NOT DESIGNATED FOR PUBLICATION

No. 118,975

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

GEORGE E. FLESHMAN JR.,
Appellant.

MEMORANDUM OPINION

Appeal from Jackson District Court; NORBERT C. MAREK JR., judge. Opinion filed September 27, 2019. Affirmed.

Corrine E. Gunning, of Kansas Appellate Defender Office, for appellant.

Steven J. Obermeier, assistant solicitor general, and *Derek Schmidt*, attorney general, for appellee.

Before POWELL, P.J., GARDNER, J., and LAHEY, S.J.

PER CURIAM: George E. Fleshman Jr. appeals his conviction of the reckless second-degree murder of his wife, Elizabeth (Beth) Jane Fleshman, arguing (1) the State presented insufficient evidence he committed the murder under circumstances manifesting an extreme indifference to the value of human life; and (2) the district court clearly erred in giving the jury no instruction on the lesser included offense of involuntary manslaughter. After a thorough review of the record, we find that sufficient evidence supports Fleshman's conviction of second-degree murder and that the district

court did not clearly err in failing to give a jury instruction on the lesser included offense of involuntary manslaughter. Accordingly, we affirm Fleshman's conviction.

FACTUAL AND PROCEDURAL BACKGROUND

On October 20, 2015, Holton Police Officer Terry Clark was dispatched to a home in Holton, Kansas, for a medical emergency. Clark met Fleshman at the front door, who informed him that his wife was in the bedroom. Clark found Beth lying across the bed, fully clothed, with her pants unbuttoned. Clark asked Beth what she needed but she only groaned. Clark was able to get Beth to state her name but she appeared to go in and out of consciousness.

Emergency Medical Technician (EMT) Jarrod Thompson was dispatched to the Fleshman home to address a person with difficulty breathing and whose lips were turning blue. On arriving, the EMTs could not take a stretcher inside due to clutter but found Beth in the bedroom next to the living room. Thompson noticed an oxygen machine in the living room, but Beth was not wearing oxygen. Beth could answer questions with one-word answers. With questioning, Beth indicated she had difficulty breathing and was not in pain. She did not appear in critical condition, but the EMTs had trouble getting her blood pressure. With his partner, Thompson rolled Beth onto a spine board and took her to the ambulance. He placed Beth on oxygen, and she was transported to Holton Community Hospital.

Thompson had a brief conversation with Fleshman at the home. Fleshman told Thompson and Clark that Beth got like that every six months. Beth would go to the hospital, get medicine, get better, and come home. He gave Thompson Beth's medication list and medications. Thompson asked if Fleshman would ride in the ambulance, but Fleshman did not want to go to the hospital that night. He had taken a sleeping pill and would go in the morning. Clark left the residence once the ambulance took Beth away.

That night, Clint Colberg, M.D., was the attending physician on call for Holton Community Hospital's emergency room. Dr. Colberg received a phone call from a nurse practitioner that Beth had low blood pressure and an altered mental status with no known cause. Beth denied any recent changes in medications, falls, or traumas. Dr. Colberg stated that generally a patient is the best source of information, but if the patient cannot provide it, then doctors may obtain information from family or EMS personnel.

A chest x-ray showed potential pneumonia, and Beth's blood count indicated she was anemic. While the hospital was awaiting the results of a CT scan, and because Beth continued to deteriorate, the nurse practitioner requested Dr. Colberg come to the hospital. On his way, Dr. Colberg learned the CT scan showed Beth had a ruptured spleen which caused a hemorrhage into her abdomen.

On arriving at the hospital, Dr. Colberg could not question Beth because she was unconscious, did not have a pulse, and was not breathing on her own. During his examination, Dr. Colberg noticed no external trauma, bruising, or lacerations. Dr. Colberg found Beth in a life-threatening condition. In addition to her ruptured spleen, Beth's low blood pressure indicated a significant amount of blood loss. The hospital developed a plan to transfer Beth to a facility with surgical capabilities. Dr. Colberg attempted to contact Beth's husband several times without success. The hospital sent a police officer to locate Fleshman and bring him to the hospital.

Clark received a call from the hospital and arrived at Fleshman's home around 12:16 a.m. After Clark knocked for several moments, Fleshman answered the door wearing a t-shirt and underwear. Clark informed Fleshman of the hospital's request and Fleshman stated he would go to the hospital. Clark had no concern with Fleshman's ability to drive because Fleshman did not appear tired or under the influence of a sleeping pill. Clark then left.

Fleshman arrived at the hospital before the ambulance transferring Beth had left. Dr. Colberg advised Fleshman that Beth's chances of surviving were extremely low and discussed possible withdrawal of care or continuing treatment. Dr. Colberg found Fleshman's demeanor unusual because Fleshman tried to joke with him a little bit while receiving the information. Fleshman later explained that, as a noncommissioned officer in the U.S. Army for 17 years, he joked in stressful situations because it would relax him and other people. Ultimately, Fleshman opted to continue with treatment and have Beth transferred to a larger hospital. Dr. Colberg asked Fleshman whether Beth had fallen or had any sort of trauma. Fleshman stated he was not aware of any falls or trauma but stated Beth had fallen in the past without telling him.

