NOT DESIGNATED FOR PUBLICATION

No. 113,900

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
*Appellant*,

v.

SONY UK,
*Appellee*.

MEMORANDUM OPINION

Appeal from Lyon District Court; DOUGLAS P. JONES, judge. Opinion filed October 7, 2016. Reversed and remanded with directions.

*Darrell Smith*, assistant county attorney, and *Amy L. Aranda*, first assistant county attorney, *Marc Goodman*, county attorney, and *Derek Schmidt*, attorney general, for appellant.

*Stephen J. Atherton*, of Atherton & Huth, of Emporia, for appellee.

Before MALONE, C.J., BUSER and BRUNS, JJ.

BUSER, J.: The State appeals the district court's grant of immunity given to Sony Uk and the dismissal of attempted voluntary manslaughter or, alternatively, aggravated battery charges against him. Upon our review, we reverse the grant of immunity and dismissal of the charges and remand for the refiling of the complaint and for further proceedings.

## FACTUAL AND PROCEDURAL BACKGROUND

On April 7, 2015, Uk was charged in Lyon County District Court with one count of attempted voluntary manslaughter of his brother, Viseth Ear, in violation of K.S.A. 2013 Supp. 21-5404(a)(2). The State amended the complaint, on April 29, 2015, by adding an alternative charge of aggravated battery upon Ear, in violation of K.S.A. 2013 Supp. 21-5413(b)(1)(A).

On May 13, 2015, Uk filed a "motion to dismiss and claim of immunity from prosecution." In the motion, Uk contended that he was authorized to use deadly force against Ear to prevent him from causing imminent death or great bodily harm to their mother, Hoeun Kraus. In particular, Uk invoked K.S.A. 2015 Supp. 21-5222, the so-called "stand your ground" law. Based on this statute, Uk sought a ruling from the district court that "he is immune from prosecution and that the Court dismiss this matter with prejudice."

On May 18, 2015, the district court held a preliminary hearing and hearing on Uk's motion to dismiss and claim of immunity from prosecution. These proceedings were conducted in accordance with *State v. Hardy*, 51 Kan. App. 2d 296, 347 P.3d 222 (2015), *rev. granted* April 21, 2016. The background case facts which are summarized in this section were presented by the State at this combined hearing.

Uk and Ear lived together in a small residence in Emporia. (II at 5-7) On the morning of April 4, 2015, Kraus arrived at the residence to visit her sons and bring them some food. Uk and Ear were in their bedrooms when Kraus arrived at the residence and walked inside. Kraus and her two sons were the only persons present in the residence.

Kraus called for Uk to come to the living room and get the food she had placed on the coffee table. Uk came out of his room, took some food, and went back to his bedroom.

Kraus than called out, "Viseth, Viseth, mom left some food on the coffee table." According to Kraus, a short time later, Ear came out of his bedroom and said, "'Huh? What? Huh? What?' And he doesn't know who I am. . . . He doesn't know himself either." Upon seeing Ear in this condition, Kraus became scared.

According to Kraus, Ear approached her and hit her on the right side of the head. Ear then hit his mother in the head a second time which, she testified, caused her to "fall and knock my head on the back then he straddle on top of me . . . He stay on top of me." Kraus and Ear are about the same size, but Ear is stronger than his mother and, as a result, he was able to hold her down. According to Kraus, while Ear was on top of her "he hit me one time then on the front, that's why I got cut." As a result, she had blood on her face. The cut also caused "a little bit" of a scar. Kraus reported that her face was swollen. According to Kraus, Ear struck her with his hand three times during the entire incident. She never testified that Ear struck her with his fist. Kraus tried, without success, to leave out the front door.

After Kraus fell to the floor, her face went numb, and her vision was blurred. Kraus heard Uk come from his bedroom and say, "What you do to mom? Why you hit mom?" Kraus then heard a noise she described as a "pop." According to Kraus, upon hearing the pop, Ear stopped hitting her, pushed her away, and then tried to get up from the floor. Kraus testified that she thought Ear stood up and faced Uk: "Then he just turn around, turn the face to the pop what, the way, just stop and [Ear] turn around like that. He try to go to beat [Uk], whatever. I don't know." According to Kraus, she then "heard a second pop, that's why [Ear said], 'Oh shit. Shit.'" Kraus testified that after the second pop

Ear went to his bedroom and closed the door, whereupon Kraus heard a window break in Ear's bedroom.

Kraus got up, ran out the front door, and ran behind the house. A passerby saw Kraus and asked if she needed help. Kraus told her to call the police. As Kraus looked back toward the house, she saw Uk running away.

