

No. 22-125,003-A

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

STATE OF KANSAS
Plaintiff-Appellee

vs.

BRIAN S. STUBBS
Defendant-Appellant

AMENDED BRIEF OF APPELLEE

Appeal from the District Court of Douglas County, Kansas
Honorable B. Kay Huff, Judge
District Court Case No. 21CR240

Jon Simpson, #26455
Assistant District Attorney
Douglas County District
Attorney's Office
111 E. 11th Street
Lawrence, Kansas 66044
Phone (785) 841-0211
Fax: (785) 832-8202
jsimpson@douglascountyks.org
daappeals@douglascountyks.org

Attorney for Appellee

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NATURE OF THE CASE

Brian Stubbs entered a man's apartment, quarreled with him, stabbed him, and then ran from the responding officer who arrived and pursued him. Though it had its doubts that Stubbs burglarized the man's apartment to attempt his murder, a jury found no reason to doubt that he criminally used a weapon and interfered with law enforcement. Now claiming an unconstitutionally vague statute invalidates the first of those convictions and insufficient evidence exists to validate the second, Stubbs appeals.

STATEMENT OF THE ISSUES

- I. **Not that Stubbs has standing to argue otherwise, but there is no unconstitutional vagueness in K.S.A. 21-6301(a)(2)'s prohibition against criminally using a "dangerous knife."**
- II. **Sufficient evidence proves Stubbs *knowingly* obstructed Sgt. Ashely's efforts to arrest him.**

STATEMENT OF FACTS

"I never actually saw [the knife], I just felt it." (R. IX, 315.)

Brian Stubbs and Edward McCutcheon, only recently acquainted, had at least one thing in common: they both had been romantically involved with the same woman, Constance Oldman ("Connie"). (R. IX, 283–84, 304–05, 313–14, 448–50, 467–68, 493, 496.) And when Stubbs showed up at McCutcheon's apartment, uninvited, in the early morning hours of March 19, 2021, for one reason or another, they ended up fighting. (R. IX, 285–88, 306–07, 309, 457–61, 472–74, 480, 482, 486.) By either man's account, the other started the fight. (R. IX, 306, 315, 457, 466, 472–74, 486, 488–89.) By both accounts, however, Stubbs gave McCutcheon's stomach a roughly half-inch-long puncture wound with this "kitchen-type" knife:



(R. IX, 286–87, 296, 300–01, 322, 326–28, 458–60, 475–78; R. IV, 48–49 [State’s Exs. 56–57]; R. V, State’s Ex. 2 at 6:54–6:58.) That knife’s blade (later recovered from Stubbs’ pocket), broke from its handle only after Stubbs stabbed McCutcheon. (R. IX, 476, 481, 485, 495.)

The fighting that followed that stabbing eventually ended when Stubbs lost his glasses. (R. IX, 292–93, 308–09, 462.) As Stubbs searched for his glasses, McCutcheon fled his apartment to seek his neighbor’s help. (R. IX, 292–93, 311, 462.)

By the time Stubbs exited McCutcheon’s apartment, he “hear[d] sirens.” (R. IX, 463.) McCutcheon had asked his neighbor to call 911. (R. IX, 293.) After “walking out” of McCutcheon’s apartment, Stubbs went directly to that neighbor’s door and banged on it. (R. IX, 293, 311–12, 463, 487.) When McCutcheon’s neighbor, Jeffrey Marconette, opened the door, Stubbs could see Marconette “on the phone” and McCutcheon behind him, “holding his side.” (R. IX, 463, 487.) Marconette told Stubbs, “you might want to get out of here, man, I’m calling the police.” (R. IX, 312.) “[G]et[ting] out of that situation as quickly as possible” then became Stubbs’ goal. (R. IX, 464, 487–88.) Connie lived nearby, and, still hearing sirens, he took off running for her apartment. (R. IX, 283, 464–65, 488.)

“He did not stop. And I continued to run.” (R. IX, 366.)

By this time, Lawrence Police Departed (LPD) Sergeant Daniel Ashley was nearing McCutcheon’s address. (R. IX, 365.) An officer who had already “arrived on scene . . . advised over the radio that a subject was running away.” (R. IX, 365; *see also* R. V, State’s Ex. 1 at 1:00–1:15, 1:26–1:30, 1:35–1:43.) As Sgt. Ashley was receiving that call, he saw Stubbs. (R. IX, 365–66.) Sgt. Ashley immediately activated his LPD-marked vehicle’s lights and sirens. (R. IX, 363, 366; R. V, State’s Ex. 1 at 1:40–1:43.) When he did so, he and Stubbs had a “deer in the headlights” moment, where Stubbs was “right there in front of [him] crossing the street running away.” (R. IX, 366.) Sgt. Ashley abruptly stopped his vehicle and exited. (R. IX, 366; R. V, State’s Ex. 1 at 1:42–1:46.) He “started running” after Stubbs and shouted, “Stop! Police!” (R. IX, 366; R. V, State’s Ex. 1 at 1:45–1:48.) Stubbs “did not stop.” (R. IX,

366.) So, Sgt. Ashley “gave chase.” (R. IX, 366.) He pursued Stubbs across the street, between two apartment buildings, through one of those building’s doors, up several flights of stairs, and then into the hallway of the building’s top floor. (R. IX, 366–69, 377; R. V, State’s Ex. 1 at 1:45 –2:59.) Only when he again yelled for Stubbs to stop did Stubbs finally comply with his commands. (R. IX, 369, 465–66; R. V, State’s Ex. 1 at 2:11–2:59.) Sgt. Ashley’s body camera recorded his pursuit of Stubbs. (*See generally* R. V, State’s Ex. 1.)

“The Court will call the case of State v. Brian Stubbs” (R. IX, 14.)

Stubbs ultimately proceeded to a jury trial on charges of attempted first-degree murder, aggravated burglary, criminal use of a weapon, and interference with law enforcement. (R. I, 22–23, 42–45.) McCutcheon, Sgt. Ashley, and various other LPD officers and crime-scene personnel testified on behalf of the State. (*See* R. IX, 2–3.) When the State rested its case, Stubbs moved for judgment of acquittal. (R. IX, 434–43.) Part of that motion involved Stubbs requesting that the district court dismiss the criminal-use-of-a-weapon charge:

Additionally, Your Honor, we’re asking for a dismissal of the charge of possession of a criminal weapon. And I apologize because I thought I had copies of this case, which is [*State v. Harris*, 311 Kan. 816, 467 P.3d 504 (2020)]

.....

This is a Court of Appeals finding that the residual clause of [“]or any other dangerous or deadly cutting instrument of like character[”] in [K.S.A. 21-6304] is unconstitutionally vague because it fails to provide an explicit and objective standard of enforcement.

In th[at] case, it applies to KSA . . . 21[-]6304, which is a felon in possession of a weapon. But the language that is found unconstitutional is identical to the language charged in this particular case.

And so while certainly Mr. Stubbs was found with a knife on him, we submit that having a knife on you doesn’t necessarily become an illegal act. And under the statute, and under [*Harris*], it is unconstitutional.

. . . . For those reasons, Your Honor, we’d ask the Court enter a directed verdict of not guilty.

(R. IX, 437–38, 441.) The district court denied Stubbs’ *Harris*-based challenge and other requests for acquittal. (R. IX, 442–44.) Later, during the parties’ jury-instructions conference,

Stubbs renewed his earlier objection to the criminal-use-of-a-weapon charge. (R. IX, 506.) The court “noted for the record” but again denied that objection. (R. IX, 506.)

Ultimately, Stubbs’ jury found him guilty of only the lesser charges of criminally using a “dangerous knife” and interfering with law enforcement by obstructing Sgt. Ashley’s efforts to arrest him. (R. I, 60–61, 68–69; R. IX, 522–23, 551.) At sentencing, the court ordered Stubbs to serve a controlling 17-month term of imprisonment, followed by a 12-month term of supervised postrelease. (R. I, 87–97.) Stubbs then timely filed notice of this appeal. (R. I, 11.)

ARGUMENTS AND AUTHORITIES

I. Not that Stubbs has standing to argue otherwise, but there is no unconstitutional vagueness in K.S.A. 21-6301(a)(2)’s prohibition against criminally using a “dangerous knife.”

Stubbs first claims that that this Court should reverse his criminal-use-of-a-weapon conviction. The statute he offended, K.S.A. 21-6301(a)(2), criminalizes:

knowingly possessing with intent to use the same unlawfully against another, a dagger, dirk, billy, blackjack, slungshot, *dangerous knife*, straight-edged razor, throwing star, stiletto or any other dangerous or deadly weapon or instrument of like character.

K.S.A. 21-6301(a)(2) (emphasis added). At trial, the State elected to prosecute Stubbs under the theory that he criminally used, specifically, a “dangerous knife.” (R. IX, 439–40.) Now, still pointing to *State v. Harris*, 311 Kan. 816, 467 P.3d 504 (2020), he argues that, like the “or any other dangerous or deadly cutting instrument of like character” clause addressed in *Harris*, K.S.A. 21-6301(a)(2)’s undefined term “dangerous knife” is so facially abstract that it offers no meaningful constraints against arbitrary and discriminatory enforcement. He argues, in other words, “dangerous knife” and “or any other dangerous cutting instrument of like character” are equally vague and facially unconstitutional. Stubbs’ claim, however, warrants neither review nor relief.

Standard of Review

Stubbs void-for-vagueness challenge raises questions of standing, statutory interpretation, and constitutional law—over all of which this Court exercises “unlimited” or “plenary” review. *State v. Bodine*, 313 Kan. 378, 385, 486 P.3d 551 (2021) (stating standard for reviewing issue of standing); *Harris*, 311 Kan. at 821 (stating standard for reviewing issues of statutory interpretation and constitutional law).

