NO. 19-120767-A

IN THE COURT OF APPEALS OF

THE STATE OF KANSAS

STATE OF KANSAS

Plaintiff-Appellee

v.

ANITA JO ALBANO

Defendant-Appellant

BRIEF OF APPELLEE

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

Kelly G. Cunningham, #14049
Assistant Riley County Attorney
Riley County Attorney's Office
105 County Courthouse Plaza
Manhattan, Kansas 66502
Telephone: (785) 565-6641
Fax No: (785) 565-6896
kcunningham@rileycountyks.gov
Attorney for Appellee

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NATURE OF THE CASE

On March 6, 2018, the State filed a Trial Information charging Anita Albano in Count I with Distribution of Oxycodone within a 1000 feet of a school, a Level 2 Drug Felony, in Count II with Distribution of Oxycodone within a 1000 feet of a school, a Level 2 Drug Felony, and in Count III with Distribution of Oxycodone within a 1000 feet of a school, a Level 3 Drug Felony. The matter proceeded to jury trial on October 31, 2018. Albano was found "not guilty" on Count I and found guilty on Counts II and III. Based on Albano's criminal history score of "F", she received a controlling sentence of 101 months in the Department of Corrections with 36 months post release supervision. Count II and Count III were ordered to run concurrent to one another. Albano appeals from her conviction and sentence.

STATEMENT OF THE ISSUES

ISSUE I: **The court's failure to submit a limiting instruction to the jury as a result of Albano's decision to introduce evidence of a prior drug conviction during her direct examination in support of her entrapment defense was not clearly erroneous.**

ISSUE II: **The court did not err in instructing the jury that it "must" follow the law and it was their "duty" to do so, as opposed to instructing the jury it "should" follow the law, thereby allowing for jury nullification.**

ISSUE III: **The judicial prior conviction findings which elevated Albano's presumptive Kansas sentencing guidelines sentence did not violate Section 5 of the Kansas Constitution Bill of Rights.**

STATEMENT OF FACTS

On March 6, 2018, the State filed a Trial Information in the above-captioned matter charging the defendant, Anita Albano in three counts. (R., Vol I, pg. 60-61).

Count I charged Albano with Distribution of a Scheduled II Controlled Substance, Oxycodone, within 1000 feet of school property, a Level 2 Drug Felony in violation of K.S.A. 21-5705(a)(1), K.S.A. 21-5705(d)(4)(B) and K.S.A. 65-4107 (b)(1)(N). (R., Vol I, pg. 60-61). The facts giving rise to the charge involved Albano's delivery of Oxycodone to Stuart Ostrom, a confidential informant working under contract with the Special Investigations Unit of the Riley County Police Department. (R., Vol XIV, pg. 88, 95-96). The delivery occurred on January 19, 2017, while Ostrom was present in the living room of Albano's apartment located at 202 East Riley Avenue, Apartment A, in Ogden, Riley County, Kansas. (R., Vol XIV, pg. 96).

Sgt. Boeckman was the officer responsible for supervising Ostrom in his capacity as a confidential informant for the police department during the three controlled buys. (R., Vol XIV, pg. 86).

Prior to the controlled buy of January 19, 2017, a strip search was conducted of Ostrom by Detective Dierks to ensure Ostrom had no controlled substances, money or contraband on his person. (R., Vol XIV, pg. 53, 96-97). Detective Dierks testified the search was very thorough. Ostrom confirmed such during his testimony. (R., Vol XIV, pg. 73-74, 97). The search was conducted in a conference room within the Riley County Police Department to ensure privacy. (R., Vol XIV, pg. 73-74). During the search Ostrom was required to remove his clothing, to include his socks and shoes. (R., Vol XIV, pg. 74). Ostrom was completely naked during the strip search. (R., Vol XIV, pg. 86-87, 97). The pockets of his clothing and shoes were searched. (R., Vol XIV, pg.74). During the process Ostrom was required to squat and cough to ensure he was not

secreting any controlled substances in his anal cavity. (R., Vol XIV, pg. 74, 86-87, 97). Additionally, given the nature of the male anatomy, Ostrom was required to lift his genitals to ensure he was not secreting any controlled substances or contraband in this area of his body as well. (R., Vol XIV, pg. 74). Detective Dierks and Ostrom both testified there was nothing of concern located on Ostrom's person or in his clothing during this search. (R., Vol XIV, pg. 74, 97).

A photocopy was made of the preserialized United States currency utilized for the controlled buy. (R., Vol XIV, pg. 75-76). Prior to the transaction taking place, Officer Dunn equipped Ostrom with recording and transmitting devices to document Albano's delivery of the Oxycodone to Ostrom. (R., Vol XIV, pg. 53-54, 75-76, 100-101). Detective Dierks testified that control is maintained over the confidential source at all times until the controlled buy has been completed and a search is conducted of the confidential source to ensure the subject has no drugs, money or contraband on his person. (R., Vol XIV, pg. 76). Ostrom was kept under constant surveillance during the controlled buy as Officer Dunn drove Ostrom to Albano's apartment. (R., Vol XIV, pg. 54). Officer Dunn observed Ostrom exit his vehicle, approach Albano's apartment and make entry. (R., Vol XIV, pg. 54). Upon Ostrom making contact with Albano inside her residence, she delivered 12 pills of Oxycodone to Ostrom for $180.00. (R., Vol XIV, pg. 50-51, 97). After the transaction was completed, Ostrom testified he left the residence and returned to the vehicle with the detective. (R., Vol XIV, pg. 97-98).

Officer Dunn testified he observed Ostrom exit Albano's apartment and return to his vehicle. (R., Vol XIV, pg. 54). Once Ostrom entered Officer Dunn's vehicle, Ostrom turned over 12 pills of Oxycodone to Officer Dunn, which Ostrom had purchased from Albano. (R., Vol XIV, pg. 54, 98). A strip search was conducted of Ostrom following the controlled buy to ensure he was not hiding any controlled substances, money or contraband on his person (R., Vol XIV, pg. 74, 87). During the strip search performed on Ostrom after the controlled buy, Detective Dierks testified there was nothing of concern located on Ostrom or in his clothing. (R., Vol XIV, pg. 74). Officer Dunn testified the pills were subsequently submitted to the KBI Laboratory for testing. (R., Vol XIV, pg. 54-57). The pills were identified in the KBI laboratory report as Oxycodone. (R., Vol XIV, pg. 56-57).

Count II charged Albano with Distribution of a Scheduled II Controlled Substance, Oxycodone, within 1000 feet of school property, a Level 2 Drug Felony in violation of K.S.A. 21-5705(a)(1), K.S.A. 21-5705(d)(4)(B) and K.S.A. 65-4107 (b)(1)(N). (R., Vol I, pg. 60-61). The facts giving rise to this particular charge involved Albano's delivery of Oxycodone to Stuart Ostrom on April 10, 2017, while present at her residence. (R., Vol XIV, pg. 99).

Prior to the controlled buy of April 10, 2017, the same protocol was followed for the strip search conducted of Ostrom by Sgt. Boeckman to ensure Ostrom had no controlled substances, money or contraband on his person. (R., Vol XIV, pg. 62, 86-87,

96-97). Sgt. Boeckman and Ostrom both testified there was nothing of concern located on Ostrom's person or in his clothing during this search. (R., Vol XIV, pg. 87, 97).

