No. 20-122782-A

IN THE
COURT OF APPEALS OF THE
STATE OF KANSAS

STATE OF KANSAS
Plaintiff-Appellee

vs.

DZUNG N. NINH
Defendant-Appellant

BRIEF OF APPELLANT

Appeal from the District Court of Sedgwick County, Kansas
Honorable Jeffrey L. Syrios, Judge
District Court Case No. 17 CR 3023

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

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Nature of the Case

This is Dzung Ninh's direct appeal.

Issues Presented

Issue 1. **The State failed to prove TNV was overcome by force and/or fear, an element of rape and aggravated criminal sodomy. Mr. Ninh's convictions for Counts 2-6 must be vacated.**

Issue 2. **In its closing argument, the State misstated the evidence and the law, argued facts not in evidence, and made comments to inflame and distract the jury. These errors prejudiced Mr. Ninh and require reversal.**

Issue 3. **The "it shall not be a defense that the offender did not know or have reason to know" language in K.S.A. 21-5503(e) and K.S.A. 21-5504(f) renders K.S.A. 21-5503(a)(1)(A) and K.S.A. 21-5504(b)(3)(A) unconstitutionally vague because those subsections lack sufficient warning for people to avoid unlawful conduct, thus leading to arbitrary enforcement.**

Issue 4. **The State violated Mr. Ninh's federal and constitutional, as well as statutory, rights to unanimous verdicts. At a minimum, Section 5 of the Kansas Constitution calls for immediate reversal.**

Statement of the Facts

The State's theory at trial was Mr. Ninh molested his stepdaughter, TNV, off and on from the time she was 13 to a day in September 2017 when she was 17. (R. 9: 15-18). TNV testified about these allegations. (R. 9, generally). Mr. Ninh's defense was TNV set him up on September 7, 2017, and the other allegations didn't happen but were made up to support the

false rape claim of September 7. (R. 9: 24-25). At trial, TNV and her boyfriend, Seth Watkins, indeed testified that they made a plan to get Mr. Ninh in trouble by having Seth watch via computer as TNV had a sexual encounter with Mr. Ninh on September 7. (R. 9: 292-93, 313; R. 10: 160).

The State chose to charge Mr. Ninh with seven counts, divided by school year: one count of aggravated indecent liberties for when TNV was 13; two counts of rape for touching when TNV was a freshman; one count of rape for touching and one count of aggravated criminal sodomy for when TNV was a sophomore; two counts of aggravated criminal sodomy for when TNV was a junior; and one count of rape for September 7, when TNV was a senior. (R. 1: 258-60). The jury acquitted Mr. Ninh of Count 7, i.e. rape on September 7, 2017, but convicted him of the remaining counts. (R. 1: 353-54). TNV was not at sentencing, and there was no victim impact statement in the presentence investigation report. (R. 2: 6; R. 11: 90). TNV's mother was there, but did not make a statement. (R. 11: 90). The State asked for all counts to run consecutively. (R. 11: 91-92). The court denied Mr. Ninh's departure motion, and imposed a controlling sentence of life (no possibility of parole for 25 years) plus 165 months. (R. 11: 100-02). Mr. Ninh filed a timely and comprehensive notice of appeal. (R. 1: 333).

The family structure and dynamics presented at trial

TNV was born July 13, 2000 in Vietnam. (R. 9: 56). For the first six years of her life, she lived with her mother, Xuan; her younger sister, KV, was born in February 2003. (R. 9: 56; R. 16, Defense Exhibit A). In 2005, Xuan started a romantic relationship with Mr. Ninh. (R. 10: 122). In 2007, Xuan and Mr. Ninh moved to the U.S., and married in 2008; TNV and KV remained in Vietnam with their aunt, where TNV lived until she was almost 13. (R. 9: 56; R. 10: 100; R. 16: Defense Exhibit A). When she and KV came to the U.S. in April 2013, they rejoined their mother, as well as Mr. Ninh and two children Xuan and Mr. Ninh had together: a son (born in 2007) and a daughter (born in 2009). (R. 9: 56; R. 10: 103; R. 16, Defense Exhibit A). All six of them lived in a one-floor, three-bedroom house; all the bedrooms were off the same hallway. (R. 9: 60, 64; R. 10: 126). TNV and KV shared a room with twin beds, the parents shared a room, and the two younger children shared a room. (R. 9: 64; R. 10: 124). At one point, KV and TNV didn't have a door on their bedroom because KV had thrown a tantrum. (R. 9: 78).

Before she came to the U.S., TNV "wasn't used to having somebody, like, a father figure in my life just to tell me, you know, this is what you're supposed to do or whatnot." (R. 9: 66-67). As TNV got older, she did not like the rules in her house, especially once she had a boyfriend. (R. 9: 185-86, 192, 198; R. 10: 135, 143). She could only use the laptop in the dining room, and

only for certain hours. (R. 9: 192; R. 10: 137). TNV was upset about the rules, which Mr. Ninh primarily enforced. (R. 10: 137-38).

TNV and Seth Watkins, who were in the same grade at the same school, became boyfriend and girlfriend by January 2017. (R. 10: 143). They didn't get to see each other in person too much other than school. (R. 10: 149). Seth worked some evenings, so that cut into their time to talk over Google Hangouts. (R. 10: 192, 196). TNV tried to rebel against the house rules and tried to sneak additional time on the laptop. (R. 10: 198). The internet restrictions, which Seth didn't have, were a real frustration. (R. 10: 199, 205).

In the summer of 2017, Seth and TNV were "having some problems, because she wasn't very honest with [Seth] with a lot of things." (R. 10: 147). He "caught her lying a few times," so he "questioned her about the whole incident with her father, trying to make sure that this is real." (R. 10: 147). After he and TNV talked, Seth told her she needed to tell her mother about what had been going on with Mr. Ninh. (R. 9: 134). TNV put a note in Xuan's lunch bag, telling her "dad's been touching me and I know I should have said this to you a long time ago but I was scared. I was afraid that this would do something to our family." (R. 9: 137). She and her mom talked about it the next day, but she didn't think Mr. Ninh knew. (R. 9: 140). Xuan asked TNV if she wanted to call the police, but TNV said no: "[TNV] and Dzung committed to each other, apologized to each other and they promise[d] not to do it again.

So she said she did not want to break [up] the family." (R. 10: 106). Xuan talked to a priest and Mr. Ninh, who said the touching was over long ago. (R. 10: 106-08). Xuan hadn't witnessed any inappropriate touching, and her other children never mentioned anything. (R. 10: 117).

Evidence admitted at trial about Count 7

The jury acquitted Mr. Ninh of Count 7, but it was a big part of the trial, for obvious reasons. Highly summarized, TNV testified at trial that she and Mr. Ninh had sexual intercourse on September 7—there was no conversation, and "it just happened." (R. 9: 148-49). She did not expect it to happen because nothing had happened in months. (R. 9: 158). That night, she told Seth what happened, and Seth was the one who told Xuan the next day after he asked her to pick him up at school. (R. 9: 157, 161; R. 10: 108-09). Xuan called the police. (R. 10: 112).

When TNV got home from school the next day, the police were at her house. (R. 9: 161). She talked to an officer, then she went to the Child Advocacy Center where a sexual assault exam took place, and then she talked with a detective. (R. 9: 175-76; R. 15: State's Exhibits 19 and 23). None of Mr. Ninh's DNA was found in TNV's vaginal or anal areas, but a swab of TNV's right breast was positive for saliva, and the DNA profile was "consistent with the profile of Dzung Ninh." (R. 11: 46, 52).

However, on cross-examination, TNV admitted that she arranged to have Seth watch her, via her laptop, having sex with Mr. Ninh in order to get him in trouble. (R. 9: 292-93). She did it "because of the restrictions around the house and what restrictions were put on for me to be able to want to keep up with the school work, do whatever it is around the house. [Seth and I] were only allowed four hours every two weeks or so to see each other at the library, and so it just really suffocated me." (R. 9: 293).

