No. 19-120903-A

IN THE
COURT OF APPEALS OF THE
STATE OF KANSAS

STATE OF KANSAS
Plaintiff-Appellee

vs.

ROBERT J. ROBISON, III
Defendant-Appellant

BRIEF OF APPELLANT

Appeal from the District Court of Lyon County, Kansas
Honorable Merlin G. Wheeler, Judge
District Court Case No. 18 CR 04

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Pursuant to K.S.A. 2018 Supp. 75-764, counsel gives notice that this brief challenges the constitutionality of a statute. In accordance with the rule, counsel serves the Attorney General.

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Robert J. Robison, III, appeals from sentencing for a single count of battery on a law-enforcement officer, arguing that he should not have been ordered to pay restitution to an insurer, that Kansas' restitution statutes violated section 5 of the Kansas Constitution Bill of Rights, or, in the alternative, violate *Apprendi*. (R. I, 74.) He asks this Court to vacate his restitution order.

Issue Statements

Issue I: **Kansas' criminal restitution statutes violate Section 5 of the Kansas Constitution Bill of Rights, and therefore, are unconstitutional.**

Issue II: **In the alternative, if restitution is punishment, Kansas' criminal restitution statutes violate *Apprendi*.**

Issue III: **The district court erred by ordering Mr. Robison to pay restitution to an insurance company when:**
(a) it did not actually suffer a loss as a result of his crime; and
(b) it did not prove it suffered a loss.

Statement of Facts

Mr. Robison entered into a plea agreement, under which he agreed to plead no contest to a single count of battery on a law-enforcement officer, in violation of K.S.A. 21-5413(c)(3)(D), a severity level 5 person felony. (R. I, 59.) Mr. Robison pled pursuant to the agreement, and the district court accepted his plea and found him guilty. (R. I, 62; VII, 17-20.) Mr. Robison had an "I" criminal-history score. (R. I, 59.)

The district court sentenced Mr. Robison to 32 months' prison, to be followed by 24 months' post-release supervision. (R. I, 69; IX, 18.) It left open the question of restitution for a later hearing. (R. I, 73; IX, 6-7.)

At the restitution hearing, the State put on Karen Hastert, a patient accounts supervisor at Newman Regional Health. (R. XI, 4.) She brought in billing records indicating that the victim's medical treatment cost $2,648.50. (R. XII, 9-11.) Ms. Hastert admitted the full amount of account had been paid in full by the insurer of Lyon County Detention Center, the victim's employer. (R. XII, 9.) The State argued Mr. Robison should pay that amount because the insurance company was an aggrieved party who had to pay out as a result of Mr. Robison's actions. (R. XII, 11.)

Mr. Robison objected on the basis that "neither [the victim], nor the sheriff's department, and even including Newman regional have suffered any out-of-pocket loss. This is all amounts that are being claimed by an insurance company for reimbursement." (R. XI, 3.) Mr. Robison argued that the insurance company was not a victim entitled to restitution because the company merely paid out on a claim for injuries, as it was contractually obligated to do. (R. XII, 14.) He noted that Lyon County Detention paid money for insurance that would pay out to medical providers if an employee was injured and needed treatment, and this is what happened here. (R. XII, 14-15.) As such, he argued that the insurance company didn't suffer a loss; rather, it took a risk, it paid, and that is the nature of its business. (R. XII, 15.)

Mr. Robison further noted that the victim didn't request any restitution, and the insurance company did not either—the State merely requested it on the insurance company's behalf. (R. XII, 15.) In fact, the State confirmed that the insurance company did not even request reimbursement from anyone, or even correspond with the State on the matter. (R. XII, 16.)

But the district court ordered Mr. Robison to pay $2,648.56 in restitution to the insurer, Tristar Risk Management, finding that it was appropriate for him to reimburse the insurer on the evidence presented. (R. I, 94; XII, 17.) Mr. Robison appealed. (R. I, 74.)

Argument & Authorities

Issue I: Kansas' criminal restitution statutes violate Section 5 of the Kansas Constitution Bill of Rights, and therefore, are unconstitutional.

Overview

The Kansas Constitution preserves the common law right to a jury trial as it existed when the Constitution came into existence in 1859. In 1859, judges could not order criminal defendants to pay for damage or loss caused by their crimes. Victims of crimes could receive compensatory damages from the perpetrator of a crime – but only if they pursued civil claims. And, in those civil proceedings, defendants had the right to a jury trial. Kansas' current criminal restitution scheme is facially unconstitutional, because it encroaches upon a criminal defendant's common law right to a civil jury trial. As such, this Court must vacate the order of restitution imposed in Mr. Robison's case.

Issue Preservation

Mr. Robison did not raise this issue below. Typically, a defendant cannot raise an issue for the first time on appeal. But there are exceptions to this rule. A defendant may raise an issue for the first time on appeal when: (1) the newly asserted theory involves only a question of law arising on proved or admitted facts and is finally determinative of the case; or (2) consideration of the theory is necessary to serve the ends of justice or to prevent denial of fundamental rights. *State v. Foster*, 290 Kan. 696, 702 (2010).

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)[1] (petition for review granted); *State v. Patterson*, 2017 WL 3207149 at *8 (Kan. App.) (unpublished opinion)[2] (petition for review granted). For two reasons, *Jones* and *Patterson* were wrongly decided.

