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Federal law defines brandished as, "with reference to a dangerous weapon (including a firearm) means that all or part of the weapon was displayed, or the presence of the weapon was otherwise made known to another person, in order to intimidate that person, regardless of whether the weapon was directly visible to that person. Accordingly, although the dangerous weapon does not have to be directly visible, the weapon must be present." (18 USCS Appx § 1B1.1)

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# The Volokh Conspiracy

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## If You Brandish a Gun in Self-Defense in Kansas, You'd Best Shoot It

by Eugene Volokh on February 12, 2010 5:41 pm

From *State v. Flint*, 2010 WL 445934 (Kan. App. Jan. 29):

“ [A]fter leaving a bar in Emporia where [Brandon] Flint's fiancée and another man exchanged angry words, Flint walked to his car. Outside, Flint's fiancée and two men continued to talk in a heated fashion. Flint's fiancée fell to the ground during the scuffle. At this point, Flint got his gun, walked back across the street, and pointed the gun at the chest of one of the men; both men immediately backed away. Flint's fiancée got up, she and Flint walked back to Flint's car, and they drove away.

The State charged Flint with aggravated assault, and the jury convicted him. Flint requested an instruction for defense of another under K.S.A. 21-3211(a), but the district court denied his request, ruling Flint's use of force was greater than reasonably necessary to resist the attack.

Now at this point one might think there'd be a discussion of whether there was sufficient evidence that Flint reasonably thought that the fiancée was in danger of death, serious bodily injury, or the like, or merely was involved in a not very serious scuffle. Or one might think there'd be a discussion of whether at the point Flint pointed the gun, the fiancée was in continuing danger, or whether the men had already started to walk away. The discussion in the opinion suggests to me that there'd probably be enough of a factual question on the subject that the matter should be left to the jury, with a suitable defense-of-others instruction (unless no reasonable jury could find, beyond a reasonable doubt, that defense of others was justified, in which case Flint should have gotten a directed judgment of acquittal). But if the court had said that the facts revealed no reasonably perceptible threat of serious harm to the fiancée, I'd have been inclined to defer to the court's knowledge of the record.

But that's not what this case is about. Let's keep reading:

“ A majority of the Supreme Court held in [*State v. Hendrix*, 289 Kan. 859 (2009).] that K.S.A. 21-3211 created a defense of self or defense of another only when there is “use of force.” The majority decided actual physical contact rather than a mere threat or display of force is necessary



to raise this defense. Since Flint merely threatened the use of his gun and there was no actual force applied, he was not entitled to the defense of another.

Wow. Had Flint actually shot the gun, he would presumably have been entitled to have the jury consider his defense-of-others defense. (Such a defense would generally be roughly similar to a self-defense defense, and use of deadly force is generally allowed in self-defense against sufficiently serious threats.) But because Flint merely brandished the gun, he's a felon — even if he reasonably believed that brandishing the gun was necessary to save his fiancée's life. That is simply absurd.

Here, by the way, is Judge Greene's concurrence:

“ I agree that the outcome here is controlled by *State v. Hendrix*, 289 Kan. 859, 218 P.3d 40 (2009), but I write separately to note that the factual scenario in this case is very much like the hypothetical scenario depicted by Chief Justice Davis' dissent in *Hendrix*. The fact that Flint has been deprived of self-defense here demonstrates the wisdom of the Chief Justice Davis' dissent and the urgent need for a legislative fix of K.S.A. 21-3211.

And here's what I wrote about *Hendrix* the day it was decided:

“ Defending Yourself Against Attack by *Threatening* Force Is a Crime in Kansas

That's what the Kansas Supreme Court just held, interpreting Kansas Stats. § 21–3211. The statute reads,

“ (a) A person is justified in the use of force against another when and to the extent it appears to such person and such person reasonably believes that such force is necessary to defend such person or a third person against such other's imminent use of unlawful force.

(b) A person is justified in the use of deadly force under circumstances described in subsection (a) if such person reasonably believes deadly force is necessary to prevent imminent death or great bodily harm to such person or a third person.

(c) Nothing in this section shall require a person to retreat if such person is using force to protect such person or a third person.

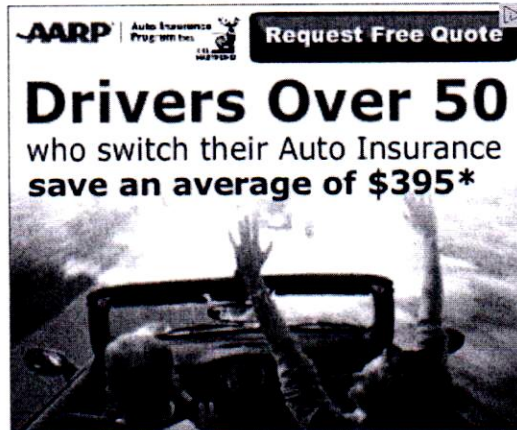
And the court concluded that while this allows self-defense that involves an actual attack on the attacker — for instance, hitting, shooting, or stabbing the attacker — it does not allow self-defense that merely involves a threat of violence against the attacker.

I think the dissent is right to say that “force” can reasonably be read as including “constructive force” such as threats, especially in light of the substantial American legal tradition of reading force this broadly (and despite the fact that other Kansas statutes generally do say “force or threat” or some such). And this is especially so because, as the dissent points out, the result is

absurd: Restraint in the use of defensive violence is rewarded by criminal punishment. I believe courts should generally read statutes as written, but they should also read their terms against the backdrop of the legal rules that help define these terms, and principles such as the rule of lenity, and the presumption against readings that produce absurd results.

