No. 19-120767-A

IN THE
COURT OF APPEALS OF THE
STATE OF KANSAS

STATE OF KANSAS
Plaintiff-Appellee

vs.

ANITA JO ALBANO
Defendant-Appellant

BRIEF OF APPELLANT

Appeal from the District Court of Riley County, Kansas
Honorable John F. Bosch, Judge
District Court Case No. 17CR455

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Notice to Attorney General Pursuant to K.S.A. 2016 Supp. 75-764

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Statement of the Case

A jury convicted Anita Jo Albano of two counts of distribution of a controlled substance (Oxycodone) within 1,000 feet of a school, one a severity level two drug felony based on the quantity of the drug pursuant to K.S.A. 21-5705(a)(1)(d)(4)(B), the other a severity level three drug felony based on the quantity of the drug pursuant to K.S.A. 21-5705(a)(1)(d)(5). Based on a criminal history score of "F", she received a controlling sentence of 101 months in the Department of Corrections with 36 months of postrelease supervision. Ms. Albano appeals from her convictions and sentence.

Statement of the Issues

Issue I: **The district court erred when it allowed the admission of Ms. Albano's prior drug conviction into evidence without instructing the jury on the limited purpose for which they could consider that evidence.**

Issue II: **The district court erred in instructing the jury that it "must" follow the law and in fact it was their "duty" to do so, when the jury should have been instructed it should follow the instructions, thereby protecting the jury's inherent right of nullification.**

Issue III: **The judicial prior conviction findings which elevated Ms. Albano's presumptive KSGA sentence violated Section 5 of the Kansas Constitution Bill of Rights.**

Statement of Facts

Three Controlled Buys

In the Spring of 2017, Stuart Ostrom was working as a confidential informant for the Riley County Police Department. (R. XIV, 95-96). Between January and April, 2017, Mr. Ostrom assisted the police with three controlled buys of Oxycodone, each purchased from Ms. Albano in Ogden, Kansas. (R. XIV, 96). Mr. Ostrom had done over 100 buys for law enforcement. (R. XIV, 108). He would later testify that he was the one

who brought Ms. Albano's name to the police, explaining that he had known her briefly several years before and generally knew her to be involved in drugs at that time. (R. XIV, 103-104).

Although he had initially become a confidential informant in order to work off an offender registration charge, Mr. Ostrom continued to work for the police, getting paid for each buy he made for them. (R. XIV, 103, 102). On each occasion he was strip searched before and after the drug buy. (R. XIV, 96-97). Mr. Ostrom later indicated, and the police confirmed, that nothing suspicious was ever found during those strip searches. (R. XIV, 97, 53, 58, 61).

On January 19, 2017, Mr. Ostrom initially reached out to Ms. Albano, asking to buy drugs, but did not get any answer. (R. XIV, 104). When he got no response, he decided to take the police over to her apartment, saying that he knew she had a kind of "open door" policy. (R. XIV, 104). He and a police officer then drove to Ms. Albano's apartment in Ogden, where the officer stayed in the car and Mr. Ostrom went up to Ms. Albano's apartment and purchased twelve OxyContin pills from her for a total of $180.00. (R. XIV, 97-98). Immediately after the buy, Mr. Ostrom returned to the vehicle and immediately handed the pills over to the officer. (R. XIV, 98).

The very next day, on January 20, 2017, Mr. Ostrom again went over to Ms. Albano's apartment to conduct another controlled buy. (R. XIV, 98). However, when Mr. Ostrom knocked at the door of the apartment, he got no answer. (R. XIV, 58). He stepped back and called Ms. Albano, who, shortly thereafter, came walking through the alley, made contact with Mr. Ostrom, and let him in to her apartment. (R. XIV, 58).

However, at that point she only had one pill left, which Mr. Ostrom purchased for $20.00. (R. XIV, 98, 57). Mr. Ostrom immediately handed over the pill to the officer waiting for him. (R. XIV, 58-59).

On April 10, 2017, Mr. Ostrom again contacted Ms. Albano and this time conducted a controlled buy for ten OxyContin pills for a total of $200.00. (R. XIV, 99). He immediately returned to the vehicle and handed over the pills to the police. (R. XIV, 99-100).

During each of these controlled buys, Mr. Ostrom wore recording devices. (R. XIV, 100). Later, at trial, Mr. Ostrom would testify that no one else was involved in any of these transactions and no one else was present during any of these transactions other than himself and Ms. Albano. (R. XIV, 101).

Based on these incidents, Ms. Albano was charged with three counts of distribution of a controlled substance within 1,000 feet of a school. (R. I, 41-42).

Trial Evidence

At trial, Corporal Michael Dunn of the Riley County Police Department testified that he participated in controlled buys of drugs from Ms. Albano with a confidential informant. (R. XIV, 47-49). Corporal Dunn identified Ms. Albano at trial as the subject of their investigation and testified that his role was to drive their confidential informant, Mr. Ostrom, to Ms. Albano's home in Ogden. (R. XIV, 50-52, 53). Corporal Dunn also testified that Ms. Albano's home was 280 feet from Ogden Elementary, a school that was part of the USD 383 school district. (R. XIV, 51-52). Corporal Dunn identified each set of pills from each buy and testified that the KBI had tested each set and identified them

all as Oxycodone. (R. XIV, 55-56, 57, 60, 61-62). Corporal Dunn also testified that it was not the Riley County Police Department's habit to drug test their confidential informants to see if they were using drugs at the time of their controlled buys. (R. XIV, 71).

Sergeant Nathan Boeckman testified that he was an investigator with the Riley County Police Department Special Investigations Unit who was in charge of handling Mr. Ostrom as a confidential informant. (R. XIV, 84-86). He testified that Mr. Ostrom was told to stay away from the people he was buying from as a confidential informant, but admitted that they did not monitor Mr. Ostrom all the time. (R. XIV, 91). Sergeant Boeckman testified that, to the best of their knowledge, Mr. Ostrom was clean during the time of these buys. (R. XIV, 91-92). He did say that there were a few times when Mr. Ostrom came in with glassy, blood-shot eyes, saying that he had recently taken Nyquil. (R. XIV, 91-92). Boeckman testified when that happened, they sent Mr. Ostrom home. (R. XIV, 91-92).

At trial, Mr. Ostrom testified to the details of the three buys he made with Ms. Albano. (R. XIV, 97-103). Although he testified that he was not under the influence of drugs or alcohol at the time of the specific buys in this case, Mr. Ostrom did admit during cross-examination that he was still struggling with using illegal narcotics during that time, including meth and pain pills. (R. XIV, 102, 107). In fact, he testified that during the same time frame that he was working with the police in this case, he was using prescription narcotics, specifically Percocet. (R. XIV, 106). Mr. Ostrom confirmed for the jury that Percocet is a form of Oxycodone. (R. XIV, 106). He clarified that although

he was not using during the actual buys with Ms. Albano, he was generally using during this timeframe. (R. XIV, 108).

Mr. Ostrom also testified that between January and April 2017, during the time of the police investigation in this case, he was frequently going over to Ms. Albano's house without the police in tow. (R. XIV, 106-107). In fact, he testified that the police never told him to stay away from the people he was buying from. (R. XIV, 107).

Video and audio of all three drug buys were played for the jury at trial. (R. XIV, 110). Then Ms. Albano took the stand in her own defense. (R. XIV, 115).

Ms. Albano's Defense of Entrapment

Ms. Albano started off explaining some of her medical history to the jury, telling them of her severe back problems caused many years before by injuries she received during a domestic violence incident with her now-estranged husband. (R. XIV, 117-118). She testified that among other prescription medications, she had been prescribed Oxycodone for her back problems which were too severe to correct with surgery and therefore had to be managed with pain management. (R. XIV, 117, 119). In addition to her back problems, Ms. Albano testified to her arthritis, sciatic nerve issues, broken ankles, and ACL reconstruction on her right knee. (R. XIV, 118-119). She testified that at the time of these buys, she was on OxyContin, but ended up having her doctor take her off that prescription. (R. XIV, 119). She told her doctor that it was because it gave her stomach issues. (R. XIV, 119). But she admitted that the real reason she asked to be taken off of it was because people like Mr. Ostrom were constantly berating her in an

effort to get her pills, explaining that if she didn't end up selling them, the pills ended up being stolen. (R. XIV, 119).

Ms. Albano testified that she was familiar with Mr. Ostrom before January 2017, but from January 2017 through April 2017, Mr. Ostrom was over at her house daily, if not multiple times a day. (R. XIV, 121). She said there were times when he came by when he wanted her to sell him her pills, but that she never wanted to. (R. XIV, 121). She described Mr. Ostrom as persistent, saying he badgered her to death and that, at times, it was just easier to do it just so she could get him to leave. (R. XIV, 121). She said that if she told Mr. Ostrom that she would not sell him her pills, he would wait around until he had a chance to get at them himself. (R. XIV, 121). She said there were several times when, after Mr. Ostrom would leave, her pills were missing. (R. XIV, 121).

Ms. Albano described the first controlled buy in January 2017, saying that she was lying on the couch, sick, fighting off a bone marrow infection that had recently hospitalized her for almost two months. (R. XIV, 122-123). She said that Mr. Ostrom just showed up at her door and woke her up. (R. XIV, 123). Ms. Albano testified that she was not expecting him and that she never wanted Mr. Ostrom to come by but that he just kept showing up, harassing her. (R. XIV, 123). Ms. Albano admitted that she gave Mr. Ostrom twelve pills at that time because she did not feel good and she didn't want to deal with him. (R. XIV, 124).

Ms. Albano said that she would try and tell Mr. Ostrom not to come over, that she really needed her pills, but he would just keep coming. (R. XIV, 124-125). Ms. Albano testified that during one of the drug buys she was really agitated, saying that he had

called her ten times, but that she kept ignoring his calls because she was at her dad's house. (R. IV, 126). She indicated that she did not expect Mr. Ostrom to be there when she returned home. (R. XIV, 126). Ms. Albano testified that she felt pressured to sell him her medications on multiple occasions and that he called her daily. (R. XIV, 127-128). Ms. Albano testified that she distributed pills to Mr. Ostrom, but maintained that she did not remember him paying. (R. XIV, 132). When it was pointed out that during the videos of the buys she could be heard counting out money, she testified that she was randomly counting out her own money, maintaining that Mr. Ostrom never paid. (R. XIV, 132-133).

In response to her own attorney's question, Ms. Albano candidly admitted that she had prior convictions for distributing drugs from four years before. (R. XIV, 129). She said that she had successfully completed her probation just four months before this first buy. (R. XIV, 130). She testified that at the time Mr. Ostrom was pressing her to sell him drugs as a confidential informant, she was trying to put her life back together and change things around. (R. XIV, 130).

Ms. Albano testified that she would not have been selling medication were it not for Mr. Ostrom's harassment. (R. XIV, 130).

Instructions, Verdict, and Sentencing

The defense asked for and received a jury instruction regarding entrapment. (R. I, 85, 121-122). However, defense counsel did not request, and the district court did not give, any limiting instruction on Ms. Albano's prior convictions for drug distribution. (R. XIV, 146-148). The jury eventually returned, acquitting Ms. Albano of the first count of

distribution of Oxycodone from the first controlled buy, but convicting her of the two subsequent distribution counts. (R. XIV, 176-177).

At sentencing, based on a criminal history score of "F", Ms. Albano received a controlling sentence of 101 months in the Department of Corrections with 36 months postrelease supervision. (R. XIV, 19-20). Ms. Albano appealed her convictions and her sentence. (R. I, 158).

Arguments and Authority

Issue I: The district court erred when it allowed the admission of Ms. Albano's prior drug convictions into evidence without instructing the jury on the limited purpose for which they could consider that evidence.

Introduction

Ms. Albano put on an entrapment defense at trial. Likely in anticipation of the fact that the State would attempt to impeach her entrapment defense with evidence of her prior convictions for distribution of drugs, Ms. Albano preemptively admitted to distributing drugs in the past during the defense case-in-chief. However, she argued to the jury that, after that conviction, she had successfully completed probation and was in the process of putting her life back together when the Riley County Police Department's confidential informant essentially harassed her into selling him some of her personally prescribed Oxycodone pills.

However, because the defense never requested, and the district court never sua sponte gave, a limiting instruction on the exact purpose for which the jury could consider this evidence, there was the real possibility that the jury may not have limited their consideration of this severely damaging evidence to the specific purpose it was relevant

to—that of rebutting Ms. Albano's entrapment defense. Without a limiting instruction, the jury very likely may have also considered this evidence as general propensity evidence when assessing the State's burden to prove each of the elements of the charged crimes. Ms. Albano now argues that this failure to give a limiting instruction on that evidence was so prejudicial that her convictions must now be vacated in favor of a new trial.

Issue Preservation

Ms. Albano did not request a limiting instruction at the district court nor did she object to its non-inclusion. However, this is no bar to appellate review of this issue for the first time on appeal. The failure to request an instruction at the district court does not bar appellate review, it simply requires that any review of such an alleged error be conducted under a clearly erroneous standard. *See State v. Breeden*, 297 Kan. 567, 582-83, 304 P.3d 660 (2013).

Standard of Review

The failure to give an unrequested jury instruction is reviewed for clear error. *State v. Molina*, 299 Kan. 651, 655, 325 P.3d 1142 (2014). In applying the clear error analysis, the appellate courts first determine whether the district court erred in omitting the instruction using an unlimited standard of review. *Molina*, 299 Kan. at 655. If error is found, reversal is required if the reviewing court is firmly convinced the jury would have returned a different verdict had the instruction been given. *Molina*, 299 Kan. at 655.

Analysis

When a defendant argues on appeal that the district court erred in failing to give a limiting instruction, the appellate courts review this alleged error under a three-prong test. First, the Court asks whether the instruction was (1) factually appropriate and (2) legally appropriate, and, if it passes both of those tests, the Court then analyzes (3) whether the error in failing to give the instruction was harmless. *State v. Williams*, 295 Kan. 506, Syl. ¶ 4, 516, 286 P.3d 195 (2012).

A Limiting Instruction was Factually Appropriate

Ms. Albano presented an entrapment defense at trial. However, under K.S.A. 21-5208(b), entrapment is not a defense if the crime was "of a type which is likely to occur and recur in the course of such person's business…".

Likely with an awareness that the State would therefore try and rebut her entrapment defense, Ms. Albano's counsel preemptively, during the defendant's case-in-chief, asked Ms. Albano about her prior convictions for distributing drugs. (R. XIV, 129). Such evidence was relevant to the material issues raised by her entrapment defense. Entrapment may be rebutted by evidence of an intent and predisposition to commit the crime. *State v. Ralston*, 43 Kan. App. 2d 353, 366, 225 P.3d 741 (2010).

Ms. Albano then admitted to the jury that she did have prior convictions for distributing drugs from four years before. (R. XIV, 129). However, then Ms. Albano was able to explain to the jury that she had successfully completed probation on those charges and had been making an effort to change her life since then. (R. XIV, 129-130). Unsurprisingly, the State relied upon the fact that Ms. Albano had previously been

convicted of distributing drugs to argue that the jury should reject her entrapment defense. (R. XIV, 171-173).

K.S.A. 60-455(a) states:

> "Subject to K.S.A. 60-477, and amendments thereto, evidence that a person committed a crime or civil wrong on a specified occasion, is inadmissible to prove such person's disposition to commit crime or civil wrong as the basis for an inference that the person committed another crime or civil wrong on another specified occasion."

However, K.S.A. 60-455(b) indicates that crimes and civil wrongs are admissible when they are relevant to prove some material fact.

In *State v. Gunby*, 282 Kan. 39, 48, 144 P.3d 647 (2006) our Supreme Court reiterated the requirement that a district court "give a limiting instruction informing the jury of the specific purpose for admission whenever K.S.A. 60-455 evidence comes in." The reason for this is to provide a safeguard "to eliminate the danger that the evidence will be considered to prove the defendant's mere propensity to commit the charged crime." *Gunby*, 282 Kan. at 48.

The admission of Ms. Albano's prior convictions for distribution of drugs meets the statutory definition of K.S.A. 60-455(a) evidence. No one at trial contested the admission of this evidence. Even if they had tried, it likely would have been admitted under K.S.A. 60-455(b) as a relevant and material fact that went to the ultimate question of her entrapment defense, i.e., whether the crime was of a type or which is likely to occur and recur in the course of her personal business. Once admitted under K.S.A. 60-455(b), Ms. Albano would then be entitled to a limiting instruction under *Gunby*.

Additionally, the fact that Ms. Albano elicited this testimony herself does not deprive her of a limiting instruction. This is because our Supreme Court has stated that "the need for a limiting instruction on other crimes evidence does not depend upon which party introduces the evidence." *Molina*, 299 Kan. at 660. Instead, as stated above, if K.S.A. 60-455 evidence is admitted, the district court '"must give a limiting instruction informing the jury of the specific purpose for admission of the evidence in order to avoid error.' [Citation omitted] This is true regardless of which party proposes the evidence." *Molina*, 299 Kan. at 660, quoting *State v. Breeden*, 297 Kan. 567, 579, 304 P.3d 660 (2013).

Under these circumstances, prior crimes evidence was admitted at trial, relevant to the possible rebuttal of Ms. Albano's entrapment defense. Under these circumstances, Ms. Albano was therefore factually entitled to a limiting instruction.

A Limiting Instruction was Legally Appropriate

The real question for this Court centers on the question of whether a limiting instruction on prior crimes evidence entered to rebut an entrapment defense is legally appropriate. This is because of the unique interplay between entrapment as an affirmative defense and our Court's traditional concerns over the prejudicial nature of propensity evidence.

Propensity and Predisposition: Two Sides of the Same Prejudicial Coin

As stated above, in *State v. Gunby*, 282 Kan. 39, 48, 144 P.3d 647 (2006) our Supreme Court indicated its requirement that a district court "give a limiting instruction informing the jury of the specific purpose for admission whenever K.S.A. 60-455

evidence comes in." The reason for this was to provide a safeguard "to eliminate the danger that the evidence will be considered to prove the defendant's mere *propensity* to commit the charged crime." *Gunby*, 282 Kan. at 48.(Emphasis added).

Propensity evidence is defined by *Black's Law Dictionary*, 11th Edition, 2019, as "A natural tendency to behave in a particular way; esp. the fact that a person is prone to a specific type of bad behavior."

That said, entrapment is a unique affirmative defense that may be rebutted with evidence of the defendant's intent and predisposition to commit the crime. *Ralston*, 43 Kan. App. 2d at 366. *Black's Law Dictionary*, 11th Edition, 2019, defines "predisposition" as "A person's inclination to engage in a particular activity; esp. an inclination that vitiates a criminal defendant's claim of entrapment."

As a panel of this Court recently noted in *State v. Peterman*, 2017 WL 6546386 (Kan. App. 2d 2017) (Unpublished)[1], although there may be some "theoretical difference" between propensity evidence and evidence of predisposition admitted in an entrapment case, such differences are likely "miniscule as a practical matter." This is because a previous conviction for a comparable crime to the charged crime is an acceptable way of proving the defendant's predisposition to commit that crime, thereby rebutting any entrapment defense. *Peterman*, 2017 WL 6546386, pg. 10.

The result of admitting prior crimes evidence (which carries with it the inherent danger of being interpreted as propensity evidence) is that, in an entrapment case, such

[1] A copy of this opinion is attached pursuant to KS Sup. Ct. Rule 7.04(g)(2)(C).

evidence may, because of its legitimate relevance to entrapment, skirt K.S.A. 60-455 protections.

Predisposition Evidence Should Be Explicitly Limited To Rebut Only the Claim of Entrapment

Ms. Albano now argues that a defendant who claims entrapment as an affirmative defense, and who happens to have prior convictions that may be used as rebuttal evidence to reject that defense, should not be forced into the position of accepting, as inevitable, that the jury will then be able to use those prior convictions as general propensity evidence.

It might be helpful at this point to review the State's obligations once entrapment is raised as a defense.

> Because entrapment is an affirmative defense, a statutory burden-shifting scheme must be applied. A defendant claiming entrapment must first meet the burden to come forward with some competent evidence in support of the claim, and thereafter, "the state has the burden of disproving the defense beyond a reasonable doubt." K.S.A. 2017 Supp. 21-5108(c). Thus, when the State or its agent solicits a defendant to commit a crime, the State must prove beyond a reasonable doubt that the defendant was predisposed to commit that crime in order to rebut an entrapment defense. *State v. Reichenberger*, 209 Kan. 210, 217, 495 P.2d 919 (1972); see also K.S.A. 2017 Supp. 21-5108(c).

State v. Rowan, 2019 WL 638138 (Kan. Ct. App. 2019).[2]

If prior convictions are validly accepted as rebuttal evidence to disprove an entrapment defense, then the jury should be told to explicitly limit its consideration of

[2] A copy of this opinion is attached to this brief pursuant to KS Sup. Ct. Rule 7.04(g)(2)(C).

those priors only to its acceptance or rejection of that affirmative defense. In other words, the jury should be explicitly limited to considering that "predisposition evidence" to the sole question of whether the crime was of a type which is likely to occur and recur in the course of the defendant's business, when deciding to accept or reject the specific entrapment defense. But then the jury should be told to compartmentalize and not consider that evidence when deciding whether the State has proven each of the actual elements of the charged crimes beyond a reasonable doubt. In short, the jury can use that evidence for the limited specific purpose for which it is admissible, i.e., to reject or accept the entrapment defense, but should not be allowed to consider that evidence as general propensity evidence that because the defendant committed a similar crime before she probably committed it again here during its assessment of the original elements of the actual charged crime.

> "Evidence sometimes can be appropriately admitted for more than one purpose. See *Kansas City Mall Assocs. v. Unified Gov't of Wyandotte County/KCK,* 294 Kan. 1, 13, 272 P.3d 600 (2012) (out-of-court statement of property owner as to value of real estate properly admitted by adverse party as both substantive evidence on value and as impeachment of owner given conflicting trial testimony). But when evidence can only be considered for a single purpose and there is some chance jurors might otherwise view it as relevant for an impermissible purpose, the district court should honor a request for a limiting instruction from the party against whom the evidence has been offered. See *State v. Denney,* 258 Kan. 437, 446, 905 P .2d 657 (1995) (finding failure to give properly requested limiting instruction error, though harmless on facts of case); *cf. State v. Dixon,* 289 Kan. 46, 68, 209 P.3d 675 (2009) ("A jury cannot be presumed to have legal knowledge outside the statements of law in the instructions.")."

State v. Brown, 2015 WL 2342141 (Kan. Ct. App. 2015)[3].

Ms. Albano asserts that when relevant and material prior crimes evidence is admitted for the specific purpose of showing predisposition to rebut an entrapment defense, it is legally appropriate for the judge to instruct the jury to limit its consideration of that evidence to that specific purpose in order to avoid that "predisposition" evidence being generally considered as propensity evidence used by the jury to alleviate the State's burden of proof on the charged elements of the crime.

The failure to give a limiting instruction was clearly erroneous

"Entrapment shields the reluctant-though-impressionable delinquent but not the criminally minded opportunist." *State v. Brooks*, 2017 WL 839793 (Kan. Ct. App. 2017), *review denied* (Aug. 30, 2017).[4]

The State's theory at trial was essentially that Ms. Albano was a criminally minded opportunist. Ms. Albano candidly admitted to the jury that, based on her prior convictions, in the past she may have been just that. Yet her defense was that now—after successfully completing probation and trying to get her life back on the right track, she was essentially a reluctant-though-impressionable delinquent and, but for Mr. Ostrom's incessant pressure, she would not have committed these crimes.

Yet, without an instruction explicitly telling them that they should only consider Ms. Albano's prior convictions in the context of deciding whether Ms. Albano had a predisposition to commit these offenses when deciding whether to accept or reject her

[3] A copy of this opinion is attached to this brief pursuant to KS Sup. Ct. Rule 7.04(g)(2)(C).
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entrapment defense, the jury was left instead potentially believing that it could generally use those prior crimes as propensity evidence when deciding Ms. Albano's ultimate guilt or innocence on the charged crimes. Our case law has consistently warned against the serious prejudice that can result when prior convictions may be inappropriately used as propensity evidence. *State v. Gunby*, 282 Kan. 39, 48, 144 P.3d 647 (2006). Such potential prejudice is only that much more likely in a case where the evidence is being admitted for such a closely related, but ultimately very legally specific reason. In a case like Ms. Albano's, this distinction between pure propensity evidence versus rebuttal evidence of predisposition really went to the heart of her defense. But because the jury was not informed to limit its consideration of this evidence, there was the real potential that the jury considered these prior convictions as general propensity evidence, instead of only in the context of rebuttal evidence to her entrapment defense—a danger is that was likely prejudicial to her case.

As stated above, the failure to give an unrequested jury instruction results in reversal if the reviewing court is firmly convinced the jury would have returned a different verdict had the instruction been given. *Molina*, 299 Kan. at 655. This is such a case. Under these circumstances, this Court should find that Ms. Albano was entitled to a limiting instruction, that the district court's failure to give that instruction was error, and that this error was so prejudicial in the context of this specific case, that this cannot declare that it was harmless. Ms. Albano therefore respectfully requests this Court vacate her convictions and remand her case for a new trial with instructions that if her prior convictions are again entered into evidence, a limiting instruction must be given.

Issue II: The district court erred in instructing the jury that it "must" follow the law and in fact it was their "duty" to do so, when the jury should have been instructed it should follow the instructions, thereby protecting the jury's inherent right of nullification.

Introduction

In this case, the district court's instructions undermined the jury's inherent right of nullification. The district court instructed the jury it had a "duty" and "must" follow the law as instructed. Such instructions informed the jury they had no right of nullification, but instead had an obligation to follow the instructions as given. These instructions undermined the jury's inherent right to nullify and warrant reversal.

Preservation and Standard of Review

Ms. Albano did not object to any of the instructions complained of on appeal. However, a failure to object to an instruction does not bar review by this Court. *See* K.S.A. 22-3414(3). Rather, appellate courts apply the more rigorous clearly erroneous standard, as opposed to the harmless error standard, if the instruction is found to be error. *State v. Williams,* 295 Kan. 506, Syl. ¶ 3, 286 P.3d 195 (2012).

To determine whether the instruction was erroneous, this Court should determine whether the instruction was legally and factually appropriate. *Plummer,* 295 Kan. at 163. If the instruction was erroneous, this Court must then determine if it was clearly erroneous to warrant reversal. To establish clear error, this Court must be "firmly convinced" that the giving of the instruction made a difference in the verdict. *State v. Cooper,* 303 Kan. 764, 771, 366 P.3d 232 (2016).

The State may attempt to claim that Ms. Albano invited the errors claimed of in this issue because she submitted proposed jury instructions ahead of trial that included these general PIK instructions. (R. I, 82-85). However, the invited error rule is not a hard and fast rule that is automatically applied. "[T]he invited-error doctrine does not automatically apply every time a party requests an instruction at trial but then, on appeal, claims the district court erred by giving it. Instead, appellate courts must engage in a searching analysis of the facts of the case to determine whether the complaining party truly invited the error." *State v. Fleming,* 308 Kan. 689, 689–90, 423 P.3d 506 (2018).

No one discussed the now complained of instructions in any detail at trial. (R. XIV, 150-154). Ms. Albano never indicated there was any strategic or tactical reason to seek instructions that undermined the right of jury nullification. Rather, this is an instance of simply "going with PIK" rather than a specific trial strategy. Further, there would not be any strategic or tactical reason to seek an instruction that that impacts Ms. Albano's constitutional right to jury nullification under the Sixth Amendment.

The invited-error doctrine should not be automatically applied. *Fleming,* 308 Kan. at 706. Rather, the error must be truly invited. Ms. Albano acknowledges that other panels of this Court have held that the invited error doctrine prevents review of this issue in similar cases. *See State v. Leonard Charles, Sr.*, 2019 WL 3242199 (Kan. App. 2d 2019)(Unpublished).[5] However, she argues that that decision, and any others like it, are wrongly decided for the same reasons set forth above. Because the proposed instruction

[5] A copy of this opinion is attached pursuant to Rule 7.04(g)(2)(C).

was not a strategic or tactical request, the error was not truly invited. It was not meant to "game the system." As such, the invited error doctrine should not apply and this Court should consider whether the instructions were erroneous and warrant a new trial.

Argument and Authorities

It has long been held that a jury has the inherent power to nullify, even if it finds beyond a reasonable doubt that the defendant it guilty of the offense charged.

> "The physical power of a jury to acquit an accused in the face of what appears to be overwhelming evidence of guilt has not been seriously questioned since 1670 when the jurymen who heard the case against William Penn and William Mead flatly refused to return a verdict of guilty for preaching to an unlawful assembly in Gracechurch Street. It is recorded that all jurors in that celebrated case were fined and jailed. Several of them spent months in prison until the case was reviewed on a writ of habeas corpus and the English court delivered the opinion which first recognized and established the raw physical power of English juries to render a verdict of acquittal. (Bushell's Case, 6 Howell's State Trials, 999 (1670).)"

State v. McClanahan, 212 Kan. 208, 213, 510P.2d 153 (1973).

> "Jury nullification has been defined as '[a] jury's knowing and deliberate rejection of the evidence or refusal to apply the law either because the jury wants to send a message about some social issue that is larger than the case itself or because the result dictated by law is contrary to the jury's sense of justice, morality, or fairness.'"

Verlo v. Martinez, 820 F.3d 1113, 1119, n. 1 (10th Cir. 2016) (quoting Jury Nullification, Black's Law Dictionary (10th ed. 2014)). The Kansas Supreme Court explicitly recognized the existence of jury nullification, holding "it is apparent the legislature intended to preserve the time honored power of the jury to return a verdict in a criminal prosecution in the teeth of the law and the facts." *State v. Osburn*, 211 Kan. 248, 255-56, 505 P.2d 742 (1973). In short, the jury has the discretion *not* to follow the law and the

evidence in reaching a verdict it deems appropriate. However, the district court's instructions in this case undermined that inherent right by specifically instructing the jury that it must follow the law and its decision must be based on the evidence admitted and law given.

The district court instructed the jury it was their "duty as sworn triers in this case to be governed in your deliberations and final conclusions by the evidence as you understand and remember it, and by the law as given in these instructions." (R. I, 125). Further, the district court instructed the jury the "verdict must be found entirely upon the evidence admitted and the law as given in these instructions." (R. I, 123). By instructing the jury it "must" follow the law and has a "duty" to follow the law, the jury is being directed to convict if the elements of the offense have been proven. If a jury must convict, then nullification is not an option. This is an incorrect statement of the law. *Osburn,* 211 Kan. at 255-6.

Additionally, if the jury was limited to the evidence admitted and law given, it could not fully exercise its right of nullification. The right of nullification is based on considerations outside of the evidence and the law. It is an inherent check on the power of the State. It is "based upon the jurors' sympathies, notions of right and wrong, or a desire to send a message on some social issue." *State v. Allen,* 52 Kan.App.2d 729, 734, 372 P.3d 432, 436 (2016). The jury, in this case, was essentially instructed it could not consider its sympathies, its notions of right or wrong or whether it wanted to send a message. It was instructed it "must" base its decision on the evidence and law given.

This Court in *State v. Amack,* No. 111,136, 2015 WL 2342371, 347 P.3d 1214 (Kan. App. 2015)(Unpublished),[6] addressed a similar argument that an instruction that the jury "must" follow the law and the verdict "must" be based on the law as given violated the jury's right of nullification. This Court found that the instructions were proper as they did not "direct the jury to enter a particular verdict." *Amack,* 2015 WL 2342371, at *5; *see also State v. Ulmer,* No. 114,315, 2016 WL 7428362, at *9, 386 P.3d 927 (Kan. App. 2016)(Unpublished)[7] (noting other unpublished cases reaching the same conclusion). However, this Court understates the impact of the language used in this case.

> "Using terms such as 'must' and 'duty' does, in fact, direct a verdict.
>
> [A]s every teacher instructing a class knows, and as every parent admonishing a child knows, should is less of an imperative than must or will.... Should as used in this instruction is not the equivalent of 'must' or 'will' used in the instructions discussed in [other cases]. Should is advisory. It is not an imperative."

State v. Allen, 52 Kan.App.2d 729, 736, 372 P.3d 432 (2016) (quoting *State v. Singleton,* No. 112,997, 2016 WL 368083, at *6 (Kan.App. 2016)(Unpublished)).[8] Such wording orders a jury to enter guilty verdicts if it finds the elements of the offense have been proven. It limits what the jury can consider in arriving at its verdict. If nullification is the acquittal of a defendant "in the face of what appears to be overwhelming evidence of guilt," then the jury cannot be instructed it can only consider the evidence at trial. *McClanahan,* 212 Kan. at 213. By doing so, a jury is constricted in its deliberations and

[6] A copy of this opinion is attached pursuant to Rule 7.04(g)(2)(C).
[7] A copy of this opinion is attached pursuant to Rule 7.04(g)(2)(C).
[8] A copy of this opinion is attached pursuant to Rule 7.04(g)(2)(C).

it cannot exercise its inherent power of nullification. It has no other options as it "must" enter a verdict of guilty based on the evidence at trial and law given by the district court.

A jury need not be informed of its power of nullification. However, "a jury instruction telling the jury it 'must' or 'will' enter a verdict" is improper. *State v. Smith–Parker,* 301 Kan. 132, Syl. ¶ 6, 340 P.3d 485 (2014). By instructing the jury that it was their "duty" to consider and follow all of the instructions and that their "verdict must be found entirely upon the evidence admitted and the law as given in these instructions," the district court directed a verdict of guilty if the jury should find the elements of the offenses have been proven by the State. These instructions improperly impaired the jury's right of nullification, to disregard the evidence and law and acquit if it felt an acquittal was appropriate, for whatever reason.

The instructions are clearly erroneous and warrant reversal.

As the instructions noted above infringed on the jury's right of nullification, they were improper. To determine whether the instructions warrant reversal, this Court must then determine if the instructions were clearly erroneous. To establish clear error, this Court must be "firmly convinced" that the giving of these instructions made a difference in the verdict. *State v. Cooper,* 303 Kan. 764, 771, 366 P.3d 232 (2016). Here, absent the instructions which undermined the jury's right of nullification, the jury would have reached a different result.

In this case, the State brought multiple charges against Ms. Albano. Ms. Albano presented an entrapment defense, which was admittedly the strongest on the first charge of distribution. The jury acquitted her of that charge, but convicted her of the other two

distribution charges. Ms. Albano had presented, as part of her entrapment defense, that although she had made mistakes in her past, that she had been trying to improve her life, had successfully completed probation, and was attempting to turn over a new leaf when the State's confidential informant had basically harassed her into violating the law. Even if the jury had rejected the entrapment defense because of the evidence and found that the State had sufficiently proven the last two charges of distribution, they could have, out of pure sympathy, or a general concern about the Riley County Police Department's use of questionable confidential informants, wanted to send a message by acquitting her of the last two charges in spite of the evidence. But they were explicitly told that was not an option by these jury instructions.

In this case, the jury obviously had questions as to the State's evidence and was shown by their acquittal on count one. However, it was improperly instructed on its right to acquit Ms. Albano in spite of the law and evidence. These instructions were damaging to Ms. Albano and changed the outcome in this matter.

Conclusion

The district court improperly instructed the jury and in the process, infringed on its inherent right of nullification. These instructions undercut Ms. Albano's chances of an acquittal. As a result, this Court must reverse and remand this matter for a new trial.

Issue III: The judicial prior conviction findings which elevated Ms. Albano's presumptive KSGA sentence violated Section 5 of the Kansas Constitution Bill of Rights.

Introduction

Section 5 of the Kansas Constitution Bill of Rights preserves the right to a jury trial as it existed at common law when the Kansas Constitution came into existence – 1859. At American common law, in 1859, judicial findings of an offender's prior convictions could not elevate the permissive punishment for a current crime of conviction.

The Kansas Sentencing Guidelines Act (KSGA) relies upon judicial findings of an offender's prior convictions to establish the presumptive sentence for a current crime of conviction. This sentencing scheme infringes the common law right to a jury trial on penalty-enhancing prior conviction findings, and is, therefore, unconstitutional.

