

No. 25-128838-A

**IN THE COURT OF APPEALS
OF THE STATE OF KANSAS**

STATE OF KANSAS
Plaintiff/Appellee

v.

BERNICE FARMER
Defendant/Appellant

BRIEF OF APPELLEE

Appeal from the District Court of Riley County, Kansas
The Honorable Kendra S. Lewison, Judge
District Court Case No. RL-2022-CR-000441

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STATEMENT OF THE ISSUE

- I. **Should this Court find the prosecutor's closing arguments were within the wide latitude afforded by law because they were based on the evidence and made in response to arguments made by defense counsel?**

STATEMENT OF THE FACTS

Defendant Bernice Farmer has filed a timely appeal of her jury trial convictions of attempted second-degree murder and aggravated battery, based on her shooting her husband Lee in the head after he made her angry and jealous at a bar. (R. 1, 165-66, 179; R. 7, 674.) A summary of relevant trial evidence follows.

On October 21, 2022, defendant and Lee were at the American Legion having a drink with their friends, Tony and Janilee Barnes. (R. 7, 387-88, 418.) Before they left, Lee was the recipient of a hug from an acquaintance, Cathy Nuss, who was leaving the bar with her husband for the night. (R. 7, 358.) Defendant never said anything to her friend, Janilee, about the hug and never acted as if there was any problem with Cathy or Cathy's relationship with Lee. (R. 7, 432.) Defendant and Lee subsequently went home in silence during the car ride, but once at home they started to argue about Cathy. (R. 7, 199, 358; R. 16, State's Exhibit 75, 00:47-1:21, 14:06, 22:31.) Defendant told Lee that she could not take it anymore, retrieved a .38 revolver from Lee's nightstand in the bedroom, and shot him in the left side of his head while he was sitting in his recliner in the living room. (R. 7, 219, 242-44, 325, 506, 528; R. 16, State's Exhibit 75, 1:41, 2:35, 4:54.)

Defendant called Janilee, but Tony answered her phone; defendant said she had shot Lee in the head and asked what she should do. (R. 7, 395, 421-22.) Tony told her to call the police, so defendant called 911 and reported that she needed an ambulance because she had just shot her husband. (R. 7, 172-74; R. 395; R. 16, State's Exhibit 1A, 00:06.)

Riley County Police Officer Wesley Ulmer was the first on the scene. (R. 7, 176.) He found Lee, somewhat conscious, sitting in a chair in the living room and reaching up toward the gunshot wound to his head. (R. 7, 178, 180-82; R. 16, State's Exhibit 69, 3:30.) The detective attempted to communicate with Lee, but Lee was incapable of effectively doing so. (R. 7, 179.) Other officers arrived, including Officer Holly Ugo, who stayed with defendant while medical personnel worked on Lee. (R. 7, 188-89.) Defendant told Officer Ugo that she and Lee were arguing because she "was tired of his shit" when she accidentally shot him and did not know the gun was loaded; she explained that "she just pointed the gun and then it went off" and that she did not pull the trigger. (R. 7, 190-95, 209; R. 16, State's Exhibit 74, 3:07, 5:25, 8:45.) Defendant never told Officer Ugo that she had intended to kill herself in front of Lee. (R. 7, 199.) Eventually, Lee was life-flighted to Stormont Vail in Topeka. (R. 7, 182, 327-28.)

Meanwhile, Janilee and Tony arrived at the scene, and defendant complained to Janilee that Cathy was a bitch for flirting with Lee; defendant never mentioned that she was trying to kill herself in front of Lee. (R. 7, 424-25; R. 16: State's Exhibit

74, 21:42.) Defendant indicated to Janilee that she had shot Lee in the top of the head. (R. 7, 426.)