A. Stubbs has no standing to complain that “dangerous knife” is overly vague.

A matter of standing first stands between Stubbs and his requested relief. To provide this Court the subject-matter jurisdiction it needs to address his vagueness challenge, Stubbs must show that he has the right to raise the claim he wants reviewed. *Bodine*, 313 Kan. at 385.

Where no First Amendment overbreadth issues are at play, only “a person directly affected” can challenge a statute’s constitutionality. *State v. Thompson*, 221 Kan. 165, 172, 558 P.2d 1079 (1976); *see also Bodine*, 313 Kan. at 385 (“[I]f there is no constitutional defect in the application of the statute to a litigant, [the litigant] does not have standing to argue that it would be unconstitutional . . . in hypothetical situations.”); *State v. Stoll*, 312 Kan. 726, 734, 480 P.3d 158 (2021) (indicating that standing requires a litigant to establish “that he or she personally suffers some actual or threatened injury as a result of the challenged conduct.”). A void-for-vagueness challenge may proceed, therefore, only if, at a minimum, “the statute may be unconstitutional in [the] circumstances . . . before the court.” *State v. Williams*, 299 Kan. 911, Syl. ¶ 2, 918–19, 329 P.3d 400 (2014); *cf. United States v. Mazurie*, 419 U.S. 544, 550 (1975) (“[V]agueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case.”). Stubbs has standing to facially attack

K.S.A. 21-6301(a)(2)'s "dangerous knife" prohibition, therefore, only insofar as *he himself* also may have suffered constitutional injury from any facial vagueness.

Stubbs complains of vagueness he never suffered. Without knowing just "how sharp," long, or "serrated" a knife must be to cross K.S.A. 21-6301(a)(2)'s harmless/dangerous, legal/illegal line, Stubbs complains, "dangerous knife" is too susceptible to arbitrary and discriminatory enforcement that it must be unconstitutional. (Appellant's Br., 5, 10.) But Stubbs never addresses his own prosecution. And indeed, his prosecution for criminally using a "kitchen-type" knife pointed and sharp enough to puncture McCutcheon's stomach was, without question, neither arbitrary nor discriminatory. (R. IX, 296, 322, 475; R. IV, 48–49 [State's Exs. 56–57]; R. V, State's Ex. 2 at 6:54–6:58.) As a matter of law, "a knife . . . taken from [a] kitchen and used in [an] attack *would* fit the definition of a dangerous knife." *State v. Sanders*, 263 Kan. 317, 330, 949 P.2d 1084 (1997) (emphasis added); *State v. Moore*, 38 Kan. App. 2d 980, 986, 174 P.3d 899 (2008) ("[A] 3.5-inch serrated blade, 'very much like a steak knife,' would qualify as a dangerous knife.").

Any possible vagueness in the statute's term "dangerous knife," therefore, was not exploited to prosecute Stubbs. He engaged in conduct "clearly proscribed" by K.S.A. 21-6301(a)(2); and as such, his complaint necessarily concerns "the vagueness of the law as applied to the conduct of others." *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982). He "may not successfully challenge [the statute] for vagueness." *Parker v. Levy*, 417 U.S. 733, 756 (1974). He lacks standing. See *Williams*, 299 Kan. at 919; *State v. Seck*, No. 110,786, 2015 WL 1401954, *10–*11 (Kan. App. 2015) (unpublished opinion) ("As such, [defendant] may not challenge the [aggravated-battery] statute's vagueness because, even if

there is some conduct the statute might not clearly prohibit, it clearly prohibits repeatedly stabbing another person with a knife.”).

Accordingly, this Court should dismiss for lack of jurisdiction the vagueness-challenge component of Stubbs’ appeal.

B. In any event, “dangerous knife” conveys enforcement guidelines discernable and objective enough that neither K.S.A. 21-6301(a)(2) nor Stubbs’ conviction is unconstitutional.

His lack of standing notwithstanding, Stubbs’ *Harris*-based vagueness claim fails for yet another reason: *Harris*’ vagueness concerns extend no further than the distinct residual clause it addressed.

Vagueness-Review Standards

Deciding the meaning and facial constitutionality of K.S.A. 21-6301(a)(2)’s term “dangerous knife,” as above noted, involves questions of law subject to this Court’s unlimited review. *State v. Williams*, 308 Kan. 1439, 1460, 430 P.3d 448 (2018). Unlimited though its review may be, however, this Court must presume the statute constitutional. *State v. Bollinger*, 302 Kan. 309, 318, 352 P.3d 1003 (2015). It must resolve any doubts “in favor of passing constitutional muster.” *Bollinger*, 302 Kan. at 318. And if there exists “any reasonable way to construe [the] statute as constitutionally valid,” this Court has “both the authority and duty” to so construe and uphold the statute. *Bollinger*, 302 Kan. at 318.

For Stubbs to overcome K.S.A. 21-6301(a)(2)’s presumptive constitutionality is no small task. His facial challenge is “disfavored.” *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450–51 (2008) (listing the “several reasons” courts disfavor a facial challenge). Consequently, at a minimum, to succeed, he must show that vagueness so permeates “dangerous knife” that the statute “lacks ‘a plainly legitimate sweep.’” *Americans*

for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2387 (2021); *City of Chicago v. Morales*, 527 U.S. 41, 55, n.22 (1999). If he fails to make that vagueness “clear beyond a reasonable doubt,” the statute must stand. *State v. Brown*, 280 Kan. 898, 899, 127 P.3d 257 (2006).

That in mind, the criminal-use-of-a-weapon statute must, as all laws must, meet “constitutional standards for definiteness and clarity.” *Kolender v. Lawson*, 461 U.S. 352, 361 (1983). “[I]mpossible standards” are not the Constitution’s measure. *United States v. Petrillo*, 332 U.S. 1, 7–8 (1947). Nor does fatal vagueness arise simply because the law’s drafters “might, without difficulty, have chosen ‘clearer and more precise language’ equally capable of achieving the end which it sought.” *United States v. Powell*, 423 U.S. 87, 94 (1975). Rather, a statute achieves the required definiteness and clarity simply by conveying “minimal guidelines to govern law enforcement,” *Kolender v. Lawson*, 461 U.S. 352, 358 (1983), and “sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices.” *Petrillo*, 332 U.S. at 7–8. By doing so, “an ‘essential’ of due process” is assured: citizens gain “fair notice” of how they might steer between lawful and unlawful conduct; law-enforcers lose opportunity to “arbitrar[il]y or discriminator[il]y” take the law into their own hands. *Sessions v. Dimaya*, 138 S.Ct. 1204, 1212 (2018); *see also Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972).

Given those anti-vagueness aims, a challenged statute ordinarily must clear two “relatively low” hurdles. *Harris*, 311 Kan. at 821 (discussing the two-part standard governing a vagueness challenge). Taking his lead from *Harris*, however, Stubbs focuses his challenge on only the second of those hurdles. (See Appellant’s Br., 9 (“Here, it is the second part of that test—whether the statute adequately guards against arbitrary and discriminatory enforcement—that is at issue.”)) The only question he effectively asks this Court to decide,

therefore, is this: does “dangerous knife” convey a “sufficiently objective” enforcement standard so as to adequately constrain arbitrary and discriminatory enforcement? *Harris*, 311 Kan. at 821, 824–25; *Williams*, 308 Kan. at 1460.

Argument

In *Harris*, our Supreme Court determined that K.S.A. 2019 Supp. 21-6304’s residual clause provides no such standard. That felon-in-possession statute criminalizes any convicted felon’s possession of “a weapon.” K.S.A. 2019 Supp. 21-6304(d)(2). The statute defines “weapon” to include “a knife;” and it defines “knife,” in turn, as “a dagger, dirk, switchblade, stiletto, straight-edged razor or *any other dangerous or deadly cutting instrument of like character.*” K.S.A. 2019 Supp. 21-6304(d)(1) (emphasis added). Under K.S.A. 21-6304 terms, therefore, not all “dangerous or deadly cutting instrument[s]” violate the possession prohibition—only those “of like character” do. For our Supreme Court, knowing which cutting instruments run afoul of that prohibition simply involves too much individualized and subjective guesswork for the statute to be constitutional. In its view, no one can read the statute and “discern a sufficiently objective standard” for uniformly enforcing its residual clause. *Harris*, 311 Kan. at 824–25. Its language thus empowers if not compels law-enforcers to ask themselves to define what characteristics a “dangerous or deadly cutting instrument” must share with “a dagger, dirk, switchblade, stiletto, [or] straight-edged razor” to be “of like character” and thus prohibited. *Harris*, 311 Kan. at 822–26. And, consequently, it impermissibly delegates the Legislature’s lawmaking authority to the ad hoc and subjective enforcement decisions of non-legislative actors. *Harris*, 311 Kan. at 822–26.

A closer look at Stubbs’ argument shows why *Harris* does not control his challenge. For Stubbs, the issue is not that “knife” is too ill-defined to constrain arbitrary and

unreasonable enforcement. He has always conceded, in fact, that he “certainly . . . was found with a knife on him.” (R. IX, 437, 541.) He takes issue, rather, with “[t]he lack of concrete definition for what constitutes ‘dangerous.’” (Appellant’s Br., 5.) Without legislative “language about what type of evidence is needed to determine that a knife is a ‘dangerous knife,’” he argues, the “catch-all phrase” ensures arbitrary enforcement. (Appellant’s Br., 5, 9.) The concern in *Harris*, however, was not that the residual clause fails to define “dangerous;” it was that the clause as a whole is unclear. *See Harris*, 311 Kan. at 816 (“[F]iguring out when an object is a ‘knife’ because it is a “dangerous or deadly cutting instrument of like character” involves so much “uncertainty . . . that the law is impermissibly and unconstitutionally vague.”). In other words, the residual clause’s catchall “any other . . . cutting instrument” language and “of like character” qualifier simply leave too much guesswork as to which “dangerous or deadly” items are prohibited.

