FILED

IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS APP DOCKET NO.
CRIMINAL DEPARTMENT

2010 JAN 12 A 8:40

CLERK OF DIST COURT
18TH JUDICIAL DISTRICT
SEDGWICK COUNTY, KS
BY

THE STATE OF KANSAS,

Plaintiff

vs.

CASE#09CR1462

SCOTT P. ROEDER,

Defendant

DEFENSE RESPONSE TO
STATE'S MEMORANDUM IN SUPPORT OF
ITS MOTION TO EXCLUDE IRRELEVANT EVIDENCE AND
STATE'S OPPOSITION TO VOLUNTARY MANSLAUGHTER OR
IMPERFECT SELF-DEFENSE JURY INSTRUCTION

Now comes the Defendant, SCOTT P. ROEDER, by defendant's attorneys, Charles Steve Osburn, Public Defender for Sedgwick County, Kansas, and Mark T. Rudy, Assistant Public Defender, and moves this Court to consider the law, arguments, and advocacy set out herein in response to the prosecution memorandum.

In support of this motion, defendant states as follows:

PROCEDURAL HISTORY

1. That defendant is accused of murder in the first degree, and two counts of aggravated assault.

2. The case is set for jury trial on or about January 11, 2010.

FACTS

3. It is alleged that the accused, Scott P. Roeder, put an end to the abortion practice of Dr. George R. Tiller, by killing him May 31, 2009.

OVERVIEW

4. The State appears to be asking the Court to expand Lawrence, Hurt, Bell, and Carter beyond their precedential value.

JURY INSTRUCTIONS—CASE LAW AND ARGUMENT

5. Under the issue of simultaneous consideration, what is analyzed is whether two offenses can be considered within a set of jury instructions and deliberations, and the order of deliberations as simultaneously or not. What is NOT analyzed is whether two offenses can be instructed upon at all or not—or whether one lesser included offense can be precluded from instructions and deliberations.

6. The State appears to have misinterpreted the idea of simultaneous consideration in the cited cases. The State has not mis-defined the term, having used it in an agreeable fashion consistent with common use (see Merriam-Webster Online Dictionary entry for simultaneous: "existing or occurring at the same time : exactly coincident"). However, the Prosecution has taken that definition and misapplied it. The term simultaneous, in the case law, is used as a reference to whether or not jury instructions for a charged offense (such as first degree murder), and a lesser included offense (such as voluntary manslaughter), are to be considered by the jury simultaneously, or sequentially. The State has used this straight forward legal issue, and expanded it to argue that the jury instruction on a lesser included offense of voluntary manslaughter is absolutely precluded from (simultaneously, or at all) consideration.

7. The State contends that United States v. Carter, 172 Fed.Appx. 883 (Tenth Cir., 2006) stands for the propositions that: "The voluntary manslaughter instruction based on a theory of imperfect self-defense is inappropriate in a case of premeditation." State's Memorandum. The State cites Carter: "[. . .] imperfect self-defense relating to voluntary manslaughter is not appropriately considered simultaneously with premeditated first-degree murder."

8. The State contends that United States v. Carter, 172 Fed.Appx. 883 (Tenth Cir., 2006) stands for the propositions that: "[. . .] the Supreme Court affirmed its prior holdings on this issue and specifically declined to change the law in this area." State's Memorandum. The State cites Carter: "In Lawrence, 281 Kan. at 1092-93, 135 P.3d 1211 (Kan. 2006) the defendant argued that both perfect and imperfect self-defense should be considered simultaneously with first-degree premeditated murder because each concept involved an underlying thought process. In other words, imperfect self-defense would not require the absence of reason, only the absence of sound reason. We rejected that argument, holding that the honest but unreasonable belief of imperfect self-defense and the premeditation of first-degree murder are mutually exclusive concepts. [new paragraph] We decline Carter's invitation to change our position and reiterate that the imperfect self-defense relating to voluntary manslaughter is not appropriately considered simultaneously with premeditated first-degree murder." State v. Carter.

9. However, it is difficult to see how the Prosecution uses the Carter decision to advocate preclusion of an instruction—especially when that instruction was given in Carter. "The district court gave instructions to the jury on first-degree premeditated murder and the lesser included offenses of second-degree intentional murder and voluntary manslaughter consistent with PIK Crim.3d 68.09." Carter.