First, Mr. Robison asserts that Kansas' criminal restitution statute is facially unconstitutional under Section 5 of the Kansas Constitution Bill of Rights. 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, 64 P.3d 382 (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. Robison respectfully disagrees with this view. Here, where the *only* issue on appeal is the court's restitution order, resolving the issue would be dispositive of his appeal.

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.

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[1] Pursuant to Kansas Supreme Court Rule 7.04(g)(2)(C), a copy of this opinion is attached as Appendix A.

[2] Pursuant to Kansas Supreme Court Rule 7.04(g)(2)(C), a copy of this opinion is attached as Appendix B.

This reasoning clashes with our Supreme Court's repeated observations that the jury trial right protected by Section 5 of the Kansas Constitution Bill of Rights is "a basic and fundamental feature of American jurisprudence" – a right that should be "carefully guarded against infringements." *Miller v. Johnson*, 295 Kan. 636, 647, 289 P.3d 1098 (2012) (quoting *Gard v. Sherwood Construction Co.*, 194 Kan. 541, 549, 400 P.2d 995 [1965]), *overruled on other grounds by Hilburn v. Enerpipe, Ltd.*, __ Kan. __, __ P.3d __ (decided June 14, 2019), Slip Op., No. 112,765. Moreover, because the jury-trial right is a fundamental right, this Court should reach the merits of this issue to protect that right. Thus, this issue is properly before this Court for review.

Standard of Review

This Court exercises unlimited review over the constitutionality of a statute. *State v. Williams*, 308 Kan. 1439, 1460, 430 P.3d 1439 (2018).

Analysis

Courts generally follow a three-tiered test to determine if a challenged statute is constitutional under the Kansas Constitution Bill of Rights. First, the party challenging the constitutionality of the statute must establish that the right exists, that our constitution protects it, and the degree to which it is protected (*i.e.*, is it a fundamental right?). *Hodes & Nauser, MDs, P.A. v. Schmidt*, __ Kan. __, 440 P.3d 461, 469 (2019). Second, the challenging party must establish the statute at issue infringes on the right. *Hodes & Nauser*, 440 P.3d at 469 (citing *State v. Limon*, 280 Kan. 275, 284, 122 P.3d 22 [2005]). Then, if the first two prongs are met and the right at issue is a fundamental one, triggering strict

scrutiny, the Court presumes the challenged statute is unconstitutional. *State v. Ryce*, 303 Kan. 899, 957, 368 P.3d 342 (2016). At that point, the third step of the test applies, and the party championing the statute must show that statute serves a compelling state interest and that the statute is narrowly tailored to further that interest. *Hodes & Nauser*, 440 P.3d at 496-97.

A. The right to a civil jury trial is a fundamental right.

First, the right to a jury trial is a fundamental right under Section 5 of the Kansas Constitution Bill of Rights. Section 5 of the Kansas Constitution Bill of Rights states: "The right of trial by jury shall be inviolate." Section 5 applies in both civil and criminal cases. *Johnson*, 295 Kan. at 648; see also *State v. Rizo*, 304 Kan. 974, 979-80, 377 P.3d 974 (2016). Moreover, the jury-trial right is "a basic and fundamental feature of American jurisprudence," which "should never be lightly denied," and which "should be carefully guarded against infringements." *Enerpipe,* Slip Op., No. 112,765, at *8; *Johnson*, 295 Kan. at 647; *Gard v. Sherwood Construction Co.*, 194 Kan. 541, 549, 400 P.2d 995 (1965). As such, the Section 5 right to a jury trial is a "fundamental interest" protected by the Kansas Constitution Bill of Rights. *Enerpipe*, Slip Op., No. 112,765, at *8.

This means that the general rule that statutes must be presumed to be constitutional does not apply when a party asserts that a particular statute violates Section 5 of the Kansas Constitution Bill of Rights. *Enerpipe*, Slip Op., No. 112,765, at *8-9. The fundamental status of the jury-trial right likewise triggers strict scrutiny under the third step of the constitutionality-of-a-statute test. *Hodes & Nauser*, 440 P.3d at 496-97.

B. The right to a jury-trial for the determination of damages constitutes a part of the civil jury-trial right, and the criminal-restitution statutes impair that right.

Furthermore, the right to have a jury determine damages is a protected part of the jury-trial right. Indeed, Section 5 of the Kansas Constitution Bill of Rights preserves the right to a jury trial as it existed at common law, in 1859, when the Kansas Constitution came into existence. *Johnson*, 295 Kan. at 647 (citing *State ex rel. v. City of Topeka*, 36 Kan. 76, 85-86, 12 P. 310 [1886]); *In re Rolfs*, 30 Kan. 758, 1 P. 523 (1883); see also *Enerpipe*, Slip Op., No. 112,765, at *10 (citing *In re L.M.*, 286 Kan. 460, 476, 186 P.3d 164 [2008] ["[T]he uncompromising language of [section 5] applies if an examination of history reveals there was a right at common law to a jury trial under the same circumstances."]) The test to be applied to determine if a statute violates Section 5 is therefore two-fold. First, does the statute implicate a right that has been historically understood to constitute part of the jury-trial right, and second, does it impair that right by interfering with the jury's fundamental function. *Enerpipe*, Slip Op., No. 112,765, at *10 (citing *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 376, 116 S. Ct. 1384, 134 L.Ed.2d 577 [1996] [noting that Seventh Amendment jury-trial analysis asks whether "particular decision must fall to the jury . . . to preserve the substance of the common-law right as it existed" at ratification]).