TNV admitted at trial that she set up her laptop on September 6 and 7 so that Seth could see her interacting with Mr. Ninh. (R. 9: 242-46). On September 6, TNV and Mr. Ninh talked for 2 ½ hours while Seth watched. (R. 9: 242-46; R. 10: 207-09). Nothing inappropriate happened. (R. 10: 211). On September 7, TNV got Mr. Ninh, brought him to the family room, and eventually engaged in sex acts with him. (R. 9: 251-59). Seth also admitted at trial that he and TNV "made a plan" to "make it look like Mr. Ninh was raping her": "[m]y plan was to frame Mr. Ninh." (R. 10: 160). TNV wanted Mr. Ninh out of the house because she was frustrated by the house rules. (R. 10: 227).

Evidence admitted at trial about Counts 1-6

Because of the issues Mr. Ninh raises in this appeal, the remaining facts are primarily arranged by count, and particular attention is paid to

evidence bearing on the elements of the offenses (i.e. overcome, by force or fear) and the level of detail TNV provided about the various time frames.

Count 1: August 15, 2013-May 30, 2014
(aggravated indecent liberties)

TNV told Detective Zander that the touching started in the summer before her 8th grade year. The first time was right after she turned 13, which was on July 13, 2000. (R. 15: State's Exhibit 23). She was sitting with Mr. Ninh, watching movies and using Photo Shop, when he put his hand under her shirt and then on top of her vagina. (R. 15: State's Exhibit 23). The second time was the next day. They were at the computer in the living room when Mr. Ninh touched her breasts and then her vagina over her clothes. She stood up and walked away, and Mr. Ninh didn't say anything. (R. 15: State's Exhibit 23). She told Detective Zander that it started happening a lot after that, but also that Mr. Ninh didn't touch her that much during 8th grade. (R. 15: State's Exhibit 23).

She told Detective Zander that "personally I know it was wrong but" she liked the attention. (R. 15: State's Exhibit 23, around 17:00). Mr. Ninh told her not to tell anyone. (R. 15: State's Exhibit 23). "I knew I had to tell him no but I didn't because I was scared"—she was finally back with her mother, and she didn't want their family to break apart. (R. 15: State's Exhibit 23, around 17:14).

At trial, TNV testified that after she turned 13, but before school started, she was sitting on Mr. Ninh's lap in front of his computer in the living room when he grabbed her breast. (R. 9: 73-74, 83-84). After that time, he would touch her under her clothes; it happened only at their house, when he got home from work, when they were at the computer. (R. 9: 74-75, 97). This happened when her siblings were home, but the touching usually stopped when someone came in the room. (R. 9: 92, 100). She described her reaction to this as "it's something that, you know, I've never done with you before. It's something new and different, and I was – I was at the age of 13 and it was something that – you know, that I'm curious about." (R. 9: 86).

She estimated that when she was in 8th grade, Mr. Ninh touched her breasts 15-20 times and her vaginal area, under her clothes, 5-6 times. (R. 9: 91, 96, 99). She and Mr. Ninh didn't talk about these touches; sometimes she would grab his hand and tell him to stop, but she didn't know if he heard her say it. (R. 9: 92-93). She also testified that if she told him not to do it, he wouldn't say anything in response but would stop. (R. 9: 95-96). It was a "different feeling" and she "honestly wanted to see what it is." (R. 9: 99). She testified she never thought about whether this was happening with her other siblings, and she didn't start to think it wasn't normal until Mr. Ninh told her one day, while she was cooking, not to tell anyone about these things. (R. 9: 99, 101-02).

TNV described how her mother and Mr. Ninh had "a really big falling out" when she was in 8th grade. (R. 9: 88). She didn't know what it was about, but her mom and biological dad used to fight, too, then got divorced—and she didn't want a repeat of that and have her siblings grow up without a father figure. (R. 9: 88).

Counts 2 and 3: August 15, 2014-May 30, 2015 (rape)

TNV told Detective Zander that around her freshman year, Mr. Ninh started coming into her bedroom, which she shared with her sister. (R. 15: State's Exhibit 23). He would do "his normal routine" of touching her nipple, but he did not put his finger inside her vagina. She said this happened 100 or more times. (R. 15: State's Exhibit 23).

At trial, TNV testified that in 9th grade, the touching was when she was sleeping or "when he thinks that my family is sleeping." (R. 9: 106). They were usually the last two people awake in the house. There was no door on the bedroom she shared with her sister. (R. 9: 109). He would touch her breasts and vagina; he would "run his finger between and then he started massaging it." The "between" was her labia, i.e. "[t]he skin flaps." (R. 9: 110). TNV didn't say anything when this happened. (R. 9: 111). She considered it "exploration" but "when it started to happen continuously I didn't want it to continue." (R. 9: 113). She "honestly [didn't] know" how many times it happened that year. (R. 9: 114). After it did happen, she would consider

telling her mom, "thinking, well, should I tell my mom and entirely break up my family or should I let this happen so that my siblings actually grew up with a father." (R. 9: 115).

Counts 4 and 5: August 15, 2015-May 30, 2016
(rape and aggravated criminal sodomy, respectively)

TNV told Detective Zander that during her sophomore year, Mr. Ninh started using his mouth on her, and did this 30-40 times. (R. 15: State's Exhibit 23). At trial, TNV testified about what "would typically happen the exact same way" that year as the one before; nothing else stood out "as being unique or different." (R. 9: 116). She started to wear a bra to bed so Mr. Ninh would "get the idea that … I didn't want this anymore." (R. 9: 119). He moved her bra out of the way and used his mouth on her breast, starting around January. (R. 9: 122). Mr. Ninh said nothing to her when it was happening. (R. 9: 128-29). Even though the State posed questions like "when you're 15 *and* 16" (emphasis added), TNV's testimony was she didn't know when Mr. Ninh started using his mouth on her vagina—it was in either her junior or senior year. (R. 9: 125-26, 129).

Count 6: August 15, 2016-May 30, 2017
(aggravated criminal sodomy)

TNV told Detective Zander that it happened so much less during her junior year, and around October 2016, Mr. Ninh completely stopped. (R. 15: State's Exhibit 23). At trial, TNV testified that during her junior year, it "was

probably once or twice" that Mr. Ninh came into her room and used his mouth on her. (R. 9: 129-30). She and Seth started talking and became boyfriend and girlfriend, "and it c[ame] to a point where nothing happened at all." (R. 9: 129). She remembered it was around August 30 or beginning of September that everything stopped. (R. 9: 130). TNV said two more times that it happened maybe "once or twice." (R. 9: 132).

Arguments and Authorities

Issue 1. The State failed to prove TNV was overcome by force and/or fear, which are elements of rape and aggravated criminal sodomy. Mr. Ninh's convictions for Counts 2-6 must be vacated.

Introduction

Even in the light most favorable to the State—which includes taking TNV's testimony and interview as true—the evidence did not prove that TNV was overcome by force or fear. To borrow a phrase from Mr. Ninh's trial attorney, don't take the attorneys' word for it—"[t]ake [TNV]'s word for it." (R. 19: 121). This Court must vacate Mr. Ninh's convictions in Counts 2-6.

Reviewability

By going to trial, Mr. Ninh raised the issue of sufficiency of the evidence. Also, a party may challenge the sufficiency of the evidence for the first time on appeal. *State v. Farmer,* 285 Kan. 541, 545, 175 P.3d 221 (2008). This issue is properly before this Court.

Standard of Review

When the sufficiency of evidence is challenged in a criminal case, the standard of review is whether, after review of all the evidence, viewed in the light most favorable to the prosecution, the appellate court is convinced that a rational factfinder could have found the defendant guilty beyond a reasonable doubt. *State v. Gutierrez*, 285 Kan. 332, 335, 172 P.3d 18 (2007).

Additional relevant facts

For the alleged incidents occurring when TNV was 14-17 years old (Counts 2-6), the State chose to charge rape and aggravated criminal sodomy—rather than other arguably appropriate-to-the-allegations offenses such as aggravated indecent liberties, incest, or even aggravated sexual battery—so it had to prove TNV was overcome by force or fear. The State started testing the waters on this element during voir dire. The State asked the venire: "How much force is required for us to call it rape?" and "How much does the person on the receiving end have to fight back? Do they have to fight back?" (R. 8: 30). She asked those questions a second time. (R. 8: 31). The State asked a woman with an 8-year-old how much force she uses to get her child to do chores, and if she ever spanks her child. (R. 8: 32-33). When the woman said she doesn't spank, the State replied, "[s]o you're able to get your child, your daughter, to comply, to do what you need them to do or want them to do without much force." (R. 8: 33).

