No. 22-125318-S

IN THE
SUPREME COURT OF THE
STATE OF KANSAS

STATE OF KANSAS
Plaintiff-Appellee

vs.

ZSHAVON DOTSON
Defendant-Appellant

BRIEF OF APPELLANT

Appeal from the District Court of Wyandotte County, Kansas
Honorable Wesley Griffin, Judge
District Court Case No. 18CR1256

Peter Maharry, #19364
Kansas Appellate Defender Office
Jayhawk Tower
700 Jackson, Suite 900
Topeka, Kansas 66603
(785) 296-5484
(785) 296-2869 fax
adoservice@sbids.org
Attorney for the Appellant

Table of Contents

Nature of the Case

Zshavon Dotson appeals after a jury convicted him of one count of Murder in the 1st Degree, contrary to K.S.A. 21-5402(a)(1), an off-grid, person felony and one count of Aggravated Battery, contrary to K.S.A. 21-5413(b)(1)(A), a severity level 7, person felony. He was sentenced to a controlling term of life imprisonment, with a minimum of 25 years before he was eligible for parole.

Statement of the Issue

Issue 1: **The prosecutor misstated the law on multiple occasions in closing arguments that denied Zshavon a fair trial and warrants reversal of this matter for a new trial.**

Issue 2: **There was insufficient evidence of premeditation to support the conviction for first-degree murder.**

Issue 3: **There is no distinction between an intentional killing under second-degree murder and a premeditated killing under first-degree murder and consequently, Zshavon's sentence for first-degree murder must be vacated and this matter must be remanded with orders to sentence Zshavon for second-degree murder.**

Issue 4: **The instructions were clearly erroneous as they failed to include a full definition of premeditation that this Court identified in *Stanley*, which given the facts of this case, would have resulted in a different verdict.**

Issue 5: **The district court erred in placing guilty first on the verdict forms, which undermined Zshavon's presumption of innocence.**

Issue 6: **Zshavon received ineffective assistance of counsel at trial and this Court must reverse this matter for a new trial.**

Issue 7: **The cumulative effect of these errors, even if insufficient standing alone to require reversal, warrants reversal for a new trial.**

Statement of the Facts

On November 26, 2018, officers with the Kansas City Police Department responded to the home of Carolyn Marks and found her son, Ronald Marks Jr., dead from gunshot wounds. (R. 13, 30-1). The State then charged Zshavon Dotson with murder.

Zshavon met Ronald when Zshavon was a student at Kansas City Kansas Community College ("KCKCC"). (R. 15, 466). They became good friends and Zshavon referred to him as a brother and his mother, Carolyn, as Mama Marks. (R. 15, 466). Given that friendship, after Zshavon had a fight with his girlfriend on November 25, 2018, he went to the Marks' residence looking for a place to stay. (R. 15, 467).

When Zshavon showed up at the Marks' residence, both Ronald and Carolyn said he could stay. (R. 15, 467). He stayed in their spare bedroom. (R. 15, 469). However, things took a turn the next morning when Zshavon woke up.

When Zshavon woke up the next morning, Ronald was yelling on the phone to someone about the light bill. (R. 15, 470). Zshavon went to the living room and tried to calm Ronald down, but Ronald only became angrier. (R. 15, 470). He yelled at Zshavon saying that he was not a good friend and had not been there for him when needed help to bond out of jail or to help pay the light bill now. (R. 15, 470-71). Zshavon responded that he did help bail him out the first time he was arrested, but it was not his "responsibility to keep paying for [his] mistakes." (R. 15, 473). He also said it was not his responsibility to pay for Ronald and Carolyn's bills. (R. 15, 473). At that point, Ronald picked up his AK, cocked it and placed it on his lap. (R. 15, 474).

Carolyn then entered the fray and said if Zshavon could not pay the light bill, he had to leave. (R. 15, 474). Zshavon agreed to leave, but before he could even pack up his stuff, Ronald stood up and put the AK to Zshavon's face. (R. 15, 476). He then demanded Zshavon give him money. (R. 15, 477). Carolyn, who had gone back to her room, returned with a gun and put it to Zshavon's head as well. (R. 15, 478).

Zshavon then tried to knock Carolyn's weapon down and grabbed for the AK. (R. 15, 479). He and Ronald then fought over the AK. As they struggled, they moved from the living room to the kitchen to the utility closet. (R. 15, 484). There, Zshavon was able wrestle the gun away from Ronald. (R. 15, 485). Ronald then fell to the ground. (R. 15, 485). When he was on the ground, Ronald pulled another gun from his right side. (R. 15, 486). In response, Zshavon fired the AK. (R. 15, 486).

After he fired the AK, Zshavon picked up the gun Ronald had and Carolyn's gun. (R. 15, 489). He grabbed his bag and left. (R. 15, 490). He threw the two pistols as he ran from the house. (R. 15, 492). He set the AK down in a place where he thought it would be safe, behind a washer in an alley. (R. 15, 492). Zshavon then kept running as he was scared, eventually taking a bus to Dallas. (R. 15, 493).

Carolyn gave a different story surrounding her son's death. She learned that Zshavon had stayed the night after waking up the morning of November 26, 2018 and hearing Ronald talking with him on the couch. (R. 14, 272). She said she told Zshavon that he could not move in and Zshavon reacted "very aggressively." (R. 14, 279). Zshavon said someone was coming to pick him up, and then got real quiet. (R. 14, 282). Carolyn then went back to bed. (R. 14, 282).

Carolyn was later awaken by the sound of arguing. (R. 14, 282). She told Zshavon and Ronald to "cut it out" and went back to bed. (R. 14, 282).

Carolyn was stirred out of bed for a third time when she heard Zshavon and Ronald arguing again. (R. 14, 283). She again told them to stop. (R. 14, 283). However, when she did, Zshavon dove for the AK. (R. 14, 283). Ronald also dove for the AK and the two fought for the gun. (R. 14, 288-89). Carolyn went to get her own gun. (R. 14, 289). When she came back, she told the two to stop and fired her gun in the air. (R. 14, 290). At that point, Carolyn said Zshavon was able to push Ronald against the wall and hit her with the AK, although he was still wrestling with Ronald for control of the AK. (R. 14, 291-92). Carolyn stated she passed out at that point. (R. 14, 292).

When Carolyn came to, Ronald and Zshavon were still wrestling over the AK. (R. 14, 296). She said Zshavon was able to hit Ronald with the AK causing Ronald to fall to the ground. (R. 14, 300). On the ground, Carolyn stated that her son started to raise his hands and was trying to say no when Zshavon shot him. (R. 14, 301-02). Zshavon then took off and she called the police. (R. 14, 306-07).

The State originally charged Zshavon with second-degree murder. (R. 1, 31). Zshavon retained Brett Richman to representing him during the criminal proceedings. (R. 1, 39). After the preliminary hearing, the State upped the charge to first-degree premeditated murder. (R. 1, 44; R. 3, 53-54). After several continuances, the district court held a pretrial hearing on several pretrial motions on March 11, 2020.

Zshavon filed a motion asserting self-defense immunity prior to trial. (R. 1, 90-94). Prior to the pretrial, Richman and the State agreed that the issue of self-defense

immunity would not require a separate hearing, but instead be addressed by the district court at the conclusion of the State's case. (R. 7, 43-50). The district court agreed and withheld any ruling on self-defense immunity. (R. 7, 49-50).

With all the issues addressed, all the parties were ready for trial. However, the trial was canceled due to the COVID pandemic. It went to trial in August 2021.

The key witness at trial was Carolyn Marks. She testified that Zshavon showed up at her house after he had a fight with his girlfriend. (R. 14, 275). The next morning, she heard Ronald and Zshavon arguing. (R. 14, 283). They then fought over the AK, eventually leading to Ronald being shot. (R. 14, 300-02). Carolyn testified that she went to KU Med the next day as she had pain and dizziness. (R. 14, 316).

Dr. Ransom Ellis was the State's final witness. He was a forensic pathologist with Frontier Forensics at the time and he did the autopsy of Ronald. (R. 14, 410). He found the cause of death was multiple gunshot wounds and ruled the death a homicide. (R. 14, 416). He testified he did not know the order of the shots. (R. 14, 448). However, one gunshot struck the aorta and lung, which would have been fatal. (R. 14, 440). He also took bodily fluids and had them tested. Ronald was found to have ethanol, alprazolam (Xanax) and cannabinoids (THC) in his system. (R. 14, 453). His blood-alcohol level was measured at .109. (R. 14, 453). At that point, the State rested. (R. 14, 455).

Zshavon testified in his defense. He reiterated that he shot Ronald in self-defense. (R. 15, 486). That morning, Zshavon woke up hearing Ronald yelling while he was on the phone talking about the light bill. (R. 15, 470). After he told Ronald to calm down, he became angry at Zshavon. (R. 15, 470). Zshavon testified it then escalated into a

fight over the gun. (R. 15, 479). Eventually, Zshavon was able to get the AK as Ronald fell to the ground. (R. 15, 485). However, as he was on the ground, Ronald tried to pull a gun and Zshavon shot him in self-defense. (R. 15, 486). After he shot Ronald, Zshavon testified he grabbed all three guns and fled because he was scared. (R. 15, 493).

Zshavon then rested his case. (R. 15, 500). At that point, the district court took up the issue of self-defense immunity. The district court found that Carolyn's testimony was more supported by the forensic evidence. (R. 15, 512-13). Consequently, it found the State's version was stronger and denied the motion for self-defense immunity. (R. 15, 513-14). As to instructions, the district court gave second-degree murder, voluntary manslaughter, sudden quarrel, and involuntary manslaughter, imperfect self-defense, as lesser-included offenses of the main charge of first-degree murder. (R. 1, 133-35; R. 15, 516-17). It also gave severity level 7 aggravated battery and misdemeanor battery as lesser-included offenses of the charge of severity level 4 aggravated battery. (R. 1, 138-39; R. 15, 518-19). The district court also gave an instruction on self-defense and, over Zshavon's objection, an instruction on an initial aggressor. (R. 1, 141-42; R. 15, 520-21).

The jury returned a verdict of guilty for first-degree murder and for the lesser-included offense of severity level 7 aggravated battery. (R. 1, 146-47; R. 15, 573-74).

After the verdict, Zshavon filed a *pro se* motion seeking a new trial based on ineffective assistance of counsel. (R. 1, 159-67). The district court allowed Richman to withdraw and appointed Cline Boone. (R. 1, 178; R. 16, 2-3).

Boone filed a motion for new trial raising several issues and the district court held a hearing on the matter. Zshavon testified Richman failed to do several things. He noted

that Richman never adopted or argued the *pro se* motion to dismiss Zshavon filed. (R. 20, 7-8). He testified that he felt pressured to waive his speedy trial rights. Richman told him if he did not, he would face 15 to 20 years' incarceration. (R. 20, 11). Richman, however, failed to tell Zshavon that he faced the Hard 50. (R. 20, 14). He only learned he faced a life sentence, with a minimum of 50 years, after the trial. (R. 20, 14).

Zshavon testified that Richman told him that there was no way a jury would convict on first-degree murder. (R. 20, 18). Richman told Zshavon his case was better than his cellmate, Tirrel Stuart. (R. 20, 26). Richman advised Stuart to take a plea the called for a 20-year sentence. He advised Zshavon not to take any plea. (R. 20, 26).

Zshavon also testified that Richman failed to highlight the inconsistent statements of Carolyn and failed to call the detectives that interviewed her. (R. 1, 195; R. 20, 28). Given her importance, it was vital that Richman fully bring out all of her inconsistencies. He also failed to call Jasmine Harris. She was on the phone with Ronald when the argument started, but was never called at trial. (R. 20, 36). Zshavon believed that her testimony would have been helpful. (R. 20, 37). Yet, Richman thought the case was "a slam dunk" and they were going to "beat it without" needing Harris. (R. 20, 38).

Richman also testified. He stated that he discussed waiving the speedy trial with Zshavon and that it was necessary to be fully prepared. (R. 20, 56-57). He never told Zshavon he had to waive his rights to speedy trial and believed Zshavon understood what he was doing when he waived his rights. (R. 20, 61-62).

Richman agreed that Zshavon claimed self-defense from the start. (R. 20, 63-64). He, however, refuted the allegations that he failed to discuss the case and possible

penalties with Zshavon. Richman testified he went through discovery, including the autopsy report, with Zshavon multiple times. (R. 20, 67). He discussed the penalties that Zshavon faced with a charge of first-degree murder and aggravated battery. (R. 20, 70). However, he did not believe a plea deal was close. His recollection was the State was seeking around 20 years, while Zshavon was looking at around three years. (R. 20, 71).

