No. 19-120590-A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS
Plaintiff-Appellee

v.

MAURICE A. BROWN
Defendant-Appellant

BRIEF OF APPELLEE

Appeal from the District Court of Sedgwick County, Kansas
The Honorable John J. Kisner, Jr., District Judge
District Court Case Number 17 CR 446

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STATEMENT OF THE ISSUES

I. **The prosecutor articulated valid race-neutral reasons for striking five prospective jurors, and defendant failed to show purposeful discrimination. Did the trial court properly reject defendant's Batson challenge?**

II. **Did the district court properly classify defendant's Michigan offense as a person felony for criminal history purposes?**

III. **Did the district court err in considering defendant's prior convictions in determining his sentence?**

IV. **Are defendant's constitutional challenges to restitution properly before this court, and, in any event, do they fail on the merits?**

STATEMENT OF THE FACTS

Maurice Brown was charged with five counts of aggravated robbery and 14 counts of kidnapping. (R. I, 26-37.) Following a preliminary hearing, he was bound over on two counts of aggravated robbery and eight counts of kidnapping; the facts of the underlying crimes are not relevant to the issues on appeal. (R. I, 45; R. X, 3-9.)

Following voir dire, defendant lodged a Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), challenge to the State's decision to strike five prospective jurors. (R. IX, 143.) After the State articulated its reasons for each strike, the district court denied defendant's challenge. (R. IX, 144-58.)

A jury convicted defendant as charged after four days of evidence. (R. XIII, 109-11.) Defendant filed a timely notice of appeal after being sentenced to 200 months in prison. (R. I, 183; R. XIV, 67-68.)

Additional facts are presented in the Arguments and Authorities section of this brief in order to fully address the issues.

ARGUMENTS AND AUTHORITIES

I. Because the prosecutor articulated valid race-neutral reasons for striking five prospective jurors, and defendant failed to show purposeful discrimination, the trial court properly rejected defendant's Batson challenge.

In Batson, 476 U.S. 79, the United States Supreme Court held that the Equal Protection Clause applies to the State's privilege to strike prospective jurors through peremptory challenges. When a Batson challenge is asserted, a three-step analysis applies; each step is governed by its own standard of review. State v. Hill, 290 Kan. 339, 358, 228 P.3d 1027 (2010); State v. Pham, 281 Kan. 1227, 1237, 136 P.3d 919 (2006).

> "First, the party challenging the strike must make a prima facie showing that the other party exercised a peremptory challenge on the basis of race. Appellate courts utilize plenary or unlimited review over this step. Hill, 290 Kan. at 358, 228 P.3d 1027.
>
> Second, if a prima facie case is established, the burden shifts to the party exercising the strike to articulate a race-neutral reason for striking the prospective juror. This reason must be facially valid, but it does not need to be persuasive or plausible. The reason offered will be deemed race-neutral unless a discriminatory intent is inherent in the explanation. The opponent of the strike continues to bear the burden of persuasion. 290 Kan. at 358, 228 P.3d 1027.
>
> Third, the trial court must determine whether the objecting party has carried the burden of proving purposeful discrimination. This step hinges on credibility determinations. '[U]sually there is limited evidence on the issue, and the best evidence is often the demeanor of the party exercising the challenge. As such, it falls within the trial court's province to decide, and that decision is reviewed under an abuse of discretion standard. [Citations omitted.]' State v. McCullough, 293 Kan. 970, 992, 270 P.3d 1142 (2012)." State v. Kettler, 299 Kan. 448, 461-62, 325 P.3d 1075 (2014).

Judicial discretion is abused if judicial action (1) is arbitrary, fanciful, or unreasonable, i.e., if no reasonable person would have taken the view adopted by the trial

court; (2) is based on an error of law, i.e., if the discretion is guided by an erroneous legal conclusion; or (3) is based on an error of fact, i.e., if substantial competent evidence does not support a factual finding on which a prerequisite conclusion of law or the exercise of discretion is based. State v. Ward, 292 Kan. 541, 550, 256 P.3d 601 (2011), *citing* State v. Gonzales, 290 Kan. 747, 755-56, 234 P.3d 1 (2010). The party asserting an abuse of discretion bears the burden of showing such abuse occurred. State v. Woodward, 288 Kan. 297, 299, 202 P.3d 15 (2009).

Defendant argues that the trial court erred in denying his Batson challenge. (Appellant's Brief, 4-18.) The record shows otherwise.

Defendant's Batson challenge focused on the State's peremptory strikes of IA, JN, KS, LS, and AO. (R. IX, 143.) JN was of mixed race, while the other four prospective jurors were African-American. (R. IX, 142-43.) The State will address each of these prospective jurors in turn.

IA

During voir dire, the prosecutor explained that if the jury convicted defendant, it would be the judge, not the jury, who would determine the sentence. (R. VIII, 99.) When the prosecutor asked if anyone had a problem with that concept, IA asked whether the law that applied at the time of the crimes or at the time of trial would apply. (R. VIII, 99-100.) He then asked, "[m]y problem here, the fact of 2015, do we have all the facts from 2015?" (R. VIII, 100.)

Near the end of the State's voir dire, the prosecutor asked whether the prospective jurors could look at all of the evidence before rendering a verdict. (R. IX, 77.) IA replied

that he would "like to receive more evidence because we want to give justice. We want justice for the victim and him. Also, I see him as a victim so his side, your side, so have to do more investigation to get to that right or to get to the justice. So I would require additional evidence." (R. IX, 77-78.)

In responding to the Batson challenge, the prosecutor noted that he was not sure where IA was from, but acknowledged that he did not appear to be from America. (R. IX, 144.) The prosecutor provided two reasons for its decision to strike IA: a language barrier that it made it difficult to communicate, and IA's repeated statements and questions indicating that he would want to see "more evidence." (R. IX, 144.)

In finding that the State had presented a valid explanation for its strike, the court stated that IA "seemed to have some very strong opinions," some of which did not appear to be based on a "correct knowledge of the system." (R. IX, 145.) The court also found that there was "[c]learly" a language barrier." (R. IX, 145.) The court ruled that defendant had not shown purposeful discrimination with regard to the State's strike. (R. IX, 145.)

JN

On the first day of voir dire, JN said that she owned her own business, specifying that she was a wedding coordinator and an interpreter. (R. VIII, 48.) Later that day, she said that she was "interested" upon being summoned for jury duty, and noted that she watched movies and television shows involving juries. (R. VIII, 88-90.)

The following day, defense counsel asked if any prospective jurors had "any concerns about finding an innocent person guilty." (R. IX, 98.) When it was her turn to address this question, JN replied:

> "With the way we are in America right now, I have a great fear of that. You hear about people, you know what we all hear about, people being in prison and then it was a case of mistaken identity. It was a coincidence, the wrong place at the wrong time, maybe not following up with all of the evidence or whatever it was. At this time it is so important to do follow-up and look at all of the evidence. And we as our responsibility to look at everything. That's why I am in fear of putting an innocent person away for – it is a great fear because essentially right now, no offense or whatever, but putting people of color especially right now. And my mom is – I am of mixed race and so that is so important to me that we get everything right.
>
> Do it right because we want to follow the steps and do everything by the book as we should. And if that is what it takes, then that's how we should do it because putting an innocent person away is the worst thing that can happen to that person. Think of the time they spend in jail, the years they have. It is like it will make them seek revenge if they want to and it will be a vicious cycle. So in doing the right thing and doing it like we should, look at all of the evidence and there is no morals, there is nothing else involved other than the evidence, that's how we should do it." (R. IX, 107-08.)

Defense counsel thanked JN, said her remarks were "awesome," and praised her for being "very eloquent in her speech." (R. IX, 109.)

Addressing the Batson challenge, the prosecutor acknowledged that JN was of mixed race and of Asian descent. (R. IX, 145-46.) The prosecutor then explained that the State struck JN for multiple reasons. First, JN's responses to defense counsel demonstrated that JN "has preference[s] towards" African-Americans. (R. IX, 146.) Further, the prosecutor stated that JN "went on basically a 15-minute rant about locking up innocent people and appears to be looking at a very microscopic view of the criminal justice system with regards to locking people up. [Defense counsel] called her very eloquent. [JN] constantly smiled when [defense counsel] was talking." (R. IX, 146.) The prosecutor also noted that JN failed to fully explain her jobs on her juror card, instead simply listing that

she was self-employed. (R. IX, 146.) Finally, the prosecutor reminded the court that JN stated that she enjoyed shows such as *CSI* and *Law and Order*. (R. IX, 146-47.)

The court found that the State presented several valid reasons for the strike. (R. IX, 147.) In the court's view, the most significant was JN's fear of convicting an innocent person; the court declared that JN's fear "was the strongest of any of the respondents." (R. IX, 147-48.) Based on that and the other factors identified by the State, the court found that defendant had not shown purposeful discrimination. (R. IX, 148.)

KS

At the outset of voir dire, the court said that it would not allow prospective jurors to work a full overnight shift, noting the need for a good night's sleep. (R. VIII, 25.) KS replied that she worked at a hotel from 11:00 p.m. until 7:00 a.m., but said that she had told her employer that she had been summoned for jury duty. (R. VIII, 26.) When the court asked whether KS's employer was going to accommodate her so she could "get a good night's sleep tonight," KS replied, "[o]h no. I go to work at 11. I'll get some sleep." (R> VIII, 26.) When the court asked whether KS would be able to comply with an order not to work more than four hours, KS replied in the affirmative, explaining that she would talk to her employer and "they will be more than happy" to comply. (R. VIII, 26-27.)

Later that day, KS said that she had remembered that her brother had been incarcerated in Texas for aggravated robbery approximately 20 years ago. (R. VIII, 94-95.)

As court concluded for the day, the court asked the prospective jurors to arrive by 8:50 the following morning, noting that the proceedings could not start until everyone

arrived. (R. VIII, 127.) KS said that she would do her best, but noted that she worked until 7:00 a.m. (R. VIII, 127-28.) In response to a follow-up question from the court, KS indicated that she would "get it together" and make it on time. (R. VIII, 128.)

The following morning, KS informed the court that she had worked her full, eight-hour, overnight shift. (R. IX, 3.) Addressing the court, KS said, "I thought that when you said we could only work four hours . . . you meant if we were selected [to serve on the jury]." (R. IX, 3.) As voir dire continued, KS said that her brother was the getaway driver in a robbery committed 20 years ago. (R. IX, 65.) In discussing the length of her brother's prison sentence for that offense, KS disclosed that her brother also had two other prior robbery convictions. (R. IX, 66-67.)

Later in the day, as defense counsel questioned whether anyone was concerned about potentially convicting an innocent person, KS said that she "[goes] to sleep watching the ID channel. It is all about real life crimes that happen, so I see that a lot." (R. IX, 109.) She expanded on this later in voir dire, noting that she fell asleep to the channel on a nightly basis. (R. IX, 119-20.) KS made clear that she was eager to serve on the jury. (R. IX, 120.)

Near the end of voir dire, defense counsel stated that she had a "weird question," and then asked whether any of the prospective jurors had tattoos. (R. IX, 136.) KS was one of two jurors to respond in the affirmative. (R. IX, 136-38.) The prosecutor asked to approach the bench, and during the ensuing bench conference, argued that defense counsel's line of inquiry was "dangerously close to trying the merits of this case with

regards to the defense." (R. IX, 138-39.) After allowing defense counsel to respond, the court sustained the prosecutor's objection. (R. IX, 139-40.)

Addressing defendant's Batson challenge, the prosecutor identified multiple reasons for striking KS. First, the prosecutor explained that he "did not want anyone with any family relation or personal experience of aggravated robbery on the defense side as a member of the jury. I certainly don't want her comparing her brother's case to this case and the evidence there." (R. IX, 148.) Second, the prosecutor noted that KS had defied the court's order regarding work: "Very simple, if she can't follow that sort of a simple court order, I have reservations [about] her following the [court's] orders and instructions." (R. IX, 148-49.) Third, the prosecutor noted that KS "watches the ID channel, these *Law and Order* shows and goes to sleep to them." (R. IX, 149.) Finally, the prosecutor said that he found it inappropriate for defense counsel to have discussed tattoos with KS, and noted that he had struck another prospective juror for the same reason. (R. IX, 149-50.)

Ruling on the challenge, the court stated that KS was a "particularly strong willed juror" and said that it was surprised that KS did not follow the court's order. (R. IX, 149.) The court noted that it was "fairly clear" in ordering KS not to work a full shift. (R. IX, 149.) The court then declared that KS's brother's history was even more significant, noting that KS's brother was "in a very similar situation to the defendant." (R. IX, 149.) Ultimately, the court ruled that the defense had not shown purposeful discrimination, finding that the State's explanations for striking KS were valid. (R. IX, 149-50.)

LS

The State identified multiple reasons for striking LS. First, LS arrived late to court on the second day of voir dire without any explanation. (R. IX, 151.) Upon arrival, LS was "somewhat hostile, which mirrors her attitude here in court. She has sat there with crossed arms or carelessly eating and spitting in a cup behind me." (R. IX, 151.) In addition, in response to questions regarding the length of her residency in Sedgwick County and Kansas on the jury card, LS wrote "14 miles," causing the prosecutor to question LS's dedication to the process, as well as her education and background. (R. IX, 151-52.) Further, the prosecutor noted that LS had listed a potential family issue on her jury card, but then declined to discuss the matter during voir dire. (R. IX, 152.)

In ruling on the challenge, the court noted that LS had arrived at 9:24 a.m., while the court had ordered the prospective jurors to arrive at 8:50 a.m. (R. IX, 152.) The court explained that when the bailiff contacted LS via telephone, LS "was very short with her." (R. IX, 153.) Further, the court stated that it had observed "her kind of lack of attention and kind of laissez-faire attitude throughout the proceedings here the last day or so." (R. IX, 153.) The court emphasized that LS's tardiness was the most important factor, stating that LS "caused at minimum a 30-minute delay" for the witnesses and prospective jurors, and noting that "it was clear from what the bailiff told me there was no significant apology or any particular reason for her being so late." (R. IX, 153.) The court ruled that defendant had not shown purposeful discrimination. (R. IX, 153.)

AO

AO said on the first day of voir dire that she worked for Marriott International. (R. VIII, 41.) She stated that she was excited to receive the jury summons because it would allow her to "get away from work," specifically referencing "annoying customers." (R. VIII, 86-88.)

The following day, defense counsel asked AO whether she thought DNA by itself is enough to convict someone of a crime. (R. IX, 113.) AO replied in the negative, and proceeded to give a hypothetical example of someone's DNA being innocently transferred onto a stolen item. (R. IX, 113.)

In explaining why he struck AO, the prosecutor noted that AO was excited to serve on the jury simply because it would allow her to miss work. (R. IX, 154.) Based on AO's comment regarding annoying customers, the prosecutor was concerned about AO's ability to get along with others. (R. IX, 154.) In addition, the prosecutor believed that AO's comments regarding DNA indicated that AO "tends to believe in remote possibility versus reasonable doubt," and would potentially "[chase] rabbits" if she served on the jury. (R. IX, 154.) Finally, the prosecutor stated that in contrast to other young members of the jury panel, AO appeared to lack motivation. (R. IX, 154-56.)

In ruling that the defense had not shown purposeful discrimination, the court found that the State had presented "several factually valid explanations." (R. IX, 157.) The court stated that AO was "disengaged throughout the process. I could hardly understand her or hear her most of the time." (R. IX, 157.) In addition, the court noted that AO appeared quiet and timid. (R. I, 157.)

Prima facie showing

JN was of mixed race, while KS, LS, and AO were African-American. (R. IX, 142-43.) IA's racial background is somewhat unclear from the record, though it appears he is not originally from America. (R. IX, 144.) In any event, the parties seemed to agree that he was of African descent, and the court found that defendant made a prima facie showing with respect to each of the five jurors at issue. (R. IX, 144-57.)

