

NOT DESIGNATED FOR PUBLICATION

No. 118,351

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,  
*Appellee,*

v.

MISTY SALEM a/k/a MISTY KOCHER,  
*Appellant.*

MEMORANDUM OPINION

Appeal from Stafford District Court; JOHN E. SANDERS, judge. Opinion filed May 24, 2019.  
Reversed and remanded.

*Korey A. Kaul*, of Kansas Appellate Defender Office, for appellant.

*Natalie Chalmers*, assistant solicitor general, and *Derek Schmidt*, attorney general, for appellee.

Before ARNOLD-BURGER, C.J., ATCHESON, J., and BURGESS, S.J.

PER CURIAM: A jury in Stafford County District Court convicted Misty Salem of intentional second-degree murder in the shooting death of Sam Salem, her former husband. On appeal, Salem argues the district court erred in denying her pretrial motion for statutory self-defense immunity and erroneously instructed the jury in three ways. The district court's failure to instruct the jury on imperfect self-defense involuntary manslaughter despite Salem's request created reversible error. We, therefore, reverse Salem's conviction and remand for a new trial.

## FACTUAL AND PROCEDURAL OVERVIEW

The undisputed trial evidence showed that Salem fatally shot Sam on the evening of March 10, 2016, in the home they shared. Although the two had divorced, Salem invited Sam to stay there after he had completed a drug treatment program. The jurors heard Salem and Sam had a difficult relationship that was often confrontational and occasionally violent. On March 10, the two went to a cookout at the home of Salem's adult son. They were accompanied by Braden Salem, their son who was almost 9 years old, and Salem Lowe, Salem's 14-year-old son and Braden's half-sibling. Sam drank heavily before and during the cookout, and Salem was also drinking. Lowe wound up driving the four home. (Given the overlapping names of the family members, we refer to Sam Salem and Braden Salem by their first names and Misty Salem and Salem Lowe by their last names.)

Salem had acquired a pistol from her adult son several months earlier and kept the gun in a lockbox in the kitchen. After returning from the cookout, Sam and Salem argued, apparently continuing an earlier disagreement. Salem testified that Sam slapped her. Hearing a commotion sometime later, Lowe went into the bedroom Sam and Salem shared. He saw Sam holding Salem in a headlock and tried to separate the two. Salem then came out of the bedroom and armed herself with the pistol. She reentered the bedroom—how long she waited is unclear. Salem fired a single shot that struck Sam in the neck, inflicting a fatal wound. Sam staggered out of the bedroom, collapsed, and quickly bled to death.

The trial evidence bearing directly on the circumstances of the shooting may fairly be characterized as starkly conflicting. In their trial testimony in July 2017, Braden and Lowe gave markedly different accounts of what happened. The jury also heard tape recorded statements the two boys had given to law enforcement officers investigating the shooting. Salem testified in her own defense and offered a rambling, sometimes internally

inconsistent account of what happened. In response to questions from the prosecutor and her own lawyer, she frequently said she didn't know or couldn't recall details of the evening and the shooting. Although Salem's mother lived in the home and was present during the shooting, she did not testify at trial.

The jury also heard from law enforcement officers who investigated the shooting, the medical doctor who performed an autopsy on Sam, Salem's adult son, a neighbor, and several people familiar with the domestic violence that marked Sam and Salem's relationship. Rather than recount all of the evidence in detail, especially given the conflicts in the testimony about what happened just before the shooting, we defer to more tailored discussions keyed to each point Salem has raised on appeal.

The State charged Salem with intentional second-degree murder, a severity level 1 person felony under K.S.A. 2015 Supp. 21-5403(a)(1). To convict Salem, the State had to prove she intentionally killed Sam without any legal justification. As we indicated, Salem filed a pretrial motion for immunity on the grounds she shot Sam in self-defense, as provided in K.S.A. 2015 Supp. 21-5231(a). The district court held an evidentiary hearing and denied the motion.

At trial, the district court instructed the jury on intentional second-degree murder and on voluntary manslaughter based on Salem having knowingly killed Sam in the heat of passion, a severity level 3 person felony under K.S.A. 2015 Supp. 21-5404(a)(1). The State requested the voluntary manslaughter instruction. The district court instructed the jury on no other lesser degrees of homicide, although Salem requested instructions on voluntary manslaughter imperfect self-defense, see K.S.A. 2015 Supp. 21-5404(a)(2), and imperfect self-defense involuntary manslaughter based on the commission of a lawful act in an unlawful manner, see K.S.A. 2015 Supp. 21-5405(a)(4). The jury convicted Salem as charged.

At a later hearing, the district court sentenced Salem to 253 months in prison, a standard guidelines sentence given her criminal history, and placed her on postrelease supervision for 36 months. The district court also ordered Salem to pay a substantial amount of restitution.

Salem has appealed. On appeal, Salem submits the district court erred by denying her motion for self-defense immunity and in failing to instruct the jury on reckless involuntary manslaughter, on imperfect self-defense involuntary manslaughter, and to consider the intentional second-degree murder charge simultaneously with the lesser charge of voluntary manslaughter in the heat of passion. Salem does not challenge her sentence or the restitution order.

#### LEGAL ANALYSIS

We take up the points as Salem has presented them, beginning with the denial of her immunity motion and progressing through the asserted instructional errors. As we indicated, we augment our discussion of the evidence as necessary for the resolution of each issue.

##### I. DENIAL OF SELF-DEFENSE IMMUNITY

Salem contends the district court erred in denying her motion for self-defense immunity under K.S.A. 2018 Supp. 21-5231(a). After hearing evidence, the district court determined the State had shown probable cause to believe Salem did not act in self-defense in shooting Sam—the governing legal standard. See *State v. Hardy*, 305 Kan. 1001, 1011, 390 P.3d 30 (2017). The district court, therefore, denied the motion. Salem says the State failed to clear that evidentiary threshold.