During an interview with Detective Derek McKee at the police station, defendant stated that Lee had been flirting with a girl at the American Legion. (R. 16, State's Exhibit 75, 00:47.) Once they were home, defendant asked Lee why he would do that right in front of her. (R. 16, State's Exhibit 75, 1:21.) She said, "I can't take no more. And I picked up the gun and I didn't know it had shells in it." (R. 7, 492-93; R. 16, State's Exhibit 75, 1:41.) She stated she wanted to scare Lee. (R. 16, State's Exhibit 75, 2:35.) She stated that she pulled the hammer back but denied pulling the trigger, and said the gun "just went off." (R. 7, 493; R. 16, State's Exhibit 75, 4:54.) Defendant stated there was not a physical fight between them. (R. 16, State's Exhibit 75, 09:22.) Rather, it was a verbal argument, and she did not know how gun went off. (R. 16, State's Exhibit 75, 14:06, 22:31.) At no point during the initial interview did defendant tell Det. McKee that she was intending to kill herself in front of Lee and never said anything about firing the gun from her hip. (R. 7, 507.)

While in jail about 30 minutes after her first interview, defendant again spoke with Detective McKee and changed her story about how the gun fired, while still indicating she did not pull the trigger to shoot Lee. (R. 7, 510, 525, 528.) She indicated she heard Lee ask the woman to meet up at Walmart. (R. 7, 507-08; R. 16, State's Exhibit 77, 2:39.) When she confronted Lee about his flirting, Lee just gave a "little silly grin." (R. 16, State's Exhibit 77, 1:18.) She again stated she told Lee she could not take it anymore and planned to shoot herself in front of Lee. (R. 16, State's Exhibit

77, 1:47.) Defendant again stated she did not pull the trigger, but it went off as she was bringing the gun up by her head. (R. 7, 510; R. 16, State's Exhibit 77, 3:13.) Her first intent was to scare Lee when she got the gun but then planned to shoot herself right in front of Lee. (R. 16, State's Exhibit 77, 5:06.) It made no sense to Det. McKee that defendant was planning to commit suicide but was also maintaining that she did not know the gun was loaded; defendant said she simply did not check the gun for ammo. (R. 7, 510-11, 530-31.) Defendant told the detective that she did not mention the suicide aspect earlier, because she did not want him to think she was crazy. (R. 7, 526; R. 16, State's Exhibit 77, 9:28.)

The State initially charged defendant with attempted second-degree intentional murder, a severity-level-three person felony, and aggravated battery by knowingly causing great bodily harm, a severity-level-four person felony. (R. 1, 1.)

A couple of days after defendant was released from jail, defendant told Janilee that the gun accidentally fired while she was trying to take off her black jacket; however, Janilee observed that defendant had not worn her black jacket that night. (R. 7, 438-40.) This was information that defendant had not told Janilee previously. (R. 7, 440.) Defendant never discussed suicide with her. (R. 7, 441.)

After defendant was released from jail, perhaps three or four days after the shooting, defendant told Tony Farmer that Lee and Cathy were messing around and that "[w]hen they got home she walked back to the bedroom, got the gun, brought it back, got in front of Lee, told Lee that she was going to commit suicide," and that "[a]s she was bringing the gun up, it went off." (R. 7, 397-98.)

Before trial, the State increased the attempted second-degree murder to attempted first-degree premeditated murder, a severity-level-one person felony. (R. 1, 22.) The aggravated battery charge remained the same. (R. 1, 22.)

At trial, the State's theory was that defendant had premeditatedly intended to kill Lee, and defendant's theory was that it was an accidental shooting. (R. 7, 162-66.) In addition to the above-stated evidence, the bullet that struck Lee in the head was recovered in the windowsill behind the recliner Lee was sitting in. (R. 7, 244, 246, 248-50.) The bullet went through the curtains at an upward angle, striking the window. (R. 7, 270; R. 16, State's Exhibit 34-44.) It struck the curtain eight inches above the height of the chair. (R. 7, 271-72.) The window was broken, with the broken part of the window extending from eight inches above the chair to 12 inches above the chair. (R. 7, 272; R. 16, State's Exhibit 43-44.) Scalp fragments and human tissue were located on the floor behind the chair, and there was blood spatter on the ceiling above the chair. (R. 7, 226-31, 250-51, 262, 297.) As of the time of trial, Lee was completely paralyzed on the right side of his body, and people could "hardly understand him" when he spoke, which frustrated Lee because he cannot speak properly and engage in a conversation. (R. 7, 397, 427, 435-36, 485.)