Preservation

At sentencing, Ms. Albano did not challenge the constitutionality of the KSGA. Typically, a defendant cannot raise an issue for the first time on appeal. But there are exceptions to this rule. A defendant may raise an issue for the first time on appeal when: (1) the newly asserted theory involves only a question of law arising on proved or admitted facts and is finally determinative of the case; or (2) consideration of a newly asserted theory is necessary to serve the ends of justice or to prevent denial of fundamental rights. *State v. Jones*, 302 Kan. 111, 117 (2015). Both of these exceptions apply to the facts of this case.

As to the first exception, Ms. Albano now argues that the KSGA is facially unconstitutional. Whether this assertion is correct has nothing to do with the particular facts of this case. Purely legal challenges to sentencing statutes, like the one presented by this case, may be reviewed without a trial objection. *State v. Dull*, 302 Kan. 32, 38-39 (2015).

As to the second exception, review of this issue would ensure compliance with Section 5 of the Kansas Constitution Bill of Rights. The jury trial right protected by Section 5 is "a basic and fundamental feature of American jurisprudence" – a right that should be "carefully guarded against infringements." *Miller v. Johnson*, 295 Kan. 636, 647 (2012), quoting *Gard v. Sherwood Construction Co.*, 194 Kan. 541, 549 (1965). Thus, review of this issue is also necessary to guard against infringements to a fundamental right.

Jurisdiction

K.S.A. 21-6820(c)(1) provides that appellate courts may not review the propriety of a presumptive KSGA sentence. In this case, Ms. Albano received a presumptive KSGA sentence. But, in this appeal, she asserts that the KSGA is, itself, unconstitutional.

When a defendant-appellant is correct in asserting the KSGA is facially unconstitutional, an appellate court may remedy an otherwise-presumptive KSGA sentence. Thus, this Court must, counterintuitively, reach a decision on the merits of this issue, before it knows whether it has jurisdiction to review this issue. *State v. Johnson*, 286 Kan. 824, 842 (2008).

Standard of Review

Appellate courts exercise unlimited review when they are asked to decide whether a KSGA sentencing scheme is constitutional. *Johnson*, 286 Kan. at 842.

Analysis

A. The Right to a Jury Trial Guaranteed by the Kansas Constitution.

Section 5 of the Kansas Constitution Bill of Rights provides: "The right of trial by jury shall be inviolate." This constitutional mandate has long-been interpreted as preserving the right to a jury trial as existed at American common law when the Kansas Constitution came into existence – 1859. *Miller*, 295 Kan. at 647; *State ex rel. v. City of Topeka*, 12 P. 310, 316 (1886). In criminal cases, Section 5 guarantees defendants the right to a jury trial on any issue of fact that would have been tried before a jury at common law. *State v. Love*, 305 Kan. 716, 735 (2017).

B. Ms. Albano's Argument

Ms. Albano submits that, prior to Kansas' statehood, American common law required any fact which increased the permissive penalty for a crime – *inclusive of an offender's prior criminal convictions* – to be proven to a jury beyond a reasonable doubt. If this assertion is correct (for reasons to be explained, it is), then it necessarily follows that the sentencing scheme set out by the KSGA – in which *judicial* findings of criminal history elevate a defendant's presumptive prison sentence – is unconstitutional. See K.S.A. 21-6814(a).

C. Prior Conviction Fact-Finding and the Sixth Amendment

Ms. Albano now distinguishes her claim of error under our State Constitution from a similar claim often raised under the Sixth and Fourteenth Amendments of our Federal Constitution. The right to a jury trial guaranteed by our Federal Constitution has been interpreted as permitting judicial fact-findings of an offender's criminal history to enhance the presumptive punishment for a current crime of conviction. *State v. Ivory*, 273 Kan. 44, 46-48 (2002). To understand why this is the case, it is necessary to revisit a land-mark United States Supreme Court opinion – *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

In *Apprendi*, the United States Supreme Court interpreted the Sixth Amendment – applicable to the states through the Fourteenth Amendment – as requiring *nearly* any fact which increases the maximum penalty for a crime to be proven to a jury beyond a reasonable doubt. *Apprendi*, 530 U.S. at 476. There was, and is, just one exception to the so-called *Apprendi* rule.

In *Apprendi*, the Supreme Court declined to overrule a prior opinion – *Almendarez-Torres v. United States*, 523 U.S. 224 (1998) – in which it was held that the government needn't prove prior convictions to a jury before using criminal history as the basis for increasing a defendant's presumptive sentence for a new conviction. *Apprendi*, 530 U.S. at 487-90. The *Apprendi* majority noted that *Almendarez-Torres* was, perhaps, wrongly decided. *Apprendi*, 530 U.S. at 489. But, to date, the *Apprendi* rule has never been extended to be inclusive of fact-finding touching on an offender's criminal history. See *United State v. Mathis*, 136 S.Ct. 2243, 2258-59 (2016) (Thomas, J., concurring)

(Justice Thomas laments the continuing existence of the "prior conviction" exception to the *Apprendi* rule).

Significant to this appeal, the *Apprendi* majority did not carve out a "prior conviction finding" exception to the Sixth Amendment right to a jury trial because penalty-enhancing judicial recidivism findings were permitted at common law. Rather, the exception was justified on the grounds that "substantial procedural safeguards" could reasonably ensure the factual existence of an offender's prior convictions. *Apprendi*, 530 U.S. at 488.

D. The American Common Law Right to a Jury Trial on Penalty-Enhancing Prior Conviction Findings

The American common law right to a jury trial on penalty-enhancing prior conviction findings is detailed in Justice Thomas' concurring *Apprendi* opinion. There, Justice Thomas cited numerous cases predating Kansas' statehood in which prior convictions which enhanced permissive punishments for a crime were understood to be elements of a criminal charge, which needed to be proven to a jury. *Apprendi*, 530 U.S. at 501-09 (Thomas, J., concurring).

As one example, Justice Thomas cited an 1854 opinion, in which the Massachusetts Supreme Court held:

> "When the statute imposes a higher penalty upon a second and third conviction, respectively, it makes the prior conviction of a similar offence a part of the description and character of the offence intended to be punished; and therefore the fact of such prior conviction must be charged, as well as proved. It is essential to an indictment, that the facts constituting the offence intended to be punished should be averred."

Tuttle v. Commonwealth, 68 Mass. 505, 506 (1854).

As another example, Justice Thomas cited to an 1859 Georgia Supreme Court opinion – *Hines v. State*, 26 Ga. 614 (1859). There, a defendant was charged with committing a crime as a second-time offense. Prosecution of that charge was structured such that a jury found the defendant guilty of committing the crime, and a judge affirmed the factual existence of the defendant's prior conviction. On appeal, the Georgia Supreme Court reversed the defendant's conviction, asserting:

> "[T]he question, whether the offence was a second one, or not, was a question for the jury [...] It is a general principle, that whatever it is necessary to allege, it is necessary to prove. *And no authority was read to us, to show that the case of an allegation, that the offence is a second one, is an exception to the rule, and we do not know of any such authority*. The allegation is certainly one of the first importance to the accused, for if it is true, he becomes subject to a greatly increased punishment."

Hines, 26 Ga. at 616 (emphasis added).

Justice Thomas' scholarship shows that, when the Kansas Constitution was enacted, criminal defendants had a common law right to a jury trial on penalty-enhancing prior conviction findings. Section 5 of the Kansas Constitution Bill of Rights – unlike the Sixth Amendment of our Federal Constitution – preserves that right.

E. The KSGA's Infringement upon a Common Law Right to a Jury Trial.

The KSGA relies upon *judicial* prior conviction findings to establish the presumptive sentence for a defendant's current crime of conviction. *State v. Wetrich*, 307 Kan. 552, 555 (2018); K.S.A. 21-6814(a). As has been noted, penalty-enhancing judicial fact-finding – of any kind – does not square with the right to a jury trial which existed at

common law. Thus, the KSGA sentencing scheme which dictated Ms. Albano's current prison sentence violates Section 5 of the Kansas Constitution Bill of Rights.

F. *State v. Valentine* is wrongly decided.

In a recent unpublished opinion, *State v. Valentine*, a panel of this Court rejected the very Section 5 challenge which Ms. Albano now advances on appeal. But, rather than exercise independent appellate review over this issue, the *Valentine* panel instead asserted:

> "Valentine concedes that this argument has been rejected with respect to the United States Constitution. […]
>
> In view of the Kansas Supreme Court's consistent rejection of the Sixth Amendment-based version of Valentine's current argument, it is incumbent on Valentine to provide authority showing our Supreme Court interprets—or would interpret—§ 5 of the Kansas Constitution Bill of Rights to require jury findings that the Sixth Amendment does not. He fails to do so. "This court is duty bound to follow Kansas Supreme Court precedent absent some indication that the court is departing from its previous position." [citation omitted]. Valentine's argument fails."
>
> *State v. Valentine*, 2019 WL 2306626 at *6 (Kan. App.)[9]

The *Valentine* panel's route toward affirmation defeats the purpose of having intermediate levels of appellate review. In its terse analysis, the *Valentine* panel tacitly conceded that our Supreme Court has not yet considered the precise question of whether Section 5 of the Kansas Constitution Bill of Rights guarantees criminal defendants the right to a jury trial on penalty-enhancing prior conviction findings. Thus, the issue raised in *Valentine*, and now this case, demands consideration from the Court of Appeals.

[9] A copy of this opinion is attached pursuant to Rule 7.04(g)(2)(C).

If the *Valentine* panel was inclined to hold that the criminal jury trial right guaranteed by Section 5 is a mere equivalency to the criminal jury right guaranteed by the Sixth Amendment, that would have been within the panel's prerogative. But, in reaching such a conclusion, the panel would have needed explain why the "inviolate" common law right to a criminal jury trial didn't extend to penalty-enhancing prior conviction findings. And that, for reasons already noted, that is not easily done.

Remedy

Within this case, Ms. Albano was convicted of multiple KSGA crimes. But judicial prior conviction findings were only used to elevate the prison sentence for her base sentence. Without unconstitutional judicial prior conviction findings, the KSGA still authorized the district court to impose a potentially lower base prison sentence than what she actually received in this case. See K.S.A. 21-6804(a). Thus, this Court should vacate Ms. Albano's current 101 month minimum base prison sentence, and remand this case with instructions for the district court to impose a base prison sentence in the appropriate "I" criminal history column.

Conclusion

For the aforementioned reasons, Ms. Albano respectfully requests that this court vacate her convictions and her sentence and remand her case back to the district court for further proceedings in accordance with the above listed issues.

408 P.3d 492 (Table)
Unpublished Disposition
This decision without published opinion
is referenced in the Pacific Reporter.
See Kan. Sup. Ct. Rules, Rule 7.04.
NOT DESIGNATED FOR PUBLICATION
Court of Appeals of Kansas.

STATE of Kansas, Appellee,

v.

Steven PETERMAN, Appellant.

No. 113,866
|
Opinion filed December 22, 2017
|
Review Denied November 21, 2018

Appeal from Reno District Court; TRISH ROSE, Judge.

Attorneys and Law Firms

Shannon S. Crane, of Hutchinson, for appellant.

Keith E. Schroeder, district attorney, and Derek Schmidt, attorney general, for appellee.

Before Hill, P.J., McAnany and Atcheson, JJ.

MEMORANDUM OPINION

Per Curiam:

***1** A jury sitting in Reno County District Court convicted Defendant Steven Peterman of electronic solicitation of a person he believed to be a child between the ages of 14 and 16 years old and of failure to register as a sex offender. Both crimes are felonies. He raises multiple claimed errors on appeal. We find no basis for reversing the convictions and affirm.

FACTUAL BACKGROUND AND PROCEEDINGS IN DISTRICT COURT

A. *Prior sex crimes convictions*

In September 2001, when Peterman was 43 years old, he told a woman that he was interested in making money by publishing sexually explicit photographs of children on the Internet; he wanted to locate young girls to photograph; and he was particularly interested in runaways because nobody cared about them. Later that same month, Peterman called the same woman to see if she was interested in participating in his venture. In response, the woman described a fictional 10-year-old child. Peterman told the woman to bring the girl to him at a motel room so he could photograph the child as he penetrated her vagina with "equipment." The woman contacted the police and told them about Peterman's proposition.

Peterman drove to a residence to meet with the woman, who again called the police before going outside to talk with Peterman in his truck. Peterman wanted her to bring the child to him that evening. He showed the woman a briefcase containing sex toys and portfolio of photographs of female children involved in sexual acts. Peterman graphically explained to the woman why he liked young girls and how he undertook sexual encounters with them to minimize injury.

Law enforcement officers responded to the woman's call and approached Peterman's truck while he and the woman were still sitting inside it. Peterman admitted asking the woman if she would help him procure young girls with whom he could have sex, photograph the sex acts, and then sell the photographs on the Internet.

Peterman was formally charged with crimes related to this incident in Reno County case No. 01 CR 1122. After a three-day trial in November 2002, a jury convicted Peterman of attempted rape, solicitation to commit rape, and solicitation to commit sexual exploitation of a child. As a result of these convictions, Peterman received a sentence of 144 months in prison and was required to register as a sex offender for the duration of his lifetime, pursuant to the Kansas Offender Registration Act (KORA), K.S.A. 2016 Supp. 22-4901 et seq. Those convictions were affirmed on appeal. See *State v. Peterman*, 280 Kan. 56, 118 P.3d 1267 (2005). Peterman was released in early 2013.

B. *KORA violation investigation*

On Thursday, January 30, 2014, Deputy Mitch Harris, then the KORA compliance officer in the Reno County Sheriff's Office, received an anonymous tip that Peterman was using an unregistered cellular telephone. As part of his KORA registration requirements, Peterman was required to register any phone numbers and websites he utilized. He was aware of this and signed documents indicating his understanding of these requirements.

***2** Dep. Harris investigated by reviewing Reno County records, contacting Rice County (where Peterman worked and was also required under KORA to register in that county), and contacting Peterman's parole officer, none of whom were aware of the tipped phone number or of Peterman having registered it. Dep. Harris then went to Detective Diana Skomal, who had been on the force for approximately 24 years, to ask for assistance in his investigation; he believed she had additional resources and experience that could help him. Det. Skomal was unaware of the specific convictions and circumstances warranting Peterman's registration as a sex offender. Using a website that allowed for looking up a person by entering their telephone number, the tipped number came back registered to "Craig Childs."

Det. Skomal was acquainted with Childs and offered to call him at the number to either disprove the anonymous tip or to help confirm that Peterman was using an unregistered cell phone. When she called the number, Det. Skomal did not identify herself as a law enforcement officer but simply asked for Craig. The man on the other end of the line said he was not Craig, told her that she had the wrong number, and they disconnected the call. Dep. Harris thought the voice sounded like Peterman's voice, but he was not sure.

Still needing to investigate the anonymous tip, Det. Skomal suggested she text the number to try to elicit the identity of the man on the other end. She wrote: "I'm so sorry to bother u again ... I just called u looking for Craig. I don't wanna give u a big sob story but r u sure ur not him?? I'd hate to think I was given a bogus # for a hook-up."

While Det. Skomal suggested that she was trying to reach Craig for a hookup, Peterman responded and confirmed he was not Craig but offered, "I am not him but if ur looking for a hookup I might help u." In later texts, Det. Skomal provided the false name of "Lyn," and Peterman disclosed that his name was Steve. Det. Skomal wanted Peterman to send his picture to attempt to confirm who he was so the officers could confirm the KORA violation. Other text messages followed, which will be discussed below; however, it was when Peterman e-mailed a photograph of himself to Lyn the next day that Det. Skomal was able to provide that photo to Dep. Harris so he could conclude that the anonymous tip was correct and the unregistered cell phone number was in use by Peterman.

It was discovered throughout the course of this investigation that Peterman was also active on two social media/dating websites he failed to register as required and he had an e-mail address he had also failed to register.

C. *Electronic solicitation investigation*

Immediately after learning Det. Skomal's false screen name, Peterman asked "Lyn" how old she was and invited her to send him of photograph. Lyn deflected and asked him how old he wanted her to be. Peterman sent Lyn his e-mail address so she could send him her picture. He also deflected disclosing his age, claiming to be an "ol country boy who loves to bullride" and then began using rodeo and bull riding euphemisms as sexual innuendo, e.g., "[I]f you want to play in my rodeo grounds" and "R u looking for a wild romp." Lyn wrote, "I don't know bout all that," and asked if he was on any social media or hook-up sites. He replied, "U wanna play or stay in the barn." Lyn wrote that she just didn't want to get burned, "Like lookin for Craig." He replied that since she still had not sent him a picture, it was "time to close the [barn] door." But, he then wrote, "I'm just an average looking guy but I guarantee I can put a smile on your face that will last a week" and asked her if she wanted him to "git [his] spurs on." He then demanded that she send him a picture or "get turned out to pasture."

Lyn replied, "Sorry I'm not very good at this. If I send u a pic u will know my age," to which Peterman replied, "U over 18." Lyn responded, "Well I can drive/But no not over 18."

***3** Peterman threatened to disengage because he thought Lyn was playing games with him, so Lyn replied, "Ain't like I do this all the time. My bad. Have a nice day." Peterman reengaged at that point and said he just wanted to see who he was talking to. Lyn asked, "So if I sent you [a picture] u won't freak cuz my age?" and Peterman replied, "Why should i."

Later messages sent by Lyn demonstrated that she was under her mother's control, afraid of her, and had to wait for her to leave before she could send a picture to Peterman. Lyn began alluding to a dysfunctional, unhappy relationship with her mother. Peterman's replies took on a patient tone, expressing his understanding of Lyn's home life. He told Lyn that he wanted a picture of her whole body ("whole package"), not just her face, and he asked where her mother was going. Lyn disclosed more personal hardships about her relationship with her mother, including drug abuse, which Lyn considered a good thing because she could be free of her mother when her mother was high. Peterman asked Lyn why she stayed with her mother, and Lyn replied that she didn't have anywhere else

to go. He again deflected answering her question about his age: "Old enough."

Lyn sent Peterman her e-mail address, lynnygirl15@gmail.com, so he could send her his picture and then said she had to go; however, Peterman continued to engage and responded, "Where u off to." Lyn said she had to go get her mom to calm down, "She mad cuz I'm hotter than her & I got a life. lol." Peterman replied, "Maybe she needs laid lol" and "Maybe you need to let me be the judge of how hot you are." Peterman asked her if she was on a computer, and Lyn replied that she could get e-mail on her cell phone.

Peterman asked Lyn how well she knew Hutchinson, described where his house was consistent with the address in his KORA registration documentation, and suggested she come over; Lyn replied, "Ur house? What u got in mind?" to which Peterman replied, "U tell me." Lyn said, "U kno I'm not that way. I mean like being direct n all. U kinda need to take the lead ... / I'm not experienced at all if ya know what I mean." Peterman then said, "Gotta go for now." Lyn asked, "Y?" Peterman still had not sent a picture.

After learning that Lyn was a virgin, Peterman's texts suggested he became apprehensive: He replied, "None at all / Why me ... / For all i know could be a shady deal if u git my drift." Nevertheless, he immediately turned back to Lyn's home life: "R things that rough at home." After she replied that her home life "sucks," he replied, "U know where im at if ur out this weekend and want to ride / Well if you want to learn how to ride cowgirl style call me." Lyn asked what he was doing after school tomorrow, then said, "Geez sorry. Guess u don't have school I do, I'm a dork. But in the afternoon?" He replied that he'd be around his house and she could come over if she wanted to.

Peterman kept the exchange going and next asked Lyn, "U natural or smooth," to which she replied, "Smooth as silk"; he indicated his appreciation with a smiley face and asked her to prove it. She asked if he wanted proof in a picture or in person, and he replied that he wanted it in person. When Peterman told Lyn to call him, she said she couldn't because her mother would take her phone if she caught Lyn texting.

The next day, Friday, January 31, 2014, Lyn texted Peterman to ask if he got her e-mailed picture. At this point, Det. Skomal still had not received Peterman's picture to establish the unregistered cell phone and KORA violation. Later that afternoon, Lyn texted Peterman that she just received his picture. He asked her what she thought of his picture and said that he got the one of her on the boat. Peterman asked her, "So whats up," and she replied that she was just ready to get out of school; he replied that he was "Ready to ride." She asked if they could meet somewhere other than his house because it was "kinda scary," and he replied, "R u looking for some experience / Or what / Come bring it on."

***4** Lyn asked if he could pick her up because she didn't want to park her mom's car somewhere out of the ordinary, but she would "like to learn." He told her she could park at a business near his house and he would pick her up there; he said, "Can teach u" and asked, "U ever play with urself or rub it," to which Lyn replied, "Since I'm only 15 I don't have a reg license so I guess I could park there. Yes I got that part figured out." Peterman replied, "Who knows about this," and Lyn replied, "Nobody"; he said, "Keep it that way / Think you can handle it." She asked him to pick her up and said she could handle it if he's a good teacher; he asked if she was a fast learner and told her, "Give u all the [practice] u want long as u stay quiet n not brag bout it." In the texts immediately following, Lyn stated she thought she could meet him at 4:30 p.m. and he asked her how long she planned to stay; he told her she would need a "Couple hours for school."

Peterman then asked Lyn who gave her his number; she reminded him she had initially been looking for Craig; and he told her to call him. In the recorded telephone call, Peterman immediately asked Lyn if this was a setup. She replied, "[M]aybe it's a bad idea altogether." He said, "I don't need no trouble and neither do you ... If you're wanting to learn, that's one thing." They discussed where to meet and he gave her directions of how to walk to his house, stating, "I'm just being a little cautious, know what I mean?" to which Lyn replied, "I guess I don't." Lyn said that maybe they should forget it; she said that it was a mistake and an accident that she called him since she was looking for Craig and that Peterman was now treating her like she'd done something to him. He encouraged her to come over and asked if she was still going to be there by 4:30. Peterman said, "You're the student wanting to learn," but Lyn said she was "freaking out"; he attempted to turn her mind to their encounter, asking her what she wanted to learn. Lyn said she was worried it would hurt and was thinking it was scary, but she didn't want to be a tease. Peterman said that if she was willing to learn, he was willing to teach her, but that he didn't want any trouble or drama, and Lyn replied that she didn't either—she didn't want her mom finding out.

At this point in the telephone conversation, Peterman explained to her that they could both get into a lot of serious trouble because he was over 21 and she wasn't and he didn't need to go to jail for rape or anything like that. Lyn asked why it would be rape and Peterman told her that the "laws have changed so much." She asked, "Would I be in trouble?" to which he replied, "I don't want you to be, and I don't want to be neither." Lyn said she didn't understand because "I have a friend, Stacy, and she's having sex with a guy who's 22 and she's my age. She's 15. Are they breaking the law?" and he replied, "[Y]es and no ... Let me ask you this: is this gonna be a consensual thing? ... All I'm asking you: are you giving consent for sex?" Lyn expressed apprehension since he mentioned rape that he might not stop if she changed her mind and said no, to which Peterman replied, "I'm gonna let you take it at your own pace."

Approximately halfway through the phone call, Peterman told Lyn, "You sound a little older than 15," to which Lyn replied that she had to grow up a lot, she was looking to "get the rest figured out" so she could get out of her mom's house sooner; she explained that she was not much of a kid because she was "kind of serious" and told Peterman, "[Y]ou're not the first person to say that." He replied by telling her that he was going to leave the decision up to her and, "If you wanna go for it, we'll go for it." Peterman never brought up Lyn's age again. For the next several minutes of the phone call, Peterman told Lyn that he wasn't trying to scold her or tell her she was doing anything wrong, and then he wanted her to tell him over the phone what she wanted him to do to her; he asked how "bashful" she was; Lyn said she didn't get the whole "sex thing" and said she's trying to figure it out, "I'm not going to be able to give you a mini-porno over the phone."

***5** Peterman asked her again how much she was willing to learn, and she asked him if he had protection because she didn't want to get pregnant. He replied, "I don't think you're going to have to worry about that ... I am very clean ... I take my bull riding very serious ... If this all works out and you want a place to stay at, you got one, okay?" She asked again if he had protection, stating that "they hammer us with that at school," and he said that it could be taken care of.

Peterman then told her he would help her relax by giving her a massage and asked if she had ever had an orgasm. He asked her again what kind of vehicle she would be driving and how soon she would be there. He reiterated that he wasn't looking for any trouble and didn't need the cops at his house. She said she didn't want any trouble either, but he was freaking her out. He asked her again how long she planned to stay, if she wanted to "go for this or not," and when she replied she would "head that way," Peterman said, "One other question for ya: how tight are you?" Lyn responded that she assumed she was pretty tight because "I haven't had anything in there."

Peterman then said, "This is the way this is gonna go down, okay? When you get here, you tell me what you want to learn. If you think you wanna try to take it, we'll just let you be on top and you see what you can handle." Peterman told her that it would probably hurt a little bit "being that you've never done it before. But I think that if we get you well lubricated I think you can probably take it." The rest of the conversation followed similarly with him telling her she would be in control, that he would teach her to use her senses, that it would take a couple of hours, and if she wanted to "skip the massage and get right down to business" he could do that, too. Lyn told him she'd be there in 20 minutes and they hung up.

Almost immediately after they hung up, Peterman texted Lyn and said that he thought something was wrong, to which she replied, "Shit dude ur freakin me out. Lets try latr." The balance of the exchange involved Lyn disengaging and Peterman trying to get her to come meet him:

> PETERMAN: "Ur ok come on / Its ok / Teacher is waiting / Will be there
>
> LYN: "I'll hit u up latr I gotta think
>
> PETERMAN: "Ok / Baby its like this if you want the experience I'm getting ready to walk out the door and head that way
>
> LYN: "Yeah but I'm freaked n scared. I need some time. Idk
>
> PETERMAN: "You'll be fine you'll be ok you ain't got nothing to be scared about or worried about okay
>
> LYN: "Ok ... I think I'm gonna think a minute. U around this weekend??
>
> PETERMAN: "Just tonight new u werent serious but im waiting for u to show
>
> LYN: "I was serious ... u weren't
>
> PETERMAN: "Yes i am / And got what you want
>
> LYN: "Like what? How's that work?

PETERMAN: "Im willing so get over here / U cumming / Guess not."

Saturday evening, Peterman sent Lyn a single text that said, "Hey."

Over the next couple of days, the texting continued. Peterman never again expressed any apprehension about thinking it was a setup. The texts consisted of her being sorry if she made him mad at her, being in trouble for blowing curfew, and her excitement about a possible snow day from school and whether that would allow them to get together. Peterman said that he still wanted to get together and asked if it had been "heavy on [her] mind," to which she replied, "Little bit yeah." Peterman asked, "Why / Who knows?" Lyn responded that no one knew and no one would know, but that it was on her mind because it was a big decision for her. He asked her if she still wanted to "do this" and told her he would be off of work the next weekend, if she could "handle this."

***6** On Friday morning, February 7th, Peterman asked her to describe her vagina and wanted her to send him a picture of it. Lyn said she wanted to please him and learn the right way. He continued telling her it would take a few hours, and he asked if she wanted more than a one-time thing and if she was excited. Peterman told her not to be nervous and that they'd go slow so she wouldn't be hurt because he wanted her to enjoy it. He told her that her being a virgin was not a "turn off" and he would teach her things that would make her better than her girlfriends.

On Monday, February 10th, the exchange transferred from texting to a messaging format on a website called TWOO.com, which Peterman invited Lyn to join. For Lyn to register, she had to include her birthdate, but the drop down box would not let her choose a year to reflect an age under 18; the youngest year was 1995, which then showed her age as approximately 18 years and 1 month old. Her profile indicated that she was in secondary school, studying. Peterman and Lyn's exchanges on this website were consistent with their texts messages—he wanted to know if she was looking forward to her lessons; he was looking forward to teaching her; she vented about her mother and wanted to run away; and he told her several times she could stay with him, if she needed to.

The next afternoon, he initiated the messaging on TWOO.com by stating, "Hi do u think we can get this done this week. You were heavy on my mind last night." In these messages, Peterman wanted to confirm that she wanted to "get laid" and that she wanted to please him, and he wanted to know when they could get started. He asked her, "[A]nybody know of this," to which she replied, "Hell no." He asked again for a picture of her vagina, but Lyn told him she couldn't send him one because her mother had been going through her things, and said, "Don't worry; been deleting all my messages." Peterman responded to not getting the picture by telling her he wasn't sure she really wanted to learn, to which she replied she just wanted to know what night worked for him; he said any night was fine and he just wanted to teach her. At this point, he began asking similarly explicit sexual questions as he had in some of his text messages regarding her virginity, her vagina, and telling her that he would teach her to have orgasms.

As part of this exchange, Peterman asked her if she had "puffy beaver lips" and "puffy pussy lips" and said he loved "it that way" because it would make it "easier" for her to "take him." He then told her that he couldn't wait to give her her first orgasm, and then he asked her to move in with him and told her it was a serious offer. He then asked her, "[W]hat size r ur boobs," and told her, "If u wanna live here come on. But no drama and it needs to be [kept] quiet ok. No one needs to know where ur at ok."

On Wednesday, February 12th, the exchange transferred back to text messages because Lyn said it was easier for her. Over the course of the morning, Peterman asked if she was planning to stay with him "for good" and to tell him when and where to pick her up at the mall in town. He told her he bought her some "sexy panties" and hoped that they would fit. He told her that she would "need to [keep] a very low profile for awhile too."

A couple of hours later, he again confirmed that she was moving in "for good" and asked her about missing school, to which she replied that it was covered because she forged a note from her mother. He asked if she was ready for her lessons and said, "[N]obody needs to know where you r." He suggested that she would have all the time she needed to learn since she would be with him during the days, too. Lyn wrote, "Hope u know that even tho I don't have sexual experience I'm more like a grownup than 15" because she knew how to cook and clean. Peterman asked if her mother would be looking for her; Lyn said she wouldn't be and her mom wouldn't know where to look anyway. Lyn told Peterman that meeting would have to wait until after school because she couldn't get out of her last class. Throughout the afternoon, he asked her questions about her vagina and whether he had "permission

to play on the playground." He told her there was no reason to be nervous, shy, or bashful and told her she could sleep naked.

*7 When Lyn told Peterman that she was out of school and going to the mall, he told her to watch for his truck; he was over by the high school, so be watching for him to pull up so she could "hop in," and he offered to take her shopping later for matching bras and panties. Peterman told her to walk through the mall doors, she'd see his white truck and he'd pick her up.

Det. Skomal testified that her initial communications were only to identify whether Peterman had the unregistered cell phone; however the investigation changed in character when it was clear from his text messages that he was not concerned about how young Lyn was.

D. *Search warrant for truck*

At trial, Det. Skomal testified that Peterman was under surveillance from the time he left his house; he was immediately apprehended and arrested in the parking lot at the mall. Peterman's truck was impounded and taken to a police lot, pending the approval of a search warrant.

Det. Skomal testified that she believed Peterman communicated with Lyn via text messaging on a cellular telephone and through the Internet, possibly by computer. She did not know the specific device or devices he used and did not know what kind of storage medium he may have used, e.g., floppy disks, thumb drives, etc. When Det. Skomal wrote the affidavit in support of the search warrant for Peterman's truck, she included the types of devices and storage options capable of recording and capturing text communications or Internet communications. The only thing in Peterman's truck that conformed to the items to be seized as described in the search warrant was Peterman's cellular telephone. The officers seized only the telephone.

E. *Interview*

After Peterman was arrested, he was Mirandized but waived his rights and agreed to talk with Dep. Harris and later Det. Skomal. Peterman told Dep. Harris, "I think I know what this is about; is it over that texting?" Dep. Harris said he was there to discuss KORA registration issues. After discussing Peterman's violations, with particular emphasis on the unregistered cellphone, Peterman admitted that he had been using the cellphone for three or four months and that he failed to register the phone in Reno County, as required. He said that the only dating site he'd been on was Meet24, but later he admitted to being on TWOO for approximately two weeks. Dep. Harris asked Peterman if there was anything on those sites he was "ashamed of" and wanted to disclose before he checked up on the sites; Peterman then admitted he was going to the mall to meet a girl who sometimes said she was 15 and sometimes said she was 18. Peterman admitted that he'd had talked with this girl about having sex and moving in to his house: "It's nothin' downright dirty or anything like that." He claimed he went to the mall to see if the girl was 15 or 18, and if she was 15, he "wanted nothing to do with her." Peterman stated that even after Lyn told him she was 15, he still had contact with her, but it was she who always initiated contact with him.

Det. Skomal entered the interview and after several minutes revealed herself to be Lyn; she told Peterman that she knew he wasn't being honest regarding the text messages because they were all in her phone, too. Det. Skomal stated:

SKOMAL: "You were going to have Lyn move in with you.

PETERMAN: "I told her she could.

SKOMAL: "You sure did.

PETERMAN: "I told her that there would be people, you know, that I would help her.

*8 SKOMAL: "You also told her you were going to teach her to have sex.

PETERMAN: "Yep, I did.

SKOMAL: "You did. And you wanted to know how tight she was.

PETERMAN: "Yep.

SKOMAL: "And you wanted her to send you a picture of her vagina.

PETERMAN: "Yep.

SKOMAL: "And you knew that she was under 18 when you asked her that.

PETERMAN: "I questioned it. I really did.

SKOMAL: "I told you twice I was 15. I told you again today I was 15.

PETERMAN: "Well, you don't look 15 to me."

He later admitted that he went to the mall to take Lyn home with him and teach her how to have sex and that he had brand new panties in his dresser drawer at home. Peterman said he was "just curious." When Det. Skomal asked Peterman to explain why he wanted Lyn to keep quiet because he didn't want to get in trouble for rape if he didn't believe she was 15, Peterman said, "I didn't know whether she was 15 or not," and that the main thing he learned from this was to be "a whole lot more cautious." Peterman said, "I thought [having sex] was a possibility, but I didn't think it was gonna happen. I just figured it was too damn good to be true."

F. *Trial and disposition*

The instructions the district court gave to the jurors included information about their duty to consider and weigh all of the evidence presented and to follow all instructions, that it was for the jurors to determine the weight and credibility of witness testimony, that they had a right to use their common knowledge and experiences in making those determinations, that it was the State's burden to prove Peterman's guilt, that they were to presume him not guilty unless convinced otherwise beyond a reasonable doubt, and that their verdict must be unanimous and founded entirely upon admitted evidence and the law in the instructions. Instructions as to the count of electronic solicitation of a child were given, as was an instruction given on Peterman's affirmative defense of entrapment. A separate instruction was given on the KORA violation.

The jury returned a verdict of guilty on both counts.

Peterman was sentenced on March 20, 2015. His criminal history score was determined to be an A. His did not object to his score. He was sentenced to the standard prison term of 233 months for his conviction on Count I, electronic solicitation of a child. He was sentenced to the standard 18 months for his conviction on Count II, violating KORA, which was to run concurrent with his sentence on Count I. Peterman has timely appealed.

ANALYSIS

For convenience, we take up the issues on appeal in an order different from the parties' briefing. We add facts as necessary.

Denial of Motion to Suppress

Peterman filed a pretrial motion to suppress evidence obtained from his cell phone on the grounds the search warrant and the supporting affidavit were overbroad and lacked sufficient particularity. He contends the search of the cell phone and the seizure of the messages from it were unreasonable and, therefore, violated the Fourth Amendment to the United States Constitution. Even assuming the search warrant or the affidavit were defective, any error would have been harmless and did not affect the trial and the jury's consideration of the charges for the simple reason the State introduced none of the information obtained from Peterman's cell phone as evidence against him. All of the messages were the versions Det. Skomal sent, received, and stored on her electronic devices. The messages bore on the electronic solicitation charge.

***9** As to the failure to register charge, the State had to show Peterman used a telephone number he had failed to report as required under KORA. The State did so without any messages taken from the cell phone itself. And the evidence established Peterman's use of the telephone number without the seizure of the cell phone. In speaking with Dep. Harris and Det. Skomal, Peterson admitted his use of an unregistered telephone.

