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CASE NUMBER: 113869

No. 15-113869-A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS
Plaintiff – Appellee

vs.

STEPHEN ALAN MACOMBER,
Defendant – Appellant

BRIEF OF APPELLANT

Appeal from the District Court of Shawnee County
The Honorable David B. Debenham, District Judge
District Court Case No. 2010-CR-1053

Jonathan B. Phelps, #11506
PHELPS-CHARTERED
1414 S Topeka Blvd.
P.O. Box 1886
Topeka, Kansas 66601-1886
785.233-4162
785/233-0766 (facsimile)
jon.phelps@phelpschartered.com
Attorney for Appellant

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NATURE OF THE CASE

Stephen Alan Macomber's (hereinafter "Macomber") seeks reversal of his conviction for involuntary manslaughter due to immunity for the exercise of self-defense and/or insufficiency of the evidence to support a conviction or reversal for new trial due to erroneous jury instruction resulting in unfair trial.

ISSUES ON APPEAL

I. THE JURY WAS IMPROPERLY INSTRUCTED AND BOTH THE INDIVIDUAL AND CUMULATIVE EFFECT OF THESE ERRORS DENIED MACOMBER A FAIR TRIAL.

II. THERE WAS INSUFFICIENT EVIDENCE TO SHOW PROBABLE CAUSE THAT MACOMBER'S USE OF DEADLY FORCE WAS NOT JUSTIFIED; AND TRIAL COURT ABUSED DISCRETION IN DENYING MOTION TO DISMISS CLAIMING IMMUNITY FROM PROSECUTION.

III. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT MACOMBER'S CONVICTION FOR INVOLUNTARY MANSLAUGHTER.

STATEMENT OF FACTS

Macomber takes a second appeal to this Court in this same case. Macomber was originally charged with murder in the first degree of Ryan Lofton and criminal possession of a firearm alleged to have occurred on June 7, 2010 (R 1, 31-32). The first jury found Macomber guilty of murder in the second degree and criminal possession of a firearm on January 11, 2012. (R 7, 565-566). The Court of Appeals reversed Macomber convictions finding that the trial court committed reversible error when it admitted evidence in violation of K.S.A. 60-455, and that it constituted double jeopardy when he was convicted of criminal possession of a firearm. The Mandate was received by the Clerk of the Court on October 17, 2014. (R 8, 645-667). The case was tried a second time on charges of murder in the second degree from March 9-13, 2015, and

the jury returned a verdict of involuntary manslaughter. (R 9, 766; R 33, 1-187; R 34, 1-146; R 35, 1-308; 36, 309-513; R 37, 514-700; R 701-716).

On June 7, 2010, Ryan Lofton was shot by Macomber. (R35, 181-183). Ryan Lofton died as a result of being shot by Macomber. (R 35, 61-77). Later, on June 7, 2010, Macomber said to Hedy Saville, "I killed a man in Topeka." (R 35, 227). "[Macomber] said the man told him he was going to shoot him so he said I shot him before he shot me." (R 35, 228). Later on June 7, 2010, early June 8, 2010, Macomber told KBI Special Agent Malick that "this gal's husband said he was going to shoot [Macomber]." Further, that "this guy, meaning this gal's husband, was trying to grab Mr. Macomber's gun." (R 36, 323, 327-328).

On June 11, 2010, Macomber told KBI Special Agent Bundy that Lofton threatened to shoot Macomber, and that he assumed since Lofton threatened to shoot him that he had a gun to shoot Macomber with; and that Macomber just wanted to go, and didn't want a confrontation with Lofton. Further, that Lofton had grabbed Macomber's gun during the events leading to the shooting. He further reports that he had a gun because there had been five shootings that past weekend in the neighborhood where Lofton and his wife lived and Lofton had people in the house with him. And, that Macomber believed Lofton was serious about his threat to shoot him. (R 36, 391; R 41, 29).

On June 15 and July 3, 2010, Macomber told persons (his Dad and "Theresa") during phone calls from the jail that Macomber knew he was in a bad neighborhood on June 7, 2010, and that's why he had a gun. That he just went to pick up Lofton's wife at her request and it didn't dawn on Macomber that there would be a problem. But as soon as he pulled into the driveway there was a problem. Lofton started quizzing him. Lofton accused him of sleeping with his wife. Lofton threatened to shoot Macomber. 4-5 people were inside or outside the house with

Lofton. Lofton started coming around the car at Macomber. Lofton started pulling on the car door at the place where Macomber was seated in the car. Lofton tried to grab Macomber's gun. (R 36, 423; R 41, 26).

Appellant incorporates verbatim by reference the "Supplemental Statement of Facts" at pages 1-3 of the "Supplemental Brief of Appellant, pro se" filed in this Court on April 5, 2016.

ARGUMENTS AND AUTHORITIES

I THE JURY WAS IMPROPERLY INSTRUCTED AND THE EFFECT OF THESE ERRORS DENIED MACOMBER A FAIR TRIAL.