10. The State contends that State v. Hurt, 278 Kan. 676, 683, 101 P.3d 1249 (2004) stands for the propositions that: "Because premeditation and unreasonable reliance on circumstances that justify deadly force are mutually exclusive concepts, an imperfect self-defense instruction is improper. [new paragraph] This theory is summarized in State v. Hurt, 278 Kan 676, 683, 101 P.3d 1249 (2004)." State's Memorandum. The State then cites Hurt: "Premeditation and heat of passion are mutually exclusive concepts. In other words, if a murder was premeditated, it cannot have been the result of heat of passion. [Citation omitted.] Thus, there is no need for the jury to consider [justification evidence] at the same time it considers evidence of premeditation. 278 Kan at 683, 101 P.3d 1249."

11. However, it is again difficult to see how the Prosecution uses the Hurt decision to advocate preclusion of an instruction—especially when that instruction was given in Hurt. "The jury was instructed on the charged offense of premeditated first-degree murder and the lesser included offenses of intentional second-degree murder and voluntary manslaughter."

12. The State contends that State v. Bell, 280 Kan. 358, 121 P.3d 972 (2005) stands for the propositions that: "In State v. Bell, 280 Kan. 358, 121 P.3d 972, the Supreme Court considered this exact argument. Bell argued that both heat of passion and imperfect self-defense could reduce first- degree premeditated murder to the lesser offense of voluntary manslaughter; therefore, the jury should have been instructed to consider those offenses at the same time. This court rejected Bell's argument [. . .]" State's Memorandum. The State cites from the following passage of the Bell opinion: "**Thus, the jury was properly instructed that intentional second-degree murder might be reduced to voluntary manslaughter if committed with an honest but unreasonable belief that circumstances justified the use of deadly force in self-defense. But** premeditated first-degree murder would not be reduced by an honest but unreasonable reliance on self-defense because, as with premeditation and heat of passion, the two are mutually exclusive concepts. If a murder were committed with premeditation, it would not be the result of an unreasonable but honest belief that circumstances justified deadly force. Premeditation requires reason; **imperfect self-defense requires the absence of reason.**" The portions not quoted by the State are in bold.

13. However, it is again difficult to see how the Prosecution uses the Bell decision to advocate preclusion of an instruction—especially when that instruction was given in Bell. "Bell was charged with first-degree premeditated murder. In addition to the charged offense, the jury was instructed on murder in the second degree intentional, voluntary manslaughter, and involuntary manslaughter."

14. Had the State placed more reliance upon Kansas v. Lawrence, 281 Kan. 1081, 135 P.3d 1211 (2006), the role of premeditation in the context of simultaneous deliberation would be

illustrated. In Lawrence, the Court creates a contrast citing Bell for one distinction of premeditated murder and a certain type of voluntary manslaughter, and citing Hurt for a different distinction of premeditated murder and a certain different type of voluntary manslaughter.

15. The Kansas Supreme Court in Lawrence, appears to find a lack of merit in the defendant's concern that, "the jury instructions improperly stated the law with regard to premeditation and imperfect self-defense where the jury was not allowed to deliberate both concepts at the same time." However, the Court cites it's decision in Hurt to provide context. "In State v. Hurt, 278 Kan. 676, 683, 101 P.3d 1249 (2004), this court held that the same rule does not hold true for first-degree premeditated murder and voluntary manslaughter. The court stated:

> "Premeditation and heat of passion are mutually exclusive concepts. In other words, if a murder was premeditated, it cannot have been the result of heat of passion. [Citation omitted.] Thus, there is no need for the jury to consider evidence of heat of passion at the same time it considers evidence of premeditation." 278 Kan. at 683, 101 P.3d 1249. Kansas v. Lawrence, 281 Kan. 1081, 135 P.3d 1211 (2006).

16. The Lawrence and Hurt decisions limit heat of passion as it relates to the ability for simultaneous deliberation—but not in the ability to actually receive the lesser included offense instruction.

17. Lawrence does not stop, however at heat of passion. "Most recently, in State v. Bell, 280 Kan. 358, 121 P.3d 972, [2005] this court considered the exact argument that the defendant is making here. Bell argued that both heat of passion and imperfect self-defense could reduce first-degree premeditated murder to the lesser offense of voluntary manslaughter; therefore, the jury should have been instructed to consider those offenses at the same time. This court rejected Bell's argument, citing both Graham and Hurt, and holding:

> [P]remeditated first-degree murder would not be reduced by an honest but unreasonable reliance on self-defense because, as with premeditation and heat of passion, the two are mutually exclusive concepts. If a murder were committed with premeditation, it would not be the result of an unreasonable but honest belief

that circumstances justified deadly force. **1219 Premeditation requires reason; imperfect self-defense requires the absence of reason." 280 Kan. at 367, 121 P.3d 972." Kansas v. Lawrence, 281 Kan. 1081, 135 P.3d 1211 (2006)

18. The Lawrence and Bell decisions limit imperfect self-defense as it relates to the ability for simultaneous deliberation—but not in the ability to actually receive the lesser included offense instruction.