Those vagueness concerns are absent, however, when it comes to figuring out when a knife is a “dangerous knife” under K.S.A. 21-6301(a)(2). “A statute will not be declared void for vagueness and uncertainty where it employs words commonly used, previously judicially defined, or having a settled meaning in law.” *City of Wichita v. Hacked*, 275 Kan. 848, 853–54, 69 P.3d 621 (2003); *see also Williams*, 308 Kan. at 1459–62 (rejecting vagueness challenge to aggravated-battery statute, under reasoning that the plain meaning of the challenged phrase affords both fair warning and “sufficient guidance to prevent arbitrary or discriminatory enforcement by prosecutors, courts, and juries.”); *Bollinger*, 302 Kan. at 317–20 (rejecting vagueness challenge to arson statute because “a reasonable interpretation of the [at-issue] statutory phrase” was “sufficiently clear,” such that “the resulting prosecution did not constitute an arbitrary and discriminatory enforcement of the statute.”). While common

usage, judicial opinion, and settled law add little meaning to guide enforcement of “any other dangerous or deadly cutting instrument of like character,” they certainly do so for “dangerous knife.”

A panel of this Court determined as much in *Moore*, 38 Kan. App. 2d at 984–87. Defendant Moore, like Stubbs, argued “dangerous knife” is unconstitutionally vague. He, unlike Stubbs, however, seemingly argued that the term is vague, not just in the sense that it inadequately guards against arbitrary enforcement, but also in the sense that it conveys insufficient warning of the proscribed conduct. *Moore*, 38 Kan. App. 2d at 984–85. The *Moore* panel wholly rejected the challenge. *Moore*, 38 Kan. App. 2d at 985–87.

Doing so, the *Moore* panel both defined “dangerous knife” and signaled when that definition ought to apply. First, it read “dangerous knife” in K.S.A. 21-6301(a)(2)’s entire context and determined that statute envisions a “dangerous knife” to be a type of per se “dangerous or deadly weapon.” *Moore*, 38 Kan. App. 2d at 985. Then, it examined how a legal encyclopedia and Kansas cases alike define “dangerous or deadly” or simply “deadly” weapon. *Moore*, 38 Kan. App. 2d at 985–86. And based on those definitions, the *Moore* panel concluded that understanding “dangerous knife” requires no “difficult” or “great leap.” *Moore*, 38 Kan. App. 2d at 986. The term, it explained, plainly prohibits possessing any “knife that is likely to produce death or serious injury when used as a weapon.” *Moore*, 38 Kan. App. 2d at 986; cf. *State v. Ultreras*, 296 Kan. 828, 850–54, 295 P.3d 1020 (2013) (discussing the plain-meaning definition of the synonymous phrases “serious bodily injury,” “serious bodily harm,” “grievous bodily injury,” and “great bodily harm”). The *Moore* panel then added to that definition. By application to the facts of Moore’s case, it indicated that any multiple-inched knife that “possess[es] a sharp point and blade” and is “designed for . . .

cutting, slicing, or puncturing something” qualifies as a “dangerous knife.” *Moore*, 38 Kan. App. 2d at 986.

Neither Stubbs’ arguments nor *Harris* ultimately undermine *Moore*’s holding that “dangerous knife” is constitutionally definite. Stubbs insists this Court ought to revisit *Moore* in light of *Harris*. (Appellant’s Br., 9.) He thinks it especially necessary because, in his view, *Moore*, unlike *Harris*, never focused on whether the at-issue language adequately guards against arbitrary enforcement. (Appellant’s Br., 9.) *Moore*, however, never so narrowed its holding. It recognized the “two-part test . . . determine[s] whether a statute is constitutionally vague.” *Moore*, 38 Kan. App. 2d at 985. It ultimately held “‘dangerous knife’ . . . is not unconstitutionally vague.” *Moore*, 38 Kan. App. 2d at 987. And it reached that holding because it determined that “dangerous knife” communicates an understandable standard for how one can “conclude that”—or “determin[e] whether”—“a knife is dangerous.” *Moore*, 38 Kan. App. 2d at 986. *Moore* can be read only to have had both the fair-warning and enforcement prongs in mind.

And for its part, *Harris* cannot be read to call *Moore* into question. *Harris* never overruled *Moore*. The majority’s opinion, in fact, never even mentioned *Moore*. See *Harris*, 311 Kan. at 820–26. That the majority left *Moore* unaddressed, even when the dissent cited *Moore* favorably as support for its view that the statute gives the residual clause “understandable dimension” that “does not insert subjective judgment unmoored from the statute’s specifics,” suggests it clearly saw no material conflict between *Moore* and its analysis. *Harris*, 311 Kan. at 831–32 (Biles, J., dissenting). And ultimately, as discussed above, no such material conflict exists. *Harris* and *Moore* addressed distinct language. Only in the latter instance did the

Legislature choose language intelligible enough to forestall arbitrary and discriminatory enforcement.

But to read *Harris* to undo *Moore* would not only put words into *Harris*' mouth, it would be a judicial about-face that calls into question every statute that prohibits or regulates anything "dangerous." Over the last century, Kansas courts have never failed to discern or enforce what the Legislature means when it writes "dangerous" or, its judicially accepted equivalent, "deadly" into a statute. *See, e.g.,*

- *State v. Bloom*, 91 Kan. 156, 136 P. 951, 951–52 (1913) (applying judicially-defined meaning of "dangerous" to distinguish between third-degree manslaughter statute's term "dangerous weapon" and fourth-degree manslaughter statute's simple use of "weapon;" agreeing that a penknife could qualify as "dangerous," not in the sense that it is "designed to inflict death or great bodily harm," like "a gun or a sword," but rather in the sense that, it can nonetheless be used in a manner which is "likely to produce death or great bodily harm.");
- *State v. Deutscher*, 225 Kan. 265, 267–71, 589 P.2d 620 (1979) (recognizing that the Legislature uses "dangerous" and "deadly" interchangeably; adapting *Bloom*'s definition of "dangerous" to aggravated-assault statutes' "deadly weapon" term; and determining that "an unloaded revolver" may be used "in such a manner as to communicate . . . an apparent ability to . . . do bodily harm" and thus falls "within the meaning expressed by the legislature");
- *State v. Hanks*, 236 Kan. 524, 537, 694 P.2d 407 (1985) (giving like definition to "deadly weapon" in aggravated-battery statute; and deciding that defendant was not entitled to instruction on simple battery because the curved, four-inch knife indisputably used against the victim "was a deadly weapon");
- *State v. Bowers*, 239 Kan. 417, Syl. ¶ 1, 721 P.2d 268 (1986) (following *Hanks*);
- *State v. Colbert*, 244 Kan. 422, Syl. ¶ 4, 769 P.2d 1168 (1989) (following *Hanks*);
- *State v. Poppelreiter*, No. 110,843, 2015 WL 2131564, at *2–*3 (Kan. App. 2015) (unpublished opinion) (following *Bloom*, *Deutscher*, *Bowers*, and *Colbert*).

And in the criminal context alone, those statutes are many. *See, e.g.,*

- K.S.A. 21-6301(a)(2) (criminal use of a weapon—"dangerous knife");
- K.S.A. 21-5412(b)(1), (d)(1) (aggravated assault and aggravated assault on a law

enforcement officer—“deadly weapon”);

- K.S.A. 21-5413(b)(1)(B)–(C), (b)(2)(A) (aggravated battery—“deadly weapon”);
- K.S.A. 21-5420(b)(1) (aggravated robbery—“dangerous weapon”);
- K.S.A. 21-5602(3)(B) (abuse of a child—“deadly weapon”);
- K.S.A. 21-6418(a) (permitting a dangerous animal to be at large—“an animal of dangerous . . . propensities”);
- K.S.A. 21-6318(a)(3) (creating a hazard—“dangerous substance”);
- K.S.A. 21-5221(a)(2) (use of force; definitions—“deadly force”).

If *Harris* intended that prospective courts read its decision to abandon the Kansas judiciary’s collective, decades-endorsed understanding of “dangerous,” and require that the Legislature “concrete[ly] defin[e] . . . ‘dangerous’” in order to ensure constitutionally valid enforcement, as Stubbs suggests, no doubt, *Harris* would have said so. (Appellant’s Br., 5, 9–10.)

Moore’s plain-meaning definition of dangerous knife provides a clear standard of enforcement. Police, prosecutors, judges, and juries know precisely how they must determine whether a particular knife is criminally “dangerous” under K.S.A. 21-6301(a)(2)’s terms. They must judge whether using the possessed knife against another has the potential to kill or seriously injure that person. *See Moore*, 38 Kan. App. 2d at 986 (“[A] dangerous knife is . . . a ‘knife that is likely to produce death or serious injury when used as a weapon.’”). Or, another way said, they must judge whether the possessed knife appears sharp or pointed enough to gravely or fatally cut, slice, or puncture another. *See Moore*, 38 Kan. App. 2d at 986–87 (“Even with its relatively short blade of 3.5 inches, [the knife] has a very sharp point and edge. It can easily puncture, cut, or slice deeply into another person. It, therefore, is dangerous[] and . . . prohibit[ed].”). “Dangerous knife” thus constrains those tasked with enforcing the law to a single, uniform inquiry. That inquiry is qualitative, sure—it calls for law-enforcers to estimate

“some matter of degree” as applied to “real-world conduct;” but it is not so unguided as to allow arbitrary enforcement. *Johnson v. United States*, 576 U.S. 591, 603–04 (2015) (suggesting that courts ought “not doubt the constitutionality of laws that call for the application of a qualitative standard such as ‘substantial risk’ to [the defendant’s] real-world conduct.”).