We needn't go through the evidence presented at the hearing because any possible error in denying the motion is harmless in light of the primary purpose of the statutory immunity and the jury's verdict that necessarily discounted Salem's self-defense evidence as insufficient to create a reasonable doubt as to her culpability in killing Sam. Under K.S.A. 2018 Supp. 21-5231(a), a person acting in self-defense has immunity from "criminal prosecution" defined as "arrest, detention in custody[,] and charging or prosecution." As the *Hardy* court explained, the immunity centers on "arrest and prosecution," so its protection "is effectively lost if a case is erroneously permitted to go to trial." 305 Kan. at 1009. That assessment of the scope of immunity squares with the statutory language; the statute conspicuously omits immunity from conviction or punishment as an objective. Salem lost the procedural shield self-defense immunity is intended to afford when she went to trial.

At trial, Salem relied in no small part on self-defense. We may assume Salem presented her best evidence for self-defense during the trial through her own testimony, the testimony of other witnesses, and cross-examination of the State's witnesses. The district court instructed the jury on self-defense. Although Salem has challenged the adequacy of other jury instructions on appeal, she does not dispute the propriety of the self-defense instructions.

The jurors, therefore, heard the evidence and were correctly informed of the law governing self-defense. They, nonetheless, convicted Salem. In doing so, they necessarily concluded the self-defense evidence failed to create a reasonable doubt as to Salem's guilt of a criminal homicide. See K.S.A. 2018 Supp. 21-5108(c) (State has burden to disprove affirmative defense beyond a reasonable doubt); *State v. Johnson*, 258 Kan. 61, 66, 899 P.2d 1050 (1995) (trier-of-fact should return not guilty verdict if self-defense evidence creates reasonable doubt as to defendant's guilt). That standard is more favorable to Salem than the standard the district court applied in the immunity hearing. Any error in assessing the hearing evidence would not have affected the outcome of the trial, so Salem

suffered no legal prejudice or harm during the trial as a result of the district court's ruling on her motion.

Our conclusion is fully consistent with the harmless error analysis the court applied in *State v. Ultreras*, 296 Kan. 828, 845-46, 295 P.3d 1020 (2013). There, the district court imposed too stringent a burden on Ultreras in denying his pretrial motion for self-defense immunity by requiring him to prove the claim by a preponderance of the evidence rather than requiring the State to establish probable cause to believe he did not act in self-defense. The error functionally required too much evidence favoring self-defense immunity. Here, if there were error in the district court's ruling denying Salem's motion, it was of the same general character and had the same effect: Salem was required to stand trial even though the hearing evidence actually may have supported the motion. In other words, according to Salem, the district court, in considering the motion, required more evidence than necessary favoring her.

Faced with the same sort of error in *Ultreras*, the court found it to be harmless precisely because a jury had considered and rejected Ultreras' self-defense theory (and the supporting evidence) at trial. The court saw no reason to remand the case for the district court to reconsider the motion for self-defense immunity given a jury verdict adverse to Ultreras that rested on a more deferential treatment of the evidence than the district court correctly would have applied in deciding the motion. 296 Kan. at 845-46. We are in the same posture here, and we come to the same conclusion. Salem has not been deprived of any right protected in the self-defense immunity statute.

Salem suggests the evidence at the self-defense hearing was more favorable to her than the evidence presented during the jury trial. But Salem would have had the opportunity to present the same favorable evidence to the jury. Salem doesn't catalogue how the evidence differed. If a witness who testified at the hearing were unavailable to testify at trial, Salem could have read the hearing transcript to the jury as evidence. See

K.S.A. 60-460(c)(2)(B). If a witness testified less favorably to Salem at trial than he or she did at the self-defense hearing, Salem could have offered otherwise relevant hearing testimony of that witness as substantive evidence—not just impeachment evidence—at the trial. See K.S.A. 60-460(a).[1]

[1]Under K.S.A. 60-460(c)(2)(B), a party may admit otherwise relevant testimony that an unavailable witness gave at "a preliminary hearing or former trial in the same action" if the adverse party had the same opportunity and incentive to challenge the testimony in the earlier proceeding. That hearsay exception would apply, since the State would have had the same interest in defusing Salem's self-defense evidence at the immunity hearing as it did at trial. And the immunity hearing qualified as a preliminary hearing in the same criminal prosecution. The phrase "preliminary hearing" used in the hearsay statute generically refers to a hearing held before trial and, thus, would include preliminary examinations under K.S.A. 22-2902, which are commonly (if imprecisely) referred to as preliminary hearings, and motions to suppress under K.S.A. 22-3215 and K.S.A. 22-3216. Under K.S.A. 60-460(a), a party may admit as substantive evidence the out-of-court statements of a person testifying at trial or available to testify.

In short, Salem had the means to present favorable testimony from the immunity hearing during her jury trial if there were discrepancies with or omissions from the trial evidence. But Salem hasn't shown any actual deviations, and the mere suggestion of them lacks traction in her effort to win a new trial or to secure self-defense immunity. We find no reversible error in the district court's pretrial denial of self-defense immunity.

## II. JURY INSTRUCTIONS

Salem asserts three errors in the jury instructions: (1) the failure to instruct on reckless involuntary manslaughter; (2) the failure to instruct on imperfect self-defense involuntary manslaughter; and (3) the failure to require the jurors to simultaneously consider intentional second-degree murder, the charged offense, with voluntary manslaughter based on heat of passion, a lesser degree of criminal homicide. As we have indicated, the district court deprived Salem of a fair trial by omitting an instruction on imperfect self-defense involuntary manslaughter.

Before we take up each of those points, we mention the brevity and informality of the instruction conference. The discussion at the conference did not offer much guidance to us on appeal in sorting out the parties' positions or the district court's ultimate determinations on how it shaped the final instructions, especially in contrast to the proposed instructions each side submitted. We presume the lawyers and the district court had some preliminary discussions about the instructions off the record. And that's certainly acceptable. We don't want to be understood to say that everything discussed in working through jury instruction issues needs to be part of the record. At the same time, however, the formal conference should in some systematic way memorialize any and all objections to the instructions the district court intends to give the jury and requests for proposed instructions the district court has declined to give. We expect the district court to offer some on-the-record explanation of its resolution of the disputes about the instructions. The record here falls short of that goal and leaves us with a bit of a guessing game as to why the final instructions looked the way they did.

