No. 10-104520-S

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IN THE
SUPREME COURT OF THE
STATE OF KANSAS

_____

STATE OF KANSAS
Plaintiff-Appellee

vs.

SCOTT P. ROEDER
Defendant-Appellant

_____

BRIEF OF APPELLANT

_____

Appeal from the District Court of Sedgwick County, Kansas
Honorable Warren Wilbert, Judge
District Court Case No. 09 CR 1462

_____

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Attorney for the Appellant

Oral Argument: 30 minutes

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Nature of Case

Scott Roeder was convicted of one count of premeditated first degree murder and two counts of aggravated assault. The district court sentenced Mr. Roeder to a hard 50 life sentence and consecutive sentences of 12 months in prison for the aggravated assault counts. Mr. Roeder now appeals his convictions and life sentence.

Statement of Issues

Pretrial and Trial Issues

Issue 1: **The district court erred in not instructing on the lesser included offense of voluntary manslaughter-imperfect defense of another.**

Issue 2: **The district court violated Mr. Roeder's due process right to present his defense of voluntary manslaughter-imperfect defense of another.**

Issue 3: **The district court erred in denying the motion for a change of venue because the history of conflict and the surrounding publicity in the Wichita community was a demonstrable reality that was reasonably certain to prejudice Mr. Roeder's right to a fair trial.**

Issue 4: **The prosecutor's improper commentary in closing argument prejudiced Mr. Roeder's right to a fair trial and is reversible error.**

Issue 5: **The district court violated Mr. Roeder's due process right by excluding the necessity defense and by failing to instruct on the necessity defense.**

Issue 6: **The district court erred in failing to give a requested instruction on the lesser included offense of intentional second degree murder.**

Issue 7: **The district court erred in failing to give a requested instruction on the "defense of others."**

Issue 8: **Cumulative trial error substantially prejudiced Mr. Roeder and denied him a fair trial.**

Sentencing Issues

Issue 1: **The district court erred in finding three aggravating circumstances, which justified the imposition of a hard 50 sentence.**

Issue 2: **The district court erred in imposing a hard 50 sentence.**
- **A. The district court erred in finding no mitigating circumstances.**
- **B. The district court erred in finding the aggravating circumstances outweighed the mitigating circumstances.**

Issue 3: **The district court erred in restricting and limiting Mr. Roeder's right of allocution at sentencing.**

Issue 4: **The hard 50 sentencing scheme is unconstitutional because a jury does not determine beyond a reasonable doubt the facts that double the penalty from an ordinary life sentence.**

Statement of Facts

On May 31, 2009, Scott Roeder fatally shot Dr. George Tiller, which resulted in Dr. Tiller's immediate death. (R. XI, 11; XXI, 72.) Dr. Tiller's practice included performing abortions, and he was one of the few late-term abortionists in this country. (R. II, 2; XXI, 85.) His abortion practice in Wichita and the resulting national pro-life protests against the abortion clinic received much media attention. (R. II, 2.)

In late 2006, in Case No. 06 CR 2961, the Kansas Attorney General's office, headed by former Attorney General Phill Kline, brought thirty felony charges against Dr. Tiller for performing illegal abortions. (R. XXI, 31.) The day after the charges were filed, however, the Sedgwick County district attorney had them dismissed. (R. XXI, 33.) In 2007, in Case No. 07 CR 2112, the Attorney General's office, under a new Attorney General, again brought criminal charges against Dr. Tiller. (R. XX, 123; XXI, 5.) Barry Disney, the Deputy Attorney General, was the lead prosecutor in the jury trial. (R. XX, 123; XXI, 5.) A jury acquitted Dr. Tiller of all misdemeanor charges in late March 2009. (R. XX, 131.)

As a member of the pro-life movement, Scott Roeder attended a few days of the jury trial against Dr. Tiller. (R. XXI, 107.) Years earlier, Mr. Roeder had learned how

Dr. Tiller was "one of the three late-term abortionists in the country." (R. XXI, 85.) Mr. Roeder became involved in "sidewalk counseling" of women considering abortions and protests at Dr. Tiller's abortion clinic. (R. XXI, 85-87.) He saw how neither the sidewalk counseling, nor the protests, stopped Dr. Tiller, and he started thinking that perhaps the law would step in and stop Dr. Tiller. (R. XXI, 92, 93.)

Mr. Roeder testified that after he learned that the jury had acquitted Dr. Tiller, he felt:

> Very frustrated. Seemed like that was the last attempt by the State of Kansas to find if there was anything at all going on illegally in George Tiller's clinic, and it seemed as though that was the last step and now he was acquitted, found not guilty.

(R. XXI, 107-08.)

Mr. Roeder decided that it was incumbent upon him to do something and he began to think of ways to stop Dr. Tiller. (R. XXI, 109.) Mr. Roeder testified:

> There was nothing being done and the legal process had been exhausted and these babies were dying every day, and I felt that if someone did not do something, he was going to continue aborting children, and so I felt that I need to act and quickly for those children.

(R. XXI, 109.)

Mr. Roeder went to Wichita the weekend of May 30-31, 2009. (R. XXI, 110, 113.) Mr. Roeder, who had attended services at the Reformation Lutheran Church before, went to the 10 a.m. service that Dr. Tiller was ushering. (R. XXI, 114.) When Mr. Roeder saw Dr. Tiller walk through the narthex or foyer, he immediately left his pew. (R. XXI, 115.) He walked up to Dr. Tiller, pointed a handgun at Dr. Tiller's forehead and fired one shot. (R. XVII, 64; XVIII, 4, 12, 18; XX, 88; XXI, 84, 88, 115.) Dr. Tiller immediately fell to the floor and showed no signs of life. (R. XI, 49-51; XX, 88.) He saw Dr. Tiller fall and immediately left the church. (R. XXI, 115-16.)

Mr. Roeder drove his car from the church towards his home in the Kansas City area. (R. XX, 48.) During the drive, a police officer stopped Mr. Roeder and arrested him. (R. XX, 44, 48, 52.)

The State charged Mr. Roeder with one count of premeditated first degree murder and two counts of aggravated assault. (R. I, 31-34.) Due to the pretrial publicity, the defense filed a pretrial motion moving for a change of venue from Sedgwick County. (R. II, 1-4.) The defense motion noted the extensive coverage by the Wichita media including television stations, radio stations, internet sites, and a major daily newspaper, the Wichita Eagle. (R. II, 3.) The district court denied the motion as premature. (R. IV, 17-19; XVII, 8.) Prior to trial, the defense again moved for a change a venue. (R. II, 2.) The court ruled that it had been able to impanel a jury that said it could be fair and impartial. (R. XVII, 9-10.)

Before the beginning of trial, the State moved to exclude Mr. Roeder from presenting a necessity defense. (R. II, 14.) The court granted the State's motion. (R. XIV, 64.) As a result, Mr. Roeder did not present a necessity defense, nor did the court instruct on the necessity defense.

Trial

The State presented witnesses verifying that Mr. Roeder had purchased a handgun on May 18, 2009, and had practiced shooting the gun on his brother's property. (R. XX, 130, 190.)

Several church members testified about Mr. Roeder's actions on the morning of May 31, 2009. (R. XVII, 54-72; XVIII, 4-224.) One church member testified that he was in the narthex when Mr. Roeder walked up to Dr. Tiller and shot him in the side of the head. (R. XVII, 64; XVIII, 4, 12, 18.) Two church members ran after Mr. Roeder as

he was walking quickly to his car. (R. XVIII, 14, 83-84.) Mr. Roeder told them both that he would shoot them if they tried to stop him. (R. XVIII, 14, 48, 89.) At least one witness reported the tag numbers from Mr. Roeder's car to the police. (R. XVIII, 17.)

A police officer testified that Dr. Tiller was dead when he arrived at the church. (R. XIX, 10.) The State's last witness, a forensic pathologist, testified that Dr. Tiller died from a single gunshot to his head. (R. XX, 88.)

Before the State rested its case, the court held hearings on Mr. Disney's motion to quash the defense's subpoena. (R. XX, 108.) To support a claim of voluntary manslaughter, the defense had subpoenaed Mr. Kline and Mr. Disney. (R. XX,.108.)

Mr. Disney's counsel argued that the subpoena was work product and was irrelevant. (R. XX, 108, 110.) The defense explained that this was not work product and was relevant because Mr. Disney would have testified that he prosecuted Dr. Tiller in good faith for performing unlawful abortions. (R. XXI, 5-9.) His testimony would consequently support Mr. Roeder's basis for believing that Dr. Tiller was performing unlawful abortions. (R. XX, 123.)

The district court quashed the subpoena of Mr. Disney, ruling that his testimony was unnecessary and "invaded Mr. Disney's mental impressions, his thought processes, his strategies and why he thought he ought to go forward with that case." (R. XX, 134.) The district court also ordered the defense to proffer Mr. Roeder's trial testimony. (R. XX, 132-33.)

Defense counsel objected to having to proffer Mr. Roeder's testimony regarding the Attorney General's office filings against Dr. Tiller. (R. XXI, 4.) The defense argued that the proffer was an infringement of Mr. Roeder's rights. (R. XXI, 4-6.) In Mr.

Roeder's proffer, defense counsel explained that Mr. Roeder would testify that he knew of the charges against Dr. Tiller for performing unlawful abortions and that the legal actions against Dr. Tiller failed to stop him from performing abortions. (R. XXI, 6-8.)

After hearing the proffer, the district court excluded testimony about "descriptions of actual [abortion] procedures, medical terms, things [that] the defendant wasn't qualified to testify." (R. XXI, 9-10.) The court ruled that Mr. Roeder could testify to "his personally-held beliefs just in general about abortion, whether it's harmful, whether it terminates a viable baby, he is going to testify to that[.]" (R. XX, 133.)

The district court also ordered the defense to proffer Mr. Kline's testimony. (R. XX, 133-34; XXI, 4.) The proffer included an explanation for Mr. Kline's conclusion that Dr. Tiller was unlawfully performing late-term abortions. (R. XXI, 22-25, 30-34.) After hearing his proffer, the district court excluded Mr. Kline as a defense witness because a portion of Mr. Kline's proffer was totally irrelevant and immaterial. (R. XXI, 49.) The district court ruled that Mr. Roeder could testify to the filed charges, the dismissal of the charges, and "a public trial in which Dr. Tiller was acquitted." (R. XXI, 49.)