The State articulated race-neutral reasons for striking the jurors at issue

In discussing the second step of a Batson challenge, our Supreme Court recently reiterated that the State "carries a relatively low burden to provide a race-neutral reason for a strike—the justification must be facially valid, but it need not necessarily be plausible or persuasive." State v. Dupree, 304 Kan. 43, 59, 371 P.3d 862 (2016).

In analyzing this step, defendant focuses solely on the State's bases for striking JN. (Appellant's Brief, 10-12.) Because he does not argue that the State did not articulate race-neutral reasons for striking the other prospective jurors, he has abandoned any such claim. State v. Littlejohn, 298 Kan. 632, 656, 316 P.3d 136 (2014) (an issue not briefed is deemed abandoned).

Turning to JN, defendant acknowledges that the State provided race-neutral reasons. (Appellant's Brief, 5.) He argues, however, that the prosecutor also "accidentally confessed to having had discriminatory intent" for striking JN, and that the court therefore should not have reached the third step of the Batson test with respect to JN. (Appellant's Brief, 11-12.) Specifically, he claims that there is no support for the prosecutor's statement

that JN expressed a preference for African-Americans. (Appellant's Brief, 11.) The record, however, shows otherwise.

Again, in discussing her fear of potentially convicting an innocent person, JN said that her fear was "especially" strong with respect to "people of color." (R. IX, 108.) She specifically explained that her mixed race heritage factored into her feelings on the matter. (R. IX, 108.) Defendant wholly ignores JN's comment that her fear of convicting an innocent person was heightened when it came to "people of color" in comparing this case to cases in which prosecutors simply assumed, based on stereotypical beliefs, that prospective jurors would be biased in favor of a member of their own racial group. (Appellant's Brief, 11.) Here, the prosecutor did not assume; rather, he relied on JN's own words. Far from acting in a discriminatory manner, the prosecutor was actually seeking to ensure that no one whose views were clouded by race would serve on the jury.

In sum, defendant's lone argument concerning the second step of Batson does not withstand a review of the record, which shows that JN did, in fact, express a heightened concern for convicting people of a specific race.

Defendant fails to meet his burden of showing purposeful discrimination

In Flowers v. Mississippi, ___ U.S. ___, 139 S. Ct. 2228, 2243, 204 L. Ed. 2d 638 (2019), the United States Supreme Court recently identified several factors to be considered in evaluating whether racial discrimination occurred:

• statistical evidence about the prosecutor's use of peremptory strikes against black prospective jurors as compared to white prospective jurors in the case;

• evidence of a prosecutor's disparate questioning and investigation of black and white prospective jurors in the case;

• side-by-side comparisons of black prospective jurors who were struck and white prospective jurors who were not struck in the case;

• a prosecutor's misrepresentations of the record when defending the strikes during the Batson hearing;

• relevant history of the State's peremptory strikes in past cases; or

• other relevant circumstances that bear upon the issue of racial discrimination.

Here, defendant points to four factors, each of which will be addressed in turn.

Statistical evidence

Defendant notes that the State struck all five "black and mixed raced non-alternate potential jurors from a pool of 28 individuals." (Appellant's Brief, 13.) However, our Supreme Court has cautioned that while numbers alone may suggest discrimination in a certain case, the trial court must avoid placing a determinative emphasis on any one factor. State v. Trotter, 280 Kan. 800, 813, 127 P.3d 972 (2006). Rather, although the court can objectively compare the numbers or other facts, the court must subjectively evaluate the credibility of the prosecutor as he explains the reasons for each challenged strike. 280 Kan. at 813.

In State v. Alexander, 268 Kan. 610, 1 P.3d 875 (2000), the State used its peremptory challenges to strike all four of the African-Americans from the jury. Although Alexander, who was also an African-American, complained that all the potential African-

American jurors were struck because of their race, this court upheld the trial court's finding that the State's strikes were race-neutral. 268 Kan. at 620-22.

Here, the statistics cited by defendant established a prima facie showing to advance defendant beyond the first step of the Batson analysis. The trial court understood this, referencing the numbers in this portion of its analysis. (R. IX, 145-57.) However, consistent with Trotter, the court then properly analyzed the credibility of the prosecutor's reasons for striking each challenged strike. Rather than challenging the prosecutor's reasons, defendant asserts that the court's statements in denying his motion for new trial demonstrate that the court failed to understand that "the sheer number of the prosecution's minority strikes itself served as evidence of its discriminatory intent." (Appellant's Brief, 14.)

Again, while sheer numbers are a factor, they are not dispositive. The court's comments at sentencing indicate that the court understood this concept. The court acknowledged that based on the numbers, an appellate court would likely look closely at the matter. (R. XIV, 61.) The court proceeded to declare, however, that the State's race-neutral reasons were supported by the court's own observations. (R. XIV, 62.) The court continued: "And I don't think the situation where the court can say, well, we've struck one so the standard is going to be a little higher for the next one or the next one or the next one because that in and of itself makes the system not race neutral." (R. XIV, 62.) It then reiterated its belief that each individual challenge was supported by valid, race-neutral reasons. (R. XIV, 62-63.)

In sum, the trial court understood that sheer numbers can be considered, but are not determinative. The court conducted the appropriate analysis of each individual strike and determined that the State had valid reasons for striking the five prospective jurors at issue. Defendant's use of the numbers notwithstanding, he is not entitled to relief.

Side-by-side comparison to empaneled jurors

Defendant argues that a side-by-side comparison of JN and AO to empaneled jurors shows that the State acted with discriminatory intent. (Appellant's Brief, 14-15.) The record does not support this assertion.

JN

Again, one of the reasons that the State struck JN was JN's fear of "locking up innocent people." (R. IX, 146.) Defendant, however, asserts that two white jurors, HW and MA, expressed the same concern. (Appellant's Brief, 15.) However, the record shows that HW's and MA's comments differed significantly from JN's. When specifically asked by defense counsel whether he was concerned "about possibly findings an innocent man guilty," HW replied, "No." (R. IX, 97.) He reiterated that response when asked the question a second time. (R. IX, 97.) When asked to explain what concerns he did have with respect to serving on a criminal jury, HW replied, "Just finding somebody guilty and having them spend a lot of time. I just hate to see people forced to do something against their will." (R. IX, 97.)

MA, meanwhile, stated that she knows that innocent people are sometimes convicted, and said that "kind of concern[ed]" her." (R. IX, 99.)

To summarize, HW expressly stated that he was not concerned with the possibility of convicting an innocent person, while MA expressed a mild concern. By contrast, JN twice described her concern as "a great fear," said that a wrongful conviction is "the worst thing that can happen to [a] person," and expressed concern that such a person might seek revenge. (R. IX, 107-08.) Tellingly, the trial judge, who observed the prospective jurors firsthand, remarked that JN "was the strongest of any of the respondents" in expressing concern about convicting an innocent person. (R. IX, 147-48.) Defendant's attempt to equate JN to HW and MA must fail.

AO

As discussed above, among the reasons the State struck AO was her youth combined with her apparent lack of motivation to further her education or "to do anything." (R. IX, 155-56.) The State believed that AO's comments indicated that she simply viewed serving on the jury as an excuse to get out of work. (R. IX, 155.)

Defendant merely notes that MM, "a young forklift driver with no apparent college education," was empaneled. (Appellant's Brief, 15.) This ignores the fact that the State expressly contrasted MM and AO in its comments to the court. Specifically, the prosecutor praised MM's work ethic, noting that despite having ADHA and having to pay child support, MM worked a third-shift job as a forklift operator in order to provide for his daughter. (R. IX, 155.) Simply stated, AO's education was but one factor in a larger equation that caused the State to question her motivation. The State did not have the same concerns about MM, and defendant's attempt to compare AO and MM fails upon a thorough review of the record.

The prosecutor did not misrepresent the record regarding JN

Defendant next argues that, contrary to the State's assertion, JN never said or remotely implied that she was biased in favor of African-Americans. (Appellant's Brief, 16.) The relevant comments made by JN are quoted in their entirety above. As relevant to this issue, JN stated that her fear of convicting an innocent person was especially strong when it came to "putting people of color [away]." (R. IX, 108.) It is difficult to read this comment without concluding that defendant's race would have potentially factored into JN's verdict had she been empaneled. The prosecutor's comment was an accurate summary of JN's own words.

Defendant also asserts that the prosecutor misrepresented the record when he said that JN went on a "15-minute rant about locking up innocent people." (Appellant's Brief, 16.) (R. IX, 146.) Defendant notes that the comments at issue are contained on a single page in the transcript and "clearly took nowhere near 15 minutes to articulate." (Appellant's Brief, 16.) Such an argument ignores the fact that the prosecutor was clearly engaging in hyperbole when he stated that JN went on "basically" a 15-minute rant. (R. IX, 146.) It defies logic to suggest that the prosecutor intended for the trial judge, who had observed JN's comments moments earlier, to take his "15-minute rant" comment literally. The point the prosecutor was making was that JN had spoken in detail about her concern of convicting an innocent person. As discussed above, the trial court expressly found that JN expressed the strongest concerns of any prospective jurors when it came to this issue. (R. IX, 147-48.) Only an illogically strict, literal reading of the prosecutor's comments could support defendant's position. Such a reading would be undermine the discretion

properly afforded to the trial judge, who unlike this court and appellate counsel, was able to assess the prosecutor's tone while making the comment at issue.

No other factors call the State's intent into question

Defendant concludes his analysis by explaining why, in his view, two arguments made by the State are not valid. (Appellant's Brief, 17.) Before the trial court, the prosecutor noted the overall diversity of the panel, as three minorities served on the jury and an African-American served as the alternate. (R. IX, 154-57; R. XIV, 49-52.) Defendant initially notes that it is not permissible to strike even a single prospective juror for a discriminatory purpose, even if other minorities are empaneled. (Appellant's Brief, 17.) The State does not dispute the accuracy of this statement, but simply reiterates that it did not strike any prospective jurors on the basis of race. The argument made by the prosecutor below was simply intended as anecdotal evidence that the State was not engaging in discriminatory behavior. Again, in evaluating a Batson challenge, courts are to consider all relevant circumstances that bear upon the issue of racial discrimination. Flowers, 139 S. Ct. at 2243.

Defendant then discounts the State's comments regarding the alternate juror, declaring that alternates "usually don't contribute to a jury verdict." (Appellant's Brief, 17.) As the prosecutor noted before the trial court, however, if such logic were accepted, it would essentially eliminate the need to have alternate jurors in the first place. (R. XIV, 52.) And as discussed above, the State's failure to challenge the alternate at issue simply serves as additional evidence that the State was not acting with discriminatory intent.

Regardless, defendant does not allege that either of the two reasons at issue contributed to the trial court's ultimate ruling on his Batson challenge.

Summary

The trial court properly rejected defendant's Batson challenge, as the prosecutor provided valid, race-neutral reasons for striking the jurors at issue.

II. The district court properly classified defendant's Michigan offense as a person felony for criminal history purposes.

Classification of prior offenses for criminal history purposes involves statutory interpretation, which is a question of law subject to unlimited review. State v. Wetrich, 307 Kan. 552, 555, 412 P.3d 984 (2018).

Defendant asserts that the district court erred in classifying a Michigan armed robbery adjudication as a person felony, thus resulting in an illegal sentence. (Appellant's Brief, 18-27.) He claims that the Michigan armed robbery statutes criminalize a broader range of conduct than their Kansas counterparts, and that his Michigan crime must therefore be classified as nonperson offense under the "identical-or-narrower" test established in Wetrich. (Appellant's Brief, 22-26.)

Defendant's Presentence Investigation Report (PSI) listed his criminal history as 'D' based on one person felony, the Michigan armed robbery offense. (R. I, 160-63.)

There is a two-step process for classifying out-of-state convictions for criminal history purposes. First, the offense is classified as either a felony or a misdemeanor according to the convicting jurisdiction's classification. K.S.A. 2018 Supp. 21-6811(e)(2). Second, the offense must be classified as either a person or nonperson crime by referring

to "comparable offenses under the Kansas criminal code in effect on the date the current crime of conviction was committed." K.S.A. 2018 Supp. 21-6811(e)(3).

Caselaw previously construed K.S.A. 21-6811(e) (formerly K.S.A. 21-4711[e]) to mean "[f]or purposes of determining criminal history, the offenses need only be comparable, not identical." State v. Vandervort, 276 Kan. 164, 179, 72 P.3d 925 (2003). The comparable offense was "the closest approximation to" the out-of-state crime. 276 Kan. at 179. Wetrich, however, announced a new rule: to be scored as a person crime, a prior out-of-state conviction must have elements identical to or narrower than a Kansas person crime. 307 Kan. at 562. Because defendant was sentenced after Wetrich was decided, the test adopted in that case governs the resolution of his claim.

Defendant's 2010 Michigan adjudication was under M.C.L.A. 750.529 (armed robbery). (R. I, 163.) That statute read as follows:

> "A person who engages in conduct proscribed under section 530 and who in the course of engaging in that conduct, possesses a dangerous weapon or an article used or fashioned in a manner to lead any person present to reasonably believe the article is a dangerous weapon, or who represents orally or otherwise that he or she is in possession of a dangerous weapon, is guilty of a felony punishable by imprisonment for life or for any term of years. If an aggravated assault or serious injury is inflicted by any person while violating this section, the person shall be sentenced to a minimum term of imprisonment of not less than 2 years."

In turn, M.C.L.A. 750.530 (robbery) stated:

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

> the larceny, or in flight or attempted flight after the commission of the larceny, or in an attempt to retain possession of the property."

Finally, M.C.L.A. 750.357 (larceny from the person) provided: "Any person who shall commit the offense of larceny by stealing from the person of another shall be guilty of a felony, punishable by imprisonment in the state prison not more than 10 years."

Meanwhile, Kansas defines robbery as "knowingly taking property from the person or presence of another by force or by threat of bodily harm to any person." K.S.A. 2014 Supp. 21-5420(a). K.S.A. 2014 Supp. 21-5420(b) defines aggravated robbery as robbery, as defined in subsection (a), when committed by a person who: "(1) Is armed with a dangerous weapon; or (2) inflicts bodily harm upon any person in the course of such robbery." Both offenses are person felonies in Kansas. K.S.A. 2014 Supp. 21-5420(c)(1), (2).

Defendant identifies two ways in which he believes that the elements of a Michigan armed robbery are broader than the Kansas offense. First, he claims that unlike in Kansas, one can commit an armed robbery in Michigan merely by putting another person in fear. (Appellant's Brief, 25.) However, our Supreme Court has determined that an express threat of bodily harm is not necessary to support a robbery conviction. State v. Moore, 269 Kan. 27, 33, 4 P.3d 1141 (2000). Rather, a robbery conviction can be sustained under circumstances in which the victim feels threatened or intimidated. 269 Kan. at 33. And in State v. Colbert, 244 Kan. 422, 426, 769 P.2d 1168 (1989), our Supreme Court approvingly cited its earlier declaration in State v. Davis, 227 Kan. 174, Syl. ¶ 1, 605 P.2d 572 (1980), that "robbery has always involved intimidation or fear." In short, defendant's underlying

premise that "an offender's mere act of putting another in fear doesn't suffice to permit a robbery conviction" in Kansas is without merit. (Appellant's Brief, 25.) As such, his attempt to distinguish the Michigan and Kansas statutes on this basis fails.

Defendant next asserts that, in Michigan, one can commit a robbery by peacefully taking property and then using force to retain the property or effectuate an escape; by contrast, in Kansas, an offender is guilty of a nonperson theft offense if he peacefully takes property and then uses force to effectuate an escape. (Appellant's Brief, 26.)