Moreover, even assuming a Fourth Amendment violation and an erroneous ruling in the district court on the motion to suppress, the appropriate remedy for the constitutional violation would have been the exclusion of any impermissibly seized evidence from Peterman's jury trial. *United States v. Leon*, 468 U.S. 897, 908-09, 104 S. Ct. 3405, 82 L.Ed. 2d 677 (1984) ("The Court has, to be sure, not seriously questioned, 'in the absence of a more efficacious sanction, the continued application of the [exclusionary] rule to suppress evidence from the case where a Fourth Amendment violation has been substantial and deliberate.' "). As we have said, Peterman can point to no evidence admitted at trial he asserts was unconstitutionally seized. In turn, he cannot show his right to a fair trial was compromised. Without that showing, Peterman demonstrates no prejudicial error or harm. We have been presented with no grounds for reversing the convictions based on an ostensible violation of the Fourth Amendment. See *State v. Miller*, No. 109,716, 2015 WL 3632029, at *3 (Kan. App. 2015) (unpublished opinion), *rev. denied* January 25, 2016.

Admission of Peterman's Past Convictions for Sex Crimes

Peterman contends that the district court did not explicitly admit the evidence of his prior sex crimes convictions under K.S.A. 2016 Supp. 60-455(d) to allow the State to

demonstrate his propensity to commit sex-related crimes involving solicitation of underage females; rather, the evidence was allowed only to show intent, motive, or absence of mistake. He also claims that a limiting instruction to the jury, although not requested by the defense, was required of the district court. Finally, he points out the district court made no express finding that the probative value of Peterman's earlier convictions and their circumstances outweighed any unduly prejudicial effect.

An appellate court must apply the statutory law on evidence as it was at the time of the challenged evidentiary ruling, i.e., at the time of trial. *State v. Page*, 303 Kan. 548, 551, 363 P.3d 391 (2015). When the question of whether the trial court complied with specific statutory requirements for admitting evidence requires interpretation of the statute, appellate review is de novo. See *State v. Stafford*, 296 Kan. 25, 47, 290 P.3d 562 (2012).

At the time of Peterman's trial in March 2015, the statutory law on evidence pertinent to the challenged ruling regarding the State's introduction of Peterman's prior sex crimes convictions was as it is in K.S.A. 2016 Supp. 60-455(d), which states:

> "Except as provided in K.S.A. 60-445, and amendments thereto, in a criminal action in which the defendant is accused of a sex offense under articles 34, 35 or 36 of chapter 21 of the Kansas Statutes Annotated, prior to their repeal, or articles 54, 55 or 56 of chapter 21 of the Kansas Statutes Annotated, or K.S.A. 2016 Supp. 21-6104, 21-6325, 21-6326 or 21-6419 through 21-6422, and amendments thereto, evidence of the defendant's commission of another act or offense of sexual misconduct is admissible, and may be considered for its bearing on any matter to which it is relevant and probative."

***10** Count I of the complaint fell under chapter 21, article 55 for electronic solicitation of a child, per K.S.A. 2016 Supp. 21-5509(a), (b)(1). This makes evidence of Peterman's prior acts or offenses of sexual misconduct admissible and allows the consideration of that evidence for its bearing on "any matter to which it is relevant and probative."

Appellate review of a trial court's decision to admit evidence is a two-step process. First, the appellate court determines whether the evidence is relevant. *State v. Phillips*, 295 Kan. 929, 947, 287 P.3d 245 (2012). Evidence is relevant if it has a "tendency in reason to prove any material fact." K.S.A. 60-401(b). A material or logical connection between the asserted facts and the inference or result they are intended to establish demonstrates "relevance." 295 Kan. 929, Syl. ¶ 7. Relevant evidence is both: (1) material, i.e., the fact has a legitimate and effective bearing on the decision of the case and is in dispute; and (2) probative, i.e., it has " 'any tendency in reason to prove' " the fact. *State v. Boleyn*, 297 Kan. 610, 622, 303 P.3d 680 (2013). Materiality is reviewed de novo, while probativeness is reviewed for abuse of discretion. 297 Kan. at 622.

If the evidence is relevant, the court next applies the statutory provisions governing admission and exclusion of evidence. *Phillips*, 295 Kan. at 947. "These rules are applied either as a matter of law or in the exercise of the district court's discretion, depending on the rule in question." *State v. Hughes*, 286 Kan. 1010, 1020, 191 P.3d 268 (2008). Whether the probative value of otherwise relevant evidence outweighs its potential for undue prejudice is reviewed for abuse of discretion. See *Phillips*, 295 Kan. at 947; *State v. Wilson*, 295 Kan. 605, 621, 289 P.3d 1082 (2012).

A district court abuses its discretion when: (1) no reasonable person would take the view adopted by the judge; (2) a ruling is based on an error of law; or (3) substantial competent evidence does not support a finding of fact on which the exercise of discretion is based. *State v. Huddleston*, 298 Kan. 941, 960, 318 P.3d 140 (2014). But "[w]hen the adequacy of the *legal* basis of a district judge's decision on admission or exclusion of evidence is questioned, we review the decision de novo." *State v. Gunby*, 282 Kan. 39, 47-48, 144 P.3d 647 (2006).

Although the district court did not directly rely on K.S.A. 2016 Supp. 60-455(d) to admit the past convictions, we may consider whether that provision furnished a sufficient statutory basis for doing so. *State v. Garcia-Barron*, 50 Kan. App. 2d 500, 507, 329 P.3d 1247 (2014) (district court may be affirmed if it reaches correct result for the wrong reason). That would be an additional reason for admitting the convictions. Because Peterman relied on an entrapment defense at trial to the electronic solicitation charge, the district court properly considered the past convictions under K.S.A. 2016 Supp. 60-455(b) to rebut that defense. To counter a claim of entrapment, the State may show the defendant had a "predisposition" to commit the charged crime—here soliciting a person believed to be a minor for illicit sexual purposes. See *State v. Nelson*, 249 Kan. 689, Syl. ¶ 4, 822 P.2d 53 (1991) ("A person who is predisposed to commit a particular crime cannot claim

entrapment."); *State v. Ralston*, 43 Kan. App. 2d 353, 366, 225 P.3d 741 (2010) (entrapment defense may be "rebutted by evidence of an intent and predisposition" to commit the crime). There may be some theoretical difference between evidence of propensity admissible under K.S.A. 2016 Supp. 60-455(d) and evidence of predisposition admissible under K.S.A. 2016 Supp. 60-455(b) in an entrapment case. But any difference would be miniscule as a practical matter. A previous conviction for a crime comparable to the charged crime is a recognized way of proving predisposition and, thus, rebutting any claimed entrapment. See *State v. Amodei*, 222 Kan. 140, 142-43, 563 P.2d 440 (1977); *United States v. Mayfield*, 771 F.3d 417, 437-38 (7th Cir. 2014); *State v. Bratton*, No. 99,521, 2009 WL 4639504, at *6 (Kan. App. 2009) (unpublished opinion).

***11** In sex offense cases, propensity evidence has a " 'legitimate and effective bearing' " on a defendant's guilt, i.e., it is material. *State v. Bowen*, 299 Kan. 339, 349, 323 P.3d 853 (2014); see also *State v. Remmert*, 298 Kan. 621, 627-28, 316 P.3d 154 (2014) (prior diversion for sex crime against young girl relevant to guilt in prosecution for sex crime against young boy); *State v. Spear*, 297 Kan. 780, 789, 304 P.3d 1246 (2013) (victim's prior molestation allegations against defendant would have been admissible propensity evidence in later prosecution for aggravated indecent liberties involving same victim); *State v. Prine*, 297 Kan. 460, 480, 303 P.3d 662 (2013) (defendant's prior sexual abuse of daughter and younger sister admissible propensity evidence in prosecution for sexual abuse against friend's daughter). In this case, the evidence of Peterman's past convictions was probative of his propensity to commit the acts alleged by the State because the prior crimes were sufficiently similar to those acts. Those crimes and the charged crime here both entailed a disposition or propensity to engage in sex with minor females and extended efforts to seek them out for that purpose.

Peterman made no request for a limiting instruction, and he would not have been entitled to one regarding propensity evidence admissible under K.S.A. 2016 Supp. 60-455(d). *State v. Breeden*, 297 Kan. 567, 577-78, 304 P.3d 660 (2013). Even assuming a limiting instruction should have been given regarding the jury's consideration of Peterman's previous convictions as they bore on his entrapment defense, review here would be for clear error, since there was no request for an instruction in the district court. K.S.A. 2016 Supp. 22-3414(3); *State v. Brammer*, 301 Kan. 333, 339, 343 P.3d 75 (2015). The Kansas Supreme Court has phrased the clearly erroneous standard as "whether [the appellate court] is firmly convinced that the jury would have reached a different verdict had the instructional error not occurred." *State v. Williams*, 295 Kan. 506, Syl. ¶ 5, 286 P.3d 195 (2012). Given the wealth of evidence against Peterman, including his own inculpatory statements to law enforcement officers, and the otherwise proper admission of his past convictions as propensity evidence without a limiting instruction, we readily conclude the omission of an instruction about their use to prove predisposition made no difference.

Finally, Peterman claims that past convictions for sex crimes was more unfairly prejudicial than probative because the evidence distracted the jury from the central issues. He suggests the material facts of the 2001 crimes were dissimilar to electronic solicitation charge in this case. Peterman also points out the district court never made an explicit finding on probative value versus undue prejudice. As we have already indicated, the prior crimes were quite similar to the electronic solicitation crime in the key respects reflecting a common propensity and predisposition. The very aspects of the earlier convictions making them prejudicial—the sordid intent, disposition, and propensity animating them—also made them highly probative. That does not amount to *unfair* prejudice requiring they be excluded as evidence.

Ultimately, the district court carefully regulated the admission of the previous crimes evidence in front of the jury in a way that minimized the danger of unfair prejudice. The district court allowed the State to admit a documentary exhibit of joint stipulations as to the underlying facts of the 2001 case. The presentation of this evidence was not time consuming, as it was admitted at trial as a written stipulation read into the record by the district court. The evidence, then, was quickly and surgically admitted without extended testimony from multiple witnesses.

The district court's lack of an explicit finding balancing the probative value of the past convictions against their undue prejudice created no meaningful error. The district court knew about the requirement and had deferred a formal ruling on the point. Although the district court never revisited the issue to make a formal ruling, its handling of the evidence, including the use of a stipulation to present it to the jury, necessarily entailed a finding favoring probative value. Peterman never asked for a specific ruling from the district court.

***12** The question before us now is whether the district court would have abused its discretion in making an explicit finding that the probative value of Peterman's past convictions

outweighed any unfair prejudice. We, of course, know what that evidence was, since it was admitted through the stipulation. Given those facts and the governing law, we can fairly conclude there was no abuse of discretion in admitting the evidence. That is, a reasonable district court judge would have acted within the broad range of judicial discretion in admitting the convictions and the stipulation in this case.

Peterman has shown no error on this point.

Jury Instructions on Entrapment

For the first time on appeal, Peterman challenges the jury instructions related to his entrapment defense in two respects. Because the points were not presented to the district court for consideration during the trial, we review them using the standard for clear error we have already outlined.

First, Peterman says the district court should have used PIK Crim. 4th 51.050 (2013 Supp.) to explain to the jurors how they should have considered the evidence on entrapment. In a case with an entrapment defense, PIK Crim. 4th 51.050 would state: "The defendant raises entrapment as a defense. Evidence in support of this defense should be considered by you in determining whether the State has met its burden of proving that the defendant is guilty. The State's burden of proof does not shift to the defendant." The district court presumably should have included PIK Crim. 4th 51.050 among the instructions given the jury in this case. But the Kansas Supreme Court has consistently held the failure to use the instruction does not rise to the level of clear error. *State v. Staten*, 304 Kan. 957, 964-67, 377 P.3d 427 (2016); *State v. Cooperwood*, 282 Kan. 572, 580-82, 147 P.3d 125 (2006); *State v. Crabtree*, 248 Kan. 33, 40-41, 805 P.2d 1 (1991). We, of course, are obligated to apply that authority and, therefore, find Peterman's point to be without merit.

For his other challenge to the instructions, Peterman asserts what the district court told the jurors didn't convey an adequate meaning of "predisposition," thereby leaving them to deliberate without a clear understanding of what the State had to show to rebut his entrapment defense. The district court used what is now PIK Crim. 4th 52.110 (2016 Supp.) to inform the jurors about the defense. As tailored for this case, the instruction stated:

> "Entrapment is a defense if Steven Peterman was induced or persuaded by a public officer to commit a crime which Steven Peterman had no previous disposition, intention, plan or purpose to commit. Entrapment is not a defense if Steven Peterman originated, began or conceived the plan to commit the crime or when he had shown a predisposition, a plan, an intention or a purpose for committing the crime and was merely afforded an opportunity to consummate or carry out his intention to complete his plan to commit the crime and was assisted by the public officer. Steven Peterman cannot rely on the defense of entrapment if the conduct of electronic solicitation of a child was likely to occur in the course of Steven Peterman's usual activities and the public officer did not mislead Steven Peterman into believing his conduct was lawful."

The instruction contains a concise rendition of the law governing entrapment. It explains that the defense would apply if Peterman "had no previous disposition" to commit the crime but would not if he "had shown a predisposition ... and ... was merely afforded an opportunity" to solicit a person he believed to be a minor. Conceptually, neither "disposition" nor "predisposition" depends upon some unusual legal meaning in explaining entrapment. The words are common English ones, and their customary definitions apply here. We have no reason to think jurors would be confused by them or misunderstand them. During their deliberations, the jurors did not ask for some clarification or additional guidance in their consideration of the instruction or the entrapment defense.

***13** In short, we are unpersuaded PIK Crim. 4th 52.110 is erroneous, let alone clearly erroneous.

Peterman has failed to show reversible error based on the jury instructions related to his entrapment defense.

Sufficiency of the Evidence Negating Entrapment

The State has the burden to negate an affirmative defense, such as entrapment, by proof beyond a reasonable doubt. K.S.A. 2016 Supp. 21-5108(c); *Staten*, 304 Kan. at 966-67 (applying 21-5108[c] to self-defense). Peterman argues the State failed to do so in this case and specifically points to a lack of evidence he was predisposed to engage in electronic solicitation of a minor. In reviewing a sufficiency challenge, we construe the evidence in a light most favorable to the party prevailing below, here the State, and in support of the jury's verdict. An appellate court will neither reweigh the evidence generally nor make credibility determinations specifically. *State v. Williams*, 299 Kan. 509, 525, 324 P.3d 1078 (2014); *State v. Pham*, 281 Kan. 1227, 1252, 136 P.3d 919 (2006). The issue for review is simply whether rational jurors could have found the defendant guilty beyond a reasonable doubt. *State v. McBroom*, 299 Kan. 731, 754, 325 P.3d 1174 (2014).

To be found guilty of electronic solicitation of a child, the State was required to prove beyond a reasonable doubt that Peterman communicated by telephone, Internet, or other electronic means to entice or solicit a person whom he believed to be a child of more than 14 but less than 16 years of age to commit or submit to an unlawful sexual act. K.S.A. 2016 Supp. 21-5509(a), (b)(1). Entrapment, as a defense to a criminal charge, rests on the policy notion that government entities and their agents should not foment unlawful conduct. See *Jacobson v. United States*, 503 U.S. 540, 553-54, 112 S. Ct. 1535, 118 L.Ed. 2d 174 (1992). So if a government agent induces a person not otherwise disposed toward criminal behavior to break the law, the ostensible lawbreaker should not be held to answer for the wrongful act. The defense, however, does not apply when the agent merely affords an opportunity to someone already inclined to commit the crime. See K.S.A. 2016 Supp. 21-5208(a); *State v. Jones*, 271 Kan. 201, 204, 21 P.3d 569 (2001) (discussing circumstances supporting entrapment defense); *State v. Jordan*, 220 Kan. 110, 116, 551 P.2d 773 (1976) (same).

Without rehashing the facts, we readily conclude there was ample evidence to support the jury's determination Det. Skomal did not induce Peterman to commit a crime he otherwise lacked a predisposition to commit. Although "Lyn" first contacted Peterman, the extended discussions between them by electronic means and telephone over the course of days do not portray a man recoiling at the possibility of engaging in a sexual encounter with an underage female. To the contrary, the discussions show Peterman repeatedly encouraging and enticing Lyn to meet him for precisely such a purpose. Although Peterman minimized his conduct while talking with law enforcement offices by expressing some doubt about Lyn's age, the evidence shows that Lyn stated several times that she was 15 years old and various details of her persona were consistent with her being a minor. The communications themselves permitted a reasonable jury to conclude Lyn did not coax or cajole an otherwise resistant Peterman to commit a crime. As this court recently observed: "Entrapment shields the reluctant-though-impressionable delinquent but not the criminally minded opportunist." *State v. Brooks*, No. 113,636, 2017 WL 839793, at *3 (Kan. App. 2017) (unpublished opinion), *rev. denied* 306 Kan. —— (August 30, 2017).

***14** Moreover, of course, the jury properly considered Peterman's past convictions for sex crimes in determining his predisposition here. That evidence substantially undercuts a claim of entrapment and lack of predisposition. Although those crimes took place in 2001, Peterman was in prison until about a year before the crime charged here took place. So a jury could conclude Peterman rather quickly seized an opportunity to act on his predisposition.

At best, Peterman's argument on sufficiency of the evidence really invites us to reweigh the evidence and to come to a conclusion different from the jury's. But that would be inconsistent with the governing standard of review. See *State v. Daws*, 303 Kan. 785, 789, 368 P.3d 1074 (2016). Viewed in the correct light, the evidence was sufficient to defuse Peterman's entrapment defense and to support his conviction for electronic solicitation of a child.

Conclusion

We have carefully considered the issues Peterman has raised and the State's responses to them. As our discussion indicates, Peterman has understandably focused on his conviction for electronic solicitation. Given the record on appeal, we have been presented with no grounds requiring reversal of Peterman's convictions for violating KORA and for electronic solicitation of a child.

Affirmed.

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Unpublished Disposition
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See Kan. Sup. Ct. Rules, Rule 7.04.
NOT DESIGNATED FOR PUBLICATION
Court of Appeals of Kansas.

STATE of Kansas, Appellee,

v.

Terry ROWAN, Appellant.

No. 118,100

Opinion filed February 15, 2019.

Appeal from Wyandotte District Court; MICHAEL A. RUSSELL, judge.

Attorneys and Law Firms

Clayton J. Perkins, of Kansas Appellate Defender Office, for appellant.

Nicholas Campbell, assistant district attorney, Mark A. Dupree Sr., district attorney, and Derek Schmidt, attorney general, for appellee.

Before Standridge, P.J., Pierron and Green, JJ.

MEMORANDUM OPINION

Per Curiam:

***1** Following a trial, Terry Rowan was convicted of two counts of distribution of marijuana and one count of possession of marijuana. Rowan now appeals those convictions claiming that the State presented insufficient evidence to rebut his entrapment defense and, alternatively, that the State committed prosecutorial error during closing argument. Finding no reversible error, we affirm Rowan's convictions.

FACTS

On December 27, 2013, Tina Johnson called Kansas City, Kansas, Police Officer Nathan Doleshal and informed him that she thought she could purchase marijuana from Rowan. At the time, Johnson was working with Doleshal as a confidential informant. In that role Johnson helped Doleshal to set up and carry out controlled, undercover drug buys. Johnson initially began working as a confidential informant in exchange for leniency on some criminal charges that she was facing. But after she had earned that leniency, Johnson continued to work as a confidential informant in exchange for monetary compensation, typically between $50 and $200 per buy. Johnson estimated that she had been a confidential informant for about six years and that she had been involved in well over 100 drug buys and investigations.

When Johnson called Officer Doleshal, she informed him that she had known Rowan for years and believed he could sell her a pound of marijuana. At the time, Rowan was living in a makeshift building located in the backyard of Kenneth Tomblin's home. Rowan had built the structure; it was essentially a single room that housed his kitchen, living, and dining areas as well as a lofted bed. Rowan made his living by collecting and recycling scrap metal from various businesses. Rowan was unable to drive because his driver's license was suspended. He therefore enlisted the help of Tomblin, and the two of them drove around collecting scrap metal and handling recycling jobs on a daily basis.

Prior to being contacted by Johnson, Officer Doleshal had no knowledge of or experience with Rowan. By contrast, his partner, Officer Jeffrey Miskec had crossed paths with Rowan on five or six different occasions, all of which involved traffic violations and/or Rowan's suspended license. And in none of those interactions did Miskec suspect that Rowan was involved in the sale or distribution of drugs. Indeed, Miskec had conducted multiple inventory searches of Rowan's vehicle but never found any drugs, paraphernalia, or other evidence indicating that Rowan was involved in narcotics. Based on that history, Miskec expressed a degree of skepticism regarding the accuracy of Johnson's claim that she could purchase a pound of marijuana from Rowan. Despite Miskec's misgivings, Doleshal did nothing to verify or confirm Johnson's information. Instead, he simply passed it along to his supervisor. Doleshal ultimately received authorization to proceed with the investigation and to "use Ms. Johnson to purchase marijuana from Mr. Rowan."

After receiving authorization, Johnson made a number of phone calls to Rowan to set up the sale. These calls were made while Johnson was sitting next to Officer Doleshal. While Doleshal was able to hear a majority of what was said and to follow both sides of the conversation, he was

not able to record the phone calls. During those phone calls, Rowan reportedly told Johnson that she could come by later that day—December 27, 2013—to carry out the previously agreed upon sale. Pursuant to the protocol for controlled drug buys, Officers Doleshal and Miskec searched Johnson for contraband, weapons, and money immediately before the planned transaction. Finding none, the officers provided Johnson with $160 in prerecorded bills, with which she was to purchase the drugs. The officers also outfitted Johnson with a discrete electronic recording device. That device allowed the audio feed to be monitored in real time and also recorded both audio and video so it could be reviewed later.

***2** After Johnson was properly searched and outfitted, the officers dropped her off in an alleyway next to Rowan's house. Johnson then called Rowan, who let her in through a backyard gate and invited her into his home. Once inside, Johnson told Rowan what she wanted, watched him weigh the requested amount of marijuana on a small scale, and then gave Rowan the $160 in prerecorded bills in exchange for that marijuana. After the sale was complete, Johnson returned to the alleyway and handed the marijuana over to the officers waiting in their vehicle. The entire process lasted no more than a few minutes. Back at the police station, Officer Miskec conducted a field test of the marijuana purchase, which revealed a positive result for the presumptive presence of THC. That finding was later confirmed by a lab test, which also showed that the total weight of the marijuana from this first controlled buy was approximately 52 grams.

A week later, on January 2, 2014, a second controlled buy was conducted. Using the exact same procedure, Johnson was able to purchase an additional $220 worth of marijuana from Rowan. Officer Miskec again conducted a field test that returned a positive result for the presumptive presence of THC. Lab testing later confirmed that finding and also showed that the total weight from the second controlled buy was approximately 50 grams.

During the second controlled buy, Johnson reportedly asked Rowan if she could purchase a pound of marijuana from him. Rowan responded that he did not have that amount but allegedly said he could get it for her if she gave him the money up front "or something to that effect."

Based on those two controlled buys and the tentative plan for Rowan to sell Johnson a pound of marijuana, Officer Doleshal applied for a warrant to search Rowan's residence. That warrant was approved on the afternoon of January 2, 2014, but Doleshal delayed the execution of the warrant while he waited for confirmation that the marijuana was at Rowan's residence. He eventually received that confirmation, and the search warrant was executed on the evening of January 3, 2014. Doleshal was off duty at the time; therefore, the search was conducted by Officer Miskec along with the department's tactical unit. The search resulted in the recovery of 10 grams of marijuana, a scale, plastic baggies, and some pipes.

Following the search, Rowan was arrested and charged with two counts of distribution of marijuana. After a preliminary hearing, the Information was amended to include a count for the possession of marijuana as well a count for the possession of drug paraphernalia. The case proceeded to trial. Rowan did not dispute that he sold marijuana to Johnson on both December 27, 2013, and January 2, 2014. Instead, he argued that he was entrapped by Johnson. Rowan testified that Johnson approached him six months before the first controlled buy and asked him to sell her some marijuana. He refused to do so and reportedly told her that he was not a drug dealer. When Johnson approached him a second time in December 2013, she allegedly told him that she needed the marijuana for her son who was sick with cancer. Rowan did not have any marijuana in his possession at the time but agreed to try and find her some because her son was sick. After two days of searching, Rowan testified that he called Johnson to let her know that he finally had found some marijuana. Rowan advised Johnson that he could only find a small amount, not the pound that she was looking for. That marijuana was sold to Johnson during the controlled buys outlined above. At the end of his testimony, Rowan reiterated that he was not a drug dealer and that he would not have sold Johnson the marijuana if she had not told him that she needed it for someone who was sick.

Johnson also testified at the trial. While she confirmed a large portion of Rowan's testimony, she denied telling him that she needed the marijuana for someone who was undergoing chemotherapy. Instead, she testified that she told Rowan that she needed the marijuana for someone who was coming in from out-of-town.

***3** Although not privy to every conversation between Johnson and Rowan, Officer Doleshal testified that Johnson had told Rowan that he—Doleshal—was her relative from out-of-town and that he wanted the marijuana to take back home with him. Doleshal said this was a common ruse that he and Johnson often used when setting up controlled buys. Doleshal also said that in all his years of working with

Johnson, he had never heard her use any type of illness to explain why she wanted to buy drugs. Indeed, Doleshal went so far as to state that he would not tolerate Johnson using a fake illness as a motive for obtaining drugs because "it can be kind of misleading and maybe convince somebody to do something they normally wouldn't do."

At the end of the trial, the jury convicted Rowan on two counts of marijuana distribution and one count of possession of marijuana. The jury acquitted him, however, on one count of possession of drug paraphernalia. Rowan filed a motion for a new trial (based on different grounds than those raised on appeal) as well as a motion for a dispositional and durational departure. Both were denied, and Rowan was sentenced to 56 months in prison. Rowan timely appeals.

ANALYSIS

Rowan appeals from his convictions for distribution of marijuana on grounds that there is insufficient evidence to rebut his entrapment defense. Rowan also claims on appeal that the State committed prosecutorial error during closing argument. We address each of Rowan's claims in turn.

1. *Sufficiency of the evidence*

Rowan does not dispute that, in the absence of his affirmative defense of entrapment, the State presented sufficient evidence to support his convictions for distribution of marijuana. Instead, Rowan raised entrapment as an affirmative defense to the charges. In support of his claim of entrapment, Rowan argued that Johnson, acting as an agent of law enforcement, induced him to sell marijuana, a crime he was unlikely and disinclined to have committed in the absence of Johnson's solicitation.

In Kansas, the statute governing the defense of entrapment provides:

> "A person is not guilty of a crime if such person's criminal conduct was induced or solicited by a public officer or such officer's agent for the purposes of obtaining evidence to prosecute such person, unless:
>
> (a) The public officer or such officer's agent merely afforded an opportunity or facility for committing the crime in furtherance of a criminal purpose originated by such person or a co-conspirator; or
>
> (b) The crime was of a type which is likely to occur and recur in the course of such person's business, and the public officer or such officer's agent in doing the inducing or soliciting did not mislead such person into believing such person's conduct to be lawful." K.S.A. 2017 Supp. 21-5208.

Because entrapment is an affirmative defense, a statutory burden-shifting scheme must be applied. A defendant claiming entrapment must first meet the burden to come forward with some competent evidence in support of the claim, and thereafter, "the state has the burden of disproving the defense beyond a reasonable doubt." K.S.A. 2017 Supp. 21-5108(c). Thus, when the State or its agent solicits a defendant to commit a crime, the State must prove beyond a reasonable doubt that the defendant was predisposed to commit that crime in order to rebut an entrapment defense. *State v. Reichenberger*, 209 Kan. 210, 217, 495 P.2d 919 (1972); see also K.S.A. 2017 Supp. 21-5108(c).

To determine whether the State has met its burden of proving predisposition beyond a reasonable doubt, the finder of fact must weigh the extent to which the government acted to solicit the crime charged against any evidence that the defendant was predisposed to committing the crime charged, including but not limited to the defendant's willingness and ready compliance with a request by the State's agent as well as a defendant's criminal history or prior suspicious conduct. *State v. Rogers*, 234 Kan. 629, 632, 675 P.2d 71 (1984); *Reichenberger*, 209 Kan. at 218. If the evidence is sufficient to prove beyond a reasonable doubt that the State or its agent merely afforded an opportunity for the defendant to commit an offense he or she already intended to commit, the State has met its burden. *State v. Jones*, 271 Kan. 201, 204, 21 P.3d 569 (2001).

***4** Therefore, the issue presented for decision is whether the State presented sufficient evidence to rebut Rowan's entrapment defense.

> " 'When sufficiency of the evidence is challenged in a criminal case, the standard of review is whether, after reviewing all the evidence in a light most favorable to the prosecution, the appellate court is convinced a rational factfinder could have found the defendant guilty beyond a reasonable doubt. Appellate courts do not reweigh evidence, resolve evidentiary conflicts, or make witness credibility determinations.' [Citation omitted.]" *State v. Chandler*, 307 Kan. 657, 668, 414 P.3d 713 (2018).

A verdict may be supported by circumstantial evidence if such evidence provides a basis for a reasonable inference by the fact-finder regarding the fact in issue. Circumstantial evidence, in order to be sufficient, need not exclude every other reasonable conclusion. *State v. Logsdon*, 304 Kan. 3, 25, 371 P.3d 836 (2016). Indeed, even the most serious offenses can be based entirely on circumstantial evidence. 304 Kan. at 25. But see *State v. Richardson*, 289 Kan. 118, 127, 209 P.3d 696 (2009) (" '[T]he circumstances in question must themselves be proved and cannot be inferred or presumed from other circumstances.' ").

In this case, there was no evidence that Rowan had previous drug convictions or was ever suspected of being involved in the drug industry. There was evidence, however, to establish that Rowan was able to quickly comply with Johnson's request to buy marijuana on two separate occasions. A reasonable juror could conclude from this fact that Rowan was predisposed to distribute marijuana. And that conclusion is supported by evidence recovered during execution of the search warrant. This evidence included marijuana (albeit a small amount), a scale, and some plastic baggies, all of which are commonly used in the distribution of drugs. Finally, the video recordings of the transactions showed that, without any hesitation or uncertainty, Rowan knew how to weigh and package the marijuana and knew what price to expect when Johnson came over to make the purchase. In light of all this evidence, a rational juror reasonably could conclude beyond a reasonable doubt that Johnson's request to buy marijuana from Rowan merely afforded an opportunity for Rowan to commit an offense he already intended to commit. See *Jones*, 271 Kan. at 204. And, in fact, that is precisely what the jury found.

Rowan disputes the jury's finding on two separate grounds. First, he argues that "there was no actual evidence of any distribution to anyone other than Johnson" and that the existing evidence only reinforces his claim of entrapment. Specifically, Rowan points to: (1) his own testimony that he is not a drug dealer, (2) Tomblin's testimony that he has never seen unusually high traffic or any other indication that Rowan was selling drugs out of his home, and (3) Officer Miskec's testimony that, based on his previous interactions with Rowan, he was skeptical of the idea that Rowan was selling drugs. But even if each of those claims are true, they simply confirm that there was no criminal history or prior suspicious conduct suggesting that Rowan was involved in drugs and do nothing to refute the evidence introduced at trial that supports the jury's decision finding Rowan was predisposed to distribute marijuana. Rowan's argument is really a request by Rowan for us to reweigh the evidence on appeal, which we cannot do. See *Chandler*, 307 Kan. at 668 (Appellate courts do not reweigh evidence, resolve evidentiary conflicts, or make witness credibility determinations.).

***5** Similarly, Rowan's second argument—that the search of his home did not reveal further evidence of marijuana or evidence of distribution to anyone beyond Johnson—also lacks merit. While the officers who searched Rowan's home did not discover the pound of marijuana that Johnson claimed Rowan was prepared to sell her, it did result in the recovery of approximately 10 grams of marijuana, a scale, and plastic baggies. Rowan argues that this small amount of marijuana was for personal use, but when combined with the plastic baggies and the scale, and looking at the evidence in a light most favorable to the prosecution, it was enough for a jury to find beyond a reasonable doubt that Rowan was predisposed to sell marijuana to Johnson.

For the reasons stated above, we find the State submitted sufficient evidence at trial to prove beyond a reasonable doubt that Rowan was predisposed to commit the crime of marijuana distribution, which, in turn, successfully rebutted Rowan's entrapment defense.

2. *Closing argument*

In his second claim of error, Rowan argues the State committed reversible error during closing argument by offering personal opinions, commenting on facts not in evidence, and/or misstating the law and facts of the case.

To evaluate claims of prosecutorial error, appellate courts utilize a two-step process. *State v. Sherman*, 305 Kan. 88, 109, 378 P.3d 1060 (2016). First, the court must determine whether any prosecutorial error occurred by deciding "whether the prosecutorial acts complained of fall outside the wide latitude afforded prosecutors to conduct the State's case and attempt to obtain a conviction in a manner that does not offend the defendant's constitutional right to a fair trial." 305 Kan. at 109. If prosecutorial error is found, then second, the court must determine whether the error prejudiced the defendant's Fourteenth Amendment due process right to a fair trial. To evaluate prejudice, the court uses the traditional constitutional harmless error test, under which "prosecutorial error is harmless if the State can demonstrate 'beyond a reasonable doubt that the error complained of will not or did not affect the outcome of the trial in light of the entire record, *i.e.*, where

there is no reasonable possibility that the error contributed to the verdict.' " 305 Kan. at 109.

Rowan argues that the State committed three different types of prosecutorial error during its closing argument: (a) offering personal opinions regarding the evidence, (b) commenting on facts not in evidence, and (c) misstating the law and facts of the case.

a. *Offering personal opinions*

Rowan's first claim of prosecutorial error is that the State improperly expressed its personal opinions regarding the evidence and the credibility of witnesses while presenting its closing argument to the jury.

A prosecutor is not permitted to offer his or her personal opinions regarding the evidence, the guilt or innocence of the defendant, or the credibility of witnesses. *State v. Charles*, 304 Kan. 158, 173, 372 P.3d 1109 (2016), *abrogated on different grounds by State v. Huey*, 306 Kan. 1005, 399 P.3d 211 (2017); *State v. Brown*, 300 Kan. 542, 560, 331 P.3d 781 (2014); *State v. Corbett*, 281 Kan. 294, 315, 130 P.3d 1179 (2006). This is for a number of reasons, first and foremost being that the prosecutor's personal opinions are simply irrelevant to the task before the jury. *Charles*, 304 Kan. at 173. Furthermore, "such expressions of personal opinion are a form of unsworn, unchecked testimony, not commentary on the evidence of the case." *Corbett*, 281 Kan. at 315. But while prosecutors are not permitted to offer their own personal opinions, they are permitted to advance an idea for the jury to consider and draw reasonable inferences from the evidence presented without it constituting an improper personal opinion. 281 Kan. at 312-16 (specifically holding that "the prosecutor used the phrase 'I/we submit' ... to advance an idea for the jury's consideration rather than [to] express[ ] a personal opinion. Thus, the prosecutor's use of the phrase 'I/we submit' was not improper").

***6** Here, Rowan claims that the State gave improper personal opinions at the following four points during its closing argument:

> "Would a person who's never sold drugs before really be that concerned with weight, know what they're talking about, meaning exactly 28 grams? I submit they wouldn't. They wouldn't know.
>
> "What does he also do? He takes the baggie, licks the baggie, and rolls it. Would a person who's never sold drugs know exactly how to wrap or the easiest way to seal a bag of marijuana? I submit that he would not. In fact, he seemed to know what he was doing quite well.
>
> ....
>
> "... At the end he says, 'I'll need 690.' But he knows how much a half pound costs. If someone who is just selling this one instance to sell the 2 ounces, how is he going to know all of a sudden that a half a pound is going to cost $650? He wouldn't. He wouldn't know unless he was in the business of being a drug dealer.
>
> ....
>
> "... Johnson had known him for a long time and never brought it to the attention of the officers. Why? I submit to you that because she didn't know he was a drug dealer either at that time. But when was he a drug dealer? Back on December 27th, 2013, and January 2nd of 2014.
>
> ....
>
> "Also look at the credibility of the witnesses. [Defense counsel] wants you to believe that Mr. Tomblin didn't know he was dealing drugs, that it wasn't a drug house. I submit he was new to the game. Had just started. Also he didn't have to sell the drugs every single time in his home. There's no evidence of that, but he doesn't have to. Also the defendant has stated that he did—[.]"

