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NC

No. 22-125318

IN THE SUPREME COURT OF THE STATE OF KANSAS

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STATE OF KANSAS

Plaintiff-Appellee

vs.

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ZSHAVON MALIK DOTSON

Defendant-Appellant

BRIEF OF APPELLEE

Appeal from the District Court of Wyandotte County, Kansas
Honorable Wesley K. Griffin
District Court Case Number 2018-CR-1256

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NATURE OF THE CASE

Dotson appeals his conviction of first-degree premeditated murder and aggravated battery level seven.

STATEMENT OF THE ISSUES

ISSUE NO. 1: The prosecutor did not misstate the law in closing arguments.

ISSUE NO. 2: There was sufficient evidence of premeditation.

ISSUE NO. 3: There is a distinction between first-degree and second-degree murder.

ISSUE NO. 4: The jury instructions were not clearly erroneous.

ISSUE NO. 5: The Court did not undermine the presumption of innocence.

ISSUE NO. 6: Dotson received effective assistance of counsel.

ISSUE NO. 7: There are no cumulative errors requiring reversal.

STATEMENT OF FACTS

In November of 2018, Carolyn Marks and her son R.J. Marks lived together in Kansas City, Kansas. (R. XIV, 263). On November 26th, 2018, Carolyn heard R.J. speaking to his friend Zshavon Dotson, who she called Vaughn, in her front room. (R. XIV, 270-272; 275). Dotson had stayed overnight on the 25th and had brought his personal items. (R. XIV, 276-278). Carolyn told Dotson he could not live with them. (R. XIV, 279). Dotson, who referred to Carolyn as Mama, looked upset when Carolyn told him that he could not live with them. (R. XIV, 279). Carolyn went to lie down and came back out when she heard R.J. and Dotson arguing. (R. XIV, 283). Dotson was complaining that R.J. was never there for him as a friend. (R. XIV, 284). Dotson dove for a gun that was near R.J. (R. XIV, 283; 287). R.J. and Dotson began fighting and wrestling over the gun and while they were both hanging on to the gun, Dotson was swinging R.J. around with the gun. (R. XIV, 289). During this, Carolyn went to get her gun from under her bed. (R. XIV, 289-290). She came back out to the living room, yelling "stop, stop, stop" at the men, and shot a warning shot into the wall. (R. XIV, 290-291). After the shot, Dotson slammed R.J. into the wall. (R. VIX, 290-291). Dotson hit Carolyn in the forehead with the back end of the gun and she fell, losing consciousness. (R. XIV, 292-296). When she woke up, Dotson and R.J. were still fighting, but the fight had

moved from the living room to the kitchen. (R. XIV, 296-297). Carolyn ran towards Dotson and R.J. as the fight continued toward the washer and dryer at the back of the house. (R. XIV, 299-300). Dotson hit R.J. and R.J. fell to the ground, with nothing in his hands. (R. XIV 300-301). Dotson stood over R.J. and shot him in the chest. (R. XIV, 302). RJ was shot in the groin area and the chest. (R. XII, 159). Carolyn was screaming, and Dotson paused and shot R.J. again. (R. XIV 301-302; 305). As Carolyn was with R.J.'s body, she heard Dotson ransacking the house. (R. XIV, 306-307).

Once the police arrive, they see a set of footprints in the snow out the front door of the Marks' residence, around the west side, and east through the alley. (R. XIII, 46). The footprints seem to be from a tall person that was running. (R. XII, 48). A canine officer followed the footprints and the scent. (R. XII, 74-78). The scent ended at an appliance in an alley where a firearm was hidden. (R. XIII, 80-81). Police collected the firearm. (R. XIII, 108). That firearm and casings from the scene were sent to the Kansas Bureau of Investigation, and Dotson stipulated to admitting the firearm report. (R. XIII, 168-169). The shell casings found on scene were fired from the rifle found in the alley. (R. XIII, 171).

Dotson was arrested in Texas the next day, with a 9-millimeter gun on him. (R. XIII, 194). Dotson's attorney elicited this information from the detective. (R. XIII, 194).

Dotson testified in self-defense. (R. XV, 465). Dotson testified he fired consecutive shots into RJ's body while RJ was laying on the floor. (R. XV, 486).

He testified he did not make the footprints in the snow. (R. XV, 491).

The court took up self-defense immunity at the close of evidence in trial and denied Dotson's motion. (R. XV, 514). During the jury instruction conference, the defense objected to "guilty" being placed first on the verdict form for both count 1 and 2. (R. XV, 522). The court denied the objection and used the PIK. (R. XV, 533).

