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No. 10-104520-S

KANSAS SUPREME COURT
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IN THE SUPREME COURT
OF THE STATE OF KANSAS

STATE OF KANSAS
Plaintiff-Appellee

v.

SCOTT P. ROEDER
Defendant-Appellant

BRIEF OF APPELLEE

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appeal from the District Court of Sedgwick County, Kansas
The Honorable Warren Wilbert, Judge
District Court Case Number 09 CR 1462

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No. 10-104520-S

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STATE OF KANSAS
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SCOTT P. ROEDER
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BRIEF OF APPELLEE

Appeal from the District Court of Sedgwick County, Kansas
The Honorable Warren Wilbert, Judge
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STATEMENT OF THE ISSUES

I. Whether the district court had a duty to instruct upon a lesser included offense where the jury could not reasonably convict defendant of the lesser included offense based upon the evidence presented at trial?

II. Whether defendant was denied his constitutional right to a fair trial by the procedure the district court employed to resolve the issue regarding defendant's ability to present his desired defense to the jury?

III. Whether the district court abused its discretion in denying defendant's motion for change of venue?

IV. Whether the prosecutor's use of legitimate means to secure a just conviction constituted reversible misconduct?

V. Whether the district court erred when it followed this court's precedent and refused to instruct the defendant's jury with respect to the "necessity defense?"

VI. Whether the district court erred in refusing to instruct upon the lesser included offense of intentional second degree murder, where there was no evidence presented at trial of an intentional killing committed without premeditation?

VII. Whether defendant was entitled to a defense of others instruction when there was not sufficient evidence introduced at trial for a rational factfinder to find for defendant on that theory?

VIII. Whether defendant was denied a fair trial under the notion of cumulative trial error?

IX. Whether the district court abused its discretion when it imposed the hard 50 sentence upon defendant? (Appellant's Sentencing Issues I& II)

X. Whether defendant was denied his statutory right to allocution at sentencing? (Appellant's Sentencing Issue III)

XI. Whether Kansas' hard 50 sentencing scheme is unconstitutional? (Appellant's Sentencing Issue IV)

XII. Whether the district court erred in failing to instruct defendant's jury with respect to voluntary manslaughter - imperfect defense of another? (Pro Se Issues Group I & II)

XIII. Whether the district court erred in failing to instruct defendant's jury with respect to the "necessity defense?" (Pro Se Issue Group III)

STATEMENT OF THE FACTS

The following facts do not appear to be in dispute.

Around 1992, Scott P. Roeder's religious beliefs intensified, and he gave his life to Christ. (R. XXI, 73-75.) Roeder formulated personal feelings about abortion that were related to his religious views - - from conception forward, abortion was the equivalent of murder. (R. XXI, 75-77.) This belief derived from the notion that it was "[n]ot man's job to take life. . . ." (R. XXI, 75.)

To this end, Roeder began "sidewalk counseling" and handing out literature at or near "abortion clinics." (R. XXI, 85-87.) One such location was in Wichita, Kansas at a clinic operated by Dr. George Tiller. (R. XXI, 86.) Roeder and others were successful in diverting some women to the "Crisis Pregnancy Center," adjacent to Dr. Tiller's clinic. (R. XXI, 86-87.) Roeder considered it a success to stop even one woman from having an abortion. (R. XXI, 87.)

As early as 1993, Roeder began to focus his attention on Dr. Tiller and plotting his death. (R. XXI, 131-32.) Initially, Roeder contemplated chopping off Dr. Tiller's hands with a sword, but ultimately concluded a more permanent solution was required. (R. XXI, 133-34.)

After considerable reconnoitering, Roeder determined that striking Dr. Tiller at his home or at his place of business would prove too difficult due to security measures taken by Dr. Tiller. (R. XXI, 108-12, 132-47.) Eventually, he determined it would be easier for him to kill Dr. Tiller at his place of worship -- Reformation Lutheran Church. (R. XXI, 110-12, 144-47.) As early as 2002,

Roeder periodically visited the church facility in order to better study the services and routine of Dr. Tiller. (R. XXI, 110-12, 144-51.) In 2008, Roeder first attempted to take Dr. Tiller's life by concealing a handgun and stalking him at church services. (R. XXI, 160.) Dr. Tiller's life was spared only because he failed to attend services that day. (R. XXI, 160-61.)

Subsequent to the 2008 attempt, Dr. Tiller escaped assassination two additional times in 2009; each similarly due to a failure to attend the same services as Roeder. (R. XXI, 156-73.)

In 2009, Roeder was aware that although Dr. Tiller was charged with numerous counts of performing illegal abortions, subsequent to a full criminal trial, Dr. Tiller was acquitted of all charges. (R. XXI, 106-08.)

On May 31, 2009, both Roeder and Dr. Tiller attended the same church services, and Roeder put his decade-plus worth of planning into action. (R. XXI, 68-206.) When Dr. Tiller separated himself from the greater congregation, Roeder

XXI, 175-84.)

Roeder immediately fled the church, and attempted to perfect his escape, but was confronted by two parishioners; one shortly after he exited and the other as Roeder reached his vehicle. (R. XVIII, 12-32, 76-98, 161-69; R. XXI, 115-18, 185-90.) Both parishioners terminated their pursuit when Roeder threatened them with the same handgun he had only moments earlier used to shoot Dr. Tiller. (R.

XVIII, 12-32, 76-98, 161-69; R. XXI, 115-18, 185-90.) Roeder drove away, but not before his description and a description of his vehicle and its license plate were relayed to the police. (R. XVIII, 161-69.)

A few hours thereafter, Roeder was taken into custody, but not before he stopped to hide his handgun, and have some pizza. (R. XIX, 41-73; R. XXI, 190-96.)

Despite holding an honest, personal belief that only God could justifiably take human life; Roeder made an apparent exception, as he knowingly broke God's law in order to kill Dr. George Tiller so that he could send a message of fear to abortionists across the country. (R. XXIII, 124-41.)

Roeder was charged with, and convicted of first-degree, premeditated murder for the death of Dr. Tiller and a single count of aggravated assault with respect to both of the parishioners. (R. I, 31-34; R. V, 91-92.)

Prior to sentencing, the State filed a notice to request mandatory fifty-year imprisonment. (R. VI, 1-3.) Subsequent to a full hearing on the matter, the district court decided to impose the "hard 50" sentence upon defendant, with a consecutive twelve month sentence for each of the aggravated assault convictions. (R. VI, 99-103; XXXIII, 26-214.)

Defendant timely filed a notice of appeal from his convictions and sentence. (R. VI, 111.)

Additional facts will be presented in the arguments and authorities section as needed to resolve the issues discussed on appeal.

ARGUMENTS AND AUTHORITIES

I. The district court had no duty to instruct upon the lesser included offense of voluntary manslaughter where the jury could not reasonably convict defendant of that lesser offense based upon the evidence presented at trial.

Standard of Review

Upon request, the district court has a duty to instruct on any lesser included offense established by the evidence, regardless of whether the evidence supporting the instruction is weak or inconclusive. However, no such duty is present if the jury could not reasonably convict the defendant of the lesser included offense based on the evidence presented. A trial court's refusal to issue a requested instruction is reviewed in the light most favorable to the requesting party. State v. Moore, 287 Kan. 121, 130, 194 P.3d 18 (2008).

Discussion

Defendant contends the district court erred in refusing to instruct the jury with respect to the lesser included offense of voluntary manslaughter-imperfect defense of another. (Appellant's Brief, 10-24.) Because the defendant's jury could not reasonably convict defendant of that lesser offense based upon the evidence at trial, the district court had no duty to instruct upon the lesser included offense. See K.S.A. 22-3414(3).

Defendant was charged under K.S.A. 21-3401 with first-degree murder, which prohibits the premeditated, intentional killing of a human being. At trial, defendant requested a voluntary manslaughter instruction under a theory of

imperfect self-defense, which is the "intentional killing of a human being committed ... (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." K. S .A. 21-3403 .

The district court addressed the matter of whether defendant would be entitled to such an instruction a number of times throughout defendant's trial. (R. X, 12-18; R. XIV, 35-64; R. XV, 22-31; R. XX, 127-34; R. XXI, 206-21.) The discussion culminated with the district court's decision to deny defendant's request for the lesser included instruction based upon the lack of evidence at trial to support an imminence of danger at the time of the murder and the lack of evidence at trial to indicate the victim was engaging in unlawful conduct:

> "Kansas also recognizes what has been referred to as an imperfect defense of voluntary manslaughter, set forth in K.S.A. 21-3403. Voluntary manslaughter is defined as the intentional killing of a human being committed upon an unreasonable but honest belief that circumstances existed that justified deadly force under K.S.A. 21-3211, 3212, 3213 and amendments thereto.
>
> "So again, you have to refer back to 21-3211, which says 'a person is justified in the use of force against another when and to the extent it appears to such person and such person reasonably believes that such force is necessary to defend such person or a third person against such other's imminent use of unlawful force.' I emphasize 'imminent' and 'unlawful.'
>
> "Subsection (b) says 'a person is justified in the use of deadly force under circumstances described in subsection (a),' which I just read, 'if such person reasonably believes deadly force is necessary to prevent imminent death or great bodily harm to such person or a third person.' The subjective part is the unreasonable but honest belief. When we return to the statutory elements under K.S.A. 21-3211, those become objective. And it's illustrated by the defendant's

proposed instruction, which is taken from PIK 54.17, use of force in defense of a person.

"And this is a proposed instruction that we haven't discussed, but it would have been incumbent upon the Court to instruct on voluntary manslaughter to give this follow-up. It's proposed as follows: 'Scott Roeder claims his use of force was permitted as the defense of another person or persons. Scott Roeder is permitted to use force against another person when and to the extent that it appears to him and he reasonably believes such force is necessary to defend someone else against the other person's imminent use of unlawful force. Reasonable belief requires both a belief by defendant and the existence of facts that would persuade a reasonable person to that belief.'

"So we move beyond the subjective belief of the defendant and we return to what is called the reasonable person or the reasonable man test, which is an objective standard. The White decision [State v. White, 284 Kan. 333, 161 P.3d 2008 (2007)] has again reaffirmed that requirement of imminence. And the facts of the White decision is that the defendant, upon learning that his grandson had been sexually or physically abused by his son-in-law, which was his grandson's stepfather, married to the defendant's daughter, I believe he was in Great Bend, Kansas, drove to Augusta, Kansas, went into a Walmart store, and shot and killed the son-in-law.

"And the court - - the issue on appeal was whether or not the court properly refused to instruct on the issue of voluntary manslaughter. And the court said that there was no imminence of danger, there was no present danger, no danger readily at hand because the grandson wasn't at the Walmart store, and there was no present threat of imminent or - - imminent danger of unlawful force. And that is conceding that that physical or sexual abuse would be unlawful force. And they found that under those circumstances the court was proper in its decision not to instruct on the lesser included of voluntary manslaughter.

"The White decision in which Justice Nuss reaffirms the Kansas court adheres to the imminence requirements, and the facts of that case are very analogous to what we have in this courtroom at this time, and in my opinion becomes very controlling on what the Court should do. We have events that occurred on a Sunday morning, by Mr. Roeder's own admission, 22 hours before the next possibility to

perform a scheduled abortion on Monday. I guess he is taking the calculation from 10:00 a.m. on Sunday to 8 a.m. the next Monday morning.

"The Hernandez decision [State v. Hernandez, 253 Kan. 705, 861 P.3d 814 (1993)] in which there was a request for voluntary manslaughter, and was denied and upheld by the Supreme Court, were events in which an individual killed his brother-in-law, who had made it known that at 11:00 a.m. more likely than not he was probably going to kill his wife, which was the defendant's sister. And shooting and killing his brother-in-law two hours before the event, the Supreme Court said was not imminent. That two-hour window still provided opportunities to call the police, to seek other intervention short of deadly force.

"Mr. Roeder by his own admission says the next event that he had to intervene on would have been 22 hours later. So under the circumstances of this case, I think the imminence requirement cannot be met, and no reasonable factfinder could find that. That is not even addressing the issue of unlawful force, which is the imminent danger of that use. And again, despite opinions throughout the United States that are diametrically opposed on abortion, in the State of Kansas abortions are legal. Late-term abortions are legal. And while Mr. Roeder's honestly held and maybe unreasonable beliefs that Dr. Tiller was performing an illegal abortion, there is no basis in the evidence, there is no proof of that, and in fact the only time that it was ever prosecuted, it's in the record now, the jury has heard that Dr, Tiller was found not guilty and acquitted.

"So Scott Roeder had no reasonable basis, no objective reasonable standard that Dr. Tiller was performing illegal abortions. There may have been suspicions on the part of one or two others, may have been attempts to prosecute and bring charges, one was dismissed, and one was tried all the way to a conclusion of a jury verdict of not guilty. So it would fail on that second prong, that there is even the unlawful use of force. We can debate whether it's deadly or not, whether or not it's a viable fetus and whether or not life is being terminated, but it is lawful in the State of Kansas." (R. XXI, 215-19 .)

The district court was correct in that the evidence admitted at trial failed to support either an imminence of danger at the time of the murder, or that the victim was engaging in unlawful conduct. The district court was also correct with respect to its understanding of the interplay between voluntary manslaughter - imperfect self-defense and the objective portions of the self-defense or defense of third person statute, K.S.A. 21-3211. See State v. McCullough, 293 Kan. 970, 270 P.3d 1142 (2012)("Having found that McCullough was not entitled to a self-defense instruction, two other claims must fail. First, she was not entitled to an involuntary manslaughter instruction based on a theory of imperfect self-defense. That theory requires the lawful exercise of self-defense, but with excessive force. K.S.A. 21-3404(c). And since McCullough was not lawfully engaged in self-defense, she was not entitled to the involuntary manslaughter instruction.")

In White, this court made it clear that without any evidence of imminent danger at the time of the shooting, a jury could not reasonably convict on the lesser included offense of voluntary manslaughter based upon the imperfect defense of others:

> "[s]imilarly, in the instant case, 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 B.A.W. was in imminent danger at the time of the shooting. At that time Aaron, the purported abuser, was not in the presence of B.A.W., the purported victim. In deed, because White went to Aaron's Wal-Mart workplace, it would be quite difficult for him to present evidence that he honestly believed his 5-year-old grandson was there and that abuse was imminent.

> "We conclude that the district court did not err in failing to give an instruction on voluntary manslaughter based upon the imperfect self-defense of others. Simply put, a jury could not reasonably convict on this lesser included offense based upon the evidence presented. See Boyd [State v. Boyd, 281 Kan. 70, 93, 127 P.3d 998 (2006)]; see also Hernandez, 253 Kan. at 713, 861 P.2d 814 (because of no evidence of imminence, 'we conclude that a rational factfinder could not find that Hernandez acted in defense of his sister, Myra, at the time he shot Randy')." [Emphasis in the original.] White, 284 Kan. at 353.

In the instant case, Dr. Tiller was at church when defendant launched his attack, the fact that defendant believed his victim may have been performing abortions in twenty-two hours from the attack, changes nothing - - as the cases from foreign jurisdictions relied upon by the White court noted, "[f]ear of future harm - no matter how great the fear and no matter how great the likelihood of the harm - will not suffice[,]" and "[p]etitioners' focus on this evidence, however, is misplaced. Taken at face value, this background evidence served only to explain *why* the brothers might have had an unreasonable fear of their parents at the moment they killed them. At most, the evidence illustrated that Erik and Lyle feared that their parents had the capacity to and might, at some point, harm them. Erik's testimony about his general fear in the days leading up to the murder does not provide any evidence that, at the moment he shotgunned his parents to death, he feared he was imminent peril." White, 284 Kan. at 352-53 (quoting In re Christian S., 7 Cal. 4th 768, 30 Cal. Rptr.2d 33, 872 P.2d 574 (1994) & Menendez v. Terhune, 422 F. 3d 1012 [9th Cir. 2005]).

Moreover, this court in State v. Shannon, 258 Kan. 425, 429-30, 905 P.2d 649 (1995), rejected a claim of error due to a trial court's refusal to instruct upon attempted voluntary manslaughter based upon the fact there was no evidence at trial of unlawful force:

> "[t]he defendant's argument concerning attempted voluntary manslaughter is also flawed. The defendant's theory of attempted voluntary manslaughter is under K.S.A.1994 Supp. 21-3403(b)-the intentional killing committed with an unreasonable but honest belief that the circumstances justified deadly force to defend another against an aggressor's imminent use of *unlawful* force. The defendant reasons that she had an honest, though unreasonable, belief that deadly force was necessary to protect unborn children from the victim's acts of abortion. However, there is no evidence in the record that the defendant honestly believed the victim's actions in performing abortions were unlawful. In fact, the defendant testified that 'our government refuses to do its job and protect the lives of the babies, so somebody has to.' Such language demonstrates the defendant recognized that performing abortions was not a use of unlawful force. The district court was only required to give an instruction on attempted voluntary manslaughter if there was some evidence upon which the jury reasonably could have convicted the defendant of the offense. There was no such evidence here, and the instruction was not required." [Emphasis in the original.]

Although defendant cites to the record (R. XXI, 95) wherein he testified regarding the fact Dr. Tiller had been charged with performing illegal abortions -- he also testified to knowing that Dr. Tiller had been acquitted of any charges of performing illegal abortions. (R. XXI, 75-77, 95-108.) Moreover, when taking the whole of defendant's testimony into consideration, his testimony most aptly stands for the proposition that he killed Dr. Tiller to prevent all abortions, not necessarily simply to prevent illegal late term abortions. (R. XXI, 75-77, 95-108.)

