a conscious disregard of that danger, manifesting an extreme indifference to the value of human life. 293 Kan. at 885–86.

According to Jones, his actions were not deliberate. He did not intentionally point the gun at Washington; he did not believe he pulled the trigger and, thus, he did not intend to shoot the gun, let alone shoot Washington. The shooting was merely an accident. But *Deal* instructs that whether Jones acted deliberately or voluntarily in causing Washington's death is not the determining factor.

We are also guided by *State v. Tahah,* 293 Kan. 267, 262 P.3d 1045 (2011), a case where an unintended killing occurred under circumstances somewhat similar to the present case. Tahah was convicted of felony murder based

on the underlying felony of discharge of a firearm at an occupied dwelling resulting in great bodily harm. In Tahah's confession, however, he admitted aiming a rifle at the victim's bedroom window, but he claimed that he was lowering the rifle when it discharged. Tahah did not intend to kill the victim. Significantly, the Supreme Court agreed with Tahah's argument that the district court erred in denying his request to instruct the jury on the lesser included offenses of reckless second-degree murder and involuntary manslaughter. The Supreme Court concluded that Tahah's confession regarding lack of intent to discharge the firearm could support a conviction on both these lesser included offenses and reversed. 293 Kan. at 273.

Viewing the facts in a light most favorable to the prosecution, Jones' actions were sufficient for the court to find he acted unintentionally but recklessly under circumstances manifesting extreme indifference to the value of human life. Jones knew enough about the operation of the rifle to apparently attach a fully loaded magazine to the firearm and manipulate the bolt to eject a cartridge and reload the gun. Jones admitted he knew the rifle was loaded when he pointed it at Washington. The victim apparently recognized the danger and told Jones to "stop playing," but Jones continued. The risk of pointing a loaded gun at a person shows a realization of the danger and conscious disregard of that danger. The fact that Jones did not intend to discharge the rifle does not negate the reckless act. The evidence was sufficient to convict Jones of reckless second-degree murder.

USING JUVENILE ADJUDICATIONS TO INCREASE THE SENTENCE WITHOUT PROVING THEM TO A JURY BEYOND A REASONABLE DOUBT

***5** Next, Jones contends the use of his prior juvenile adjudications for sentencing purposes, without proving the adjudications to a jury beyond a reasonable doubt, increased the maximum possible penalty for his offense in violation of *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). Jones concedes this issue has been decided against him in *State v. Hitt,* 273 Kan. 224, 42 P.3d 732 (2002), *cert. denied*537 U.S. 1104 (2003).

We are duty bound to follow Kansas Supreme Court precedent, absent some indication the court is departing from its previous position. *State v. Merrills,* 37 Kan.App.2d 81, 83, 149 P.3d 869,*rev. denied*284 Kan. 949 (2007). There is no indication our Supreme Court is departing from its ruling in *Hitt. See, e.g., State v. Harris,* 293 Kan. 798, 818, 269 P.3d 820 (2012). Accordingly, this issue has no merit.

Affirmed.

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