In assessing an appellate challenge to the failure to give a particular jury instruction, we consider a set of serial considerations: (1) reviewability based on preservation of the point at trial and jurisdiction; (2) legal appropriateness of the instruction; (3) factual support in the evidence for the instruction; and (4) harmlessness of any actual error. *State v. Blansett*, 309 Kan. 401, 408, 435 P.3d 1136 (2019); *State v. Brown*, 300 Kan. 542, 554-55, 331 P.3d 781 (2014); *State v. Plummer*, 295 Kan. 156, Syl. ¶ 1, 283 P.3d 202 (2012). Some iterations collapse the second and third criteria into a single measure encompassing both legal and factual sufficiency. See *State v. McLinn*, 307 Kan. 307, 317-18, 409 P.3d 1 (2018). A district court is statutorily required to instruct on any lesser included offenses supported in the evidence even in the absence of a request from either the State or the defendant. K.S.A. 22-3414(3). Those principles apply to Salem's first two instructional issues.

### *A. Failure to Instruct on Reckless Involuntary Manslaughter*

On appeal, Salem contends the district court should have instructed the jury on reckless involuntary manslaughter. In K.S.A. 2018 Supp. 21-5405, the Legislature criminalized various and somewhat disparate forms of homicide under the umbrella of involuntary manslaughter. The statute, thus, criminalizes the killing of a person "committed . . . [r]ecklessly." K.S.A. 2018 Supp. 21-5405(a)(1). The Legislature has defined "reckless" and "recklessly" as marking the criminally culpable mental state when a defendant "consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow." K.S.A. 2018 Supp. 21-5202(j). In turn, conscious disregard entails "a gross deviation" from the standard of care a reasonable person would consider appropriate under the circumstances. K.S.A. 2018 Supp. 21-5202(j). A reckless involuntary manslaughter entails a death resulting from the defendant's exceptional carelessness or indifference rather than from actions the defendant undertakes either knowing that another person is reasonably certain to die or intending to kill another person.

#### *A.1. Preservation*

We first look at preservation of the issue for appellate review. Salem did not include an instruction on reckless involuntary manslaughter among those she formally submitted in writing to the district court. She did include an instruction on imperfect self-defense involuntary manslaughter. The State did not submit an instruction on any form of involuntary manslaughter.

During the instruction conference, the district court recognized involuntary manslaughter to be a point of contention and invited the prosecutor to open the discussion. Unfortunately, as the State concedes on appeal, the prosecutor cited *State v. Bailey*, 263 Kan. 685, 690-91, 952 P.2d 1289 (1998), for the proposition that deliberately

discharging a handgun is an intentional act inconsistent with involuntary manslaughter as a reckless homicide. The *Bailey* case at least loosely supports that principle. But when *Bailey* was decided, the involuntary manslaughter statute criminalized only *unintentional* killings. In the 2011 recodification of the Kansas Criminal Code governing here, the Legislature removed that limitation, so involuntary manslaughter now applies to any killing otherwise coming within one of the statutory subsections of K.S.A. 2018 Supp. 21-5404(a). The killing need not be unintentional. The change in the statutory definition of involuntary manslaughter renders *Bailey* inapposite.

In addition, the undisputed facts in *Bailey* showed that Bailey deliberately aimed a handgun at the victim and pulled the trigger. The bullet struck the victim in the head, inflicting a fatal injury. Bailey claimed he didn't intend to kill the victim. On appeal, the court rejected the idea that a killing under those circumstances could be legally treated as unintentional or reckless. 263 Kan. at 690-91. In a later case, however, the court recognized that the focus should not be on whether the act itself was intentional or reckless but on whether the defendant intended to kill the victim or merely to injure or scare the victim. *State v. McCullough*, 293 Kan. 970, 978-80, 270 P.3d 1142 (2012). If the means the defendant chose to injure or scare the victim were reckless in the sense that a death might be reasonably foreseeable, then the defendant could be guilty of reckless manslaughter.

In short, the prosecutor here launched a legally flawed argument to oppose any instruction on involuntary manslaughter. In response, Salem's lawyer didn't discuss her actual request for an instruction on imperfect self-defense involuntary manslaughter. Nor did she make a clear oral request for an instruction on reckless involuntary manslaughter. Instead, she asserted Salem had testified she didn't intend to fire the handgun, suggesting Sam's death was the result of a reckless or careless discharge of the weapon.

Reading the transcript of the hearing, we are left with the distinct impression the prosecutor and Salem's lawyer were talking past each other, leaving the district court adrift. Given the limited record on the jury instructions, we do not believe Salem sought an instruction on reckless involuntary manslaughter and, therefore, did not preserve the issue. Lack of preservation, however, doesn't preclude appellate review; it requires Salem to show the failure to give the instruction amounted to clear error. K.S.A. 22-3414(3); *State v. Thurber*, 308 Kan. 140, 198, 420 P.3d 389 (2018). To find clear error, an appellate court must be firmly "convinced that the jury would have reached a different verdict" had the omitted instruction been given. *State v. Pulliam*, 308 Kan. 1354, 1369, 430 P.3d 39 (2018); see *State v. Williams*, 295 Kan. 506, 516, 286 P.3d 195 (2012) (recognizing standard for clear instructional error).

#### A.2. *Legal and Factual Appropriateness*

Reckless involuntary manslaughter is a lesser degree of criminal homicide than intentional second-degree murder. See *State v. Seba*, 305 Kan. 185, 203, 380 P.3d 209 (2016). So a jury instruction on it would have been legally appropriate.

Factual appropriateness presents a close question given the trial evidence. Salem testified she confronted Sam with the pistol to scare him and fired it with her eyes closed. But that testimony was little more than a passing description in Salem's lengthy and somewhat disjointed account of the shooting. She frequently prefaced her answers by saying she did not particularly remember what happened. For example, Salem first testified she did not aim the gun at Sam. Her lawyer then asked, "Did you aim at all?" She answered, "I'm not—I don't know."

