59 Kan.App.2d 367
Court of Appeals of Kansas.

STATE of Kansas, Appellant,
v.
Leon A. **DUKES** Jr., Appellee.

No. 121,790
|
Opinion filed February 12, **2021**.

Synopsis
Background: Defendant moved to dismiss charge of voluntary manslaughter, asserting his actions were immune from prosecution on ground of justifiable use of force. The District Court, 18th Judicial District, Sedgwick County, Deborah Hernandez Mitchell, J., denied motion but later granted defendant's motion to reconsider and dismissed the case. **State** appealed.

Holdings: The Court of Appeals, Warner, J., held that:

[1] in opposing request for justified-use-of-force immunity, the **state** is required to show probable cause that a reasonable person would believe that defendant's use of deadly force was not justified, not that use of deadly force may not have been justified;

[2] substantial competent evidence supported trial court's conclusion that defendant "waffled" in his account of whether victim had a gun when he first approached defendant's truck;

[3] evidence supported trial court's conclusion that defendant was not the initial aggressor in confrontation with victim; and

[4] use of deadly force was justified, and thus immunity applied.

Affirmed.

Procedural Posture(s): Appellate Review; Pre-Trial Hearing Motion.

West Headnotes (18)

[1] Homicide Defense of another person
Homicide Actual belief in or apprehension of danger

From a subjective standpoint, a defendant's use of deadly force is justified only if he or she sincerely believed it was necessary to kill to prevent imminent death or great bodily harm to the defendant or a third person. Kan. Stat. Ann. § 21-5222(b).

[2] Homicide Reasonableness of belief or apprehension

From an objective standpoint, a defendant's use of deadly force is justified only when a reasonable person in the defendant's circumstances would have perceived the use of deadly force in self-defense as necessary to prevent imminent death or great bodily harm. Kan. Stat. Ann. § 21-5222(b).

1 Cases that cite this headnote

[3] Criminal Law Special pleas in bar in general

Because justified-use-of-force immunity provides a defendant with not only a defense to criminal liability, but also complete immunity from criminal prosecution, the question of immunity should be addressed at the early stages of the proceeding based on the evidentiary record submitted by the parties at that time. Kan. Stat. Ann. § 21-5231(a).

[4] Criminal Law Special pleas in bar in general

After a criminal defendant files a motion requesting immunity under the

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justified-use-of-force immunity statute, the **state** must come forward with evidence to show probable cause that the defendant's use of force was not statutorily justified. Kan. Stat. Ann. § 21-5231.

[5] **Criminal Law** Special pleas in bar in general

To show probable cause that a defendant's use of force was not statutorily justified, the **state** must convince the district court that the evidence is sufficient for a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the defendant's guilt despite the claim of justified-use-of-force immunity; the **state** must show probable cause that the defendant did not honestly believe the use of force was necessary or that a reasonable person would not believe the use of force was necessary under the circumstances. Kan. Stat. Ann. § 21-5231.

1 Cases that cite this headnote

[6] **Criminal Law** Special pleas in bar in general

The **state** may overcome a defendant's request for justified-use-of-force immunity by demonstrating that the defendant was the initial aggressor and thus provoked the use of force. Kan. Stat. Ann. §§ 21-5226, 21-5231.

[7] **Criminal Law** Special pleas in bar in general

On a motion for justified-use-of-force immunity, the district court must consider the totality of the circumstances, weigh the evidence before it without deference to the **state**, and determine whether the **state** has carried its burden to establish probable cause that the person's use of force was not statutorily justified. Kan. Stat. Ann. § 21-5231.

[8] **Criminal Law** Special pleas in bar in general

To decide whether the **state** has met its burden to show probable cause that the defendant's use of force was not justified, as will defeat a defendant's motion for immunity from prosecution based on justifiable use of force, the district court must first make findings of fact based on the evidence presented at the hearing and the parties' stipulations, and then draw a legal conclusion, based on the totality of the circumstances, as to whether the **state** has met its burden to show the case should go forward. Kan. Stat. Ann. § 21-5231.