Around 2 a.m., the ambulance transported Beth to a hospital in Topeka. Clark testified he was dispatched to the Holton hospital around 1:30 a.m. because staff was concerned about Fleshman driving while impaired by a sleeping pill. Clark stated he found Fleshman sitting on a bench when he arrived. Fleshman told Clark that Beth was being taken to Topeka and it did not look good. Fleshman stated he intended to go to Topeka after he went home, got some coffee, and woke up a bit. Fleshman did not appear impaired to Clark, but Clark followed Fleshman home and saw no signs of impairment in Fleshman's driving.

Clark also spoke with hospital staff at that time, and he was asked if there was any domestic assault history between the Fleshmans. Clark did not know of any. Later, Clark requested dispatch look into the Fleshmans and he learned there had been a domestic battery incident. Clark also contacted the Topeka hospital and learned Beth had a spleen injury. Based on this information, Clark contacted the Jackson County Sheriff's Office.

Detective Phil McManigal of the Jackson County Sheriff's Office testified Clark contacted him about Fleshman. McManigal went to the Fleshman home about mid-morning the next day. Fleshman answered the door and appeared to have been in the

shower. Fleshman had not been to the Topeka hospital but agreed to go to the sheriff's office to speak with McManigal.

During McManigal's interview, Fleshman stated he had not been to bed that night but had contacted family and friends and posted a message about Beth on Facebook. The Fleshmans had been married since 1990, and during that time Beth had had many medical problems. She had undergone several back surgeries and had an internal pain pump that pumped narcotics directly into her spine. She had COPD from smoking and was supposed to be on oxygen at all times. Beth took blood thinners and frequently took ibuprofen for massive headaches—which caused her to bleed easily. Beth used a wheel chair, walker, or cane to move around. Fleshman stated that Beth fell a lot and did not always tell him about it.

As to Beth's condition the previous night, Fleshman stated at about 6 or 6:30 p.m., he observed Beth with her hand on her stomach while she was asleep. Fleshman woke Beth and asked if she was okay. Beth stated her stomach hurt and she went to lay down. Fleshman turned on Beth's oxygen concentrator, and she went to bed. Around 9 or 9:30 p.m., Fleshman took his sleeping pill and went into the bedroom. When he turned on a lamp, Beth had blue lips, appeared pale, had urinated herself, and was laying across the bed. Fleshman stated she was curled onto her side and hugging a pillow. When he asked if she was okay, Beth stated she did not feel good and her head fell back. Fleshman called 911. He saw no bleeding or bruises on Beth. Fleshman denied drinking alcohol and stated the two had not argued. Fleshman stated he had had nothing to drink since June, when the police were called because of a domestic disturbance between the couple.

After the interview, Fleshman went to the hospital in Topeka. Beth died at 6 p.m. on October 21, 2015.

McManigal continued his investigation. During the investigation, Fleshman told McManigal that Beth and he were the only people present in the house on October 19 and 20, 2015. Fleshman never told McManigal that he struck Beth or caused the injury. But when McManigal asked Fleshman whether it was possible that he struck Beth or caused the injury, Fleshman said anything was possible but he could not recall.

Due to the circumstances of Beth's death, the hospital ordered an autopsy. McManigal attended the autopsy completed by Dr. Erik Mitchell. Dr. Mitchell found a single bruise on Beth's forearm but documented no other bruising or external injury to her body. In relevant part, Dr. Mitchell determined Beth's cause of death to be a tear to her spleen which caused a hemorrhage and a significant amount of blood loss in her abdomen. Dr. Mitchell estimated Beth lost over 2 liters of blood.

While Dr. Mitchell determined Beth's cause of death to be a tear due to abdominal trauma, he could not anatomically determine how the trauma occurred, and so the manner of death was undetermined. The spleen is located under the rib cage, and in reviewing Beth's spleen, Mitchell found the size normal. Based on her anatomy, Mitchell could determine the impact came from the side or front. Mitchell found the lack of external bruising and broken ribs indicated Beth did not suffer trauma from a narrow object because narrow objects are more likely to leave marks than blunt objects. Because Beth also had some fat on her stomach, she was less likely to bruise. Mitchell determined Beth suffered trauma from a blunt object or blunt surface.

In Dr. Mitchell's experience, splenic tears almost always related to trauma, such as car crashes; interpersonal violence, such as a blow to the abdomen or chest; crush injuries; or a fall from sufficient height. Dr. Mitchell also found a blood clot on Beth's spleen. Dr. Mitchell determined Beth's body could still form clots, despite her use of blood thinners, and the membrane on the clot indicated the trauma had not recently happened but had happened sometime—possibly days—before her death. However, Dr.

Mitchell could not determine the precise time for when the trauma to Beth's spleen occurred.

Dr. Mitchell stated Beth's use of blood thinners would make it more likely for her to bruise, but he found the lack of small bruises on Beth's body indicated she had a lower propensity to bleed from minor trauma and did not suffer from frequent falls. He also found it unlikely Beth suffered a spontaneous tear to her spleen, i.e., a tear without physical trauma, because of her normal-sized spleen and the lack of disease in the spleen. Dr. Mitchell stated that Beth's medical conditions and medication would cause Beth to bleed more once bleeding started but would not cause her spleen to tear. Dr. Mitchell believed domestic abuse could have led to Beth's injury. McManigal later admitted he may have told the doctor about the past domestic violence between the couple.