A defendant's account of the relevant events may be factually sufficient to warrant an instruction on a lesser offense, so long as the description is not utterly implausible under the circumstances. Typically, the district court must credit the defendant's version

in considering jury instructions even if other witnesses directly contradict or impeach that version because the conflict reflects precisely the sort of credibility determination entrusted to juries. If, however, the defendant's testimony bears on his or her own subjective intent or state of mind, the district court may decline to instruct on a lesser offense in the face of overwhelming contrary evidence. See 305 Kan. at 204-05.

Salem's account of the shooting pertinent to reckless self-defense entails depictions of both external events and internal state of mind, straddling the rule outlined in *Seba*. There were only two witnesses to the fatal shooting—one of whom was Sam, and he could not offer a contradictory version of the events. We simply assume for purposes of the appeal that Salem's testimony was factually sufficient to warrant an instruction on reckless involuntary manslaughter. And we, therefore, assume without deciding that the district court erred in failing to give the instruction.

### *A.3. Legal Effect of Any Error*

Because Salem did not request an instruction on reckless involuntary manslaughter she must show the district court's failure amounted to clear error. In light of the totality of the evidence, she cannot meet that high standard. The great weight of the evidence cannot be reconciled with recklessness, including other aspects of Salem's own testimony and her actions and statements contemporaneous with the shooting. For example:

- Salem testified Sam had physically abused her multiple times. Some witnesses corroborated seeing Salem with a black eye or other physical injuries. Other witnesses had seen Sam with cuts and bruises at various times that he implied Salem had given him. Two witnesses testified to seeing Sam hit Salem; each of them described a separate incident. Lowe testified that Sam had Salem in a headlock in the bedroom and she was struggling to free herself just a few minutes before the shooting. That sort of history

offers circumstantial evidence Salem feared for her safety and, thus, would have acted deliberately rather than recklessly in shooting Sam.

- Salem testified she got the pistol out of a lockbox shortly after coming out of the bedroom. There was conflicting evidence about whether the gun was already loaded or who loaded it that evening. According to Braden, Salem told her mother to take him out of the house because she was going to kill Sam. Lowe did not corroborate Braden's recollection in that respect, and Salem's mother did not testify at trial. The evidence, however, showed Salem deliberately armed herself and returned to the bedroom where Sam was.

- Salem testified that when she returned to the bedroom with the pistol, Sam lunged at her from the bed. She then fired the pistol. Lowe testified that he heard Salem tell Sam to leave the house to which Sam replied with a laugh. Lowe said he heard the shuffling of feet in the bedroom, consistent with movement, immediately followed by a single gunshot. The forensic evidence was consistent with Sam sitting on the bed or beginning to rise from a seated position when he was shot. The evidence indicated he was within 2 feet of the muzzle of the gun when he was shot. Those circumstances are consistent with Salem deliberately shooting the pistol at Sam rather than recklessly firing a shot or accidentally discharging the pistol.

- Salem testified she was afraid for her life when she fired the pistol. But she also told the jurors she only wanted to scare Sam and had earlier explained that the gun simply "went off," suggesting something less than a volitional act. She also told the jury she wasn't sure about what happened and didn't recall parts of the shooting and the surrounding events. Those discordant descriptions coupled with a concededly inexact recall of critical circumstances undercut Salem's credibility and could leave a jury doubting her version of what happened and why. See *State v. Franco*, 49 Kan. App. 2d

924, 936, 319 P.3d 551 (2014) (jury could find defendant not credible because he gave conflicting accounts of key circumstances).

- Immediately after the shooting, Salem went out on the porch of the house and, according to Braden, was shouting, "I killed him. I killed him." The first law enforcement officer to arrive at the house testified that an agitated Salem ran up to him and repeated two or three times, "I shot him." Those exclamations, which Salem never disputed, also suggest a deliberate shooting rather than a reckless one. Had Salem recklessly or accidentally fired the pistol, we (and more particularly the jurors) fairly could have expected that to be reflected in her excited description of what happened. That is, Salem would have said something to the effect of "I shot him; but I didn't mean to!" or "I only meant to scare him!" or "The gun just went off!"

The law, of course, gives particular resonance to utterances a person makes in the stressful grip of having just perceived an especially intense event. See K.S.A. 60-460(d)(2) (excited utterance excepted from general exclusion of hearsay evidence). Whether the declarant witnessed or participated in the event, the extreme and immediate emotional stress is considered a condition inhibiting deliberate falsification because it overrides a person's cognitive ability to think through what happened and to shade the description or to outright prevaricate. So otherwise relevant excited utterances may be considered candid and admissible even though the declarant never testifies and, thus, neither takes an oath to tell the truth nor submits to cross-examination. See *State v. Brown*, 285 Kan. 261, 295, 173 P.3d 612 (2007), *questioned on other grounds by State v. Williams*, 306 Kan. 175, 197, 392 P.3d 1267 (2017); *United States v. Davis*, 577 F.3d 660, 668-69 (6th Cir. 2009). Those same considerations lend credibility to Salem's exclamatory descriptions immediately after the shooting.

Given the skimpy evidence suggesting Salem recklessly shot Sam and the substantial countervailing evidence, we have little reason to think, let alone a firm

conviction, that the jurors would have come to a different result had they been instructed on reckless involuntary manslaughter. If the district court erred in failing to so instruct the jury, the error was harmless.

### *B. Failure to Instruct on Imperfect Self-Defense Involuntary Manslaughter*

Salem contends the district court erred in failing to instruct the jury on imperfect self-defense, another form of involuntary manslaughter, as a lesser form of second-degree murder. Because Salem specifically sought a jury instruction on this lesser offense, we review the district court's refusal under a more searching standard than we applied to the omission of an instruction on reckless involuntary manslaughter. We ask whether "there is a 'reasonable probability that the error . . . did affect the outcome of the trial in light of the entire record.'" *Plummer*, 295 Kan. at 168 (quoting *State v. Ward*, 292 Kan. 541, 569, 256 P.3d 801 [2011]); see *State v. Salary*, 301 Kan. 586, 599, 343 P.3d 1165 (2015) (clarifying that *Ward* standard for nonconstitutional error governs district court's failure to give requested jury instruction on lesser included offense). As the party benefiting from the error, the State has the burden to demonstrate there was no such probability. *McCullough*, 293 Kan. 970, Syl. ¶ 9. As we explain, under that standard, the district court's error cannot be dismissed as harmless.