Furthermore, as argued in the Brief of Amici Curiae at 8-9, the instant case falls outside of the historic understanding of "unreasonable but honest belief' as the phrase in K.S.A. 21-3403 has been applied:

> "[s]econd, Defendant incorrectly relies on the phrase 'unreasonable but honest belief,' id. § 21-3403, to suggest that it is precisely because his anti-abortion beliefs are so extreme - extreme enough to lead to premeditated murder - that he is entitled to assert the defense. See, e.g., Appellant's Br. At 21-23 (quoting Defendant, 'I did what I thought was needed to be done to protect the children. I shot him.') see also id. at 16-17. But the term 'unreasonable belief," as used in the voluntary manslaughter statute, does not refer to the defendant's dogma or world view. As **used in the statute, the term 'unreasonable belief refers to an honest, even if unreasonable, misunderstanding of the circumstances that led to the use of deadly force.** See, e.g., *State v. Carter,* 284 Kan. 312 [160 P.3d 457] (2007) (defendant argued he was entitled to voluntary manslaughter defense for intentionally killing because he mistakenly believed he was about to be robbed); *State v. Jones,* 27 Kan. App. 2d 910 [8 P.3d 1282 (2000)] (defendant entitled to voluntary manslaughter instruction where he intentionally shot and killed individual who was part of a mob descending on his family, and he mistakenly believed that individual had a gun). The defense was never intended to be a vehicle through which Defendant can mitigate his culpability for intentional homicide based upon political of moral beliefs, such as Defendant's belief that abortion is murder, even though he knows it is a constitutionally protected medical procedure. In other words, the imperfect self defense charge is available only when the defendant mistakenly believes the circumstances are such that the use of deadly force is justified; it is not available where, as here, Defendant is perfectly cognizant of the circumstances and that they do not justify deadly force under existing law, but he simply disagrees with the law, and thinks it should ban abortion." [Emphasis added.]

Although not expressly considered by the district court in rejecting defendant's request for the lesser included offense, the judgment of the district court may be upheld on appeal for any valid reason, regardless of whether the

court expressly based its decision on the argument asserted on appeal. See State v. Kirtdoll, 281 Kan. 1138, 1149, 136 P.3d 417 (2006).

Defendant was not entitled to have his jury instructed with respect to voluntary manslaughter based upon the imperfect defense of others as there was no evidence admitted at trial to support an imminence of danger at the time of the murder or evidence that victim was engaging in unlawful conduct. Both factors were required in order for a jury to reasonably convict on the proposed lesser included offense. Here, the district court's duty to instruct under K.S.A. 22-3414(3) was not triggered.

II. Defendant was not denied his constitutional right to a fair trial by the procedure the district court employed to resolve the issue regarding his ability to present his desired defense to the jury.

Standard of Review

"Under the state and federal Constitutions, a defendant is entitled to present the theory of his or her defense, and the exclusion of evidence that is an integral part of that theory violates a defendant's fundamental right to a fair trial. [Citation omitted.] However, the right to present a defense is subject to statutory rules and case law interpretation of the rules of evidence and procedure. [Citation omitted.]" State v. Walters, 284 Kan. 1, 8, 159 P.3d 174 (2007). Whether an evidentiary ruling violated defendant's constitutional rights is reviewed de novo. State v. White, 279 Kan. 326, 332-33, 109 P.3d 1199 (2005).

Discussion

Within a single issue, defendant presents six sub-issues, with some of the sub-issues having additional sub-points. (Appellant's Brief, 24-49.) This confusion is compounded by the fact defendant challenges district court rulings made pre-trial, and district court rulings made during trial, but fails to clearly distinguish when the court's rulings were made. At times, it is difficult to follow defendant's precise argument; however, it appears that defendant's main point is that the district court violated his due process right to present his chosen "defense" of voluntary manslaughter - imperfect defense of another pursuant to K.S.A. 21-3403. In turn, defendant's complaint appears to center around the district court's refusal to allow him to present testimony from former Attorney General Phill Kline, former Deputy Attorney General Barry Disney or instruct the jury regarding two criminal cases, 06 CR 2961 and 07 CR 2112. The overall import of this evidence appears to impact only defendant's belief that Dr. Tiller was performing "illegal abortions." (Appellant's Brief, 48-49.) In essence, defendant's argument is that had he been able to present the evidence disallowed by the district court, he would have been able to demonstrate entitlement to a jury instruction on voluntary manslaughter - imperfect defense of another because he would have had some evidence regarding the fact the victim was engaging in unlawful conduct. (Appellant's Brief, 48-49.) However, at no point does defendant specifically contend any of the excluded testimony would have touched upon the issue of imminence of danger at the time of the murder -- a matter there would need to be

evidence of before defendant would be entitled to the imperfect defense-of-others manslaughter instruction. White, 284 Kan. at 349-353.

Defendant's right to present his theory of defense at trial is subject to relevant statutory provisions and the rules of evidence. Walters, 284 Kan. at 8. As such, even if defendant's position is accepted as true, that the district court erred in failing to admit any or all of the evidence excluded, defendant would still not have been entitled to the requested instruction because the evidence as a whole would fail to support an affirmative finding by a reasonable factfinder with respect to defendant's proposed instruction.

In other words, in the absence of any evidence regarding the imminence of danger, the proposed evidence regarding unlawful conduct was rendered immaterial pursuant to K.S.A. 60-401(b). A similar ruling was made by this court in State v. McCullough, 270 P.3d at 1152:

> instruction, two other claims must fail. First, she was not entitled to an involuntary manslaughter instruction based on a theory of imperfect self-defense. That theory requires the lawful exercise of self-defense, but with excessive force. K.S.A. 21-3404(c). And since McCullough was not lawfully engaged in self-defense, she was not entitled to the involuntary manslaughter instruction. *Second, evidence of threats Callaway made while hospitalized were properly excluded. McCullough claims this evidence was "integral to the self-defense theory," but we hold that argument is inapplicable under the facts of this case. These threats were not relevant to any material fact, as required by K.S.A. 60-401(b).* [Emphasis added.]

See also, State v. Harvey, 41 Kan. App. 2d 104, 202 P.3d 21 (2009) (defendant required to proffer evidence satisfying five conditions regarding compulsion

defense prior to entitlement to presentation of defense to jury -- failure to make an affirmative showing on any of the five conditions cuts off defendant's right to the defense and further indicates district court did not abuse its discretion in excluding the testimony offered in support of the defense at trial).

Here, the individual rulings complained of on appeal by defendant are rendered academic, as the evidence was material only to support a lesser included offense instruction to which defendant was otherwise not entitled. Defendant was not entitled to present the issue of voluntary manslaughter - imperfect defense of another to the jury, and therefore, was denied nothing by the district court's rulings.

III. The district court did not make an arbitrary, fanciful or unreasonable decision when it denied defendant's motion for change of venue, nor was the decision based upon an error of law or fact.

Standard of Review

Change of venue decisions are entrusted to the sound discretion of the district court, and such decisions will not be disturbed on appeal unless there is a showing of prejudice to the substantial rights of the defendant. State v. Higgenbotham, 271 Kan. 582, 591, 23 P.3d 874 (2001); see K.S.A. 22-2616(1).

In State v. Ward, 292 Kan. 541, 550, 256 P.3d 801 (2011), this court stated,

> "[j]udicial discretion is abused if judicial action (1) is arbitrary, fanciful, or unreasonable, i.e., if no reasonable person would have taken the view adopted by the trial court; (2) is based on an error of law, i.e., if the discretion is guided by an erroneous legal conclusion; or (3) is based on an error of fact, i.e., if substantial competent

evidence does not support a factual finding on which a prerequisite conclusion of law or the exercise of discretion is based."

Discussion

On appeal, as before the district court, defendant attempts to persuade this court that the venue of his trial should have been changed due to media publicity. (Appellant's Brief, 49-56.) Media publicity alone does not establish prejudice. State v. Verge, 272 Kan. 501, 508, 34 P.3d 449 (2001).

Prior to trial, defendant filed a motion for change of venue speculating that media publicity regarding the case would not allow the parties to select an impartial jury free from outside influence in Sedgwick County. (R. II, 1-4.) Defendant introduced numerous media clippings in support of his position. (R. II, 7-8; R. XXX.) The State filed a response arguing that defendant must present real, and not speculative, evidence that a fair and impartial jury could not be seated, and that such a determination would be better resolved after having gone through the jury selection process. (R. II, 21-24), citing State v. Shannon, 258 Kan. 425, 905 P.2d 649 (1995).

The court agreed with the State:

"[b]ut again, at this point in time the Court is making every effort to provide a cross-section of the community to provide [defendant] a fair and impartial trial. As you are aware, we sent out 300 summonses. We hope to have at least 150 to 200 people respond.. .

"The events in question happened on May 31st 2009. Although you have cited various newspaper articles and exhibits that continue up to the month of November, the vast majority of the publicity or what might be considered the sensationalism of the events was shortly

after they occurred, primarily in the month of June. It's now some six months subsequent, to that initial, if you can use the term onslaught of media attention, and memories do subside and fade from time to time. Not everyone subscribes to the Wichita Eagle, but I acknowledge there are other sources for news, for people to obtain their news in this local community.

"The real question is, despite what anyone has heard in the media, if an individual juror will agree to set that aside, to listen to the evidence presented in the courtroom and the instructions that I will give them on the law at the end of the trial to determine if in fact they can be fair and impartial.

"Also, the Court, with suggestions of counsel, has provided and prepared a questionnaire that will be utilized in jury selection and there are portions of that questionnaire that are devoted to inquiring of the jurors the media issues and the attention and what they have learned about it from the media, and until we have jurors answer those questions, we can't really determine what, if any, extent that may or may not impact the ability to give Mr. Roeder a fair and impartial trial in this venue, in Sedgwick County.

"Bottom line is that we need to qualify 42 individuals. Even allowing for two alternatives and seating 14 people to hear the evidence, it would take 42 individuals that both the State and the defense would pass for cause, and after, if my math is correct, after allowing 12 peremptory strikes on each side and two more each for the alternatives, that should arrive at the final 14.

"But I think it is premature at this time for the Court to speculate, and it would be speculation at this point that we can't impanel a fair and impartial jury. I will remain open and cautiously and vigilantly watch the answers and the jury selection process, and if defendant or his attorneys think at the end of that process we cannot obtain a fair and impartial jury, I'm currently open to hearing additional arguments on the issue and, again, keeping an open mind, to make that determination. But to do this without even attempting to impanel a jury, I think is premature, and for those reasons I'm going to deny the motion at this time. It is certainly without prejudice and subject to the defendant renewing their motion at the end of the

> selection process, if in fact you think it merits further attention from the Court." (R. XIV, 17-20.)

Thereafter, the case proceeded to the voir dire examination. (R. XXIV.)1 Although 140 jurors were available, the court was able to arrive at a jury of twelve plus two alternates from the very first panel of sixty-one potential jurors; the second and third available panels were not needed. (R. XVII, 9-10.) The defendant did not challenge any of those impaneled for cause. (R. V, 70; R. XXIV, Volume One, 3-23; Volume Two, 80-89; Volume Three, 74-83, 83-93, 113-24, 125-35, 177-89; Volume Four, 20-27, 27-53, 84-98, 98-114, 168-81; Volume Five, 62-69, 70-82.)

Subsequent to the jury selection process, defendant renewed his objection to the denial of his change of venue motion:

> "[a]t that time you indicated you would not rule on that until we attempted to seat a jury. Obviously that's happened, but we are going to renew our motion for change of venue. *We recognize we did not run out of jurors, we recognize we did not for cause challenge all the jurors that were seated. And simply we're going to ask you to look at a portion of the motion for change of venue dealing with pretrial publicity.*
>
> "Without revealing what all the jurors said about pretrial publicity, I don't think it can be disputed that I think every single juror indicated they were aware of the case, they were aware of Dr. Tiller, they were aware of Dr. Tiller's profession, they were aware of the general motivation for the alleged crime. *We believe just on pretrial publicity alone, the motion should be granted."* [Emphasis added.] (R. XVII, 8-9.)

In denying relief, the district court stated:

[1] Volume XXIV is actually comprised of six separate volumes.

"[Waving embarked upon the jury selection process and providing the jurors with confidential questionnaires and a private setting for personal questions conducted by the counsel before we convened the general portion of the voir dire yesterday afternoon, while it's true there has been pretrial publicity, each juror was examined on that, if they could base their decisions on the evidence presented in the courtroom and not based upon any publicity or any pretrial publicity or otherwise, ongoing publicity outside of this courtroom.

"I think every juror acknowledged that after they appeared for their pretrial questionnaire and were given the Court's admonition to avoid all forms of media and any avenues that they would be subjected to the pretrial publicity, each one of them has made a very conscientious and honest effort to do that. For the record, we were able to impanel enough jurors to allow for preemptory strikes and arrive at the 12 plus two alternates from the first panel. Although we had 140 jurors available, we were able to accomplish that with the first panel, which was 61 jurors, and without even reaching panels 2 or 3.

"So in this Court's opinion, having undertaken the process and we now have a jury impaneled ready to be sworn and to try the case, that there isn't such adverse pretrial; publicity that we couldn't find a sufficient number of fair and impartial people to try the case. For those reasons, your motion for change of venue is overruled." (R. XVII, 9-10.)

Again, despite defendant's request, media publicity alone does not establish prejudice. Verge, 272 Kan. at 508. K.S.A. 22-2616(1) provides:

order that the case be transferred as to him to another county or district if the court is satisfied that there exists in the county where the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial in that county."

Defendant has the burden to show actual prejudice exists in the community, "[n]ot as a matter of speculation but as a demonstrable reality." Higgenbotham, 271 Kan. at 591. Further, defendant must show that the prejudice was such that it was

reasonably certain he or she could not have obtained a fair trial. 271 Kan. at 591–92. Of actual prejudice, the Supreme Court of Montana recently remarked:

> "[a]ctual prejudice exists when voir dire reveals that the jury pool harbors actual partiality or hostility against the defendant. [Citation omitted.] The voir dire testimony and the record of publicity must reveal 'the kind of wave of public passion' that would make a fair trial unlikely by a jury empaneled from that community. [Citation omitted.] The relevant question is whether prospective jurors' responses reflect 'such fixed opinions that they could not judge impartially the guilt of the defendant.' [Citation omitted.] 'Impartiality does not mean jurors are totally ignorant of the case. Indeed, it is difficult to imagine how an intelligent venireman could be completely uninformed of significant events in his community. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.' [Citation omitted.]" State v. Kingman, 362 Mt. 330, 264 P.3d 1104, 1112-13 (2011).

This court has noted a variety of factors that may be considered in determining whether the atmosphere is such that a defendant's right to a fair trial would be jeopardized:

> "[T]he particular degree to which the publicity circulated throughout the community; the degree to which the publicity or that of a like nature circulated to other areas to which venue could be changed; the length of time which elapsed from the dissemination of the publicity to the date of trial; the care exercised and the ease encountered in the selection of the jury; the familiarity with the publicity complained of and its resultant effects, if any, upon the prospective jurors or the trial jurors; the challenges exercised by the defendant in the selection of the jury, both peremptory and for cause; the connection of government officials with the release of the publicity; the severity of the offense charged; and the particular size of the area from which the venire is drawn. [Citation omitted.]" Higgenbotham, 271 Kan. at 592.

Here, defendant's argument stalls at the first factor. No real attempt was made either at the time of trial, or on appeal, to flesh out the remaining factors.

Moreover, the State is not required to produce evidence refuting that of the defendant offered in conjunction with a motion to change venue. State v. Jackson, 262 Kan. 119, 128, 936 P.2d 761 (1997).

Defendant makes no attempt to discuss, "[t]he degree to which the publicity or that of a like nature circulated to other areas to which venue could be changed."

The district court spoke to the next factor of, "[t]he length of time which elapsed from the dissemination of the publicity to the date of trial":

> have cited various newspaper articles and exhibits that continue up to the month of November, the vast majority of the publicity or what might be considered the sensationalism of the events was shortly after they occurred, primarily in the month of June. It's now some six months subsequent to that initial, if you can use the term onslaught of media attention, and memories do subside and fade from time to time. Not everyone subscribes to the Wichita Eagle, but I acknowledge there are other sources for news, for people to obtain their news in this local community." (R. XIV, 18.)

The next factor outlined in Higgenbotham asks the reviewing court to consider, "[t]he care exercised and the ease encountered in the selection of the jury...." 271 Kan. at 592. Here, there was great care taken in the jury selection process, and the process was resolved with relative ease. The district court, with the help of the parties, crafted an extensive juror questionnaire which was successfully employed during individual voir dire examinations. (R. V. 35-55; R. XXIV.) Although 140 jurors were available, the court was able to arrive at a jury of twelve plus two alternates from the very first panel of sixty-one potential jurors; the second and third available panels were not needed. (R. XVII, 9-10.)

With respect to the factor that questions, "[t]he familiarity with the publicity complained of and its resultant effects, if any, upon the prospective jurors or the trial jurors," there is no question this case was covered by the media and that the vast majority of the potential jurors were familiar with some aspect or another of the case. By the same token, there is no question that the "resultant effects" of such publicity was negligible in that each of the jurors that ultimately heard the case affirmatively indicated they could put aside any pretrial publicity and base their decision only upon the evidence submitted at trial. (R. V, 70; R. XXIV, Volume One, 3-23; Volume Two, 80-89; Volume Three, 74-83, 83-93, 113-24, 125-35, 177-89; Volume Four, 20-27, 27-53, 84-98, 98-114, 168-81; Volume Five, 62-69, 70-82.) Mere knowledge of the facts of the case does not equate with impartiality. See Kingman, 264 P.3d at 1122. In addition, "[i]t is sufficient if [a juror] can lay aside his impression or opinion and render a verdict based on the evidence presented in court." 264 P.3d at 1122.

With respect to, "[t]he challenges exercised by the defendant in the selection of the jury, both peremptory and for cause," defendant makes no argument regarding the peremptory aspect of the challenges. As for the for cause portion of the challenges, the defendant did not challenge any of those impaneled for cause. (R. V, 70; R. XXIV, Volume One, 3-23; Volume Two, 80-89; Volume Three, 74-83, 83-93, 113-24, 125-35, 177-89; Volume Four, 20-27, 27-53, 84-98, 98-114, 168-81; Volume Five, 62-69, 70-82.)

