

IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CRIMINAL DEPARTMENT

THE STATE OF KANSAS,
Plaintiff,

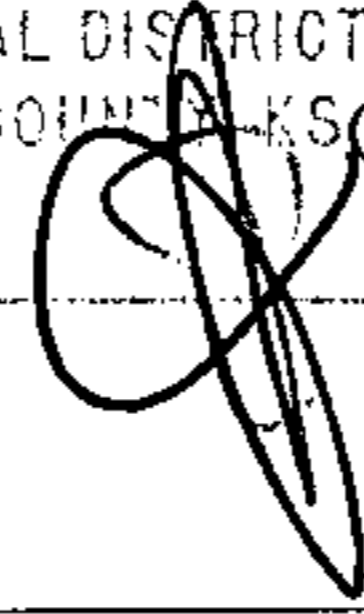
vs.

SCOTT ROEDER,
Defendant.

FILED
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CLERK OF DIST. COURT
18TH JUDICIAL DISTRICT
SEDGWICK COUNTY, KANSAS Case No. 09 CR 1462

BY _____



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

COMES NOW the State of Kansas, and for its Memorandum in support of its motion to exclude irrelevant evidence and State's opposition to a voluntary manslaughter or imperfect self-defense jury instruction states as follows:

OVERVIEW

The purpose of this motion is to exclude all references in jury selection, opening statements, direct and cross examinations, any evidence that is not relevant to the material facts in issue under K.S.A. 60-401 *et alia*.

The State submits any evidence suggesting the defendant was acting to defend unborn babies is irrelevant under K.S.A. 60-401, where the defendant is charged with first-degree premeditated murder, and there is substantial evidence of premeditation.

The Court previously, in consideration of State's Motion in Limine, placed heavy reliance on dicta in *State v. Ordway*, a case decided in 1997. Since then, there have been several cases that hold and explain where imperfect self-defense instructions are improper. Kansas law does not support the giving of such instruction in the instant case.

INTRODUCTION

The State urges this Court to exclude any irrelevant evidence of abortion, the defendant's views on abortion, and the character of Dr. Tiller. Previously, this Court indicated it would consider whether this type of evidence should be admissible pertaining to an imperfect self-

defense claim. Case law is clear, both in Kansas and nationwide, that the circumstances of this murder do not justify an imperfect self-defense instruction. For these reasons, the State asks this Court to exclude all such evidence.

LAW AND ANALYSIS

1. Imperfect self-defense relating to voluntary manslaughter is not appropriately considered simultaneously with premeditated first-degree murder. *State v. Carter*, 284 Kan. 312, 325-326, 160 P.3d 457, 467 (2007).

a. Kansas courts have consistently held that an imperfect self-defense instruction is improper in situations where there is substantial evidence of premeditation, such as choosing in advance the time and manner of the killing. Because evidence of premeditation shows reasoning, premeditation and imperfect self-defense are mutually exclusive theories.

The voluntary manslaughter instruction based on a theory of imperfect self-defense is inappropriate in a case of premeditation. The Kansas Supreme Court has held that premeditation shows rational planning; accordingly, a defendant cannot claim that he honestly believed, although unreasonably, that circumstances which justified killing existed at the time of the murder under K.S.A. § 21-3211. Because premeditation and unreasonable reliance on circumstances that justify deadly force are mutually exclusive concepts, an imperfect self-defense instruction is improper.

This theory is summarized in *State v. Hurt*, 278 Kan. 676, 683, 101 P.3d 1249 (2004).

The court stated:

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

In *State v. Carter*, 284 Kan. 312, 160 P.3d 457 (Kan. 2007), the Supreme Court affirmed its prior holdings on this issue and specifically declined to change the law in this area. After examining other Kansas cases on this issue, the Court held:

In *Lawrence*, 281 Kan. at 1092-93, 135 P.3d 1211 (Kan. 2006) the defendant argued that both perfect and imperfect self-defense should be considered simultaneously with first-degree premeditated murder because each concept involved an underlying thought process. In other words, imperfect self-defense would not require the absence of reason, only the absence of *sound* reason. We rejected that argument, holding that the honest but unreasonable belief of imperfect self-defense and the premeditation of first-degree murder are mutually exclusive concepts.