In State v. Plummer, 295 Kan. 156, Syl. ¶ 3, 283 P.3d 202 (2012), our Supreme Court declared that "[i]f a defendant completes the taking of property before using force or threat of bodily harm on the property owner or victim, the defendant has committed a theft, rather than a robbery."

In State v. Heard, No. 118,569, 2018 WL 6580497, at *2-3 (Kan. App. 2018) (unpublished opinion), *petition for rev. filed* January 3, 2019, a panel of this court analyzed the Arkansas robbery statute, which allows a person to be convicted of robbery based on using force to accomplish an escape.[1] Noting that, by contrast, acts occurring after the taking of property do not support a robbery conviction in Kansas, the panel held that the Arkansas statute was broader than its Kansas counterpart. 2018 WL 6580497, at *3.

Even if the rationale in Heard is accepted, it does not dictate that defendant's Michigan adjudication be classified as a nonperson offense. K.S.A. 21-6811(e)(3) provides that in classifying an out-of-state crime as person or nonperson, "comparable offenses"

[1] A copy of all unpublished cases cited herein is attached to this brief as required by Supreme Court Rule.

shall be referred to. Thus, more than one comparable Kansas offense can be considered in determining the person or nonperson classification of an out-of-state offense. See Judge Malone's dissenting opinion in State v. Briggs, No. 116,420, 2018 WL 3995795, at *4-6 (Kan. App. 2018) (unpublished opinion).

As relevant to this case, a person who uses physical force after taking property in Kansas would be guilty of battery, which is a person offense. K.S.A. 2014 Supp. 21-5413. Meanwhile, threatening to employ immediate physical force constitutes assault (K.S.A. 2014 Supp. 21-5412) and/or criminal threat (K.S.A. 2014 Supp. 21-5415) in Kansas, both of which are also person offenses. Simply stated, there is no conduct found in the relevant Michigan statutes that is not contained within a comparable person crime in Kansas.

Finally, the State wishes to address an alternative argument made by defendant. Specifically, he claims that, as a matter of law, courts cannot apply the modified categorical approach in analyzing statutes that set out alternative means by which an offender can commit an offense. (Appellant's Brief, 27.) He supports this argument by citing Wetrich and Mathis v. United States, 579 U.S. ___, 136 S. Ct. 2243, 195 L. Ed. 2d 604 (2016). (Appellant's Brief, 27.) However, federal courts use different language to encompass the concept of alternative means versus options within a means, and it is admittedly confusing. Under federal law, Kansas's "alternative means" are considered different "elements," whereas Kansas's "option within a means" are called "alternative means." *Compare* State v. Brown, 295 Kan. 181, 197, 284 P.3d 977 (2012) (alternative means are different elements of an offense requiring juror unanimity or a super-sufficiency to be shown, whereas options within a means do not state material distinct elements; rather they describe

a material element or describe a factual circumstance that would prove the element and do not require jury unanimity) *with* United States v. Rivera, 847 F.3d 847, 849 (7th Cir.), *cert. denied*, 137 S. Ct. 2228, 198 L. Ed. 2d 669 (2017) (citing Mathis, 136 S. Ct. at 2248-49, and explaining that alternative elements are the constituent parts of a crime's legal definition which a jury must agree upon to convict, while alternative means in federal parlance are "various factual was of committing some component of the offense" and that a jury need not agree on which way the defendant committed the offense to convict him.) In short, "alternative means" under federal law is actually equivalent to "options within a means" under Kansas law, thus the potential for confusion. When a statute presents "alternative means" as that phrase is used in Kansas, the modified categorical approach can be utilized. While it does not come into play in this case, the State wishes to make its position on this matter clear.

Because the district court properly classified defendant's Michigan adjudication as a person offense, defendant's criminal history challenge fails.

III. The district court did not err in considering defendant's prior convictions in determining his sentence.

Construction of the Kansas Sentencing Guideline Act and determination of the constitutionality of its provisions are questions of law. State v. Davis, 275 Kan. 107, 124, 61 P.3d 701 (2003).

Defendant argues that the district court violated his rights under section 5 of the Kansas Constitution Bill of Rights when it considered his prior convictions in determining his sentence. (Appellant's Brief, 27-35.) This claim does not warrant relief.

Defendant acknowledges that he did not raise this issue before the trial court. (Appellant's Brief, 28.) As a general rule, constitutional grounds for reversal asserted for the first time on appeal are not properly before this court for review. See State v. Godfrey, 301 Kan. 1041, 1043, 350 P.3d 1068 (2015). However, there are three exceptions to this rule: (1) The newly asserted theory involves only a question of law arising on proved or admitted facts and is finally determinative of the case; (2) consideration of the theory is necessary to serve the ends of justice or to prevent the denial of fundamental rights; and (3) the judgment of the trial court may be upheld on appeal despite its reliance on the wrong ground or having assigned a wrong reason for its decision. State v. Phillips, 299 Kan. 479, 493, 325 P.3d 1095 (2014).

Defendant claims that the first two exceptions apply. (Appellant's Brief, 28.) However, the first exception is not applicable because (a) defendant's appeal does not solely challenge his sentence and thus determination of the criminal history issue would not be determinative of "the case," and (b) even if this court agreed with defendant's argument, his prior convictions could be presented to a jury upon remand. Meanwhile, defendant's reliance on the second exception rings hollow in light of his failure to raise the issue either before, or at the time of, sentencing.

While not abandoning the argument advanced above, the State alternatively asserts that defendant is not entitled to relief even if this court reaches the merits. As defendant acknowledges, our 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). (Appellant's Brief, 30.) Defendant, however, argues that the language in section 5 of our Bill of Rights provides greater protection than the United States Constitution. (Appellant's Brief, 30-33.)

Section 5 of our Bill of Rights provides: "The right of trial by jury shall be inviolate." Our 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). Conway has been effectively overruled on other grounds (see State v. Astorga, 299 Kan. 395, 324 P.3d 1046 (2014)), but our Supreme Court's rejection of an argument that section 5 is broader than the Sixth Amendment remains good law. This court is duty bound to follow our 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 defendant presents no authority indicating that section 5 provides greater protection than the Sixth Amendment, he is not entitled to relief on this issue.

Finally, the State notes that a panel of this court recently rejected the precise argument that defendant advances in this appeal. State v. Valentine, No. 119,164, 2019 WL 2306626 at *6 (Kan. App. 2019) (unpublished opinion), *petition for rev. filed* June 21, 2019. The Valentine court wrote:

"The sum of Valentine's 'argument' on this issue is his assertion that:

> '[P]rior to Kansas' statehood, American common law required any fact which increased the permissive penalty for a crime—

> inclusive of an offender's prior criminal convictions—to be proven to a jury beyond a reasonable doubt."

Valentine continues with a contingent conclusion:

> 'If this assertion is correct, it necessarily follows that the sentencing scheme set out by the KSGA—in which judicial findings of criminal history elevate a defendant's presumptive prison sentence—is unconstitutional.'

In view of the Kansas Supreme Court's consistent rejection of the Sixth Amendment-based version of Valentine's current argument, it is incumbent on Valentine to provide authority showing our Supreme Court interprets—or would interpret—§ 5 of the Kansas Constitution Bill of Rights to require jury findings that the Sixth Amendment does not. He fails to do so. 'This court is duty bound to follow Kansas Supreme Court precedent absent some indication that the court is departing from its previous position.' State v. Meyer, 51 Kan. App. 2d 1066, 360 P.3d 467 (2015). Valentine's argument fails." 2019 WL 2306626 at *6.

Defendant's argument should be similarly rejected.

IV. Defendant's constitutional challenges to restitution are not properly before this court, and, in any event, fail on the merits.

The constitutionality of a statutory provision presents a question of law over which this court exercises unlimited review. State v. Riojas, 288 Kan. 379, 388, 204 P.3d 578 (2009). A statute is presumed constitutional, and all doubts must be resolved in favor of its validity. If there is any reasonable way to construe a statute as constitutionally valid, the court must do so. A statute must clearly violate the constitution before it may be struck down. This court not only has the authority, but also the duty, to construe a statute in such a manner that it is constitutional if the same can be done within the apparent intent of the legislature in passing the statute. State v. Johnson, 286 Kan. 824, 842-843, 190 P.3d 207 (2008).

For the first time on appeal, defendant argues that Kansas's criminal restitution scheme violates section 5 of the Kansas Constitution Bill of Rights and/or the Sixth Amendment of the United States Constitution because it encroaches upon a criminal defendant's common law right to a civil and/or criminal jury trial. (Appellant's Brief, 35-45.)

Again, as a general rule, constitutional grounds for reversal asserted for the first time on appeal are not properly before us for review. See Godfrey, 301 Kan. at 1043. Defendant, however, claims that the first two exceptions discussed in the previous issue apply. (Appellant's Brief, 36-37.) These issues, however, are not "finally determinative of the case." Indeed, even if defendant's argument(s) were accepted, the remedy would seemingly be for the matter to be remanded so that defendant could have a jury determine restitution. In short, no ruling on these claims would definitively remove defendant's obligation to pay restitution.

With regard to the second exception, it cannot be said that defendant's fundamental rights were violated where defendant did not so much as dispute the fact that he owed restitution.

Multiple panels of this court have rejected attempts to invoke the two exceptions relied upon by defendant in an effort to gain review of this claim for the first time on appeal. State v. Patterson, No. 114,861, 2017 WL 3207149 at *7-8 (Kan. App. 2017) (unpublished opinion), *rev. granted* Feb. 26, 2018; State v. Bradwell, Jr., No. 115,153, 2016 WL 7178771 at *3-4 (Kan. App. 2016) (unpublished opinion); State v. Jones, No. 113,044, 2016 WL 852865 at *8-9 (Kan. App. 2016) (unpublished opinion), *rev. granted* Dec. 22,

2017. And perhaps most importantly, our Supreme Court's recent opinion in Hilburn v. Enerpipe, LTD, 309 Kan. 1127, 1131-32, 442 P.3d 509 (2019), demonstrates that section 5 claims must be preserved in order to be properly raised on appeal. In light of such authority, defendant's attempt to gain review of this issue must fail. Tellingly, after initially granting review in Patterson and Jones, our Supreme Court determined that the petitions for review in those cases had been improvidently granted.

Defendant's section 5 claim is without merit, as restitution is not a civil remedy

If this court breaks with the above caselaw and elects to address defendant's claims, defendant is not entitled to relief on the merits. Again, section 5 declares, "The right of trial by jury shall be inviolate." Section 5 preserves the jury trial right as it historically existed at common law when our state's constitution came into existence in 1859. Miller v. Johnson, 295 Kan. 636, 647, 289 P.3d 1098 (2012).

In Hilburn, our Supreme Court examined the constitutionality of K.S.A. 60-19a02, which caps jury awards for noneconomic damages in personal injury cases. 309 Kan. at 1128. In resolving the matter, the court held that the quid pro quo test that has been applied to analyze challenges under section 18 of the Kansas Constitution Bill of Rights is inapplicable to challenges under section 5. The court ultimately determined that the cap on damages imposed by K.S.A. 60-19a02 is facially unconstitutional because it violates section 5. 309 Kan. at 1150.

While dealing with a different statute, Hilburn is nevertheless instructive in analyzing defendant's challenge to the restitution statute. As Justice Stegall wrote in his concurring opinion, "[w]hether [a] statute implicates section 5 is a threshold question."

309 Kan. at 1150. Justice Stegall explained the "clear difference between section 5 and section 18 in the Kansas Constitution Bill of Rights" as follows:

> "The section 5 'right of trial by jury' that 'shall be inviolate' is a procedural right to who decides contested questions in Kansas courts. It does not guarantee or prescribe the substantive matter of which questions Kansas courts can decide. A different provision of the Kansas Constitution—section 18—governs the latter. So the procedural right to have a jury (rather than, say, the Legislature) decide the kinds of contested questions juries historically decided is sacrosanct under the Kansas Constitution. But the substantive decision about what kinds of questions—in legalese, what causes of action—Kansas courts have the power to resolve is untouched by the section 5 guarantee. Put another way, just because a jury would have resolved a particular substantive question under Kansas common law in 1859 does not mean that a party has a constitutional right to a jury resolution of that question today. This is because the scope of contested questions that Kansas courts may answer can and does change—and this does not violate section 5." 309 Kan. at 1151.

Justice Stegall thus declared that:

> "the threshold question we should ask of . . . any statute challenged under sections 5 and 18 is whether it is a procedural measure affecting who decides or a substantive measure affecting what is being decided. If it is the former, section 5 and its inviolate guarantee applies. If it is the latter, section 18—with its wider guard rails—applies." 309 Kan. at 1152.

K.S.A. 60-19a02, the statute at issue in Hilburn, implicates section 5 because the legislature passing that provision "did not alter the cause of action for noneconomic damages but instead substituted its judgment for the jury's." 309 Kan. at 1155. Significantly, in finding the statute unconstitutional, the Hilburn court emphasized the important historic role of the jury in assessing compensatory damages in a civil suit. 309 Kan. at 1149.

Here, defendant's challenge cannot survive the threshold question of whether K.S.A. 21-6604(b)(1) and K.S.A. 21-6607(c)(2) implicate section 5. Our Supreme Court

has expressly declared that "[r]estitution ordered in criminal proceedings and civil damages are separate and independent remedies under Kansas law." State v. Applegate, 266 Kan. 1072, 1978, 976 P.2d 936 (1999). The court continued:

> "K.S.A. 21-4610(d)(1) provides a general statement of legislative intent, requiring the sentencing court to exercise discretion in ordering reparation or restitution to the aggrieved party for the actual damage or loss caused by the defendant's crime. In addition, the district judge must have some basis for determining the amount of damages, but the same rigidness and proof of value required in a civil action does not apply to determining restitution. [Citation omitted.] The judge's order of restitution in a criminal action does not bar a victim from seeking damages in a separate civil action. Likewise, the judge, when sentencing a defendant in a criminal action, is not foreclosed from ordering restitution just because the victim has received compensation in a civil action." 266 Kan. at 1078-79.

Kansas is far from alone in treating restitution and civil damages as separate remedies. While defendant notes that one federal court treats restitution as a civil remedy, see U.S. v. Behrman, 235 F.3d 1049, 1053-54 (7th Cir. 2000); U.S. v. Bach, 172 F.3d 520, 522-23 (7th Cir. 1999), that court is an outlier, with several of its sister circuits classifying restitution as a criminal penalty. See U.S. v. Wooten, 377 F.3d 1134, 1144-45 (10th Cir. 2004); U.S. v. Cliatt, 338 F.3d 1089, 1094 (9th Cir. 2003); U.S. v. Ross, 279 F.3d 600 (8th Cir. 2002); U.S. v. Syme, 276 F.3d 131, 159 (3d Cir. 2002). More importantly, neither of the cases that defendant relies on grapples directly with the jury-trial right. As such, the Seventh Circuit's unique characterization of restitution is unpersuasive.

Simply stated, defendant cannot prevail on the threshold question in this case because he has failed to demonstrate that juries have historically determined the amount of restitution in criminal cases. Tellingly, defendant does not so much as argue that Kansas juries have ever determined restitution in criminal cases. In fact, he acknowledges that

common law authorized criminal courts to impose restitution-like orders. (Appellant's Brief, 39.) This concession should prove fatal with respect to the threshold question of whether K.S.A. 21-6604(b) and K.S.A. 21-6607(c)(2) implicate section 5; if common law authorized criminal courts to impose restitution, the enactment of these statutes did not invade the historic province of the jury to decide that contested matter. See, e.g., Tillman v. Goodpasture, 56 Kan. App. 2d 65, 424 P.3d 540 (2018), *rev. granted*, Feb. 28, 2019 (section 5 applies to only those causes of action recognized in 1859; it is not implicated because there was no right available under common law for a wrongful birth action in 1859).

