No. 19-120590-A

IN THE
COURT OF APPEALS OF THE
STATE OF KANSAS

STATE OF KANSAS
Plaintiff-Appellee

vs.

MAURICE BROWN
Defendant-Appellant

BRIEF OF APPELLANT

Appeal from the District Court of Sedgwick County, Kansas
Honorable John Kisner, Judge
District Court Case No. 17 CR 446

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

Table of Contents

Nature of the Case

A jury convicted Maurice Brown on two counts of aggravated robbery and eight counts of kidnapping. Subsequently, the district court imposed a 200 month prison sentence, and ordered Mr. Brown to pay $83,811 in criminal restitution. Mr. Brown now appeals his convictions and sentence.

Statement of the Issues

Issue I: **The State unconstitutionally utilized its preemptory juror strikes to ensure that no black or mixed race citizens contributed to the jury's verdict.**

Issue II: **The district court erred by classifying a Michigan armed robbery adjudication as a person felony.**

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

Issue IV: **The judicial fact-finding which informs a criminal restitution judgment violates a criminal defendant's constitutional right to a civil and/or criminal jury trial.**

Statement of Facts

On February 16, 2017, the State charged Maurice Brown with five counts of aggravated robbery and 14 counts of kidnapping. (R. I, 26-35). Following a preliminary hearing, Mr. Brown was bound over on two counts of aggravated robbery and eight counts of kidnapping. (R. V, 4-9). On October 22, 2018, Mr. Brown went to trial on those charges. (R. VIII, 1).

Trial Evidence

On January 30, 2015, two armed African American men robbed a Red Sky Wireless cell phone store in Wichita. (R. X, 27, 32-35, 79). To facilitate this robbery, the perpetrators bound the arms and legs of two store employees with zip ties and duct tape. (R. X 43-44, 82-83). The robbers escaped with cash and cell phones devices well before police arrived on the scene. (R. X, 41-42; XI, 6).

Three months later, on March 29, 2015, two armed African American men robbed another Red Sky Wireless cell phone store in Wichita. (R. XI, 154-58; XII, 4-7). To facilitate that robbery, the perpetrators bound the arms and legs of six individuals who happened to be in the store at the time of the robbery. (R. XI, 162). Again, the robbers escaped with cash and cell phones devices well before police arrived on the scene. (R. XI, 178-79).

At trial, the State presented evidence indicating that Maurice Brown matched a very general description of one of the Red Sky Wireless robbers – *i.e.*, he was a young, average height, average weight, African-American man with tattoos on one of his forearms. (R. X, 88; XI, 82, 174-76; XII, 15, 21). But none of this case's robbery/kidnapping victims could identify Mr. Brown as one of the Red Sky Wireless robbers. (R. X, 70-71, 88; XI, 188; XII, 32).

To prove that Mr. Brown was one of the two Red Sky Wireless robbers, the State relied almost exclusively upon DNA evidence. (R. XII, 87-89). During the first Red Sky robbery, a crime scene investigator discovered a torn portion of a latex glove on the duct tape used to bind one the kidnapping victims. (R. XI, 24-25). Subsequent forensic testing indicated that Mr. Brown's DNA was present on that glove fragment. (R. XII, 88).

There was no forensic evidence which tied Mr. Brown to the second Red Sky Wireless robbery. (R. XI, 146). But, during the course of that second robbery, robbers made statements which conveyed that they were the same people who had previously robbed a Red Sky Wireless store. (R. XI, 160-61, 165).

In defense to the State's charges, Mr. Brown presented evidence that he was living in the Detroit metro area at the time of the Wichita Red Sky Wireless robberies. (R. XII, 110-15, 134-138). He also presented pictorial evidence showing that he had long braids shortly after the Red Sky Wireless robberies occurred. (R. XII, 169, 71-73). This hairstyle conflicted with eyewitness recollections that the two Red Sky Wireless robbers had short haircuts. (R. XII, 29, 31-32).

Verdict and Sentencing

A jury convicted Mr. Brown on all of the charges which the State brought to trial. (R. XIII, 109-10). Subsequently, a presentence investigation report (PSI) concluded that Mr. Brown's criminal history score was D. (R. I, 162). That reported score was predicated upon classifying a prior Michigan armed robbery juvenile adjudication as a person felony. (R. I, 163). Prior to sentencing, Mr. Brown filed a motion which objected to this person felony classification. (R. I, 164).

At sentencing, the district court overruled Mr. Brown's criminal history objection, and found that his criminal history score was D. (R. XIV, 18, 27). With that score, the court imposed a presumptive 200 month prison sentence. (R. XIV, 67-68). The court also, without objection, ordered $83,811 in criminal restitution. (R. XIV, 68-69). Following sentencing, Mr. Brown filed a timely notice of appeal. (R. I, 183).

Arguments and Authorities

Issue I: The State unconstitutionally utilized its preemptory juror strikes to ensure that no black or mixed race citizens contributed to the jury's verdict.

The prosecution used 5 of its 8 non-alternate preemptory juror strikes to prevent any black or mixed race citizens from serving on Mr. Brown's jury. While the prosecution provided race-neutral reasons for striking some potential jurors, it also explicitly conceded a racial motivation for striking one particular mixed race juror. This concession, coupled with the gallingly discriminatory appearance of preventing 5 out of 5 potential black and mixed race jurors from deciding a black man's fate, should lead this Court to conclude that the district court erred by overruling an equal protection challenge to the prosecution's preemptory juror strikes.

Additional Facts

The district court allotted each party eight preemptory, non-alternate juror strikes to use on a pool of 28 non-alternate jurors. (R. I, 127-28). Each party was also allotted one juror strike to use on a predetermined pool of three alternate jurors. (R. I, 127). The prosecution used 5 of its 8 non-alternate juror strikes on black and mixed raced jurors. (R. I, 127-28). These minority strikes included:

- J.N. – A citizen who identified as mixed race. (R. I, 127; IX, 108). J.N.'s physical appearance and last name indicated that she had East Asian ancestry. (R. IX, 145-46). The other racial group with which J.N. identified is not apparent from the record.

- I.A. – A citizen who, based upon physical appearance and accent, appears to have emigrated from an African country. (R. I, 127; IX, 144-45).

- K.S. – An African American citizen. (R. I, 127; IX, 143).

- L.S. – An African American citizen. (R. I, 128; IX, 143).

- A.O. – An African American citizen. (R. I, 127; IX, 143).

The prosecution's minority juror strikes left zero non-alternate black or mixed race citizens to serve on the jury of an African American criminal defendant. (R. IX, 143; XIV, 61). This appearance of impropriety bothered the district court, and drew a *Batson* objection from defense counsel. (R. IX, 142-43, 158, XIV, 62).

In the first step of its *Batson* analysis, the district court concluded that the prosecution's high number of minority juror strikes established a prima facie a showing of racial discrimination. (R. IX, 145, 147, 150, 152, 157). With respect to the second step of *Batson* analysis, the prosecution offered the following race neutral reasons for striking every black and mixed race person from Mr. Brown's jury:

- J.N. – (1) A bias toward African Americans; (2) A "15-munute rant about locking up innocent people" during voir dire questioning; (3) The act of smiling when defense counsel was talking; (4) Noting that she was "self-employed" on a pre-voir dire questionnaire, rather than more fully noting that she was self-employed as a wedding coordinator and interpreter; (5) A professed enjoyment of watching Law and Order and CSI television programs. (R. IX, 146-47).

- I.A. – An inability to fully understand legal concepts, due to speaking English as a second language. (R. IX, 144).

- K.S. – (1) A brother who had been convicted on multiple robbery charges; (2) A decision to work over four night shift hours before the second day of jury selection, in violation of a court order not to do so; (3) A professed enjoyment of watching Law and Order-type television programs; (4) The fact that defense counsel directed questions to her about tattoos during voir dire. (R. IX, 148-49).

- L.S. – (1) Arrived late on the second day of jury selection; (2) Presented a hostile demeanor during jury selection; (3) Provided a non sequitur response to one question on a pre-voir dire questionnaire. (R. IX, 143).

- A.O. – (1) Professed excitement to serve on a jury because it would mean the she wouldn't need to deal with "annoying" customers at work; (2) Tended to "believe in remote possibility versus reasonable doubt"; (3) Her relative youth "and the lack of furthering any education." (R. IX, 154-56).

The district court accepted the State's race neutral reasons for striking jurors, and, thus, overruled Mr. Brown's *Batson* challenge. (R. IX, 157-58).

Following trial, defense counsel filed a motion for new trial which renewed Mr. Brown's *Batson* objection to the prosecution's discriminatory juror strikes. (R. I, 149). When responding to that objection, at sentencing, the prosecutor asserted that he was not "racist," and emphasized that he had refrained from striking several Hispanics jurors and one alternate African American juror. (R. XIV, 52).

The district court ultimately denied Mr. Brown's motion for new trial. In doing so, the court commented:

> [Y]ou know, the Batson challenges that were made certainly on its face I suspect the appellate court is going to look at that a little bit and say look at the number of African/American potential jurors we have had and look at how many we ended up with, which is pretty much none, other than our alternate. And yet that's not prima facie case was there [sic], it is just there were race neutral reasons that were supported by what I view, what I heard, what I think for the most part the record

> reflects that was said or done by the various individuals that were struck and challenged under Batson. […]
>
> And I don't think the situation [exists] where the Court can say, well, we've struck one so the standard is going to be a little higher for the next one or the next one or the next one because that in and of itself makes the system not race neutral. […]
>
> [T]he appellate courts will look at that and they can make their own independent determination, but I felt like under Batson that each of the challenges was appropriate. (R. XIV, 61-63).

Preservation

This *Batson* issue was thoroughly litigated, and ruled upon, during jury selection. (R. IX, 142-158). And, following the jury's verdict, this issue was re-litigated, and re-ruled upon, through a motion for new trial. (R. I, 149; XIV, 36-37, 49-52, 61-63). Thus, this issue is now preserved for appellate review.

Standard of Review

In the first step of *Batson* analysis, a district court decides whether a defendant has established a prima facie case of purposefully discriminatory juror strikes. An appellate court exercises unlimited review over this finding. *State v. Gonzalez-Sandoval*, 309 Kan. 113, 121 (2018).

If a district court concludes (as it did in this case) that a defendant has establish a prima facie showing of discrimination, it next considers whether the prosecution has provided race neutral, nondiscriminatory reasons for its use of preemptory strikes. *Gonzalez-Sandoval*, 309 Kan. at 122. At this point, district courts *should not* consider the plausibility of the prosecution's nondiscrimination claims. Thus, an appellate court also

appears to exercise unlimited review over a district court's findings in the second step of its *Batson* analysis. *Gonzalez-Sandoval*, 309 Kan. at 126.

In third step of *Batson* analysis, a district court assesses the plausibility of the prosecution's proffered reasons for striking jurors. According to the United States Supreme Court, an appellate court reviews this plausibility finding for "clear error." *Flowers v. Mississippi*, 139 S.Ct. 2228, 2244 (2019). Our Supreme Court has equated this constitutionally mandated "clear error" standard to an abuse of discretion review. *Gonzalez-Sandoval*, 309 Kan. at 126-27.

Analysis

The Fourteenth Amendment of the United States Constitution and Sections 1 and 2 of the Kansas Constitution Bill of Rights guarantee citizens equal protection under the law. Since the 1880s, constitutional equal protection principles have officially precluded state governments from discriminating on the basis of race during the selection of a criminal jury. *Strauder v. West Virginia*, 100 U.S. 303, 310 (1879). This prohibition protects not only the rights of an accused, but also the rights of jurors. *Flowers*, 139 S.Ct. at 2242. For the public's equally protected right to serve on a jury is among *the* defining characteristics of American democracy. *Flowers*, 139 S.Ct. at 2238.

The constitutional bar on discriminatory jury selection practices is oftentimes undermined by our country's embrace of "preemptory strike" jury selection procedure. This procedure permits opposing parties to strike a fixed number of potential jurors from a jury pool without reason or explanation. Through preemptory strikes, a prosecutor (or a defense attorney) could surreptitiously remove potential jurors from a jury on account of

their race or ethnicity. *Flowers*, 139 S.Ct. at 2238. Indeed, prior to the civil rights movement, attorneys routinely used preemptory juror strikes as a means of bringing Jim Crow into the courthouse. *Flowers*, 139 S.Ct. at 2239-40.

In *Batson v. Kentucky*, the United States Supreme Court set out the current procedure for policing the public's right to be free from discriminatory juror strikes. *Batson v. Kentucky*, 476 U.S. 79 (1986). Employing this procedure, if any – even just one – preemptory juror strike is found to have been substantially motivated by race, a court must take measures to remedy this equal protection violation. *Foster v. Chatman*, 136 S.Ct. 1737, 1747 (2016). At the post-conviction stage of a criminal proceeding, this remedy means a new trial, with a newly empaneled jury. *Batson*, 476 U.S. at 100.

Turning to the big picture, presented by this case, the prosecution used 5 of its 8 non-alternate juror strikes on black and mixed citizens. This resulted in no identified black or mixed race person contributing to a jury verdict. The volume of the prosecution's non-white juror strikes, coupled with its non-factual and explicitly racial explanation for striking one particular mixed race juror, should have precluded the district court from adversely ruling upon Mr. Brown's *Batson* challenge. To explain why, Mr. Brown now walks through the three steps of his meritorious *Batson* claim.

Batson Step One

In the first step of *Batson* analysis, a district court decides whether a defendant has established a prima facie showing of purposeful discrimination. *Gonzalez-Sandoval*, 309 Kan. at 121. This standard is typically met when a minority defendant shows that a prosecutor has struck several minority jurors from his or her jury. *State v. Pham*, 281 Kan. 1227, 1238 (2006).

In this case, the prosecution used 5 of its 8 non-alternate juror strikes to eliminate all potential non-alternate black or mixed race jurors from Mr. Brown's jury. Given that Mr. Brown is, himself, an African American man, the appearance of impropriety underlying the State's use of preemptory strikes was, and is, stunning. Sensing this impropriety, the district court correctly ruled that Mr. Brown had made a prima facie showing of discrimination. (R. IX, 145, 147, 150, 152, 157).

Batson Step Two

Reviewing the second step of a district court's *Batson* analysis is usually somewhat of a formality. To get past the second step of a *Batson* challenge, a prosecutor need only provide a specific, racially neutral reason for his or her use of preemptory strikes. *Gonzalez-Sandoval*, 309 Kan. at 126. Unless a prosecutor refuses to provide a specific reason for a juror strike, or accidentally confesses to having had discriminatory intent, a *Batson* claim will move on to a more meaningful third step of judicial scrutiny. *Purkett v. Elem*, 514 U.S. 765, 775 (1995) (Stevens J., dissenting).

This is the rare case in which a prosecutor accidentally confessed to having had discriminatory intent. *See e.g.*, *Kesser v. Cambra*, 465 F.3d 351, 357 (2006) (prosecutor stated that he struck a potential Native American juror, in part, because of stereotypical beliefs which he held about Native American culture). This occurred when the prosecutor commented:

> [T]here was a lot of reasons for [J.N.]. [J.N.] is of an Asian descent. She's clearly mixed, but Ms. Krier clearly pointed out **[J.N.] has biases toward African/Americans. She has preference towards African/Americans.** (R. IX, 145-46).

For her part, J.N. never, at any point during voir dire questioning, conveyed that she was biased toward African Americans. The prosecutor's emphasized statement appears to relate to a comment in which J.N. asserted that she, as a mixed race person, felt that it was important to "do everything by the book" to ensure that innocent persons are not incarcerated for crimes they did not commit. (R. IX, 108). Why is this significant? The prosecutor clearly assumed that J.N. was biased toward African Americans simply because she, herself, identified as mixed race.

The United States Supreme Court has unequivocally held that prosecutors may not strike a juror sharing the racial identity of a criminal defendant based upon the theory that jurors are prone to bias toward a member of their own racial group. This rationale for exclusion is inherently discriminatory. *Flowers*, 139 S.Ct. at 2241-42; *Batson*, 476 U.S. at 97-98. Thus, the prosecutor, in this case, proffered an explicitly discriminatory reason for striking J.N. from Mr. Brown's jury.

The prosecutor's ability to proffer some officially race neutral reasons for striking J.N. should not have induced the district court to go beyond the second step of *Batson* analysis. Equal protection principles preclude juror strikes which are motivated "in substantial part" by race. *Foster*, 136 S.Ct. at 1755. Taking the prosecutor at his word, his strike of J.N. was substantially racially motivated. Thus, this Court must conclude that the district court erred by allowing the prosecution to remove J.N. from Mr. Brown's jury.

Batson Step Three

In third step of *Batson* analysis, a district court assesses the plausibility of the prosecution's proffered reasons for striking jurors. *Gonzalez-Sandoval*, 309 Kan. at 126. In doing so, a court should consider, among other possible relevant factors:

- Statistical evidence about the prosecutor's use of peremptory strikes against non-white prospective jurors as compared to white prospective jurors;
- Side-by-side comparisons of non-white prospective jurors who were struck and white prospective jurors who were not struck; and
- A prosecutor's misrepresentations of the record when defending his or her strikes during a *Batson* hearing.