During the investigation, McManigal also interviewed 30 witnesses, obtained a search warrant, and conducted a search of Fleshman's house. The State later charged Fleshman with the unintentional, reckless second-degree murder of Beth in violation of K.S.A. 2015 Supp. 21-5403(a)(2).

At trial, McManigal testified that Beth's sister, Coila Rush, told him she called Beth on October 19, 2015. Beth said she could not talk because Fleshman was mad about having to go to court. Rush spoke to Beth about two days before her death, could hear Fleshman yelling while talking to Beth, and told Beth to get out of the house. Beth told Rush she was okay and she had nowhere to go. Rush did not know what Fleshman was angry about.

Several witness also discussed Beth's daily routine and the Fleshmans' marriage. Beth had limited mobility and rarely left the house. She never got dressed but remained in her pajamas or night clothes during the day. Due to her health problems, Beth could no longer work. She refused to sleep in the same bed as Fleshman and spent most of her

days on the couch, where she also slept. Beth had to surrender her driver's license and relied on family, friends, or Fleshman for rides to her appointments. Beth typically used a cane and, while she moved slowly, she had little trouble going up and down the steps on her front porch. Beth told her brother she fell sometimes but that she got right back up. Beth's mobility test scores showed she had a low risk of falling.

Her brother, Arnold Gleason, who lived with the Fleshmans for about a month when he first moved to Holton in March 2010, stated he did not know Beth to go upstairs in the house. Gleason stated Beth did not trust herself to go up that many stairs. Beth's friend, Christina Kaler, testified she had been upstairs in the Fleshmans' home two or three times and claimed Beth never went upstairs because she was scared she would fall down the stairs. Kaler stated Beth always asked her or Fleshman to takes things up or down the stairs.

As to the marriage, the couple had difficulties. The couple previously lost a home to foreclosure. At one point, Fleshman learned Beth may have been unfaithful, and the two separated. The couple reunited a few years later. In June 2015, the couple was arrested after the police were called. Officer Brian Barber of the Holton Police Department responded and testified that Fleshman had what appeared to be a defensive wound on his arm that looked like a deep scratch from a nail. Beth had a chipped nail, a bruise on her breast, and blood on her shirt. Beth denied or did not remember scratching Fleshman. Beth also did not indicate that Fleshman caused her injuries and denied that he hit her. Beth did not appear to have been drinking, but Fleshman was intoxicated. Later tests showed Fleshman was above the legal driving limit.

The June 2015 incident started because the two had been arguing and Fleshman made threatening comments towards Beth. Fleshman yelled at Beth to get the dogs back inside the house or she would be dead. Beth's son from a prior marriage, Robert Cripps, testified Beth told him Fleshman had wanted to kick her out of the house that night and

threatened to kill her if she did not leave. Barber stated that Fleshman denied threatening or hitting Beth. Beth told Barber that Fleshman had been verbally abusive towards her and her family, threatened to hit her, and she was scared he would hit her. An eyewitness confirmed the couple's account of the argument and stated Fleshman had belittled Beth about not getting things done around the house and called her family stupid. After the incident, Beth moved to Topeka to live with her sister, Bonnie, and the couple had been ordered not to contact each other. Eventually, Beth moved back in with Fleshman.

Fleshman was a heavy drinker. Gleason stated Fleshman worked the graveyard shift, would come home in the morning, and could drink half of a half-gallon of whiskey in one day. Gleason stated he believed Fleshman drank like that before Gleason moved in with the couple and that Fleshman drank daily when he lived there. Cripps testified he lived with the couple as a teenager about 20 years ago. He maintained contact with his mother by telephone and testified he knew Fleshman drank alcohol and became mean—such as name-calling—when he drank a little too much. Cripps stated his mother typically reacted by crying and blaming herself.

Cripps testified his mother had debated moving out or leaving Fleshman since about 2010. Beth had discussed with others leaving Fleshman but had said she could not leave because she needed his health insurance and she lacked financial resources. Rush stated the couple kept separate bank accounts; Fleshman's money went into his account, and Beth only received a tiny social security check. Rush stated Fleshman had all the spending responsibilities because Beth could not go anywhere.

Based on other witnesses' accounts, Fleshman was abusive. McManigal admitted that witnesses reported hearing Fleshman become violent but no witness reported seeing Fleshman become violent in any other way towards Beth. But Beth told her friend, Lisa Wamego, that Fleshman became verbally abusive when he drank and treated her like she was nothing. Fleshman did not like it when Beth talked on the phone to her friends and

family. Gleason had heard Fleshman call Beth a bitch and lazy whore and stated he would cuss at Beth for not having his meals done on time and for failing to complete the to-do list of chores he would leave for her. Gleason told McManigal he had seen Fleshman get angry and double up his fists during an argument. But Gleason testified he never saw Fleshman get physically aggressive towards Beth.

On September 23, 2015, Beth reported to Josh Moulin—a Physician's Assistant at Holton Community Hospital who had worked with Beth for a few years—that Fleshman was verbally and emotionally abusive. Beth described Fleshman as an alcoholic. Moulin stated that Beth was very emotional and had to pause at times due to her crying. Beth stated Fleshman yelled at her a lot but denied to Moulin that Fleshman had ever physically abused her. Moulin told Beth she needed to leave the home; he would follow up with her in a month and, if she had not moved out, he would report Fleshman to adult protective services.