Appellant incorporates by reference verbatim the arguments and authorities for Issue No. I "The Jury Was Improperly Instructed, Both the Individual and Cumulative Affect (sic) Of These Errors Denied Macomber a Fair Trial" set forth at pages 3 to 9 of the "Supplemental Brief of Appellant, pro se" filed in this Court on April 5, 2016.

Standard of Review:

The Supreme Court's standard of review for addressing challenges to jury instructions is based upon the following analysis: "'(1) First, the appellate court should consider the reviewability of the issue from both jurisdiction and preservation viewpoints, exercising an unlimited standard of review; (2) next, the court should use an unlimited review to determine whether the instruction was legally appropriate; (3) then, the court should determine whether there was sufficient evidence, viewed in the light most favorable to the defendant or the requesting party, that would have supported the instruction; and (4) finally, if the district court erred, the appellate court must determine whether the error was harmless, utilizing the test and degree of certainty set forth in *State v. Ward*, 292 Kan. 541, 256 P.3d 801 (2011), *cert. denied.*

132 S.Ct. 1594 (2012).' [Citation omitted]" *State v. Woods*, 301 Kan. 852, 876, 348 P.3d 583 (2015).

Appellant incorporates verbatim by reference the "Appellate Review Standard for Instructional Error" at page 3 of the "Supplemental Brief of Appellant, pro se" filed in this Court on April 5, 2016.

Appellant incorporates verbatim by reference the arguments and authorities for Issue No. I "The Jury Was Improperly Instructed, Both the Individual and Cumulative Affect (sic) Of These Errors Denied Macomber a Fair Trial" set forth at pages 3 to 9 of the "Supplemental Brief of Appellant, pro se" filed in this Court on April 5, 2016.

a. Trial Court erred by giving jury instructions on lesser included offense of involuntary manslaughter.

Appellant incorporates by reference verbatim the arguments and authorities for Issue No. I(a) set forth at pages 3 to 5 of the "Supplemental Brief of Appellant, pro se" filed in this Court on April 5, 2016, with the following additions.

Despite the language used in K.S.A. 22-3414(3) giving a lesser included instruction should still be considered directory rather than mandatory because reversing a conviction is not an automatic consequence if there is failure to give a lesser included instruction. In *Hooper v. McNaughton*, 113 Kan. 405, 214 P. 613 (1923) the Supreme Court added the concept of consequences of explicit noncompliance to the mix of factors to be considered in determining the import of "shall." They said: "The distinction between mandatory and directory provision of a statute lies in consequences of nonobservance. An act done in disobedience of a mandatory provision is void. While a directory provision should be obeyed, an act done in disobedience of it may still be valid." 113 Kan. at 407.

In *Wilcox v. Billings*, 200 Kan. 654, 438 P.2d 108 (1968), the Court stated: "No absolute test exists by which it may be determined whether a statute is directory or mandatory. Each case must stand largely on its own facts…"

In *State v. Sappington*, 285 Kan. 158, 169 P.3d 1096 (2007), the Court stated: "[t]trial courts are not required to provide instructions for every possible theory of defense just because some supporting evidence may be produced at trial, if the defendant has not relied on the particular defense theory." 285 Kan. at 165.

State v. Appleby, 289 Kan. 1017, 221 P. 3d 525 (2009): "When a party has objected to an instruction at trial, the instruction will be examined on appeal to determine if it properly and fairly states the law as applied to the facts of the case and could not have reasonably misled the jury. In making the determination an appellate court is required to consider the instructions as a whole and not isolate any one instruction." 289 Kan. at 1059.

A myriad of Kansas appellate courts have held that the evidence did not warrant a lesser included offense instruction on unintentional reckless second-degree murder. See *State v. Martinez*, 288 Kan. 443, 452-53, 294 P.3d 601 (2009); *State v. Davis*, 283 Kan. 569, 158 P.3d 316 (2006); *State v. Cavaness*, 278 Kan. 469, 472-77, 101 P.3d 717 (2004); *State v. Jones*, 267 Kan. 627, 629-33, 984 P.2d 132 (1999); *State v. Bailey*, 263 Kan. 685, 688-91, 952 P.2d 1289 (1998); *State v. Robinson*, 261 Kan. 865, 881-83, 934 P.2d 38 (1997); *State v. Pierce,* 260 Kan. 859, 865-67, 927 P.2d 929 (1996); *State v. Deal*, 41 Kan.App.2d 866, 872-78, 206 P.3d 529, *aff'd* 293 Kan. 872, 269 P.3d 1282 (2012); and *State v. Jones*, 27 Kan.App.2d 910, 914-15, 8 P.3d 1282 (2000).

b. Trial Court erred by not giving Defendant's requested instructions regarding his theory of defense, including:

i. Failing to give jury use of force presumption regarding an occupied vehicle as required by K.S.A. 21-5224;

Appellant incorporates verbatim by reference the arguments and authorities for Issue No. I(b)(i) set forth at pages 5 to 7 of the "Supplemental Brief of Appellant, pro se" filed in this Court on April 5, 2016, with the following additions.