There was some discussion regarding, "[t]he connection of government officials with the release of the publicity," aspect of the analysis at the district court level, that was seemingly resolved against the defendant's position, yet works its way back into defendant's brief on appeal as though the aforementioned resolution had not occurred. Defendant's brief, citing defendant's motion for change of venue, states, "'[t]he Wichita Eagle ran stories relating to Dr. Tiller, and information regarding the defendant *daily* until June 11, 2009, some eleven days after the event . . . . the Sedgwick County District Attorney was widely quoted in the media claiming that the shooting of Dr. Tiller was 'an American act of terrorism.' (R. II, 3.) (Emphasis in the original.)" (Appellant's Brief, 51.) At the district court level, it was resolved that, although a similar statement was attributable to the Sedgwick County District Attorney, the truth of the matter was that the comment was not made in a public forum:

> "[Prosecutor]: Your Honor, so the record is clear, the comment that counsel indicated was in chambers and the comment went to the nature and history of an individual regarding their suitability for bond, and the facts and information presented to the Court went to that. The case was heard in chambers, although I believe they were able to get a transcript of it subsequently, but it was not in a public location, and in any event it certainly was necessary for the State to indicate to the Court the history of the offense and the offender and what bond should be set in light of those characteristics that the Court is required to take into consideration in granting a bond or the amount of the bond, and I believe that the evidence is there to support our request for that bond and that the bond was set.
>
> "[Defense Counsel]: If I may respond briefly, I do believe it was in a transcript that eventually made its way to the media. Nonetheless, it was widely disseminated, especially when it was early in the case and the media did find it quite sensational.

> "THE COURT: Well, again, I think we have now resolved that the statement was made in chambers. It was during a bond hearing and it was the Court's attempt to accommodate counsel without the formality of a filed motion, to make myself available and to take up what was considered a very pressing matter at the time. I don't have any independent recollection whether that was, although in camera in my chambers, whether it was designed to be under seal or not, but in any event, for whatever reason those statements, via a transcript, have made their way into the media." (R. XIV, 16-17.)

Any attempt to now attribute the comment as a "release of publicity" under the Higgenbotham factor would appear to be out of place, and questionable at best. As the State further noted at the time of the hearing:

> "[w]e sat here and followed Rule 3.6 [Kansas Rule of Professional Conduct 3.6 Advocate: Trial Publicity] and said only information that is necessary to the issues of moving forward in this case, the settings and things of that nature. The District Attorney's Office has not commented on this case. We have made no comments with regard to the nature of the case or with regard to our positions on this case. The only time that we were in court on this was at a bond hearing and that bond hearing, of course, was held in chambers." (R. XIV, 13.)

The next factor addressed, "[t]he severity of the offense charged"; defendant was charged with, and convicted of first-degree, premeditated murder for the death of Dr. Tiller and a single count of aggravated assault with respect to both Mr. Hoepner and Mr. Martin. (R. I, 31-34; R. V, 91-92.) The offenses were severe.

The final Higgenbotham factor questions, "[t]he particular size of the area from which the venire is drawn." Sedgwick County is a large area, by population

standards, in the State of Kansas - - the State's unrefuted estimate at the district court level put the population at 500,000.

Although defendant acknowledges it was his burden, "[t]o show prejudice exists in the community, not as a matter of speculation buy as a demonstrable reality, and that the prejudice was such that it was reasonably certain [he] could not have obtained a fair trial"; defendant nevertheless fails to meet his obligation. The district court, which was in the best position to make such a determination, did not abuse its discretion in refusing to grant defendant's motion for change of venue. See Patton v. Yount, 467 U.S. 1025, 1037, 104 S. Ct. 2885, 81 L. Ed. 2d 847 (1984).

IV. The prosecutor's use of legitimate means to secure a just conviction did not constitute reversible misconduct.

Standard of Review

This court recently summarized the applicable standard of review as follows:

> "[t]his court employs a two-step analysis when considering allegations of prosecutorial misconduct during closing argument. First, the court determines whether the prosecutor's statements exceed the wide latitude of language and manner afforded a prosecutor in making closing arguments. Second, the court determines whether the prosecutor's comments constitute plain error. This occurs when the statements are so gross and flagrant that they prejudiced the jury against the defendant and denied the defendant a fair trial. [State v. Inkelaar, 293 Kan. 414, 427, 264 P.3d 81 (2001)]; State v. Decker, 288 Kan. 306, 314, 202 P.3d 669 (2009).

"The second step focuses on whether the misconduct was so prejudicial that it denied the defendant a fair trial. This requires, a harmlessness inquiry. Three factors are considered: (1) whether the misconduct was so gross and flagrant it denied the accused a fair trial; (2) whether the remarks showed ill will by the prosecutor; and (3) whether the evidence against the defendant was of such a direct and overwhelming nature that the prosecutor's statements would not have much weight in the jurors' minds. No individual factor controls. Inkelaar, 293 Kan. at 427, 264 P.3d 81; Decker, 288 Kan. at 315, 202 P.3d 669.

"This court has long held that the third factor cannot override the first two factors unless the harmless error tests of both K.S.A. 60-261 (inconsistent with substantial justice) and [Chapman v. California, 386 U.S. 18, 87 S. Ct. 824, 17 L.Ed. 2d 705, reh. denied 386 U.S. 987, 87 S. Ct. 1283, 18 L.Ed. 2d 241 (1967)] (conclusion beyond reasonable doubt that the error had little, if any, likelihood of having changed the results of the trial), have been met. See, e.g.,[State v. Ward, 292 Kan. 541, 550, 256 P.3d 801 (2011); State v. Adams, 292 Kan. 60, 66-67, 253 P.3d 5 (2011); State v. Tosh, 278 Kan. 83, 93, 91 P.3d 1204 (2004).

"But this court recently recognized that the applicable level of certainty required differs under state statutes and federal Constitution. If the fundamental failure infringes on a constitutional right, appellate courts apply the federal constitutional standard, which requires the party benefitting from the error to prove beyond a reasonable doubt that the error complained of will not or did not affect the outcome of the trial in light of the entire record. Ward, 292 Kan. at 568-69, 256 P.3d 801. And if a fundamental failure does not infringe a constitutional right, appellate courts apply K.S.A. 60-261 and K.S.A. 60-2105 to determine "if there is a reasonable probability the misconduct affected the outcome of the trial." Inkelaar, 293 Kan. at 430, 264 P.3d 81; Ward, 292 Kan. at 569, 256 P.3d 801.

Since our cases require that both standards be satisfied in the prosecutorial misconduct context, the State, as the party who benefitted from the misconduct, bears the burden to establish beyond a reasonable doubt that the error did not affect the defendant's substantial rights, i.e., there is no reasonable possibility the error

> affected the verdict. In short, the third factor cannot override the first two factors unless we are able to say the Chapman constitutional error standard has been met. Inkelaar, 293 Kan. at 431, 264 P.3 d 81. McCullough, 270 P.3d at 1157-1161.

Discussion

For the first time on appeal, defendant presents a complaint regarding the State's closing argument. Defendant charges the State with intentional statements that were grossly and flagrantly designed with ill will, and specifically crafted toward the common goal of denying defendant a fair trial. (Appellant's Brief, 56-61.) These allegations stand in stark contrast with the record on appeal, as not one of the instances isolated for complaint drew an objection at the time of trial. While this failure to object does not bar the allegations from consideration on direct appeal, the lack of such a timely and specific objection is still relevant to the court's inquiry. See State v. Bunyard, 281 Kan. 392, 420, 133 P.3d 14 (2006) (dissenting opinion by Chief Justice McFarland) ["The fact that the prosecutor's statements prompted neither an objection by counsel nor interruption by the judge also indicates that they were not glaring misstatements or conspicuously offensive. . . . See People v. Rodriguez, 794 P.2d 965, 972 (Colo. 1990) (recognizing lack of objection is factor to consider in examining prosecutorial misconduct, as lack of objection may demonstrate defense counsel's belief that argument was not overly damaging)."]; see also State v. King, 288 Kan. 333, 349, 204 P.3d 585 (2009); State v. Miller, 284 Kan. 682, 720, 163 P.3d 267 (2007).

In effect, defendant argues that although not one person in the courtroom who was trained to spot and prohibit improper closing argument recognized the prosecutor's closing as "misconduct," the jury not only had the ability to isolate the subject comments from the remainder of the closing, but did so, and further, there is a real danger they based their decision upon the comments to the exclusion of the otherwise relevant evidence produced at trial, which included the defendant's admission of guilt from the witness stand, and the district court's instructions.

It is the duty of the prosecutor to see the State's case is properly presented with earnestness and vigor, and to use every legitimate means to bring about a just conviction. State v. Ruff, 252 Kan. 625, 634, 847 P.2d 1258 (1993). Allegedly improper remarks should be reviewed in the context of the total argument, the issues in the case and the instructions given. State v. Whitaker, 255 Kan. 118, 135, 872 P.2d 278 (1994).

Defendant isolates for complaint, the underlined portion of the prosecutor's rebuttal closing argument:

> "On May 31st, that quiet Sunday, Wichita did change. It changed from a quiet community celebrating their Sabbath to a community terrorized. We are a society of laws. We each rely on it everyday. We rely on judges, we rely on legislators, and we rely on jurors taking an oath to follow the law, as each of you have done.
> "But on that day and the days before, when [defendant' contemplated taking the law into his own hands, he took it from the rest of us." (R. XXII, 28.)

"And while Gary Hoepner lives, as you saw even today, with the guilt of failing to stop this man, the killer, the defendant feels relieved at his success. And while in this courtroom the defendant picks through the State's case at the various witnesses and acts incredulous after answers, the defendant is preparing his testimony, where he can proudly in a public forum take credit for his murder. And while he does so, it send chills down the backs of conscientious people.

"He claims justification. These are not the acts of a justified man. These are the acts - - these acts are cowardly. A justified man has no need to cover himself inside the safety of a church. A justified man has no need to pretend piousness while he holds and pretends to be someone else, with a murderous intent. A justified man has no need to secret his weapon in his pocket or bury it later for retrieval. A justified man has no need to take his victim unaware. A justified man has no need to run or flee the scene of his act. And a justified man has no need to threaten those who pursue him in order to hold him accountable." (R. XX, 30.)

Here, defendant's complaints regarding closing argument focus exclusively upon the State's rebuttal closing as impermissible pleas to the passion of the jury. (Appellant's Brief, 56-61.) Yet the comments defendant now challenges were made in response to and a result of prior arguments and statements made by defense counsel in closing argument. State v. Murray, 285 Kan. 503, 517, 174 P.3d 407 (2008) ("[n]o prejudicial error occurs - including prosecutorial misconduct - where the questionable statements are provoked and made in response to prior arguments or statements by defense counsel."). While appellate counsel for defendant reproduces portions of the prosecutor's closing argument in her brief on appeal, it is notable that appellate counsel neglected to also include any portion of defendant's closing argument. (Appellant's Brief, 56-61.) A review of the pertinent portion of the record on appeal demonstrates that the import of

defendant's closing argument is most aptly characterized as a plea to the passion of each juror and a specific request to base their decision on matters outside of the evidence:

> "But after you've rendered your verdict, and the weeks and the months and the years pass, the memories of this trial will fade away. The standards and issues regarding abortion probably won't. That debate will rage on.
>
> "We remember some things from history. We learn our lessons from history. We all remember the horrible things we've heard about and read about. The last century alone we endured and recorded the travesties of the inhumane and shameful relocation of Native American Indians on to reservations. We know that Stalin had purges in Mother Russia, and the incomprehensible slaughter of 6 million Jews by an Austrian named Hitler.
>
> "Likewise, we remember and we celebrate individuals who stood up and made the world a better place. No one in our country has to go and sit in the back of the bus anymore, and we set aside a holiday every Monday -- we celebrated it last Monday, of the wisdom and words and courage of Dr. Martin Luther King. Enduring themes such as theirs is reserved for only a few, and they leave their mark based on their words and their deeds.
>
> "You're going to sit here now in a few minutes, and you're going to be instructed to pass judgment on your fellow man. We do not ask you to check your common sense at the door. We know and expect that you'll bring that into the jury room the wisdom you've garnered over the course of your lifetime. That is what makes you a jury of his peers. You have all taken an oath to fairly try this case, and we will hold you all to that promise. We expect courage in your deliberations, we expect wisdom in your deliberations.
>
> "Wichita changed on May 31st, 2009. I think that can't be disputed. We are going to ask you to all collectively fulfill your duties, and in your verdict represent our little part of the nation well. The State as well as [defendant] proved to you that he killed Dr. George Tiller, but only you collectively can determine if he murdered George Tiller. No defendant should ever be convicted based upon his convictions. We ask you not to convict the defendant. We are going

> to ask you to acquit [defendant] of first degree murder. And I again than you for your services." (R. XXII, 26-27.)

While the prosecutor's argument may have been infused with passion, it certainly was not an improper plea for passion to form the foundation of the jury's verdict - - that request was exclusive to defendant. To the extent any portion of the prosecutor's rebuttal closing argument appears suspect, any and all such concerns dissipate when it is realized that this portion of the prosecution's greater closing argument was an attempt to: (1) counter defendant's outright plea to the jury to base its decision on passion, and (2) to redirect the jury back to the reality of their duty - - "[w]e rely on jurors taking an oath to follow the law, as each of you have done." (R. XXII, 28.) See State v. McReynolds, 288 Kan. 318, 325, 202 P.3d 658 (2009) (Kansas appellate courts have generally held that no misconduct occurs when a prosecutor's potential misstep in rebuttal closing argument was provoked by defendant's arguments or comments); State v. Murray, 285 Kan. at 517 (2008); State v. Elnicki, 279 Kan. 47, 64, 105 P.3d 1222 (2005); State v. McKinney, 272 Kan. 331, 347, 33 P.3d 234 (2001), overruled on other grounds by State v. Davis, 283 Kan. 569, 575, 158 P.3d 317 (2007); State v. Follin, 263 Kan. 28, 45, 947 P.2d 8 (1997); State v. Sexton, 256 Kan. 344, 363, 886 P.2d 811 (1994); State v. Baker, 249 Kan. 431, 446, 819 P.2d 1173 (1991).

Simply put, the prosecutor's statements in rebuttal closing argument did not go beyond the wide latitude afforded the prosecution when making argument to

the jury. As such, it does not appear there is any need to address the second part of the prosecutorial misconduct analysis.

To the extent this court is compelled to address the second step of the misconduct analysis, the focus is on whether the misconduct was so prejudicial as to deny the defendant a fair trial. Inkelaar, 293 Kan. at 427. The factors to consider are whether: (1) the misconduct was so gross and flagrant it denied the accused a fair trial; (2) the remarks showed ill will by the prosecutor; and (3) the evidence against the defendant was of such a direct and overwhelming nature that the prosecutor's statements would not have much weight in the jurors' minds. Inkelaar, 293 Kan. at 427. This court has held that before the third factor can override the first two factors, the State, "[b]ears the burden to establish beyond a reasonable doubt that the error did not affect the defendant's substantial rights, i.e., there is no reasonable possibility the error affected the verdict." McCullough, 270 P.3d at 1160.

Here, there is no showing of either "gross and flagrant" conduct or "ill will." In any event, the instant case is clearly one in which, "[t]he evidence against the defendant was of such a direct and overwhelming nature that the prosecutor's statements would not have much weight in the juror's minds." In the instant case, defendant was charged with first-degree, premeditated murder for the death of Dr. Tiller and a single count of aggravated assault with respect to both Mr. Hoepner and Mr. Martin. (R. I, 31-34.) The defendant's jury was instructed upon the elements of first-degree premeditated murder and aggravated assault

without any lesser included offenses, or any affirmative defenses. (R. V, 75-87.) Defendant, from the witness stand, admitted to each and every element of both offenses. (R. XXI, 68-200.) Additionally, with respect to the murder charge, counsel for defendant admitted as much in his closing argument, "[t]he State as well as [defendant] proved to you that he killed Dr. George Tiller. . . ." (R. XXII, 27.) It took the jury thirty-six minutes to reach a verdict. (R. XXII, 32-33.)

To the extent this court finds: (1) the portions of the prosecutor's rebuttal closing argument isolated for complaint for the first time on appeal were beyond the wide latitude afforded the State in closing argument and (2) the comments were "gross and flagrant" and made with "ill will" - - based upon the specific facts of this case, the State has fulfilled its burden of "[e]stablish[ing] beyond a reasonable doubt that the error did not affect the defendant's substantial rights, i.e., there is no reasonable possibility the error affected the verdict."

V. The district court did not err when it followed this court's precedent and refused to instruct the defendant's jury with respect to the "necessity defense."

Standard of Review

The availability of the defense of necessity with respect to any particular factual scenario, appears to be a question of law and subject to de novo review. See City of Wichita v. Tilson, 253 Kan. 285, 288, 855 P.2d 911 (1993).

Discussion

Defendant argues on appeal that he was -entitled to an instruction on the defense of necessity, and the district court's refusal to so instruct denied him a fair trial. (Appellant's Brief, 61-66.)

Prior to trial, the State filed a motion in opposition to allow defendant to present a necessity defense, and defendant filed a pro se motion arguing in favor of instruction on the defense of necessity. (R. II, 55-100; R. III, 1-58; R. II, 14-15.) The issue was addressed by the court, throughout the course of the trial. (R. X, 2-9; R. XIV, 50-64; R. XXI, 215.) The district court determined the defense of necessity not to apply based upon the facts of the instant case and this court's treatment of that defense in Tilson. Specifically, the court ruled: (1) the harm or evil which defendant sought to prevent by his own criminal conduct was not a legal harm because abortion in Kansas is a constitutionally protected legal activity and (2) because defendant indicated he took life, to save life, the activity sought to be stopped by the defendant could not be considered the "greater harm," which is the hallmark of a viable necessity defense. (R. XIV, 50-64.) The district court did not err in so holding.

Tilson analyzed a question of trespassing on the property of the Wichita Family Planning Clinic in order to prevent the clinic from providing abortions. 253 Kan. at 287. This court refused to recognize the existence of the necessity defense in Kansas, but nevertheless held that with respect to the factual scenario at issue, such a defense would not have otherwise been viable:

"2. If recognized as a defense in a criminal case, the justification by necessity defense only applies when the harm or evil which a defendant seeks to prevent by his or her own criminal conduct is a legal harm or evil as opposed to a moral or ethical belief of the individual defendant.

"3. The justification by necessity defense, except as codified in statutes such as those relating to self-defense and compulsion, has not been adopted in Kansas.