Judicial determination of restitution in criminal cases encroaches upon a criminal defendant's common law right to a civil jury trial, which historically has been understood to comprise a part of the jury-trial right. See *Enerpipe*, Slip Op., No. 112,765, at *10. At common law, tort actions were triable to a jury. *Johnson*, 295 Kan. at 647. This jury trial

right extended to determinations of causation and damages for a tort claim. *Johnson*, 295 Kan. at 648; *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).

Under current Kansas law, an aggrieved party may bypass a jury trial, and receive a judgment requiring payment from a criminal defendant judged guilty of a crime, without that defendant ever having waived his or her right to a jury trial on the matter of restitution. The legislature has accomplished this through statutory provisions now cited as K.S.A. 21-6604 (b)(1) and K.S.A. 21-6607(c)(2).

K.S.A. 21-6604 (b)(1) and K.S.A. 21-6607(c)(2) require judges to impose restitution as a part of a criminal sentence. These restitution orders must reflect "damage or loss caused by the defendant's crime," and are payable to those allegedly harmed by the defendant's crime. While a defendant may request an evidentiary hearing prior to the imposition of a restitution order, he or she has no right to a jury. By statute, judges determine what damages were caused by a defendant's crime. See *State v. Hall*, 298 Kan. 978, 989-91 (2014); K.S.A. 22-3424 (d).

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 State's current restitution scheme could be squared with 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 the alternative, take "the value of them out of the offender's goods." Blackstone, Commentaries on the Laws of England, 362 (1769); see also *State v. Ragland*, 171 Kan. 530, 534-35 (1951) (summarizing common law).

Kansas' first territorial statutes, enacted in 1855, aligned with common law, in that they did not authorize courts to award tort damages through criminal restitution orders. Those statutes provided various consequences for criminal convictions – execution,

imprisonment, hard labor, fines, even castration. They did not authorize restitution.[3] The Statutes of the Territory of Kansas, 1855, Chapters 47-54.

By 1859, our territorial statutes still did not provide non-common law authority to impose criminal restitution orders. Territory of Kansas, General Laws, 1859, Chapter 28. Further, our statutes provided:

> Issues of fact arising in an action for the recovery of money, or specific real or personal property, shall be tried by a jury, unless a jury is waived or a reference be ordered. Territory of Kansas, General Laws, 1859, Chapter 25, Title IX, Chapter 2, Art. I, § 274.

If anything, Kansas' territorial statutes granted a more robust jury trial right than what was provided at common law. Territorial criminal procedure required:

> Where the indictment charges an offense against the property of another by robbery, theft, fraud, embezzlement or the like, the jury, on conviction, shall ascertain and declare in their verdict the value of the property taken, embezzled or received and the amount restored, if any, and the value thereof. Territory of Kansas, General Laws, 1859, Chapter 27, Title IX, § 219.

While, at common law, a judge may have had the authority to make this valuation-finding, in Kansas, valuation-findings were reserved for a jury.

Kansas' restitution statutes permit aggrieved parties to obtain criminal restitution orders for all losses caused by a crime. This allows restitution orders exceeding the value of converted property. See, *e.g.*, *Hall*, 298 Kan. 991 (district court properly awarded relocation expenses in a restitution order). The judicially-determined restitution currently

[3] These statutes, drafted by a pro-slavery legislature, do not reflect the emancipation values embodied by our State Constitution. But they do offer insight into the common law jury trial right (recognized by both pro and anti-slavery factions of the United States) which existed around the enactment date of our State Constitution.

authorized by Kansas statutes 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.

In 1859, Mr. Robison would have had the right for a jury to decide whether his tortious acts caused damage to another. If the jury made that finding, it would also determine the amount of damages caused by his misconduct. Kansas' restitution statutes abrogated those rights, and allowed a judge to impose a $2,648.56 civil judgment against

Mr. Robison. For that reason, Kansas' restitution statutes infringe on the Section 5 right to a civil jury trial, which entrusts juries with the responsibility of determining whether damage was caused by a defendant's act, and in what amount.

Furthermore, the restitution statutes—which allow a judge to determine restitution—interfere with the jury's fundamental function. In *Enerpipe*, the Kansas Supreme Court considered whether a statute capping damages for noneconomic loss in personal-injury actions at $250,000, regardless of the amount of noneconomic loss found by the jury, violated Section 5 of the Kansas Constitution Bill of Rights. It first determined that Section 5 was implicated by the damage-cap statute because, at common law, "there is no question . . . that the right to trial by jury includes the right to have a jury determine actual damages" because the jury's traditional role is to decide issues of fact and the amount of damages is an issue of fact. *Enerpipe*, Slip Op., No. 112,765, at *10. Then, it concluded that the statute interfered with the jury's fundamental function. It noted that the damage cap's effect was "to disturb the jury's finding of fact on the amount of the award" resulting in the substitution of the Legislature's judgment for the jury's judgment, a result that could not stand because the people deprived the legislature of the power to determine damages by reserving that power to the jury when they ratified the Kansas Constitution Bill of Rights. Slip Op., No. 112,765, at *29.

