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NO. 21-124510-S

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IN THE SUPREME COURT  
OF THE STATE OF KANSAS

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STATE OF KANSAS  
Plaintiff/Appellee

v.

DARY JENE GREEN  
Defendant/Appellant

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AMENDED SUPPLEMENTAL BRIEF OF APPELLANT

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Appeal from the District Court of  
Wyandotte County, Kansas  
Honorable Jennifer Myers, Judge  
District Court, No. 19-CR-161

Dary Jene Green #126193  
WCF  
1806 Pinecrest Circle  
Winfield, KS 67156

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## NATURE OF THE CASE

Dary Green was convicted of premeditated first degree murder. Green represented himself thru trial. Green brings this direct appeal to this court. Green moves this court to address the merits set forth herein.

## STATEMENT OF ISSUES

ISSUE 1: ARREST WITHOUT WARRANT VIOLATED DEFENDANT'S CONSTITUTIONAL RIGHT.

ISSUE 2: PROSECUTORIAL MISCONDUCT

ISSUE 3: THE TRIAL COURT AND STATE PROSECUTOR FAILURE TO EXCLUDE WITNESSES STATEMENT DENIED DEFENDANT A FAIR TRIAL.

ISSUE 4: THE STATE AND TRIAL COURT ERRED BY ALLOWING STATE WITNESSES, MORRIS HOLISHED TO TESTIFY AT TRIAL THAT DJ WAS DARY GREEN.

## STATEMENT OF FACTS

At the outset, Green notes that appellate counsel erroneously reffered to Dary Green as DJ throughout his brief. (See Appellant's Brief, p. 1). Appellant wants this court to know appellate counsel misstated the facts by stating Green arrived in his car with the deceased as his passenger. In fact, the record show Hollinshed stated DJ was the person who drove down the street, not Mr. Green. (See Affidavit, p. 1). Green ask this court to note appellate counsel erroneously reffered to him as Green throughout his brief. Green states the appellate counsel misstated the facts by stating Holished saw Green shoot the decease. However, Holished stated in the affidavit DJ shot the deceased. (See Affidavit, 1).

Appellate counsel misstated the facts by stating Holished saw the deceased pull up in a black cadillac with Green. The Affidavit correctly stated deceased pull up in a black cadillac with a man named DJ. (Affidavit, 1).

Appellate counsel misstated the facts by stating as the deceased was getting out, Holished watched as Green pulled out a gun. The record correctly states as the deceased was getting out, Holished watched as DJ pulled out a gun. (See Affidavit, 1).

Appellate counsel misstated the facts by stating Holished ask Green not to shoot. The affidavit correctly states Holished asked DJ not to shoot. (Affidavit, p. 1). Appellate counsel misstated the facts in his brief by stating Green shot twice at the deceased, hitting her once. However, the record stated it was DJ who shot twice at the deceased, hitting her once. (Affidavit, p. 1).

Appellate counsel erroneously stated in his brief Michael William further testified that Green shot the deceased. However, the record show Williams, the second witness, stated at the preliminary hearing he did not know the race of the driver. (See Preliminary Hearing, p. 41, L. 22-25). Therefore Williams did not know the voice of the driver in the drivers seat because he never had a conversation or communication with the defendant. Micheal Williams never seen Green at the crime scene.

## ARGUMENT AND AUTHORITIES

The defendant was booked for first degree murder despite the fact there was no warrant for his arrest. Defendant allege the officer lied to him about his arrest upon which he was detained for. The arresting officer (Kellog) subsequently arressed defendant without reading him his miranda rights.

A hearing was held, i.e., suppression hearing, where the arresting officer stated in court he lied when he informed defēndant he had a warrant for defendant's arrest. (See Sup-  
pression hearing). The issue here is whether an arrest warrant must be issued when a defendant is detained follow-  
ing a warrantless felony arrest when no probable cause has been found by the court based on the arresting officer affidavit. Green states he was the sole owner of his gray cadillac and he did not give the officer consent to remove his vehicle from his residence. Defendant alleges the arrest was improper because an arrest warrant should have been obtained prior to entering the home. Based on this argument, defendant allege all proceedings occuring after the illegal arrest was improper and therefore, any evidence found at the time of his arrest should be suppressed. See State v. Platten, 225 Kan. 764, 594, P.2d 202 (1979). Defendant cite Kansas authority that an arrest without a warrant and the subsequent searches by officers violated his rights under the Fourth Amendment and Section 15 of Kansas Constitution Bill of Rights.

Green ask the court to take judicial notice that the color of the car that was seen at the crime scene was black, but that his car was grey. (See Trial trans., ). Green states it was a fact there was no premeditation because the State's only witness stated the man woh did the shooting was DJ, not Dary Green. (See Affidavit, p. 1).

Green disagrees with counsel's statement the evidence at trial would support a conviction for the lesser included offense of intentional second degree murder because Morris Holished stated his statement that the person he saw at the scene was a man named DJ, not Dary Green. (See Affidavit, p. 1).