In an effort to support his contention, defendant instead points to the common law right to have a jury determine compensatory damages in *civil* suits. Because restitution and civil damages are distinct entities, a jury's rule in deciding civil damages is irrelevant in answering the threshold question of whether K.S.A. 21-6604(b) and K.S.A. 21-6607(c)(2) violate a defendant's right to have a jury decide a question that juries have historically decided. In sum, because defendant cannot show that there was a common law right to a jury trial on restitution in criminal cases, his section 5 argument does not get off the ground.

Defendant must acknowledge that K.S.A. 21-6604(b) and K.S.A. 21-6607(c)(2) do not supplant his right to have a jury decide damages in a subsequent civil suit if initiated by his victim. The State, meanwhile, acknowledges that in certain situations, there may be an overlap between restitution and civil damages. This potential, practical effect, however, should not factor into the analysis of the threshold question. It is only after a positive

determination regarding applicability that the possibility of impairment is to be considered. Hilburn, 442 P.3d at 514 ("The noneconomic damages cap in K.S.A. 60-19a02 clearly implicates section 5's 'inviolate' jury trial right, as that right has historically been understood. The next question is whether it impairs that right by interfering with the jury's fundamental function.").

Finally, public policy weighs heavily against applying section 5 to criminal restitution. In Hilburn, the court held that the legislature cannot override the jury's determination of damages. 309 Kan. at 1149-50. As such, striking down K.S.A. 21-6604(b) and K.S.A. 21-6607(c)(2) as unconstitutional necessarily requires eliminating the protections for defendants that are built into those statutes. For example, the district court and prisoner review board would likely not be able to adjust or reduce the jury's restitution assessment based on the defendant's circumstances. See K.S.A. 21-6604(b)(1); K.S.A. 21-6607(c)(2); K.S.A. 22-3717(n). Similarly, having jurors determine restitution would seemingly run afoul of the general premise that jurors are not to be concerned about the disposition of a case beyond the determination of guilt or innocence. Instead, the jury would be tasked with considering at least part of the defendant's disposition, extending their role in noncapital cases.

Restitution, unlike civil damages, has not historically been determined by Kansas juries. Defendant is not entitled to relief on his section 5 claim.

Defendant's Sixth Amendment claim likewise fails

This court addressed an Apprendi-based, Sixth Amendment challenge to restitution in State v. Huff, 50 Kan. App. 2d 1094, 336 P.3d 397 (2014). In rejecting Huff's claim,

this court declared: "Restitution, although part of a defendant's sentence, is not punishment; even if restitution were considered punishment, it does not exceed the statutory maximum of a defendant's sentence." 50 Kan. App. 2d at 1099. In explaining the first portion of its holding, the court wrote:

> "While it is undeniable that restitution is part of a defendant's sentence, it does not mean restitution is punishment. See State v. McDaniel, 292 Kan. 443, 446, 254 P.3d 534 (2011); State v. Hall, 45 Kan. App. 2d 290, 298, 247 P.3d 1050 (2011) (restitution not part of punishment or sanction for defendant's conduct), *aff'd* 297 Kan. 709, 304 P.3d 677 (2013). In fact, a sentence does not contain only punishment or sanctions. See State v. Robinson, 281 Kan. 538, 543, 132 P.3d 934 (2006) (BIDS attorney fees imposed at sentencing not part of punishment or sanction for defendant's criminal conduct but a 'recoupment'). Our Supreme Court has found: 'Restitution imposed as a condition of probation is not a legal obligation equivalent to a civil judgment, but rather an option which may be voluntarily exercised by the defendant to avoid serving an active sentence.' [Applegate, 266 Kan. at 1075]." 50 Kan. App. 2d at 1099.

In State v. Arnett, No. 112,572, 2018 WL 2072804 at *2 (Kan. App. 2018) (unpublished opinion), *rev. granted* Nov. 27, 2018, this court likewise held that restitution is not punishment. The court continued:

> "Even if restitution were considered punitive and, thus, punishment, Arnett's argument fails. The Kansas statutes governing restitution impose neither mandatory minimum amounts nor maximum amounts. See K.S.A. 2017 Supp. 21-6604(b)(1); K.S.A. 2017 Supp. 21-6607(c)(2). A mandatory minimum would be a specified amount a convicted defendant would have to pay a victim even if the victim had little or no financial loss. The statutes require no such obligation. The statutes, likewise, impose no cap or upper limit on restitution that might be exceeded only in exceptional circumstances or upon proof of statutorily identified facts. So even if restitution were punitive, the scheme does not entail mandatory minimums or maximums triggering the protections set out in [Alleyne v. United States, 570 U.S. 99, 103, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013)], and Apprendi." 2018 WL 2072804 at *2.

Defendant does not present any arguments that have not been previously rejected by multiple panels of this court. This court should follow the well-reasoned logic of those panels and deny relief.

CONCLUSION

Because the prosecutor articulated valid race-neutral reasons for striking five prospective jurors, and defendant failed to show purposeful discrimination, the trial court properly rejected defendant's Batson challenge.

The district court properly classified defendant's Michigan offense as a person felony for criminal history purposes.

The district court did not err in considering defendant's prior convictions in determining his sentence.

Defendant's constitutional challenges to restitution are not properly before this court, and, in any event, fail on the merits.

The State respectfully requests that defendant's convictions be affirmed.

Respectfully Submitted,

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APPENDIX A

431 P.3d 905 (Table)
Unpublished Disposition
This decision without published opinion
is referenced in the Pacific Reporter.
See Kan. Sup. Ct. Rules, Rule 7.04.
NOT DESIGNATED FOR PUBLICATION
Court of Appeals of Kansas.

STATE of Kansas, Appellee,

v.

Dennis L. HEARD, Appellant.

No.
118,569

Opinion filed December 14, 2018.

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

Attorneys and Law Firms

Korey A. Kaul, of Kansas Appellate Defender Office, for appellant.

Matt J. Maloney, assistant district attorney, Marc Bennett, district attorney, and Derek Schmidt, attorney general, for appellee.

Before Gardner, P.J., Atcheson and Powell, JJ.

MEMORANDUM OPINION

Per Curiam:

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

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

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

The district court classified Heard's criminal history as an A, based in part on two prior Arkansas robbery convictions and a prior Arkansas burglary conviction. Heard argues that because the elements of Arkansas robbery are broader than Kansas robbery, those convictions must be scored as nonperson felonies. He also argues that his prior Arkansas conviction for burglary was improperly classified as a person offense. He claims that this resulted in an incorrect criminal history score and thus an illegal sentence, and requests that we vacate his sentence and remand for resentencing. We agree.

Jurisdiction

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

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

Classifying Heard's out-of-state convictions

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

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

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

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

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

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

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

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

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

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

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

> "[T]o constitute the crime of robbery ... it is necessary that the violence to the owner must either precede or be contemporaneous with the taking of the property and

> robbery is not committed where the thief has gained peaceable possession of the property and uses no violence except to resist arrest or to effect his escape." *State v. Aldershof*, 220 Kan. 798, 803, 556 P.2d 371 (1976).

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

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

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

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

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

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

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

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

K.S.A. 2017 Supp. 21-6811(d)(1) specifically addresses prior burglary convictions. The Kansas Supreme Court addressed this provision in *Dickey*, holding that to classify a prior

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

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

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

> "(a) Burglary is, without authority, entering into or remaining within any:
>
> (1) Dwelling, with intent to commit a felony, theft or sexually motivated crime therein;
>
> (2) building, manufactured home, mobile home, tent or other structure which is not a dwelling, with intent to commit a felony, theft or sexually motivated crime therein; or
>
> (3) vehicle, aircraft, watercraft, railroad car or other means of conveyance of persons or property, with intent to commit a felony, theft or sexually motivated crime therein." K.S.A. 2017 Supp. 21-5807(a).

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

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

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

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

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

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

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

In support of its argument that the *Wetrich* holding was a change in the law, the State claims that prior to *Wetrich*, Kansas applied a common-sense definition of "comparable" that did not require prior offenses to contain identical or narrower elements. Instead, the Kansas Supreme Court held that crimes do not need identical elements to be comparable.

State v. Williams, 299 Kan. 870, 873, 326 P.3d 1070 (2014); *State v. Vandervort*, 276 Kan. 164, 179, 72 P.3d 925 (2003).

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

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

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

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

Conclusion

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

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

All Citations

431 P.3d 905 (Table), 2018 WL 6580497

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APPENDIX B

423 P.3d 551 (Table)
Unpublished Disposition
This decision without published opinion
is referenced in the Pacific Reporter.
See Kan. Sup. Ct. Rules, Rule 7.04.
NOT DESIGNATED FOR PUBLICATION
Court of Appeals of Kansas.

STATE of Kansas, Appellee,
v.
Leroy K. BRIGGS, Appellant.

No.
116,420
|
Original opinion filed April 20, 2018;
|
modified opinion filed August 1, 2018.

Appeal from Wyandotte District Court; J. DEXTER BURDETTE, judge.

Attorneys and Law Firms

Jeffrey Leiker, of Leiker Law Office, P.A., of Kansas City, for appellant.

David Greenwald, assistant district attorney, Mark A. Dupree Sr., district attorney, Olathe, and Derek Schmidt, attorney general, Topeka, for appellee.

Before Arnold-Burger, C.J., Malone and McAnany, JJ.

MODIFIED OPINION [1]

MEMORANDUM OPINION

McAnany, J.:

*1 Leroy K. Briggs appeals from what he claims to be an erroneously imposed sentence. He argues that the sentencing court erred in classifying his two prior Missouri convictions for resisting or interfering with arrest under Mo. Rev. Stat. § 575.150 (2000 and 2012 Supp.) as person offenses for criminal history purposes. The sentencing court based its ruling on its determination that the Missouri crime of resisting or interfering with arrest is comparable to the Kansas offense of fleeing or attempting to elude a police officer under K.S.A. 2015 Supp. 8-1568(b). Because the statutes are not comparable, we vacate Briggs' sentence and remand for resentencing with a criminal history score that classifies the Missouri convictions as nonperson crimes.

Pursuant to a plea agreement with the State, Briggs pled guilty to aggravated battery, a level 4 person felony, and the State dismissed the remaining charges in this and another case against Briggs. Before sentencing, Briggs objected to his criminal history score. At his sentencing hearing, the court denied Briggs' request for a downward departure and sentenced him to 162 months in prison, 36 months' postrelease supervision, and restitution. Briggs appealed, and a panel of this court held that his prior burglary adjudication should have been classified as a nonperson felony and remanded the case for resentencing. *State v. Briggs*, No. 111,686, 2016 WL 199045, at *4 (Kan. App. 2016) (unpublished opinion).

On remand, Briggs again objected to his criminal history score. He argued that the Missouri offense of resisting or interfering with arrest under Mo. Rev. Stat. § 575.150 should not be scored as a person felony because Missouri does not designate crimes as person or nonperson crimes.

At Briggs' resentencing hearing, he again challenged his criminal history score, arguing that the particular crimes he had been convicted of in Missouri should be categorized as nonperson misdemeanors as opposed to person felonies. The State presented the court with certified documents regarding Briggs' two prior Missouri convictions for resisting or interfering with arrest. After examining the Missouri charging documents, the district court denied Briggs' challenge to his criminal history score of B, noting that Briggs had two out-of-state convictions for person felonies. The court stated that the felonies are "precisely detailed" in the supporting documents and they both "align with what we would determine to be person felonies." The district court sentenced Briggs to the aggravated term of 162 months' imprisonment, the same number of months in prison it had previously imposed. Briggs appeals.

Briggs argues that the sentencing court erred in classifying his two Missouri convictions for resisting or interfering with arrest under Mo. Rev. Stat. § 575.150 as person offenses, resulting in a calculated criminal history score of B. He claims the Missouri convictions are not comparable to the Kansas offense of fleeing or attempting to elude a police officer under K.S.A. 2015 Supp. 8-1568, as argued by the State. Accordingly, he contends that his Missouri convictions must

be classified as nonperson felonies under K.S.A. 2017 Supp. 21-6811(e) and that we should remand the case again for resentencing. The State counters that while the two offenses do not have identical elements, they are sufficiently similar to constitute comparable offenses under K.S.A. 2017 Supp. 21-6811(e).

*2 The determination of an offender's criminal history score is governed by the revised Kansas Sentencing Guidelines Act (KSGA), K.S.A. 2017 Supp. 21-6801 et seq. Whether a sentencing court has correctly interpreted and applied the provisions of the KSGA is a question of law which we review de novo. *State v. Keel*, 302 Kan. 560, Syl. ¶ 4, 357 P.3d 251 (2015), *cert. denied* 136 S. Ct. 865 (2016). Likewise, whether a prior conviction was properly classified as a person or nonperson crime for criminal history purposes is a question of law subject to unlimited review. *State v. Dickey*, 301 Kan. 1018, Syl. ¶ 5, 350 P.3d 1054 (2015).

In considering an out-of-state conviction, the sentencing court makes two classifications after the State proves that the conviction exists. First, the court determines under K.S.A. 2017 Supp. 21-6811(e)(2) whether the prior conviction is a misdemeanor or a felony based on the law of the state where the defendant was convicted. The statute also provides "[i]f a crime is a felony in another state, it will be counted as a felony in Kansas." K.S.A. 2017 Supp. 21-6811(e)(2)(A). Here, Briggs' prior Missouri convictions were felonies.

Second, the sentencing court determines whether the prior out-of-state conviction is a person or a nonperson offense by comparing the prior conviction statute to the "comparable offense" in effect in Kansas on the date the current crime was committed. K.S.A. 2017 Supp. 21-6811(e)(3). The court makes this determination by looking for a comparable offense in Kansas at the time the defendant committed the current crime of conviction. K.S.A. 2017 Supp. 21-6811(e)(3); *Keel*, 302 Kan. at 590. If there is no comparable Kansas crime, the court must classify the prior conviction as a nonperson crime. K.S.A. 2017 Supp. 21-6811(e)(3). But if there is a comparable offense and Kansas classifies it as a person crime, the out-of-state conviction should also be classified as a person crime. K.S.A. 2017 Supp. 21-6811(e)(3).

After the briefs were filed in this case, our Supreme Court construed the meaning of "comparable offense" as used in K.S.A. 2017 Supp. 21-6811(e)(3). In its March 9, 2018, decision in *State v. Wetrich*, 307 Kan. 552, 412 P.3d 984 (2018), the court held that the analysis of whether crimes are comparable requires a comparison of the elements of the out-of-state crime to the elements of the Kansas crime. If the out-of-state crime does not have elements that are identical to, or narrower than, the Kansas offense to which it is being compared, the out-of-state conviction must be classified as a nonperson offense. 307 Kan. 552, Syl. ¶ 2.

Though Briggs does not argue that the Missouri crimes are not identical to or narrower than the Kansas crime, we review the issue de novo with the guidance provided by our Supreme Court in *Wetrich* with the objective of arriving at a decision consistent with *Wetrich*.

Here, Briggs' criminal history shows two prior convictions for resisting or interfering with arrest under Mo. Rev. Stat. § 575.150. That statute states, in relevant part:

> "1. A person commits the crime of resisting ... arrest, detention, or stop if, knowing that a law enforcement officer is making an arrest, or attempting to lawfully detain or stop an individual or vehicle, or the person reasonably should know that a law enforcement officer is making an arrest or attempting to lawfully detain or lawfully stop an individual or vehicle, for the purpose of preventing the officer from effecting the arrest, stop or detention, the person:
>
> *3 "(1) Resists the arrest, stop or detention of such person by using or threatening the use of violence or physical force or by fleeing from such officer."