The same protocol was followed for the preserialization of the United States currency utilized for the controlled buy. (R., Vol XIV, pg. 75-76). Prior to the transaction taking place, Officer Dunn equipped Ostrom with recording and transmitting devices to document Albano's delivery of the Oxycodone to Ostrom. (R., Vol XIV, pg. 53-54, 63-64, 75-76, 100-101). Ostrom was kept under constant surveillance during the controlled buy as Officer Dunn drove Ostrom to Albano's apartment. (R., Vol XIV, pg. 61). Officer Dunn observed Ostrom exit his vehicle, approach Albano's apartment and make entry. (R., Vol XIV, pg. 61). Upon Ostrom making contact with Albano inside her residence, she delivered 10 pills of Oxycodone to Ostrom for $200.00. (R., Vol XIV, pg. 61-62, 99). After the transaction was completed, Ostrom testified he left the residence and returned to the vehicle with the detective. (R., Vol XIV, pg. 99).

Officer Dunn testified he observed Ostrom exit Albano's apartment and return to his vehicle. (R., Vol XIV, pg. 61). Once Ostrom entered Officer Dunn's vehicle, Ostrom turned over 10 pills of Oxycodone to Officer Dunn, which Ostrom had purchased from Albano. (R., Vol XIV, pg. 61-62, 99). A strip search was conducted of Ostrom following the controlled buy to ensure he was not hiding any controlled substances, money or contraband on his person (R., Vol XIV, pg. 61, 86-87). Officer Dunn and Sgt. Boeckman testified there was nothing of concern located on Ostrom or in his clothing. (R., Vol XIV, pg. 61, 87-88). Officer Dunn testified the pills were subsequently submitted to the KBI

Laboratory for testing. (R., Vol XIV, pg. 61-63). The pills were identified in the KBI laboratory report as Oxycodone. (R., Vol XIV, pg. 63).

Count III charged Albano with Distribution of a Scheduled II Controlled Substance, Oxycodone, within 1000 feet of school property, a Level 3 Drug Felony in violation of K.S.A. 21-5705(a)(1), K.S.A. 21-5705(d)(4)(A)-(d)(5) and K.S.A. 65-4107 (b)(1)(N). (R., Vol I, pg. 60-61). The facts giving rise to this particular charge involved Albano's delivery of Oxycodone to Stuart Ostrom on January 20, 2017, while present at her residence. (R., Vol XIV, pg. 98).

Prior to the controlled buy of January 20, 2017, the same protocol was followed for the strip search that was conducted of Ostrom by Detective Dierks to ensure he had no controlled substances or contraband on his person. (R., Vol XIV, pg. 75-76, 58, 96-97).

The same protocol was followed for the preserialization of the United States currency to be utilized for the controlled buy. (R., Vol XIV, pg. 75-76). Prior to the transaction taking place, Officer Dunn equipped Ostrom with recording and transmitting devices to document Albano's delivery of the Oxycodone to Ostrom. (R., Vol XIV, pg. 63-64, 75-76, 100-101). Ostrom was kept under constant surveillance during the controlled buy as Officer Dunn drove Ostrom to Albano's apartment. (R., Vol XIV, pg. 58). Officer Dunn testified that when he arrived at Albano's residence, Ostrom exited his vehicle and walked up to the front door of the residence. (R., Vol XIV, pg. 58). Ostrom knocked on the door and did not get an answer. (R., Vol XIV, pg. 58). Ostrom placed a

telephone call to Albano. (R., Vol XIV, pg. 58). Shortly thereafter, Officer Dunn testified he observed Albano walk through the alley and directly toward the front of his vehicle. (R., Vol XIV, pg. 58). Officer Dunn observed Albano make contact with Ostrom. (R., Vol XIV, pg. 58). He then observed Albano and Ostrom walk inside her apartment. (R., Vol XIV, pg. 58).

Upon Ostrom making contact with Albano inside her residence, she delivered 1 pill of Oxycodone to Ostrom for $20.00. (R., Vol XIV, pg. 57-58, 98). Ostrom explained during his testimony that he thought Albano had just filled her prescription for Oxycodone the previous day. (R., Vol XIV, pg. 98). Ostrom had been provided enough controlled buy money to purchase several pills, but was only able to purchase 1 pill. (R., Vol XIV, pg. 98). After the transaction was completed, Ostrom left the residence and returned to Officer Dunn's vehicle. (R., Vol XIV, pg. 58-59, 98).

Officer Dunn testified he observed Ostrom exit Albano's apartment and return to his vehicle. (R., Vol XIV, pg. 58-59). Once Ostrom entered Officer Dunn's vehicle, Ostrom turned over to Officer Dunn the 1 pill of Oxycodone Ostrom had purchased from Albano. (R., Vol XIV, pg. 59, 98). The same protocol was followed for the strip search conducted of Ostrom to ensure he was not hiding any controlled substances, money or contraband on his person (R., Vol XIV, pg. 75, 87, 96-97). Detective Dierks testified there was nothing of concern located on Ostrom or in his clothing. (R., Vol XIV, pg. 75). Officer Dunn testified the pill was subsequently submitted to the KBI Laboratory for

testing. (R., Vol XIV, pg. 59-60). The pill was identified in the KBI laboratory report as Oxycodone. (R., Vol XIV, pg. 60).

Testimony was offered during trial by Officer Dunn and Sgt. Boeckman that Albano's residence was located within 280 feet of Ogden Elementary School. (R., Vol XIV, pg. 51-52, 87-88).

Prior to the commencement of the jury trial on October 31, 2018, the parties filed proposed jury instructions for the court's consideration. (R., Vol. XIV, pg. 1, Vol. I, pg. 82-85, 86-90). In the proposed instructions filed by Albano, the court and the State were alerted Albano intended to raise an entrapment defense. (R., Vol I, pg. 82-85). In Albano's proposed jury instructions to the court, she requested the court instruct the jury on PIK Instruction No. 52.110, entitled "Entrapment". (R. Vol I, pg. 82-85). During the cross examination of Ostrom, counsel for Albano pursued questioning in an attempt to support Albano's entrapment defense. Counsel for Albano asked Ostrom if he was responsible for reaching out to Albano in January of 2017. (R., Vol XIV, pg. 104). Ostrom advised he was the party who reached out to Albano. (R., Vol XIV, pg. 104). Ostrom testified he was familiar with Albano prior to January of 2017. Ostrom knew Albano was into drugs and he had actually used drugs with her on a previous occasion several years prior to 2017. (R., Vol XIV, pg. 104-105). Ostrom testified that Albano had a reputation for having an open door policy with her apartment, and drug people were always coming to the apartment, hanging out and getting high. (R., Vol XIV, pg. 104-105).

With respect to the three controlled buys, Ostrom indicated he tried reaching out to Albano on all three occasions. (R., Vol XIV, pg. 105). On one occasion Albano had been

at her father's residence and couldn't answer the phone. (R., Vol XIV, pg. 105). This involved the controlled buy of January 20, 2017 when Officer Dunn observed Albano returning to her residence and initiating contact with Ostrom in front of his vehicle. (R., Vol XIV, pg. 58). On another occasion, Ostrom indicated he was able to make contact with Albano over the telephone prior to the controlled buy. (R., Vol XIV, pg. 104). When inquiring to purchase Oxycodone, Ostrom described Albano as saying, "Yeah, come on." (R., Vol XIV, pg. 104). Ostrom indicated that on one of the controlled buys, when he reached out to Albano he did not get a response. (R., Vol XIV, pg. 105). On said occasion, Ostrom advised law enforcement he would simply be able to go directly to her home without there being prior contact. (R., Vol XIV, pg. 106).

Albano's Testimony

During the course of Albano's testimony, she admitted to delivering 12 pills of Oxycodone to Ostrom on January 19, 2017. Albano acknowledged that she was sitting on the couch in her residence counting out the pills delivered to Ostrom, which was captured on a recording device affixed to Ostrom during each of the controlled buys. (R., Vol. XIV, pg. 124, 63-64). Through the course of her testimony she discussed the deliveries of Oxycodone to Ostrom on January 20, 2017 and April 10, 2017 as well. (R., Vol. XIV, pg. 121-129). During this testimony, Albano described Ostrom as being very persistent in coming to her residence and encouraging Albano to sell her prescribed medication to him. The theme of Albano's testimony was such that she never reached out to Ostrom to try and sell him her medication. Rather, she felt pressured by him on multiple occasions to sell her medication. (R., Vol. XIV, pg. 128). In the context of this testimony,

Albano described Ostrom calling her daily and showing up at her residence several times a day under the guise of checking on her well- being. (R., Vol. XIV, pg. 128). This testimony was offered by Albano in support of her entrapment defense.