The defense also filed a motion asking the court to take judicial notice of the court filings in 06 CR 2961 and 07 CR 2112, the two criminal cases brought against Dr. Tiller. (R. IV, 63.) The defense also asked the court that upon its judicial notice of these two cases, the defense asked the court to instruct the jury. (R. IV, 63.) Defense counsel argued that the court should take judicial notice of the cases because the court had granted Disney's motion to quash subpeona, excluded the former Attorney General's testimony, and had earlier stated that it would take judicial notice of the court filings in

the two criminal cases. (R. IV, 63.)

The court denied Mr. Roeder's motion to take judicial notice on the court filings and to instruct the jury on the court filings, and ruled that only Mr. Roeder could discuss the criminal charges against Dr. Tiller. (R. XXI, 54.)

Due to the court's earlier rulings, the defense presented only one witness, Mr. Roeder. (R. XXI, 2, 68.) Mr. Roeder testified that Dr. Tiller was scheduled to perform abortions 22 hours after he shot Dr. Tiller. (R. XXI, 109.)

Mr. Roeder explained how he started thinking about Dr. Tiller's church as a means of accessing Dr. Tiller. "I felt that actually if he was to be stopped, that probably was the only place he could have been stopped, and actually I had an honest belief that he was not stopped there...then he would not have been stopped anywhere." (R. XXI, 110.) Mr. Roeder testified that his thoughts of killing Dr. Tiller began in 1993, and he thought of different ways to kill Dr. Tiller. (R. XXI, 109, 132, 135-56.)

Throughout the trial, the court and the parties continually referenced Mr. Roeder's theory of defense, voluntary manslaughter. The State filed a motion in opposition to a voluntary manslaughter jury instruction. (R. III, 61.) And before Mr. Roeder testified, the court stated that the defense had a "formidable and daunting task" in presenting evidence sufficient to support a voluntary manslaughter instruction. (R. XX, 135.) The district court did not include the voluntary manslaughter instruction in its prepared instructions. (R. XXI, 208.)

At the instructions conference, the defense requested instructions on the lesser included offenses of second degree murder and voluntary manslaughter. (R. XXI, 207, 209.) In support of the voluntary manslaughter instruction, the defense argued that Mr.

Roeder had testified "that he honestly believed that he had to do what he did in order to protect others....[H]e indicated that he honestly believed the he had to do when he did[.]" (R. XX1, 209.) The defense also requested instructions on second degree murder, defense of others, and a necessity defense. (R.)00, 207-08.) The district court denied all of Mr. Roeder's instruction requests. (R. V, 76-87; XXI,221.)

As a result of the district court's denial of Mr. Roeder's instruction requests, the court instructed the jury only on the premeditated first degree. (R. V, 82.) After closing arguments, the jury quickly reached a verdict of guilty for all three counts. (R. V, 91-92; XXII, 33, 34.) The State informed the court and Mr. Roeder that the State would be "pursuing a request for sentencing under the Hard 50 under 21-635[.]" (R. XXII, 37.)

In its motion for a new trial, the defense argued that a new trial was warranted for many reasons, including the court's pretrial rulings, the quashing of the subpoena of Disney, the denial of a change of venue, the denial of Mr. Roeder's necessity defense, and the failure to instruct on lesser included offenses and defense of others. (R. XXIII, 5-7.) The district court denied the motion for a new trial. (R. 7.)

HARD 50

The State filed a pretrial notice of its intent to request the mandatory 50 year imprisonment under K.S.A. 21-4635. (R. VI, 2.) At the hard 50 hearing, the State argued that Mr. Roeder had committed the crime in an especially heinous, atrocious or cruel manner. Specifically, the State argued that Mr. Roeder's actions fell under K.S.A. 21-4636(f)(1),(2), (7), because he stalked Dr. Tiller; he had prepared and planned to kill Dr. Tiller; and the shooting in a church was especially heinous, atrocious or cruel. The State also argued that when Mr. Roeder shot Dr. Tiller, he "knowing or purposely created a great risk of death to more than one person[.]" (R. VI, 2.)

The district court rejected the State's argument that Mr. Roeder created a great risk of death to others. (R. XXIII, 63-65.) The court, however, found the following statutory aggravating circumstances: (1) prior stalking of, or criminal threats to, the victim; (2) preparation or planning, indicating an intention that the killing was meant to be especially heinous, atrocious, or cruel; and (3) that shooting at a church was especially heinous, atrocious or cruel. (R. VI, 107-110; XXIII, 65-70.)

The defense argued that the State had failed to prove aggravating circumstances. (R. XXIII, 45-57.) The defense noted that the State had provided no authority in support of its argument that the court should adopt the common meaning of stalking and find that aggravating circumstance. (R. XXIII, 51.) With respect to the aggravating circumstances of preparation or planning, the defense also argued that the State had failed to present evidence "that he intended this to be especially heinous, atrocious or cruel, and there was no evidence that was his intention at all." (R. XXIII, 52.)

After the court found aggravating circumstances and heard the State's arguments that there were no mitigating circumstances, the district court had Mr. Roeder present his allocution. (R. XXIII, 147.) The defense then presented evidence of two mitigating circumstances: (1) Mr. Roeder's lack of significant criminal history; and (2) Mr. Roeder's capacity "to appreciate the criminality of his conduct or, moreover, to conform his • conduct to the requirements of the law, was substantially impaired" when he shot Dr. Tiller. (R. XXIII, 101-140; 199-203.) The defense argued that because the aggravating circumstances did not outweigh the two mitigating circumstances, the court had "no choice but to impose the life sentence with parole possibility after 25 years." (R. XXIII, 201.)

The State argued that Mr. Roeder had a "very significant history of criminal activity" because "he was ready and willing to kill Dr. Tiller." (R. XXIII, 203.) The

district court found no mitigating circumstances and ruled, "The Court will find that there are no mitigating factors that outweigh the aggravating factors previously found by the Court." (R. XXIII, 210, 214.) The district court sentenced Mr. Roeder to a hard 50 life sentence and consecutive sentences of 12 months. (R. XXIII, 211.) The court also imposed parole and lifetime registration for committing a violent act with a deadly weapon. (R. VI, 99-103; XXIII, 211.)

Pretrial and Trial Issues

Issue 1: The district court erred in not instructing on the lesser included offense of voluntary manslaughter-imperfect defense of another.

Introduction

The legislature enacted a lesser included crime of homicide, voluntary manslaughter-imperfect defense of another, under K.S.A. 21-3403(b), which results from an unreasonable but honest belief that deadly force was justified in the defense of another. In this case, the defense presented evidence of an intentional killing due to Mr. Roeder's unreasonable but honest belief that the use of force was necessary to defend others. As a result, the district court should have instructed on voluntary manslaughter-imperfect defense of another.

Because the evidence would justify a jury verdict in accordance with Mr. Roeder's theory of defense, the district court's error prevented the jury from considering a lesser included crime and rendering a different verdict. Viewing the evidence in a light most favorable to Mr. Roeder, there was some evidence in the record that would reasonably justify a voluntary manslaughter conviction. This Court must reverse and remand for a new trial.

Background

At the instruction conference, the defense requested an instruction on voluntary

manslaughter as a lesser included offense of first degree murder. (R. V, 1-34; XXI, 211, 212.) The instruction was based on PIK Crim. 3d. 56.05:

> If you do not agree that the defendant is guilty of First Degree Murder, you should then consider the lesser included offense of Voluntary Manslaughter:
>
> To establish this charge, each of the following claims must be proved:
> 1. That the defendant intentionally killed George Tiller;
> 2. That it was done upon an unreasonable but honest belief that circumstances existed that justified deadly force in defense of a person;
> 3. That this act occurred on or about the 31 st day of May, 2009, in Sedgwick County, Kansas.

(R. IV, 76.)

Defense counsel argued that Mr. Roeder "testified that he honestly believed that he had to do what he did in order to protect others. And I believe that he indicated that he honestly believed that he had to do what he did when he did," because he believed that the children were in imminent harm. (R. XXI, 209.) While the defense argued that imminence was subjective, the district court ruled that the subjective part of the analysis was "the unreasonable but honest belief' of K.S.A. 21-3403, and that "when we return to the statutory elements of K.S.A. 21-3211, those become objective." (R. XXI, 212, 216.) Before denying the instruction, the district court explained its ruling:

> Through whatever process, Mr. Roeder, through self-education, through reading, through other arguments and discussions with others, that he came to a firmly held and honest belief, it is just that. It's not supported by the law, there is no imminence of danger on a Sunday morning in the back of the church, let alone any unlawful conduct, given that what Dr. Tiller did at his clinic the following day, Monday through Friday, is lawful in the State of Kansas.
>
> For those reasons the Court will deny any request for the instruction on voluntary manslaughter based upon the honestly held but unreasonable belief, because of the objective requirements, the reasonable man standards that must be met for the imminence and unlawful force.

(R. XXI, 220-21.)

Interpretation of K.S.A. 21-3403(b)

The standard of review in a case involving statutory interpretation is de novo. *State v. Snow,* 282 Kan. 323, 340, 144 P.3d 729 (2006).

The district court was required to follow K.S.A. 21-3403(b), as enacted by the legislature. In 1992, the legislature broadened the definition of voluntary manslaughter by adding an imperfect defense to voluntary manslaughter. K.S.A. 21-3403(b) provides:

> Voluntary manslaughter is the intentional killing of a human being committed:
> (a) Upon a sudden quarrel or in the heat of passion; or
> (b) Upon an unreasonable but honest belief that circumstances existed that justified deadly force under K.S.A. 21-3211.

Voluntary manslaughter, unlike K.S.A. 21-3211, is not an affirmative defense, but a lesser included offense of first degree murder. *State v. Kirkpatrick,* 286 Kan. 329, 339, 184 P.3d 247 (2008).

Standing alone, K.S.A. 21-3211 provides the circumstances when a person is justified in the use of deadly force: when a defendant "reasonably believes that such use of deadly force is necessary to prevent imminent death or great bodily harm to such person or a third person." K.S.A. 21-3211.