The same is true here. The restitution statutes don't just disturb the jury's finding of facts as to restitution—the statutes take away the right of the jury to make factual findings in the first place. Moreover, the criminal restitution statutes substitute the judge's judgment for the jury's just as the damage cap substitute the legislature's judgment for the jury's

judgment. Slip Op., No. 112,765, at *29. And the people deprived the judge of the power to determine damages when they ratified the Kansas Constitution Bill of Rights, which made the right to a *jury* trial inviolate. Moreover, the Constitution deprived the legislature of the power to delegate the damage-determining power to the judge by taking it away from the jury. In sum, the criminal restitution statutes impair defendants' fundamental jury-trial rights.

C. This Court need not reach the third step, because, under *Enerpipe*, any infringement on the jury-trial right is intolerable.

Because Mr. Robison has established that Section 5 of the Kansas Constitution Bill of Rights protects his right to have a jury determine damages resulting from his crime, if any, and in what amount, and that Kansas' criminal restitution statutes infringe upon that right, this Court might be tempted to turn to the typical third-step of the constitutionality-of-a-statute test, and to provide the State with the opportunity to show that the statutes at issue are narrowly tailored to further a compelling state interest. See *Hodes & Nauser*, 440 P.3d at 496-97.

However, in *Enerpipe*, the majority made it clear that no infringement on the jury-trial right is tolerable. Instead, when the Kansas constitution was ratified, it expressed the people's choice to elevate the common-law jury-trial right to constitutional status by stating that the jury-trial right is "inviolate," meaning it cannot be violated. This right included the right of a jury to determine damages. Kansas Constitution Bill of Rights, Section 5; see also *Enerpipe*, Slip Op., No. 112,765, at *13. As such, without amending the Constitution, any legislative limits placed on the jury-trial right cannot stand. Slip Op., No. 112,765, at

*14 (quoting *Samsel v. Wheeler Transport Servs., Inc.*, 246 Kan. 369-70, 789 P.2d 541 [1990] [Herd, J., *dissenting.*], *abrogated on other grounds by Enerpipe*, Slip Op., No. 112,765). Indeed, for the "inviolate" language in Section 5 to mean anything, statutes must not limit or disturb the jury's role. Thus, the Kansas criminal restitution statutes are unconstitutional, regardless of what (if any) government interest they further. For that reason, this Court must vacate the district court's order of restitution in Mr. Robison's case.

Issue II: If restitution is punishment, Kansas' criminal restitution statutes violate *Apprendi*.

Overview

Kansas' restitution statutes require judges to impose a mandatory minimum amount of restitution upon those convicted of a crime. That mandatory minimum amount of restitution is established by judicial fact-finding. Thus, if restitution is punishment, Kansas' restitution statutes violate the *Apprendi* rule.

Standard of Review

An appellate court has unlimited review when ruling upon the constitutionality of a statute. *State v. Williams*, 308 Kan. 1439, 1460 (2018).

Preservation

Mr. Robison 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. 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. Foster*, 290 Kan. 696, 702 (2010). Both of those exceptions apply to the facts of this case.

As above, Mr. Robison acknowledges that, in *State v. Jones* and *State v. Patterson* (unpublished opinions), panels of this Court held that this very issue was not reviewable for the first time on appeal. But neither *Jones* nor *Patterson* explain why this is the case. *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). And Mr. Robison respectfully disagrees with their conclusions.

First, *Apprendi* challenges to sentencing schemes are, by their nature, purely legal and determinative of a case. For this reason, Kansas appellate courts routinely review these claims when they are raised for the first time on appeal. *See e.g.*, *State v. Conley*, 270 Kan. 18, 30-31 (2000); *State v. Gould*, 271 Kan. 394, 404-05 (2001); *State v. Anthony*, 273 Kan. 726, 727 (2002); *State v. Dickey*, 50 Kan. App. 2d 468, 474 (2014). Mr. Robison is unaware of any published opinion in which an appellate court has refused to review a newly raised *Apprendi* challenge to a statutory sentencing scheme when the appellant's brief complied with Supreme Court Rule 6.02(a)(5).

Second, *Apprendi* claims also implicate our fundamental constitutional right to a jury trial. This is another reason why appellate courts routinely review *Apprendi* challenges to statutory sentencing schemes when they are raised for the first time appeal. *See e.g.*, *Conley*, 270 Kan. at 30-31; *Gould*, 271 Kan. at 404-05; *Anthony*, 273 Kan. at 727; *Dickey*, 50 Kan. App. 2d at 474-75; *State v. Weis*, 47 Kan. App. 2d 703, 717 (2012). Thus, this

Court must review this issue to protect Mr. Robison's fundamental constitutional right to a jury trial finding on restitution under *Apprendi*.

Analysis

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." Because of this right, 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, 120 S. Ct. 2348, 147 L.Ed.2d 435 (2000). In lieu of jury fact-finding, the State may also increase a criminal penalty by securing a knowing and voluntary plea from a defendant. *Blakely v. Washington*, 542 U.S. 296, 310, 124 S. Ct. 2531, 159 L.Ed.2d 403 (2003).

In this case, Robison pled to a crime. But his plea did not include an admission he'd caused a particular amount of harm to the victim or any third party. Notwithstanding this, Kansas statutes required the district judge to impose criminal restitution based upon his findings regarding: (1) whether Mr. Robison's crime caused damage to another person; and (2) the amount of those damages. K.S.A. 21-6604 (b); K.S.A. 21-6607(c)(2). 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*, 50 Kan. App. 2d 1094, 1099, 336 P.3d 897 (2014), 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 not use judicial fact-finding to

establish a defendant's maximum restitution sentence. The *Huff* panel's first point is debatably correct. Its second is not.