Beth had told her friend, Pat Usry, she was frightened and scared to death of Fleshman. Beth also told Rush she feared Fleshman. Beth disclosed to Usry that Fleshman was constantly drinking and sometimes she would have to find a safe place to hide. Beth told Usry that when Fleshman got drunk, he got physical and would pull her arms and shove her. Beth never told Usry that Fleshman smacked her, but Beth told Rush if anything happened to her, Fleshman did it. Beth similarly told Kaler she would leave a note in her house stating that if she passed away, George did it and to look into it. Upon searching the house, the police found a note inside of a vacuum box with many other papers. A document examiner with the Kansas Bureau of Investigation conducted a handwriting analysis and determined that Beth wrote the note. The note read:

> "To bring it up there would be hell for me to pay so I won't say a word but continue to take it.

"As a side note if I ever land up in the hospital or worse with broken bones, cut bruises, slug marks rest assured I swear to God they came from my husband and to the Dr's, law enforcement you all do what you think is best. I will not argue with you.

"I will add I am becoming honestly afraid to even say anything for fear of his God awful temper, it is very very frightening.

"Thanks for listening,
"B."

Witnesses reported seeing bruises on Beth's body. Wamego testified she saw bruises all up Beth's side when she visited the couple in another house in Holton. Beth told Wamego she fell. Beth James, a co-worker of Fleshman's, testified she went to the Fleshmans' home once but could not recall if her visit occurred before 2010. Beth answered the door, and James saw bruises all over Beth's neck going up the side of her face and on parts of her arms. When James asked Fleshman about it, he told her that Beth falls. Kaler testified she once asked Beth if she got the bruises from falling, and Beth responded no, she got bruises from her dogs jumping on her. Kaler stated Beth did run into things and would fall off balance but she never saw Beth fall.

Fleshman testified in his defense. He stated that on October 19, 2015, Beth told him she went upstairs and got as much of her craft materials as possible to bring downstairs. Beth told Fleshman she fell. He testified Beth had gone upstairs and fallen before, and he would learn about it because she always told him. Fleshman testified he never hit Beth and did not hit her within a week of her death. On cross-examination, Fleshman explained he did not tell McManigal about Beth's fall previously because he did not recall Beth's statement. Fleshman also confirmed he told police he stayed home after seeing Beth at the Holton hospital. But he also confirmed his bank records showed he made a withdrawal at an ATM located 20 miles away near Powhattan at 2:11 that

morning. Fleshman denied that his cell phone records showed he exchanged text messages with various women between August 2015 and October 2015.

Fleshman called Manny Moser, M.D., to testify on his behalf. Dr. Moser testified Beth's lifestyle contributed to her deteriorating health, such as her smoking, lack of exercise, poor diet, age, and use of prescription drugs. Dr. Moser testified he had encountered a ruptured spleen during his time practicing as a doctor that resulted from a man falling while working on his house and hitting his abdomen. Dr. Moser described the spleen as a very fragile organ. Thomas Young, M.D., testified that in his opinion, Beth's ruptured spleen and bleeding could have been caused by a fall or multiple falls over time in conjunction with her COPD and her use of blood thinners and ibuprofen. In contrast, as stated above, Dr. Mitchell testified a ruptured spleen generally requires the use of physical force. Similarly, Dr. Colberg testified in his experience that he had only seen a ruptured spleen from high-impact accidents that required a significant amount of trauma, such as a car or ATV accident. Dr. Colberg testified he had never seen a lacerated spleen from a fall or a routine fall from standing height. Moulin testified injuries to the spleen generally required a high-impact injury.

After the presentation of evidence, the jury found Fleshman guilty of the second-degree murder of Beth. The district court subsequently sentenced Fleshman to 117 months in prison with 36 months' postrelease supervision.

Fleshman timely appeals.

I. DID THE STATE PRESENT INSUFFICIENT EVIDENCE TO CONVICT FLESHMAN OF SECOND-DEGREE MURDER?

As Fleshman challenges the sufficiency of the State's evidence, we apply our well known standard of review.

> """When the sufficiency of the evidence is challenged in a criminal case, this court reviews the evidence in a light most favorable to the State to determine whether a rational fact-finder could have found the defendant guilty beyond a reasonable doubt.'" "'In making a sufficiency determination, the appellate court does not reweigh evidence, resolve evidentiary conflicts, or make determinations regarding witness credibility.'" An appellate court will reverse a guilty verdict even if the record contains some evidence supporting guilt only in rare cases when the court determines that evidence was so incredulous no reasonable fact-finder could find guilt beyond a reasonable doubt. [Citations omitted.]" *State v. Torres*, 308 Kan. 476, 488, 421 P.3d 733 (2018).

Fleshman argues the State's case was based entirely on circumstantial evidence. However, "'[a] conviction of even the gravest offense can be based entirely on circumstantial evidence and the inferences fairly deducible therefrom. If an inference is a reasonable one, the jury has the right to make the inference.' [Citation omitted.]" *State v. Brown*, 306 Kan. 1145, 1157, 401 P.3d 611 (2017). "Circumstantial evidence, in order to be sufficient, 'need not rise to that degree of certainty which will exclude any and every other reasonable conclusion.' Instead, circumstantial evidence 'affords a basis for a reasonable inference by the jury' regarding a fact at issue. [Citations omitted.]" *State v. Logsdon*, 304 Kan. 3, 25, 371 P.3d 836 (2016).