During the course of Albano's testimony in her case-in-chief, counsel for Albano asked the following questions during her direct examination:

Ms. Ingels: Now, Anita, have you – do you have prior convictions for distributing drugs?

Defendant: I do.

Ms. Ingels: And when was that from?

Defendant: Four years ago, I was with a friend on a motorcycle. We got pulled over, and –

Ms. Ingels: I want to stop you, because that's not really what we're here for today. My question was, you have prior convictions for distribution. Is that correct?

Defendant: Yes.

Ms. Ingels: And did you go on probation for that?

Defendant: Yes.

Ms. Ingels: Did you successfully complete probation?

Defendant: I sure did.

Ms. Ingels: When did you complete probation?

Defendant: It was two years ago, or four months prior to the first supposed buy.

Ms. Ingels: And during this time frame, we're talking about in January of 2017 through April, were you in the business of selling drugs?

Defendant: No. No. I was in the business of putting my home together, and trying to get my life put back together, and help with my dad's Parkinson's. We had just recently found out he had had Parkinson's in that time frame that I was on probation, and I only had one sanction the entire 18 months, and I was actually on for 22 months, due to the hospital.

Ms. Ingels: So after being on probation were you trying to change things around"

Defendant: Yes. Very much so. I've been trying ever since.

Ms. Ingels: Do you believe that you would have been selling your medications if it hadn't been for Mr. Ostrom constantly harassing you and bothering you to do so?

Defendant: No, I wouldn't have been selling them without the badgering of him.

Ms. Ingels: Now, when you were arrested for this, did law enforcement ever speak with you about becoming a confidential informant?

Defendant: No. As a matter of fact, I asked if there was something I could do to help myself, and the gentleman, I believe it was the third officer that testified today, said that very emphatically no, there was nothing I could do.

Ms. Ingels: So you weren't given that opportunity?

Defendant: No. (R. Vol XIV, pg. 128-130).

Following the submission of the evidence to the jury for consideration and deliberation, in the jury instructions provided by the court to the jury were two instructions related to Albano's entrapment defense. (R., Vol. XIV, pg. 121-122).

Instruction No. 11 provided as follows: "The defendant raises entrapment as a defense. Evidence in support of this defense should be considered by you in determining whether the State has met its burden of proving that the defendant is guilty. The State's burden of proof does not shift to the defendant." (R., Vol. I, pg. 121).

Instruction No. 12 provided as follows: "Entrapment is a defense if the defendant was persuaded by a public officer's agent to commit a crime which the defendant had no previous plan to commit. Entrapment is not a defense if defendant conceived the plan to commit the crime or when she had shown a plan for committing the crime and was merely afforded the opportunity to complete her plan to commit the crime and was assisted by the public officer's agent. The defendant cannot rely on the defense of entrapment if you find that the distribution of Oxycodone was likely to occur in the

course of defendant's usual activities and the public officer's agent did not mislead the defendant into believing her conduct was lawful." (R., Vol. I, pg. 122).

On November 1, 2018, the Jury returned a verdict of "not guilty" on Count I. (R., Vol. I, pg. 128). The jury found Albano guilty on Count II and Count III. (R., Vol. I, pg. 129-130).

The Presentence Investigation Report prepared by Community Corrections sets forth Albano's prior criminal history. (R., Vol. I, pg. 140). Albano's criminal history reflects that she was previously convicted of Possession of Drug Paraphernalia on December 27, 2005 in Riley County Cause No. 05-CR-634, Possession of Methamphetamine on January 6, 2006 in Geary County Cause No. 05-CR-474, Possession of Drug Paraphernalia on April 11, 2012 in Riley County Cause No. 11-CR-921, Possession of Marijuana on April 11, 2012 in Riley County Cause No. 11-CR-921 and Possession with Intent to Distribute Methamphetamine on January 20, 2015 in Riley County Cause No. 14-CR-430. (R., Vol. I, pg. 140).

Sentencing was held on January 28, 2019. (R., Vol. XV, pg. 1). The court noted that the Presentence Investigation Report identified Albano's criminal history as an "F". (R., Vol. XV, pg. 2-6). The court also noted on the record that Albano had filed a Motion for Dispositional and Durational Departure to include a report prepared by Dr. Barnett who conducted a psychological evaluation of Albano. (R., Vol. XV, pg. 6). Defense counsel requested the court grant a dispositional departure to probation, or in the alternative, a durational departure. (R., Vol. XV, pg. 6-7).

In support thereof, defense counsel cited to Dr. Barnett's report, which

recommended mental health treatment for Albano. Counsel argued that Dr. Barnett believed it would benefit Albano in staying out of trouble and complying with the terms of probation. Counsel cited to Albano's ability to participate in substance abuse treatment if she were to remain in the community as a factor in support of her request for dispositional departure. Defense counsel also advised the court Albano's family had been in contact with her throughout the course of the legal proceedings, and that her brother was present in court, which demonstrated family support which should be a factor considered in support of Albano's request for dispositional departure. Bearing such in mind, defense counsel requested the court enter a finding that rehabilitation exists and that Albano would benefit from probation as opposed to a term of incarceration. (R., Vol. XV, pg. 7). Counsel further requested that if the court were to impose a term of incarceration, rather than imposing the "standard" number of 108 months, defense counsel requested the court impose no more than 50 months incarceration. (R., Vol. XV, pg. 7-8).

The State resisted Albano's request for dispositional or durational departure. The State requested the court sentence Albano to the "presumption" and advised the court it would defer to the court's discretion as to whether to impose concurrent or consecutive sentencing. (R., Vol. XV, pg. 9). The State identified four factors for the court to consider in determining whether to grant a dispositional or durational departure. Those factors included the following: (1) whether the community would be better served if Albano were afforded probation; (2) whether Albano suffers from psychological issues; (3) whether Albano was in need of rehabilitation; and (4) the extent of Albano's family support.

In light of these factors, the State noted that Albano had been on probation before. While Albano had completed probation without being arrested for any new drug offenses, testimony was offered by Albano at the time of trial which suggested she was in fact involved in the distribution of pills while on probation. Albano was on probation for Possession with Intent to Distribute Methamphetamine. Shortly after the termination of her probation, she was involved in distributing controlled substances to Ostrom. (R., Vol. XV, pg. 9).

The State further noted that during Albano's own testimony, she specifically admitted to distributing controlled substances to the confidential informant as well as others. For these reasons, the State argued the community would not benefit from having Albano placed on probation. (R., Vol. XV, pg. 10).The State argued that Albano's psychological issues did not cause her to distribute the pills that she was prescribed by her doctor. The State referenced Albano's psychological evaluation, which indicated she did not suffer from any major psychological issues. (R., Vol. XV, pg. 10).The State noted that not only was Albano feeding the opioid epidemic within the community, but contributing to a nation-wide problem.

Additionally, the State noted Albano was committing fraud in that she was selling prescription pills she had been prescribed by a doctor. As such, Albano's rehabilitation was not compelling enough to force the court to do anything but remand her to prison. (R., Vol. XV, pg. 10).

As for family support, the State argued Albano's supportive family had nothing to do with her distributing her prescription medication. Albano was a 50-year old woman

making her own decisions. She had previously been convicted of a crime involving her distribution of controlled substances. Albano continued to violate the law and distribute pills and other controlled substances. Given all of these factors, the State requested the court deny Albano's Motion for Dispositional and/or Durational Departure. (R., Vol. XV, pg. 10-11).