Flowers, 139 S.Ct. at 2243.

A careful consideration of these factors demonstrates that the district court clearly erred by concluding that Mr. Brown had not made a sufficient showing of purposeful racial discrimination.

A. Statistical Evidence

When evaluating the plausibility of a prosecutor's nondiscrimination claims, the raw number of strikes which he or she must defend may "speak loudly." *Flowers*, 139 S.Ct. at 2245. In this case, the prosecutor struck all five black and mixed raced non-alternate potential jurors from a pool of 28 individuals. By Mr. Brown's calculations, the odds of this prosecutorial discretion occurring, by chance, were approximately 1 in 1,750.[1] As the table below shows, in a pure chance scenario, one would expect the prosecution to have struck between zero and three black and/or mixed race jurors.[2]

Non-white Strikes	White Strikes	Chance
0	8	15.78%
1	7	39.44%
2	6	32.48%
3	5	10.83%
4	4	1.42%
5	3	0.06%
Total		100.01%

In *Flowers v. Mississippi*, the United States Supreme Court found it very suspicious when a prosecutor used seven preemptory strikes to prevent five out of six potential black jurors from serving on a particular jury. The unlikelihood of such racially disproportion strikes occurring by pure chance strongly contributed to an appellate conclusion that the prosecutor's strikes were substantially motivated by discriminatory intent. *Flowers*, 139 S.Ct. at 2246.

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[1] $\frac{\binom{5}{5}\binom{23}{3}}{\binom{28}{8}} = \frac{1}{1{,}755} = 0.057\%$

[2] Appellate counsel consulted with a PhD student in an Accounting program, who is also a Kansas licensed CPA, to analyze statistical evidence.

In this case, when considering the prosecution's repeated strikes of black and mixed race jurors, the district court commented:

> I don't think the situation [exists] where the Court can say, well, we've struck one so the standard is going to be a little higher for the next one or the next one or the next on because that in and of itself makes the system not race neutral. (R. XIV, 62).

This analysis is legally flawed – to the point of being an abuse of discretion – because the court did not appreciate that the sheer number of the prosecution's minority strikes, itself, served as evidence of its discriminatory intent. See *State v. Ward*, 292 Kan. 541, Syl. ¶ 3 (2011) (an appellant may demonstrate an abuse of discretion by showing that a judicial ruling was informed by an erroneous legal conclusion). Simply put, this case presents either: (1) discrimination; or (2) a statistical anomaly. The district court erred by concluding that fluke chance was a more likely explanation for a jury lacking any black or mixed race citizens than was discrimination.

B. Side-by-Side Comparison to Empaneled Jurors

A side-by-side comparison of the prosecution's reasons for striking J.N. and A.O., and the attributes of empaneled jurors, further supports a conclusion that the State acted with discriminatory intent.

1. J.N.

To justify its strike of J.N., the prosecution emphasized a response that she gave to a question, in which she expressed concern over wrongful convictions in our criminal justice system. (R. IX, 146). Mr. Brown can, admittedly, see why the prosecution would prefer jurors who are not bothered by the fact innocent people are, sometimes, convicted

of crimes. But it must be noted that the prosecution had no problem empaneling white jurors who expressed concerns over the possibility of wrongful convictions – particularly, H.W., and M.A. (R. I, 127-28; IX, 97, 99). This inconsistency supports a finding of pretext.

2. A.O.

To justify its strike of A.O., the prosecution cited her relative youth, "and the lack of furthering any education." (R. IX, 156). But, oddly, immediately before citing this rationale, the prosecutor noted that there were a lot of young people serving on Mr. Brown's jury. (R. IX, 154-55). In so noting, the prosecutor was positively emphasizing the age diversity of empaneled jurors. (R. IX, 154-55).

In fairness, the prosecution may have been trying to convey that it took issue with A.O.'s youth, coupled with her apparent lack of higher education. (R. IX, 156). But that still wouldn't explain why the State had no problem with M.M. – a young forklift driver with no apparent college education – serving on Mr. Brown's jury. (R. I, 128; IX, 155). The prosecutor's inability to convey, in real-time, whether youth and lack of higher education was a good or bad thing, suggests that his *Batson* rationale was pretextual.

C. Prosecutorial Misrepresentation of the Record

Also contributing to a finding discriminatory intent, the prosecutor badly represented the record to justify his strike of J.N. The non-factual portion of that rationale follows:

> Judge, there was a lot of reasons for [J.N.], candidly. [J.N.] is of an Asian descent. She's clearly mixed, but Ms. Krier clearly pointed out [J.N.] has biases towards African/Americans. She has preference towards African/Americans. Two, she went on basically a 15-minute rant about locking up innocent people and appears to be looking at a very microscopic view of the criminal justice system with regards to looking people up. (R. IX, 145-46).

J.N.'s alleged biased towards African Americans is, as has been noted, totally unsupported by the record. During voir dire, J.N. did comment:

> I am in fear of putting an innocent person away for – it is a great fear because especially now, no offense or whatever, but putting people of color especially right now. And my mom is – I am of mixed race and so that is import to me that we get everything right.
>
> Do it right because we want to follow the steps and do everything by the book as we should. (R. IX, 108).

In this comment, J.N. never says, or remotely implies, that she is biased towards African Americans. At best, the prosecutor was prejudicially inferring J.N.'s bias on the basis of her own racial identity – *i.e.*, assuming that a non-white person *must* be biased toward other non-white people.

The prosecutor also misrepresented the record when he claimed that J.N. "went on basically a 15-minute rant about locking up innocent people." The "rant," to which the prosecutor referred, is a one transcript page answer to a question which J.N. provided at the request of defense counsel. (R. IX, 107-08). This response clearly took nowhere near 15 minutes to articulate. And, by characterizing J.N.'s thoughtfully articulated opinion as a "rant," the prosecutor betrayed the racial animus which substantially motivated his decision to strike.

D. The prosecutor's restraint from striking Hispanic jurors, and one African American alternate juror, does not undermine Mr. Brown's showing of discrimination.

Before concluding this issue, Mr. Brown briefly addresses two *Batson* defenses which the prosecutor raised in district court. First, the prosecutor noted that he had permitted three Hispanic citizens to serve on Mr. Brown's jury. (R. IX, 154-55, 56; XIV, 49). Second, the prosecutor emphasized that he had allowed an African American citizen to serve as alternate juror. (R. IX, 156-57; XIV, 52).

In response to the prosecution's first argument, Mr. Brown simply notes that non-discrimination on the basis of ethnicity hardly forgives discrimination on the basis of race. The prosecution's contrary insinuation is absurd. See *Flowers*, 139 S.Ct. at 2248 ("the Constitution forbids striking even a single prospective juror for a discriminatory purpose").

In response to the prosecution's second argument, Mr. Brown makes another obvious point – alternative jurors usually don't contribute to a jury verdict. Thus, this Court should view the prosecution's decision to accept one *alternate* African American juror as an attempt to obscure its otherwise complete annihilation of a racially diverse jury. *Flowers*, 139 S.Ct. at 2248.

Conclusion

The prosecution utilized 5 of its 8 preemptory strikes in way which ensured that no black or mixed race person contributed to a jury verdict. Further, its official reason for striking one mixed raced juror was explicitly discriminatory. And, as if that weren't enough, some prosecutorial strike rationales were very suggestive of pretext. Taking all these considerations together, the district court erred by concluding that none of the

prosecution's juror strikes were substantially motivated by race. To remedy that error, this Court must remand this case for a new trial.

Issue II: The district court erred by classifying a Michigan armed robbery adjudication as a person felony.

A Michigan armed robbery offense is elementally broader than a Kansas robbery offense. Thus, the district court erred by classifying Mr. Brown's prior Michigan armed robbery juvenile adjudication as a person felony. Since that misclassification elevated Mr. Brown's criminal history score, this Court must remand this case for resentencing.

Preservation

Prior to sentencing, Mr. Brown filed a motion objecting to his PSI's person classification of a prior Michigan armed robbery juvenile adjudication. (R. I, 164). The State responded to this objection, contending that the PSI's classification was correct. (R. I, 171).

At sentencing, the parties vigorously argued their respective positions. (R. XIV, 3-17). Then the district court ruled that Mr. Brown's prior Michigan armed robbery adjudication was appropriately classified as person felony. (R. XIV, 18). Accordingly, the court sentenced Mr. Brown with a criminal history score of D. (R. XIV, 27). Since Mr. Brown's appellate criminal history challenge was thoroughly litigated in district court, it is now preserved for this Court's review.

Also, when a prior adjudication is misclassified in a way which affects a defendant's criminal history score, this results in an illegal sentence. And illegal sentences may be corrected for the first time on appeal. *State v. Dickey*, 301 Kan. 1018, Syl. ¶ 3 (2015). Thus, even if Mr. Brown's criminal history challenge were being raised for the first time on appeal, this Court would still be required to reach a decision on its merits.

Standard of Review

Appellate courts exercise unlimited review to resolve criminal history challenges. *State v. Wetrich*, 307 Kan. 552, 555 (2018).

Analysis

Mr. Brown was convicted of multiple nondrug felonies. The appropriate prison sentences for those convictions were dictated by the KSGA's nondrug sentencing grid. See K.S.A. 21-6804(a). Application of that grid required the district court to determine the severity level of Mr. Brown's convictions and Mr. Brown's criminal history score. *Wetrich*, 307 Kan. at 555. Doing this, the court imposed a base prison sentence prescribed by a 3-D nondrug grid block.

To impose a base sentence along the A axis of the nondrug sentencing grid, the district court needed to find that Mr. Brown had one person felony conviction/adjudication in his criminal history. K.S.A. 21-6809. In this appeal, Mr. Brown asserts that he has zero person felonies in his criminal history. Thus, he should have received a lesser base prison

sentence, dictated by a 3-G grid block.[3]

A. Why did the district court sentence Mr. Brown with a criminal history score of D?

A PSI reported that Mr. Brown had a single person felony in his criminal history – specifically a 2010 Michigan armed robbery juvenile adjudication. (R. I, 162-63). The district court relied upon that PSI classification to sentence Mr. Brown with a criminal history score of D. (R. XIV, 18, 27).

Mr. Brown asserts that his PSI misclassified his Michigan armed robbery adjudication as a person felony. Had that adjudication been scored as a nonperson felony, Mr. Brown's criminal history score would have been G rather than D. K.S.A. 21-6809.

B. The statutory procedure for classifying out-of-state adjudications.

When Mr. Brown allegedly committed his current crimes of conviction, a district court's authority to classify out-of-state adjudications as person offenses was controlled by K.S.A. 2014 Supp. 21-6811(e). *Wetrich*, 307 Kan. at 556-57. That statutory subsection provided:

> The state of Kansas shall classify the crime as person or nonperson. In designating a crime as person or nonperson comparable offenses shall be referred to. If the state of Kansas does not have a comparable offense, the out-of-state conviction shall be classified as a nonperson crime.

[3] Because courts impose nonbase prison sentences as if a defendant's criminal history score was I, this criminal history challenge does not directly implicate Mr. Brown's many nonbase sentences. K.S.A. 21-6819(b)(5). A reduction of Mr. Brown's base sentence would, however, implicate the KSGA's "double rule," and thus reduce the extent to which Mr. Brown's nonbase sentences contributed to his total prison sentence. See K.S.A. 21-6819(b)(4) (the total prison sentence imposed for a criminal case may not exceed twice the duration of a base sentence).

Our Supreme Court has long-recognized that K.S.A. 2014 Supp. 21-6811(e)'s language requires sentencing courts to compare the *statutory elements* of prior out-of-state adjudications with the *statutory elements* of in-state offenses to designate a prior adjudication as a person or nonperson felony. *State v. O'Connor*, 229 Kan. 819, 823-25 (2014). And, more recently, in *State v. Wetrich*, our Supreme Court held that a prior out-of-state adjudication must be scored as a nonperson felony, unless the prior adjudication statute has elements which are identical to, or narrower than, the elements of a Kansas person crime. *Wetrich*, 307 Kan. at 561-62.

C. *Wetrich's* interpretation of K.S.A. 2014 Supp. 21-6811(e) applies to Mr. Brown's case.

Recently, in *State v. Murdock II*, our Supreme Court held that the legality/illegality of a sentence is fixed at the time of a sentencing hearing. *State v. Murdock II*, 309 Kan. __, 439 P.3d 307, 312 (2019). And, even more recently, in *State v. Newton*, our Supreme Court applied the holding in *Murdock II* to conclude that misapplication of *Wetrich's* "identical or narrower" rule *will not* make a sentence illegal, unless sentencing occurred after *Wetrich's* publication date. *State v. Newton*, __ Kan. __, 442 P.3d 489, 492 (2019). But as a caveat to *Newton's* application of *Wetrich*, our Supreme Court also noted, in *Murdock II*, that defendants litigating a direct appeal should receive the benefit of any change in the law which occurs while a direct appeal is pending. *Murdock II*, 439 P.3d at 312.

Here, Mr. Brown was sentenced after *Wetrich's* March 9, 2018 publication date. (R. XIV, 1). And he is now litigating a direct appeal. Thus, according to *Murdock II*, this Court must apply *Wetrich's* "identical or narrower" rule, to determine whether the district court appropriately calculated Mr. Brown's criminal history score.

Mr. Brown also notes that the legislature has recently, and significantly, amended the KSGA rules for classifying prior out-of-state adjudications. See K.S.A. 2019 Supp. 21-6811(e)(3)(B). But this recent amendment is not purported to operate retroactively. And its application will, in many cases, affect the permissible legal duration of an offender's criminal sentence. Accordingly, it only applies to defendants who commit crimes on or after May 23, 2019 – the date which relevant statutory amendments went into effect. *State v. Bernhardt*, 304 Kan. 460, 479-80 (2016). Since Mr. Brown allegedly committed his crimes of conviction in 2015, the KSGA's new out-of-state adjudication classification rules do not apply to this case.

D. Michigan's 2010 armed robbery statutes criminalized a broader range of conduct than Kansas' robbery statutes.

In 2009, as today, Michigan set out the elements of an armed robbery offense through three statutes – M.C.L.A. 750.529, M.C.L.A. 750.530, and M.C.L.A. 750.357.[4] These statutes provide:

> A person who engages in conduct proscribed under section 530 and who in the course of engaging in that conduct, possesses a dangerous weapon or an article used or fashioned in a manner to lead any person present to reasonably believe the article is a dangerous weapon, or who represents orally or otherwise that he or she is in possession of a dangerous weapon, is guilty of a

[4] Mr. Brown's 2010 adjudication resulted from an event which was alleged to have occurred in 2009. (R. XIV, 22).

> felony punishable by imprisonment for life or for any term of years. If an aggravated assault or serious injury is inflicted by any person while violating this section, the person shall be sentenced to a minimum term of imprisonment of not less than 2 years.
>
> M.C.L.A. 750.529.
>
> (1) A person who in the courts of committing a larceny of any money or other property that may be the subject of larceny, uses force or violence against any person who is present, or who assaults or puts the person in fear, is guilty of a felony punishable by imprisonment for not more than 15 years.
>
> (2) As used in this section, "in the course of committing a larceny" includes acts that occur in an attempt to commit the larceny, or during commission of the larceny, or in flight or attempted flight after the commission of the larceny, or in an attempt to retain possession of the property.
>
> M.C.L.A. 750.530.
>
> Any person who shall commit the offense of larceny by stealing from the person of another shall be guilty of a felony, punishable by imprisonment in the state prison not more than 10 years.
>
> M.C.L.A. 750.357

Putting these three statutes together, Michigan has created the following pattern armed robbery jury instruction:

> (1) The defendant is charged with the crime of armed robbery. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:
>
> (2) First, the defendant [used force or violence against / assaulted / put in fear] [*state complainant's name*].

(3) Second, the defendant did so while [he / she] was in the course of committing a larceny. A "larceny" is the taking and movement of someone else's property or money with the intent to take it away from that person permanently.

"In the course of committing a larceny" includes acts that occur in an attempt to commit the larceny, or during the commission of the larceny, or in flight or attempted flight after the commission of the larceny, or in an attempt to retain possession of the property or money.

(4) Third, [*state complainant's name*] was present while defendant was in the course of committing the larceny.

(5) Fourth, that while in the course of committing the larceny, the defendant:

[*Choose one or more of the following as warranted by the charge and proofs:*]

(a) possessed a weapon designed to be dangerous and capable of causing death or serious injury; [or]

(b) possessed any other object capable of causing death or serious injury that the defendant used as a weapon; [or]

(c) possessed any [other] object used or fashioned in a manner to lead the person who was present to reasonably believe that it was a dangerous weapon; [or]

(d) represented orally or otherwise that [he / she] was in possession of a weapon.

