IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 121,914

STATE OF KANSAS,
Appellee,

v.

JOSEPH P. LOWRY,
Appellant.

SYLLABUS BY THE COURT

1.

Even if a lesser included offense instruction is legally appropriate, it must also be factually appropriate. A trial judge's failure to give a lesser included offense instruction is not error if the instruction falls short on either or both the factual and legal appropriateness requirements.

2.

A voluntary manslaughter instruction is factually appropriate only if some evidence, viewed in a light most favorable to the defendant, shows an adequate provocation that deprives a reasonable person of self-control and causes that person to act out of passion, rather than reason. A sudden quarrel, or any unforeseen angry altercation, can fall into the definition of heat of passion and thus be sufficient provocation. But ongoing and protracted interactions do not usually provide factual support for a voluntary manslaughter instruction.

3.

A trial judge errs by admitting gruesome photographs that only inflame the jury. But gruesome photographs are not automatically inadmissible. Indeed, gruesome crimes

result in gruesome photographs. Faced with an objection, rather than automatically admit or deny admission of a gruesome photograph, a trial judge must weigh whether the photograph presents a risk of undue prejudice that substantially outweighs its probative value. On appeal, appellate court's review a trial judge's assessment for an abuse of discretion, often asking whether the judge adopted a ruling no reasonable person would make.

4.

Under a compulsion defense, a person is not guilty of a crime other than murder or voluntary manslaughter because of conduct the person performs under the compulsion or threat of the imminent infliction of death or great bodily harm. The defense applies only if such person reasonably believes that death or great bodily harm will be inflicted upon such person or upon such person's spouse, parent, child, brother, or sister if such person does not perform such conduct. The coercion or duress must be present, imminent, and impending and cannot be invoked by someone who had a reasonable opportunity to avoid doing the thing, or to escape. Additionally, a compulsion defense instruction is not warranted when the coercion is not continuous.

5.

Cumulative trial errors may require reversal when, under the totality of the circumstances, the combined errors substantially prejudice a defendant and deny a fair trial. The cumulative error rule does not apply if there are no errors or only a single error.

Appeal from Shawnee District Court; MARK S. BRAUN, judge. Opinion filed February 24, 2023. Affirmed.

Shawna R. Miller, of Miller Law Office, LLC, of Holton, argued the cause and was on the brief for appellant.

Kristafer R. Ailslieger, deputy solicitor general, argued the cause, and *Derek Schmidt*, attorney general, was with him on the brief for appellee.

The opinion of the court was delivered by

LUCKERT, C.J.: Joseph Lowry challenges his convictions arising from the murders of three individuals over a period of several hours in a Topeka home. On direct appeal following a jury trial, Lowry argues the trial judge erred by not giving a jury instruction on voluntary manslaughter as a lesser included offense of first-degree premeditated murder, admitting crime scene and autopsy photographs, and not giving a jury instruction on the compulsion defense. He contends any of these errors is alone enough to require us to reverse his convictions. If we disagree on that point, he asserts these errors cumulatively cause such prejudice as to justify reversal.

We reject all of Lowry's arguments. As to his first and third issues, neither a voluntary manslaughter instruction nor an instruction on the compulsion defense were factually appropriate, and thus the trial judge did not err in declining Lowry's requests for these instructions. And the judge did not abuse his discretion in determining the objected-to photographs were relevant, probative, and not unduly prejudicial. Finding no error, we affirm Lowry's convictions.

FACTUAL AND PROCEDURAL BACKGROUND

All three murders occurred in the Topeka home of Kora Liles. Liles lived there with Lowry, her sister, and others. Liles' house was a place where people would gather to hang out and use drugs.

On the evening of the murders two groups gathered, one on the main level of the house and another in the basement where Liles' sister lived. The makeup of each group changed throughout the evening and into the night.

Lowry and others who took part in or witnessed the murders were part of the main level gathering. Joseph Krahn was at the house for a while, left, and returned. Krahn strangled or suffocated each of the three murder victims. Krahn came to Liles' house with Richard Folsom, who witnessed some of the crimes. Liles' ex-husband Brian Flowers was also present during part of the events.

The basement gathering included one of the murder victims, Nicole Fisher, who had come to visit Liles' sister. Sometime after Fisher arrived, Liles' sister and others in the basement left the house for the evening while Fisher remained as she made calls to find a ride. She eventually found her ride when friends contacted another murder victim, Matthew Leavitt, and he agreed to pick up Fisher. Leavitt instructed that Fisher needed to go outside to wait because he did not want to enter Liles' house. Liles had recently accused Leavitt of raping her and had told Lowry and others of her accusation. On Leavitt's way to get Fisher, he picked up his friend, Shane Mays, who would survive the events that led to the murder of his friend.