A. 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 v. United States*, __ U.S. __, 139 S.Ct. 509, 202 L.Ed.2d 627 (2019) (J., Gorsuch, dissenting from the denial of certiorari). And federal appellate courts are split on this 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. Robison'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." *United States v. Behrman*, 235 F.3d 1049, 1054 (7th Cir. 2000). 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. Robison 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. *State v. Hall*, 298 Kan. 978, Syl. ¶ 1, 319 P.3d 506 (2014). 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, 976 P.2d 936 (1999).

If the Kansas Supreme Court views criminal restitution as punishment, Mr. Robison's Section 5 challenge would likely fail because there is no right to a civil jury trial in the determination of punishment. But viewing restitution as punishment would mean that Kansas' criminal-restitution scheme violates *Apprendi*. Thus, if this Court determines that criminal restitution is punishment, it should also find that Kansas' criminal-restitution scheme violates Mr. Robison's federal constitutional rights.

B. In Kansas, 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, 133 S. Ct. 2151, 186 L.Ed.2d 314 (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 Kansas' restitution statutes.

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. In a similar vein, K.S.A. 21-6607(c)(2) directs that a judge "shall" order defendants receiving probation sentences to pay restitution "for the damage or loss caused by the defendant's crime." These statutes require Kansas judges to make factual findings, and order *mandatory minimum*

amounts of restitution based upon those findings. See *Hester*, 139 S.Ct. 509 (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 additional judicial findings of unworkability).

Again, the *Apprendi* rule applies when factual findings elevate a mandatory minimum sentence. *Alleyne*, 570 U.S. at 103. Since Kansas' restitution scheme uses judicial fact-finding to establish a mandatory minimum restitution sentence, *Apprendi's* protections attach (assuming that restitution is a form of punishment).

C. Our Supreme Court will be deciding this issue.

Following an adverse ruling, the *Huff* appellant petitioned to the Kansas Supreme Court to no avail. But, since the denial of the *Huff* appellant's petition for review, our Supreme Court has granted review of another case in which a panel of this Court adversely ruled upon the merits of an appellant's *Apprendi* challenge to a restitution sentence. *State v. Arnett*, No. 112,572, 2018 WL 2072804 at *2 (Kan. App., 2018) (unpublished opinion),[4] *pet. for rev. granted* November 27, 2018. This review could, eventually, result in our Supreme Court overruling *Huff*.

Conclusion

Kansas' restitution statutes require judges to make fact findings which dictate a criminal defendant's mandatory restitution sentence. Thus, if this Court is inclined to view

[4] Pursuant to Kansas Supreme Court Rule 7.04(g)(2)(C), a copy of this opinion is attached as Appendix C.

restitution as a criminal punishment, rather than a civil judgment, it must conclude that Kansas' restitution statutes violate *Apprendi*.

Issue III: The district court erred by ordering Mr. Robison to pay restitution to an insurance company when they did not actually suffer a loss as a result of his crime.

Overview

K.S.A. 21-6604(b)(1) states that "the 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 which would render a plan of restitution unworkable." The district court ordered Mr. Robison to pay $2,648.56 in restitution to the insurance company for his victim's employer. Mr. Robison contends this Court erred in ordering restitution to an insurance company because insurance companies do not experience actual loss as a matter of law, and because this insurance company in particular did not establish any loss. Mr. Robison requests that this Court vacate the district court's order of restitution.

Standard of Review

To the extent this issue involves the interpretation of K.S.A. 21-6604 and K.S.A. 21-6607, this Court has unlimited review. *State v. Dexter*, 276 Kan. 909, 913, 80 P.3d 1125 (2003) (citing *State v. Goeller*, 276 Kan. 578, Syl. ¶ 1, 77 P.3d 1272 [2003]; *State v. Maass*, 275 Kan. 328, 330, 64 P.3d 382 [2003]). To the extent Mr. Robison challenges the district court's decision to impose restitution under the facts of his case, this court reviews the restitution award for an abuse of the district court's discretion: "The amount of restitution and manner in which it is made to the aggrieved party is to be determined by the court

exercising its judicial discretion and is subject to abuse of discretion review. [Citation omitted.]" *State v. Hunziker,* 274 Kan. 655, 660, 56 P.3d 202 (2002); *State v. Cole*, 37 Kan. App. 2d 633, 635, 155 P.3d 739 (2007). The district court abuses its discretion when it bases its decision on an error of fact, *i.e.,* if substantial competent evidence does not support a factual finding on which a prerequisite conclusion of law or the exercise of discretion is based." *State v. Ward,* 292 Kan. 541, 550, 256 P.3d 801 (2011), *cert. denied* 132 S.Ct. 1594 (2012).

Issue Preservation

At the restitution hearing, defense counsel objected to ordering restitution to be paid to an insurance company who suffered no actual loss, but the district court nonetheless ordered restitution over Mr. Robison's objection. (R. X, 5-8.) Thus, whether an insurer is entitled to restitution generally is subject to appellate review.

Mr. Robison contends that his counsel's argument about the insurer in this case—who did not appear for the restitution hearing—likewise preserve the issue of whether sufficient evidence supported finding a loss to the particular insurer in this case. In the event this Court disagrees, however, it may nonetheless reach the merits of Mr. Robison's argument. First, Mr. Robison would note that he is challenging the sufficiency of the evidence of the restitution amount ordered. Generally, claims regarding the sufficiency of the State's evidence may be properly raised for the first time on appeal. *State v. Foster*, 298 Kan. 348, 352, 312 P.3d 364 (2013). Thus, Mr. Robison asserts that *Foster* mandates the conclusion that he needn't have objected to the sufficiency of the evidence supporting his restitution order to challenge it on appeal.

