

No. 12-108615-A

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

STATE OF KANSAS
Plaintiff-Appellee

vs.

JAMES EDEN
Defendant-Appellant

BRIEF OF APPELLANT

Appeal from the District Court of Shawnee County, Kansas
Honorable Mark Braun, Judge
District Court Case No. 10 CR 2447

Christina M. Kerls, #22234
Kansas Appellate Defender Office
Jayhawk Tower
700 Jackson, Suite 900
Topeka, Kansas 66603
(785) 296-5484
Attorney for the Appellant

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**CAROL G. GREEN
CLERK OF APPELLATE COURTS**

Table of Contents

Nature of the Case 1

Statement of Issues 1

Statement of Facts 1

Arguments and Authorities 4

Issue I: Mr. Eden’s conviction violates the Due Process Clause of the United States Constitution because the State of Kansas was estopped from prosecuting Mr. Eden for an offender registration violation when it was the actions of the State which made it impossible for Mr. Eden to complete his registration during the time required..... 4

State v. Holt, 285 Kan. 760, 175 P.3d 239 (2008)..... 5

State v. Gomez, 290 Kan. 858, 235 P.3d 1203 (2010)..... 5, 7

State v. Foster, 290 Kan. 696, 233 P.3d 265 (2010) 7

State v. Shopteese, 283 Kan. 331, 153 P.3d 1208 (2007)..... 7

Denning v. Johnson County, Sheriff’s Civil Service Board,
46 Kan. App. 2d 688, 266 P.3d 551 (2011)..... 7

State v. Black, 45 Kan. App. 2d 168, 244 P.3d 1274 (2011)..... 7

Cox v. State of Louisiana, 379 U.S. 559, 13 L. Ed. 2d 487,
85 S. Ct. 476 (1965)..... 8-11

Raley v. State of Ohio, 360 U.S. 423, 3 L. Ed. 2d 1344,
79 S. Ct. 1257 (1959)..... 8-11

Schad v. Arizona, 501 U.S. 624, 115 L. Ed. 2d 555,
111 S. Ct. 2491 (1991)..... 11

State v. Mossman, 294 Kan. 901, 281 P.3d 153 (2012)..... 12

Smith v. Doe, 538 U.S. 84, 155 L. Ed. 2d 164,
123 S. Ct. 1140 (2003)..... 12

Issue II: The district court violated Mr. Eden’s fundamental right to a fair trial when it refused to instruct the jury on the definition of “general intent” because Mr. Eden’s intent was substantially at issue...... 13

State v. Plummer, 295 Kan. 156, 283 P.3d 202 (2012). 14

State v. Ellmaker, 289 Kan. 1132, 221 P.3d 1105 (2009). 14

In re C.P.W., 289 Kan. 448, 4213 P.3d 413 (2009)..... 14

State v. Kirtdoll, 206 Kan. 208, 478 P.2d 188 (1970). 14

State v. Houston, 289 Kan. 252, 213 P.3d 728 (2009) 17

State v. Sappington, 285 Kan. 158, 169 P.3d 1096 (2007)..... 17

<i>Chapman v. California</i> , 386 U.S. 18, 17 L. Ed. 2d 705, 87 S. Ct. 824, <i>reh. denied</i> 386 U.S. 987, 18 L. Ed. 2d 241, 87 S. Ct. 1283 (1967).....	17
<i>State v. Ward</i> , 292 Kan. 541, 256 P.3d 801 (2011).....	17
Issue III: The State failed to present sufficient evidence to sustain Mr. Eden’s offender registration violation conviction.....	19
<i>State v. Davis</i> , 275 Kan. 107, 61 P.3d 701 (2003).....	19
<i>In re Winship</i> , 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).....	19
<i>In re C.P.W.</i> , 289 Kan. 448, 213 P.3d 413 (2009).....	19
<i>State v. Kirtdoll</i> , 206 Kan. 208, 478 P.2d 188 (1970).	19
PIK.CRIM.3d 54.01-A	19
Issue IV: The district court violated Mr. Eden’s Sixth and Fourteenth Amendment rights when it used his prior convictions to increase his sentence without requiring them to be proved to a jury beyond a reasonable doubt.....	21
<i>Apprendi v. New Jersey</i> , 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000).....	21
<i>State v. Ivory</i> , 273 Kan. 44, 41 P.3d 781 (2002).	21
<u>Conclusion</u>	21

Nature of the Case

A jury convicted James Eden of one count of offender registration violation. (R. II, 111). The district court sentenced him to 36 months probation with an underlying 120 month prison term. (R. II, 112). Mr. Eden appeals his conviction and his sentence. (R. II, 109).