A plain reading of these two statutes indicates that "voluntary manslaughter is an intentional killing upon a defendant's unreasonable but honest belief that he or she reasonably believed the use of force was necessary to defend others." *State v. Ordway,* 261 Kan. 776, 787, 934 P.2d 94 (1997) (held imperfect defense of another defense did not apply when the defendant raised the defense of insanity).

To instruct on voluntary manslaughter, the defendant must present evidence that he or she "actually believed that an imminently dangerous situation existed at the time of the killing." *State v. White,* 284 Kan. 333, Syl. 1110, 161 P.3d 208 (2007); see also *Ordway,* 261 Kan. at 787. ("Both elements in the offense of voluntary manslaughter as defined in 21-3403(b) are subjective.")

The legislative history of K.S.A. 21-3403 supports the argument that the defendant's belief must be both honest and unreasonable, that the use of force is necessary to defend others. The March 22, 1992, minutes of the Senate Judiciary Committee regarding the new subsection (b) of K.S.A. 21-3403 provides:

> This new subsection covers intentional killings that result from an unreasonable but honest belief that deadly force was justified in self-defense. In essence, the defendant meets the subjective, but not the objective, test for self-defense... The Model Penal Code also follows this approach.

Ordway, 261 Kan. at 787-889 (quoting L. 1992, ch. 298, 5.). The legislature also explained that this "partial defense to intentional killings" is:

> [S]imply a recognition of the practical realities of plea bargaining and jury verdicts. Often it is unjust to prosecute and convict such killers of murder and it is equally unjust to acquit them. This new subsection provides a middle category that is theoretically sound and legitimizes the realities of plea bargaining and jury verdicts.

Ordway, 261 Kan. at 787-889 (quoting L. 1992, ch. 298, 5.)

Other jurisdictions have also held that imperfect self-defense applies where the defendant's belief in the need to use force is unreasonable. See, e.g., *State v. Faulkner,* 483 A.2d 759, 763 (Md. 1984) (imperfect self-defense requires no more than defendant's subjective belief that his actions were necessary for his safety, even though the belief was objectively unreasonable).

Courts that recognize imperfect self-defense "reason that a defendant who

commits a homicide while honestly believing he is threatened with death or serious bodily harm does not act with malice and that, absent malice, he cannot be convicted of murder." *State v. Shaw,* 721 A.2d 486, 489 (Vt. 1998); see *State v. Powell,* 419 A.2d 406, 409 (N.J. 1980) ("Ulf a defendant was honest in his belief, but incorrect and unreasonable in his perception of the imminency of danger, or used an excessive and therefore unreasonable amount of force to repel such danger, a claim of imperfect self-defense would be appropriate.")

In *State v. Marr,* 765 A.2d 645, 647 (Md. 2001), the Maryland Supreme Court explained that imperfect self-defense was not based upon an objectively reasonable belief:

> The prospect of 'imperfect' self-defense arises when the actual, subjective belief on the part of the accused that he/she is in apparent imminent danger of death or serious bodily harm from the assailant, requiring the use of deadly force, is not an objectively reasonable belief. What may be unreasonable is the perception of imminent danger or the belief that the force employed is necessary to meet the danger, or both.

Marr, 765 A.2d at 648 (Emphasis added.) Imperfect self-defense thereby reduces the offense of first degree murder to manslaughter when, "A person laboring under the honest subjective belief that he/she was, indeed, in apparent imminent danger of death or serious bodily harm and that the force used was necessary to meet the danger cannot be found to have acted out of malice." *Marr,* 765 A.2d at 648.

Under a three-step analysis, the district court should have instructed on the lesser included offense of voluntary manslaughter.

There is a three-step analysis in determining whether a lesser included instruction should have been given for first degree murder:

> (1) Is voluntary manslaughter a lesser included offense of premeditated, first degree murder?

(2) If it is a lesser included offense, is there "some evidence" that would "reasonably justify" a conviction of voluntary manslaughter in this case? and

(3) If there was evidence in the record that would justify a voluntary manslaughter conviction, is the court's failure to provide the instruction reversible error?

State v. Gallegos, 286 Kan. 869, 872-73, 190 P.3d 226 (2008).

When reviewing the district court's refusal to issue an instruction, this Court views the evidence in a light most favorable to the party requesting the instruction. *State v. Nelson,* 291 Kan. 475, Syl. 1, 243 P.3d 343 (2010) (citing *State v. Moore,* 287 Kan. 121, 130, 194 P.3d 18 [2008]). "A trial court must instruct the jury on a lesser included offense where there is some evidence which would reasonably justify a conviction of the lesser crime." *State v. Reid,* 286 Kan. 494, 496, Syl. 19, 186 P.3d 713 (2008); see also K.S.A. 22-3414(3). "The evidence of a lesser included offense need not be strong or extensive as long as it presents circumstances from which the lesser offense might reasonably be inferred. Such an instruction must be given even though the evidence is weak and inconclusive and consists solely of the testimony of the defendant." *State v. Horn,* 278 Kan. 24, Syl. ¶ 6, 91 P.3d 517 (2004) (citing *State v. Follin,* 263 Kan. 28, 33, 947 P.2d 8 [1997]).

Three-step analysis

First step: whether voluntary manslaughter is a lesser included offense of premeditated, first degree murder.

Whether a crime is a lesser included offense of another under K.S.A. 21-3107(2) is a purely legal question over which this Court has unlimited review. *Gallegos,* 286 Kan. at 873. This Court has continually held that voluntary manslaughter is a lesser included offense of premeditated first degree murder. *Gallegos,* 286 Kan. at 873; see also *Horn,* 278 Kan. at 39.

Second step: whether there is "some evidence" that would "reasonably justify" a conviction of voluntary manslaughter.

Because voluntary manslaughter is a lesser included offense, the second step of the analysis is determining whether there is "some evidence" that would "reasonably justify" a conviction of voluntary manslaughter. *Gallegos,* 286 Kan. at 873. This second question is reviewed de novo. *Gallegos,* 286 Kan. at 873. In order for Mr. Roeder to be convicted of voluntary manslaughter based on imperfect self-defense, the evidence had to show that Mr. Roeder unreasonably but honestly believed that the use of force was necessary to defend another. The district court had a duty to instruct on voluntary manslaughter because Mr. Roeder presented evidence that he actually believed that an imminently dangerous situation existed at the time of the killing.

The term "imminent" describes a broader time frame than immediate, the term "imminent" is not without limit." *State v. Hernandez,* 253 Kan. 705, Syl. ¶ 1, 861 P.3d 814 (1993) (Emphasis added) ("K.S.A. 21-3211 requires at least an imminently dangerous situation at the time of the killing before a defense-of-another instruction should be given.") Yet the common and legal understanding of the term "imminent" also includes an element of certainty. See *Purzycki v. Fairfield,* 708 A.2d 937, 945 (Conn. 1998)(Callahan, J. dissenting) ("There can be no doubt that the common and legal understanding of the term 'imminent' includes an element of both immediacy and certainty.")

At trial, Mr. Roeder testified that he thought the children were in imminent danger of great bodily harm when he shot Dr. Tiller:

Defense counsel: Why did you kill him?

Mr. Roeder: The lives of those children were in imminent danger. If someone did not stop George Tiller, he was going to continue as he had done for 36 years prior to that time. If someone did not stop him, they were going to continue to die. The babies were going to continue to die. My honest belief was that if he did not stop that, at that time when I had the window of opportunity, *they would have continue to die 22 hours later.* He had appointments scheduled. There was no belief to understand that he was going to change his mind and stop the next day.

(R. XXI, 112-13.) (Emphasis added.) Given Mr. Roeder's belief of the scheduled abortions in 22 hours, he believed that "children" or "babies" were in imminent danger when he shot Dr. Tiller. (R. XXI, 109, 112, 113, 123.) By statute, a " 'person' and `human being' also mean an unborn child," and " '[u]nborn child' means a living individual organism of the species homo sapiens, in utero, at any stage of gestation from fertilization to birth.") K.S.A. 21-3452.

The harm was also imminent because the he believed the children's deaths were *certain.* Mr. Roeder testified that he was aware that Dr. Tiller "performed abortions daily." (R. XXII, 109.) He testified that within 22 hours, there were planned abortions at Dr. Tiller's clinic. (R. IV, 58, XXI, 113.)

At the end of his direct examination, defense counsel asked Mr. Roeder,

Defense counsel: Scott, you testified that the reason that you killed Dr. Tiller, you believed you had to do it in order to save the unborn –

Mr. Roeder: Yes.

Defense counsel: -- and you did it where you did it and when you did it because you thought those children were in imminent harm?

Mr. Roeder: That is exactly right. If I didn't do it, the babies were going to die the next day.

(R. XXI, 123.)

In *State v. White,* 284 Kan. 333, this Court considered whether the district court erred in not instructing on the lesser included offense of voluntary manslaughter. In *White,* the defendant shot his son-in-law, Ruboyianes, because he believed Ruboyianes was sexually and physically abusing White's grandson, B.A.W. *White,* 284 Kan. at 336, 348-49. White's theory of defense at trial was that he suffered from mental disease or defect at the time of the shooting. In the alternative, White requested the voluntary manslaughter-imperfect self-defense instruction based upon his alleged honestly held but unreasonable belief that he needed to act to protect B.A.W. from his step-father's further abuse. *White,* 284 Kan. at 348.

After noting that evidence did exist to support White's belief that his grandson had been abused, the *White* Court explored the State's argument that the instruction should not have been given because White had not presented any evidence that he believed his grandson was in imminent danger at the time of the shooting. *White,* 284 Kan. at 350. The Court reviewed *State v. Hernandez,* 253 Kan. 705, 861 P.2d 814 (1993), a murder case where the district court instructed on self-defense; but denied defendant's request to instruct on defense of another. In that case, Hernandez fatally shot Weis, his brother-in-law, three days after Weis threatened to get his gun and shoot Hernandez's sister. *Hernandez,* 253 Kan. at 706. Although Hernandez testified that he shot Weis to stop him from going after his sister, his sister was not present when Hernandez shot Weis. *Hernandez,* 253 Kan. at 713. In finding no error for the court's refusal to instruct on defense of another, the *Hernandez* Court explained:

The history of violence could not turn the killing into a situation of

> imminent danger. The trial court correctly determined that K.S.A. 21-3211 requires at least an imminently dangerous situation at the time of the killing before a defense-of-another instruction should be given.