The State presented evidence of gunshot residue testing on swabs taken from defendant's hands and face. (R. 7, 253-55, 278-79.) The testing showed that defendant had gunshot residue on her right hand, and no gunshot residue on her left hand or face. (R. 7, 543-44, 549; R. 15, 1.) Additionally, the State presented evidence from a KBI firearms expert that the gun used to shoot Lee had at least a two-pound trigger

pull and was equipped with a hammer block, which prevents the gun from firing unless there is a trigger pull, regardless of whether the hammer is partially or fully pulled back or has not been pulled back at all. (R 7, 566-71, 577, 579.) If the hammer has not been pulled back, it takes more pounds of pull to fire a shot. (R. 7, 571-72, 580-81.)

The State also admitted evidence that defendant had experience with guns. (R. 7, 443-45.) Atlee Cullison, Lee's brother-in-law, had defendant and Lee out to his house in New Mexico to shoot at Atlee's gun range. (R. 7, 443-45.) The State admitted Exhibit 73, which was a target showing a close cluster of shots that were within a five-inch circle made by defendant with both a .38 caliber and a .45 caliber handgun. (R. 450-51, 455-57; R. 16: State's Exhibit 73.) According to Atlee, it showed a decent grouping of shots for somebody who was shooting from 15 to 20 feet away and who had not done a lot of shooting. (R. 7, 459.) Atlee also testified that in his experience the .38 revolver could not fire a bullet if the hammer was only partially pulled back; but he acknowledged it was not impossible. (R. 7, 461-62.) Atlee also stated that if the gun revolver was equipped with a hammer block that a partial pull could not cause a bullet to fire. (R. 7, 472.)

Defense counsel argued the shooting range evidence showed that the shooting was accidental, because it was unlikely she would have missed her target when Lee was only five feet from her. (R. 7, 637.) Counsel argued, "If she wanted Lee dead, boom. He's dead," and that if defendant wanted to kill Lee, she could have fired five times, but only fired once, striking the side of his head. (R. 7, 637.) Counsel also noted

that defendant then called 911 to get help. (R. 7, 637.) Additionally, counsel argued the science supported defendant's argument that this was an accidental shooting because the bullet struck Lee and struck the curtains eight inches above the chair, suggesting an upward trajectory. (R. 7, 638.) Counsel argued this was consistent with defendant's statement that the gun accidentally went off as she was raising it. (R. 7, 639.) Further, counsel argued the absence of gunshot residue on defendant's face suggests she was raising the gun when it went off, and that this was reckless conduct, at best. (R. 7, 640, 644.)

The jury ultimately found defendant not guilty of attempted first-degree premeditated murder, but guilty of the lesser included offense of attempted second-degree intentional murder and aggravated battery by knowingly causing great bodily harm as charged. (R. 1, 165-66; R. 7, 674.) The district court imposed a 61-month prison sentence for the attempted second-degree murder, a concurrent 43-month sentence for aggravated battery, and 36 months of postrelease supervision. (R. 1, 182, 186-87; R. 3, 84.)

Additional facts to support the sole issue on appeal will be set forth below.

ARGUMENTS AND AUTHORITIES

- I. This Court should find the prosecutor’s closing arguments were within the wide latitude afforded by law because they were based on the evidence and made in response to arguments made by defense counsel.**

Standard of Review

To evaluate a claim of prosecutorial error, appellate courts use a two-step process: First, the court determines whether any error occurred and, if so, determines whether there was prejudice. *State v. Sherman*, 305 Kan. 88, 109, 378 P.3d 1060 (2016). In determining whether error occurred, the court “must decide whether the prosecutorial acts complained of fall outside the wide latitude afforded prosecutors to conduct the State’s case and attempt to obtain a conviction in a manner that does not offend the defendant’s constitutional right to a fair trial.” *Id.* at 109. The wide latitude the State enjoys in arguing its case extends to opening and closing remarks alike, and in determining whether a particular comment exceeds proper boundaries, a reviewing court considers it in the context in which it was made, rather than analyzing it in isolation. *State v. Timley*, 311 Kan. 944, 949-50, 469 P.3d 54 (2020).