Dotson was convicted of first-degree, premediated murder and aggravated battery level seven. (R. XV, 520-21). He was sentenced to a Hard 25 on the murder and 12 months on the aggravated battery, to run concurrently. (R. 8, 75-77).

During the motion for new trial, defense presented evidence of ineffective assistance of his trial counsel. (R. XX, 4). Dotson and his trial counsel testified. (R. XX, 4, 51).

Trial counsel indicated he called and left messages for the potential witness Jasmine Harris but also strategically, he "really didn't want to have [her] testify as she was a significant other of the deceased." (R. XX. 76-77). Trial counsel did not believe Miss Harris' statement was helpful and it bolstered the State's position. (R, XX, 80). He believed this because it would have corroborated Carolyn's testimony that Dotson was angrier than R.J. and would actually help the State with the initial aggressor theory. (R. XX, 81). Trial counsel testified his strategy was self-defense and to diminish RJ and Carolyn's credibility. (R. XX, 97). He also wanted every version of Carolyn's statements to come in so he could point out discrepancies. (R.

XX, 99-100). He asked the Detective about Dotson being arrested in Texas with a firearm and his strategic reason was first, to show Dotson could legally possess a firearm and two, show that the gun Dotson had was not RJ or Carolyn's gun. (R. XX, 101-102). He also strategically wanted to be the one who brought up the gun instead of the State. (R. XX, 102). Trial counsel discussed his lengthy cross examination of Carolyn at trial and how his strategy of how to cross examine her changed in the middle of trial because of Carolyn's demeanor. (R. XX, 106-107).

Dotson timely appeals. (R. I, 250).

ARGUMENTS AND AUTHORITIES

ISSUE NO. 1: The prosecutor did not misstate the law during closing arguments.

Standard of Review

"To determine whether prosecutorial error has occurred, this Court must decide 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. Sherman*, 305 Kan. 88, 109, 378 P.3d 1060 (2016). If error is found, the appellate court must next determine whether the error prejudiced the defendant's due process rights to a fair trial. If this Court finds prosecutorial error, the State must demonstrate beyond a reasonable doubt that the error complained of will not or did not affect the outcome of the trial in light of the entire record, *i.e.*, where

there is no reasonable possibility that the error contributed to the verdict. *Id.*

Every instance of prosecutorial error will be fact specific, and any appellate test for prejudice must likewise allow the parties the greatest possible leeway to argue the particulars of each individual case. *Id* at 110. The Court must primarily analyze the impact of the error on the verdict, giving secondary analysis to the weight of the evidence. *Id.* at 111.

Argument: Self-Defense

The prosecutor did not commit error in the closing argument regarding the self-defense instructions. The points that appellant brings up are taken out of context. In closing, the prosecutors stated:

> "You cannot claim self-defense in a fight that you started. The State's evidence shows you that the defendant started this first when he dove...for that gun. State argues that you do not get to say self-defense when you initially provoke an argument...And you know what you don't get to do under Kansas law if you are the person that dives for the 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 don't get to shoot somebody because you started a fight and they pull a knife." (R. XV, 544; 564).

These examples are a correct statement of Kansas law because of the initial aggressor instruction given to the jury in this case:

> "A person who initially provokes the use of force against himself is not permitted to use force to defend himself unless the person reasonably believes that he is in present danger of death or great bodily harm and he has used every reasonable means to escape such danger." (R. XV, 534).

The initial aggressor instruction is codified in K.S.A. 21-5226(c). There are two prongs in the initial aggressor argument: reasonable belief of danger and

reasonable means of escape. The State's theory was always that Dotson was the initial aggressor—that his act of diving for the gun made him the initial aggressor. The State then proceeded in its closing to discuss every reasonable means to escape such danger other than the use of physical force. They used an analogy. The prosecutor was never saying there was a knife or anything in this situation. These remarks also do not go outside the wide latitude allowed to discuss the evidence. Even if those statements do go outside the wide latitude, the statements were not so gross and flagrant that they prejudiced the jury against the defendant. The prosecutors did not commit error.

Argument: Premeditation

The prosecutor did not commit error in the closing argument regarding premeditation. In closing, the State argued:

> "I don't have to show you Vaughn's diary from the day before saying I am going to kill R.J. I don't have to show that to you. I do have to show you that it's more than just an instant act of taking his life, and I believe the State has shown that to you." (R. XV, 537)
>
> "I want you to picture an umpire and a baseball manager, right? But if we're locked and I look, that's what you need. That's it. The opportunity came and he took it, and that's why when [State's other counsel] was talking about 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 that plain. It's just more than instantaneous." (R. XV, 563).