Moreover, note the implications of this ruling for neighboring sections: § 21–3215, for instance, provides that “A law enforcement officer, or any person whom such officer has summoned or directed to assist in making a lawful arrest, need not retreat or desist from efforts to make a lawful arrest because of resistance or threatened resistance to the arrest. Such officer is justified in the use of any force which such officer reasonably believes to be necessary to effect the arrest and of any force which such officer reasonably believes to be necessary to defend the officer’s self or another from bodily harm while making the arrest.” Presumably then police officers remain criminally liable if they say “Stop, or I’ll shoot!,” though not when they actually actually shoot. Does that make sense?

But in any event, whether or not the Kansas Supreme Court rightly interpreted the statute, the Kansas Legislature should repair this problem as soon as possible. Likewise, pro-self-defense groups in Kansas should make sure that this is on the Legislature’s docket.



< The Myth of Lost Financial Virtue:

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70 comments



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David Breaux · 4 years ago

**ShelbyC:** Anybody have any thoughts on a 1A right to threaten the legal use of force?

I was recently being followed by two vehicles, my rate of speed was 15mph due to obvious yet unknown vehicle trouble. I tried to indicate by switching on my flashers and pulling over and letting the two cars pass. Two times they went around only to again continue to follow very closely behind



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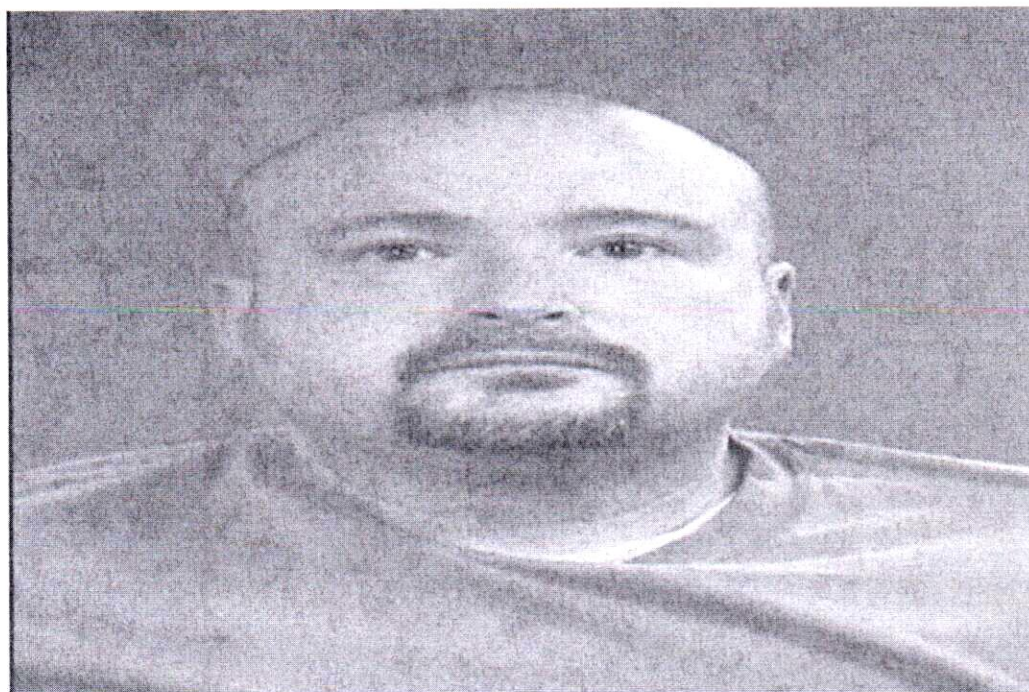
**40°**

## **Man Attempts to Stop Felon and Charged**

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by [Sharon Ko](#)

Published May 28, 2013



MEDFORD, Ore. — A man uses his firearm to stop a wanted felon and he's now facing criminal charges.

Medford police say the incident started around 11:30 p.m. on Sunday. They responded to an apartment complex on the 2000 block on Table Rock Road for a disturbance call. When officers were on scene, they heard a gunshot and a man running out toward the parking lot.

Police say 40 year-old Jonathon Kinsella, a wanted felon, was running. 36 year-old Corey Thompson told NewsWatch 12, he shot a warning shot at Kinsella because he was trying to break in through his back door.

“This is the end result. You break into someone’s house, there’s consequences,” explained Thompson.

Thompson says he grabbed his AR-15 assault rifle and told Kinsella to stop near his back door.

“When I’m dealt with a stressful situation, being a veteran from Iraq and the Afghanistan war, it’s natural. I just jump into combat mode. I told him I’m going to give you a warning shot,” said Thompson.

But police say that was not the right move.

“There was nothing that the suspect was doing that was aggressive enough to justify the shooting. In fact, the suspect was walking away,” said Medford Police Lt. Mike Budreau.

Thompson was charged with Unlawful Use of a Weapon, Menacing and Reckless Endangering.

“I can see where they’re coming from, with those kinds of ordinances and stuff. I understand yes, I did discharge my weapon but I was careful not to fire it at any body’s residence. It was at the ground specifically,” explained Thompson.

Unlike bullets from handguns, police say firing bullets from assault rifles can skip.

“They just don’t hit something and absorb. Especially if it’s something with that high velocity. It could skip off of objects and wind up going into a house, through a wall, through a window,” said Lt. Budreau.

Police took Thompson’s assault rifle because they say it was used in the commission of a crime. If a judge finds Thompson not guilty, he will get his firearm back.

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1.

*rick says:*

May 28, 2013 at 7:43 pm (UTC -8)

flippin cops need to go...ask jos.county my family does fine without cops allready gottin rid of a few bad guys ..we need that hear..bad guys and gals invited here... WORD TO THE IDIOTS ....WE ARE ARMED YOU ARE IN DANGER..

1.