Asking a third time "[h]ow much force is required before we call it rape," a juror who had worked in prisons for 27 years said he would want to see the legal definition—"obviously there's definitions." (R. 8: 7: 145; R. 8: 33). Finally, the State told them:

> So one of the elements for the charge of rape is that it's sexual intercourse when a person's consent has been overcome by force or fear. That's one theory or one method of rape, but it's up to the jury to decide if or what level of force or fear. Knowing that information, do you have in your mind a certain amount of force that would be required?

(R. 8: 34). A potential juror answered, "[p]robably have to listen to testimony," at which point the State moved on. (R. 8: 34).

As set out in the Statement of Facts, TNV's own words about why she did not stop the alleged encounters with Mr. Ninh were "I knew I had to tell him no but I didn't because I was scared"—she didn't want their family to break apart. She didn't want to repeat what happened in Vietnam between her mother and biological father. TNV didn't want her siblings to grow up without a father. (R. 9: 88; R. 15: State's Exhibit 23).

But the State pushed for more. During the State's direct examination of TNV, the words "fear" or "feared" came up three times: in two questions posed by the State, and in TVN's answer to one of them. (R. 9: 105, 191). The words "force", "forceful", or "forced" came up in six questions from the State, but only in one of TVN's answers (to one of the State's questions). (R. 9: 85, 192, 193, 194, 308). The State asked TNV what went through her mind

during the sexual contacts, and TNV said "I just thought, okay, he's doing what he usually does and I 'm just gonna let him do it because, you know, in my mind at the time it wasn't – I didn't think of it as a serious problem." (R. 9: 176).

The State asked her if she was "relieved, were you frustrated, were you angry or something else" when the contacts stopped. She "was just thinking, okay, well, since that's something I don't have to worry about right now[.]" (R. 9: 176-79). The State asked TNV if she felt "that there would be consequences if [she] demanded that those sexual contacts stop[ped] happening," to which she replied:

> You know, in my mind, if I don't do these things, I was scared or afraid that he was gonna either – like, I would just lose my Internet access completely. It was the only thing that was honestly the problem. Like, I guess I wanted to be able to, you know, not just sit in the house and read a book because, you know, I wanted to go on the Internet and watch movies or YouTube or whatnot. And so that's – I guess it's what I feared that would happen. Like, I would lose my phone, lose my Internet, lose, like, just access to going out to friends or just doing, like extracurricular activity at school or something like that.

(R. 9: 191).

The State asked TNV if she ever "thought about fighting back or being more forceful with him," and she said no: "I don't like the idea of fighting back. It's just that if I do, you know, fight back or say something about it, something might happen to me or my siblings or that was, like, what would – what usually would go through my head if I were to tell him off or something

like that." (R. 9: 192). The State tried again to get force testimony, asking TNV whether she was concerned "that if you pushed back more then your stepdad would use more force on you?" (R. 9: 193). TNV replied that she did think "a couple of times" that if she tried to tell him she didn't want this to happen any more, he might "forcefully just do the things that he does to me." (R. 9: 194).

In closing argument, the State argued that Count 1 did not require force, "but [TNV] starts to describe for you at the age of 13 the feeling she has as to why *she will eventually come to be forced* and why she *will eventually feel fear* when it comes to the defendant and his sexual advances." (R. 19: 109-10) (italics added). The "feeling" referred to as TNV "was scared that if she told her mother it would hurt the family....She doesn't want her younger siblings to grow up without a father the way she did, that it would hurt her siblings, it would break the family apart." (R. 19: 110-11). And "he controls the phone. He controls the Internet." (R. 19: 112).

In the final moments of the State's second half of its closing argument, the State summed up the evidence in support of the element of force like this:

> He's treating her like she's special. She described how that type of touching he would engage in all through her teenage years, it wasn't the type of touching where – you know, some rapists are sadists. Some of them cause pain. Some rapists use alcohol so a victim doesn't know or is incapacitated and can't respond back. *His form of force was grooming.*

> His form of force was making sure it felt good so that way, if nothing else, she was confused. If nothing else, she would feel pleasure. She describes feeling those sensations. She may have had orgasms or climaxed during these activities because he wanted to make sure she would keep giving it up to him, and that's the kind of force that is insidious in his actions. That's the kind of force that would prove to you that he is guilty of all of these counts.

(R. 19: 144-45) (italics added).

Relevant law

K.S.A. 2014 Supp. 21-5503(a)(1)(A), the subsection under which the State charged Mr. Ninh in Counts 2-4, provides: "[r]ape is … knowingly engaging in sexual intercourse with a victim who does not consent to the sexual intercourse . . . when the victim is overcome by force or fear." K.S.A. 2015 Supp. 21-5504(b)(3)(A), the subsection under which the State charged Mr. Ninh in Count 5 provides: "[a]ggravated criminal sodomy is … sodomy with a victim who does not consent to the sodomy … [w]hen the victim is overcome by force or fear." K.S.A. 2016 Supp. 21-5504(b)(3)(A), the subsection for Count 6, reads the same as the 2015 version. (R. 1: 258-60).

What constitutes force

For the purposes of K.S.A. 21-5503 (and, because the language is the same, K.S.A. 21-5504), whether the alleged victim is overcome by force is a question for the jury. The force required to sustain a rape conviction does not require the alleged rape victim to resist the assailant to the point of becoming the victim of a battery or aggravated assault. Kansas law does not require

that the alleged rape victim be physically overcome by force in the form of beating or physical restraint in addition to forced sexual intercourse. See *State v. Borthwick*, 255 Kan. 899, 910-11, 914, 880 P.2d 26 (1994).

Mr. Ninh could find no Kansas cases that supported the idea of "grooming" being a form of force. To the contrary, the "grooming" references counsel found suggested that grooming is not the actual sex act or the circumstance present at the time of it (i.e. force or fear), but rather things done in advance of the act that would make a person amenable to sexual advances or desensitized to them. See, *e.g.*, *State v. Berosik*, 352 Mont. 16, 23, 214 P.3d 776 (2009) (cited in *State v. Akins*, 298 Kan. 582, 604, 315 P.3d 868 (2014)). And it is a misstatement of law to not "acknowledg[e] that the intent and conduct must be simultaneously present." *Akins*, 298 Kan. at 606.

What constitutes fear and overcome

The *Borthwick* Court also "refused to define in absolute terms the degree of fear required to sustain a rape conviction, stating that 'fear is inherently subjective' because '[w]hat renders one person immobilized by fear may not frighten another at all.'" *State v. Brooks*, 298 Kan. 672, 685, 317 P.3d 54 (2014), quoting from *Borthwick*, 255 Kan. at 913. See also *State v. Tully*, 293 Kan. 176, Syl. ¶ 12, 262 P.3d 314 (2011) ("[f]orce or fear within the definition of rape is a highly subjective concept that does not lend itself to definition as a matter of law"). Consequently, the question of whether the

alleged rape victim "is overcome by fear for purposes of [the rape statute] is to be resolved by the jury." *Brooks*, 298 Kan. at 688.

In referring to "overcome by fear," the *Brooks* Court cited to Webster's Third New International Dictionary 1607 (1993) for "defining 'overcome' as 'to get the better of' and 'to affect or influence so strongly as to make physically helpless or emotionally distraught' and identifying 'overpower,' 'conquer,' and 'subdue' as synonyms of overcome." *Brooks*, 298 Kan. at 691.