In order to convict a person under this statute, the State of Missouri is required to prove: (1) The defendant knew that a law enforcement officer was making an arrest or stop of a person or vehicle; (2) the defendant resisted the arrest or stop by using or threatening to use violence or physical force *or* by fleeing from the officer; and (3) the defendant did so with the purpose of preventing the officer from completing the arrest or stop. See Mo. Rev. Stat. § 575.150; *State v. Clark*, 263 S.W.3d 666, 673 (Mo. App. 2008), *overruled in part on other grounds by State v. Daws*, 311 S.W.3d 806 (Mo. 2010).

The comparable Kansas offense to Briggs' Missouri convictions is fleeing and eluding under K.S.A. 2015 Supp. 8-1568(b). At the time Briggs committed his current crime, the crime of fleeing and eluding stated in part:

> "(b) Any driver of a motor vehicle who willfully fails or refuses to bring such driver's vehicle to a stop, or who otherwise flees or attempts to elude a pursuing police

vehicle or police bicycle, when given visual or audible signal to bring the vehicle to a stop, and who: (1) Commits any of the following during a police pursuit: (A) Fails to stop for a police road block; (B) drives around tire deflating devices placed by a police officer; (C) engages in reckless driving as defined by K.S.A. 8-1566, and amendments thereto; (D) is involved in any motor vehicle accident or intentionally causes damage to property; or (E) commits five or more moving violations." K.S.A. 2015 Supp. 8-1568(b).

To prove a violation of K.S.A. 2015 Supp. 8-1568, the State must prove: (1) The defendant was driving a motor vehicle; (2) the defendant was signaled by a police officer to stop; (3) the defendant intentionally failed or refused to stop or otherwise fled or attempted to elude a pursuing police vehicle; (4) the police officer giving the signal was in uniform and prominently displaying his or her badge; and (5) the police vehicle was appropriately marked as an official police vehicle. Violation of this Kansas statute is not predicated on the alternative to fleeing that the defendant used or threatened violence or physical force.

Applying the *Wetrich* analysis, we conclude that Mo. Rev. Stat. § 575.150 is not comparable to K.S.A. 2015 Supp. 8-1568(b) as it existed when Briggs committed the crime in this case. Mo. Rev. Stat. § 575.150 can be violated by either fleeing *or* threatening the use of violence, but the Kansas statute applies only to fleeing. Thus, we hold the Missouri statute is broader than the Kansas statute. Accordingly, the Missouri convictions must be scored as nonperson felonies.

Briggs also argues that the sentencing court used his criminal history score for sentencing purposes in violation of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). This issue has already been decided adversely to Briggs and is without merit. See *State v. Ivory*, 273 Kan. 44, 46-47, 41 P.3d 781 (2002). He also argues that the sentencing court abused its discretion by "vindictively choosing to increase the defendant's sentence after the case was remanded ... after a successful appeal." But because we are remanding for resentencing, this issue is now moot.

*4 Briggs' sentence is vacated, and the matter is remanded for resentencing with directions to the district court to classify the prior Missouri convictions for resisting or interfering with arrest as nonperson offenses.

Reversed and remanded with directions.

Arnold-Burger, C.J., concurring:

I write to concur in the judgment, but write separately only to note my position that the State abandoned any argument concerning whether Leroy K. Briggs' prior convictions under Mo. Rev. Stat. § 575.150 (2000 and 2012 Supp.) were comparable to any Kansas statute other than K.S.A. 2015 Supp. 8-1568(b).

When the briefs were submitted in this case in 2017, the State argued that Briggs' Missouri convictions for resisting or interfering with an arrest (Mo. Rev. Stat. § 575.150) should be compared solely to K.S.A. 2015 Supp. 8-1568(b) (fleeing or attempting to elude) for purposes of determining whether they were person felonies. After our decision was entered finding that the statutes were not comparable, the State filed a motion to reconsider under Supreme Court Rule 7.05(a) (2018 Kan. S. Ct. R. 49). In it the State conceded that Mo. Rev. Stat. § 575.150 was not identical or narrower than K.S.A. 2015 Supp. 8-1568(b). But it went on to propose, for the first time, that if the court combines the elements of both K.S.A. 2015 Supp. 8-1568(b) (fleeing and eluding) and K.S.A. 2015 Supp. 21-5415(a)(1) (criminal threat), both of which are person felonies, then all the same conduct is prohibited by Mo. Rev. Stat. § 575.150—making them comparable. It is this new argument that the dissent adopts.

But a motion to reconsider is not a place to raise new issues or obtain a second chance to present a stronger case. See *Servants of Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000) ("[A] motion for reconsideration is appropriate where the court has misapprehended the facts, a party's position, or the controlling law. It is not appropriate to revisit issues already addressed or advance arguments that could have been raised in prior briefing."); *Sithon Maritime Co. v. Holiday Mansion*, 177 F.R.D. 504, 505 (D. Kan. 1998) ("Appropriate circumstances for a motion to reconsider are where the court has obviously misapprehended a party's position on the facts or the law, or the court has mistakenly decided issues outside of those the parties presented for determination. A party's failure to present its strongest case in the first instance does not entitle it to a second chance in the form of a motion to reconsider.").

Moreover, the State does not provide any reasons in either its motion for reconsideration or its supplemental brief for asking us to consider an argument it has never made before. It does not argue for any exception to the general rule. And I can think

of no legal reason why this argument could not have been made from the outset in this case.

For these reasons, I would deem the State's new argument abandoned and I render no opinion as to its efficacy.

Malone, J., dissenting:

I respectfully dissent from the majority's conclusion that Leroy K. Briggs' two prior Missouri convictions for resisting or interfering with arrest must be scored as nonperson offenses for criminal history purposes. Applying the analysis in *State v. Wetrich*, 307 Kan. 552, Syl. ¶ 3, 412 P.3d 984 (2018), the majority finds that Mo. Rev. Stat. § 575.150 (2000 and 2012 Supp.) is not comparable to K.S.A. 2015 Supp. 8-1568(b) because the Missouri statute can be violated by either fleeing *or* threatening the use of violence, but the Kansas statute applies only to fleeing. But whichever way a defendant violates Mo. Rev. Stat. § 575.150, it still constitutes a person crime in Kansas. Thus, I would find that the district court did not err in classifying Briggs' prior Missouri convictions as person offenses for criminal history purposes.

*5 K.S.A. 2017 Supp. 21-6811(e)(1) provides that out-of-state convictions and juvenile adjudications shall be used in classifying the offender's criminal history. K.S.A. 2017 Supp. 21-6811(e)(3) provides:

> "The state of Kansas shall classify the crime as person or nonperson. In designating a crime as person or nonperson, *comparable offenses* under the Kansas criminal code in effect on the date the current crime of conviction was committed shall be referred to. If the state of Kansas does not have a comparable offense in effect on the date the current crime of conviction was committed, the out-of-state crime shall be classified as a nonperson crime." (Emphasis added.)

K.S.A. 2017 Supp. 21-6811(e)(3) states that in classifying an out-of-state crime as person or nonperson, *comparable offenses* shall be referred to. In other words, more than one comparable Kansas offense can be considered in determining whether an out-of-state conviction should be scored as a person or nonperson crime for criminal history purposes.

In *Wetrich*, the court held that when determining if the offenses are comparable, "the elements of the out-of-state crime cannot be broader than the elements of the Kansas crime. In other words, the elements of the out-of-state crime must be identical to, or narrower than, the elements of the Kansas crime to which it is being referenced." 307 Kan. at 562. The court went on to find that the elements of the Missouri crime of second-degree burglary are broader than the elements of burglary of a dwelling in Kansas; thus, the two offenses are not comparable. 307 Kan. at 562-64. Because there was no comparable offense in Kansas, the court concluded that the Missouri crime must be classified as a nonperson offense for criminal history purposes. 307 Kan. at 564.

Briggs' criminal history shows two prior convictions for resisting or interfering with arrest under Mo. Rev. Stat. § 575.150. That statute states, in relevant part:

> "1. A person commits the crime of resisting ... arrest, detention, or stop if, knowing that a law enforcement officer is making an arrest, or attempting to lawfully detain or stop an individual or vehicle, or the person reasonably should know that a law enforcement officer is making an arrest or attempting to lawfully detain or lawfully stop an individual or vehicle, for the purpose of preventing the officer from effecting the arrest, stop or detention, the person:
>
> "(1) Resists the arrest, stop or detention of such person by using or threatening the use of violence or physical force or by fleeing from such officer."

In Kansas, at the time Briggs committed his current crime of conviction, the crime of fleeing or attempting to elude a police officer was defined in K.S.A. 2015 Supp. 8-1568, in relevant part:

> "(b) Any driver of a motor vehicle who willfully fails or refuses to bring such driver's vehicle to a stop, or who otherwise flees or attempts to elude a pursuing police vehicle or police bicycle, when given visual or audible signal to bring the vehicle to a stop, and who: (1) Commits any of the following during a police pursuit: (A) Fails to stop for a police road block; (B) drives around tire deflating devices placed by a police officer; (C) engages in reckless driving as defined by K.S.A. 8-1566, and amendments thereto; (D) is involved in any motor vehicle accident or intentionally causes damage to property; or (E) commits five or more moving violations;

*6 ...

"(c)(2) Violation of subsection (b) is a severity level 9, person felony."

As the majority opinion points out, Mo. Rev. Stat. § 575.150 can be violated by either fleeing *or* threatening the use of violence but the Kansas statute applies only to fleeing. Thus, Mo. Rev. Stat. § 575.150 is broader than K.S.A. 2015 Supp. 8-1568(b). As a result, the majority concludes that the Missouri convictions must be scored as nonperson felonies.

However, K.S.A. 2015 Supp. 8-1568(b) is not the *only* comparable Kansas offense that should be considered in determining whether Briggs' Missouri convictions should be scored as person or nonperson crimes for criminal history purposes. K.S.A. 2015 Supp. 21-5415, defining the Kansas crime of criminal threat, provides in part:

"(a) A criminal threat is any threat to:

(1) Commit violence communicated with intent to place another in fear ...;

....

"(c)(1) A criminal threat is a severity level 9, person felony."

In determining whether Briggs' Missouri convictions should be scored as person or nonperson crimes for criminal history purposes, *any* comparable Kansas offenses should be considered. If Briggs violated Mo. Rev. Stat. § 575.150 by fleeing, that crime is identical to, or narrower than, the elements of the Kansas crime of fleeing or attempting to elude a police officer as defined in K.S.A. 2015 Supp. 8-1568(b), a person felony. If Briggs violated Mo. Rev. Stat. § 575.150 by threatening the use of violence, that crime is identical to, or narrower than, the elements of the Kansas crime of criminal threat as defined in K.S.A. 2015 Supp. 21-5415(a)(1), a person felony. Whichever way Briggs violated Mo. Rev. Stat. § 575.150, it would be a person offense in Kansas. Thus, Briggs' violation of Mo. Rev. Stat. § 575.150 is comparable to a person offense in Kansas. This conclusion is consistent with the court's analysis in *Wetrich*.

In sum, there is no conduct found in Mo. Rev. Stat. § 575.150 that is not fully found within a comparable person crime in Kansas. Thus, I conclude that Briggs' two prior Missouri convictions for resisting or interfering with arrest under Mo. Rev. Stat. § 575.150 should be classified as person felonies in Kansas for criminal history purposes.

All Citations

423 P.3d 551 (Table), 2018 WL 3995795

Footnotes

1 **REPORTER'S NOTE**: Opinion No. 116,420 was modified by the Court of Appeals on August 1, 2018, after the State's Motion to Reconsider was granted June 5, 2018. The concurrence and dissent are added to the opinion with no other changes.

End of Document

APPENDIX C

441 P.3d 1087 (Table)
Unpublished Disposition
This decision without published opinion
is referenced in the Pacific Reporter.
See Kan. Sup. Ct. Rules, Rule 7.04.
NOT DESIGNATED FOR PUBLICATION
Court of Appeals of Kansas.

STATE of Kansas, Appellee,

v.

Kim P. VALENTINE, Appellant.

No.
119,164

Opinion filed May 31, 2019.

Appeal from Sedgwick District Court; FAITH A.J. MAUGHAN, judge.

Attorneys and Law Firms

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

Matt J. Maloney, assistant district attorney, Marc Bennett, district attorney, and Derek Schmidt, attorney general, for appellee.

Before Arnold-Burger, C.J., Hill, J., and Stutzman, S.J.

MEMORANDUM OPINION

Per Curiam:

*1 The State brought Kim P. Valentine before a jury in the Sedgwick County District Court on charges of rape, aggravated criminal sodomy, aggravated battery, and domestic battery, in each instance allegedly committed against V.M.D. The jury found Valentine guilty of aggravated criminal sodomy and domestic battery, acquitted him on the aggravated battery charge, and failed to reach a unanimous verdict on the rape charge. This is Valentine's direct appeal of his aggravated criminal sodomy conviction.

FACTS AND PROCEDURAL BACKGROUND

V.M.D. testified that, at the time of the events that led to the charges, she had known Valentine for about two years and was involved in a romantic relationship with him. They lived together in a Wichita motel. By V.M.D.'s account of the events of April 25, 2017, she and Valentine were arguing in his car when he hit her in the face with a closed fist and she immediately felt her jaw break. She jumped out of the car with her seizure alert dog, but without her shoes, and tried to get away. As she tried to flee, Valentine got out, called her dog to him and picked it up, then caught up with her. V.M.D. swung her backpack at Valentine to get away from him. Valentine continued to hold V.M.D.'s dog in his arms and waved down a passing car. V.M.D. went across the street and asked someone to call 911.

Valentine presented testimony from witnesses who said Valentine stopped them as they were driving by on April 25 and asked them to call 911. They saw Valentine in an altercation with a woman and, before police arrived, they saw her repeatedly hitting herself in the face with a closed fist and scratching her arms. V.M.D. testified she was rubbing her face because it hurt, but she denied hitting herself in the mouth, cheeks, or jaw.

The police arrived and spoke with Valentine, then told V.M.D. that Valentine had promised to let her leave if she would go home and take her medication. After V.M.D. made her report to the police she went back to Valentine. She said although Valentine told the police he would let her leave, he then told her "[she] wasn't going anywhere," but she stayed to get her dog back. V.M.D. said Valentine would not let her leave, and she stayed with him at the motel until May 2.

Officer Kyle Mellard from the Wichita Police Department testified he responded to the 911 call on April 25. Mellard said that he and other officers concluded that V.M.D.'s facial injuries from that night were self-inflicted and her claim that Valentine had broken her jaw was false.

V.M.D. told the jury that on May 1, she and Valentine had argued during the day after the "guys next door" asked her for a cigarette and Valentine accused her of sleeping with them. She said Valentine was drinking and continued to talk about his accusations the whole night. V.M.D. said she realized Valentine was drunk and she knew she might get hurt, as he got demanding and angrier and poured a bottle of whiskey over her head. At one point, Valentine told her to leave, but when V.M.D. got up to leave, he told her to lay back down

or he was going to "knock the crap out of [her]." V.M.D. said she laid back down because she did not want to get hit.

*2 When V.M.D. laid back down, Valentine demanded that she give him oral sex. He said he would give her to the count of five to do what he said, or else he was going to "kick [her] butt." V.M.D. testified she was afraid Valentine would hit her as he had before, so she complied with his demand. Nevertheless, Valentine was dissatisfied with what V.M.D. was doing; V.M.D. was crying and told him her mouth was hurting from the April 25 injury, but Valentine told her if she tried again to stop "he was going to knock the crap out of [her]." Eventually, V.M.D. told Valentine she had to stop because she couldn't breathe. Valentine then started hitting her in the face, head, chest, and body, turned her over, and forcefully penetrated her to have vaginal sex without her consent. V.M.D. said Valentine told her to call herself names like "whore."