"4. A woman has an unfettered constitutional right to an abortion during the first trimester of pregnancy and a somewhat more restricted right to abortion thereafter. Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973).

"5. The defense of justification by necessity cannot be utilized when the harm sought to be avoided is a constitutionally protected legal activity and the harm incurred by the defendant's acts is in violation of the law." 253 Kan at 285, Syl. §2-5.

The Tilson court concluded by warning, "[t]o allow the personal, ethical, moral, or religious beliefs of a person, no matter how sincere or well-intended, as a justification for criminal activity aimed at preventing a law-abiding citizen from exercising her legal and constitutional rights would not only lead to chaos but would be tantamount to sanctioning anarchy." 253 Kan. at 296.

Since Tilson, our Court of Appeals has addressed a similar issue in which a defendant attempted to distinguish his case from Tilson by alleging he was trespassing at a clinic to prevent *illegal* abortions. City of Wichita v. Holick, (Unpublished Opinion No. 95,340 Issued February 16, 2007)[2]. While noting that the Tilson court "[e]xplicity declined to recognize the existence of the necessity

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Pursuant to Supreme Court Rule 7.04, a copy of the aforementioned unpublished opinion has been attached in an appendix to the instant brief

defense in Kansas ...[,] "the Holick court looked to a Tenth Circuit case, United States v. Turner, 44 F.3d 900 (10th Cir. 1995), to establish a working formulation of the elements of the necessity defense in order to resolve the issue before the court. The Turner court isolated four elements: (1) that the defendant was faced with a choice of evils and chose the lesser evil, (2) the defendant acted to prevent imminent harm, (3) the defendant reasonably anticipated a direct causal relationship between his conduct and the harm to be averted, and (4) the defendant had no legal alternatives to violating the law. [Turner] 44 F.3d at 902." Holick, at 3.

Holick was denied relief:

> "[i]n summary, by failing to proffer evidence of illegal abortions occurring at the facility on the day of his trespass, Holick failed to provide a sufficient factual basis to support the applicability of the first two elements of the necessity defense as formulated in Turner. Moreover, while Holick attempts to distinguish the present case from Tilson by arguing that his conduct was necessary to prevent the imminent harm of illegal abortions, a fair reading of the record reveals that Holick's primary purpose in trespassing at the clinic was to prevent all abortions, including those women have a right to obtain under our United States Constitution and Kansas law. For all these reasons Tilson mandates that the necessity defense is unavailing." Holick, at 5.

The same can be said for the instant defendant. Here, defendant knew that Dr. Tiller had been acquitted of any charges of performing illegal abortions, and it is clear from defendant's own testimony that his primary purpose in killing Dr. Tiller was to prevent all abortions, not merely illegal late term abortions. (R. XXI, 75-77, 95-108.)

In addition, defendant's own testimony cuts against his position with respect to the element that requires that "[t]he defendant had no legal alternatives to violating the law." At trial, defendant testified that he and others were successful in diverting some women to the "Crisis Pregnancy Center" next door to Dr. Tiller's clinic. (R. XXI, 86-87.) Defendant considered it a success to stop even one woman from having an abortion. (R. XXI, 87.) With respect to this element, the Holick court reasoned and ruled:

> "[w]e next consider the fourth element of the Turner formulation of the necessity defense-whether Holick had any legal alternatives to violating the law. 44 F.3d at 902. In the district court, Holick contended "we have exhausted all available, legal alternatives and those alternatives as a class has [sic] been futile over a long period."
>
> In rejecting Holick's argument, the district court found:
>
> 'An abortion is a medical procedure that cannot be performed in an instant. The medical staff would have to take some time to prepare and complete the procedure. A person trespassing upon land to save a drowning child would not have the time to call for assistance. To prevent an illegal abortion from occurring, law enforcement could be called in time to stop.'
>
> "On appeal, Holick expands his argument to include not just illegal abortions, but legal abortions:
>
> 'Defendant ... and others have taken every legal step conceivable to put an end to legalized abortion. The evidence will show that Defendant has appealed to legislative bodies and countless politicians, picketed abortion clinics, conducted sidewalk counseling, distributed pro-life information and campaigned for pro-life candidates-but abortion on demand remains legal.'
>
> "Holick's argument and the testimony he presented at trial refutes his claim that there were no legal alternatives to violating the law. First, as noted earlier, the necessity defense is inapplicable to defend

against criminal conduct perpetrated to prevent a constitutional or legal right of another. Second, Holick presented evidence at trial that the legal alternative of counseling could be effective in convincing women to forgo an abortion. In particular, Holick presented testimony from Donna Lippoldt, a "sidewalk counselor" outside the clinic who testified that '[t]housands of people have allowed us to help them over the 14 years or we wouldn't still be there.'

"In affirming the defendant's conviction in Turner, the Tenth Circuit solely based its determination that Turner was not entitled to a necessity defense instruction on this fourth factor—the defendant's failure to show there were no legal alternatives to violating the law. 44 F.3d at 902. The court observed:

'Ms. Turner could go door-to-door conveying her views, distribute literature personally, through the mails or via publication, or simply continue her otherwise lawful protests. Plainly, women can be, and in fact are educated on issues concerning abortion by legal means; violating the laws of the United States and ignoring orders of the federal courts are not the only way of doing so.' 44 F.3d at 902.

"We agree. Holick failed to prove that no legal alternatives existed to deter illegal abortions." Holick, at 7.

While it is true that the district court did not expressly consider or rule upon this exact basis, the reason given by a trial court is immaterial if the result is correct for any reason. See Drake v. Kansas Dept. of Revenue, 272 Kan. 231, 239, 32 P.3d 705 (2001).

The district court did not err in refusing to allow defendant to present a necessity defense to the jury - - this court has explicitly declined to recognize the existence of the defense in Kansas, and has further found that such a defense would not be viable in a similar factual setting.

VI. The district court did not err in refusing to instruct upon the lesser included offense of intentional second degree murder, where there was no evidence presented at trial of an intentional killing committed without premeditation.

Standard of Review

Whether a district court's duty to instruct upon a lesser included offense is triggered within a particular case appears to be a matter subject to de novo review. See State v. Scaife, 286 Kan. 614, 620, 186 P.3d 755 (2008).

Discussion

On appeal, as before the district court, defendant alleges error on the part of the district court for refusing to instruct upon the lesser included offense of intentional second-degree murder. (Appellant's Brief, 66-69.) Specifically, defendant alleges the instruction was proper because, "[b]oth crimes have the same element of an intentional killing." (Appellant's Brief, 67.) While defendant is, of course, correct that both crimes share the element of "an intentional killing"; here, the district court did not err in failing to instruct upon intentional second-degree murder because there was no evidence to suggest the murder of Dr. Tiller was not premeditated.

K.S.A. 22-3414(3) provides that, [i]n cases where there is some evidence which would reasonably justify a conviction of some lesser included crime as provided in subsection (2) of K.S.A. 21-3107 and amendments thereto, the judge shall instruct the jury as to the crime charged and any such lesser included crime." In Scaife, this court addressed the very issue presented by the defendant:

> [m]ore recently, in State v. Jones, 279 Kan. 395, 406-07, 109 P.3d 1158 (2005), this court clarified and simplified the analysis for determining when a trial judge must give a requested second-degree murder instruction as a lesser-included offense of premeditated first-degree murder, as that primary crime of first-degree murder is currently defined by statute. The unanimous decision in Jones instructed:
>
> > 'In short, [the defendant] has a right to an instruction on second-degree intentional murder as long as the evidence, when viewed in the light most favorable to [the defendant], would reasonably justify a jury's conviction on the offense, and the evidence does not exclude a theory of guilt [second-degree murder].' 279 Kan. at 401, 109 P.3d 1158." [Scaife,] 286 Kan. at 260.

At trial, defendant's counsel requested an instruction on second-degree intentional murder, a lesser included offense of first-degree premeditated murder, because, "[I] think premeditation is a question for the jury to decide." (R. XXI, 208.) The district court refused to instruct upon the lesser included offense because, "[i]t would be hard for a reasonable fact finder to find anything other than the defendant formulating his belief and then planned on multiple occasions of coming to this church to determine if the opportunity would present itself to carry out his intention and plan of killing Dr. Tiller, to eliminate the practice of abortion in this town, at his clinic." (R. XXI, 213.)

Based upon the facts of this case, the district court was correct, in that the State alleged premeditation, and the defendant agreed -- there simply was no evidence presented at trial of an intentional killing committed without premeditation. See State v. Amos, 271 Kan. 565, 572, 23 P.3d 883 (2001) ("There

is no evidence to suggest the killing of James was not premeditated. The trial court did not err in failing to instruct on second-degree intentional murder."). This court need look no further than defendant's own testimony to determine there was no dispute regarding the fact defendant acted with premeditation. (R. XXI, 21-201.)

VII. Defendant was not entitled to a defense of others instruction when there was insufficient evidence introduced at trial for a rational factfinder to find for defendant on that theory.

Standard of Review

When a defendant's request for a self-defense instruction has been rejected by the district court, this court applies the following standard of review over the decision on appeal, la] defendant is entitled to instructions on the law applicable to his or her theory of defense if there is evidence to support the theory. However, there must be evidence which, viewed in the light most favorable to the defendant, is sufficient to justify a rational factfinder finding in accordance with the defendant's theory.'" State v. Anderson, 287 Kan. 325, 334, 197 P.3d 409 (2008).

Discussion

Defendant alleges reversible error based upon the district court's refusal to instruct the jury with respect to defense of others. (Appellant's Brief, 69-71.) As previously noted, defendant is unable to display a reasonable belief that his actions were required and therefore, was not entitled to the requested instruction. See Hernandez, 253 Kan. at 710-11 (defense of other theory required defendant's belief be reasonable; trial court correctly refused to give requested instruction

because rational factfinder could not find that defendant acted in defense of his sister when he shot victim).

Defendant was not entitled to a self-defense/defense of another instruction. The right to use deadly force in the defense of others is codified at K.S.A. 21-3211, which, in relevant part, states:

> "(a) A person is justified in the use of force against another when and to the extent it appears to such person and such person reasonably believes that such force is necessary to defend such person or a third person against such other's imminent use of unlawful force.
>
> "(b) A person is justified in the use of deadly force under circumstances described in subsection (a) if such person reasonably believes deadly force is necessary to prevent imminent death or great bodily harm to such person or a third person."

The statutory provision presents a two-prong test. The first prong is subjective, requiring a showing that defendant sincerely and honestly believed it to be necessary to kill in order to defend others. The second portion is an objective standard requiring defendant to show that a reasonable person in his circumstances would have perceived the use of deadly force as necessary. See State v. Barnes, 263 Kan. 249, 265-66, 948 P.2d 627 (1997).

For a defense of others instruction to be available at trial, the evidence, when taken together, must provide for an affirmative finding under both prongs by a rational factfinder. To a large extent, this matter was discussed in the instant brief within the first issue regarding the district court's refusal to instruct upon voluntary manslaughter - imperfect self-defense. *Supra,* 6-14. To summarize, the

facts of the instant case do not support an imminence of danger at the time of the murder, and similarly fail to support the notion that the victim was engaging in unlawful conduct. White, 284 Kan. at 353; Shannon, 258 Kan. 429-30.

As there was no evidence that defendant's actions were objectively reasonable, defendant was not entitled to the requested instruction.

VIII. Defendant was not denied a fair trial under the notion of cumulative trial errors because each individual allegation of error has failed independently and the evidence against the defendant was overwhelming.

Standard of Review

This court's standard of review over an allegation of cumulative error is well settled:

> "[c]umulative trial errors, when considered collectively, may be so great as to require reversal of the defendant's conviction. The test is whether the totality of circumstances substantially prejudiced the defendant and denied him a fair trial. No prejudicial error may be found upon this cumulative effect rule, however, if the evidence is overwhelming against the defendant." State v. Ackward, 281 Kan. 2, 29, 128 P.3d 382 (2006).

Discussion

Here, each of defendant's alleged trial errors have independently failed, and as such, a claim of cumulative error must be dismissed. In addition, there can be no successful allegation of cumulative error in light of the overwhelming strength of the State's case against defendant.

IX. The district court did not abuse its discretion when it imposed the hard 50 sentence .upon defendant. (Appellant's Sentencing Issues I&II)

Standard of Review

Defendant's challenge to the sufficiency of the evidence for establishing the existence of aggravating circumstances in a hard 50 sentencing proceeding is governed by the following standard of review: "'whether, after a review of all the evidence, viewed in the light most favorable to the prosecution, a rational factfinder could have found the existence of the aggravating circumstance by a preponderance of the evidence.' [Citations omitted.]" State v. Boldridge, 274 Kan. 795, 808, 57 P.3d 8 (2002), cert. denied 538 U.S. 950, 123 S.Ct. 1629, 155 L.Ed.2d 494 (2003).

Where an appeal seeks review of a trial court's refusal to find a mitigating circumstance, the standard of review questions, "'whether, after a review of all the evidence, viewed in a light most favorable to the defendant, a rational factfinder could have found by a preponderance of the evidence the existence of the mitigating circumstance.' [Citation omitted.]" Boldridge, 274 Kan. at 809.

Ultimately, a trial court's balancing of aggravating and mitigating circumstances is within the district court's sound discretion and will not be disturbed on appeal absent an abuse of discretion. State v. Lopez, 271 Kan. 119, 141-42, 22 P.3d 1040 (2001).

Discussion

A conviction for premeditated first-degree murder holds a life sentence with a mandatory twenty-five year term before a defendant is eligible for parole, unless a sentencing court finds an enhanced minimum sentence that requires a mandatory hard 50 term should be imposed. K.S.A. 21-4635; see K.S.A. 22-3717(b)(1). In order to impose the hard 50 sentence, the district court must find at least one of the aggravated circumstances set out in K.S.A. 21-4636 exists and that the aggravating factor(s) are not outweighed by any mitigating factor. K.S.A. 21-4635(d).

Here, the State filed notice and a memorandum in support of imposing the hard 50 sentence. (R. VI, 1-30.) Defendant filed a responsive motion and a separate motion arguing for the existence of mitigating factors. (R. VI, 83-95.)

Subsequent to a full hearing on the matter (R. XXIII, 26-215), the sentencing court determined the aggravating circumstance that defendant committed the crime in an especially heinous, atrocious, or cruel manner existed. (R. VI, 107-10.) The aggravating factor was based upon: (1) prior stalking of the victim (K.S.A. 21-4636(0(1)); (2) preparation or planning, indicating an intention that the killing was meant to be especially heinous, atrocious or cruel (K.S.A. 21-4636(0(2)) and (3) any other conduct the court expressly finds is especially heinous (K.S.A. 21-4636(0(7)) - - the fact defendant specifically chose to kill Dr. Tiller inside a church; a place of peace and tranquility and an asylum from violence. (R. VI, 107-10; R. XXIII, 26-215.)

By way of mitigating factors, the defendant argued: (1) he had no significant history of prior criminal activity (K.S.A. 21-4637(a)), and (2) his capacity to appreciate the criminality of his conduct or to conform to the requirements of law were substantially impaired (K.S.A. 21-4637(0). (R. VI, 92-95; R. XXIII, 26-215.) The district court concluded the first factor was not present, and that even if it made a finding that the second factor existed, it would not be sufficient to outweigh the aggravating factors. (R. XXIII, 213-14.)

Specifically, by way of journal entry, the court ruled:

"K.S.A. 21-4635(f)(1): Prior Stalking of the Victim (Dr. George Tiller)

"a. The defendant learned of the home address of Dr. George Tiller and contemplated or planned his killing, but found the address was in a gated community, which did not afford him access to Dr. Tiller.
"b. The defendant went to Dr. Tiller's clinic on numerous occasions as a side walk [sic] protester or counselor to check out access to the clinic, and also surveyed nearby rooftops of buildings to carry out a possible sniper attack on Dr. Tiller.
"c. The defendant went to Reformation Lutheran Church on numerous occasions to determine the access and layout beginning in 2002, when he parked his car at St. George Orthodox Church and went over to the Reformation Lutheran Church to observe its layout.

"K.S.A. 21-4635(f)(2): Preparation or Planning

"a. The defendant had come to the conclusion as early as 1993 that Dr. Tiller had to die.
"b. The defendant had contemplated cutting off Dr. Tiller's hands or chopping off his lower arms, but abandoned that plan because Dr. Tiller could still teach other doctors to perform the procedures.
"c. The defendant had contemplated running his car into Dr. Tiller's by ramming his car and possibly shooting him with a rifle, but abandoned that plan due to the potential of harming others and the fact that Dr. Tiller drove an armored vehicle.

"d. The court has previously mentioned the defendant's plan for a long range sniper killing from a near by [sic] roof top [sic], but was abandoned by the defendant after he concluded that it would not be feasible.

"e. The defendant visited the Reformation Lutheran Church on 4 or 5 prior occasions to learn its layout and the routine of its services and the duties of the ushers, since the defendant was aware that Dr. Tiller performed the services of an usher at that church.

"f. The defendant ultimately decided that the church was the only accessible place for him to carry out his plan to kill Dr. Tiller. In late August of 2008 he took a 9mm semi-automatic handgun concealed in a shoulder holster under his suit jacket to the church but Dr. Tiller was not there on that date.

"g. By April of 2009 the defendant again attended church services with a concealed knife hoping to stab Dr. Tiller but again was unable to locate Dr. Tiller at those services.

"h. In May of 2009, the defendant purchased a .22 caliber semi-automatic pistol. He test fired it for accuracy and had it oiled and lubricated by a gun shop and bought the recommended ammunition that would cycle through the pistol and again test fired the pistol in rural areas on his trip to Wichita.

"i. The defendant came to Wichita and attended the church services on May 24, 2009, but Dr. Tiller was not there, and was in fact on vacation with his family in Florida.

"j. The defendant returned to Wichita on May 30, 2009 to attend the Saturday evening Swahili service but determined that Dr. Tiller was not attending that service.

"k. The defendant returned the next morning on May 31, 2009 and sat in the back pews of the sanctuary, until he observed Dr. Tiller enter the sanctuary.

