No. 22-125318-S

IN THE
SUPREME COURT OF THE
STATE OF KANSAS

STATE OF KANSAS
Plaintiff-Appellee

vs.

ZSHAVON DOTSON
Defendant-Appellant

REPLY BRIEF OF APPELLANT

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

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Nature of Case

Zshavon Dotson files this reply brief pursuant to Supreme Court Rule 6.05 to address the State's arguments that it did not misstate the law in closing arguments. The direct quotes highlighted in Zshavon's brief show that the State misstated the law in its closing concerning self-defense. That was critical in a case that centered on self-defense and those misstatements were not harmless. Additionally, while the State asserts there was ample evidence of premeditation, the facts show otherwise and had the district court fully instructed the jury on what is required to find premeditation, the jury would have come back with in a different verdict.

Statement of 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 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.**

Statement of Facts

Zshavon will rely upon the statement of facts as presented in the Brief of Appellant. (Brief of Appellant, pgs. 2-9).

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.

In closing arguments, the State argued that being an initial aggressor was incompatible with self-defense. It argued:

> "You cannot claim self-defense in a fight that you started. The State's evidence shows you that the defendant started this fight when he dove, lunged, slid, whatever word you want to use, for that gun. The State argues that you do not get to say self-defense when you initially provoke an argument."

(R. 15, 544). The State later 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). In its brief, the State asserts that the statements are taken out of context. (Brief of the State, pg. 6). The State certainly made other arguments in its closing. (R. 15, 536-544, 559-573). However, those complained of statements are direct quotes. There is no context missing. The State specifically argued that being an initial aggressor and self-defense were mutually exclusive. It argued, "[y]ou cannot claim self-defense in a fight that you started." (R. 15, 544). It reiterated that in its rebuttal closing by stating "Kansas law" does not allow you to claim self-defense if you start a fight. (R. 15, 564). There is no question or confusion as to the arguments the State made.

Those arguments were misstatements of the law. While it may be more limited, self-defense is still available for one who starts a fight. Self-defense is available to a person who "initially provokes the use of any force" if 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). As this Court has found, 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 and the State's arguments otherwise were misstatements of the law.

Further, the damage is clear. As the State asserts, 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." (Brief of the State, pg. 8) (emphasis added). The State is correct that the jury could have believed Zshavon was the initial aggressor *and self-defense did not apply.* The jury would have come to this conclusion because of the State's improper comments. It specifically argued to the jury that being an initial aggressor and self-defense were mutually exclusive. This is not the law, but because of the State's improper comments, even the State notes that the jury could have been led down the wrong legal path.

When analyzing whether the error is harmless, this Court has 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). Given the State acknowledges the jury could have improperly applied the law, a direct result of the State's improper comments, it cannot be stated "beyond a reasonable doubt" that those improper comments did not have an impact on the verdict. In fact, those improper comments directly contributed to the guilty verdict.

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

The State asserts there is ample evidence to prove premeditation. It highlights the fact there was a fight. It highlights the damage around Ronald Mark's body. It also highlights the injuries Ronald suffered and that the coroner's testimony showed he was shot while on the floor. (Brief of the State, pg. 9). However, the evidence the State points to is simply evidence that someone was shot and killed. It does not go to the issue of premeditation. It does not go to whether Zshavon went through a 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).

Reviewing the testimony of Carolyn Marks, the only eyewitness, shows this was an instantaneous shooting during a fight. 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). Her testimony shows that the shooting was instantaneous. It was not premeditated.

Additionally, if the evidence highlighted by the State establishes premeditation, the State's argument further shows that there is no difference between an intentional killing and a premeditated killing as asserted in Issue 3 of Appellant's brief. (*See generally* Brief of Appellant, pgs. 25-32).

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.

The State agrees the instructions outlined in *State v. Bernhardt,* 304 Kan. 460, 464-72, 372 P.3d 1161 (2016) and *State v. Stanley,* 312 Kan. 557, 572, 478 P.3d 324 (2020) were legally and factually appropriate. It argues, however, that the error in failing to give those instructions does not warrant reversal because had such instructions been given they would have actually helped the State and made a finding of premeditation by the jury more likely. (Brief of the State, pg. 12).

There are two problems with the State's claim. First, the argument made was that the language identified by this Court in *Stanley* should have been given. The *Bernhardt* instructions were never requested at trial. Further, it has not been argued on appeal the additional instructions on premeditation first outlined in *Bernhardt* should have been given in this case. The argument centered on the instruction outlined in *Stanley.* (Brief of Appellant, pgs. 32-38).

Second, the instruction outlined in *Stanley,* had it been given, would have been immensely helpful to Zshavon and his defense. *Stanley* stated that 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. It reiterated that there has to be some conscious reflection and that must be before the homicidal act. With the evidence at trial, that was a standard the State would not have met.

Reiterating Carolyn's testimony, she testified that "[t]here was no pause. It was bam, bam, hit, on floor dead." (R. 14, 387). She 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). It was instantaneous. It was not after "thoughtful, conscious reflection and pondering." *Stanley,* 312 Kan. at 574.

Further, *Stanley* reiterated that the time of thoughtful reflection must be before the "final act of killing." *Stanley,* 312 Kan. at 574. Carolyn testified that the first shots were to Ronald's chest. (R. 14, 302). Dr. Ransom Ellis testified the gunshot wounds to the chest were fatal. (R. 14, 440-42). Consequently, the jury would have had to find that Zshavon had contemplated and considered killing Ronald before those first shots. It would have had to find that before the first shots, Zshavon went through a "thoughtful, conscious reflection and pondering" about whether to kill Ronald, not something done in the heat of the moment. *Stanley,* 312 Kan. at 574. That was something the jury would not have found.

Carolyn testified about the speed with which Zshavon shot Ronald after gaining control of the AK. She testified, "it was like before you could say hello." (R. 14, 393). It was "like one quick motion." (R. 14, 393). It was instantaneous. With a proper instruction under *Stanley,* the jury would not have found this was a premeditated murder.

Conclusion

For the reasons stated above and in the Brief of Appellant, 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,

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Certificate of Service

The undersigned hereby certifies that service of the above and foregoing brief was sent by e-mailing a copy to Mark A. Dupree, Sr., Wyandotte District Attorney, 710 N. 7th Street, Ste. 10, Kanas City, KS 66101, phone (913) 573-2851, FAX (913) 573-2948, at DAWyCoefiling@wycokck.org; and by e-mailing a copy to and by e-mailing a copy to Kris Kobach, Attorney General, 120 SW 10TH Ave, Topeka KS 66612, phone (785) 296-2215, FAX (785) 296-6296, at ksagappealsoffice@ag.ks.gov on the 19th day of December 2023.

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