Counts 2-6 required both "overcome" and "by force or fear"

The *Borthwick* Court concluded that rape "requires only a finding that [the alleged victim] did not give her consent and that the victim was overcome by force or fear to facilitate the sexual intercourse." *Borthwick*, 255 Kan. at 914. The *Brooks* Court held that "overcome by force or fear .... describes a factual circumstance that may prove a distinct, material element of rape — namely, having nonconsensual sexual intercourse with a victim who is 'overcome.'" *Brook*s, 298 Kan. at 681-82. "In other words, the actus reus ["guilty act"] of [rape] is 'to overcome.' *Brooks*, 298 Kan. at 682, 694.

Analysis

"In order to determine whether a rational factfinder could have found beyond a reasonable doubt that a victim of rape has been overcome by force or fear, we consider the record as a whole. Each case must be decided on its unique facts in arriving at this determination." *Borthwick*, 255 Kan. at 911.

The question for this Court is whether TNV's testimony is sufficient to support the rape and aggravated criminal sodomy convictions. The answer in this case is no.

No evidence TNV was overcome

Notably, the State never said what evidence supported that TVN was overcome—the only mentions it made of that element were conclusory, such as in referring to the jury instructions' language. (R. 19: 113, 115, 118, 139). At the end of its closing, the State seemed to meld three elements into one, and still did not explain how TNV was overcome: "even if you choose to believe that it was a set up, she still gets to maintain that boundary, and that's the boundary that on September 7, 2017 Mr. Ninh overcame by force or fear. That's the level, that's the area where [TNV] did not consent and that was what was overcome by that force and that fear." (R. 19: 139).

Furthermore, the State argued that Mr. Ninh's "force" in the form of "pleasure" was designed "to make sure she would keep giving it up to him." (R. 19: 145). But "give it up" is not being overcome *by force or fear*; it's "to give in to one's sexual urges in a quick manner; usually referring to females." See Urban Dictionary (last visited July 5, 2021)

The evidence from TNV's trial testimony and taped interview do not rise to the level of overcome: i.e. "'to get the better of' and 'to affect or influence so strongly as to make physically helpless or emotionally

distraught'" with synonyms being "'overpower,' 'conquer,' and 'subdue.'" See *Brooks*, 298 Kan. at 691. There was no evidence that Mr. Ninh forced TNV to sit on his lap at the computer or forced her into a room away from others. He did not say she had to do sexual things in exchange for her phone or internet. There was no evidence Mr. Ninh held TNV down, directed her to position herself in certain ways, blocked her from leaving, or told her something would happen if she refused. *Compare Brooks*, 298 Kan. at 674, 690. There was no evidence that TNV was physically helpless or powerless to stop what was happening. *Compare Borthwick*, 255 Kan. at 903. There was no evidence that TNV was emotionally distraught before, during, or after the incidents in the living room or her shared bedroom.

Even if what TVN said about July 2013 through August 2017 is true, she simply was not overpowered, conquered, or subdued by Mr. Ninh. Acquiescing is not being overcome. *Compare* definition of "overcome", *supra*, with "acquiesce" ("to accept, comply, or submit tacitly or passively;" synonyms include "assent," "consent," "accede," "agree," and "subscribe"), https://www.merriam-webster.com/dictionary/acquiesce (last visited July 5, 2021). The actus reus of rape is to overcome, and that was not present in this case. Justice Johnson's parting words in *Brooks* come to mind: "In sum, the State proved that Brooks committed a reprehensible act, but it did not prove

that he committed the statutory crime of rape." *Brooks*, 298 Kan. at 693, Johnson, J., dissenting.

Insufficient evidence of fear

While fear is an inherently subjective concept–"what renders one person immobilized by fear may not frighten another at all"–there still has to be reasonableness to the claim that the alleged victim was overcome by fear. *Borthwick*, 255 Kan. at Syl. ¶ 6. Again, there was no evidence of TNV being overcome. Furthermore, TNV wasn't fearful of her safety if she refused Mr. Ninh —she testified that she was scared to tell her mom that it was happening because she didn't want to break up their family. She feared that she would lose her internet access completely. "It was the only thing that was honestly the problem." (R. 9: 191). But that fear was not reasonable because she did not lose her internet access after she told her mom what had happened or once everything stopped in September or October 2016.

Insufficient evidence of force

On redirect, the State asked TNV if she felt like she was "being forced to submit to the actions your stepfather was doing?" (R. 9: 308).

> A. A lot of the time, yes, but not on September 7th.
> Q. And when we say forced, tell me what you mean by forced.
> A. As in if I don't do this it's not going to happen tonight or if I don't, like, let him have his way now it's going to happen eventually.
> Q. Better to get it over with now as opposed to just wait?
> A. Yes.

(R. 9: 308-09). Again, this is not "overcome" and this is not "force."

The State also argued that "his force was grooming," which cannot legally be the case. In *Akins*, the Court found the State committed prosecutorial misconduct by "misstating the law by arguing that grooming could establish Akins' sexual intent[.]" *Akins*, 298 Kan. at 600, 606. "Here, the prosecutor's statement implied that Akins' state of mind during past instances of 'grooming' was sufficient to establish the intent required for the crimes he later allegedly committed. But without acknowledging that the intent and conduct must be simultaneously present, it was a misstatement of law." *Akins*, 298 Kan. at 606.

While *Akins* was a misconduct issue dealing with the element of intent (i.e. intent to arouse or satisfy sexual desires), it supports Mr. Ninh's point that "grooming" is recognized as "*preparation for* acts of sexual abuse" and *not the acts themselves*. *Akins*, 298 Kan. at 606 (italics added). This means the State cannot rely on "grooming" as evidence toward an element of rape or aggravated indecent liberties because the conduct of force and the conduct of the sexual act have to occur simultaneously.

Conclusion

What TNV experienced in her high school years was regrettable, to say the least. But the element of "force" in the context of rape and aggravated criminal sodomy cannot be met by "grooming" and "pleasure." The element of

"fear" cannot be met by personally not wanting to go back to a single-parent household or losing internet access. What's more, there is no evidence that TNV was overcome. Because the State failed to prove all of the elements of rape and aggravated criminal sodomy, this Court must vacate Mr. Ninh's convictions for Counts 2-6.

Issue 2. In its closing argument, the State misstated the evidence and the law, argued facts not in evidence, and made comments to inflame and distract the jury. These errors prejudiced Mr. Ninh and require reversal.

Introduction

Prosecutorial error violates a defendant's fundamental right to a fair trial as guaranteed by the Fourteenth Amendment. *State v. Sperry*, 267 Kan. 287, 308, 978 P.2d 933 (1999); U.S. Const. amend. XIV. The State committed a number of errors during closing argument. Because the State will be unable to prove the errors didn't affect the outcome of this trial, reversal is required.

Reviewability

Mr. Ninh did not object to the State's comments in closing argument. However, a contemporaneous objection is not required in order for this Court to review a prosecutorial error claim based on remarks made during voir dire, opening statements, or closing argument. *State v. King,* 288 Kan. 333, 349, 204 P.3d 585 (2009).

Standard of Review

Appellate courts use a two-step process – error and prejudice – to evaluate claims of prosecutorial error. *State v. Sherman*, 305 Kan. 88, 109, 378 P.3d 1060, 1075 (2016). If error is found, the prejudice inquiry is subject to the constitutional harmlessness standard. *Sherman*, 305 Kan. at 109-10.

Analysis

Misstating the law, stating facts not in evidence, inflaming the jury's passions, and diverting the jury's attention are all error

"Prosecutors enjoy wide latitude in crafting closing arguments. [Citations omitted.] This latitude allows a prosecutor to make reasonable inferences based on the evidence, but it does not extend so far as to permit arguing facts not in evidence. [Citation omitted.] But arguments must remain consistent with the evidence." *State v. Coones*, 301 Kan. 64, 82–83, 339 P.3d 375 (2014). A prosecutor may not misstate the applicable law. *State v. Gunby,* 282 Kan. 39, 63, 144 P.3d 647 (2006). "A prosecutor should not make statements intended to inflame the prejudices of the jury or to divert the jury's attention away from its duty to decide the case based on the evidence and the controlling law." *State v. Witten*, 45 Kan. App. 2d 544, 553, 251 P.3d 74 (2011).