"1. Upon Dr, Tiller turning and leaving the sanctuary, the defendant immediately followed him into the narthex area of the church, whereupon he walked up to Dr. Tiller and placed the .22 caliber handgun to his forehead and shot Dr. Tiller at pointblank range, resulting in his death.

"m. In other documents provided to the court for its consideration, the court learned that the defendant would have continued to come to the Reformation Lutheran Church until the job was done if he had not been successful on May 31st, 2009.

"n. Additional planning and preparation that defendant undertook would include backing his car into the parking spaces at the Reformation Lutheran Church to ease his escape, and always sitting

in the back of the sanctuary to provide quick access to the exit doors leading out of the sanctuary and/or the narthex into the parking lot.

"K.S.A. 21-435[sic](f)(7): Any other conduct in the opinion of the court that is especially heinous, atrocious or cruel.

"a. The fact that the defendant chose a church, a house of GOD, and a place of worship because Dr. Tiller would expect to be safe and would not take the usual steps for his protection, is the primary reason the defendant chose to kill Dr. Tiller at his church on Sunday, May 31, 2009.
"b. The church is supposed to be a place of peace and tranquility. If any place should provide a sanctuary or asylum from the violence in our society, church should be one of the most obvious places.
"c. The fact that the defendant intentionally killed Dr. Tiller in a church, which is a place that abhors the use of violence, is especially heinous, atrocious or cruel in this court's opinion.
"d. The defendant did not arrive early enough before he entered the service to kill Dr. Tiller in the church parking lot before he entered the church. The parking lot would have provided less exposure to the members attending the service. Rather, the defendant chose to kill Dr. Tiller after the 10:00 a.m. service had started and the church was full.
"e. All of the sanctuary doors lead into the narthex, which was the only available way to exit the church, except for the designated fire escape exits.
"f. The defendant shot and killed Dr. Tiller at pointblank range, leaving him bleeding on the floor of the narthex, where everyone exiting from the sanctuary would see the horrific scene, including women, small children, and members of Dr. Tiller's family.
"g. The location chosen by the defendant to meet his need for access, and in total disregard for the reverence that should be shown in a house of worship, is in this court's opinion by itself, heinous, atrocious and cruel.

"The court after considering the mitigating circumstances presented by the defendant pursuant to K.S.A. 21-4637(a)&(f), finds that the mitigating circumstances did not outweigh the aggravating circumstances, and accordingly the defendant is sentenced to K.S.A. 21-4638 and amendments thereto." (R. VI, 107-10.)

The aggravating factor set out in K.S.A. 21-4636(f) provides, in pertinent part:

> "[t]he defendant committed the crime in an especially heinous, atrocious or cruel manner. A finding that the victim was aware of such victim's fate or had conscious pain and suffering as a result of the physical trauma that resulted in the victim's death is not necessary to find that the manner in which the defendant killed the victim was especially heinous, atrocious or cruel. In making a determination that the crime was committed in an especially heinous, atrocious or cruel manner, any of the following conduct by the defendant may be considered sufficient:
>
> "(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;
>
> "(7) any other conduct in the opinion of the court that is especially heinous, atrocious or cruel."

In State v. Lessley, 271 Kan. 780, 798, 26 P.3d 620 (2001), this court applied the following definitions to the terms heinous, atrocious or cruel: "The term 'heinous' means extremely wicked or shockingly evil; 'atrocious' means outrageously wicked and vile; 'cruel' means pitiless or designed to inflict a high degree of pain, utter indifference to, or enjoyment of, the sufferings of others.

First, defendant challenges the sufficiency of the evidence supporting the existence of the aggravating circumstances selected by the court. (Appellant's Brief, 72-86.)

Despite the fact K.S.A. 21-4636(f) specifically indicates, "[a] *finding that the victim was aware of such victim's fate or had conscious pain and suffering* as a

result of the physical trauma that resulted in the victim's death *is not necessary* to find that the manner in which the defendant killed the victim was especially heinous, atrocious or cruel[,]" defendant argues the "prior stalking of or criminal threats to the victim [21-4636(f)(1)]" circumstance cannot find support because defendant's victim was unaware he was being stalked by defendant. (Appellant's Brief, 77-80.) Defendant does not otherwise dispute a finding that he "stalked" his victim.

Defendant urges this court to read all of the elements of the stalking criminal statute, K.S.A. 21-3438, into the provisions of K.S.A. 21-4636(0(1). (Appellant's Brief, 77.) This court has previously rejected such a request, finding:

> "[w]ith respect to the alleged prior stalking, Johnson urges us to apply the definition of stalking found in our criminal code, i.e., "an intentional, malicious and repeated following or harassment of another person." (Emphasis added.) See K.S.A. 2006 Supp. 21-3438. As such, Johnson argues that the two confrontations shortly before the murder are insufficient to establish the repetitive conduct which is the gravamen of stalking.
>
> "While Johnson makes a colorable argument against labeling his conduct during the 2 weeks prior to the murder as the "prior stalking" contemplated by 21-4636(f)(1), such a determination would make scant difference in our analysis. Under 21-4636(f)(7), the district court is permitted to consider "any other conduct in the opinion of the court that is especially heinous, atrocious or cruel." Therefore, Johnson's conduct during the weeks prior to the murder can be considered by the court, regardless of the label assigned to that conduct." State v. Johnson, 284 Kan. 18, 25, 159 P.3d 161 (2007).

Moreover, even if this court were to grant defendant's request, the stalking statute does not require that *"the targeted person is actually placed in such fear"* in

order to obtain a valid conviction. That language is required *only* for a conviction under subsection (a)(1). The requirement is absent from subsection (a)(2) which criminalizes "[i]ntentionally engaging in a course of conduct targeted at a specific person which the individual knows will place the targeted person in fear for such person's safety or the safety of a member of such person's immediate family. . . ." K.S.A. 2008 Supp. 21-3438. Defendant has expressed no logical basis for this court to apply one subsection of the statutory provision over the other in the event his request to read all of the elements of the stalking criminal statute, K.S.A. 21-3438, into the provisions of K.S.A. 21-4636(f)(1) would be granted.

In any event, whether considered under the "prior stalking" provision of K.S.A. 21-4636(f)(1) or the "any other conduct" provision of K.S.A. 21-4636(f)(7), what is clear and uncontested by defendant, is that he participated in the underlying behavior. As the State argued in its brief to the district court:

> "[t]he defendant admitted during the course of his testimony that he in fact had made a conscious and deliberate plan to stalk Dr. Tiller. He admitted that he stalked him over a period of several years. He stated that he first started coming down to Wichita in pursuit of Dr. Tiller in the period of time between 2000-02. He mentioned that he stalked the activities he engaged in while trying to find Dr. Tiller. The previously mentioned protests at and the visits to Reformation Lutheran Church, where on at least 3 occasions prior to May 31, 2009, he was armed with either a 9mm or a .22 caliber handgun hoping to kill Dr. Tiller at his church; protests outside Dr. Tiller's medial clinic; reviews of facilities around the clinic where he might find Dr. Tiller accessible by bullet from a SKS assault rifle; trips to the gated community where Dr. Tiller lived with the hope of finding a way to attack him at his home." (R. VI, 21-22.)

The court also ruled that under K.S.A. 21-4635(f)(1), defendant participated in preparation or planning that indicated an intention that the killing was meant to be especially heinous, atrocious or cruel. Here, defendant acknowledged that he had been planning the murder since 1999. Defendant's plan originally contemplated chopping off the victim's hands or lower arms, and culminated in an ambush at the victim's chosen place of worship. The ambush was never planned to occur in an isolated portion of the church parking lot or in any other secluded portion of the church property; rather, defendant's plan focused on killing his victim within the church knowing that the victim's friends and family would stand a great chance in witnessing either the event itself, or the event's gruesome aftermath. This public nature of the killing was wholly unnecessary to the plans overarching goal -- and is easily characterized as "shockingly evil," "outrageously wicked and vile" and an action taken with utter indifference to the suffering of others. See State v. Lessley, 271 Kan. at 798.

In addition, the killing's higher purpose was to send a warning to others who would dare provide the constitutionally protected services Dr. Tiller had provided. (R. XXIII, 130-41.) At its base level, the killing was an act of violence designed to create terror in others. (R. XXIII, 130-41.)

Finally, the district court determined that the fact defendant purposefully selected a place of worship to serve as a backdrop to his attack, was conduct that in the opinion of the court, was especially heinous, atrocious and cruel. The court noted that such locations normally serve as places of peace and tranquility - - a

place one would expect to be safe. (R. VI, 106-07.) To exploit the sanctity of such a location unquestionably displays a depravity that is especially evil.

Defendant's challenge to the sufficiency of the evidence for establishing the existence of aggravating circumstances in a hard 50 sentencing proceeding is governed by the following standard or review: "'whether, after a review of all the evidence, viewed in the light most favorable to the prosecution, a rational factfinder could have found the existence of the aggravating circumstance by a preponderance of the evidence.' [Citations omitted.]" State v. Boldridge, 274 Kan. 795, 808, 57 P.3d 8 (2002), cert. denied 538 U.S. 950, 123 S.Ct. 1629, 155 L.Ed.2d 494 (2003). With respect to the aggravating factor as a whole, a rational factfinder could easily have made the same findings as did the trial court based upon a preponderance of the evidence.

In an attempt to counter the aggravating circumstances, defendant asserted his actions were mitigated due to his lack of significant prior criminal activity (K.S.A. 21-4637(a)) and by his alleged inability to conform to the requirements of the law (K.S.A. 21-4637(f)). The district court found the first factor was not present, and that even if the court made a finding that the second factor existed, it would not be sufficient to outweigh the aggravating factor. (R. XXIII, 213-14.)

While the State recognized that for criminal history purposes, defendant would be considered a category I, the State argued "criminal history" was not the relevant test. (R. XXIII, 203.) K.S.A. 21-4637(a) asks whether "[t]he defendant has no significant history of *prior criminal activity."* It is clear, by way of

defendant's admissions at trial, that defendant had a considerable history of prior criminal activity as evidenced by the number of instances where he was ready and willing to kill Dr. Tiller. (R. XXII, 203.)

With respect to defendant's alleged inability to conform to the requirements of the law under K.S.A. 21-4637(f), defendant's testifying expert at the time of sentencing, Dr. George Hough, indicated more that defendant chose voluntarily to commit his act of violence because that is what his self selected belief system led him to want to do. (R. XXIII, 101-45.) Defendant knew what was criminal and what was not criminal and simply chose to act based upon his personal beliefs. Defendant was not impaired psychologically, he simply desired to impose his will upon others.

Where a defendant challenges a trial court's refusal to find a mitigating circumstance, the standard of review is, "'whether, after a review of all the evidence, viewed in a light most favorable to the defendant, a rational factfinder could have found by a preponderance of the evidence the existence of the mitigating circumstance.' [Citation omitted.]" Boldridge, 274 Kan. at 809. Even after examining the evidence in the light most favorable to defendant, it is difficult to conclude that a rational factfinder could have found by a preponderance of the evidence that defendant's actions were mitigated to any significant degree by either his alleged lack of significant prior criminal activity, or by his alleged inability to conform to the requirements of the law.

Even if there was error in failing to affirmatively find the existence of the suggested mitigators, the error would not justify reversal of the sentencing as the district court found that such would still not outweigh the aggravating factors. (R. XXIII, 213-14.) The trial court's weighing of aggravating and mitigating circumstances is within its sound discretion and will not be disturbed on appeal absent an abuse of discretion. State v. Lopez, 271 Kan. 119, 141-42, 22 P.3d 1040 (2001). Here, the trial court gave a thorough explanation on the record of its consideration of the aggravating and mitigating circumstances. The trial court's reasoning does not reflect an abuse of discretion and defendant's argument on appeal should be rejected.

X. Defendant was not denied his statutory right to allocution. (Appellant's Sentencing Issue III)

Standard of Review

Whether a defendant has been denied his statutory right to allocution and is otherwise entitled to resentencing appears to be a matter subject to de novo review. See State v. Mebane, 278 Kan. 131, 133-35, 91 P.3d 1175 (2004). Moreover, a claim of denial of allocution is subject to a harmless error standard of review. State v. Bafford, 255 Kan. 888, 889-90, 879 P.2d 613 (1994).

Discussion

When provided an opportunity for allocution at sentencing, defendant chose to read from a prepared statement. (R. XXIII, 146-47.) For forty minutes, or

thirty-one pages of transcript, defendant addressed the court without interruption. (R. XXIII, 146-78.) When the gravamen of defendant's comments turned from matters material to mitigation toward philosophies and political beliefs on issues that did not necessarily pertain to mitigation, the district court intervened. (R. XXIII, 178-90.) Defendant's counsel objected. (R. XXIII, 182, 186.) Eventually, defendant was allowed to proffer the material he wanted reviewed for the record on appeal (R. XXVIII & XXIX), although it appears defendant was actually able to communicate his point to the court:

> "THE COURT: I will take your statement, [defense counsel] on behalf of your client, that [defendant] did not believe that the duly elected District Attorney of this judicial district was not [sic] adequately performing her duties, as you just stated, and if he wants to discuss his feelings about the trial of Dr. Tiller and his observations and his frustration that may have arisen out of the jury's verdict, which was prosecuted by the Attorney General's Office, by Assistant District Attorney [sic] Barry Disney, I'm more inclined to listen to that, to see if it's relevant and appropriate to his belief system. And to the extent that you just summarized what [defendant] wants to say about Ms. Foulston and her neglect or failure to carry out her duties, it's duly noted and accepted on behalf of [defendant] your statements on his behalf." (R. XXIII, 182.)

Defendant was allowed to continue on with his allocution, discussing the aggravating and mitigating factors found by the court. (R. XXIII, 190-96.) Again, defendant was stopped by the court, but not before his position was made clear - - it was only after defendant launched into character attacks not illustrative of his legitimate position that the court intervened:

> "[Defendant], once again, you have explained in one or two sentences why you don't think this was a sanctified place and a true church. Now you have gone on to the character assassination of the

membership of the Reformation Lutheran Church and the two pastors that preside over that church. I don't see how that is mitigating. It only takes one or two sentences for you to say I didn't believe it was really a holy place of worship, so I don't think I was violating the sanctity of this holy church when I shot George Tiller in the back of the narthex. That's all you need to say. The rest of it is just political diatribe." (R. XXIII, 196.)

Again, defense counsel objected; but this time there was no proffer made regarding what, other than that already communicated, defendant wished to express. (R. XXIII, 196-97.)

Immediately thereafter, defendant continued:

"[Defendant]: I just wanted [to] say that, okay - - at this point I would like to speak to expectant mothers. To all of you women - -

"THE COURT: Now wait a minute. How does that, again - - I'm not providing you with a forum for an all-night dissertation on a political debate about the issue of abortion. We all have our personal views on that and they are diametrically opposed in a lot of circles, and there's extremes and there's always kind of opinions that meet in the middle.
"How does that go to your belief that what you did was somehow justified or somehow you couldn't conform your conduct to the requirements of the law?

"[Defendant]: Because of what their children have been subjected to, and the law is, if it's illegal to perform something that is just, you have to either decide if you are going to obey God or man.

"THE COURT: You already said that, about 45 minutes ago, and I listened to it and I allowed it. Now for you to make a statement to the mothers, and I don't know what mothers you are addressing except everyone that is watching the television - -

"[Defendant]: Expectant mothers.

"THE COURT: Well, that, and you have made the statement that by killing Dr. Tiller, you saved future babies, babies that would not be aborted at his medical facility. I understand that, and that is part of

your belief system and that is why you feel relieved and you don't feel any guilt or remorse. Your psychologist testified to that and I have heard all that."

"[Defense Counsel]: Your Honor, he will move on to the next section. Again note our objection." (R. XXIII, 197-98.)

With respect to this exchange, it appears from the judge's comments that the information defendant intended to communicate was already known. In any event, to the extent that conclusion is incorrect, no proffer was made regarding what unknown, legitimate, previously unexpressed information defendant wished to communicate.

K.S.A. 22-3422 provides defendant with a statutory right to allocution. That statute indicates that the court must provide counsel an opportunity to speak on behalf of the defendant and that the court must inquire if the defendant wishes to make a statement or otherwise present evidence in mitigation of punishment. K.S.A. 22-3422(e). However, a defendant's right to allocution cannot be without limits, and a trial judge holds an inherent authority to exercise reasonable control over the presentation of evidence, which should extend to the limitation of allocution. See United States v. Mack, 200 F.3d 653 (9th Cir. 2000) (defendant's allocution rights not violated where court personally addressed defendants and provided an opportunity to present evidence on mitigation, but would not allow commentary on irrelevant philosophical discussions regarding environmental destruction, civil disobedience and the legal system); United States v. Muniz, 1 F.3d 1018, 1024-25 (10th Cir. 1993).

To obtain relief based upon a denial of allocution, defendant must make a proffer of the contemplated, but disallowed evidence in mitigation and establish that his substantial rights were prejudiced by the denial of the right to present that evidence. See State v. Borders, 255 Kan. 871, 878-81, 879 P.2d 620 (1994).

Here, a fair reading of the record on appeal reveals that with respect to each objection lodged by counsel, either the district court was already aware of the message defendant desired to communicate, or the defense failed to proffer the legitimate evidence that had been excluded. Under either scenario, defendant is not entitled to resentencing - - either the court was presented with and considered defendant's position, or defendant failed to make a proffer. Under the latter scenario, the failure to make a proffer precludes this court from finding reversible error because the court will necessarily have no indication of the substance of the evidence defendant planned to present. See State v. Duke, 256 Kan. 703, 728, 887 P.2d 110 (1994); Borders, 255 Kan. at 880.

Moreover, defendant has also failed to establish his substantial rights were prejudiced; defendant merely asserts as much without any real argument to flesh out his claim. See Borders, 255 Kan. at 881.

Here, defendant was personally addressed by the court and given an adequate opportunity under the circumstances to speak on his own behalf and present any legitimate information in mitigation of the sentence. Instead, defendant was bent on using the opportunity to discuss his beliefs on abortion. The judge continuously attempted to redirect defendant to speak on germane

issues. This court should conclude that the district court did not deny defendant the right of allocution at sentencing.