Statement of Issues

- Issue I:** Mr. Eden's conviction violates the Due Process Clause of the United States Constitution because the State of Kansas was estopped from prosecuting Mr. Eden for an offender registration violation when it was the actions of the State which made it impossible for Mr. Eden to complete his registration during the time required.
- Issue II:** The district court violated Mr. Eden's fundamental right to a fair trial when it refused to instruct the jury on the definition of "general intent" because Mr. Eden's intent was substantially at issue.
- Issue III:** The State failed to present sufficient evidence to sustain Mr. Eden's offender registration violation conviction.
- Issue IV:** The district court violated Mr. Eden's Sixth and Fourteenth Amendment rights when it used his prior convictions to increase his sentence without requiring them to be proved to a jury beyond a reasonable doubt.

Statement of Facts

James Eden was required to register as an offender three times a year – during his birth month, which was November, then every four months. (R. X, 15). In November 2010, Mr. Eden lived in Shawnee County. (R. X, 50-51). Due to the high number of registered offenders in Shawnee County, an offender was required to make an appointment in order to register. (R. X, 31, 53).

In the middle of November of 2010, Mr. Eden called the Shawnee County Sheriff's Department to make an appointment to complete his November registration. (R.

X, 54-55). Mr. Eden had until the end of November to register. (R. X, 53).

When Mr. Eden called the Shawnee County Sheriff's Department in the middle of November, no one answered his call. (R. X, 54). He left a message for Emily Adams, the officer in charge of registration, to call him back so that he could make an appointment to complete his November registration. (R. X, 54). Ms. Adams never returned his call. (R. X, 54).

Mr. Eden called the Shawnee County Sheriff's Department a few days later to once again try to make an appointment to complete his November registration. (R. X, 55). This time he was given an appointment to complete his required November registration on December 8, 2010. (R. X, 54-55).

On December 8, 2010, Mr. Eden showed up at the Shawnee County Sheriff's Department to complete his November registration requirement. (R. X, 56). However, because he arrived ten minutes late for his appointment, he was not allowed to register. He was turned away and told to make another appointment. (R. X, 56). Mr. Eden made another appointment to complete his November registration requirement for December 16, 2010. (R. X, 56). Mr. Eden completed his offender registration on December 16, 2010 – the first date that the Shawnee County Sheriff's Department would allow him to register. (R. X, 11).

In Shawnee County, Kansas, there are roughly 800 registered offenders. (R. X, 15). Despite this high number of registered offenders, the Shawnee County Sheriff's Department only had one deputy that was in charge of handling the registrations and investigations. (R. X, 15). Because of this workload, the Topeka Police Department and the Shawnee County Sheriff's Department entered into a collaborative agreement to have

one investigator assigned to assist the sheriff's department in the criminal investigations of offender registration violations. (R. X, 15). In November and December of 2010, that investigator was Detective Bryan Wheelles from the Topeka Police Department. (R. X, 14-16).

On December 2, 2010, Detective Wheelles received notification from the Shawnee County Sheriff's Department that James Eden had not come in during November for his mandatory birthday month registration. (R. X, 16). Detective Wheelles testified that during his investigation he learned that the Shawnee County Sheriff's Department had given Mr. Eden an appointment on December 8, 2010, to register. (R. X, 19). Detective Wheelles testified that Mr. Eden was late to the December 8, 2010 appointment and was not allowed to register, but was given another appointment for later in December. (R. X, 20-21, 56).

Detective Wheelles made contact with Mr. Eden on December 15, 2010. Mr. Eden told Detective Wheelles that he had, in fact, showed up to register on December 8, 2010, but because he was ten minutes late to his appointment, the Shawnee County Sheriff's Department would not allow him to register. (R. X, 20-21; XI, State's Exhibit 1). Mr. Eden told Detective Wheelles that he immediately made another appointment to register for December 16, 2010. (R. XI, State's Exhibit 2). Despite having this information, Detective Wheelles arrested Mr. Eden on December 15, 2010. (R. X, 21). Mr. Eden was charged with an offender registration violation. (R. I, 11).

During trial, the evidence above was uncontested. Mr. Eden's theory of defense was that there was no intent to register late. As such, Mr. Eden requested that the jury be instructed on the definition of "general intent". (R. I, 59; X, 77). The district court refused

to give the requested instruction. (R. X, 83). The jury convicted Mr. Eden of offender registration violation. (R. X, 111). The district court granted Mr. Eden's motion for a downward dispositional departure and sentenced him, under criminal history "B", to 36 months probation with an underlying 120 month prison term. (R. X, 112). Mr. Eden appealed. (R. X, 109).