If error is found, the court moves to the second step and determines whether the error prejudiced defendant’s due process rights to a fair trial. Evidence of prejudice is evaluated under the constitutional harmless error inquiry established in *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). *Sherman*, 305 Kan. at 109. “In other words, prosecutorial error is harmless if the State can demonstrate ‘beyond a reasonable doubt that the error complained of will not or did not affect the outcome of the trial in light of the entire record, i.e., where there is no

reasonable possibility that the error contributed to the verdict.” 305 Kan. at 109 (quoting *State v. Ward*, 292 Kan. 541, Syl. ¶ 6, 256 P.3d 801 (2011)).

Arguments

Defendant contends the prosecutor improperly argued during closing arguments that defense counsel was trying to distract the jury with theatrics during closing arguments. (Appellant’s brief, 5-10.) She points out three instances where the prosecutor made such arguments and asserts they “had the effect of undermining [her] ability to get the jury to fully consider her defense at trial.” (Appellant’s brief, 12.) Defendant is not entitled to relief because she has not established the prosecutor’s arguments were outside the permitted wide latitude; if this Court disagrees, then it should find any error to be harmless.

Additional Facts

During the State’s initial closing arguments, the prosecutor spent the bulk of his argument talking about the inconsistencies in defendant’s stories to various people involved in the case at different times and how those inconsistencies were an indication that defendant was not credible about how the shooting occurred. (R. 7, 624-32.)

During closing arguments, defense counsel sought to define reasonable doubt of intent by making references to colors of pieces of paper, and the prosecutor objected to counsel misstating the law. (R. 7, 633-34.) The district court sustained the objection, but counsel stated without objection, “As we look at this we can all agree that this color of – that this piece of paper is not blue and it is in fact green, but it

says blue on it.” (R. 7, 634.) Counsel later argued that if defendant wanted to kill her husband, she could have easily done so and yelled out, “Boom. He’s dead,” five times:

This is a five-shot revolver. At 20 feet, she’s lethal. Hard to miss at five feet, plus two and a half feet that she gets closer to Lee as she points the gun at his head. If she wanted Lee dead, boom. He’s dead. Boom. He’s dead. Boom. He’s dead. Boom. He’s dead. Boom. He’s dead. Five times she could have shot him, if she wanted him dead. One shot. One shot. Where did the shot come from?

(R. 7, 637.) Counsel also argued the bullet had an upward trajectory, which supported defendant’s claim that the gun accidentally discharged. (R. 7, 639.)

On rebuttal, the prosecutor continued to ask the jury to evaluate the evidence in the case while also asking the jury not to be swayed by defense counsel’s arguments that were supported by inconsistent versions of the evidence. (R. 7, 645-50.) The prosecutor responded to counsel’s (1) attempt to use colors to define reasonable doubt, (2) “[s]hout[ing] at the top . . . of his lungs” about the sound of gunshots by characterizing the arguments as “distractions,” (3) argument that there was an accidental discharge of the gun, with the prosecutor stating it was “just an argument that was made up to fit the narrative what they’re trying to say it is,” as defendant had been doing since she called 911:

Now, there was some talk about aim and how close she was. Well, she might have been a good shot in a controlled environment 10 years ago while she’s got a great range master telling her how to shoot a gun. Well, could her aim be a little off, right? When she’s filled with anger and jealousy about what or didn’t or did not occur between Cathy and Lee, right? And quite frankly, her aim wasn’t that far off. Where did she shoot Lee, right? She did more than just scare Lee. She shot him in the head.

Now, there is this idea that, well, she could have shot Lee multiple times after she shot him once, if that’s really what she wanted to do. Well,

ladies and gentlemen of the jury, now, it was used as a dramatic demonstrative. He yelled "boom" a whole bunch of times, right?