Albano was afforded her right of allocution. (R., Vol. XV, pg. 14-17). Thereafter, the court sentenced Albano to 101 months incarceration, which was the base sentence. For the second offense, the court sentenced Albano to 49 months. The court advised Albano that given her criminal history, she fell within the presumptive prison box. (R., Vol. XV, pg. 19). While the court recognized it had the authority to place Albano on probation, the court advised there had to be substantial and compelling reasons proven to support a departure. The court acknowledged the various factors argued by Albano in support of her request for a departure to include community issues, mental health issues, rehabilitation issues and supportive family issues. The court advised that the arguments presented by Albano in favor of departure were present in many cases that come before the court. The court stated that in reviewing Albano's personal and criminal history, the court determined there was no compelling reason to grant a dispositional or durational departure. The court ordered the sentences be served concurrent with Albano being committed to the Secretary of Adult Corrections to serve an underlying sentence of 101 months. (R., Vol. XV, pg. 20).

ARGUMENTS AND AUTHORITIES

ISSUE I

THE COURT'S FAILURE TO SUBMIT A LIMITING INSTRUCTION TO THE JURY AS A RESULT OF ALBANO'S DECISION TO INTRODUCE EVIDENCE OF A PRIOR DRUG CONVICTION DURING HER DIRECT EXAMINATION IN SUPPORT OF HER ENTRAPMENT DEFENSE WAS NOT CLEARLY ERRONEOUS.

PRESERVATION AND STANDARD OF REVIEW

Albano did not request the court submit a limiting instruction to the jury as a result of her decision to introduce evidence of a prior drug conviction during her direct examination. Albano's failure to preserve this issue for appeal, requires this court to employ a clearly erroneous standard to determine whether there was a real possibility the jury would have rendered a different verdict if the error had not occurred. State v. Pfannenstiel, 302 Kan. 747, 752, 357 P.3d 877 (2015).

***Background*:**

In addressing the error claimed by Albano, recognition needs to be given to the fact that Albano chose to introduce evidence of her prior drug conviction during her case-in-chief. Prior to the introduction of this evidence, Albano did not alert the court or the State of her intent to do so. The State points this out as Albano's argument seems to suggest the court committed error as a result of some affirmative action taken on its part. This was not the case. There was no discussion among the parties or the court that this evidence would be offered. In fact, the record reflects Albano was cautioned about testimony offered in her case-in-chief should she take the stand to testify.

Following the close of the State's case-in-chief, the court engaged in discussion

with Albano on the record about her Fifth and Sixth Amendment rights under the United States Constitution. (R., Vol. XIV, pg. 113). During this discussion the court inquired of Albano if she had had an opportunity to discuss with her legal counsel whether she wished to testify or not. Albano replied that she had. The court advised Albano the court wanted to make sure that Albano understood that it was her decision alone, and not that of her attorney's, in deciding whether she would testify or not. (R., Vol. XIV, pg. 113-114). Albano responded to this line of inquiry by stating, "[a]bsolutely, I understand that." (R., Vol. XIV, pg. 114). Based on Albano's response, the court asked her whether she wished to testify or wished to waive her right to testify on her own behalf. Albano advised the court she wished to testify. (R., Vol. XIV, pg. 114).

With this record having been made, counsel for Albano asked to supplement the record further as to Albano's election to testify to address risks associated with her opening the door during her testimony to the introduction of her prior drug convictions. As such, the following record was made in open court:

Ms. Ingels: Since you did bring up the understanding of her rights to testify or not testify, which I had gone over with her, I did have her sign for my records, but I think maybe it's proper at this point outside the presence of the jury, I did advise Ms. Albano, she understands the risks opening the door to her prior convictions coming in on—based on her testimony, and that's just something that we have discussed, and we've gone over that.

The Court: And maybe further to explain to you, Ms. Albano, that when you take the stand, if you take the stand, you're subject to the same inquiries and tests on cross-examination as any other witness, and so Mr. Garrison will have a chance to cross-examine you. Do you understand that?

Defendant: I absolutely understand that.

The Court: All right. Very well, then. Good enough….. (R., Vol. XIV, pg. 115-116).

LEGAL ANALYSIS

In response to Albano's argument that the court committed error by admitting evidence of a prior drug conviction pursuant to K.S.A. 60-455, without providing a limiting instruction to the jury, the State argues Albano invited the error that occurred. A review of the proposed instructions filed by Albano on June 12, 2018, do not reflect the submission of a limiting instruction. (R. Vol. I, pgs. 82-85). Following the completion of Albano's case-in-chief, the court met with the parties to discuss the jury instructions to be submitted to the jury. (R. Vol XV, pgs. 146-154). During this conference there was no request made by Albano to the court for a limiting instruction, nor was there an objection raised on the record as to its non-inclusion. (R. Vol XV, pgs. 146-154). For the first time on appeal Albano now argues that the court's failure to give a limiting instruction on this evidence was so prejudicial that her convictions must now be vacated in favor of a new trial.

Based on this record, the State asserts Albano should not be able to raise this issue on appeal. In reviewing the application of the "invited-error" doctrine, a brief description of the doctrine and its roots is necessary. "Essentially, under the doctrine, it is fundamental that a litigant who invites and leads a trial court into error will not be heard on appeal to complain of that action." State v. Carter, 220 Kan. 16, Syl. ¶ 1, 551 P.2d 821 (1976); see State v. Parks, 308 Kan. 39, 42-43, 417 P.3d 1070 (2018); Gilliland v. Kansas Soya Products Co., 189 Kan. 446, 451-52, 370 P.2d 78 [1962]; Mercer v. McPherson, 70 Kan. 617, 619, 79 P. 118 [1905]). As this suggests, the principle that underlies the doctrine is that a party cannot ask a court to take a

specific action and then later ask for the judgment to be reversed because the court complied with the request. State v. Divine, 291 Kan. 738, 742, 246 P.3d 692 (2011).

The State further asserts the court's failure to give a limiting instruction resulted in harmless error. The State directs this court's attention to the case of State v. Holman, 295 Kan. 116, 284 P.3d 251 (2012). The facts involved an appeal following Holman's conviction of three counts of aggravated indecent liberties with a child following a jury trial. Holman was the step father of the victim, T.M.A., who was ten years old when the matter proceeded to trial. Id., at 258. As is relevant to the discussion of the case at bar, the Kansas Supreme Court had occasion to address the very issue being raised by Albano in the case at bar.

Prior to trial, the State filed a motion to admit evidence pursuant to K.S.A. 60-455 regarding an uncharged incident that occurred in T.M.A.'s bedroom. This incident was revealed by T.M.A. following therapy. According to T.M.A., she was lying on her bed when Holman removed her pants and underwear and began to perform oral sex upon her. Id., at 261.

At the pretrial hearing, Holman's counsel objected to the State's motion because it raised another allegation the State failed to charge in the trial information. Counsel argued this violated Holman's right to confrontation and due process. After argument, the district court ruled that the evidence was relevant and material and that its probative value outweighed its prejudicial effect. The district court ruled the evidence was admissible for the limited purposes of proving intent, plan, preparation, lack of mistake or accident, continuing course of conduct, and the relationship of the parties." Id., at 261.

Although the State had proposed the wording for a limiting instruction in its motion, the State was directed to draft a limiting instruction in conformity with the court's order. In spite of this directive, the court did not submit a limiting instruction to the jury. Furthermore, Holman never submitted his own proposed limiting instruction, nor object to the court's failure to provide a limiting instruction to the jury. Id., at 261.

On appeal, Holman contended the court's failure to provide the jury with a limiting instruction indicating the limited purposes for which the jury could consider the K.S.A. 60-455 evidence constituted reversible error. Id., at 261.

