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Lawyer says Roeder can't use defense

BY RON SYLVESTER
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Scott Roeder's lawyer said Tuesday that the defense his client had hoped for in the murder trial of a Wichita abortion provider isn't legal.

On Monday, Roeder publicly confessed to killing George Tiller to reporters from the Kansas City Star and the Associated Press. Roeder also said he hoped to use as his defense that killing Tiller was necessary to save the lives of the unborn.

"There's no such thing as the necessity defense," said Steve Osburn, head of the Sedgwick County Public Defender's Office and Roeder's lead counsel. "This is a fictional defense made up by these people."

It's not a legal defense, either, Osburn said.

"There is nothing in the law of Kansas, or anywhere else, that allows this kind of defense," Osburn said.

Not-guilty plea

Roeder, 51, of Kansas City, Mo., is charged with one count of first-degree murder in Tiller's death and two counts of aggravated assault for allegedly threatening two ushers who tried to stop him during the May 31 shooting in the foyer of the physician's Wichita church. Roeder has pleaded not guilty.

While prosecutors and defense attorneys say they expect Roeder's trial to resemble other first-degree murder trials, there are some exceptions.

Picking a jury was always expected to be difficult. But Roeder's statements this week indicate that he wants the trial to focus on the morality of abortion rather than Tiller's death.

"It was always going to be a can of worms picking a jury," Osburn said. "Nothing has changed about that."

Jurors could face personal questioning about their views on abortion.

Judge Warren Wilbert is scheduled to hear arguments about jury selection at pre-trial hearings next month.

Linda Marvin, who supervises juries at the Sedgwick County Courthouse, said she had already discussed jury selection processes with Wilbert. She declined to release any details at this stage until the judge approves.

Motions about jury questionnaires are under seal.

Jurors' beliefs

Abortion comes up so rarely as the focus of trials, jury consultant Anne Reed said she doesn't remember ever seeing a pre-trial questionnaire dealing with that issue. As the author of the blog "Deliberations," Reed keeps a library of jury questionnaires.

"There are not only political issues involved, but personal ones," said Reed, a trial lawyer in Milwaukee. "Experiences such as having an abortion or knowing a loved one who has had one help form personal opinions about that."

Lawyers are aware that potential jurors can let their personal beliefs enter the legal process in trials that include controversial issues.

While Roeder's defense of protecting the unborn may not be recognized by law, that may not stop jurors from trying to insert those views into the trial.

Lawyers call verdicts based on personal beliefs "juror nullification." The term refers to juries taking the law into their own hands.

It happened during the civil rights movement, when white juries in the south acquitted white people despite overwhelming evidence that the defendant had killed a black person.

To find out whether jurors can set aside their beliefs about abortion and listen to the evidence, lawyers may have to ask some personal questions, such as any experiences with abortion.

"I would think this would be similar to a sexual assault case," Reed said. "In those cases lawyers, very respectfully, ask potential jurors about personal experiences with those types of crimes. Most lawyers find ways to respectfully learn about personal issues."

Jury nullification

Reed said even jurors who don't know about the theory of nullification can easily find it, because it is prevalent on the Internet.

"So even if they're searching 'jury duty' for something as innocent as what to wear, they may be exposed to jury nullification," Reed said.

The defense that Roeder had hoped for isn't recognized by law, but it is included on numerous Web sites, mostly by anti-abortion activists. That includes ScottRoeder.org, sponsored by a group calling itself the "radical fringe," registered to an address in Wisconsin.

It doesn't represent the mainstream of the anti-abortion movement, said Troy Newman, president of Operation Rescue in Wichita.

"My first reaction was, 'Hey, Roeder, this isn't 'Law and Order.' Or Hollywood," Newman said, referring to a popular television show. "No matter what his defense is, it is not representative of the pro-life movement, and I wish he'd stop trying to identify with people who abhor people who use violence to justify their religious beliefs."

A murder trial

As the trial judge, it's up to Wilbert to decide what testimony is relevant, including what Roeder might say if he decides to take the witness stand. A judge also can instruct the jury that a certain defense is not allowed by law.

Lawyers may try to limit the role that abortion plays in the trial. Despite the emotion, the politics and hot-button issues, lawyers on both sides say they're hoping to keep the focus on Roeder's trial much like any other first-degree murder case.

"Every case is different, but our preparation is always to present the facts in front of a jury," said Georgia Cole, spokeswoman for the Sedgwick County District Attorney's Office.

Said Osburn: "We are preparing for a defense much like we do in any murder trial."

Jury selection begins Jan. 11.

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