A short time later, Emporia Police Detective Kelly Davis conducted an investigation which included executing a search warrant at the residence. Outside of Ear's bedroom on the front porch, Davis found a window with blood on it. The frame was still around the window, which led Davis to conclude that Ear had jumped from inside his bedroom through the window and onto the outside porch located at the front of the house. There was also blood on the mini blinds in the opening where the window had been located.

Inside the front door of the residence, in the living room, blood was smeared on the lower part of the wall. About 5 feet from the front door in the living room there were also a number of blood drops on the floor around Kraus' cell phone and her brown hat. The distance between the front door and Ear's bedroom door was estimated at only 2 or 3 feet.

Detective Davis found three empty .22 caliber shell casings in the living room. Walking from the front door towards the back of the inside of the house, the detective found one shell about 5 to 7 feet from the next shell, which was about 5 to 7 feet from the next shell, which was about 5 to 7 feet from a live .22 caliber bullet found in the hallway about 2 feet from the doorway to Uk's bedroom. A live .22 caliber bullet was also found in a desk in Uk's bedroom.

Detective Davis discovered gunshot damage inside the residence. The first area of damage was located inside of the interior frame of the front door. The detective testified, "I found one bullet hole in the door frame where the casing around the front door on the . . . inside on the living room side. Then, behind that, I pried that off and did discover an actual bullet behind that." The bullet was located about the same height as the door knob.

Detective Davis observed a television set in the living room about 1 or 2 feet from Ear's bedroom door. The detective noticed that "there was a skip or a bullet had gone through the top edge of the television." This bullet hole was about 42 inches high. There were several marks on Ear's bedroom door. In particular, Detective Davis noticed one "fresh" bullet hole that splintered the door and was about 53 inches from the floor. In the detective's opinion, comparing the skip mark to the fresh bullet hole in Ear's bedroom door, it appeared that the bullet had skipped off the television set in the living room and "looked like it went towards that bedroom door." Alternatively, Detective Davis indicated that the bullet may have just been shot through Ear's closed bedroom door.

Emporia Police Investigator Todd Ayer also assisted in the investigation and testified at the hearing. According to Investigator Ayer, he learned that after the shooting, Ear had gone to the break room of the Dollar General store across the street from his residence. Ear was bleeding at the time officers arrived. As a result, he was transported to the hospital. Investigator Ayer went to the emergency room of the hospital where he observed that Ear had a bandaged left arm.

As part of his duties, Investigator Ayer interviewed Kraus regarding the incident. According to the investigator, Kraus advised:

> "She said she'd gone over there that morning to deliver some food to her two sons, Uk and Ear. She stated that she fed Sony in his room. She came out into the living room and

was placing some food on a table there. Went over to Viseth's room, knocked on the door to let him know that she was there and had food.

. . . .

"She said Viseth came out of—out of his bedroom and said that he'd been waiting to see her and then began hitting her.

. . . .

"She said she hit the ground or she fell to the ground and hit the back of her head as she did. She said—she said that Mr. Ear continued his attack at which point she heard Sony come out asking why he was hitting his mom, why—what, you know, what he was doing. She stated that she heard a pop, um, she said Viseth stopped hitting her and kind of turned around to see what it was. She said she heard another pop at which time she said Viseth jumped up and ran into his bedroom and then she heard the window break as she was opening the front door to leave."

Investigator Ayer testified that the way Kraus described the shooting, he understood that "maybe a second or two" elapsed between the two shots or at least enough time "for [Ear] to turn before [Kraus] heard the second pop." Additionally, Kraus told the investigator that a few months prior to the incident, Uk showed her a long gun he had in his possession. Investigator Ayer noted that Kraus had sustained the following injuries: "She had a—it was a bruise up on her forehead. There was a cut right in the middle of her forehead. There was a lump on the back of her head.

Dr. Peter James Seberger treated Ear in the emergency room of Newman Regional Hospital. According to Dr. Seberger, upon arrival at the hospital Ear was "combative, not very cooperative, and he had a bandage or some blood around the left elbow." In the doctor's opinion, Ear appeared to be drunk or under the influence of another substance.

Upon examining Ear, Dr. Seberger observed that "it looked like some kind of entrance wound by something in the left elbow and he had a small laceration of his penis." The doctor opined that the entrance wound was consistent with having been made by a gunshot. An x-ray of the wound revealed: "a foreign object, very dark or radio

opaque, consistent with a small caliber bullet. . . . Then, there was a fracture involving the—we call it the proximal portion of the ulna or the portion of the ulna closest to the body was fractured and was going to need further treatment." With regard to the location of the entrance wound as demonstrated by Dr. Seberger in court, the magistrate judge summarized his understanding that "I think the doctor was pointing to what I would call the outside of the arm or the part of the arm that would be facing away from the body." The doctor indicated he was unable to testify exactly as to the location of the entrance wound.