Given this background, the Kansas Supreme Court stated that "[i]f a defendant did not request the district court to give a particular jury instruction and did not object to its omission from the court's instructions, the defendant's claim of error for the failure to give the challenged instruction is reviewed under the clearly erroneous standard." Id., at 262, citing, State v. Cook, 286 Kan. 1098, Syl. ¶ 4, 191 P.3d 294 (2008); see K.S.A. 22-3414(3). That standard provides: "Instructions are clearly erroneous if there is a real possibility the jury would have rendered a different verdict had the instruction error not occurred." Id., at 262-263.

The Kansas Supreme Court stated that "evidence introduced pursuant to K.S.A. 60-455 requires a limiting instruction. Id., at 263, citing, State v. Gunby, 282 Kan. 39, 58-59, 144 P.3d 647 (2006). As a result, the court considered whether this error was clearly erroneous based on the evidence presented at trial. Upon a careful review of the record, the Kansas Supreme Court stated it was not convinced there was a real possibility the jury would have rendered a different verdict if it had been given a limiting instruction.

Several factors persuaded the Kansas Supreme Court that the trial court's omission was not clearly erroneous. These factors were identical to factors present in the case at bar.

First, the jury had acquitted Holman of one count of rape and one count of aggravated indecent liberties. These acquittals demonstrated the jury did not exaggerate the importance of the K.S.A. 60-455 evidence and improperly conclude that because Holman "had committed a similar crime before, it might properly be inferred he committed the other crimes, or, that he deserved punishment because he was a general wrongdoer even if the prosecution had not established guilt beyond a reasonable doubt." Id., at 263, citing, State v. Gunby, 282 Kan. at 48-49 (quoting State v. Davis, 213 Kan. 54, 58, 515 P.2d 802 (1973)).

"If the jury had considered the K.S.A. 60-455 evidence as proof of Holman's propensity to engage in illicit sexual behavior, one would expect that Holman would have been convicted of all the crimes charged." Id., at 263.

This decision is extremely relevant to the analysis of Albano's claim before this court. The evidence presented to the jury during the State's case-in-chief established Albano delivered Oxycodone to Ostrom on three separate occasions to include January 19, 2017, January 20, 2017 and April 10, 2017. (R., Vol. XIV, pgs. 47-110). Given the three separate deliveries, which spanned a period of approximately 3 months, an entrapment defense was a challenging defense to pursue at the very least. When one adds into the equation that each of the deliveries were recorded through a discreet monitoring device placed by law enforcement on Ostrom, the submission of these recordings for the jury's viewing made the use of an entrapment defense even more difficult. (R., Vol. XIV,

pgs. 49-50, 54, 63-64, 75-76, 100-101, State's Exhibit 5, State's Exhibit 6, State's Exhibit 7 and State's Exhibit 8).

Creating further difficulties for the defense was the fact that Ostrom was searched before and after each controlled buy to ensure he had no drugs, money or contraband on his person, beyond the controlled buy money provided for the purchase of Oxycodone. (R., Vol. XIV, pgs. 54, 63-64, 75-76, 100-101, State's Exhibit 5, State's Exhibit 6, State's Exhibit 7 and State's Exhibit 8). Additionally, Ostrom was driven to Albano's residence on all three occasions by Cpl. Dunn who observed Ostrom enter and leave the residence prior to and after each controlled buy. (R. Vol. XIV, pgs. 50-64). On one occasion Cpl. Dunn even observed Albano return to her residence on foot to meet with Ostrom for the purpose of making a delivery of Oxycodone. (R. Vol. XIV, pgs. 57-59). The recordings, the tight control of Ostrom by law enforcement during each of the controlled buys, the three month span of time over which the deliveries were made, and the observations of Cpl. Dunn act as a counter to any testimony offered by Albano that she engaged in the three deliveries of Oxycodone as a result of constant duress occasioned upon her by Ostrom in continually contacting her to acquire Oxycodone.

The State did not seek to, nor introduce evidence of Albano's prior conviction for distribution of a controlled substance to demonstrate her propensity or intent to commit these crimes. The State did not even question Albano about her prior drug distribution conviction during the State's cross-examination as a means of challenging her entrapment defense. A review of the transcript from trial reflects such. (R. Vol. XIV, pgs. 131-140). Albano was questioned about testimony she offered during her direct examination

regarding Ostrom and other individuals coming to her and badgering her to provide them with the Oxycodone prescribed by her doctor during the period of January through April of 2017. (R., Vol. XIV, pg. 115-116). During this line of questioning on cross-examination, the State directly asked Albano if she sold Oxycodone to Ostrom on January 19, 2017, January 20, 2017 and April 10, 2017. (R., Vol. XIV, pg. 131-134). Albano readily admitted to the deliveries on January 19th and January 20th, but wanted to quibble about the number of pills of Oxycodone delivered to Ostrom on April 10th. (R., Vol. XIV, pg. 131-134). The State confronted Albano with the fact that she never communicated to Ostrom she did not want to sell him Oxycodone on any of the recordings made of the controlled buys. (R., Vol. XIV, pg. 131-134). When this line of questioning was pursued, Albano testified she did not like to hear herself on camera and so she didn't pay attention to the recordings when they were played. (R., Vol. XIV, pg. 133-134).

The State further questioned Albano regarding her testimony during direct examination that Ostrom badgered her to sell him Oxycodone by calling her on a daily basis. (R., Vol. XIV, pg. 134-135). The State inquired whether Albano had acquired a call log from her telephone company to establish Ostrom was repeatedly calling her. (R., Vol. XIV, pg. 134). Albano, initially tried dodging the question but eventually admitted she did not have a call log to establish repeated telephone contact by Ostrom. (R., Vol. XIV, pg. 134-135).

The State also addressed testimony offered by Albano during her direct examination that she requested her doctor drop her current prescription for Oxycodone as several

people were seeking to acquire such. (R., Vol. XIV, pg. 131-138). While Albano was denying others when they requested Oxycodone from her, she capitulated to Ostrom due to his constant badgering of her. (R., Vol. XIV, pg. 131-138).

This line of cross-examination by the State served to impeach Albano in her qualified denials of having delivered Oxycodone to Ostrom on at least one occasion in April of 2017 and her use of an entrapment defense to explain her involvement in the two deliveries of Oxycodone in January of 2017. (R., Vol. XIV, pg. 131-138).

As such, Albano's argument on appeal that the court committed error in not submitting a limiting instruction to the jury in light of the admission of K.S.A. 60-455 evidence, as previously noted, has no merit. Albano was the party who chose to offer this evidence up for the jury's consideration during her direct examination in support of her entrapment defense. Albano made a strategic decision in the defense of her case to introduce evidence of her prior drug conviction. This defense strategy was pursued as a means of preventing attempts by the State to impeach Albano regarding her prior predisposition to distribute drugs. Without addressing the prior conviction and subsequently explaining to the jury she had been successful on probation thereby leaving that lifestyle behind, she had little success at an entrapment defense. When Albano testified to her prior conviction for distribution of drugs, she did so to suggest that she had been placed on probation and successfully completed such thereby having moved beyond this type of activity in an effort to establish a healthier lifestyle. (R. Vol XIV, pg. 128-130). This required Albano to address why she became involved in the three deliveries of Oxycodone to Ostrom. In response, Albano testified that she acted under duress due to constant pressure placed

upon her by Ostrom who insisted she sell her prescription medication to him. (R. Vol XIV, pg. 119-138). The fact the jury acquitted Albano on Count I involving the first delivery of Oxycodone made to Ostrom clearly demonstrates the jury did not exaggerate the importance of the K.S.A. 60-455 evidence as it related to her propensity or intent to commit the crimes charged.