XI. Kansas' hard 50 sentencing scheme is not unconstitutional. (Appellant's Sentencing Issue IV)

Standard of Review

The constitutionality of a statute is a question of law over which this court has unlimited review. State v. Ponce, 258 Kan. 708, 709, 907 P.2d 876 (1995).

Discussion

Defendant argues that Kansas' hard 50 sentencing scheme is unconstitutional because, "[a] jury does not determine the facts that increase the penalty beyond a reasonable doubt." (Appellant's Brief, 99.)

Most recently, this court rejected defendant's argument by reasoning and ruling:

> "Harris next argues the hard 50 scheme is unconstitutional because it imposes additional punishment based on factors not submitted to the jury, and asks this court to revisit its decision in State v. Conley, 270 Kan. 18, 11 P.3d 1147 (2000), cert. denied 532 U.S. 932, 121 S.Ct. 1383, 149 L.Ed.2d 308 (2001), which affirmed the hard 50 scheme. This court has previously declined to revisit or overrule Conley, and has also affirmed a defendant's hard 50 sentence despite the claim that the sentencing scheme violated the defendant's Sixth and Fourteenth Amendment rights. See State v. Washington, 280 Kan. 565, 574, 123 P.3d 1265 (2005), cert. denied 549 U.S. 1018, 127 S.Ct. 552, 166 L.Ed.2d 408 (2006) (Hard hard (sic) 50 sentence upheld after defendant convicted of first-degree murder argued Apprendi required aggravating factors to be submitted to the jury and asked the court to overrule Conley)."

"Similar rejections to challenges to the hard 50 sentencing scheme, as well as declined invitations to revisit Conley, are found in State v. Foster, 290 Kan. 696, 699, 233 P.3d 265 (2010); State v. Kirtdoll, 281 Kan. 1138, 1151, 136 P.3d 417 (2006); State v. Oliver, 280 Kan. 681, 707-08, 124 P.3d 493 (2005), cert. denied 547 U.S. 1183, 126 S.Ct. 2361, 165 L.Ed.2d 286 (2006); State v. James, 279 Kan. 354, 358, 109 P.3d 1171 (2005); State v. Buehler–May, 279 Kan. 371, 386, 110 P.3d 425, cert. denied 546 U.S. 980, 126 S.Ct. 549, 163 L.Ed.2d 465 (2005); State v. Robertson, 279 Kan. 291, 308, 109 P.3d 1174 (2005); State v. Hurt, 278 Kan. 676, 686-88, 101 P.3d 1249 (2004); State v. Wilkerson, 278 Kan. 147, 160, 91 P.3d 1181 (2004); State v. Hebert, 277 Kan. 61, 107-08, 82 P.3d 470 (2004); and State v. Douglas, 274 Kan. 96, 111-12, 49 P.3d 446 (2002), cert. denied 537 U.S. 1198, 123 S.Ct. 1268, 154 L.Ed.2d 1037 (2003). Harris provides no additional authority or facts not already included in these previous decisions that would warrant reconsideration of the issue." State v. Harris, ___ Kan. ___, ___ 26 P.3d 820, 832 (2012).

The instant defendant, like Harris and the others before him, has provided "no additional authority or facts not already included in [the] previous decisions that would warrant reconsideration of the issue[,]" and as such, defendant's request for relief must be denied.

XII. The district court did not err by refusing to instruct defendant's jury with respect to voluntary manslaughter - imperfect defense of another. (Pro Se Issues Group I & II)

Standard of Review

"Under the state and federal Constitutions, a defendant is entitled to present the theory of his or her defense, and the exclusion of evidence that is an integral part of that theory violates a defendant's fundamental right to a fair trial. [Citation omitted.] However, the right to present a defense is subject to statutory rules and case law interpretation of the rules of evidence and procedure. [Citation omitted.]"

Walters, 284 Kan. at 8. Whether an evidentiary ruling violated the defendant's constitutional rights is reviewed de novo. White, 279 Kan. at 332-33.

Upon request, the district court has a duty to instruct on any lesser included offense established by the evidence, regardless of whether the evidence supporting the instruction is weak or inconclusive. However, no such duty is present if the jury could not reasonably convict defendant of the lesser included offense based on the evidence presented. A trial court's refusal to issue a requested instruction is reviewed in the light most favorable to the requesting party. State v. Moore, 287 Kan. at 130.

Discussion

Defendant's pro se supplemental brief is separated into three "groups" of issues. The first two "groups" concern the district court's refusal to instruct the jury with respect to voluntary manslaughter - imperfect defense of another. In this respect, defendant's first two issues minor the first two issues raised by appointed appellate counsel. Supra, 6-17.

Defendant first takes issue with the district court's exclusion of testimonial evidence from former Attorney General Phill Kline and former Deputy Attorney General Barry Disney and/or otherwise presents argument with respect to the need to provide some evidence that Dr. Tiller was engaging in "unlawful conduct" in that he was performing "illegal abortions." (Pro Se Supplemental Brief, 1-18.)

Aside from a passing reference, defendant does not contend this proposed evidence would have impacted the issue of imminence of danger at the time of the

killing. Defendant needed to provide some evidence of such in order to be entitled to an instruction on the lesser included offense of imperfect defense-of-others manslaughter instruction. White, 284 Kan. at 349-53.

In the absence of any evidence regarding the imminence of danger, the proposed evidence regarding unlawful conduct was rendered immaterial pursuant to K.S.A. 60-401(b). Here, defendant shot Dr. Tiller to death while Dr. Tiller was at church services. The fact that defendant believed his victim may have been performing abortions in twenty-two hours from the attack, changes nothing, "[f]ear of future harm - no matter how great the fear and no matter how great the likelihood of the harm - will not suffice." White, 284 Kan. at 352-53 (quoting In re Christian S., 7 Cal. 4th 768, 30 Cal. Rptr.2d 33, 872 P.2d 574 (1994).

Defendant's right to present his theory of defense at trial is subject to relevant statutory provisions and the rules of evidence. Walters, 284 Kan. at 8. As such, even if defendant's position is accepted as true, that the district court erred in failing to admit any or all of the evidence excluded, defendant would still not have been entitled to the requested instruction because the evidence as a whole would fail to support an affirmative finding by a reasonable factfinder with respect to defendant's proposed instruction.

Defendant next separately takes issue with the district court's understanding and application of the imminence factor of the lesser included offense instruction of voluntary manslaughter - imperfect defense of another. (Pro Se Supplemental Brief, 18-40.) Defendant does little more than argue against this court's

established precedent regarding the matter. In White, this court resolved the matter presented by the pro se defendant against his position. 284 Kan. at 352-53. The White court noted, "[f]ear of future harm - no matter how great the fear and no matter how great the likelihood of the harm - will not suffice[,]" and "[p]etitioners' focus on this evidence, however, is misplaced. Taken at face value, this background evidence served only to explain *why* the brothers might have had an unreasonable fear of their parents at the moment they killed them. At most, the evidence illustrated that Erik and Lyle feared that their parents had the capacity to and might, at some point, harm them. Erik's testimony about his general fear in the days leading up to the murder does not provide any evidence that, at the moment he shotgunned his parents to death, he feared he was in imminent peril." White, 284 Kan. at 352-53 (quoting In re Christian S., 7 Cal. 4th 768, 30 Cal. Rptr.2d 33, 872 P.2d 574 (1994) & Menendez v. Terhune, 422 F. 3d 1012 [9th Cir. 2005]).

The district court was under a duty to apply this court's precedent. As such, the district court did not err in refusing to instruct the defendant's jury upon the lesser included offense and defendant is not entitled to relief on either "Group I" or "Group II" of his alleged errors.

XIII. The district court did not err in refusing to instruct defendant's jury with respect to the "necessity defense." (Pro Se Issue Group III)

Standard of Review

The availability of the defense of necessity with respect to any particular factual scenario, appears to be a question of law and subject to de novo review. See Tilson, 253 Kan. at 288.

Discussion

Defendant's third group of pro se issues basically challenges the district court's determination that defendant was not entitled to an instruction on the necessity defense. (Pro Se Supplemental Brief, 40-50.) This matter was addressed in appointed appellate counsel's issue five in the instant brief Supra, 36-40.

Here, the district court ruled the defense was inapplicable because the facts of the instant case and this court's treatment of the defense in Tilson. Specifically, the court ruled: (1) the harm or evil which defendant sought to prevent by his own criminal conduct was not a legitimate harm because abortion in Kansas is a constitutionally protected legal activity, and (2) because defendant indicated he took life, to save life, the activity sought to be stopped by defendant could not be considered the "greater harm," which is the hallmark of a viable necessity defense. (R. XIV, 50-64.)

In Tilson this court refused to recognize the existence of the necessity defense in Kansas, but nevertheless held that with respect to the factual scenario at

issue, such a 253 Kan at 285, Syl. ¶ 2-5. The Tilson court concluded by warning, "[t]o allow the personal, ethical, moral, or religious beliefs- of a person, no matter how sincere or well-intended, as a justification for criminal activity aimed at preventing a law-abiding citizen from exercising her legal and constitutional rights would not only lead to chaos but would be tantamount to sanctioning anarchy." 253 Kan. at 296.

Since Tilson, our Court of Appeals addressed an attempt to distinguish a case from Tilson in which the defendant argued he was trespassing at a clinic to prevent *illegal* abortions. City of Wichita v. Holick, (Unpublished Opinion No. 95,340 Issued February 16, 2007)[3]. While noting that the Tilson court "[e]xplicity declined to recognize the existence of the necessity defense in Kansas ...[,]"the Holick court looked to a Tenth Circuit case, United States v. Turner, 44 F.3d 900 (10th Cir. 1995), to establish a working formulation of the elements of the necessity defense in order to resolve the issue before the court. The Turner court isolated four elements: (1) that the defendant was faced with a choice of evils and chose the lesser evil, (2) the defendant acted to prevent imminent harm, (3) the defendant reasonably anticipated a direct causal relationship between his conduct and the harm to be averted, and (4) the defendant had no legal alternatives to violating the law. [Turner] 44 F.3d at 902." Holick, at 3.

Holick was denied relief:

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[3] Pursuant to Supreme Court Rule 7.04, a copy of the aforementioned unpublished opinion has been attached in an appendix to the instant brief.

> "[i]n summary, by failing to proffer evidence of illegal abortions occurring at the facility on the day of his, trespass, Holick failed to provide a sufficient factual basis to support the applicability of the first two elements of the necessity defense as formulated in Turner. Moreover, while Holick attempts to distinguish the present case from Tilson by arguing that his conduct was necessary to prevent the imminent harm of illegal abortions, a fair reading of the record reveals that Holick's primary purpose in trespassing at the clinic was to prevent all abortions, including those women have a right to obtain under our United States Constitution and Kansas law. For all these reasons Tilson mandates that the necessity defense is unavailing." Holick, at 5.

The same can be said for the instant defendant. Here, defendant knew that Dr. Tiller had been acquitted of any charges of performing illegal abortions, and it is clear from defendant's own testimony that his primary purpose in killing Dr. Tiller was to prevent all abortions, not necessarily illegal late term abortions. (R. XXI, 75-77, 95-108.)

In addition, defendant's own testimony cuts against his position with respect to the element that requires that "[t]he defendant had no legal alternatives to violating the law." At trial, defendant testified that he and others were successful in diverting some women to the "Crisis Pregnancy Center" next door to Dr. Tiller's clinic. (R. XXI, 86-87.) Defendant considered it a success to stop even one woman from having an abortion. (R.)(XL 87.) With respect to this element, the Holick court reasoned and ruled:

> "[w]e next consider the fourth element of the Turner formulation of the necessity defense-whether Holick had any legal alternatives to violating the law. 44 F.3d at 902. In the district court, Holick contended "we have exhausted all available, legal alternatives and those alternatives as a class has [sic] been futile over a long period."

In rejecting Holick's argument, the district court found:

'An abortion is a medical procedure that cannot be performed in an instant. The medical staff would have to take some time to prepare and complete the procedure. A person trespassing upon land to save a drowning child would not have the time to call for assistance. To prevent an illegal abortion from occurring, law enforcement could be called in time to stop.'

"On appeal, Holick expands his argument to include not just illegal abortions, but legal abortions:

'Defendant ... and others have taken every legal step conceivable to put an end to legalized abortion. The evidence will show that Defendant has appealed to legislative bodies and countless politicians, picketed abortion clinics, conducted sidewalk counseling, distributed pro-life information and campaigned for pro-life candidates-but abortion on demand remains legal.'

"Holick's argument and the testimony he presented at trial refutes his claim that there were no legal alternatives to violating the law. First, as noted earlier, the necessity defense is inapplicable to defend against criminal conduct perpetrated to prevent a constitutional or legal right of another. Second, Holick presented evidence at trial that the legal alternative of counseling could be effective in convincing women to forgo an abortion. In particular, Holick presented testimony from Donna Lippoldt, a "sidewalk counselor" outside the clinic who testified that '[t]housands of people have allowed us to help them over the 14 years or we wouldn't still be there.'

"In affirming the defendant's conviction in Turner, the Tenth Circuit solely based its determination that Turner was not entitled to a necessity defense instruction on this fourth factor—the defendant's failure to show there were no legal alternatives to violating the law. 44 F.3d at 902. The court observed:

'Ms. Turner could go door-to-door conveying her views, distribute literature personally, through the mails or via publication, or simply continue her otherwise lawful protests. Plainly, women can be, and in fact are educated on issues concerning abortion by legal means; violating the laws of the United States and ignoring orders of the federal courts are not the only way of doing so.' 44 F.3d at 902.

"We agree. Holick failed to prove that no legal *Alternatives* existed to deter illegal abortions." Holick, at 7.

While it is true that the district court did not expressly consider or rule upon this exact basis, the reason given by a trial court is immaterial if the result is correct for any reason. See Drake v. Kansas Dept. of Revenue, 272 Kan. at 239.

The district court did not err in refusing to allow defendant to present a necessity defense to the jury - - this court has explicitly declined to recognize the existence of the defense in Kansas, and has further found that such a defense would not be viable in a similar factual setting.

CONCLUSION

The district court had no duty to instruct upon the lesser included offense of voluntary manslaughter where the jury could not reasonably convict defendant of that lesser offense based upon the evidence presented at trial.

Defendant was not denied his constitutional right to a fair trial by the procedure the district court employed to resolve the issue regarding his ability to present his desired defense to the jury.

The district court did not make an arbitrary, fanciful or unreasonable decision when it denied defendant's motion for change of venue, nor was the decision based upon an error of law or fact.

The prosecutor's use of legitimate means to secure a just conviction did not constitute reversible misconduct.

The district court did not err when it followed this court's precedent and refused to instruct the defendant's jury with respect to the "necessity defense."

The district court did not err in refusing to instruct upon the lesser included offense of intentional second degree murder, where there was no evidence presented at trial of an intentional killing committed without premeditation.

Defendant was not entitled to a defense of others instruction when there was insufficient evidence introduced at trial for a rational factfinder to find for defendant on that theory.

Defendant was not denied a fair trial under the notion of cumulative trial errors because each individual allegation of error has failed independently, and the evidence against the defendant was overwhelming.

The district court did not abuse its discretion when it imposed the hard 50 sentence upon defendant. (Appellant's Sentencing Issues I&II)

Defendant was not denied his statutory right to allocution. (Appellant's Sentencing Issue III)

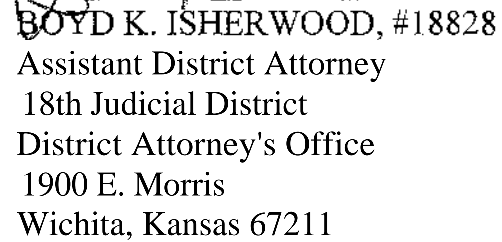
Kansas' hard 50 sentencing scheme is not unconstitutional. (Appellant's Sentencing Issue IV)

The district court did not err by refusing to instruct defendant's jury with respect to voluntary manslaughter - imperfect defense of another. (Pro Se Issues Group I & II)

The district court did not err in refusing to instruct defendant's jury with respect to the "necessity defense." (Pro Se Issue Group III)

The State respectfully requests defendant's convictions and sentence be affirmed.

Respectfully submitted,



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APPENDIX A

151 P.3d 864 (Table), 2007 WL 518988 (Kan.App.)
Unpublished Disposition
Briefs and Other Related Documents
Judges and Attorneys
(Pursuant to Kansas Supreme Court Rule 7.04(f), unpublished opinions are not precedential and are not favored for citation. They may be cited for persuasive authority on a material issue not addressed by a published Kansas appellate court opinion.)

Court of Appeals of Kansas.
CITY OF WICHITA, Appellee,
v.
Mark HOLICK, Appellant.

No. **95,340.**
Feb. 16, 2007.

Background: Defendant was convicted by a jury in the District Court, Sedgwick County, David W. Kennedy and Clark V. Owens, II., JJ., of trespass in violation of city code. Defendant appealed.

Holdings: The Court of Appeals held that:
(1) defendant was not entitled to present a necessity defense;
(2) trial court's refusal to allow defendant to reopen his defense case to call himself as a witness was not an abuse of discretion; and
(3) trial court had discretion to impose special probation condition that prohibited defendant from being within 100 yards of women's clinic.

Affirmed.

[11 KeyCite Citing References for this Headnote

386 Trespass
[Westlaw key] 386III Criminal Responsibility
c= 386k84 k. Defenses. Most Cited Cases

Defendant was not entitled to present a necessity defense, in prosecution for trespassing; defendant failed to establish illegal abortions were performed at clinic, and thus he could not establish that he trespassed on clinic property to prevent imminent harm, defendant's motivation in trespassing was to prevent all abortions, not just illegal abortions, there was not a direct causal relationship between defendant's trespass and the harm to be averted, and defendant had other legal alternatives to trespass. K.S.A. 65-6701, 65-6704, 65-6705, 65-6721.

[2] [checkmark] KeyCite Citing References for this Headnote

C=410 Witnesses
In General
C=410k7 Subpoena
C =410k13 k. Service. Most Cited Cases

Order quashing subpoenas was proper, where the trial court determined that the subpoenas had not been properly served.