In *State v. Hilt*, 299 Kan. 176, 322 P.3d 267 (2014): Generally a defendant is entitled to instructions on the law applicable to his or her theory of defense if there is sufficient evidence for a rational factfinder to find for the defendant on that theory. If the defendant requests an instruction at trial, the appellate court must view the evidence in light most favorable to the defendant. 299 Kan. at 184.

In *State v. Gonzalez*, 290 Kan. 747, 234 P.3d 1 (2010) the Court states: "When a discretionary decision requires fact-based determinations, a district court abuses its discretion when the decision is based on factual determinations not supported by the evidence." 290 Kan. 757. "We review the district court's factual findings for substantial competent evidence and determine whether the court's factual findings support its conclusions of law." *State v. Adams*, 297 Kan. 665, 669, 304 P.3d 311 (2013). Substantial competent evidence refers to legal and relevant evidence that a reasonable person could accept as being adequate to support a conclusion. See *State v. May*, 293 Kan. 858, 862, 269 P.3d 1260 (2012). "We review the district court's conclusions of law de novo." *Adams*, 297 Kan. at 669.

"A district court abuses its discretion when (1) no reasonable person would take the view adopted by the judge; (2) a ruling is based on an error of law; or (3) substantial competent evidence does not support a finding of fact on which the exercise of discretion is based." *State v. Smith*, 299 Kan. 962, at 970, 327 P.3d 411 (2014).

The trial court's factual findings and legal conclusions can't be reconciled as reasonable considering the plethora of evidence, contrary to its findings, which supported the defense theory that Ryan Lofton was either unlawfully or forcefully attempting to enter or had in fact entered Macomber's vehicle and was inside the vehicle when Macomber used deadly force. Eyewitness statements to law enforcement, trial testimony and other evidence presented at trial provide the factual basis requiring the use-of-force presumption instructions being given to the jury.

Cassandra Skirvin Taylor testified: that Ryan Lofton continued to have contact with Macomber's white car after Ryan Lofton's wife, Risa Lofton, got in the passenger side of his vehicle (R 36, 344); she could hear arguing (including Ryan Lofton yelling) but couldn't hear everything that was said while Ryan Lofton was by Macomber's car (R 36, 344 and 356); Macomber never got out of the car (R 36, 346); she saw struggling between Macomber and Ryan Lofton before the shot, she didn't know what Ryan Lofton was doing in Macomber's car, but he had his head in the car and there was a struggle either between Ryan Lofton and Risa Lofton or between Ryan Lofton and Macomber—she didn't know for sure (R 36, 348, 357, 362 and 363); and Ryan Lofton was struggling to get Risa Lofton out of the car (R 36, 357).

Joshua Kenolly testified: that Ryan Lofton was at the car when he heard the gunshot (R 36, 469); he didn't see Ryan Lofton at the time of the shot (36, 470); Ryan Lofton went to the driver's side of the door after he was unsuccessful at preventing Risa Lofton from leaving, there was a "little tussle" and Ryan Lofton stated, "what are you going to do, shoot me?" and Ryan Lofton was not even a foot away from Macomber's vehicle standing right over the driver's side window; "He was standing by the car still." (R 37, 523-25).

Don Ballard, defense investigator testified that he interviewed Joshua Kenolly just prior to trial and Mr. Kenolly made the following statements: there was a heated argument between

Ryan Lofton and Risa Lofton; Ryan Lofton was aggressive and heated with Macomber also, though Macomber never left his vehicle (R 36, 482-83); there was a tussle meaning Ryan Lofton reached into the Macomber vehicle and there was back and forth pulling and pushing movements between Ryan Lofton and Macomber (R 36, 484); Mr. Kenolly never stated that he saw Ryan Lofton turn around (R 36, 485); that Ryan Lofton's turning or backing was after the gunshot – Ryan Lofton was the aggressor, Macomber hadn't done anything but he was just the dude that brought the car (R. 36, at 486).

Dr. Donald Pojman, the coroner, testified that the range of fire from the muzzle of the gun and the body of Ryan Lofton was indeterminate but that law enforcement gave him no indication that the gun was fired through a Crown Royal Bag (R 35, 65-66). It could have been a close range of fire if there was something between the barrel of the gun and skin (R 35, 101 and 106); and, a non-reactive ferrotrace test of Ryan Lofton's hands is meaningless (R 35, 81). Technically, Ryan Lofton's gunshot wound was to his chest and his report would not say he was shot in the back; "this is a gunshot wound of the chest." The wound was closer to his side than his back. (R 35, 91 and 95).

Risa Lofton's testimony was that the gun that Macomber was in a Crown Royal Bag (R 35, 178), and that she got out of the vehicle intending to push her husband out of the way [implying that Ryan Lofton was either in or at Macomber's vehicle trying to get in the vehicle] (R 35, at 181).

KBI Agent Steven Bundy testified that Macomber stated that the gun was in a Crown Royal Bag and that the bag was in Macomber's vehicle (R 36, 392-93; State's Exhibit 2, R 36, at 395; State's Exhibit 18 and 19, R 41, 18-19). KBI Agent Mark Malick testified that Macomber stated that Ryan Lofton said that he was going to shoot him and that he shot Ryan Lofton when

he reached for the gun. Macomber stated that Ryan Lofton tried to grab the gun (R 36, 325, 326 and 328).