#### *B.1. Preservation*

Salem included an instruction on imperfect self-defense involuntary manslaughter in the packet she submitted to the district court. Although that alone doesn't preserve the district court's refusal to give an instruction for anything other than clear error review, Salem did more here. See *State v. Brammer*, 301 Kan. 333, 341, 343 P.3d 75 (2015) (merely submitting proposed written instruction insufficient to make and preserve objection to district court's failure to give instruction). During the instruction conference, the district court raised involuntary manslaughter as a point of contention. The prosecutor

argued, albeit misguidedly, against any instruction on involuntary manslaughter. Salem's lawyer offered a rejoinder, though unfocused, for an instruction. The give and take may have been less than fully illuminating, but Salem's lawyer continued to press her request and, thus, preserved the issue for appellate review.

### *B.2. Legal Appropriateness*

Imperfect self-defense involuntary manslaughter is a crime and constitutes a lesser degree of homicide than intentional second-degree murder. *Pulliam*, 308 Kan. at 1362. Under K.S.A. 2018 Supp. 21-5405(a)(4), involuntary manslaughter includes "the killing of a human being . . . during the commission of a lawful act in an unlawful manner." In *Pulliam*, the court recognized that form of involuntary manslaughter covers imperfect self-defense in certain circumstances. 308 Kan. at 1363. If a person is lawfully justified in using force to defend himself or herself against an attack but resorts to excessive force resulting in the death of the attacker, that person would be guilty of involuntary manslaughter. 308 Kan. at 1363 (K.S.A. 2017 Supp. 21-5405[a][4] criminalizes lawful self-defense in which excessive force deployed). The court pointed out, as we have mentioned, the involuntary manslaughter statute is no longer confined to unintentional killings and may apply to some intentional homicides. An instruction on imperfect self-defense involuntary manslaughter was legally appropriate.

### *B.3. Factual Appropriateness*

Turning to factual appropriateness, we first look at self-defense as it has been codified, since that provides the yardstick with which to measure Salem's actions. Kansas law permits a person to act in self-defense to repel a physical attack with a commensurate degree of force. Under K.S.A. 2018 Supp. 21-5222(b), a person has a right to use "deadly force" to defend himself or herself against the infliction of "imminent death or great bodily harm." Deadly force as a means of self-defense is that degree of force "likely to

cause death or great bodily harm" to the aggressor and necessarily permits deployment of handguns, knives, or other lethal weapons. K.S.A. 2018 Supp. 21-5221(a)(2). In the face of a threat of less than death or great bodily harm, a person may defend himself or herself with what might be characterized as ordinary force. That degree of permissible force entails threats to use force, including deadly force; "display" of a weapon or other "means of force"; and "the application of" less than deadly force. See K.S.A. 2018 Supp. 21-5221(a).

To act in self-defense, a person must "reasonably believe" both a physical threat exists and the degree of force he or she uses in response to be necessary under the circumstances. K.S.A. 2018 Supp. 21-5222. The required statutory belief has subjective and objective components, meaning, first, the person must honestly believe he or she is in immediate danger necessitating the use of that degree of force against an aggressor (subjective belief) and, second, an objectively reasonable person would also view the circumstances that way (objective belief). See *Salary*, 301 Kan. at 593-94; *State v. Andrew*, 301 Kan. 36, 45, 340 P.3d 476 (2014).

The divide between the permissible use of deadly force rather than ordinary force is less than clear, especially when the perceived threat involves the infliction of great bodily harm rather than death. The self-defense statutes do not define great bodily harm. The appellate courts have never tried to formulate a rigorous predictive test and treat the existence of "great bodily harm" as a fact question for jurors to answer based on the circumstances in a given case. See *State v. Cooper*, 303 Kan. 764, 770-71, 366 P.3d 232 (2016) (reiterating great bodily harm presents factual issue for jury and disapproving "matter of law" determinations); *State v. Simmons*, 45 Kan. App. 2d 491, 500-04, 249 P.3d 15 (2011) (detailed discussion of law regarding "bodily harm" and "great bodily harm" for purposes of criminal battery), *aff'd* 295 Kan. 171, 283 P.3d 212 (2012); see also *State v. Kelly*, 262 Kan. 755, Syl. ¶ 2, 942 P.2d 579 (1997) (great bodily harm must

be distinguished from "slight . . . or moderate harm" and requires more than "mere bruises").

Although the caselaw has largely dealt with battery prosecutions where the infliction of great bodily harm on the victim is punished more severely than the infliction of bodily harm, we presume the same principles come into play in assessing an objectively reasonable threat of great bodily harm for purposes of self-defense. See *State ex rel. Brant v. Bank of America*, 272 Kan. 182, 188, 31 P.3d 952 (2001) ("Ordinarily . . . identical words or terms used in different statutes on a specific subject are interpreted to have the same meaning absent anything in the context to suggest that a different meaning was intended."). As a result, district courts should afford jurors tremendous latitude to determine whether a criminal defendant claiming self-defense faced an objectively reasonable threat of great bodily harm warranting the use of deadly force in response. In turn, those courts must carefully weigh giving an instruction on imperfect self-defense involuntary manslaughter as a lesser degree of homicide when a defendant relies on self-defense. The jurors could well find the threat did not reasonably entail great bodily harm justifying the use of deadly force even though ordinary force would have been legally justified, thereby negating outright self-defense but supporting imperfect self-defense involuntary manslaughter.

The *Pulliam* decision opens up several scenarios in which imperfect self-defense involuntary manslaughter could be a factually appropriate lesser degree of homicide. For example, consistent with *Pulliam*, a person who reasonably perceives a physical threat as permitting the lawful use of ordinary force but responds with deadly force could be found guilty of imperfect self-defense involuntary manslaughter. As the court explained, the crime includes the "lawful exercise of self-defense, but with excessive force." *Pulliam*, 308 Kan. at 1363 (quoting *McCullough*, 293 Kan. at 976). In that situation, self-defense would be legally proper, although deadly force would not. Similarly, imperfect self-defense involuntary manslaughter would seem to be applicable under *Pulliam* if the

circumstances objectively permitted a person to use ordinary force in self-defense but the person subjectively believed deadly force was required and acted on that belief. As we discuss, the evidence here, viewed favorably to Salem, presents a comparable scenario. *Seba*, 305 Kan. at 204 (district court typically should instruct on lesser offense if "'some evidence'" taken favorably to defendant would support conviction).