Rowan argues each of these four statements constituted an attempt by the prosecutor to compare Rowan's actions with what, in the prosecutor's opinion, are the actions of a typical drug dealer. However, none of those statements are improper personal opinions. Instead, each is simply an invitation for the jury to consider an idea or to draw a reasonable inference from evidence that was presented at trial. See 281 Kan. at 312, 316. Specifically, that State invited the jury to: (1) look at the evidence that was presented regarding Rowan's actions (i.e., that he was able to weigh and package the marijuana as well as come up with an appropriate price); (2) draw reasonable inferences from that evidence (i.e., that Rowan in fact knew what he was doing and had likely done it before); and (3) consider the idea that Rowan may be an experienced drug dealer. We find none of the statements about which Rowan complains are improper personal opinions by the State constituting prosecutorial error.

b. *Commenting on facts not in evidence*

During trial, the State presented testimony from D.C. Broil, who was the director of the forensic laboratory at Kansas City, Kansas, Community College. As part of her duties at the lab, Broil is provided with substances from the police department and asked to test these substances to determine whether they are narcotics. While Broil was testifying, Rowan began to get emotional and upset, to the point that the court had to take a recess to allow Rowan a chance to calm down and compose himself. It is unclear from the record what sparked Rowan's emotional outburst. But regardless of its cause, the State referenced the incident during its closing argument, stating:

> ***7** "And the defendant reacted emotionally. It's—you might become emotional during this case. He did. When did he do so? When D.C. Broil testified, the very last witness called by the State. She was testifying to if the drugs tested positive. This was after Miss Johnson, Officer Doleshal ... and Officer Miskec had all testified. Had the gauntlet of evidence laid against him before Miss Broil testified, he became emotional. Take that for what it's worth."

Rowan argues that it was inappropriate for the prosecutor to make reference in closing argument to his demeanor during trial because such a reference goes beyond the scope of the evidence presented at trial.

Kansas courts routinely hold "that it is improper for a prosecutor to comment on facts not in evidence, to divert the jury's attention from its role as factfinder, or to make comments that serve no purpose other than to inflame the passions and prejudices of the jury." *State v. Stimec*, 297 Kan. 126, 128, 298 P.3d 354 (2013). This prohibition extends not only to comments regarding facts not in evidence but also to comments that go beyond the scope of the evidence presented. *State v. Robinson*, 303 Kan. 11, 308, 363 P.3d 875 (2015), *disapproved on other grounds by State v. Cheever*, 306 Kan. 760, 402 P.3d 1126 (2017). It does not extend, however, to comments regarding matters that are properly before the jury. *State v. Todd*, 299 Kan. 263, 283, 323 P.3d 829 (2014). "A jury is permitted to consider the demeanor of a witness, as well as his or her words. And a prosecutor may remind jurors about a witness' demeanor when the prosecutor is making a closing argument." 299 Kan. at 285-86; see also *State v. Scaife*, 286 Kan. 614, 624, 186 P.3d 755 (2008).

In support of prosecutorial error, Rowan points to the Supreme Court's opinion in *Robinson*. In that case, the prosecutor made a comment during the penalty phase of a capital case. The comment noted that the defendant cried one time during trial. The court held that a prosecutor's comments regarding the defendant's demeanor during trial went beyond the scope of the penalty phase evidence and "appear[ed] to serve no legitimate purpose other than to inflame the passions or prejudices of the jurors and divert their attention from the task at hand." 303 Kan. at 308. Although the prosecutor's comment in *Robinson* was made in the closing argument during the penalty phase of a capital case, we find that fact indistinguishable to the holding of the case: that a prosecutor's comments regarding the defendant's demeanor during trial went beyond the scope of the evidence and appeared to serve no legitimate purpose other than to inflame the passions or prejudices of the jurors and divert their attention from the task at hand.

With that said, the prosecutorial errors considered by our Supreme Court in *Todd* and *Scaife* are distinguishable. In both of those cases, the prosecutor made reference in closing argument to the demeanor of witnesses while they were on the witness stand testifying at trial. The prosecutor urged the jury to consider what the witnesses said and how they said it, i.e., their demeanor. One of the reasons that appellate courts do not assess witness credibility from the cold record is that the ability to observe the declarant is an important factor in determining whether he or she is being truthful. *Scaife*, 286 Kan. at 624. In both *Todd* and *Scaife*, the court held the prosecutor should be permitted to explain that facet of the credibility calculus to the jury.

***8** In this case, however, the prosecutor commented on Rowan's demeanor while he was sitting at counsel's table. The prosecutor urged the jury to consider how emotional Rowan became when witness Broil laid "the gauntlet of evidence" against him. The prosecutor did not ask the jury to consider Rowan's demeanor in order to assess his credibility as a witness. And the prosecutor did not ask the jury to consider Rowan's demeanor as relevant evidence in the case. Instead, the prosecutor asked the jury to consider Rowan's demeanor at counsel's table as evidence of his guilt. As such, we find the prosecutor's comments regarding Rowan's demeanor during trial went beyond the scope of the evidence and served no legitimate purpose other than to inflame the passions or prejudices of the jurors and divert their attention from the task at hand. Thus, the State erred in drawing attention to the fact that Rowan became upset while Broil was testifying.

To determine whether the prosecutor's comment on Rowan's demeanor was harmless, we consider whether the State has

demonstrated beyond a reasonable doubt that the error did not affect the outcome of the trial in light of the entire record. See *Sherman*, 305 Kan. at 109. Under this standard, we find the error harmless. The remark was brief and isolated. The remark drew no objection from the defense. Nor did the comment run afoul of any prior ruling of the district judge. Moreover, the district judge instructed the jury that arguments of counsel were not to be considered as evidence. In light of the totality of the circumstances, we find no reasonable possibility that the error contributed to the verdict.

c. *Misstatement of facts and law*

Rowan's third and final claim of prosecutorial error is that the State misstated the law and the facts of the case during its closing argument.

Prosecutors are granted considerable latitude to discuss the evidence and draw reasonable inferences when making their closing arguments. *State v. McCorkendale*, 267 Kan. 263, 275, 979 P.2d 1239 (1999). That considerable latitude does not, however, allow prosecutors to state facts that are not in evidence or misstate facts to the point that they are no longer supported by the evidence. *State v. Ly*, 277 Kan. 386, 393, 85 P.3d 1200 (2004). Prosecutors are similarly prohibited from misstating the law of the case, particularly where "the facts are such that the jury could have been confused or misled by the [mis]statement." *State v. Hall*, 292 Kan. 841, 849, 257 P.3d 272 (2011).

Here, Rowan first claims that the State misstated the law of entrapment during its closing argument. Specifically, Rowan points to the following exchange:

> "[Prosecutor:] The State's not alleging that Mr. Rowan has been a drug dealer for twenty years, for any sort of time. We allege that on December 27th, 2013, and January 2nd, 2014, he was a drug dealer.
>
> "[Defense Counsel]: Judge, I object. I believe that misstates the law as to—
>
> "THE COURT: Overruled."

Rowan argues that this misstated the law of entrapment because it "indicated that the jury could convict based simply upon the State's evidence of the solicited distribution to Johnson on December 27th, 2013, and January 2nd, 2014." As noted above, however, nothing in the law of entrapment requires the State to prove that Rowan had a history of dealing drugs. See K.S.A. 2017 Supp. 21-5208; *Reichenberger*, 209 Kan. at 218 ("Uncensurable solicitation by an officer met with ready compliance by the actor is generally, if not universally, accepted as evidence of predisposition."). Instead, the State must simply prove beyond a reasonable doubt that its agent "merely afforded an opportunity or facility" for the defendant to commit the crime. K.S.A. 2017 Supp. 21-5208(a). We conclude the State did not misstate the law of entrapment during its closing argument. Because we have determined there was no prosecutorial error, there is no need for us to conduct a prejudice analysis.

***9** But Rowan also claims that the State misstated the facts of the case when, during closing argument and in reference to Officer Miskec's interactions with Rowan, the prosecutor said: "He hadn't seen him in six or seven years. Been on the narcotics unit for two years." The State concedes that neither of these statements were supported by the evidence; therefore, we necessarily find that prosecutorial error occurred. Having found the State committed prosecutorial error during its closing argument, we move on to the second step of the analysis to determine whether the error prejudiced Rowan's constitutional due process right to a fair trial. See *Sherman*, 305 Kan. at 109. "[P]rosecutorial error is harmless if the State can demonstrate 'beyond a reasonable doubt that the error complained of will not or did not affect the outcome of the trial in light of the entire record, *i.e.*, where there is no reasonable possibility that the error contributed to the verdict.' [Citation omitted.]" 305 Kan. at 109. Remarks that are brief and isolated in nature bear little weight in the minds of jurors and consequently do little to affect the outcome of the trial or contribute to the verdict. See *Robinson*, 303 Kan. at 308-09.

Here, the State committed two prosecutorial errors during closing argument. First, the State claimed that Officer Miskec had not seen Rowan in six or seven years. This was a misstatement of fact as Miskec actually testified that he had not seen Rowan in three or four years. Second, the State claimed that Miskec had been on the narcotics unit for two years. This was another misstatement of fact as Miskec actually testified that he had been with narcotics for 19 months. Notwithstanding these misstatements of fact, we find no reasonable possibility that either of the misstatements contributed to the verdict. Both are minor discrepancies that largely can be attributed to basic rounding or, at worst, an unintentional and immaterial confusion of a few numbers. And despite Rowan's argument to the contrary, neither of the two misstatements were related to any of the core issues of fact or law at trial; instead, the misstatements

constituted basic background facts about Miskec. Finally, the two misstatements comprised two lines of a closing argument in a three-day trial that was recorded in over 500 pages of transcript. They were therefore too brief and isolated to bear any weight in the minds of the jurors. See *Robinson*, 303 Kan. at 309 (erroneous remarks bore little weight in minds of jurors because they "comprised a few lines of a closing argument in a multi-week trial recorded in thousands of pages of transcript"). For these reasons, we find the two misstatements, although error, were not reversible error as they did not prejudice Rowan's constitutional due process right to a fair trial.

Affirmed.

All Citations

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347 P.3d 1214 (Table)
Unpublished Disposition
(Pursuant to Kansas Supreme Court Rule 7.04(f), unpublished opinions are not precedential and are not favored for citation. They may be cited for persuasive authority on a material issue not addressed by a published Kansas appellate court opinion.)
Court of Appeals of Kansas.

STATE of Kansas, Appellee,
v.
Bernice BROWN, Appellant.

No. 110,469.
|
May 8, 2015.
|
Review Denied October 9, 2015.

Appeal from Johnson District Court; Stephen R. Tatum, Judge.

Attorneys and Law Firms

Adam D. Stolte, of Kansas Appellate Defender Office, for appellant.

Paul E. Brothers, legal intern, Steven J. Obermeier, senior deputy district attorney, Stephen M. Howe, district attorney, and Derek Schmidt, attorney general, for appellee.

Before McANANY, P.J., ATCHESON, J., and HEBERT, S.J.

MEMORANDUM OPINION

PER CURIAM.

***1** Defendant Bernice Brown appeals her conviction for abuse of a dependent adult on the grounds the Johnson County District Court erred by allowing the State to present improper impeachment evidence to the jury and in failing to give any limiting instruction regarding that evidence. Although the district court mishandled those related issues, the errors were harmless in light of the strong case against Brown, including two witnesses who saw her strike a nursing home resident in her care. We, therefore, affirm the judgment of conviction.

FACTUAL AND PROCEDURAL HISTORY

Brown, a certified nursing assistant, had worked at a private care facility in Johnson County for about 18 months at the time of the incident. Brown's duties as an activities assistant included regular contact with residents with moderate to severe dementia or similar cognitive impairments who lived in a designated unit at the facility. V.F., the victim, had significant dementia and resided there. V.F. needed assistance with basic tasks, including eating and bathing. As with many people afflicted with dementia, V.F. could become combative if she were upset.

On June 22, 2012, Tamara Koecher and Lontisha Tate, both nursing assistants, were helping V.F. clean up when she became agitated. Brown came into the room ostensibly to calm V.F. and help in the immediate task. At trial, Koecher and Tate gave generally similar accounts of what happened, although they differed on some details. According to them, Brown slapped V.F.'s bare buttocks and laughed. As a result, V.F. became more combative and began flailing at Brown with her arms and legs. V.F. hit Brown. Brown then again laughed at V.F. and slapped her right thigh. By then, Koecher and Tate had cleaned and diapered V.F. and had gotten her back in her wheelchair. They testified that Brown then taunted V.F. When V.F. verbally responded, they said Brown got angry and slapped her face. Neither Koecher nor Tate reported the incident promptly.

The next day, Tate was in the room when V.F. told another nursing assistant that someone had hit her. Tate then said she had seen Brown strike V.F. The other nursing assistant contacted LuAnn Fahey, the director of nursing at the care facility. In short order, Koecher and Tate described to Fahey what had happened. As required by law, Fahey reported the incident to state authorities. Brown was later fired. Following an investigation, the district attorney charged Brown with one count of mistreatment of a dependent adult in violation of K.S.A.2011 Supp. 21–5417(a)(1), a severity level 5 person felony.

At trial, Brown testified in her own defense. She told the jurors that Koecher asked her for help in changing V.F. Brown said she had a good relationship with V.F. and was often able to keep her calm when other staff couldn't. According to Brown, she assisted V.F. without incident and simply left the room when she finished.

After hearing 2 days of evidence in May 2013, the jury convicted Brown as charged. The district court later imposed a 34–month prison sentence on Brown, the mitigated presumptive period of incarceration, to be followed by a 24–month term of postrelease supervision. Brown has appealed.

LEGAL ANALYSIS

***2** As we have indicated, Brown raises two points on appeal related to the State's introduction of rebuttal evidence intended to impair her credibility. She contends the evidence was improper, and, even if it were admissible, the district court failed to give a limiting instruction to the jury on how the information should have been considered. We outline the pertinent trial proceedings and then address those issues.

Trial Proceedings

While cross-examining Brown in front of the jury, the prosecutor asked her about taunting V.F. Brown denied doing so, prompting this exchange:

> "Q. Completely made up, wasn't it?
>
> "A. Yes, it was because I [have] been doing this for a long time, and this is the first time this ever happened."

The prosecutor then launched into a series of questions regarding what Brown meant about this being a first-time occurrence. The cross-examination went this way:

> "Q. You've never been in trouble; you've never been called by LuAnn Fahey at your time at Shawnee Gardens about another resident?
>
> "A. About doing vitals for a shower or something, they just said my voice was loud. That's why I ended up getting an opportunity to a better position for activities because I do a lot.
>
> "Q. Let's back up. You first said you've never been in trouble before?
>
> "A. I mean, like hitting a resident—
>
> "Q. Now you're changing that?
>
> "A. Hitting a resident, no, I never ever—no, I haven't never ever been hit [*sic*]
>
> "Q. What did you do in the shower that you just talked about?
>
> "A. I said vitals. It wasn't in a shower. It was in a resident's room getting vitals for some students. It wasn't from the employee. It was from students that—you got to come—when they go to school, you go to nursing homes and get—I guess that's how you get your training, how to shower residents, how to bath [*sic*] residents, feed them, get them dressed for bed.
>
> "Q. But you said you've never been in trouble, and now you're talking about—
>
> "A. As far as—no. I never been trouble for hitting a resident, no I haven't.
>
> "Q: And I'm not talking about just hitting. Any behaviors toward a resident, have you ever been called to LuAnn Fahey's office or had discussions with her about that?
>
> "A. About not hitting, but loud voice. My voice is loud."

After the defense rested, the prosecutor called Fahey as a rebuttal witness. The district court overruled Brown's objection to the testimony. Fahey testified that before the incident with V.F., Brown had been suspended during an internal investigation of an allegation that she had required an unwilling resident to take a shower. Based on the investigation, the care facility administrators concluded Brown had not hit or physically abused that resident but deviated from accepted procedures for bathing or showering residents. According to Fahey, Brown was counseled as to the correct procedures. But it was unclear from Fahey's trial testimony whether Brown had been formally disciplined in any way.

***3** In closing argument, the prosecutor told the jurors Brown should not be believed about what happened with V.F. at least in part because she had testified untruthfully about never having been in trouble for her dealings with other residents of the facility. In other words, according to the prosecutor, Brown's credibility had been impeached by the contradiction between her cross-examination testimony and Fahey's rebuttal testimony.

District Court Error in Allowing Rebuttal Testimony

Brown contends the district court erred in allowing Fahey's rebuttal testimony. We agree. There were several problems with admitting the testimony.

A district court's decision to admit or exclude evidence will be reviewed on appeal either as a matter of law without deference if the ruling is based on materiality or as an abuse of discretion if it is based on probativeness. *State v. Boleyn*, 297 Kan. 610, Syl. ¶ 1, 303 P.3d 680 (2013); see also *State v. Berriozabal*, 291 Kan. 568, 586, 243 P.3d 352 (2010) (An appellate court reviews de novo a contested determination of materiality.); *Wendt v. University of Kansas Med. Center*, 274 Kan. 966, 975, 59 P.3d 325 (2002) (A decision to admit or exclude a particular piece of evidence that is otherwise material largely rests in the trial court's sound discretion.). The Kansas Supreme Court succinctly laid out the general rule this way:

> "When reviewing a district court's decision concerning the admission of evidence, an appellate court first determines whether the evidence is relevant. All relevant evidence is admissible unless statutorily prohibited. Evidence is relevant if it has any tendency in reason to prove any material fact. Accordingly, there are two elements of relevancy: a materiality element and a probative element. Materiality addresses whether a fact has a legitimate and effective bearing on the decision of the case and is in dispute. Evidence is probative if it has any tendency in reason to prove a fact. An appellate court reviews a district court's determination that evidence is probative for abuse of discretion whereas the district court's decision regarding materiality is reviewed de novo." *Boleyn*, 297 Kan. 610, Syl. ¶ 1.

A district court abuses that discretion if it rules in a way no reasonable judicial officer would under the circumstances, if it ignores controlling facts or relies on unproven factual representations, or if it acts outside the legal framework appropriate to the issue. See *Northern Natural Gas Co. v. ONEOK Field Services Co.*, 296 Kan. 906, 935, 296 P.3d 1106, *cert. denied* 134 S.Ct. 162 (2013); *State v. Ward*, 292 Kan. 541, Syl. ¶ 3, 256 P.3d 801 (2011), *cert. denied* 132 S.Ct. 1594 (2012).

We surmise the prosecutor knew about the earlier circumstance in which Brown required the reluctant resident to shower and was counseled about her conduct. Assuming that to be so, the prosecutor seemed to be looking for some evidentiary opening to get that information in front of the jurors. The prosecutor effectively invented one. Even if the prosecutor had no ulterior purpose in her cross-examination of Brown, the admission of Fahey's rebuttal testimony was improper.

***4** Brown's conduct resulting in the counseling about facility procedures was not independently relevant or admissible to show Brown had criminally abused V.F. The earlier situation did not involve physical abuse, only the misapplication of an internal policy on when to bathe or shower residents. So that information would not have made a material fact directly related to the offense charged in this case any more or less likely true, since the crime turned on the physical abuse of V.F. K.S.A.2011 Supp. 21–5417(a)(1) (mistreatment of dependent adult entails "[i]nfliction of physical injury"). Stated in the converse, Brown's actions in showering the resident and the facility's response were irrelevant to the alleged mistreatment of V.F. See K.S.A. 60–401(b) (defining "relevant evidence"); K.S.A. 60–407(f) (relevant evidence admissible); *State v. Bowen*, 299 Kan. 339, 348, 323 P.3d 853 (2014) (relevant evidence must have tendency to prove disputed, material fact). In short, the information was neither material to nor probative of the charged crime.

Even if the earlier situation had some tenuous relevance, it would have related only to Brown's "bad" propensities in dealing with residents, a statutorily impermissible purpose for offering such evidence. K.S.A.2011 Supp. 60–455(a). The State quite correctly advances no argument that the information could have been admitted to show plan, motive, intent, or some other proper purpose outlined in K.S.A.2011 Supp. 60–455(b).

But evidence may also be considered relevant and thus admissible, within certain constraints, if it affects the credibility of a witness. *State v. Ross*, 280 Kan. 878, 886, 127 P.3d 249, *cert. denied* 548 U.S. 912 (2006) (" " '[P]roof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness' testimony.' " " [quoting *State v. Knighten*, 260 Kan. 47, 54, 917 P.2d 1324 (1996)]); *State v. Nott*, 234 Kan. 34, 40, 669 P.2d 660 (1983) ("Generally, it is proper to attack the credibility of a witness by showing a prior inconsistent statement."). That is true even if the credibility evidence has no direct bearing on the legal dispute at issue in the case—here Brown's guilt or innocence.

In attacking the credibility of a defense witness, a plaintiff may offer in rebuttal extrinsic evidence showing that the

witness has testified falsely regarding a relevant fact. And that method of impeachment may be deployed whether the testimony on the relevant fact had been elicited on direct examination or cross-examination. The extrinsic evidence undermines the witness' credibility by contradicting that specific aspect of the witness' testimony, presumably causing the jurors to question his or her trustworthiness and veracity generally. The rebuttal evidence may take the form of testimony from other witnesses or documentary evidence conflicting with what the defense witness has testified to. Defendants may, of course, use the same mode of impeachment by presenting that sort of evidence directed at plaintiffs' witnesses. Defendants simply roll the presentation into their cases in chief because procedurally they don't ordinarily get rebuttal.

***5** If a criminal defendant testifies in his or her own defense, the State may offer extrinsic evidence contradicting specific facts brought out in the defendant's *direct* testimony whether those facts are otherwise relevant or not, since the contradiction itself becomes material in assessing credibility. *Boleyn,* 297 Kan. at 626; *State v. Blue,* 221 Kan. 185, 188, 558 P.2d 136 (1976). In *Boleyn,* for example, the defendant testified on direct examination that he was not a homosexual—a fact without legal relevance in the case. The court held the State could offer contradictory evidence for the narrow purpose of showing that the defendant was not credible precisely because he had given false testimony on direct examination. 297 Kan. at 624–25. As the court explained, "[b]ecause Boleyn denied being gay during his direct examination, we conclude that evidence establishing that Boleyn is gay would be material to the issue of judging the credibility of his testimony." 297 Kan. at 626. The court in *Blue* similarly recognized the State could offer extrinsic rebuttal evidence to contradict specific facts in the direct testimony of the defendant and another defense witness, although the facts had no relevance to guilt or innocence. The contradiction itself bore on their credibility, making the rebuttal evidence admissible. 221 Kan. at 188 ("Admission of the rebuttal evidence, put forward to contradict facts brought forth in the defendant's evidence was not error.").

The rule of *Boleyn* and *Blue* is akin to a particularized application of the notion that if a party opens the door by eliciting irrelevant testimony, the opposing party may then rebut that evidence. See *Boleyn,* 297 Kan. at 626. In its appellate brief, the State likens Brown's testimony on cross-examination to the open door allowing in the rebuttal evidence from Fahey. But the analogy fails.

First, as a general matter, the State cannot open its own door to get otherwise inadmissible evidence before the jury. See *State v. Prine,* 287 Kan. 713, 728, 200 P.3d 1 (2009). That's functionally what happened here. Brown opened no doors in her direct examination with testimony bolstering herself as an employee who had never been counseled or disciplined. In answering a question from the prosecutor, Brown added a nonresponsive and decidedly vague tagline, saying, "this is the first time this has ever happened." Rather than moving to strike that part of the answer as nonresponsive, the prosecutor began questioning Brown about what she meant. The prosecutor, however, imputed her own meaning to the response and asked Brown if she had ever been "in trouble" at the facility. Brown responded that she hadn't been in trouble for hitting a resident, thus clarifying and explaining what she had said earlier. Brown wasn't portraying herself as a perfect employee of the care facility—only as one that hadn't hit its residents. But the prosecutor persisted in questioning Brown as if she had changed her testimony and had originally said she had never been counseled, disciplined, or in trouble. Brown, however, never made such a statement, as the transcript shows.

***6** Even if the door had opened a crack with Brown's original answer, something we doubt, it was then firmly closed when Brown clarified at least twice in response to continued cross-examination that she had not been accused of hitting a patient before the report about V.F. Accordingly, the prosecutor could not then have continued based on the meaning she desired to give Brown's initial comment—a meaning rendered plainly inaccurate by Brown's explanation in response to follow-up questions. Once Brown clarified that she had never before been accused of hitting a resident of the facility—a clarification fully consistent with her initial comment—the prosecutor's continued cross-examination amounted to the State opening its own door by eliciting otherwise irrelevant information about Brown's employment history with the care facility.

Because that irrelevant information came out on cross-examination of Brown rather than on direct examination, the State could not then offer extrinsic evidence contradicting those irrelevancies for the sole purpose of attacking Brown's credibility. Both *Boleyn* and *Blue* stand for such a limitation on the scope of impeachment. Counsel for one party generally may not elicit otherwise wholly irrelevant facts on cross-examination and then offer contradictory extrinsic evidence about those facts simply to impeach the witness. So the

prosecutor should not have been permitted to call Fahey as a rebuttal witness to talk about Brown's deviation from the showering policy. The prosecutor impermissibly opened the door to that otherwise irrelevant information.

In addition, Fahey's rebuttal testimony didn't contradict Brown's testimony on cross-examination that the incident with V.F. had been the first time she had been accused of hitting a resident of the facility. Fahey's testimony, thus, tended to confirm Brown's actual representation. But it also veered off into the otherwise irrelevant matter of Brown's compliance with the internal policy on bathing and showering residents. The district court should not have allowed Fahey as a rebuttal witness. See *State v. Edwards*, 299 Kan. 1008, 1016, 327 P.3d 469 (2014) (purpose of rebuttal witness to refute testimony given in opposing party's case in chief); *State v. Sitlington*, 291 Kan. 458, 464, 241 P.3d 1003 (2010) (rebuttal evidence contradicts evidence introduced by an opposing party).

But not every trial error requires reversal. A defendant must show that the error has resulted in actual prejudice, *i.e.*, the denial of a fair trial. See *State v. Cruz*, 297 Kan. 1048, 1075, 307 P.3d 199 (2013) ("As we have recognized for decades, '[a] defendant is entitled to a *fair* trial but not a perfect one[.]' ") (quoting *State v. Bly*, 215 Kan. 168, 178, 523 P.2d 397 [1974]). In the absence of a constitutional defect—and there was none on this score—we should affirm a conviction if there is no reasonable probability the error contributed to the verdict. See *State v. McCullough*, 293 Kan. 970, Syl. ¶ 9, 270 P.3d 1142 (2012); *Ward*, 292 Kan. at 565. The State, as the party benefiting from the error, has the burden to demonstrate harmlessness. *McCullough*, 293 Kan. 970, Syl. ¶ 9.

***7** The rebuttal testimony from Fahey did not materially contribute to the verdict, given the other evidence in the case. Principally, of course, two eyewitnesses described conduct establishing the essential elements of the charged crime and told the jurors Brown engaged in that conduct. Although their accounts didn't match perfectly, witnesses often do not see and recall a single event precisely the same way. They recounted versions that generally matched as to the material facts. Looking at the evidence—and that is all Brown asks us to do in assessing the impact of the error—we cannot say Fahey's rebuttal testimony made any tangible difference in the outcome. The testimony from Koecher and Tate was strong evidence supporting the conviction.

District Court Error in Failing to Give Limiting Instruction

For her second and related point, Brown contends the district court should have given a limiting instruction to the jurors about how they could consider Fahey's rebuttal testimony, assuming it were otherwise admissible. Brown requested a limiting instruction. We agree that the failure to give a limiting instruction was error.

As we have already discussed, Fahey's rebuttal testimony could have been admitted only to show that Brown was not credible and, therefore, the jurors should discount her version of the situation involving V.F. The jurors should not have considered the rebuttal testimony for any other purpose. There was at least a fair risk that without a limiting instruction the evidence might have been misused to support some sort of bad propensity or disposition on Brown's part.

As provided in K.S.A. 60–406, a district court should give jurors an appropriate instruction regarding the limited purpose for which specific evidence has been admitted and may be considered if the party against whom the evidence has been offered so requests. Here, Brown requested a limiting instruction. The limiting instruction she proffered failed to address adequately the limited purpose for Fahey's rebuttal testimony. The district court, however, decided not to give an instruction. We, therefore, presume without deciding that the issue is one of law governed by K.S.A. 60–406 and is, thus, subject to review without any particular deference to the district court. Brown would be entitled to no more generous a standard of review.

The district court declined to give a limiting instruction because it concluded Fahey's rebuttal testimony "went entirely to the credibility of [Brown] who testified in her own behalf[.]" And while that was the basis on which the State presented Fahey's testimony and on which the district court admitted it, that misses the point of a limiting instruction. The jurors could have misconstrued the testimony as some type of propensity evidence, as well.

Evidence sometimes can be appropriately admitted for more than one purpose. See *Kansas City Mall Assocs. v. Unified Gov't of Wyandotte County/KCK*, 294 Kan. 1, 13, 272 P.3d 600 (2012) (out-of-court statement of property owner as to value of real estate properly admitted by adverse party as both substantive evidence on value and as impeachment of owner given conflicting trial testimony). But when evidence can only be considered for a single purpose and there is some chance jurors might otherwise view it as relevant for an impermissible purpose, the district court should honor

a request for a limiting instruction from the party against whom the evidence has been offered. See *State v. Denney*, 258 Kan. 437, 446, 905 P .2d 657 (1995) (finding failure to give properly requested limiting instruction error, though harmless on facts of case); *cf. State v. Dixon*, 289 Kan. 46, 68, 209 P.3d 675 (2009) ("A jury cannot be presumed to have legal knowledge outside the statements of law in the instructions."). We do not mean to suggest a district court should give a limiting instruction against the wishes of the disadvantaged party; there may be sound tactical reasons in a given case for declining the instruction. See *State v. Acevedo*, 49 Kan.App.2d 655, 668–69, 315 P.3d 261 (2013), *rev. denied* 300 Kan. —— (October 31, 2014); *State v. Massengale*, No. 109,351, 2014 WL 349612, at *10–11 (Kan.App.2014) (unpublished opinion) (Atcheson, J., concurring), *rev. denied* 301 Kan. —— (January 15, 2015).

***8** Here, the district court erred in failing to give an appropriate limiting instruction. But this, too, is an error subject to review for harmlessness. For the same reason that allowing Fahey's rebuttal testimony at all was harmless, the district court's failure to give a limiting instruction likewise did not substantially prejudice Brown.

Brown also contends the combined or cumulative effect of both related errors deprived her of a fair trial. Appellate courts will weigh the collective impact of trial errors and may grant relief if the overall result of the imperfections deprives the defendant of a fair hearing even when the errors considered individually would be harmless. *State v. Smith–Parker*, 301 Kan. 132, 167–68, 340 P.3d 485 (2014). Here, given the overlapping nature of the errors, we find their adverse cumulative impact to be diminished in contrast to multiple errors infecting different aspects of a trial. See 301 Kan. at 167–68 (exclusion of evidence, faulty jury instruction, and failure to conduct evidentiary hearing on potential juror misconduct, among other errors, combined to require reversal of convictions). We remain unpersuaded that Brown received so fundamentally flawed a trial as to call into question the verdict.

Affirmed.

All Citations

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390 P.3d 125 (Table)
Unpublished Disposition
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is referenced in the Pacific Reporter.
See Kan. Sup. Ct. Rules, Rule 7.04.
Court of Appeals of Kansas.

STATE of Kansas, Appellee,
v.
Christopher BROOKS, Appellant.

No. 113,636
|
Opinion filed March 3, 2017
|
Review Denied August 30, 2017

Appeal from Lyon District Court; JEFFRY J. LARSON, judge.

Attorneys and Law Firms

Sam Schirer, of Kansas Appellate Defender Office, for appellant.

Laura L. Miser, assistant county attorney, Marc Goodman, county attorney, and Derek Schmidt, attorney general, for appellee.

Before Buser, P.J., Atcheson and Powell, JJ.

MEMORANDUM OPINION

Atcheson, J.:

****1** Defendant Christopher Brooks' friend arranged to purchase methamphetamine from him in a controlled buy that law enforcement officers set up. Brooks went to trial in Lyon County District Court on multiple drug charges arising from the buy, and the jury convicted him. Brooks asserts, among other trial errors, that the jury should have been allowed to consider entrapment as a defense, the State impermissibly prosecuted him on multiplicitous crimes, and the district court mishandled a stipulation. We have reviewed each of Brooks' claimed points of error and find no reason to reverse any of the guilty verdicts or the judgment of conviction.

FACTUAL AND PROCEDURAL HISTORY

After being arrested on a bench warrant in April 2014 for failing to appear in municipal court, Gregory Webster offered to help narcotics officers with the Emporia Police Department by purchasing illegal drugs in a monitored transaction. Webster told the officers he could buy methamphetamine from Brooks. The officers immediately arranged to have the warrant withdrawn and Webster's court date postponed. So later the same day, Webster texted Brooks to invite him to dinner that evening. Webster asked Brooks to bring chicken to grill and a "dub" that he would buy. According to trial testimony, the term "dub" was common parlance among drug traffickers for $20 worth of methamphetamine.

During the afternoon, Webster continued to text Brooks to make sure he was coming over. The messages were not introduced at trial. But from the evidence in the record, we infer some of the messages referred to both the chicken and the drugs. Brooks continued to indicate he would be there. To set up the controlled buy from Brooks, the narcotics officers searched Webster to make sure he had no illegal drugs and gave him identified money to be used to pay for the methamphetamine. They and other law enforcement officers then accompanied Webster to his apartment. The narcotics officers hid in a darkened hallway from which they could watch Webster in the kitchen of his apartment. The other officers positioned themselves outside the apartment.

Brooks entered the apartment through a back patio door and went into the kitchen with Webster. According to the narcotics officers' trial testimony, Webster and Brooks spoke briefly. Brooks then handed Webster a small plastic bag, and Webster gave Brooks two identified $10 bills. The narcotics officers immediately came out of hiding, ordered Brooks to the floor, handcuffed him, and read him his *Miranda* rights. The other officers entered the apartment. An officer searched Brooks. Brooks had a glass pipe of the type used with illegal drugs in his pocket. He also had two cell phones and a charger. The officers recovered the buy money and the plastic bag with the methamphetamine.

A detective took custody of Brooks and drove him to the county jail to be booked. On the way, the detective told Brooks it would be in his best interest to disclose any contraband he might have before being searched at the jail. Brooks told the detective he had a plastic bag with methamphetamine in his

hat. At the jail, the detective found the plastic bag containing what looked like about a gram of methamphetamine.

**2 An analyst with the Kansas Bureau of Investigation tested the contents of the plastic bag Webster received from Brooks in the controlled buy. According to the lab report, the contents consisted of 1.1 grams of methamphetamine. Nothing in the record indicates the contents of the plastic bag Brooks had in his hat were tested.

Webster's apartment was within 1,000 feet of William Allen White School, a public elementary school in Emporia.

During Brooks' 2–day trial in September 2014, the jury considered three charges: (1) distribution of methamphetamine within 1,000 feet of school property, a felony; (2) possession of methamphetamine with the intent to distribute within 1,000 feet of school property, a felony; and (3) possession of drug paraphernalia, a misdemeanor. Several of the law enforcement officers involved in the controlled buy testified during the trial. Webster did not. Brooks testified in his own defense. He admitted having the methamphetamine found in his hat. But he denied the methamphetamine involved in the controlled buy belonged to him. Brooks told the jury Webster had both the drugs and the money. He disclaimed any knowledge of the drug transaction until the police rushed in and arrested him.