Richman never found Harris. He only tried to contact her by phone. (R. 20, 77). Consequently, he never knew if she would verify the statement she gave to the police. (R. 20, 80). Regardless, Richman testified that she was not someone he wanted to testify. He was concerned because she was the "significant other of the deceased, [Ronald]." (R. 20, 77). He also thought her statement "bolstered the State's position" and the testimony of Carolyn painting Zshavon as the initial aggressor. (R. 20, 80).

Richman agreed that he did not object to several pieces of evidence put forth by the State. He did not object to the autopsy report because it showed drugs and alcohol in Ronald's system. (R. 20, 85). He did not object to testimony that when Zshavon was arrested he had a gun, as he wanted to show Zshavon could legally possess a gun and that it was not the gun used. (R. 20, 86-87). Richman also testified that he discussed stipulating to the KBI report with Zshavon. (R. 20, 101). Finally, he did not object to Carolyn's medical records because he wanted to show she had memory problems and took multiple medications, as documented in the medical reports. (R. 20, 103).

Richman thought Zshavon had a strong case and did not think a conviction was likely. (R. 20, 111-12). That opinion did not change at trial. (R. 20, 112). He did not recommend a plea, but did not guarantee an acquittal. (R. 20, 111-12).

The district court found that Richman was not ineffective. (R. 20, 171). It found he did a proper job in questioning Carolyn at trial. (R. 20, 158-59). Further, several of the decisions made were strategic decisions properly made by Richman, such as the decision to allow into evidence testimony that Zshavon was arrested with a gun. (R. 20, 161). The district court felt the stipulations made were in the best interest of Zshavon. (R. 20, 161). It also found it was reasonable for Richman to believe that Harris would not be helpful or worse, be helpful for the State. (R. 20, 166-67). Finally, it found that Richman never guaranteed an acquittal and the district court's own memory was that Zshavon did not want to enter a plea given the time the State was seeking. (R. 20, 164).

Prior to sentencing, Zshavon moved for a departure, seeking the Hard 25. He asserted two reason supported such a departure: his young age, being just 23 years' old at the time, and his lack of any criminal history. (R. 1, 225-26; R. 8, 64). The district court agreed. It sentenced Zshavon to the Hard 25 for the charge of first-degree murder. (R. 1, 230; R. 8, 77). It sentenced Zshavon to a concurrent term of 12 months for the aggravated battery charge pertaining to Carolyn. (R. 1, 234-35; R. 8, 75).

Zshavon filed a timely notice of appeal. (R. 1, 250).

Arguments and Authorities

Issue 1: The prosecutor misstated the law on multiple occasions in closing arguments that denied Zshavon a fair trial and warrants reversal of this matter for a new trial.

1. Introduction

In closing arguments, the State sought to explain how the doctrine of the initial aggressor related to claims of self-defense. It sought to explain premeditation. It

mangled both. These misstatements of the law were critical in a case that hinged on self-defense. These misstatements warrant reversal for a new trial.

2. Preservation

Although there was no objection at trial, one is not needed to allow for review by this Court. An objection is not necessary to allow for review of a claim of prosecutorial error in closing arguments. *State v. Pribble,* 304 Kan. 824, 831, 375 P.3d 966 (2016).

3. Standard of Review

When evaluating a claim of prosecutorial error, this Court uses a two-step process. First, this Court determines whether "the prosecutorial acts complained of fall outside the wide latitude afforded prosecutors to conduct the State's case and attempt to obtain a conviction in a manner that does not offend the defendant's constitutional right to a fair trial." *State v. Hachmeister,* 311 Kan. 504, Syl. ¶ 2, 464 P.3d 947 (2020). Next, this Court considers whether the error caused prejudice. If it did and it implicated a constitutional right, this Court must determine, using the constitutional harmless error standard, whether the State can prove that there is no reasonable possibility that the prosecutor's error contributed to the jury's verdict. *Hachmeister,* 311 Kan. at 513-14.

4. Argument and Authorities

a. The State misstated the law on self-defense

In closing, the State asserted, "[y]ou cannot claim self-defense in a fight that you started." (R. 15, 544). Because, as the State argued, Zshavon started the fight he could not "get to say self-defense when you initially provoke an argument." (R. 15, 544). It returned to this argument in its rebuttal closing argument. It argued:

> "And you know what you don't get to do under Kansas law if you are the person that dives for that gun? You do not get to claim self-defense later, not unless you have exhausted every means necessary to remove yourself from that situation. You go start a fist fight with somebody and they pull a knife, you gotta run away. You don't get to shoot somebody because you started a fight and they pull a knife and you're, like, oh crap, they're gonna kill me with a knife. That's not how it works."

(R. 15, 564). This is a misstatement of the law surrounding self-defense. If you start a fight and the person pulls a knife, you can, contrary to the State's argument, shoot the individual in self-defense.

Self-defense allows for the use of deadly force when a person reasonably believes deadly force is necessary to prevent imminent death or great bodily harm. *State v. Qualls,* 309 Kan. 553, 557, 439 P.3d 301 (2019); K.S.A. 2018 Supp. 21-5222. However, a person may not be able to claim self-defense if they are the "initial aggressor." Specifically, self-defense is not available to a person who "initially provokes the use of any force" unless he or she "has reasonable grounds to believe that such person is in imminent danger of death or great bodily harm, and has exhausted every reasonable means to escape such danger other than the use of deadly force." K.S.A. 2018 Supp. 21-5226(c)(1). This statute still allows for the use of deadly force by the initial aggressor, just in more limited circumstances.

The legal effect of the initial aggressor statute is to "raise the threshold of proof for self-defense." *State v. Adam,* 257 Kan. 693, 702-03, 896 P.2d 1022 (1995). It, however, does not eliminate the defense for an initial aggressor. An initial aggressor is still able to assert self-defense if he or she meets one of two exceptions, sometimes referred to as the "safe harbor exceptions." *State v. Phillips,* 312 Kan. 643, 663, 479 P.3d

176 (2021). If the initial aggressor can show that he or she is facing death and has no avenue of escape, a person can still use deadly force legally. K.S.A. 2018 Supp. 21-5226(c)(1). Consequently, while the defense is more limited, it still is available.

Despite this, the State's argument to the jury all but foreclosed the possibility that Zshavon could claim self-defense if the jury believed he was the initial aggressor. The State asserted that "You don't get to shoot somebody because you started a fight and they pull a knife and you're, like, oh crap, they're gonna kill me with a knife. That's not how it works." (R. 15, 564). This argument tells the jury that the initial aggressor can never claim self-defense. The statute, however, does allow for self-defense by the initial aggressor in certain circumstances. If a person starts a fight and the other participant pulls a knife, the initial aggressor can claim self-defense if two conditions are met. First, the initial aggressor believes he or she faces death or great bodily harm, which seems reasonable if one is facing a knife-wielding assailant. Second, the initial aggressor has no reasonable means of escape. In that case, if you get into a fight and the other guy pulls a knife, you can shoot in self-defense. Yet, the State's argument says otherwise. It glosses over the exceptions in the statute and paints a black and white picture for the jury. It tells the jury if Zshavon was the initial aggressor he cannot claim self-defense. The statute has exceptions allowing an initial aggressor to claim self-defense. The State's argument is contrary to the statute and is a misstatement of the law.

Prosecutors are given a "wide latitude" in closing arguments. *State v. Tahah,* 302 Kan. 783, 787, 358 P.3d 819 (2015). However, any argument must accurately state the law. *State v. Holmes,* 272 Kan. 491, 499-500, 33 P.3d 856 (2001); *State v. Ross,* 310

Kan. 216, 221, 445 P.3d 726 (2019). The State's arguments here did not properly state the law. It incorrectly made being an initial aggressor and self-defense incompatible when there are circumstances when self-defense is available for an initial aggressor. Consequently, the State's arguments were improper and warrant reversal.

b. The State improperly diminished the element of premeditation

During closing, the State noted it could not define the amount of time for premeditation. (R. 15, 537). Rather, it just had "to show you that it's more than just an instant act of taking his life." (R. 15, 537). Then, in rebuttal closing arguments, the State tried to define premeditation beyond the instructions. It argued "premeditation. It sounds like a big deal from TV and movies. Like she said, we don't have to find someone's diary that talks about their plan. It's just more than instantaneous." (R. 15, 563). This line of argument improperly diminished premeditation to a meaningless term.

Again, any argument by the State must accurately state the law. *State v. Anderson,* 294 Kan. 450, 463, 276 P.3d 200 (2012). This Court has long stated that premeditation cannot be instantaneous. *See Holmes,* 272 Kan. at 499-500 (finding the argument that premeditation "can occur in an instant" improper). By arguing premeditation was not really a big deal and reducing it down to "just more than instantaneous," the State was equating it with instantaneous action and misstating the law. (R. 15, 563).

In *State v. Kettler,* 299 Kan. 448, 325 P.3d 1075 (2014), the State argued

> *"What that means is ... that they thought it over before they went in and did it. That's what premeditation is. There's even an instruction about what does that mean, thought it over, you could think it over, just a half second before you actually fired the fatal shot, that's true."*

Kettler, 299 Kan. at 474 (emphasis in original). This Court found that reducing premeditation down to a "half second" is "not significantly different" that arguing premeditation can occur "in an instant" or in a "squeeze of a trigger." *Kettler,* 299 Kan. at 476. It noted that it had previously found that an argument that premeditation could occur in a second improper. *Kettler,* 299 Kan. at 475-76 (citing *Holmes,* 272 Kan. at 499-500). To make such an argument "is not significantly different than saying 'in an instant' or in a 'squeeze of a trigger,' " which have been found to be improper. *Kettler,* 299 Kan. at 476. Such arguments tend "to diminish the importance of the element of premeditation." *State v. Moncla,* 262 Kan. 58, 72, 936 P.2d 727 (1997). It blurs the line between an instantaneous act and acting with premeditation.

The State makes the same error here. Its argument diminishes premeditation to nothing more than an instantaneous act. This Court has said that the argument the premeditation can take a second or even half a second is improper as it equates premeditation with instantaneous. The argument premeditation is "just more than instantaneous" requires less than a fraction of a second. It further diminishes premeditation to the point where it is indistinguishable from an instantaneous act. This Court in both *Holmes* and *Kettler* found that short time periods were improper arguments as it related to premeditation. Arguing premeditation is "just more than instantaneous" suffers the same flaw and misstated the law on premeditation.

c. The State's improper statements were not harmless

These arguments directly undercut Zshavon's defense at trial. By doing so, it denied him a fair trial and this Court must apply the constitutional harmless error

standard. That standard requires this Court to determine "beyond a reasonable doubt," whether the error affected the outcome of the trial "in light of the entire record, i.e., where there is no reasonable possibility that the error contributed to the verdict." *State v. Ward,* 292 Kan. 541, Syl. ¶ 6, 256 P.3d 801 (2011).

Here, the key issue at trial was self-defense and premeditation. Zshavon's defense was firmly rooted in the argument of self-defense. His attorney, Richman, started his closing arguments by stating: "there was a choice made, and a forced choice. Mr. Dotson was forced to defend himself to make a choice to kill his brother, someone he deemed was his brother, and he did so in self-defense." (R. 14, 545-46). It was vital that the jury properly consider that defense in order from Zshavon to get a fair trial. However, the State's arguments prevented a proper consideration of Zshavon's only defense at trial.

K.S.A. 2018 Supp. 21-5226(c)(1) is intended to make it harder for an initial aggressor to claim self-defense. "Because the legal effect of the accused's initially provoking the use of force is to raise the threshold of proof for self-defense, a finding by the jury that the defendant initially provoked the use of force diminishes the likelihood that it will find that defendant's conduct was justified as self-defense." *Adam,* 257 Kan. 702-03. The State's arguments go one-step farther. It eliminates the defense.

The State's arguments improperly make self-defense and initial aggressor status mutually exclusive. It repeatedly argued, "[y]ou cannot claim self-defense in a fight that you started." (R. 15, 544). This argument told the jury that if it believed Zshavon was the initial aggressor, he could not claim self-defense. By making this argument, Zshavon's only avenue to an acquittal was if the jury fully believed his testimony. If it

believed Carolyn's testimony that he initiated the fight by diving for the gun, he then had no defense. Even if the jury believed Ronald pulled a gun on him at the end of the fight, Zshavon could not "claim self-defense in a fight that [he] started." (R. 15, 544).

