

No. 22-125003-A

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

STATE OF KANSAS
Plaintiff-Appellee

vs.

BRIAN STUBBS
Defendant-Appellant

AMENDED BRIEF OF APPELLANT

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

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Nature of the Case

A jury convicted Mr. Brian S. Stubbs of interference with law enforcement, a severity level 9 nonperson felony, and criminal use of weapons, a class A nonperson misdemeanor. The jury acquitted him of attempted pre-meditated first degree murder and aggravated burglary. Mr. Stubbs was sentenced to 17 months of imprisonment plus 12 months of postrelease supervision. This is his direct appeal.

Statement of the Issues

- Issue I: K.S.A. 21-6301(a)(2) is unconstitutionally vague because the statute criminalizes the possession of a “dangerous knife,” which is overbroad, as it invites varying and unpredictable enforcement decision on an ad hoc and subjective basis.**
- Issue II: The evidence was insufficient to prove interference with law enforcement where Mr. Stubbs testified that he did not hear the officer shout at him to stop, and the bodycam footage does not definitively refute him.**

Statement of the Facts

In the early morning hours of March 19, 2021, in Lawrence, Brian Stubbs and Edward McCutcheon fought each other inside McCutcheon’s apartment. (R. IX, 282-288, 458-460.) Each man claimed that the other one started the fight. (R. IX, 286, 458.) They had only known each other for a few weeks and had spent a few

evenings hanging out together in that time. (R. IX, 313.) Ultimately, Mr. Stubbs stabbed McCutcheon in the lower abdomen, asserting that he acted in self-defense. (R. IX, 286-287, 295, 458-459.)

Mr. Stubbs' version of events

Mr. Stubbs testified that he went over to McCutcheon's apartment to hang out. (R. IX, 455.) He brought with him beers, cigarettes, and a Bluetooth speaker. (R. IX, 455.) He said that out of nowhere McCutcheon attacked him, knocked off his glasses, and was hitting and kicking him. (R. IX, 457-458.) During the scuffle, Mr. Stubbs saw a knife on the floor, grabbed it, and as he was trying to get up and trying to escape, he stabbed McCutcheon. (R. IX, 458-459.)

After that, he dropped the knife, but the two men continued to fight. (R. IX, 459-460.) Mr. Stubbs ultimately pocketed the knife because he thought if McCutcheon got ahold of it, then he would use it to kill Mr. Stubbs. (R. IX, 460.) After a while, both men are winded and they stop fighting. (R. IX, 461.) Mr. Stubbs testified that he hopped up and helped McCutcheon up, that McCutcheon said, "you need to go," but Mr. Stubbs needed to get his things and find his glasses. (R. IX, 462.)

Both men scanned the room for Mr. Stubbs' glasses. (R. IX, 462.) Neither of them found the glasses. (R. IX, 462.) Mr. Stubbs gathered his beers, cigarettes, and speaker and tried to "get out of there as quick as possible." (R. IX, 463.)

Mr. Stubbs walked over to the neighbor's apartment and knocked on the door. (R. IX, 463.) The neighbor answered the door, he was on the phone, and McCutcheon was inside. (R. IX, 463.) At this point, Mr. Stubbs heard sirens and testified: "So I hear sirens and I'm in shock. I was just, I was just in this traumatic event. And I'm just freaked out, I'm trying to find, I'm just trying to find like, I guess, like a safe spot, somewhere where I can just like calm down, just trying to get it together and stuff. So I end up running over to the, I'm running over to the Campus View Apartments." (R. IX, 464.)

He testified that while he was outside, he saw flashing lights out of his peripheral vision, but he never heard anyone yell that he was police or to stop. (R. IX, 465.)

McCutcheon's version of events

McCutcheon testified that Mr. Stubbs came knocking at his door that early morning, and that as soon as he opened the door, Mr. Stubbs stabbed him. (R. IX, 285.) Then the men fought, during

which McCutcheon fell into the wall and caused some damage to it, and Mr. Stubbs lost his glasses. (R. IX, 288, 291-292.) Next, McCutcheon testified that he got up and left the apartment “to get some help.” (R. IX, 293.) He went to his neighbor’s apartment and the neighbor called 911. (R. IX, 293.)

Police respond

Police arrived at McCutcheon’s apartment complex and saw to McCutcheon’s abdominal wound prior to the ambulance arriving. (R. IX, 322-323.) Officer Ashley heard on the police radio that a suspect was running, and he saw a man running while he was driving to the crime scene. (R. IX, 365-366.) So he stopped his car, got out and shouted, “Stop! Police!” (R. IX, 366; V, ex. 1.) The suspect continued to run into an apartment building. Officer Daniel Ashley pursued on foot and confronted Mr. Stubbs in the hallway. (R. III, 368-369.) The officer shouted at Mr. Stubbs to get down or he would be tasered, and Mr. Stubbs complied. (R. IX, 369; V, ex. 1.) He had in his possession at that time a beer can and the Bluetooth speaker. (R. IX, 377.)