The *Pulliam* court also noted that the defendant in that case was legally entitled to instructions on both voluntary manslaughter imperfect self-defense and imperfect self-defense involuntary manslaughter as lesser degrees of intentional second-degree murder. 308 Kan. at 1369. Salem made that dual request, although she has not appealed the district court's failure to give an instruction on voluntary manslaughter imperfect self-defense. Those considerations drive our analysis here.[2]

[2]The *Pulliam* decision did not explain how voluntary manslaughter imperfect self-defense should be meshed or reconciled with imperfect self-defense involuntary manslaughter. Voluntary manslaughter, as defined in K.S.A. 2018 Supp. 21-5404(a)(2), seems to overlap with involuntary manslaughter under K.S.A. 2018 Supp. 21-5405(a)(4) as construed in *Pulliam*. We do not see that the issues on appeal here require us to explore how the two forms of imperfect self-defense interrelate or to forge some reconciliation of them. Superficially, at least, they do not fit together seamlessly. For example, a person who intended to kill an aggressor as a means of self-defense but acts unreasonably using deadly force rather than ordinary force presumably would be guilty of involuntary manslaughter, consistent with *Pulliam*. But a person in essentially the same predicament who knowingly killed the aggressor would be guilty of voluntary manslaughter, a more severe crime, even though acting knowingly is a less culpable mental state than acting intentionally.

Reviewing the trial evidence favorably to Salem, she and Sam had been drinking, likely heavily, during the evening leading up to the shooting. When they returned home from the cookout, Sam physically assaulted Salem. She testified he slapped her at least once in the kitchen, and Lowe testified he attacked her in the bedroom. Sam and Salem had a history of domestic violence. Sam had struck Salem on numerous occasions, blackening her eye at least once and inflicting other injuries that she described at trial. He

was physically imposing. But the evidence also indicated Salem had sometimes hit and scratched Sam.

After the bedroom assault, Salem got a pistol she kept in a lockbox and went back into the bedroom. She told Sam to leave, and he responded by laughing. Sam then lunged at her, and she fired the pistol once. Immediately afterward, Salem almost hysterically acknowledged having shot Sam. At trial, Salem testified she feared for her safety.

There was, of course, other evidence, less favorable to Salem. But, as we discuss, that evidence essentially created conflicts for the jury to resolve rather than rendering the favorable evidence inherently unreliable.

The evidence reasonably could support a jury verdict for imperfect self-defense involuntary manslaughter. Salem testified she feared Sam would hurt her. If believed, that testimony satisfied the subjective component for self-defense. Sam's assault of Salem that evening coupled with their history of domestic violence supports the objective component for some form of self-defense. In other words, the jury could find that a reasonable person in Salem's position would have believed she needed to defend herself. So a favorable take on the evidence suggests Salem was justified in acting in self-defense. That sufficiently supports one component of imperfect self-defense involuntary manslaughter under K.S.A. 2018 Supp. 21-5405(a)(4)—a lawful act.

The other component requires that Salem should have undertaken the lawful act (here, self-defense) in an unlawful manner. The way in which Salem defended herself bears on that component and whether she unlawfully used deadly force. Arming herself and brandishing or displaying the handgun did not constitute deadly force. Actually pointing the gun at Sam probably did not, either. Deliberately shooting Sam would have. If Salem reasonably believed Sam intended to kill her or inflict great bodily harm on her,

she would have been lawfully entitled to use deadly force.[3]

[3]Salem has never sought to justify the shooting as the defense of a third person or as an effort to get Sam out of the house after he refused to leave. Because they were divorced, Sam had no lawful right to be in the house apart from Salem's invitation, which the evidence suggests she revoked after they returned from the cookout. Deadly force may be used to defend a third person against an aggressor's attack likely to cause death or great bodily harm. K.S.A. 2018 Supp. 21-5222. Salem developed no evidence along that line. The self-defense statutes probably do not permit deadly force to evict someone who has lawfully entered a dwelling but has remained there unlawfully. Reasonable force may be used to prevent an otherwise unlawful attempt to enter or to attack a dwelling. See K.S.A. 2018 Supp. 21-5223.

Salem has not argued that she believed Sam intended to kill her. Nor does anything in the evidence suggest he harbored such an intent. Nobody testified he threatened to kill Salem. And everybody agrees Sam did not have a weapon the evening he was shot. Although his conduct toward Salem was aggressive and abusive, it was not homicidal.

Salem still would have been legally justified in shooting Sam—applying deadly force—if she reasonably believed he intended to inflict great bodily harm on her. She would have been acting in self-defense, and the shooting would have been legally justified. *State v. Waller*, 299 Kan. 707, 720-21, 328 P.3d 1111 (2014) (self-defense is based on justification or excuse for conduct and is applicable to crimes involving the use of force). But if Salem thought Sam might again hit her without inflicting great bodily harm or a reasonable person in her position would have thought so, she did not have a lawful right to use deadly force to defend herself. In that circumstance, shooting Sam would have amounted to excessive force and, therefore, would have been unlawful. That would satisfy the second component of imperfect self-defense involuntary manslaughter—acting in an unlawful manner while doing an otherwise lawful thing. The evidence viewed in Salem's favor matches up with the description of imperfect self-defense involuntary manslaughter in *Pulliam*.