Because the probative values of the evidence are intrinsically similar, we draw no distinction between the weight assigned direct and circumstantial evidence. *State v. Darrow*, 304 Kan. 710, Syl. ¶ 3, 374 P.3d 673 (2016). "Instead, the appellate court's function is to determine if the direct and circumstantial evidence, viewed in a light most favorable to the State, could have reasonably supported a rational factfinder's guilty verdict." 304 Kan. 710, Syl. ¶ 3.

> "[C]onvictions based entirely upon circumstantial evidence "'can present a special challenge to the appellate court'" because "'the circumstances in question must themselves be proved and cannot be inferred or presumed from other circumstances.'" Where the State relies on such inference stacking, *i.e.*, where the State asks the jury to

> make a presumption based upon other presumptions, it has not carried its burden to present sufficient evidence. [Citations omitted.]" *State v. Banks*, 306 Kan. 854, 859, 397 P.3d 1195 (2017).

While the State cannot "rely upon the theory that presumption A leads to presumption B leads to presumption C leads to fact D, it is perfectly proper for the State's case to be grounded upon a theory that presumption A, presumption B, and presumption C all separately point to fact D." 306 Kan. at 861.

In reviewing the elements of second-degree murder, K.S.A. 2018 Supp. 21-5403(a)(2) provides that: "Murder in the second degree is the killing of a human being committed . . . unintentionally but recklessly under circumstances manifesting extreme indifference to the value of human life." Under K.S.A. 2018 Supp. 21-5202(j), "[a] person acts 'recklessly' or is 'reckless,' when such person consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation."

The district court instructed the jury:

> "The defendant is charged with murder in the second degree. The defendant pleads not guilty.
>
> "To establish this charge, each of the following claims must be proved:
>
> "1. The defendant killed [Beth] unintentionally but recklessly under circumstances that show extreme indifference to the value of human life.
>
> "2. This act occurred on or about the 21st day of October, 2015, in Jackson County Kansas.

. . . .

"A defendant acts recklessly when the defendant consciously disregards a substantial and unjustifiable risk that certain circumstances exist; or a result of the defendant's actions will follow.

"This act by the defendant regarding the risk must be a gross deviation from the standard of care a reasonable person would use in the same situation."

Fleshman argues the State presented no evidence he acted beyond simple recklessness and failed to show he acted under circumstances manifesting extreme indifference to the value of human life. Fleshman contends the State only presented evidence he had knowledge of Beth's various medical conditions. We are unpersuaded by Fleshman's argument.

To reverse a conviction based on insufficient evidence, the reviewing court must find the evidence "so incredulous no reasonable fact-finder could find guilt beyond a reasonable doubt." *Torres*, 308 Kan. at 488. If based on circumstantial evidence, the evidence "'need not rise to that degree of certainty which will exclude any and every other reasonable conclusion.' Instead, circumstantial evidence 'affords a basis for a reasonable inference by the jury' regarding a fact at issue. [Citations omitted.]" *Logsdon*, 304 Kan. at 25.

In reviewing the meaning of the element of "extreme indifference to the value of human life" in a void for vagueness challenge, our Supreme Court stated: "Reckless involuntary manslaughter differs from unintentional but reckless second-degree murder 'only in the degree of recklessness required to prove culpability.' [Citation omitted.]" *State v. Brown*, 300 Kan. 565, 588, 331 P.3d 797 (2014). While reviewing a district court's denial of a defendant's request to instruct on the lesser included offenses of

reckless second-degree murder and reckless involuntary manslaughter in a prosecution for first-degree murder, our Supreme Court explained:

> "The 'difference between unintentional second-degree murder and involuntary manslaughter is one of degree and not one of kind.' 307 Kan. at 583. There is a 'recognized spectrum of culpability for the results of one's reckless acts.' 307 Kan. at 583. Recklessness attributable to '"purpose or knowledge is treated as depraved heart second-degree murder, and less extreme recklessness is punished as manslaughter."' 307 Kan. at 583 (quoting *State v. Robinson*, 261 Kan. 865, 877-78, 934 P.2d 38 [1997]). In *Gonzalez*, the 'instructions required the jury to place [the defendant's] conduct on that spectrum by deciding whether the facts showed he was not just reckless in disregarding the risk that [the victim] would die, but also extremely indifferent to the value of human life.' *Gonzalez*, 307 Kan. at 583." *State v. James*, 309 Kan. 1280, 1300-01, 443 P.3d 1063 (2019).

In other words, to determine if the recklessness arises to an extreme indifference to the value of human life, "[a] jury only has to look at the facts as alleged, determine whether those facts are properly proven, and then apply them to the offense's elements." *State v. Gonzales*, 307 Kan. 575, Syl. ¶ 5, 412 P.3d 968 (2018).