Because “dangerous knife” “marks boundaries sufficiently distinct for judges and juries fairly to administer the law in accordance with the [Legislature’s] will,” both K.S.A. 21-6301(a)(2) and Stubbs conviction are valid. *United States v. Petrillo*, 332 U.S. 1, 7 (1947).

II. Sufficient evidence proves Stubbs *knowingly* obstructed Sgt. Ashely’s efforts to arrest him.

As to his interference-with-law-enforcement conviction, Stubbs disputes that the State proved one of that crime’s necessary elements. He claims the State offered insufficient “pro[of] that [he] had the requisite knowledge to obstruct an official duty.” (Appellant’s Br., 13.) To prove Stubbs guilty of interference, the State indeed needed to produce evidence that Stubbs “knowingly obstruct[ed]” Sgt. Ashley’s efforts to arrest him. K.S.A. 21-5904(a)(3); *see also* PIK Crim. 4th 59.040; (R. I, 61.) And make no mistake, flight from an officer attempting to make an arrest, if knowingly done, is obstruction. *See State v. Logan*, 8 Kan. App. 2d 232, 233–35, 654 P.2d 492 (1982) (illustrating that obstruction may occur when a would-be arrestee disregards an officer’s orders not to leave). But from his own review of the trial record, evidence that he “‘knowingly’ ran from [Sgt.] Ashley” was lacking because:

- He started running for Connie’s apartment “long before he could have ever seen or heard [Sgt.] Ashley, and before law enforcement was pursuing him.”
- He “testified that he did not hear [Sgt. Ashley’s] command.”
- Sgt. Ashley’s bodycam footage “does not clearly show [him] until . . . inside the apartment building.”
- No evidence shows “how far away [he] was from [Sgt.] Ashley” or “what direction

he was facing” when Sgt. Ashley first commanded him to stop. (Appellant’s Br., 12–13.) Stubbs’ defense-favoring view of the evidence, however, ignores both this Court’s standard of review and the ample evidence that incriminated him.

Standard of Review

This Court reviews sufficiency-of-the-evidence challenges by asking itself one question: could a rational factfinder have convicted defendant? *State v. Brown*, 305 Kan. 674, 689, 387 P.3d 835 (2017). When answering that question, the Court must consider “all the evidence.” *Brown*, 305 Kan. at 689. It must consider that evidence “in the light most favorable to the prosecution.” *Brown*, 305 Kan. at 689. And it must not “reweigh evidence, resolve evidentiary conflicts, or make witness credibility determinations.” *Brown*, 305 Kan. at 689.

Argument

Stubbs’ insufficient-evidence claim effectively asks that this Court reweigh the trial evidence in his favor. He wants his testimony credited and Sgt. Ashley’s bodycam footage reweighed against the State. But that sort of factfinding is not this Court’s task. *Brown*, 305 Kan. at 689. Stubbs’ conviction shows the jury obviously chose not to credit his testimony. And given the evidence, it had good reason to: a State-favoring view of the collective evidence plainly supports Stubbs’ interference-with-law-enforcement conviction.

Before Stubbs ever started running for Connie’s apartment, he “hear[d] sirens.” (R. IX, 463.) He then went to Marconette’s door and was told “you might want to get out of here, man, I’m calling *the police*.” (R. IX, 312 (emphasis added).) Only then, still hearing sirens, did Stubbs take off running, so he could “get out of that situation as quickly as possible.” (R. IX, 463–64, 488.) Though Stubbs claims his flight was for innocent reasons and in progress “long before . . . law enforcement was pursuing him,” a jury could reasonably

have inferred from this evidence that, even before Sgt. Ashley arrived, Stubbs ran precisely *because* he feared arrest and knew law enforcement was on its way. (Appellant’s Br., 12–13.) Of course, that alone does not prove he knowingly ran from Sgt. Ashley specifically. *See State v. Lee*, 242 Kan. 38, 42–43, 744 P.2d 845 (1987) (stating that the obstruction statute criminalizes “the obstruction of a specific officer, rather than that of justice generally.”).

That evidence comes from Sgt. Ashley’s testimony and body-camera footage. Sgt. Ashley arrived armed and in full uniform. (R. IX, 363.) He drove an LPD-marked police vehicle—not an ambulance or firetruck. (R. IX, 363.) He encountered Stubbs in an illuminated area. (*See* R. V, State’s Ex. 1 at 1:38–1:57.) When he saw Stubbs, he activated his vehicle’s lights and siren. (R. IX, 366.) Stubbs, in turn, saw the “flashing lights . . . out of his peripheral” but continued across the street “right there in front of [Sgt. Ashley].” (R. IX, 366, 465.) When Stubbs then continued to run, Sgt. Ashley exited his vehicle and clearly shouted “Stop! Police!” (R. IX, 366.) As he did so, his body-camera¹ captured this footage of Stubbs:

¹ Of note, a viewer can adjust the playback speed of Sgt. Ashley’s body-camera footage by right-clicking in Windows Media Player window, going to the “Enhancements” option, and selecting “Play speed settings.”



(R. V, State's Ex. 1 at 1:43-1:47.) A real-time viewing of the footage further shows that, when Sgt. Ashley clearly shouted for him to stop, Stubbs was running roughly perpendicular to Sgt.

Ashley, through a generally open area, at a roughly 20-step distance,² and had not yet rounded the apartment building's corner. (R. V, State's Ex. 1 at 1:43–1:53.) Stubbs was, in other words, within earshot of Sgt. Ashley. A rational factfinder could—as Stubbs' jury did—credit this evidence as doubt-defying proof that Stubbs, despite testifying otherwise, saw, heard, and *knowingly* fled from Sgt. Ashley. His conviction should stand.

CONCLUSION

Stubbs wants K.S.A. 21-6301(a)(2)—if not innumerable other statutes—declared void. He also wants a redetermination of his case's facts. For the foregoing reasons, neither should occur. Respectfully, the State requests that this Court dismiss for lack of jurisdiction his vagueness challenge and otherwise affirm both his convictions.

Respectfully Submitted,

/s/ Jon Simpson, #26455
Assistant District Attorney
111 E 11th Street
Lawrence, Kansas 66044
Phone: (785) 841-0211
Fax: (785) 832-8202
jsimpson@douglascountyks.org

SUZANNE VALDEZ
Douglas County District Attorney

Kris Kobach
Kansas Attorney General
Attorneys for Appellee

² The video indicates Sgt. Ashley had to take roughly 20 steps to close the distance between the areas where he and Stubbs were located when he shouted for Stubbs to stop. (R. V, State's Ex. 1 at 1:43–1:53.)

CERTIFICATE OF SERVICE

I certify that on January 19, 2023, I sent a copy of the foregoing brief to Derek Schmidt, Attorney General, Solicitor Division, for approval and filing, and e-mailed a copy to:

Jennifer C. Bates, 21269
Attorney for Appellee
adoservice@sbids.org

/s/ Jon Simpson, #26455
Assistant District Attorney
jsimpson@douglascountyks.org

345 P.3d 295 (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.

Joshua SECK, Appellant.

No.

110786

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|

March 20, 2015.

|

Review Denied October 7, 2015.

Appeal from Reno District Court; Timothy J. Chambers, Judge.

Attorneys and Law Firms

Randall L. Hodgkinson, of Kansas Appellate Defender Office, for appellant.

Andrew R. Davidson, assistant district attorney, Keith E. Schroeder, district attorney, and Derek Schmidt, attorney general, for appellee.

Before BRUNS, P.J., BUSER and POWELL, JJ.

MEMORANDUM OPINION

PER CURIAM.

*1 Joshua Seck appeals the jury's verdict convicting him of aggravated battery and criminal threat, claiming his convictions should be reversed because the district court erred by: (1) giving the jury an overbroad aggravated battery instruction; (2) instructing the jury it could convict Seck of criminal threat if it agreed that he threatened the victim either physically or verbally; (3) failing to give the lesser included instruction of battery; and (4) committing cumulative errors necessitating a new trial. For the first time on appeal, Seck also contends portions of the aggravated battery statute are unconstitutionally vague. We disagree and affirm Seck's convictions.

FACTUAL AND PROCEDURAL BACKGROUND

In August 2012, David Stover visited Michael Pelsor, who was living with Pelsor's sister and brother-in-law, April and Joshua Seck, in Hutchinson. Stover parked his car in the alley behind the Secks' house, and they asked him to move his car. Stover got mad about this and left the house. A week or so later, the Secks asked Pelsor to move out because he had stolen April's car and gotten into a hit-and-run drunk-driving accident. Pelsor subsequently moved into a garage owned by Tom Smith, a neighbor of the Secks. At this point, both Stover and Pelsor were angry at Seck, and Pelsor gave Seck's phone number to Stover. Stover began repeatedly calling Seck and threatening to beat him up. Stover admitted he had texted Seck with what could be seen as threatening messages.

On August 26, 2012, April was at home with Seck and their children. She said Seck continued to receive threatening phone calls from Stover and had received around 30 of them. She locked the children in their rooms and locked the doors to the house because she was afraid Pelsor and Stover might try to get inside of their house.