The jury convicted Brooks of the distribution and paraphernalia charges and a lesser felony of possession with intent to distribute less than 1 gram of methamphetamine within 1,000 feet of a school. At a later hearing, the district court ordered Brooks to serve 73 months in prison and 36 months on postrelease supervision, reflecting a standard guidelines sentence for the distribution conviction. The district court ordered Brooks to concurrently serve lesser sentences on the other convictions. The district court directed that Brooks serve the sentence in this case consecutive to any incarceration ordered in two earlier cases in which Brooks had been placed on probation. Brooks has timely appealed.

LEGAL ANALYSIS

Brooks raises four points on appeal: (1) The district court erred in refusing to instruct the jury on entrapment as a defense to the charge of distributing methamphetamine; (2) the convictions for distributing methamphetamine and possession with intent to distribute methamphetamine are multiplicitous; (3) the district court improperly accepted a stipulation to a common element of the distribution and possession charges without securing a waiver from Brooks of his right to jury trial on that element; and (4) the State failed to prove the requisite specific intent to support the possession with intent to distribute charge. We address the contentions in that order, supplementing the introductory recitation of the facts and procedural history.

Entrapment Defense

In reviewing a challenge to the district court's failure to give a jury instruction, an appellate court undertakes a sequential examination of related considerations addressing issue preservation, instruction appropriateness, and impact of any error. *State v. Brown*, 300 Kan. 542, 554–55, 331 P.3d 781 (2014); *State v. Plummer*, 295 Kan. 156, Syl. ¶ 1, 283 P.3d 202 (2012). The steps in the inquiry have been described this way: "(1) reviewability considering preservation of the issue at trial and jurisdiction; (2) legal appropriateness of the instruction; (3) factual support in the evidence for the instruction; and (4) harmlessness of any actual error." *State v. Franco*, 49 Kan. App. 2d 924, Syl. ¶ 1, 319 P.3d 551 (2014), *rev. denied* 301 Kan. 1049 (2015); see *Plummer*, 295 Kan. 156, Syl. ¶ 1. We follow that path.

**3 Brooks requested that the district court give an entrapment instruction to the jury outlining a defense to the charge of distributing methamphetamine. The district court declined, a decision to which Brooks never acceded. The issue, therefore, has been properly preserved.

In considering the legal appropriateness of an entrapment defense and, hence, a pertinent jury instruction, we first outline the theory behind entrapment as a shield to criminal prosecution. Entrapment has been codified in the Kansas Criminal Code as affording a defense when the defendant's "criminal conduct was induced or solicited by a public officer or his agent for purposes of obtaining evidence to prosecute" the defendant. K.S.A. 2016 Supp. 21-5208. Entrapment rests on the policy notion that government entities and their agents should not foment unlawful conduct. See *Jacobson v. United States*, 503 U.S. 540, 553–54, 112 S. Ct. 1535, 118 L.Ed. 2d 174 (1992); *State v. Hunter*, 241 Kan. 629, 643, 740 P.2d 559 (1987) ("[E]ntrapment has evolved in recent years as a curb to seriously improper law enforcement conduct."). So if government agents entreat a person not otherwise disposed toward criminal behavior to break the law, the ostensible lawbreaker should not be held to answer for the wrongful act. The principal policy objective is to discourage that sort

of government action and, in turn, to advance the idea that law enforcement agents should investigate criminal conduct rather than precipitate it.

Consistent with that purpose, a defendant need not show that government agents effectively broke his or her free will, thus essentially compelling the commission of the crime. Government agents may entrap a defendant by persuading him or her—through barbed pressure or smooth coaxing—to abandon an initial refusal in favor of willing participation in the suggested criminal activity. See *State v. Rogers*, 234 Kan. 629, 632, 675 P.2d 71 (1984) (entrapment constitutes "an avoidance" in which defendant submits "law enforcement officers ... implanted the [criminal] idea in his otherwise innocent mind by suggestion or solicitation"). The defense, however, does not apply when the agent "merely afford[s] an opportunity" to someone already inclined to criminality. K.S.A. 2016 Supp. 21-5208(a); see *State v. Jones*, 271 Kan. 201, 204, 21 P.3d 569 (2001) (discussing circumstances supporting entrapment defense); *State v. Jordan*, 220 Kan. 110, 116, 551 P.2d 773 (1976) (same). The government agents, therefore, must do more than simply offer a chance to take part in a criminal enterprise but need not so coerce the defendant that he or she acts without volition. Entrapment shields the reluctant-though-impressionable delinquent but not the criminally minded opportunist.

Based on the policy objectives underlying entrapment, the Kansas Supreme Court has held that defendants generally cannot raise the defense if they otherwise deny any involvement in the charged crime. *Hunter*, 241 Kan. at 643; *Rogers*, 234 Kan. at 633. That is, a defendant may not simultaneously disclaim participating in the criminal act and invoke as a defense a public policy designed to punish government agents for having induced his or her participation. Entrapment, thus, represents an exception to the general rule that a defendant may present legally or factually inconsistent defenses. *Hunter*, 241 Kan. at 643. The exception may be justified on equitable grounds in the sense that a defendant ought not be allowed to rely on entrapment—a defense premised on the impermissible conduct of government agents—simply as a backup if the factfinder determines his or her primary defense to be unworthy of belief.

****4** Brooks acknowledges the court's treatment of entrapment and concedes he has relied on entrapment as an alternative defense in this case, since he denied distributing methamphetamine. He claimed Webster had the money and the plastic bag with the methamphetamine all along and no exchange ever took place. Under the circumstances, an entrapment instruction would not have been legally appropriate. Brooks argues that in decisions after *Rogers* and *Hunter*, the Kansas appellate courts have recognized a criminal defendant may present alternative and even contradictory affirmative defenses. But none of those cases involved entrapment, which depends upon a precise public policy that distinguishes it from other affirmative defenses.

Brooks also cites *State v. Anderson*, 287 Kan. 325, 330, 197 P.3d 409 (2008), as support for his position. In *Anderson*, the defendant wanted to assert a defense of compulsion and on appeal challenged the standard the district court used to determine if he had presented sufficient evidence to warrant a jury instruction. The court noted the general rule that a defendant is entitled to an instruction on a defense supported in the evidence and went on to clarify the amount of evidence necessary to cross that threshold. Nowhere in that discussion, however, did the court presume to address entrapment specifically—a defense that had nothing to do with Anderson's case. The court mentioned that its retooled evidentiary standard supplanted what had been used in a number of earlier cases, including *State v. Farmer*, 212 Kan. 163, 510 P.2d 180 (1973), an entrapment case. *Anderson*, 287 Kan. at 330, 334. The *Anderson* court, however, did not purport to consider, let alone change, the limitation on entrapment recognized in *Hunter*, *Rogers*, and other cases requiring that the defendant admit participating in the crime. In short, *Anderson* does not advance Brooks' position.

We are constrained to follow *Rogers* and the authority on which it relies. The discussion in *Hunter*, though highly instructive, is technically dicta and, thus, not binding authority. See *State v. Hankins*, 304 Kan. 226, 237, 372 P.3d 1124 (2016) ("discussion ... was dicta, which binds nobody"). As we have indicated, based on that precedent, Brooks could not assert an entrapment defense, and his requested jury instruction was legally inappropriate.

Although our determination on legal appropriateness disposes of the point, we consider briefly the factual support for Brooks' entrapment defense. A defendant typically is entitled to an instruction on a theory of defense if there is sufficient evidence for a jury to reasonably find for him or her on that defense. *State v. Hilt*, 299 Kan. 176, 184, 322 P.3d 367 (2014). That means the evidence has enough substance that a jury properly could entertain a reasonable doubt as to the defendant's guilt. See K.S.A. 2016 Supp. 21-5108(c); *State v. Chavez*, No. 108,955, 2014 WL 1795760, at *2 (Kan.

App. 2014) (unpublished opinion), *rev. denied* 301 Kan. 1048 (2015) ("[A] criminal defendant need only create reasonable doubt with his or her evidence of an affirmative defense, such as self-defense or entrapment, to be acquitted.").

Brooks, however, failed to marshal sufficient evidence at trial to factually support an entrapment defense. First, of course, Brooks' own version of the events was incompatible with his being entrapped to distribute methamphetamine. Brooks told the jurors he didn't physically give any methamphetamine to Webster. He generally disclaimed having any idea Webster wanted him to bring methamphetamine to their dinner and specifically pleaded ignorance about the meaning of the term "a dub." The trial evidence shows that Webster and Brooks exchanged multiple text messages during the afternoon leading up to the controlled buy. Webster did not testify, so the jurors didn't have his version. Nor did they get to see the actual text messages. But a law enforcement officer involved in the arrest testified that Webster asked Brooks to come with chicken and a dub—a slang term for $20 worth of methamphetamine, according to the officer.

****5** Webster acted as a government operative in arranging the controlled buy. The trial evidence, however, failed to show that Webster or any other government agent induced Brooks to participate in the sale of methamphetamine despite some initial reluctance or outright resistance on his part. The available evidence portrayed Brooks as a willing participant from the outset, assuming he participated at all. Accordingly, an entrapment instruction was factually unsupported, an independent basis to uphold the district court's decision.

Having found an entrapment instruction both legally inappropriate and factually unsupported, we need not continue the analysis to weigh the impact of any claimed error in instructing the jury. There was none.

Multiplicitous Convictions

Brooks contends his separate convictions for distribution of methamphetamine and for possession of methamphetamine with the intent to distribute are impermissibly multiplicitous. According to Brooks, he is being twice punished for one criminal wrong.

Multiplicity arises when the State charges a single criminal act in two or more counts, thereby exposing the defendant to pyramiding punishments for that one offense. *State v. Weber*, 297 Kan. 805, 808, 304 P.3d 1262 (2013) (citing *State v. Thompson*, 287 Kan. 238, 244, 200 P.3d 22 [2008]). Multiple convictions and punishments for one criminal act violate a defendant's protection against double jeopardy contained in the Fifth Amendment to the United States Constitution and § 10 of the Kansas Constitution Bill of Rights. *Weber*, 297 Kan. at 808. Whether two crimes are multiplicitous typically presents a question of law. *State v. Colston*, 290 Kan. 952, 971, 235 P.3d 1234 (2010).

Brooks has raised the multiplicity argument for the first time on appeal. But the Kansas appellate courts have considered multiplicity challenges initially presented on appeal because doing so serves the ends of justice and prevents the denial of a fundamental right—one of the bases for taking up a point not presented to the district court. *Weber*, 297 Kan. at 809; *Colston*, 290 Kan. at 971. We do so here.

But having done so, we see no multiplicity problem. The governing criminal statute prohibits a person from "distribut[ing] or possess[ing] with the intent to distribute" particular illegal drugs, including methamphetamine. K.S.A. 2016 Supp. 21-5705(a)(1). Brooks says the statutory language defines a single crime that may be committed in different ways. From that premise, which seems sound, he posits that his conduct at Webster's home entailed a discrete criminal episode that amounted to one violation of K.S.A. 2016 Supp. 21-5705(a)(1).

The argument, however, doesn't conform to the facts, as found by the jury. The jury rejected Brooks' claim that Webster already had the methamphetamine related to the sale. So in assessing the multiplicity argument, we must view the facts this way: Brooks arrived at Webster's apartment with two plastic bags of methamphetamine; he sold one to Webster for $20 and retained the other—the one in his hat—for some other purpose. Brooks told the jury he was an addict and intended to use the methamphetamine in his hat. The jury was free to believe Brooks' explanation or not.

The sale to Webster supported a charge of distribution of that methamphetamine. But Brooks kept some methamphetamine. His retention of the second plastic bag of methamphetamine amounted to a separate crime—either simple possession or possession with intent to distribute *that particular methamphetamine*, depending on what he planned to do with it. See K.S.A. 2016 Supp. 21-5706 (criminalizing possession of specified drugs). The crimes occurred at roughly the same time and in the same place, but they were distinct violations. So they could be punished separately. Were the law as Brooks contends, a drug trafficker making a sale could be charged

only with that sale and not with anything related to the unsold portion of his or her inventory. That result seems stupefying. We, therefore, reject Brooks' multiplicity argument.

Stipulation Regarding School

**6 As we have pointed out, Brooks was charged with distributing methamphetamine within 1,000 feet of school property and with possession with intent to distribute within 1,000 feet of school property. The ownership and use of the property and its proximity to the criminal act form an element of each of those offenses that enhances the presumptive punishment. See K.S.A. 2016 Supp. 21-5701(r) (term "school property" used in criminal statutes related to controlled substances limited to buildings used by school district for "student instruction or attendance or extracurricular activities" for kindergarten or any grades one through 12); K.S.A. 2016 Supp. 21-5705(d)(5) (presumptive penalty for distribution of or possession with intent to distribute controlled substance increased by one severity level if within 1,000 feet of "school property"). The prosecutor and Brooks' trial lawyer entered into a stipulation presented to the jury that "the alleged offenses" occurred within 1,000 feet of William Allen White School, owned by Unified School District No. 253 and "used for K-5 student instruction." The only other evidence the State presented on that element was a passing reference from one of the law enforcement officers that Webster's apartment was less than 1,000 feet from William Allen White School.

As we have indicated, Brooks contends the district court's handling of the stipulation compromised his right to a jury trial. Some background principles help frame the contention. Criminal defendants have a fundamental constitutional right to have their cases tried to juries, as provided in the Sixth Amendment to the United States Constitution. *State v. Parker*, 301 Kan. 556, 563, 344 P.3d 363 (2015). After consultation with his or her lawyer, a criminal defendant must personally make the decision to waive a trial to a jury or to a judge. See *Taylor v. Illinois*, 484 U.S. 400, 417–18 & n.24, 108 S. Ct. 646, 98 L.Ed. 2d 798 (1988). The lawyer cannot make the choice. *State v. Carter*, 270 Kan. 426, 439, 14 P.3d 1138 (2000); *State v. Irving*, 216 Kan. 588, 590, 533 P.2d 1225 (1975). To secure a proper waiver of jury trial, the district court must inform a defendant of that right and have the defendant personally give up the right on the record in open court or in writing. 216 Kan. at 590. Conversely, a lawyer has the authority to make tactical decisions before and during a criminal trial even without the defendant's assent. *Faretta v. California*, 422 U.S. 806, 820, 835, 95 S. Ct. 2525, 45 L.Ed. 2d 562 (1975) ("[W]hen a defendant chooses to have a lawyer manage and present his case, law and tradition may allocate to the counsel the power to make binding decisions of trial strategy in many areas."); *Carter*, 270 at 438–39 ("[T]actical decisions" such as filing motions, selecting jurors, calling and examining witnesses are the sole province of the lawyer exercising "professional skill and judgment.").

On appeal, Brooks argues the stipulation amounted to an impermissible waiver of his right to jury trial and taints those convictions. We assume Brooks' premise of error and reject his conclusion. We find any error to have been harmless. Brooks, therefore, has not shown grounds for reversing the convictions. The issue, however, is less than straightforward given the substance of the stipulation and how the district court applied it.

Here, Brooks and the State stipulated to historical facts —the ownership, use, and proximity of William Allen White School. Those facts bore on a particular element of the charged offenses. The stipulation was uncontroverted and represented virtually the only evidence on that point admitted during the trial. Ordinarily, jurors consider stipulated historical facts along with all of the other trial evidence in assessing a defendant's guilt, as measured against the elements of the offense. See *State v. Longoria*, 301 Kan. 489, 517–18, 343 P.3d 1128 (2015); PIK Crim. 4th 50.050 ("[Y]ou should consider and weigh everything admitted into evidence ... includ[ing] ... admissions or stipulations of the parties[.]"). With an unrebutted stipulation setting out facts effectively establishing an element of a crime, the jurors in a given case presumably would readily find the State had proved that element and move on to other issues.

**7 But the district court did not treat the stipulation that way. Rather, the district court apparently used it as a stipulation of legal effect. A stipulation of legal effect entails the parties' agreement to a legal determination or conclusion that withdraws an issue from the factfinder's consideration. See *United States v. Jones*, 108 F.3d 668, 671 (6th Cir. 1997); *United States v. Mason*, 85 F.3d 471, 472–73 (10th Cir. 1996). For example, in a tort action for personal injuries, a defendant may admit the plaintiff's allegations of wrongful conduct, effectively stipulating to liability and leaving only the issue of compensable damages for the jury to decide. See, *e.g.*, *McBride v. Dice*, 23 Kan. App. 2d 380, 380, 930 P.2d 631 (1997); *Adams v. City of Chicago*, 798 F.3d 539, 541 (7th Cir. 2015). Here, presumably based on the stipulation, the district court simply excluded the ownership, use, and

proximity of the school building from the jury instructions identifying the elements the State had to prove to convict Brooks of distribution and possession with intent to distribute within 1,000 feet of school property. See *State v. Witten*, 45 Kan. App. 2d 544, 550–51, 251 P.3d 74 (conviction for drug offense within 1,000 feet of school property requires proof building regularly used for instruction of students or their extracurricular activities), *rev. denied* 293 Kan. 1114 (2011); PIK Crim. 4th 57.020 (instruction includes sample language for drug crime near school property). In other words, the jurors were never asked to consider and never decided whether the offenses occurred within 1,000 feet of school property.

The district court neither discussed the stipulation with Brooks nor secured his personal assent to it. So the district court did not explain to Brooks that the stipulation would be used to remove an element of the charged crimes from the jurors' consideration. And the district court did not suggest the stipulation in any way compromised Brooks' right to a jury trial. Although Brooks appears to have signed the stipulation, as did his lawyer and the prosecutor, his signature imputes no particular meaning under these circumstances and certainly does not amount to an endorsement of the stipulation's legal effect. In short, Brooks submits that absent his informed agreement, the way the district court used the stipulation violated his constitutional right to jury trial.

Had the stipulation been treated strictly as one of historical fact, meaning the jurors could have considered it in determining whether the crimes took place within 1,000 feet of a school, we question whether the issue could be fairly characterized as a waiver of the right to a jury trial at all. For Brooks, the stipulation reflected a sound (and quite narrow) tactical decision. At oral argument, the prosecutor assured us that absent a stipulation regarding the school, she would have called a school district administrator as a witness at trial. The administrator would have testified the building was, indeed, owned by the district, and the testimony would have highlighted that elementary school pupils were taught there. All of that would satisfy the criteria for the enhanced punishment. See *Witten*, 45 Kan. App. 2d at 550–51.

But the testimony also would have accentuated facts that could not have favorably disposed the jurors toward Brooks. Conventional wisdom holds that a stipulation tends to draw less attention from jurors than would witness testimony. See *United States v. Grassie*, 237 F.3d 1199, 1210–11 (10th Cir. 2001); *United States v. Muse*, 83 F.3d 672, 678 (4th Cir. 1996). In addition, we understand the ownership and particular use of William Allen White School was not open to any real dispute. We, likewise, presume that to be true of the distance between the school and Webster's residence, since one of the law enforcement officers testified without contradiction that they were within 1,000 feet of each other. Brooks doesn't argue the ownership, use, or proximity of the school could have been reasonably refuted. So the tactical call by Brooks' lawyer to opt for a stipulation to those historical facts makes sense.

We see this stipulation of historical facts itself to be akin to other litigation decisions entrusted to the trial lawyer rather than to the criminal defendant personally. Its use as the body of trial evidence regarding William Allen White School is like a decision to softly cross-examine a sympathetic prosecution witness or to forgo any questions at all especially if the testimony were cumulative, effectively unimpeachable, or collateral. And it is like a decision to decline a technically proper limiting instruction because the instruction would highlight for jurors a snippet of testimony they might otherwise simply gloss over. See *State v. Massengale*, No. 109,351, 2014 WL 349612, at *11 (Kan. App. 2014) (Atcheson, J., concurring), *rev. denied* 301 Kan. 1050 (2015). Were that the end of the matter, we would be disposed to put the stipulation in the column of decisions properly entrusted to a trial lawyer's professional judgment as an advocate. In turn, even though the facts bore on and effectively established an element of the crimes, the stipulation would not have impaired Brooks' right to a jury trial in a way that required his personal agreement.

**8 But the use of the stipulation to remove an element of the charged crimes from the jurors' decisionmaking casts a different light on the issue. In a criminal case, a district court cannot direct a verdict of guilty no matter how overwhelming the government's evidence—doing so violates the defendant's Sixth Amendment right to jury trial. *Sullivan v. Louisiana*, 508 U.S. 275, 277, 113 S. Ct. 2078, 124 L.Ed. 2d 182 (1993) (citing *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572–73, 97 S. Ct. 1349, 51 L.Ed. 2d 642 [1977]; *Sparf v. United States*, 156 U.S. 51, 105–06, 15 S. Ct. 273, 39 L.Ed. 343 [1895]); *State v. Sisson*, 302 Kan. 123, 129–30, 351 P.3d 1235 (2015). That rule extends to individual elements of particular crimes. *Neder v. United States*, 527 U.S. 1, 12, 119 S. Ct. 1827, 144 L.Ed. 2d 35 (1999); *Sisson*, 302 Kan. at 129–30; *State v. Brice*, 276 Kan. 758, 772, 80 P.3d 1113 (2003). Nonetheless, criminal defendants may voluntarily relinquish the right to have a jury decide their guilt or innocence at

all in favor of a trial to the judge alone or as part of a plea disposing of the case. It necessarily follows that a defendant may withdraw an element of a charged crime from the jury's consideration with the State's consent. The question here is how much, if any, input the defendant personally must have in *that* decision.

Through his argument, Brooks implicitly equates withdrawal of an element of a crime to the forbearance of a jury trial in its entirety. An argument could be made that they differ only in degree—withdrawing all of the elements of every crime charged is either the same as or the essence of pleading guilty. But the comparison frays upon much inspection, and, as we discuss, the Kansas Supreme Court has rejected a similar argument made about trials to the district court based solely on stipulated facts. *White v. State*, 222 Kan. 709, 713, 568 P.2d 112 (1977).

Brooks, of course, had a jury trial. The State presented evidence. He testified in his own defense. The jurors sorted through all of that to determine if he had been proved guilty beyond a reasonable doubt, save for the ownership, use, and location of the school. That's not much like a guilty plea and the requisite waiver of a jury trial that accompanies it. Brooks really isn't complaining about the loss or relinquishment of the fundamental right to a jury trial but a limited intrusion or encroachment. So it is not self-evident that the same informed-consent requirements ought to apply. In short, a stipulation removing an element of a crime from the jury's consideration seems measurably less momentous than those core decisions a criminal defendant must personally make. See *State v. Hargrove*, 48 Kan. App. 2d 522, 534, 293 P.3d 787 (2013) (outlining decisions entrusted to criminal defendant personally). That seems especially so here, given the limited function of the stipulation and the relative insignificance of the particular element to Brooks' defense and in the overall context of the trial.

Brooks offers no general statement of the rule he suggests we apply. He says only that the district court should have advised him that the stipulation curtailed his right to jury trial and, therefore, should have secured his personal agreement to the stipulation. We have already indicated that we doubt such a rule to be required for stipulations to historical facts. The rule, however broadly or narrowly applied, creates potential problems Brooks doesn't address. Any judicial inquiry into a criminal defendant's personal understanding of his or her lawyer's decisions or the product of those decisions, such as a proposed stipulation, at the very least treads close to privileged attorney-client communication. In most instances, what a criminal defendant knows about his or her lawyer's handling of the case comes from the lawyer. The more times a district court is required to secure the personal approval of a defendant for his or her lawyer's conduct of the case, the greater the intrusion into that confidential professional relationship. The court inquiries risk disclosing strategic plans to the defendant's potential detriment and risk dampening candor between client and lawyer if the client believes he or she may have to reveal some of what has been discussed. In short, what Brooks suggests could drive a wedge between the defendant and his or her lawyer.

****9** Brooks also doesn't explain precisely what a district court ought to do should a defendant disagree with his lawyer's strategic decision to stipulate to certain facts or evidence. He premises his claim of error here on the district court's failure to inquire at all. If the district court has to elevate the defendant's position over his or her lawyer's—as Brooks' contention would seem to require; otherwise the failure to inquire would be harmless because the district court could always side with the lawyer—then the defendant arguably would be engaged in self-representation as to that decision. But effectuating a criminal defendant's Sixth Amendment right to self-representation invokes another set of mandatory protocols. *Faretta*, 422 U.S. at 835 (criminal defendant exercising right to self-representation and concomitantly relinquishing right to counsel must do so knowingly and intelligently); *State v. Jones*, 290 Kan. 373, 376–77, 228 P.3d 394 (2010) (To insure the sufficiency of a criminal defendant's choice to represent himself or herself, a district court must advise the defendant of the pitfalls of abandoning the right to counsel.); see *Iowa v. Tovar*, 541 U.S. 77, 87–89, 124 S. Ct. 1379, 158 L.Ed. 2d 209 (2004). If Brooks were correct that a stipulation amounts to a defendant's focused waiver of his or her right to a jury as to the subject of the stipulation, it follows that a defendant may self-represent with respect to that narrow issue and necessarily does so should he or she disagree with trial counsel.

Ultimately, however, we need not plumb or resolve those potential problems. Nor, in this case, do we have to decide whether Brooks has presented a legally sound argument. For purposes of resolving the issue, we *assume* he has, so the district court should have informed him about the legal effects of the stipulation, determined his personal position on it, and given that position controlling weight. The assumed error, however, does not automatically entitle Brooks to relief. Had Brooks made an uninformed waiver of his right to an entire

jury trial as a prelude to a bench trial or a plea, that would be true. But Brooks received a jury trial on everything except a single element of two of the charges against him.

The assumed error left Brooks in the same position he would have occupied had the district court inadvertently omitted that element from the jury instructions. In that circumstance, the jurors never would have considered the element because they had (mistakenly) never been told about it. The omission compromises a defendant's constitutional right to jury trial, but the mistake may be reviewed for harmlessness. *Neder*, 527 U.S. at 18; *State v. Linn*, 251 Kan. 797, 802, 840 P.2d 1133 (1992). The error should be considered harmless only if the omitted element were "uncontested and supported by overwhelming evidence." *Neder*, 527 U.S. at 17; *State v. Richardson*, 290 Kan. 176, 182–83, 224 P.3d 553 (2010). The test for harmlessness, then, is twofold. Not only must the evidence bearing on the omitted element approach the irrefutable, a defendant effectively has to concede that component of the charged crime.

Here, the record supports a finding of harmless error. The ownership of the building and its use as an elementary school entailed essentially objective facts that could be easily proved through wholly disinterested witnesses. So Brooks' lawyer correctly recognized them to be essentially uncontestable in this case. Apart from the stipulation, a law enforcement officer testified to the proximity of the school and Webster's apartment—testimony Brooks didn't challenge. That simply underscores the point. Similarly, the very willingness of Brooks' lawyer to stipulate to those historical facts indicates they weren't refutable and, thus, provided no avenue to reasonable doubt. Given the particular facts and their ease of proof, we conclude the stipulated facts were both uncontestable and uncontested in this case. The stipulation, as the substance of the information given the jurors about those historical facts, similarly rendered the trial evidence on the element overwhelming and undisputed. That wouldn't be true of a stipulation reflecting only part of the admitted evidence on a given point, especially if the other evidence conflicted with the stipulation. See, *e.g.*, *United States v. Lee*, 834 F.3d 145, 159 n.8 (2d Cir. 2016) (parties stipulate to testimony of absent witness); *United States v. Urena*, 73 F. Supp. 3d 291, 305 (S.D.N.Y. 2014) (same).

****10** On appeal, Brooks doesn't argue any actual prejudice and implicitly submits the mere existence of the error he defines requires a reversal of his convictions on the distribution and possession with intent to distribute charges. Even granting the error, which we have done merely as a forensic device, Brooks requests too generous a remedy. The nature of the presumed error requires an evaluation for harmlessness. That review of the trial record demonstrates the narrow factual issue covered in the stipulation would not have furnished even a colorable defense. And the decision to stipulate itself reflected the futility of trying to base a defense on that element. Those considerations together render any error harmless under the stringent standard required by *Neder* and *Richardson*.

In the interests of completeness, we mention three cases—one Brooks cites and two he doesn't—that discuss affiliated issues. They do not, however, directly govern the way in which a district court should handle either a stipulation covering historical facts or a stipulation removing an element from the jurors' consideration to preserve a criminal defendant's right to jury trial. The latter reflects the issue Brooks raises and we avoid by presuming error and then finding the error harmless.

Brooks relies, in part, on *State v. Lee*, 266 Kan. 804, 814, 977 P.2d 263 (1999), in which the Kansas Supreme Court held the State could not refuse a proffered stipulation from a defendant charged with being a felon in possession of a firearm that he or she, in fact, had been convicted of a felony. The stipulation, thus, precluded the State from introducing evidence showing the precise felony or relating any facts about that earlier conviction. The court cast a deliberately narrow holding applying only to charges of criminal possession of a firearm or a similar offense in which the defendant's "status" as a convicted felon forms a legally required part of the State's proof. 266 Kan. at 814. The *Lee* decision also rests on evidence law alone and does not purport to discuss stipulations as potential impingements on a defendant's Sixth Amendment right to jury trial. The court concluded that because the State need only prove a conviction for some felony, the nature and circumstances of the particular felony were irrelevant as an evidentiary matter and the information, in many instances, would be unduly and impermissibly prejudicial to the defendant. 266 Kan. at 813–14.

Brooks zeros in on a concluding paragraph in *Lee* where the court stated the district court should inquire of the defendant personally and determine that he or she approves of the stipulation and waives any right to have that element of the charged crime proved beyond a reasonable doubt. 266 Kan. at 815–16. The court went on to state the district court

could instruct the jurors that they treat the element of the defendant's status as a convicted felon proved by the parties' agreement reflected in the stipulation. 266 Kan. at 816. The court, however, never otherwise discussed or explained why a district court ought to direct the jury to find for the State on the element of a felony conviction based on a stipulation of historical fact or the concomitant need to secure a waiver from the defendant. The court referred to "the analysis" in *Brown v. State*, 719 So. 2d 882, 889 (Fla. 1998). Although the Florida Supreme Court crafted the same approach to establishing a previous felony in comparable felon-in-possession cases, it never provided a rationale for its treatment of the stipulation in that manner. 719 So. 2d at 889.

At best, *Lee* offers limited persuasive authority for Brooks' argument that the district court should have informed him about the legal effect of the stipulation regarding the school and obtained his personal consent to it. Had the stipulation been used as one of historical fact and simply submitted to the jury as evidence, *Lee* would be inapposite. In *Lee*, the stipulation was treated as a basis for directing the jurors to find for the State on the element of the defendant's past felony conviction. Here, of course, the district court went even further and removed the element of the school's ownership, use, and proximity from the jurors' consideration at all. But *Lee* neither says a district court's failure to inquire of the defendant amounts to error, although that might be inferred, nor defines just what right would be compromised. And *Lee* plainly does not suggest how such an error ought to be remedied. Arguably, *Lee* does no more than set forth some "best practices" in its concluding directive. See, *e.g.*, *State v. Key*, 298 Kan. 315, 322–23, 312 P.3d 355 (2013) (court "close[s] with brief comments on future best practices" regarding procedures for challenging past driving-under-the-influence convictions used for sentencing enhancement).

****11** In *White*, 222 Kan. 709, White filed a 60-1507 motion challenging his murder conviction on the grounds the district court should have treated his bench trial on an eight-paragraph stipulation of facts as the functional and legal equivalent of a guilty plea. The court held that the issue wasn't properly raised in a 60-1507 motion but addressed the merits anyway, since White never filed a direct appeal from his conviction. 222 Kan. at 712. The stipulation and bench trial, which immediately followed White's waiver of jury trial, were part of a negotiated disposition of multiple charges that White's retained lawyer worked out with the prosecutor.

The court rejected White's suggested equivalence of his abbreviated trial with a guilty plea and, on that basis, affirmed the denial of his 60-1507 motion. 222 Kan. at 713. The court pointed out that in his motion, White did not claim he misunderstood the stipulation or the legal effect it could have on the criminal charges against him. Nor did he contend he had been pressured or tricked into disposing of the charges that way. Without elaboration, the court observed that no statutory or case authority of which it was aware required a district court to "interrogate and advise a defendant, who is represented by counsel, before accepting and approving stipulations as to the evidence [.]" 222 Kan. at 713. The observation, however, simply posits a generalization that may be correct as far as it goes without considering exceptions or specific factual situations. The court did not tie that generalization to White's waiver of jury trial. White didn't challenge the jury trial waiver, and the court never discussed it. We are disinclined to extrapolate a precedential rule from *White* applicable to Brooks' claim premised on his right to jury trial. Another panel of this court, however, has relied on *White* in rejecting an argument like Brooks'. See *State v. Newman*, No. 104,872, 2011 WL 5526561, at *1–2 (Kan. App. 2011) (unpublished opinion), *rev. denied* 296 Kan. 1134 (2013).

Last year, in *State v. Rizo*, 304 Kan. 974, 377 P.3d 419 (2016), the court addressed a procedural scenario comparable to *White*. Rizo waived his right to a jury trial and later the same day had a bench trial on stipulated facts, resulting in his conviction for felony murder and several other serious crimes. As part of the arrangement, the State dismissed a separate felony case against Rizo that would have substantially increased his criminal history had it resulted in a conviction. Unlike White, who attacked his trial on stipulated facts, Rizo challenged the sufficiency of his jury trial waiver specifically because he was not informed whether the district court would hear evidence or simply receive a stipulation during the bench trial. When Rizo entered his plea, the parties had not yet determined how the bench trial would be conducted. The court held that the specifics of what would be presented to the district court were not integral to Rizo's knowing and voluntary waiver of his right to jury trial. 304 Kan. at 981.

As the lawyers assembled for the bench trial, they informed the district court they would be submitting a stipulation of facts. The district court explained to Rizo the differences between a bench trial on stipulated facts and one involving witnesses and physical evidence and then determined he had discussed the proceedings with his lawyer. The Kansas Supreme Court implicitly indicated Rizo voiced no objection

to a bench trial on stipulated facts. The court cited *White* to recognize the district court did more than was necessary in discussing the trial by stipulation with Rizo. 304 Kan. at 982–83. But the holding in *Rizo* does not dictate the outcome here.

**12 Both *White* and *Rizo* dealt with defendants relinquishing their jury trial rights entirely and substituting bench trials on stipulated facts. Here, Brooks fashions a different sort of argument based on the removal of an issue from the jury's consideration by stipulation—a situation in which he had exercised his constitutional right to a jury trial only to have that right, in his view, materially compromised by his lawyer's agreement with the State to limit what the jury got to decide. Brooks contends that confluence of circumstances required the district court to inform him of and obtain his assent to that agreement. Neither *White* nor *Rizo* says otherwise. Nor do they set forth rationales that ineluctably expand to defeat Brooks' claim. By the same token, they certainly do nothing to advance his position.

Requisite Intent to Distribute

For his final point on appeal, Brooks contends the State failed to prove the statutory intent required for his conviction of possession with intent to distribute methamphetamine within 1,000 feet of a school. Brooks reads the statute as punishing a defendant who plans to traffic in a controlled substance near a school. That is, the intended sale or other distribution is to occur within 1,000 feet of the school. Brooks says there was no direct or circumstantial evidence he had that particular intent regarding the methamphetamine he kept in his hat.

The first step in analyzing this issue calls for an interpretation of the relevant statutory language to discern the required intent. That is a question of law. *State v. Collins*, 303 Kan. 472, 473–74, 362 P.3d 1098 (2015). The legislature criminalized "distribut[ion] or possess[ion] with the intent to distribute" certain controlled substances, including methamphetamine. K.S.A. 2016 Supp. 21-5705(a)(1). And the legislature imposed an enhanced punishment "if the controlled substance ... was distributed or possessed with the intent to distribute on or within 1,000 feet of any school property." K.S.A. 2016 Supp. 21-5705(d)(5). The enhancement plainly applies if the defendant has actually distributed a controlled substance within 1,000 feet of a school. But does the proximity requirement apply to the "possession" component or the "intended distribution" component of the phrase "possessed with the intent to distribute"?