[9] **Criminal Law** Special pleas in bar in general

Though a district court need not make particularized findings on the record regarding its analysis of whether the **state** has established probable cause for a case to proceed beyond the request for justified-use-of-force immunity, the record must nevertheless demonstrate that the court not only recognized but also applied the appropriate legal standard. Kan. Stat. Ann. § 21-5231.

[10] **Criminal Law** Pleas

Appellate courts review the factual findings underlying a district court's ruling on justified-use-of-force immunity for substantial competent evidence, deferring to those findings if they are supported by legal and relevant evidence in the record. Kan. Stat. Ann. § 21-5231.

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[11] **Criminal Law** Pleas

Court of Appeals does not reweigh conflicting evidence or second-guess a district court's credibility assessments when reviewing a district court's ruling on justified-use-of-force immunity. Kan. Stat. Ann. § 21-5231.

[12] **Criminal Law** Review De Novo

Court of Appeals reviews de novo the district court's ultimate legal conclusion as to the applicability of justified-use-of-force immunity. Kan. Stat. Ann. § 21-5231.

[13] **Criminal Law** Special pleas in bar in general

In opposing a defendant's request for justified-use-of-force immunity, the **state** is required to show probable cause that a reasonable person would believe that defendant's use of deadly force was not justified, not that use of deadly force may not have been justified. Kan. Stat. Ann. §§ 21-5222(b), 21-5231.

1 Cases that cite this headnote

[14] **Criminal Law** Sufficient, reasonable, or probable cause

During a preliminary hearing in a criminal case, the **state** is not required to prove the elements of the crime charged beyond a reasonable doubt; instead, the **state** must convince the court that the evidence is sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the accused's guilt.

[15] **Criminal Law** Special pleas in bar in general

When a defendant requests justified-use-of-force immunity, the **State** is not required to provide a level of proof necessary to sustain a criminal conviction; rather, the **State** must show that a person of ordinary prudence and caution would not believe the use of force was necessary to protect the defendant or another person from a qualifying injury. Kan. Stat. Ann. § 21-5231.

[16] **Criminal Law** Special pleas in bar in general

Substantial competent evidence at hearing on defendant's request for justified-use-of-force immunity in prosecution for voluntary manslaughter supported trial court's finding that defendant "waffled," that is, vacillated, in his account of whether victim had a gun when he first approached defendant's truck; evidence indicated that defendant initially told police that victim had a gun when he first approached defendant's truck in parking lot where defendant shot victim, but defendant acknowledged at hearing that victim probably did not have gun when victim first approached truck, and defendant testified he thought he saw victim with a gun when defendant was driving out of parking lot. Kan. Stat. Ann. §§ 21-5222(b), 21-5231.

[17] **Criminal Law** Special pleas in bar in general

Evidence supported trial court's conclusion that defendant was not the initial aggressor in confrontation with victim, and thus defendant was entitled to justified-use-of-force immunity in prosecution for voluntary manslaughter, even

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though evidence conflicted as to whether victim had gun when he first approached defendant's truck, and even though defendant pointed his gun at victim in an effort to deter his aggressive approach; defendant had received several threatening messages written by victim the previous day, and victim was aggressive and confrontational when he approached defendant's truck. Kan. Stat. Ann. §§ 21-5221(a)(2), 21-5222(b), 21-5226, 21-5231.

[18] **Criminal Law** Special pleas in bar in general

Defendant's use of deadly force against victim was justified, and thus justified-use-of-force immunity applied in prosecution for voluntary manslaughter; victim aggressively charged defendant's vehicle and threatened him, defendant only used deadly force when victim yelled, "I've got something for you" and darted to his car to retrieve his own gun, and victim was found with a loaded semi-automatic weapon close to his hand. Kan. Stat. Ann. §§ 21-5222(b), 21-5231.