John Cayton, Macomber's Firearm Expert, testified that he examined the Crown Royal Bag and there was damage to the bag consistent with a muzzle blast and a bullet tearing a hole in the end (R 36, 555).

Also noteworthy: these same facts prompted the trial court decision in denying the Defendant's Motion to Dismiss based on Use-of-Force Immunity (R 32, at 5). Thus, the trial court abused its discretion by not giving the requested use of force instruction.

In *State v. Scoobee*, 242 Kan. 421, 748 P.2d 862 (1988), the court reversed the defendant's involuntary manslaughter conviction based on the trial court's failure to give the no duty to retreat instruction as a supplement to the general self-defense instruction. 242 Kan. 429. Alone, the trial court's failure to instruct on Macomber's requested use-of-force presumption denied him a fair trial. If, because certain facts exist, a jury is specially instructed to presume that the Defendant's use of deadly use of force is presumed reasonable and the predicate facts necessary for the presumption are as plentiful and undisputed as this record reflects – it's impossible to reconcile that failure to give the instruction could be harmless.

ii. Failing to give jury statutory definitions of "use of force" pursuant to K.S.A. 21-5211.

Appellant incorporates verbatim by reference the arguments and authorities for Issue No. I(b)(ii) set forth at page 8 of the "Supplemental Brief of Appellant, pro se" filed in this Court on April 5, 2016, with the following additions.

K.S.A. 21-5221(a) states:

> "Use of force; definitions: (1) "Use of force" means any or all of the following directed at or upon another person or thing: (A) Words or actions that reasonably convey the threat

> of force, including threats to cause death or great bodily harm to a person; (B) the presentation or display of the means of force; or (C) the application of physical force, including by a weapon or through the actions of another. (2) "Use of deadly force" means the application of any physical force described in paragraph (1) which is likely to cause death or great bodily harm to a person. Any threat to cause death or great bodily harm, including, but not limited to, by the display or production of a weapon, shall not constitute the use of deadly force, so long as the actor's purpose is limited to creating an apprehension that the actor will, if necessary, use deadly force in defense of such actor or another or to affect a lawful arrest."

The defense theory was that Ryan Lofton's actions escalated the incident which inevitably justified Macomber's use of deadly force under both defense of a person and defense of an occupied vehicle neither of which are mutually exclusive. The evidence showed that Macomber was invited by Risa Lofton to pick her up at her residence. Macomber never left his vehicle after arriving and at some point Ryan Lofton threatened to shoot him (an unlawful use of force). Macomber responded by displaying a handgun (a lawful use of force). Ryan then came to the driver's side door where Macomber was located where the window was rolled down and began to aggressively reach into Macomber's vehicle where both Risa Lofton and Macomber were located (unlawfully and forcefully enter or present within the vehicle) at which point Macomber cocked the firearm (a lawful use of force). While inside the Macomber vehicle Ryan Lofton then grabbed the gun which was enclosed in a Crown Royal Bag and exclaimed, "What are you going to do – shoot me mother fucker!" At which time Macomber fired the gun which resulted in Ryan Lofton's death (a lawful use of deadly force). It was determined that Ryan Lofton had high levels of methamphetamine in his blood at the time of the incident which likely contributed to his aggressive, erratic behavior (R 27, at 872; R 24, at 303-05).

The Court declined to give the instruction erroneously concluding that giving the use-of-force definitions would minimize the rationalization of Macomber and a reasonable person; "...it lowers the standard of the force." (R 37, 639-640).

Here, the jury was likely misled because evidence was presented from which the jury could have found that Ryan Lofton had unlawfully or was forcefully attempting to enter or had entered Macomber's occupied vehicle. However, by not receiving instructions defining use of force they didn't have enough information to conclude that Ryan Lofton's actions could be legally defined as unlawful.

c. It was clear error not to give the jury PIK Crim. 4th, Inference of Intent Instruction.

Appellant incorporates verbatim by reference the arguments and authorities for Issue No. I(c) set forth at pages 8 to 9 of the "Supplemental Brief of Appellant, pro se" filed in this Court on April 5, 2016, with the following additions.

In *State v. Barber*, 302 Kan. 367, 353 P.3d 1108 (2015), the Supreme Court states: If "[a] party fails to preserve an objection to the jury instructions by not raising the argument before the trial court, we will still review whether the instruction was legally and factually appropriate but will reverse only for 'clear error.' (Citations Omitted) An instruction is clearly erroneous when ' 'the reviewing court is firmly convinced that the jury would have reached a different verdict had the instruction error not occurred.'" 302 Kan. at 377.

d. It was clear error to not instruct the jury pursuant to K.S.A. 2010 Supp. 21-3404(c).

Appellant incorporates verbatim by reference the arguments and authorities for Issue No. I(d) set forth at page 9 of the "Supplemental Brief of Appellant, pro se" filed in this Court on April 5, 2016.

e. Macomber was prejudiced by the erroneous instructions to the jury, viewing the jury instructions individually or cumulatively.