Pelsor and Stover had been drinking beer in Chase, Kansas, for most of that day. Pelsor needed a ride to Hutchinson, and Stover asked his daughter Samantha to drive them there. Stover said he had consumed between 6 and 10 beers, admitted he had exchanged insulting text messages with Seck throughout the drive, and knew dropping off Pelsor would bring him near Seck's house. Stover said Seck had threatened to kill him in a text message, but Stover believed it was a joke because he thought they were friends.

Around 7:30 p.m., Stover, Pelsor, Pelsor's girlfriend, and Samantha pulled into the alley behind the Seck and Smith houses. Smith saw them pull up; so did the Secks, who walked outside to meet the car. Seck called out to Pelsor as he got out of the car, and the two men began arguing. Smith and April both said Stover then got out of the car and approached Seck and Pelsor. April said Pelsor hit Seck in the face three times. Stover said Pelsor did hit Seck but only after Seck had grabbed Pelsor's throat.

The parties and witnesses disagree about what happened next. According to Smith, Stover and Seck lunged for each other at the same time. April said Stover punched Seck and then grabbed onto his throat until Seck turned blue. Stover said he got involved in a physical confrontation with Seck when

he tried to break up the fight between Seck and Pelsor. April said when Seck finally broke free of Stover, Stover had been stabbed. Smith and Stover both testified Seck broke free from Stover, ran into his house, and then came back out with two large knives, one of which he held against Stover's throat. They said Stover had tried to back away from Seck but Seck had been pursuing him, "charging" him. Stover testified Seck held a knife to his throat and said he could kill him.

*2 Scared of the knife against his throat, Stover said he froze and then shoved Seck back, but Seck stabbed him five to seven times. Stover said Seck repeatedly threatened to kill him while stabbing him. When Smith saw Seck stabbing Stover, he called the police. Stover said Seck stopped stabbing him when he heard the police were coming.

The police found Stover a short distance from the crime scene and took him to the hospital, where his stab wounds were treated and his blood-alcohol level was tested. Before going to the hospital, Stover talked with Officer Kyle Carlisle, who reported seeing multiple stab wounds and said Stover seemed disoriented and confused.

The State's initial complaint charged Seck with aggravated battery in violation of K.S.A.2013 Supp. 21-5413(b)(1)(B). The complaint tracked the statute's language and stated Seck had "knowingly cause[d] bodily harm to another person, to-wit: David Stover, in any manner whereby great bodily harm, disfigurement or death can be inflicted, to wit: with a knife." After a preliminary hearing where Stover testified, the complaint was amended to include a second count of criminal threat. The amended complaint said Seck had "communicate[d] a threat to commit violence with the intent to place another in fear, to wit: David Stover, or made in reckless disregard of the risk of causing such fear," which violated K.S.A.2013 Supp. 21-5415(a)(1).

As the case proceeded to trial, multiple notices filed with the court alerted Seck about various court hearings between September 2012 and January 2013. Each of the notices stated the primary charges against Seck were aggravated battery and intentional bodily harm with a deadly weapon.

Before trial, Seck requested a number of jury instructions, one of which was the standard aggravated battery instruction contained in the Pattern Instructions Kansas, PIK Crim. 4th, without any alterations. See PIK Crim. 4th 54.310. He also proposed the jury be given an instruction on simple battery as a lesser included offense of aggravated battery. See

PIK Crim. 4th 54.300, 68.080. The district court ultimately gave an instruction similar to the model aggravated battery instruction, but it substituted the word "intentionally" for the word "knowingly" under the first element:

"In Count One Joshua Seck is charged with the crime of aggravated battery. He pleads not guilty.

"To establish this charge, each of the following claims must be proved:

1. That Joshua Seck intentionally caused bodily harm to David Stover with a deadly weapon or in any manner whereby great bodily harm, disfigurement, or death can be inflicted; and

2. That this act occurred on or about the 26th day of August, 2012, in Reno County, Kansas.

"A deadly weapon is an instrument which, from the manner in which it is used, is calculated or likely to produce death or serious bodily injury."

Moreover, the court did not give the lesser included offense instruction of simple battery. Seck did not object to the instructions at trial or propose any additional instructions.

*3 During deliberations, the jury posed a written question to the court, asking whether the criminal threat charge was counted as verbal or physical criminal threat. The court proposed to respond to the question with "either," noting caselaw said a criminal threat could be communicated by either words or physical actions.

Seck opposed the court's proposed answer, arguing the court should tell the jury the criminal threat charge was about a verbal threat, contending the State had only introduced evidence of a verbal criminal threat-Seck had put a knife to Stover's throat and verbally threatened to kill him. The court pointed out Seck's attorney had also described a physical action: holding the knife to Stover's throat. Accordingly, the court told the jury the threat in the criminal threat statute could be either physical or verbal. It also reminded the jury it had to agree on the same underlying act constituting a threat to convict Seck under the statute.

The jury found Seck guilty of both aggravated battery and criminal threat, and the district court sentenced him to 24 months' probation with an underlying prison term of 16 months.

Seck timely appeals.

DID THE DISTRICT COURT GIVE AN OVERBROAD AGGRAVATED BATTERY JURY INSTRUCTION?

First, Seck argues the district court erred by giving the jury an overbroad aggravated battery instruction. However, he did not object to the aggravated battery instruction, nor did he propose a different instruction in its place. Typically, a party must object at trial to preserve a claim of error for appellate review, but, under Kansas law, appellate review of a clearly erroneous jury instruction does not require a simultaneous objection at trial. K.S.A.2014 Supp. 22-3414(3); see *State v. Briseno*, 299 Kan. 877, 882, 326 P.3d 1074 (2014). Accordingly, when a defendant fails to contemporaneously object to an instruction, we may reverse the district court only if the jury instruction it gave was clearly erroneous. 299 Kan. 877, Syl. ¶¶ 1-3.

“[T]he test to determine whether the instruction is clearly erroneous is composed of two parts. First, ‘the reviewing court must ... determine whether there was any error at all. To make that determination, the appellate court must consider whether the subject instruction was legally and factually appropriate, employing an unlimited review of the entire record.’ “ *State v. Herbel*, 296 Kan. 1101, 1121, 299 P.3d 292 (2013) (quoting *State v. Williams*, 295 Kan. 506, Syl. ¶ 4, 286 P.3d 195 [2012]).

Only if error is found under the first step do we engage in the test's second step. See *Briseno*, 299 Kan. at 883 (noting “[i]f error is found, then the second part is considered”) (Emphasis added.). The test's second step is a reversibility inquiry wherein we examine “ ‘ “whether [we are] firmly convinced that the jury would have reached a different verdict had the instructional error not occurred.” ’ ” 299 Kan. at 883 (quoting *Williams*, 295 Kan. 506, Syl. ¶ 5). If the verdict would have changed, we must reverse the district court. See *Briseno*, 299 Kan. 877, Syl. ¶ 3. The party claiming an error

occurred bears the burden “to establish the degree of prejudice necessary for reversal .” *Williams*, 295 Kan. 506, Syl. ¶ 5.

*4 Seck argues the aggravated battery instruction given to the jury constituted clear error because it was not legally appropriate and because it prejudiced his rights. Specifically, Seck contends the aggravated battery jury instruction was legally inappropriate because it was overbroad.

Seck is correct that jury instructions must not be broader than the charging document. *State v. Trautloff*, 289 Kan. 793, 802, 217 P.3d 15 (2009). The charging document must inform the defendant of the accusations against him and protect him from being convicted based on facts which were not contemplated in the initial charges. *State v. Hart*, 297 Kan. 494, 508, 301 P.3d 1279 (2013).

Generally, jury instructions are overbroad compared to the charging document when the instructions contain language not included in the original complaint. *State v. Jones*, 290 Kan. 373, 383-84, 228 P.3d 394 (2010). For example, in *Trautloff*, the Kansas Supreme Court concluded a jury instruction was overbroad where it allowed the jury to convict the defendant for displaying, procuring, or producing a sexual photo or video of a child when the complaint only charged the defendant with “displaying” a picture of a child. 289 Kan. at 802-03. The *Trautloff* court concluded this constituted clear and reversible error because the evidence the defendant “displayed” the image was weak, but the evidence he procured it was very strong, which meant he was prejudiced by the instruction. 289 Kan. at 802-03. Further, there was a strong possibility Trautloff had been convicted based off facts not contemplated in the initial charges. 289 Kan. at 802-03.

Similarly, in *State v. Wade*, 284 Kan. 527, 161 P.3d 704 (2007), our Supreme Court concluded a jury instruction was overbroad where the charging document accused the defendant of aggravated burglary while committing a felony (specifically first-degree murder) but where the jury instruction told the jury it could convict the defendant if it found he committed burglary and either first-degree murder or aggravated assault. 284 Kan. at 530, 537. Because the defendant was not on notice that assault could be the underlying felony for his aggravated burglary charge, it was an unfair surprise to ask him to defend against that accusation at the instruction phase of his trial. 284 Kan. at 536-37.

Here, Seck argues the district court gave an overbroad aggravated battery instruction because it allowed the jury to find Seck had committed aggravated battery if Seck either intentionally caused bodily harm to Stover with a deadly weapon *or* in any manner whereby great bodily harm could be inflicted. Seck contends providing the jury with two alternatives for finding he committed aggravated battery—with a deadly weapon or in any manner that could result in great bodily harm—was overbroad because the charging document used only the “any manner” language.