This isn't about yelling about as loud as you can to make a point. This isn't about colors and demonstrative aids. This is about the facts, right? And so when she shot Lee, right? Sure, there would have been that loud boom. Did that loud boom surprise a bunch of you, right? Get you to maybe focus on intention?

So she shoots him. She even describes that sound, right? The sound that the gun made. The sound that it made hitting Lee. And what did it do? It brought her back to reality, right? And again, there's a difference between regretting doing something terrible and not -- and saying that the act didn't happen, right?

...

Again, we want to make arguments about bullet trajectories and this, that, and the other. Well, if you go back and you listen to the science professionals in this case, and one of them being Crime Scene Investigator Wade Chermis, what did he tell you? Okay? When a projectile hits a hard object like a human skull, a lot of things can happen. That bullet can go all different ways. So to say that there's any scientific proof that because Mr. Farmer got hit on the top of his skull and shot in his head that that definitively proves what angle it is from, there's no evidence for that. It doesn't support that. No one said that. It's just an argument that was made up to fit the narrative what they're trying to say it is, right?

...

Again, if you think about this, all right? Colors are a distraction. Shouting at the top of her lungs, at the top of his lungs, that's a distraction. What you need to focus on is the evidence before you in this case. Bernice saying she pointed a gun at him. Made her mad. All of those things point to her intent and why she shot Lee in the head. And don't let her regret for her terrible act confuse you, because her regret is evidence that she did exactly what the State is saying she did. She feels terrible about it, because she did a terrible thing. A thing that altered Mr. Farmer's life for the rest of his life. It didn't kill him, but it might as well have, ladies and gentlemen of the jury.

And so when you go back, I want you to think about the themes that were presented at the beginning of this case, right? Defense counsel,

that theme has changed back and forth. Seemed to change back and forth whether it's hip firing. All these things change themes. Arguments changed. Bernice's statements changed. But what the State told you is a woman shot her husband in the head and the facts and the details about how and why it kept changing, just kept changing, and again, think about the timing, right? When the significant details like the gun, she actually knew the gun was loaded, right? That only occurred after she had been arrested.

...

The significant details just kept changing. So with that, ladies and gentlemen of the jury, I would ask that you find Bernice Farmer guilty of both counts.

(R. 7, 646-50.) It is notable that defense counsel did not object that the prosecutor had improperly characterized the arguments, *i.e.*, not objecting about loudly yelling "Boom." *Id.*

No Prosecutorial Error

These arguments by the prosecutor are consistent with Kansas law. Our courts have stated that a prosecutor has wide latitude to craft arguments and draw reasonable inferences from the evidence but cannot comment on facts outside of evidence. *State v. Hachmeister*, 311 Kan. 504, 514, 464 P.3d 947 (2020). Thus, a prosecutor's arguments must accurately reflect the trial evidence and the law and cannot be designed to inflame the passions or prejudices of the jury or to divert the jury from its duty to base its verdict on the evidence and the controlling law. *Id.* Moreover, a prosecutor may provide fair comment on defense trial tactics and the interpretation of evidence but may not inappropriately denigrate defense counsel or inject personal opinions regarding witness credibility. *State v. Butler*, 307 Kan. 831, 865, 868, 416 P.3d 116 (2018) (the prosecutor's use of the word "ridiculous" to

comment on the believability of defense's theory was not error, as it did not disparage defense counsel).

In *State v. Crum*, 286 Kan. 145, 149-50, 184 P.3d 222 (2008), the defense argued, in closing, that inconsistencies in the testimony of the State's witnesses were substantial and should draw into question the credibility of their statements. The State responded in rebuttal by arguing that defense counsel was berating and belittling the witnesses and by arguing they were doing things that were stupid or ridiculous. *Id.* at 149. While Crum argued on appeal that the State's rebuttal closing amounted to an impermissible attack on defense counsel, the Kansas Supreme Court found otherwise: "[T]he prosecutor's statements were fair comment on the defense tactic of suggesting to the jury that the inconsistencies in the testimony of the State's witnesses proved the testimony to be false." *Id.* at 150. The argument was thus not an impermissible attack on counsel, but a legitimate argument on Crum's theory of the case. *Id.*; see also *State v. Baker*, 249 Kan. 431, 448-49, 819 P.2d 1173 (1991) (a prosecutor may respond in kind to defense counsel's arguments attacking the State's evidence and arguments).