19. To make it's argument, the State engages in a deliberation-like conclusion about the evidence and determines that the evidence indicates premeditation. The State then uses this characterization of the evidence to argue that premeditation is inconsistent with the type of intent necessary for voluntary manslaughter, and therefore the lesser included offense should not be given at all. The State stands in the place of the judge and jury, reviews the evidence, and claims the decision is made without need for any lesser included offense, or jury instruction thereupon—due to the allegation of premeditation.

APPROPRIATENESS OF VOLUNTARY MANSLAUGHTER INSTRUCTION—STATUTES AND CASE LAW AND ARGUMENT

20. The State asserts a threshold that must exist under K.S.A. 21-3211, 21-3212, or 21-3213, before an instruction may be given by the Court on voluntary manslaughter / imperfect self-defense. "The threshold requirement for an instruction of voluntary manslaughter based on imperfect self-defense is that the circumstance of use of imminent unlawful force by an aggressor must exist at the time of the killing as required by the statutory scheme for defense of a person as set out in K.S.A. § 21-3211, 21-3212, or 21-3213 and amendments thereto" State's Memorandum. The State cites to K.S.A. 21-3403 and (b), which in its complete citation is as follows: "Voluntary manslaughter is the intentional killing of a human being committed: [(a) omitted] (b) upon an unreasonable but honest belief that circumstances existed that justified deadly force under K.S.A. 21-3211, 21-3212 or 21-3213 and amendments thereto."

21. The state relies initially upon a plain reading of the statute for its analysis, before moving on to case law. However, Ordway fully discusses the history of the relevant manslaughter statute, and creates the impression that reference to the statute requires interpretation.

22. Kansas v. Ordway, 934 P.2d 94, 261 Kan. 776 (1997) discusses involuntary manslaughter as follows:

> "K.S.A. 21-3403(b) defines voluntary manslaughter as an intentional killing upon an unreasonable but honest belief that circumstances existed that justified deadly force under 21-3211. K.S.A. 21-3211 provides that the circumstances justify the use of force when a defendant reasonably believes that its use is necessary to defend others. When the two statutes are read together, the unreasonable belief element of 21-3403 must be reconciled with the reasonable belief element of 21-3211. It seems that this may be accomplished by a plain reading. That is, if the reasonable belief that force was necessary, which is the substance of 21-3211, is substituted for the defense-of-self-or-others as designated in 21-3403(b), the latter provides that voluntary manslaughter is an intentional*787 killing upon a defendant's unreasonable but honest belief that he or she reasonably believed the use of force was necessary to defend others. In other words, the 21-3211 reasonableness of the belief that deadly force was justified is irrelevant because the 21-3403(b) belief is unreasonable. Although Ordway could not qualify for acquittal under the perfect defense of defense of self or others under 21-3211, the reasonableness element of 21-3211 should not prevent a trial court's giving an instruction on the lesser included offense of voluntary manslaughter."

23. Kansas v. Ordway, immediately continues the discussion on involuntary manslaughter as follows:

> "[3] [4] With regard to a defense-of-others instruction, this court has stated that the evidence must support affirmative findings by a rational factfinder to the subjective question whether defendant honestly believed his action was necessary to defend others as well as to the objective question whether his belief was reasonable. State v. Rutter, 252 Kan. 739, 746, 850 P.2d 899 (1993). In a case such as the present one, however, where the defendant is seeking an instruction on the lesser included offense of voluntary manslaughter rather than asserting the affirmative defense of defense of others, the objective component

> of defense of others should be immaterial. Both elements in the offense of voluntary manslaughter as defined in 21-3403(b) are subjective. The defendant's belief must be sincerely held, and it must be unreasonable. State v. Jones, 257 Kan. 856, 873, 896 P.2d 1077 (1995). For this reason, the "objective elements" of 21-3211-an aggressor, imminence, and unlawful force-would not come in for consideration."