(31 KeyCite Citing References for this Headnote

110 Criminal Law
c=110XX Trial
c=110XX(C) Reception of Evidence
c=110k685 Reopening Case for Further Evidence
c=110k686 In General
c=110k686(2) k. After Party Offering Evidence Has Rested. Most Cited Cases

c=410 Witnesses KeyCite Citing References for this Headnote
c=410II Competency
c=410II(B) Parties and Persons Interested in Event
c=410k87 Defendants in Criminal Prosecutions
410k88 k. In General. Most Cited Cases

The trial court's refusal to allow defendant to reopen his defense case to call himself as a witness was not an abuse of discretion, in prosecution for trespass; defendant was called as a witness by co-defendant and was afforded his constitutional right to testify.

The trial court's refusal to allow defendant to reopen his defense case to call himself as a witness was not an abuse of discretion, in prosecution for trespass; defendant was called as a witness by co-defendant and was afforded his constitutional right to testify.

141 KeyCite Citing References for this Headnote

c=386 Trespass
c=386k89 k. Trial. Most Cited Cases

Trial court was not required to instruct the jury that when a group of people were trespassing each person had to personally and individually be told to leave in order to convict that person of trespassing, as argued by defendant; city ordinance required personal communication, not individualized communication.

151 KeyCite Citing References for this Headnote

c=350H Sentencing and Punishment
c=350HIX Probation and Related Dispositions
c=350HIX(G) Conditions of Probation
c=350Hk1967(2) k. Validity. Most Cited Cases

Trial court had discretion to impose special probation condition that prohibited defendant from being within 100 yards of women's clinic; city ordinance, which, listed permissible probation conditions, empowered the trial court to "impose any conditions of probation or suspension of sentence that the court deems proper."

161 KeyCite Citing References for this Headnote

c=92 Constitutional Law
c=92k1413 Criminal Law
k. Probation. Most Cited Cases

-92 Constitutional Law KeyCite Citing References for this Headnote
92XIV Right of Assembly
c=92k1430 k. In General. Most Cited Cases

c=92 Constitutional Law KeyCite Citing References for this Headnote
92XVIII Freedom of Speech, Expression, and Press
c=92XVIII(V) Judicial Proceedings
c=92XVIII(V)2 Criminal Proceedings
c=92k2104 k. Probation and Parole. Most Cited Cases

c=350H Sentencing and Punishment if KeyCite Citing References for this Headnote
c= 350HIX Probation and Related Dispositions
c=350HIX(G) Conditions of Probation
c=350Hk1964 Particular Terms and Conditions
c=350Hk1967 Geographic or Travel Restrictions
c=350Hk1967(2) k. Validity. Most Cited Cases

Special probation condition that prohibited defendant from being within 100 yards of women's clinic did not violate defendant's First Amendment rights of freedom of speech, assembly, or religion, in prosecution for trespassing; the condition bore a reasonable relationship to the goal of defendant's probation, as defendant's conviction was his fourth conviction for illegal activities occurring at medical clinics, and the probation condition was limited in scope. U.S.C.A. Const.Amend. 1.

Special probation condition that prohibited defendant from being within 100 yards of women's clinic did not violate defendant's First Amendment rights of freedom of speech, assembly, or religion, in prosecution for trespassing; the condition bore a reasonable relationship to the goal of defendant's probation, as defendant's conviction was his fourth conviction for illegal activities occurring at medical clinics, and the probation condition was limited in scope. U.S.C.A. Const.Amend. 1.

Appeal from Sedgwick District Court; David W. Kennedy and Clark V. Owens, II, judges. Opinion filed February 16, 2007. Affirmed.
Mark E. Holick, appellant pro se.

Sharon L. Dickgrafe, assistant city attorney, Gary E. Rebenstorf, city attorney, for appellee.

Before MCANANY, P.J., ELLIOTT and BUSER, J.J.

MEMORANDUM OPINION

PER CURIAM.

*1 Mark Holick appeals his conviction for trespass in violation of the Wichita City Code. We affirm.

Factual and Procedural Background

Holick and several codefendants were convicted of criminal trespass in the Wichita Municipal Court. Holick appealed his conviction to the Sedgwick County District Court.

At the jury trial, Carl Swinney, a security guard at Women's Health Care Services, testified that on June 16, 2004, 12 individuals, including Holick, entered the clinic's parking lot. Access to this parking lot was controlled by an opening in a wooden privacy fence which displayed "No Trespassing" signs. Swinney told the group that they were trespassing and needed to leave. The group refused to leave, and the Wichita Police Department was called for assistance.

Officer David Halverson, testified that when he arrived he spoke with Swinney, who told him that the 12 people were not authorized to be on the property. Halverson observed that the group was peaceful and some individuals were carrying Bibles. In particular, he recalled that Holick was either

standing or kneeling while praying in the parking lot.

Halverson told the group on two occasions to leave the property. At the time of these orders, Halverson was about 10 to 12 feet in front of the group. He also advised the group that if any person left the property they would avoid arrest. Halverson testified that it appeared to him that the group members heard his commands. Lieutenant Walker Andrews also ordered the group to leave the property. Andrews testified he was absolutely certain that everyone heard the order. The group members, including Holick, refused to leave and were arrested.

At trial, Holick appeared pro se and presented three witnesses in his defense case. Donna Lippoldt, a self-described pro-life missionary, testified to her observations of what occurred at the facility on the day Holick was arrested. She also testified regarding her years of work as a "sidewalk counselor" offering pregnant women entering the facility alternatives to abortion. Michelle McGinnis, wife of codefendant William McGinnis, laid the evidentiary foundation for admission of a videotape that depicted a crying woman and a man entering the facility on June 16, 2004. Finally, Marilyn Shipman testified briefly that, as a teenage patient of Dr. George Tiller, a physician at the facility, she was very uncomfortable on occasions when she had regular checkups.

Holick rested his defense case without calling himself as a witness. Codefendant William McGinnis, however, called Holick to testify as a defense witness. Holick testified he was a pastor for almost 15 years, frequently counseling women regarding abortion-related issues. Holick referenced Old and New Testament verses which he testified motivated him on the day of his arrest. In particular, Holick testified:

> "And then the Scripture that probably most moved me that day was based on the Word of God as found in Proverbs, Chapter 24, in Verse 11, 'Rescue those who are being led away to death; hold back those staggering toward slaughter.' If you say, "But we knew nothing about this", does not he who weighs the heart perceive it? Does not he who guards your life know it? Will he not repay each person according to what he has done?" '

*2 Holick testified that his motives for being at the facility that day were peaceful and related to his experiences as a minister.

The jury found Holick and several codefendants guilty of criminal trespass. Holick was sentenced to 180 days' imprisonment and a fine of $100 but was placed on probation for 2 years. His probation included the special condition that he not be within 100 yards of the perimeter of Women's Health Care Services. Holick appeals.

Preclusion of the Necessity Defense

Prior to trial, the City filed a motion in limine seeking to preclude Holick and his codefendants from "presenting testimony, evidence or arguments that their actions were justified to save a human life." This is commonly known as the necessity defense. Additionally, the City sought to preclude the defense "from arguing that the jury may disregard the law and that they are allowed to 'do what they believe is fair.' " In a written response, Holick did not address the necessity defense but did argue in support of jury nullification.

The district court granted the City's motion finding that although Kansas law had not specifically recognized the necessity defense, it was found to be inapplicable in a similar abortion clinic trespass case, *City of Wichita v. Tilson,* 253 Kan. 285, 855 P.2d 911 (1993). While the district court in the present case disallowed evidence or argument regarding the necessity defense, the court ruled it would allow the defendants to present testimony about their motives for trespassing. At a hearing on the defendants' motion to reconsider this adverse decision, the district court allowed the defendants to present evidence, make proffers, and argue in support of the necessity defense. Upon reconsideration, however, the district court reaffirmed its prior ruling precluding this defense.

The determination of the applicability of the necessity defense in the present case involves "questions of law subject to broad appellate review." 253 Kan. at 288, 855 P.2d 911 (citing *State, ex.*

rel. v. Doolin & Shaw, 209 Kan. 244, 261, 497 P.2d 138 (19721).

We agree with the district court that our Supreme Court's holding in *Tilson* is important to the resolution of this issue. In *Tilson,* the defendant was arrested for trespassing on property owned by the Wichita Family Planning Clinic, Inc., in violation of the Wichita City Code. Following her conviction in the Wichita Municipal Court, Tilson appealed to the district court. During a bench trial (presided over by the same judge who precluded the use of the necessity defense in the present case) the defendant admitted she had blocked the entrance to the clinic but justified her actions because " 'abortion takes the life of an unborn baby, and I wanted to prevent that, and I wanted to prevent the detrimental effect that happens to the woman, the father of the baby, the grandparents and brothers and sisters involved.' " 253 Kan. at 287, 855 P.2d 911.

At the conclusion of the trial, the district court acquitted Tilson of trespass based upon the necessity defense. The City reserved the question of whether or not the necessity defense was applicable to Tilson's act of criminal trespass. Our Supreme Court agreed with the City's position and sustained the appeal.

*3 The *Tilson* court explicitly declined to recognize the existence of the necessity defense in Kansas but held that in the context of a trespass upon the property of an abortion clinic the defense was inapplicable. 253 Kan. 285, Syl. 11 6, 855 P.2d 911. Our Supreme Court reasoned:

> "To allow the personal, ethical, moral, or religious beliefs of a person, no matter how sincere or well-intended, as a justification for criminal activity aimed at preventing a law-abiding citizen from exercising her legal and constitutional rights would not only lead to chaos but would be tantamount to sanctioning anarchy." 253 Kan. at 296, 855 P.2d 911.

Holick attempts to distinguish the present case from *Tilson,* however, by alleging he was trespassing at the clinic to prevent the preforming of *illegal* abortions. In particular, Holick claims these abortions were illegal because they were performed on minors, coerced women, and women with viable late-term pregnancies.

In considering Flolick's argument, the district court adopted the Tenth Circuit's formulation of the necessity defense, as set forth in United States v. Turner, 44 F.3d 900 (10th Cir.1995). In *Turner,* a "sidewalk counselor" scaled the fence surrounding the same clinic at issue in the present case—Women's Health Care Services—and "entered the clinic in order to pray and place her body in front of a woman who was attempting to enter the clinic." 44 F.3d at 901. Turner was arrested and subsequently convicted of obstructing a federal court order not to trespass. Following a successful appeal, Turner was retried and again convicted.

Turner's primary claim on appeal was that the district court erred in refusing to instruct the jury on the necessity defense. The Tenth Circuit set out the four elements of the defense as follows: (1) that the defendant was faced with a choice of evils and chose the lesser evil, (2) the defendant acted to prevent imminent harm, (3) the defendant reasonably anticipated a direct causal relationship between his conduct and the harm to be averted, and (4) the defendant had no legal alternatives to violating the law. 44 F.3d at 902.

Considering *Turner's* four factors in the present case, the district court first considered whether there was an imminent harm or evil which Holick sought to prevent. The district court noted "[a]s defendants recognize under Kansas law the harm must be something more than the performance of an abortion." We agree.

As our Supreme Court noted in *Tilson, "[a]* woman has an unfettered constitutional right to an abortion during the first trimester of pregnancy and a somewhat more restricted right to abortion thereafter." 253 Kan. 285, Syl. 11 4, 855 P.2d 911. K.S.A. 65-6701 *et seq* codifies this constitutional right and sets forth a complex array of requirements which must be complied with by physicians, abortion providers, counselors, women (including unemancipated minors) seeking an abortion, the parents or legal guardians of unemancipated minors seeking an abortion, the Department of Health and Environment, and Kansas courts.

*4 Holick alleges there was an imminent harm occurring, however, because illegal abortions were being committed. In particular, Holick advised the district court he intended to call Pastor Daniel .Thompson to testify.that he had seen underage women entering the clinic. This fact does not prove any illegality, however, because Kansas law permits minors under strictly circumscribed conditions to obtain abortions. See K.S.A. 65-6704 and K.S.A. 65-6705.

In the district court, Holick also proffered evidence that late-term partial birth abortions were being performed at the clinic. Holick argues on appeal, "Kansas law not only criminalizes partial birth abortions, but also prohibits the abortion of viable fetuses."

K.S.A. 65-6721, however, provides an exception that allows a partial birth abortion on a viable fetus when the abortion provider and another physician determines "(1) [t]he abortion is necessary to preserve the life of the pregnant woman; or (2) a continuation of the pregnancy will cause a substantial and irreversible impairment of a major physical or mental function of the pregnant woman." Holick failed to proffer evidence that any partial birth abortions were scheduled at the clinic on June 16, 2004, let alone that such procedures were planned without compliance with the requirements of K.S.A. 65-6721(1) and (2). As a result, Holick failed to establish any imminent harm by an illegal act.

In the district court, Holick also sought to establish imminent harm by playing a videotape of a crying woman and her boyfriend walking into the clinic on June 16, 2004. This tape was not included in the record on appeal for this court to review. On appeal Holick alleges this incident and others show "that women were being coerced into the abortion procedure by 'boyfriends' or other domineering males who insisted that the pregnancies be terminated, probably so that the putative father could avoid the responsibility of child support."

As the district judge concluded, however,

> "[t]he only problem with that proffer of the video tape is that the video tape, first of all, is rather vague as to whether or not she was just having second thoughts or if there's other interpretations of her actions on that occasion. The bottom line is she did not get the abortion as I understand. That, apparently, when it came to be given the consent inside the clinic, she chose not to sign it."

K.S.A. 65-6709 mandates that "[ri]o abortion shall be performed or induced without the voluntary and informed consent of the woman upon whom the abortion is to be performed or induced." To insure compliance, the statute requires that extensive written information must be provided to the woman prior to an abortion, that the physician who is to perform the abortion have a private meeting with the woman "to ensure that she has an adequate opportunity to ask questions of and obtain information from the physician concerning the abortion," and that the woman must certify in writing the information was provided and that she, in fact, met with the physician. K.S.A. 65-6709(c) and

*5 Holick did not proffer evidence that these statutory requirements to insure a woman's knowing and voluntary decision to have an abortion were not met in the case of the woman depicted on the videotape. The district court properly concluded "[o]utside observers would have to speculate as to the manner in which the informed consent is given. Proof of an imminent harm by an illegal act cannot be shown."

Finally, after a thorough review of Holick's pleadings, proffers, evidence and argument on the motion to reconsider it is apparent that Holick's primary motivation in trespassing upon the clinic's property was to prevent *all* abortions not just illegal ones. In his motion for reconsideration, Holick wrote:

> "The key issue is what is the unborn? If the unborn is not a human being then clearly trespassing on the abortion clinic parking lot is the greater evil. But if the unborn is a human being, then without a doubt, the greater evil in this case is the taking of an innocent life.

"The [defendants] are united in our belief that it is morally wrong to intentionally take the life of an innocent human being and we believe that the [*sic]* this court must by definition hold to this same belief. I will be proving that abortion intentionally takes the life of an innocent human. Leaving us the only conclusion that abortion is wrong and is the greater evil."

Only recently, however, our Supreme Court reiterated that there exists a federal constitutional right "long recognized and protected by the United States Supreme Court" which "is the fundamental right of a pregnant woman to obtain a lawful abortion without government imposition of an undue burden on that right." *Alpha Med. Clinic v. Anderson,* 280 Kan. 903, 920, 128 P.3d 364 (2006).

In assessing the applicability of the necessity defense in the present case, the district court thoughtfully considered Holick's fervent beliefs that motivated his criminal conduct and those federal and state laws that provide for legalized abortion: "I sympathize with the position of the defendants that feel very morally committed to this position. Nevertheless, it's the Court's obligation to uphold the law. And until that law is changed there isn't any option for the Court but to carry out the mandate of the higher court." In this regard, the district court faithfully adhered to *Ti/son's* guiding principle: "When the objective sought is to prevent by criminal activity a lawful, constitutional right, the defense of necessity is inapplicable." 253 Kan. at 296, 855 P.2d 911.

In summary, by failing to proffer evidence of illegal abortions occurring at the facility on the day of his trespass, Holick failed to provide a sufficient factual basis to support the applicability of the first two elements of the necessity defense as formulated in *Turner.* Moreover, while Holick attempts to distinguish the present case from *Tilson* by arguing that his conduct was necessary to prevent the imminent harm of illegal abortions, a fair reading of the record reveals that Holick's primary purpose in trespassing at the clinic was to prevent all abortions, including those women have a right to obtain under our United States Constitution and Kansas law. For all these reasons *Tilson* mandates that the necessity defense is unavailing.

*6 While our finding resolves the necessity defense issue, we also review the other two *Turner* factors because they were addressed by the district court and the parties.

The third element of the *Turner* formulation is whether the defendant reasonably anticipated a direct causal relationship between his conduct and the harm to be averted. 44 F.3d at 902.

In the district court, Holick argued "[w]e contend that [the trespass] did exactly what we had expected and had the police done their job and ascertained our reasons for being there instead of only listening to the security guard, then further action could have been taken to protect the unborn children being killed inside."

In rejecting Holick's argument, the district court observed:

"[I]t would be reasonable to anticipate that what's going to happen in a trespass scenario is that the defendants are going to be arrested. They are not going to actually be able physically to get into the clinic, get access to the patients, and stop an abortion from taking place. But rather what it amounts to is, basically a token protest."

Holick's claim in the district court, that had the police listened to his arguments they may have been persuaded to allow the defendants to take further action to prevent abortions performed at the clinic, is speculation. Moreover, there was evidence, provided by Holick, that the police would not be amenable to assisting him in his efforts to prevent abortions at the clinic. In his motion for reconsideration Holick indicated: "In the past we have reported illegal activity to the police where they have not responded with an investigation.... Police have disregarded our requests." Holick's own words undermine his argument that there was a direct causal relationship between his trespass and the harm to be averted.

On appeal, Holick modifies his argument:

"Defendant has personal knowledge from past experience that his actions *do* dissuade women from aborting their children. If permitted Defendant would have testify [*sic*] that his acts, combined with 'sidewalk counseling' of women entering an abortion clinic, have led to women changing their mind with regard to an abortion. Thus, Defendant was reasonable in believing that his actions would prevent at least one woman from taking her child's life."