We suppose linguists and grammarians could parse the statute either way. But we are neither, so we don't know for sure. We do know that we surely are members of an intermediate appellate court and, as such, are bound to the decisions of the Kansas Supreme Court. *State v. Maestas*, 298 Kan. 765, 789–90, 316 P.3d 724 (2014). The court has already considered this precise statutory question and has answered it adversely to Brooks. *State v. Barnes*, 275 Kan. 364, 373, 64 P.3d 405 (2003). In *Barnes*, the court construed legally equivalent terminology in K.S.A. 65-4161(d), a predecessor of K.S.A. 2016 Supp. 21-5705(d)(5), as criminalizing "possession of the required quantity of drugs within 1,000 feet of a school and an intent to distribute the drugs somewhere[.]" *Barnes*, 275 Kan. at 373.[*]

[*]In K.S.A. 65-4161(d), the legislature mandated certain drug crimes be treated as severity level 2 offenses—increasing the presumptive guidelines punishment and operating as an enhancement similar to that in K.S.A. 2016 Supp. 21-5705(d)(5). The severity level 2 designation applied to defendants who "possessed [controlled substances] with intent to sell, deliver or distribute ... in or on, or within 1,000 feet of any school property [.]" K.S.A. 65-4161(d). As we have indicated, the relevant language is functionally and legally indistinguishable from what's in K.S.A. 2016 Supp. 21-5705(d)(5). The *Barnes* court recognized the legislature imposed the increased penalty to promote "drug-free zones" around schools. 275 Kan. at 370. We have no reason to conclude the legislature had some different objective when it recodified K.S.A. 65-4161(d) and modified other aspects of the statute. So *Barnes* continues to provide a controlling interpretation of the statutory language Brooks challenges.

**13 We need not puzzle over the meaning of K.S.A. 2016 Supp. 21-5705(d)(5). The *Barnes* decision removes any puzzlement and requires we rule against Brooks on this point.

Affirmed.

Buser J., concurring:

I concur with the holding of this opinion. I do not concur in the discussion regarding the stipulation. I would find that because Brooks' counsel jointly entered into the stipulation for strategic purposes any error was invited and, therefore, Brooks is foreclosed from challenging the error on appeal. See *State v. Verser*, 299 Kan. 776, 784, 326 P.3d 1046 (2014); *State v. Hargrove*, 48 Kan. App. 2d 522, 531–32, 293 P.3d 787 (2013); *State v. Downey*, 27 Kan. App. 2d 350, 358, 2 P.3d 191 (2000).

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Court of Appeals of Kansas.

STATE of Kansas, Appellee,
v.
Leonard D. CHARLES Sr., Appellant.

No. 119,346
|
Opinion filed July 19, 2019

Appeal from Sedgwick District Court; JOHN J. KISNER JR., judge.

Attorneys and Law Firms

Peter Maharry, of Kansas Appellate Defender Office, for appellant.

Lance J. Gillett, assistant district attorney, Marc Bennett, district attorney, and Derek Schmidt, attorney general, for appellee.

Before Leben, P.J., Malone and Gardner, JJ.

MEMORANDUM OPINION

Per Curiam:

***1** Leonard D. Charles appeals his convictions of one count of aggravated kidnapping, one count of aggravated domestic battery, one count of criminal threat, and two counts of domestic battery. Charles claims: (1) the State committed reversible prosecutorial error in closing argument; (2) there was insufficient evidence to support his aggravated kidnapping conviction; (3) the district court erred on the verdict form by placing "guilty" before "not guilty," violating the presumption of innocence; (4) the jury instructions infringed on the jury's power of nullification; and (5) cumulative error requires reversal of his convictions. The State challenges our jurisdiction over this appeal based on an insufficient notice of appeal. We find that the State has failed to show any prejudice based on Charles' deficient notice of appeal. But we find against Charles on each of his claims of error, so we affirm the district court's judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Charles and R.C. had been involved in a romantic relationship for five years and planned to get married in the future. In August and September 2017, R.C. noticed a change in Charles' behavior. Charles became aggressive and egotistical. He began staying up for days at a time and neglecting his hygiene. During this time, Charles began several projects around the house, tearing things up and leaving projects unfinished. R.C. tried to talk to Charles about his behavior many times, but he denied having a problem and told her that "he needed to show the world that he wasn't going to take its crap anymore." In early September 2017, R.C. sent her 14-year-old son to live with his adult sister because R.C. feared for his safety because of Charles' aggressive behavior.

On September 17, 2017, R.C. had been away from the house running errands. When she returned home in the afternoon, she found the house in disarray. Charles was hanging up flags in a window. R.C. complained to Charles about the mess. In response, Charles got in R.C.'s face, "kind of headbutted [R.C.]," pointed his finger at her, and called her "a stupid bitch." This was the first time that Charles had ever physically attacked her. Charles followed R.C. to the bathroom and kept yelling and screaming at her. R.C. told Charles that he should just leave and she went outside to smoke.

Charles followed R.C. outside, and he swung the screen door open with enough force that the door hit R.C. Charles got in R.C.'s face and kept yelling and screaming at her to the point that he was "kind of spitting on [her]." Charles told R.C. that he was tired of her complaints and he could do what he wanted to do. Charles then grabbed R.C. by the hair and slammed her to the ground. Charles began to kick and hit R.C. while she was on the ground. R.C. said she was in shock and did not understand why this was happening. As R.C. tried to get up off the ground, Charles grabbed her hair and drug her back into the house as she screamed.

Back in the house, Charles slammed R.C. to the floor and locked both locks on the door. As Charles began to shut the windows, R.C. went to the door and tried to unlock the locks. Charles pulled R.C. away from the door and slammed her down again. R.C. then tried to escape through the bedroom, which had a back door. Charles again caught up with her, grabbed her, and slammed her against a mattress that was leaning up against the wall, causing the mattress to fall on her. Charles lifted the mattress off R.C., grabbed R.C. by her

hair, pulled her head back, and started to choke her. As he was choking her, Charles told R.C. that he could kill her with his hands.

***2** Charles left R.C. in the bedroom. R.C. could hear Charles in the living room shutting windows, so she got up and ran for the back door in the bedroom. Before R.C. could get the slide lock open, Charles returned to the bedroom. He grabbed R.C. with both hands and squeezed her neck. R.C. tried to pull Charles' hands off her neck, but she passed out. As R.C. regained consciousness, Charles told her: "[Y]ou can die. If I'm jumping off a cliff, you can go with me." This pattern of choking R.C. until she passed out, waiting for her to wake up, and then choking her again happened five or six times.

When Charles left the room, R.C. went down the hallway to try to get to the front door. As soon as she made it into the living room, Charles came running up behind her with a golf club. Charles told R.C. to take the golf club and "beat my ass" and "[s]how me how bad you are." R.C. did not take the golf club but again began to run away. Charles hit her in the upper right side of her back with the golf club, knocking her to the floor. Charles grabbed R.C. by the hair and pulled her neck so far back that it "literally felt like it was going to snap at any time."

R.C. begged Charles to allow her to leave, but Charles said: "[Y]ou can't go anywhere now, not go looking like that. You look like the elephant man." Charles made R.C. take off her shirt because it was torn and had blood on it. Charles then poured a bottle of alcohol and a bottle of peroxide on her face before rubbing antibacterial cream on her. R.C. could taste the alcohol and her face burned as Charles poured the liquids on her. Charles also placed a towel with ice on her face. R.C. estimated that he held her in the house for a couple of hours before she finally talked him into letting her go across the street to get a Pepsi. Charles warned R.C. not to call the police.

Once outside, R.C. walked to a nearby Dollar General and called 911. R.C. also called a friend, Anette Hunt, who arrived at the Dollar General before the police. R.C.'s daughter and her daughter's boyfriend came and parked their car in front of R.C.'s house and waited for the police to arrive. About an hour later, after two additional calls to 911, the police arrived at the Dollar General.

Officer Juan Atondo responded to the Dollar General. Atondo took a statement from R.C. and took photographs of her injuries. He testified that R.C. had several scratches on her face and a "huge goose egg" on her forehead. R.C. also had red marks along her neck and cheek. Atondo believed he could see petechial hemorrhages in R.C.'s eyes consistent with being choked. Atondo said that R.C. looked like she had been in a car accident. EMS attended to R.C., but she declined to go to the hospital. Instead, she walked back to her house with the police.

By that time, Charles had left and other police officers had cleared the house. R.C. took Hannah Holley, a crime scene investigator, through the house and pointed out things that had changed since she was able to leave. Holley noted that the entire house smelled like cleaning solution. Holley located a single golf club in the bedroom. Holley collected various items from the house as evidence. In Holley's presence, R.C. undressed so that Holley could document her injuries. R.C. sustained large bruises and scrapes all over her body, a contusion on her head, bruising and scratching to her neck, bruising to her arms, bruising up and down her back, a blood clot under her chin, a concussion, and whiplash.

On September 20, 2017, the State charged Charles with aggravated battery, aggravated domestic battery, and criminal threat. The State later filed an amended information to include a charge of aggravated kidnapping and another charge of aggravated battery.

***3** At trial, R.C., Hunt, Holley, Atondo, and other law enforcement officers testified for the State. The State introduced over 100 photographs showing R.C.'s injuries and the condition of her residence on September 17, 2017. Charles testified in his defense. He denied having an argument with R.C. and denied hitting or kicking her. He claimed that R.C. fell off the porch and when he went to help her, R.C. told him to get off of her. Charles testified that R.C. was taking medications that made her tend to exaggerate.

The district court instructed the jury on all five charges as well as the lesser included offenses. The jury found Charles guilty of one count of aggravated kidnapping, one count of aggravated domestic battery, one count of criminal threat, and two counts of domestic battery.

Before sentencing, Charles filed a motion for appointment of new counsel, which the district court denied. Charles then chose to represent himself at the sentencing hearing. The district court sentenced him to a controlling term of 638 months in prison.

Charles filed a timely pro se notice of appeal.

JURISDICTION

The State claims that this court lacks jurisdiction over the appeal because Charles' notice of appeal is insufficient to confer appellate jurisdiction. Whether jurisdiction exists is a question of law over which an appellate court has unlimited review. *State v. Smith*, 304 Kan. 916, 919, 377 P.3d 414 (2016).

K.S.A. 2018 Supp. 60-2103(b) provides: "The notice of appeal shall specify the parties taking the appeal; shall designate the judgment or part thereof appealed from, and shall name the appellate court to which the appeal is taken." In addition, Supreme Court Rule 2.02 (2019 Kan. S. Ct. R. 14) states that the "notice of appeal must be filed in the district court, be under the caption of the district court case, and be in substantial compliance with the judicial council form."

After sentencing, and within the 14 days required to file a notice of appeal, Charles filed a pro se document entitled "Pro se Motion for 'NOTICE OF APPEAL.' " The notice of appeal identifies the correct criminal case as 2017 CR 2787. But instead of identifying the order from which the appeal is taken, the remainder of the notice of appeal identifies trial errors below and reads much like a K.S.A. 60-1507 motion. Nowhere in the notice of appeal does Charles state that he is appealing from his convictions nor does he identify a date of conviction or sentencing. The notice of appeal also fails to identify the Court of Appeals as the appellate court to which the appeal is taken.

Generally, the appellate courts construe notices of appeal broadly to confer jurisdiction. In *State v. Laurel*, 299 Kan. 668, 673, 325 P.3d 1154 (2014), our Supreme Court noted that K.S.A. 2011 Supp. 60-2103(b) should be liberally construed to " 'to assure justice in every proceeding.' " But the court also indicated there was a substantive minimum notice required by the statute to support jurisdiction. 299 Kan. at 673.

As noted by the State, Charles' notice of appeal violates K.S.A. 2018 Supp.60-2103(b), as it fails to designate the judgment appealed from or the appellate court to which the appeal is taken. But the notice of appeal is identified as a notice of appeal, it properly contains the caption of the district court case, and it is apparent from the substance of the document that he is challenging the circumstances that led to his convictions. Charles filed the notice of appeal within 14 days of his sentence.

In *Laurel*, our Supreme Court found that "a notice of appeal need not be overly technical or detailed," and the court focused on whether the State could show prejudice from the shortcomings in the notice of appeal. 299 Kan. at 674. Here, the State claims prejudice, but it fails to explain how it suffered prejudice. Instead, the State argues it "should not be required to demonstrate prejudice or surprise under circumstances showing no notice of appeal being filed."

***4** There is no indication that the State has suffered any surprise or prejudice as a result of Charles' notice of appeal. Based on *Laurel*, we find that the notice of appeal was sufficient to convey notice that Charles was appealing his convictions. Thus, we conclude that this court has jurisdiction over Charles' appeal.

PROSECUTORIAL ERROR

Charles argues that the prosecutor committed reversible error in closing argument by appealing to the jury's sympathy for the victim, R.C. The State responds that the prosecutor was merely making fair comment on the evidence. The State also asserts that Charles cannot show prejudice resulting from any error in the closing argument.

In *State v. Sherman*, 305 Kan. 88, 378 P.3d 1060 (2016), the Kansas Supreme Court clarified that the appellate court uses a two-step process to evaluate claims of prosecutorial error:

> "These two steps can and should be simply described as error and prejudice. To determine whether prosecutorial error has occurred, the appellate court must decide whether the prosecutorial acts complained of fall outside the wide latitude afforded prosecutors to conduct the State's case and attempt to obtain a conviction in a manner that does not offend the defendant's constitutional right to a fair trial. If error is found, the appellate court must next determine whether the error prejudiced the defendant's due process rights to a fair trial. In evaluating prejudice, we simply adopt the traditional constitutional harmlessness inquiry demanded by *Chapman* [*v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)]. In other words, prosecutorial error is harmless if the State can demonstrate 'beyond a reasonable doubt that the error complained of will not or did not affect the outcome of

the trial in light of the entire record, *i.e.*, where there is no reasonable possibility that the error contributed to the verdict.' *State v. Ward*, 292 Kan. 541, Syl. ¶ 6, 256 P.3d 801, (2011), *cert. denied* 565 U.S. 1221 (2012). We continue to acknowledge that the statutory harmlessness test also applies to prosecutorial error, but when 'analyzing both constitutional and nonconstitutional error, an appellate court need only address the higher standard of constitutional error.' [Citation omitted.]" 305 Kan. at 109.

Charles claims the State committed prosecutorial error in the closing argument by referring to the R.C.'s strength and to what she endured at the hands of Charles. The relevant part of the State's closing argument is as follows:

"I'm strong. Those were the words of the defendant yesterday to you. He was strong. So much so that he made his wife look like she had just been in a car accident, according to Officer Atondo. That's what he thought the first thing he saw her. But I would suggest to you that the evidence that you heard over the last couple of days was that the strong person was [R.C]. She was strong enough to be violently confined, threatened, beat for hours in her own home and not fight back. She had the strength to not do that. She had the strength to get away and the brain power to convince him to let her go get that Pepsi. She had the strength to call 911 on someone she loved and had known for a long time. She had the strength to tell that 911 operator what happened to her. She had the strength to tell Officer Atondo what happened to her. She had the strength to disrobe in front of a stranger and let her photograph her, while she pealed [*sic*] away her clothing to show the injuries her husband had just put on her. And she had the strength to come in here and answer questions about what happened to her."

***5** "So this is the time where you put the evidence that you hear, the words, the physical evidence to the law that the Judge gave to you. And the instructions tell you you're to use your common knowledge and experience. You get to use your common sense. And I ask you to do that."

Prosecutors are allowed wide latitude when delivering closing arguments. *State v. Pribble*, 304 Kan. 824, 832, 375 P.3d 966 (2016). Even so, a prosecutor's statements must be based on the evidence. *State v. Stimec*, 297 Kan. 126, 128, 298 P.3d 354 (2013). A prosecutor should refrain from making statements that "inflame the passions or prejudices of the jury or distract the jury from its duty to make decisions based on the evidence and the controlling law." *State v. Baker*, 281 Kan. 997, 1016, 135 P.3d 1098 (2006). A prosecutor should not seek to draw the jurors' attention away from the task of weighing the evidence and instead invite them to rely on underlying emotions. See *State v. Schunacher*, 298 Kan. 1059, 1073, 322 P.3d 1016 (2014).

Here, the prosecutor referred to R.C.'s strength and to what she had to endure during and after the physical altercation with Charles. Arguably the prosecutor's statements invoked sympathy for R.C. But on the other hand, the statements were based on evidence presented at the trial. Without deciding whether the statements amounted to prosecutorial error, we will proceed directly to the prejudice prong of the two-step process to evaluate the claim of prosecutorial error.

Prosecutorial error is harmless if the State can show "beyond a reasonable doubt that the error complained of will not or did not affect the outcome of the trial in light of the entire record, *i.e.*, where there is no reasonable possibility that the error contributed to the verdict." *Sherman*, 305 Kan. at 109. Here, even if the prosecutor's statements amounted to error, the State presented overwhelming evidence to the jury corroborating R.C.'s version of a prolonged attack leading to injuries to various parts of her body. This evidence included the corroborating testimony from several witnesses, dozens of photographs, and video evidence. The evidence was inconsistent with Charles' account of a single fall from a shallow porch.

Moreover, the district court instructed the jury that "[s]tatements, arguments, and remarks of counsel are intended to help you in understanding the evidence and in applying the law, but they are not evidence. If any statements are made that are not supported by evidence, they should be disregarded." Jurors are presumed to follow the district court's instructions. *State v. Peppers*, 294 Kan. 377, 392, 276 P.3d 148 (2012). Finally, the fact that the jury found Charles guilty of two lesser included offenses shows that the jury was not influenced by emotions and sympathy but focused on the evidence.

In light of the entire record, we conclude there is no reasonable possibility that any prosecutorial error in closing argument contributed to the jury's verdict here. Charles fails to show any prejudice. As a result, the challenged comments were harmless beyond a reasonable doubt and do not require reversal.

SUFFICIENCY OF THE EVIDENCE TO SUPPORT AGGRAVATED KIDNAPPING

Next, Charles challenges the sufficiency of the evidence supporting his aggravated kidnapping conviction. The State charged Charles with aggravated kidnapping with the intent to hold R.C. to inflict bodily harm or to terrorize her. The State also charged Charles with criminal threat and three aggravated battery offenses. Relying on our Supreme Court's holding in *State v. Buggs*, 219 Kan. 203, 216, 547 P.2d 720 (1976), Charles contends the confinement was incidental to these offenses, and there was not a separate and distinct act supporting the aggravated kidnapping charge.

***6** When a defendant challenges the sufficiency of the evidence in a criminal case, an appellate court reviews the evidence in a light most favorable to the State to determine whether a rational fact-finder could have found the defendant guilty beyond a reasonable doubt. *State v. Rosa*, 304 Kan. 429, 432-33, 371 P.3d 915 (2016). This court does not reweigh the evidence or assess the credibility of witnesses. *State v. Dunn*, 304 Kan. 773, 822, 375 P.3d 332 (2016).

The State charged Charles with aggravated kidnapping under K.S.A. 2017 Supp. 21-5408(a)(3), which requires confinement with the intent "to inflict bodily injury or to terrorize the victim or another." The district court instructed the jury consistent with the elements of the charged crime. See K.S.A. 2017 Supp. 21-5408(a)(3).

Charles argues that for an aggravated kidnapping conviction to stand, the kidnapping must be separate and distinct from the underlying crimes. "[A] kidnapping statute is not reasonably intended to cover movements and confinements which are slight and 'merely incidental' to the commission of an underlying lesser crime." *Buggs*, 219 Kan. at 215. In *Buggs*, the Kansas Supreme Court laid out a framework for determining whether the confinement was distinct enough from the other crimes to allow a separate charge of kidnapping. The movement or confinement:

> "(a) Must not be slight, inconsequential, and merely incidental to the other crime;"
>
> "(b) Must not be of the kind inherent in the nature of the other crime; and"
>
> "(c) Must have some significance independent of the other crime in that it makes the other crime substantially easier of commission or substantially lessens the risk of detection." 219 Kan. at 216.

But Charles' argument fails because the three-part *Buggs* test only applies to kidnapping with the intent to facilitate flight or commission of any crime in violation of K.S.A. 2017 Supp. 21-5408(a)(2). In *State v. Burden*, 275 Kan. 934, 943-44, 69 P.3d 1120 (2003), the Kansas Supreme Court held that the three-part *Buggs* test does not apply to kidnapping with the intent to inflict bodily injury or to terrorize the victim or another in violation of K.S.A. 2017 Supp. 21-5408(a)(3). Charles' argument based on *Buggs* fails because the State charged him with aggravated kidnapping in violation of K.S.A. 2017 Supp. 21-5408(a)(3) and not K.S.A. 2017 Supp. 21-5408(a)(2).

Charles argues that *Burden* was wrongly decided because the Supreme Court failed to consider that charging aggravated kidnapping under K.S.A. 2017 Supp. 21-5408(a)(3) is similar in effect as charging a defendant under K.S.A. 2017 Supp. 21-5408(a)(2). But the Court of Appeals is duty bound to follow Kansas Supreme Court precedent, absent some indication the Supreme Court is departing from its previous position. *State v. Meyer*, 51 Kan. App. 2d 1066, 1072, 360 P.3d 467 (2015). There is no indication that the Supreme Court is departing from its precedent in *Burden*.

Removing the *Buggs* argument from consideration, we are left to decide whether the evidence presented at trial, viewed in a light most favorable to the State, supports Charles' conviction of aggravated kidnapping. Here, there is evidence of confinement. R.C. had removed herself from the verbal altercation with Charles and was sitting on the front porch smoking a cigarette. Charles sought R.C. out on the front porch, began a physical altercation, dragged her inside the house, and locked both of the locks to prevent her release. He also shut the windows of the house to prevent anyone from hearing her calls for help, and he prevented her from escaping out the back door. Every time R.C. tried to leave the house, Charles prevented her from doing so. The evidence is overwhelming that Charles committed these acts with the intent to inflict bodily injury on R.C. or to terrorize her. Finally, the evidence was overwhelming that Charles inflicted bodily harm upon R.C. Thus, the State presented sufficient evidence to support the jury's verdict that Charles was guilty beyond a reasonable doubt of aggravated kidnapping.

VERDICT FORM

***7** Next, Charles argues that the district court violated his constitutional right to the presumption of innocence by placing the "guilty" option before the "not guilty" option on the verdict form. During the jury instruction conference, Charles requested that the "not guilty" line on the verdict form be placed first, followed by the "guilty" line. The district court denied the request and provided a verdict form that listed the "guilty" line as the first option as provided in the Pattern Instructions of Kansas (PIK). The district court also provided a presumption of innocence instruction.

"While a verdict form is not technically a jury instruction, it is part of the packet sent with the jury which includes the instructions and assists the jury in reaching its verdict. It is appropriate to apply the same standard of review applicable to the review of instructions." *Unruh v. Purina Mills*, 289 Kan. 1185, 1197-98, 221 P.3d 1130 (2009).

> "When analyzing jury instruction issues, we follow a three-step process:
>
> '(1) determining whether the appellate court can or should review the issue, *i.e.*, whether there is a lack of appellate jurisdiction or a failure to preserve the issue for appeal; (2) considering the merits of the claim to determine whether error occurred below; and (3) assessing whether the error requires reversal, *i.e.*, whether the error can be deemed harmless.' [Citation omitted.]" *State v. McLinn*, 307 Kan. 307, 317, 409 P.3d 1 (2018).

Here, Charles objected to the verdict form in district court, so we can review his claim on appeal. But the district court did not err in using a verdict form with the "guilty" opinion before the "not guilty" option. In *State v. Wesson*, 247 Kan. 639, 652, 802 P.3d 574 (1990), *cert. denied* 501 U.S. 1236 (1991), *disapproved of on other grounds by State v. Rogers*, 282 Kan. 218, 144 P.3d 625 (2006), our Supreme Court held that the district court did not err by using a verdict form placing the "guilty" option before the "not guilty" option as long as the district court properly instructed the jury on the defendant's presumption of innocence. Here, the district court properly instructed the jury that it "must presume that [Charles] is not guilty unless you are convinced from the evidence that he is guilty." Based on our Supreme Court's holding in *Wesson*, we reject Charles' claim that the district court used an erroneous verdict form. See also *State v. Wilkerson*, 278 Kan. 147, 158-59, 91 P.3d 1181 (2004).

JURY NULLIFICATION

Next, Charles contends that several of the jury instructions were clearly erroneous because the instructions failed to preserve the jury's power of nullification. Charles presents two complaints. First, he contends the district court erred by instructing the jury that it could only consider the lesser included offenses if it could not agree on guilt for the crime charged. Second, Charles argues the district court erred by instructing the jury that it "must" follow the law and it was the jury's "duty" to do so.

We have already set forth the three-step standard of review when analyzing jury instruction issues. *McLinn*, 307 Kan. at 317. If there was no objection to the complained-of instruction, this court applies the clearly erroneous standard for reversal. K.S.A. 2017 Supp. 22-3414(3); *State v. Williams*, 295 Kan. 506, Syl. ¶ 3, 286 P.3d 195 (2012).

Jury nullification is

> " '[a] jury's knowing and deliberate rejection of the evidence or refusal to apply the law either because the jury wants to send a message about some social issue that is larger than the case itself or because the result dictated by law is contrary to the jury's sense of justice, morality, or fairness.' Black's Law Dictionary 875 (8th ed. 2004)." *Silvers v. State*, 38 Kan. App. 2d 886, 888, 173 P.3d 1167, *rev. denied* 286 Kan. 1180 (2008).

***8** See *State v. McClanahan*, 212 Kan. 208, 213, 510 P.2d 153 (1973).

Sequential consideration of lesser included offenses

The district court instructed the jury on several lesser included offenses. As part of the instructions, the district court informed the jury that it could only consider the lesser included offenses if it did not agree that the defendant was guilty of the greater offense. Charles complains that requiring the jury to consider the offenses sequentially coerced it to find him guilty of the more serious charge and violated its power of nullification.

In *State v. Smith*, No. 117,423, 2018 WL 6712629, at *7 (Kan. App. 2018) (unpublished opinion), *petition for rev. filed* January 16, 2019, this court rejected a similar argument, finding "[s]equential consideration of lesser included offenses

is legally appropriate." Relying on *State v. Parker*, 301 Kan. 556, 561, 344 P.3d 363 (2015), and *State v. Trujillo*, 225 Kan. 320, 324, 590 P.2d 1027 (1979), this court found that instructing the jury to consider the lesser offenses sequentially and in descending order of severity is an orderly method of consideration and does not coerce the jury into returning a guilty verdict for the more severe charge. *Smith*, 2018 WL 6712629, at *7.

Although this court's decision in *Smith* is not final, we adopt the reasoning in that case and reject Charles' claim that the district court erred by instructing the jury to consider the lesser included offenses sequentially. We point out that Charles' jury found him guilty of two lesser included offenses of domestic battery, so clearly the jury was not coerced to find him guilty of the more serious charge on those counts.

Jury "must" follow the law and had a "duty" to do so.

Next, Charles asserts the district court erred by instructing the jury that it "must" follow the law and it was the jury's "duty" to do so. He complains this language improperly compelled the jury to find him guilty rather than giving the jury the option of exercising its power of nullification.

In Instruction No. 1, the district court instructed the jury that it was the jury's "duty to consider and follow all of the instructions." Instruction No. 11 provided: "Your verdict must be founded entirely upon the evidence admitted and the law as given in these instructions."

The State argues this issue should not be considered because of invited error. Under the invited error doctrine, a defendant cannot challenge an instruction on appeal, even as clearly erroneous under K.S.A. 2017 Supp. 22-3414(3), when there has been an on-the-record agreement to the wording of the instruction at trial. *State v. Stewart*, 306 Kan. 237, 248-49, 393 P.3d 1031 (2017). Here, Charles invited any error on Instruction No. 1 as he specifically requested the identical language. He also did not object to this instruction during the jury instruction conference. Charles also specifically requested the identical jury instruction as provided in Instruction No. 11, and he did not object to this instruction during the jury instruction conference. Thus, Charles is precluded from relief based on invited error. 306 Kan. at 248-49. In any event, Kansas appellate courts have approved of jury instructions with similar language, finding that a jury instruction directing the jury to follow the law is not error. See *State v. Pennington*, 254 Kan. 757, 764, 869 P.2d 624 (1994); *McClanahan*, 212 Kan. 208, Syl. ¶ 3.

CUMULATIVE ERROR

***9** Finally, Charles claims he was denied a fair trial based on cumulative error. See *State v. Santos-Vega*, 299 Kan. 11, 27-28, 321 P.3d 1 (2014). But the only possible error we have identified in this opinion is prosecutorial error by invoking sympathy for the victim in closing argument. A single error cannot support reversal under the cumulative error doctrine. *State v. Gonzales*, 307 Kan. 575, 598, 412 P.3d 968 (2018).

Affirmed.

All Citations

Slip Copy, 2019 WL 3242199 (Table)

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347 P.3d 1214 (Table)
Unpublished Disposition
(Pursuant to Kansas Supreme Court Rule 7.04(f), unpublished opinions are not precedential and are not favored for citation. They may be cited for persuasive authority on a material issue not addressed by a published Kansas appellate court opinion.)
Court of Appeals of Kansas.

STATE of Kansas, Appellee,
v.
Chad Duane AMACK, Appellant.

No. 111,136.
|
May 8, 2015.
|
Review Denied October 9, 2015.

Appeal from Shawnee District Court; Nancy E. Parrish, Judge.

Attorneys and Law Firms

Korey A. Kaul, of Kansas Appellate Defender Office, for appellant.

Jodi Litfin, assistant district attorney, Chadwick J. Taylor, district attorney, and Derek Schmidt, attorney general, for appellee.

Before HILL, P.J., STANDRIDGE and ATCHESON, JJ.

MEMORANDUM OPINION

PER CURIAM.

***1** Chad Duane Amack appeals his conviction for obstructing legal process. First, he argues the State presented insufficient evidence at trial for the jury to find him guilty beyond a reasonable doubt. Second, he argues the district court improperly instructed the jurors that they must follow the law in arriving at a verdict.

FACTS

On January 7, 2013, Special Agent Joseph Cox of the Kansas Department of Corrections, Deputy John Peterson of the Shawnee County Sheriff's Office, and Officer Tony Obregon of the Topeka Police Department went to the La Casa Grande Apartments in Topeka to serve an arrest warrant on Amack. Cox had received information that Amack and a female, Kristen Brownlee, were in apartment 101. The officers arrived at the complex at about 9 a.m. and split up. Cox and Obregon went to the management office to gather any background information they could, while Peterson went to the rear of apartment 101 to watch for anyone who might be leaving the apartment.

After collecting information from the management office, Cox went to the front door of the apartment and began to knock. There was a peephole in the door. Cox was wearing a Kevlar vest, and the word "police" was written in large block letters across his chest. The first couple of knocks were not particularly hard or loud. But after Cox began knocking, a dog started to bark at him from inside the apartment. At this point, Peterson saw a tattooed hand lower a safety bar on the back door. The safety bar locked the sliding glass door in place. When Peterson saw this hand, he quickly approached the sliding glass back door and, while slapping the glass, loudly instructed Amack to go to the front door. After Peterson informed Cox that somebody locked the back door, Cox knocked very loudly on the front door, declared that he was a police officer, announced he had a warrant for Amack's arrest, and requested Brownlee or Amack to come to the door.

Cox called for more officers as back up. As he waited for the back-up officers to arrive, Cox repeatedly knocked at the front door, announced his presence, stated he had an arrest warrant for Amack, and tried to get an answer from inside the apartment. While doing so, Cox heard shuffling and bumping inside. Five or 10 minutes after Cox started knocking, maintenance staff working for the complex provided Cox with a key to the apartment. Cox attempted to open the apartment's front door using the key; however, the door would only open a few inches. Nonetheless, Cox continued to knock on the door and make verbal announcements.

Once backup arrived, Shawnee County Sheriff Deputy John Burghart and another officer went to the side of the apartment to watch some of the windows. Burghart successfully opened the bedroom window, from which he could see the main entrance to the apartment. Burghart noticed that a chair, a table, and a mattress were all piled up against the apartment's front door. Burghart announced 5 to 10 times that the sheriff's department was there with a warrant for Amack's arrest and ordered Amack to come to the door.

***2** At some point, Amack came around a corner into Burghart's line of sight, told Burghart that a woman in the apartment was having a seizure, and then opened the back door. Amack was taken into custody at about 10 a.m., roughly an hour after the officers first arrived and between 20 and 30 minutes after Cox obtained the key from maintenance. After taking Amack into custody, the officers entered the apartment and found Brownlee and another male, Jeran Reed, in the residence. Neither Brownlee nor Reed had tattoos on their hands, but Amack did.

As a result of these events, Amack was charged with one count of obstructing legal process. A jury later convicted him of that offense. Amack now appeals his conviction.

ANALYSIS

Sufficiency of the evidence

When reviewing the sufficiency of the evidence following a conviction in a criminal case, the appellate court looks at all the evidence in a light most favorable to the prosecution and determines whether a rational factfinder could have found the defendant guilty beyond a reasonable doubt. *State v. Frye*, 294 Kan. 364, 374–75, 277 P.3d 1091 (2012). This court will not reweigh evidence, resolve conflicts in the evidence, or pass on the credibility of witnesses. A conviction may be based entirely on circumstantial evidence and the reasonable inferences deducible from that evidence. *State v. McCaslin*, 291 Kan. 697, 710–11, 245 P.3d 1030 (2011), *overruled on other grounds by State v. Astorga*, 299 Kan. 395, 402, 324 P.3d 1046 (2014).

K.S.A.2014 Supp. 21–5904(a)(3) prohibits "knowingly obstructing, resisting or opposing any person authorized by law to serve process in the service or execution or in the attempt to serve or execute any writ, warrant, process or order of a court, or in the discharge of any official duty." In order for a defendant to be found guilty under K.S.A.2014 Supp. 21–5904(a)(3), it must be shown that the defendant substantially hindered or increased the burden of the officer carrying out his or her official duty. See *State v. Parker*, 236 Kan. 353, Syl. ¶ 5, 690 P.2d 1353 (1984). In addition, the defendant must have reasonable knowledge that he or she is opposing a police officer. *State v. Gasser*, 223 Kan. 24, 30, 574 P.2d 146 (1977). Finally, the obstruction must be directed against the officer named in the complaint. *State v. Lee*, 242 Kan. 38, 42, 744 P.2d 845 (1987).

Although apparently conceding that he barricaded and locked doors to prevent Cox from entering the apartment, Amack argues his conviction for obstruction cannot be sustained because there was no evidence that Cox (1) attempted to enter the apartment or (2) would have entered the apartment but for the barricaded and locked doors. But the record contradicts Amack's assertion that Cox never tried to enter the apartment. Cox testified that he obtained a key to apartment 101 from the maintenance staff at the complex and attempted to open the front door; however, the door would only open a couple of inches.

***3** But even if there had been no evidence that Cox attempted to enter or would have entered the apartment but for the barricaded and locked doors, such evidence is not necessary to sustain a conviction for obstructing legal process. Our Supreme Court established long ago that the term "obstruct" as used in K.S.A.2014 Supp. 21–5904 "does not necessarily imply the employment of direct force or the exercise of direct means. It includes any passive, indirect, or circuitous impediments to the service or execution of process, *such as hindering or preventing an officer by not opening a door.*" (Emphasis added.) See *State v. Merrifield*, 180 Kan. 267, 270, 303 P.2d 155 (1956). Here, after Cox began knocking on the door, he identified himself as a police officer and announced that he had a warrant for Amack's arrest. Therefore, in addition to the evidence that Amack actively resisted his arrest by barricading the front door, there was also evidence that he passively obstructed Cox by failing to open the door after Cox announced that he was a police officer and was there to serve an arrest warrant on Amack.