M. Crim JI 18.1.
https://courts.michigan.gov/Courts/MichiganSupremeCourt/criminal-jury-instructions.

The district court appears to have concluded that a Michigan armed robbery offense was comparable to the Kansas person offense of aggravated robbery. (R. XIV, 17-26). But, in this appeal, Mr. Brown focuses his comparability analysis on the Kansas person offense of simple robbery. This is because simple robbery is a lesser included offense of aggravated robbery simply by virtue of having fewer statutory elements. Compare K.S.A. 21-5520(a) with K.S.A. 21-5520(b). If a Michigan armed robbery offense is not comparable to a Kansas simple robbery offense, it logically follows that it is also not comparable to Kansas' elementally narrower aggravated robbery offense.

Kansas currently defines robbery as:

> [K]knowingly taking property from the person or presence of another by force or by threat of bodily harm to any person.
>
> K.S.A. 21-5420(a).

When comparing the statutory elements of a Michigan armed robbery against the statutory elements of a Kansas robbery, a two major differences jump out.

First, in Michigan, one may commit an armed robbery by putting another person in fear. *People v. Hearn*, 159 Mich. App. 275, 281 (1987). By the plain language of Kansas' robbery statute, an offender's mere act of putting another in fear doesn't suffice to permit a robbery conviction. *But see*, *State v. Moore*, 269 Kan. 27, 33 (2000) (a threat giving rise to criminal liability may be implicit). Thus, a Michigan armed robbery is elementally broader than a Kansas robbery.

Second, in Michigan, one may commit a robbery by peacefully taking another's property, and then using force to retain the property and/or effectuate an escape. *People v. Letham*, 2007 WL 1687468 at *1 (Mich. Ct. App) (unpublished opinion). Not so in Kansas. Here, if offender peacefully takes property, and then uses force to effectuate an escape with that property, he or she is simply guilty of a nonperson theft offense. *State v. Plummer*, 295 Kan. 156, 165 (2012). The broader timing element of a Michigan armed robbery offense makes it non-comparable to a Kansas robbery. *State v. Heard*, 2018 WL 6580497 at *3 (Kan. App.) (unpublished opinion) (petition for review filed).

E. Modified categorical analysis had no role to play in the classification of a Michigan armed robbery offense.

In its ruling, the district court conveyed that it used modified categorical analysis when classifying Mr. Brown's Michigan armed robbery adjudication. (R. XIV, 17-18). It isn't clear how much, if at all, modified categorical analysis affected the court's ultimate ruling. Regardless though, it was legally inappropriate.

Sentencing courts may employ so-called "modified categorical" analysis, and review court documents from a convicting jurisdiction, *only* when an offender's prior adjudication flows from a statute which creates multiple elemental crimes. And the point of this analysis, when appropriate, *is not* to enable judicial fact-finding which extends beyond identifying the elements of a prior adjudication. This (usually unnecessary) review is intended for the sole purpose of identifying what elemental crime a defendant was actually adjudicated of violating. *Wetrich*, 307 Kan. at 563-64; *Mathis v. United States*, 136, S.Ct. 2243, 2253-55 (2016).

Here, the district court conveyed that modified categorical analysis was warranted, since Michigan statutes set out "alternatives means" by which an offender may commit armed robbery. (R. XIV, 17-18). This conclusion runs directly contrary to United States and Kansas Supreme Court precedent holding that an alternative means statute *does not* permit modified categorical analysis. *Wetrich*, 307 Kan. at 563-64; *Mathis*, 136, S.Ct. at 2253-55. Thus, the district court was wrong to think that modified categorical analysis had a role to play in the classification of Mr. Brown's prior armed robbery adjudication.

Conclusion

Mr. Brown's current 200 month prison sentence flows from the misclassification of a prior Michigan armed robbery adjudication. Thus, this Court must remand this case with instructions for the district court to resentence Mr. Brown with a reduced criminal history score of G.

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

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 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 upon the common law right to a jury trial on penalty-enhancing prior conviction findings, and is, thus, unconstitutional.

Preservation

At sentencing, Mr. Brown 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. And 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, Mr. Brown 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. This jury trial right is "a basic and fundamental feature of American jurisprudence," and should be "carefully guarded against infringements." *Hilburn v. Enerpipe LTD.*, __ Kan. __, 442 P.3d 509, 513 (2019). 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, Mr. Brown received a presumptive KSGA sentence. But, in this appeal, he 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

When resolving a Section 5 challenge to the constitutionality of a statute, appellate courts exercise unlimited review, without presuming the constitutionality of the challenged statute. *Hilburn*, 442 P.3d at 513.

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." Without caveat, this constitutional mandate preserves the right to a jury trial which existed at American common law when the Kansas Constitution came into existence – 1859. *Hilburn*, 442 P.3d at 514, 521. 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. Mr. Brown's Argument

Mr. Brown 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

Mr. Brown now distinguishes his 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 landmark 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 punishment, were understood to be elements of a criminal charge. *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 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. See *Hilburn*, 442 P.3d at 524 (Stegall, J., concurring) (any infringement upon the common law right to a jury trial equates to a Section 5 violation).

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 American common law. Thus, the KSGA sentencing scheme which dictated Mr. Brown'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 Mr. Brown 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.) (petition for review pending).

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.

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, this would have been within the panel's prerogative. But, in reaching such a conclusion, the panel would have needed explain why the now "inviolate" common law right to a criminal jury trial didn't extend to penalty-enhancing prior conviction findings. And, for reasons already noted, that is not easily done.

Remedy

Within this case, Mr. Brown was convicted of multiple KSGA crimes. But judicial prior conviction findings were only used to elevate the prison sentence for his base conviction. And, without unconstitutional judicial prior conviction findings, the KSGA still authorized the district court to impose a base prison sentence ranging from 55 to 61 months. See K.S.A. 21-6804(a). Thus, this Court should vacate Mr. Brown's current 100 month

base prison sentence, and remand this case with instructions for the district court to impose a base prison sentence ranging from 55 to 61 months.

Issue IV: The judicial fact-finding which informs a criminal restitution judgment violates a criminal defendant's constitutional right to a civil and/or criminal jury trial.

Logic dictates that criminal restitution orders are either: (1) a civil remedies; or (2) a criminal penalties. If restitution is a civil remedy, then a procedure in which it is imposed on the basis of judicial fact-finding violates the civil jury trial right guaranteed by Section 5 of the Kansas Constitution Bill of Rights. Alternatively, if restitution is a criminal punishment, then a procedure in which it is imposed on the basis of judicial fact-finding violates the criminal jury trial right guaranteed by Section 5 of the Kansas Constitution Bill of Rights and the Sixth Amendment of the United States Constitution. Thus, this Court should find that jury-less procedure for imposing criminal restitution orders mandated by K.S.A. 21-6604(b)(1) is unconstitutional.

Preservation

Mr. Brown did not raise this issue in district court. Typically, a defendant cannot raise an issue for the first time on appeal. But there are exceptions to this rule. And 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 the theory is necessary to serve the ends of justice or to prevent denial of fundamental rights. *State v. Jones*, 302 Kan. 111, 117 (2015).

In *State v. Jones* and *State v. Patterson* (unpublished opinions), panels of this Court held that this issue was not reviewable when raised for the first time on appeal. *State v. Jones*, 2016 WL 852865 at *9 (Kan. App.) (unpublished opinion) (petition for review granted); *State v. Patterson*, 2017 WL 3207149 at *8 (Kan. App.) (unpublished opinion) (petition for review granted). For two reasons, *Jones* and *Patterson* were wrongly decided.

First, Mr. Brown asserts that Kansas' criminal restitution statute is facially unconstitutional under Section 5 of the Kansas Constitution Bill of Rights and/or the Sixth Amendment of the United States Constitution. This issue is purely legal, and arises on indisputable facts. Thus, it may be reviewed without a trial objection. See *State v. Maas*, 275 Kan. 328, 331 (2003) (determining the constitutionality of a statute when the issue was raised for the first time on appeal).

The *Jones* and *Patterson* panels disagreed by making a conclusory statement that a constitutional challenge to Kansas' restitution statutes is not finally dispositive of a case. *Jones*, 2016 WL 852865 at *9; *Patterson*, 2017 WL 3207149 at *8. Mr. Brown respectfully disagrees with this view. Kansas' restitution scheme is either constitutional, or it is not. The particular facts of this case are irrelevant.

Second, review of this issue is necessary to prevent the denial of fundamental constitutional rights. Again, the *Jones* and *Patterson* panels disagreed. The *Jones* panel, in particular, argued:

> It cannot be argued that that consideration of the issue is necessary to serve the ends of justice or to prevent a denial of fundamental rights when [a defendant] did not even object to the imposition of or the amount of restitution at sentencing.
>
> *Jones*, 2016 WL 852865 at *9.

Jones' reasoning clashes with our Supreme Court's repeated observations that the constitutional right to a jury trial right is "a basic and fundamental feature of American jurisprudence," and should be "carefully guarded against infringements." *Hilburn v. Enerpipe LTD.*, __ Kan. __, 442 P.3d 509, 513 (2019). Thus, this Court must review this issue to guard against infringements to a fundamental right.

Standard of Review

When resolving a Section 5 challenge to the constitutionality of a statute, appellate courts exercise unlimited review, without presuming the constitutionality of the challenged statute. *Hilburn*, 442 P.3d at 513.

Analysis

The district court ordered Mr. Brown to pay $83,811 in criminal restitution. (R. XIV, 68-69). This judgment was authorized by subsection (b)(1) of K.S.A. 21-6604. That provision states:

> [T]he court shall order the defendant to pay restitution, which shall include, but not be limited to, damage or loss caused by the defendant's crime, unless the court finds compelling circumstances that would render a plan of restitution unworkable.

While Mr. Brown did have the right to request an evidentiary hearing on the appropriate amount of restitution ordered pursuant to K.S.A. 21-6604(b)(1), he had no right to a jury trial. By statute, only a judge could determine what damages were caused by Mr. Brown's alleged crimes. *State v. Hall*, 298 Kan. 978, 989-91 (2014); see also, K.S.A. 22-3424 (d)(1).

A. If restitution is a civil remedy, then K.S.A. 21-6604(b)(1) violates Section 5 of the Kansas Constitution Bill of Rights.

Section 5 of the Kansas Constitution Bill of Rights provides: "The right of trial by jury shall be inviolate." Without caveat, this constitutional mandate preserves the right to a jury trial which existed at American common law when the Kansas Constitution came into existence – 1859. *Hilburn*, 442 P.3d at 514. Since our Supreme Court has recently disavowed "quid pro quo" analysis which, in the past, served to forgive infringements upon the common law right to a jury trial, any established legislatively encroachment upon common law jury trial rights now equates to a Section 5 violation. *Hilburn*, 442 P.3d at 521.

Historically, common law tort actions were triable to a jury. This jury trial right extended to determinations of causation and damages for a tort claim. *Hilburn*, 442 P.3d at 514; *Gard v. Sherwood Construction Co.*, 194 Kan. 541, Syl. ¶ 2, 400 P.2d 995 (1965). Parties seeking damages and parties defending themselves against a claim had an equal right to a jury trial. See *Hasty v. Pierpont*, 146 Kan. 517, 72 P.2d 69, 72 (1937) (civil defendant constitutionally entitled to a jury trial).

Restitution orders are treated exactly like civil judgments. If a defendant does not voluntarily pay an order of restitution, state agents may collect restitution on behalf of the party allegedly harmed by the defendant's crime. K.S.A. 21-6604 (b)(1); K.S.A. 22-3424 (d); K.S.A. 60-4301.

The Seventh Circuit Court of Appeals has noted that "restitution for harm done is a classic civil remedy," and that criminal restitution statutes require "judges to include this remedy in a criminal judgment to avoid the need for the victims of crime to file separate civil suits-litigation." *United States v. Behrman*, 235 F.3d 1049, 1054 (7th Cir. 2000). In *United States v. Bach*, Judge Posner noted that criminal restitution orders permit aggrieved parties "to be compensated for definite losses just as if the persons were successful tort plaintiffs." *United States v. Bach*, 172 F.3d 520, 523 (7th Cir. 1999). Since judicial restitution orders are, effectively, civil orders for a defendant to pay damages for tortious conduct, they encroach upon a defendant's common law right to a jury's factual-findings.

The only way that the K.S.A. 21-6604(b)(1)'s jury-less restitution procedure could be squared with civil common law jury rights, is if judges were generally permitted to impose restitution judgments upon criminal conviction, prior to 1859. To a limited extent, common law did authorize criminal courts to impose restitution-like orders. But courts could only do this when a defendant had been convicted of a larceny-type offense. And those orders merely authorized the victim to retake his or her goods, or, in alternative, take "the value of them out of the offender's goods." Blackstone, Commentaries on the Laws of England, 362 (1769); see also, *Hester v. United States*, 139 S.Ct. 509, 511 (2019) (J., Gorsuch, dissenting from the denial of certiorari) (summarizing common law).

K.S.A. 21-6604(b)(1) permits aggrieved parties to obtain criminal restitution orders for all losses caused by a crime. This allows restitution orders far exceeding the value of converted property. *See e.g.*, *Hall*, 298 Kan. at 991 (district court properly awarded relocation expenses in a restitution order). The judicially-determined restitution currently authorized by K.S.A. 21-6604(b)(1) is not in-line with common law, but, rather, a relatively modern trend in criminal justice.

The idea of restitution orders that fully compensated persons allegedly harmed by crimes didn't take off until 1980s, when the United States Congress enacted the Victim and Witness Protection Act. See Matthew Dickman, *Should Crime Pay: A Critical Assessment of the Mandatory Victims Restitution Act of 1996*, 97 Cal. L. Rev. 1687, 1687-88 (2009). Prior to 1995, Kansas statutes only authorized criminal restitution as a condition of probation, or parole; restitution *was not* permitted as part of a defendant's general sentence. Compare K.S.A. 1994 Supp. 21-4603d(a) with K.S.A. 1995 Supp. 21-4603d(a); see also, *State v. DeHerrera*, 251 Kan. 143, Syl. ¶ 5, 153-55 (1992) (interpreting Kansas' early-1990's restitution statutes).

Many jurists view the judicial imposition of tort damages upon criminal defendants as "a welcome streamlining of the cumbersome processes of our law." *Bach*, 172 F.3d at 523. That view is debatable. See *Gard*, 194 Kan. at 549 (the right to a jury trial "is of ancient origin;" it "should be carefully guarded against infringements"). But the Kansas Constitution does not surrender our common law jury trial rights simply because they may, debatably, undermine public policy. *Hilburn*, 442 P.3d at 524 (J., Stegall, concurring).

In 1859, Mr. Brown would have had the right for a jury to decide whether his tortious acts caused damage to another. And, if a jury made that finding, it would also determine the amount of damages caused by his misconduct. K.S.A. 21-6604(b)(1) abrogated those rights, and allowed a judge to impose a $83,811 civil judgment against Mr. Brown. Thus, K.S.A. 21-6604(b)(1) violated Mr. Brown's Section 5 right to a civil jury trial.

Mr. Brown concedes that a panel of this Court, in *State v. Arnett*, has previously adversely ruled upon the merits of the Section 5 challenge civil jury claim which he raises in this appeal. But, in doing so, the *Arnett* panel bafflingly equated a criminal defendant's Section 5's right to civil jury trial with the his or her Section 18 right to a civil remedy. From that faulty conflation, the *Arnett* panel concluded that, since the imposition of criminal restitution does not implicate a criminal defendant's right to a civil remedy, it also necessarily doesn't implicate his or her right to a civil jury trial. *State v. Arnett*, 2018 WL 2072804 at *2 (Kan. App.) (unpublished opinion) (review granted).

Since *Arnett's* filing, our Supreme Court has clarified that Section 18 analysis has no role to play in determining whether a statute unconstitutionally infringes upon a party's common law right to a civil jury trial. *Hilburn*, 442 P.3d at 521. This, perhaps, explains why the Supreme Court granted review of this Court's *Arnett* decision. Upon exercising review, Mr. Brown is confident that the Supreme Court will disapprove of *Arnett's* Section 5 analysis.

B. If restitution is a criminal penalty, then K.S.A. 21-6604(b)(1) violates the Sixth Amendment of the United States Constitution and Section 5 of the Kansas Constitution Bill of Rights.

The Sixth Amendment to our Federal Constitution provides that in "all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." In a similar vein, Section 5 of the Kansas Constitution Bill of Right provides that a criminal defendant's right to a jury trial "shall be inviolate." See *State v. Love*, 305 Kan. 716, 736 (2017) (Section 5 preserves the common law right to a criminal jury trial). These constitutional protections now assert themselves through application of the "*Apprendi* rule." According to this rule, any fact that increases the maximum penalty for a crime (besides a prior conviction) must be submitted to a jury, and proven beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000).

In this case, Mr. Brown was convicted of multiple crimes. But none of those convictions flowed from jury fact-finding that Mr. Brown caused a particular amount of financial harm to crime victims. Notwithstanding this, K.S.A. 21-6604(b)(1) required a sentencing judge to impose criminal restitution based upon his findings regarding: (1) whether Mr. Brown's crimes caused damage to another person; and (2) the amount of those damages. Our Supreme Court recognizes that both of these inquiries are factual in nature. *State v. Hall*, 297 Kan. 709, 712, 304 P.3d 677 (2013).