****186** *Syllabus by the Court*

1. K.S.A. 2020 Supp. 21-5231(a) **states** that a person who is justified in the use of deadly force under K.S.A. 2020 Supp. 21-5222(b) and whose conduct meets other statutory requirements is immune from criminal prosecution and civil action for that act.

2. After a defendant in a criminal case files a motion requesting immunity under K.S.A. 2020 Supp. 21-5231, the **State** must come forward with evidence establishing probable cause that the defendant's use of force was not statutorily justified. This generally means the **State** must show probable cause that (1) the defendant did not honestly believe the use of force was necessary or (2) a reasonable person would not believe the use of force was necessary under the circumstances.

3. Appellate courts review the factual findings underlying a district court's ruling on use-of-force immunity for substantial competent evidence, deferring to those findings if they are supported by legal and relevant evidence in the record. Appellate courts do not reweigh conflicting evidence or second-guess district courts' credibility assessments.

Appeal from Sedgwick District Court; DEBORAH HERNANDEZ MITCHELL, judge.

Attorneys and Law Firms

Matt J. Maloney, assistant district attorney, Marc Bennett, district attorney, and Derek Schmidt, attorney general, for appellant.

Patrick H. Dunn, of Kansas Appellate Defender Office, for appellee.

Before Warner, P.J., Powell, J., and McAnany, S.J.

Opinion

Warner, J.:

****187** ***367** Kansas law immunizes a person from criminal prosecution when he or she uses deadly force while reasonably believing the force is necessary to protect that person or others from imminent death or great bodily harm. In recent years, Kansas appellate courts have considered the contours of use-of-force immunity on multiple occasions, often instructing district courts on ***368** various aspects of the interpretation or application of the statutes that define it. This case presents a set of circumstances where the district court appropriately considered and applied the law, concluding Leon A. **Dukes** Jr. was immune from prosecution. We affirm the court's ruling.

FACTUAL AND PROCEDURAL BACKGROUND

Leon "Tony" **Dukes** Jr. owned a barbershop in Wichita. Because **Dukes**' customers often paid for his services with cash, **Dukes** carried a concealed handgun for protection.

On June 19, 2018, **Dukes** finished at the barbershop and met up with a friend, Tanisha Bryant. Bryant and **Dukes**

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ran an errand and then returned to let the cleaner into the shop. As the two waited in **Dukes**' truck, a car quickly pulled into the parking lot and abruptly stopped near the truck. Neither **Dukes** nor Bryant recognized the car or its occupants at first. But they could see that a man in the driver seat was yelling at a woman in the passenger seat. As they watched, the man appeared to punch the woman in the face. **Dukes** asked Bryant to stay calm, as he did not want to get involved; such confrontations were unfortunately common in the neighborhood.

The enraged driver (later identified as Lafian Berryman) got out of his car and started toward **Dukes**' truck. As he approached, Berryman shouted at the car's passenger (later identified as Leatha Lawton), "Where's the nigga at?" **Dukes** looked around, trying to find who Berryman might be referring to, but he and Bryant were the only other people in the parking lot. Lawton then got out of the car, and **Dukes** recognized her.

Dukes and Lawton had been involved in a relationship about a year before. More recently, Lawton had borrowed a small amount of money from **Dukes** so her son could put gas in his car, and she had paid him back about a week before the incident in the parking lot. A few days after she dropped the money off, Lawton messaged **Dukes** on Facebook, asking if he was still "loving around." **Dukes** had responded that he had "just been chilling." The night before the encounter in the parking lot, **Dukes** had received a series of messages from Lawton's Facebook account, **stating**:

***369** "Nigga what you want with my bitch";

"A nigga you keep hitting the bitch up like im playing nigga I know where you work cuz";

"I will be at your shop today nigga";

"Both of y'all going to get fucc Ed up nigga";

"I ain't got nothing but time nigga";

"Think I'm playing"; and

"I will bust your ass behind this pussy bitch."