The Supreme Court in *State v. Tully*, 293 Kan. 176, 262 P.3d 314 (2011), stated: "In a cumulative error analysis, an appellate court aggregates 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. [Citation omitted] In other words, was the defendant's right to a fair trial was violated because the combined errors affected the outcome of the trial." 293 Kan. at 205.

The final step the appellate courts take in analyzing instructional errors is the harmless error test. See *State v. Ward*, 292 Kan. 541, syl. 6, 256 P.3d 801 (2011), *cert denied* 132 S.Ct. 1594 (2012). Because the trial court's errors implicated Macomber's constitutional right to present his theory of defense, this test requires the appellate court to assess whether the error was harmless under the federal constitutional harmless error standard, i.e., whether there was "no reasonable possibility" that the error contributed to the verdict. See *Chapman v. California*, 386 U.S. 18, 24 S.Ct. 824, 17 L.Ed2d 705, *reh. denied* 386 U.S. 987, 87 S.Ct. 1283, 18 L.Ed.2d 241 (1967) (The prosecution carries the burden to show the error harmless beyond a reasonable doubt.)

Appellate courts will weigh the collective impact of trial errors and may grant relief if the overall result deprives the defendant of a fair hearing even though the error considered individually might be considered harmless. *State v. Smith-Parker,* 301 Kan. 132, 167-68, 340 P.3d 485 (2014). Here, each instructional error was compounded by the next, denying Macomber a fair trial.

II. THERE WAS INSUFFICIENT EVIDENCE TO SHOW PROBABLE CAUSE THAT MACOMBER'S USE OF DEADLY FORCE WAS NOT JUSTIFIED; AND TRIAL COURT ABUSED DISCRETION IN DENYING MOTION TO DISMISS CLAIMING IMMUNITY FROM PROSECUTION.

Appellant incorporates verbatim by reference the arguments and authorities for Issue No. II "There Was Insufficient Evidence To Show Probable Cause That The Defendant's Use-Of-Deadly-Force Was Not Justified (Thus Immune From Prosecution); And Insufficient Evidence to Support Macomber's Conviction For Involuntary Manslaughter," set forth at pages 9-14 of the of the "Supplemental Brief Of Appellant, pro se" filed in this Court on April 5, 2016.

Standard of Review:

The standard for analyzing a district court's denial of immunity for use-of-force based on sufficiency of evidence has not yet been established. Macomber suggests that it should be analyzed similarly to claims brought under K.S.A. 60-1507 where the district court conducts a full evidentiary hearing. See *State v. Adams,* 297 Kan. 665, 304 P.3d 311 (2013): Where appellate court's review the district court's factual findings for substantial competent evidence and determine whether the factual findings support the district court's conclusions of law, they apply a de novo review to the conclusions of law. 297 at 669. Likewise, when the State appeals the dismissal of a complaint, an appellate court's review of an order discharging the defendant for lack of probable cause is de novo. *State v. Evans*, (112,000) 360 P.3d 1086; 2015 Kan.App. LEXIS 71 at *9-10; (quoting) *State v. Fredrick,* 292 Kan. 169, 171, 251 P.3d 48 (2011).

Factual and Procedural History

Macomber filed Motion to Dismiss Based on Use Of Force Immunity Pursuant to K.S.A. 21-5231 (R 8, 673-77). The State filed a Response to Motion to Dismiss (R 8, 720-27). Macomber filed Traverse/Reply to State's Response to Motion to Dismiss. (R 9, 750-59).

In denying Macomber's Motion to Dismiss the district court considered the State's Response, Macomber's Traverse/Reply, the preliminary hearing transcript and first trial transcript, as well as the testimony from Macomber's witnesses presented at the evidentiary

hearing held on February 26, 2015 (R 32, 4-5), and then made the following factual findings and legal conclusions:

"...I find that the use of force was not necessary under the factual circumstances that were before the Court. It's beyond what a reasonable person under the circumstances would have believed was necessary. I also found that the defendant's statement during the point in time of the trial that he testified that Ryan Lofton had had threatened to shoot him was not a credible statement. That doesn't mean it doesn't come in for the jury to weigh at that point in time. I waited for a specific purpose, and that was the purpose on the motion to dismiss based on immunity at this point in time. The defendant's version that Ryan Lofton was reaching into the car when the gun went off is not supported by the scientific evidence or the factual evidence in this case. There is quite simply a break in time between when Mr. Lofton was reaching in the car to when the victim, Mr. Lofton, was shot in this case. There is no evidence that Mr. Lofton had a gun. In fact, the defendant admits that, and he was pretty sure he didn't have a gun at one point in time and later testified that he did not have a gun, referring to Mr. Lofton." (R 32, 5-6).

"Anyway, what I find is that the state has met its burden in this particular case and that was they had to establish that the force was not justified as part of the probable cause determination. And I find that they have met that burden and I am dismissing—or denying, I should say, the defendant's motion to dismiss based on immunity grounds in this case." (R 32, 6).