The first time the State mentioned "grooming" in this case overall was during Detective Zander's testimony, when it asked him if "escalation of

sexualized touching over a long period of time" had "any sort of specific terminology?"—to which Detective Zander replied, "Yes. They call it grooming behavior." (R. 1: 304-07; R. 19: 6). The State asked him if he had seen this "sort of grooming behavior" in other cases, and he said he had "many times." (R. 19: 6). The State differentiated those who "groom" from others who "use alcohol to incapacitate the person they want to have sexual intercourse with," which drew an objection. (R. 19: 7). The State rephrased and asked if "[f]orce can come in many different styles, many different types," including "[g]rooming behavior, is that one type of force that you've seen?" (R. 19: 7). It also asked if he "frequently [sees] grooming behavior occurring" in family relationships. (R. 19: 7). And, as covered in Issue 1, the State told the jury in its final moments of closing argument that Mr. Ninh's "form of force was grooming." (R. 19: 144).

Furthermore, in the first part of its closing argument, the State opined that "[w]e've already discussed the measure of force he's putting into place.... A rapist is only going to use as much force as they have to to be able to accomplish their goal, to accomplish their ends. The rapist isn't going to hit someone unless they have to." (R. 19: 114). In the second part of its argument, the State talked about "the evidence that the defendant, the suspect, leaves behind. It is the evidence that the rapist leaves behind." (R. 19: 143). And, finally, the State claimed this:

> He's treating her like she's special. She described how that type of touching he would engage in all through her teenage years, it wasn't the type of touching where – you know, some rapists are sadists. Some of them cause pain. Some rapists use alcohol so a victim doesn't know or is incapacitated and can't respond back. His form of force was grooming.

(R. 19: 144).

These comments include many errors. First, what "some rapists" do was irrelevant in this case—it served to distract the jury from the matter at hand and fan the flames of prejudices people discussed in voir dire. See*, e.g.*, (R. 7: 171-232; R. 8: 12-82). Second, the State repeatedly calling Mr. Ninh a rapist was inflammatory and "outside the scope of evidence upon which the prosecutor is allowed to comment." *State v. Scott*, 271 Kan. 103, 21 P.3d 516 (2001) (prosecutorial misconduct, as it was called then, to call the accused a "killer").

Third, the State opining about what various rapists are like was discussion of things not admitted into evidence. Fourth, the State misstated the law when it equated grooming—something that takes place before an offense—with force, which has to be present at the same time as the other elements. As argued in Issue 1, it is an error of law to fail to acknowledge that the conduct supporting the elements must be simultaneously present. See *State v. Akins*, 298 Kan. 582, 606, 315 P.3d 868 (2014).

Misstating the evidence is error

Again, arguments must remain consistent with the evidence. *Coones*, 301 Kan. at 82–83. In opening, the State told the jury that it would hear testimony that Mr. Ninh put his finger inside of TNV's vagina and that she thought it hurt. (R. 9: 17). In closing, the State told the jury that Count 2 is for "the defendant's finger being inserted into her vagina." (R. 19: 103). Also as to Count 2, the State said TNV "described that it would hurt so she usually pulled away." (R. 19: 114).

But TNV said no such thing. First, she said Mr. Ninh put his finger between the skin flaps, i.e. her labia; there was no testimony he inserted his fingers in her vagina. (R. 9: 110, 118). Second, when the State asked whether it was ever "painful," TNV replied, "It was not painful. It was not ever honestly painful." (R. 9: 111-12).

The errors were prejudicial and require reversal

"Appellate courts must simply consider any and all alleged indicators of prejudice, as argued by the parties, and then determine whether the State has met its burden—*i.e.*, shown that there is no reasonable possibility that the error contributed to the verdict." *Sherman*, 305 Kan. at 111.

The parties had an agreement that led to a pretrial order prohibiting the use of prejudicial labels "including, but not limited to, the words 'victim,' 'victim coordinator or advocate,' 'sexual assault,' and 'sexual abuse.'" (R. 1:

145, 184). This agreement came about after Mr. Ninh filed a four-page motion with case law and social science research on the danger of allowing the prosecution "to use prejudicial labels that presuppose a crime has occurred." (R. 1: 145-49). These labels were worthy of an order in limine, and "rapist" is certainly worse.

But even putting aside the inflammatory language the State repeatedly used and its misstatements of the evidence, a problem remains: the State's misstatement of the law. The State opted to charge Mr. Ninh with six severity-level-one sex offenses, all of which had the same elements as to without consent, overcome, by force or fear. From the time of opening statement, the State had been bringing up what constitutes force. One of its last comments was about grooming being Mr. Ninh's force.

Notably, the district court pointed to evidence of grooming when it denied Mr. Ninh's motion for judgment of acquittal after the State's case, and relied on evidence from Detective Zander of "grooming as a type of force by the detective" to bind over Mr. Ninh on the amended Count 6. (R. 10: 106; R. 19: 63). But that is incorrect as a matter of law. If the court—who is trained in the law—made this mistake, then the State cannot show the jury did not do the same.

Conclusion

The State cannot sustain its burden to show that "there is no reasonable possibility that the error[s] contributed to the verdict." *Sherman*, 305 Kan. at 111. The State's errors violated Mr. Ninh's right to a fair trial and require reversal of all counts.

Issue 3. The "it shall not be a defense that the offender did not know or have reason to know" language in K.S.A. 21-5503(e) and K.S.A. 21-5504(f) renders K.S.A. 21-5503(a)(1)(A) and K.S.A. 21-5504(b)(3)(A) unconstitutionally vague because those subsections lack sufficient warning for people to avoid unlawful conduct, thus leading to arbitrary enforcement.

Introduction

Five of the six charges the jury convicted Mr. Ninh of—Counts 2 through 6—had essentially the same elements. In addition to being instructed on the elements, the court included the following statutorily derived language in the jury instructions: "it is not be a defense that Dzung Ninh did not know or have reason to know that TNV did not consent to the sexual intercourse, that the victim was overcome by force or fear." (R. 1: 267-71, 276; R. 19: 159). Very recently, the Kansas Supreme Court "assume[d]" that rape is a strict liability crime: "If a defendant cannot defend by claiming not to have had a guilty state of mind—that is, knowledge that he was engaging in nonconsensual sex—then the crime appears to have no legally

required mens rea." *State v. Thomas*, __ Kan. __, __ P.3d __ (No. 119,240, filed Kan. June 18, 2021), 2021 WL 2483578, at *2.

Now that (1) rape and aggravated criminal sodomy are "assumed" to be strict liability crimes, i.e. it is irrelevant if the accused knew or had reason to know that the person did not consent to sex or sodomy, or was overcome by force or fear, and (2) whether someone was overcome by force or fear is subjective and a jury question, then (3) the subsections of rape and aggravated criminal sodomy to which the "it is not a defense" language applies are unconstitutionally vague because they explicitly deny a person notice that their actions could be a crime and they fail to provide explicit standards for enforcement.

Reviewability

Mr. Ninh raised the issue of vagueness created by the "it's not a defense" language at the jury instructions conference, in his written motion for new trial, and at the sentencing hearing. (R. 1: 307-09; R. 11: 30; R. 19: 74-75, 79-83). The district court gave the jury instructions over Mr. Ninh's objection and denied his post-trial motion. (R. 11: 5, 47, 49, 52-53; R. 19: 77-83).

To the extent, if any, that this Court thinks this issue was not raised below, Mr. Ninh can raise it now because (1) it involves only a question of law arising on proved or admitted facts that would be determinative of the case,

and (2) consideration of the issue is necessary to prevent the denial of fundamental rights. See *State v. Ortega–Cadelan*, 287 Kan. 157, 159, 194 P.3d 1195 (2008). First, the question of whether the "it is not a defense" language renders K.S.A. 21-5503(a)(1)(A) and K.S.A. 21-5504(b)(3)(A) unconstitutionally vague is a question of law based upon the language of the statute, the constitutional due process requirements, other law, and the fact that language was given in the jury instructions for Counts 2-6. See, *e.g.*, *State v. Armstrong*, 276 Kan. 819, 821, 80 P.3d 378 (2003) (vagueness is a question of law).