In *State v. Huff*, a panel of this Court held that criminal restitution orders do not implicate *Apprendi* for two primary reasons. First, the *Huff* panel contended that restitution is not a punishment. Second, the *Huff* panel asserted that Kansas' restitution scheme does rely upon judicial fact-finding to establish a defendant's maximum restitution sentence.

State v. Huff, 50 Kan. App. 2d 1094, 1099 (2014). The *Huff* panel's first point is debatably correct. Its second is not.

1. Is criminal restitution punishment?

The United States Supreme Court has not yet weighed in on whether criminal restitution is punishment within the meaning of the United States Constitution. *Hester*, 139 S.Ct. 509 (2019) (J., Gorsuch, dissenting from the denial of certiorari). And lower federal appellate courts are split on the issue. Compare *United States v. Bonner*, 522 P.3d 804, 807 (7th Cir. 2008) (restitution is not punishment) and *United States v. Green*, 722 F.3d 1146, 1150 (9th Cir. 2013) (restitution is "not clearly" punishment) with *United States v. Leahy*, 438 F.3d 328 (3rd Cir. 2006) (restitution is punishment) and *United States v. Sawyer*, 825 F.3d 287, 297 (6th Cir. 2016) (restitution is punishment).

In Mr. Brown's view, criminal restitution is, in essence, a civil remedy imposed "to avoid the need for the victims of crime to file separate civil suits-litigation." *Behrman*, 235 F.3d at 1054. If this view is correct, for reasons already argued, Kansas' criminal restitution statutes would violate Section 5 of our State Constitution's Bill of Rights.

Mr. Brown raises an *Apprendi* challenge in his appeal, to protect himself from an appellate determination that criminal restitution is punishment. A holding of that nature would not be without support. Our Supreme Court has held that criminal restitution is a part of a defendant's criminal sentence. *Hall*, 298 Kan. at Syl. ¶ 1. And, according to our Supreme Court, restitution is imposed for the punitively-tinged purposes of deterring and rehabilitating criminal offenders. *State v. Applegate*, 266 Kan. 1072, 1075 (1999).

If this Court viewed criminal restitution as punishment, Mr. Brown's civil jury trial claim would likely fail. But viewing restitution as punishment would also put Kansas' criminal restitution scheme in violation of the *Apprendi* rule. Thus, if this Court determines that criminal restitution is punishment, it should also find that Kansas' jury-less criminal restitution procedure violates Mr. Brown's constitutional right to a criminal jury trial.

2. Mandatory minimum criminal restitution sentences are established by judicial fact-finding.

Apprendi's protections apply when judicial fact-finding elevates a criminal defendant's *mandatory minimum or maximum* punishment for a crime. *Alleyne v. United States*, 570 U.S. 99, 103 (2013). The *Huff* panel determined that an *Apprendi* challenge failed, in part, because it viewed Kansas' restitution statutes as not dictating a mandatory minimum, or maximum, restitution sentence. *Huff*, 50 Kan. App. 2d at 1103-04. That view does not square with the plain language of K.S.A. 21-6604(b)(1).

K.S.A. 21-6604(b)(1) directs that a judge "shall" order restitution in an amount that "shall include, but not be limited to, damage or loss caused by" a crime. This statutory mandate compels a sentencing judge to make factual findings, and order a *mandatory minimum* amount of restitution based upon those findings. See *Hester*, 139 S.Ct. at 510 (2019) (J., Gorsuch, dissenting form the denial of certiorari). If, for example, a judge found that a defendant's crimes of conviction caused $1,000 in damages to a victim, the judge would be required to impose a $1,000 restitution sentence (barring a special judicial finding of unworkability).

Again, the *Apprendi* rule applies whenever factual findings elevate a mandatory minimum sentence. *Alleyne*, 570 U.S. at 103. Since K.S.A. 21-6604(b)(1) requires judicial fact-finding to establish a mandatory minimum restitution sentence, *Apprendi's* protections attach (assuming that restitution is a form of punishment).

Conclusion

If restitution is a civil remedy, then it implicates Mr. Brown's Section 5 right to a civil jury trial. In contrast, if restitution is a criminal penalty, then it implicates Mr. Brown's Sixth Amendment and Section 5 right to a criminal jury trial. Thus, the constitutionally of K.S.A. 21-6604(b)(1) does not ultimately turn upon whether restitution is a civil remedy or a criminal punishment. This distinction merely affects the reason *why* K.S.A. 21-6604(b)(1) is unconstitutional. See *Hester*, 139 S.Ct. at 510-11 (2019) (J., Gorsuch, dissenting from the denial of certiorari) (opining that federal criminal restitution statutes likely violate either a criminal defendant's Sixth Amendment right to a criminal jury trial, or a criminal defendant's Seventh Amendment right to a civil jury trial). Since K.S.A. 21-6604(b)(1) is unconstitutional, this Court must vacate Mr. Brown's restitution sentence.

Conclusion

Mr. Brown respectfully asks this Court to remand his case for a new trial. In the alternative, he asks this Court to vacate his current prison and restitution sentences.

2007 WL 1687468
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

PEOPLE of the State of Michigan, Plaintiff-Appellee,
v.
ROYAL WILSON LETHAM, Defendant-Appellant.

Docket No. 269789.
|
June 12, 2007.

Wayne Circuit Court; LC No. 05-012397.

Before: FITZGERALD, P.J., and SAWYER and O'CONNELL, JJ.

Opinion

PER CURIAM.

***1** Defendant appeals of right from his conviction of unarmed robbery, MCL 750.530, for which he was sentenced to three to five years' imprisonment. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant argues that he was deprived of due process of law because there was insufficient evidence to support his conviction of unarmed robbery. Specifically, he claims that because his theft of liquor from a Meijer store occurred without violence, or the threat of force, or by putting a victim in fear, he was not guilty of the crime of unarmed robbery. He asserts that the law requires an application of force contemporaneous with the larceny to elevate the crime to unarmed robbery, and that there was no evidence showing either contemporaneous force or violence, or that anyone was placed in fear of an immediate battery. Defendant claims that the prosecution, at most, proved that he committed a larceny in a building.[1]

This Court reviews a conviction de novo, *People v. Lueth*, 253 Mich.App 670, 680; 660 NW2d 322 (2002), to determine if it is supported by sufficient evidence by "view[ing] the evidence in a light most favorable to the prosecution and determin[ing] whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v. Wolfe*, 440 Mich. 508, 515; 489 NW2d 748 (1992), amended 441 Mich. 1201 (1992), citing *People v. Hampton*, 407 Mich. 354, 368; 285 NW2d 284 (1979).

The elements of unarmed robbery are: "(1) a felonious taking of property from another, (2) by force or violence or assault or putting in fear, and (3) being unarmed." *People v. Johnson*, 206 Mich.App 122, 125-126; 520 NW2d 672 (1994). Since July 1, 2004,[2] the unarmed robbery statute has provided that:

> (1) A person who, *in the course of committing a larceny of any money or other property that may be the subject of larceny,* uses force or violence against any person who is present, or who assaults or puts the person in fear, is guilty of a felony punishable by imprisonment for not more than 15 years.
>
> (2) As used in this section, "in the course of committing a larceny" includes acts that occur in an attempt to commit the larceny, or during commission of the larceny, *or in flight or attempted flight after the commission of the larceny,* or in an attempt to retain possession of the property. [MCL 750.530 (emphasis added).]

The theft in this case occurred on November 21, 2005. This was after the effective date of the amended statute and so the amendment applies to defendant's conduct.

Defendant took several expensive bottles of liquor and concealed them in a cardboard box. "[L]arceny is complete when the taking occurs." *People v. Randolph*, 466 Mich. 532, 543; 648 NW2d 164 (2002). He then attempted to leave the store with the box and without paying for the liquor. Defendant was confronted as he was leaving the store. He then used force or violence (striking two store employees) to break free and allow him to flee. Defendant was not armed when he committed these acts. Defendant's assaultive behavior occurred "in flight or attempted flight after the commission of the larceny." MCL 750.530(2). The amended statute has eliminated the restriction that the application of force or violence must occur contemporaneous with the larcenous taking. Hence, there was sufficient evidence to support defendant's conviction of unarmed robbery.

***2** Affirmed.

All Citations

Not Reported in N.W.2d, 2007 WL 1687468

Footnotes

1 We note that defendant could not have been convicted of larceny in a building because of the statutory restriction imposed by the retail fraud statute, either second or third degree, MCL 750.356d(3) and (5), that precludes anyone who commits the crime of retail fraud in the second degree or retail fraud in the third degree from being prosecuted for larceny in a building.

2 The unarmed robbery statute was amended by the Legislature, effective July 1, 2004, apparently in reaction to our Supreme Court's decision in *People v. Randolph*, 466 Mich. 532; 648 NW2d 164 (2002), in which the Court held that in order for an unarmed robbery to occur, the thief must use force or violence at the time of the taking, and that the use of force or violence after the taking is accomplished in order to retain the property does not elevate the completed larceny to an unarmed robbery. The Legislature amended the unarmed robbery statute to add the language "in the course of committing a larceny," MCL 750.530(1), and defined this phrase to include acts of force or violence that occurred in the attempt to commit the offense, in the commission of the offense, "or in flight or attempted flight after the commission of the larceny, or in an attempt to retain possession of the property." MCL 750.530(2).

431 P.3d 905 (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.
Dennis L. HEARD, Appellant.

No. 118,569
|
Opinion filed December 14, 2018.

Appeal from Sedgwick District Court; WARREN M. WILBERT, judge.

Attorneys and Law Firms

Korey A. Kaul, 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 Gardner, P.J., Atcheson and Powell, JJ.

MEMORANDUM OPINION

Per Curiam:

***1** Dennis L. Heard pleaded guilty to one count of burglary and one count of aggravated assault. The presentence investigation report revealed that Heard had four prior person felonies and three person misdemeanors that converted into a person felony.

At sentencing, the State conceded that one of the person felonies—an Arkansas burglary—was actually a theft and thus should have been scored as a nonperson felony. Even then, Heard's criminal history score remained an A. The district court stated that even if the remaining Arkansas burglary conviction could not be classified as a person offense under *State v. Dickey*, 301 Kan. 1018, 350 P.3d 1054 (2015), Heard had two remaining person felonies, plus the three convertible person misdemeanors, which kept his criminal history score an A. Based on his criminal history, the court sentenced Heard to 30 months in prison. Heard appeals, challenging the district court's classifications of his three Arkansas convictions as person felonies.

Did the District Court Improperly Classify Heard's Prior Out-Of-State Robbery Convictions and his Out-Of-State Burglary Conviction as Person Crimes?

The district court classified Heard's criminal history as an A, based in part on two prior Arkansas robbery convictions and a prior Arkansas burglary conviction. Heard argues that because the elements of Arkansas robbery are broader than Kansas robbery, those convictions must be scored as nonperson felonies. He also argues that his prior Arkansas

conviction for burglary was improperly classified as a person offense. He claims that this resulted in an incorrect criminal history score and thus an illegal sentence, and requests that we vacate his sentence and remand for resentencing. We agree.

Jurisdiction

The State first argues that this panel lacks jurisdiction to consider Heard's appeal because it was not timely filed. The timely filing of a notice of appeal is jurisdictional. *State v. Shelly*, 303 Kan. 1027, 1036, 371 P.3d 820 (2016). A criminal defendant has 14 days from judgment to file a notice of appeal. K.S.A. 2017 Supp. 22-3608(c). In a criminal case such as this one, judgment occurs at sentencing and the time to file a notice of appeal runs from the oral pronouncement of the sentence. *State v. Ehrlich*, 286 Kan. 923, 925, 189 P.3d 491 (2008). But Heard filed his notice of appeal 15 days after sentencing.

Because of that possible lack of jurisdiction, our motions panel ordered the parties to show cause why we should not dismiss this case. After considering the responses to that order, we retained the appeal based on *State v. Ortiz*, 230 Kan. 733, 736, 640 P.2d 1255 (1982). That case provides an exception to the general 14-day rule when a defendant's attorney fails to perfect and complete an appeal. We see no reason to depart from that ruling. We thus reject the State's argument that we lack jurisdiction and consider Heard's case on the merits.

Classifying Heard's out-of-state convictions

Heard contends that the district court erred in classifying as person crimes two prior Arkansas robbery convictions and one prior Arkansas burglary conviction.

***2** Whether the district court properly classified Heard's prior convictions as person or nonperson crimes for criminal history purposes is a question of law subject to our unlimited review. *Dickey*, 301 Kan. 1018, Syl. ¶ 5.

To classify an out-of-state conviction for criminal history purposes, Kansas courts follow two steps. First, we categorize the prior conviction as a misdemeanor or a felony by deferring to the convicting jurisdiction's classification of the crime. K.S.A. 2017 Supp. 21-6811(e). Then we determine whether the prior conviction is a person or nonperson offense. Only the second step is challenged here.

To determine whether the prior conviction is a person or nonperson offense, we look to the comparable offense in Kansas when the defendant committed the current crime of conviction. K.S.A. 2017 Supp. 21-6811(e)(3). The Kansas Supreme Court recently clarified that "[f]or an out-of-state conviction to be comparable to an offense in Kansas, the elements of the out-of-state crime must be identical to or narrower than the elements of the Kansas crime." *State v. Wetrich*, 307 Kan. 552, Syl. ¶ 3, 412 P.3d 984 (2018). If Kansas has no comparable crime, the out-of-state crime is classified as a nonperson crime. K.S.A. 2017 Supp. 21-6811(e)(3).

Did the district court err in classifying Heard's prior Arkansas robbery conviction as a person crime?

Heard contends that his prior Arkansas convictions for robbery are not comparable to a Kansas crime because Arkansas's robbery statute is broader than Kansas' robbery statute.

In 1992, Heard was convicted of two robberies under Ark. Code Ann. § 5-12-102(a) (1987), which stated: "A person commits robbery if, with the purpose of committing a felony or misdemeanor theft or resisting apprehension immediately after committing a felony or misdemeanor theft, the person employs or threatens to immediately employ physical force upon another person."

The Kansas robbery statute on the date Heard committed his current crime of conviction defines robbery as "knowingly taking property from the person or presence of another by force or by threat of bodily harm to any person." K.S.A. 2017 Supp. 21-5420(a).

Several elements of Arkansas' robbery statute are not identical to or narrower than the elements of Kansas' robbery statute. First, Kansas requires that an offender physically take property—Arkansas does not. In Kansas, "the test for determining whether a defendant has committed a theft or a robbery 'should be whether or not the taking of the property has been completed at the time the force or threat is used by the defendant.' *State v. Aldershof*, 220 Kan. 798, 803, 556 P.2d 371 (1976)." *State v. Plummer*, 295 Kan. 156, 166, 283 P.3d 202 (2012); see *State v. Leaks*, No. 115,647, 2017 WL 1535171, at *3 (Kan. App. 2017) (unpublished opinion). But in Arkansas, "robbery can be committed without actually taking the property of another, since robbery is defined as employing or threatening to employ physical force upon another with the purpose of committing a felony or misdemeanor theft or resisting apprehension immediately thereafter." *Cartwright v. State*, 501 S.W.3d 849, 852 (Ark. 2016). Instead, the language in the Arkansas statute criminalizes employing or threatening to employ physical force with the purpose of committing theft.

***3** Secondly, the Kansas robbery statute requires that property be taken from the person or presence of another. But the Arkansas robbery statute has no personal presence requirement, resting solely on an underlying theft. See *Thompson v. State*, 284 Ark. 403, 408, 682 S.W.2d 742 (1985) (explaining that "[t]heft is the wrongful appropriation of the victim's property").

Lastly, under the Arkansas statute, a person can be convicted of robbery based on using force to accomplish an escape. Not so in Kansas. This is because the Arkansas statute provides that a person may commit robbery by employing or threatening to immediately employ physical force upon another person with the purpose of resisting apprehension immediately *after committing a felony or misdemeanor theft*. But the Kansas robbery statute does not permit a conviction based on acts which occur after the taking of property. Instead, cases interpreting our robbery statute specifically prohibit finding a robbery when force is used only to accomplish an escape. It is well settled in Kansas that the violence must precede or be contemporaneous with the taking of the property:

> "[T]o constitute the crime of robbery ... it is necessary that the violence to the owner must either precede or be contemporaneous with the taking of the property and robbery is not committed where the thief has gained peaceable possession of the property and uses no violence except to resist arrest or to effect his escape." *State v. Aldershof*, 220 Kan. 798, 803, 556 P.2d 371 (1976).

The Arkansas robbery statute is thus broader than the Kansas robbery statute in these three respects. Its elements are not identical to or narrower than its Kansas counterpart—robbery. It is thus possible that Heard committed robbery in Arkansas without committing that person crime in Kansas.

To this the State argues "to the extent that an offender intends, but fails, to take property, such an act would be comparable to an attempted robbery in Kansas, which is also a person offense." See K.S.A. 2017 Supp. 21-5301(a) (defining an attempt as any overt act toward the perpetration of a crime done by a person who intends to commit such crime but fails in the perpetration thereof or is prevented or intercepted in executing such crime). But this approach does nothing to address the second and third ways noted above in which the Arkansas statute is broader than the Kansas statute.