****188** **Dukes** did not take these threats seriously when he received them.

As Lawton followed Berryman toward **Dukes**' truck, she shouted, "Tony, please tell him you and me ain't messed around." **Dukes** then addressed Berryman out of the cracked truck window, saying, "I ain't got nothing to do with that" and "I don't want no problems." Berryman continued towards the truck, and Bryant (who was terrified) told **Dukes** she thought Berryman had a gun. She then got out of the truck and ran away. Bryant later testified, "I remember the guy—the male outside the vehicle, he, like, pointed towards Tony's vehicle. And I'm not sure, I thought he had something in his hand at the time. And I remember hearing a gun cock."

Dukes drew his own handgun from between his seat and the console and pointed it at Berryman as he came up beside the truck in an effort to deter his assault, telling Berryman he did not "want any problems." When Berryman saw **Dukes**' gun, he said, "You want to play like that? Okay. I got something for you. I got something for you." Berryman ran to the passenger door of his car, which was closest to **Dukes**' truck. **Dukes** testified that he believed Berryman was going back to his car to get a gun: "Basically he was telling me he was going to get his gun .... I was thinking he was going to shoot me. He was telling me he was going to shoot me. ... There wasn't a doubt in my mind."

When Berryman reached the open passenger door, **Dukes** fired his weapon several times. **Dukes** later explained, "I fired the gun to save my life." He continued, "I'm just explaining the way I felt, and I was scared for my life." One of the shots hit Berryman in the left arm or shoulder and then lodged in his ribcage. Berryman died from the injury.

Surveillance footage did not show whether Berryman was armed when **Dukes** started shooting. But a loaded semi-automatic ***370** handgun with a scratched-off serial number was later found under Berryman's body on the passenger seat of the car.

After firing his weapon, **Dukes** backed out of the parking lot—still holding his gun out the window—and drove away towards his grandmother's house. **Dukes** testified that he saw Berryman holding a gun as **Dukes** drove away. **Dukes** then called 911. Later, **Dukes** went back to the parking lot to speak to the police, telling them that he fired only after Berryman "[came] out with the gun" and pointed it at him.

The **State** charged **Dukes** with voluntary manslaughter, alleging he acted with an honest but unreasonable belief that deadly force was justified. **Dukes** moved to dismiss the charge, asserting his actions were immune from prosecution. He claimed that he "fired his gun ... in reasonable anticipation that [Berryman] intended to shoot him."

The district court held an evidentiary hearing on the immunity question. The court later issued a decision

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explaining its findings of fact and conclusions of law. In its factual findings, the court noted that the evidence was "unpersuasive" as to whether Berryman was carrying a weapon when he first approached **Dukes**' truck; the surveillance footage did not conclusively demonstrate this point, and two 911-callers who observed the incident provided conflicting accounts. But the court found the evidence was "clear" that "a semi-automatic weapon was found in the passenger seat of [Berryman's] vehicle." And the court found it compelling that **Dukes** "stressed during his testimony that [Berryman] clearly said, 'I've got something for you', as he was running back towards his car where the gun was later found on the seat." Thus, the court found it "clear" that **Dukes** "had a subject[ive] belief that [Berryman] posed a danger to both [**Dukes**] and his passenger."

The court's decision then assessed the reasonableness of this belief. The court indicated that the **State** had to show probable cause "only that deploying deadly force *may* not have been justified." The court found the **State** met this burden, and thus **Dukes** was not immune from prosecution (though he was free to argue self-defense at trial).

Dukes filed a motion to reconsider, arguing the court applied the wrong standard in its ruling. **Dukes** argued that the **State** was required to establish by probable cause that ****189** a reasonable person ***371** *would not* have believed that deadly force was necessary under the circumstances, not that a reasonable person *may not* have believed such force was necessary. After reconsidering the caselaw on this point, the court agreed and granted **Dukes**' motion to dismiss.