Amack compares his conviction to *State v. Everest*, 45 Kan.App.2d 923, 256 P.3d 890 (2011), *rev. denied* 293 Kan. 1109 (2012). In that case, a panel of this court overturned Everest's conviction for obstruction of official duty. Everest was stopped for not having a properly illuminated license tag. He did not have a driver's license on him and provided a false name when the officer asked about his identity. He also smelled of alcohol and had watery eyes, but he denied having anything to drink. The arresting officer contacted dispatch and was informed that dispatch had no record of the name Everest had provided. It only took about 3 minutes for the officer to check with dispatch and return to his DUI investigation. Everest was eventually arrested, and the officer found a card displaying Everest's true identity during a search of his car. This court reversed his conviction for obstruction of official duty because Everest's true identity was quickly established

before his lie caused any substantial burden on the police officer. 45 Kan.App.2d at 930.

But this case is clearly distinguishable from *Everest.* In *Everest,* the defendant's false identification only distracted the officer from his ongoing DUI investigation for about 3 minutes. Further, the investigation alleged to have been obstructed was not even dependent on knowing the defendant's true identity. Conversely, Cox was not investigating a crime in this case. Rather, Cox was attempting to complete the singular task of serving Amack with an arrest warrant. Amack prevented Cox from doing so for a significant period of time. Although Cox knocked, announced that he was a police officer, and informed Amack that he had an arrest warrant, Amack did not respond and did not answer the door. When Cox later received a key from maintenance, he was blocked from entering the apartment by several household items that had been stacked against the front door. It was not until 20 to 30 minutes after Cox tried to enter the apartment that Amack finally surrendered.

***4** Viewed in a light most favorable to the prosecution, a rational factfinder could have concluded that Amack substantially hindered Cox or increased Cox's burden by both passively and actively preventing him from serving the arrest warrant. Given that Amack does not challenge the sufficiency of the evidence relating to any other element of the crime of obstructing legal process, his point of error on this issue is without merit.

Jury instruction

Amack claims the district court erred by instructing the jury that it must follow the law in arriving at a verdict. Amack cites two instructions given to the jury that he believes were erroneous in this regard. The first was when the trial judge said, "I will give you instructions about the law that you must apply" before the jury left the courtroom the day before closing arguments. The second was when, prior to deliberation, the court instructed the jury that the "verdict must be founded entirely upon the evidence admitted and the law as given in these instructions." Amack argues instructing the jury that it must follow the law in arriving at a verdict necessarily deprived the jury of its right to render a verdict contrary to the evidence or the law, a practice referred to as jury nullification.

When jury instructions are challenged for the first time on appeal, as here, this court reviews the instructions for clear error. See K.S.A.2014 Supp. 22–3414(3). This requires a two-step analysis. First, this court must determine whether there was an error in the instruction, which is a question of law subject to unlimited review. If an error exists, then the court must determine whether reversal is required. To reverse, this court must be firmly convinced that the jury would have reached a different verdict had the error not occurred. This requires a de novo determination based on a review of the entire record. *State v. Williams,* 295 Kan. 506, 515–16, 286 P.3d 195 (2012).

Jury nullification has been defined by a prior panel of this court as:

> " 'A jury's knowing and deliberate rejection of the evidence or refusal to apply the law either because the jury wants to send a message about some social issue that is larger than the case itself or because the result dictated by law is contrary to the jury's sense of justice, morality, or fairness. [Citation omitted.]" *Silvers v. State,* 38 Kan.App.2d 886, 888, 173 P.3d 1167, *rev. denied* 286 Kan. 1180 (2008).

Certainly, " '[j]ury nullification is always a possibility.' " 38 Kan.App.2d at 890. If a defendant can present admissible evidence that plays on the jurors' sympathies or notions of right and wrong, there is nothing to stop a jury from acquitting the defendant, regardless of the law or the evidence. See 38 Kan.App.2d at 890–91. Nevertheless, we are not persuaded instructing the jury that it must follow the law in arriving at a verdict deprives the jury of its right to render a verdict contrary to the evidence or the law.

***5** In *State v. Naputi,* 293 Kan. 55, 66, 260 P.3d 86 (2011), the Kansas Supreme Court explained that "[i]t is not the role of the jury to rewrite clearly intended legislation, nor is it the role of the courts to instruct the jury that it may ignore the rule of law, no matter how draconian it might be." On the other hand, our Supreme Court recently held that "a jury instruction telling the jury it 'must' or 'will' enter a verdict" was improper. *State v. Smith–Parker,* 301 Kan. 132, Syl. ¶ 6, 340 P.3d 485 (2014). The court held that the wording of such an instruction came too close to "directing a verdict for the State. A judge cannot compel a jury to convict, even if it finds all elements proved beyond a reasonable doubt." 301 Kan. at 164.

Unlike the instruction provided by the court to the jury in *Smith–Parker,* however, the instruction in this case did not direct the jury to enter a particular verdict; instead, the instruction simply directed the jury that it must follow the

law. This instruction is in line with the one sanctioned in *State v. Pennington*, 254 Kan. 757, 764, 869 P.2d 624 (1994). In that case, our Supreme Court held the following instruction provided sufficient direction to the jury: " 'You should decide the case by applying these instructions to the facts as you find them.' " 254 Kan. at 764. The court went on to say that using the stronger term " 'must' " in place of " 'should' " in that instruction would be a better practice. 254 Kan. at 764. The propriety of instructing a jury that it must apply the instructions to the facts as it finds them is consistent with the Supreme Court's earlier decision in *State v. McClanahan*, 212 Kan. 208, Syl. ¶ 3, 510 P.2d 153 (1973), which held that "it is the proper function and duty of a jury to accept the rules of law given to it in the instructions by the court, apply those rules of law in determining what facts are proven and render a verdict based thereon." And directing the jury to follow the law also is consistent with the jury's oath to reach a verdict founded upon the evidence presented and the law as instructed, see K.S.A.2014 Supp. 60–247(d), and the legislature's directive that, when trial is by jury, questions of law shall be decided by the court and issues of fact shall be determined by the jury, K.S.A. 22–3403(3).

For the reasons stated above, we find the jury's inherent power to nullify existed regardless of the instructions at issue here; accordingly, we conclude the district court did not err by instructing the jury to follow the law in reaching its verdict.

Affirmed.

All Citations

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See Kan. Sup. Ct. Rules, Rule 7.04.
Court of Appeals of Kansas.

STATE of Kansas, Appellee,

v.

Shawn ULMER, Appellant.

No. 114,315

Opinion filed December 23, 2016

Review Denied September 28, 2017

Appeal from Wyandotte District Court; MICHAEL A. RUSSELL, Judge.

Attorneys and Law Firms

Caroline M. Zuschek, of Kansas Appellate Defender Office, for appellant.

Johnathan Grube, assistant district attorney, Jerome A. Gorman, district attorney, and Derek Schmidt, attorney general, for appellee.

Before Malone, C.J., Green and Leben, JJ.

MEMORANDUM OPINION

Leben, J.:

***1** Shawn Ulmer fixed cars as a hobby. He made a deal with an acquaintance to put an engine in her car, but he couldn't get the car to run. He thought he'd done what he had agreed to do by just putting the engine in; the acquaintance thought he also was supposed to get the car to actually work. Tensions flared, particularly between Ulmer and the boyfriend of the car's owner.

Those tensions boiled over when the boyfriend came to Ulmer's house. Ulmer admitted to hitting the man with a ratchet and to throwing a tire iron through the windshield of the man's car. Ulmer claimed that he had hit the man with the ratchet both in self-defense and in defense of his dwelling, but the district court refused to give the jury the option of acquitting Ulmer based on those defenses. The jury convicted Ulmer of aggravated battery (here, knowingly causing great bodily harm or disfigurement to another person) and criminal damage to property.

Ulmer has appealed, mainly arguing that the district court should have given the jury instructions about self-defense and defense of a dwelling. But neither defense applied on the facts presented here:

- Ulmer's self-defense claim fails because he was, at best, a mutual combatant, having been the first to make physical contact as he tried to lead the other man out of the house. Self-defense is usually not applicable in cases of mutual combat. See *State v. Caton*, No. 110,411, 2014 WL 6777415, at *2 (Kan. App. 2014) (unpublished opinion) (citing cases).

- Ulmer's defense-of-a-dwelling claim fails because the victim entered Ulmer's home lawfully, having been let in by Ulmer's roommate, and hadn't attacked either the dwelling or its occupants. The statute on defense of a dwelling, K.S.A. 2015 Supp. 21–5223, allows the use of force only when necessary "to prevent or terminate such other's unlawful entry into or attack upon such person's dwelling." Neither situation was present when Ulmer struck the victim.

In addition, Ulmer raises two other claims regarding how the trial transpired, but in each case, if an error occurred, it didn't affect the trial's outcome. Once one determines that Ulmer wasn't entitled to claim self-defense or defense of a dwelling, the evidence against him is overwhelming—he admits hitting the other man in the head with a ratchet. And the jury quite reasonably found that this caused great bodily harm—the victim received both staples and stitches to close his head wound, lost two teeth, and suffered other cuts and bruising to his face, hands, and arms. We therefore affirm the district court's judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Ulmer and Leann Moore agreed that she would sell him her Ford Probe for $400 if he put a motor in her Jeep. When recounting their deal later, the two disagreed about the precise terms of the agreement. Moore said she believed that Ulmer would get the Probe only if the Jeep worked after he installed the motor. Ulmer said that he had expressed concerns about the quality of the motor that Leann's boyfriend, Keith

Brentlinger, had picked out and had warned Moore that the Jeep might not work even after installing it. According to Ulmer, once he finished installing the motor and paid the money, the Probe belonged to him, regardless of whether the Jeep ran.

***2** Somewhere between a few days and a week before November 2, 2014, Moore went to Ulmer's house to discuss the status of the repairs on the Jeep and to get the rest of the $400 that Ulmer owed her because he had already taken possession of the Probe. Moore testified that during this interaction, Ulmer had begun "getting loud" and had made her "feel uncomfortable." Moore said that during the exchange, her phone had accidentally dialed Brentlinger, allowing Brentlinger to hear the conversation. Brentlinger then drove over to Ulmer's house because he was upset by how Ulmer was talking to Moore.

Ulmer testified that he had told Moore that the engine was installed but was making a clanking sound, leading him to think there was something wrong with the engine. He also testified that Brentlinger had been highly critical of his work and had told Moore not to give him the title to the Probe. As tensions flared, Moore claimed that Ulmer "got up in [Brentlinger's] face, and [Brentlinger] just stood there." Ulmer testified that Brentlinger had said, "Do you want some of me? I'll show you where the rubber meets the road." Brentlinger said he didn't recall saying that but acknowledged that he did use that expression periodically.

Moore testified that Ulmer had said to her that he didn't like the way Brentlinger had spoken to him and that if Brentlinger ever spoke to him like that again, he would hit Brentlinger "upside the back of his head." Moore replied that Ulmer couldn't win in a fight with Brentlinger, even on his best day. After the disagreement, Ulmer told them to get the Jeep off the property. He claimed that he also told them to leave and not come back. Brentlinger testified that Ulmer hadn't told him not to come back. The next day, Moore and her boss towed the Jeep to her work. Later, Moore returned to retrieve the Probe, although Ulmer had paid the entire $400.

On November 2, 2014, Brentlinger and Moore's boss began working on the Jeep and, as they both later testified, found a paint scraper in the oil pan. Later that night, Brentlinger decided to go to Ulmer's house, which Ulmer shared with the owner, Everett Lumley, to return the scraper. Both Moore and her boss told Brentlinger not to go over that night to return the scraper because it wasn't "wise." When Brentlinger arrived, Lumley answered, Brentlinger asked to speak with Ulmer, and Lumley invited Brentlinger inside. After that point, the parties' stories diverge.

We will start with Brentlinger's version of the events. According to Brentlinger, Ulmer immediately became defensive and told him that there was no way he'd found the paint scraper in the oil pan. Ulmer then said that they should settle things and walked outside. When Ulmer returned, he said, "You can have the free tire iron that's in your windshield." Brentlinger testified that he hadn't responded to Ulmer's comment and had just kept talking with Lumley about the work on the Jeep. He claimed that while he had been talking with Lumley, Ulmer had come up behind him and hit him on the back of the head with a metal pipe, which he saw in his periphery just before it struck him. Ulmer then struck him again on the arm, and the two scuffled as Brentlinger tried to get the object away. Brentlinger said that Lumley eventually intervened to get the pipe away from both of them. Brentlinger denied ever striking or punching Ulmer. After the fight, Lumley got Brentlinger a towel to control the bleeding. Brentlinger then called the police and waited for them at the end of Lumley's driveway.

Ulmer testified to a different series of events. He said that he had been hanging out with Lumley and two acquaintances, Mark and Harold Wardlow, when Brentlinger arrived and Lumley answered the door. Ulmer claimed he had heard Brentlinger tell Lumley that the sound in the Jeep's motor had been caused by the paint scraper. Ulmer joined them in the kitchen and told Brentlinger that the sounds had come from a different part of the motor. Ulmer said he had then asked Brentlinger to leave and said that Brentlinger had only come over to make trouble. Ulmer testified that he had gone outside to get some fresh air and had started putting away some tools he had out. He then went back inside and again told Brentlinger to leave, but Brentlinger refused to do so. At that point, Ulmer admitted, he went outside and threw a tire iron at Brentlinger's windshield to get Brentlinger's attention and to make him leave. Ulmer testified that he had gone back into the kitchen, told Brentlinger he could have the free tire iron in his windshield, and asked Brentlinger to leave.

***3** When Brentlinger refused to move, Ulmer said that he had grabbed Brentlinger by the arm and started showing him to the door. Ulmer testified that he had had a ratchet in his hand that he hadn't put away. According to Ulmer, Brentlinger then grabbed him, ripping his shirt, and the two began fighting. Ulmer acknowledged that he had hit Brentlinger

over the head while holding the ratchet. He explained why the injury was to the back of Brentlinger's head by saying that Brentlinger's head had been bent forward when he struck him. The fight lasted less than a minute before Lumley was able to get the ratchet away from both of them. Ulmer claimed that he had had bruises in two places where Brentlinger had punched him.

Lumley testified that he hadn't been in the room when the confrontation began and said he hadn't seen Ulmer hit Brentlinger. He said that he had gone into the kitchen after hearing shuffling and had then seen Brentlinger all bloody. At the time of the incident, Lumley was recovering from open-heart surgery and had difficulty recalling at trial what had happened or what he had told police.

Mark Wardlow testified that he hadn't seen Ulmer hit Brentlinger on the back of head but said he had seen them fighting—pushing and shoving one another. He also testified that he had heard Ulmer say that Brentlinger had just come there to make trouble and had heard him repeatedly ask Brentlinger to leave. The police officer who responded to the scene testified that Brentlinger had told him that he and Ulmer had gotten into a physical confrontation in the kitchen.

Brentlinger received both staples and stitches in his head, lost two of his front teeth, and suffered other cuts and bruising to his face, hands, and arms. He also estimated that Ulmer had caused over $1,000 in damage to the windshield of the Jeep.

The State charged Ulmer with criminal damage to property and the most severe form of aggravated battery, knowingly causing great bodily harm or disfigurement to another person. See K.S.A. 2015 Supp. 21–5413(b) and (g)(2) (providing the various forms of aggravated battery); K.S.A. 2015 Supp. 21–5813(a)(1) and (c). After a 2–day trial, a jury convicted Ulmer of both charges.

The district court sentenced Ulmer to 162 months in prison for the aggravated-battery conviction and 6 months in jail for the criminal-damage-to-property conviction. The court ran the two sentences concurrently, or at the same time, so that the controlling overall sentence is 162 months.

Ulmer has appealed to our court. In the next section, we will review each of the arguments he has raised on appeal (though in a different order than presented in his appellate brief).

ANALYSIS

I. *The District Court Did Not Err by Failing to Instruct on Self–Defense.*

Ulmer contends that the district court should have instructed the jury that he had a right to defend himself and that it could acquit him based on this defense. The State argues that the district court properly refused to give the instruction because it wasn't warranted by the evidence.

The Kansas Supreme Court has broken down the process for considering challenges to jury instruction into four steps. First, we consider whether the question was preserved in the district court. Second, we look to see whether the instruction was legally appropriate. Third, we determine whether there was sufficient evidence, looking at the evidence in the light most favorable to the defendant, to give the instruction. Fourth, if we find an error, we must determine whether it was harmless. *State v. Salary*, 301 Kan. 586, Syl. ¶ 1, 343 P.3d 1165. A defendant is entitled to an instruction on his or her theory of defense if there is sufficient evidence for a rational factfinder to find for the defendant on that theory. *State v. McCullough*, 293 Kan. 970, 974, 270 P.3d 1142 (2012).

***4** We find that the issue was sufficiently raised before the district court. While our record doesn't contain all of the proposed instructions, the transcript of the jury-instruction conference shows that Ulmer had requested a self-defense instruction. His attorney said that he had "request[ed] the Court to consider self-defense," but the court had determined "based on [Ulmer's] testimony, that it was a mutual combat situation and that self-defense would not be instructed upon." The State responded at the conference on the merits of the issue, suggesting that the instruction not be given because Ulmer had initiated the physical confrontation.

Both parties agree that a self-defense instruction can be legally appropriate on an aggravated-battery charge. So the key question is whether, under the evidence presented to the jury, there was sufficient evidence to support giving that instruction.

We find that there was not. To analyze that question, though, we must first review the basic law regarding self-defense.

K.S.A. 2015 Supp. 21–5222(a) provides that a person is justified in using force against another "when and to the extent it appears to such person and such person reasonably believes

that such use of force is necessary to defend such person or a third person against such other's imminent use of unlawful force." A legally sufficient claim of self-defense requires satisfying both a subjective and objective test: The defendant must subjectively believe that the use of unlawful force is imminent and that using force in response is necessary, and an objective reasonable person would have come to the same conclusions. *State v. Andrew*, 301 Kan. 36, 45, 340 P.3d 476 (2014). Stated another way, to establish that using force was necessary, the defendant must show that he or she sincerely and honestly believed that using force was necessary to defend himself or herself and that a reasonable person in the defendant's circumstances would have believed the same. *Salary*, 301 Kan. at 593–94; *State v. Bellinger*, 47 Kan. App. 2d 776, Syl. ¶ 4, 278 P.3d 975 (2012); *State v. Smith*, No. 112,728, 2016 WL 3365747, at *4 (Kan. App. 2016) (unpublished opinion).

There's another rule that applies if the person seeking to claim self-defense was the person who started the physical confrontation. Under K.S.A. 2015 Supp. 21–5226(c), a person cannot be legally justified in using force when that person initially provokes the use of force by the other unless (1) the person reasonably believes that he or she is in imminent danger of death or great bodily harm and has exhausted reasonable means to escape such danger, or (2) in good faith, the person withdraws from the physical contact with the assailant and clearly indicates that he or she wants to withdraw and terminate the use of force.

The district court found that the evidence didn't support a self-defense instruction, concluding that "there was no imminent use of deadly force or great bodily harm by the victim" and "that this was a mutual fight."

We agree that the evidence didn't support the instruction. Even viewing the evidence in the light most favorable to Ulmer, Ulmer initially grabbed Brentlinger by the arm and started ushering him to the door. Ulmer was the first to create physical contact, thus provoking a physical confrontation; that makes K.S.A. 2015 Supp. 21–5226 applicable. Neither of the exceptions found in that statute—(1) reasonable belief that the person is in imminent danger of death or great bodily harm after having exhausted reasonable means to escape or (2) having withdrawn from physical contact and quit using force—apply here. Further, the district court concluded that the facts established that this incident was a "mutual fight," which is supported by Ulmer's version of events. Mutual combatants generally cannot claim self-defense. *Caton*, 2014 WL 6777415, at *2 (citing cases). The district court did not err in refusing to give a self-defense instruction.

II. *The District Court Did Not Err by Failing to Instruct on Defense of a Dwelling.*

***5** Ulmer also contends that the district court should have instructed the jury that he had a right to defend his dwelling and that it could acquit him based on that defense. The State again argues that the district court properly refused to give the instruction because it wasn't warranted by the evidence. The State also argues that the defendant didn't properly preserve this objection in the trial court, in which case we would reverse the district court only under the more stringent "clear error" test.

Our record isn't complete regarding the defendant's proposed jury instructions, which aren't in the record on appeal. It does appear, though, that the defense had requested a defense-of-a-dwelling instruction because the State, at the instruction conference, told the court that instructions on "self-defense *or defense of property* should not be given" because Ulmer had initiated the physical confrontation. (Emphasis added.) The district court then ruled on the issue, concluding that a defense-of-a-dwelling instruction was not appropriate because Brentlinger had entered the premises with the homeowner's permission, not unlawfully. Although the issue is perhaps debatable, we will presume for the purposes of our opinion that the defendant did properly preserve his objection to the court's failure to include a defense-of-a-dwelling instruction.

Both parties again agree that a defense-of-a-dwelling instruction can be legally appropriate on an aggravated-battery charge. So we again turn to the question of whether, under the evidence presented to the jury, there was sufficient evidence to support giving that instruction.

We again find that there was not, a conclusion that becomes clear only after we first review the law regarding defense of a dwelling.

Under Kansas law, a person may be legally justified in using force to defend his or her dwelling in some circumstances, and so, in some cases, defense of a dwelling can be a complete defense to battery charges:

> "A person is justified in the use of force against another when and to the extent that it appears to such person and such person reasonably believes that such use of force is

> necessary to prevent or terminate such other's unlawful entry into or attack upon such person's dwelling, place of work or occupied vehicle." K.S.A. 2015 Supp. 21–5223(a).

See also K.S.A. 2015 Supp. 21–5231(a) (providing that a person who was legally justified in using force cannot be charged or prosecuted). In this context, "use of force" means using words or actions that threaten to cause death or great bodily harm to a person, presenting or displaying the means of force, or using physical force that is not likely to cause death or great bodily harm. K.S.A. 2015 Supp. 21–5221(a)(1) and (2) (defining "use of force" and "use of deadly force").

To establish that the use of force was legally justified, the party claiming the defense must pass both a subjective and an objective test. So the defendant must show that he or she believed that the person upon whom force was used posed a threat to the defendant or the defendant's dwelling and that a reasonable person in the same circumstances would have believed that using force was necessary. See *McCracken v. Kohl*, 286 Kan. 1114, Syl. ¶ 3, 191 P.3d 313 (2008); *Bellinger*, 47 Kan. App. 2d 776, Syl. ¶ 4. (We should note that a defendant must meet an even higher standard to justify using deadly force. K.S.A. 2015 Supp. 21–5223[b]. For the purposes of this decision, where we must take the evidence in the light most favorable to Ulmer, we will assume that he used less than deadly force even though he hit Brentlinger in the head with a metal ratchet.)

***6** When we look at the requirements of K.S.A. 2015 Supp. 21–5223(a), it's apparent that its terms are not met here. Brentlinger didn't enter the premises unlawfully. Nor did he attack the premises or initiate physical contact with anyone before Ulmer grabbed Brentlinger.

Ulmer tries to get around this straightforward reading of the statute by arguing that he was entitled to a defense-of-a-dwelling instruction because a person is justified in using force to prevent someone from *unlawfully remaining* in his or her dwelling. In essence, Ulmer contends that even if Brentlinger had lawfully entered the house with Lumley's permission, Ulmer was justified in using force after he told Brentlinger to leave and Brentlinger refused to do so.

Ulmer's position is contrary to the plain wording of the statute. In support of his argument, he quotes from *State v. Cole*, No. 90,047, 2003 WL 22990196, at *2 (Kan. App. 2003) (unpublished opinion) (citing PIK Crim. 3d 54.18): "A person is justified in the use of force to the extent it appears to the person, and the person reasonably believes, that such conduct is necessary to prevent another from unlawfully entering into or remaining in that person's dwelling."

Of course, an unpublished opinion from our court does not change the meaning of K.S.A. 2015 Supp. 21–5223(a); we cannot insert words into it that are not readily found there. But the actual facts and holding of *Cole* do not support Ulmer's argument anyway.

In *Cole*, the defendant had pushed a police officer who was attempting to serve a valid arrest warrant on the owner of the residence and was charged with battery against a police officer. The defendant requested a defense-of-property instruction, but the district court denied his request in part because the officer's entry was lawful. In affirming the district court's conclusion, a panel of this court noted that K.S.A. 21–3212, the previous version of the defense-of-a-dwelling statute, "expressly applies only to an 'unlawful entry,' " and the officers had lawfully entered the residence. 2003 WL 22990196, at *2. The panel also affirmed the district court's refusal to give the instruction because Cole's own testimony proved he was not " 'defending his dwelling' " at the time he pushed the officer. 2003 WL 22990196, at *2. So the actual ruling in *Cole* is not in any way contrary to the plain meaning of the statute.

More recently, in *State v. Williams*, No. 107,366, 2014 WL 274455 (Kan. App. 2014) (unpublished opinion), our court addressed a similar issue to the one now before us. In *Williams*, the defendant claimed that he was entitled to a defense-of-a-dwelling instruction after his attempts to remove his stepson from his house resulted in a fight that ended with the stepson's death. The defendant argued that the district court erred in concluding that defense of a dwelling was not applicable because the stepson had lawfully entered the house.

Our court affirmed the district court's decision to deny the request for the instruction. First, we held that there was insufficient evidence—even when viewed in the light most favorable to the defendant—from which a rational factfinder could have concluded that the stepson's entry into the house was unlawful, noting in particular that the stepson kept clothes at the house, had never been banned from the house or told by the defendant that he was not welcome, and had been invited inside by a temporary resident of the house on the night he died. 2014 WL 274455, at *8. Second, we rejected Williams' argument that even if his stepson had lawfully entered, the lawful entry was converted into an unlawful entry when

Williams told his stepson to leave and his stepson refused and threatened him. 2014 WL 274455, at *8. Our court focused on the plain language of the defense-of-a-dwelling statute, which applies only "to efforts of a defendant to prevent or terminate an *unlawful entry* into or attack upon a dwelling." 2014 WL 274455, at *8. We concluded that "[b]y [the statute's] very terms, then, a defendant may not assert justification under the Kansas defense of a dwelling statute where the victim enters upon the premises lawfully but subsequently engaged in unlawful conduct for which the occupant of the dwelling seeks to expel the victim." 2014 WL 274455, at *8.

***7** Ulmer's argument that he was entitled to a defense-of-a-dwelling instruction because Brentlinger was "unlawfully remaining" within his dwelling is not supported by the law. To the extent that this issue requires this court to interpret the defense-of-a-dwelling statute, we review the issue independently, with no required deference to the district court's conclusion. *State v. McCormick*, 305 Kan. 43, 378 P.3d 543, 547 (2016). The defense-of-a-dwelling statute expressly provides that a person is only justified in using force "to prevent or terminate such other's *unlawful entry* into or attack upon such person's dwelling." (Emphasis added.) K.S.A. 2015 Supp. 21–5223(a). Under the statute, Ulmer cannot successfully argue that Brentlinger's refusal to leave after having lawfully entered the house justified using force to remove him. See *Williams*, 2014 WL 274455, at *8. Because a defense-of-a-dwelling instruction did not apply to the facts of this case, the district court did not err in failing to give that instruction to the jury.

III. *If the District Court Erred by Not Acting to Prevent Prosecutorial Error, the Error Was Harmless.*

Ulmer argues that the prosecutor made statements going beyond the evidence in closing argument. Specifically, when discussing the photos of the victim's injuries that had been admitted, the prosecutor argued that the angle of the wounds was more consistent with Brentlinger's testimony (that he was struck from behind while standing) than Ulmer's (that he struck Brentlinger after Brentlinger lowered his head during their struggle):

> "I'd also like to talk to you about the consistency of testimony with the actual physical evidence that we saw. The defendant says that it wasn't until they were already fighting, engaged in a fight, that he had a right overhand. Right? That's what he said. If he had a right overhand, wouldn't you expect there to be a different angle on that cut? Go back and look at all those photos. The cut is more consistent with the way [Brentlinger] explained this happening. He's got his back to him. The defendant comes up with a pipe and whacks him over the back of the head, and there is a line right there on the top. The defendant's testimony is not consistent with the physical evidence."

Ulmer argues that such a conclusion could only be made by an expert witness and that the State didn't present an expert on this point. The State contends that the remark was a proper comment on the evidence and that, even if it was improper, any error was harmless.

The parties argue their claims under the framework of *State v. Tosh*, 278 Kan. 83, 91 P.3d 1204 (2004), but the Kansas Supreme Court recently adopted a new approach for considering prosecutorial error in *State v. Kleypas*, 305 Kan. 224, 382 P.3d 373, 435–36 (2016). In both frameworks, the court first looks to see whether the prosecutor went beyond allowable limits and, if so, then considers whether that error prejudiced the defendant.

We have some difficulty in this case at the first step of the analysis because the photos that the prosecutor was discussing have not been included in the appellate record. Without them, it's hard to tell whether the prosecutor went beyond what a layperson might be able to conclude from looking at them. We will assume, however, that the prosecutor went too far in his argument because it is clear to us that any error did not prejudice the defendant in this case.

Two key facts in this case are absolutely undisputed, even by Ulmer: Ulmer hit Brentlinger on the head with a metal ratchet, and doing so caused serious injury to Brentlinger. Once the defenses Ulmer claimed (self-defense and defense of a dwelling) are ruled out, the evidence against Ulmer is simply overwhelming. The charge was aggravated battery —knowingly causing great bodily harm to Brentlinger. He admittedly struck Brentlinger on the head with a metal ratchet, causing injuries sufficient to constitute great bodily harm. If

the prosecutor's argument was error, there is no reasonable possibility that the error contributed to the verdict in light of the entire record. See *State v. Ward*, 292 Kan. 541, Syl. ¶ 6, 256 P.3d 801 (2011).

IV. *If the District Court Erred in Admitting Evidence of a Prior Crime, the Error Was Harmless.*

***8** Ulmer also claims that the district court should not have allowed the jury to hear evidence that he had told Moore that he would hit Brentlinger "upside the head" if Brentlinger talked to him in a disrespectful manner again. Ulmer argues that this constituted a criminal threat under K.S.A. 2015 Supp. 21–5415(a)(1). He then points to K.S.A. 2015 Supp. 60–455, which provides that evidence of past crimes is generally inadmissible, though it can be used to prove motive, intent, plan, or absence of mistake if the State notifies the defendant before trial and the court gives the jury an instruction that the evidence may only be considered for that limited purpose.

At trial, the district court agreed that the statement "could constitute an act of criminal threat" but ultimately concluded it was relevant to Ulmer's intent in striking Brentlinger and so should be allowed as evidence. The court gave the jury a limiting instruction that it could only be considered with regard to Ulmer's intent.

Ulmer complains about this issue on appeal in part because the State didn't notify him 10 days before trial that it would use the evidence, as required by K.S.A. 2015 Supp. 60–455(e). The State argues on appeal that K.S.A. 2015 Supp. 60–455 doesn't apply at all because the statement didn't rise to the level of a criminal threat. Even if it did, the State contends that any error was harmless.

As with the claim of prosecutorial error, even if we assume that it was error to admit this evidence, the error was harmless. Ulmer admitted to hitting Brentlinger on the back of the head with a metal ratchet. Ulmer argues that the alleged threat "showed an intent otherwise missing from the State's case," but the jury heard extensive evidence of the tension between Ulmer and Brentlinger before the November 2 incident. And Ulmer testified that he had said Brentlinger was only there to make trouble on the night of the fight. A reasonable jury could infer Ulmer's intent from that evidence. See *State v. Kettler*, 299 Kan. 448, Syl. ¶ 4, 325 P.3d 1075 (2014) (holding that intent may be inferred from the circumstances of the case, providing the inferences are reasonable). All the jury had to find was that Ulmer acted "knowingly," K.S.A. 2015 Supp. 21–5413(b)(1)(A), meaning that Ulmer acted with an awareness that his conduct (hitting Brentlinger with a metal ratchet) was reasonably certain to bring about the result (great bodily injury). See K.S.A. 2015 Supp. 21–5202(i). Again, Ulmer admitted striking Brentlinger in the head with the ratchet, and Ulmer has not challenged on appeal the jury's finding that Brentlinger sustained great bodily injury. Based on our review of the entire record, there is no reasonable probability that the admission of Ulmer's alleged threat, even if in error, affected the trial's outcome.

V. *The District Court Did Not Err by Instructing the Jury That Its Verdict Must Be Based upon the Evidence Admitted and the Legal Instructions Provided by the Court.*

Ulmer also objects to one other jury instruction—a standard instruction to the jury that its "verdict must be founded entirely upon the evidence admitted and the law as given in these instructions." See PIK Crim. 4th 68.010. Ulmer complains that this instruction precludes the possibility of jury nullification—the power of the jury "to disregard the rules of law and evidence in order to acquit the defendant based on the jurors' sympathies, notions of right and wrong, or a desire to send a message on some social issue." *State v. Allen*, 52 Kan. App. 2d 729, Syl. ¶ 4, 372 P.3d 432 (2016), *petition for rev. filed* June 6, 2016.

***9** Although a jury in a criminal case *may* disregard the rules of law and the evidence to acquit a defendant, the proper duty of a jury is to accept the rules of law given to it as instructions, apply those rules to determine what facts are proven, and render a verdict based on those considerations. *State v. McClanahan*, 212 Kan. 208, 217, 510 P.2d 153 (1973). For those reasons, criminal defendants are not entitled to have the jury explicitly instructed on its inherent power of nullification. *State v. Naputi*, 293 Kan. 55, 66, 260 P.3d 86 (2011). But jury instructions *cannot forbid* a jury from exercising its inherent power of nullification. See *State v. Smith–Parker*, 301 Kan. 132, 163–64, 340 P.3d 485 (2014) (concluding that instructing the jury that it must or will enter a verdict of guilty if it has no reasonable doubt that the State has proven the charges was error).

Accordingly, several panels of this court have rejected identical arguments that the instruction at issue precludes the possibility of jury nullification. See, *e.g.*, *State v. Moss*, No. 113,034, 2016 WL 3856824, at *16–17 (Kan. App. 2016) (unpublished opinion), *petition for rev. filed* August 12, 2016; *State v. Price*, No. 112,405, 2015 WL 5311353, at *1–2 (Kan. App. 2015) (unpublished opinion), *rev. denied* 304 Kan. 1021 (2016); *State v. Cash*, No. 111,876, 2015 WL

5009649, at *3–4 (Kan. App. 2015) (unpublished opinion), *rev. denied* 303 Kan. 1079 (2016); *State v. Boone*, No. 110,836, 2015 WL 3632046, at *3–5 (Kan. App. 2015) (unpublished opinion), *rev. denied* 303 Kan. 1079 (2016); *State v. Amack*, No. 111,136, 2015 WL 2342371, at *4–5 (Kan. App.) (unpublished opinion), *rev. denied* 302 Kan. 1012 (2015). We agree and find no error in the district court's use of this pattern jury instruction.

VI. *Cumulative Error Does Not Require Reversal Here.*

Ulmer's final argument is that even if no individual error mandates reversal, we still should reverse his convictions based on the cumulative effect of all errors made. He's right that cumulative error may require reversal even when no error alone would. To be such a case, we must find that the cumulative effect of all the errors substantially prejudiced the defendant and denied him or her a fair trial. *State v. Fisher*, 304 Kan. 242, 263, 373 P.3d 781 (2016).

Here, there are at most two errors: (1) the district court admitting evidence that Ulmer allegedly threatened Brentlinger without following the procedural requirements of K.S.A. 2015 Supp. 60–455 and (2) the prosecutor's remarks in closing argument about the angle of the cuts on Brentlinger's head. The errors are not directly related, and the evidence against Ulmer was simply overwhelming, as we have previously discussed. The cumulative-error rule does not require reversal here.

We affirm the district court's judgment.

All Citations

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364 P.3d 1221 (Table)
Unpublished Disposition
This decision without published opinion
is referenced in the Pacific Reporter.
See Kan. Sup. Ct. Rules, Rule 7.04.
Court of Appeals of Kansas.

STATE of Kansas, Appellee,
v.
William B. SINGLETON, Appellant.

No. 112,997.
|
Jan. 29, 2016.
|
Review Denied Dec. 21, 2016.