#### ARGUMENT AND AUTHORITIES

##### ISSUE 1: ARREST WITHOUT A WARRANT VIOLATED DEFENDANT'S CONSTITUTIONAL RIGHT.

In February 19, 2019, at 12:00 am, defendant was at his residence asleep when he was awoke by an officer. The officer informed defendant he had a warrant for his arrest; however, there was no warrant for defendant's arrest. However, defendant's wife testified in court that the officer stated that he had a warrant for Green's arrest and a million dollar bond. (See suppression hearing transcript). Defendant was detained at the Jackson County detention center, in Missouri. Thereafter, defendant learned there was no warrant but a bond was set for one million dollars, but there is no record to support this claim.

The Fourth Amendment to the United States Constitution, while not identical, is essentially the same. Platten, 225 Kan. 764.

Defendant argues that warrantless entry for purposes of arrest is illegal because searches conducted outside the judicial process, without prior approval by a judge or magistrate are per se unreasonable under the Fourth Amendment to the United States Constitution. 225 Kan. 764. In Platten, as in the instant case, defendant was arrested without a warrant within the privacy of his home, that he did not consent to the entry by the police, and that no warrant was obtained prior thereto. Such an intrusion upon a person's right to privacy, absent exigent circumstances is a violation of the Fourth Amendment to the United States Constitution and Section 15 of the Kansas Bill of Rights.

Defendant asserts that the arresting officer gained illegal entry of his home; that the officer was not authorized to search defendant without a search warrant because there was no probable cause to connect him to a felony and he was not considered dangerous. State v. Anderson, 1991 Kan. App. LEXIS 238. Defendant contends that the arresting officer act of intentionally given false statements to him incidental to the warrantless search of his home without consent constitutes unlawful detention under the Fourth Amendment and Kansas Constitution Bill of Rights because there was a close proximity between the constitutional violation and consent. State v. Murlock, 40 Kan. App. 2d 216, 190 P.3d 1002 (2008).

Section 15 of Kansas Bill of Rights provides "The rights of the people to secure in there persons and property against unreasonable searches and seziures, shall be in-violate; and no warrant shall issue but no probable cause, supported by oath or affirmation, particularly describing the place to be searched and the person or property to be seized.

Defendant argues the arresting officer had no probable cause to detain him without a warrant and without conscent to search his residence in light of the officers deception to obtain defendant's girlfriend consent to serch his home, a ruse entry.

For all the above reasons, this court must reverse de-fendant's conviction or dismiss his case on the grounds that the warrantless arrest was unlawful.

#### ISSUE 2: PROSECTORIAL MISCONDUCT

Green asserts that prosecutorial misconduct denied him a fair trial because the prosector did not confine her remarks to the evidence during his trial. As a fundamental rule in closing arguments, prosecutor must confine there argument to comments to matters in evidence. Commenting to facts not in evidence is clearly improper. State v. Carter, 278 Kan. 74, 91 P.3d 1162 (2005).

The prosecutor misstated the evidence by stating that the victim was standing and shot in the back.

Green concedes a prosecutor is allowed considerable latitude in discussing the evidence and drawing reasonable inferences based on the evidence. 278 Kan. 74. Green argues because the prosecutor's statement is not supported by the evidence, it is beyond the wide latitude prosecutors are allowed in commenting on the evidence. State v. Baker, 281 Kan. 997, 135 P.3d 1098 (2006).

Green argues that the prosecutor's remarks constitutes reversible error. The misstatement of facts about the victim being shot in the back was a factual misrepresentation, was gross and flagrant, denying Green a fair trial because the jury was led to infer shooting the victim in the back constituted premeditated first-degree murder. The prosecutor's misstatements that the victim was shot in the back throughout Green's trial was a misstatement of fact constituting prejudice to Green's theory of defense as it was a significant part of the State's case.

Green notes that the factual misstatements was gross and flagrant constituting plain error denying defendant the right to a fair trial. For these reasons Green ask the court to remand his case to the district court for a new trial. Green challenges the prosecutor telling the jury the victim was shot in the back. A juror could easily construe the prosecutor's misstatements as suggesting Green did this, i.e., shoot the victim in the back, in preparation for murder, amplifying the impact of the State's motive evidence.

Green argues it was error for the prosecutor to tell the jury throughout trial that the victim was standing and shot in the back. These misstatements conveyed serious adverse impressions to the jury. The statements improperly declared that Green had motive to commit premeditated first-degree murder.

Green points out the prosecutor had access to the autopsy report and the prosecutor knew the victim was shot in the arm instead of being shot in the back. Yet, the prosecutor chose to misstate the evidence despite Green's objection at trial. When prosecutor's argue facts not in evidence, the argument is outside the wide latitude given to them. State v. Hall, 292 Kan. 841, 848, 257 P.3d 272 (2011). This error prejudiced Green's due process right to a fair trial and thus requires reversal and remand for a new trial.

ISSUE 3: THE TRIAL COURT AND STATE PROSECUTOR FAILURE TO EXCLUDE WITNESS FALSE STATEMENT DENIED DEFENDANT A FAIR TRIAL.

Defendant Green ask this court to reverse his conviction because the State and trial court failed to exclude Morris Hollinshed prejudicial statements during trial. State v. Murrell, 224 Kan. 689, 585 P.2d 1017 (1978).