Upon reconsideration, the court found that the "correct standard" for use-of-force immunity considers whether the **State** demonstrated "there was probable cause to believe that deadly force by [**Dukes**] *was* not justified." Applying this standard to the facts, the court underscored that the semi-automatic weapon was found on the passenger seat in Berryman's car. The court noted that the weapon was "found by [Berryman's] hand lying across the passenger seat as if he had dropped the gun once he was shot." And it observed that this was "clearly not the location of the gun" when Berryman and Lawton arrived at the parking lot because Lawton was in the passenger seat at the time.

Based on these observations and its previous factual findings, the district court concluded that "both [**Dukes**'] subjective belief and the objective reasonable person standard establish that [his] use of deadly force meets the requirement under K.S.A. 2016 Supp. 21-5231." The court therefore dismissed the case. The **State** appeals.

DISCUSSION

[1] [2]Kansas' use-of-force immunity is defined by statute. See K.S.A. 2020 Supp. 21-5220 through K.S.A. 2020 Supp. 21-5231. K.S.A. 2020 Supp. 21-5222(b) **states** that a person is "justified in the use of deadly force" when he or she "reasonably believes that such use of deadly force is necessary to prevent imminent death or great bodily harm" to that person or to someone else. Courts have indicated that this statute includes both subjective and objective components. From a subjective standpoint, a defendant's use of force is justified only if he or she "sincerely believed it was necessary to kill to prevent imminent death or great bodily harm to the defendant or a third person." ***State*** *v. Thomas*, 311 Kan. 403, 410, 462 P.3d 149 (2020). And objectively, the statutory justification only applies when "a reasonable person in the defendant's circumstances would have perceived the use of deadly force in self-defense ***372** as necessary to prevent imminent death or great bodily harm." 311 Kan. at 410-11, 462 P.3d 149.

[3]A person who is justified in the use of deadly force under K.S.A. 2020 Supp. 21-5222(b) (and whose conduct meets other statutory requirements) is "immune from criminal prosecution and civil action" for that act. K.S.A. 2020 Supp. 21-5231(a). This statutory framework thus provides an actor "true immunity" from suit. ***State*** *v. Collins*, 311 Kan. 418, 424, 461 P.3d 828 (2020). In other words, "K.S.A. 2019 Supp. 21-5231 provides not only a defense to criminal liability, but also complete immunity from criminal prosecution" and civil actions. ***State*** *v. Phillips*, 312 Kan. ——, ——, 479 P.3d 176 (**2021**); see K.S.A. 2020 Supp. 21-5231(a). For this reason, the question of immunity should be addressed "at the early stages of the proceeding based on the evidentiary record submitted" by the parties at that time. 312 Kan. at ——, 479 P.3d 176. And the district court must act as the gatekeeper to "insulate ... qualifying cases from continued prosecution and trial." 312 Kan. at ——, 479 P.3d 176.

[4] [5] [6]In a series of recent opinions, the Kansas Supreme Court has outlined the process for determining whether immunity applies. See *Phillips*, 312 Kan. at ——, 479 P.3d 176; *Collins*, 311 Kan. 418, 461 P.3d 828; *Thomas*, 311 Kan. 403, 462 P.3d 149; ***State*** *v. Hardy*, 305 Kan. 1001, 390 P.3d 30 (2017). After a defendant in a criminal case files a motion requesting immunity under K.S.A. 2020 Supp. 21-5231, the **State**

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must "come forward with evidence" to show probable cause "that the defendant's use of force was not statutorily justified." *Phillips*, 312 Kan. at ——, 479 P.3d 176. In doing so, the **State** must convince the district court that the evidence is "sufficient for a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of [the] defendant's guilt despite the claim of justified use-of-force immunity." 312 Kan. ——, Syl. ¶ 3, 479 P.3d 176. Practically speaking, this means that the **State** must show probable cause that "(1) the defendant did not honestly believe the use of force was necessary" or ****190** "(2) a reasonable person would not believe the use of force was necessary under the circumstances." 312 Kan. ——, Syl. ¶ 4, 479 P.3d 176. The **State** may also overcome a defendant's request for immunity by demonstrating that the defendant was the initial aggressor as defined in K.S.A. 2020 Supp. 21-5226 and thus provoked the use of force. See 312 Kan. ——, Syl. ¶ 5, 479 P.3d 176.