Hernandez, 253 Kan. at 712.

But as the *White* Court acknowledged, *Hernandez* could only give some guidance because it is not an imperfect defense case. *White*, 284 Kan. at 351. That acknowledgement by the *White* Court of the differences between *Hernandez* and an imperfect defense case is critical because it showcases the fundamental difference between a self-defense case based solely on K.S.A. 21-3211.

For further guidance on imminent harm, the *White* Court analyzed two imperfect defense of self cases from California, *In re Christian S.*, 872 P.2d 574 (Cal. 1994), and *Menendez v. Terhune*, 422 F.3d 1012 (9th Cir. 2005). *White*, 284 Kan. at 351. Under California's doctrine of imperfect self-defense, "when the trier of fact finds that a defendant has killed another person because the defendant *actually* but unreasonably, believed he was in imminent danger or great bodily injury, the defendant is deemed to have acted without malice and thus can be convicted of no crime greater than voluntary manslaughter." *In re Christian S.*, 872 P.2d at 575, 583 (Emphasis in original.)

In *Menendez*, the Ninth Circuit held that the district court had not erred in denying the defendants' request for an imperfect self-defense instruction. The defendants, Erik and Lyle Menendez had been convicted of first degree murder of their parents. *White*, 284 Kan. at 352. The defendants feared their parents had the capacity to harm them. Yet they did not present evidence that at the moment of the killings, they had actual fear and a belief in the necessity to defend against imminent peril to life or great bodily injury. "[T]his evidence would have helped explain why they had the unreasonable fear. Nonetheless, the fears leading up the murders and the reasons why such fears night have

existed simply are not the threshold issue for California's imperfect self-defense instruction." *White,* 284 Kan. at 353 (quoting *Menendez*, 422 F.3d at 1030, citing *In re Christian S.*, 872 P.2d 574 [1992]).

After reviewing *Hernandez* and the two California cases, the *White* Court concluded, "the evidence relied upon by White explains why he might have believed that B.A.W. had previously been abused or would be abused in the future. But *White did not provide any evidence* that he believed that B.A.W. was in imminent danger at the time of the shooting." *White*, 284 Kan. at 353. (Emphasis added.) The *White* Court held that the district court did not err in denying the defense's instruction request. *White,* 284 Kan. at 353.

Unlike in *White*, where the defendant raised this theory of defense as an alternative defense, Mr. Roeder's imperfect defense of another was his primary defense. *White*, 284 Kan. at 348-49. In *White*, the defendant only presented evidence of White's belief that his son-in-law's had abused White's grandson and he needed to protect his grandson. *White*, 284 Kan. 348-49. Whereas Mr. Roeder testified that he honestly believed that the children were in imminent harm. Defense counsel explained this point to the district court at the instruction conference: "White is different from us because we did in fact provide evidence through Scott Roeder that he honestly believed that he had to do what he had to do and that the babies were in imminent danger." (R. XXI, 211.) *White* explains that for a court to instruct on imperfect defense of another, Mr. Roeder needed to provide evidence that he actually believed that the unborn lives were in imminent danger at the time of the shooting. In this case, moreover, there was also the element of certainty. Mr. Roeder testified about his belief in the certainty of impending harm; at the time of the shooting, infants were scheduled to be aborted Monday morning,

22 hours later. (R. XXI, 113.)

In both *White* and *Hernandez*, the defendants shot a family member, i.e., White's son-in-law and Hernandez's brother-in-law, who had harmed another family member. *White*, 284 Kan. at 335; *Hernandez*, 253 Kan. at 706, 713. To prevent harm to these family members, White's grandson or Hernandez's sister, two defendants could have removed the harmed family member from being in contact with the abusive son-in-law or the brother-in-law. Yet in this case, Mr. Roeder only knew the aggressor, not the victims. Mr. Roeder felt that if Dr. Tiller "was to be stopped, that [Dr. Tiller's church] probably was the only place he could have been stopped, and actually I had an honest belief that he was not stopped there...then he would not have been stopped anywhere." (R. *XXI*, 110.) For Mr. Roeder, he believed that he had no other opportunity to act other than on that morning. (R V, 19.) There was sufficient evidence from which a reasonable person could conclude that Mr. Roeder actually believed that an imminently dangerous situation existed at the time of the shooting.

Mr. Roeder honestly, though unreasonably, believed Dr. Tiller was unlawfully harming children by performing unlawful abortions. In *State v. Shannon*, 258 Kan. 425, 426, 905 P.2d 649 (1995), the defendant was convicted of attempted first degree murder and aggravated assault for shooting Dr. Tiller. On appeal, the defendant claimed that the district court should have instructed on attempted voluntary manslaughter-imperfect defense of another under K.S.A. 1994 Supp. 21-3403(b). The defendant recognized that "performing abortions was not a use of unlawful force." *Shannon*, 258 Kan. at 430.

The *Shannon* Court noted that while the defendant presented evidence that she had an "honest, though unreasonable, belief that deadly force was necessary to protect unborn children from the victim's acts of abortion," the defense had not presented evidence that

"the defendant honestly believed the victim's actions in performing abortions were unlawful." *Shannon,* 258 Kan. at 429. The *Shannon* Court held that an instruction on attempted voluntary manslaughter was not warranted "when the record contains no evidence the *accused honestly believed* the aggressor was performing *an unlawful act." Shannon,* 258 Kan. at 425, Syl. ¶ 4. (Emphasis added.)

Unlike in *Shannon,* Mr. Roeder had a sincere and honest belief that Dr. Tiller was the aggressor because he performed unlawful abortions. While abortion, in general, may be found to be legal as noted by the district court, Mr. Roeder believed Dr. Tiller was performing abortions illegally. (R. XXI, 95.) In light of the criminal charges the State filed against Dr. Tiller, Mr. Roeder believed Dr. Tiller was about to use unlawful force. At trial, Mr. Roeder testified that the Attorney General's office had investigated Dr. Tiller's abortion practice and had subsequently filed criminal charges against Dr. Tiller: He testified, "There were charges brought because late-term abortions were being *performed unlawfully."* (R. XXI, 95.) (Emphasis added.)

Mr. Roeder sincerely believed that his use of force against Dr. Tiller was necessary: "I did what I thought was needed to be done to protect the children. I shot him." (R. XXI, 115.) As noted by defense, "Mr. Roeder had a lengthy and varied involvement in the pro-life movement." (R V, 18.) His commitment to the pro-life cause was sincere and honestly held. (R. V, 18.) See Model Penal Code § 3.04 ("The use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.")

Viewing the evidence in a light most favorable to Mr. Roeder, a reasonable fact-finder, instructed on the elements of voluntary manslaughter, could have concluded that this was an intentional killing based upon an unreasonable but honest belief that deadly

force was justified in the defense of another.

Third step: whether the court's failure to provide the instruction was harmless error.

Where evidence is admitted that a killing is done under the mitigating circumstances of an unreasonable but honest belief that deadly force is necessary, it is error to fail to so instruct. *State v. McCown,* 264 Kan. 655, Syl. ¶ 3, 957 P.2d 401 (1998). Because the evidence would justify a voluntary manslaughter conviction, the third step of the analysis is whether the court's failure to provide the instruction is reversible error.

Because the jury could have reasonably convicted Mr. Roeder of the lesser included crime based on the evidence presented, the district court should have instructed on imperfect defense of another. As a consequence to the court's erroneous ruling, Mr. Roeder was prevented from having the jury decide his guilt as to voluntary manslaughter.

This Court should not weigh evidence to determine if a reasonable fact-finder would convict Mr. Roeder of voluntary manslaughter. That is a factual determination that must be left for the jury's factual determination. See *State v. Moore,* 269 Kan. 27, 30, 4 P.3d 1141 (2000) ("It is the function of the jury and not the appellate court to weigh evidence and pass on the credibility of witnesses.")

The district court's denial of Mr. Roeder's request for an imperfect defense of another jury instruction deprived him of his due process right to have the jury consider a conviction of a lesser included crime. See *State v. Wade,* 45 Kan. App. 2d 128, 135-36, 245 P.3d 1083 (2010) (citing *State v. McIver,* 257 Kan. 420, Syl. ¶ 1, 902 P.2d 982 [1995]) ("The failure to give instructions on the law applicable to the theory of defense when requested may 'deny the defendant a fair trial.") The court's failure to provide this instruction, thus, was not harmless error.

This Court must follow what the legislature enacted when it broadened the

definition of voluntary manslaughter and included imperfect defense of another. The legislature included a lesser included crime of homicide where the defendant commits an intentional killing based on an unreasonable but honest belief that deadly force was necessary to defend others. This Court must reverse and remand for a new trial.

Issue 2: The district court violated Mr. Roeder's due process right to present his defense of voluntary manslaughter-imperfect defense of another.

When a criminal defendant claims that a district judge has interfered with his or her constitutional right to present a defense, this Court reviews the issue de novo. *State v. Carter,* 284 Kan. 312, Syl. ¶ 2, 160 P.3d 457 (2007) (citing *State v. Kleypas,* 272 Kan. 894, 921-22, 40 P.3d 139 [2001]); see also *State v. White,* 279 Kan. 326, 332, 109 P.3d 1199 (2005) (Whether defendant's constitutional right to a fair trial and to present a defense was violated is question of law.)

Introduction

To support a claim of voluntary manslaughter, the defense issued subpoenas to both former Attorney General Phill Kline, and Deputy Attorney General Barry Disney. (R.)0C, 108.) Before Mr. Roeder testified, the district court also ordered the defense to proffer his trial testimony. At trial, however, the district court quashed the subpoena of Mr. Disney. The court ordered the defense to proffer Mr. Kline's testimony, and after hearing the proffer, excluded the witness from testifying. Before Mr. Roeder testified, the district court denied the defense's motion to take judicial notice and to instruct the jury of two criminal cases, 06 CR 2961 and 07 CR 2112. Lastly, during Mr. Roeder's direct examination, the district court erroneously limited Mr. Roeder's testimony by sustaining the State's objections. These limitations, individually and collectively, violated Mr. Roeder's due process right to present his theory of defense to the jury.