During the hearing, Ear appeared with counsel and invoked his right against self-incrimination under the Fifth Amendment to the United States Constitution. As a result, he did not testify to the events of April 4, 2015.

Uk also did not testify on his own behalf. Defense counsel did, however, ask the court to take judicial notice that Ear had been charged with aggravated battery of Kraus as a result of this incident. In response, the State noted that Ear had also been charged with an alternative misdemeanor charge of domestic battery. The district court took notice of the criminal case file relating to the charges against Ear.

After completion of the evidence, the State acknowledged that it had the burden to show probable cause that Uk committed the felony crime charged and probable cause to believe that Uk's use of deadly force was not justified under the circumstances. The State emphasized that *Hardy* provided guidance regarding how the district court should consider the evidence:

> "[T]he district court should not resolve conflicts in the evidence and weigh that evidence. [It] should, rather, construe the evidence in the record, everything that the Court's heard today in a light most favorable to the State. In other words, *Hardy* says that this Court must accept the version that's most favorable to the State."

The crux of the State's argument was that "at the time that Mr. Uk fired the second shot, [Ear] had disengaged from causing any kind of harm to Hoeun Kraus." In response, defense counsel observed that a mandate had not been issued yet in *Hardy* but even with applying *Hardy*, "This is as good a case as I've ever seen and, certainly, I think probably that the Court has ever seen." Defense counsel argued that "[s]elf defense immunity requires the State to establish much more than what we have here. . . . It's the State trying to speculate. That's not probable cause."

The magistrate judge addressed the prosecutor and summarized his understanding of the State's position opposing any grant of immunity: "[T]hat appears to be your theory was that it was that moment in time from the initial pop, as described by Ms. Kraus, or . . . that it was in the second gunshot is where the State alleges that any potential for claim of immunity would have eroded; is that correct?" The prosecutor agreed with the district court's understanding of the State's theory. The prosecutor explained:

> "We have three spent shell casings. We don't know which of the two or three shots struck Mr. Ear, but the evidence would suggest that he—at the time that—at least at the time of the second shot and possibly a third shot, [Ear] was disengaged from causing any kind of harm to Ms. Kraus. He had stood up. He was turned away from her at that point."

The magistrate judge then noted the State had charged Ear in the companion case with aggravated battery under the theory that the striking of his mother was done "in a manner whereby great bodily harm, disfigurement, or death can be inflicted." The judge asked if that charge "in any way supports the defendant's claim for immunity under [K.S.A. 2015 Supp.] 21-5222?" In response, the prosecutor argued that given the evidence presented at the hearing, disfigurement was "the most applicable" theory, and she reminded the court of the alternative misdemeanor charge against Ear which did not involve any claim of great bodily harm.

Defense counsel argued that

> "the State has to pick and choose essentially. Judicial estoppel is a doctrine that basically says that the State can't take one position in one prosecution then flip-flop to suit their needs in another one. There's either an [aggravated] battery here in which case my client should be granted immunity or there's not."

The district judge, noting the necessity under K.S.A. 2015 Supp. 21-5222(b) for a person to have a reasonable belief that the use of deadly force was necessary to prevent imminent death or great bodily harm, then inquired of defense counsel to "point me to the evidence today that would indicate your client's reasonable belief that such [deadly force] was necessary." Defense counsel responded, "[b]lood covering her face. Blood spatter on the floor . . . she was obviously bleeding from the moment she was cut, so what more do you need?" The prosecutor countered that Kraus had a small cut on her forehead which bled but asserted this was no basis to support a reasonable belief that deadly force was necessary under the circumstances.

Before announcing its decision, the district court stated it was relying on *Hardy*'s admonition to "conduct an evidentiary hearing procedurally comparable to a preliminary examination so that the rules of evidence apply and conflicting evidence should be resolved in favor of the State." The district court also cited *State v. Ultreras*, 296 Kan. 828, 295 P.3d 1020 (2013), for the proposition that "the State bears the burden of establishing proof that the force was not justified as part of the probable cause determination required under K.S.A. 21-3219(b) and (c)."

The district court made numerous findings of fact. Of particular importance to our resolution of this appeal were the district judge's findings that

> "before [Ear] stood up or removed himself from Ms. Kraus, there was an initial pop or a gunshot and then a second gunshot *after he removed himself.* I believe that the—it's my

> opinion that the evidence was that this took place in no more than a second or a few seconds, so I classify that as the break in the period of time in which the period of the first shot to the second shot. So that is really the evidence." (Emphasis added).