24. Though Ordway did not receive an instruction on voluntary manslaughter, instructions on other lesser offenses were given. The reason that Ordway did not receive a voluntary manslaughter instruction appears to be because of the involvement of the insanity defense. Such defense is not applicable in the Roeder matter.

25. The State contends that Kansas v. Hunt, 270 Kan. 203, 14 P.3d 430 (2000) stands for the propositions that: "Imperfect self-defense instruction is improper in situations where the defendant is the aggressor. Kansas cases have held that a defendant is not entitled to an imperfect self-defense instruction, even when an attack is imminent, if the defendant was the aggressor at the time of the killing." State's Memorandum.

26. The Hunt decision notes several items. "The trial court judge refused to instruct on voluntary manslaughter on the ground that it was not supported by the evidence." Hunt also features the following, "Evidence that would have supported an instruction on voluntary manslaughter would have shown that Hunt honestly, if unreasonably, believed that Williams was the aggressor and that it was necessary for Hunt to shoot Williams to defend himself against Williams' imminent use of unlawful force." The Court in Hunt is NOT saying that an imperfect self-defense instruction is ALWAYS improper in situations where the defendant is the aggressor. In fact, the Court appears willing to analyze the facts and consider the assertions of the defense on a case by case basis to decide, 1) who was the aggressor (or to let the jury make that determination), and 2) whether even an aggressor may be entitled to an involuntary manslaughter instruction.

27. Hunt provokes the challenging question: if it is the defendant's perception of who is an aggressor that is at issue, then is this question related to the question of, "unreasonable but honest belief," under the voluntary manslaughter statute. These are jury questions.

28. The State contends that Kansas v. White, 284 Kan. 333, 161 P.3d 208 (2007) stands for the propositions that: "For the Court to instruct on voluntary manslaughter, there must be evidence of an imminent attack at the time of the killing. Kansas cases have never allowed "imminence" to cover future harm, or injury that may occur at some point in the future. Recent controlling Kansas case law indicates that the attacker must have an actual fear of an imminent attack, regardless of whether the belief is reasonable, in order to use the imperfect self-defense." State's Memorandum.

29. White, however is factually distinguishable from the Roeder matter, for at least one of the same reasons as in Ordway. "Here, White requested an instruction on imperfect defense-of-others voluntary manslaughter based upon his alleged honestly held but unreasonable belief that he needed to act to protect B.A.W. from Aaron's further abuse. The district court determined that White was precluded from receiving an instruction on voluntary manslaughter because he asserted the mental disease or defect defense, citing Ordway, 261 Kan. 776, 934 P.2d 94, and State v. Baacke, 261 Kan. 422, 932 P.2d 396 (1997)." White. However, the Court liberates White from the precedent of Ordway, and instead finds the instruction inapplicable based on the conclusion that imminence was lacking.

30. The State contends that Kansas v. Vann, 212 P.3d 263, 2009 WL 2371009 (Kan. App., 2009) unpublished, stands as further support for White: [as] "directly on point and further explains the rationale of White's binding holding." State's Memorandum.

31. The Vann opinion, however, is limited to a fairly narrow set of facts, beginning with a failure to request the instruction, and further limited to the following:

> "*3 Vann's argument that the district court erred by failing to instruct the jury on the lesser included offense of imperfect self-defense attempted voluntary

manslaughter fails for two reasons. First, Vann was the initial aggressor in the final shooting incident at Donnell's mini-mart. Even though Vann testified that he did not make specific threats to kill Donnell or the other individuals in the store, Vann initiated the use of force against himself by entering the store and firing his weapon. Thus, even if Vann sincerely believed his life was in danger, Vann is the one who placed his life in danger by entering the store and shooting his gun. K.S.A. 21-3214 acts as a bar to Vann's claim that he sincerely but unreasonably believed he was acting in self-defense.

Second, Vann's testimony did not show that he was in imminent danger of great bodily harm when he initiated the final shooting incident at Donnell's mini-mart. Fear of some future harm is not adequate to show a person is in imminent danger, nor will a history of violence suffice to show imminent danger; the danger must be imminent at the time of the shooting. State v. White, 284 Kan. 333, 351-52, 161 P.3d 208 (2007)." Vann

32. The case before the Court is not a dispute between two parties with too many weapons at a convenience store. The defense is requesting the instruction. The issue of who is, or is not an aggressor, should be an issue for determination by the jury.