***373** [7] [8] [9]The district court—the gatekeeper who determines whether the case may proceed beyond the request for immunity—must "consider the totality of the circumstances, weigh the evidence before it without deference to the **State**, and determine whether the **State** has carried its burden to establish probable cause that the [person's] use of force was not statutorily justified." *Hardy*, 305 Kan. at 1011, 390 P.3d 30. As with any probable-cause analysis, this process involves two steps. First, the district court must make findings of fact based on the evidence presented at the hearing and the parties' stipulations. *Collins*, 311 Kan. at 425, 461 P.3d 828; *Thomas*, 311 Kan. at 413, 462 P.3d 149. Second, the district court must draw a legal conclusion, based on the totality of the circumstances, as to whether the **State** has met its burden to show the case should go forward. *Collins*, 311 Kan. at 425, 461 P.3d 828; *Thomas*, 311 Kan. at 413, 462 P.3d 149. Though the district court need not make particularized findings on the record regarding its analysis, the record must nevertheless demonstrate that the court "not only recognized but also applied the appropriate legal standard." *Phillips*, 312 Kan. ——, Syl. ¶ 6, 479 P.3d 176.

[10] [11] [12]Appellate courts review the factual findings underlying a district court's ruling on use-of-force immunity for substantial competent evidence, deferring to those findings if they are supported by legal and relevant evidence in the record. See 312 Kan. at ——, 479 P.3d 176; ***State*** *v. Macomber*, 309 Kan. 907, 916, 441 P.3d 479, *cert. denied* —— U.S. ——, 140 S. Ct. 319, 205 L.Ed.2d 189 (2019). We do not reweigh conflicting evidence or second-guess a district court's credibility assessments. *Hardy*, 305 Kan. 1001, Syl. ¶ 5, 390 P.3d 30. And we review the district court's ultimate legal conclusion—whether immunity applies—de novo. *Phillips*, 312 Kan. at ——, 479 P.3d 176.

The **State** argues that the district court deviated from its prescribed gatekeeper role in two respects. The **State** claims that the district court applied the wrong legal standard when it ultimately granted **Dukes**' request for immunity and effectively required a greater showing by the **State** than what probable cause demands. The **State** also claims that one of the district court's factual findings was not supported by evidence in the record and that this finding essentially undermined the district court's perception of the other evidence. For the reasons we discuss here, we are not persuaded by either argument.

***374** The **State** first asserts that the district court applied the wrong legal standard in its final immunity ruling. The **State** does not dispute the district court's finding that **Dukes** personally believed his use of deadly force was necessary under the circumstances. But it challenges the standard the district court applied to determine whether **Dukes**' beliefs were objectively reasonable. Specifically, the **State** argues it was only required to show probable cause that a reasonable person would believe that **Dukes**' use of deadly force *may not have been* justified (as the district court initially found)—not, as the court later ruled, that **Dukes**' conduct *was not* justified. And alternatively, the **State** argues that the difference in the two phrases—"may not have been justified" versus "was not justified"—is semantic at best and thus should not have resulted in a different result during the court's reconsideration of the facts.