Second, vagueness is clearly a question involving the denial of fundamental rights because it is purely an argument that the statute violates the requirements of constitutional due process. *State v. White*, 53 Kan. App. 2d 44, 55, 384 P.3d 13 (2016). Thus, this Court has previously found other vagueness challenges appropriately raised for the first time on appeal. *White*, 53 Kan. App. 2d at 55.

Standard of Review

Because review of a challenge to a statute's constitutionality is a legal question, the standard of review is unlimited. *State v. Watson*, 277 Kan. 426, 428, 44 P.3d 357 (2002).

Relevant law

Relevant to this appeal, the law required the State to prove for Counts 2-4 that

> Dzung Ninh knowingly engaged in sexual intercourse with TNV.
> TNV did not consent to sexual intercourse.
> The sexual intercourse occurred under circumstances when TNV was overcome by force or fear.

(R. 1: 264-66). In Counts 5-6, the law required the State to prove that

> Dzung Ninh engaged in sodomy with TNV.
> TNV did not consent to the sodomy.
> The sodomy occurred under circumstances when TNV was overcome by force or fear.

(R. 1: 267-69). The jury was instructed accordingly. (R. 1: 264-69). However, the court also instructed the jury, at the State's request and over Mr. Ninh's objections, that "[i]t is not a defense that Dzung Ninh did not know or have reason to know that TNV did not consent to the [sexual intercourse or sodomy], or was overcome by force or fear." (R. 1: 267-72; R. 19: 74-77, 79-83). This language appears in PIK Crim. 4th 55.030 (rape) and PIK Crim. 4th 55.070 (aggravated criminal sodomy), with a note on use in both that the court should use the "it is not a defense" language for offenses on and after July 1, 2011.

When addressing a vagueness challenge, this Court considers whether a statute: (1) fails to give ordinary people fair notice of the conduct it punishes or (2) is so standardless that it invites arbitrary enforcement.

Johnson v. United States, 576 U.S. 591, 135 S. Ct. 2551, 2556, 192 L. Ed. 2d 569 (2015). The standards of certainty required for a criminal statute are higher than for non-criminal statutes. *Watson*, 273 Kan. at 431.

Analysis

During closing argument, the State told the jury that "the law does not require [Mr. Ninh] to be a mind reader and look into [TNV]'s head as to whether or not she consents. The law does not require him to be a mind reader and to be able to see that she is overcome by force or fear." (R. 19: 114-15). The State's response to Mr. Ninh's post-trial motion sums up what happened in this case and the impact of the "it is not a defense" language:

> Specifically, the mens rea in this case describes or informs the jury as to the defendant's culpable state of mind as he's committing the specific act. He knowingly committed the act, which was engaging in sexual intercourse, or he knowingly committed the act, which was engaging in sodomy. There's no requirement that the defendant is required to know the age of the victim. There's no requirement that the defendant is required to know whether or not TNV consented or if she was overcome by force or fear.
>
> Ultimately what he is required to know is that he's engaging in that specific act of sexual conduct, not the other outside peripheral circumstances. So this instruction was appropriate for the jury. It does clarify for the jury what exactly the defendant's culpable mental state refers to and it provides clarity for the jury that he's required to know certain aspects of the crime but not – and specifically clarifies the aspects of the crime he is not obligated to know about or the State is not obligated to prove he knows about.

(R. 11: 41-42).

The "outside peripheral circumstances" can mean the difference between a rape charge or not. Or the difference between legal sodomy and criminal sodomy that carries a mandatory prison sentence of 147 to 653 months. See K.S.A. 21-6804; K.S.A. 21-5503. The "it is not a defense language" makes those crucial "circumstances" a nonissue.

Recently the Kansas Supreme Court concluded the residual clause of the criminal possession of weapons statute was unconstitutionally vague. *State v. Harris*, 311 Kan. 816, 822, 467 P.3d 504 (2020). In that case, "[b]ecause an impermissible delegation of legislative power will often lead to arbitrary enforcement based on subjective or even prejudicial criteria," the Court emphasized the second prong of the vagueness doctrine: "The primary problem with a law that fails to 'provide explicit standards' for enforcement … is that such laws 'invite arbitrary power.' [Internal citation omitted.] That is, these laws 'threaten to transfer legislative power to' police, prosecutors, judges, and juries, which leaves 'them the job of shaping a vague statute's contours through their enforcement decisions.' [Internal citation omitted.]" *Harris*, 311 Kan. at 822.

The subsections of the rape and aggravated criminal sodomy that include the "it is not a defense" language fail to provide explicit standards for enforcement, thereby transferring legislative power to actors in the system, who use subjective criteria in determining who to enforce the law against.

Consider the statutes Mr. Ninh was charged with and convicted of, and how they interact with other law at play when those crimes are charged. There's the law that "[f]orce or fear within the definition of rape is a highly subjective concept that does not lend itself to definition as a matter of law." *State v. Tully*, 293 Kan. 176, Syl. ¶ 12, 262 P.3d 314 (2011). And the law that made the question of whether the alleged rape victim "is overcome by fear for purposes of [the rape statute] [one] to be resolved by the jury." *State v. Brooks*, 298 Kan. 672, 688, 317 P.3d 54 (2014). And the Court's only-weeks-old decision that assumed/concluded a person charged with rape or aggravated criminal sodomy does not need to have a guilty state of mind to be convicted. *Thomas*, 2021 WL 2483578, at *2.

Taken all together, police can decide to arrest someone who was unaware that their sex partner was overcome by force or fear. Prosecutors have discretion to charge rape and aggravated criminal sodomy (rather than, say, aggravated indecent liberties, which is a severity level 3 or 4), knowing they do not have to prove the accused knowingly did anything other than have sex or sodomy. Judges and juries hear evidence from alleged victims and resolve the question of their highly subjective state of mind, but the accused is forbidden from arguing that he had no notice of what was in that person's mind. In the end, the only person involved in this process who is not entitled to consider, weigh what to do with, or base a decision on the highly subjective

state of mind of an alleged victim is the person facing 147 to 653 months in prison for the highest grid offense in Kansas.

Conclusion

For the reason argued above, the rape and aggravated criminal sodomy statutes Mr. Ninh was convicted of are unconstitutionally vague, and Mr. Ninh's convictions must be reversed.

Issue 4. The State violated Mr. Ninh's federal and state constitutional, as well as statutory, rights to unanimous verdicts. At a minimum, Section 5 of the Kansas Constitution calls for immediate reversal.

Introduction

Often in sex cases involving minors, the alleged minor victim details numerous instances of abuse in general, but does not describe each instance in particular. This is what happened in Mr. Ninh's case.

TNV's testimony, as elicited by the State, conflicts with Mr. Ninh's right to a unanimous jury verdict on the specific criminal acts leading to convictions. If (1) the State charges the accused with one count of abuse, (2) the witness testifies to a plethora of multiple acts of abuse, and (3) the witness fails to testify to all incidents with specificity, the jury cannot unanimously agree on the same underlying act for conviction. This scenario violates the Sixth Amendment to the United States Constitution, section 5 of

the Kansas Constitution Bill of Rights, and K.S.A. 22-3421, the statutory right to a unanimous verdict.

Reviewability

Mr. Ninh raised this issue in his written post-trial motion for judgment of acquittal or new trial. (R. 1: 289, 293-95, 313-15). The district court considered the motion and denied it after Mr. Ninh made argument on it prior to sentencing. (R. 11: 5, 16-18, 47-53). Although the motion itself did not mention the Sixth Amendment or Kansas statute numbers, the authority Mr. Ninh relied on did. See Renewed Motion for Judgment of Acquittal or, In the Alternative, Motion for New Trial, p. 9 and 29 (found at R. 1: 294) (citing *State v. Aguilar*, 52 Kan. App. 2d 466, 469, 367 P.3d 324 (2016) ["[b]ecause criminal defendants have a statutory right to a unanimous verdict, jurors have to agree on a particular act for each of the counts charged when the State has presented evidence of multiple acts", citing K.S.A. 21-3421 and K.S.A. 21-3423(1)(d)]; *State v. Barber*, 26 Kan. App. 2d 330, 331, 988 P.2d 250 (1999) (referring to Sixth Amendment right to unanimous verdict).