Analysis

In *State v. Hardy*, 51 Kan.App.2d 296, 347 P.3d 222 (2015), a panel of this Court stated:

> "By statute, Kansas extends immunity from criminal prosecution to persons acting in self-defense. K.S.A. 2014 Supp. 21-5231. The statute, however, fails to describe how district courts should go about deciding a request for that protection. The Kansas Supreme Court has held the State must establish probable cause to show that a defendant has not acted in lawful self-defense. *State v. Ultreras*, 296 Kan. 828, 845, 295 P.3d 1020 (2013). But the Court expressly declined to outline the procedures for presenting or resolving immunity claims. This case requires us to fill that void. Drawing from cues from *Ultreras*, we find a district court should conduct an evidentiary hearing procedurally comparable to a preliminary examination, to the rules of evidence apply and conflicting evidence should be resolved in favor of the state...." 51 Kan.App.2d at 296.

K.S.A. 2014 Supp. 21-5231 in relevant provides:

> "(a) A person who uses force which, subject to the provision of K.S.A. 2014 Supp. 21-5226, and amendments thereto, is justified pursuant to K.S.A. 2014 Supp. 21-5222, 21-5223, or 21-5225, and amendments thereto, is immune from

> criminal prosecution and civil action for the use of such force...As used in this subsection, 'criminal prosecution' includes arrest, detention in custody and charging or prosecution of the defendant." ... (c) A prosecutor may commence a criminal prosecution upon a determination of probable cause."

State v. Smith, 299 Kan. 962, 327 P.3d 441 (2014): "A district court abuses its discretion when: (1) no reasonable person would take the view adopted by the Judge; (2) a ruling is based on an error of law; or (3) substantial competent evidence does not support a finding of fact on which the exercise of discretion is based." 299 Kan. at 970. Substantial competent evidence is defined as "such legal and relevant evidence as a reasonable person might accept as being sufficient to support a conclusion." See *State v. Luna*, 271 Kan. 573, 575, 24 P.3d 125 (2001); or evidence that exhibits both relevance and substance and provides a substantial factual basis to reasonably resolve the issues. See *Wilkins v. State*, 286 Kan.971, 980, 190 P.3d 957 (2008).

The trial court's findings that there was not scientific or factual evidence to support Macomber's version that Ryan Lofton was reaching into the vehicle when the gun went off; and that there was a break in time between when Ryan Lofton was reaching in the car and when he was shot were not supported by substantial competent evidence. The district court's finding "a break in time" was accomplished by improperly filling a void or gap in the evidence. There was no conflicting evidence to consider regarding reference to the time of events in relation to each other, because no evidence was presented to show this dimension. No evidence suggests that Ryan Lofton's actions of standing over the passenger's side door, reaching in the vehicle, grabbing the gun and saying, "What are you going to do—shoot me..." were not virtually simultaneous (or without a break in time) to his being shot.

Joshua Kenolly stated that the incident lasted a total of five seconds (R 10, 17) and by all accounts, Ryan Lofton was standing less than a foot away from Macomber's car, directly over

the open driver's side window (R 10, 11-12) in reaching in the car at Macomber where a tussle ensued (R 31, 9).

Kassandra Skirvin's testimony and statements were: Ryan Lofton continues to have contact with the white car after Risa Lofton gets in the passenger side (R 36, 344); she couldn't hear what Ryan Lofton was saying (R 36, 344); she observed that she also saw a struggle occurring just prior to the shot (R 36, 348); Macomber never gets out of the car (R 36, 346); the struggle between Macomber and Ryan Lofton was inside the car with Ryan Lofton's head inside the car (R 36, 357); Ryan Lofton was trying to get into Macomber's vehicle and that she never mentioned that Ryan Lofton was ever trying to run away from Macomber or his vehicle (R 31, 11-12, and 15).

Macomber's statements and testimony were documented in Macomber's Traverse/Reply to State's Response to Motion to Dismiss (R 9, 755-56): Macomber told Hedy Saville as well as multiple law enforcement officers that Ryan Lofton threatened to shoot him (R 23, 52-53 and R27, 979, 986-988); Macomber claimed Ryan Lofton tried to unlock his door and grab the gun from him (R 26, 500 and R 27, 988); the gun was in a Crown Royal Bag and Ryan Lofton was yanking the bag/gun out the window (R 27, 1044); and that Macomber thought about firing a round to get Ryan away from the car (R 27, 989).

Risa Lofton testified: Ryan Lofton was angry but she couldn't remember the words Ryan Lofton spoke to Macomber (R 27, 870); when Ryan Lofton is smoking Methamphetamine and is angry he gets agitated (R 27, 872); that Macomber pulled out a Crown Royal Bag that she knew was a gun and that the bag was never taken off the gun (R 24, 179-181, 184); Macomber held gun in Crown Royal Bag (R 27, 879); she thinks that Ryan Lofton and Macomber were shouting at each other while Ryan Lofton walked to Macomber's car and couldn't remember what Ryan

Lofton was doing when she was grabbing Macomber's arm but that he was standing there at the driver's side door (R 24, 183); she couldn't recall Ryan Lofton saying anything but he might have (R 24, 261); she was getting out of Macomber's car to push her husband out of the way [implying that Ryan Lofton was right at the driver's side door] (R 24, 185); she didn't see Ryan Lofton fall or the gun being shot because of Crown Royal Bag (R 24, 265).