We decline Carter's invitation to change our position and reiterate that the imperfect self-defense relating to voluntary manslaughter is not appropriately considered simultaneously with premeditated first-degree murder. *State v. Carter*, 284 Kan. at 325-326, 160 P.3d at 467. [Emphasis added].

In *State v. Bell*, 280 Kan. 358, 121 P.3d 972, the Supreme Court considered this exact argument. Bell argued that both heat of passion and imperfect self-defense could reduce first-degree premeditated murder to the lesser offense of voluntary manslaughter; therefore, the jury should have been instructed to consider those offenses at the same time. This court rejected Bell's argument, holding:

[P]remeditated first-degree murder would not be reduced by an honest but unreasonable reliance on self-defense because, as with premeditation and heat of passion, the two are mutually exclusive concepts. If a murder were committed with premeditation, it would not be the result of an unreasonable but honest belief that circumstances justified deadly force. Premeditation requires reason; imperfect self-defense requires the absence of reason." *Id.* at 367.

2. The threshold requirement for an instruction of voluntary manslaughter based on imperfect self-defense is that the circumstance of use of imminent unlawful force by an aggressor must exist at the time of the killing as required by the statutory scheme for defense of a person as set out in K.S.A. § 21-3211, 21-3212, or 21-3213 and amendments thereto

The above threshold for a voluntary manslaughter instruction based on a theory of imperfect self-defense instruction cannot be met.

Upon a plain reading of the statute, voluntary manslaughter 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...

a. Imperfect self-defense instruction is improper in situations where the defendant is the aggressor.

Kansas cases have held that a defendant is not entitled to an imperfect self-defense instruction, even when an attack is imminent, if the defendant was the aggressor at the time of the killing. *State v. Hunt*, 270 Kan. 203, 14 P.3d 430 (2000).

b. For the Court to instruct on voluntary manslaughter, there must be evidence of an imminent attack at the time of the killing. Kansas cases have never allowed “imminence” to cover future harm, or injury that may occur at some point in the future.

Recent controlling Kansas case law indicates that the attacker must have an actual fear of an imminent attack, regardless of whether the belief is reasonable, in order to use the imperfect self-defense. *State v. White*, 284 Kan. 333, 353, 161 P.3d 208.

The more recent unpublished case, *State v. Vann*, 212 P.3d 263, 2009 WL 2371009 (Kan. App. unpublished, 2009), is directly on point and further explains the rationale of *White*'s binding holding. *Vann*'s attack that led to his conviction for attempted second-degree murder was the result of a day-long dispute with his victim. *Id.* at *1. After several escalating run-ins throughout the day, the defendant returned to the victim's store, armed with a gun, and shot at the victim. *Id.* Although the defendant presented evidence of a history of violence with the victim, and testified that he honestly feared the victim would shoot him, no evidence was presented that

the defendant honestly thought he was in imminent danger. *Id.* at *3.

The Kansas Court of Appeals held as follows:

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

The Kansas cases that have allowed an imperfect self-defense argument involve situations where the perceived threat was capable of being carried out immediately and was likely to occur within minutes. *State v. Bench*, 188 P.3d 42 (Kan. App. 2008). This is clearly not the situation in the current case.

It has been the uncontroverted law in the State of Kansas since at least 1883 that no one can attack or kill another because he may fear injury at some point in the future. *State v. Rose*, 30 Kan. 501, 1 P. 817 (Kan. 1883).

Finally, the court should proceed with caution before allowing the evidence that the State seeks to exclude. Allowing such evidence would be contrary to American jurisprudence and would have far reaching detrimental effects on the Rule of Law.

Taken to its logical extreme, this line of thinking would allow anyone to commit premeditated murder, but only be guilty of manslaughter, simply because the victim holds a different set of moral and political beliefs than the attacker; allowing an attacker to choose the time and place of the murder, regardless of whether the victim was engaged in threatening conduct at the time of the killing. Such a ruling would resuscitate a necessity defense which this court has previously ruled inappropriate and allow preemptive murders based on a fear of future danger.

The State encourages this Court to not be the first to enable a defendant to justify premeditated murder because of an emotionally charged political belief. Such a ruling has far reaching consequences and would be contrary to Kansas law.

RESPECTFULLY SUBMITTED,



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CERIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing was delivered on this, the 10th day of January, 2010, to the following via facsimile, email, and ~~U.S. Mail~~ to the following:

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