As for the Kansas Constitution, Mr. Ninh may raise this ground for the first time on appeal under two exceptions, i.e. (1) consideration of the theory is necessary to serve the ends of justice or to prevent denial of fundamental rights, and (2) the newly asserted theory involves only a

question of law arising on admitted facts and is finally determinative of the case. *State v. Phillips*, 299 Kan. 479, 493, 325 P.3d 1095 (2014).

First, at stake is the right to a jury trial in section 5 of the Kansas Constitution Bill of Rights. Section 5's right to a jury trial is a fundamental constitutional right. *Hilburn v. Enerpipe Ltd.*, 309 Kan. 1127, 1133, 442 P.3d 509 (2019). Although this Court can and should "exercise[] [its] sovereign power to interpret certain provisions of the Kansas Constitution in a manner different from parallel provisions of the United States Constitution," the Court must begin by acknowledging that the Sixth Amendment right to a unanimous jury is a fundamental constitutional right. *State v. Albano*, __ Kan. __, __ P.3d __ (2021) (No. 120,767, filed May 28, 2021), 2021 WL 2171172, at *4 (for quote about this Court's power); *Ramos v. Louisiana*, 140 S. Ct. 1390, 1397, 206 L. Ed. 2d 583 (2020) ("the Sixth Amendment right to jury trial, as incorporated against the States by way of the Fourteenth Amendment, requires a unanimous verdict to convict a defendant of a serious offense"). Consequently, Mr. Ninh also possesses a fundamental right to unanimity under section 5—another reason for this Court to review this issue.

Second, this issue presents a question of law on settled facts that is determinative of this issue. There is no question that the State presented multiple acts evidence as to Counts 2-6 and so applying the law to that

settled fact may be done for the first time now, and doing so will completely resolve this appeal.

Standard of Review

This issues involves constitutional and statutory interpretation, which are questions of law over which an appellate court has unlimited review. *Padron v. Lopez*, 289 Kan. 1089, 1097, 220 P.3d 345 (2009).

Analysis

As argued by the State and testified to by TNV, this case involves multiple acts for all counts that ended in conviction. But the State presented unspecified incidents of the same alleged misconduct for each time frame charged. By choosing to present multiple acts but providing no concrete details differentiating the alleged incidents of abuse, the State violated Mr. Ninh's Sixth Amendment, section 5, and statutory rights to a unanimous verdict on a particular act.

It's true the district court instructed the jury regarding multiple acts in each of the counts' elements instructions. (R. 1: 266-71). But to be clear from the outset, Mr. Ninh has the right to a unanimous verdict on each of the underlying acts—not the right to a multiple acts instruction. This right to a unanimous verdict on a particular act is so much more than a right to a multiple acts instruction; the instruction is merely a means to help ensure protection of the actual right. In other words, just because a multiple acts

instruction was given here, Mr. Ninh's right to unanimous verdicts on the underlying acts was still contravened by the way in which the State chose to present its case.

The Sixth Amendment ensures unanimity for a conviction

The Sixth Amendment promises all criminal defendants the right to a jury trial as it existed at common law, and, at common law, that meant the right to a unanimous jury, which applies to state and federal criminal trials equally. *Ramos*, 140 S. Ct. at 1397. "Unanimity in this context 'means more than a conclusory agreement that the defendant has violated the statute in question; there is a requirement of substantial agreement as to the principal factual elements underlying a specified offense' "; a principal factual element is the fact that directly leads a juror to find the committal of an element. See *United States v. Gonzalez*, 786 F.3d 714, 716 (9th Cir. 2015) (quoting *United States v. Ferris*, 719 F.2d 1405, 1407 [9th Cir.1983]). However, the jury need not agree on preliminary factual matters which underlie the verdict; a preliminary factual matter is a fact that leads a juror to find the principal factual element. See *Gonzalez*, 786 F.3d at 717. This means, for multiple acts cases, the jury must unanimously agree on the same underlying incident for a valid conviction, but it need not agree on every preliminary factual matter taking place during that specific incident.

Section 5 ensures unanimity for a conviction

Along with the Sixth Amendment, section 5 of the Kansas Constitution Bill of Rights also guarantees all criminal defendants the right to a jury trial as it existed at common law. *Hilburn*, 309 Kan. at 1133. When the Sixth Amendment was ratified in 1791, the right to a "trial by an impartial jury" meant—according to "the common law, state practices in the founding era, [and] opinions and treatises written soon afterward"—the right to a unanimous verdict. *Ramos*, 140 S. Ct. at 1395. At the time of ratification in 1791, "unanimous verdicts had been required for about 400 years." *Ramos*, 140 S. Ct. at 1396. Less than a century later, when Kansas adopted its Bill of Rights in 1859, the common law still required a unanimous jury verdict and so did section 5—according to Ohio which has a constitutional right identical to section 5. *Shoffstahl v. Elder*, 23 Ohio Dec. 485, 487 (Com. Pl. 1913) ("The right of trial by jury shall be inviolate" at the time of common law meant "a common law jury consisting of twelve men, and that the verdict requires the concurrence of all the jurors"—unanimity.); see also *State v. Boysaw*, 309 Kan. 526, 537, 439 P.3d 909 (2019) (noting that "the Kansas Constitution Bill or Rights . . . was largely modeled on the Ohio Constitution" and that our constitutional provisions should, generally, be interpreted like Ohio's).

The section 5 right of unanimity must extend to a concurrence on the underlying criminal act resulting in conviction; it cannot just mean all 12

jurors agree on guilt in general. Our Supreme Court has interpreted the statutory right to a unanimous verdict that way. See, *e.g.*, *State v. King*, 297 Kan. 955, 977, 305 P.3d 641 (2013); *State v. Trujillo*, 296 Kan. 625, 629-32, 294 P.3d 281 (2013); *State v. Wright*, 290 Kan. 194, 201, 224 P.3d 1159 (2010); *State v. Voyles*, 284 Kan. 239, 244-45, 160 P.3d 794 (2007). It stands to reason that our Supreme Court would interpret the state constitutional right to a jury verdict similarly. The reason being, there is no unanimity if jurors agree on different underlying criminal acts, and unanimity was required at common law.

For example, say in a multiple acts case that the State charged one count but presented evidence of two incidents, and some jurors believed the first incident while others believed the second. It cannot be said that upholding a verdict under those circumstances constitutes unanimity because, if the jurors were forced to concur, they would not be able to. What's more, if, staying with this example, the State presented just one criminal incident in order to prove one count, then no guilty verdict could be entered because some jurors didn't believe that particular incident. But because the State introduced multiple acts, the State obtained a guilty verdict. This cannot be constitutional unanimity.

For the section 5 right to a unanimous jury to mean something in a multiple acts case, then it must mean unanimity as to the particular criminal

act relied on by the jury to return a guilty verdict. If not, this Court would be allowing the State to circumvent the right to a unanimous verdict in multiple acts cases, as seen in the above example.

K.S.A. 22-3421 ensures unanimity for a conviction

It is settled that K.S.A. 22-3421 is the final source of unanimity supplying all criminal defendants the right to unanimity on the criminal act on which the conviction rests. "When a case involves multiple acts, the jury must be unanimous in finding which specific act constitutes the crime. See K.S.A. 22-3421." *King*, 297 Kan. at 977-78.

This case involved multiple acts

Issues concerning multiple acts typically revolve around instruction issues. While this issue does not concern the instructions, one part of the analysis for instruction issues helps guide the analysis for this issue. For the first step of the instruction analysis, "the threshold question is whether jurors heard evidence of multiple acts, each of which could have supported conviction on a charged crime." *King*, 299 Kan. at 379 (citing *Voyles*, 284 Kan. at 239, Syl. ¶ 1). A single act becomes multiple acts if they are factually separate and distinct. *King*, 299 Kan. at 379. Pertinent here, "incidents are factually separate when independent criminal acts have occurred at different times." *King*, 299 Kan. at 379. In this case, the State introduced multiple acts evidence for Counts 1-6.