Diminishing the element of premeditation also was prejudicial. The State's argument blurred the lines between what is required to establish premeditation and what is an instantaneous act. In this case, it was uncontroverted that there was a struggle over a gun. The evidence of premeditation was far from overwhelming as this case certainly fit within multiple lesser-included offenses. It could easily have been seen as voluntary manslaughter, involuntary manslaughter or outright self-defense as recognized by the fact the district court instructed the jury on each of those options. (R. 1, 134-35, 141). Blurring the lines diminished the burden on the State to prove premeditation. It essentially just had to prove the act: Zshavon shot Ronald. Consequently, it diminished what the State had to prove to get its conviction for the primary offense.

Reducing the burden on the State as to what was required to prove first-degree murder was prejudicial because it meant the jury would be less likely to convict Zshavon of a lesser-included offense. The jury was specifically instructed that the lesser-included offenses could only be considered if it "did not agree" Zshavon was guilty of first-degree murder. (R. 1, 133). Consequently, the jury would be less likely to work down the lesser-included offense tree contained in the instructions. The State's argument diminished premeditation and made it easier to convict Zshavon of first-degree murder. It allowed for a conviction for premeditated first-degree murder based on nothing more than instantaneous action.

Taking away a line of defense and blurring the lines of premeditation had an impact at trial. It was vital that the jury properly applied the legal doctrines surrounding self-defense for Zshavon to get a fair shake at trial. It was vital it properly understood premeditation. However, the State's improper arguments prevented that from happening. Given the central importance of self-defense at trial and the issue of premeditation, the State cannot prove "beyond a reasonable doubt" that its improper statements did not affect the outcome of the trial. *Ward,* 292 Kan. at Syl. ¶ 6.

5. Conclusion

The State misstated the law on self-defense and its availability to an initial aggressor. It misstated the law surrounding premeditation. Those misstatements eliminated a defense for Zshavon, lowered the burden on the State and denied Zshavon a fair trial. Consequently, this Court must reverse and remand this matter for a new trial.

Issue 2: There was insufficient evidence of premeditation to support the conviction for first-degree murder.

1. Introduction

The testimony of the State's key witness, Carolyn, was that Zshavon and Ronald fought for control of the AK. She also testified that once Zshavon wrestled control away from Ronald, Zshavon shot Ronald in "one quick motion." (R. 14, 393). She testified there was no pause. (R. 14, 387). The testimony at trial, even in the light most favorable to the State, shows there was no premeditation to support the conviction. As a result, this Court must reverse Zshavon's conviction for first-degree murder and remand this matter to the district court with orders to sentence Zshavon for second-degree murder.

2. Preservation

Challenges to sufficiency of the evidence do not have to be raised in the district court to allow for review. *State v. Farmer,* 285 Kan. 541, 545, 175 P.3d 221 (2008).

3. 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." *Ward,* 292 Kan. at 581.

4. Argument and Authorities

"Under the Due Process clause of the 14th Amendment, no person may be convicted of a crime unless every fact necessary to establish the crime with which he is charged is proven beyond a reasonable doubt." *State v. Switzer,* 244 Kan. 449, 450, 769 P.2d 645 (1989) (citing *In re Winship,* 397 U.S. 358, 368, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)). Anything short mandates reversal of the conviction. Here, there was insufficient evidence of premeditation mandating reversal of Zshavon's conviction for first-degree, premeditated murder.

Viewing the facts in the light most favorable to the State would show that there was a struggle between Zshavon and Ronald over the AK. According to Carolyn, during the struggle, Zshavon hit Ronald with the AK and he fell to the ground in the room off the kitchen. (R. 14, 300-01). She testified that Ronald's "hands were up and he was in the middle of saying no" when he was shot by Zshavon in the chest. (R. 14, 302). Carolyn testified that Ronald was shot at the same time his hands were going up. She

testified it was "[o]ne quick movement. Bam, hit, you on the floor. It's not like you can break it up in pieces. There was no pause. It was bam, bam, hit, on floor dead." (R. 14, 387). She was then asked "[a]nd no pause, it was a quick time it happened?" (R. 14, 387). She responded, "[t]hat first shot, yes." (R. 14, 387). She later reiterated Ronald was shot as he was putting his hands up. "It was at the same time. It was like one quick motion." (R. 14, 393). "It was like (slapping hands together) and it was like before you could say hello." (R. 14, 393). As Ronald fell, "his hands was already in the air from falling" and "they were going up as he hit the ground and he goes no and he was shot." (R. 14, 393-94). After a pause of some time, Zshavon fired multiple more shots in Ronald's groin area. (R. 14, 302-03, 394).

The State also presented evidence regarding the gunshot wounds through Dr. Ellis. (R. 14, 416). He testified there were multiple gunshot wounds and ruled the death a homicide as a result. (R. 14, 416). In his autopsy, Dr. Ellis noted one of the gunshot wounds entered the chest on the right side of the body and injured the aorta, the primary artery coming out of the heart. (R. 14, 418-19). Another went through the right lung. (R. 14, 426).

Of note, Dr. Ellis testified the gunshot wound to the aorta would have caused an "immense amount of blood loss" and "combined with the injuries to the lungs would cause somebody to be incapacitated rather quickly." (R. 14, 440). The gunshot wound to the lung would also have caused a "substantial amount of bleeding." (R. 14, 441-42). These two gunshot wounds would have caused "immediate incapacitation." (R. 14, 442). Dr. Ellis testified the gunshot wounds to the aorta and lung were fatal. (R. 14, 440).

This is consistent with Carolyn's testimony. She testified that after being shot in the chest, Ronald was "laying with his hands up, eyes looking straight up at the ceiling, not blinking or nothing." (R. 14, 305). After the first shots to the chest, Ronald did not move. (R. 14, 306).

This evidence shows that the fatal shots were not premeditated, but instantaneous shots fired in the midst of a fight. This Court has consistently stated "Premeditation is the process of thinking about a proposed killing *before engaging in the homicidal conduct*." *State v. Scott,* 271 Kan. 103, 108, 21 P.3d 516 (2001) (emphasis added); *see State v. Hilyard,* 316 Kan. 326, 331, 515 P.3d 267 (2022) (stating the same standard). Further, "premeditation is a cognitive process which occurs at a moment temporally distinct from the subsequent act." *State v. Stanley,* 312 Kan. 557, 572, 478 P.3d 324 (2020). Carolyn's testimony described the shooting as "like one quick motion." (R. 14, 393). "It was like (slapping hands together) and it was like before you could say hello." (R. 14, 393). She testified that the actions leading up to the shooting were one continuous act that could not be broken up. (R. 14, 387). "There was no pause. It was bam, bam, hit, on floor dead." (R. 14, 387). That testimony shows that the shooting was instantaneous. Once Zshavon was able to wrestle away the gun, he shot Ronald. There was no deliberation about the matter. There was no pause. There was not a moment "temporally distinct" from the shooting. There was not even "a mere hesitation." *Stanley,* 312 Kan. at 573. It was an instantaneous shooting in the midst of a fight.

It is recognized that this Court has noted several factors to consider whether there was premeditation. Those include:

> " '(1) the nature of the weapon used; (2) lack of provocation; (3) the defendant's conduct before and after the killing; (4) threats and declarations of the defendant before and during the occurrence; and (5) the dealing of lethal blows after the deceased was felled and rendered helpless.' "

Kettler, 299 Kan. at 467 (quoting *State v. Scaife,* 286 Kan. 614, 617-18, 186 P.3d 755 (2008)). Admittedly, a few of the factors would seem to apply. While the first and third factors would seem to be general inquiries for any homicide, factors two, four and five would appear to be more case dependent. As it relates to this case, arguably the fifth factor applies. Yet, any pause between the two separate bursts of shots cannot be used to establish premeditation as the second round of shots came after the homicidal act.

As noted above, this Court has said that premeditation requires thinking about the homicidal act before engaging in the homicidal act. *Scott,* 271 Kan. at 108. Any thoughts Zshavon had while he stood over Ronald before he fired the second round of shots cannot be premeditation as he had already engaged in the homicidal act. As Justice Johnson stated, "beforehand" means just that. It means "prior to commencing the death-causing act, rather than during said act but sometime prior to its effecting the death." *State v. Warledo,* 286 Kan. 927, 956, 190 P.3d 937 (2008) (Johnson, J., concurring); *see also Barnes v. State,* 218 So.3d 500, 504-05 (Fla. Dist. Ct. App. 2017) (finding insufficient evidence of premeditation as there was no evidence that "Barnes committed the murder according to a preconceived plan or that he had exhibited, mentioned, or even possessed an intent to kill the victim at any time prior to the actual homicide."). The consequence of allowing premeditation to occur after the homicidal act or during the homicidal act renders premeditation meaningless.

In *State v. Appleby,* 289 Kan. 1017, 221 P.3d 525 (2009), Justice Johnson reiterated that premeditation must come before the homicidal act. In that case, he noted that there was sufficient premeditation as there was a period of time between the first strangulation, which was not fatal, and the second strangulation, which was fatal, for premeditation to occur. *Appleby,* 289 Kan. at 1075. The opposite is present in this case. The fatal shots were fired first. Carolyn testified the shots to the chest came first. Those were fatal. The time Zshavon stood over Ronald before firing more shots cannot be seen as time to premeditate about the first shots--something that already occurred.

Further, the evidence clearly shows that the shots were fired instantaneously after a prolonged fight between Ronald and Zshavon. "When the evidence establishes a fight and then a killing, there must be a showing of 'a thought process undisturbed by hot blood' in order to establish first-degree, premeditated murder." *People v. Plummer,* 581 N.W.2d 753, 757 (Mich. App. 1998) (citing *People v. Morrin,* 187 N.W.2d 434, 449 (Mich. App. 1971)). Likewise, Federal courts note that premeditation requires that an individual act with "a 'cool mind' that is capable of reflection, and . . . did, in fact, reflect, at least for a short period of time before his act of killing." *United States v. Shaw,* 701 F.2d 367, 393 (5th Cir. 1983) *abrogated on other grounds by Greer v. Miller,* 483 U.S. 756, 763, 107 S.Ct. 3102, 97 L.Ed.2d 618 (1987); *see also State v. Corn,* 278 S.E.2d 221, 223 (N.C. 1981) (noting that premeditation must be done in a "cool state of blood," and "in furtherance of a fixed design to gratify a feeling of revenge, or to accomplish some unlawful purpose."). Yet, here the evidence shows the opposite of deliberate reflection. Rather, it shows an instant reaction by Zshavon after wrestling the gun away

from Ronald. There was no fixed design or carrying out of a preconceived plan. There simply was no calm calculus on the part of Zshavon, necessary to establish premeditation, before the fatal shots were fired.

"Premeditation" is defined as "consideration or planning of an act beforehand that shows intent to commit that act." Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/premeditation. Black's Law Dictionary defines premeditation as the "[c]onscious consideration and planning that precedes an act [such as committing a crime]; the pondering of an action before carrying it out." Black's Law Dictionary 1429 (11th ed. 2019). This Court defines premeditation as "the process of thinking about a proposed killing before engaging in the homicidal conduct." *Scott,* 271 Kan. at 108. Whatever reference is used, the key to premeditation is that it must occur *beforehand.* There must be evidence of reflection before the homicidal act. There must be evidence of thought and planning before the homicidal act. That was lacking here. There was no evidence of premeditation before the homicidal act in this case to support the conviction. Rather, this was, at best for the State, an intentional shooting in the midst of a fight between Zshavon and Ronald.

Without evidence to support premeditation, Zshavon's conviction for first-degree murder cannot stand. Generally, when this Court finds insufficient evidence, the remedy is to vacate the conviction. *See State v. Scott,* 285 Kan. 366, 372, 171 P.3d 639 (2007) (noting that if this Court finds insufficient evidence supports a conviction "as a matter of law, the conviction must be reversed; and no retrial on the same crime is possible."). However, "[w]here a defendant has been convicted of a greater offense but the evidence

supports only a lesser included offense, the case must be remanded to resentence the defendant for conviction of the lesser included offense." *State v. Kingsley,* 252 Kan. 761, Syl. ¶ 3, 851 P.2d 370 (1993). In *State v. Witten,* 45 Kan. App. 2d 544, 251 P.3d 74 (2011), the Court of Appeals found that the State failed to establish the sale of the drugs were within a 1,000 feet of a school. *Witten,* 45 Kan. App. 2d at 551. It did find "ample evidence" that Witten sold methamphetamine. *Witten,* 45 Kan. App. 2d at 551. Consequently, it set aside Wittens' conviction for sale of methamphetamine within 1,000 feet of a school and ordered that he be resentenced for the lesser-included offense of sale of methamphetamine. *Witten,* 45 Kan. App. 2d at 552.