In *State v. Sinzogan*, 53 Kan. App. 2d 324, 330-31, 388 P.3d 176 (2017), a panel of this Court found no error in the prosecutor's rebuttal argument that commented on defense counsel's trial tactics and arguments, despite Sinzogan's argument that the prosecutor was diminishing the role of defense counsel by portraying defense attorneys as shady liars who try to hide the truth:

The State began its rebuttal by saying:

“In this instance I’m encouraging each of the members of the jury to just follow the instructions because in the instructions you will find that marriage is not mentioned. Boyfriend is not mentioned. What their relationship was, or wasn’t is not relevant to the crime charged and it’s only the elements that the crime charged you’re directed to put your attention on and deliberate on and the elements don’t say anything about marriage, divorce, when it happened, who paid for it. *I can appreciate Mr. Sinzogan would like to have you looking over here while this is happening over here, and I appreciate that that’s a common tactic of the defense but in this case, Ladies and Gentlemen of the Jury, the only acts that are in the instruction took place October 15th, 2013.* Please follow the instructions and focus October 15, 2013.” (Emphasis added.)

Id. The *Sinzogan* panel ultimately held that the prosecutor’s statements “were not outside the wide latitude granted prosecutors when discussing the evidence” and when considered in context, “the prosecutor was clearly commenting on defense counsel’s trial tactics and closing argument, not trying to diminish the role of defense attorneys.” *Id.* at 331. In so holding, the *Sinzogan* panel followed the rationale in *State v. Mosley*, 25 Kan. App 2d 519, 524, 965 P.2d 848 (1998), *overruled on other grounds by State v. Jasper*, 269 Kan. 649, 8 P.3d 708 (2000), where the prosecutor’s comments were not deemed to be error because the comments concerned trial tactics by defense counsel. *Sinzogan*, 53 Kan. App. 2d at 330 (“don’t let the defendant confuse you about who’s on trial. And that’s his whole game anyway, ladies and gentlemen, is to confuse you about the evidence, okay?”).

Meanwhile, the *Sinzogan* panel distinguished and declined to follow a decision in another case, *State v. Pham*, 27 Kan. App. 2d 996, 1005-06, 10 P.3d 780 (2000),

where error was found because the prosecutor argued to the jury that defense counsel, who testified as a witness, did not want and did not care about the truth, while also stating, “ ‘Boy, if you’re going to be looking at the credibility of the witnesses, you might also start with some of these lawyers.’ ” *Sinzogan*, 53 Kan. App. 2d at 331; see also *State v. Knox*, 301 Kan. 671, 684, 347 P.3d 656 (2015) (error for the prosecutor to state that it was defense counsel’s job to make the State’s witnesses look like liars because it was disparaging of counsel); *State v. Lockhart*, 24 Kan. App. 2d 488, 492, 947 P.2d 461, *rev. denied* 263 Kan. 889 (1997) (prosecutor improperly called both defendant and defense counsel liars).

Therefore, based on the cases cited, this Court should conclude that at no point in the rebuttal argument did the prosecutor improperly denigrate defense counsel or ask the jury to make a decision on anything but the evidence presented. Notably, defendant argues that the prosecution was trying to distract the jury with theatrics; however, the prosecutor never mentioned “theatrics” in his argument. Contrary to defendant’s arguments and case citations, the prosecutor never called defense counsel a liar, never questioned defense counsel’s credibility, and never argued that counsel was trying to mislead the jury. (Appellant’s brief, 7, citing *State v. Villanueva*, 274 Kan. 20, 34, 49 P.3d 481 (2002) (finding the State’s comments that a “second rape” took place when the witness was subject to cross-examination was improper); *State v. Lockhart*, 24 Kan. App. 2d at 492; *State v. Knox*, 301 Kan. at 683; *State v. Pabst*, 268 Kan. 501, 996 P.2d 321 (2000) (finding it improper for prosecutor to suggest defense counsel was misleading the jury).) Every argument was tied to a defense

tactic and the prosecutor's desire to bring the jury's attention back to evaluating the evidence rather than defense counsel's closing arguments that were not entirely based on credible evidence. The prosecutor had every right to respond to counsel's arguments and focus the jury on evaluating the evidence from the State's perspective.

