No. 22-125318

IN THE SUPREME COURT OF THE STATE OF KANSAS

STATE OF KANSAS

Plaintiff-Appellee

vs.

ZSHAVON MALIK DOTSON

Defendant-Appellant

SUPPLEMENTAL BRIEF OF APPELLEE

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

CLAIRE KEBODEAUX, #27913
Assistant District Attorney
Wyandotte County District Attorney's Office
710 N. 7th Street – Suite 10
Kansas City, KS. 66101
(913) 573-2851
(913) 573-2948 (Fax)
Email address: DAWyCoefiling@wycokck.org

Attorney for Appellee

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BRIEF OF APPELLEE

NATURE OF THE CASE

Dotson appeals his convictions for first-degree premeditated murder and level seven aggravated battery. This brief addresses the issues raised in Dotson's pro se supplemental brief.

STATEMENT OF THE ISSUES

ISSUE NO. 1: The Court did not err on the imperfect self-defense instruction.

ISSUE NO. 2: The Court did not err on the heat of passion instruction.

ISSUE NO. 3: The prosecutor did not violate the Defendant's rights.

ISSUE NO. 4: Dotson received effective assistance of counsel.

STATEMENT OF FACTS

In November of 2018, Carolyn Marks and her son R.J. Marks lived together in Kansas City, Kansas. (R. XIV, 263). On November 26th, 2018, Carolyn heard R.J. speaking to his friend Zshavon Dotson, who she called Vaughn, in her front room. (R. XIV, 270-272; 275). Dotson had stayed overnight on the 25th and had brought his personal items. (R. XIV, 276-278). Carolyn told Dotson he could not live with them. (R. XIV, 279). Dotson, who referred to Carolyn as Mama, looked upset when Carolyn told him that he could not live with them. (R. XIV, 279).

Carolyn went to lie down and came back out when she heard R.J. and Dotson arguing. (R. XIV, 283). Dotson was complaining that R.J. was never there for him as a friend. (R. XIV, 284). Dotson dove for a gun that was near R.J. (R. XIV, 283; 287). R.J. and Dotson began fighting and wrestling over the gun, and while they were both hanging on to the gun, Dotson was swinging R.J. around with the gun. (R. XIV, 289).

During this, Carolyn went to get her gun from under her bed. (R. XIV, 289-290). She came back out to the living room, yelling "stop, stop, stop" at the men, and shot a warning shot into the wall. (R. XIV, 290-291). After the shot, Dotson slammed R.J. into the wall. (R. VIX, 290-291). Dotson hit Carolyn in the forehead with the back end of the gun, and she fell, losing consciousness. (R. XIV, 292-296).

When she woke up, Dotson and R.J. were still fighting, but the fight had

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

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

Dotson was arrested in Texas the next day, with a 9-millimeter gun on him. (R. XIII, 194). It was Dotson, not the State, that entered this fact into evidence. (R. XIII, 194).

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

XV, 486). He testified he did not make the footprints in the snow. (R. XV, 491).

The court took up self-defense immunity at the close of evidence in trial and denied Dotson's motion. (R. XV, 514).

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

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

Trial counsel indicated he called and left messages for the potential witness Jasmine Harris, but also strategically, he "really didn't want to have [her] testify as she was a significant other of the deceased." (R. XX. 76-77). Trial counsel did not believe Miss Harris' statement was helpful and believed it bolstered the State's position. (R, XX, 80). He believed this because it would have corroborated Carolyn's testimony that Dotson was angrier than R.J. and would actually help the State with the initial aggressor theory. (R. XX, 81). Trial counsel testified his strategy was self-defense and to diminish R.J. and Carolyn's credibility. (R. XX, 97). He also wanted every version of Carolyn's statements to come in so he could point out discrepancies. (R. XX, 99-100). He asked the Detective about Dotson being arrested in Texas with a firearm, and his strategic reason was, first, to show Dotson could legally possess a firearm, and second, to show that the gun Dotson

had was not RJ or Carolyn's gun. (R. XX, 101-102). He also strategically wanted to be the one who brought up the gun instead of the State. (R. XX, 102). Trial counsel discussed his lengthy cross examination of Carolyn at trial and how his strategy of how to cross examine her changed in the middle of trial because of Carolyn's demeanor. (R. XX, 106-107).

Dotson timely appeals. (R. I, 250). Dotson filed a pro se additional brief.

ARGUMENTS AND AUTHORITIES

ISSUE NO. 1: The Court did not err on the imperfect self-defense instruction.

Standard of Review

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

Argument

During the jury instruction conference, the defense did not object to voluntary manslaughter, sudden quarrel. (R. XV, 516-517). The defense did not object to involuntary manslaughter. (R. XV, 517). The jury was instructed on imperfect self-defense. (R. XV, 529).

Dotson argues that he did not receive an imperfect self-defense instruction, but he clearly did. (R. XV, 529). Dotson cannot show error or prejudice.

Dotson briefly discusses that the Court should have given a "detailed" instruction but does not brief it. Due to this failure, his argument is forfeited. *State v. Arnett*, 307 Kan. 648, 650, 413 P.3d 787 (2018) ("An issue not briefed by an appellant is deemed waived and abandoned.").

ISSUE NO. 2: The Court did not err on a heat of passion instruction.