Here, there was insufficient evidence of premeditation. It is not asserted that there was insufficient evidence of the other elements for first-degree, premeditated murder. Consequently, the evidence at trial would support a conviction for the lesser-included offense of second-degree, intentional murder. This Court must then reverse Zshavon's conviction for first-degree murder and remand this matter to the district court with orders to sentence Zshavon for second-degree murder.

5. Conclusion

Without sufficient evidence of premeditation, there was insufficient evidence to support the conviction for first-degree murder. As a result, this Court must reverse Zshavon's conviction for first-degree murder and remand this matter to the district court with orders to sentence Zshavon for second-degree murder.

Issue 3: There is no distinction between an intentional killing under second-degree murder and a premeditated killing under first-degree murder and consequently, Zshavon's sentence for first-degree murder must be vacated and this matter must be remanded with orders to sentence Zshavon for second-degree murder.

1. Introduction

This Court has said the following are correct statements of the law:

- " 'Premeditation' means to have thought over the matter beforehand, in other words, to have formed the design or intent to kill before the act."
- "Premeditation does not necessarily mean that an act is planned, contrived, or schemed beforehand."

State v. Bernhardt, 304 Kan. 460, 464-72, 372 P.3d 1161 (2016). Not only are these contradictory, but the result is that there is no scenario under which an intentional murder is not also a premeditated murder. Without any distinction, the statutes are identical and Zshavon can only be subject to the penalties for second-degree murder.

2. Preservation

This issue was not raised below. However, an identical offense challenge is purely a legal issue. *State v. Williams,* 299 Kan. 911, 925, 329 P.3d 400 (2014). This Court can address new issues on appeal if it involves only a question of law arising on proved or admitted facts and is determinative of the case. *State v. Ortega-Cadelan,* 287 Kan. 157, 159, 194 P.3d 1195 (2008). As only a legal issue, review by this Court is proper. In *Stanley,* this Court also faced an identical offense argument regarding first and second-degree murder. Despite not being raised in the district court, this Court address the merits of the issue. *Stanley,* 312 Kan. at 565-74.

3. Standard of Review

This issue revolves around interpretation of statutes. The interpretation of statutes is a question of law subject to unlimited review. *State v. Stoll,* 312 Kan. 726, 736, 480 P.3d 158 (2021).

4. Argument and Authorities

As this Court noted, "[o]n the surface, premeditation appears quite similar to intent." *Stanley,* 312 Kan. at 571. This Court maintained that there was a difference. It asserted that "what distinguishes premeditation from intent is *both* a temporal element (time) *and* a cognitive element (consideration)." *Stanley,* 312 Kan. at 573 (emphasis in original). However, following this Court's line of cases discussing the definition of premeditation and the evidence needed to prove premeditation shows that there simply is no difference. There is no daylight between first and second-degree murder. Any intentional act would also be sufficient to establish premeditation.

In *Stanley,* this Court addressed the instructions given on premeditation. The district court gave not only the standard PIK instruction on premeditation, but also additional instructions describing premeditation. It instructed the jury that:

> "Premeditation means to have thought the matter over beforehand, in other words, to have formed the design or intent to kill before the act. Although there is no specific time period required for premeditation, the concept of premeditation requires more than the instantaneous, intentional act of taking another's life.
>
> "Premeditation does not have to be present before a fight, quarrel, or struggle begins. Premeditation is the time of reflection or deliberation. Premeditation does not necessarily mean that an act is planned, contrived or schemed beforehand.

> "Premeditation can occur during the middle of a violent quarrel, struggle or fight."

Stanley, 312 Kan. at 562-63. This Court stated the instructions were a correct statement of the law on premeditation. *Stanley,* 312 Kan. at 564. Yet, such a definition destroys any difference between premeditation and intentional. One begets the other.

In *State v. Bernhardt,* 304 Kan. 460, 372 P.3d 1161 (2016), the victim struck the defendant, who then stopped the car, pulled her out and began kicking her. He eventually dumped her body. This Court found that the defendant "did not have to premeditate [the victim's] murder before pulling her out of the car and beginning to kick her." *Bernhardt,* 304 Kan. at 472. Likewise, in *Warledo,* the State argued that the defendant had time to think between stomps and that time could establish premeditation. This Court found the statements were proper to inform the jury the defendant did not have to premeditate before the fight started and it could have occurred during the fight. *Warledo,* 286 Kan. at 950. As Justice Johnson pointed out, allowing for premeditation to occur during the act is incongruent with the definition of premeditation. Such "concurrent premeditation is an oxymoronic concept that obliterates the distinguishing feature of first-degree premeditated murder." *State v. Marks,* 297 Kan. 131, 151, 298 P.3d 1102 (2013) (Johnson, J., dissenting). It also eliminates any distinction between an intentional killing and a premeditated one.

> "If we merge the concept that the killer must have thought over the matter beforehand, as in premeditated first-degree murder, with the concept that a killer must have formed the intent to kill prior to the victim's death, as in intentional second-degree murder, we have rendered the premeditation element redundant and opened the door to defendant's same elements argument."

Warledo, 286 Kan. at 956 (Johnson, J., concurring); *see State v. Saleem,* 267 Kan. 100, 115, 977 P.2d 921 (1999) (Allergrucci, J., concurring) ("By defining "premeditated" as simply meaning "to have thought over the matter beforehand," the majority has effectively converted second-degree murder to first-degree murder.").

These cases undermine this Court's continued assertion that premeditation requires any thought "beforehand." This Court noted that the time for reflection before the act is the basis for treating premeditated murder more severely, noting that "a person 'who not only aims at evil, but takes time and consideration to achieve this evil, appears particularly culpable.' " *Stanley,* 312 Kan. at 573 (citing Ferzan, *Plotting Premeditation's Demise,* 75, No. 2, Law and Contemporary Problems 83, 95 (2012)). Yet, this Court goes on to undermine that distinguishing feature of premeditated murder by stating that the "temporal space required to complete that process may be very short – a mere hesitation." *Stanley,* 312 Kan. at 573. The practical effect is that premeditation is no different than intentional, which is borne out by the fact this Court, to counsel's best research efforts, has never found insufficient evidence of premeditation to support a conviction for first-degree murder, save one: *Craft v. State,* 3 Kan. 450 (1866).

Rather, given the factors this Court considers, every intentional murder can be premeditated. An unprovoked attack can be evidence of premeditation. *Hilyard,* 316 Kan. at 331-32; *State v. Dean,* 310 Kan. 848, 860-61, 450 P.3d 819 (2019). On the other side, this Court in *State v. Sprague,* 303 Kan. 418, 432, 362 P.3d 828, 840 (2015), found sufficient evidence of premeditation based on evidence that the defendant "confessed he

struck Kandi when she attacked him and he then choked her to death." A killing in retaliation can be evidence of premeditation. *Dean,* 310 Kan. at 860-61. The use of a gun or any deadly weapon can be evidence of premeditation. *State v. Shields,* 315 Kan. 814, 828-29, 511 P.3d 931 (2022); *State v. Hurt,* No. 114,984, 2017 WL 2834282, at *3 (Kan. App. 2017) (stating, "A deadly weapon can indicate a premeditation to kill.").[1] Actions during the altercation can be evidence of premeditation. *Warledo,* 286 Kan. at 950; *State v. Hillard,* 315 Kan. 732, 788, 511 P.3d 883 (2022) (finding evidence of torture can establish premeditation). Actions afterwards can also be evidence of premeditation. While addressing a prosecutorial error argument, this Court in *State v. Carter,* 305 Kan. 139, 380 P.3d 189 (2016) found that the lack of remorse can be evidence of premeditation. *Carter,* 305 Kan. at 152-53. Multiple shots or stab wounds can be evidence of premeditation. *State v. Blansett,* 309 Kan. 401, 417, 435 P.3d 1136 (2019) (finding that "[e]vidence of several stab wounds can be a factor supporting a finding of premeditation."). "[I]t is well settled 'that death by strangulation presents strong evidence of premeditation.' " *State v. Davis,* 306 Kan. 400, 410, 394 P.3d 817 (2017) (quoting *State v. Walker,* 304 Kan. 414, 446-47, 372 P.3d 1147 (2016)). Multiple blows can be evidence of premeditation. *State v. Rice,* 261 Kan. 567, 588, 932 P.2d 981, 997 (1997) (finding sufficient evidence of premeditation as the defendant administered multiple blows in several locations over a span of time); *Warledo,* 286 Kan. at 944 (finding that breaks in the stomping of the victim were evidence of premeditation).

[1] *Hurt* is attached pursuant to Rule 7.04(g)(2)(C).

These cases show that every intentional murder is also premeditated murder under this Court's standards. The problem is that by stating premeditation only means to have thought the matter over beforehand, and then stating it can be inferred from virtually anything or occur during the act eliminates the distinguishing feature of premeditation. Without requiring evidence of any planning or scheming and evidence of action done pursuant to that planning *before* the act devolves premeditation to nothing more than an intentional act. In *Craft*, this Court reflected on the difference between the levels of murder. At that time, first-degree murder was any murder "committed by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary, or other felony." *Craft,* 3 Kan. at 482. To distinguish it from second-degree murder, which only needed to be done "purposely and maliciously," this Court found that "premeditated," meant to "plan, contrive or scheme beforehand." *Craft,* 3 Kan. at 483. Further, there must be evidence of "reflection upon the time, place and manner of the killing-- some preparation with express reference to the homicide." *Craft,* 3 Kan. at 484. Using that definition, this Court in *Craft* found the testimony was that two friends met by chance, exchanged a few words and the "killing effected immediately." *Craft,* 3 Kan. at 487. It found no evidence of "former grudges, threats or previous planning." *Craft,* 3 Kan. at 487. Consequently, its search of the record for evidence of premeditation was "in vain." *Craft,* 3 Kan. at 487. Premeditation requires evidence of planning or scheming beforehand. Without such evidence, premeditated murder is no different from second-degree, intentional murder.

"A person acts 'intentionally,' or 'with intent,' with respect to the nature of such person's conduct or to a result of such person's conduct when it is such person's conscious objective or desire to engage in the conduct or cause the result." K.S.A. 2018 Supp. 21-5202(h). If premeditation can occur during a fight or during the act, it is simply intentional. It is an act done with a conscious objective or desire to reach a certain result. It becomes no different from second-degree, intentional murder.

" 'Where two criminal offenses *have identical elements* but are classified differently for purposes of imposing a penalty, a defendant convicted of either crime may be sentenced only under the lesser penalty provision.' " *State v. Cooper,* 285 Kan. 964, 966-67, 179 P.3d 439 (2008) (emphasis in original) (quoting *State v. Nunn,* 244 Kan. 207, 229, 768 P.2d 268 (1989)). The doctrine prevents a prosecutor from indiscriminately choosing between the statutes in charging the offenses and, thus, impermissibly directing the range of sentences. *Cooper,* 285 Kan. at 968. It prevents criminal penalties from becoming "a matter of prosecutorial whimsy." *State v. Clements,* 241 Kan. 77, 83, 734 P.2d 1096 (1987). As first-degree, premeditated murder and second-degree, intentional murder are identical, this Court must vacate Zshavon's sentence for first-degree, intentional murder and remand this matter with orders that he be sentenced for second-degree, intentional murder. This Court must order that Zshavon be sentenced between 147 and 165 months' incarceration, the sentencing range for a severity level 1 offense with a criminal history of I. *See* K.S.A. 2018 Supp. 21-6804(a).

5. Conclusion

First-degree, premeditated murder is identical to second-degree, intentional murder given this Court's definition of premeditation. As a result, the district court could only sentence Zshavon for second-degree, intentional murder under the identical offense doctrine. This Court must reverse and remand this matter for resentencing with orders that Zshavon be sentenced between 147 and 165 months' incarceration, the sentencing range for a severity level 1-I offense.

Issue 4: The instructions were clearly erroneous as they failed to include a full definition of premeditation that this Court identified in *Stanley*, which given the facts of this case, would have resulted in a different verdict.

1. Introduction

The shooting in this case occurred after a struggle over a gun. Carolyn testified, "[t]here was no pause. It was bam, bam, hit, on floor dead." (R. 14, 387). With such testimony, it was vital the district court fully instruct the jury on premeditation. It should have included additional language this Court identified in *Stanley* in the instructions. The failure to do so was clearly erroneous and warrants reversal for a new trial.