Secondly, the evidence introduced at trial to prove all three counts of distribution of Oxycodone was proven through testimony offered by the same witness, Stuart Ostrom. Ostrom's credibility was at issue throughout the trial. His testimony was corroborated by law enforcement officers and the recording devices which documented his contact with Albano. The K.S.A. 60-455 evidence testified to by Albano was offered in support of her entrapment defense that Ostrom's ongoing harassment was the sole reason for her distribution of Oxycodone. The acquittal of Albano on Count 1, is a strong indication this testimony was considered favorably by the jury in its decision to acquit her as to this count. The difficulty Albano faced thereafter was her continued distribution of Oxycodone to Ostrom on two separate occasions, the last occasion occurring well over 2 months later. As a result, Albano cannot demonstrate any potential prejudice from the lack of a limiting instruction.

Thirdly, during closing argument, Albano's counsel used her prior conviction for drug distribution as a focal point to attack Ostrom's credibility regarding the charged offenses and in support of her entrapment defense. Counsel discussed with the jury Ostrom's admission on the stand that he would call and text Albano many times in an attempt to purchase Oxycodone. Counsel further discussed that Ostrom admitted Albano

would not respond to these calls or texts. Counsel explained that this was where the entrapment defense came into play. While Albano had a prior conviction for drug distribution, she had moved beyond that point in her life. Counsel argued that Albano needed her pain medication to address her own health issues, but she couldn't get away from people like Ostrom who constantly harassed her. (R. XIV, 167-168).

Finally, given the substantial direct evidence of Albano's guilt, apart from the K.S.A. 60-455 evidence admitted without a limiting instruction, the evidence introduced at trial is such that this court would be unable to say there was a real possibility the jury would have rendered a different verdict had the instruction error not occurred. The testimony offered by law enforcement and the recordings provided the jury with an independent source of evidence to assess both the credibility of Ostrom and Albano. For all of these reasons, the court's failure to provide the jury with a limiting instruction regarding the K.S.A. 60-455 evidence was not clearly erroneous.

K.S.A. 22-3414, entitled "Order of trial", speaks to the very issue Albano has presented to court for consideration. It states, in relevant part, that "[n]o party may assign as error the giving or failure to give an instruction…unless the party objects thereto before the jury retires to consider its verdict stating distinctly the matter to which the party objects and the grounds of the objection unless the instruction or the failure to give the instruction is clearly erroneous. Opportunity shall be given to make the objections out of the hearing of the jury."

K.S.A. 60-251, entitled "***Jury Instructions; objections; erroneous instructions***", provides in pertinent part, as follows:

(d) *Assigning error; clearly erroneous. (1) Assigning error.* A party may assign as error:

(A) An error in an instruction actually given, if that party properly objected; or

(B) a failure to give an instruction, if that party properly requested it and, unless the court rejected the request in a definitive ruling on the record, also properly objected.

(2) Clearly erroneous instruction. A court may consider an error in the instructions that has not been preserved as required by subsection (d)(1) if the giving or failure to give an instruction is clearly erroneous and the error affects substantial rights.

The import of the statutory provisions of K.S.A. 60-215 was discussed by the Kansas Supreme Court in State v. Moore, 230 Kan. 495, 498, 639 P.2d 458 (1982). A review of the record indicated there was no contention by the parties any instruction given at the trial was clearly erroneous. The Kansas Supreme Court stated that the defendant waived any right to a specific instruction by failure to object and failure to submit a requested instruction in writing.

In light of the foregoing, the State respectfully requests this Court affirm Albano's convictions as to Count II and Count III.

ISSUE II

THE COURT DID NOT ERR IN INSTRUCTING THE JURY THAT IT "MUST" FOLLOW THE LAW AND IT WAS THEIR "DUTY" TO DO SO, AS OPPOSED TO INSTRUCTING THE JURY IT "SHOULD" FOLLOW THE LAW, THEREBY ALLOWING FOR JURY NULLIFICATION.

PRESERVATION AND STANDARD OF REVIEW

Albano did not object to any of the instructions complained of on appeal. Albano's failure to preserve this issue for appeal, requires this court to employ a clearly erroneous standard to determine whether there was a real possibility the jury would have rendered a different verdict if the error had not occurred. State v. Pfannenstiel, 302 Kan. 747, 752, 357 P.3d 877 (2015).

LEGAL ANALYSIS

In Appellant's brief, Albano argues that the court's instructions undermined the jury's inherent right of nullification. By way of background, the parties were ordered to submit proposed jury instructions to the court prior to trial. On June 12, 2018, Albano submitted her "Proposed Instructions by the Defense". In reviewing the instructions submitted by Albano, she requested the submission of PIK Instruction No. 68.010 entitled "Concluding Instructions". On June 13, 2018, the State submitted its "Proposed Instructions by the State". (R., Vol I, pg. 82-85). In reviewing the State's proposed instructions, a request was made for PIK Instruction No. 68.010 as well. (R., Vol I, pg. 86-90). A section denoted "Notes on Use" is set forth in PIK Instruction No. 68.010, which states: "Absent special circumstances, this concluding instruction should be used in every criminal trial."

Following the conclusion of evidence, the court held a conference with the parties to discuss the court's proposed instructions to the jury. (R., Vol XIV, pg. 145-154). During the conference, when the parties were asked if they had any objection to Instruction No. 13, setting forth PIK Instruction No. 68.010, both the State and counsel for Albano indicated "No". (R., Vol. XIV, pg. 153). As such, when the proceedings reconvened after the jury had been brought back into court, Judge Bosch read Instruction No. 13 to the jury: "When you retire to the jury room you will first select one of your members as a presiding juror. The person selected will preside over your deliberations, will speak for the jury in court, and will sign the verdict upon which you agree. Your verdict must be founded entirely upon the evidence admitted and the law as given in

these instructions. (R., Vol. XIV, pg. 161).

In the case of State v. Boothby, 2019 WL 4230521, 448 P.3d 416 (2019), the Kansas Supreme Court had occasion to address a similar argument raised, that the burden of proof instruction given to the jury by the district court prohibited the jury's power of nullification.

In the case at bar, Albano claims there is a right to jury nullification and Jury Instruction No. 13 wrongly told the jury that it could not nullify. The *Boothby* decision, which was published in September of this year, has clearly resolved this matter. The Kansas Supreme Court could not have been any clearer when it stated that it has not recognized a "right" to jury nullification, and it declined to do so now. State v. Boothby, supra at 424.

Boothby involved a challenge to the very language set forth in Jury Instruction No. 13. In addressing the language contained in PIK Instruction No. 68.010, the Kansas Supreme Court stated that "the challenged instruction was legally correct… This is an accurate—and bedrock—statement of law that mirrors the juror's oath; upholds the role of judge and jury; and most importantly, protects the accused." State v. Boothby, supra at 425. "Thus, we reject the argument that a legally correct jury instruction interferes with the jury's power to nullify." State v. Boothby, supra at 425.

Based on the foregoing, the State respectfully requests this Court affirm the lower court in its use of PIK Instruction No. 68.010.

ISSUE III

THE JUDICIAL PRIOR CONVICTION FINDINGS WHICH ELEVATED ALABANO'S PRESUMPTIVE KANSAS SENTENCING GUIDELINES SENTENCE DID NOT VIOLATE SECTION 5 OF THE KANSAS CONSTITUTION BILL OF RIGHTS.

STANDARD OF REVIEW

An attack on the constitutionality of the Kansas Sentencing Guidelines involves a question of law, over which an appellate court has unlimited review. State v. Crow, 266 Kan. 690, Syl. P 2, 974 P.2d 100 (1999).