Leavitt and Mays parked near Liles' house just as Krahn and Folsom left the main level gathering. As Folsom was walking toward his car, Lowry ran by Folsom and warned Folsom to leave if he did not want to be involved. Krahn and Folsom left.

Lowry, who had been joined by Liles' ex-husband Flowers, continued toward Leavitt's car. Lowry and Flowers pointed guns at Leavitt and Mays and forced them out of the car. Lowry drove Leavitt's car away. The car was later found in the Kansas River. While Lowry drove away, Flowers held Leavitt and Mays at gunpoint and, following Liles' directions, forced the two into the basement with Fisher.

Lowry eventually returned to Liles' house, and he again threatened Leavitt and Mays with a gun. Lowry asked Leavitt whether "he wanted the bullet in his head or in his chest because he [was] going to die there" that night. Lowry accused Leavitt of being a rapist. Leavitt denied this, but Liles told the others that Leavitt had raped her.

Flowers and Liles went upstairs and took Mays with them. Lowry followed, forcing Leavitt and Fisher upstairs at gunpoint. By this time, Krahn had returned. Lowry, Krahn, and the others forced Mays, Leavitt, and Fisher to sit on a couch.

Lowry, Liles, and Krahn began smoking meth and talking about what they planned to do. Mays distinctly heard Liles say, "[T]hey all have to die." Mays and Leavitt began pleading for their lives; this annoyed Krahn who threatened them.

While this was going on in the house, Folsom, who had driven Krahn back to the house, remained in his car. He saw Luke Davis—who would become the third murder victim—walking nearby. Folsom called out to warn Davis not to go into the house. Davis ignored Folsom's warning and knocked on the door. Lowry and Krahn answered the door and pulled Davis inside. Davis was forced to sit with Leavitt, Fisher, and Mays. Later, Folsom grew tired of waiting outside and came into the house. He took a seat in another room from the others, but he could see the captives.

At about 4 a.m., Lowry left the house to purchase ponchos, bandanas, and zip ties. He returned, and at some point, Liles turned on music and asked Leavitt, Mays, and Davis to dance. They did not want to, but Liles threatened them with a gun and told them to take off their shirts and dance. Lowry grabbed Mays by the throat, threatened him with a tire iron, and told him to stop looking at Liles.

Fisher was fidgeting and talking a lot; Krahn and Lowry became annoyed because she did not comply with their orders to be quiet. Krahn told Lowry, Liles, and Flowers to put on latex gloves. Krahn pulled Fisher off the couch, bound her hands behind her back using the zip ties Lowry had purchased, and put her in a swivel chair. Krahn told Lowry to bring him a trash bag. Krahn put the bag over Fisher's head and began suffocating her.

After a few seconds, Lowry told Krahn to stop so Liles could leave the house to establish an alibi and "go be on camera somewhere." Lowry tried to get Liles to eat a cigarette so she would have to go to the hospital. She refused, so they decided she should go to Walmart, where she shopped for clothes.

After she left, Lowry and Krahn bound Davis' wrists with zip ties and forced him into the chair. Krahn placed a plastic bag over Davis' head, but Davis broke free and ran for the door where Krahn tackled him. Krahn and Lowry wrestled with Davis. During the struggle, Krahn's knife fell on the floor; Lowry grabbed the knife and stabbed Davis. Krahn grabbed an electrical cord from a nearby fan and strangled Davis with it until Davis died.

Krahn and Lowry turned their attention to Fisher. They told her to sit in the swivel chair. Krahn told Mays he was "up" and handed Mays a trash bag. In an earlier conversation, Liles had said Mays could live if Mays killed his friend. Mays began to suffocate Fisher with the trash bag, but after about 30 seconds let go. Krahn stepped in and suffocated Fisher with the trash bag until she died.

Krahn and Lowry turned to Leavitt, who pleaded for his life and offered money. Krahn told Mays this was his last chance and handed Mays another trash bag. Mays put the trash bag over Leavitt's head but failed to tighten it. Krahn became irritated and took over. Leavitt broke free and struggled with Krahn and Lowry. Eventually Krahn was able to get his legs around Leavitt's neck, and he strangled Leavitt to death.

Sometime during these events, Flowers left the house. Folsom also left the house after the three victims were dead. But he did not go to police because he feared Krahn, who had threatened to kill anyone who talked.

Krahn and Lowry decided not to kill Mays but told him to help clean and move the bodies to the basement. Liles returned to the house and was told of the events; Liles simply nodded. Eventually, Lowry, Liles, Krahn, and Mays drove away.

