NOT DESIGNATED FOR PUBLICATION

No. 95,908

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

STEVEN RAIBURN,
Appellant.

MEMORANDUM OPINION

Appeal from Elk District Court; DAVID A. RICKE, judge. Opinion filed April 22, 2010. Reversed and remanded.

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

Marla Foster Ware, county attorney, and *Steve Six*, attorney general, for appellee.

Before HILL, P.J., GREEN and MARQUARDT, JJ.

Per Curiam: Steven Raiburn asks us to overturn his felony conviction of possession of marijuana. We do reverse his conviction and remand the case for a new trial because the trial court failed to advise Raiburn of his right to a 12-person jury when the court asked the defendant whether or not he wanted to proceed with an 11-person jury. Prior cases teach us that a trial court is obliged to advise the defendant of his or her options before deciding whether to proceed with an 11-person jury. If the court fails to do so, it is reversible error.

We do not address Raiburn's issue concerning the admission of the marijuana into evidence because he failed to object to its admission at trial. With no contemporaneous objection, such an issue is not preserved for appeal.

The parties are aware of the facts concerning Raiburn's arrest and the State's seizure of the marijuana, and we will not repeat them here. But we will offer what the record yields concerning the jury issue. We cannot consider the marijuana issue. Our Supreme Court has instructed us that evidentiary claims must be preserved for appeal by way of a contemporaneous objection. When the marijuana was offered into evidence during the trial, Raiburn did not object. Thus, there was no contemporaneous objection. Going further, even though Raiburn filed and argued a motion to suppress the marijuana before trial he must still object at the time it is offered during the trial in order to preserve the issue for appeal. *State v. Houston*, 289 Kan. 252, 270, 213 P.3d 728 (2009).

Prior to Raiburn's trial, the district court raised the issue of choosing an alternative juror. During this discussion, the court stated that it understood that both parties would agree to proceed to trial with 11 jurors if a juror was lost during the course of trial. The State agreed. The court then stated, "Mr. House, let me ask you, is your client of the agreement . . . that matters can proceed to verdict with the 11 remaining jurors?" Defense counsel responded, "Yes, Your Honor. We have discussed it briefly out in the courtroom and we are agreeable to that. Isn't that right, Steve?" Raiburn replied, "Yeah." The district court then stated, "Let the record reflect the defendant himself has indicated that we will proceed with 11 jurors if we lose a juror . . . ."

During trial, the district court announced that one of the jurors had become disoriented and left. The court excused the juror, stating,

> "The record should show also at this juncture, pursuant to a prior stipulation of the parties to this case that should this eventuality take place, that a juror needed to leave or become

> disqualified for any reason, that we would continue this trial and proceed to verdict with 11 jurors rather than 12. With that stipulation already a part of the record, the Court will just continue with the trial at this stage with the 11 remaining jurors."

We address this fundamental issue.

Because Raiburn alleges a violation of a fundamental right, we review his claim for the first time on appeal. Our Kansas courts have long recognized the "fundamental nature" of an accused's right to a jury trial. See *State v. Irving*, 216 Kan. 588, 589, 533 P.2d 1225 (1975). Even though, ordinarily, we do not consider issues on appeal that have not been raised before the district court, we will do so when necessary to serve justice or prevent the denial of a fundamental right. See *State v. Shoptease*, 283 Kan. 331, 339, 153 P.3d 1208 (2007).

We examine the statute and prior cases.

Our statute that deals with this subject is K.S.A. 22-3403. It requires a jury of 12 to try a felony. But, "the parties may agree in writing, at any time before the verdict, with the approval of the court, that the jury shall consist of any number less than twelve." This statute has been interpreted to allow waivers made by a defendant in open court on the record and not just waivers made in writing. See *State v. Roland*, 15 Kan. App. 2d 296, 807 P.2d 705 (1991). The Roland court held that in order to effectively waive a 12-person jury, the defendant must (1) be advised by the court of the right to a 12-person jury, and (2) personally waive that right in writing or in open court. 15 Kan. App. 2d at 300.

Therefore we must reject Raiburn's claim that the district court lacked statutory authority to proceed with 11 jurors because his waiver was not in writing. Indeed, when defense counsel asked Raiburn whether he was willing to proceed with an 11-person jury, Raiburn said, "Yeah." The judge then stated, "Let the record reflect the defendant himself has indicated that we will proceed with 11 jurors if we lose a juror . . . ." In light

of the ruling in *Roland* we cannot say Raiburn's waiver was invalid simply because it was not in writing.

The trial court failed to advise Raiburn of his fundamental right to a jury of 12.

The record on appeal contains no evidence that the trial judge personally advised Raiburn of his right to a 12-person jury prior to asking him if he objected to proceed with an 11-person jury. The record only reflects Raiburn's agreement to an 11-person jury. This procedure conflicts with the holding in *Roland*. See 15 Kan. App. 2d at 300 (holding the district court must advise the defendant of his or her right to a 12-person jury). But *Roland* is not the only case that deals with this issue.

Once again, in *State v. Simpson*, 29 Kan. App. 2d 862, 32 P.3d 1226 (2001), a panel of this court held the personal advice of the court to the defendant of his or her right was crucial to establishing a record that supported a conclusion that the defendant made a knowing and voluntary waiver of his or her right to a jury of 12.

> "Asking Simpson whether he objected to an 11-member jury falls far short of advising him of his right to a jury of 12 jurors. Moreover, the trial court should not have shifted the responsibility of advising Simpson of his right to a 12-person jury to defense counsel.
>
> "At the very least, the trial court was required to advise Simpson of his right to a 12-person jury. The trial court should have also explained to Simpson that he had the option of continuing with an 11-member jury or opting for a mistrial. Because the trial court failed to advise Simpson of his right to a 12-person jury, he did not possess the necessary information to make a knowing and voluntary waiver of that right. Moreover, we cannot say that the trial court's error in failing to advise Simpson of the right to a 12-person jury is harmless because the right to a jury of 12 jurors is a fundamental right." 29 Kan. App. 2d at 869.

Contrast the feeble waiver made in this case with the waiver made in *State v. Bland*, 33 Kan. App. 2d 412, 415-16, 103 P.3d 492 (2004), *rev. denied* 279 Kan. 1008 (2005). In *Bland*, the court held a waiver was knowing and voluntary and effective where the district court told the defendant that if he gave up the right to a jury trial, he would never be able to try the case to a jury and would have to try it before a judge and enter a guilty plea or make some other disposition.

As in Simpson, the district court here merely asked Raiburn whether he objected to an 11-person jury. 29 Kan. App. 2d at 869. In light of the rulings in *Simpson* and *Roland* we must reverse this conviction and remand for a new trial.

Reversed and remanded.