Constitutional Right to a Fair Trial and Present a Defense

The United States Supreme Court has long held that "the right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." *Chambers v. Mississippi,* 410 U.S. 284, 294, 35 L. Ed. 2d 297, 93 S. Ct. 1038 (1973). "The right to present one's theory of defense is absolute." *State v. Bradley*, 223 Kan. 710, 714, 576 P.2d 647 (1978). "The exclusion of relevant, admissible, and noncumulative evidence, which is an integral part of the theory of the defense, violates the defendant's fundamental right to a fair trial." *State v. Mays,* 254 Kan. 479, Syl. ¶ 2, 866 P.2d 1037 (1994).

A. The district court erred by quashing the subpoena of a defense witness.

Background

Upon receipt of the defense's subpoena, Mr. Disney moved to quash the subpoena. (R. IV, 15; XX, 108, 110.) At the hearing, Mr. Disney's counsel argued that the subpoena should be quashed for two reasons: (1) the witness' testimony was irrelevant; and (2) it was privileged work product. (R. XX, 108, 110.)

Defense counsel argued that quashing the subpoena was premature because the district court had not yet heard Mr. Roeder's testimony. (R. *XX*, 112, 113.) Defense counsel also explained that Mr. Disney's testimony would assist in supporting Mr. Roeder's claim of imperfect defense of another. Mr. Roeder's defense included his reliance on the criminal charges filed against Dr. Tiller. (R. XX, 112.) Mr. Disney's testimony would support Mr. Roeder's belief that Dr. Tiller was performing unlawful abortions. The resulting acquittal of Dr. Tiller also supported Mr. Roeder's unreasonable but honest belief that he needed to act once Dr. Tiller was acquitted. (R. XX, 112.)

Defense explained that Mr. Disney would have testified that he was a licensed attorney, employed by the Kansas Attorney General's office, which alleged that on at least nineteen occasions, Dr. Tiller failed to "obtain an independent second opinion relative to the patient on whom he performed an abortion." (R. XX, 135-36; XXI, 5-9.) Defense counsel explained that he would elicit testimony that Mr. Disney was the lead prosecutor in Case No. 07 CR 2112, and that a prosecutor has "a good faith belief" when proceeding with criminal prosecutions. (R. XX, 123.) The defense, therefore, would not elicit testimony from Mr. Disney that was a work product privilege.

The State argued that the subpoena should be quashed because it was "not relevant at all to whether or not [Mr. Disney] standing up in court made Scott Roeder think it was okay, that he was unlawfully doing something, when a jury found Dr. Tiller not guilty." (R. XX, 131.) The State also argued.that Mr. Disney's good faith was not an issue in the case. (R. XX, 132.)

The district court agreed with the State's argument that Mr. Disney's good faith was not an issue: "I agree, and they don't need to call him for that reason, not to mention it invades his mental process and his work product and everything else that is protected. I'm sustaining the motion to quash." (R. XX, 132.)

In reaching this ruling, the district court found that the testimony of the witness' good faith basis to prosecute Dr. Tiller was "almost redundant." (R. XX, 120.) The court also noted that the facts of the criminal prosecution of Dr. Tiller "are facts that are well known." (R. XX, 120.) Because Mr. Roeder had attended Dr. Tiller's trial, the court ruled, he "can comment about his beliefs that were formed as a result and the outcome of the not guilty verdict." (R. XX, 129.)

At the end of the hearing, the court summarized its ruling:

> What they have proffered today, that they want Barry Disney to get up here and say, I had a good-faith belief to prosecute George Tiller, is unnecessary, number 1, and it invades Mr. Disney's mental impressions, his thought processes, his strategies and why he thought he ought to go forward with that case. I think the Court file in and of itself can stand for that proposition without calling Mr. Disney.

(R. XX, 134.)

Argument

K.S.A. 60-245(c)(3)(A) provides four instances for when an issuing court must quash or modify a subpoena:

> (i) Fails to allow a reasonable time to comply;
> (ii) requires a resident of this state who is neither a party nor a party's officer to travel more than 100 miles from where that person resides, is employed or regularly transacts business in person or requires a nonresident who is neither a party nor a party's officer to travel more than 100 miles from where the nonresident was served with the subpoena, is employed or regularly transacts business in person, except that, subject to paragraph (3)(B)(iii), the person may be commanded to travel to the place of trial;
> (iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or
> (iv) subjects a person to undue burden.

The subpoena of Mr. Disney should have been honored because the facts in this case did not meet any of the four provisions in K.S.A. 60-245(c)(3)(A). The subpoena did not fail to allow a reasonable time to comply since Mr. Disney was present at the hearing. During the hearing, the State told the district court that Mr. Disney was present and thus, available for questioning. (R. XX, 136.) The witness could have testified later that day or the following day. Nor did the subpoena cause the witness to travel more than 100 miles from his practice; Mr. Disney had conducted the trial against Dr. Tiller in Wichita.

The district court erred in finding that Mr. Disney's testimony required "disclosure of privileged or other protected matter" as required under K.S.A. 60-

245(c)(3)(A)(iii). See *State v. Gonzalez,* 290 Kan. 747, 754, 234 P.3d 1 (2010):

> The work-product rule is codified at K.S.A. 60-226(b)(4), which states in part:
>
> (4) Trial preparation; materials. (A) Documents and tangible things. Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative, including the other party's attorney, consultant, surety, indemnitor, insurer or agent. But, subject to subsection (b)(5), those materials may be discovered if:
> (i) They are otherwise discoverable under paragraph (1); and
> (ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.
> (B) Protection against disclosure. If the court orders discovery of those materials, *it must protect against disclosure of the mental impressions, conclusions, opinions or legal theories of a party's attorney or other representative concerning the litigation.*

"The work product rule is not an absolute privilege but rather is a limitation on discovery." K.S.A. 60-226(b), see also *Wichita Eagle and Beacon Pub. Co., Inc. v. Simmons,* 274 Kan. 194, 218, 50 P.3d 66 (2002).

Mr. Disney's testimony did not fall under an attorney's work product privilege. Inquiry of Mr. Disney regarding his good faith belief in prosecuting the case was not an inquiry regarding facts that would reveal any privileged thought process. Prosecutors, as a rule, must prosecute cases in good faith. Under Supreme Court Rule 3.8(a), *Special Responsibilities of a Prosecutor,* "The prosecutor in a criminal case shall refrain from prosecuting a charge that the prosecutor *knows is not supported by probable cause."* (Emphasis added.) Defense counsel correctly explained:

> [T]here are a lot of prosecutors and some ex-prosecutors in the room, and none of us would have prosecuted a case if we didn't have a good faith belief as to the guilt of the defendant. So that's not work product at all. We are just asking that he was the prosecutor and in all cases had a good faith belief.

(R. XX, 123.)

The district court also noted that the court filings in 07 CR 2112 were public information. (R. XX, 120.) The court stated that the prosecution of Dr. Tiller spoke for itself and that Mr. Disney would simply testify that he prosecuted the case in good faith:

> But for Barry Disney to get up here and say I prosecuted Dr. Tiller and I had a good faith basis to prosecute him is almost redundant. *The pretrial motions that were filed in that case would demonstrate that Barry Disney had a good faith belief.* The court's findings that allowed it to go all the way to a jury verdict and denied all kind[s] of motions for a directed verdict and to discharge the defendant at the close of the State's case, which is typically done[1...illl *those events speak for themselves,* and Barry Disney has nothing more to offer to say well, *I prosecuted this with a good faith belief. That is assumed or presumed.*

(R. XX, 120.) (Emphasis added.)

Nor was Mr. Disney's testimony protected under the attorney-client privilege. "The work-product limitations are based on policy considerations that are similar to those underlying the attorney-client privilege." *State v. Gonzalez*, 290 Kan. 747, 762, 234 P.3d 1 (2010). K.S.A. 60-426(a), which sets forth the attorney-client privilege, only "protects from compelled disclosure certain confidential communications made between an attorney and client in the course of their professional relationship." *Gonzalez*, 290 Kan. at 758.

"A privilege is a rule of evidence that allows a person "to shield [a] confidential communication or information from compelled disclosure during litigation." *Gonzalez*, (citing Imwinkelried, The New Wigmore: EvidentiaryPrivileges § 1.1, p. 2 [2d ed. 2009])." In this case, Mr. Disney's testimony would not require a disclosure of privileged or other protected matter.

The subpoena also did not subject the witness to undue burden. Counsel for Mr. Disney never argued that the subpoena placed an undue burden on the witness. (R. XX, 123.) And the State told the court that the subpoena should not be quashed because of

undue burden: "Well, he can make time if he is subpeonaed to come to this court. And if I subpoenaed him, I would say he would have to make time to come here to answer to that subpoena." (R. XX, 131.)

The district court, in fact, stated that the defense only wanted the witness to testify for a *"very limited, five-minute examination* that he prosecuted Dr. Tiller in good faith, that he had a good-faith basis to prosecute him." (R. XX, 132.) (Emphasis added.) Although the court acknowledged the "inconvenience" to the witness was one of its many factors that it would consider, the court did not list this as a factor in its ruling. (R. XX, 120, 132-34.)

The district court's ruling was in error. The court also stated that the testimony was "unnecessary." (R. XX, 134.)

B. The district court erred by excluding the Mr. Disney and Mr. Kline from testifying in support of Mr. Roeder's defense.

Background

The day after the court quashed the subpoena of Mr. Disney, the court ordered the defense to proffer Mr. Kline's testimony to determine if he should testify. (R. XX, 133-34; XXI, 4.)

For Mr. Kline's proffer, the defense had Mr. Kline speak about the criminal charges that the Attorney General office's brought against Dr. Tiller. (R. XX, 1.20; XXI, 14.) Mr. Kline stated that he initiated an investigation into the potential of criminal late-term abortion. (R. XX1, 17.) The proffer included his explanation as to why the late-term abortions were considered unlawful under a new state statute. (R. XXI, 19-25, 30-34.) Mr. Kline explained how he filed charges against Dr. Tiller and how the Sedgwick County district attorney's office moved to have the court dismiss the charges. (R. XXI, 31-33.)