The district court fell into a trap of filling in the gap of relating to the timing of the events surrounding the shooting. The first and only suggestion that there was a "break in time" can be traced back to the preliminary examination, where the State misrepresented the facts to the Court in response to Macomber's objection that the State failed to show probable cause of premeditation. See Joshua Kenolly's preliminary examination testimony at R 10, 13:

"Q. Did you see Ryan trying to walk away, or what was he doing?

A. When the shot happened?

Q. Yeah.

A. He was standing by the car still."

In referring to this testimony the State argued, "when the victim says, what are you going to do now, shoot me, and turns around and walks away, that is sufficient evidence for premeditation." (R 10, 58-59). Unfortunately for Macomber the fallacy of this argument seemed to have perpetuated itself into the District Court's decision denying him immunity from prosecution, as no evidence remotely supports the Court's findings.

In *State v. Ultreras*, 296 Kan. 828, 925 P.3d 1020 (2013), the Kansas Supreme Court established that the State bears the burden of establishing proof that the force used by the defendant was not justified as part of the probable cause determination under the immunity statute. 296 Kan. 845.

The State has failed to meet this burden because it simply cannot be discerned from the evidence presented that there was ever a break in time in relation to any of Ryan Lofton's immediate actions prior to his death.

It appears that the District Court considered K.S.A. 21-5224, use-of-force presumption (occupied vehicle) and K.S.A. 21-5222(c) defense of a person—no duty to retreat clause in considering Macomber's Motion to Dismiss, though it is clear that the Court failed to apply these concepts properly. The decision in *State v. Hardy*, 51 Kan.App.2d 296, 303-304, 347 P.3d 222 (2015) came out after the District Court's decision denying Macomber immunity. *Hardy* confirms the District Court was correct to consider both these concepts as they weren't inapplicable under any version of the facts. The presumption that Macomber's use of deadly force was reasonable raises the bar for the State to show probable cause that his use of deadly force was unlawful. It is undisputed that Ryan Lofton had forcefully and unlawfully entered or was attempting entering the vehicle occupied by Macomber and Risa Lofton when he was reaching inside the vehicle, attempting to unlock the door, tussling or struggling with Macomber and grabbing the gun.

Contrary to the District Court's findings, Macomber's version of events is 100% compatible with both the factual and scientific evidence:

Dr. Pojman, coroner, testified that the range of fire was indeterminate but that an intervening material between the barrel of the gun would prevent stippling and soot that would be indicative of a close range shot, generally considered to be a shot from 18 inches to 36 inches and that he was never given information that the gun was fired through a Crown Royal Bag (R 24, 323); Ryan Lofton tested positive for methamphetamine at levels where deaths had been recorded and that the effects of this drug can cause people to get agitated, jittery and act

erratically (R 24, 303-05); Ryan Lofton's wound likely stunned the central nervous system causing the lower extremities to collapse (R 24, 307-08). In fact, in considering a scenario which incorporated Macomber's version of events, Dr. Pojman testified it would be possible for someone to have received a gunshot wound in the manner that Ryan Lofton received the gunshot wound in the way the physiological path that the bullet travelled through him, as a result of reaching in a car, pulling on a firearm, or a hand that was holding a firearm, releasing it as he was pulling [in the motion described in scenario]. (R 26, 793). This was articulated in Macomber's Traverse/Reply (R 9, 756). Dr. Pojman also testified that the negative ferrotrace test on Ryan Lofton's hands was meaningless. (R 35, 81).

The Court's finding here illustrates that it lowered the State's burden to show that probable cause that Macomber's use of deadly force was not justified when it unreasonably found no scientific or factual evidence supported Macomber's version. The evidence considered by the District Court overwhelmingly supports Macomber's version of events, however, it is void of any evidence to show that Ryan Lofton was not reaching into Macomber's car or inside his car at the time he was shot—nowhere does the record indicate that there was a break in time as stated by the Court.

Error of Law: Macomber's credibility.

Finally, the District Court abused its discretion because it made an error of law. The immunity determination was to be made in regard to Macomber's prosecution for intentional, second-degree murder or, i.e., use of deadly force. However, District Court abused its discretion further by finding that Macomber's statement during the point in time of the trial when he testified that Ryan Lofton had threatened to shoot him was not a credible statement. The District Court erred in making this credibility determination because it regarded Macomber's display of

force which was not the purpose of the immunity hearing. The hearing was for a use of deadly force, which requires a precursor application of physical force. More importantly, giving deference to the District Court's findings, no reasonable person, under the circumstances described here, would have found Macomber's statement regarding Ryan Lofton threatening to shoot him not credible. Ryan Lofton was under the influence of a large amount of methamphetamine. Prior to Macomber arriving Ryan Lofton had been reported to be angry and fighting with his wife. Ryan Lofton was upset that his wife was leaving and was displaying aggressive behavior. Macomber made numerous consistent statements concerning the shooting where he claimed he claimed that Ryan Lofton had threatened to shoot him. The District Court's credibility determination is impossible to reconcile the facts.