To address those other discrepancies, the State urges us to follow the dissent in *State v. Briggs*, No. 116,420, 2018 WL 3995795, at *4-6 (Kan. App. 2018) (Malone, J. dissenting) (unpublished opinion). There, Judge Malone opined that more than one Kansas offense can be considered in determining whether an out-of-state conviction should be considered a person or nonperson crime. That dissent focuses on the plain language from the relevant statute: "The State of Kansas shall classify the crime as person or nonperson. In designating *a crime* as person or nonperson, *comparable offenses* under the Kansas criminal code in effect on the date the current crime of conviction was committed shall be referred to." (Emphasis added.) K.S.A. 2017 Supp. 21-6811(e)(3). See *Briggs*, 2018 WL 3995795, at *5. And the Kansas Supreme Court has placed great emphasis recently on the court's duty to give effect to the plain language of a statute. See, e.g., *State v. Barlow*, 303 Kan. 804, 813, 368 P.3d 331 (2016) (explaining that absent an ambiguity, the plain meaning of the words chosen by the Legislature will control and courts will not add words to the law); *Hoesh v. Triplett, Inc.*, 303 Kan. 358, 367, 361 P.3d 504 (2015) (finding "the court's duty to give effect to the

plain language of an unambiguous statute is not diluted just because that effect renders the statute unconstitutional").

***4** *Wetrich* does not use the plural "offenses." Instead, it says that "the elements of the out-of-state crime cannot be broader than the elements of the Kansas crime. In other words, the elements of the out-of-state crime must be identical to, or narrower than, the elements of the Kansas crime to which it is being referenced." 307 Kan. at 562. In *Wetrich*, however, no party raised the issue whether multiple comparators could be used, so its use of the singular could be unintentional.

But the State does not attempt to apply this multiple comparator approach, as is necessary. Instead it argues only that if Heard used physical force his acts would constitute a battery in Kansas; and if Heard threatened to employ immediate physical force, his acts would constitute assault or criminal threat in Kansas, all of which are person crimes. That conclusory and undeveloped argument fails to show that the elements of the Arkansas robbery statute are, in fact, identical to or narrower than those of the suggested Kansas comparators. We decline to undertake that crucial task for the State. Instead, we note, as an example, that if Heard had committed robbery in Arkansas by making a threat with the purpose of committing a felony or misdemeanor theft so as to violate Ark. Code Ann. § 5-12-102, he would not necessarily have threatened to commit violence with intent to place another in fear, as is required for a conviction in Kansas of criminal threat, see K.S.A. 2017 Supp. 21-5415(a)(1). The purpose element required by the Arkansas robbery statute is different than "the intent to place another in fear" required by the Kansas criminal threat statute. So despite what may be the facial appeal of the multiple comparator approach, we find it unnecessary to decide this abandoned issue. See *State v. Anderson*, 291 Kan. 849, 858, 249 P.3d 425 (2011) ("An issue not briefed or raised incidentally but not argued is deemed abandoned.").

The Arkansas robbery statute does not meet the identical-or-narrower analysis and is therefore not comparable.

Did the district court err in classifying Heard's Arkansas burglary conviction as a person crime?

Next, Heard contends that his Arkansas burglary conviction from 1992 was incorrectly classified as a person felony. The State argues that we should not address the classification of this crime because the district court did not consider it when determining Heard's criminal history. But on appeal Heard has challenged his entire criminal history score, which includes all prior crimes in his presentence investigation report. We therefore address the classification of Heard's prior Arkansas burglary conviction.

K.S.A. 2017 Supp. 21-6811(d)(1) specifically addresses prior burglary convictions. The Kansas Supreme Court addressed this provision in *Dickey*, holding that to classify a prior burglary conviction as a person offense under K.S.A. 2014 Supp. 21-6811(d), "a sentencing court must find that the prior burglary involved a 'dwelling,' *i.e.*, 'a building or portion thereof, a tent, a vehicle or other enclosed space which is used or intended for use as a human habitation, home, or residence.' K.S.A. 2014 Supp. 21-5111(k)." 301 Kan. at 1021. Therefore, to score Heard's Arkansas burglary conviction as a person felony for Kansas criminal history purposes, we must find the Arkansas crime comparable to Kansas' burglary of a dwelling offense at the time the current crime of conviction was committed. See *Wetrich*, 307 Kan. at 557 (citing *State v. Keel*, 302 Kan. 560, 590, 357 P.3d 251 [2015]).

***5** The Arkansas burglary statute from Heard's prior conviction states that a person commits residential burglary in Arkansas "if he or she enters or remains unlawfully in a residential occupiable structure of another person with the purpose of committing in the residential occupiable structure any offense punishable by imprisonment." Ark. Code Ann. § 5-39-201(a)(1) (1987). Arkansas authorizes imprisonment for misdemeanors. Ark. Code Ann. § 5-4-401(b) (1987).

The Kansas burglary statute from the year of his current crime of conviction provides:

"(a) Burglary is, without authority, entering into or remaining within any:

(1) Dwelling, with intent to commit a felony, theft or sexually motivated crime therein;

(2) building, manufactured home, mobile home, tent or other structure which is not a dwelling, with intent to commit

a felony, theft or sexually motivated crime therein; or

(3) vehicle, aircraft, watercraft, railroad car or other means of conveyance of persons or property, with intent to commit a felony, theft or sexually motivated crime therein." K.S.A. 2017 Supp. 21-5807(a).

Arkansas' burglary statute has a broader intent requirement than Kansas' burglary statute. The specific intent required for the Arkansas burglary is that the purpose is to commit "any offense punishable by imprisonment." A conviction under Ark. Code Ann. § 5-39-201 (1987) does not require the offender to have the requisite intent required to be convicted of burglary in Kansas—the specific intent to commit a felony, theft, or sexual battery required by K.S.A. 2017 Supp. 21-5807(a).

The Kansas Supreme Court compared the Kansas burglary statute to Missouri's 1986 burglary statute in *Wetrich*. The court determined that the intent required to be convicted of burglary in Missouri was broader than the intent required in Kansas, rendering the two statutes incomparable:

"The Kansas crime to which the Missouri conviction is being compared—burglary of a dwelling—requires that the entry into or remaining within be done with the specific intent to commit a felony, theft, or sexual battery therein. In contrast, the specific intent required for the Missouri second-degree burglary is that the burglar's purpose is to commit any crime. Consequently, the mere existence of the Missouri conviction does not establish the mental state element of the Kansas reference offense because the Missouri mental state element is broader. The purpose for the unlawful entry in Missouri could have been to commit misdemeanor property damage which would not be a burglary in Kansas." *Wetrich*, 307 Kan. at 563.

The Arkansas burglary statute is broader than, and therefore not comparable to, the narrower Kansas burglary statute. Because the crimes are not comparable, we cannot consider the Arkansas burglary to be a person felony. See *Wetrich*, 307 Kan. at 563. Heard's sentence is illegal because it was based on an incorrect criminal history score.

Do the 2017 amendments to K.S.A. 22-3504 prevent Heard's sentence from being illegal?

The State claims that Heard's sentence is nonetheless legal based on a 2017 amendment to K.S.A. 22-3504. That amendment states: "A sentence is not an 'illegal sentence' because of a change in the law that occurs after the sentence is pronounced." K.S.A. 2017 Supp. 22-3504. The State argues that *Wetrich*'s holding requiring the identical-or-narrower rule was a change in the law after Heard was sentenced and thus cannot provide the basis for an illegal sentence.

***6** Resolving this claim involves interpretation of a statute. Interpretation of a statute is a question of law over which we have unlimited review. *State v. Collins*, 303 Kan. 472, 473-74, 362 P.3d 1098 (2015).

In support of its argument that the *Wetrich* holding was a change in the law, the State claims that prior to *Wetrich*, Kansas applied a common-sense definition of "comparable" that did not require prior offenses to contain identical or narrower elements. Instead, the Kansas Supreme Court held that crimes do not need identical elements to be comparable. *State v. Williams*, 299 Kan. 870, 873, 326 P.3d 1070 (2014); *State v. Vandervort*, 276 Kan. 164, 179, 72 P.3d 925 (2003).

But panels of this court have determined that *Wetrich* merely clarified existing law, rather than changed it. See *State v. Smith*, 56 Kan. App. 2d 343, 352-54, No. 118,042, 2018 WL 4374273 (Kan. App. 2018); *State v. Jones*, No. 117,808, 2018 WL 4656409, at * 8-10 (Kan. App. 2018) (unpublished opinion).

"Simply put: the [Kansas Sentencing Guidelines Act] KSGA and its reference to the term 'comparable offenses' has not changed .... The only thing that may have changed is our Supreme Court's interpretation of the KSGA. But a judicial construction of a statute is an authoritative statement of what the statute meant *before* as well as after the decision. See *Rivers*, 511 U.S. at 312-13. As previously stated, the *Wetrich* court found that the identical-or-narrower test was the intent of the Legislature when it passed the KSGA based on the legislative history of the Act and the purposes and objectives of the sentencing guidelines. 307 Kan. at 561-62." *Smith*, 56 Kan. App. 2d at 354.

Those panels based their determination that *Wetrich* interpreted existing law, rather than changed the law, on legislative history, the Kansas Supreme Court's language describing its holding, and its treatment of pre-*Wetrich* cases with inconsistent holdings. The *Smith* panel noted that the *Wetrich* court found that the identical-or-narrower test was the intent of the Legislature when it passed the KSGA based on the legislative history of the Act and the purposes and objectives of the sentencing guidelines. *Smith*, 56 Kan. App. 2d at 354. It also found that *Wetrich* applied the rule set out in *Dickey*, and out court has previously held that *Dickey* was not a change in the law but was an application of *Apprendi*. *Smith*, 56 Kan. App. 2d at 354. The *Jones* panel noted that the Kansas Supreme Court did not overrule its prior opinions, further indicating that it did not intend to make new law by issuing its opinion in *Wetrich*, and that in cases following *Wetrich*, the Kansas Supreme Court described the decision as "construl ing] the meaning of 'comparable offense.' " *Jones*, 2018 WL 4656409, at *10; see *State v. Moore*, 307 Kan. 599, 602, 412 P.3d 965 (2018); *State v. Buell*, 307 Kan. 604, 607, 412 P.3d 1004 (2018).

We agree. The identical-or-narrower rule described in *Wetrich* did not create new law but clarified existing statutory language. The 2017 amendment of K.S.A. 22-3504(3) does not limit Heard's ability to seek relief.

Conclusion

Heard's Arkansas robbery and burglary crimes must be classified as nonperson crimes. The district court is directed to resentence Heard after scoring his 1992 Arkansas robbery convictions and his Arkansas burglary conviction as nonperson felonies. The parties agree that Heard's second Arkansas burglary offense listed in his presentence investigation report should be changed to a theft. This leaves Heard with only one person felony—the one based on his three person misdemeanors that convert to a person felony. Heard should have a criminal history score of C.

***7** Convictions affirmed, sentence vacated, and case remanded with directions.

2019 WL 2306626
Unpublished Disposition
Only the Westlaw citation is currently available.
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.

All Citations

Slip Copy, 2019 WL 2306626 (Table)

KeyCite Yellow Flag - Negative Treatment
Review Granted December 22, 2017

366 P.3d 667 (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.
Jalen J. JONES, Appellant.

No. 113,044.
|
March 4, 2016.
|
Review Granted Dec. 22, 2017.

Appeal from Sedgwick District Court; Stephen J. Ternes, Judge.

Attorneys and Law Firms

Samuel 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 MALONE, C.J., SCHROEDER, J., and BURGESS, S.J.

MEMORANDUM OPINION

PER CURIAM.

***1** Jalen J. Jones appeals his convictions of attempted first-degree murder and aggravated battery. Jones claims the district court erred when it denied his requests to instruct the jury on defense of a person and the lesser offense of attempted voluntary manslaughter. He also raises constitutional challenges to Kansas' criminal restitution scheme for the first time on appeal. For the reasons set forth herein, we affirm the district court's judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On the evening of August 24, 2013, Chandria Young was spending time at the house of her friend, Autumn Ashlock. Later that night, the two women were joined by three men, Quentin Lawrence, also known as Ratchet; Daijour Parker, also known as DP; and Dominque Gordon, also known as Bully. The three men were members of the Piru Blood gang. Young was in a relationship with Gordon, and Ashlock was in a relationship with Lawrence.

Eventually, Ashlock drove the group to QuickTrip to purchase cigarettes. While at QuickTrip, Gordon saw Young

talking to Aquarius Hurt, who was a member of a rival gang called the Gangster Disciples, or GDs. Gordon approached Hurt. The two men exchanged insults, and Gordon eventually punched Hurt in the face. Young, Ashlock, Parker, and Lawrence grabbed Gordon, placed him into their car, and the group returned to Ashlock's house.

After the incident at QuickTrip, Hurt called Jones, his brother, and told him what had happened. Jones was with his friend, Joshua Grier. Hurt said that he was mad about the incident and asked Jones and Grier to come pick him up. Grier, who was driving his gray Taurus, agreed to do so. Jones was carrying a .40 Hi–Point semiautomatic gun, and Grier had a .380 Bersa, also a semiautomatic weapon.

Jones, Hurt, and Grier initially drove to Young's house to try to find Gordon, but no one was there. The three men then proceeded to drive to Ashlock's house. Ashlock, Young, Lawrence, Parker, and Gordon were sitting on Ashlock's porch when Grier, Jones, and Hurt pulled up in the street in front of the house. All three men immediately got out of Grier's car. The two women, Ashlock and Young, initially approached the men. Hurt eventually told Lawrence, Parker, and Gordon to come to the street. Hurt said something about finishing what they had started at QuickTrip.

Lawrence, Parker, and Gordon came down to the street. At this time, Jones and Hurt were standing toward the back of the car on the passenger side. Gordon approached Grier and the two men squared off to fight, but Young and Ashlock tried to stop the altercation from becoming physical. As this occurred, Lawrence was standing in front of a white truck parked in the street; Parker also was standing in the street. Neither Lawrence nor Parker got involved in the altercation between Gordon and Grier. Lawrence, Parker, and Gordon were unarmed. As Young and Ashlock continued their efforts to separate Gordon and Grier, numerous gunshots were fired in rapid succession. Young saw two shooters firing from behind Grier's vehicle, where Jones and Hurt had been standing. Ashlock, meanwhile, saw that Jones and Hurt were, in fact, the shooters.

***2** Lawrence was struck by five of the gunshots; he was shot twice in the arm, and once each in the neck, stomach, and back. From Young's vantage point, she could see that at least some of the shots were fired at Lawrence after he was already lying on the ground. After the shooting stopped, Grier, Jones, and Hurt fled the scene in Grier's car. Young and Parker ran to Lawrence and used shirts to apply pressure to his neck to control the bleeding.

After fleeing the scene of the shooting, Jones, Hurt, and Grier met up with Tenacious Sargent, Jones and Hurt's mother. Jones and Hurt were each holding a gun. Jones told his mother, "We did something and I'm sorry." Sargent eventually took the guns, placed them in a plastic bag, and hid them in a vacant garage down the street.

Jones, Hurt, and Grier next went to the house of their friend, Mikalia Smith. The men woke up Smith, and Jones asked her to say that the men had been at her house since 10 p.m. All three men showered and changed clothes at Smith's house. Sargent also came to Smith's house and told her to tell police that Jones, Grier, and Hurt had been at the house since 10 p.m. eating pizza, watching television, and playing video games.

Later, police arrived and transported everyone to the police station. Sargent eventually informed police of the location of the guns and took them there. Crime scene investigators recovered the plastic bag from the garage. In the bag, investigators found a .380 Bursa and a .40 Hi–Point semiautomatic weapons with ammunition for each gun. Investigators later conducted firearm analysis on the weapons and the shell casings that were recovered at the scene of the shooting. Four of the shell casings that were recovered were fired from the .40 caliber Hi–Point. Six other shell casings that were recovered were fired from the .380 Bursa. A bullet that was recovered from the pool of blood where Lawrence was lying was fired from the .380 Bursa. A bullet that was recovered from Lawrence's body also was fired from the .380 Bursa.

The State ultimately charged Jones with attempted first-degree murder and aggravated battery. At trial, Jones testified on his own behalf. Jones testified that when he, Grier, and Hurt arrived at Ashlock's house, he initially stayed inside Grier's car. According to Jones, Grier and Gordon squared up, "acting like they're going to fight." Jones claimed that it was at this point that he first exited the car. He testified that he walked to the back of the car, holding the .40 caliber gun behind his back. As Jones stood at the rear of the car, Lawrence asked him if he was Scarface, a reference to Jones' nickname. At that point, Gordon said, "If that's Scarface, shoot him down."

Jones testified that he was not paying attention to Lawrence at the time, as he was instead focused on the confrontation between Gordon and Grier. Jones claimed that Young began pushing Grier toward the Taurus, so Jones began

backpedaling toward the car as well. Jones testified that he, Young, Ashlock, and Hurt all yelled for Grier to get in the car. Jones acknowledged that he never saw any of the other men with guns, but he testified that Lawrence and Parker had their hands in their pants as if they had guns.