In the alternative, Mr. Robison's issue regarding the sufficiency of the State's evidence supporting his restitution order may nonetheless be reviewed under an exception to the general rule that new issues may not be raised for the first time on appeal. New issues may be raised for the first time on appeal if "(1) [t]he newly asserted claim involves only a question of law arising on proved or admitted facts and is determinative of the case; (2) consideration of the claim is necessary to serve the ends of justice or to prevent the denial of fundamental rights; and (3) the district court is right for the wrong reason. [Citations omitted.]" *State v. Ortega–Cadelan,* 287 Kan 157, 159, 194 P.3d 1195 (2008).

Relevant here, a new issue may be considered for the first time on appeal when doing so is necessary to prevent the denial of an accused's fundamental rights or to serve the ends of justice. *State v. Schroeder,* 279 Kan. 104, 116, 105 P.3d 1237 (2005). Mr. Robison had a fundamental due-process right to be sentenced in accordance with the law, and not considering whether the law was followed would deny him that right. Likewise, it would serve the ends of justice to ensure that the State presented sufficient evidence of the restitution Mr. Robison owed.

Accordingly, this Court may consider Mr. Robison's issue that the State failed to present sufficient evidence that a party suffered a loss in the amount it requested because: it may be brought for the first time on appeal under *Foster*; and (3) it comprises an exception to the general rule that new issues may not be raised on appeal because considering it is necessary to preserve the ends of justice and prevent the denial of Mr. Robison's fundamental rights.

Analysis

K.S.A. 21-6604(b)(1) states that "the 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 which would render a plan of restitution unworkable." (Emphasis added.) Here, Mr. Robison argues that TriStar—the county's insurance company—experienced no damage or loss, nor did it demonstrate any damage or loss, and was therefore not entitled to restitution for two reasons: (1) by business model, and as a matter of law, insurance companies suffer no actual loss by paying out on claims of their insureds; and (2), also, or in the alternative, the insurance company in this case failed to demonstrate an actual loss

1. Insurance companies do not experience loss by paying out on the claims of their insured.

Insurance companies do not experience loss by paying out on the claims of those they insure. As Mr. Robison argued below, paying out on an insured's claim is the *business* of an insurer. (R. XII, 15.) If the insurer suffered actual loss for paying out on claims, it would not continue to do business, or it would raise premiums to cover that loss. Instead, the clients of an insurer pay the insurer in small increments to cover the possibility that the insurer will need to pay out sometime in the future. This is what happened here. And, in fact, the insurance company did not actually request any reimbursement, either from Mr. Robison, the victim, or the State. The State merely asked for the money on the insurance company's behalf.

Because the insurance companies generally suffer no actual loss by paying out on the claims of the insured, Mr. Robison contends that line of Kansas cases which have "required restitution to an insurance company, as a secondary 'aggrieved party,' in an amount tied to what the company has paid out under the victim's policy for the claimed loss," are wrongly decided. *State v. Hand*, 45 Kan. App. 2d 898, 904-05, 257 P.3d 780 (2011), *rev. on other grounds,* 297 Kan. 734, 304 P.3d 1234 (2013) (citing to *State v. Yost,* 232 Kan. 370, 374–75, 378, 654 P.2d 458 [1982], wherein our Supreme Court found a third party who paid the victim the amount lost when the defendant passed a worthless check was an aggrieved party and entitled to restitution as a condition of the defendant's probation); *State v. Harkins*, No. 108,614, 2015 WL 5458665 (Kan. App., 2015) (unpublished decision).[5]

Further, even if this Court determines that cases where our State's appellate courts decided the issue of whether third-party insurance companies could be aggrieved parties, such as *Hand* and *Yost*, were decided correctly, Mr. Robison argues that this case is distinguishable. In *Yost* and *Hand*, the district court ordered restitution as a condition of probation, pursuant to the restitution statute that controls when a defendant receives probation. *Yost*, 232 Kan. at 373-378; *Hand*, 45 Kan. App. 2d at 899, 904-905. That statute, now K.S.A. 21-6607(c)(2) gives courts authority to order restitution in probation cases, and it states district courts may order defendant to pay "restitution to the *aggrieved party* for the damage or loss caused by the defendant's crime" as a condition of probation.

[5] Pursuant to Kansas Supreme Court Rule 7.04(g)(2)(C), a copy of this opinion is attached as Appendix D.

Here, because Mr. Robison did not receive probation, the applicable statute is not the one that was at issue in *Yost* and *Hand.* Rather, the applicable statute is K.S.A. 21-6604(b)(1), which does *not* include a provision of payment to aggrieved parties. Instead, this statute merely provides for restitution for "damage or loss" caused by a crime. Thus, even if the insurance party was in some way aggrieved as the court found in *Yost* and *Hand*, it would not be entitled to compensation because it suffered no actual loss.