A jury could find Sam neither created nor posed a threat to inflict great bodily harm on Salem. In part, that's because great bodily harm is an especially elastic concept under Kansas law. So what rises to that level isn't always obvious. The evidence doesn't particularly show that Sam planned to severely beat Salem that evening any more than he intended to kill her. Based on descriptions of the earlier physical altercations the two had, the jury could have concluded those episodes did not result in great bodily harm to Salem, and, in turn, she would have had no reason to believe Sam planned to act differently that evening after the cookout. But some of what she recounted as past abuse was cruel—ripping out clumps of her hair—or potentially life threatening—squeezing her throat. Physical abuse like that arguably falls in a vast gray area in Kansas law that encompasses conduct a jury could find to be great bodily harm but which is not conclusively so. See *Simmons*, 295 Kan. at 177 ("We have repeatedly held that establishing the difference between harm and great bodily harm is a decision for the jury."); *State v. Frazier*, No. 112,368, 2016 WL 1545628, at \*15 (Kan. App. 2016) (unpublished opinion) (Atcheson, J., dissenting) (noting "immense gray area" between what law considers merely bodily harm and conclusively treats as great bodily harm). Salem, therefore, would have been legally justified in resisting with ordinary force but not necessarily deadly force when she re-entered the bedroom armed with the pistol. In sum, there was sufficient play in the evidence to factually support an instruction on imperfect self-defense involuntary manslaughter.[4]

[4]Our discussion should not be understood as minimizing or condoning domestic violence. We have simply endeavored to explain how self-defense law and, in particular, the use of deadly force, applies in responding to varying levels of physical aggression. One domestic partner's battery of the other is inexcusable and constitutes a crime. See K.S.A. 2018 Supp. 21-5414. Similarly, the infliction of great bodily harm on another person, regardless of any marital or familial relationship, is a felony. See K.S.A. 2018 Supp. 21-5413(b)(1)(A), (b)(2)(A), (g)(2)(A), (g)(2)(C).

The district court, therefore, erred in failing to give the jury an instruction on imperfect self-defense involuntary manslaughter.

### *B.3. Legal Effect of Any Error*

In the final step of our analytical progression, the State has the burden to show the failure to instruct the jury on imperfect self-defense involuntary manslaughter had no reasonable probability of affecting the outcome of the trial in light of all of the admissible evidence. The task is a difficult one for the State, given the highly conflicting testimony the jury heard.

Braden, who was almost nine years old at the time of the shooting, offered incriminating accounts of Salem's behavior leading up to Sam's death in two tape recorded interviews with law enforcement officers and his trial testimony. The recorded interviews were played for the jury.

In the first interview, four days after the shooting, Braden described Sam coming into the living room where Salem confronted him and twice attempted to fire the handgun, only to have it jam. According to Braden, Salem told Sam something like, "I could have killed you twice, but it won't shoot." He did not, however, testify to that statement at trial. In the second interview, about two months after the shooting, Braden recalled Salem telling her mother to leave the house with him because she intended to kill Sam. Braden did testify to that statement at trial. But he never mentioned it in the first interview. Law enforcement officers interviewed Braden both times in the presence of his paternal grandparents at their home, where he was living after the shooting. At trial, Braden acknowledged he was "angry" with Salem because "[s]he shot my dad." Braden's recollections weigh against self-defense and support the State's theory of a legally unjustified killing.

But Lowe did not corroborate the statements Braden attributed to Salem. Lowe testified he told Braden and Salem's mother to leave, and they went with a neighbor who had come over from his house across the street. The neighbor, however, testified that he went to Salem's house only after Braden and Salem's mother arrived at his door. The neighbor said he was still on the porch of Salem's house when he heard the gunshot. During her testimony, Salem first denied she told her mother and Braden to leave the house and later agreed she had done so because she figured somebody might call the police.

Lowe testified that Sam never came out of the bedroom after Salem got the pistol out of the lockbox. Lowe and Braden differed on other points. Braden testified that Lowe initially got the pistol and gave it to Salem. Lowe and Salem both testified she retrieved the gun from the lockbox.

Those narratives of the shooting and the surrounding events are jumbled and contradictory on key points. The contradictions cannot be easily reconciled simply as the product of poor memories. We, of course, can't be sure how the jurors went about making credibility determinations and otherwise resolved those contradictions during their deliberations.

By all accounts, however, Salem went back into the bedroom with the pistol and confronted Sam. Her conduct wasn't wholly consistent with self-defense and could be characterized as aggressive. But Lowe testified Salem told Sam to leave and he refused. And Salem testified that she repeatedly asked Sam to leave that evening. Those requests or demands arguably support the idea Salem was trying to avert any further physical abuse from Sam and went into the bedroom for that reason. Salem never offered a specific explanation at trial for why she returned to the bedroom with the pistol. We again have a mixed bag for the jurors to sort out.

The limited forensic evidence doesn't lend much clarity. The pathologist who performed the autopsy on Sam concluded the muzzle of the pistol was about 2 feet away from him when Salem fired. He also determined the angle of the bullet as it passed through Sam's body. Using that information, the layout of the bedroom, the final location of the bullet, and other data points, a crime scene investigator with the Kansas Bureau of Investigation prepared a computer-aided reconstruction of the shooting. The reconstruction indicated Sam was sitting on the bed and Salem was standing at the foot of the bed just inside the doorway. The reconstruction put the two in close proximity and didn't refute that Sam had at least begun to rise and move toward Salem.

Human endeavors are often messy, perhaps no more so than when they turn violent and people wind up seriously injured or dead. The recollections of the participants and witnesses may be confused or confounded by the emotional impact of those sorts of events. And the accounts sometimes may also be deliberately or unconsciously shaped by self-interest. The killing of Sam and the surrounding events are extraordinarily messy in that way. In the judicial process, we hand juries the task of cleaning up those messes by weighing evidence, evaluating credibility, and finding facts. But juries then must be fully instructed on the relevant law to know what to do with those facts.

Here, the conflicting evidence is such that reasonable jurors very well could have found the statutory components of imperfect self-defense involuntary manslaughter to have been established. That result was more than an abstract possibility; it was a realistic probability. So the district court's failure to instruct the jury on that offense may well have affected the outcome of the trial. More to the point, given the burden of persuasion, the State has not satisfactorily explained why the result would have been no different had the jury been instructed on imperfect self-defense involuntary manslaughter. As a result, Salem's conviction must be reversed, and she is entitled to a new trial.