Later, Mays and Liles separately went to police and reported the murders, after which Lowry was arrested and charged.

A jury convicted Lowry of two counts of first-degree premeditated murder for Davis' and Leavitt's murders, two alternative counts of felony murder for those murders, and one count of first-degree felony murder for Fisher's murder. The jury also convicted him of three counts of aggravated kidnapping, one count of aggravated assault, and one count of aggravated robbery.

Lowry timely appealed to this court, which has jurisdiction of the appeal. See K.S.A. 60-2101(b) (Supreme Court jurisdiction over direct appeals governed by K.S.A. 2022 Supp. 22-3601); K.S.A. 2022 Supp. 22-3601(b)(3)-(4) (life sentence and off-grid crime cases permitted to be directly taken to Supreme Court); K.S.A. 2022 Supp. 21-5402(b) (first-degree murder is off-grid person felony).

ANALYSIS

On appeal, Lowry raises four issues but establishes no error. We thus affirm Lowry's convictions.

ISSUE I: LESSER INCLUDED OFFENSE INSTRUCTION NOT FACTUALLY WARRANTED

Lowry first argues that he and Krahn reacted to a sudden quarrel that started when Davis broke free and ran for the door. Lowry contends this sudden quarrel warranted a voluntary manslaughter instruction as a lesser included offense of first-degree murder of Davis.

Lowry first made this argument during the jury instruction conference at trial. Then, and now on appeal, Lowry and the State agree that voluntary manslaughter is a lesser included offense of first-degree premeditated murder and is therefore legally appropriate. *State v. Bernhardt*, 304 Kan. 460, 475, 372 P.3d 1161 (2016); PIK Crim. 4th 69.010 (2022 Supp.). But even if a lesser included offense instruction is legally appropriate, it must also be factually appropriate. A trial judge's failure to give a lesser included offense instruction is not error if the instruction falls short on either or both the factual and legal appropriateness requirements.

State v. Uk, 311 Kan. 393, 397-98, 461 P.3d 32 (2020) (discussing four step analysis of jury instruction claims of error set out in *State v. Plummer*, 295 Kan. 156, 163, 283 P.3d 202 [2012], of reviewability, factual appropriateness, legal appropriateness, and reversibility); see *State v. Becker*, 311 Kan. 176, 183, 459 P.3d 173 (2020).

An inquiry about factual appropriateness of a lesser included offense instruction begins with consideration of what the jury must find to convict the defendant of the lesser included offense—here, voluntary manslaughter. As relevant to the parties' arguments, K.S.A. 2022 Supp. 21-5404 defines the elements of voluntary manslaughter as "knowingly killing a human being . . . upon sudden quarrel or in the heat of passion." Applying those requirements, factual appropriateness for a voluntary manslaughter

instruction requires some evidence, viewed in a light most favorable to the defendant, of an adequate provocation that deprives a reasonable person of self-control and causes that person to act out of passion, rather than reason. *Uk*, 311 Kan. at 397-98. A sudden quarrel, or any unforeseen angry altercation, can fall into the definition of heat of passion and thus be sufficient provocation. *Bernhardt*, 304 Kan. at 476 (citing *State v. Johnson*, 290 Kan. 1038, 1048, 236 P.3d 517 [2010]). But ongoing and protracted interactions do not usually provide factual support for a voluntary manslaughter instruction. See *State v. Wade*, 295 Kan. 916, 925, 287 P.3d 237 (2012) (heat of passion is taking action upon impulse and without reflection); *State v. Henson*, 287 Kan. 574, 583, 197 P.3d 456 (2008) (act of violence separated from the provocation is evidence of calculation rather than passion).

Lowry argues a sudden quarrel evolved during Davis' struggle to escape. He contends this physical struggle between Davis and Krahn prompted Lowry to "assist Krahn and . . . ultimately angered Krahn to the point where he strangled and killed Davis." But this ignores the requirement that a quarrel be sudden and unforeseen.

Our cases emphasize these requirements. For example, in *Uk*, the defendant argued he was provoked by a sudden argument with the victim, but other evidence showed that the arguments had been ongoing between the defendant and the victim. Under these circumstances we held a voluntary manslaughter instruction was not appropriate. 311 Kan. at 398-99. Likewise, in *Bernhardt*, the defendant's claim that he was provoked because his girlfriend slapped him was found insufficient to warrant a voluntary manslaughter instruction because evidence of the defendant's excessive brutality and ongoing conduct undermined his sudden quarrel and heat of passion arguments. 304 Kan. at 477.