The jury was instructed on premeditation:

> "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." (R. XV, 527).

The prosecutor was not attempting to change the timeframe. He was discussing what is and is not needed to prove premeditation. The closing was not misleading. It is not outside the wide latitude allowed when discussing the evidence.

Argument: Harmlessness

The statements made by the State were not error. Even if they are error, the State can prove beyond a reasonable doubt that they did not affect the outcome of the trial because the theory was self-defense. Dotson admitted to shooting and killing RJ (R. XV, 486). The issue in this case was whether it was self-defense or not. The jury either believed that Dotson was the initial aggressor and self-defense did not apply or they did not find Dotson credible and did not believe self-defense at all. Even if the State's statements about initial aggressor were error, the jury was instructed on the correct form of initial aggressor. (R. XV, 534). The jury was also properly instructed on premeditation.(R. XV, 527). Courts are to presume that the jury followed the court's jury instructions. *State v. Williams*, 299 Kan. 509, 548, 324 P.3d 1078 (2014). In light of the whole record, the statements, if error, were harmless.

ISSUE NO. 2: There was sufficient evidence of premeditation.

Standard of Review

"'When the sufficiency of the evidence is challenged in a criminal case, we review the evidence in a light most favorable to the State to determine whether a

rational factfinder could have found the defendant guilty beyond a reasonable doubt. An appellate court does not reweigh evidence, resolve conflicts in the evidence, or pass on the credibility of witnesses. *State v. Aguirre*, 313 Kan. 189, 209, 485 P.3d 576 (2021).

Argument

There is more than enough evidence to prove premeditation in this case based on Carolyn's testimony and the placement of RJ's body when he died.

Dotson started the fight by diving for the gun that was near R.J. (R. XIV, 283; 287). While the police searched the house, they found divots and broken tiles underneath and around RJ's body. (R. XIII, 102-104). The detective believed RJ died where he was shot. (R. XIII, 154). All the bullet damage was either to RJ or to the floor around or under RJ. (X, XIII, 156). All the shells from the type of firearm used eject to the right and were found in the kitchen. (R. XII, 158). That placement is consistent with someone standing over RJ's body and repeatedly shooting him. (R. XII, 158).

The coroner testified about RJ's multiple gunshot wounds to the chest. (R, XIV, 418-19). The wounds had stippling, which allowed the coroner to know that the maximum distance from the barrel of the gun to RJ's chest could have been two and a half feet. (R. XIV, 420). There were also wounds to the upper thighs and penis. (R. XIV, 435-439). RJ also had injuries to his arm known as pseudo stippling, which are shrapnel wounds. (R. XIV, 431-432). The coroner testified that the injuries could be consistent with someone laying on a hard floor and being

shot from a downward angle, with floor shrapnel imbedding in the arm. (R. XIV, 444). The coroner also testified that the damage to RJ's right arm was consistent with someone laying on the ground and turned to the right side so their right arm was on the floor under them and shot from above. (R. XIV, 444).

Carolyn testified that Dotson stood over R.J. and shot him in the chest. (R. XIV, 302). R.J. was shot in the groin area and the chest, each being a distinct area of wounds. (R. XII, 159). The coroner's testimony shows how R.J. was positioned at the time of his death, with his right arm underneath him. (R. XIV, 444).

There is more than enough evidence to show that Dotson stood over R.J. and repeatedly shot him while R.J. was on the ground. There is evidence to show there were two district areas of wounds and a pause in between. There is sufficient evidence of premeditation.

ISSUE NO. 3: There is a distinction between first-degree and second-degree murder.

Standard of Review

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).

Argument

In *State v. Stanley*, 312 Kan. 557, 478 P.3d 324 (2020), this Court took up an identical issue. It pondered the difference between premeditation and intentional and decided "what distinguishes premeditation from intent is *both* a temporal element (time) *and* a cognitive element (consideration). It is "thought"

that happens "beforehand." We trust everyone—included every juror—will instinctively understand this experience." *Stanley*, at 573 (emphasis in original). The *Stanley* court analogized the difference between premeditation and intentional by discussing eating a cookie. *Id.* at 572. If someone eats a cookie without a second thought—that is intentional. *Id.* If someone thinks about if they should eat the cookie, then eats the cookie—that is premeditated. *Id.* at 572. The difference between first-degree and second-degree murder is enshrined in Kansas law and should not be disturbed.

ISSUE NO. 4: The instructions were not clearly erroneous.