Of note, the district court did not make a finding as to which shot wounded Ear. The district court also reiterated that it had taken judicial notice of the criminal case "where the State has alleged that Mr. Ear did commit an aggravated battery on Ms. Kraus whereby great bodily harm or death can be inflicted."

The district court ruled that Uk was immune from prosecution and dismissed the criminal complaint. The magistrate judge ruled:

> "I will find that Mr. Uk should be immune from further prosecution under the statute as previously cited that his actions, based upon my review of the evidence today, were justified based upon a reasonable belief as the evidence has set forth today. . . . I would find the State has failed to meet its burden that force was not justified and so I'm granting the motion today."

The district court subsequently filed a journal entry memorializing its ruling. The State filed a timely appeal.

## ANALYSIS

On appeal, the State contends the district court erred when it found the prosecution did not show sufficient proof that Uk's use of deadly force was not justified as part of the probable cause determination required under K.S.A. 2015 Supp. 21-5231. This statute generally provides immunity from prosecution for any person who lawfully uses force in self-defense or defense of a person. In response, Uk argues that the district court "correctly evaluated the evidence and determined the State failed to establish probable

cause [that Uk] had not acted with legal justification in defending his mother from attack."

Resolving this issue requires our court to interpret and apply Kansas' self-defense immunity statute, K.S.A. 2015 Supp. 21-5231, and our state's self-defense and defense of a person statute, K.S.A. 2015 Supp. 21-5222. Interpretation of a statute is a question of law over which appellate courts have unlimited review. *State v. Eddy*, 299 Kan. 29, 32, 321 P.3d 12, *cert. denied* 135 S. Ct. 91 (2014).

Preliminarily, Uk presents a two sentence argument that "the [d]istrict [c]ourt's finding that the State failed to meet its burden of proof is a negative finding." Uk cites *City of Dodge City v. Norton*, 262 Kan. 199, 203, 936 P.2d 1356 (1997), a case wherein the district court dismissed a complaint because it found a lack of probable cause for the officer to arrest the defendant for driving under the influence of alcohol. Uk cites *Norton* in support of the proposition that the negative finding standard should be applicable in this defense of others immunity case, and because the State does not allege an arbitrary disregard of undisputed evidence, judicial bias, passion or prejudice, the State has failed to meet this standard.

More recent cases, however, indicate that our standard of review is de novo. "[W]hen the State appeals from a district court's dismissal of a criminal prosecution for lack of probable cause, an appellate court reviews the evidence de novo, applying the same standards as did the district court." *In re Care & Treatment of Burch*, 296 Kan. 215, 224, 291 P.3d 78 (2012). Likewise, "'[w]hen the State appeals the dismissal of a complaint, an appellate court's review of an order discharging the defendant for lack of probable cause is de novo.' [Citation omitted.]" *State v. Fredrick*, 292 Kan. 169, 171, 251 P.3d 48 (2011). In fact, our Supreme Court has rejected the negative finding standard of review in criminal cases when the State has failed to meet its burden of proof on motions to suppress. See *State v. Garza*, 295 Kan. 326, 331, 286 P.3d 554 (2012); *State v. Marx*,

289 Kan. 657, 661, 215 P.3d 601 (2009). Most recently, in *State v. Evans*, 51 Kan. App. 2d 1043, 1048, 360 P.3d 1086 (2015), *petition for rev. filed* November 23, 2015, our court cited *Fredrick*, 292 Kan. at 171, and concluded that "when the State appeals the dismissal of a complaint, an appellate court's review of an order discharging the defendant for lack of probable cause is de novo." We conclude that we have de novo review of this matter.

In this appeal, we address one aspect of Kansas' "stand your ground" law—an individual's right to use deadly force in defense of a third person. The relevant statute is K.S.A. 2015 Supp. 21-5222 and it provides:

> "(a) A person is justified in the use of force against another when and to the extent it appears to such person and such person reasonably believes that such use of force is necessary to defend such person or a third person against such other's imminent use of unlawful force.
>
> "(b) A person is justified in the use of deadly force under circumstances described in subsection (a) if such person reasonably believes that such use of deadly force is necessary to prevent imminent death or great bodily harm to such person or a third person.
>
> "(c) Nothing in this section shall require a person to retreat if such person is using force to protect such person or a third person."