Macomber's statements to law enforcement and Hedy Seville were consistent with other witness statements and were made prior to assessing discovery, such as witness statements. Arguably, Macomber's statements were given prior to him having a motive to lie as they were given during a stand-off with police where he was reported to be suicidal and expected to be killed. (R 36, 310-329; R 36, 328-329). Without conflicting evidence, the District Court's findings are simply unreasonable.

III. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT MACOMBER'S CONVICTION FOR INVOLUNTARY MANSLAUGHTER

Standard of Review

When sufficiency of the evidence is challenged on appeal, this court reviews all the evidence in the light most favorable to the prosecution and determines whether a rational factfinder could have found the defendant guilty beyond a reasonable doubt. See *State v. Williams*, 299 Kan. 509, 525, 324 P.3d 1078 (2014). In determining whether there is sufficient

evidence to support a conviction, the appellate court generally will not re-weigh the evidence or assess the credibility of witnesses. 299 Kan. 525. It is only in rare cases where the testimony is incredible that a guilty verdict will be reversed. *State v. Matlock*, 233 Kan. 1, 4-6, 660 P.2d 945 (1983).

Analysis

K.S.A. 1993 Supp. 21-3201(b) defines: "intentional conduct is conduct that is purposeful and willful and not accidental. As used in this code, the terms "knowing," "willful," "purposeful," and "on purpose" are included within the term "intentional."

K.S.A. 1993 Supp. 21-3201(c) in relevant part, defines: "reckless conduct is conduct 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 …."

K.S.A. 2010 Supp. 21-3404: "Involuntary manslaughter is the unintentional killing of a human being committed:

> (a) Recklessly;
>
> (b) in the commission of, or attempt to commit, or flight from any felony other than an inherently dangerous felony as defined in K.S.A. 21-3436 and amendments thereto, that enacted for the protection of human life or safety or a misdemeanor that is enacted for the protection of human life or safety, including acts described in K.S.A. 8-1567 and amendments thereto;
>
> (c) during the commission of a lawful act in an unlawful manner."

At trial Macomber didn't object to the form of the involuntary manslaughter instruction, noting now that the entire PIK 3rd 56.06 involuntary manslaughter instruction was not given. Jury Instruction No. 17 (PIK 3rd 56.06, 56.04(f)):

> "If you do not agree that the defendant is guilty of voluntary manslaughter, you should then consider the lesser included offense of involuntary manslaughter. To establish this charge, each of the following claims must be proved:

1. That the defendant unintentionally killed Ryan Keith Lofton;

2. That it was done recklessly; and

3. That this act occurred on or about the 7th day of June, 2010, in Shawnee County, Kansas.

Reckless conduct means conduct done under circumstances that show a realization of the imminence of danger to the person of another and conscious and unjustifiable disregard of that danger. The terms 'gross negligence,' 'culpable negligence,' 'wanton negligence,' and wantonness" are included within 'reckless conduct.'" (R 37, 656-67).

Omitted from the instruction was an essential element necessary to prove the crime of involuntary manslaughter because there was no evidence to support that the defendant acted recklessly and the trial court failed to instruct the jury as to K.S.A. 2010 Supp. 21-3404(c) as to an unintentional killing, during the commission of a lawful act in an unlawful manner—the only subsection applicable to the facts of the case.

CONCLUSION

Wherefore, Appellant requests this Court reverse his conviction for involuntary manslaughter declaring him immune from prosecution and/or that there was insufficient evidence to support his conviction, or in the alternative, remand the case to the District Court for a new trial.

Respectfully submitted,

Jonathan B. Phelps, #11506
Attorney for Stephen A. Macomber
PHELPS-CHARTERED
1414 S. Topeka Blvd.-P.O. Box 1886
Topeka, Kansas 66601-1886
785/233-4162
785/233-0766 (facsimile)
jon.phelps@phelpschartered.com

CERTIFICATE OF SERVICE:

I hereby certify that the copies required by court rule to be delivered to opposing counsel were done so on this 18th day of April, 2016, to: Shawnee County District Attorney, 200 E. 7th St., Suite 214, Topeka, KS 66603, and the Office of the Attorney General, 120 SW 10th Ave., Topeka, KS 66612.

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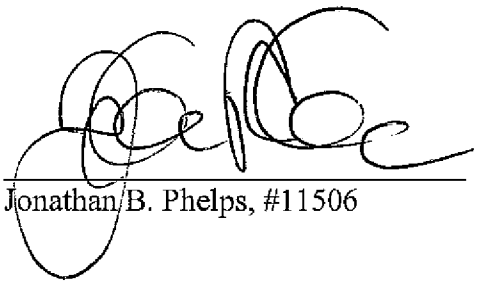

Jonathan B. Phelps, #11506