PRESERVATION OF THE ISSUE

At sentencing, Albano did not challenge the constitutionality of the Kansas Sentencing Guidelines Act. Kansas follows a common-law rule that constitutional grounds for reversal asserted for the first time on appeal are not properly preserved for appellate review subject to three exceptions. A new legal theory may be asserted for the first time on appeal if: (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 a denial of fundamental rights; and (3) the judgment of the trial court may be upheld on appeal despite relying on the wrong ground or assigning a wrong reason for its decision. State v. Gomez, 290 Kan. 858, 862, 235 P.3d 1203 (2010).

Background:

After the jury returned verdicts of guilty to Count II and Count III of the Trial Information, the court ordered that a Presentence Investigation Report be prepared for purposes of sentencing. (R. Vol XIV, pg. 178-180).The Presentence Investigation Report

was filed with the Riley County Clerk of Court on December 28, 2018. (R. Vol I, pg. 135-142). According to the Presentence Investigation Report, Albano's criminal history reflected she had previously been twice convicted of Possession of Drug Paraphernalia, a Class A Nonperson Misdemeanor, Possession of Methamphetamine, a Level 5 Drug Felony, Possession of Marijuana, a Class A Nonperson Misdemeanor and Possession with Intent to Distribute Methamphetamine, a Level 4 Drug Felony. (R., Vol. I, pg. 140). As a result of these prior convictions, the Presentence Investigation Report identified Albano's criminal history score as "F" having been convicted of two (2) Nonperson Felonies. (R., Vol. I, pg. 135).

Sentencing was held on January 28, 2019. (R., Vol. XV, pg. 1). The court noted for the record that Albano had been found guilty of two offenses. The first offense was Distribution of a Controlled Substance within 1000 feet of school property, a Level 2 Drug Felony. The second offense was Distribution of a Controlled Substance within 1000 feet of school property, a Level 3 Drug Felony. The court noted that the Presentence Investigation Report identified Albano's criminal history as "F". The court inquired of the parties whether there was any objection to Albano's criminal history. The parties advised the court they had no objection to Albano's criminal history. As such, the court determined Albano's correct criminal history score was an "F". (R., Vol. XV, pg. 5-6).

In handing down its sentence, the court stated the following:

Court: The jury did find you guilty, and the first offense, and the base offense for which I'm going to sentence you on today is the distribution of a controlled substance within 1,000 feet of a school property being a severity Level 2 Drug Felony with a criminal history of "F".

For that conviction, ma'am, which is going to be the base sentence, I hereby sentence you to a term of 101 months in the custody of the Secretary of Corrections. On this sentence you may earn up to a maximum good time credit of fifteen percent and would be subject to a mandatory post-release supervision duration of 36 months.

For the second offense of distribution of a controlled substance within 1,000 feet of school property being a Level 3 Drug Felony with a criminal history of "I", I hereby sentence you to a term of 49 months in the custody of the Secretary of Corrections. On this sentence you may earn a maximum good time credit of 20 percent and would be subject to a mandatory post-release supervision duration of 36 months.

Now, because of your criminal history, both of these offenses fall into what's considered a presumption prison box. While the Court has the power to give you probation, you must understand that the Court cannot do it unless there are substantial and compelling reasons proven to support the Court departing, and I understand the reasons, the community issue, the supportive family issue, but actually that occurs in many of these cases, and after reviewing your history and your criminal history, the Court doesn't find there's any compelling reason to grant you a dispositional departure or durational, and so I'm going to, however, order that the two counts be served concurrent, that you'll be given credit for time spent in the county jail of two days, but that you be committed to the custody of the Secretary of Corrections to serve the underlying sentence then of 101 months.... (R., Vol. XV, pg. 19-20).

LEGAL ANALYSIS

A. THE SENTENCE IMPOSED BY THE COURT FELL WITHIN THE PARAMETERS SET BY THE KANSAS SENTENCING GUIDELINES ACT.

The sentence imposed by the court fell within the parameters set by the Kansas Sentencing Guidelines Act. Based on Albano's criminal history of "F", for a Level Two Drug Felony, the court had the authority to impose an aggravated number of 113 months, the standard number of 108 months or the mitigated number of 101 months. The court imposed the mitigated number as a term of incarceration on Count II, which was designated as the base sentence for the primary crime pursuant to the provisions of

K.S.A. 21-6819(b)(2).

K.S.A. 21-6819(b)(2) provides that the "primary crime is the crime with the highest crime severity ranking".

As to Count III, pursuant to the provisions of K.S.A. 21-6819(b)(4), the court was required to sentence Albano under the "I" box, for the Level 3 Drug Felony. As such, the court could impose the aggravated number of 51 months, the standard number of 49 months or the mitigated number of 46 months. As reflected by the sentencing transcript, the court imposed the standard number of 49 months to run concurrent to Count 1.

K.S.A. 21-6819(b)(4) provides, in pertinent part, that "[t]he total prison sentence imposed in a case involving multiple convictions arising from multiple counts within an information, complaint or indictment cannot exceed twice the base sentence."

The sentences for Count II and Count III were presumptive prison according to the Kansas sentencing guideline grid box. Pursuant to K.S.A. 21-6819(b), the sentencing judge had the discretion to impose concurrent or consecutive sentences in multiple conviction cases. In this particular instance, the court chose to impose concurrent sentencing as to Count II and Count III.

The Kansas Supreme Court has already ruled that a sentence to any term, including an aggravated term, within the range in the Kansas sentencing guideline presumptive grid box is constitutional. K.S.A. 21-6805(c)(1) provides, in pertinent part, "[t]he sentencing court has discretion to sentence at any place within the sentencing range. In the usual case it is recommended that the sentencing judge select the center of the range and reserve the upper and lower limits for aggravating and mitigating factors

insufficient to warrant a departure."

Because a sentence that falls within a grid box is a presumptive sentence, appellate courts lack jurisdiction to consider a challenge to such sentence under K.S.A. 21-6820(c). K.S.A. 21-6820(c) provides, in pertinent part, as follows: "On appeal from a judgment or conviction entered for a felony committed on or after July 1, 1993, the appellate court shall not review (1) any sentence that is within the presumptive sentence for the crime."

As to presumptive prison sentences, K.S.A. 21-6805(d) provides, in pertinent part, that "[e]ach grid block states the presumptive sentencing range for an offender whose crime of conviction and criminal history place such offender in that grid block...If an offense is classified in a grid block above the dispositional line, the presumptive disposition shall be imprisonment."

When reviewing the transcript of the sentencing hearing and the statutory provisions the court was required to adhere to, it is clear there was no error committed by the court in the sentence it imposed in this matter. In spite of such, Albano appealed her sentence. On appeal Albano admits that she did not challenge the constitutionality of the Kansas Sentencing Guidelines Act, which she is now raising for the first time as an issue on appeal. In her appeal, Albano argues that the State was required to prove her prior convictions to the jury, before she could be sentenced in accordance with a criminal history score of "F". The Kansas Supreme Court has already spoken to this issue and has ruled that the State is not required to prove criminal convictions to the jury for purposes of determining a defendant's criminal history score.

In the case of State v. Ivory, 273 Kan. 44, 46-47, 41 P.3d 781 (2002), the Kansas

Supreme Court specifically ruled that the State is not required to prove a prior conviction to a jury beyond a reasonable doubt. Moreover, appellate courts are duty bound to follow Supreme Court precedent absent some indication the court is departing from its previous position. State v. Singleton, 33 Kan. App. 2d 478, 488, 104 P.3d 424 (2005).

In examining the facts set forth in State v. Ivory, Ivory challenged the judgment of the Sedgwick County District Court, following a guilty plea to the charge of theft. The court imposed the aggravated sentence of 13 months incarceration to be served consecutively to a parole revocation in another matter Ivory faced. The Kanas Court of Appeals affirmed the judgment of the district court. In its ruling, the Kansas Court of Appeals held that because Ivory's sentence was within the presumptive range established by the Kansas Sentencing Guidelines Act, the sentence was not subject to challenge on appeal and the United States Supreme Court's decision in *Apprendi* did not apply. On appeal Ivory argued his constitutional rights were violated when his sentence was increased based on his prior criminal history. Ivory contended *Apprendi* prevented the use of prior convictions to increase a sentence beyond the statutory maximum unless proven to a jury beyond a reasonable doubt. Following the decision rendered by the Kansas Court of Appeal, Ivory filed a petition for further review. State v. Ivory, 273 Kan. 44, 44, 41 P.3d 781 (2002).