Kansas' immunity statute, K.S.A. 2015 Supp. 21-5231, among other provisions, provides immunity from prosecution for any individual who uses deadly force in defense of another upon the belief that use of deadly force *is necessary to prevent imminent death or great bodily harm to that person*. That statute provides:

> "(a) A person who uses force which . . . is justified pursuant to K.S.A. 2015 Supp. 21-5222, . . . and amendments thereto, is immune from criminal prosecution and civil action for the use of such force . . . . As used in this subsection, 'criminal

prosecution' includes arrest, detention in custody and charging or prosecution of the defendant.

"(b) A law enforcement agency may use standard procedures for investigating the use of force as described in subsection (a), but the agency shall not arrest the person for using force unless it determines that there is probable cause for arrest.

"(c) A prosecutor may commence a criminal prosecution upon a determination of probable cause." K.S.A. 2015 Supp. 21-5231.

Considered together in the present case, these statutes afforded Uk immunity from prosecution if he used deadly force upon a reasonable belief that such force was necessary to prevent imminent death or great bodily harm to his mother. See K.S.A. 2015 Supp. 21-5222(a), (b); K.S.A. 2015 Supp. 21-5231(a). Because Uk claimed immunity for his use of deadly force under K.S.A. 2015 Supp. 21-5231(a), the State had the burden of proof to show there was probable cause that Uk's use of deadly force was *not* justified under K.S.A. 2015 Supp. 21-5222(a). See *Ultreras*, 296 Kan. at 845.

In *State v. Hardy*, 51 Kan. App. 2d 296, 347 P.3d 222 (2015), *rev. granted* April 21, 2016, our court set forth certain guidelines for district courts to follow in self-defense immunity cases. These procedures included holding an evidentiary hearing in conjunction with the preliminary hearing whenever possible. 51 Kan. App. 2d at 304. As detailed earlier, the district court, adhering to *Hardy*'s procedural guidance, conducted a joint evidentiary hearing and preliminary hearing in this case.

What is the appropriate standard a district court should use to evaluate the evidence presented at a hearing on a defendant's motion for self-defense immunity? This question is of critical importance to the resolution of this appeal. In *Evans*, our court reiterated *Hardy*'s guidance and stated:

"A defendant's motion for self-defense immunity is a *dispositive* motion. If granted by the district court, the State's charges are dismissed and the defendant is

> immune from prosecution. As with any dispositive motion filed before the parties are allowed to present their complete evidence at trial, such as a motion for summary judgment in a civil case, the evidence must be weighed in the light most favorable to the nonmoving party. Thus, in ruling on Evans' motion for self-defense immunity, the district court should have been required to resolve all facts and inferences which may reasonably be drawn from the evidence in favor of the party against whom the ruling was sought." *Evans*, 51 Kan. App. 2d at 1052.

See *Hardy*, 51 Kan. App. 2d at 304.

This standard is also consonant with the point of view district courts employ in preliminary hearings to determine whether there is probable cause to believe the defendant committed a felony: As *Evans* reiterates, "'[i]f there is a conflict in witness testimony that presents a question of fact for the jury, the preliminary hearing judge must accept the version of the testimony which is most favorable to the State.'" 51 Kan. App. 2d at 1053 (quoting *State v. Bell*, 259 Kan. 131, 133, 910 P.2d 205 [1996]). Accordingly, we will consider the evidence in a light most favorable to the State.

On appeal, the State makes two arguments in support of its contention that the district court erred in ruling that the prosecution had failed to show there was probable cause to believe that Uk's use of deadly force was not justified under K.S.A. 2015 Supp. 21-5222(a). First, the State argues there was no evidence that Uk subjectively believed that deadly force was necessary under the circumstances. Second, the State maintains that Uk's belief was not objectively reasonable because Kraus was never in imminent risk of death or great bodily harm. We will individually address these two claims.

*Did Uk have a Subjective Belief that Kraus was in Imminent Danger of Death or Great Bodily Harm*?

At the outset, it is undisputed that Uk fired a deadly weapon which caused Ear to sustain a bullet wound to his arm. It is also undisputed that this application of force was "likely to cause death or great bodily harm to a person." See K.S.A. 2015 Supp. 21-5221(a)(2). Given that Uk used deadly force against Ear, this application of force was only justified as defense of another "if such person reasonably believes that such use of deadly force is necessary to prevent imminent death or great bodily harm to such person or a third person." K.S.A. 2015 Supp. 21-5222(b).

Our Supreme Court has developed a "two-prong self-defense test" from the reasonable belief requirement of K.S.A. 2015 Supp. 21-5222(b). *State v. McCullough*, 293 Kan. 970, 975, 270 P.3d 1142 (2012). The first prong is "subjective and requires a showing that [the defendant] sincerely and honestly believed it was necessary to kill to defend . . . others." 293 Kan. at 975. In the case on appeal, the first prong requires evidence that Uk sincerely and honestly believed it was necessary to use physical force likely to cause death or great bodily harm to defend his mother from Ear's aggression.