2. Preservation and Standard of Review

At trial, Zshavon did not request any additional instructions on the definition of premeditation. (R. 15, 516). While this does not bar review of this issue, it does impact how it is reviewed by this Court. First, this Court determines whether the instruction is legally and factually appropriate. *State v. Gentry,* 310 Kan. 715, 720-21, 449 P.3d 429 (2019). If it is, this Court determines whether the failure to give the instructions warrants reversal. Without a request, this Court determines if the error is clearly erroneous. To

establish clear error, the party claiming error must convince this Court that the jury would have reached a different verdict without the error. *Gentry,* 310 Kan. at 721.

3. Argument and Authorities

At trial, the district court gave the standard PIK instruction on premeditation. It instructed the jury "Premeditation means to have though the matter over beforehand, in other words, to have formed the design or intent to kill before the act. Although there is no specific time period required for premeditation, the concept of premeditation requires more than the instantaneous, intentional act of taking another's life." (R. 1, 132). No further instructions on premeditation were requested. (R. 15, 516). No request was made for the *Bernhardt* instructions. *See Bernhardt,* 304 Kan. at 469-72 (finding additional paragraphs to define premeditation in the instructions to be an accurate statement of the law). In *Stanley,* this Court reviewed the instructions in *Bernhardt* and reiterated that the instructions in *Bernhardt* were a correct statements of the law. *Stanley,* 312 Kan. at 564. However, this Court went on to state:

> "the best practice in future cases using a *Bernhardt* instruction is to add the following: Premeditation requires more than mere impulse, aim, purpose, or objective. It requires a period, however brief, of thoughtful, conscious reflection and pondering—done before the final act of killing—that is sufficient to allow the actor to change his or her mind and abandon his or her previous impulsive intentions."

Stanley, 312 Kan. at 574. Even without a *Bernhardt* instruction, the additional language was necessary to properly instruct the jury in this case.

First, this additional language stated in *Stanley* defining premeditation is legally appropriate. In *Bernhart,* the additional language was challenged at trial and on appeal.

However, this Court found the additional language was a "correct statements of Kansas law." *Bernhardt,* 304 Kan. at 472. Consequently, it was legally appropriate and the district court did not error in giving the additional language. Similarly, the language from *Stanley* is an accurate statement of the law and legally appropriate.

Further, it would have been factually appropriate. This Court in *Stanley* noted, "[w]ith this extended explanation, we affirm our precedent holding that premeditated first-degree murder and intentional second degree murder are not identical." *Stanley,* 312 Kan. at 574. This extended explanation was factually appropriate, as it was necessary to properly inform the jury of the differences between first-degree, premeditated murder and second-degree, intentional murder given the facts of this case.

As noted above, it was undisputed that a verbal argument turned into a physical fight over a gun that immediately preceded the shooting. There was testimony, from the State's key witness, that the shooting was "like one quick motion." (R. 14, 393). "It was like (slapping hands together) and it was like before you could say hello." (R. 14, 393). Given the testimony that described the shooting as instantaneous after Zshavon was able to control the gun, the additional language from *Stanley* was critical so the jury could determine if there was a "period, however brief, of thoughtful, conscious reflection and pondering" that was sufficient to allow Zshavon the time to "change his or her mind and abandon his or her previous impulsive intentions." *Stanley,* 312 Kan. at 574. Additionally, it was critical for the jury to know that this "conscious reflection" must be done before the fatal act, i.e. before the fatal shots were fired. Without such guidance, the jury was led astray.

In closing, the State repeatedly emphasized the number of shots. It argued:

- "He made the choice, the deliberate, intentional decision to keep going. Vaughn made the decision to pull that trigger again and again and again and again and again and again." (R. 15, 536).

- "Every bullet was a choice." (R. 15, 536).

- Zshavon "chose to hit [Ronald] and then stand over him shoot and shoot and then pause, move the gun and then shoot and shoot and shoot. He made that deliberate decision." (R. 15, 537).

- "He chose to shoot and keep shooting." (R. 15, 537).

- Zshavon "made that choice every single time he pulled the trigger." (R. 15, 538).

- "[E]very time he pulled that trigger, it was a decision." (R. 15, 539).

- "Every bullet that Vaughn Dotson shot that day was a choice and the State believes we've proven beyond a reasonable doubt and that you should find him guilty of both premeditated murder and aggravated battery." (R. 15, 545).

- "And these 7.62 high-velocity rounds shattered that floor and sent that debris into [Ronald's] body just like they shredded his body. Every single one of them a decision from this man with this semiautomatic weapon." (R. 15, 567).

The State also emphasized other aspects of the case that occurred after the fatal shots. The State noted Zshavon made a "conscious decision" to take all of the guns from the house. (R. 17, 540). He made the "conscious decision to go to Texas." (R. 17, 540).

Given these arguments and the facts of the case, the clarifying language of *Stanley* was vital. It was necessary to ensure the jury understood that premeditation was more than just intentional conduct. It was "more than mere impulse, aim, purpose, or objective." *Stanley,* 312 Kan. at 574. Further, it would have ensured the jury understood

that the "conscious reflection" necessary for premeditation was "done before the final act of killing." *Stanley,* 312 Kan. at 574. That would have ensured that the jury understood that premeditation had to be formed before the fatal shot. Yet, without such instructions, the jury was led to believe that any conscious thought at seemingly any point until Zshavon's arrest, could satisfy the element of premeditation.

While this Court in *Stanley* seemed to qualify when the additional language should be given, the lack of a *Bernhardt* instruction should not prevent additional language to define premeditation that is both legally and factually appropriate. In *Bernhardt,* the district court gave non-PIK instructions in addition to the PIK instruction. This Court found the additional paragraphs were accurate statements of the law and warranted in that case. Consequently, the instructions were proper. In a similar vein, the additional language stated in *Stanley* was legally and factually appropriate. Such additional language was warranted given the facts of this case. Consequently, the district court should have given the additional instruction to fully define premeditation for the jury.

The district court's failure to give the language stated in *Stanley* was clearly erroneous. To be clearly erroneous, this Court must be "firmly convinced" that the jury would have reached a different verdict had there not been this instructional error. *State v. Williams,* 295 Kan. 506, 516, 286 P.3d 195 (2012). Given the facts of this case, this Court should be firmly convinced the jury would not have returned a verdict finding Zshavon guilty of premeditated murder if it had been fully instructed on premeditation.

Without repeating all that has been previously stated, the testimony of Carolyn showed that the shooting was an instantaneous, impulsive act during the course of a

struggle between Zshavon and Ronald. With her testimony, it was vital that the jury be clearly instructed that premeditation requires more than "mere impulse, aim, purpose, or objective." *Stanley,* 312 Kan. at 574. It requires a period "of thoughtful, conscious reflection and pondering—done before the final act of killing—that is sufficient to allow the actor to change his or her mind and abandon his or her previous impulsive intentions." *Stanley,* 312 Kan. at 574. That was absent. Consequently, if the jury had been given such an instruction, it would have returned a different verdict.

Additionally, an instruction based on the language this Court identified in *Stanley,* would have clarified that the moment of reflection must be *before* the final fatal shot. *Stanley,* 312 Kan. at 574. That was key to this case. It meant the moment of reflection had to come before the first shot was fired. Yet, State's arguments led the jury to believe that the number of shots would establish premeditation. With an instruction clarifying when premeditation must occur, the jury would not have found sufficient evidence of premeditation. The evidence showed an instantaneous act during a struggle. "It was like (slapping hands together) and it was like before you could say hello." (R. 14, 393). The jury faced with such evidence would not have found Zshavon guilty of premeditated murder had it been given an instructions specifically stating that the time of reflection must be before the fatal shot.

4. Conclusion

There would have been a different verdict had the district court properly instructed the jury on premeditation in line with the language this Court stated in *Stanley.* The failure to include this additional language was clearly erroneous and warrants reversal.

Issue 5: The district court erred in placing guilty first on the verdict forms, which undermined Zshavon's presumption of innocence.

1. Introduction

During the instruction conference, Zshavon requested that "Not Guilty" be placed first on the verdict form. (R. 15, 522-23). The district court went with standard PIK. (R. 15, 522-23). By doing so, the district court violated Zshavon's presumption of innocence, warranting reversal for a new trial.

2. Preservation and Standard of Review

Zshavon requested that the district court place the not guilty line first on the verdict form. (R. 15, 522-23). This request determines the standard of review this Court must apply should it find error. In determining whether there was an error, this Court uses as unlimited standard of review to determine whether the instruction as given was legally appropriate. Next, this Court must determine if the instruction was factually appropriate viewing the evidence in the light most favorable to the defendant. If an error is determined, this Court then must determine whether that error was harmless, using the constitutional harmless error test. *State v. Plummer,* 295 Kan. 156, 163, 283 P.3d 202 (2012). While reviewing a verdict form does not fall neatly into this framework, it is still the framework to be used. *Unruh v. Purina Mills, LLC,* 289 Kan. 1185, 1197-98, 221 P.3d 1130 (2009) ("While a verdict form is not technically a jury instruction, it is part of the packet sent with the jury which includes the instructions and assists the jury in reaching its verdict. It is appropriate to apply the same standard of review applicable to the review of instructions.").

3. Argument and Authorities

During the instruction conference, Zshavon requested that "Not Guilty" be placed first on the verdict form. (R. 15, 522-23). The district court denied his request. (R. 1, 146-47; R. 15, 522-23). Further, it is noted that the Kansas Supreme Court has previously found PIK, which places "Not Guilty" first, is proper as long as the district court properly instructed the jury on the presumption of innocence. *State v. Wesson,* 247 Kan. 639, 652, 802 P.3d 574 (1990), *cert. denied* 501 U.S. 1236 (1991), *disapproved of on other grounds by State v. Rogers,* 282 Kan. 218, 144 P.3d 625 (2006). Further, *Wesson* has been affirmed in *State v. Wilkerson,* 278 Kan. 147, 158-59, 91 P.3d 1181 (2004) and *State v. Frairie,* 312 Kan. 786, 795-96, 481 P.3d 129 (2021). However, it is respectfully submitted that those opinions are incorrect and should be revisited.

The presumption of innocence should be the focus and the first question posed to the jury. "The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." *Coffin v. United States,* 156 U.S. 432, 453, 15 S.Ct. 394, 39 L.Ed. 481 (1895). Court's must be cognizant of anything that undermines that concept. *Estelle v. Williams,* 425 U.S. 501, 503-04, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976). By placing not guilty first, the instructions squarely places the burden on the government to prove its case and preserves a defendant's presumption of innocence. However, inverting the verdict form undermines these principles.

Placing guilty first is advantageous to the State because it undercuts the presumption of innocence. This Court only has to look at the fact that the State always

seeks to have guilty be placed first. (R. 15, 522). This shows that the ordering of a verdict form in placing guilty first is more than semantics. It is advantageous to the State.

It is recognized that PIK instructions are "strongly recommended." *State v. Dunn,* 249 Kan. 488, 492, 820 P.2d 412 (1991). In this case, the district court followed PIK. (R. 15, 523). PIK should not be blindly followed. In this case, the PIK instructions are legally erroneous as they violated the presumption of innocence and presupposed guilt by placing guilty first. This was error and warrants reversal.

To reverse, this Court must determine whether this erroneous instruction was harmless. This Court must determine whether "there is no reasonable possibility that the error contributed to the verdict." *Ward,* 292 Kan. at 565. Given the contradictory testimony and the issue of self-defense, placing not guilty first was vital to Zshavon's defense and cannot be stated that this error was harmless.

In this case, the issue was self-defense. Zshavon did not deny shooting Ronald, but asserted it was in self-defense. In such a situation, it was important that the jury start with the presumption of innocence. However, placing guilty first meant the jury lead with that consideration. Essentially, Zshavon was forced to prove his innocence. He was forced to prove he acted in self-defense. While the instructions stated he was presumed innocent and the State had to disprove his defense, the verdict force the jury to consider first, whether he was guilty of premeditated murder. In a close case where Zshavon asserted an affirmative defense, any implication that the defendant is guilty is particularly prejudicial. By placing guilty first in the verdict form, the implication was Zshavon was guilty and any questions about the case should be resolved in the State's favor. It cannot

be said that the ordering of the verdict form, which conveyed a presumption of guilt, did not impact the ultimate verdict of guilt in this case.

4. Conclusion

This Court should find that placing guilty first on the verdict form implies guilt and violates the basic principle that defendants are innocent until proven guilty. Further, this Court should find that placing guilty first on the verdict form impacted the verdict in this case to the State's favor and cannot be deemed harmless. This Court must reverse this matter for a new trial.

Issue 6: Zshavon received ineffective assistance of counsel at trial and this Court must reverse this matter for a new trial.