33. The State attempts to distinguish the Roeder case, using Kansas v. Bench, 188 P.3d 42 (Kan. App., 2008) as standing for the propositions that: "The Kansas cases that have allowed an imperfect self-defense argument involve situations where the perceived threat was capable of being carried out immediately and that, in the opinion of the aggressor, was likely to occur within minutes." State's Memorandum.

34. Bench is a homicide case involving a request for instruction on voluntary manslaughter—heat of passion. The conduct in Bench was not sufficient to merit that instruction, being described as follows: "At most, Best exhibited verbal anger and threatened to leave Bench on the side of the road. Words and gestures, even when expressed in anger, do not generally constitute legally sufficient provocation requiring a heat of passion instruction. Guebara, 236 Kan. at 797-98, 696 P.2d 381 (discussing several Kansas cases)." Bench. This conduct was of

a minimal nature, and is not analogous to the case before the Court. However, the events alone were not the sole basis for not providing the instruction. "Bench's "heat of passion" contention on appeal is inconsistent with her theory of self-defense and without any evidentiary basis." Bench. It could be reasoned, though tenuously based on this opinion alone, that the Court perceives heat of passion to be mutually exclusive from imperfect self defense.

35. However, of note in Bench is the following portion of the opinion regarding which instructions were given: "With regard to the lesser included voluntary manslaughter instruction, the district court allowed the jury to consider whether Bench's conduct was an "intentional killing upon an unreasonable but honest belief that circumstances existed that justified deadly force" in defense of a person." Bench. This was apparently instructed upon based on the defendant's perceptions of events. "It is undisputed that Bench's sole theory of the case was self-defense. According to her, when Best turned toward the sleeping compartment and began rummaging about the mattresses Bench reasonably believed that he was going to obtain a firearm to "blow my head off and throw me in the ditch." In defense of what Bench understood to be Best's imminent use of unlawful force, she repeatedly stabbed him." Bench.

36. The State contends that State v. Rose, 30 Kan. 501, 1 P. 817 (Kan. 1883) stands for the propositions that: "It has been the uncontroverted law in the State of Kansas since at least 1883 that no one can attack or kill another because he may fear injury at some point in the future." State's Memorandum.

37. The Rose case is factually different from the above captioned matter. Rose involved two neighbors who were in a dispute and one was killed. The defendant in Rose was allegedly responding to threats from the victim, and the bad character of the victim, and provocation of self defense. The victim in the current case was not a threat based on character, or exchange of words, or provocation of physical self defense, but instead based abortion procedures that have resulted in deaths, and have been reported to the State of Kansas, Kansas Department of

Health and Environment. Those were deaths that occurred in the past. Those were deaths that would occur in the future.

38. The imminence of danger was greater than mere fear of future harm. There was a state licensed facility operating in Sedgwick County to perform abortions. It had a staff. It had a practitioner. It had a budget. It had clientele. It assumedly had a set schedule of pending abortion procedures. In the mind of Mr. Roeder, the victim presented a clear danger to unborn children.

CONCLUSION

39. Kansas v. Miller, 208 P.3d 361 (Table), 2009 WL 1591572 (2009 Kan.App.) Unpublished Disposition, provides one of a variety of normative standards for the Court. The States interest in excluding jury instructions from jury deliberations, and advocacy from being presented by counsel, is difficult to fathom.

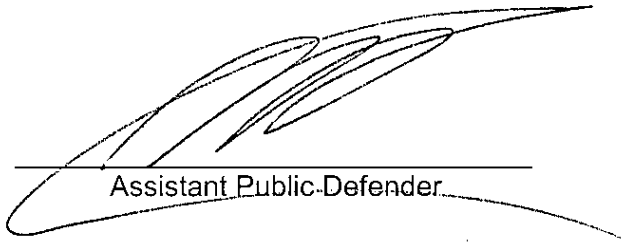
WHEREFORE, defendant moves this Court to consider the law, arguments, and advocacy set out herein in response to the prosecution memorandum.

Respectfully submitted,

Mark T. Rudy #23090
Assistant Public Defender
Office of the Public Defender
604 North Main, Suite D
Wichita, Kansas 67203
(316) 264-8700 ext 208

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Motion was delivered in person to the Sedgwick County District Attorney's office this _____.



Assistant Public Defender

NOTICE OF HEARING

Please take notice and be advised that the foregoing Motion will be heard at 1:30 on the 1/12/10, before Judge [illegible].