The State might counter that if the jury agreed that all incidents happened, then it was necessarily unanimous on the specific act. But that counter argument goes to harmlessness, not error. Whenever the State alleges multiple acts and at the same time fails to provide evidence distinguishing those separate acts from one another, the State has violated the right to a unanimous verdict on the specific act. Mr. Ninh's right to a unanimous verdict on the particular underlying act was violated in this case.

Relating to Count 1, the State told the jury in closing that "what we have is one count of aggravated indecent liberties with a child when [TNV] is 13 years of age, and this involves specifically the touching of her breast and her vagina during that time frame." (R. 19: 102). The time frame in Count 1 was August 15, 2013 to May 30, 2014. (R. 1: 258). Later, the State "suggest[s] you utilize – when you have to be unanimous as to which time, which act the defendant is guilty of, I would submit the second time she provides the most detail." (R. 19: 108). "It started happening a lot after that.... [TNV] does mention that this happens over and over and over again. So you can pick any one of those incidents if you would like to find him guilty for that offense." (R. 19: 109).

But the trial evidence, i.e. TNV's testimony and her interview with Detective Zander, includes only two incidents with details—both occurring *before* the time frame alleged in Count 1. The evidence in the charged time

frame was without specificity. TNV said it happened at their house, when her siblings were home, and always when she and Mr. Ninh were at the computer. (R. 9: 74-75, 92, 97, 100). The State asked her how many times it happened when she was in 8th grade, and TNV estimated Mr. Ninh touched her breasts 15-20 times and her vaginal area, under her clothes, 5-6 times. (R. 9: 91, 96, 99).

So we have up to 20 alleged incidents of the exact same misconduct taking place in nine months, but TNV did not give any details differentiating one incident from the others. There is no way the jury could agree on any given incident because the State provided no evidence distinguishing the up to 20 incidents from one another.

For Counts 2 and 3, the trial evidence on these counts lacked any differentiation. TNV told Detective Zander that Mr. Ninh would do "his normal routine," and this happened 100 or more times. (R. 15: State's Exhibit 23). She testified that it always happened in the bedroom she shared with KV, and she "honestly [didn't] know" how many times it happened that year. (R. 9: 106, 109, 114).

The State told the jury in closing argument that Counts 2 and 3 "[u]ltimately, they are going to appear identical when it comes to the instructions and those elements. Those are both for when she is 14 years of age during her freshman year … and that specific conduct that is described in

those two counts is the defendant's finger being inserted into her vagina." (R. 19: 102-03). Notably, the jury later asked "Count 2 and Count 3 have the same exact date range. Why same exact dates and charges? Are they two separate counts and charges?" (R. 19: 156).

The State asked the jury "to find one event that is specific to Count 2 and one event that is specific to Count 3," but did not elicit evidence to make this possible. The evidence was there were 100 alleged incidents of the exact same misconduct taking place in nine months, but TNV did not give any details differentiating one incident from the others. There is no way the jury could agree on any given incident because the State provided no evidence distinguishing the incidents from one another.

Regarding Counts 4 and 5, TNV told Detective Zander that during her sophomore year, Mr. Ninh started using his mouth on her, and did this 30-40 times. (R. 15: State's Exhibit 23). TNV testified about what "would typically happen the exact same way" that school year as school year before (i.e. the time frames charged by the State)—in fact, nothing else stood out "as being unique or different." (R. 9: 116). She didn't know when Mr. Ninh started using his mouth on her vagina—it was "in one of those time frames," i.e. junior or senior year. (R. 9: 125-26, 129).

So we have 30-40 alleged incidents of the exact same misconduct taking place in nine months, but TNV did not give any details differentiating one

incident from the others. There is no way the jury could agree on any given incident because the State provided no evidence distinguishing the incidents from one another.

Mr. Ninh anticipates that the State may argue that it suggested "January of that school year as that main event to be unanimous on." (R. 19: 118). But that was only one incident, and the State charged two counts for events occurring in the nine-month time frame. (R. 1: 260; R. 19: 16-18).

As to Count 6, TNV told Detective Zander that it happened so much less during her junior year, and around October 2016, it completely stopped. (R. 15: State's Exhibit 23). TNV testified three times that it was probably or maybe "once or twice" that Mr. Ninh came into her room and used his mouth on her, and it was over by August 30 or beginning of September—which would have been about two weeks into the State's nine-month-school-year time frame. (R. 1: 260; R. 9: 129-32).

Again, we have up to two incidents of misconduct taking place in nine months (or 2-3 weeks), but TNV did not give any details differentiating one incident from the others. In fact, there were no additional details other than what TNV said happened in previous years. The jury could not have agreed on any given incident because the State provided no evidence distinguishing the alleged incidents from one another. This was apparent from the State's closing argument when it suggested to the jury that "the specific time that

you can find him guilty of in this count, you can pick any of them, but that would be toward the beginning of the school year." (R. 19: 119). There was no specificity to mention.

The lack of any possible unanimity warrants reversal

The unanimity error calls for reversal on all counts, but how we get there depends on which source of unanimity was violated. Under section 5, this Court must reverse the convictions without a review for harmlessness because the right to unanimity is "inviolate." See *Hilburn*, 309 Kan. at 1150 (holding that statutory encroachment on an "inviolate" jury-trial right renders the statute unconstitutional without any harmlessness analysis).

Likewise, under the Sixth Amendment, this Court must reverse the convictions without a review for harmlessness because that's how the United States Supreme Court does it. The *Ramos* Court performed no review of harmlessness: "Not a single Member of this Court is prepared to say Louisiana secured his conviction constitutionally under the Sixth Amendment. *No one before us suggests that the error was harmless.*" (Emphasis added.) *Ramos*, 140 S. Ct. at 1408. This Court should do as *Ramos* did and reverse without any consideration of harmlessness. In the event this Court completes a harmlessness examination for the Sixth Amendment violation, then this Court must do so under the constitutional harmless error

standard, which places the burden to prove harmlessness on the State. See *State v. Ward*, 292 Kan. 541, 568-69, 256 P.3d 801 (2011).

Finally, if this Court finds only statutory error under K.S.A. 22-3421, then it must apply the statutory harmless error test. Pursuant to that test, this Court must determine whether there is a reasonable probability that the error affected the outcome of the trial in light of the entire record. *State v. Lowery*, 308 Kan. 1183, 1235, 427 P.3d 865 (2018).

Following the constitutional or statutory harmlessness test, the errors in this case necessitate reversal. No group of rational people could come together to agree on a particular criminal act for each count as charged in the State's Amended Information—the evidence simply does not permit such an agreement. Even with a multiple acts instruction, the record belies any possibility that Mr. Ninh's jury relied on the same underlying act to convict him on all six counts. As a result, this Court must reverse Mr. Ninh's convictions to afford him the right to a unanimous verdict at a new trial.

Conclusion

At one point, the State asked TNV:

> Q. Okay. Overall, how many times did ... Mr. Ninh's hands touch your vagina?
> A. In the span of from eighth grade to junior year?
> Q. Yeah.
> A. I don't know. I just know that it happened over years and it had happened a lot.

(R. 9: 183). In closing argument, the State said these things "happen with such frequency that it's hard for her to put a real number on it." (R. 19: 115).

The State decided which offenses, and how many, to charge. The State controlled the questions it asked TNV. The State had the burden to present evidence to allow a jury to render constitutionally permitted verdicts. The State did not meet this burden. It was not enough for the State to elicit evidence that could lead a jury to "a conclusory agreement that [Mr. Ninh] has violated the statute in question" (*Gonzalez*, 786 F.3d at 716)—the State had to present the evidence that could allow jurors to all rely on the same underlying acts. Because it failed to do so, this Court must reverse Mr. Ninh's convictions to afford him the right to a unanimous verdict at a new trial.

Conclusion

For the reasons argued here, this Court should reverse all of Mr. Ninh's convictions. Alternatively, it should reverse Counts 2-6 and vacate the same, and also reverse Count 1 and remand for a new trial on that count. As a final alternative, this Court should reverse all six convictions and remand for a new trial.

Respectfully submitted,

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