Holick's argument on appeal is confusing. He seems to suggest there were other occasions wherein he trespassed at a clinic that performs abortions which prevented an abortion, yet Holick made no proffer of any prior trespass. Holick also undercuts his argument by suggesting that sidewalk counseling (which does not involve a trespass) is an important adjunct with trespassing in order to convince women not to have an abortion. As a result, Holick's argument only reflects an indirect and tangential relationship between trespassing and the prevention of illegal abortions. In summary, Holick's arguments relating to the third *Turner* element are both speculative and lacking a sufficient factual basis to establish the requisite direct causal relationship between his criminal conduct and the harm to be averted.

*7 We next consider the fourth element of the *Turner* formulation of the necessity defense—whether Holick had any legal alternatives to violating the law. 44 F.3d at 902. In the district court, Holick contended "we have exhausted all available, legal alternatives and those alternatives as a class has [*sic*] been futile over a long period."

In rejecting Holick's argument, the district court found:

"An abortion is a medical procedure that cannot be performed in an instant. The medical staff would have to take some time to prepare and complete the procedure. A person trespassing upon land to save a drowning child would not have the time to call for assistance. To prevent an illegal abortion from occurring, law enforcement could be called in time to stop."

On appeal, Holick expands his argument to include not just illegal abortions, but legal abortions:

"Defendant ... and others have taken every legal step conceivable to put an end to legalized abortion. The evidence will show that Defendant has appealed to legislative bodies and countless politicians, picketed abortion clinics, conducted sidewalk counseling, distributed pro-life information and campaigned for pro-life candidates—but abortion on demand remains legal."

Holick's argument and the testimony he presented at trial refutes his claim that there were no legal alternatives to violating the law. First, as noted earlier, the necessity defense is inapplicable to defend against criminal conduct perpetrated to prevent a constitutional or legal right of another. Second, Holick presented evidence at trial that the legal alternative of counseling could be effective in convincing women to forgo an abortion. In particular, Holick presented testimony from Donna Lippoldt, a "sidewalk counselor" outside the clinic who testified that "[t]housands of people have allowed us to help them over the 14 years or we wouldn't still be there."

In affirming the defendant's conviction in *Turner,* the Tenth Circuit solely based its determination that Turner was not entitled to a necessity defense instruction on this fourth factor—the defendant's failure to show there were no legal alternatives to violating the law. 44 F.3d at 902. The court observed:

"Ms. Turner could go door-to-door conveying her views, distribute literature personally, through the mails or via publication, or simply continue her otherwise lawful protests. Plainly, women can be, and in fact are educated on issues concerning abortion by legal means; violating the laws of the United States and ignoring orders of the federal courts are not the only way of doing so." 44 F.3d at 902.

We agree. Holick failed to prove that no legal alternatives existed to deter illegal abortions.

In *Tilson,* our Supreme Court stated: "Whether the necessity defense should be adopted or recognized in Kansas may best be left for another day." 253 Kan. at 291, 855 P.2d 911. Fourteen years later, that day has not yet dawned. We do, however, reaffirm *Ti/son's* holding that: "[Uri a criminal prosecution for trespass upon the property of an abortion clinic, the defense of justification by necessity is inapplicable." 253 Kan. 285, Syl. 11 6, 855 P.2d 911. Moreover, assuming arguendo the necessity defense was applicable given the particular circumstances of the present case, Holick failed to proffer a sufficient factual basis to justify this defense.

**8* We hold the district court did not err in sustaining the City's motion in limine to preclude Holick from presenting testimony, evidence, or argument that his criminal conduct was justified by the defense of necessity.

Quashing of Subpoenas

121, Three days prior to the original trial date, several defense subpoenas were served on a guard at the security desk of the Women's Health Care Services clinic. Attorneys for the individuals named in the subpoenas promptly filed a motion to quash the subpoenas. After considering memoranda and argument, the district judge ruled:

> "The subpoenas weren't served. They're not valid. There's no valid service on the subpoenas. And there's nothing to enforce.
>
> "But, even if there had been proper service, based on the motion in limine and based on the rulings I made on the motions for discovery ... I would still probably quash all—well, probably all of the testimony that I'm hearing is wanting to be elicited. So. There's nobody to bring to court, and so it's gonna be moot on that—in that respect."

On appeal, Holick claims the quashing of the subpoenas violated his constitutional rights.

Holick did not include copies of the subpoenas in the record on appeal. The burden is on the appellant to furnish a record which affirmatively shows that prejudicial error occurred in the district court. Without such a record, an appellate court presumes the action of the district court was proper. *State v. Holmes,* 278 Kan. 603, 612, 102 P.3d 406 (2004).

On appeal, Holick also fails to address the district court's ruling that the subpoenas were improperly served. By failing to challenge on appeal one of the alternative reasons cited by the district court for its ruling quashing the subpoenas, Holick has conceded the propriety of the district court's decision in that regard. See *Greenwood v. Blackjack Cattle Co.,* 204 Kan. 625, 627, 464 P.2d 281 (1970) (when the district court's decision is based on alternative grounds, appellant's failure to challenge all grounds on appeal "renders unnecessary" a decision on the issue that is raised); see also *Roy v. Young,* 278 Kan. 244, 248, 93 P.3d 712 (2004) (issue not briefed is deemed waived or abandoned). We find no error in the quashing of the subpoenas.

Refusal to Allow Holick to Reopen His Defense Case

[31 Holick called three witnesses during his case in chief. After the third witness testified, the district court asked Holick if there were any other witnesses he would like to call to the stand. Holick said, "No, sir, I have no other witnesses." The district court then proceeded to allow a codefendant to present his defense case. Holick did not contemporaneously advise the district court that he desired to testify on his own behalf or object to this procedure.

Later, Holick was called to testify on behalf of codefendant McGinnis. Holick's testimony, however, primarily focused on his own motive for trespassing at the clinic. According to Holick, his motive was to rescue the unborn from the evil of abortion. He testified his motive was based on religious beliefs founded on scripture and his years of experience working as a minister. Holick also noted the peaceful nature of his conduct in remaining upon the clinic property.

**9* During a series of objections interposed by the prosecutor during this testimony, Holick said, "Your Honor, it may be easier if I just call myself as a witness. Can we do that?" The district judge

replied, "You've already rested. So you're gonna have to rely on [the codefendant]." Holick did not object or seek to reopen his defense case.

On appeal, Holick claims his constitutional right to testify on his own behalf was violated by the district court's refusal to allow him to testify after he rested his defense case.

We first note the general rule that an appellant must raise an issue before the district court before it can be raised on appeal. *State v. Rotas,* 280 Kan. 931, Syl. 11 1, 127 P.3d 247 (2006). Moreover, with certain exceptions, even when constitutional grounds are asserted, issues raised for the first time on appeal are not properly before an appellate court for review. *State v. Williams,* 275 Kan. 284, 288, 64 P.3d 353 (2003). Although it appears Holick's question to the district court was more of an attempt to facilitate his testimony, rather than an invocation of his constitutional right to testify, we will consider the merits.

We begin our analysis by citing well-settled precedent: It is a matter of discretion whether the trial court permits either or both of the parties to reopen a case for introduction of additional evidence after having rested. *McDaniel v. Jones,* 235 Kan. 93, 114, 679 P.2d 682 (1984). An abuse of discretion exists only when no reasonable person would take the view adopted by the trial court. *State v. Moses,* 280 Kan. 939, 945, 127 P.3d 330 (2006).

The issue Holick presents, however, is not a typical situation wherein a defendant seeks to reopen his case. What distinguishes Holick's claim is that he alleges constitutional error because he sought to reopen his defense case in order to testify on his own behalf.

During presentation of his defense case, Holick never intimated any desire to testify. After Holick advised the district court that he had no further witnesses, he did not object when the court proceeded to allow another defendant to present his case. In short, the record does not indicate that Holick desired to testify as part of his defense case. In this regard it must be remembered there is no general rule which mandates that a trial court advise a defendant of his right to testify. See *State v. McKinney,* 221 Kan. 691, 694, 561 P.2d 432 (1977). Moreover, a trial court has no duty to ask a defendant whether the defendant wishes to waive his right to testify. *Taylor v. State,* 252 Kan. 98, 106, 843 P.2d 682 (1992).

For whatever reason, Holick chose to present his testimony and augment the defense case by submitting himself for questioning by McGinnis, rather than by testifying in narrative form in his own case-in-chief. We have reviewed the record of Holick's testimony and are convinced that, under questioning by McGinnis, Holick was afforded his constitutional right to testify, especially regarding his background, the circumstances of the trespass incident, and his motive based upon religious beliefs which caused him to trespass at the clinic. Moreover, the only limitation on Holick's testimony occurred when the questions asked or testimony elicited violated the court's motion in limine.

*10 We find no abuse of discretion in the district court's determination to not allow Holick to reopen his defense case.

Response to Jury's Question

[4] During deliberations, the jury requested that each defendant's testimony be read back wherein they testified about whether they were personally asked to leave the clinic property. Without objection, the district court ordered a read back of this requested testimony. Additionally, the jury sent the district court a note with the following question: "Does the 'law' say you have to be 'personally' asked to leave the property or is a blanket statement to leave be [*sic*] considered a `personal' statement for each one to leave?"

In response to the district court's inquiry of the defendants, Holick requested that the court respond by reading the criminal trespass ordinance to the jury. The district court denied Holick's request and sent the following response to the jury: "A blanket statement which is communicated to someone is legally sufficient if the person heard it." Subsequent to this response and before any read back of the requested testimony, the jury returned its verdicts.

Holick argues "[a]ccording to City Code communication must be 'personally' communicated. The courts [*sic]* instructions were incorrect. The jury was instructed by the court that 'a blanket statement is sufficient,' and repeated court statements confirm that blanket statements were given." As a result, Holick claims, "the law has been misapplied." Holick provides no case law precedent in support of his contention.

Where a district court's response to a jury's question during deliberation is at issue, this court's standard of review is abuse of discretion. *State v. Moore*, 274 Kan. 639, 643, 55 P.3d 903 (2002).

Wichita City Ordinance 5.66.050 states, in relevant part:

"Criminal trespass is entering or remaining upon or in any land ... by a person who knows he/she is not authorized or privileged to do so, and: person enters or remains therein in defiance of an order not to enter or to leave such premises on property personally communicated to such person by the owner thereof or other authorized person."

"The fundamental rule of statutory construction is to ascertain the legislature's intent.... A statute should not be read to add language that is not found in it." *State v. Bryan*, 281 Kan. 157, 159, 130 P.3d 85 (2006). Holick essentially asks this court to add a requirement that, where a group of people are trespassing, each person must be personally and *individually* told to leave. The language of the statute, however, does not support such a construction. The. Wichita ordinance requires personal communication, not individualized, one-on-one communication.

In order to convict Holick of violating the ordinance, it was necessary for the jury to find that he was personally advised by an authorized person that he should leave the property. Whether Holick was alone or part of a group at the time that message was personally communicated is irrelevant. The district court's response to the jury's inquiry fairly and accurately reflected the language of the ordinance. We find no abuse of discretion.

Special Probation Condition

***11** 151 R Finally, Holick protests the district court's special probation condition that he not be within 100 yards of the perimeter of Women's Health Care Services. In particular, Holick argues that this special probation condition is not provided for by the Wichita ordinance and also violates his First Amendment rights.

"'Probation from serving a sentence is an act of grace by the sentencing judge and is granted as a privilege, not as a matter of right. The judge, when granting probation, has broad powers to impose conditions designed to serve the accused and the community.' "State *v. Spencer*, 31 Kan.App.2d 681, 683, 70 P.3d 1226, *rev. denied* 276 Kan. 973 (2003). Imposition of probation conditions is within the sound discretion of the district court. *State v. Calhoun*, 28 Kan.App.2d 340, 342, 19 P.3d 179 *rev, denied* 269 Kan. 935 (2000).

Wichita City Ordinance 99.02.164(2)(c) provides a list of permissible probation conditions that may be imposed for violation of city ordinances. None of these conditions include the special probation condition at issue. The ordinance, however, also empowers the sentencing court to "impose any conditions of probation or suspension of sentence that the court deems proper." This suggests the sentencing court has discretion to impose nonspecified conditions when appropriate to protect the community and rehabilitate the offender. The district court's order that Holick avoid the vicinity wherein his trespass occurred is just such an order.

161 _Next, Holick asserts this special probation condition violates his First Amendment rights to freedom of speech, assembly, and religion as guaranteed by the United States Constitution.

We have previously held there are limitations on probation conditions that impinge on constitutional rights. *Calhoun*, 28 Kan.App.2d at 342, 19 P.3d 179. This is consistent with the Tenth Circuit's approach in *Turner:*

> "Incidental restrictions of First Amendment rights to freedom of speech and association are permissible if reasonably necessary to accomplish the essential needs of the state and public order. *Birzon v. King,* 469 F.2d 1241, 1243 (2d Cir.1972). Courts have consistently upheld imposition of conditions of probation that restrict a defendant's freedom of speech and association when those conditions bear a reasonable relationship to the goals of probation. *Cf, Porth v. Templar,* 453 F.2d 330, 334 (10th Cir.1971)." *United States v. Turner,* 44 F.3d 900, 903 (10th Cir.1995).

See *Gibbons v. State,* 775 S.W.2d 790, 791 (1989) (protester convicted of trespass on church property ordered not go onto or within 200 yards of the property); *United States v. Lowe,* 654 F.2d 562, 563 (9th Cir.1981) (protester convicted of trespass on Trident missile base ordered not to come within 250 feet of the base); *United States v. Bird,* 124 F.3d 667, 669 (5th Cir.1997) (defendant convicted of violating the Freedom of Access to Clinic Entrances Act, 18 U.S.C.A. § 248(a)(1), ordered to stay at least 1,000 feet from abortion clinics).

***12** *Turner* is especially instructive in this regard. As noted earlier, *Turner* involved an anti-abortion trespasser at the same Wichita clinic where Holick engaged in trespassing. The federal district court in *Turner* imposed a special probation condition that Turner not " 'harass, intimidate or picket in front of any gynecological or abortion family planning services center.' " 44 F.3d at 903. In upholding this special probation condition the Tenth Circuit concluded:

> "There is no question here but that the conditions imposed on Ms. Turner bear a reasonable relationship to the goal of her probation. Given her deeply held convictions regarding abortion, it is not fantastic to speculate that if she were permitted to protest at abortion clinics, she might not be able to restrict her activities within lawful parameters. In order to help insure Ms. Turner does not repeat her criminal conduct, the district court did not abuse its discretion by imposing this condition as a term of her probation." 44 F.3d at 903.

In the present case, the district court's special probation condition restricted Holick from the vicinity of this particular clinic for a 2-year period. This condition facilitated the protection of the clinic and its employees and patients from further trespass by Holick. Moreover, imposition of a 100-yard buffer zone seems particularly appropriate given the State's proffer that the present offense was Holick's fourth conviction for illegal activities occurring at Wichita medical clinics. Given Holick's history, the buffer zone seems reasonable because he had demonstrated an inability to refrain from unlawful conduct when engaged in otherwise lawful protest activities. In short, the special probation condition was reasonably related to the goal of insuring the safety of the public and rehabilitating the offender.

Finally, we view any restrictions on Holick's First Amendment rights with heightened scrutiny. Holick's crime was a violation of property rights. Apart from his trespass, Holick has constitutionally protected rights of free speech and assembly, and religious expression which entitle him to articulate his long-standing and strongly held anti-abortion views. Given the fundamental liberties at issue, we scrutinize whether the special probation condition is reasonably related to the purposes of probation, yet not unduly restrictive upon Holick's constitutional rights. See *Turner,* 44 F.3d at 903 (1995); *State v. Friberg,* 435 N.W.2d 509, 515-17 (Minn.1989).

In the present case, the district court's special probation condition was limited in scope. The buffer zone simply provided that Holick may not revisit the scene of the offense in order for Holick to resist the temptation to engage in further incidents of trespass. The district court did not limit in any way Holick's continued participation in anti-abortion or religious activities. Under the court's order, Holick is free to express his views, associate with individuals who share his commitment to the anti-abortion movement (or any other religious or political cause), and also protest at other medical clinics or locations Holick chooses in an attempt to persuade individuals to adopt his beliefs.

**13* We hold the special probation condition was permitted under the Wichita ordinance, was reasonably related to the goals of probation, and did not unreasonably limit Holick's First Amendment rights of freedom of speech, assembly, or religion.

Stare Decisis

In his brief, Holick extensively discusses what he believes are the limitations of the doctrine of stare decisis, especially as it relates to the United States Supreme Court decision in *Roe v. Wade,* 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973).

At the outset, Holick did not specifically raise this issue before the district court. As a general rule, an appellant must raise an issue in the district court before it may be raised on appeal. *State v. Rojas,* 280 Kan. 931, Syl. ¶ 1, 127 P.3d 247 (2006). Moreover, our Supreme Court has consistently upheld *Roe's* holding. *Alpha Med. Clinic v. Anderson,* 280 Kan. 903, 923, 128 P.3d 364 (2006). In this regard, the Court of Appeals is duty bound to follow Kansas Supreme Court precedent, absent some indication the court is departing from its previous position. *State v. Beck,* 32 Kan.App.2d 784, 788, 88 P.3d 1233, *rev. denied* 278 Kan. 847 (2004). We know of no such indication.

Holick's claim is not properly before us and is also without merit.

Affirmed.

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Briefs and Other Related Documents (Back to top)

- 2006 WL 2783850 (Appellate Brief) Brief and Appendix of Plaintiff-Appellant, Mark Holick (Aug. 25, 2006) Original Image of this Document with Appendix (PDF)
- 2006 WL 1870768 (Appellate Brief) Brief of Appellee (Apr. 6, 2006)
- 2006 WL 890985 (Appellate Brief) Brief and Appendix of Plaintiff-Appellant, Mark Holick (Feb. 27, 2006)
- 95340 (Docket) (Oct. 5, 2005)

Judges and Attorneys (Back to top)

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CERTIFICATE OF SERVICE

This is to certify that a copy of Appellant's brief was sent via email to:

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