Harmless Error

If this Court disagrees with the State's position and finds error in any of the three instances of alleged misconduct, it should find that any error is harmless. There is no legitimate basis from which this Court can conclude beyond a reasonable doubt that any of the alleged errors affected the outcome of the trial in light of the entire record. *State v. Ward*, 292 Kan. at 569. The alleged errors constituted but a very small part of the prosecutor's closing argument—perhaps one page out of thirteen pages—and were focused on the evidence. See *State v. Friday*, 297 Kan. 1023, 1035, 306 P.3d 265 (2013) (recognizing harmless error inquiry can take into account the scope of the comments in relation to the overall length of the closing argument—one page out of thirty pages); see also *Sinzogan*, 53 Kan. App. 2d at 331 (commenting about the limited references to defense tactics). This Court may also consider that there was no objection to the prosecutor's arguments. *State v. Smith*, 320 Kan. 62, 73, 563 P.3d 697 (2025) (although a contemporaneous objection to prosecutorial error is not required, the Court may consider the absence of an objection when evaluating whether there was prejudice).

Moreover, the evidence established that defendant intentionally shot her husband, instead of accidentally discharging the gun. Defendant's claim of an

accidental discharge occurring without pulling the trigger is belied by the State's expert witness who testified that the gun could not have been discharged without pulling the trigger. The reality is that defendant pulled the trigger while pointing it at her husband and hit her target, which was his head. There was no accidental discharge of the gun. It matters not that the jury convicted of attempted second-degree intentional murder instead of attempted first-degree premeditated murder. Both required proof of intentional murder.

This Court should also consider that the record shows the district court instructed the jury to follow its instructions and apply the instructions to the facts as found by the evidence (Instruction No. 1), that “[s]tatements, arguments, and remarks of counsel are intended to help you in understanding the evidence and applying the law, but they are not evidence” and that statements not supported by evidence should be disregarded (Instruction No. 2), that the jury had to determine the credibility of witnesses (Instruction No. 4), that the “verdicts must be founded entirely upon the evidence admitted and the law as given in these instructions” (Instruction No. 14), that the jury should give attention to the arguments of counsel as an aid to understanding the evidence presented, but anything said by the attorneys in the arguments should not take the place of the duty to have deliberations that are guided by the evidence and “by the law as given in these instructions” (Instruction No. 15). (R. 1, 147, 148, 150, 162, 163-64.) This Court must presume the jury followed those instructions. See *State v. Wilson*, 295 Kan. 605, 621, 289 P.3d 1082 (2012) (a

jury is presumed to have followed the instructions); see also *State v. Smith*, 320 Kan. at 73 (harmless error analysis may include consideration of the jury instructions).

In light of defendant's changing stories about how the shooting occurred, the evidence presented, and the jury instructions, this Court should conclude that there is no reasonable probability that the challenged statements contributed to the verdict. The jury would have reached the same verdict even without the statements.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court find no error, let alone reversible error, in the prosecutor's closing arguments, and affirm defendant's convictions and sentences and deny defendant's request for a new trial.

RESPECTFULLY SUBMITTED,

/s/ David Lowden

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CERTIFICATE OF SERVICE

This is to certify that a copy of Appellee's Brief was served by notice of electronic filing pursuant to Kansas Supreme Court Rule 1.11(b) and was also served by email to Peter Maharry, #19364, Assistant Kansas Appellate Defender, Kansas Appellate Defender Office, 700 Jackson, Suite 900, Topeka, KS 66603, (785) 296-5484, Fax: (785) 296-2869, adoservice@sbids.org, on this 12th day of February 2026.

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