#### B.4. *Skip Rule Inapplicable to Uphold Verdict*

On appeal, the State argues that the so-called skip rule demonstrates any error in failing to instruct the jury on imperfect self-defense involuntary manslaughter must be harmless because the jury was instructed on and rejected heat-of-passion voluntary manslaughter—a greater degree of homicide. But the argument misperceives the application of the skip rule. See *Plummer*, 295 Kan. 156, Syl. ¶ 5 (rule represents tool to demonstrate harmlessness in some circumstances). If the crime of conviction necessarily demonstrates the jury rejected an element of a lesser included offense on which it was instructed, then an appellate court may infer the jury similarly would have rejected a still lesser offense on which it was not instructed that requires the same element.

For example, if a jury convicts a defendant of severity level 4 aggravated battery requiring great bodily harm to the victim and rejects a lesser included offense of severity level 7 aggravated battery based on bodily harm to the victim done in a manner in which great bodily harm, death, or disfigurement could be inflicted, then an appellate court can conclude the jury found that degree of harm proved beyond a reasonable doubt even though the trial evidence may have been disputed. In turn, the court may infer that the failure to instruct the jury on simple battery must have been harmless because a conviction would have required the jury to find the victim suffered only bodily harm—a fact it clearly rejected. See *Simmons*, 295 Kan. at 179-80 (using aggravated battery to illustrate proper application of skip rule).

The rule, however, can't be invoked in this case, since it would require an inapplicable logical progression or deduction. Here, Salem was charged with intentional second-degree murder, and the district court instructed the jury on only voluntary manslaughter heat of passion as a lesser offense. Assuming the jury considered the voluntary manslaughter charge, it would have rejected the charge because the evidence failed to establish heat of passion. Nothing in the voluntary manslaughter charge required

the jury to consider imperfect self-defense. So we have no basis to deduce the jury would have rejected imperfect self-defense involuntary manslaughter, which has nothing to do with heat of passion, had that option been available. The skip rule, therefore, doesn't help the State in this case.

### *C. Consideration of Second-Degree Murder and Voluntary Manslaughter*

Salem argues that the district court erred in failing to instruct the jurors that they should have considered the lesser offense of voluntary manslaughter simultaneously with the principal charge of intentional second-degree murder. We may dispose of this point without extended discussion. In *State v. Sims*, 308 Kan. 1488, Syl. ¶ 2, 431 P.3d 288 (2018), the Kansas Supreme Court recently held that juries need not be instructed to consider varying degrees of criminal homicide simultaneously, abandoning what had been the rule with intentional second-degree murder and forms of voluntary manslaughter. In short, *Sims* disposes of this issue adversely to Salem.

Even before *Sims*, this court held that juries no longer should be instructed to consider intentional second-degree murder simultaneously with a lesser included offense of manslaughter and, instead, should consider them sequentially beginning with the murder charge. *State v. Younger*, No. 116,441, 2018 WL 911414, at \*19 (Kan. App.) (unpublished opinion), *rev. denied* 308 Kan. 1601 (2018); *State v. Brown*, No. 110,234, 2015 WL 3513997, at \*7 (Kan. App. 2015) (unpublished opinion). This court recognized that under the 2011 criminal code, intentional second-degree murder entails an "intentional" killing while voluntary manslaughter now entails a "knowing" killing in which the defendant has acted in the heat of passion or during sudden quarrel or in the honest but unreasonable belief he or she faced an imminent threat requiring deadly force in self-defense. Because the two crimes now have different mental states reflecting distinct degrees of culpability—intentional being more culpable or blameworthy than

knowing—a defendant is not legally disadvantaged if a jury considers the second-degree murder charge before considering the lesser offense of voluntary manslaughter.

Before 2011, voluntary manslaughter criminalized intentional killings mitigated by one of those additional circumstances—heat of passion, sudden quarrel, or imperfect self-defense. So the only difference between intentional second-degree murder and voluntary manslaughter was the existence of a mitigating factor. Given the elements of the crimes, the Kansas Supreme Court held that juries should be instructed to consider them simultaneously and, thus, to consider the evidence of any mitigation along with the elements of second-degree murder. See *State v. Graham*, 275 Kan. 831, Syl. ¶ 4, 69 P.3d 563 (2003), *overruled by Sims*, 308 Kan. 1488. Since 2011, however, the two crimes differ as to their culpable mental states. In *Younger* and *Brown*, this court acknowledged that asking juries to consider those charges simultaneously no longer served any legal purpose in light of that change and wasn't required. Given the material amendment to the statutory definition of voluntary manslaughter, *Graham* no longer constituted controlling authority. See *Younger*, 2018 WL 911414, at \*17; *Brown*, 2015 WL 3513997, at \*6-7. In *Sims*, the Kansas Supreme Court went further to categorically reject having juries simultaneously consider any degrees of criminal homicide as both legally unnecessary and unduly confusing. 308 Kan. at 1503.

## CONCLUSION

Making sense of the circumstances of Sam Salem's death at the hands of Misty Salem, his ex-wife, is no easy task. The accounts of those circumstances are in disarray. Motive and intent have been clouded in that confusion. We entrust jurors in criminal cases with the unenviable duty of sorting the accurate and the honest from the mistaken and the mendacious and, having done so, to render a just verdict. But the verdict can be no more just than the legal options the district court presents to the jurors for their consideration.

We are persuaded the jurors were deprived of an option supported in a reasonable reconciliation of those accounts of what happened leading up to the fatal shooting and the other relevant evidence presented at trial. The jurors should have been permitted to consider whether Misty Salem was guilty of imperfect self-defense involuntary manslaughter. The district court's omission of that option kept the jurors from fully and fairly completing their task. For that reason, Misty Salem must be given a new trial.

We have offered no suggestion or opinion on what result a jury should reach in this case. Nothing in our explanation of our determination should be taken that way. It is not our place to offer such advice. Nor do we have the tools to give sound advice on that score, since we never saw the witnesses as they testified and, therefore, cannot presume to assess their credibility. But it is our place to correct legal errors that materially compromise the trial process. We have found such an error here. Apart from correcting that error by ordering a new trial, we have no warrant to say how the case should now proceed or how that trial should be conducted.

Reversed and remanded for a new trial.