In his brief, Fleshman focuses on the lack of direct evidence showing the manner of how he caused the fatal injury to Beth. Admittedly, this case presents a closer call than many other sufficiency of the evidence challenges to a second-degree murder conviction typically because an eyewitness recounts the events or the defendant admits to causing the fatal injury or injuries. See, e.g., *State v. Kirby*, 272 Kan. 1170, 1190-91, 39 P.3d 1 (2002) (holding sufficient evidence where witness saw defendant kick victim more than dozen times while victim was lying on ground and victim later died of ruptured spleen); *State v. Robinson*, 261 Kan. 865, 881, 934 P.2d 38 (1997) (holding sufficient evidence where witness saw and defendant admitted to hitting victim in back of head with golf

club). Here, the State lacks direct evidence regarding the immediate circumstances surrounding Beth's fatal injury.

However, "'[i]f an inference [drawn from the evidence in support of a fact] is a reasonable one, the jury has the right to make the inference.'" *Brown*, 306 Kan. at 1157. Here, the jury heard evidence that Fleshman had abused Beth verbally and emotionally. According to witnesses, Beth had contemplated leaving Fleshman since 2010, had said she was scared and frightened of Fleshman, and had said she sometimes had to find a safe place to hide. One witness described hearing Fleshman yelling in the background during a phone call with Beth two days before her death.

While no witnesses had seen Fleshman physically abuse Beth, the police were called in June 2015 for a domestic disturbance. Fleshman had a deep scratch to his arm and Beth had a bruise on her breast and blood on her shirt, but Beth denied that Fleshman had physically hurt her. Witnesses testified that Beth had said if something happened to her, then Fleshman did it and that she would leave a note stating that if something happened to her, Fleshman did it and to look into it. After Beth's death, police found a note written by Beth, detailing that if there were physical marks or injuries found on her body, her husband caused them.

Fleshman denied hitting Beth. Dr. Colberg testified that, in his experience, he had never seen a spleen rupture caused from a routine fall or a fall from standing height. During the autopsy, Dr. Mitchell found Beth's spleen was normal sized and lacked signs of disease, and he could not determine the manner of death. However, the autopsy showed she died from blunt trauma that caused a tear in her spleen and hemorrhage in her abdomen and that the blow to Beth's abdomen likely came from the front or side. Beth had no bruising on her abdomen or broken ribs, which indicated a blunt object rather than a narrow one caused the trauma. Moreover, a membrane development on a blood clot on Beth's spleen indicated her injury had not recently happened but could have happened

days before. Dr. Mitchell testified that interpersonal violence—such as a blow to the abdomen—and domestic abuse could cause a splenic tear. Generally, the State's medical witnesses testified that a ruptured spleen or splenic tear usually requires a high-impact, physical injury.

Fleshman stated Beth relied on a wheelchair, walker, or cane to get around. He said she was on blood thinners which caused her to bleed even from minor trauma. Fleshman told McManigal that Beth always needed to be on oxygen for her COPD, and he had turned on her oxygen concentrator when she went to lay down. Notably, Fleshman testified Beth fell when she went upstairs but he did not mention Beth's fall because he did not recall it at the time. Witnesses testified Beth rarely got dressed and remained in her pajamas. Beth never slept in the bedroom but largely spent her days on the couch where she also slept, and Beth did not typically go upstairs. Moreover, when the EMTs arrived, Beth was found in the bedroom, which was located on the first floor behind the living room, lying on the bed fully clothed, and her oxygen machine was in the living room.

In his first interview with McManigal, Fleshman acknowledged Beth had limited mobility and relied on him to get to appointments. Fleshman did not ride in the first ambulance with Beth. After determining Beth had a ruptured spleen, medical staff were unable to contact Fleshman and sent police to his home. Even after learning Beth had an extremely low chance of survival, Fleshman declined to ride to the Topeka hospital in the ambulance. Fleshman said he had taken a sleeping pill, but Clark testified he observed no impaired driving when he followed Fleshman home from the Holton hospital. Fleshman testified he remained at home after returning from the Holton hospital, yet his bank records confirmed he visited an ATM about 20 miles away around 2 a.m.

The medical testimony providing the nature of the injury needed to cause a ruptured spleen, Fleshman's knowledge of Beth's health and medical history, evidence the

injury to Beth could have occurred days before, Beth's dependence on others, and Fleshman's actions before and after seeking emergency help for Beth's condition provides sufficient evidence for a reasonable fact-finder to conclude Fleshman acted recklessly and with an extreme indifference to the value of human life in causing Beth's death. Thus, the jury had sufficient evidence to support finding Fleshman guilty of second-degree murder.

II. DID THE DISTRICT COURT CLEARLY ERR IN PROVIDING NO JURY INSTRUCTION ON INVOLUNTARY MANSLAUGHTER?

Next, Fleshman argues some evidence at trial supported a jury instruction on the lesser included offense of involuntary manslaughter. Fleshman concedes he failed to object to the failure to give the lesser included offense instruction and, as a result, the clearly erroneous standard applies. See K.S.A. 2018 Supp. 22-3414(3); *State v. Cameron*, 300 Kan. 384, 389, 329 P.3d 1158, *cert. denied* 135 S. Ct. 728 (2014). To establish clear error, "[w]e first determine whether the instructions were legally and factually appropriate, employing an unlimited review of the entire record. If error is found, 'the defendant must firmly convince the court the jury would have reached a different result without the error.' [Citations omitted.]" *Brown*, 306 Kan. at 1164.

A. *Was a jury instruction for involuntary manslaughter legally and factually appropriate?*

Fleshman first argues that a jury instruction for the lesser included offense of involuntary manslaughter was legally appropriate.