The *Hankins* court considered a similar argument, but ultimately concluded that "nothing in K.S.A. 21-6604(b)(1) limits or otherwise defines for whom . . . restitution may be ordered" because it doesn't contain the "aggrieved party" language. 2015 WL 5458665, at*2. But the *Hankins* court misunderstood the argument. Mr. Robison contends that under the probation-restitution statute, restitution may be ordered to be paid to *either* someone who suffered actual loss, or an otherwise aggrieved party if that party covered the actual loss for another. The prison-restitution statute, however, only authorizes restitution to those individuals who suffered damage or loss. K.S.A. 21-6604(b)(1). Thus, because insurers don't suffer actual losses over the amount of money paid into them to cover future payouts, Mr. Robison should not have been ordered to pay restitution to the insurance company TriStar.

Moreover, even if an insurer *could* be entitled to restitution for damage or loss for paying out to a crime victim, Mr. Robison contends that more than the fact that it paid out would be needed to show the loss. Rather, it would need to show that it experienced a loss from paying out not covered by the premiums paid into it by the party.

2. TriStar did not demonstrate any actual loss.

In the alternative, even if insurers generally can experience a demonstrable loss, the insurance company here—TriStar—failed to demonstrate such a loss. The only evidence presented at the restitution hearing in this case was that the victim's hospital bills were paid in full by the victim's employer—Lyon County Detention, whose payment was covered by TriStar Risk Management. (R. XII, 9-11.) But, as noted above, TriStar did not appear at the hearing, nor did it request reimbursement for its losses from either the victim, Lyon County Detention Center, or the State. (R. XII, 15-16.) Even the State admitted, "[t]here's been no subrogation addressed by either the victim or by the insurance company." (R. XII, 16.)

Thus, while the State put on evidence of value--$2,648.56—it failed to put on any evidence that a *loss* of that value occurred. And, a district court's restitution order must be based on "reliable evidence." *Hunziker,* 274 Kan. 655, Syl. ¶ 3. Here, the district court abused its discretion in ordering restitution without sufficient evidence that anyone suffered the loss the prosecutor claimed.

Conclusion

In sum, the prison-restitution statute is narrower than the probation-restitution statute because it doesn't apply to all aggrieved parties, only to individuals who suffered actual loss. If an insurer suffered actual loss, it should be required to show that loss. Because TriStar demonstrated no actual loss in this case and did not appear at all, the district court erred by ordering Mr. Robison to pay restitution to TriStar.

Conclusion

For the aforementioned reasons, Mr. Robison respectfully requests that this Court vacate the order of restitution.

Respectfully submitted,

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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

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End of Document

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. Secresi*, 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 *Secresi*, 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

400 P.3d 676 (Table), 2017 WL 3207149

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Review Granted November 27, 2018
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.
|
Review Granted November 27, 2018

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

Attorneys and Law Firms

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

Alan T. Fogelman, assistant district attorney, Jerome A. Gorman, district attorney, and Derek Schmidt, attorney general, for appellee.

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.

All Citations

417 P.3d 268 (Table), 2018 WL 2072804

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356 P.3d 436 (Table)
Unpublished Disposition

Court of Appeals of Kansas.

STATE of Kansas, Appellee,
v.
Mary M. HARKINS, Appellant.

No. 108,614.
|
Sept. 18, 2015.

Appeal from Sedgwick District Court; John J. Kisner, Jr., Judge.

Attorneys and Law Firms

Caroline Zuschek and Kimberly Streit Vogelsberg, of Kansas Appellate Defender Office, for appellant.

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

Before McANANY, P.J., GARDNER, J., and WALKER, S.J.

MEMORANDUM OPINION

PER CURIAM.

***1** Pursuant to a plea agreement with the State, Mary M. Harkins pled guilty to aggravated battery and abuse of a child. She agreed "to pay all medical expenses for [the child] resulting from this offense ... notwithstanding the lack of a formal 'restitution order' in this case as the nature of care and recovery may be ongoing." The plea agreement also contained a provision allowing the State to recommend that the court order her to register as an offender under the Kansas Offender Registration Act (KORA) for 10 years, and Harkins was free to argue against this recommendation.

Harkins moved for probation and the State concurred, but the district court denied the motion and sentenced Harkins to 60 months' imprisonment on the aggravated battery conviction and a concurrent 32 months' imprisonment on the abuse of a child conviction. The court ordered Harkins to register as an offender under KORA for a period of 10 years pursuant to K.S.A.2011 Supp. 22–4902(a)(5), for "[a]n offense not otherwise required." The State sought $17,540.65 in restitution on behalf of CoventryCares of Kansas for the amount it paid for the child's medical treatment required for the injuries sustained in the aggravated battery. Harkins agreed to the amount of restitution. The court ordered her to pay $17,540.65 to CoventryCares. Harkins appeals.

KORA

Harkins argues that the district court did not have the authority to order her to register under KORA and that the "catch-all" portions of KORA relied on by the district court only allowed the district court to require registration for offenses that do not fall under other provisions of KORA if made as part of a probation order. She states that no other provision of KORA requires registration for her offenses of conviction. The State concedes this point on appeal.

Harkins acknowledges that she did not raise this issue before the district court, but she argues, and the State concedes, that the issue involves only a question of law arising on proven or admitted facts and is finally determinative of the case. *State v. Phillips*, 299 Kan. 479, 493, 325 P.3d 1095 (2014). Accordingly, we will consider the issue using the standards expressed in *Phillips; State v. Williams*, 298 Kan. 1075, 1079, 319 P.3d 528 (2014); and *State v. Brooks*, 298 Kan. 672, 685, 317 P.3d 54 (2014).