1. Introduction

During the criminal proceedings, Richman made several key mistakes. Further, those mistakes detrimentally impacted Zshavon's case. Richman was ineffective and this Court must reverse and remand this matter for a new trial to ensure Zshavon receives his constitutionally guaranteed right to effective assistance of counsel.

2. Preservation

After the trial, Zshavon filed a motion for new counsel alleging he received ineffective assistance of counsel during the criminal proceedings. (R. 1, 159-67). The district court appointed new counsel and had an evidentiary hearing on his claims. The district court eventually denied the motion. (R. 20, 150-67). As a result, this issue was raised below and ruled on by the district court allowing for review by this Court. *See* Rule 6.02(a)(5).

3. Standard of Review

"Ineffective assistance of counsel claims . . . involve mixed questions of fact and law." *State v. Cheatham,* 296 Kan. 417, 430, 292 P.3d 318 (2013). This Court "must determine whether the district court's factual findings are supported by substantial competent evidence and whether those findings are sufficient to support the district court's conclusions of law." *Bellamy v. State,* 285 Kan. 346, 355, 172 P.3d 10 (2007).

4. Argument and Authorities

The standards for establishing ineffective assistance of counsel are well known. To prevail, a defendant must show "(1) that the performance of defense counsel was deficient under the totality of the circumstances, and (2) prejudice, i.e., that there is a reasonable probability the jury would have reached a different result absent the deficient performance." *Sola–Morales v. State,* 300 Kan. 875, 882, 335 P.3d 1162 (2014) (relying on *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

Here, Zshavon filed his motion shortly after trial identifying several areas of concern. The district court then allowed Richman to withdraw and appointed Boone. (R. 1, 178; R. 16, 3). Boone then filed an amended motion for new trial raising various claims, including claims of ineffective assistance of counsel. (R. 1, 192-202).

First, there were problems with communication between Zshavon and Richman, which manifest itself at various times. As noted by the inmate visitor history, Richman visited Zshavon several times, but there were clear gaps. Richman visited Zshavon in February 2019, but it was another six months before he visited him again. (R. 22, Exh. F, pg. 1). He visited Zshavon twice in 2020 and several times in 2021. (R. 22, Exh. F, pgs.

1-2). However, he did not visit Zshavon in the six weeks before the trial. (R. 22, Exh. F, pg. 2). Further, Zshavon sent letters to Richman requesting more information concerning his case. (R. 22, Exh. C, pgs. 1-3; R. 22, Exh. D, pgs. 1-2). This limited communication had clear detrimental impacts. Zshavon testified that he felt pressured to waive his speedy trial rights. (R. 1, 160-61; R. 20, 10). He stated that Richman told him that he had to waive his speedy trial rights as he was not fully paid and needed to gather more information. (R. 1, 161). Further, Zshavon understood that if he did not waive his speedy trial rights, he would face 15 to 20 years. (R. 20, 11). While Richman testified he felt that Zshavon understood his speedy trial rights, it is clear Zshavon did not given his testimony. (R. 20, 62).

Similarly, Zshavon never understood the penalty he faced if convicted of first-degree murder. He testified that he was never told he faced the Hard 50. (R. 1, 161; R. 20, 14). Again, Richman believed that he had discussed the penalties with Zshavon. (R. 20, 68). Although, he admitted he did not discuss the possibility that the charges could be amended to add more charges or more severe charges. (R. 20, 69).

Zshavon's confusion shows that clear communication between the two was lacking. This left Zshavon in a position of confusion. He could not fully evaluate the pros and cons of a plea or trial. This was particularly prejudicial given Richman's stance on the strength of the State's case. He testified that he did not believe there was any merit for the amended charge of first-degree murder. (R. 20, 69). He stated that he thought "it would be unlikely, based off the evidence and his statement," that Zshavon would be convicted of first-degree murder. (R. 20, 111-12).

Richman's over confidence led to a large gap in the plea offers between the State and Zshavon. Zshavon, not understanding the penalties he faced, believed he would prevail and never offered a plea deal close to what the State was offering. (R. 20, 70-71). Further, this gap in understanding was never cleared up by Richman. Notably, Richman did not see Zshavon in the month prior to trial. (R. 20, 91). Richman had not seen Zshavon since June 25, 2021, by the time the trial that started on August 9, 2021. (R. 20, 92). These lapses in communication had a detrimental impact on Zshavon and his ability to evaluate his options. He was left with the belief that he would win at at trial. This made a plea all but impossible and pushed Zshavon to trial not understanding the dangers he faced. It led to Zshavon being blindsided by the conviction and penalties he now faces. (R. 20, 14).

Second, Richman failed to fully investigate the case and put on a full defense, most notably by failing to call Jasmine Harris to testify. To be effective, an attorney must do a reasonable investigation. *State v. Hoedges,* 269 Kan. 895, 914, 8 P.3d 1259 (2000). Richman testified that one of the continuances was to allow time to find Harris. (R. 20, 66). She was a potential witness as she was on the phone with Ronald at the time of the argument. (R. 20, 36; R. 22, Exh. E, pgs. 1-2, 5-8). Yet, Richman never took any measures, other than leaving a message on her phone, to locate Harris. (R. 20, 76). He never talked about getting an investigator to track her down. (R. 20, 78). He never did any internet sleuthing to find her. (R. 20, 78-79). This lack of investigation on Richman's part meant he did not know whether her statements to the police was true or if she had information above and beyond her statement. (R. 20, 80).

A "defense counsel cannot make a strategic decision against pursuing a line of investigation when he or she has not yet obtained facts upon which that decision could be made." *State v. Mullins,* 30 Kan. App. 2d 711, 716, 46 P.3d 1222 (2002) (citing *Kenley v. Armontrout,* 937 F.2d 1298, 1308 (8th Cir. 1991)). Despite that lack of information, Richman felt that Harris would not be helpful and did not actively pursue her. (R. 20, 80). It was vital that Richman track down Harris and determine what she knew and could say about the argument between Zshavon and Ronald. Without knowing what she would say, Richman failed to fully investigate the case and could not present a full defense.

Further, the information known shows that she would have been an important witness for Zshavon. The information she provided to the police would have bolstered Zshavon's testimony that Ronald was the aggressor. She stated she heard the gun cocking. (R. 20, 80; R. 22, Exh. E, pg. 8). Further, she stated that she could tell Ronald was close to the phone. (R. 22, Exh. E, pg. 7). While Richman felt that fact was of little value, it would have bolstered Zshavon's testimony that Ronald had the gun and was threatening him. It would have been more likely that Harris would have been able to hear the gun cocking if the gun was close to the phone, i.e. that both were being held by Ronald. (R. 20, 81-82; R. 22, Exh. E, pg. 7).

By failing to fully investigate Harris, Richman left a potential supporting witness on the sidelines. The trial then boiled down to Carolyn's statements against Zshavon's. Given how Richman approached Carolyn at trial, this was problematic.

Richman failed to bring into court the officers that took Carolyn's statement. (R. 20, 89-90). The decision on whether to call a witness at trial is generally considered a

strategic decision left to the attorney. *Bledsoe v. State,* 283 Kan. 81, 103, 150 P.3d 868 (2007) (citing *State v. Nunn,* 247 Kan. 576, 581, 802 P.2d 547 (1990)). However, Richman saw the problems in not calling the officers, but failed to call them anyway. This cannot be chalked up to a strategic decision. Rather, it was a failure on Richman's part to present a full and complete defense for Zshavon at trial.

Richman admitted that he had concerns about not calling the officers. (R. 20, 90). He was concerned if Carolyn contradicted her earlier statement to the police, he would be stuck with it since he did not line up the officers to testify. (R. 20, 90). In addition, he admitted that Carolyn was far better prepped at trial than she was at the preliminary hearing. (R. 20, 107). Richman testified his intent at trial was to paint Carolyn as someone protecting her son. (R. 20, 107). Someone whose statements could not be taken at face value. However, at trial, Carolyn was not nearly as difficult as she had been at the preliminary hearing. Richman noted that her demeanor was far different and she cried a few times while on the stand at trial. (R. 20, 107). In the face of her new demeanor at trial, Richman testified that he could not be as aggressive in his cross-examination as hoped. He believed had he been aggressive at trial in his questioning, he would have made Carolyn more sympathetic to the jury. (R. 20, 107). Given her demeanor was better at trial, it was more difficult for Richman to cross-examine her on her inconsistent statements. This meant it was all the more important to call the officers so that he could use them to point out the inconsistencies in Carolyn's testimony. It was vital that he be able to point out her inconsistencies clearly for the jury and the officers were the best vehicle for doing so. Had he done so, Richman would have lessened Carolyn's

credibility in the eyes of the jury and provided additional support to Zshavon and his defense. Despite this, Richman failed to call the officers to testify at trial. (R. 20, 90).

The failure to adequately communicate with Zshavon and put on a full defense at trial were deficient performance that had a prejudicial effect on Zshavon both before and during trial. To warrant reversal, it must be shown that "there is a reasonable probability the jury would have reached a different result absent the deficient performance." *Sola-Morales,* 300 Kan. at 882. Proper communication would likely have led to a plea. A full defense would have likely meant Zshavon would not have been convicted of first-degree murder. Richman's failures were prejudicial to Zshavon.

Zshavon noted in his motion that not only was he never told he faced the Hard 50 and a life sentence, but Richman told him it was "nearly impossible" that he would be convicted of first-degree murder. (R. 1, 161). With this advice, Zshavon said three years was the most he would consider as part of a plea. (R. 20, 71). Zshavon's position on a plea was hardened by Richman's failures. Had the penalties been properly communicated and Richman not been overly confident of a not guilty verdict, Zshavon stated he would have approached the State's plea offers differently. (R. 20, 17). There would have been a real likelihood of a plea where Zshavon faced less time than he currently does. The State offered pleas calling for a grid sentence of around 20 years. (R. 20, 71). As it stands, Zshavon faces a life sentence, with a minimum of 25 years before even being eligible for parole. (R. 1, 230).

Likewise, the failure to find Harris and call the officers likely led to a different result at trial. The issues at trial was self-defense and relatedly, who was the initial

aggressor. Calling witnesses that could support Zshavon's testimony that Ronald was the aggressor would have bolstered his case for self-defense. At the very least, it would have bolstered his case for imperfect self-defense or voluntary manslaughter. However, as it played out at trial, Carolyn's testimony painting Zshavon as the initial aggressor who then murdered Ronald in cold-blood was only disputed by Zshavon. Zshavon could not point to the testimony of Harris that would have supported Zshavon's claim Ronald pointed the gun at him and cocked it. He could not point to the officers to establish the inconsistencies in Carolyn's testimony at trial versus her statements to the police. The State's case simply was not called into question at trial as it should have been. The end result was a verdict of guilty for first-degree murder, instead of a verdict on a lesser-included offense or an acquittal based on self-defense. Again, these failures caused real and substantial harm to Zshavon as he is now facing a life sentence and will be forced to serve, at a minimum, 25 years before he is parole eligible.

5. Conclusion

Zshavon received ineffective assistance of counsel during the criminal proceedings in this case. The lack of communication meant he was not fully advised of what penalties he faced and what his chances were at trial. Further, after being misled into trial, Richman failed to present a full and complete defense. These failures amounted to deficient performance and resulted in a conviction for first-degree murder. As such, this Court must reverse and remand this matter for a new trial as Zshavon failed to receive his constitutional right of effective assistance of counsel during the criminal proceedings in this case.

Issue 7: The cumulative effect of these errors, even if insufficient standing alone to require reversal, warrants reversal for a new trial.

"Cumulative trial errors, considered collectively, may be so great as to require reversal of a defendant's conviction." *State v. Pruitt,* 42 Kan. App. 2d 166, Syl. ¶ 9, 211 P.3d 166 (2009). "The test to determine whether cumulative errors require reversal of a defendant's conviction is 'whether the totality of circumstances substantially prejudiced the defendant and denied him [or her] a fair trial.' " *Boldridge v. State,* 289 Kan. 618, 640, 215 P.3d 585 (2009) (quoting *State v. Ackward,* 281 Kan. 2, 29, 128 P.3d 382 (2006)). Taken together, the errors outlined above denied Zshavon his constitutional right to a fair trial in this case.