> "'An instruction on a lesser included crime is legally appropriate. *State v. Plummer*, 295 Kan. 156, 161, 283 P.3d 202 (2012). And a lesser included crime includes a "lesser degree of the same crime." K.S.A. 2017 Supp. 21-5109(b)(1). This court has recognized

> five degrees of homicide. In descending magnitude, they are capital murder, first-degree murder, second-degree murder, voluntary manslaughter, and involuntary manslaughter. *State v. Carter*, 305 Kan. 139, 161, 380 P.3d 189 (2016) (citing *State v. Cheever*, 295 Kan. 229, 258-59, 284 P.3d 1007 [2012]).' *Pulliam*, 308 Kan. at 1362." *James*, 309 Kan. at 1298.

Fleshman is correct. Because involuntary manslaughter is a lesser degree of second-degree murder, the instruction would have been legally appropriate. See 309 Kan. at 1298.

Next, Fleshman argues there was some evidence admitted at trial to support that the crime of killing was committed only recklessly. K.S.A. 2018 Supp. 21-5405(a)(1) defines involuntary manslaughter, in part, as "the killing of a human being committed . . . [r]ecklessly." The district court instructed the jury on the definition of reckless or to act recklessly pursuant to K.S.A. 2018 Supp. 21-5202(j) in the jury instruction on second-degree murder. The district court also instructed the jury that to find Fleshman guilty of second-degree murder, it had to find Fleshman acted recklessly and in a manner manifesting an extreme indifference to the value of human life. Thus, when it convicted Fleshman of second-degree murder, the jury found the State proved beyond a reasonable doubt that Fleshman acted recklessly and in the heightened degree of recklessness.

Fleshman argues that because the only difference between a reckless second-degree murder and reckless involuntary manslaughter is the degree of recklessness, the district court erred in failing to give an involuntary manslaughter instruction. Our Supreme Court addressed this argument in *James*, 309 Kan. at 1300: "It does not follow automatically that facts supporting a reckless second-degree murder instruction also support a reckless involuntary manslaughter instruction because of the difference in degree of recklessness between the crimes mentioned above." Instead, the *James* court reviewed the evidence to determine if an involuntary manslaughter instruction was

factually appropriate, although it had already found a second-degree murder instruction factually appropriate. 309 Kan. at 1300.

There, the *James* court found the second-degree murder instruction factually appropriate because some testimony and physical evidence supported that James did not intend to kill the victim. "The first shot fired by James went into the air and hit the ceiling. James testified that he was not firing at anyone when he shot the second time. This testimony echoed what he had told Kindred when he learned McClennon was dead." 309 Kan. at 1299-1300. The *James* court also found an involuntary manslaughter instruction was factually appropriate.

> "If jurors accepted that James acted recklessly, the evidence did not foreclose culpability at either end of the spectrum for the results of his reckless acts. The varying accounts of what happened inside the basement—and outside view of any surveillance cameras—presented the jury with a range of possibilities. It was the jury's task, not the district judge's, to consider the evidence and assess factors—such as the number of people in the basement and James' reasons for shooting—before reaching a conclusion on whether James' recklessness rose to the second-degree murder level of extreme indifference to the value of human life. The district judge also erred in refusing to give the reckless involuntary manslaughter instruction." 309 Kan. at 1301.

The *James* court found the instructional errors harmless because the jury found James guilty of first-degree murder, which required jurors to conclude the killing was intentional and premediated and reasoned the verdict eliminated the possibility the jury viewed the killing as merely reckless. 309 Kan. at 1302.

Unlike *James*, neither party here argues the evidence established that Fleshman intended to kill Beth, and the jury did not convict Fleshman of premeditated first-degree murder. In this case, the medical testimony established that Beth's cause of death was a high-impact, blunt, physical force to her abdomen that resulted in a tear to her spleen and

hemorrhage into her abdomen. In finding Fleshman guilty of reckless second-degree murder beyond a reasonable doubt, the jury had to find Fleshman acted "unintentionally but recklessly under circumstances manifesting extreme indifference to the value of human life." See K.S.A. 2018 Supp. 21-5403(a)(2).

Fleshman argues the jury did not have the option of determining whether reckless conduct alone caused Beth's death. But Fleshman merely argues that there was some evidence he acted only recklessly. He provides no explanation of the record evidence or authority in support of his argument. That said, the record evidence provides support for Fleshman's assertion that a lesser included offense instruction on involuntary manslaughter was factually appropriate.

To establish the recklessness required to prove second-degree murder, the jury must decide "the facts showed [the defendant] was not just reckless in disregarding the risk that [the victim] would die, but also extremely indifferent to the value of human life." *Gonzalez*, 307 Kan. at 583. In other words, the jury determines from the facts whether the higher standard of recklessness applies or the lower standard applies. See *James*, 309 Kan. at 1299-1301 (describing difference of recklessness required to show second-degree murder and involuntary manslaughter as one of degree which, when jury instructed on both, requires jury to determine from facts where defendant's culpability falls on spectrum). In this case, the jury did not have the option of considering whether Fleshman's conduct only met the lower standard of recklessness—i.e., that Fleshman consciously disregarded a substantial and unjustifiable risk that circumstances existed or that a result would follow, and his disregard constituted "a gross deviation from the standard of care which a reasonable person would exercise in the situation." See K.S.A. 2018 Supp. 21-5202(j).