Like the conduct at issue in *Uk* and *Bernhardt*, Davis' actions were part of a protracted altercation and were foreseeable. Krahn had placed a plastic bag over Davis'

head and Lowry and Krahn restrained him. Together they attempted to kill him. When Davis tried to escape being murdered, he did not start a sudden quarrel. Rather, he took the foreseeable step of defending himself from strangulation or suffocation—acts of violence Lowry and Krahn had initiated. See *State v. Gallegos*, 313 Kan. 262, 270, 485 P.3d 622 (2021) (voluntary manslaughter lesser included offense instruction not factually appropriate, evidence that defendant strangled victim with shoelace, which took several minutes, revealed a level of calculation not consistent with a sudden quarrel).

Davis' attempts to counter Krahn and Lowry's aggression were not an adequate provocation or the type of sudden quarrel that justifies a voluntary manslaughter instruction. The evidence, even when viewed in the light most favorable to Lowry, thus does not show a legally sufficient provocation that would make a voluntary manslaughter instruction factually appropriate. See *Becker*, 311 Kan. at 183 (factual appropriateness determination requires examining sufficiency of evidence in light most favorable to defendant). The trial judge did not err in declining Lowry's request to give the voluntary manslaughter instruction.

ISSUE II: CRIME SCENE AND AUTOPSY PHOTOGRAPHS ADMISSIBLE

Before trial, Lowry filed a pretrial motion in limine objecting to photographs, arguing they were unduly prejudicial. The motion was general and did not address specific photographs. Even so, during a pretrial hearing on the matter, the trial judge addressed all photographs the State planned to introduce. After a thorough discussion, the judge held the photographs were relevant to the type of injuries, the cause of death, and the events that happened in the house that evening. He also held that any prejudicial effect was outweighed by the probative value.

The judge later issued a written memorandum order in which he described each photograph and its probative value. Although the judge recognized that some photographs "are indeed gruesome," he recognized there is a need to show gruesome photographs in some cases, especially a murder case. The judge added that the photographs would help educate the jurors and would assist them in determining the cause and manner of death of each victim. He ultimately held the photographs were not unduly prejudicial but were relevant and probative.

During trial, Lowry renewed his pretrial objection with another broad objection made during a conference between defense counsel, the State, and the judge. He argued the photographs were cumulative, repetitious, and unduly prejudicial. The prosecutor conceded that defendant preserved the objections for review. The judge overruled the objections, repeating his rationale from the pretrial ruling. All autopsy photographs were referenced by the medical examiner during his testimony. And crime scene photographs were used by witnesses to describe the crime scene.

Against that backdrop, we review Lowry's arguments that the photographs were unduly prejudicial. Despite Lowry's attempt to have us focus on the gruesome nature of the photographs, something the trial judge acknowledged, our first analytical decision is determining whether the photographs are relevant, not whether they are gruesome. *State v. Alfaro-Valleda*, 314 Kan. 526, 533, 502 P.3d 66 (2022) (discussing two-prong test of relevance: [1] materiality, reviewed de novo and [2] probativeness, reviewed for abuse of discretion).

Here, the judge explained the relevance of each photograph. As to the post-mortem photographs of the three murder victims, which Lowry focuses on in his appellate brief, he noted they depict the extent of injury resulting from Lowry and Krahn fighting and strangling Davis and Leavitt and suffocating Fisher. The photos were referenced by the medical examiner in his testimony about the victims' injuries and

manner of death and were relevant to prove material facts and various elements, such as premeditation. See 314 Kan. at 534 (discussing cases recognizing relevance of photographs illustrating the nature and extent of wounds and corroborating testimony of witnesses, including pathologist opining about cause of death); *State v. Rodriguez*, 295 Kan. 1146, 1157, 289 P.3d 85 (2012) ("Although [photographs] may sometimes be gruesome, autopsy photographs that assist a pathologist in explaining the cause of death are relevant and admissible.").

Our de novo review of the photographs confirms the depictions of the crime scene and of the victims and their injuries were material. And we find no abuse of discretion in the trial judge's assessment that the photographs were probative.

At the next step of analysis, we review the trial judge's determination that the risk of undue prejudice does not outweigh the probative value of the evidence. When making that review, we recognize a trial judge errs by admitting gruesome photographs that *only* inflame the jury. *Alfaro-Valleda*, 314 Kan. at 535. But gruesome photographs are not automatically inadmissible. Indeed, "'[g]ruesome crimes result in gruesome photographs.'" 314 Kan. at 536 (quoting *State v. Green*, 274 Kan. 145, 148, 48 P.3d 1276 [2002]). Faced with an objection, rather than automatically admit or deny admission of a gruesome photograph, a trial judge must weigh whether the photograph presents a risk of undue prejudice that substantially outweighs its probative value. 314 Kan. at 535. On appeal, we review the judge's assessment for an abuse of discretion, often asking whether the judge adopted a ruling no reasonable person would make. 314 Kan. at 533-34 (explaining abuse of discretion standard); 314 Kan. at 535-36 (applying standard to prejudice versus probative analysis).