During trial, the State not only misstated the law on self-defense, but also minimized what is necessary for premeditation. The instructions failed to fully inform the jury what was necessary for premeditation and undermined the presumption of innocence. Along with all these errors, Zshavon received ineffective assistance of counsel. Combined, these errors greatly reduced the burden on the State to prove premeditated murder. "The Due Process Clause of the Fourteenth Amendment requires proof beyond a reasonable doubt of each element of the crime charged." *State v. Craig,* 311 Kan. 456, 462, 462 P.3d 173 (2020). By lowering the standard for a conviction, the errors cumulatively denied Zshavon a fair trial. These errors, collectively, " 'substantially prejudiced [Zshavon] and denied him a fair trial.' " *Boldridge,* 289 Kan. at 640 (quoting *Ackward,* 281 Kan. at 29). As a result, this Court must reverse Zshavon's convictions and order a new trial in this matter.

Conclusion

For the reason stated above, this Court must vacate Zshavon's conviction for first-degree, premeditated murder, and order that he be resentenced for second-degree murder as there was insufficient evidence to establish premeditation. Alternatively, this Court should reverse and remand this matter for a new trial given the trial errors and ineffective assistance of counsel or order Zshavon to be resentenced for second-degree, intentional murder under the identical offense doctrine.

Respectfully submitted,

/s/ Peter Maharry
Peter Maharry, #19364
Kansas Appellate Defender Office
Jayhawk Tower
700 Jackson, Suite 900
Topeka, Kansas 66603
(785) 296-5484
(785) 296-2689 fax
adoservice@sbids.org
Attorney for the Appellant

Memorandum Opinion

399 P.3d 285 (Table)
Unpublished Disposition
This decision without published opinion is referenced in the Pacific Reporter. See Kan. Sup. Ct. Rules, Rule 7.04.
NOT DESIGNATED FOR PUBLICATION
Court of Appeals of Kansas.

STATE of Kansas, Appellee,

v.

Aquarius Terrell HURT, Appellant.

No. 114,984

Opinion filed June 30, 2017

Review Denied February 27, 2018

Appeal from Sedgwick District Court; ERIC R. YOST, Judge.

Attorneys and Law Firms

Carl F.A. Maughan, of Maughan Law Group LC, of Wichita, for appellant.

Matt J. Maloney, assistant district attorney, Marc Bennett, district attorney, and Derek Schmidt, attorney general, for appellee.

Before Buser, P.J., Pierron and Standridge, JJ.

MEMORANDUM OPINION

Per Curiam:

***1** After a jury trial, Aquarius Terrell Hurt was convicted of attempted first-degree murder, aggravated battery, and criminal use of a weapon. On appeal, Hurt argues that the district court made several trial errors: (1) There was insufficient evidence to prove premeditation; (2) the district court erred in permitting evidence of gang affiliation; and (3) the district court erred in failing to instruct the jury regarding eyewitness identification. Finding no error, we affirm Hurt's conviction.

FACTS

On August 24, 2013, Chandria Young was at the house of her friend, Autumn Ashlock. The women invited Quentin Lawrence, Daijour Parker, and Dominic Gordon to Ashlock's house, where they listened to music and drank alcohol. Young and Gordon were in a relationship at that time. At some point in the evening, Ashlock drove the group to QuikTrip to buy cigars or cigarettes.

While at QuikTrip, Young saw Hurt, whom she knew, and talked to him. Gordon saw Young talking to Hurt and confronted Hurt. Gordon asked Hurt what "set" he was in, meaning what gang he was affiliated with. The exchange escalated into yelling, and ultimately Gordon punched Hurt in the face. Lawrence intervened, apologized to Hurt, shook his hand, and told him Gordon was drunk. Gordon and his group eventually went back to Ashlock's house.

Hurt returned to a birthday party hosted by Alaisha Wright, at which he had been earlier in the evening. Wright reported Hurt was yelling and making a scene at the party and said he was "going to go shoot this dude." Hurt called his brother, Jalen Jones, who was with a friend, Joshua Grier, to ask for a ride. Jones and Grier picked Hurt up in Grier's car, and Hurt told them that he had been punched in the face at QuikTrip. The three men drove to Young's house, but there were no lights on, so they left. Grier, who was in a relationship with Ashlock at the time, believed that Young and Ashlock were together, so they drove to Ashlock's house. When they arrived, Hurt told Grier and Jones that he thought he saw the person who hit him on the porch. Grier parked the car in front of the house and the three men got out.

Young, Ashlock, Lawrence, Parker, and Gordon were sitting on Ashlock's porch and smoking cigarettes when Grier's car pulled up outside. Ashlock walked down to meet Grier in the driveway and asked him what was going on. Hurt told everyone to come down to the street. Ashlock heard Hurt say he wanted to "handle" the QuikTrip incident. Grier asked who hit his brother.

Grier and Gordon squared off to fight in the middle of the street in front of Ashlock's house. At one point, Young stood between them and attempted to keep them from fighting. Parker and Lawrence were standing near the street, but neither got involved in the altercation between Grier and Gordon. Hurt and Jones were standing behind Grier's car. Jones testified that Gordon recognized him as "Scarface" and told the others to "shoot him down."

Shots were fired in rapid succession from the direction of Grier's car. Jones testified at trial that he was the only shooter

and that he used two guns. Ashlock testified that she saw Hurt and Jones both shooting. Young said that she saw two shooters behind Grier's car but could not identify who they were; but she stated that no one else—Grier, Gordon, Lawrence, Parker, Ashlock, and herself—had a gun. Neither Parker nor Lawrence saw the shooters, but they both testified that they did not have guns, nor did Grier or Gordon.

***2** Lawrence was struck by five gunshots: twice in the arm, and once each in the neck, back, and torso. Young and Parker tended to Lawrence as he lay in the street, using shirts to apply pressure to the wound in Lawrence's neck. A neighbor who heard the shooting called the police and rendered aid. Emergency personnel arrived, and Lawrence was taken to the hospital.

After leaving the scene of the shooting, Grier drove Hurt and Jones to meet their mother, Tenacious Sergeant, at her sister's house. Hurt and Jones were each holding a gun when they walked into the house. Jones said, "Mama, we are sorry," and Hurt told Sergeant that Gordon had punched him in the face, but neither son explained to her what happened. Sergeant took the guns from her sons, wrapped them in a shirt and a plastic bag, and hid them in a vacant garage down the street.

Hurt, Jones, and Grier then went to the house of Lillia Parker and Mikalia Smith, where they all showered and changed clothes. Sergeant subsequently arrived at Parker and Smith's house, and told them that if anybody asked, the three men had been there since 10 p.m.

Hurt was charged with attempted first-degree murder, aggravated battery, and criminal use of a weapon. A jury convicted Hurt as charged. Based on these convictions and his criminal history, Hurt was sentenced to 155 months in prison.

ANALYSIS

Premeditation

In his first argument on appeal, Hurt contends the evidence was insufficient to prove premeditation, which is an essential element to proving attempted first-degree murder. When the sufficiency of the evidence is challenged in a criminal case, the appellate court must consider all of the evidence in a light most favorable to the prosecution and then determine whether a rational jury could have found the defendant guilty beyond a reasonable doubt. *State v. Parker*, 282 Kan. 584, 597, 147 P.3d 115 (2006). This court does not reweigh the evidence, resolve evidentiary conflicts, or make witness credibility determinations, which would usurp the role of the jury. *State v. Frye*, 294 Kan. 364, 375, 277 P.3d 1091 (2012).

To prove Hurt committed the crime of attempted first-degree murder, the State was required to prove that (1) Hurt performed an overt act toward the commission of first-degree murder, which is defined as an intentional and premeditated killing; (2) he did so with the intent to commit first-degree murder; (3) he failed to complete the commission of the crime; and (4) the act occurred on or about August 25, 2013, in Sedgwick County, Kansas. See K.S.A. 2016 Supp. 21-5301; K.S.A. 2016 Supp. 21-5402; PIK Crim. 4th 53.010 (2012 Supp.).

Hurt contends that there is no evidence that he premeditated murder. While he acknowledges that he said he was going to *shoot* someone, Hurt contends he never said he was going to *kill* someone. Similarly, Hurt claims the evidence shows only that he fired a gun into a group of people, without evidence of what his "goal" was or whether he considered the "outcome" of the shooting. But such direct evidence is not necessary to prove intent. "Premeditation and deliberation may be inferred from the established circumstances of a case when the inference is reasonable." *State v. Lloyd*, 299 Kan. 620, Syl. ¶ 4, 325 P.3d 1122 (2014). "[C]ircumstantial evidence of intent is almost to be expected: 'Intent, a state of mind existing at the time an offense is committed, does not need to be and rarely can be directly proven' through direct evidence. [Citation omitted.]" *State v. Thach*, 305 Kan. 72, 82, 378 P.3d 522 (2016).

***3** "Premeditation does not necessarily mean an act is planned, contrived, or schemed beforehand; rather, premeditation indicates a time of reflection or deliberation." *Lloyd*, 299 Kan. 620, Syl. ¶ 4.

> "Factors to consider when determining whether the evidence gives rise to an inference of premeditation include: (a) the nature of the weapon used; (b) lack of provocation; (c) the defendant's conduct before and after the killing; (d) the defendant's threats and declarations before and during the occurrence; and (e) the dealing of lethal blows after the deceased was felled and rendered helpless." 299 Kan. 620, Syl. ¶ 5.

Here, the circumstantial evidence was more than sufficient to prove Hurt's intent. The incident was instigated when Gordon

punched Hurt in the face at QuikTrip. Hurt went immediately to a party, where the host described Hurt as upset and said Hurt declared that he was going to "shoot some dude." Hurt called Jones and Grier to pick him up; in the car, Hurt told them that Gordon had punched him in the face. The three drove to Ashlock's house, where Hurt indicated he saw the person who had punched him on the porch. When Hurt exited the car, witnesses heard him tell everyone on the porch to come down to the street and he wanted to "handle" the QuikTrip incident. As Grier and Gordon were in the street squaring off to fight, Hurt and Jones fired their guns a total of 10 times toward the group; 5 bullets struck Lawrence. After the shooting, Hurt and Jones met up with Sergeant, their mother, where Hurt told her he had been punched in the face earlier in the night. Sergeant assisted her sons by hiding the guns. Hurt, Jones, and Grier then went to their friends' house and showered and changed clothes before being detained.

In addition to the facts set forth above, the evidence reflects Hurt made several statements before and after the incident that showed he was upset about being punched in the face and wanted to "handle" the situation and "shoot" someone. The shooting itself was a disproportionate response to being punched earlier in the evening. A deadly weapon can indicate a premeditation to kill. See *State v. Phillips*, 299 Kan. 479, 499, 325 P.3d 1095 (2014); *State v. Pabst*, 268 Kan. 501, 513, 996 P.2d 321 (2000). Finally, Hurt and Jones allowed their mother to hide evidence after the shooting. A rational factfinder could conclude from the facts presented, and the reasonable inferences drawn from those facts, that Hurt premeditated the murder attempt.

Hurt proposes several alternative inferences that can be drawn from the evidence. He first asserts his intent could have been simply to "fire his weapon in the direction of a bunch of people." Hurt notes that he was 17 years old and intoxicated, which he asserts "would tend to diminish the idea of premeditation" and "question the validity of any conclusion that the defendant specifically intended to kill." Hurt suggests that it was "more likely that he was angry, young, impulsive and intoxicated when he decided to fire a gun." But Hurt's challenges essentially ask this court to reweigh the evidence and draw a different conclusion than that reached by the jury. We decline to do so. See *Frye*, 294 Kan. at 375 (" 'It is the jury's function, not ours, to weigh the evidence and determine the credibility of witnesses.' ").

***4** Construing the evidence in the light most favorable to the State, we find sufficient evidence from which a reasonable factfinder could have concluded that Hurt deliberated and premeditated murder prior to the shooting. Thus, a rational factfinder could have found Hurt guilty beyond a reasonable doubt of attempted first-degree murder.

Gang affiliation

The State filed a pretrial motion to admit gang evidence, arguing it was relevant to explain Hurt's motive for an otherwise inexplicable act and to explain witness bias. The district court held a hearing on the motion immediately prior to voir dire. The State asserted that Hurt and Jones were members of the gang Gangster Disciples (GDs), and Lawrence, Parker, and Gordon were members of the gang Piru Bloods (Bloods). The State described an ongoing rivalry between the two gangs in Wichita since 2009, when a member of the GDs was murdered; the GDs believed a member of the Bloods was responsible. The State argued that gang evidence was necessary to explain the motive for "why just a simple punch at a QuikTrip would escalate to the level that it did where Quentin Lawrence is lying on the ground with five bullet holes in his body." Defense counsel responded in the following manner:

> "Well, Judge, obviously even with gang evidence the standard is, is it more probative than prejudicial. We think that gang evidence[,] generally speaking, especially with juries in Sedgwick County, Kansas, is almost always prejudicial. It is usually more prejudicial than probative. I understand that a certain amount of gang evidence regarding the various affiliations and all of that will probably come in as it goes to explain certain actions that happened. And I guess it could be used to, at least, in an argumentative way, to explain contradictions or desires on a witness's behalf to testify one way or another.
>
> "I guess my main concern is the extent that we will get into this feud that has been ongoing since 2009.... I don't know how much of that the State intends to get into with these witnesses or their expert. But I think that when we start talking about a feud as a basis for why an act happened, that we need to be more—we need to be careful about how much we get into that.... So I think we need to make sure there is a limit as to how far into it we can go."