Appeal from Sedgwick District Court; David L. Dahl, Judge.

Attorneys and Law Firms

Heather Cessna, of Kansas Appellate Defender Office, for appellant.

Julie A. Koon, assistant district attorney, Marc Bennett, district attorney, and Derek Schmidt, attorney general, for appellee.

Before BRUNS, P.J., MCANANY, J., and JOHNSON, S.J.

MEMORANDUM OPINION

PER CURIAM.

***1** William B. Singleton was charged in the alternative with fleeing or attempting to elude a police officer (1) by fleeing from an officer attempting to make a traffic stop in violation of K.S.A.2014 Supp. 8–1568(b)(1)(C) (count 1) and (2) by driving around tire deflating "stop sticks" during the officer's ensuing pursuit in violation of K.S.A.2014 Supp. 8–1568(b)(1)(B) (count 2). He was convicted on both counts. At his sentencing, the court recognized that the charges were in the alternative and sentenced Singleton on count 1 to a sentence of 16 months in prison, followed by a 12–month period of postrelease supervision. He appeals this conviction and sentence, claiming the district court erred (1) in instructing the jury on the charge of fleeing or attempting to elude a police officer, (2) in instructing the jury on the burden of proof without preserving the right to jury nullification, and (3) in misclassifying a prior crime as a person felony when computing his criminal history score.

Facts

The events leading to his appeal began when Wichita Police Officer Richard Bachman attempted to stop a Buick automobile driven by Singleton. Singleton's car briefly slowed but then sped off. Officer Bachman followed in pursuit as Singleton raced down Hillside, a street with a speed limit of about 40 miles per hour. Other streets involved in the chase had lower speed limits. At times, Singleton's car reached a speed of 75 miles per hour. Singleton ignored numerous stop signs and stop lights along the way and swerved to avoid "stop sticks" placed by the police at several intersections. Singleton led the police through various neighborhoods of the city. Eventually the stop sticks punctured Singleton's right front tire, but Singleton continued on in his efforts to evade the police even after his tire was shredded and he was driving on the tire rim. As he drove on, his tire rim cut grooves into the roadway. Officer Bachman testified, "He was actually losing control of his vehicle." Singleton eventually brought the car to a stop, and he was arrested. Officer Bachman estimated that the chase covered a distance of more than 7 miles.

The presentence investigation (PSI) report prepared after Singleton's convictions showed a number of prior convictions, including a conviction in Missouri in 1992 for attempted rape. This Missouri conviction was before Kansas adopted its sentencing guidelines. The district court classified Singleton's rape conviction as a person felony and determined his criminal history score was A.

On appeal, Singleton first claims trial errors relating to the court's jury instructions. His first claim relates to the court's instruction on the elements of fleeing or attempting to elude a police officer.

Reckless Driving

Singleton contends the district court committed reversible error by not instructing the jury on the elements of reckless driving when defining the elements of the charge in count 1.

***2** Singleton did not object to the court's instruction, so we apply the clearly erroneous standard. See K.S.A.2014 Supp. 22–3414(3); *State v. Williams*, 295 Kan. 506, 515, 286 P.3d 195 (2012). Under this standard, if we determine the instruction was given in error, we will reverse only if we are

firmly convinced that the jury would have reached a different verdict without the error. *State v. Cameron*, 300 Kan. 384, 389, 329 P.3d 1158, *cert. denied* 135 S.Ct. 728 (2014).

The challenged jury instruction states:

> "In count one, the defendant is charged with the crime of fleeing or attempting to elude a police officer. The defendant pleads not guilty.
>
> "To establish this charge, each of the following claims must be proved:
>
> "1. The defendant was driving a motor vehicle.
>
> "2. The defendant was given a visual or audible signal by a police officer to bring the motor vehicle to a stop.
>
> "3. The defendant willfully failed or refused to bring the motor vehicle to a stop, or otherwise fled or attempted to elude a pursuing police vehicle.
>
> "4. The police officer giving such a signal was in uniform, prominently displaying such officer's badge of office.
>
> "5. The police officer's vehicle was appropriately marked showing it to be an official police vehicle.
>
> "6. *The defendant engaged in reckless driving.*
>
> "7. This act occurred on or about the 11th day of November, 2013, in Sedgwick County, Kansas.
>
> " 'Reckless' means driving under circumstances that show a realization of the imminence of danger to another person or the property of another where there is a conscious and unjustifiable disregard of that danger." (Emphasis added.)

Fleeing or attempting to elude a police officer can be a class B nonperson misdemeanor. K.S.A.2014 Supp. 8–1568(c)(1)(A). But when the offense involves driving around tire deflation devices or reckless driving, as charged here, the offense becomes a severity level 9 person felony. K.S.A.2014 Supp. 8–1568(b) and (c)(2).

Though Singleton was convicted of both driving around a tire deflation device and driving recklessly, these charges were in the alternative. At sentencing Singleton was sentenced based upon the reckless driving alternative, and it is his conviction under this alternative that he is appealing.

The district court has the duty to define the offense charged in the jury instructions, either in the language of the statute or in appropriate and accurate language of the court. Furthermore, the district court has the duty to inform the jury of every essential element of the crime that is charged. *State v. Richardson*, 290 Kan. 176, 181, 224 P.3d 553 (2010).

"When a statute makes the commission of a crime or the intent to commit a crime an element of another crime, the jury instructions must set out the statutory elements of the underlying offense." 290 Kan. at 182; see *e.g.*, *State v. Rush*, 255 Kan. 672, 679, 877 P.2d 386 (1994); *State v. Linn*, 251 Kan. 797, 801–02, 840 P.2d 1133 (1992), *superseded by statute on other grounds by State v. Hedges*, 269 Kan. 895, 8 P.3d 1259 (2000); *State v. Walker*, 21 Kan.App.2d 950, 954, 910 P.2d 868 (1996).

***3** Here, the district court was required to instruct the jury on the statutory elements of reckless driving. Felony fleeing or attempting to elude a police officer under K.S.A.2014 Supp. 8–1568(b)(1)(C) requires a specific showing of "reckless driving as defined by K.S.A. 8–1566."

Reckless driving involves either willful conduct or wanton conduct. K.S.A. 8–1566(a) provides: "Any person who drives any vehicle in *willful or wanton* disregard for the safety of persons or property is guilty of reckless driving." (Emphasis added.) Here, the court's instruction used the words to define the wanton conduct aspect of reckless driving: "[D]riving under circumstances that show a realization of the imminence of danger to another person or the property of another where there is a conscious and unjustifiable disregard of that danger."

K.S.A.2014 Supp. 21–5202(j) defines reckless conduct as: "A person acts recklessly or is reckless, when such person consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation." Wanton conduct was included in the term "recklessness" under the prior version of the statute. See K.S.A. 21–3201(c).

Wanton conduct in the context of operating an automobile is reckless driving. In the court's jury instruction, it gave the jury the definition of wanton conduct in this context. Thus, in its jury instruction the district court included all the elements necessary for the jury to find that Singleton

engaged in reckless driving by his wanton conduct while attempting to flee or elude the police. The jurors were not left to speculate what the court meant when it told them that they must find that Singleton engaged in reckless driving as he attempted to elude Officer Bachman. The instruction made clear that upon a showing by the State that Singleton drove the Buick "under circumstances that show a realization of the imminence of danger to another person or the property of another where there is a conscious and unjustifiable disregard of that danger," the jury could conclude that Singleton drove recklessly, thus satisfying the requirements for a conviction.

The district court did not err in giving this instruction. But even if it had, there was overwhelming and uncontested evidence to support Singleton's conviction and to render any potential error harmless. See *Richardson*, 290 Kan. at 182. If there was something erroneously omitted from the court's instruction, the evidence could not have " 'rationally lead to a contrary finding with respect to the omitted element.' " 290 Kan. at 183 (quoting *Neder v. United States*, 527 U.S. 1, 19, 119 S.Ct. 1827, 144 L.Ed.2d 35 [1999]).

Here, the only evidence at trial came from Officer Bachman. It was uncontested that Singleton fled from Officer Bachman and attempted to elude him by driving at a high speed through urban and residential areas. Singleton's vehicle reached as high as 75 miles per hour during the pursuit, well in excess of the posted speed limits. Moreover, he ignored numerous stop lights and stop signs along the way.

***4** In closing argument, Singleton's counsel essentially conceded the accuracy of the officer's testimony regarding the movements of the car he was pursuing, as described in the fact section of this opinion. She argued that "[no one] was jeopardized by this pursuit ." But the focus of her argument was what happened after the final stop. She argued: "[Officer Bachman] was very clear and very concise about those details [of the chase]. He testified that when the vehicle finally came to a stop that he identified Mr. Singleton. He did not identify Mr. Singleton as the driver of the vehicle." This argument was in spite of Officer Bachman's trial testimony:

> "Q. And did you have contact with the driver of this vehicle?
>
> "A. I did.
>
> "Q. And did you identify him.
>
> "A. I did.
>
> "Q. Who did you identify him as?
>
> "A. William Singleton."

Defense counsel continued with her closing argument: "There was testimony that was replete about how this Buick traveled that night, where it went, where it stopped and when it slowed down. But when it came to the final resting place of that vehicle, you have very little evidence as to what actually happened."

Defense counsel's argument was that there were others in the Buick and it was not established that Singleton, rather than one of the other occupants, was the driver. Obviously, the jury rejected this argument, and the sufficiency of the evidence supporting that finding is not challenged in this appeal. Nor does Singleton challenge the sufficiency of the evidence establishing that his driving constituted an "imminence of danger to another person or the property of another." Given the uncontested testimony on what the driver of the Buick did that night, we cannot say that we are firmly convinced that the jury would have reached a different verdict had there been some error in the court's jury instruction. Thus, Singleton has failed to demonstrate that he was prejudiced by the giving of this instruction.

Jury Nullification

Singleton contends the jury instruction on the burden of proof was clearly erroneous because it failed to preserve the jury's right to nullification. Jury Instruction No. 5 instructed the jury, without objection, as follows:

> "The State has the burden to prove the defendant is guilty. The defendant is not required to prove he is not guilty. You must presume that he is not guilty unless you are convinced from the evidence that he is guilty.
>
> "The test you must use in determining whether the defendant is guilty or not guilty is this: If you have a reasonable doubt as to the truth of any of the claims required to be proved by the State, you must find the defendant not guilty. If you have no reasonable doubt as to the truth of each of the claims required to be prove by the State, you *should* find the defendant guilty." (Emphasis added.)

Singleton seizes on the phrase "you should find the defendant guilty" and argues that the use of the word "should" improperly compelled the jury to find him guilty rather

than giving the jury the option of not finding him guilty notwithstanding the law and the evidence.

***5** Because there was no objection to this instruction, we examine it using the clearly erroneous standard discussed above.

Jury nullification is

> " '[a] jury's knowing and deliberate rejection of the evidence or refusal to apply the law either because the jury wants to send a message about some social issue that is larger than the case itself or because the result dictated by law is contrary to the jury's sense of justice, morality, or fairness.' Black's Law Dictionary 875 (8th ed.2004)." *Silvers v. State*, 38 Kan.App.2d 886, 888, 173 P.3d 1167, *rev. denied* 286 Kan. 1180 (2008).

Before a trial begins, all jurors swear on their oaths to try the case conscientiously and to return a verdict according to the law and the evidence. K.S.A.2014 Supp. 60247(d). Violation of that oath is to be neither commended nor encouraged. While jurors in a criminal case have it within their power to acquit a defendant by disregarding the law and evidence, the Kansas Supreme Court has consistently held that jury instructions informing juries of the power of nullification are not appropriate. See *State v. Smith–Parker,* 301 Kan. 132, 164, 340 P.3d 485 (2014); *State v. Naputi,* 293 Kan. 55, Syl. ¶ 4, 109 P.3d 1199 (2005); *State v. McClanahan,* 212 Kan. 208, 210–17, 510 P.2d 153 (1973).

Singleton attempts to distinguish not informing a jury of its right to nullify from misinforming the jury that it has no such right. He relies on *Smith–Parker,* which overruled *State v. Lovelace,* 227 Kan. 348, 607 P.2d 49 (1980).

In *Lovelace,* the defendant challenged an instruction that stated: " 'If you have no reasonable doubt as to the truth of any of the claims made by the State, you *must* find the defendant guilty as charged.' " (Emphasis added.) 227 Kan. at 354. At that time, PIK Crim. 52.02 used "should" rather than "must." The Kansas Supreme Court held the instruction was not given in error. The court found "no substantial difference [between should and must] and what differences there may be could very well be in [the defendant's] favor." 227 Kan. at 354.

In 2014, the Kansas Supreme Court overruled *Lovelace* in *Smith–Parker,* wherein the district court instructed the jury: " 'If you do not have a reasonable doubt from all the evidence that the State has proven murder in the first degree on either or both theories, then you *will* enter a verdict of guilty.' (Emphasis added.)" 301 Kan. at 163. The court in *Smith–Parker* found "the wording of the instruction at issue in *Lovelace*—'must'—and the wording at issue here—'will'—fly too close to the sun of directing a verdict for the State. A judge cannot compel a jury to convict, even if it finds all elements proved beyond a reasonable doubt." *Smith–Parker,* 301 Kan. at 164.

Singleton argues that in the challenged instruction in this case "should" is the equivalent of "will," just as the court found in *Smith–Parker* that "must" is the equivalent of "will." Therefore, Singleton concludes that the use of "should" in this instruction violates the rule in *Smith–Parker* by compelling the jury to convict.

***6** But as every teacher instructing a class knows, and as every parent admonishing a child knows, should is less of an imperative than must or will. See *State v. Pennington,* 254 Kan. 757, 764, 869 P.2d 624 (1994). Nutritionists urge that we all should eat our vegetables. But that does not constitute a directive to have recalcitrant diners force-fed their vegetables if they do not comply. A parent admonishing a child that he should eat his lima beans is clearly less of an imperative than the phrase every child has heard at one time or another, "You *will* eat your lima beans!" Should as used in this instruction is not the equivalent of "must" or "will" used in the instructions discussed in *Lovelace* and *Smith–Parker. Should* is advisory. It is not an imperative. The district court did not err in giving this instruction.

Criminal History

Singleton claims his sentence is illegal because the district court misclassified his 1992 Missouri conviction for attempted rape as a person felony. He relies on *State v. Murdock,* 299 Kan. 312, 323 P.3d 846 (2014), *modified by Supreme Court order* September 19, 2014, *overruled by State v. Keel,* 302 Kan. 560, 357 P.3d 251 (2015). Further, he asserts that the retroactive application of House Bill 2053 violates the Ex Post Facto Clause of the United States Constitution.

Although Singleton did not file a motion to correct an illegal sentence, K.S.A. 223504(1) authorizes us to correct an illegal sentence at any time.

> "An illegal sentence is: (1) a sentence imposed by a court without jurisdiction; (2) a sentence that does not conform to the applicable statutory provision, either in character or term of authorized punishment; or (3) a sentence that is

> ambiguous with respect to the time and manner in which it is to be served." *State v. Lewis,* 299 Kan. 828, 858, 326 P.3d 387 (2014) (citing *State v. Taylor,* 299 Kan. 5, 8, 319 P.3d 1256 [2014]).

Singleton's claim falls squarely under the second category because he claims his sentence does not conform to our statutory sentencing guidelines.

Whether a prior conviction is properly classified as a person or nonperson crime is a question of law over which we have unlimited review. *Keel,* 302 Kan. 560, Syl. ¶ 4. Here, Singleton's prior Missouri attempted rape conviction was not determinative of his criminal history score. Singleton had ample postsentencing guidelines convictions to qualify him for a criminal history score of A without regard to his prior Missouri attempted rape conviction. Besides, *Murdock,* on which he relies, has been overturned by *Keel,* 302 Kan. 560, Syl. ¶ 9. *Keel* controls and we are duty bound to follow it. See *State v. Ottinger,* 46 Kan.App.2d 647, 655, 264 P.3d 1027 (2011), *rev. denied* 294 Kan. 946 (2012). Singleton's remaining argument is moot.

Affirmed.

All Citations

364 P.3d 1221 (Table), 2016 WL 368083

441 P.3d 1087 (Table)
Unpublished Disposition
This decision without published opinion
is referenced in the Pacific Reporter.
See Kan. Sup. Ct. Rules, Rule 7.04.
NOT DESIGNATED FOR PUBLICATION
Court of Appeals of Kansas.

STATE of Kansas, Appellee,

v.

Kim P. VALENTINE, Appellant.

No. 119,164
|
Opinion filed May 31, 2019.

Appeal from Sedgwick District Court; FAITH A.J. MAUGHAN, judge.

Attorneys and Law Firms

Sam Schirer, of Kansas Appellate Defender Office, for appellant.

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

Before Arnold-Burger, C.J., Hill, J., and Stutzman, S.J.

MEMORANDUM OPINION

Per Curiam:

***1** The State brought Kim P. Valentine before a jury in the Sedgwick County District Court on charges of rape, aggravated criminal sodomy, aggravated battery, and domestic battery, in each instance allegedly committed against V.M.D. The jury found Valentine guilty of aggravated criminal sodomy and domestic battery, acquitted him on the aggravated battery charge, and failed to reach a unanimous verdict on the rape charge. This is Valentine's direct appeal of his aggravated criminal sodomy conviction.

FACTS AND PROCEDURAL BACKGROUND

V.M.D. testified that, at the time of the events that led to the charges, she had known Valentine for about two years and was involved in a romantic relationship with him. They lived together in a Wichita motel. By V.M.D.'s account of the events of April 25, 2017, she and Valentine were arguing in his car when he hit her in the face with a closed fist and she immediately felt her jaw break. She jumped out of the car with her seizure alert dog, but without her shoes, and tried to get away. As she tried to flee, Valentine got out, called her dog to him and picked it up, then caught up with her. V.M.D. swung her backpack at Valentine to get away from him. Valentine continued to hold V.M.D.'s dog in his arms and waved down a passing car. V.M.D. went across the street and asked someone to call 911.

Valentine presented testimony from witnesses who said Valentine stopped them as they were driving by on April 25 and asked them to call 911. They saw Valentine in an altercation with a woman and, before police arrived, they saw her repeatedly hitting herself in the face with a closed fist and scratching her arms. V.M.D. testified she was rubbing her face because it hurt, but she denied hitting herself in the mouth, cheeks, or jaw.

The police arrived and spoke with Valentine, then told V.M.D. that Valentine had promised to let her leave if she would go home and take her medication. After V.M.D. made her report to the police she went back to Valentine. She said although Valentine told the police he would let her leave, he then told her "[she] wasn't going anywhere," but she stayed to get her dog back. V.M.D. said Valentine would not let her leave, and she stayed with him at the motel until May 2.

Officer Kyle Mellard from the Wichita Police Department testified he responded to the 911 call on April 25. Mellard said that he and other officers concluded that V.M.D.'s facial injuries from that night were self-inflicted and her claim that Valentine had broken her jaw was false.

V.M.D. told the jury that on May 1, she and Valentine had argued during the day after the "guys next door" asked her for a cigarette and Valentine accused her of sleeping with them. She said Valentine was drinking and continued to talk about his accusations the whole night. V.M.D. said she realized Valentine was drunk and she knew she might get hurt, as he got demanding and angrier and poured a bottle of whiskey over her head. At one point, Valentine told her to leave, but when V.M.D. got up to leave, he told her to lay back down or he was going to "knock the crap out of [her]." V.M.D. said she laid back down because she did not want to get hit.

***2** When V.M.D. laid back down, Valentine demanded that she give him oral sex. He said he would give her to the count of five to do what he said, or else he was going to "kick [her] butt." V.M.D. testified she was afraid Valentine would hit her as he had before, so she complied with his demand. Nevertheless, Valentine was dissatisfied with what V.M.D. was doing; V.M.D. was crying and told him her mouth was hurting from the April 25 injury, but Valentine told her if she tried again to stop "he was going to knock the crap out of [her]." Eventually, V.M.D. told Valentine she had to stop because she couldn't breathe. Valentine then started hitting her in the face, head, chest, and body, turned her over, and forcefully penetrated her to have vaginal sex without her consent. V.M.D. said Valentine told her to call herself names like "whore."

Valentine eventually stopped because he was mad that V.M.D. wasn't "into it." He told her to start oral sex again, telling her again that "if [she] didn't do it he was going to knock the crap out of [her]." V.M.D. testified Valentine grabbed her head and pushed it down on his penis until she gagged numerous times and had trouble breathing. Valentine became angry that he did not reach orgasm and began hitting V.M.D. again.

V.M.D. tried to leave, but Valentine told her if she did, he would hurt her. He told her "if [she] was a police-calling bitch that ... they would have to take [her] out in a body bag because [she] would be dead before they got there." V.M.D. stayed in the motel room until Valentine passed out. She then got dressed, washed the blood off her face, and left the motel room with only her dog and wallet. Once on the street, she waved down a police officer. She wanted to get to the hospital because her mouth hurt so much. She did not tell the first officer about the sexual assaults because she just wanted to get away.

Deputy Joseph Slaughter with the Sedgwick County Sheriff's Office testified that V.M.D. flagged him down around 1:30 a.m. on May 2, 2017. She told him her jaw hurt and she was worried that her boyfriend would find her. V.M.D. kept looking back to see if Valentine was walking down the street. She told Slaughter that her boyfriend had hit her several times, but she waited for him to pass out before sneaking out of their motel room. V.M.D. said "she didn't do what he wanted her to do." Slaughter called an ambulance, which took her to a hospital.

Dr. Daniel Gillespie, a radiologist who treated V.M.D. at the hospital, testified that when he examined CT images of V.M.D. on May 2, 2017, he saw two fairly new fractures of her jaw—one on each side. Dr. Gillespie said a patient with those fractures would typically have extreme pain. He had never heard of a person self-inflicting this type of injury and said that to be able to cause those fractures, someone would need "to be fairly strong, and very accurate." On cross-examination, Dr. Gillespie acknowledged he could not rule out the possibility of a self-inflicted fracturing of the jaw.

While at the hospital, V.M.D. recognized the police officer who showed up as the one she had seen in April. She felt he prejudged her, since he asked "if [she] had done this to [herself]." She did not tell him about the sexual assaults right away because she did not think he would listen. She told him she had been involved in a "bad sexual encounter." She then was taken to a different hospital where Amy Mitchell, a forensic nurse, performed a sexual assault examination. Mitchell said V.M.D.'s injuries were consistent with her account that the oral and vaginal sex was nonconsensual. V.M.D. also reported no consensual intercourse within the past three days and that Valentine was the only assailant.

V.M.D. testified that after the examination she told a detective what had happened but said she did not want to press charges "[b]ecause nobody listens to me, they listen to him." V.M.D. left the hospital and went to a shelter. While there, she obtained a protection from abuse order against Valentine, alleging only that he broke her jaw during the incident on April 25, 2017.

***3** On May 2, 2017, Officer Corey Masterson with the Wichita Police Department was dispatched at 3:41 a.m. to contact a suspect in a sexual assault at the Model Motel. The suspect was Valentine. During the initial contact, and before any officers suggested to Valentine that he was being investigated for a possible sexual assault, Valentine said, " 'Fuck all the rape charge and all this shit.' " After being read his rights, Valentine made another comment about, " 'I'm not arrested for some rape charge?' " Masterson then told Valentine about V.M.D.'s accusations, after which Valentine said they had sex on the previous day but had not had sex that day. Dana Loganbill, a forensic nurse, performed a sexual assault examination on Valentine on May 2.

Forensic scientist Sarah Geering examined the DNA swabs obtained during Valentine's and V.M.D.'s sexual assault examinations. She concluded that swabs from areas of Valentine's genitals indicated V.M.D. could not be excluded as contributing to the DNA profile she found.

After the State rested, Valentine moved for judgment of acquittal. The trial court denied the motion to acquit, finding that after viewing the evidence presented in the light most favorable to the State, there was sufficient evidence to support the charges.

At a jury instruction conference on the third day of trial, the district court reviewed the parties' proposed instructions. For the first element on the aggravated criminal sodomy instruction, the State asked the court to tell the jury that the State must prove Valentine "caused [V.M.D.] to engage in sodomy with *a person*." (Emphasis added.) In contrast, Valentine asked that the instruction use the phrase: "[*t*]*he defendant* engaged in sodomy with [V.M.D.]" (Emphasis added.) Without objection from Valentine, the district court elected to instruct the jury on the aggravated criminal sodomy charge using the form requested by the State, with the first element obligating the State to prove Valentine "caused [V.M.D.] to engage in sodomy with a person."

The jury found Valentine guilty of aggravated criminal sodomy and domestic battery from the May 2 incidents and not guilty of aggravated battery on April 25. The jury failed to reach a unanimous verdict on the rape charge. The State later moved to dismiss that rape charge without prejudice because V.M.D. did not want to go through another trial.

The district court sentenced Valentine to the presumptive prison term of 272 months for the aggravated criminal sodomy conviction, consecutive to a 12-month jail sentence for the domestic battery conviction. Valentine timely appeals.

ANALYSIS

Valentine sets before us two alleged errors: first, that there was insufficient evidence to support his conviction for aggravated criminal sodomy; and second, that the Kansas Sentencing Guidelines Act (KSGA) relies on judicial findings concerning prior convictions to establish the presumptive sentence for a crime, contravening § 5 of the Kansas Constitution Bill of Rights.

Valentine's aggravated criminal sodomy conviction

Valentine's claim of insufficient evidence for the aggravated criminal sodomy conviction is not the type of "insufficiency" argument typically presented. He does not assert that the evidence failed to show he intentionally engaged in sodomy with V.M.D. when she did not consent under circumstances when she was overcome by force or fear in Sedgwick County on May 2, 2017. Instead, he relies on the fact that the first element in the district court's instruction for that crime said the State had to prove he "caused [V.M.D.] to engage in sodomy with a person," which he contends could only mean some person *other* than him. Since the State only presented evidence showing that he forced V.M.D. to engage in sodomy *with him*, he reasons the evidence was insufficient to prove the first element in the court's instruction.

***4** In response, the State first points to the relevant language of that charge in the amended complaint, alleging that Valentine: "did then and there unlawfully engage in sodomy with [V.M.D.] or cause [V.M.D.] to engage in sodomy with any person or animal," contrary to K.S.A. 2016 Supp. 21-5504(b)(3)(A). The State contends the trial evidence showed Valentine twice forced V.M.D. to engage in sodomy with him.

Standard of review

As our Supreme Court recently observed:

> "Our standard of review for a sufficiency of the evidence claim is a familiar one, often repeated:
>
> " 'When sufficiency of the evidence is challenged in a criminal case, the standard of review is whether, after reviewing all the evidence in a light most favorable to the prosecution, the appellate court is convinced a rational factfinder could have found the defendant guilty beyond a reasonable doubt. Appellate courts do not reweigh evidence, resolve evidentiary conflicts, or make witness credibility determinations.' [Citation omitted.]" *State v. Nesbitt*, 308 Kan. 45, 51, 417 P.3d 1058 (2018).

To the extent we are required to engage in interpretation of statutes, our review is de novo. *State v. Alvarez*, 309 Kan. 203, 205, 432 P.3d 1015 (2019).

Discussion

In both his briefs and his argument, Valentine endeavors to limit the scope of analysis to the sufficiency of the evidence to support a finding that he caused V.M.D. to engage in sodomy with someone else. He claims both *State v. Dickson*, 275 Kan. 683, 69 P.3d 549 (2003), and *State v. Fitzgerald*, 308 Kan. 659, 423 P.3d 497 (2018), provide support for his

interpretation that "any person" in the sodomy statute means a person other than the defendant.

The State concedes there was no evidence showing the involvement of another person and focuses its initial argument on an analysis of *Dickson* and *Fitzgerald*. Alternatively, the State suggests that if there was error, it was error in the jury instruction and it did not rise to the level of clear error, which would be required because Valentine did not object to the district court giving that instruction. In reply to that argument, Valentine contends that instruction error is not an issue he raised or claimed as error, and the State invites error by this court when it asks us to consider that argument.

We do not decide issues that are not preserved and presented for our review. But Valentine attempts to move that boundary even further by restricting our analysis of the conviction he is challenging in his appeal and limiting us to an assessment of the sufficiency of the evidence for a crime that both parties agree did not happen. No one claims Valentine forced V.M.D. to engage in sodomy with some third person. And from the facts recited above, we find without any difficulty that the jury had amply sufficient evidence upon which to base a finding that Valentine forced V.M.D. to engage in sodomy with him. While the issues asserted by an appellant do set the scope of appellate review, they do not dictate the analysis of those issues. Despite Valentine's attempt to cast it in a different light, the problem Valentine raises must be examined for error in the instruction.

The foundation of Valentine's argument is that the language in the instruction controls. He looks to *State v. Robinson*, 27 Kan. App. 2d 724, 8 P.3d 51 (2000), to support his contention that the State must "prove the particular crime defined in a jury's elements instruction." *Robinson* involved an aggravated robbery conviction for stealing a car while pointing a sawed-off shotgun at the car's owner. The district court instructed the jury that they must find proof that Robinson took the car "from the person" of the owner. The charging document likewise alleged the car was taken from "the person" of the owner, omitting any reference to the language in the statute about a taking from "the presence" of the owner. 27 Kan. App. 2d at 725, 727. The critical distinction between *Robinson* and the present case is that the State's amended complaint against Valentine included the full statutory language, charging that he "did then and there unlawfully engage in sodomy with [V.M.D.] or cause [V.M.D.] to engage in sodomy with any person or animal."

***5** Neither do we find *Dickson* or *Fitzgerald* to be helpful or controlling here, because they present distinctly different scenarios from this case. In his appeal, Dickson conceded he engaged in sodomy with a child, but he asserted there had been no proof he caused a child to engage in sodomy with someone else or an animal. The two circumstances were the subject of separate subsections of the statute, at that time codified in K.S.A. 21-3505. Dickson had been charged under the subsection for causing a child to engage in sodomy with "any person or animal." *Dickson*, 275 Kan. at 686. The Supreme Court found "Dickson was charged with criminal sodomy under K.S.A. 21-3505(a)(3), whereas the evidence established a violation of K.S.A. 21-3505(a)(2)," and reversed that conviction. 275 Kan. at 695.

In *Fitzgerald*, the proof also departed from the charging document. The Supreme Court concisely summed up the issue:

> "The State charged Fitzgerald with aggravated criminal sodomy by 'feloniously [causing C.C.] (DOB: 02/21/2004), a child under 14 years of age, to engage in oral copulation with another person' in violation of K.S.A. 2017 Supp. 21-5504(b)(2) and (c)(3).
>
> "Although the State charged Fitzgerald with causing C.C. to engage in oral copulation 'with another person,' all parties thereafter proceeded with the case as though Fitzgerald had been charged with engaging in sodomy with C.C. himself." *Fitzgerald*, 308 Kan. at 660.

Without objection from either party, the first element of the district court's instruction said the State had to prove "[t]he defendant engaged in sodomy with [C.C.]." 308 Kan. at 662.

The Supreme Court discussed the discrepancy between what the State had charged and the evidence, instruction, and verdict, concluding that "we are compelled to reverse Fitzgerald's conviction as unsupported by sufficient evidence of the crime the State charged." 308 Kan. at 666. Contrary to the theory Valentine urges us to adopt, in *Fitzgerald* the State *did* prove the crime described in the instruction, but it was the charging document that controlled, not the instruction.

Both *Dickson* and *Fitzgerald* involved situations in which the defendant was charged with one means of committing the crime and all evidence pointed to another. Here, the State charged Valentine using the full statutory language, encompassing both a situation in which Valentine was the person engaging in nonconsensual sodomy and that in which

he caused V.M.D. to engage in the act with another. The problem in Valentine's case is not that the evidence failed to prove the crime charged, as in *Dickson* and *Fitzgerald*, but that the instruction chose the means from the complaint that did not match the evidence presented to the jury.

Our standard of review changes when presented with a question of error in a jury instruction:

> "When analyzing jury instruction issues, we follow a three-step process:
>
> " '(1) determining whether the appellate court can or should review the issue, *i.e.,* whether there is a lack of appellate jurisdiction or a failure to preserve the issue for appeal; (2) considering the merits of the claim to determine whether error occurred below; and (3) assessing whether the error requires reversal, *i.e.,* whether the error can be deemed harmless.' " [Citation omitted.] *State v. McLinn*, 307 Kan. 307, 317, 409 P.3d 1 (2018).

Since Valentine offered no objection to the district court's instruction on aggravated criminal sodomy, we find no error unless the instruction was clearly erroneous. See K.S.A. 2018 Supp. 22-3414(3). Next, "in determining whether an error actually occurred, we 'consider whether the subject instruction was legally and factually appropriate, employing an unlimited review of the entire record.' [Citation omitted.]" 307 Kan. at 318. If error is found, and we reach the third step of the analysis, reversal is only warranted if we cannot find the error was harmless. An error is not harmless if we are " 'firmly convinced that the jury would have reached a different verdict had the instruction error not occurred.' [Citation omitted.]" 307 Kan. at 318.

***6** The district court's instruction was legally appropriate for an instance of aggravated criminal sodomy when a defendant is charged with forcing a person, without consent, to engage in sodomy with someone other than the defendant. The instruction, however, was not factually appropriate, since all the evidence that the State presented addressed that part of the charge alleging Valentine forced V.M.D. to engage in sodomy *with him*. Thus, giving the instruction in the form used by the district court was error.

Finally, since there was error, we must decide whether it constituted clear error, requiring us to be "firmly convinced that the jury would have reached a different verdict had the instruction error not occurred." The State's evidence focused entirely on proving Valentine forced V.M.D. to engage in sodomy with him, without her consent. If the instruction error had not occurred, the district court would have written the first element to read: "The defendant engaged in sodomy with V.M.D." In view of the evidence, we are not persuaded the jury's verdict would have been any different if the correct instruction had been given. The error was harmless.

KSGA and § 5 of Kansas Constitution Bill of Rights

Valentine next argues the KSGA is "facially unconstitutional" because it provides for judicial determination of a defendant's criminal history, violating § 5 of the Kansas Constitution Bill of Rights. Valentine concedes that this argument has been rejected with respect to the United States Constitution. See *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."). Similarly, Valentine admits the Kansas Supreme Court has repeatedly rejected the argument that the KSGA violates the Sixth and Fourteenth Amendments to the United States Constitution. See *State v. Ivory*, 273 Kan. 44, 45-48, 41 P.3d 781 (2002). Valentine concedes he did not raise this issue before the district court. We may consider it nonetheless, as it implicates a claim to the fundamental right of trial by a jury. See *State v. Beaman*, 295 Kan. 853, 858, 286 P.3d 876 (2012).

The sum of Valentine's "argument" on this issue is his assertion that:

> "[P]rior to Kansas' statehood, American common law required any fact which increased the permissive penalty for a crime—*inclusive of an offender's prior criminal convictions*—to be proven to a jury beyond a reasonable doubt."

Valentine continues with a contingent conclusion:

> "If this assertion is correct, it necessarily follows that the sentencing scheme set out by the KSGA—in which *judicial* findings of criminal history elevate a defendant's presumptive prison sentence—is unconstitutional."

In view of the Kansas Supreme Court's consistent rejection of the Sixth Amendment-based version of Valentine's current argument, it is incumbent on Valentine to provide authority showing our Supreme Court interprets—or would interpret—§ 5 of the Kansas Constitution Bill of Rights to require jury findings that the Sixth Amendment does not. He fails to do so.

"This court is duty bound to follow Kansas Supreme Court precedent absent some indication that the court is departing from its previous position." *State v. Meyer*, 51 Kan. App. 2d 1066, 360 P.3d 467 (2015). Valentine's argument fails.

Affirmed.

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Certificate of Service

The undersigned hereby certifies that service of the above and foregoing brief was sent by e-mailing a copy to Riley County Attorney Office, bwilkerson@rileycountyks.gov and bdisney@rileycountyks.gov; and by e-mailing a copy to Derek Schmidt, Attorney General, at ksagappealsoffice@ag.ks.gov on the 31st day of July, 2019.

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