As we recently noted, "judges regularly admit gruesome photographs in murder cases . . . [a]nd we regularly hold no abuse of discretion occurred in admitting them." 314 Kan. at 536 (citing *State v. Morris*, 311 Kan. 483, 494-96, 463 P.3d 417 [2020] [detailing

many photographs showing decedent, his injuries, decomposition, and animal damage to the decedent's body]; *State v. Seba*, 305 Kan. 185, 213-15, 380 P.3d 209 (2016) [holding no abuse of discretion in trial court's admission of photograph showing trajectory of bullet through decedent's brain and photographs of decedent's deceased fetus]).

These photographs present yet another situation where we find no abuse of discretion. The trial judge analyzed each photograph. And while Lowry argues the prejudicial impact was compounded by the cumulative nature of some photographs, witnesses, including the pathologist, used the photos to explain their testimony. Each photograph served a purpose other than to inflame the jury. Thus, the trial judge did not abuse his discretion in determining the potential prejudice did not outweigh the probative value of admitting the photographs. The trial judge did not err.

ISSUE III: COMPULSION DEFENSE INSTRUCTION NOT FACTUALLY APPROPRIATE

At trial, Lowry requested a jury instruction on compulsion based on threats made by Krahn against the other participants. Under the compulsion defense,

> "[a] person is not guilty of a crime other than murder or voluntary manslaughter by reason of conduct which such person performs under the compulsion or threat of the imminent infliction of death or great bodily harm, if such person reasonably believes that death or great bodily harm will be inflicted upon such person or upon such person's spouse, parent, child, brother or sister if such person does not perform such conduct." K.S.A. 2022 Supp. 21-5206(a).

The coercion or duress must be present, imminent, and impending and cannot be invoked by someone who had a reasonable opportunity to avoid doing the thing, or to escape. Additionally, a compulsion defense instruction is not warranted when the coercion is not continuous. See *State v. Dupree*, 304 Kan. 377, 398-99, 373 P.3d 811 (2016); *State v. Anderson*, 287 Kan. 325, 337-38, 197 P.3d 409 (2008) (compulsion may

not be invoked by one who had opportunity to withdraw or avoid the act); *State v. Dunn*, 243 Kan. 414, 421-22, 758 P.2d 718 (1988) (crimes committed two weeks after threats did not warrant compulsion instruction).

State v. Hutto, 313 Kan. 741, 490 P.3d 43 (2021), illustrates these points in the context of a compulsion argument analogous to Lowry's. There, the defendant was a participant, along with several other people, in two murders. The defendant argued the physically violent and manipulative actions of the group's de facto leader warranted a compulsion instruction as a defense to felony-murder charges. But the evidence showed that the events unfolded over several days, and no evidence showed the defendant could not escape or contact law enforcement. "Hutto may have been manipulated into committing murder, but he was not acting under statutory compulsion when he committed the murders." 313 Kan. at 749.

Applying those principles, the trial judge denied Lowry's request for a jury instruction on the defense after finding no evidence showed a continuous and ongoing threat and finding that Lowry had opportunities to leave. We find no error in that determination. The evidence showed the events occurred over many hours during which Lowry left the house to hide Leavitt's car and to go shopping. This revealed he was free to extract himself from the situation if he so desired. And others did so; Liles, Flowers, and Folsom left as it became clear people would be or had been murdered. Like them, Lowry was free to come and go without hindrance, even if afraid of Krahn.

Simply put, the evidence does not show a continuous, ongoing threat against Lowry that would support a compulsion instruction. Rather, it shows that Lowry had several opportunities throughout the evening to avoid or escape the situation. A jury instruction for compulsion was not factually appropriate, and the trial judge did not err in declining to give the instruction.

ISSUE IV: NO CUMULATIVE ERROR

Cumulative trial errors may require reversal when, under the totality of the circumstances, the combined errors substantially prejudice a defendant and deny a fair trial. *Alfaro-Valleda*, 314 Kan. at 551. The cumulative error rule does not apply if there are no errors or only a single error. *Gallegos*, 313 Kan. at 277.

Here, we have no error and thus no error to accumulate.

CONCLUSION

We hold Lowry's arguments do not warrant reversal. We affirm his convictions.

Affirmed.

WILSON, J., not participating.