The second prong "is an objective standard and requires a showing that a reasonable person in [the defendant]'s circumstances would have perceived the use of deadly force in self-defense as necessary." 293 Kan. at 975. Importantly, the objective prong should be determined "in light of the totality of the circumstances." *State v. Walters*, 284 Kan. 1, 16, 159 P.3d 174 (2007). And those circumstances which are evaluated should be the defendant's circumstances. See *McCullough*, 293 Kan. at 975. In other words, the critical question is "the reasonableness of [the defendant's] belief that self-defense is necessary." *Walters*, 284 Kan. at 16.

Applying first the subjective prong to the facts of this case, there was no direct testimony regarding whether Uk sincerely and honestly believed it was necessary for him to use deadly force under the circumstances to defend his mother. "A defendant's own assertions may be sufficient to establish this factor." *Walters*, 284 Kan. at 9. However, Uk did not testify and there was no direct evidence of his beliefs presented, for example, by law enforcement officers or others who may have spoken with him after the shooting about his beliefs regarding the necessity of using deadly force.

The State argues that the "district court had insufficient evidence to determine what Mr. Uk saw from his perspective, and why he believed that deadly force was necessary to prevent great bodily harm or death to Ms. Kraus." Uk counters that the State charged him with attempted voluntary manslaughter on the basis that he had an "unreasonable *but honest* belief, that circumstances existed justifying the use of deadly force in defense of his mother." In short, Uk contends the State's imperfect self-defense theory of attempted voluntary manslaughter provides sufficient evidence that Uk's subjective belief was honest.

We question Uk's argument that the State's mere charge of attempted voluntary manslaughter based on an imperfect self-defense theory was evidence to be considered at the self-defense immunity hearing. Still, under the imperfect self-defense theory of attempted voluntary manslaughter, the State must make some showing at the preliminary hearing that the defendant had an honest belief that circumstances existed that justified deadly force in defense of a person. K.S.A. 2015 Supp. 21-5404(a)(2); *State v. Salary*, 301 Kan. 586, 598, 343 P.3d 1165 (2015); PIK Crim. 4th 54.170. Because Uk's honest belief was an element of the charge of attempted voluntary manslaughter, insufficient evidence on this point could have resulted in the attempted voluntary manslaughter charge being dismissed for lack of probable cause that the felony was committed, not just a rejection of Uk's self-defense immunity claim.

Of course, Uk was also charged in the alternative with aggravated battery, which does not have the defendant's honest belief as an element of the State's proof. But Uk contends that Ear's "failure to stop the attack when [Uk] called out to him is clear subjective evidence [Uk] honestly and reasonably believed deadly force was necessary to stop the attack on his mother."

We are not convinced. Ear's failure to immediately stop hitting his mother upon Uk's question, "What you do to mom? Why you hit mom?" does not provide evidence of Uk's honest and sincere belief that deadly force was necessary. Rather, it may be circumstantial evidence that Uk believed verbal persuasion was of no use and some force was necessary to stop Ear from hitting his mother. Considering all the evidence in a light most favorable to the State, we conclude the prosecution established probable cause to believe that with regards to the aggravated battery charge, there was insufficient evidence that Uk subjectively believed deadly force was necessary under the circumstances.

*Would a Reasonable Person Perceive that the Use of Deadly Force was Necessary*?

Next, we consider the second or objective prong of the self-defense test: Would a reasonable person in Uk's circumstances have perceived that the use of deadly force in defense of others was necessary?

The State contends that no reasonable person would have believed that lethal force was necessary to stop Ear from hitting his mother. In support, the State notes that Ear was unarmed at all times, and Uk did not attempt to stop Ear's blows in a non-lethal or less deadly manner before opening fire. Moreover, the State argues, "Ms. Kraus was never in imminent risk of death or great bodily harm." The State highlights that Ear struck his mother with his hand, not a weapon, and she never lost consciousness but only sustained a cut to her forehead that was later treated by her husband at their home.

Uk counters that Ear was stronger than Kraus, the blows to her head caused her to almost lose consciousness, she was bloody from the cut on her head, and that even after the incident Ear "was combative and appeared to be drunk or have some other substance in his system." Uk also argues there was sufficient evidence to prove that Kraus risked suffering great bodily harm or death because Ear was charged in the separate but related criminal case with aggravated battery of Kraus.