Defense counsel concluded with concerns that the gang-related evidence would expand into other incidents between the GDs and the Bloods that were less relevant. After fully

hearing from the parties, the district judge stated that without the gang evidence, "it is almost like the jury is not going to have any idea what is really going on." The court ultimately granted the State's pretrial motion to admit gang evidence on grounds that the feud between the gangs stemming from the 2009 murder was "such an important part of what happened here." But the court placed a limitation on the parties by instructing them they could not introduce evidence of a second 2011 incident, which the court found to be less probative to the issues in the case. Defense counsel did not object further on the matter.

Evidence related to gang affiliation was offered through several witnesses during the trial. The State presented Detective Joseph Stearns as an expert on gang intelligence for the Midwest, to which Hurt did not object. Stearns explained the history of the rivalry between the GDs and the Bloods and applied his expertise to the observations he made while responding to the scene of the shooting in this case. In addition, both the State and defense questioned several fact witnesses about their gang affiliation or knowledge of the gang affiliations of the parties. Hurt never objected at trial to the admission of any gang-related questioning. And defense counsel voluntarily raised the issue of gang affiliation in opening statements, in closing arguments, and in examining the only defense witness, Jones. The defense used Jones' testimony to explain that he was shooting at members of the Bloods, whom he feared would shoot him first.

***5** Hurt argues the district court erred by allowing the parties to introduce evidence that Hurt and other witnesses at trial were affiliated with gangs. Hurt claims the evidence is not relevant and, even if it was, the gang affiliation evidence is more prejudicial than probative under K.S.A. 2016 Supp. 60-455. But the State contends Hurt did not preserve his argument for appeal because he did not lodge a specific or timely objection when the gang evidence was introduced at trial as required by statute. See K.S.A. 60-404 (statutory procedural bar to appealing evidentiary issue unless party makes specific and timely objection at trial that permits trial court opportunity to rule).

In *State v. King*, 288 Kan. 333, 204 P.3d 585 (2009), our Supreme Court put emphasis on the legislature's intent in enacting K.S.A. 60-404, which "dictates that evidentiary errors shall not be reviewed on appeal unless a party has lodged a *timely* and *specific* objection to the alleged error at trial." (Emphasis added.) 288 Kan. at 349. Although our Supreme Court acknowledged that it may have not strictly enforced the rule in the past, the court unequivocally stated in its opinion that "[f]rom today forward, in accordance with the plain language of K.S.A. 60-404, evidentiary claims ... must be preserved by way of a contemporaneous objection for those claims to be reviewed on appeal." 288 Kan. at 349.

The purpose of requiring a contemporaneous and specific objection to the introduction of evidence is to prevent the use of tainted evidence, thereby avoiding possible reversal while allowing the trial court to fulfill its intended role as gatekeeper of admissible evidence. 288 Kan. at 342, 349. Hurt did not contemporaneously object to any gang-related questioning introduced at trial by the State and, in fact, voluntarily raised the issue of gang affiliation throughout the trial proceedings. Given his failure to lodge a specific and contemporaneous objection, we find Hurt's claims of error regarding the introduction of gang affiliation evidence were not properly preserved for appeal.

In so finding, we acknowledge that Hurt's attorney expressed concern at the pretrial hearing about the district court granting the State's motion without limitation; *i.e.*, requiring the gang affiliation evidence to be relevant and to be more probative than prejudicial. Although the court ultimately granted the State's motion, the court apparently was persuaded by Hurt's concerns because the court limited the scope of gang-affiliation evidence that could be introduced. Hurt did not object to the court's ruling in this regard; in fact, the court arguably granted the only request made by the defense. And at trial, defense counsel introduced gang-related evidence within the court's limitation to explain the case to the jury. In its opening statement, defense counsel introduced Hurt and Gordon by explaining their gang affiliations: "The evidence will show that [Hurt] is associated with the Gangster Disciples, the GDs. [Gordon] is a member of the Bloods—the Piru Bloods." Defense counsel asked its only defense witness, Jones, if he was in a gang and whether his gang was "involved in any feuds or skirmishes with any other gang." In its closing argument, the defense connected the gang evidence to explain why Jones shot at the victim:

> "Is it a stretch to imagine that [Jones] believed the Bloods were after him, that they might have guns, as he suggested, that they might have a gun. That is what he thought. [Jones] testified that he believed that they were going to draw down based on what he saw, based on what he heard. Based on what he heard, he believed it was [Gordon] that said if that is Scarface [Jones] shoot him down."

***6** As a preliminary matter, we find Hurt's challenge to the district court's pretrial order to be disingenuous given Hurt used the gang affiliation evidence to support his own theory of defense. But even if he had not used the challenged evidence to his own benefit, Hurt's pretrial challenge to the evidence has not been preserved for review on appeal because he failed to contemporaneously object when the evidence subsequently was introduced at trial. Given the underlying rationale for requiring a contemporaneous objection, "a pretrial objection by itself is not timely because the evidence may be different from that submitted at the pretrial hearing or the evidence may be viewed differently by the judge in the context of all of the evidence and argument heard at trial." *State v. Kelly*, 295 Kan. 587, 590, 285 P.3d 1026 (2012); see *State v. Nunn*, 244 Kan. 207, 213, 768 P.2d 268 (1989) (pretrial ruling is not sufficient because the "materiality of the proposed evidence may not become actually apparent until other evidence has been admitted"). For these reasons, a pretrial challenge to admission of evidence will not be deemed timely unless the challenging party renews the objection when the opposing party seeks to introduce it at trial or the court has granted the challenging party's request for a continuing objection. See *State v. Richard*, 300 Kan. 715, 720-21, 333 P.3d 179 (2014) (pretrial objection must be renewed at trial); *State v. Berriozabal*, 291 Kan. 568, 579-80, 243 P.3d 352 (2010) (pretrial challenge to admission of evidence insufficient to preserve objection for appellate review when party does not renew objection at trial or request continuing objection).

Hurt's pretrial objection did not meet the specificity requirement of K.S.A. 60-404 either. Although Hurt asserts in his appellate brief that the gang affiliation evidence simply was not relevant, the only argument Hurt asserted at the pretrial hearing was that the evidence was unduly prejudicial. "[A] defendant may not object to the introduction of evidence on one ground at trial, and then assert a different objection on appeal." *State v. Bryant*, 272 Kan. 1204, 1208, 38 P.3d 661 (2002). Moreover, Hurt asserted at the pretrial hearing that gang evidence is *generally* more prejudicial than probative, but did not specify how it was prejudicial in this case. *Richmond*, 289 Kan. at 429 ("[T]he trial court must be provided the specific objection so it may consider as fully as possible whether the evidence should be admitted and therefore reduce the chances of reversible error.").

Given his failure to lodge a specific and contemporaneous objection, we find Hurt's claims of error regarding gang affiliation was not properly preserved for appeal.

Jury instruction

In his final issue on appeal, Hurt argues the district court erred in failing to instruct the jury on eyewitness identification. Hurt acknowledges that he did not request the instruction or object to the court's failure to give the instruction at trial. As a result, this court's standard of review is whether the failure to give the instruction was clearly erroneous. K.S.A. 2016 Supp. 22-3414(3); see *State v. Duong*, 292 Kan. 824, 835, 257 P.3d 309 (2011). To find the failure to instruct clearly erroneous, this court must be "firmly convinced that there is a real possibility the jury would have rendered a different verdict if the trial error had not occurred." *State v. Mann*, 274 Kan. 670, 677, 56 P.3d 212 (2002).

In any criminal action in which eyewitness identification is a critical part of the prosecution's case and there is a serious question about the reliability of the identification, a cautionary instruction should be given advising the jury as to the factors to be considered in weighing the credibility of eyewitness identification testimony. *Mann*, 274 Kan. at 677-78; *State v. Saenz*, 271 Kan. 339, 353, 22 P.3d 151 (2001).

Hurt contends that unreliable eyewitness testimony of several witnesses identified him as a shooter. He claims that the witnesses observed him in poor light after drinking alcohol, under a heightened emotional state because of the fight, where their attention would have been drawn toward the fight and not the shooter, and in a situation in which events happened quickly. Hurt contends that the jury should have been instructed according to PIK 4th Crim. 51.110 (2013 Supp.), which provides:

> "The law places the burden upon the State to identify the defendant. The law does not require the defendant to prove (he) (she) has been wrongly identified. In weighing the reliability of eyewitness identification testimony, you should determine whether any of the following factors existed and, if so, the extent to which they would affect accuracy of identification by an eyewitness. Factors you may consider are:

*7 "1. The opportunity the witness had to observe. This includes any physical condition which could affect the ability of the witness to observe, the length of the time of observation, and any limitations on observation like an obstruction or poor lighting;

"2. The emotional state of the witness at the time including that which might be caused by the use of a weapon or a threat of violence;

"3. Whether the witness had observed the defendant(s) on earlier occasions;

"4. Whether a significant amount of time elapsed between the crime charged and any later identification;

"5. Whether the witness ever failed to identify the defendant(s) or made any inconsistent identification; and

"6. Whether there are any other circumstances that may have affected the accuracy of the eyewitness identification."

But the eyewitness identification cautionary instruction is not appropriate given the facts presented in this case. Strictly speaking, no witness provided any identification testimony in this case. Hurt does not deny that he was at the scene of the crime; testimony from several eyewitnesses, including Jones, confirms Hurt was present and standing near Grier's car at the time of the shooting. Hurt claims that witnesses provided identification testimony that he was a shooter, which is a critical issue in this case. But this eyewitness testimony about Hurt's actions on the night of the incident is not equivalent to identification testimony. See *Mann*, 274 Kan. at 679 ("The reliability of the identification and credibility of an eyewitness are not the same thing."); *State v. Shanklin*, No. 97,749, 2008 WL 4291469, at *3 (Kan. App. 2008) (unpublished opinion) (rejecting application of eyewitness identification instruction to eyewitness testimony in general and holding "there was no dispute that Shanklin was at the garage, so identification was not at issue"); *State v. Aldrich*, No. 92,364, 2006 WL 538267, at *4-5 (Kan. App. 2006) (unpublished opinion) (identification of perpetrator not an issue, so the differences in the various versions of what transpired might have raised at most an issue of witness credibility). There simply is no evidence to support the instruction Hurt now argues should have been provided to the jury.

And even if we were to look at the witness testimony, there is no reason to believe that it is unreliable. Evidence calling reliability into question is required. See *State v. Harris*, 266 Kan. 270, 278, 970 P.2d 519 (1998). Ashlock was the only witness who testified she saw Hurt shoot one of the guns. Based on the circumstances under which she identified Hurt as a shooter, we find there is no serious question of Ashlock's reliability. Ashlock saw Hurt earlier in the night at QuikTrip. Our Supreme Court has held that the eyewitness identification instruction "contemplate[s] an eyewitness who does not know the defendant personally." *Saenz*, 271 Kan. at 354 (holding that where witness had seen defendant early in the evening at the bar, witnesses' reliability was not questionable and district court was not required to give eyewitness instruction). Ashlock identified Hurt and Jones as the shooters based on a photo array at the police station on the same day as the incident. Finally, defense counsel fully cross-examined Ashlock regarding her observation of Hurt shooting the weapon, so the jury heard the circumstances Hurt now claims cause her testimony to be unreliable. The jurors were instructed that it was their role to determine the weight and credit of witness testimony. Accordingly, there is no real possibility that the requested instruction would have resulted in a different verdict. Hurt has not demonstrated that omission of the jury instruction was clear error.

*8 Affirmed.

All Citations

399 P.3d 285 (Table), 2017 WL 2834282

End of Document

Certificate of Service

I hereby certify that the above and foregoing Appellant's brief was served by emailing a copy to Mark A. Dupree, Sr., Wyandotte County Attorney, at DAWyCoefiling@wycokck.org; and Kris Kobach, Attorney General, at ksagappealsoffice@ag.ks.gov on the 21st day of July 2023.

/s/ Peter Maharry
Peter Maharry, #19364