Valentine eventually stopped because he was mad that V.M.D. wasn't "into it." He told her to start oral sex again, telling her again that "if [she] didn't do it he was going to knock the crap out of [her]." V.M.D. testified Valentine grabbed her head and pushed it down on his penis until she gagged numerous times and had trouble breathing. Valentine became angry that he did not reach orgasm and began hitting V.M.D. again.

V.M.D. tried to leave, but Valentine told her if she did, he would hurt her. He told her "if [she] was a police-calling bitch that ... they would have to take [her] out in a body bag because [she] would be dead before they got there." V.M.D. stayed in the motel room until Valentine passed out. She then got dressed, washed the blood off her face, and left the motel room with only her dog and wallet. Once on the street, she waved down a police officer. She wanted to get to the hospital because her mouth hurt so much. She did not tell the first officer about the sexual assaults because she just wanted to get away.

Deputy Joseph Slaughter with the Sedgwick County Sheriff's Office testified that V.M.D. flagged him down around 1:30 a.m. on May 2, 2017. She told him her jaw hurt and she was worried that her boyfriend would find her. V.M.D. kept looking back to see if Valentine was walking down the street. She told Slaughter that her boyfriend had hit her several times, but she waited for him to pass out before sneaking out of their motel room. V.M.D. said "she didn't do what he wanted her to do." Slaughter called an ambulance, which took her to a hospital.

Dr. Daniel Gillespie, a radiologist who treated V.M.D. at the hospital, testified that when he examined CT images of V.M.D. on May 2, 2017, he saw two fairly new fractures of her jaw----one on each side. Dr. Gillespie said a patient with those fractures would typically have extreme pain. He had never heard of a person self-inflicting this type of injury and said that to be able to cause those fractures, someone would need "to be fairly strong, and very accurate." On cross-examination, Dr. Gillespie acknowledged he could not rule out the possibility of a self-inflicted fracturing of the jaw.

While at the hospital, V.M.D. recognized the police officer who showed up as the one she had seen in April. She felt he prejudged her, since he asked "if [she] had done this to [herself]." She did not tell him about the sexual assaults right away because she did not think he would listen. She told him she had been involved in a "bad sexual encounter." She then was taken to a different hospital where Amy Mitchell, a forensic nurse, performed a sexual assault examination. Mitchell said V.M.D.'s injuries were consistent with her account that the oral and vaginal sex was nonconsensual. V.M.D. also reported no consensual intercourse within the past three days and that Valentine was the only assailant.

V.M.D. testified that after the examination she told a detective what had happened but said she did not want to press charges "[b]ecause nobody listens to me, they listen to him." V.M.D. left the hospital and went to a shelter. While there, she obtained a protection from abuse order against Valentine, alleging only that he broke her jaw during the incident on April 25, 2017.

*3 On May 2, 2017, Officer Corey Masterson with the Wichita Police Department was dispatched at 3:41 a.m. to contact a suspect in a sexual assault at the Model Motel. The suspect was Valentine. During the initial contact, and before any officers suggested to Valentine that he was being investigated for a possible sexual assault, Valentine said, " 'Fuck all the rape charge and all this shit.' " After being read his rights, Valentine made another comment about, " 'I'm not arrested for some rape charge?' " Masterson then told Valentine about V.M.D.'s accusations, after which Valentine said they had sex on the previous day but had not had sex that day. Dana Loganbill, a forensic nurse, performed a sexual assault examination on Valentine on May 2.

Forensic scientist Sarah Geering examined the DNA swabs obtained during Valentine's and V.M.D.'s sexual assault

examinations. She concluded that swabs from areas of Valentine's genitals indicated V.M.D. could not be excluded as contributing to the DNA profile she found.

After the State rested, Valentine moved for judgment of acquittal. The trial court denied the motion to acquit, finding that after viewing the evidence presented in the light most favorable to the State, there was sufficient evidence to support the charges.

At a jury instruction conference on the third day of trial, the district court reviewed the parties' proposed instructions. For the first element on the aggravated criminal sodomy instruction, the State asked the court to tell the jury that the State must prove Valentine "caused [V.M.D.] to engage in sodomy with *a person*." (Emphasis added.) In contrast, Valentine asked that the instruction use the phrase: "*[t]he defendant* engaged in sodomy with [V.M.D.]" (Emphasis added.) Without objection from Valentine, the district court elected to instruct the jury on the aggravated criminal sodomy charge using the form requested by the State, with the first element obligating the State to prove Valentine "caused [V.M.D.] to engage in sodomy with a person."

The jury found Valentine guilty of aggravated criminal sodomy and domestic battery from the May 2 incidents and not guilty of aggravated battery on April 25. The jury failed to reach a unanimous verdict on the rape charge. The State later moved to dismiss that rape charge without prejudice because V.M.D. did not want to go through another trial.

The district court sentenced Valentine to the presumptive prison term of 272 months for the aggravated criminal sodomy conviction, consecutive to a 12-month jail sentence for the domestic battery conviction. Valentine timely appeals.

ANALYSIS

Valentine sets before us two alleged errors: first, that there was insufficient evidence to support his conviction for aggravated criminal sodomy; and second, that the Kansas Sentencing Guidelines Act (KSGA) relies on judicial findings concerning prior convictions to establish the presumptive sentence for a crime, contravening § 5 of the Kansas Constitution Bill of Rights.

Valentine's aggravated criminal sodomy conviction

Valentine's claim of insufficient evidence for the aggravated criminal sodomy conviction is not the type of "insufficiency" argument typically presented. He does not assert that the evidence failed to show he intentionally engaged in sodomy with V.M.D. when she did not consent under circumstances when she was overcome by force or fear in Sedgwick County on May 2, 2017. Instead, he relies on the fact that the first element in the district court's instruction for that crime said the State had to prove he "caused [V.M.D.] to engage in sodomy with a person," which he contends could only mean some person *other* than him. Since the State only presented evidence showing that he forced V.M.D. to engage in sodomy *with him*, he reasons the evidence was insufficient to prove the first element in the court's instruction.

*4 In response, the State first points to the relevant language of that charge in the amended complaint, alleging that Valentine: "did then and there unlawfully engage in sodomy with [V.M.D.] or cause [V.M.D.] to engage in sodomy with any person or animal," contrary to K.S.A. 2016 Supp. 21-5504(b)(3)(A). The State contends the trial evidence showed Valentine twice forced V.M.D. to engage in sodomy with him.

Standard of review

As our Supreme Court recently observed:

> "Our standard of review for a sufficiency of the evidence claim is a familiar one, often repeated:
>
> " 'When sufficiency of the evidence is challenged in a criminal case, the standard of review is whether, after reviewing all the evidence in a light most favorable to the prosecution, the appellate court is convinced a rational factfinder could have found the defendant guilty beyond a reasonable doubt. Appellate courts do not reweigh evidence, resolve evidentiary conflicts, or make witness credibility determinations.' [Citation omitted.]" *State v. Nesbitt*, 308 Kan. 45, 51, 417 P.3d 1058 (2018).

To the extent we are required to engage in interpretation of statutes, our review is de novo. *State v. Alvarez*, 309 Kan. 203, 205, 432 P.3d 1015 (2019).

Discussion

In both his briefs and his argument, Valentine endeavors to limit the scope of analysis to the sufficiency of the evidence to support a finding that he caused V.M.D. to engage in sodomy with someone else. He claims both *State v. Dickson*,

275 Kan. 683, 69 P.3d 549 (2003), and *State v. Fitzgerald*, 308 Kan. 659, 423 P.3d 497 (2018), provide support for his interpretation that "any person" in the sodomy statute means a person other than the defendant.

The State concedes there was no evidence showing the involvement of another person and focuses its initial argument on an analysis of *Dickson* and *Fitzgerald*. Alternatively, the State suggests that if there was error, it was error in the jury instruction and it did not rise to the level of clear error, which would be required because Valentine did not object to the district court giving that instruction. In reply to that argument, Valentine contends that instruction error is not an issue he raised or claimed as error, and the State invites error by this court when it asks us to consider that argument.

We do not decide issues that are not preserved and presented for our review. But Valentine attempts to move that boundary even further by restricting our analysis of the conviction he is challenging in his appeal and limiting us to an assessment of the sufficiency of the evidence for a crime that both parties agree did not happen. No one claims Valentine forced V.M.D. to engage in sodomy with some third person. And from the facts recited above, we find without any difficulty that the jury had amply sufficient evidence upon which to base a finding that Valentine forced V.M.D. to engage in sodomy with him. While the issues asserted by an appellant do set the scope of appellate review, they do not dictate the analysis of those issues. Despite Valentine's attempt to cast it in a different light, the problem Valentine raises must be examined for error in the instruction.

The foundation of Valentine's argument is that the language in the instruction controls. He looks to *State v. Robinson*, 27 Kan. App. 2d 724, 8 P.3d 51 (2000), to support his contention that the State must "prove the particular crime defined in a jury's elements instruction." *Robinson* involved an aggravated robbery conviction for stealing a car while pointing a sawed-off shotgun at the car's owner. The district court instructed the jury that they must find proof that Robinson took the car "from the person" of the owner. The charging document likewise alleged the car was taken from "the person" of the owner, omitting any reference to the language in the statute about a taking from "the presence" of the owner. 27 Kan. App. 2d at 725, 727. The critical distinction between *Robinson* and the present case is that the State's amended complaint against Valentine included the full statutory language, charging that he "did then and there unlawfully engage in sodomy with [V.M.D.] or cause [V.M.D.] to engage in sodomy with any person or animal."

*5 Neither do we find *Dickson* or *Fitzgerald* to be helpful or controlling here, because they present distinctly different scenarios from this case. In his appeal, Dickson conceded he engaged in sodomy with a child, but he asserted there had been no proof he caused a child to engage in sodomy with someone else or an animal. The two circumstances were the subject of separate subsections of the statute, at that time codified in K.S.A. 21-3505. Dickson had been charged under the subsection for causing a child to engage in sodomy with "any person or animal." *Dickson*, 275 Kan. at 686. The Supreme Court found "Dickson was charged with criminal sodomy under K.S.A. 21-3505(a)(3), whereas the evidence established a violation of K.S.A. 21-3505(a)(2)," and reversed that conviction. 275 Kan. at 695.

In *Fitzgerald*, the proof also departed from the charging document. The Supreme Court concisely summed up the issue:

> "The State charged Fitzgerald with aggravated criminal sodomy by 'feloniously [causing C.C.] (DOB: 02/21/2004), a child under 14 years of age, to engage in oral copulation with another person' in violation of K.S.A. 2017 Supp. 21-5504(b)(2) and (c)(3).
>
> "Although the State charged Fitzgerald with causing C.C. to engage in oral copulation 'with another person,' all parties thereafter proceeded with the case as though Fitzgerald had been charged with engaging in sodomy with C.C. himself." *Fitzgerald*, 308 Kan. at 660.

Without objection from either party, the first element of the district court's instruction said the State had to prove "[t]he defendant engaged in sodomy with [C.C.]." 308 Kan. at 662.

The Supreme Court discussed the discrepancy between what the State had charged and the evidence, instruction, and verdict, concluding that "we are compelled to reverse Fitzgerald's conviction as unsupported by sufficient evidence of the crime the State charged." 308 Kan. at 666. Contrary to the theory Valentine urges us to adopt, in *Fitzgerald* the State *did* prove the crime described in the instruction, but it was the charging document that controlled, not the instruction.

Both *Dickson* and *Fitzgerald* involved situations in which the defendant was charged with one means of committing the crime and all evidence pointed to another. Here, the

State charged Valentine using the full statutory language, encompassing both a situation in which Valentine was the person engaging in nonconsensual sodomy and that in which he caused V.M.D. to engage in the act with another. The problem in Valentine's case is not that the evidence failed to prove the crime charged, as in *Dickson* and *Fitzgerald*, but that the instruction chose the means from the complaint that did not match the evidence presented to the jury.

Our standard of review changes when presented with a question of error in a jury instruction:

> "When analyzing jury instruction issues, we follow a three-step process:
>
> " '(1) determining whether the appellate court can or should review the issue, *i.e.*, whether there is a lack of appellate jurisdiction or a failure to preserve the issue for appeal; (2) considering the merits of the claim to determine whether error occurred below; and (3) assessing whether the error requires reversal, *i.e.*, whether the error can be deemed harmless.' " [Citation omitted.] *State v. McLinn*, 307 Kan. 307, 317, 409 P.3d 1 (2018).

Since Valentine offered no objection to the district court's instruction on aggravated criminal sodomy, we find no error unless the instruction was clearly erroneous. See K.S.A. 2018 Supp. 22-3414(3). Next, "in determining whether an error actually occurred, we 'consider whether the subject instruction was legally and factually appropriate, employing an unlimited review of the entire record.' [Citation omitted.]" 307 Kan. at 318. If error is found, and we reach the third step of the analysis, reversal is only warranted if we cannot find the error was harmless. An error is not harmless if we are " 'firmly convinced that the jury would have reached a different verdict had the instruction error not occurred.' [Citation omitted.]" 307 Kan. at 318.

*6 The district court's instruction was legally appropriate for an instance of aggravated criminal sodomy when a defendant is charged with forcing a person, without consent, to engage in sodomy with someone other than the defendant. The instruction, however, was not factually appropriate, since all the evidence that the State presented addressed that part of the charge alleging Valentine forced V.M.D. to engage in sodomy *with him*. Thus, giving the instruction in the form used by the district court was error.

Finally, since there was error, we must decide whether it constituted clear error, requiring us to be "firmly convinced that the jury would have reached a different verdict had the instruction error not occurred." The State's evidence focused entirely on proving Valentine forced V.M.D. to engage in sodomy with him, without her consent. If the instruction error had not occurred, the district court would have written the first element to read: "The defendant engaged in sodomy with V.M.D." In view of the evidence, we are not persuaded the jury's verdict would have been any different if the correct instruction had been given. The error was harmless.

KSGA and § 5 of Kansas Constitution Bill of Rights

Valentine next argues the KSGA is "facially unconstitutional" because it provides for judicial determination of a defendant's criminal history, violating § 5 of the Kansas Constitution Bill of Rights. Valentine concedes that this argument has been rejected with respect to the United States Constitution. See *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."). Similarly, Valentine admits the Kansas Supreme Court has repeatedly rejected the argument that the KSGA violates the Sixth and Fourteenth Amendments to the United States Constitution. See *State v. Ivory*, 273 Kan. 44, 45-48, 41 P.3d 781 (2002). Valentine concedes he did not raise this issue before the district court. We may consider it nonetheless, as it implicates a claim to the fundamental right of trial by a jury. See *State v. Beaman*, 295 Kan. 853, 858, 286 P.3d 876 (2012).

The sum of Valentine's "argument" on this issue is his assertion that:

> "[P]rior to Kansas' statehood, American common law required any fact which increased the permissive penalty for a crime—*inclusive of an offender's prior criminal convictions*—to be proven to a jury beyond a reasonable doubt."

Valentine continues with a contingent conclusion:

> "If this assertion is correct, it necessarily follows that the sentencing scheme set out by the KSGA—in which *judicial* findings of criminal history elevate a defendant's presumptive prison sentence—is unconstitutional."

In view of the Kansas Supreme Court's consistent rejection of the Sixth Amendment-based version of Valentine's current argument, it is incumbent on Valentine to provide authority

showing our Supreme Court interprets—or would interpret—§ 5 of the Kansas Constitution Bill of Rights to require jury findings that the Sixth Amendment does not. He fails to do so. "This court is duty bound to follow Kansas Supreme Court precedent absent some indication that the court is departing from its previous position." *State v. Meyer*, 51 Kan. App. 2d 1066, 360 P.3d 467 (2015). Valentine's argument fails.

Affirmed.