The State charged Mr. Stubbs with attempted first-degree murder, aggravated burglary, interference with law enforcement, and criminal use of a weapon. (R. I, 22-23.) The jury acquitted Mr.

Stubbs of attempted first-degree murder (and the lesser included offenses of attempted second-degree murder and attempted voluntary manslaughter) and aggravated burglary. (R. I, 67-69.)

Arguments and Authorities

Issue I: K.S.A. 21-6301(a)(2) is unconstitutionally vague because the statute criminalizes the possession of a “dangerous knife,” which is overbroad, as it invites varying and unpredictable enforcement decision on an ad hoc and subjective basis.

Introduction

The law must “provide explicit standards for those who apply them” or it will amount to an “impermissibl[e] delegat[ion]” of “basic policy matters” by the legislative branch to “policemen, judges, and juries for resolution on an ad hoc and subjective basis.” *Grayned v. City of Rockford*, 408 U.S. 104, 108-09, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972).

K.S.A. 21-6301(a)(2) criminalizes the possession with intent to use unlawfully a “dangerous knife.” The lack of concrete definition for what constitutes “dangerous” ensures that enforcement decisions will be arbitrary. Thus, K.S.A. 21-6301(a)(2) is unconstitutionally vague.

Standard of Review and Preservation of the Issue

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

Mr. Stubbs' attorney made an oral motion for judgment of acquittal at the trial after the state rested. (R. III, 437.) In that motion, he asked for dismissal of this charge, stating that it was unconstitutional. (R. III, 437.) The district court found that it would be a jury issue and denied the motion. (R. III, 443.) In the event this court finds it was not preserved for appeal, this court can still consider this issue for the first time on appeal.

“Generally, constitutional claims cannot be raised for the first time on appeal.” *State v. Hillard*, 315 Kan. 732, 756–57, 511 P.3d 883, 906 (2022) (citing *State v. Daniel*, 307 Kan. 428, 410 P.3d 877 [2018]). However, there are exceptions, including when the appellant establishes “the claim involves only a question of law arising on proved or admitted facts and is determinative of the case; consideration of the claim is necessary to serve the ends of justice or prevent the denial of fundamental rights; or the district court is

right for the wrong reason.” *Hillard* at 757 (citing *State v. Alvarez*, 309 Kan. 203, 209, 432 P.3d 1015 [2019]).

This court should reach this constitutional issue because it meets two of the recognized exceptions—(1) it involves only a question of law that is determinative of the issue and arises from proved or admitted facts; and (2) consideration of the claim is necessary to serve the ends of justice or prevent the denial of fundamental rights.

As to the first exception, this is a pure question of law. And, the constitutionality of a statute is a question of law over which this court exercises de novo review. *State v. Harris*, 311 Kan. 816, 821, 467 P.3d 504 (2020).

As to the second exception, conviction under a vague statute violates the Due Process Clause. *State v. Dunn*, 233 Kan. 411, 418, 662 P.2d 1286, 1293 (1983) (“A statute must be sufficiently definite to meet due process standards.”) The right to due process is a fundamental right. Appellate courts have recognized this principle and addressed claims that statutes are unconstitutional for vagueness for the first time on appeal. *State v. Jenkins*, 311 Kan.

39, 52, 455 P.3d 779 (2020). Therefore, this court can and should reach the issue.

“Determining a statute's constitutionality is a question of law subject to unlimited review. An appellate court presumes statutes are constitutional and must resolve all doubts in favor of a statute's validity. Further, an appellate court must interpret a statute in a manner that renders it constitutional if there is any reasonable construction that will maintain the legislature's apparent intent.”
State v. Soto, 299 Kan. 102, Syl. ¶ 8, 322 P.3d 334 (2014).

Analysis

K.S.A. 21-6301(a)(2) reads:

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

“A two-part test exists to determine whether a statute is unconstitutionally vague. First, the court determines whether the statute conveys a sufficiently definite warning of the proscribed conduct considering common understanding and practice. Second, the court determines whether the statute adequately guards

against arbitrary and discriminatory enforcement.” *State v. Moore*, 38 Kan. App. 2d 980, 985, 174 P.2d 899 (2008).

The term “dangerous knife” is unclear and unconstitutionally vague. The Kansas legislature can describe weapons with great specificity. See K.S.A. 21-6301(a)(2) and (m)(4); K.S.A. 21-6304(d)(1). There are specific knives listed that cannot be carried concealed such as a dagger or dirk. Also listed is a “dangerous knife.” There is no language in the statute that defines a “dangerous knife” or any language about what type of evidence is needed to determine that a knife is a “dangerous knife.” The term “dangerous knife” is a catch all phrase that is vague and ambiguous. See *State v. Harris*, 311 Kan. 816, 822, 467 P.3d 504 (2020) (holding that “dangerous cutting instrument of like character” in K.S.A. 21-6304 is unconstitutionally vague).