Seck is correct that the charging document and the jury instruction used different language to describe the crime of aggravated battery. In the charging document, only the “any manner” language was used up front, though Seck’s use of a knife was mentioned at the end of the crime’s description:

*5 “[0]n or about the 26th day of August, 2012, in said County of Reno and State of Kansas, one **JOSHUA J. SECK** then and there being, did then and there, unlawfully, FELONIOUSLY and willfully:

knowingly cause bodily harm to another person, to-wit: **David Stover**, in any manner whereby great bodily harm, disfigurement or death can be inflicted, to-wit: **with a knife.**”

Conversely, in the jury instruction on aggravated battery, the “deadly weapon” language was used at the beginning of the sentence along with the “any manner” language:

“To establish [the charge of aggravated battery], each of the following claims must be proved:

1. That Joshua Seck intentionally caused bodily harm to David Stover *with a deadly weapon* or in any manner whereby great bodily harm, disfigurement, or death can be inflicted; and

2. That this act occurred on or about the 26th day of August, 2012, in Reno County, Kansas.

“A deadly weapon is an instrument which, from the manner in which it is used, is calculated or likely to produce death or serious bodily injury.” (Emphasis added.)

Seck is also correct that the effect of the language in the two documents is different. In the charging document, the knife is one way he could have inflicted great bodily harm, disfigurement, or death. In the jury instruction, however, inflicting great bodily harm and using a deadly weapon (*i.e.*,

the knife) to inflict mere bodily harm are alternate ways he could be convicted of committing the crime of aggravated battery.

Seck appears to argue he could be convicted of aggravated battery under the jury instruction given if he used the knife to attack Stover, even if he did so in a manner that could not inflict great bodily harm, disfigurement, or death. Thus, he claims it was unfair to allow the jury to convict him for either intending to seriously harm Stover *or* for using a deadly weapon on him, even if he did not mean to seriously harm Stover, because the charging document only warned Seck the State was accusing him of intending to cause Stover great bodily harm.

We must reject Seck’s argument for two reasons. First, the definition of “deadly weapon” provided in the jury instructions precluded the jury from convicting Seck of aggravated battery for using the knife on Stover in a manner not designed to inflict great bodily harm, disfigurement, or death. Specifically, Seck’s argument that he could somehow be convicted of aggravated battery no matter how he used the knife against Stover is foreclosed by the deadly weapon definition in the instructions. The definition in the jury instruction clarifies a deadly weapon is identified based on the manner in which it is used, which must be calculated or likely to produce death or serious bodily injury.

So, even if the jury could convict Seck under the alternate avenue of using a deadly weapon *instead of* acting in a manner whereby great bodily harm, death, or disfigurement can be inflicted, the jury would still have to find Seck used the weapon in a manner likely to produce death or serious bodily injury. Thus, the intent elements the State must prove to convict Seck of aggravated battery under the “deadly weapon” alternative actually impose a *higher* burden on the prosecution because it did not have the option of showing Seck intended to cause “disfigurement.” Otherwise, the elements of using a deadly weapon and acting in “any manner” are identical; the State must show the *exact same thing* to establish Seck’s guilt under either alternative, if not more to establish his guilt under the deadly weapon alternative. Rephrasing the language between the charging document and the jury instruction, therefore, was not clear error because the meaning did not change.

*6 Second, even if we were to assume the language of the jury instruction was distinct enough from the charging document’s language to be overbroad and in error, the jury

instruction did not prejudice Seck because it did not unfairly surprise him. Unlike the defendants in *Wade* and *Trautloff*, who were unfairly surprised by instructions that allowed the jury to convict them under alternate elements they had not prepared defenses for, Seck knew from the charging document that the State was accusing him of using a knife to attack Stover. Therefore, the jury's verdict would not have been different without the error under the test's second step because evidence of the knife still would have been admitted, indicating Seck acted in a manner that could have caused Stover great bodily harm, death, or disfigurement.

Accordingly, the district court did not err by rephrasing the language in the jury instruction from the language in the charging document because it did not change the meaning of the language when it did so. Moreover, the change did not prejudice Seck.

DID THE DISTRICT COURT
APPROPRIATELY RESPOND TO THE JURY'S
QUESTION ON CRIMINAL THREAT?

Seck next argues the district court provided the jury with a legally inadequate response to the question it posed during jury deliberations. Under K.S.A. 22-3420(3), the district court must respond to a jury's request to be informed on a point of law. See *State v. Wade*, 295 Kan. 916, Syl. ¶ 1, 287 P.3d 237 (2012).

“[W]hether the trial court's response to a jury question was a correct statement of the law necessarily presents a legal question, subject to unlimited review on appeal. But the district court's selection of one legally correct response to a jury question in lieu of another legally correct response is reviewed for an abuse of discretion, *i.e.*, whether no reasonable person would have given the response adopted by the trial court.” 295 Kan. 916, Syl. ¶ 2.

Here, the jury asked whether the threat under the criminal threat statute counted as a verbal or physical threat. The court responded “either” after discussing the question with counsel and Seck, and it reminded the jury that it had to agree on the same underlying act that constituted the threat.

Seck argues the district court's response was in error because it broadened the elements of criminal threat beyond what he was charged. Seck says because the charging document alleged only that he verbally threatened to kill Stover, the district

court in essence gave the jury an overbroad instruction by saying it could find Seck had made either a physical or a verbal criminal threat. He argues the district court therefore misstated the law as it applied to his case when it answered the jury's question.

While Seck admits criminal threat may be proved by either physical or verbal threats and the district court did not misstate the law in a general sense when it told this to the jury, see *State v. Miller*, 6 Kan.App.2d 432, 435, 629 P.2d 748 (1981) (criminal threat can be communicated through words or physical acts), Seck's argument here is the State did not allege in its complaint that he physically threatened Stover. Accordingly, Seck contends the court should not have given the jury the opportunity to convict him for physically threatening Stover when he did not know he was charged with doing so. The issue, therefore, becomes whether the charging document notified Seck that the State alleged he had physically threatened Stover.

*7 Assuming without deciding the district court's answer to the jury's question was in essence a jury “instruction,” we have already noted above that a charging document must inform the defendant of the nature of the accusations against him or her and must protect him or her from being convicted based on facts not contemplated by the initial charges. *Hart*, 297 Kan. at 508. Consequently, when the district court explains the law to the jury, it should not go beyond the charging document and permit the jury to convict the defendant on a theory not identified there. *State v. Martinez-Herrera*, No. 106,624, 2013 WL 1729227, at *7 (Kan.App.) (unpublished opinion) (citing *Wade*, 284 Kan. at 536-37), *rev. denied* 297 Kan. 1253 (2013). If the district court exceeds the language of the charging document when instructing the jury, this error requires reversal if the defendant is prejudiced by it. *Jones*, 290 Kan. at 383-84; *Martinez-Herrera*, 2013 WL 1729227, at *7. Prejudice does not result from an overbroad instruction unless the instruction unfairly surprised the defendant or misled the defendant in preparing or presenting his or her defense. See *Wade*, 284 Kan. at 536-37.

Here the district court's answer to the jury's question did not impermissibly deviate from the charging document. As to the criminal threat charge, the charging document indicated Seck “communicate[d] a threat to commit violence with the intent to place another in fear, to-wit: David Stover, or made [a threat] in reckless disregard of the risk of causing such fear” in violation of K.S.A.2013 Supp. 21-5415(a)(1). Though

K.S.A.2013 Supp. 21–5415(a)(1) lists other ways a defendant could commit criminal threat—by threatening to cause the evacuation or lockdown of a building, for example—the complaint clearly borrowed the language from the statute: “(a) A criminal threat is any threat to: (1) Commit violence communicated with intent to place another in fear ... or in reckless disregard of ... causing such fear.”

Because a criminal threat can be verbal or physical, as Seck acknowledges in his brief, it is difficult to see how a complaint that clearly tracked the statute's language and did not purport to limit the types of evidence of criminal threat the State would introduce deprived Seck of notice that the State alleged he both physically and verbally threatened Stover. See *Miller*; 6 Kan.App.2d at 435; *State v. Bursack*, No. 97,161, 2008 WL 2891056, at *2 (Kan.App.2008) (unpublished opinion), *rev. denied* 287 Kan. 766 (2009). The district court's response to the jury's question with an accurate statement of the law—a criminal threat can be communicated with either words or physical acts—was therefore not error generally or in Seck's case. See *Miller*; 6 Kan.App.2d at 435; *Bursack*, 2008 WL 2891056, at *2.

Seck nonetheless contends we should look at the context in which the State amended the complaint to charge him with criminal threat. He argues because the State added this charge after the preliminary hearing, we must consider the explanation the State gave for adding the charge and must construe that explanation as limiting the charging document's language. Seck points out that the State, when requesting the additional charge of criminal threat, specifically referenced when Seck came out and said, “I'm going to kill you with the knives.” Seck says this response conclusively shows the State only accused him of a verbal threat.

*8 We disagree for three reasons. First, the statement, “I am going to kill you with the knives,” did not clearly refer only to a verbal threat, but it also clearly referred to the knives in Seck's possession. Brandishing a weapon with the intent to instill fear in someone or in reckless disregard of causing fear is a physical act which can constitute a criminal threat, either on its own or in conjunction with a verbal threat. See *State v. Foster*; 290 Kan. 696, 714, 233 P.3d 265 (2010) (criminal threat conviction affirmed where defendant threatened a person with knives and verbal statements, saying he would kill her and her family if she told anyone about the incident).

Second, Seck's argument takes a single statement by the prosecutor out of context. After the prosecutor referenced Seck's verbal threat, Seck objected to the amendment, arguing the State should not be allowed to amend the complaint to add criminal threat. Stover testified at the preliminary hearing that he thought everything was a joke and he did nothing when Seck came toward him with the knives and said he was going to kill Stover. It is obvious from Seck's response the defense knew brandishing the knives was part of the threat or he would not have specifically mentioned Seck had the knives. Moreover, the State, in arguing there was enough evidence to hold Seck over for trial on both charges, noted: “He came out with two knives.... He told [Stover] he was going to kill him. He came out with the knives so it's sufficient evidence on both aggravated battery and criminal threat.”