Before the proffer, the court had already listed its reasons for excluding the testimony of Mr. Disney and Mr. Kline:

> But again, going to Barry Disney's beliefs, former Attorney General Phill Kline's beliefs, as a means to somehow bolster or corroborate or collaterally support Scott Roeder's beliefs, I don't think is appropriate....I don't think that Barry Disney or Phill Kline would add any more or any less to what he would testify to.
>
> He would be testifying to events that have occurred and what his expectations or those events would do and how it might affect or satisfy his beliefs on abortion. But to then have a former - - an Attorney General who prosecuted and a former Attorney General who sought to bring charges to say well, we have a good-faith belief, I think is almost *redundant.*
>
> And without getting into the whole merits of the Phill Kline filings, that was handled by another judge based upon the positions taken by the District Attorney and her jurisdiction on filing the charges within the venue of Sedgwick County, Kansas, and the 18th Judicial District. And another judge dismissed those charges. That is just part of the factual background and scenario that is events that led up to and prior to May 31, 2009, of which I think Mr. Roeder can testify about.

(R. XXI, 10, 11.) After hearing Mr. Kline's proffer, the district court ruled that Mr. Kline could not testify. (R. XXI, 46.) The court explained that regarding the filing and dismissal of the charges against Dr. Tiller, "are facts readily known and were made known in the media... Mr. Roeder can testify about how that affected him, how it affected his beliefs," and his thought process. (R. XXI, 46.) The court also did not want Mr. Kline to testify to his good faith belief regarding the criminal charges. (R. XXI, 46.)

Argument

Relevant evidence is defined as "evidence having a tendency in reason to prove any material fact." *State v. Mays,* 254 Kan. at 486 (citing K.S.A. 60-401(b) and *State v. Baker,* 219 Kan. 854, 549 P.2d 911 [1976]). "To be admissible evidence must be confined to the issues, but need not bear directly upon them. For evidence of collateral

facts to be competent there must be some natural or logical connection between them or result they are designed to establish." *State v. Brown,* 217 Kan. 595, Syl. ¶ 2, 538 P.2d 631 (1975).

In *Simmons v. State,* 542 A.2d 1258, 1265 (1988), an imperfect self-defense case, the Maryland Supreme Court held that the district court committed reversible error by excluding defendant's expert witness. In that case, the defendant proffered that "at the time of the homicide he believed that use of force was necessary to prevent imminent death or serious harm[.]" *Simmons,* 542 A.2d at 1259. The "expert would only testify that such a subjective belief wouleconsistent with Simmons' psychological profile[.]" *Simmons,* 542 A.2d at 1261. The district court excluded the evidence on the ground that the jury's function would be usurped if the psychiatrist testified that Simmons acted under an honest belief that self-defense was necessary when he killed the victim. The district court ruled that no one could testify as to what Simmons' thought processes was at the time of the homicide. *Simmons,* 542 A.2d at 36, 41.

In reversing, the *Simmons* Court ruled that the psychiatrist's "proffered testimony tended to prove an element of the imperfect self-defense[.]" *Simmons,* 542 A.2d at 1261. The Maryland Supreme Court explained:

> [W[hen the defendant asserts imperfect self-defense against a charge of murder, the State and the accused will necessarily present conflicting evidence as to the presence or absence of a mitigating factor. If the trier of fact is convinced that the defendant honestly believed that the use of force was necessary to avoid serious bodily injury, but also find this subjective belief to be unreasonable under the circumstances, the defendant is guilty of voluntary manslaughter.

Simmons, 542 A.2d at 1261.

In that case, the proffered testimony "had some relevance in that consistency between the specific subjective belief testified to by Simmons and Simmons

psychological profile tends to make it more likely that Simmons in fact held that subjective belief." *Simmons,* 542 A.2d at 1265. The Court reversed the district court's ruling because the defendant was permitted to present evidence of his mental state in support of his defense of imperfect self-defense. *Simmons,* 542 A.2d at 1261.

Here, the two prosecutors' testimony had some relevance to Mr. Roeder's specific belief that he must act when the court dismissed the charges. Mr. Roeder's honest but unreasonable belief that he needed to act was reinforced when the jury acquitted Dr. Tiller. As *Simmons* explains, given the subjective nature of this defense, Mr. Roeder had to present testimony that explained why he came to the conclusion that he had to act against Dr. Tiller. Specifically, the testimony of the Attorney General's prosecution of Dr. Tiller went to Mr. Roeder's belief of the unlawful nature of Dr. Tiller's abortion practice and how the State failed in prosecuting Dr. Tiller. The basis of Mr. Roeder's honest belief was formed in part by prosecutors who practiced in the same state in which Dr. Tiller performed abortions.

Naturally, due to their official character as officers of the court, Mr. Roeder, "counted on and relied on an official of the Attorney General when prosecuting the case, and obviously prosecuting in good faith." (R. XX, 112.) Mr. Roeder, in fact, had personally attended a few days of Dr. Tiller's trial. (R.)0(I, 107.) The jury, more importantly, would have given greater weight to the testimony of the two prosecutors testifying about criminal proceedings. See *Hall v. United States,* 419 F.2d 582, 583-84 (5th Cir. 1969) ("The power and force of the government tend to impart an implicit state of believability to what the prosecutor says.") With their testimony, the jury would have had a better understanding that Mr. Roeder's honest but unreasonable belief that, under the circumstances, the use of force was necessary.

The court had ruled that because Mr. Roeder had attended the trial of Dr. Tiller, he "can comment about his beliefs that were formed as a result and the outcome of the not guilty verdict." (R. XX, 129.) But the trier of fact should have all the relevant evidence unless some overriding consideration of policy or expediency requires its exclusion. *Baker,* 219 Kan. at 858. As defense counsel explained, just having Mr. Roeder "talk about the trial does not have the same effect or result that we are attempting to do, we are obligated to do, in proving beyond a reasonable doubt that he had an honest belief." (R. XX, 113.) See *Simmons,* 542 A.2d at 1265 (the psychiatrist's proffered testimony made it more likely that the defendant held the subjective belief that the use of force was necessary to serious bodily harm).

In *State v. Shannon,* 258 Kan. 425, 426, 905 P.2d 649 (1995), the defendant claimed that the district court should have instructed on attempted voluntary manslaughter-imperfect defense of another. This Court held that an instruction on attempted voluntary manslaughter was not warranted "when the record contains no evidence the *accused honestly believed* the aggressor was performing *an unlawful act." Shannon,* 258 Kan. 425, Syl. ¶ 4. (Emphasis added.)

The *Shannon* opinion explained the need to present evidence of a belief that Dr. Tiller was performing unlawful abortions. The defense had to show the timeline of events surrounding Dr. Tiller, which included Dr. Tiller's trial and acquittal two months before the shooting. In fact the district court stated:

> It's not the intent to let in any collateral sources to bolster Scott Roeder's opinions. *It has to be somehow factually tied to dates and times that precede May 31st 2009,* and become part of or a basis for his reasonably or unreasonably held belief when he walked into that church on May 31, 2009, and shot Dr. Tiller[.]

(R. XX, 137.) (Emphasis added.)

Mr. Disney would have testified that Dr. Tiller was acquitted of the nineteen criminal charges. (R. XXI, 5.) After Mr. Roeder learned that the jury had acquitted Dr. Tiller, he felt:

> Very frustrated. Seemed like that was the last attempt by the State of Kansas to find if there was anything at all going on illegally in George Tiller's clinic, and it seemed as though that was the last step and now he was acquitted, found not guilty.

(R. XXI, 107-08.) The prosecutors' testimony was factually tied to the events that proceeded the May 31, 2009, shooting.

Although at the beginning of his proffer, Mr. Kline discussed his investigation of Dr. Tiller, which included information that had not been publically made, the defense explained that its purpose in calling Mr. Kline was for him to simply testify as to "the results of the investigation and the dismissal [of the charges]." (R. XXI, 22-26.)

In not allowing Mr. Kline to testify, the court focused on the legality of Dr. Tiller's practice, noting, "there has been no indication in the record for Mr. Roeder to say that he had some factual basis or knowledge that Dr. Tiller violated the law was conducting illegal abortions." (R. XXI, 47.)

Yet, as the defense explained, "the fact that he was found not guilty and the fact that the cases were dismissed *are just as important in the mindset of Mr. Roeder as the fact that they were filed in the first place."* (R. XXI, 47.) (Emphasis added.) The defense explained:

> It's to talk about how it affected Scott Roeder that the cases were dismissed and that he was acquitted. It doesn't go to show what he was actually doing, it goes to how he interpreted that, and then he based that action, those actions, those failures of the State to successfully prosecute Dr. Tiller, being dismissed and being acquitted, that goes to the mindset of Scott Roeder. That is what **leito** the frustration and honest belief.

(R. XXI, 47.)

Mr. Roeder had the right to show "why he came to this honest belief that he needed to act the way he did." (R. XX, 119.) The exclusion of these two relevant and material witnesses deprived Mr. Roeder of presenting testimony about the criminal litigation surrounding the unlawful nature of Dr. Tiller's abortion practice and what prompted him to take action.

C. The district court erred by ordering defense to proffer Mr. Roeder's testimony before he testified and to proffer Mr. Kline's testimony.

Background

Before the defense presented its case, the district court ordered the defense to proffer Mr. Roeder's trial testimony to rule on the scope of his testimony. (R. XVII, 7-8; XX, 132-33.)

> *I can't even rule on the scope of Scott Roeder's testimony until it's proffered.* And we have all discussed that. *It has to be proffered outside the presence of the jury*. I have already said we are not going to discuss partial-birth abortions, we are not going to discuss late-term abortions and actual medical procedures. Scott Roeder doesn't have the medical knowledge to testify to that, and anything he would know about that is hearsay because it would come from other sources.

(R. XX, 132-33.)