While in 2009, in *State v. Moore*, 38 Kan.App.2d at 987, this court found that “dangerous knife” was not unconstitutionally vague, it should revisit that opinion in light of the Kansas Supreme Court’s 2020 ruling in *Harris*. This court’s analysis in *Moore* focused on the first part of the two-part test, that is, whether the statute conveys a sufficiently definite warning of the proscribed conduct to

a person of common intelligence. *Moore* at 986. Here, it is the second part of that test—whether the statute adequately guards against arbitrary and discriminatory enforcement—that is at issue. As in *Harris*, the catch-all phrase “dangerous knife” cannot clear that hurdle.

Whether a person is arrested or charged with violating a law must depend on objective and discernable rules and not on guesswork. *Harris* at 823. The enforcers of this statute face considerable difficulty. How will they know for sure whether an instrument is a “dangerous knife?” It is highly subjective. It is undisputed that Mr. Stubbs did not knowingly possess with intent to use unlawfully against another, a dagger, dirk, billy, blackjack, slungshot, straight-edged razor, throwing star, or stiletto. But what is a dangerous knife? Does it depend on how sharp the cutting edge is? Does it depend on the length of the blade? Or whether it is serrated? Because we cannot discern an objective standard for enforcement, the term “dangerous knife” is unconstitutionally vague. Therefore, Mr. Stubbs’ conviction should be reversed.

Issue II: The evidence was insufficient to prove interference with law enforcement where Mr. Stubbs testified that he did not hear the officer shout at him to stop, and the bodycam footage does not definitively refute him.

Preservation and Standard of Review

“There is no requirement that a criminal defendant challenge the sufficiency of the evidence before the trial court in order to preserve it for appeal.” *State v. Farmer*, 285 Kan. 541, 545, 175 P.3d 221 (2008). Therefore, this issue is properly before this Court for review.

Sufficiency of the evidence claims are reviewed to determine whether a rational fact finder could have found Mr. Stubbs guilty beyond a reasonable doubt after reviewing the evidence in the light most favorable to the state. *State v. Allen*, 52 Kan. App. 2d 729, 731, 372 P.3d 432 (2016).

Analysis

The record does not contain sufficient evidence to support a conviction for interference with law enforcement because the State failed to produce evidence that Mr. Stubbs knowingly obstructed Officer Ashley in discharging an official duty.

The state is required to prove all elements of the alleged crime beyond a reasonable doubt. *State v. Wade*, 295 Kan. 916, 925-

26, 287 P.3d 237 (2012); *In re Winship*, 397 U.S. 358, 362 (1970) (Due Process requires proof beyond a reasonable doubt). The state charged Mr. Stubbs with interference with law enforcement. (R. I, 23). To convict on this charge, the State must prove four elements. *First*, the person obstructed must be an identified law enforcement officer carrying out an official duty. *Second*, the defendant must knowingly and willingly obstruct or oppose that officer in the performance of that duty. *Third*, the State must prove the defendant knew or should have known the person he or she opposed was a law enforcement officer. *Fourth*, the defendant's action must substantially hinder or increase the burden of the officer in carrying out his or her official duty. See K.S.A. 21-5904(a)(3); *State v. Parker*, 236 Kan. 353, 364-65, 690 P.2d 1353 (1984).

The jury was instructed that the state had to prove that Mr. Stubbs “knowingly” obstructed Officer Ashley in discharging an official duty. (R. I, 61.) In this case, there is no evidence in which to infer that Mr. Stubbs knew that Officer Ashley shouted “Stop! Police!” at him outside the apartment building. Mr. Stubbs testified that he did not hear such a command. (R. IX, 465.) The bodycam evidence does not clearly show Mr. Stubbs until the two men are

inside the apartment building, at which point the officer issued a command to “get down” and Mr. Stubbs complied. (R. V.)

No evidence was presented as to how far away Mr. Stubbs was from Officer Ashley when the officer issued the first command to stop, or in what direction he was facing. The State failed to prove that Mr. Stubbs “knowingly” ran from Officer Ashley. In fact, the evidence showed that Mr. Stubbs ran from the Ousdahl apartment to the Campus View Apartments and was therefore running long before he could have ever seen or heard Officer Ashley, and before law enforcement was pursuing him. (R. IX, 464.)

Because the State failed to prove that Mr. Stubbs had the requisite knowledge to obstruct an official duty, the conviction for interference with law enforcement must be reversed.

Conclusion

For the foregoing reasons, this court must reverse Mr. Stubbs’ convictions.

Respectfully submitted,

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Certificate of Service

The undersigned hereby certifies that service of the above and foregoing Appellant's Brief was sent by emailing a copy to Suzanne Valdez, Douglas County Attorney, at daappeals@douglascountyks.org and by e-mailing a copy to Derek Schmidt, Attorney General, at ksagappealsoffice@ag.ks.gov on the 18th day of January, 2023.

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