[13]These arguments are wide of the mark. As a starting point, the standard the district court applied during its reconsideration of **Dukes**' request for immunity—whether the **State** showed a reasonable person would believe **Dukes**' use of deadly force "was not justified"—is the standard set forth in Kansas Supreme Court caselaw. See *Phillips*, 312 Kan. ——, Syl. ¶ 1, 479 P.3d 176; *Collins*, 311 Kan. 418, Syl. ¶ 1, 461 P.3d 828; *Thomas*, 311 Kan. 403, Syl. ¶ 1, 462 P.3d 149; *Hardy*, 305 Kan. 1001, Syl. ¶ 1, 390 P.3d 30 ****191** (all indicating the **State** must prove the use of force "was not statutorily justified"). The **State** acknowledges as much in its brief. Thus, the district court set forth the correct legal standard when it reconsidered its immunity decision.

As the district court explained in its reconsideration decision, the standard it applied initially—whether the use of force "may not have been justified"—was based on a

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phrase from this court's decision in *State v. Collins*, 56 Kan. App. 2d 140, 425 P.3d 630 (2018), that was taken out of context. The State argues that this phrase means the same thing as "was not justified" because the State was merely required to show probable cause to believe Dukes' use of deadly force did not meet the definition in K.S.A. 2020 Supp. 21-5222(b). But we disagree. As the district court here acknowledged, the first standard it applied—whether the use of force "may not have been justified"—caused the court to analyze the evidence differently than it did under the standard articulated by the Kansas Supreme Court. Accord ***375** *Phillips*, 312 Kan. at ——, 479 P.3d 176 (emphasizing that the district court must recognize and apply the correct legal standard).

The State's attempt to equate these two phrases is belied by its alternative argument—that the standard the district court ultimately applied (requiring a showing that the use of deadly force "was not justified") elevated the State's burden of proof beyond probable cause. This argument, too, is without merit. Indeed, the Kansas Supreme Court effectively rejected it in *Hardy*, 305 Kan. at 1011-12, 390 P.3d 30, when the court articulated the appropriate standard in use-of-force immunity, and we are bound by that precedent. See *State v. Rodriguez*, 305 Kan. 1139, 1144, 390 P.3d 903 (2017). But the State's argument is also unpersuasive because the State's burden when faced with a request for immunity, as explained by Kansas Supreme Court caselaw, is consistent with other pretrial probable-cause assessments.

[14] [15]During a preliminary hearing in a criminal case, the State is not required to prove the elements of the crime charged beyond a reasonable doubt. Instead, the State must convince the court that the evidence is "sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the accused's guilt." *State v. Huser*, 265 Kan. 228, 230, 959 P.2d 908 (1998). Likewise, when a defendant requests immunity under K.S.A. 2020 Supp. 21-5231, the State is not required to provide a level of proof necessary to sustain a criminal conviction. Rather, the State must show that a person of ordinary prudence and caution would not believe the use of force was necessary to protect the defendant or another person from a qualifying injury. See, e.g., *Macomber*, 309 Kan. at 917-18, 441 P.3d 479 (affirming the district court's ruling that there was "probable cause that Macomber's use of deadly force was not statutorily justified"). The district court applied this standard here.

[16]Finally, the State argues that even if the district court applied the correct legal standard, its ruling relied on a factual finding that was not supported by the evidence at the hearing. The State points out that though Dukes initially told the police that Berryman had a gun when he first approached Dukes' truck, Dukes acknowledged at the hearing that he probably did not. Both decisions by the district court described Dukes' changing account as ***376** "waffl[ing]" on whether Berryman initially had a gun. The State argues that this description was contrary to the record and infected the court's remaining findings, some of which relied on Dukes' description of his fear and motivation for shooting when he did. The State argues that the court should have inferred from Dukes' changing accounts that Dukes was the "initial aggressor" and thus not entitled to immunity.

The district court found the evidence conflicted as to whether Berryman had a gun when he first approached Dukes' truck, noting that two witnesses had reported Berryman was carrying a gun at that point and one other witness did not. The court also noted that Dukes' description when he originally reported the incident to the police was different from his testimony at the hearing. But the court found it was unnecessary to resolve this conflict because Dukes' actions were justified ****192** in light of Berryman's subsequent conduct.