***3** Jones testified that he started the engine of the Taurus. He claimed that Hurt already was in the car by this point. As Grier was trying to get inside the car, Jones saw his head move towards him. Jones thought that Gordon had hit Grier, so he got out of the car carrying both the .40 caliber and the .380 caliber guns.

Jones testified that he opened fire with both guns. According to Jones, he was not trying to hit anyone; instead he was aiming at a white truck, which is where he had seen Lawrence standing with his hands in his pants. Jones testified that he fired the .40 caliber gun until it jammed, at which point he started shooting the .380 caliber weapon. He testified that people began running when he started shooting, and he stated that he continued firing as they fled. When asked why he kept shooting, Jones replied that he "just wanted them to leave." Jones reiterated that he did not intend to shoot anyone. On cross-examination, Jones acknowledged that he initially exited the Taurus with his .40 caliber gun before any threats had been made against him. He also admitted that no one ever pulled a gun on him or struck him at the scene of the shooting.

At the jury instruction conference, Jones requested an instruction on defense of a person. However, the district court ruled that the instruction was not supported by the evidence. The district court instructed the jury on the lesser offense of attempted second-degree murder. Jones also requested a jury instruction on the lesser offense of attempted voluntary manslaughter. However, the district court ruled that the evidence did not support an instruction on that charge.

The jury convicted Jones of attempted first-degree murder and aggravated battery. The district court sentenced Jones to 176 months' imprisonment for the attempted murder conviction and 41 months' imprisonment for the aggravated battery conviction, with the sentences to run concurrently. The district court also ordered Jones to pay restitution in the amount of $2,662. Jones did not object to the imposition of or the amount of restitution. Jones timely appealed the district court's judgment.

JURY INSTRUCTION ON DEFENSE OF A PERSON

Jones first claims the district court erred when it denied his request to instruct the jury on defense of a person. Jones argues that when the evidence is viewed in the light most favorable to him, he was acting in defense of himself or Grier when he started shooting. Jones argues that his use of deadly force was justified because his life had been threatened during the altercation between Gordon and Grier, and Jones' retreat to Grier's car before he started shooting did not take away the immediacy of the threat.

The State argues that the district court did not err because giving a defense of person instruction would have been factually inappropriate. First, the State argues that the instruction was factually inappropriate because Jones was the initial aggressor since he went to Ashlock's house to start a fight and he had his gun out before any fight started. Second, the State argues the instruction was factually inappropriate because Jones, Grier, and Hurt were engaged in mutual combat with Parker, Lawrence, and Gordon. Third, the State argues the instruction was factually inappropriate because the evidence did not support both a subjective and objective belief by Jones that deadly force was necessary to defend Jones or another person against the imminent use of deadly force.

***4** In analyzing jury instruction issues, appellate courts employ a multistep standard of review:

> " '(1) First, the appellate court should consider the reviewability of the issue from both jurisdiction and preservation viewpoints, exercising an unlimited standard of review; (2) next, the court should use an unlimited review to determine whether the instruction was legally appropriate; (3) then, the court should determine whether there was sufficient evidence, viewed in the light most favorable to the defendant or the requesting party, that would have supported the instruction; and (4) finally, if the district court erred, the appellate court must determine whether the error was harmless, utilizing the test and degree of certainty set forth in *State v. Ward*, 292 Kan. 541, 256 P.3d 801

(2011), *cert. denied* 132 S.Ct. 1594 (2012).' [Citation omitted.]" *State v. Woods*, 301 Kan. 852, 876, 348 P.3d 583 (2015).

A criminal defendant generally is entitled to instructions on the law applicable to his or her theory of defense if there is sufficient evidence for a rational factfinder to find for the defendant on that theory. If the defendant requests an instruction at trial, the court must review the evidence in the light most favorable to the defendant. *State v. Hilt*, 299 Kan. 176, 184, 322 P.3d 367 (2014).

Apply the four-step analysis, we first note that Jones requested the instruction on defense of a person at trial preserving the issue for appeal. Second, neither party disputes the fact that a defense of person instruction is legally appropriate in a murder or attempted murder prosecution. *State v. Knox*, 301 Kan. 671, 677–78, 347 P.3d 656 (2015).

The determinative issue is whether a defense of person instruction is factually appropriate in this case. A requested instruction on defense of a person is factually appropriate if there is sufficient evidence, when viewed in the light most favorable to the defendant, for a rational factfinder to find for the defendant on that theory. *State v. Story*, 300 Kan. 702, 710, 334 P.3d 297 (2014). Sufficiency is examined against the legal elements of defense of a person, which are defined in K.S.A.2015 Supp. 21–5222. Under that statute, the use of force can only be justified to the extent a 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." K.S.A.2015 Supp. 21–5222(a). The use of deadly force, meanwhile, can only be justified to the extent a person "reasonably believes deadly force is necessary to prevent imminent death or great bodily harm to such person or a third person." K.S.A.2015 Supp. 21–5222(b). These subsections establish a two-part test, the first of which is subjective, as it requires a showing that the defendant sincerely and honestly believed the use of deadly force in defense of a person was necessary. The second part is objective, as it requires a showing that a reasonable person in the defendant's circumstances would have perceived the use of deadly force in defense of a person was necessary. *State v. Salary*, 301 Kan. 586, 593–94, 343 P.3d 1165 (2015).

***5** K.S.A.2015 Supp. 21–5226(c), however, provides that an aggressor, *i.e.*, one who initially provokes the use of force against himself or herself, may claim self-defense under K.S.A.2015 Supp. 21–5222 only in limited circumstances. The statute reads in relevant part:

"The justification described in ... K.S.A. [2015 Supp.] 21–5222 ... is not available to a person who:

....

"(c) otherwise initially provokes the use of any force against such person or another, unless:

(1) Such person has reasonable grounds to believe that such person is in imminent danger of death or great bodily harm, and has exhausted every reasonable means to escape such danger other than the use of deadly force; or

(2) in good faith, such person withdraws from physical contact with the assailant and indicates clearly to the assailant that such person desires to withdraw and terminate the use of such force, but the assailant continues or resumes the use of such force." K.S.A.2015 Supp. 21–5226(c).

Jones argues that the district court erred in denying his request to instruct on defense of a person. In his packet of proposed instructions, Jones requested that the district court instruct the jury on defense of another. However, at the jury instruction conference, Jones focused solely on self-defense. Jones argued that the instruction was appropriate because there was evidence that Lawrence and Parker had their hands in their pants as if they might be holding guns and Gordon told Lawrence to shoot Jones if he was Scarface. There was also evidence at trial that earlier in the day Lawrence had made documented efforts to obtain a gun.

Even considering the evidence in the light most favorable to Jones, we agree with the district court that a jury instruction on defense of person would have been factually inappropriate in this case. First, the evidence showed that Jones was an initial aggressor. After hearing what had happened at the QuickTrip, Jones, Hurt, and Grier went to two locations in order to locate the man who had punched Jones' brother. While Jones claims that he had no intention of starting a fight, his own testimony showed that he held a loaded gun behind his back when he stepped out of the car upon arriving at Ashlock's house. In other words, Jones had the weapon in his hand *before* Gordon allegedly made a threatening comment and *before* Jones claimed to have seen Lawrence and Parker with their hands in their pants. In

such circumstances, Jones was the aggressor as identified by K.S.A.2015 Supp. 21–5226 and was not entitled to a self-defense instruction.

Moreover, the instruction was not appropriate because, at a minimum, Jones, Hurt, and Grier willingly engaged in mutual combat with Lawrence, Parker, and Gordon. Mutual combat has been defined as one into which both the parties enter willingly or voluntarily; it implies a common intent to fight, but not necessarily an exchange of blows. *State v. Coop*, 223 Kan. 302, 306, 572 P.2d 1017 (1978) (quoting Black's Law Dictionary 332–33 [Rev. 4th ed.1968]). In *State v. McCullough*, 293 Kan. 970, 975–76, 270 P.3d 1142 (2012), our Supreme Court stated:

> ***6** "The doctrine of self-defense cannot excuse a killing done when the defendant willingly engaged in mutual combat unless the defendant has withdrawn in good faith and done everything in the defendant's power to avert the necessity of the killing. [Citation omitted.] This rule does not destroy the right to self-defense in all mutual combat cases; but for self-defense to justify the killing, the defendant must be acting 'solely for the protection of [the defendant's] own life, and not to inflict harm upon [the defendant's] adversary.' [Citations omitted.]"

Furthermore, a jury instruction on defense of person would have been factually inappropriate because the evidence does not support both a subjective and objective belief by Jones that deadly force was necessary to defend himself against the imminent use of deadly force by another. The evidence was undisputed that Lawrence, Parker, and Gordon were unarmed, and Jones never saw the men display any weapons. All Jones saw was that Lawrence and Parker had their hands in their pants, and the evidence showed that the two men were dressed in gym shorts. Even after Jones allegedly heard Gordon say, "If that's Scarface, shoot him," Jones did not subjectively believe that the use of deadly force was necessary to defend himself. Jones testified that he was not paying attention to Lawrence at the time, as he was instead focused on the confrontation between Gordon and Grier. In other words, after hearing the threat, Jones simply continued to watch Gordon and Grier circle each other in the street.

Jones testified that he eventually made his way back toward the car as Ashlock and Young tried to separate Gordon and Grier. Jones testified that he, Young, Ashlock, and Hurt all yelled for Grier to get in the car. According to Jones, it was not until he thought he saw Gordon hit Grier that he got back out of the car with the two guns and started shooting.

But the main reason a defense of person instruction would have been factually inappropriate in this case is because Jones unequivocally testified that he never intended to shoot anyone. Our Supreme Court has held that a defendant cannot unintentionally act in self-defense. *State v. Collins*, 257 Kan. 408, 419, 893 P.2d 217 (1995). Self-defense is the intentional use of reasonable force to fend off an attacker. *State v. Bradford*, 27 Kan.App.2d 597, Syl. ¶ 4, 3 P.3d 104 (2000). As this court has previously stated, "a victim acting in self-defense intends to inflict injury on the attacker." *Manning v. State*, No. 105,699, 2012 WL 3289951, at *3 (Kan.App.2012) (unpublished opinion) (citing *Bradford*, 27 Kan.App.2d at 602).

Jones testified that he did not intend to shoot anyone. Instead, Jones testified that he just wanted people to go away. That is why he fired his weapons at the white truck and he did not fire directly at Lawrence or Parker. Jones' testimony that he was not trying to hit anyone with the shots is logically inconsistent with a claim that he subjectively believed deadly force was necessary. Therefore, the district court did not err when it denied Jones' request for a defense of person instruction.

LESSER OFFENSE OF ATTEMPTED VOLUNTARY MANSLAUGHTER

***7** Next, Jones claims the district court erred when it denied his request to instruct the jury on the lesser offense of attempted voluntary manslaughter. Jones argues an instruction on attempted voluntary manslaughter was appropriate because he had an honest but unreasonable belief that the use of deadly force was justified. The State argues that this instruction was inappropriate because Jones was the initial aggressor and the evidence showed that Jones did not have a subjective fear that his life was in danger.

We previously set forth the multistep standard of review in analyzing jury instruction issues. Voluntary manslaughter is a lesser offense of premeditated first-degree murder. As such, Jones' request for an instruction on attempted voluntary manslaughter was legally appropriate. This type of voluntary manslaughter is a knowing killing of a human being committed "upon an unreasonable but honest belief that circumstances existed that justified use of deadly force." See K.S.A.2015 Supp. 21–5404(a)(2). K.S.A.2015 Supp. 22–3414(3) requires lesser included offense instructions "where there is some evidence which would reasonably justify a conviction of some lesser included crime."

Jones' argument for a jury instruction on the lesser offense of attempted voluntary manslaughter fails for much the same reasons as his argument for a jury instruction on self-defense. The evidence at trial showed that Jones was the initial aggressor in the incident that occurred outside Ashlock's house. But more importantly, Jones unequivocally testified that he never intended to hit anybody with the gunshots; he only fired the shots because he wanted Gordon, Lawrence, and Parker to leave. As previously discussed, Jones' testimony that he was not trying to hit anyone with the shots is logically inconsistent with a claim that he subjectively believed deadly force was necessary. This lack of intent to injure anyone precludes a claim of self-defense and thereby precludes a claim of imperfect self-defense. Thus, the district court did not err when it denied Jones' request to instruct the jury on the lesser offense of attempted voluntary manslaughter.

Jones also claims that he was denied a fair trial based on the cumulative effect of the two instructional errors. The test for cumulative error is whether the totality of the circumstances establishes that the defendant was substantially prejudiced by cumulative errors and was denied a fair trial. *State v. Holt,* 300 Kan. 985, 1007, 336 P.3d 312 (2014). However, the court will find no cumulative error when the record fails to support any of the errors the defendant raises on appeal. *State v. Santos–Vega,* 299 Kan. 11, 27–28, 321 P.3d 1 (2014). For the reasons we have discussed, the district court did not err when it denied Jones' requested jury instructions. Because the record does not support any error, Jones is not entitled to relief under his claim of cumulative error.

CONSTITUTIONAL CHALLENGES TO RESTITUTION

***8** Next, Jones argues that the Kansas criminal restitution scheme violates § 5 of the Kansas Constitution Bill of Rights because it encroaches on a criminal defendant's right to a civil jury trial to determine restitution. The State asserts that Jones should be prohibited from raising this argument on appeal because he did not raise it before the district court and, in the alternative, the argument is without merit.

Determining a statute's constitutionality is a question of law subject to unlimited review. The appellate courts presume statutes are constitutional and must resolve all doubts in favor of a statute's validity. Courts must interpret a statute in a way that makes it constitutional if there is any reasonable construction that would maintain the legislature's apparent intent. *State v. Soto,* 299 Kan. 102, 121, 322 P.3d 334 (2014).

Specifically, Jones argues that § 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 was enacted. At common law, tort actions were triable to a jury and this included jury findings of causation and damages. Jones argues that the legislature abridged this right to a jury trial for tort actions by permitting victims of crimes to bypass a jury trial and receive a monetary judgment from a defendant through a court order of restitution under K.S.A.2015 Supp. 21–6604(b)(1). According to Jones, the legislature may abridge the constitutional right to a jury trial only if it complies with the quid pro quo test. Jones argues that K .S.A.2015 Supp. 21–6604(b)(1) violates the quid pro quo test because the legislature did not substitute any benefit to criminal defendants in return for stripping their right to have a jury determine their liability for and the amount of monetary damages to crime victims.

Constitutional grounds for reversal asserted for the first time on appeal are not properly before an appellate court for review. *State v. Godfrey,* 301 Kan. 1041, 1043, 350 P.3d 1068 (2015). However, there are three exceptions to this rule: (1) The newly asserted theory involves only a question of law arising on proved or admitted facts and is finally determinative of the case; (2) consideration of the theory is necessary to serve the ends of justice or to prevent the

denial of fundamental rights; and (3) the judgment of the trial court may be upheld on appeal despite its reliance on the wrong ground or having assigned a wrong reason for its decision. *State v. Phillips*, 299 Kan. 479, 493, 325 P.3d 1095 (2014).

Jones acknowledges that he did not raise his argument before the district court. However, Jones argues that this court should still review the merits of his claim because it only involves a question of law arising on proved or admitted facts and is finally determinative of the case. He further argues that consideration of the claim is necessary to serve the ends of justice or to prevent a denial of his fundamental rights.

***9** We disagree with Jones that either of these exceptions is applicable. The first exception does not apply because the determination of Jones' restitution claim is not finally determinative of the case. The second exception does not apply because it cannot be argued that consideration of the issue is necessary to serve the ends of justice or to prevent a denial of fundamental rights when Jones did not even object to the imposition of or the amount of restitution at sentencing. See *United States v. Dudley*, 739 F.2d 175, 179 (4th Cir.1984) (appellate court refused to consider restitution issue for first time on appeal when defendant failed to object to restitution in district court). Therefore, we reject Jones' constitutional issue as not properly preserved for appellate review.

In a related issue, Jones argues that Kansas' criminal restitution scheme violates the ruling in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). Again, Jones failed to raise this issue before the district court, and we find no applicable exception to address the issue for the first time on appeal. Although we decline to address the merits of Jones' claim, we note in passing that this court previously has held that the imposition of restitution in a criminal case does not implicate *Apprendi*. See *State v. Huff*, 50 Kan.App.2d 1094, 1103–04, 336 P.3d 897 (2014), *rev. denied* 302 Kan. —— (August 4, 2015).

Finally, Jones argues that the district court unconstitutionally used his two prior juvenile adjudications to elevate his criminal history at sentencing without requiring the State to prove the adjudications to a jury beyond a reasonable doubt, which Jones claims violates *Apprendi*, 530 U.S. 466. As Jones acknowledges, the Kansas Supreme Court previously has rejected this argument in *State v. Hitt*, 273 Kan. 224, 236, 42 P.3d 732 (2002). This court is duty bound to follow Kansas Supreme Court precedent, absent some indication the Supreme Court is departing from its previous position. *State v. Belone*, 51 Kan.App.2d 179, 211, 343 P.3d 128, *rev. denied* 302 Kan. —— (September 14, 2015). There is no indication that our Supreme Court is departing from its holding in *Hitt*.