The district court found probable cause to believe Seck committed criminal threat based on Seck's statements, but it granted the State the authority to amend the charging document, and it did not require the State to limit the charging document to a particular type of threat. Jury instructions are sufficiently limited if they match the defendant's charging document, and there is no precedent that the instructions must also match pretrial testimony.

Third, evidence presented at the preliminary hearing and at trial supported the district court's answer to the jury that it could find Seck guilty of criminal threat if it found he physically threatened Stover. At the preliminary hearing, Stover testified Seck had two big steak knives he put to Stover's neck and said, “I could kill you, I'm gonna kill you.” Stover also testified at the preliminary hearing that after Seck stabbed him in the neck, Stover “freaked.” Based on Stover's testimony, then, Stover felt afraid at just the presence of the knives, even without considering Seck's verbal threats, which supports a potential finding that Seck's physical behavior criminally threatened Stover.

At trial, Stover gave similar testimony: Seck approached him with the knives, Stover became afraid and froze, Seck held a knife to his throat and verbally threatened to kill him, and then Seck began stabbing him while repeating the threats. Ample evidence supported the district court's decision to instruct the jury that it could find Seck committed criminal threat if it agreed he had verbally *or* physically threatened Stover because the State had evidence of both types of threats.

*9 The district court adequately responded to the jury's question and did not permit the jury to convict Seck for

criminal threat on a theory broader than the one under which he was charged.

WAS A JURY INSTRUCTION REQUIRED ON THE LESSER INCLUDED OFFENSE OF SIMPLE BATTERY?

Seck also argues his conviction should be reversed because the district court did not instruct the jury on simple battery as a lesser included offense of aggravated battery. Because Seck proposed a simple battery instruction before the district court, we must review the evidence in the light most favorable to him to determine if it supported a simple battery instruction. See *State v. Young*, 277 Kan. 588, 599–600, 87 P.3d 308 (2004). If the evidence would not have permitted a rational factfinder to find the defendant guilty of a lesser included offense, then the trial court had no duty to instruct on it. 277 Kan. at 599–600. In other words, if all of the evidence taken together showed the offense, if committed, was the offense of the higher degree, then the district court did not need to instruct on lesser included offenses. *State v. Brice*, 276 Kan. 758, Syl. ¶ 4, 80 P.3d 1113 (2003). On the other hand, the district court has a duty to instruct on all possible offenses supported by substantial evidence. *Brice*, 276 Kan. 758, Syl. ¶ 4.

Seck is correct that “simple battery is a lesser included offense of aggravated battery.” *State v. Davis*, 236 Kan. 538, 542–43, 694 P.2d 418 (1985); see K.S.A.2013 Supp. 21–5109(b)(2); K.S.A.2013 Supp. 21–5413(a) and (b). Where a defendant is convicted of aggravated battery and argues on appeal a simple battery instruction should have been given to the jury because it could have found evidence of bodily harm instead of great bodily harm, we look at the evidence to support that finding. *Brice*, 276 Kan. at 112–1 A. If the evidence showed the jury could have found the harm slight, trivial, minor, or moderate, such as bruising, then the district court erred by not giving a lesser included offense instruction on simple battery. *State v. Smith*, 39 Kan.App.2d 64, 70, 176 P.3d 997, rev. denied 286 Kan. 1185 (2008). Conversely, if the evidence showed the victim's injury was not slight, trivial, moderate, or minor, then the district court correctly refused to give a simple battery instruction. 39 Kan.App.2d at 70.

Though our courts have recognized there is a fine line between great bodily harm and mere bodily harm, the multiple stab wounds permanently scarred Stover and required hospitalization, indicating Stover's injuries were not minor, trivial, moderate, or akin to mere bruising. See *Brice*, 276

Kan. at 774. Seck's wife admitted Seck stabbed Stover, and the extent of Stover's injuries was not disputed. Moreover, Seck's defense was not that he did not stab Stover but that he stabbed Stover in self-defense. Thus, Seck was either guilty of aggravated battery or not guilty at all. See *Davis*, 236 Kan. at 542–43. The district court did not err by not instructing the jury on simple battery.

IS SECK ENTITLED TO A NEW TRIAL BECAUSE OF CUMULATIVE ERRORS?

*10 Finally, Seck argues that the combination of the district court's errors entitles him to a new trial. When the district court makes multiple trial errors, which on their own do not necessitate reversing a defendant's conviction, it is possible to find collectively that the errors cannot be considered harmless. *State v. Tully*, 293 Kan. 176, 205, 262 P.3d 314 (2011). Because the district court did not make any of the errors Seck alleged, this cumulative error doctrine does not apply here. *State v. Dixon*, 289 Kan. 46, 71, 209 P.3d 675 (2009).

IS THE AGGRAVATED BATTERY STATUTE UNCONSTITUTIONALLY VAGUE?

For the first time on appeal, Seck argues that the aggravated battery statute under which he was convicted is unconstitutionally vague. As an initial matter, the State argues Seck cannot challenge the statute on appeal because he did not object to it below and therefore did not properly preserve the issue. In the alternative, the State argues Seck cannot challenge the statute for vagueness because it clearly prohibited his conduct.

First, we agree with the State that constitutional issues not raised below generally may not be raised for the first time on appeal. *State v. Gomez*, 290 Kan. 858, 862, 235 P.3d 1203 (2010). These issues have also included vagueness challenges asserted for the first time on appeal. *State v. Papen*, 274 Kan. 149, 161–62, 50 P.3d 37 (declining to reach the merits of a vagueness challenge raised for the first time on appeal), cert. denied 537 U.S. 1058 (2002).

Second, even if the issue were properly before us, we agree with the State's argument that Seck cannot complain about the statutory language that precludes causing bodily harm in any way great bodily harm, disfigurement, or death

“can be inflicted” because the statute clearly prohibited Seck’s conduct. See K.S.A.2013 Supp. 21–5413(b)(1)(B). A defendant to whom a statute is constitutionally applied cannot challenge the statute on the grounds it could be applied unconstitutionally in factual situations not before the court. *Papen*, 274 Kan. at 162. This means a defendant whose conduct is clearly prohibited by a statute may not assert that the statute is unconstitutionally vague. *Hearn v. City of Overland Park*, 244 Kan. 638, 639, 772 P.2d 758, cert. denied 493 U.S. 976 (1989).

Here, Seck stabbed Stover at least five times with a large knife. Further, the jury was instructed it could find Seck guilty if he acted in any manner whereby great bodily harm could be inflicted *or* if he acted with a deadly weapon. As we discussed in the first issue, the deadly weapon language was appropriate in this case, and the use of the knife was clearly forbidden by the “deadly weapon” language, even if it could be argued it was not clearly forbidden by the “can be inflicted” language.

Similarly, there is no question stabbing someone repeatedly can inflict great bodily harm, disfigurement, or death, in the sense such an act has the possibility to cause such injury. See American Heritage Dictionary 269 (5th ed.2011) (defining “can” as a word “used to indicate possibility or probability”). Repeatedly stabbing another person with a sharp knife is clearly the kind of conduct *both* parts of the aggravated battery statute prohibit. As such, Seck may not challenge the statute’s vagueness because, even if there is

some conduct the statute might not clearly prohibit, it clearly prohibits repeatedly stabbing another person with a knife. See *State v. Martinez*, No. 108,441, 2014 WL 3731888, at *6 (Kan.App.2014) (unpublished opinion).

*11 Finally, as an aside, we would note that our courts have repeatedly upheld the constitutionality of the aggravated battery statute despite numerous challenges to its alleged vagueness. *State v. Bowers*, 239 Kan. 417, 426–27, 721 P.2d 268 (1986) (finding “in any manner” portion of statute sufficiently definite); *State v. Sanders*, 223 Kan. 550, 552, 575 P.2d 533 (1978) (holding “great bodily harm” clear and not unconstitutionally vague); *State v. Kleber*, 2 Kan.App.2d 115, 118–19, 575 P.2d 900 (holding “can be inflicted” was not unconstitutionally vague), rev. denied 225 Kan. 846 (1978); *State v. Landwehr*, No. 107,273, 2013 WL 2917879, at *4 (Kan.App.2013) (unpublished opinion) (holding “can be inflicted” language was not overly vague), rev. denied 298 Kan. — (November 22, 2013); *State v. Walker*, No. 107,878, 2013 WL 3970180, at *6–7 (Kan.App.2013) (unpublished opinion) (finding aggravated battery statute not unconstitutionally vague), rev. denied 299 Kan. (April 28, 2014).

Affirmed.

All Citations

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Unpublished Disposition

Only the Westlaw citation is currently available.
(Pursuant to Kansas Supreme Court Rule 7.04(f), unpublished opinions are not precedential and are not favored for citation. They may be cited for persuasive authority on a material issue not addressed by a published Kansas appellate court opinion.)

NOT DESIGNATED FOR PUBLICATION

Court of Appeals of Kansas.

STATE of Kansas, Appellee,

v.

Kyle POPPELREITER, Appellant.

No.

110,843

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|

May 1, 2015.

|

Review Denied Jan. 25, 2016.

Appeal from Reno District Court; Trish Rose, Judge.

Attorneys and Law Firms

Johnathan M. Grube, of Kansas Appellate Defender Office, for appellant.

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

Before BUSER, P.J., STANDRIDGE, J., and HEBERT, S.J.

MEMORANDUM OPINION

PER CURIAM.

