

No. 19-120767-A

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**IN THE  
COURT OF APPEALS OF THE  
STATE OF KANSAS**

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**STATE OF KANSAS**  
Plaintiff-Appellee

vs.

**ANITA ALBANO**  
Defendant-Appellant

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**APPELLANT'S REPLY TO BRIEF OF APPELLEE**

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Appeal from the District Court of Riley County, Kansas  
Honorable John F. Bosch, Judge  
District Court Case No. 17 CR 455

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## NATURE OF THE CASE

Ms. Albano replies to the arguments raised by the State in response to her original briefing to this Court.

## STATEMENT OF THE ISSUES

- Reply Issue I:** Ms. Albano did not invite the instructional errors she identified in Issue I of her original brief.
- Reply Issue II:** Ms. Albano has raised a broader instructional challenge in Issue II of her brief than that addressed in *State v. Boothby*.
- Reply Issue III:** *State v. Hilburn* reinforces Ms. Albano's assertion that Section 5 of the Kansas Constitution provides an inviolate jury trial right, stronger than the right protected by the United States Constitution.

## STATEMENT OF THE FACTS

The relevant facts have been sufficiently laid out in the parties' earlier filings.

## ARGUMENTS AND AUTHORITIES

- Reply Issue I:** Ms. Albano did not invite the instructional errors she identified in Issue I of her original brief.

The State argues that Ms. Albano invited the district court's failure to provide a limiting instruction, and therefore cannot raise the issue on appeal. Brief of Appellee at 18-19. But Ms. Albano did not ask the district court not to provide a limiting instruction – she simply did not request the instruction, and did not object to its omission. (R. XIV, 149-154). As Ms. Albano argued in her original briefing, this affects this Court's standard of review. It does not preclude review of the issue entirely. Brief of Appellant at 9; See *State v. Breeden*, 297 Kan. 567, 582-83, 304 P.3d 660 (2013).

Furthermore, although Ms. Albano did not address the application of the invited error doctrine with respect to this issue, she did address it in Issue II of her original briefing. Brief of Appellant at 19-20. Specifically, she cited to *State v. Fleming*, 308 Kan. 689-90, 423 P.3d 506 (2018) for the proposition that: “[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.” Brief of Appellant at 19.

**Reply Issue II: Ms. Albano has raised a broader instructional challenge in Issue II of her brief than that addressed in *State v. Boothby*.**

In responding to the jury nullification arguments raised in Issue II of Ms. Albano’s original briefing, the State relies heavily on *State v. Boothby*, \_\_\_ Kan. \_\_\_, 448 P.3d 416 (2019). *Boothby* was decided in September of 2019, after Ms. Albano filed her original brief with this Court. *Boothby* considered a challenge to a jury instruction stating that the “verdict must be founded entirely upon the evidence admitted and the law as given in these instructions.” 448 Kan. at 424. The Supreme Court held that this instruction does not prevent a jury from exercising the power of nullification. *Boothby*, 448 P.3d at Syl. ¶ 3.

But the scope of Ms. Albano’s challenge is broader than the challenge raised in *Boothby*. While Ms. Albano did challenge language identical to the language at issue in *Boothby*, she also challenged the court’s instruction informing jurors that 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.” Brief of Appellant at 21; (R. I, 125). Because the instructions in this case went farther than the *Boothby* instructions in restricting the jury’s power to nullify, *Boothby* does not control the outcome of this case.

The Supreme Court has held that certain instructions “fly too close to the sun of directing a verdict for the State.” *State v. Smith-Parker*, 301 Kan. 132, ¶ 6, 164, 340 P.3d 485 (2014) (telling a jury that it “must” or “will” enter a verdict is clear error); *Boothby*, 448 P.3d 424-25. Ms. Albano renews her argument the combined effect of the two challenged instructions in this case misstated the law relevant to jury nullification. Because the instructions were clearly erroneous, this Court must reverse.

**Reply Issue III:     *State v. Hilburn* reinforces Ms. Albano’s assertion that Section 5 of the Kansas Constitution provides an inviolate jury trial right, stronger than the right protected by the United States Constitution**

The State argues that Ms. Albano: “presents no authority indicating that Section 5 provides greater protection than the Sixth Amendment.” But the authority, as Ms. Albano argued in her original briefing, is the plain language of Section 5: “The right of trial by jury shall be inviolate.” Brief of Appellant at 27. In *Hilburn v. Enerpipe Ltd.*, 309 Kan. 1127, 1149-50, 442 P.3d 509 (2019), the Kansas Supreme Court held that inviolate means inviolate. Thus, *any* infringement on the common law jury trial right violates Section 5 of the Kansas Constitution Bill of Rights. See *Hilburn*, 309 Kan. at 1150 (Stegall J., concurring).

**CONCLUSION**

For all of these reasons, as well as those raised in her original briefing, Ms. Albano respectfully asks this court to reverse her convictions and sentence, and to remand to the district court for further proceedings.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that this reply brief was served on the Riley County Attorney, by notice of electronic filing pursuant to Kansas Supreme Court Rule 1.11(b), and by email at [bwilkerson@rileycountyks.gov](mailto:bwilkerson@rileycountyks.gov) and [bdisney@rileycountyks.gov](mailto:bdisney@rileycountyks.gov); and on Derek Schmidt, Attorney General, by email at [ksagappealsoffice@ag.ks.gov](mailto:ksagappealsoffice@ag.ks.gov) on the 5<sup>th</sup> day of December, 2019.

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