Affirmed.

All Citations

366 P.3d 667 (Table), 2016 WL 852865

400 P.3d 676 (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.
Gabriel A. PATTERSON, Appellant.

No. 114,861
|
Opinion filed July 28, 2017
|
Review Granted February 26, 2018

Appeal from Douglas District Court; PAULA B. MARTIN, Judge.

Attorneys and Law Firms

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

Kate Duncan Butler, assistant district attorney, Charles E. Branson, district attorney, and Derek Schmidt, attorney general, for appellee.

Before Standridge, P.J., Leben, J., and Patricia Macke Dick, District Judge, assigned.

MEMORANDUM OPINION

Per Curiam:

***1** While hanging out at a bar, one of Gabriel A. Patterson's friends hatched a plan to rob some small-time drug dealers. Patterson stayed close as his friends concocted their scheme and gathered weapons. Patterson ultimately recruited another man to help with the robbery. After the men finalized the plan, Patterson concealed his face and the group headed over to the apartment they planned to rob. Patterson stepped inside the apartment and waited by the front door in the living room as three of his companions beat, threatened, and robbed their victims. The State charged Patterson with several crimes, and a jury convicted him of three counts of aggravated robbery and one count of aggravated burglary. He appeals his conviction and sentence. Finding no error, we affirm.

FACTS

One night in November 2014, roommates Kendri Salmons and Christopher Adams ran into a mutual acquaintance at a bar in Lawrence. The acquaintance, Yusef Kindell, asked if Adams had any marijuana, as Adams and his roommates

each dealt small amounts of drugs. In fact, Kindell previously had come to Adams' apartment to buy the party drug ecstasy from Adams. After their encounter with Kindell, Salmons and Adams left the bar to smoke marijuana and spend time with friends at home.

At the same time, and unbeknownst to the roommates, Kindell and his friends hatched a plan to rob them. Kindell and Cody Kukuk previously had joked about robbing Adams' apartment a handful of times. After Kindell saw Adams at the bar that night, he and Kukuk started planning a burglary. Kukuk texted others, including Driskell Johnson, about joining them. Kukuk asked Johnson to bring a gun. Kukuk's good friend Patterson, who was at the bar with Kindell and Kukuk, remained nearby throughout the entire planning period.

The men continued planning after they arrived back at Kukuk's house. Patterson said he saw gloves, a knife, and a handgun on the table at Kukuk's house. Patterson also said they were calling other people in an attempt to get another person to participate. Zachary Pence, who ultimately did participate, testified that Patterson was the person who called and invited him to join in the robbery. Patterson claimed that he did not call Pence to get involved and that it was Kukuk who used his phone for that purpose; however, when Pence called back, Patterson admitted he answered the call and relayed to the group that Pence wanted them to come and get him. Patterson admitted he went with the others to pick up Pence. Patterson told police that Pence was invited to join them because he's "crazy," and that Pence was "probably just an extra body or something," "muscle."

The agreed-upon plan was for Kukuk, Johnson, and Pence to keep the people inside the apartment out of the way while Kindell and Patterson "[took] stuff." Most of the men, Patterson included, concealed their faces. Kukuk carried a broken chair leg as a weapon, and Johnson had an unloaded gun. Together, the five walked from Kukuk's residence to the apartment, where Pence broke the door in by ramming it with his shoulder. Pence entered the apartment first, followed by Johnson and Kukuk. All three of these men went up the stairs towards the bedrooms while Patterson and Kindell stepped inside the house and waited by the front door in the living room.

***2** There were four victims in the apartment that night: the three male roommates (Shubhankar Mathur, Adams, and Salmons) and Mathur's girlfriend, Jacqueline Wells. All were asleep at the time the five men entered the apartment. Pence, Kukuk, and Johnson confronted the residents of the apartment separately, and there was evidence at trial of the following:

- Johnson hit Salmons with the gun, cutting a gash in Salmons' head and causing him to scream, but no property was taken directly from Salmons.

- Kukuk, Johnson, and Pence broke into Mathur and Wells' bedroom, threatened them, and took from them approximately $140, some marijuana, and their cell phones.

- Kukuk, Johnson, and Pence then went to Adams' room, where Kukuk hit Adams several times with the wooden stick while demanding money and marijuana. Adams surrendered a safe, which Kukuk took. The safe later yielded marijuana and cash.

- As Kukuk, Johnson, and Pence were leaving the apartment, Pence punched Mathur in the eye and Johnson took an X–Box console from the living room.

While Pence, Kukuk, and Johnson were upstairs, Patterson remained positioned just inside the front door in the living room. Patterson stated in an interview with police officers that "[Johnson] was just cracking people. ... He was just so on fire, like he was so mad," and that he heard screaming coming from upstairs, someone yelling, "I'm sorry" and "I don't have any weed." Patterson told police that when he heard the screaming, he thought, "This is not ideal," and that the people "shouldn't be screaming that bad." Patterson said that one of the men who lived in the apartment came downstairs, saw him standing by the door, and then went into the living room: "He didn't see [my face] or anything. ... I made sure nobody could." At that point, Patterson went outside the apartment to wait for the others.

From outside, Patterson saw Pence throw a cellphone from an upstairs window or balcony, and it was at that time Patterson decided to leave. Patterson said to police, "After it got really bad ... I was the first person to leave." Patterson stated that he was afraid someone would get "split open." Patterson said he was sorry "as soon as [he] heard screaming." Patterson told police that he decided to leave because it got too violent, "I just felt like that wasn't what

I pictured it was gonna go down like in my mind."

Patterson ran back to Kukuk's house, and the other four men arrived 1 or 2 minutes after him. Kindell had the safe and Johnson had the X–Box console and the gun. Patterson told police that when the other men returned, they were "pumped up" on adrenaline and gave him the safe to open. The men talked about what had just transpired, and one of the details revealed was that Johnson had "pistol whipped" someone.

Patterson admitted that he opened the safe with a knife and that they discovered a couple of ounces of marijuana and approximately $1,500 in cash inside the safe once it was opened. Another man who was at the house when the five men returned, Michael Thurman, divided the money between the men, keeping a cut for himself; Thurman knew about the crimes, but had not participated, and Patterson was unsure why Thurman received a portion of the money. Patterson said that after they split the money, he went home.

The victims notified the police. Wells recognized Pence because he had not concealed his identity, and she and Pence had attended the same high school. Wells identified Pence by name to police officers called to the scene. Later that same day, Pence was arrested. Pence entered into a plea arrangement in exchange for information regarding the other four men involved in the crimes. Officers recovered the broken safe and the chair leg from Kukuk's home. Later, Patterson texted Kindell to tell him Pence had been arrested for the burglary. A day or two later, Patterson again contacted Kindell, this time saying that he and Kukuk had left town. The Lawrence police eventually caught up with Patterson in California.

***3** The State charged Patterson with four counts of aggravated robbery and one count of aggravated burglary. The State later amended the information to drop one count of robbery and add a count of aggravated battery. The case proceeded to a jury trial, where Kindell testified that Patterson stayed with the group throughout the planning and execution of the robbery. Kindell also testified that Patterson never objected, attempted to stop the others, or thwarted the plan in any way.

Like Kindell, Pence remembered Patterson being present during the planning stages. In fact, Pence specifically recalled that Patterson called him to help in the first place. He also remembered Patterson and Kindell standing at the front door while he, Johnson, and Kukuk raided the apartment.

Johnson testified that other than leaving briefly to deal with his girlfriend, Patterson remained with the group as they discussed the robbery. He also recalled driving past the apartment with Patterson and others before they actually carried out their plan. Pence and Johnson remembered Patterson riding along to pick up Pence, and no one recalled Patterson protesting or backing out of the robbery at any time. Johnson characterized Patterson as generally agreeing with the plan.

The jury convicted Patterson of all but the aggravated battery charge. The district court granted Patterson's motion for downward departure to a controlling sentence of 22 months and ordered joint and several liability with the other four codefendants for restitution in an amount of $1,496.13. The district court found that a firearm was involved in the crimes and that Patterson was aware that a firearm was involved in the crimes, and so ordered that Patterson be required to register as a violent offender for 15 years.

ANALYSIS

Patterson raises four issues on appeal: (1) the prosecutor committed reversible error by arguing to the jury that it could find him guilty of aiding and abetting based on the fact that he opened the safe, an act which occurred after the crimes were complete; (2) the court violated his constitutional rights under *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), by failing to have the jury determine whether a deadly weapon was involved in committing the crimes at issue here; (3) the criminal statutory scheme under which he is required to pay restitution is unconstitutional in that it bypasses a victim's right to a civil jury trial for damages; and (4) the court violated his

constitutional rights under *Apprendi* by failing to have the jury make any factual findings necessary related to the court's order requiring him to pay restitution. We address each of the issues raised by Patterson in turn.

1. *Prosecutorial error*

At trial, the State's theory of the case revolved around Patterson as an aider and abettor. In other words, the State argued that even if Patterson never handled the gun or entered the apartment, he aided, assisted, and encouraged the others to participate. While outlining this theory in her closing argument, the prosecutor said,

> "[I]n determining [whether Patterson intentionally aided another in committing the crimes], you can consider all the evidence of what the defendant did before, during, and immediately after."

The prosecutor continued from there, highlighting Patterson's role in the planning, his presence during the actual crime, and his prying open the safe; then she discussed evidence of his mindset and consciousness of guilt.

***4** Patterson alleges the isolated portion of the State's argument urging the jury to consider Patterson's behavior after the crime (specifically, his opening the safe) amounts to prosecutorial reversible error. Patterson made no objections to the State's closing argument at trial; however, such an objection was not necessary to preserve the issue for appeal. A claim of prosecutorial error based on comments made during voir dire, opening statements, or closing argument (that are not evidence) will be reviewed on appeal even when a contemporaneous objection was not made at the trial level. *State v. Anderson*, 294 Kan. 450, 461, 276 P.3d 200 (2012); see *State v. Roeder*, 300 Kan. 901, 932, 336 P.3d 831 (2014) (statements during closing argument). Further, a misstatement of controlling law must be reviewed on appeal, regardless of a timely objection at trial, to protect a defendant's right to due process. When a misstatement of controlling law is made deliberately, it is outside the considerable latitude given to prosecutors during their arguments. *State v. Gunby*, 282 Kan. 39, 63, 144 P.3d 647 (2006).

Recently, our Supreme Court reevaluated several years of caselaw and established an improved two-step framework for evaluating claims of prosecutorial error. *State v. Sherman*, 305 Kan. 88, 378 P.3d 1060 (2016).

> "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* 132 S. Ct. 1594 (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.]" *Sherman*, 305 Kan. at 109.

In support of error, Patterson claims the prosecutor misstated the law by arguing to the jury that it could consider the behavior of a defendant after a crime has been committed to determine whether a defendant shares liability for the crime with the principal under an aiding and abetting theory of prosecution. Patterson cites to *State v. Davis*, 283 Kan. 569, 158 P.3d 317 (2006), which he argues stands for the legal proposition that a defendant's behavior after the crime can never be considered in an aiding and abetting case. But Patterson's reliance on *Davis* is misplaced, as both the facts and the law are readily distinguishable from the facts and law presented here.

In *Davis*, the defendant claimed the district court erred in failing to give an instruction directing the jury to consider

the testimony of an accomplice witness with caution. PIK Crim. 3d 52.18 pertains to accomplice witness testimony and specifically provides that it applies to witnesses who testify that they were " 'involved in the commission of the crime with which the defendant is charged.' " 283 Kan. at 576. Davis argued the instruction was factually proper because the witness testified that she was involved in events that occurred after the crime was committed, which made her an accessory after the fact. But the court disagreed, holding that a witness who qualifies only as an accessory after the fact is not enough to warrant an accomplice witness instruction. In order for an accomplice witness instruction to be factually proper, the court held that there must be evidence that the witness participated in the crime with which the defendant is charged. *Davis*, 283 Kan. at 577–80 (although witness may have been involved with events after the murder, only evidence at trial regarding witness' whereabouts and involvement was offered by witness herself, who testified that she was *not* present at time of the murder and there was no evidence that she otherwise participated in the planning or commission of the murder other than the events that occurred after the murder). In *Davis*, the court had to decide whether a witness was an accomplice to determine if an accomplice witness jury instruction was legally and factually proper. The decision we must make here, however, is if a defendant's actions after a crime are relevant to whether that defendant shares liability for the crime as an aider and abettor.

***5** An individual aids and abets another—and is therefore criminally liable for that person's crime—if he or she "advises, hires, counsels or procures the other to commit the crime or intentionally aids the other in committing the conduct constituting" that crime. K.S.A. 2016 Supp. 21-5210(a). That individual must also act "with the mental culpability required for the commission" of the crime in question. K.S.A. 2016 Supp. 21-5210(a). As presented in the jury instructions, the State pursued the theory that Patterson "intentionally aid[ed] another to commit the crime."

Many Kansas cases have considered what behaviors constitute aiding and abetting. Specifically, "the law requires that the person knowingly associates with the unlawful venture and participates in a way which indicates that such person is furthering the success of the venture." *State v. Baker*, 287 Kan. 345, Syl. ¶ 7, 197 P.3d 421 (2008). As such, "[m]ere association with the principals who actually commit the crime or mere presence in the vicinity of the crime is itself insufficient to establish guilt as an aider and abettor." 287 Kan. 345, Syl. ¶ 7. However, " 'if from the facts and circumstances surrounding the defendant's presence at the time and from the defendant's conduct it appears that the defendant's presence did in fact encourage someone else to commit the criminal act, guilt may be inferred.' " *State v. Bland*, 33 Kan. App. 2d 412, 417–18, 103 P.3d 492 (2004). If there is no direct evidence showing that the defendant planned " 'to encourage, incite, aid, abet, or assist in the crime,' " the jury is still permitted to consider the defendant's failure " 'to oppose the commission of the crime in connection with other circumstances' " and to therefore conclude " 'that the [defendant] assented to the commission of the crime ... and thereby aided and abetted the commission of the crime.' " 33 Kan. App. 2d at 418. With that said, "failing to stop or report a crime is not the basis for liability under an aider and abettor theory" without additional indicators of the defendant's intention to " 'further[ ] the success of the venture.' " *State v. Simmons*, 282 Kan. 728, 738, 148 P.3d 525 (2006).

Based on the applicable law as cited above, we find the prosecutor did not err by arguing to the jury that it could consider the fact that Patterson opened the safe in deciding whether Patterson was guilty of the crimes charged under an aiding and abetting theory. In making this finding, we acknowledge that opening the safe is not an element of the underlying crimes of aggravated burglary or of aggravated robbery and that Patterson opened the safe after the crimes were complete. But to prove the burglary charge in this case, the State needed to show that Patterson shared the intent to commit a theft inside the apartment. Theft requires an intent to permanently deprive. See K.S.A. 2016 Supp. 21-5801(a). Patterson's help opening the safe, removing the money, and keeping his share of the proceeds is the clear evidence of this intent. Patterson's concession that he opened the safe and took his cut of the marijuana and money found inside—which he knew had just been stolen from the victims' apartment—is relevant evidence from which a jury could conclude that Patterson was not merely present in the vicinity of the crimes committed but instead intentionally associated with the unlawful venture and participated in a way which indicated that he was furthering the success of the venture. See *Baker*, 287 Kan. 345, Syl. ¶ 7. Because it is relevant to Patterson's intent, the prosecutor did not misstate the law by telling the jury they could consider as a factor Patterson's conduct immediately after the crimes in determining his culpable state of mind. See *Sherman*, 305 Kan. at 109.

***6** And contrary to the characterization of events in his appellate brief, Patterson did not stand idly by while his companions plotted and carried out the robbery. Patterson participated in or at least listened extensively to the planning stages of the robbery. Patterson watched as Kukuk and Johnson armed themselves. Pence testified that it was Patterson who called to ask him to participate in the crime, and Patterson admitted he went with the others to pick Pence up after Pence agreed to take part in the robbery. Patterson also admitted that he knew Pence was invited to join them because

he's "crazy," and would provide "an extra body" and "muscle." After the men finalized their plan, Patterson concealed his face and accompanied the others to the apartment. Patterson and Kindell stepped inside the apartment and waited by the front door in the living room as Pence, Kukuk, and Johnson rushed inside. Patterson admitted that as he stood guard, "[Johnson] was just cracking people. ... He was just so on fire ... so mad," and that he heard screaming coming from upstairs, someone yelling, "I'm sorry" and "I don't have any weed." Patterson also reported that when one of the men who lived in the apartment came downstairs and saw him standing by the door, he made sure the resident could not see his face. At no time did Patterson protest, back out, object, or disapprove of the plan to rob Adams, Salmons, and Mathur. From the initial planning stages until the distribution of the proceeds, the evidence at trial demonstrates Patterson intended to associate with the unlawful venture and to participate in a way which would further the success of the venture. See *Baker*, 287 Kan. 345, Syl. ¶ 7.