We are persuaded that the State has the better argument. From Uk's point of view, a reasonable person would have understood that Ear's hand hit his mother's head twice, causing her to fall, whereupon he struck her a third time. There was no evidence presented that Uk (or a reasonable person) would have known or believed that Kraus was at risk of "imminent death or great bodily harm," K.S.A. 2015 Supp. 21-5222(b), from Ear's aggression. While Uk was surely justified in exerting ordinary, non-lethal force against Ear in defense of his mother, the record is bereft of evidence that a reasonable person would have objectively observed the incident and concluded that Kraus was at risk of imminent death or great bodily harm sufficient to justify shooting Ear with a firearm at close range.

We note the district court took judicial notice of the complaint filed in the separate criminal case against Ear. This charging document alleged that Ear had committed aggravated battery and, in the alternative, domestic battery against his mother. Before ruling, the district judge asked if that charge "in any way supports the defendant's claim for immunity under [K.S.A. 2015 Supp.] 21-5222?" Uk's counsel replied that it did prove that Uk had justification for believing his mother had sustained aggravated battery. In part, the State countered that the complaint also alternatively alleged domestic battery which has no element of proof requiring great bodily harm.

We find the district judge's consideration of the complaint in the criminal case against Ear as evidence to prove the nature of the injuries to Kraus in the joint preliminary hearing and immunity hearing was error.

> "Kansas charging documents need only show that a case has been filed in the correct court, *e.g.*, the district court rather than municipal court; show that the court has territorial jurisdiction over the crime alleged; and allege facts that, if *proved beyond a reasonable doubt*, would constitute a Kansas crime committed by the defendant." (Emphasis added.) *State v. Dunn*, 304 Kan. 773, Syl. ¶ 2, 375 P.3d 332 (2016).

At the joint hearing, the complaint was improperly admitted as evidence or proof that Ear had committed aggravated battery of Kraus. But the charging document was not proof of the crime alleged, it was simply the formal charge which the State was required to prove beyond a reasonable doubt at Ear's separate trial. As a result, in our de novo review we have not considered the complaint as evidence supporting the nature and extent of Kraus' injuries.

In assessing whether a reasonable person in Uk's circumstances would have perceived that the use of deadly force in defense of his mother was necessary, the district court's factual findings relating the timing of the shootings to Ear's cessation of aggression against his mother are especially probative. Upon our review, which is based on the district court's factual findings and viewed in a light most favorable to the State, there is at least probable cause to believe that Uk's use of deadly force that resulted in the wounding of Ear occurred after Ear had stopped hitting his mother. And once Ear stopped striking his mother there was no risk of imminent death or great bodily harm to her.

As the district court found, Ear stopped hitting his mother after the first shot was fired. Ear then pushed Kraus away, stood up, turned, and faced Uk, whereupon a second shot was fired. Immediately upon the firing of the second shot, Ear made two exclamations, promptly went to his nearby bedroom, closed the door and jumped out a

window, landing on the front porch. Additionally, in the district court's view, medical testimony indicated that the location of the entrance wound was on the "outside of the arm or the part of the arm that would be facing away from the body." Considered together, Ear's two expletives, his body position vis-a-vis Uk coupled with the medical testimony regarding the bullet wound entering on the outside of Ear's arm, and Ear's expeditious fleeing from the living room immediately upon the firing of the second shot, provide a reasonable inference that Ear was wounded by the second shot fired by Uk which only occurred after Ear had stopped hitting his mother.

Given this scenario, which was well supported by the evidence, we conclude that a reasonable person would not have perceived that the use of deadly force in defense of others was necessary to prevent Kraus from imminent death or great bodily harm under the circumstances. Viewing the evidence in a light most favorable to the State, we are persuaded the prosecution sufficiently proved probable cause to believe that Uk's use of deadly force in defense of his mother was not justified.

Accordingly, we hold the district court erred in its legal conclusion that the State did not establish probable cause to believe that Uk's use of deadly force was not justified under K.S.A. 2015 Supp. 21-5222(a). As a result, the district court erred in granting Uk immunity from prosecution under K.S.A. 2015 Supp. 21-5231.

The district court's grant of immunity to Uk and dismissal of the complaint is reversed. The case is remanded with directions that the complaint be refiled and for further proceedings.

* * *

MALONE, C.J., dissenting: I respectfully dissent from the majority's decision to reverse the grant of immunity and dismiss the charges against Sony Uk. I would affirm

the decision of the district judge who, after hearing the evidence, found that the State had failed to meet its burden of showing that Uk's use of force in defense of his mother was not justified under the facts of this case.