The following day, the district again ruled that Mr. Roeder had to proffer his testimony to determine if it is irrelevant or immaterial:

> But again, until I hear a proffer of what Scott Roeder intends to testify to, if he does - - he has a right to testify and the Court has to instruct the jury in that regard. If he chooses to testify, there is going to be a proffer made by counsel, *because he is not going to get up there and get to just blurt out whatever he wants to say*. I agree. It has to be relevant and material. But until I hear the proffer, I can't even judge if it's irrelevant or immaterial, nor can I do that on Phill Kline.

(R. XX, 133.) (Emphasis added.)

The defense objected to the court's ruling. (R. XXI, 4-6.) Reluctantly, the defense proffered Mr. Roeder's testimony specifically relating to "the relationship and his

dependence upon the prosecutions" of Dr. Tiller. (R. XXI, 6.) The defense proffered Mr. Roeder's testimony that he had honest beliefs that were formed in part due to the "the actions and failures of Mr. Kline and Mr. Disney," as well as the actions of the Sedgwick County District Attorney's office in having the charges dismissed, and that the district court ultimately dismissed the charges brought by Mr. Kline. (R. *XXI,* 8.) The defense further proffered:

> Scott came to believe that if two men, attorneys, officers of the court who prosecute criminals for a living, had good-faith beliefs - - and this would have come out in their testimony, and will in Mr. Kline's testimony - - if these men had good-faith beliefs that Dr. Tiller was killing unlawfully, Scott came to believe that he needed to act in the manner that he did.

(R. XXI, 8.)

After the proffer, the district court restated its earlier ruling. (R. XXI, 9-10.) Mr. Roeder could not testify about "descriptions of actual procedures, medical terms, things of the defendant wasn't qualified to testify[.]" (R. XXI, 9-10.) The court erred in ordering the defense to proffer Mr. Roeder's testimony.

Argument

The court infringed on Mr. Roeder's constitutional rights and failed to ensure his right to a fair trial by ordering counsel to proffer his testimony before the State had rested its case. (R.)0(I, 6, 60.) Mr. Roeder had a right to testify under the Sixth Amendment. See *Nix v. Whiteside,* 475 U.S. 157, 164, 89 L. Ed. 2d 123, 106 S. Ct. 988 (1986); *Faretta v. California,* 422 U.S. 806, 819, 45 L. Ed. 2d 562, 95 S. Ct. 2525 (1975) (listing a defendant's right to testify in his own behalf as one of several constitutional rights "essential to due process of law in a fair adversary process[.]") That right and the right to present a defense should not be compromised out of concern that a witness would "just blurt out whatever he wants to say." (R. *XX*, 133.)

"Whether the defendant is to testify is an important tactical decision as well as a matter of constitutional right". *Brooks v. Tennessee*, 406 U.S. 605, 612, 32 L. Ed. 2d 358, 92 S. Ct. 1891 (1972). Thus, to make a defendant proffer a portion of his testimony, and more importantly, his theory of defense before the State has closed its case or else lose that right to testify violates a defendant's right to a fair trial. See *Brooks*, 406 U.S. at 612 (statute requiring defendant to testify first before defense's other witnesses or waive that right to testify violates the defendant's privilege against self-incrimination).

The court had already ruled that Mr. Roeder could not testify to partial-birth abortions, late-term abortions and actual medical procedures because of Mr. Roeder's lack of medical knowledge. (R. XX, 132-33.) Because of this earlier ruling, it was not necessary for Mr. Roeder to proffer his testimony. Not surprisingly, after Mr. Roeder's testimony was proffered, the court's ruling did not change. (R. XXI, 9-10.)

Normally in a criminal trial, a defendant submits a proffer when the State's motion in limine has been granted and "the party being limited by the motion has the responsibility of proffering sufficient evidence to the trial court in order to preserve the issue for appeal." *State v. Evans*, 275 Kan. 95, 62 P.3d 220 (2003); see also *Rozier v. State*, 636 So. 2d 1386, 1387 (Fla. 4th DCA 1994) ("The primary purpose of a proffer is to include the proposed evidence in the record so the appellate court can determine whether the trial court's ruling was correct.")

In this case, however, the court had not granted a motion in limine before ordering the defense to proffer the testimonial evidence of the former Attorney General. (R. IV, generally; XX, 133-34; XXI, 4, 5.) The defense was not proffering excluded evidence to ensure that the trial court made an evidentiary decision and to preserve the issue for

appeal. See *State v. Deal*, 271 Kan. 483, 490, 23 P.3d 840 (2001) (purpose of making a proffer is to allow trial court to make evidentiary decision based on substance of testimony and thus, the failure to make a proffer of excluded evidence precludes appellate review).

Rather, the district court ordered Mr. Roeder to proffer his testimony out of concern that Mr. Roeder would "blurt out whatever he wants to say." (R. XXI, 133.) Yet any objections as to Mr. Roeder's testimony should have been done during his direct examination. If defense counsel attempted to inquire about irrelevant matter, the State could object.

For example, in *State v. Shannon*, 258 Kan. 425, 905 P.2d 649 (1995), a case cited by the district court throughout Mr. Roeder's trial, when the defendant discussed the victim as a "late-term abortionist" on direct examination, the State objected that the testimony was irrelevant. *Shannon*, 258 Kan. at 434. The district court sustained the State's objection. *Shannon*, 258 Kan. at 434. The district court in *Shannon* did not resort to first proffering the defendant's testimony out of concern that her testimony may include irrelevant testimony. Nor did the *Shannon* Court suggest that the better way of preventing a defendant from testifying on irrelevant matters was for the district court to order a proffer of the witness' testimony.

The district court was fully aware of the role of the contemporaneous objection. During a break in Mr. Roeder's testimony, the district court reminded the State of their responsibility to timely object: "[Y]ou have every reason to object [based] on leading and suggestive. We are just going to have to cross each bridge on each question." (R. XXI, 102-03.) With the proffer requirement, however, the district court essentially pre-empted the need for the State to lodge a contemporaneous objection.

Further, the district court's requiring Mr. Roeder to make a proffer of testimony did not ensure that Mr. Roeder's testimony would only include relevant material evidence. See *Luce v. United States,* 469 U.S. 38, 41, 83 L. Ed. 2d 443, 105 S. Ct. 460 (1984) (explain that requiring a defendant to make a proffer of testimony may be futile because "his trial testimony could, for any number of reasons, differ from the proffer.").

By hearing Mr. Roeder's proffer, the State gained an advantage. The State was able to "preview" Mr. Roeder's direct examination, allowing the State to make numerous timely objections when Mr. Roeder testified. (R. XXI, 91, 93.) Additionally, if the court had not heard the proffer, the court may have allowed Mr. Kline to testify. After hearing Mr. Roeder's proffer about Mr. Kline's criminal filings against Dr. Tiller, the court maintained that Mr. Kline's testimony was collateral and unnecessary. See *Simmons,* 542 A.2d at 1265 (expert testimony was relevant and supported defendant's imperfect self-defense argument that he held a subjective belief that he was in mortal danger at time of homicide). Given all of these benefits to the State, the proffer of Mr. Roeder weakened his defense and denied him the right to a fair trial.

The trial court also erred in requiring a proffer of Mr. Kline's testimony.

The trial court also erred in requiring a proffer of Mr. Kline's testimony. (R. XXI, 14.) Mr. Kline's proffer was unnecessary. The district court had already learned why the defense needed to have Mr. Kline testify at the motion to quash subpoena hearing. The court stated, "And we will address Phill Kline tomorrow morning; and I will make a ruling. These witnesses will not be called and just get to blurt out whatever they want to whatever the defense tries to extract from them." (R. XX, 127.)

As noted above, in *Luce v. United States,* 469 U.S. 38, 41, 83 L. Ed. 2d 443, 105 S. Ct. 460 (1984), the United States Supreme Court stated that requiring a proffer of testimony may be futile because the witness's "trial testimony could, for any number of

reasons, differ from the proffer." *Luce,* 469 U.S. at 41; see also

Earlier the court stated that it was hesitant to include testimony on Mr. Kline's good faith filing of the charges due to recent disciplinary actions regarding his investigation of Dr. Tiller. (R. XXI, 11.) If the State was concerned about Mr. Kline's testimony, then it could have raised a contemporaneous objection at the time of the question. At that time, the court could rule on his testimony. The court erred in ordering the defense to first proffer Mr. Kline's testimony.

D. The district court erred by denying Mr. Roeder's motion to take judicial notice and instruct the jury of the two criminal cases of Dr. Tiller.

Background

Because the district court had granted Mr. Disney's Motion to Quash Subpeona, had excluded Mr. Kline as a defense witness, the defense asked the court to take judicial notice and instruct the jury, on 06 CR 2961 and 07 CR 2112, the two criminal cases brought against Dr. Tiller. (R. IV, 63; XXI, 50-51.)

At the motion to quash subpoena hearing, the court said it would take judicial notice of the two cases. In denying the defense's subpoena to have Mr. Disney testify about his prosecution of Dr. Tiller in 07 CR 2112, the court remarked, "You could bring up the court file in 07 CR 2112 to establish that. You can ask the Court to take judicial notice of its own court file." (R. XX, 120.) Later at that same hearing, the court stated: "I think the Court file in and of itself can stand for that proposition without calling Mr. Disney." (R. XX, 134.)

The following day, after the district court ruled that Mr. Kline could not testify as a defense witness, the defense filed a motion to take judicial notice and to instruct the jury. (R. IV, 63.) Regarding the defense's request to instruct the jury, under K.S.A. 60-411, once a district court takes judicial notice, the court is then required to instruct the

jury "to accept as a fact" the information that the court took notice of See K.S.A. 60-411.

The defense requested that the court take judicial notice of the two criminal cases, specifically, the existence of 06 CR 2961 and 07 CR 2112, the nature of the charges, the disposition of these two cases, and the fact that in all criminal prosecutions, and that "individuals who prosecute those cases must have a good faith belief that the defendant being charged and prosecuted is in fact guilty of those charges[.]" (R. IV, 63.)

At the hearing, the defense referred to its motion and asked the court to instruct the jury that the criminal cases were filed, "the contents of the filings, the relative dates of the filings, and the disposition, including the fact that it was dismissed - - Mr. Kline's case was dismissed and Mr. Disney's case resulted in an acquittal of George Tiller. We believe that that is evidence that is fairly admitted[.]" (R. XXI, 51.)