2. *Registration requirement*

Patterson next argues that the district court violated his Sixth and Fourteenth Amendment rights under *Apprendi* when it found that the crimes of conviction had been committed with a deadly weapon and ordered him to register as a violent offender. Patterson acknowledges that he never raised this issue with the district court. Generally, constitutional grounds for reversal asserted for the first time on appeal are not properly before the appellate court for review. *State v. Godfrey*, 301 Kan. 1041, 1043, 350 P.3d 1068 (2015). There are several exceptions to this general rule, and review of an issue raised under *Apprendi* is considered one of these exceptions "to prevent the denial of a fundamental right." *State v. Wheeler*, No. 114,518, 2016 WL 5853090, at *1 (Kan. App. 2016) (unpublished opinion), *petition for rev. filed* October 28, 2016.

Whether a defendant's constitutional rights have been violated is a question of law that we review without any required deference to the district court. *State v. Unrein*, 47 Kan. App. 2d 366, 369, 274 P.3d 691 (2012). Under the Kansas Offender Registration Act, a district court can order a defendant to register as a violent offender if (among other reasons) the defendant is convicted of a person felony and the court makes a finding on the record that a deadly weapon was used in the commission of that person felony. K.S.A. 2016 Supp. 22-4902(e)(2). In this case, Patterson was convicted of three counts of aggravated robbery and one count of aggravated burglary, and the district court found that a deadly weapon was used to commit those crimes, so it ordered him to register as a violent offender for the next 15 years. *Apprendi* held that because of the Sixth Amendment right to a jury trial and the Fourteenth Amendment right to due process, "[o]ther 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." 530 U.S. at 476–85, 490. So Patterson argues that the district court violated *Apprendi* because ordering him to register as a violent offender increased the penalty for his crime and was based on a court finding that had not been proved to a jury beyond a reasonable doubt.

But Patterson's argument is grounded in the legal principle that registration as a violent offender constitutes punishment. If registration is not punishment, then *Apprendi* does not apply. Our court has held on several occasions that a registration requirement does not increase the penalty for a crime beyond the legal maximum because registration is separate from and does not impact the length of a defendant's sentence. *Unrein*, 47 Kan. App. 2d at 372; *State v. Chambers*, 36 Kan. App. 2d 228, 238–39, 138 P.3d 405 (2006). Based on those cases, requiring a defendant to register as a violent offender, even when the finding that triggers registration is made by the court rather than a jury, does not violate *Apprendi*. *Unrein*, 47 Kan. App. 2d at 372; *Chambers*, 36 Kan. App. 2d at 238–39.

***7** Whether our prior rulings on this question are still good law is put in some doubt by our Supreme Court's ruling in *State v. Charles*, 304 Kan. 158, 178, 372 P.3d 1109 (2016). In that case, the Kansas Supreme Court reached the opposite conclusion, holding that because a registration requirement qualifies as a type of punishment, imposing registration effectively increases the penalty for a crime. *Charles*, 304 Kan. at 178. Under this reasoning, imposing registration without a jury finding that the defendant used a deadly weapon would violate *Apprendi*. But once the Kansas Supreme Court gives an indication that it is departing from its own precedent, we are no longer bound to follow that precedent. *Heartland Presbytery v. Presbyterian Church of Stanley, Inc.*, 53 Kan. App. 2d 622, Syl. ¶ 10, 390 P.3d 581 (2017). And the Kansas Supreme Court has given a strong indication that *Charles* is not good law anymore. The ruling in *Charles* was based on a case published on the same day, *Doe v. Thompson*, 304 Kan. 291, 373

P.3d 570 (2016), overruled by *State v. Petersen–Beard*, 304 Kan. 192, 377 P.3d 1127 (2016). *Thompson*, a four-to-three decision, held that the registration requirement was a type of punishment; therefore, the Ex Post Facto Clause of the United States Constitution applied to prevent retroactive application of amendments to the registration statutes. 304 Kan. 291, Syl. ¶ 7. But *Thompson* was overruled on the day it was issued: *Petersen–Beard*, with a different four-judge majority, held that the registration requirement could not be challenged as cruel and unusual punishment under either the United States or the Kansas Constitutions because it was not a type of punishment. 304 Kan. 192, Syl. ¶¶ 1–2.

Petersen–Beard did not expressly overrule *Charles*, but it did expressly overrule *Thompson*. And in *Charles*, the court noted that the *Petersen–Beard* holding—which is the exact opposite of the *Thompson* holding that *Charles* relied on—"may influence whether the [registration-requirement] holding of this case is available to be relied upon by violent offenders whose appeals have yet to be decided." *Charles*, 304 Kan. at 179. So while *Charles* is exactly on point and has not been expressly overruled, we have an indication, both from the *Charles* court and from the differently constituted *Petersen–Beard* court, that the Supreme Court is departing from the position that an *Apprendi* violation occurs when the court requires a defendant to register based on its finding that a deadly weapon was used in the felony of conviction. See *State v. Secrest*, No. 115,565, 2017 WL 543546, at *4–5 (Kan. App. 2017) (unpublished opinion), *petition for rev. filed* March 9, 2017; *State v. Brown*, No. 114,808, 2016 WL 7429424, at *8–9 (Kan. App. 2016) (unpublished opinion), *petition for rev. filed* January 18, 2017.

For the reasons stated above, we conclude that *Charles* is no longer good law. Thus, the district court did not violate *Apprendi* when it found that a deadly weapon was used in the commission of Patterson's felony convictions. See *Secrest*, 2017 WL 543546, at *5 (no *Apprendi* violation in these circumstances); accord *State v. Perez–Medina*, No. 114,589, 2017 WL 262025, at *6 (Kan. App. 2017) (unpublished opinion), *petition for rev. filed* February 21, 2017; *Brown*, 2016 WL 7429424, at *8–9; *Wheeler*, 2016 WL 5853090, at *3; *State v. Campbell*, No. 114,167, 2016 WL 3407598, at *6 (Kan. App. 2016) (unpublished opinion), *rev. denied* April 26, 2017.

3. *Restitution and the common-law right to civil jury trial*

Patterson argues that the Kansas criminal restitution scheme is facially unconstitutional because it encroaches on a criminal defendant's common-law right to a civil jury trial without offering anything in return. Patterson acknowledges that he did not raise this issue before the district court. He did not object to any portion of his sentence at sentencing and did not dispute the amount of restitution ordered.

Constitutional grounds for reversal asserted for the first time on appeal are not properly before an appellate court for review. *Godfrey*, 301 Kan. at 1043. However, there are three exceptions to this rule: (1) The newly asserted theory involves only a question of law arising on proved or admitted facts and is finally determinative of the case; (2) consideration of the theory is necessary to serve the ends of justice or to prevent the denial of fundamental rights; and (3) the judgment of the district court may be upheld on appeal despite its reliance on the wrong ground or having assigned a wrong reason for its decision. *State v. Phillips*, 299 Kan. 479, 493, 325 P.3d 1095 (2014). Patterson contends that this court should review the merits of his claim because two exceptions apply: the issue only involves a question of law arising on proved or admitted facts that is finally determinative of the case, and the consideration of the claim is necessary to serve the ends of justice or to prevent a denial of his fundamental rights. The State argues that Patterson should be prohibited from raising this argument for the first time on appeal because he did not raise it below and, in the alternative, the argument is without merit.

***8** Patterson concedes in his brief that a panel of this court previously held the issue he raises was not reviewable for the first time on appeal. *State v. Jones*, No. 113,044, 2016 WL 852865, at *9 (Kan. App. 2016) (unpublished opinion), *petition for rev. filed* March 30, 2016. The *Jones* court disagreed that either exception was applicable:

> "The first exception does not apply because the determination of Jones' restitution claim is not finally determinative of the case. The second exception does not apply because it cannot be argued that consideration of the issue is necessary to serve the ends of justice or to prevent a denial of fundamental rights when Jones did not even object to the imposition of or the amount of restitution at sentencing. See *United States v. Dudley*, 739 F.2d 175, 179 (4th

> Cir. 1984) (appellate court refused to consider restitution issue for first time on appeal when defendant failed to object to restitution in district court). Therefore, we reject Jones' constitutional issue as not properly preserved for appellate review." 2016 WL 852865, at *9.

See also *State v. Bradwell*, No. 115,153, 2016 WL 7178771, at *4 (Kan. App. 2016) (unpublished opinion) (following *Jones*). Like in *Bradwell*, a determination of Patterson's restitution claim is not finally determinative of his criminal appeal, and Patterson did not object to his sentence or the restitution ordered; therefore, the issue is not properly preserved for appellate review.

4. *Restitution as punishment*

Finally, Patterson argues that the Kansas criminal restitution scheme is punitive, as it requires a mandatory minimum amount of money to be determined by a judge, and thus violates *Apprendi*. Patterson again acknowledges that he did not raise this issue to the district court. Suggesting that the Kansas criminal restitution scheme is a sentencing scheme, and therefore appropriate for an *Apprendi* challenge, Patterson argues that review is proper because consideration of the issue involves only a question of law arising on proved or admitted facts that is finally determinative of the case and is necessary to serve the ends of justice or to prevent a denial of his fundamental rights. The State contends that, in light of the holdings in *Jones* and *Bradwell*, Patterson's claimed exceptions are inapplicable.

The *Jones* court addressed this same issue and Jones' failure to raise it to the district court:

> "Again, Jones failed to raise this issue before the district court, and we find no applicable exception to address the issue for the first time on appeal. Although we decline to address the merits of Jones' claim, we note in passing that this court previously has held that the imposition of restitution in a criminal case does not implicate *Apprendi.* See *State v. Huff,* 50 Kan. App. 2d 1094, 1103–04, 336 P.3d 897 (2014), *rev. denied* 302 Kan. [1015 (2015)]." 2016 WL 852865, at *9.

While Patterson attempts to distinguish *Huff* from the facts of this case, he fails to acknowledge the weight of caselaw that distinguishes restitution orders from sentencing schemes reviewable under *Apprendi*. See, *e.g.*, *United States v. Burns*, 800 F.3d 1258, 1261–62 (10th Cir. 2015) (*Apprendi*'s rule has no application to restitution). As restitution does not implicate *Apprendi*, no exceptions apply to warrant review of this issue for the first time on appeal.

***9** Affirmed.

All Citations

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417 P.3d 268 (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.
Taylor ARNETT, Appellant.

No. 112,572
|
Opinion on remand filed May 4, 2018.

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

Attorneys and Law Firms

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Before Atcheson, P.J., Schroeder, J., and Hebert, S.J.

MEMORANDUM OPINION

Per Curiam:

***1** After granting a petition for review in this case, the Kansas Supreme Court held that restitution may be ordered against a defendant in a criminal case if the loss to the victim was proximately caused by the crime of conviction. *State v. Arnett*, 307 Kan. 648, Syl. ¶ 7, 413 P.3d 787 (2018). The court reversed this panel's decision that the State failed to show a sufficient causal connection for restitution between Defendant Taylor Arnett's plea to and conviction for conspiracy to commit burglary and the financial loss to two victims whose homes were burglarized by her coconspirators, who stole a substantial amount of personal property. See *State v. Arnett*, No. 112,572, 2015 WL 6835244 (Kan. App. 2015) (unpublished opinion). The court found both that the panel applied too strict a causation standard and that the Wyandotte County District Court made sufficient factual determinations to establish proximate cause supporting its restitution order for $33,248.83. 307 Kan. at 654-56.

Because the panel reversed the restitution order on causation grounds, it did not address Arnett's alternative arguments against the order. 2015 WL 6835244, at *3. The Supreme Court has remanded the case for the panel to now consider those arguments: (1) The State failed to establish the amount of the property loss at the restitution hearing; (2) the statutory restitution scheme violates § 5 of the Kansas Constitution Bill of Rights; and (3) the scheme cannot be reconciled with a criminal defendant's right to have a jury find certain facts enhancing punishment as required by *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L.Ed. 2d 435 (2000). *Arnett*, 307 Kan. at 656.

We now take up those points and find them unavailing. We, therefore, affirm the district court's restitution order.

As to the first, Arnett did not dispute the amount of requested restitution at the district court hearing. She, therefore, cannot do so for the first time on appeal. See *State v. Thach*, 305 Kan. 72, 81, 378 P.3d 522 (2016).

As to the second, Arnett cites § 5 of the Kansas Constitution Bill of Rights recognizing "[t]he right of trial by jury shall be inviolate." She argues that at common law, crime victims could seek compensation from defendants only through civil actions for damages. Under the common law, as outlined by Arnett, the victims would be entitled to have juries hear those actions, and the defendants would have a correlative right to request a jury trial. Arnett contends restitution impermissibly compromises that right and provides no "quid pro quo" substitute, thereby violating § 5 of the Bill of Rights.

The argument fails. First, restitution does not legally supplant civil actions. A crime victim may still file a civil suit against a criminal defendant to recover money damages. Most don't simply because few criminal defendants have ready assets (or realistic prospects for acquiring assets) sufficient to make the effort worthwhile. Either party, however, could request a jury trial.

***2** More generally, Arnett's argument fails because the substitute remedy or quid pro quo requirement applies when the Legislature extinguishes or substantially curtails a common-law cause of action for damages, thereby implicating both § 5 and § 18 of the Kansas Constitution Bill of Rights. Section 18 provides: "All persons, for injuries suffered in person, reputation, or property, shall have remedy by due course of law, and justice administered without delay." In tandem, those provisions require that the Legislature provide an adequate substitute remedy for the curtailment or elimination of a common-law claim. See *Miller v. Johnson*, 295 Kan. 636, 654-55, 289 P.3d 1098 (2012). The prototypical example has been the State's workers compensation system that replaced common-law tort actions for employment related injuries with an administrative process largely aimed at providing prompt, if more limited, recompense without regard to fault or negligence. See *Injured Workers of Kansas v. Franklin*, 262 Kan. 840, 852, 942 P.2d 591 (1997). Workers compensation was deemed a constitutionally adequate substitute remedy, despite the elimination of jury trials, because it afforded financial relief to a significantly greater number of injured workers than did fault-based negligence law.

Arnett has no grounds to assert a constitutional deprivation of any of her rights otherwise protected in §§ 5 and 18 as a result of the district court's restitution order. In short, restitution does not deprive Arnett of a remedy for any injury she has suffered. Here, Arnett inflicted the injury. The Legislature was not obligated to provide her or any other criminal defendant with some quid pro quo or substitute remedy when it required payment of restitution. If restitution had been enacted as the sole remedy for crime victims seeking compensation from convicted perpetrators, those victims might have an argument their rights under § 5 and particularly under § 18 had been impermissibly curtailed. But Arnett—as a convicted criminal defendant—can make no corresponding argument that a restitution order violates her constitutional rights.

Finally, Arnett contends *Apprendi* and its application in *Alleyne v. United States*, 570 U.S. 99, 103, 133 S. Ct. 2151, 186 L.Ed. 2d 314 (2013), prohibit judicially imposed restitution as a violation of her right to jury trial under the Sixth Amendment to the United States Constitution and her right to due process under the Fourteenth Amendment. Those cases recognize that a fact used to impose a punishment greater than either a statutory mandatory minimum punishment or a statutory maximum punishment must be found by a jury beyond a reasonable doubt. *Alleyne*, 570 U.S. at 103; *Apprendi*, 530 U.S. at 476. Arnett's argument fails for two reasons.

First, restitution is not considered punishment in the same way incarceration or a fine paid to the State would be. Rather, it is a rehabilitative and compensatory tool designed to aid both convicted criminals and their victims. See *State v. Huff*, 50 Kan. App. 2d 1094, 1100, 336 P.3d 397 (2014); *State v. Heim*, No. 111,665, 2015 WL 1514060, at *2 (Kan. App. 2015) (unpublished opinion) ("Restitution is intended to fairly compensate crime victims and to further the rehabilitation of defendants by instilling in them some sense of the costs their wrongdoing has inflicted."). Although a district court typically enters a restitution order during a sentencing hearing, that doesn't make the order a form of punishment.

Even if restitution were considered punitive and, thus, punishment, Arnett's argument fails. The Kansas statutes governing restitution impose neither mandatory minimum amounts nor maximum amounts. See K.S.A. 2017 Supp. 21-6604(b)(1); K.S.A. 2017 Supp. 21-6607(c)(2). A mandatory minimum would be a specified amount a convicted

defendant would have to pay a victim even if the victim had little or no financial loss. The statutes require no such obligation. The statutes, likewise, impose no cap or upper limit on restitution that might be exceeded only in exceptional circumstances or upon proof of statutorily identified facts. So even if restitution were punitive, the scheme does not entail mandatory minimums or maximums triggering the protections set out in *Alleyne* and *Apprendi*.

***3** Arnett has presented no arguments that undercut the district court's restitution order.

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 Boyd Isherwood, Chief Attorney, Sedgwick County, Appeals Division, at appeals@sedgwick.gov; and by e-mailing a copy to Derek Schmidt, Attorney General, at ksagappealsoffice@ag.ks.gov on the 2nd day of August, 2019.

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