The law in Kansas on immunity from prosecution is currently unsettled. We know that K.S.A. 2015 Supp. 21-5231 generally provides immunity from prosecution for any person who lawfully uses force in self-defense or defense of another person. We also know that in *State v. Ultreras*, 296 Kan. 828, 845, 295 P.3d 1020 (2013), the Kansas Supreme Court determined that the standard of proof for whether a defendant is entitled to immunity from criminal prosecution is probable cause. Furthermore, the State bears the burden of establishing proof that the force used by the defendant was not justified as part of the probable cause determination under the immunity statute. 296 Kan. at 845. In other words, the State bears the burden of proving a negative, *i.e.*, that the defendant's use of force in self-defense or defense of another person was *not* justified.

In *State v. Hardy*, 51 Kan. App. 2d 296, 304, 347 P.3d 222 (2015), *rev. granted* April 21, 2016, this court held that in considering a motion for self-defense immunity, a district court must conduct an evidentiary hearing unless the parties otherwise stipulate to the factual record. The hearing should be held in conjunction with the preliminary hearing whenever possible. 51 Kan. App. 2d at 304. This court further held that consistent with making a probable cause determination at a preliminary hearing, the district court must view the evidence in a light favoring the State, meaning conflicts in the evidence must be resolved to the State's benefit and against a finding of immunity. 51 Kan. App. 2d at 304; see *State v. Evans*, 51 Kan. App. 2d 1043, 1050, 360 P.3d 1086 (2015), *petition for review filed* November 23, 2015.

If the Kansas Supreme Court ultimately rejects this court's holdings in *Hardy* and *Evans* that the district court must view the evidence in a light favoring the State to resolve immunity claims, then Uk's case is easy to decide. Clearly there is evidence to support the

district court's decision that Uk is entitled to immunity from prosecution under the facts herein, unless the district court is required by law to view the evidence in a light favoring the State. But even if our Supreme Court upholds this court's rulings in *Hardy* and *Evans* that the district court must view the evidence in a light favoring the State, I would still take the position that we should affirm the district court's grant of immunity to Uk.

I begin by noting that this case does not present conflicting evidence as to the events of April 4, 2015. Hoeun Kraus, mother of Uk and Viseth Ear, was the only witness who described the shooting inside the residence. Emporia Police Investigator Todd Ayer interviewed Kraus after the incident and also testified at the preliminary hearing. However, there were no inconsistencies between Kraus' testimony and Ayer's testimony as to how the shooting happened. Thus, this case does not present a situation where the magistrate judge was required to weigh the evidence, assess the credibility of witnesses, and resolve conflicting accounts of how the shooting took place.

There was only one version of the facts presented at the hearing. Uk walked out of his bedroom and saw his brother on top of Kraus, beating her with his fists. Kraus had blood all over her face. Uk fired a shot from a .22 caliber handgun in the direction of Ear. Ear stood up and "maybe a second or two" later, Uk fired a second bullet which most likely struck Ear in his arm. Dr. Peter James Seberger was unable to testify exactly as to the location of the entrance wound. Ear shouted an expletive and began to run away. Apparently Uk fired a third shot at Ear as he was trying to run back to his bedroom, and the third bullet splintered the bedroom door. As the majority opinion states, the evidence established "a reasonable inference that Ear was wounded by the second shot." Ear was later treated in the emergency room where he was combative and appeared to be drunk.

K.S.A. 2015 Supp. 21-5222(b) authorized Uk to use deadly force under these circumstances if Uk reasonably believed that such use of force was necessary to prevent imminent death *or great bodily harm* to his mother. Uk was inside his residence when the

incident took place. Ear savagely attacked Kraus and was beating her with his fists. Kraus had blood all over her face. She testified that Ear hit her so hard that she almost blacked out and her face swelled up and turned black. The State later charged Ear with aggravated battery under the theory that he struck Kraus "in a manner whereby great bodily harm, disfigurement, or death can be inflicted."

The burden was on the State to establish probable cause that Uk's use of force was *not* legally justified under the circumstances of this case. At the preliminary hearing, the State's theory was that by the time Uk fired the second shot, Ear already had stood up from beating his mother and had "disengaged" from causing any kind of harm to Kraus. The prosecutor essentially conceded that Uk was justified in firing the first shot at Ear. However, the State argued that any potential for claim of immunity "would have eroded" by the second shot. The district court did not accept the State's theory and neither do I.

The evidence established that the shooting happened very fast and that "maybe a second or two" elapsed between the first two shots. Ultimately, the burden was on the State to show that Uk was not justified in his use of force to protect his mother from great bodily harm. Based on the record before us, even viewing the evidence in a light favoring the State, I would affirm the district court's finding that the State failed to meet its burden of proving that Uk's use of force in defense of his mother was unlawful.