Notably, as stated above, the State lacked direct evidence showing the immediate circumstances surrounding Beth's death. There was conflicting evidence regarding the

cause, whether it was from a fall or a physical blow to her abdomen by Fleshman. The manner of the injury required to cause a ruptured spleen—that led to Beth's death—could have arguably occurred from Fleshman's reckless conduct alone. Dr. Mitchell testified a blow to the abdomen from interpersonal violence could cause a splenic tear, but there was no evidence of how many blows or impacts to Beth's abdomen resulted in the splenic tear. Multiple witnesses and Fleshman stated Beth had no signs of bleeding or bruising on her abdomen. Due to a lack of external injury, Fleshman may have felt less pressure to seek medical attention for Beth which could explain the autopsy findings that the injury could have occurred days before. In turn, some evidence supported that Fleshman did not act with an extreme indifference to the value of human life but acted in gross deviation from the standard of care a reasonable person would exercise and with a conscious disregard to a substantial and unjustifiable risk in causing a blunt, physical blow to Beth's abdomen and in delaying seeking medical attention for Beth. Thus, a jury instruction on the lesser included offense of involuntary manslaughter was factually appropriate.

B. *Does Fleshman firmly convince us the jury would have reached a different result if an involuntary manslaughter instruction had been given?*

Even if the district court erred in failing to give the lesser-included instruction on involuntary manslaughter, we must still be firmly convinced the jury would have reached a different result absent the error. See *Brown*, 306 Kan. at 1164. "'Just because we find that a rational jury *could* have found [the defendant] guilty of the lesser included offense does not necessarily mean that we believe that the jury *would* have convicted [him or] her of the lesser offense.'" *State v. Cooper*, 303 Kan. 764, 772, 366 P.3d 232 (2016). As with the sufficiency of the evidence issue, this instructional error issue also presents a close call because its resolution turns largely on the burden of proof. Unlike in the present case, where a party's offering of a lesser included instruction is rejected by the district court, it is the State's burden to persuade the reviewing court that there is no reasonable probability the error affected the outcome of the trial. See *State v. Plummer*, 295 Kan.

156, 162-63, 283 P.3d 202 (2012). But under the clear error standard, it is Fleshman's duty to firmly convince us the jury would have reached a different verdict but for the error. Given the highly controverted nature of the evidence, that is a tall order.

Here, the State argues the jury had the option to acquit Fleshman if the jury found his actions did not rise to the level of manifesting an extreme indifference to the value of human life. The State also asserts that the "skip rule" should apply because the jury did not consider the lesser included offense of voluntary manslaughter (as instructed by the district court) and convicted Fleshman of reckless, second-degree murder.

Our Supreme Court has explained:

> "The skip rule '"is not really a rule at all in the sense that it must be invariably or even routinely applied . . . . It is, rather, simply a logical deduction that may be drawn from jury verdicts in certain cases."' Those certain cases are ones in which 'the elements of the crime of conviction, as compared to a rejected lesser included offense, necessarily show that the jury would have rejected or eliminated an even lesser offense.' When these circumstances exist, the skip rule provides 'a route to harmlessness.' [Citations omitted.]" *State v. Longoria*, 301 Kan. 489, 515-16, 343 P.3d 1128 (2015).

Our Supreme Court also has cautioned against applying the skip rule automatically but has explained the rule should be considered as part of the applicable harmlessness test. See *State v. Barrett*, 309 Kan. 1029, 1037-39, 442 P.3d 492 (2019).

Based on the verdict, the jury found Fleshman guilty of reckless, second-degree murder and did not consider the lesser offense of voluntary manslaughter. But the dissimilarity in the elements of reckless second-degree murder and reckless involuntary manslaughter undermine application of the skip rule in this case, particularly because the lesser included offense of voluntary manslaughter instructed upon by the district court

included the element requiring the State to prove Fleshman acted upon a sudden quarrel or in the heat of passion, evidence which is lacking in the record.

Nevertheless, Fleshman provides no record evidence to support his claim the jury could have found his conduct amounted only to simple recklessness and did not rise to the level of manifesting extreme indifference to the value of human life. The district court instructed the jury that the State had the burden of proving beyond a reasonable doubt that Fleshman committed the second-degree murder recklessly *and* that his conduct manifested an extreme indifference to the value of human life. The district court instructed the jury it could consider the lesser included offense of voluntary manslaughter if it did not agree that Fleshman committed second-degree murder. The jury found Fleshman guilty of reckless, second-degree murder and determined the facts supported that his conduct met the heightened recklessness standard.

When instructed, a jury determines from the facts whether a defendant acted with the level of recklessness needed to support a conviction of second-degree murder or involuntary manslaughter. See *James*, 309 Kan. at 1299-1301. The jury here concluded from the evidence that Fleshman acted recklessly and manifested an extreme indifference towards the value of human life. Reasonable people could disagree with the jury's verdict, but Fleshman has not firmly convinced us that the jury would have reached a different verdict, i.e., find that Fleshman was not guilty of second-degree murder but instead guilty of involuntary manslaughter, if the jury had been so instructed. As a result, the district court did not clearly err in failing to instruct the jury on the lesser included offense of involuntary manslaughter.

Affirmed.