Standard of Review

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

Argument

"Kansas, along with most states, considers sudden quarrel to be one form of heat of passion." *State v. Johnson*, 290 Kan. 1038, 1048, 236 P.3d 517 (2010). "Sudden quarrel is one form of provocation for 'heat of passion' and is not separate and apart from 'heat of passion.' The provocation whether it be 'sudden quarrel' or some other form of provocation must be sufficient to cause an ordinary man to lose control of his actions and his reason." *State v. Coop*, 223 Kan. 302, 305-07,

573 P.2d 1017 (1978).

Dotson alleges no heat of passion instruction was given. But during the jury instruction conference, the defense did not object to voluntary manslaughter, sudden quarrel. (R. XV, 516-517). The jury was instructed on voluntary manslaughter, sudden quarrel. (R. XV, 528). Sudden quarrel is a more specific form of heat of passion. *Id.* Dotson cannot show error or prejudice.

Dotson cites zero law to make his point. He does not point to any fact establishing any other form of heat of passion applied. His argument must be deemed waived or abandoned. *State v. Arnett*, 307 Kan. 648, 650, 413 P.3d 787 (2018) ("An issue not briefed by an appellant is deemed waived and abandoned.").

ISSUE NO. 3: The prosecutor did not violate the Defendant's rights.

Standard of Review

"To determine whether prosecutorial error has occurred, this Court must decide whether the prosecutorial acts complained of fall outside the wide latitude afforded prosecutors to conduct the State's case and attempt to obtain a conviction in a manner that does not offend the defendant's constitutional right to a fair trial." *State v. Sherman*, 305 Kan. 88, 109, 378 P.3d 1060 (2016). If error is found, the appellate court must next determine whether the error prejudiced the defendant's due process rights to a fair trial. If this Court finds prosecutorial error, the State must demonstrate beyond a reasonable doubt that the error complained of will not or did not affect the outcome of the trial in light of the entire record, *i.e.*, where there is no reasonable possibility that the error contributed to the verdict. *Id.*

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

Argument: Magazine

Dotson complains that the prosecutor stated false evidence in the opening when he spoke about a magazine not being out of bullets. The part of the opening statement that the Dotson complains about was after the prosecutor said, "The evidence will show you, and we're going to ask you to return that verdict based on the fact that he locked down, he took aim, he fired, he paused, he fired and kept firing 'til he decided he was done." (R. XIII, 19-20). The prosecutor was using a rhetorical device to explain that Dotson did not stop shooting because the magazine ran out of bullets, Dotson did not stop shooting because someone got out of range, but stopped shooting because he decided to stop shooting. The prosecutor was not misstating the evidence, and this does not fall outside the wide latitude given to prosecutors.

Argument: Premeditation

Dotson complains that the prosecutor committed error by saying the word "just" when discussing premeditation in the latter half of the closing. The prosecutor did not commit error in the closing argument regarding premeditation. In closing, the State argued:

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

The jury was instructed on premeditation:

> "Premeditation means to have thought the matter over beforehand, in other words, to have formed the design or intent to kill before the act. Although there is no specific time period required for premeditation, the concept of premeditation requires more than the instantaneous, intentional act of taking another's life." (R. XV, 527).

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

In the first half of the closing, the prosecutor stated "I wish I could define for you what that instantaneous, what that amount of time is. I can't define that for you. That's up to you, but I can tell you that the State doesn't have to prove—I don't have to show you Vaughn's diary from the day before saying and I am going to kill R.J." (R. XV, 536-537). The part that Dotson complains about is a callback to that—the prosecutor explicitly telling the jury that they cannot define the amount of time.

In *State v. Hall*, 292 Kan. 841, 850-52, 257 P.3d 272 (2011), the prosecutor

argued that the defendant "form[ed] premeditation after the pull of the first trigger, because remember, he pulls four times." This Court found that to be error because it essentially suggested that premedication could have been formed in an instant. *Id.* The present case is distinguishable because the prosecutor is correctly stating Kansas law that premeditation is more than instantaneous. The prosecutor is not attempting to define a specific time period.

If this Court finds that it is error, any error was not prejudicial in light of the entire record. It was a brief mention, not repeated mentions of the word "just." There is no reasonable probability that the error contributed to the verdict because the jury was instructed on the correct definition of premeditation. (R. XV, 527). There is also no reasonable probability because the errors were brief. If this Court finds error, the Court should find beyond a reasonable doubt that any error did not contribute to the verdict.

ISSUE NO. 4: Dotson received effective assistance of counsel

The State is not sure that Dotson still wants to pursue this issue based on his comment in the Table of Contents. Even if he does, the State stands on its initial brief as it has already addressed these arguments.

CONCLUSION

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

Respectfully submitted,

MARK A. DUPREE SR.
Wyandotte County District Attorney
710 N. 7th Street – Suite 10
Kansas City, KS. 66101

/s/ Claire Kebodeaux
CLAIRE KEBODEAUX #27913
Assistant District Attorney
Wyandotte County District Attorney's Office
710 N. 7th Street – Suite 10
Kansas City, KS. 66101
(913) 573-2851
(913) 573-2948 (Fax)
Email address: DAWyCoefiling@wycokck.org

Kris W. Kobach
Attorney General
Memorial Hall Building
120 S.W. 10th Avenue - 2nd Floor
Topeka, KS. 66612

ATTORNEYS FOR APPELLEE

CERTIFICATE OF SERVICE

The undersigned hereby certifies that service of the above and foregoing Brief of Appellee was made by e-mailing a copy to the Kansas Appellate Defender Office,

Jayhawk Tower, 700 Jackson, Suite 900, Topeka, KS 66603 at ADOService@sbids.org on the 7th day of February, 2024.

/s/ Claire Kebodeaux
Claire Kebodeaux, #27913
Assistant District Attorney