*1 Kyle Poppelreiter was convicted by a jury of aggravated assault with a deadly weapon. Poppelreiter appeals from that conviction, contending the State failed to present sufficient evidence at trial that he used a deadly weapon or that he knew that his actions would cause the victim to fear bodily harm. Poppelreiter also argues that the district court violated his constitutional rights by using his prior criminal history to enhance his sentence.

We find the evidence presented was sufficient to support the conviction and that there was no error in sentencing. Accordingly, we affirm the conviction and sentence.

Factual and Procedural Background

At about 9:30 a.m. on June 19, 2012, Bruce Griffin began mowing the lawn at a duplex where he had been hired to mow for about 10 years. After he had mowed the backyard and had started on the front, Kyle Poppelreiter, who was renting the duplex, came outside, shut off Griffin's riding lawn mower, and started "cussing" and "chewing [Griffin] out." Griffin said Poppelreiter told him it was too early in the morning to be mowing and that he had just reseeded the lawn. Poppelreiter accused Griffin of intentionally mowing early in the morning because he knew Poppelreiter worked late at night.

After Poppelreiter started yelling, Griffin turned the mower back on, and Poppelreiter grabbed a walking stick from his porch—it was a "solid" stick, hand carved, and approximately 3 feet long. Griffin said Poppelreiter "started swinging" the stick over his head and around him and "push[ed] it against the mower." Griffin told the jury that Poppelreiter swung the stick within 6 inches of him and told the police that Poppelreiter was near enough that he worried he might run over Poppelreiter's feet with the mower. Griffin said that the "whole thing went on" for about "15 to 20 minutes." Griffin also testified that at the time, he felt "pretty scared" because if Poppelreiter had hit him in the head, it could have killed him or done "a lot of damage." A neighbor and her daughter later testified that they saw Poppelreiter waving the stick at Griffin. They indicated Poppelreiter appeared very angry and, thinking that Griffin was in danger, they called the police.

The State charged Poppelreiter with one count of aggravated assault with a deadly weapon, a severity-level 7 person felony. At Poppelreiter's trial, the jury was instructed on both aggravated assault and the lesser-included crime of assault. The jury convicted Poppelreiter of aggravated assault, and the district court granted him probation with an underlying sentence of 13 months in prison. Poppelreiter timely appealed from the conviction and sentence.

Sufficient Evidence Supports the Conviction for Aggravated Assault

Aggravated assault with a deadly weapon is defined as knowingly placing another person in reasonable apprehension of immediate bodily harm with a deadly weapon. K.S.A.2014 Supp. 21-5412(a), (b)(1). Poppelreiter contends the State

failed to present sufficient evidence at trial to support the conviction. He argues the State did not prove that the walking stick was used as a deadly weapon or that he knowingly caused Griffin to fear immediate bodily harm.

Standard of Review

*2 This court applies a well-known standard of review when sufficiency of the evidence is challenged in a criminal case. *State v. Williams*, 299 Kan. 509, 525, 324 P.3d 1078 (2014). After reviewing all the evidence in a light most favorable to the prosecution, this court must be convinced a rational factfinder could have found the defendant guilty beyond a reasonable doubt. It does not reweigh evidence, resolve evidentiary conflicts, or make witness-credibility determinations. 299 Kan. at 525, 324 P.3d 1078.

The Walking Stick Constituted a Deadly Weapon

Poppelreiter first contends that there was insufficient evidence that he used the walking stick as a deadly weapon. In 1913, our Supreme Court held that a weapon may be may be dangerous or deadly based either on its design or “the manner in which it is used.” *State v. Bloom*, 91 Kan. 156, 136 P. 951 (1913). The Kansas Supreme Court has since defined “deadly weapon” as the district court did in Poppelreiter's case: “ “[A]n instrument which, from the manner in which it is used, is calculated or likely to produce death or serious bodily injury.” “ (Emphasis added.) *State v. Colbert*, 244 Kan. 422, 425, 769 P.2d 1168 (1989); *State v. Bowers*, 239 Kan. 417, 424–26, 721 P.2d 268 (1986); *State v. Deutscher*, 225 Kan. 265, 269, 589 P.2d 620 (1979).

Our Supreme Court has adopted a subjective analysis for determining whether an assault was committed with a deadly weapon. *State v. Graham*, 27 Kan.App.2d 603, 606, 6 P.3d 928, *rev. denied* 269 Kan. 936 (2000). An objectively harmless object can be a deadly weapon when used in a manner that communicates to the victim an apparent ability to inflict bodily harm. *Graham*, 27 Kan.App.2d at 606, 6 P.3d 928. Thus, juries consider whether an object was used in a manner likely to produce death or injury by looking at whether the victim subjectively but reasonably perceived the weapon as deadly. K.S.A.2014 Supp 21–5412; *Graham*, 27 Kan.App.2d at 606–07, 6 P.3d 928. Whether an object was used as a deadly weapon is a factual question to be determined by the jury. See *State v. Guebara*, 24 Kan.App.2d 260, Syl. ¶ 3, 944 P.2d 164 (1997).

Here, the evidence supports the jury's determination that the walking stick was used as a deadly weapon. There was evidence Griffin subjectively believed that bodily injury could occur if Poppelreiter hit him with the stick; Griffin testified that he felt “pretty scared,” because if Poppelreiter had hit him in the head, it could have killed him or “done a lot of damage.”

Griffin's belief was also reasonable. Poppelreiter's use of the stick caused the neighbor and her daughter to be concerned enough about Griffin's safety to call the police. Poppelreiter swinging the stick over Griffin's head was also similar to uses of sticks found to be deadly weapons by courts in other jurisdictions. In *People v. Knapp*, 34 Mich.App. 325, 332–34, 191 N.W.2d 155 (1971), the court pointed out that sticks can be used in a manner likely to cause death or injury, noting that “before the discovery of guns and gunpowder, man had had a long history of inflicting mortal [w]ounds with but a slender shaft propelled by hand.” See also *Bouie v. State*, 108 So.3d 735, 735–36 (Fla.Dist.App.2013); *People v. Lee*, 46 Ill.App.3d 343, 345–48, 4 Ill.Dec. 798, 360 N.E.2d 1173 (1977). Indeed, Poppelreiter's use of a solid, hand-carved, 3-foot walking stick brings to mind the traditional Irish shillelagh which, although now more frequently perceived as an ornate “walking stick,” was originally employed as a cudgel intended for inflicting mayhem on another.

*3 Clearly, a reasonable jury could conclude that Poppelreiter's manner of using his “walking stick” communicated to Griffin an apparent ability to inflict immediate death or serious bodily harm. Thus, sufficient evidence supports the “deadly weapon” element of Poppelreiter's conviction.

Poppelreiter Knowingly Placed Griffin in Reasonable Apprehension of Immediate Bodily Harm

Poppelreiter's second argument is that the State did not prove he knew or he intended that swinging the walking stick would cause Griffin to believe he would be harmed. Poppelreiter cites *State v. Hawkins*, 40 Kan.App.2d 10, 14–15, 188 P.3d 965 (2008), *rev. denied* 287 Kan. 767 (2009), in which this court analyzed the former assault statutes and held that aggravated assault is a general-intent crime but requires proof that the defendant intentionally placed another person in immediate apprehension of bodily harm. See K.S.A. 21–3408 and K.S.A. 21–3410(a) (aggravated assault is *intentionally* placing another person in reasonable apprehension of immediate bodily harm with a deadly weapon).

Since *Hawkins*, the legislature has updated criminal intent requirements. It recodified the Kansas Criminal Code in 2011, and the new criminal code applies to Poppelreiter's offense since it occurred after the new code became effective. Under the revised statute defining assault, the word "intentionally" has been replaced with "knowingly"—"[a]ssault is *knowingly* placing another person in reasonable apprehension of immediate bodily harm ... [w]ith a deadly weapon." (Emphasis added.) K.S.A.2014 Supp. 221–5412(a), (b)(1).

The testimony from Griffin and other witnesses describing the incident is sufficient evidence that Poppelreiter was aware his actions would cause Griffin to fear bodily harm. It is difficult to imagine that anyone who endured a very angry person repeatedly swinging a solid 3-foot stick near his or her head and coming within inches of hitting him or her while "cussing" and "chewing [him or her] out" would not fear being hurt. Indeed, there would be no other reasonable explanation for Poppelreiter's actions other than to knowingly and/or intentionally induce fear of injury in order to coerce Griffin into acceding to Poppelreiter's demands, lest he be beaten with the stick.

We are convinced that when all the evidence is reviewed in a light most favorable to the prosecution, sufficient evidence

exists to support this jury's verdict as rational factfinders, finding Poppelreiter guilty beyond a reasonable doubt of aggravated assault with a deadly weapon.

The Sentence Does Not Violate Poppelreiter's Constitutional Rights

Poppelreiter also raises an argument that the district court violated his constitutional rights under *Apprendi v. New Jersey*, 530 U.S. 466, 477, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), by basing his sentence on his prior criminal history without requiring the State to plead and prove the history to the jury. Poppelreiter concedes that the Kansas Supreme Court rejected that argument in *State v. Ivory*, 273 Kan. 44, 46–47, 41 P.3d 781 (2000). The court has shown no indication that it is departing from its previous position and has, in fact, consistently reaffirmed *Ivory*. See *State v. Baker*, 297 Kan. 482, 485, 301 P.3d 706 (2013). We are bound to follow this precedent. *State v. Ottinger*, 46 Kan.App.2d 647, 755, 264 P.3d 1027 (2011), *rev. denied* 294 Kan. 946 (2012).

*4 Affirmed.

All Citations

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