The court must apply the version of KORA in effect at the time of sentencing. *State v. Orange*, No. 108,806, 2014 WL 37688, at *10 (Kan.App.) (unpublished opinion), *rev. denied* 300 Kan. 1106 (2014). Here, the statute as amended in 2012 applies.

Aggravated battery and abuse of a child are not included in any of the specific provisions requiring registration under KORA. K.S.A.2012 Supp. 22–4902(a)(5), the "catch-all" provision relied on by the district court, defines an offender to include "any person required by court order to register for an offense not otherwise required *as provided in the Kansas offender registration act.*" (Emphasis added.) The only provision of KORA that references K.S.A. 22–4902(a)(5) is K.S.A.2012 Supp. 22–4906(i), which states:

***2** "Notwithstanding any other provision of law, *if a*

> *diversionary agreement or probation order, either adult or juvenile, or a juvenile offender sentencing order,* requires registration under the Kansas offender registration act for an offense that would not otherwise require registration as provided in subsection (a)(5) of K.S.A. 22–4902, and amendments thereto, then all provisions of the Kansas offender registration act shall apply, except that the duration of registration shall be controlled by such diversionary agreement, probation order or juvenile offender sentencing order." (Emphasis added.)

This provision applies only when the court has ordered registration as part of a diversion agreement, probation order, or juvenile offender sentencing. Harkins was denied probation, so this provision did not apply. Thus, the district court was without authority to order registration under KORA, and the registration order is vacated.

Restitution

Harkins argues that the district court erred in ordering her to pay restitution to CoventryCares for reimbursement of the child's medical expenses. She contends that "insurance companies do not experience actual loss, and ... the insurance company was not the actual victim of her crime." Our review of this issue is unlimited. *State v. Looney,* 299 Kan. 903, 906, 327 P.3d 425 (2014).

K.S.A.2011 Supp. 21–6604(b)(1) states:

> "In addition to or in lieu of any of the above, the 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 which would render a plan of restitution unworkable." (Emphasis added.)

State v. Hand, 45 Kan.App.2d 898, 257 P.3d 780 (2011), *rev'd on other grounds* 297 Kan. 734 (2013), and *State v. Yost,* 232 Kan. 370, 654 P.2d 458 (1982), examined the statutory provision which authorizes the district court to order restitution as a condition of probation. The statute requires the district court to order "reparation or restitution *to the aggrieved party* for the damage or loss caused by the defendant's crime." (Emphasis added.) K.S.A.2012 Supp. 21–6607(c)(2). In *Hand,* which cites to *Yost,* the court stated that an insurance company becomes a "secondary 'aggrieved party' in an amount tied to what the company has paid out under the victim's policy for the claimed loss." *Hand,* 45 Kan.App.2d at 904.

Harkins argues that K.S.A.2011 Supp. 21–6604(b)(1) only authorizes restitution to the victim and makes no mention of restitution to an "aggrieved party" as allowed under K.S.A.2011 Supp. 21–6607(c)(2). But the "aggrieved party" language in K.S.A.2011 Supp. 21–6607(c)(2) only applies when the court orders restitution as a condition of probation. Harkins was denied probation. K.S.A.2011 Supp. 21–6604(b)(1) is the statute that applies to any person found guilty of a crime and it contains no reference to an "aggrieved party." Contrary to Harkins' assertion, nothing in K.S.A.2011 Supp. 21–6604(b)(1) limits or otherwise defines for whom such restitution may be ordered. Causation is the controlling factor in this statute.

***3** Harkins does not dispute the fact that she agreed to make reimbursement for the child's medical expenses, nor does she dispute that CoventryCares paid $17,540.65 for these expenses. Had Harkins not committed this crime, CoventryCares would not have paid these necessary expenses caused by Harkins' criminal conduct. We find no merit in Harkins' argument. Under the statute, CoventryCares was entitled to reimbursement. The district court did not err in its restitution order.

Apprendi

Harkins argues that her sentence violates the Sixth and Fourteenth Amendments of the United States Constitution under *Apprendi v. New Jersey,* 530 U.S. 466, 477, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), because the State did not include her prior convictions in its charging document and did not prove those convictions to a jury before the district court used those convictions to increase her sentence.

In *State v. Ivory,* 273 Kan. 44, 45–46, 41 P.3d 781 (2002), our Supreme Court rejected the argument Harkins makes here. We are duty bound to follow Kansas Supreme Court precedent absent some indication the court is departing from its previous position. *State v. Ottinger,* 46 Kan.App.2d 647, 655, 264 P.3d 1027 (2011), *rev. denied* 294 Kan. 946 (2012). Because the Kansas Supreme Court has repeatedly declined to reconsider this point of law, we have no reason to believe that the court is departing from its holding in *Ivory.* See *State v. Castleberry,* 301 Kan. 170, 191, 339 P.3d 795 (2014); *State v. Brown,* 300 Kan. 565, 590, 331 P.3d 797 (2014). Accordingly, this contention fails.

Affirmed in part and vacated in part.

All Citations

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Certificate of Service

I hereby certify that the above and foregoing amended brief was served on the Lyon County District Attorney, by notice of electronic filing pursuant to Kansas Supreme Court Rule 1.11(b) and by e-mailing a copy to Derek Schmidt, Attorney General, at ksagappealsoffice@ag.ks.gov on the 13th day of December, 2019.

/s/ Caroline M. Zuschek
Caroline M. Zuschek, #26073