All Citations

441 P.3d 1087 (Table), 2019 WL 2306626

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APPENDIX D

400 P.3d 676 (Table)
Unpublished Disposition
This decision without published opinion
is referenced in the Pacific Reporter.
See Kan. Sup. Ct. Rules, Rule 7.04.
Court of Appeals of Kansas.

STATE of Kansas, Appellee,

v.

Gabriel A. PATTERSON, Appellant.

No.
114,861

Opinion filed July 28, 2017

Review Granted February 26, 2018

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

Attorneys and Law Firms

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

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

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

MEMORANDUM OPINION

Per Curiam:

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

FACTS

One night in November 2014, roommates Kendri Salmons and Christopher Adams ran into a mutual acquaintance at a bar in Lawrence. The acquaintance, Yusef Kindell, asked if Adams had any marijuana, as Adams and his roommates each dealt small amounts of drugs. In fact, Kindell previously had come to Adams' apartment to buy the party drug ecstasy from Adams. After their encounter with Kindell, Salmons and Adams left the bar to smoke marijuana and spend time with friends at home.

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

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

The agreed-upon plan was for Kukuk, Johnson, and Pence to keep the people inside the apartment out of the way while Kindell and Patterson "[took] stuff." Most of the men, Patterson included, concealed their faces. Kukuk carried a broken chair leg as a weapon, and Johnson had an unloaded gun. Together, the five walked from Kukuk's residence to the

apartment, where Pence broke the door in by ramming it with his shoulder. Pence entered the apartment first, followed by Johnson and Kukuk. All three of these men went up the stairs towards the bedrooms while Patterson and Kindell stepped inside the house and waited by the front door in the living room.

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

- Johnson hit Salmons with the gun, cutting a gash in Salmons' head and causing him to scream, but no property was taken directly from Salmons.
- Kukuk, Johnson, and Pence broke into Mathur and Wells' bedroom, threatened them, and took from them approximately $140, some marijuana, and their cell phones.
- Kukuk, Johnson, and Pence then went to Adams' room, where Kukuk hit Adams several times with the wooden stick while demanding money and marijuana. Adams surrendered a safe, which Kukuk took. The safe later yielded marijuana and cash.
- As Kukuk, Johnson, and Pence were leaving the apartment, Pence punched Mathur in the eye and Johnson took an X--Box console from the living room.

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

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

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

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

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

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

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

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

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

ANALYSIS

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

1. *Prosecutorial error*

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

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

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

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

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

> "These two steps can and should be simply described as error and prejudice. To determine whether prosecutorial error has occurred, the appellate court must decide whether

> the prosecutorial acts complained of fall outside the wide latitude afforded prosecutors to conduct the State's case and attempt to obtain a conviction in a manner that does not offend the defendant's constitutional right to a fair trial. If error is found, the appellate court must next determine whether the error prejudiced the defendant's due process rights to a fair trial. In evaluating prejudice, we simply adopt the traditional constitutional harmlessness inquiry demanded by *Chapman* [*v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)]. In other words, prosecutorial error is harmless if the State can demonstrate 'beyond a reasonable doubt that the error complained of will not or did not affect the outcome of the trial in light of the entire record, *i.e.*, where there is no reasonable possibility that the error contributed to the verdict.' *State v. Ward*, 292 Kan. 541, Syl. ¶ 6, 256 P.3d 801 (2011), *cert. denied* 132 S. Ct. 1594 (2012). We continue to acknowledge that the statutory harmlessness test also applies to prosecutorial error, but when 'analyzing both constitutional and nonconstitutional error, an appellate court need only address the higher standard of constitutional error.' [Citation omitted.]" *Sherman*, 305 Kan. at 109.

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

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

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

Many Kansas cases have considered what behaviors constitute aiding and abetting. Specifically, "the law requires that the person knowingly associates with the unlawful venture and participates in a way which indicates that such person is furthering the success of the venture." *State v. Baker*, 287 Kan. 345, Syl. ¶ 7, 197 P.3d 421 (2008). As such, "[m]ere association with the principals who actually commit the crime or mere presence in the vicinity of the crime is itself insufficient to establish guilt as an aider and abettor." 287 Kan. 345, Syl. ¶ 7. However, " 'if from the facts and circumstances surrounding the defendant's presence at the time and from the defendant's conduct it appears that the defendant's presence did in fact encourage someone else to commit the criminal act, guilt may be inferred.' " *State v. Bland*, 33 Kan. App. 2d 412, 417--18, 103 P.3d 492 (2004). If there is no direct evidence showing that the defendant planned " 'to encourage, incite, aid, abet, or assist in the crime,' " the jury is still permitted to consider the defendant's failure " 'to oppose the commission of the crime in connection with other circumstances' " and to therefore conclude " 'that the

[defendant] assented to the commission of the crime ... and thereby aided and abetted the commission of the crime.' " 33 Kan. App. 2d at 418. With that said, "failing to stop or report a crime is not the basis for liability under an aider and abettor theory" without additional indicators of the defendant's intention to " 'further[ ] the success of the venture.' " *State v. Simmons*, 282 Kan. 728, 738, 148 P.3d 525 (2006).

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

*6 And contrary to the characterization of events in his appellate brief, Patterson did not stand idly by while his companions plotted and carried out the robbery. Patterson participated in or at least listened extensively to the planning stages of the robbery. Patterson watched as Kukuk and Johnson armed themselves. Pence testified that it was Patterson who called to ask him to participate in the crime, and Patterson admitted he went with the others to pick Pence up after Pence agreed to take part in the robbery. Patterson also admitted that he knew Pence was invited to join them because he's "crazy," and would provide "an extra body" and "muscle." After the men finalized their plan, Patterson concealed his face and accompanied the others to the apartment. Patterson and Kindell stepped inside the apartment and waited by the front door in the living room as Pence, Kukuk, and Johnson rushed inside. Patterson admitted that as he stood guard, "[Johnson] was just cracking people. ... He was just so on fire ... so mad," and that he heard screaming coming from upstairs, someone yelling, "I'm sorry" and "I don't have any weed." Patterson also reported that when one of the men who lived in the apartment came downstairs and saw him standing by the door, he made sure the resident could not see his face. At no time did Patterson protest, back out, object, or disapprove of the plan to rob Adams, Salmons, and Mathur. From the initial planning stages until the distribution of the proceeds, the evidence at trial demonstrates Patterson intended to associate with the unlawful venture and to participate in a way which would further the success of the venture. See *Baker*, 287 Kan. 345, Syl. ¶ 7.

2. Registration requirement

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

Whether a defendant's constitutional rights have been violated is a question of law that we review without any required deference to the district court. *State v. Unrein*, 47 Kan. App. 2d 366, 369, 274 P.3d 691 (2012). Under the Kansas Offender Registration Act, a district court can order a defendant to register as a violent offender if (among other reasons) the defendant is convicted of a person felony and the court makes a finding on the record that a deadly weapon was used in the commission of that person felony. K.S.A. 2016 Supp. 22-4902(e)(2). In this case, Patterson was convicted of three counts of aggravated robbery and one count of aggravated burglary, and the district court found that a deadly weapon was used to commit those crimes, so it ordered him to register as a violent offender for the next 15 years. *Apprendi* held that

because of the Sixth Amendment right to a jury trial and the Fourteenth Amendment right to due process, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 476–85, 490. So Patterson argues that the district court violated *Apprendi* because ordering him to register as a violent offender increased the penalty for his crime and was based on a court finding that had not been proved to a jury beyond a reasonable doubt.

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

*7 Whether our prior rulings on this question are still good law is put in some doubt by our Supreme Court's ruling in *State v. Charles*, 304 Kan. 158, 178, 372 P.3d 1109 (2016). In that case, the Kansas Supreme Court reached the opposite conclusion, holding that because a registration requirement qualifies as a type of punishment, imposing registration effectively increases the penalty for a crime. *Charles*, 304 Kan. at 178. Under this reasoning, imposing registration without a jury finding that the defendant used a deadly weapon would violate *Apprendi*. But once the Kansas Supreme Court gives an indication that it is departing from its own precedent, we are no longer bound to follow that precedent. *Heartland Presbytery v. Presbyterian Church of Stanley, Inc.*, 53 Kan. App. 2d 622, Syl. ¶ 10, 390 P.3d 581 (2017). And the Kansas Supreme Court has given a strong indication that *Charles* is not good law anymore. The ruling in *Charles* was based on a case published on the same day, *Doe v. Thompson*, 304 Kan. 291, 373 P.3d 570 (2016), overruled by *State v. Petersen–Beard*, 304 Kan. 192, 377 P.3d 1127 (2016). *Thompson*, a four-to-three decision, held that the registration requirement was a type of punishment; therefore, the Ex Post Facto Clause of the United States Constitution applied to prevent retroactive application of amendments to the registration statutes. 304 Kan. 291, Syl. ¶ 7. But *Thompson* was overruled on the day it was issued: *Petersen–Beard*, with a different four-judge majority, held that the registration requirement could not be challenged as cruel and unusual punishment under either the United States or the Kansas Constitutions because it was not a type of punishment. 304 Kan. 192, Syl. ¶¶ 1–2.

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

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

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

Patterson argues that the Kansas criminal restitution scheme is facially unconstitutional because it encroaches on a criminal defendant's common-law right to a civil jury trial without offering anything in return. Patterson acknowledges that he did not raise this issue before the district court. He did not

object to any portion of his sentence at sentencing and did not dispute the amount of restitution ordered.

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

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

> "The first exception does not apply because the determination of Jones' restitution claim is not finally determinative of the case. The second exception does not apply because it cannot be argued that consideration of the issue is necessary to serve the ends of justice or to prevent a denial of fundamental rights when Jones did not even object to the imposition of or the amount of restitution at sentencing. See *United States v. Dudley*, 739 F.2d 175, 179 (4th Cir. 1984) (appellate court refused to consider restitution issue for first time on appeal when defendant failed to object to restitution in district court). Therefore, we reject Jones' constitutional issue as not properly preserved for appellate review." 2016 WL 852865, at *9.

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

4. *Restitution as punishment*

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

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

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

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

*9 Affirmed.

All Citations

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

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APPENDIX E

386 P.3d 524 (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.

Oliver W. BRADWELL, Jr., Appellant.

No. 115,153

Opinion filed December 9, 2016

Appeal from Sedgwick District Court; STEPHEN J. TERNES, judge.

Attorneys and Law Firms

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

Julie A. Koon, assistant district attorney, Marc Bennett, district attorney, and Derek Schmidt, attorney general, for appellee.

Before Standridge, P.J., Arnold-Burger and Bruns, JJ.

MEMORANDUM OPINION

Per Curiam:

*1 Oliver W. Bradwell Jr. appeals from the district court's summary denial of his pro se motion for ineffective assistance of counsel and from the imposition of restitution. First, Bradwell seeks remand of his ineffective assistance of counsel motion. Second, he contends that restitution violates Section 5 of the Kansas Constitution Bill of Rights and the Sixth Amendment of the United States Constitution. Although we agree that the issue of ineffective assistance of counsel should be remanded, we reject Bradwell's arguments regarding restitution. Thus, we affirm in part, vacate in part, and remand for further proceedings.

FACTS

Bradwell pled guilty to aggravated battery following an incident that occurred at an International House of Pancakes in the early morning hours of August 17, 2014. As part of a plea agreement, the State agreed to recommend the mid number in the appropriate sentencing grid box and to recommend a dispositional departure to probation with community corrections. The State also agreed not to charge Bradwell in an unrelated incident for which he had been arrested on September 3, 2015. Moreover, Bradwell agreed to pay for the victim's medical expenses and to have no contact with the victim.

The plea agreement further provided that the State would not be bound by its terms if Bradwell were arrested, committed a new offense, violated his bond conditions, or failed to appear for a court hearing prior to sentencing. Likewise, Bradwell acknowledged that the plea agreement did not bind the district court. Bradwell also agreed that his defense attorney had done "a good job counseling and assisting [him], and [he was] satisfied with the advice and help [his] lawyer [had] given [him]."

At the plea hearing held on September 4, 2015, the district court reviewed with Bradwell the rights he would be giving up by entering a plea, the possible penalties for aggravated battery, and the terms of the plea agreement. Specifically, the district court advised Bradwell that it was not required to place him on probation but could incarcerate him for his offense. In response, Bradwell indicated that he understood his rights and the terms of the plea agreement. The district court also discussed the sentencing process and answered Bradwell's questions regarding probation. Bradwell was again informed that the plea agreement was not binding upon the district court. At the conclusion of the hearing, Bradwell entered a guilty plea, which the district court accepted.

After Bradwell entered his plea, the district court modified his bond conditions to include pretrial services. Moreover, the district court advised Bradwell that he was required to contact pretrial services. Although the district court stressed the importance of reporting to pretrial services, Bradwell failed to report as ordered. Accordingly, Bradwell's bond was revoked on September 16, 2015, he was taken into custody, and his bond was set at $75,000.

On October 20, 2015, Bradwell moved for a downward dispositional departure to probation. At the sentencing hearing held the following day, the district court found that the State was no longer bound by the plea agreement because

of Bradwell's violation of his conditions of release. The State then recommended the district court sentence Bradwell to prison because his actions demonstrated he was not amenable to probation. Bradwell's attorney, however, continued to ask the district court to follow the recommendations set forth in the plea agreement and place his client on probation. Ultimately, the district court denied Bradwell's request for a downward dispositional departure, sentenced him to 45 months of prison time with 36 months of postrelease supervision, and ordered him to pay restitution in the amount of $9,228.24 to reimburse the Crime Victims Compensation Board plus an additional $3,440.06 to be paid to the victim.

*2 On October 29, 2015, Bradwell filed a pro se motion for ineffective assistance of counsel. Bradwell argued his attorney refused to adequately prepare for his case, ignored his requests to withdraw his plea prior to sentencing, and coerced him into signing the plea. Specifically, Bradwell stated that he had "attempted to communicate with [his] attorney several times before sentencing for [the attorney] to file a motion to withdraw [his] plea and ... [the attorney] told [him] at sentencing that it was too late to do so." On November 4, 2015, Bradwell filed a pro se motion to set aside his plea, arguing that his attorney was not competent, that his attorney misled him into signing the plea agreement, and that he did not understand the plea at the time he pled.

In an order entered on November 4, 2015, the district court summarily denied both of Bradwell's pro se motions. In the order, the district court found Bradwell's allegations regarding his claim of ineffective assistance of counsel to be conclusory. It also found that Bradwell's allegations offered in support of his request to withdraw his plea were not credible. The following day, the district court allowed Bradwell to file an untimely notice of appeal.

ANALYSIS

Bradwell raises three issues on appeal. The first issue relates to his motion for ineffective assistance of counsel, contending that the district court erred in not ordering an evidentiary hearing on his motion. The other two issues relate to the restitution he was ordered to pay by the district court. Specifically, Bradwell argues that the Kansas restitution scheme violates the Kansas Constitution and, as applied to him, violates his rights under the Sixth Amendment of the United States Constitution.

Motion for Ineffective Assistance of Counsel

We have three options as to how to address a claim of ineffective assistance of counsel on direct appeal:

> "First, an appellate court may follow the general rule and decline to address the issue, leaving the defendant to pursue relief through a timely K.S.A. 60-1507 motion. See *State v. Levy*, 292 Kan. 379, 388-89, 253 P.3d 341 (2011). Second, the appellate court may remand to the district court for examination of the issue in further proceedings pursuant to *State v. Van Cleave*, 239 Kan. 117, 119-21, 716 P.2d 580 (1986). See *State v. Dull*, 298 Kan. 832, 839, 317 P.3d 104 (2014) ('The usual course of action is a request by appellate counsel for remand to district court for a hearing on the ineffective assistance claim.'). Finally, although rare, ' "there are circumstances when no evidentiary record need be established, when the merit or lack of merit of an ineffectiveness claim about trial counsel is obvious," and an ineffectiveness claim can therefore be resolved' by an appellate court. 298 Kan. at 839 (quoting *Rowland v. State*, 289 Kan. 1076, 1084-85, 219 P.3d 1212 [2009]); see *State v. Carter*, 270 Kan. 426, 433, 14 P.3d 1138 (2000) (remand would serve no purpose where assessment by trial court unnecessary because record on appeal sufficiently complete for appellate court to decide issue)." *State v. Reed*, 302 Kan. 227, 233-34, 352 P.3d 530, *cert. denied* 136 S. Ct. 344 (2015).