The Kansas Supreme Court granted Ivory's request for further review, noting he had raised an issue of first impression which the court sought to resolve. Id., at 45. In reviewing the record, the Kansas Supreme Court noted that Ivory had prior criminal convictions, which resulted in a criminal history score of "C". Based on his criminal

history score, the district court judge imposed an aggravated term for the period of confinement to be served consecutively to a case Ivory was on parole for at the time he committed the theft. Id., at 45.

In Ivory's argument to the Kansas Supreme Court, he asserted the "application of the horizontal axis of the sentencing grid was unconstitutional under *Apprendi*." Id., at 45. Ivory reasoned that *Apprendi* prevented the use of prior convictions to increase a sentence beyond the statutory maximum unless proven to a jury beyond a reasonable doubt. The Kansas Supreme Court stated that Ivory's conception of a statutory maximum sentence was "an interesting feature of his argument. According to Ivory, the statutory maximum sentence is derived from consideration of the severity level of the crime and a horizontal axis criminal history score of "I" (no prior record). He contends that: (1) the sentencing court increased his sentence by using prior convictions, (2) the convictions were neither included in his complaint nor presented to a jury and proven beyond a reasonable doubt, and (3) prior criminal history should not be included in calculating his sentence." Id., at 45.

The Kansas Supreme Court stated that Ivory's attack on the constitutionality of the KSGA sentencing grid involves a question of law, over which it had unlimited review. Id., at 46, citing, State v. Crow, 266 Kan. 690, Syl. P 2, 974 P.2d 100 (1999).

In the court's ensuing discussion, it noted that the Kansas Sentencing Guidelines Act "builds criminal history into the calculation of a presumptive sentence, rather than using criminal history as an enhancement. The determination of a felony sentence is based on two factors: the current crime of conviction and the offender's prior criminal

history. The sentence contained in the grid box at the juncture of the severity level of the crime of conviction and the offender's criminal history category is the presumed sentence." Id., at 46, citing, K.S.A. 2001 Supp. 21-4704. See State v. Gould, 271 Kan. 394, 23 P.3d 801 (2001).

That being said, the Kansas Supreme Court noted that "[i]n *Apprendi,* the United States Supreme Court said: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt." Id., at 46, citing, Apprendi v. New Jersey, 530 U.S. 466, 490, 147 L.Ed.2d 435, 120 S.Ct. 2348 (2000).

This holding was further clarified by the Kansas Supreme Court's decision in *Wilson*, which held that *Apprendi* required a jury to determine any fact that increases the penalty for a crime beyond the statutory maximum and does not apply to a defendant's presumptive sentence that is based in part on the defendant's criminal history score under the Kansas Sentencing Guidelines Act. State v. Wilson, 35 Kan. App. 2d 333, 130 P.3d 139, (Kan. Ct. App. 2006).

The Kansas Supreme Court also stated that the Tenth Circuit Court of Appeals had rejected the notion that prior convictions should be treated as essential elements to be presented in an indictment and decided by a jury. Id., at 47, citing, U.S. v. Wilson, 244 F.3d 1208, 1216-17 (10th Cir. 2001). As such, the Kansas Supreme Court held that Ivory's sentence should stand and the decision of the Kansas Court of Appeals was affirmed as to this issue. Id., at 48.

B. ALBANO IS NOT ENTITLED TO RELIEF UNDER SECTION 5 OF THE KANSAS CONSTITUTION'S BILL OF RIGHTS.

As to Albano's claim that the court violated her rights under Section 5 of the Kansas Constitution's Bill of Rights when it considered her prior conviction in determining her sentence, this claim does not warrant relief either. Section 5 states the following: "The right of trial by jury shall be inviolate." A review of the various criminal cases having raised Section 5 violations on appeal, primarily address the issue of whether a valid waiver of a defendant's right to jury trial occurred, focusing on whether the trial court properly advised a defendant of the nature and extent of his constitutional right to trial by jury, (See State v. Frye, 294 Kan. 364, 277 P.3d 1091, (2012)), and whether the defendant knowingly and voluntarily waived that right (See State v. Bowers, 42 Kan.App.2d 739, 216 P.3d 715 (2009)).

Section 5 would be implicated as was addressed in the *Horn* decision, where, following a guilty plea, a jury was empaneled to determine the applicability of an aggravating factor. The Kansas Court of Appeals determined that all applicable issues were considered by the jury, and the trial court had valid authority to enter the upward durational departure sentence in this instance. State v. Horn, 40 Kan. App. 2d 687, 196 P.3d 379, (Kan. Ct. App. 2008), rev'd, 291 Kan. 1, 238 P.3d 238 (2010). Clearly, that is not the fact pattern presented to this Court for review. The term of incarceration imposed by the lower court in the case at bar, was based on the sentence contained in the grid box at the juncture of the severity level of the crime of conviction and Albano's criminal history category.

The State further asserts that defendant is not entitled to relief even if this Court

reaches the merits. As defendant acknowledges, the Kansas Supreme Court, citing Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), has held that a sentencing court does not violate the Sixth Amendment to the United States Constitution when it considers prior convictions in determining a defendant's sentence. State v. Ivory, 273 Kan. 44, 45-48, 41 P.3d 781 (2002) Albano, however, argues that the language in Section 5 of our Bill of Rights provides greater protection than the United States Constitution. The Kansas Supreme Court has expressly rejected a claim that this language is more inclusive than that found in the Sixth Amendment to the United States Constitution. State v. Conley, 270 Kan. 18, 35, 11 P.3d 1147 (2000). This Court is duty bound to follow the Kansas Supreme Court's precedent. State v. Ottinger, 46 Kan.App.2d 647, 655, 264 P.3d 1027 (2011), *rev. denied* 294 Kan. 946 (2012). Because Albano presents no authority indicating that Section 5 provides greater protection than the Sixth Amendment, she is not entitled to relief on this issue.

Given the rulings in these decisions, it is clear there is no merit in the argument raised by Albano. The statutory provisions cited to by the State and the decisions set forth above, definitively establish that the court committed no error in considering her prior criminal history to determine her criminal history score, recognizing that the prior convictions were not proven by the State to the jury.

CONCLUSION

WHEREFORE, the State respectfully requests this Court affirm Albano's convictions on Count II and Count III, affirm the lower court's use of PIK Instruction No. 68.010 and affirm the lower court's use of Albano's criminal history score in determining

the sentence to be imposed.

RESPECTFULLY SUBMITTED,

/s/ Kelly G. Cunningham
Kelly G. Cunningham, #14049
Assistant Riley County Attorney
Riley County Attorney's Office
105 County Courthouse Plaza
Manhattan, Kansas 66502
Telephone: (785) 565-6641
Fax No: (785) 565-6896
kcunningham@rileycountyks.gov

Derek Schmidt
Kansas Attorney General
120 SW 10th, 2nd Floor
Topeka, Kansas 66603
Attorneys for the State

CERTIFICATE OF SERVICE

The undersigned hereby certifies that service of the above and foregoing ***Appellee's Brief*** was sent by e-mailing a copy to the Kansas Appellate Defender's Office, adoservice@sbids.org; and by e-mailing a copy to Derek Schmidt, Attorney General, at ksagappealsoffice@ag.ks.gov on the 27th day of November, 2019.

/s/ Kelly G. Cunningham
Kelly G. Cunningham, #14049