In particular, the court found that Berryman had a semi-automatic weapon within reach (under him on the passenger seat) when he returned to his car. The district court found that this evidence and a reasonable inference therefrom—Berryman had purposefully retrieved the gun since Lawton was in the passenger seat when Berryman drove into the parking lot—combined with Dukes' testimony that he believed Berryman was retrieving a gun with the intent to shoot him and that Dukes saw Berryman with a gun when Dukes drove away, were sufficient to convince a reasonable person that Dukes acted with a reasonable belief that his life was in danger.

Having reviewed the transcript of the evidentiary hearing, we conclude there is evidence in the record that supports the district court's finding that Dukes "waffled"—i.e., vacillated or flip-flopped—in his account of whether Berryman had a gun when he first approached Dukes' truck. See Merriam-Webster.com, https://www.merriamwebster.com/dictionary/waffle (online ed. 2021). As the district court indicated, Dukes initially told the police that Berryman carried a gun when he came toward the truck, but at the hearing Dukes stated he thought he saw Berryman with a gun when Dukes was driving out of the parking lot. The State places too fine a point on the district court's use of the verb "waffled" (instead of using a word like "altered"), especially since the ***377** State did not correct the court when it used the same language in its initial denial of Dukes' request for

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immunity. Regardless, the district court's finding is supported by substantial competent evidence in the record.

At its core, the **State's** argument is not so much a challenge to the sufficiency of the evidence supporting the district court's finding as it is an effort to undermine to the court's credibility assessments and weighing of **Dukes**' testimony against the **State's** assertions that **Dukes**, not Berryman, was the initial aggressor in the confrontation. In its brief, the **State** urges several reasons why the court should not have credited **Dukes**' account of the events. But it is not our role on appeal to second-guess credibility determinations. Instead, we must determine whether relevant and legal evidence in the record supports the district court's factual findings. See *Macomber*, 309 Kan. at 916, 441 P.3d 479.

[17]The **State** presented its initial-aggressor theory to the district court, and the court did not find that theory persuasive. The court noted in its factual findings that regardless of whether Berryman was carrying a gun when he approached the truck, he was aggressive and confrontational. At least two witnesses other than **Dukes** believed that Berryman was armed from the outset. The evidence showed that **Dukes** had received several threatening messages—sent from Lawton's phone, but apparently by Berryman—the previous day. And though **Dukes** did point his gun at Berryman in an effort to deter his aggressive approach, K.S.A. 2020 Supp. 21-5221(a)(2) indicates that the threat of deadly force, including "the display or production of a weapon," does not "constitute use of deadly force" if that act is done for the limited purpose of "creating an apprehension that the actor will, if necessary, use deadly force in defense of such actor or another." The district court did not abuse its discretion when it rejected the **State's** argument that **Dukes** was the initial aggressor. Accord ***State*** *v. Smith*, 303 Kan. 673, 679, 366 P.3d 226 (2016) (affirming the district court's rejection of the **State's** argument in an *Ortiz* hearing when the **State** failed to carry its evidentiary burden of proof).

[18]Under K.S.A. 2020 Supp. 21-5222(b), **Dukes** could use deadly force if he reasonably believed it was necessary to prevent imminent death or great bodily harm to himself or others. **Dukes** ***378** was faced with a situation where an aggressive man charged his vehicle and threatened him. But **Dukes** only used deadly force—that is, he only shot at Berryman—when Berryman yelled, "I've got something for you" and darted to retrieve his own gun. Berryman was found with a loaded semi-automatic weapon close to his hand.

The **State** bore the burden to establish probable cause to believe that **Dukes**' use of deadly force was not legally justified. The ****193** district court did not err when it found the **State** failed to make this showing and granted **Dukes**' request for immunity under K.S.A. 2020 Supp. 21-5231(a).

Affirmed.

All Citations

59 Kan.App.2d 367, 481 P.3d 184

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