The decision of whether to remand a case to the district court for a *Van Cleave* hearing is within the discretion of the appellate court. *Van Cleave*, 239 Kan. at 119-21. See also *Rowland v. State*, 289 Kan. 1076, 1084-85, 219 P.3d 1212 (2009); *State v. Allen*, No. 101,367, 2010 WL 3636269, at *3 (Kan. App. 2010) (unpublished opinion). To warrant a *Van Cleave* hearing, an appellant "must do more than simply ... argue that he or she would have handled the case differently." *State v. Levy*, 292 Kan. 379, 389, 253 P.3d 341 (2011). Rather, an appellant must present an appellate court with grounds sufficient to show the alleged claim has some merit. 292 Kan. at 389.

*3 Bradwell requests that this court remand the motion for ineffective assistance of counsel to the district court to determine whether Bradwell asked his attorney to file a motion to withdraw his plea prior to the sentencing hearing. In response, the State indicates that there is no need for an evidentiary hearing because the record demonstrates that Bradwell knowingly and voluntarily pled guilty. Further, the State notes that the same judge who presided over the plea

hearing also decided Bradwell's postsentencing motions and, as such, would be in the best position to evaluate whether Bradwell should be allowed to withdraw his plea. The State, however, does not address Bradwell's allegation that his attorney refused his request to file a motion to withdraw his plea prior to sentencing.

Although we take no position regarding whether Bradwell will ultimately be successful in showing that his attorney was ineffective, we find that it is appropriate to remand the motion for ineffective assistance of counsel to the district court for a *Van Cleave* hearing. In particular, we find that the district court should determine whether Bradwell did in fact instruct his attorney to file a motion to withdraw his plea prior to the sentencing hearing and, if so, why his attorney did not do so. Of course, Bradwell will have the burden to establish that the representation fell below an objective standard of reasonableness and that the inadequacy caused him to be prejudiced—meaning there would probably have been a different outcome but for the attorney's errors. *Strickland v. Washington*, 466 U.S. 668, 687-88, 694, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984).

We also note that a defendant's burden of proof for withdrawing a plea prior to sentencing is different from his or her burden of proof following sentencing. Here, had Bradwell's attorney filed a motion to withdraw plea prior to sentencing, his burden would have been to show good cause as opposed to manifest injustice. K.S.A. 2015 Supp. 22-3210(d). Accordingly, we find that Bradwell has alleged sufficient facts—that he attempted to communicate with his attorney several times prior to sentencing to request that he file a motion to withdraw plea—to justify an evidentiary hearing. We, therefore, vacate the order summarily denying the motion for ineffective assistance of counsel and remand this matter for further proceedings.

Constitutional Attacks on Criminal Restitution

Bradwell next contends we should vacate the restitution order entered by the district court. In particular, he contends that the Kansas criminal restitution scheme violates § 5 of the Kansas Constitution Bill of Rights and, as applied to him, violates the Sixth Amendment to the United States Constitution. In response, the State points out that this issue was not raised before the district court. Likewise, the State contends that even if we decide the issue of constitutionality of the Kansas restitution scheme on the merits, Bradwell's challenge must fail.

Determining the constitutionality of a statutory provision presents a question of law subject to unlimited review. *State v. Riojas*, 288 Kan. 379, 388, 204 P.3d 578 (2009). Courts are to presume statutes are constitutional, and we must resolve all doubts in favor of a statute's validity. In other words, we must construe a statute as being constitutionally valid if there is any reasonable way to do so. *State v. Soto*, 299 Kan. 102, 121, 322 P.3d 334 (2014).

As a general rule, constitutional grounds for reversal asserted for the first time on appeal are not properly before us for review. See *State v. Godfrey*, 301 Kan. 1041, 1043, 350 P.3d 1068 (2015). However, there are three exceptions to this rule: (1) The newly asserted theory involves only a question of law arising on proved or admitted facts and is finally determinative of the case; (2) consideration of the theory is necessary to serve the ends of justice or to prevent the denial of fundamental rights; and (3) the judgment of the trial court may be upheld on appeal despite its reliance on the wrong ground or having assigned a wrong reason for its decision. *State v. Phillips*, 299 Kan. 479, 493, 325 P.3d 1095 (2014).

*4 Bradwell contends that the first two exceptions are applicable in this case. However, we find that the first exception does not apply because a determination of the restitution issue is not determinative of this case. As indicated above, we are remanding this case for a *Van Cleave* hearing on the issue of ineffective assistance of counsel. In addition, even if we adopted Bradwell's argument and vacated the restitution order, the issue of restitution could still be presented to a jury. Similarly, we find that the second exception does not apply because Bradwell did not object to either the imposition of or the amount of restitution either at sentencing or in his postsentencing motions. See *State v. Jones*, No. 113,044, 2016 WL 852865, at *8-9 (Kan. App. 2016) (unpublished opinion) (citing *United States v. Dudley*, 739 F.2d 175, 179 [4th Cir. 1984]).

In a related issue, Bradwell also argues that the Kansas criminal restitution scheme violates the Sixth Amendment to the United States Constitution, as interpreted by *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L.Ed. 2d 435 (2000). Once again, Bradwell failed to raise this issue before the district court and, for the reasons stated above, we decline to address the issue on the merits. Furthermore, even if we were to decide this issue on the merits, we note that a panel of this court in *State v. Huff*, 50 Kan. App. 2d 1094, 1103-04, 336 P.3d 897 (2014), held that the imposition of restitution does not implicate *Apprendi*. Specifically, the *Huff* court reasoned:

> "[B]ecause restitution ... is limited to the victim's actual loss, it lacks a punitive element and therefore is not punishment. [Citations omitted.] Because the key language in *Apprendi* refers to the requirement that any fact which increases the maximum penalty for a crime be proven to a jury and because restitution is not a penalty, Huff's Sixth Amendment rights were not violated when the district court made factual findings to impose a restitution requirements upon her." 50 Kan. App. 2d at 1100.

Regardless of whether restitution is ordered as a condition of probation under K.S.A. 2015 Supp. 21-6607(c)(2)—as it was in *Huff*—or is ordered as part of a prison sentence under K.S.A. 2015 Supp. 21-6604(b)(1)—as it was in the present case, we find the reasoning set forth in *Huff* to be persuasive. Additionally, we note that our Supreme Court has read both statutes as mandating that " 'restitution for a victim's damages or loss depends on the establishment of a causal link between the defendant's unlawful conduct and the victim's damages.' [Citation omitted.]" *State v. Dexter*, 276 Kan. 909, 912, 80 P.3d 1125 (2003). Accordingly, restitution is not punishment but rather is restorative in nature. See *State v. Pister*, No. 113,752, 2016 WL 4736619, at *6-7 (Kan. App. 2016) (unpublished opinion). We, therefore, conclude that Bradwell's Sixth Amendment rights have not been violated and that the restitution order entered in this case should be affirmed.

Affirmed in part, vacated in part, and remanded for an evidentiary hearing on the motion for ineffective assistance of counsel.

All Citations

386 P.3d 524 (Table), 2016 WL 7178771

End of Document

APPENDIX F

KeyCite Yellow Flag - Negative Treatment
Review Granted December 22, 2017
366 P.3d 667 (Table)
Unpublished Disposition
This decision without published opinion
is referenced in the Pacific Reporter.
See Kan. Sup. Ct. Rules, Rule 7.04.
Court of Appeals of Kansas.

STATE of Kansas, Appellee,

v.

Jalen J. JONES, Appellant.

No. 113,044.

March 4, 2016.

Review Granted Dec. 22, 2017.

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

Attorneys and Law Firms

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

Matt J. Maloney, assistant district attorney, Marc Bennett, district attorney, and Derek Schmidt, attorney general, for appellee.

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

MEMORANDUM OPINION

PER CURIAM.

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

FACTUAL AND PROCEDURAL BACKGROUND

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

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

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

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

Lawrence, Parker, and Gordon came down to the street. At this time, Jones and Hurt were standing toward the back of the car on the passenger side. Gordon approached Grier and the two men squared off to fight, but Young and Ashlock tried to stop the altercation from becoming physical. As this occurred, Lawrence was standing in front of a white truck parked in the street; Parker also was standing in the street. Neither Lawrence nor Parker got involved in the altercation between Gordon and Grier. Lawrence, Parker, and

Gordon were unarmed. As Young and Ashlock continued their efforts to separate Gordon and Grier, numerous gunshots were fired in rapid succession. Young saw two shooters firing from behind Grier's vehicle, where Jones and Hurt had been standing. Ashlock, meanwhile, saw that Jones and Hurt were, in fact, the shooters.

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

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

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

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

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

Jones testified that he was not paying attention to Lawrence at the time, as he was instead focused on the confrontation between Gordon and Grier. Jones claimed that Young began pushing Grier toward the Taurus, so Jones began backpedaling toward the car as well. Jones testified that he, Young, Ashlock, and Hurt all yelled for Grier to get in the car. Jones acknowledged that he never saw any of the other men with guns, but he testified that Lawrence and Parker had their hands in their pants as if they had guns.

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

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

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

manslaughter. However, the district court ruled that the evidence did not support an instruction on that charge.

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

JURY INSTRUCTION ON DEFENSE OF A PERSON

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

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

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

> " '(1) First, the appellate court should consider the reviewability of the issue from both jurisdiction and preservation viewpoints, exercising an unlimited standard of review; (2) next, the court should use an unlimited review to determine whether the instruction was legally appropriate; (3) then, the court should determine whether there was sufficient evidence, viewed in the light most favorable to the defendant or the requesting party, that would have supported the instruction; and (4) finally, if the district court erred, the appellate court must determine whether the error was harmless, utilizing the test and degree of certainty set forth in *State v. Ward*, 292 Kan. 541, 256 P.3d 801 (2011), *cert. denied* 132 S.Ct. 1594 (2012).' [Citation omitted.]" *State v. Woods*, 301 Kan. 852, 876, 348 P.3d 583 (2015).

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

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

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

of deadly force in defense of a person was necessary. *State v. Salary*, 301 Kan. 586, 593–94, 343 P.3d 1165 (2015).

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

> "The justification described in ... K.S.A. [2015 Supp.] 21–5222 ... is not available to a person who:
>
> ...
>
> "(c) otherwise initially provokes the use of any force against such person or another, unless:
>
> (1) Such person has reasonable grounds to believe that such person is in imminent danger of death or great bodily harm, and has exhausted every reasonable means to escape such danger other than the use of deadly force; or
>
> (2) in good faith, such person withdraws from physical contact with the assailant and indicates clearly to the assailant that such person desires to withdraw and terminate the use of such force, but the assailant continues or resumes the use of such force." K.S.A.2015 Supp. 21–5226(c).

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

Even considering the evidence in the light most favorable to Jones, we agree with the district court that a jury instruction on defense of person would have been factually inappropriate in this case. First, the evidence showed that Jones was an initial aggressor. After hearing what had happened at the QuickTrip, Jones, Hurt, and Grier went to two locations in order to locate the man who had punched Jones' brother. While Jones claims that he had no intention of starting a fight, his own testimony showed that he held a loaded gun behind his back when he stepped out of the car upon arriving at Ashlock's house. In other words, Jones had the weapon in his hand *before* Gordon allegedly made a threatening comment and *before* Jones claimed to have seen Lawrence and Parker with their hands in their pants. In such circumstances, Jones was the aggressor as identified by K.S.A.2015 Supp. 21–5226 and was not entitled to a self-defense instruction.

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

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

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

Jones testified that he eventually made his way back toward the car as Ashlock and Young tried to separate Gordon and Grier. Jones testified that he, Young, Ashlock, and Hurt all

yelled for Grier to get in the car. According to Jones, it was not until he thought he saw Gordon hit Grier that he got back out of the car with the two guns and started shooting.

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

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

LESSER OFFENSE OF ATTEMPTED VOLUNTARY MANSLAUGHTER

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

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

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

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

CONSTITUTIONAL CHALLENGES TO RESTITUTION

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

Determining a statute's constitutionality is a question of law subject to unlimited review. The appellate courts presume

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

Specifically, Jones argues that § 5 of the Kansas Constitution Bill of Rights preserves the right to a jury trial as it existed at common law when the Kansas Constitution was enacted. At common law, tort actions were triable to a jury and this included jury findings of causation and damages. Jones argues that the legislature abridged this right to a jury trial for tort actions by permitting victims of crimes to bypass a jury trial and receive a monetary judgment from a defendant through a court order of restitution under K.S.A.2015 Supp. 21–6604(b)(1). According to Jones, the legislature may abridge the constitutional right to a jury trial only if it complies with the quid pro quo test. Jones argues that K .S.A.2015 Supp. 21–6604(b)(1) violates the quid pro quo test because the legislature did not substitute any benefit to criminal defendants in return for stripping their right to have a jury determine their liability for and the amount of monetary damages to crime victims.

Constitutional grounds for reversal asserted for the first time on appeal are not properly before an appellate court for review. *State v. Godfrey,* 301 Kan. 1041, 1043, 350 P.3d 1068 (2015). However, there are three exceptions to this rule: (1) The newly asserted theory involves only a question of law arising on proved or admitted facts and is finally determinative of the case; (2) consideration of the theory is necessary to serve the ends of justice or to prevent the denial of fundamental rights; and (3) the judgment of the trial court may be upheld on appeal despite its reliance on the wrong ground or having assigned a wrong reason for its decision. *State v. Phillips,* 299 Kan. 479, 493, 325 P.3d 1095 (2014).

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

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

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

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

Affirmed.

All Citations

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

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APPENDIX G

KeyCite Yellow Flag - Negative Treatment
Review Granted November 27, 2018

417 P.3d 268 (Table)
Unpublished Disposition
This decision without published opinion
is referenced in the Pacific Reporter.
See Kan. Sup. Ct. Rules, Rule 7.04.
NOT DESIGNATED FOR PUBLICATION
Court of Appeals of Kansas.

STATE of Kansas, Appellee,

v.

Taylor ARNETT, Appellant.

No.
112,572

Opinion on remand filed May 4, 2018.

Review Granted November 27, 2018

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

Attorneys and Law Firms

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

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

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

MEMORANDUM OPINION

Per Curiam:

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

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

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

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

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

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

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

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

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

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

Even if restitution were considered punitive and, thus, punishment, Arnett's argument fails. The Kansas statutes governing restitution impose neither mandatory minimum amounts nor maximum amounts. See K.S.A. 2017 Supp. 21-6604(b)(1); K.S.A. 2017 Supp. 21-6607(c)(2). A mandatory minimum would be a specified amount a convicted defendant would have to pay a victim even if the victim had little or no financial loss. The statutes require no such obligation. The statutes, likewise, impose no cap or upper limit on restitution that might be exceeded only in exceptional circumstances or upon proof of statutorily identified facts. So even if restitution were punitive, the scheme does not entail mandatory minimums or maximums triggering the protections set out in *Alleyne* and *Apprendi*.

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

Affirmed.

All Citations

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

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CERTIFICATE OF SERVICE

This is to certify that a copy of Appellee's Brief was e-mailed to Sam Schirer, Kansas Appellate Defender Office, adoservice@sbids.org, on this 4th day of December, 2019.

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