Standard of Review

When a party asserts an instruction error for the first time on appeal, the failure to give a legally and factually appropriate instruction is reversible only if the failure was clearly erroneous. *State v. Butler*, 307 Kan. 831, 845, 416 P.3d 116 (2018). The appellate court must be firmly convinced that the jury would have reached a different verdict if the erroneous instruction had not been given. *State v. Crosby*, 312 Kan. 630, 639, 479 P.3d 167 (2021). The party claiming clear error has to show both error and prejudice. *Id.*

Argument

The jury was instructed on the PIK definition of premeditation. (R. XV, 527). Neither party requested a *Bernhardt* or *Stanley* instruction to be added to the premeditation instruction. In Bernhardt, the court added to the PIK premeditation instruction:

> 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 be inferred from other circumstances including: (1) the nature of the weapon used, (2) the 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, or (5) dealing of lethal blows after the deceased was felled and rendered helpless.
>
> Premeditation can occur during the middle of a violent episode, struggle, or fight." *State v. Bernhardt*, 304 Kan. 460, 464, 372 P.3d 1161, (2016).

Stanley approved the *Bernhardt* instruction and approved adding this language: "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." *State v. Stanley*, 312 Kan. 557, 574, 478 P.3d 324, (2020).

The *Stanley* and *Bernhardt* instructions were legally and factually appropriate in this case, but Dotson cannot show error in not instructing as in *Bernhardt* and *Stanley* because it would have helped the State. The instruction, if given, would have made the finding of premeditation more likely because it would even better fit the facts of this case. The instructions would have made the jury more likely to find premeditation, not less. Therefore, the verdict would not have changed if the instruction had been given.

ISSUE NO. 5: The Court did not undermine the presumption of innocence.

Standard of Review

While a verdict form is not technically a jury instruction, it is appropriate to apply the same standard of review applicable to the review of the instructions. *Unruh v. Purina Mills, LLC*, 289 Kan. 1185, 1197-98, 221 P.3d 1130 (2009).

> We therefore consider whether the instructions were legally and factually appropriate, using an unlimited standard of review of the entire record. The court views the evidence in the light most favorable to the defendant. Because Fraire objected to the order of the verdict form, this court will reverse only if it determines there is a reasonable probability that the error affected the outcome of the trial in light of the entire record. *State v. Fraire*, 312 Kan. 786, 796, 481 P.3d 129 (2021).

Argument

Dotson argues that because this is a self-defense case, the guilty first presupposes the jury's decision. The jury was instructed on the presumption of innocence (R. XV, 526). While self-defense is an affirmative defense, the State still has the burden and has to prove the crimes beyond a reasonable doubt and the jury was specifically instructed that evidence of self-defense "should be considered by you in determining whether the State has met its burden of proving that the defendant is guilty." (R. XV, 533).

"The purpose of a trial is to determine if the accused is guilty." *State v. Wesson*, 247 Kan. 639, 651; 802 P.2d 574 (1990). Dotson argues that *Wesson*, *State v. Wilkerson*, 278 Kan. 147, 159, 91 P.3d 1181 (2004), and *State v. Fraire*, 312 Kan. 786, 796, 481 P.3d 129, (2021), are all wrongly decided. In *Fraire*, the Court reasoned "realistically, jurors are probably not closely examining the verdict form before they begin their deliberations, and it is unrealistic to suggest they

change their collective conclusion when the foreperson starts to fill out the form." *Id.* Dotson cannot show that there is a reasonable probability that the verdict would have been different if not guilty was first on the verdict form.

ISSUE NO. 6: Dotson received effective assistance of counsel.

Standard of Review

When the district court conducts an evidentiary hearing on claims of ineffective assistance of counsel, the appellate courts review the district court's factual findings using a substantial competent evidence standard. Appellate courts review the district court's legal conclusions based on those facts applying a de novo standard of review. See *Khalil-Alsalaami v. State*, 313 Kan. 472, 486, 486 P.3d 1216 (2021).

To prevail on a claim of ineffective assistance of counsel, a movant must establish (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, (2014) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 [1984]). Judicial scrutiny of counsel's performance on a claim of ineffective assistance of counsel is highly deferential and requires consideration of all the evidence before the judge or jury. *Bledsoe v. State*, 283 Kan. 81, 90, 150 P.3d 868 (2007). The reviewing court must strongly presume that counsel's conduct fell within the broad range of reasonable professional assistance. *State v.* Kelly, 298 Kan. 965, 970, 318

P.3d 987 (2014). "[T]he [movant] bears the burden of demonstrating that trial counsel's alleged deficiencies were not the result of strategy." *Sola-Morales*, 300 Kan. at 888. To establish prejudice, the movant must show a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different, with a reasonable probability meaning a probability sufficient to undermine confidence in the outcome. *State v. Sprague*, 303 Kan. 418, 426, 362 P.3d 828 (2015).