The State earlier had argued that the criminal file where Dr. Tiller was a defendant was "irrelevant, immaterial, has no basis in this courtroom[.]" (R. XX, 128.) The court denied Mr. Roeder's motion to take judicial notice and instruct on the filings and regarding prosecutors' good-faith, and ruled that only Mr. Roeder could discuss the criminal charges against Dr. Tiller. (R. XXI, 54.) The court did not instruct the jury of the two Wichita cases against Dr. Tiller. (R. XXI, 206-07.)

Argument

This Court has stated that under the doctrine of judicial notice, a court takes "cognizance of facts known generally by well-informed person, but not of particular facts not of common notoriety, of which they have no constructive knowledge, or which may be disputed by competent evidence." *Razey v. Unified School Dist. No.* 385, 205 Kan. 551, 470 P.2d 809 (1970) (quoting Brandon *v. Lozier-Broderick &* Gordon, 160 Kan.

506, Syl. ¶ 3, 163 P.2d 384 [1945]); see also K.S.A. 60-409(b) (Judicial notice may be taken without request by a party, of "such facts as are so generally known or of such common notoriety within the territorial jurisdiction of the court that they cannot reasonably be the subject of dispute").

Whereas K.S.A 60-410(c) provides when the court shall *decline* to take judicial notice of the information:

> If the information possessed by or readily available to the judge, whether or not furnished by the parties, fails to convince the judge that a matter falls clearly within 60-409, or if it is insufficient to enable him or her to take notice the matter judicially, he or she shall decline to take judicial notice thereof

In this case, the district court's reasons for not taking judicial notice of the court files, namely that judicial notice of the two cases was unnecessary, did not fall under K.S.A 60-410(c).

Without the requested information, the jury was not adequately informed of the criminal charges brought against Dr. Tiller for performing illegal abortions, which support Mr. Roeder's subjective belief. Earlier in the trial, the district court told the defense, "You could bring up the court file in 07 CR 2112 to establish that. You can ask the Court to take judicial notice of its own court file." (R. XX, 120, 134.) The district court's erroneous ruling directly contradicted its earlier statements.

Besides taking judicial notice of the criminal cases, the defense also asked the court to take judicial notice of the prosecutors' good faith. (R. IV, 63.) The court stated that it was "inappropriate" to take judicial notice of the good faith filing of the charges: (R. XXI, 52.)

Yet even without judicial notice of the prosecutors' good faith, the court still could have taken judicial notice of the uncontroverted facts of the cases themselves,

including the nature of the charges and the cases' disposition. In fact, the court stated that it could "take judicial notice of its own files," including that case number 06 CR 2961 was filed on December 21, 2006 by Mr. Kline "and was dismissed the next day for lack of jurisdiction." (R. XXI, 53.) And that the Attorney General's office filed 07 CR 2112, "alleging 19 misdemeanor violations of the laws, and that the matter proceeded to a jury trial and on a date in question, the date of the jury's verdict, Dr. George Tiller was found not guilty." (R. XXI, 53.)

The court, however, denied the defense motion to take judicial notice. (R. XXI, 53.) The court's ruling was too broad because it could have limited its judicial notice to its own court filings. See *Simmons,* 542 A.2d at 1261 (reversing district court's ruling, which excluded defendant's proposed testimony in support of an imperfect self-defense, because the court ruling was "too broad"). The court erred in not taking judicial notice of its own filings.

Under K.S.A. 60-411, if the district court in this case had taken judicial notice of the criminal cases, the court would have been required to instruct the jury "to accept as a fact" the nature of the criminal charges against Dr. Tiller, the 06 CR 2961 charges were dismissed, and that the Dr. Tiller was acquitted in 07 CR 2112.

K.S.A 60-411, *Instructing the trier offact as to matter judicially noticed,* provides:

> If a matter judicially noticed is other than the common law or construction or public statutes of this state, the judge shall indicate for the record the matter which is judicially noticed and if the matter would otherwise have been for determination by a trier of fact other than the judge, he or she shall instruct the trier of fact to accept as a fact the matter so noticed.

Without the judicial notice, the jury was never instructed of the court's own files. The only evidence about the criminal charges came from Mr. Roeder's direct

examination. (R. XXI, 107-08.)

Mr. Roeder had a right to present relevant evidence in support of his belief. See *Shannon,* 258 Kan. at 429 (denying attempted imperfect defense of another instruction because the defense had not presented evidence that "the defendant honestly believed the victim's actions in performing abortions were unlawful.") This exclusion of the relevant and material evidence, which supported his belief, violated Mr. Roeder's right to present a defense.

E. The district court erred by limiting Mr. Roeder's testimony during direct examination.

Background

The day before Mr. Roeder testified, the district court limited Mr. Roeder's testimony. (R. XX, 133.) The court stated that Mr. Roeder would not be allowed to "discuss late-term abortions and actual medical procedures. Scott Roeder doesn't have the medical knowledge to testify to that, and anything he would know about that is hearsay because it would come from other sources." (R. XX, 133.) Mr. Roeder could testify regarding "his personally-held beliefs just in general about abortion, whether it's harmful, whether it terminates a viable baby, he is going to get to testify to that[.] (R. XX, 133.) At trial, however, the court continually limited the scope of his testimony beyond its earlier ruling.

For example, on direct examination, defense counsel asked Mr. Roeder about the former Attorney General's investigations into Dr. Tiller's practice:

> Defense: Did you follow with any interest – are you aware if Mr. Kline had any investigations into the practice of abortion in Kansas and specifically the practice of Dr. Tiller?
>
> Mr. Roeder: Yes - -

State: Objection. Non-responsive.

The Court: Anything beyond yes is non-responsive and could call for *objectionable material* that we have discussed and ruled upon the presence of the jury.

(R. XXIII, 95.)

Mr. Roeder's understanding of the investigations, moreover, was not "objectionable material." His awareness of the actions taken by the Attorney General's office was highly relevant to his defense and required more than just a yes-or-no answer. The proffer of former Attorney General showed that the answer did not require testimony regarding medical procedures. (R.)0(I, 19-21, 30-32.)

Also during Mr. Roeder's testimony, counsel asked him if he believed that "late-term abortions are somehow worse than other abortions?" (R. XXI, 84.) Mr. Roeder responded, "My understanding-" and stopped when the State objected:

State: Your Honor, I'm going to object. This sounds like his understanding is going to turn into an explanation.

The Court: I think as phrased it calls for a yes or no. He can answer yes or no and he is not allowed to elaborate beyond that. The question as phrased calls for a yes or no answer. Do you want it read back?

Defense counsel withdrew the question and asked another question. (R. XXI, 84.)

Defense: What are *your feelings* about late-term abortion?

Mr. Roeder: They are definitely wrong.

Defense: How so?

Mr. Roeder: The child is more developed, feels more pain.

State: Your Honor, objection, this is - -

The Court: That is speculation, the last statement. *The jury is admonished to disregard the reference to pain.* Mr. Rudy, I think you need to rephrase your question or at least guide and direct your client's

testimony in this regard.

(R. XXI, 84.) (Emphasis added.)

This testimony was about Mr. Roeder's feelings, his *personal belief about* late-term abortions. The district court erred in sustaining the State's objections to Mr. Roeder's testimony. The testimony was relevant because it tended to make it more likely that Mr. Roeder held an honest but unreasonable belief that the use of force was necessary.

The court had earlier ruled that Mr. Roeder could testify regarding "his personally-held beliefs just in general about abortion, *whether it's harmful,* whether it terminates a viable baby[.]" (R. XX, 133.) (Emphasis added.) The court should have followed its earlier ruling that only limited Mr. Roeder's testimony of different abortion procedures that required a medical background.

In determining that Mr. Roeder could not testify to medical procedures, the district court relied upon *State v. Shannon,* 258 Kan. 425, 905 P.2d 649 (1995). The *Shannon* Court upheld the district court's ruling that the defendant could not testify about abortion procedures because the testimony was irrelevant. *Shannon,* 258 Kan. at 434. The defendant had "wanted to testify about procedures used for terminating late-stage pregnancies." *Shannon,* 258 Kan. at 434. The defendant, however, "did not know why she selected the victim as her target. "Therefore, it was not the victim's particular procedure for performing abortions, or even the fact that he performed abortions during the late stages of pregnancy, that gave rise to her motive, it was the fact that he performed abortions at all." *Shannon,* 258 Kan. at 434. Consequently, the *Shannon* Court held that the district court had not erred in limiting the defendant's testimony on direct

examination because "[t]estimony concerning the victim's abortion procedures was not relevant to this case." *Shannon,* 258 Kan. at 434.

After analyzing *Shannon,* the district court simply followed its holding and ruled that Mr. Roeder could not testify to Dr. Tiller's abortion practices. (R. XX, 132-33.) Unlike the defendant in *Shannon,* Mr. Roeder did testify that he choose Dr. Tiller because of his late-term abortion practice. (R. XXI, 85.)

The court should have allowed Mr. Roeder to testify about what he believed concerning the Attorney General's investigations into Dr. Tiller's abortion practice, about his personally-held beliefs on late-term abortions and whether he believed abortion was harmful and caused the unborn to feel pain. Mr. Roeder's position on these issues was an important basis for his unreasonable but honest belief that he needed to act.

Federal constitutional error

The district court's rulings, which quashed the subpoena of the Deputy; excluded the former Attorney General and the Deputy from testifying; denied Mr. Roeder's motion for judicial notice of the cases against Dr. Tiller; denied the motion to instruct the jury on the cases; and erroneously limited Mr. Roeder's testimony; violated his due process right to present a defense.

The court's denial of Mr. Roeder's constitutional right to a fair trial was not harmless. Constitutional rights of a party are governed by the federal constitutional error rule. *State v. Ward,* Kan. ___, Op. No. 99,549, pg. 29 (July 29, 2011) (a Kansas court must be persuaded beyond a reasonable doubt that there was no impact on the trial's outcome, i.e., there is no reasonable possibility that the error contributed to the verdict); *State v. Eaton,* 244 Kan. 370, 385, 769 P.2d 1157 (1989) (quoting *Fahy v. Connecticut,*