The first statement which prejudiced Green's case was when he stated to the jury the decendent was shot in the back. However, the autopsy report states the decendent was shot one time in her right arm, above her right elbow, the bullet passed thru her right torso, exiting out her left side.

The second misstatement of fact which prejudiced Green's case was when the State prosecutor allowed the jury to consider Hollished statement the person driving the black cadillac was DJ, who is known as Dary Green.

The third misstatement of fact which prejudiced Green's case was when the prosecutor told the jury Hollished would testify to the fact defendant possessed a 40 caliber hand gun, and that he believed that was the same gun used by the defendant. Green argues that the above misrepresentations was outside the scope of evidence, and such admissions prejudiced his right to a fair trial. This error constitutes remand of defendant's case for a new trial.

ISSUE 4: IT WAS PREJUDICIAL ERROR TO ALLOW THE STATE WITNESS, MORRIS HOLLISHED TO EXPLAIN TO THE JURY DJ WAS DARY GREEN.

The trial court and the State prejudiced Green's case by allowing Morrish Hollished to tell the jury a man name DJ was Dary Green because the State had no factual support in evidence to support this fact in its case in chief. See LaPointe v. State, 42 Kan. App. 2d 522, 214 P.3d 684 (2009). Green alleges the State failed to present evidence that Green and DJ was the same person whom Hollished alleged was at the crime scene. The trial court failed to suppress Hollished statement which constitutes reversible error because the statement was false and misleading thus should not have been presented to the jury as it negatively affected Green's defense. Green asserts the State failed to place him at the scene as being

DJ because Holished never factually stated Green was the alleged shooter. Holished merely stated that DJ was the shooter. At one time Hollished did state Green was DJ, but there is no evidence to support Holished statement. This error in itself prejudiced Green's defense because Holished inconsistent statements about the alleged shooter was based on facts unsupported by evidence.

ISSUE 5: THE DISTRICT COURT ERRED WHEN THEY FAILED TO CONSIDER DEFENDANT'S MIRANDA CLAIM.

Mr. Green contends that the district court erred by failing to address the merits of his miranda claim during his hearing to suppress his Fourth Amendment right. Defendant attempted to address the merits of his miranda claim at the suppression hearing. The court refused to consider the issue, stating:

"THE COURT: what's the relevance of miranda with regard to the motion to suppress?

MR. GREEN: The miranda warning would -- cause he arrested me on that night without reading my miranda right warning.

THE COURT: Okay. What does that have to do with the motion to suppress?

MR. GREEN: Because it violated the Fourth Amendment, all right?

MR. GREEN: Fifth Amendment. They violated the Fifth Amendment.

THE COURT: Okay. We'll, were here to talk about the Fourth Amendment. So your -- that question is -- the objection sustained. We're not here for Miranda. If you want to talk about Miranda in statements that were taken, that can be the

subject of a separate motion and separate hearing, not for today.

MR. GREEN: Am I allowed to ask was my Miranda warning read? Did he witness it? Am I allowed to ask that?

THE COURT: What is the relevance of Miranda today? There's no relevance of Miranda for purposes of this hearing.

(See Suppression Hearing, p. 138-39)

Green was not given Miranda warnings when arrested and the officer came to his residence, and the trial court refused to address the merits of Green's Fifth Amendment Miranda claim. The reason the court refused to address the merits of Green's Miranda claim was because the court did not think it was appropriate that Green raised the issue at the suppression hearing. Here, the court abused its discretion by denying Green the right to address the merits of his Miranda claim. Thus, the court denied Green due process of law at the suppression hearing. *State v. Aguirre*, 301 Kan. 950, 349 P.3d 1245 (2015).

Green contends that the trial court should hold a hearing to determine whether he may voluntarily waive his Miranda rights. Green alleges the district court erred by failing to hold a hearing to allow him to present his evidence to the court. Green submits this issue concerns a factual dispute which cannot be resolved from the record and files.

Defendant filed his motion to suppress, which itself specifically sought to contest his unlawful arrest without an arrest warrant.

The procedural safeguards of miranda are to be timely applied. See, State v. Goering, 8 Kan.App.2d 338, 656 P.2d 790 (1983). The trial court failure to order a suppression hearing to determine whether defendant validly raised a Fifth Amendment bar was deficient under the circumstances surrounding this case.

For the above reasons, this Court should find the district court erred by failing to consider defendant's miranda claim. Defendant ask that his conviction be reversed and remanded for new trial or dismissal.

#### CONCLUSION

For the above reasons, defendant ask that this court remand his case back to the district court for a new trial.

Respectfully submitted,



Dary Jene Green #126193

#### CERTIFICATE OF SERVICE

The foregoing Supplemental Brief was mailed, postage prepaid, on the 23<sup>rd</sup> day of August, 2023, upon the following: Appellate Court, 301 SW 10th Ave., Topeka, KS 66612, District Attorney, 120 SW 10th Ave., Topeka, KS 66612-1594, District Attorney, and James M. Latta, Attorney, 700 SW Jackson, Topeka, KS 66603-3733.



Dary Jene Green #126193