Argument

Dotson received effective trial counsel and the issues he complains about were decisions based on trial strategy.

"Although the right to make key decisions such as what plea to enter, whether to waive a jury trial, or whether to testify belong to the defendant, strategic and tactical decisions are within the exclusive province of defense counsel." *Flynn v. State*, 281 Kan. 1154, 1163, (2006). "'[S]trategic decisions made by trial counsel based on a thorough investigation are virtually unchallengeable.'" *Fuller v. State*, 303 Kan. 478, 488, 363 P.3d 373 (2015). The decision whether to call a particular witness is a matter of trial strategy so long as counsel conducted some investigation and had enough information upon which to base that decision. *Winter v. State*, 210 Kan. 597, Syl. ¶ 2, 502 P.2d 733 (1972); *State v. Lewis*, 33 Kan. App. 2d 634, 645, 111 P.3d 636 (2003). "Even though experienced attorneys may disagree on the best tactics or strategy, deliberate decisions based on strategy may not establish ineffective

assistance of counsel." *Flynn*, 281 Kan. at 1165.

"An attorney's strategic decisions are essentially not challengeable if the attorney made an informed decision based on a thorough investigation of the facts and the applicable law." *Wilson v. State*, 51 Kan. App. 2d 1, 14, 340 P.3d 1213 (2014).

"'It is within the province of a lawyer to decide what witnesses to call, whether and how to conduct cross-examination, and other strategic and tactical decisions.'" *State v. Butler*, 307 Kan. 831, 853, (2018).

Dotson complains about lack of communication with his attorney. Dotson was actively assisting his attorney at all times during the trial. (R. XV, 46-47). Dotson tries to point to inmate visit history but fails to point out the fact that there was a global pandemic that kept his attorney from visiting and kept his case on hold with no reason for an attorney to visit a client. Dotson's trial counsel was not ineffective in communication and Dotson cannot show prejudice.

Dotson's trial counsel's decision to not call Jasmine Harris was strategic. Jasmine Harris was R.J.'s girlfriend at the time of his death. At the motion for new trial, Dotson testified that Harris would have testified that she was on the phone with R.J. and heard the argument between R.J. and Dotson. (R. XX, 36). Dotson's trial counsel testified he strategically did not want to call Harris because he believed she would be detrimental to self-defense and helpful to the State. He made that strategic decision.

Harris was subpoenaed for the motion for new trial and did not appear. (R.

XV, 147). Dotson cannot show prejudice.

Dotson's trial counsel thoroughly cross-examined Carolyn. He testified that he had to change strategies based on her demeanor, but that he pointed out her inconsistencies throughout his cross examination. Dotson tries to say that calling the officers who took Carolyn's statement would have helped him, but that is another instance where it might have helped the State more. He cannot show prejudice in not calling the officers who took Carolyn's statement because Dotson's trial counsel did a thorough cross-examination at trial.

ISSUE NO. 7: There are no cumulative errors requiring reversal.

Standard of Review

Cumulative trial errors, when considered together, may require reversal of the defendant's conviction when the totality of the circumstances establish that the defendant was substantially prejudiced by the errors and denied a fair trial. The errors must be examined in context and consider how the trial judge dealt with the errors as they arose; the nature and number of errors and whether they are interrelated; and the overall strength of the evidence. If any of the errors being aggregated are constitutional in nature, the party benefitting from the error must establish beyond a reasonable doubt that the cumulative effect did not affect the outcome. *State v. Alfaro-Valleda*, 314 Kan. 526, 551-52, 502 P.3d 66 (2022).

Argument

The State did not make any constitutional errors in this trial. The State did not misstate the law on self-defense and premeditation. The jury instructions were

proper. Dotson did receive effective assistance of trial counsel.

If this court does believe the state made any errors, they did not affect the outcome of the trial.

CONCLUSION

For the reasons stated above, the state asks this court to affirm Dotson's convictions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that service of the above and foregoing Brief of Appellee was made by e-mailing a copy to the Kansas Appellate Defender Office, Jayhawk Tower, 700 Jackson, Suite 900, Topeka, KS 66603 at ADOService@sbids.org , (785) 296-5484 (phone number), (785) 296-2869 (fax) on the 20th day of November 2023.

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