Arguments and Authorities

Issue I: Mr. Eden's conviction violates the Due Process Clause of the United States Constitution because the State of Kansas was estopped from prosecuting Mr. Eden for an offender registration violation when it was the actions of the State which made it impossible for Mr. Eden to complete his registration during the time required.

Introduction

Mr. Eden tried to comply with the offender registration law when he called to make an appointment to register in the middle of November. (R. X, 54). After never receiving a return phone call to schedule the appointment, Mr. Eden once again tried to comply with the law by calling a few days later. (R. X, 54-55). Mr. Eden tried to comply with the law when he arrived at the Shawnee County Sheriff's Department to register on December 8, 2010, the Shawnee County Sheriff's Department would not let him register. (R. X, 54). Mr. Eden again tried to comply with the law when he scheduled another appointment to register on December 16, 2010. (R. X, 54). Mr. Eden tried to comply with the law and he complete his offender registration on December 16, 2010. (R. X, 11). The only thing that prevented Mr. Eden from completing his registration prior to the expiration of his time to register was the actions of the State, through the Shawnee County Sheriff's Department. As such, the State was prevented from prosecuting Mr. Eden for the offender registration violation under the doctrine of Entrapment by Estoppel.

Mr. Eden's conviction of an offender registration violation violated the Due Process Clause of the Fourteenth Amendment of the United States Constitution and must be vacated.

Standard of Review

The question of whether a due process right has been violated is a question of law. *State v. Holt*, 285 Kan. 760, 774, 175 P.3d 239 (2008). This Court has unlimited review. *Holt*, 285 Kan. at 774.

This issue is reviewable even though it is raised for the first time on appeal.

While Mr. Eden's defense at trial very clearly relied on the fact that the Shawnee County Sheriff's Department prevented Mr. Eden from registering during the month of November, 2010, and Mr. Eden relied on the Shawnee County Sheriff's Department assertions and policies when taking the actions that he did, the exact Due Process violation alleged here was never raised in the district court. (R. X, 77). As a general rule, constitutional issues cannot be raised for the first time on appeal. *State v. Gomez*, 290 Kan. 858, 862, 235 P.3d 1203 (2010). However, there are three exceptions to this general rule:

- (1) The newly asserted claim involves only a question of law arising on proved or admitted facts and is determinative of the case;
- (2) consideration of the claim is necessary to serve the ends of justice or to prevent the denial of fundamental rights; and
- (3) the district court is right for the wrong reason.

Gomez, 290 Kan. at 862. This issue is reviewable under the first two exceptions.

i. The newly asserted claim involves only a question of law arising on proved or admitted facts and is determinative of the case

Whether Mr. Eden's due process rights were violated is a question of law. *Holt*, 285 Kan. at 774. If this Court were to find that Mr. Eden's due process rights were

violated by the prosecution and subsequent conviction of Mr. Eden, this claim would be determinative of the case. Finally, the facts of this case are uncontested. The State itself presented evidence at trial that Mr. Eden called the Shawnee County Sheriff's Department in the middle of November to make an appointment to register. (R. XI, State's Exhibit 1). Mr. Eden left a message for Emily Adams to return his call so that he could make an appointment to register. (R. XI, State's Exhibit 1). When Ms. Adams did not return his call, Mr. Eden called the Shawnee County Sheriff's Department again, and the Shawnee County Sheriff's Department schedule his appointment to register on December 8, 2010 – eight days after the expiration of his required month to complete his registration. (R. XI, State's Exhibit 1).

The State presented evidence, through the recorded interview of Mr. Eden, that when he arrived at the Shawnee County Sheriff's Department to register on December 8, 2010, he was not allowed to register because he was a few minutes late. (R. XI, State's Exhibit 1). At the end of the recorded interview, Detective Wheelles told Mr. Eden that he would check on his claim that he showed up to register on December 8, 2010. (R. XI, State's Exhibit 1). At trial, Detective Wheelles could not contest Mr. Eden's assertion that he went to the Shawnee County Sheriff's Department on December 8, 2010, to register but was not permitted to do so because he was a few minutes late. (R. X, 28-29). The State did not contest that Mr. Eden made another appointment to register after he was not allowed to register on December 8, 2010. (R. X, 28-29). The State did not contest that Mr. Eden did, in fact, complete his offender registration on the first occasion that the Shawnee County Sheriff's Department allowed him to – on December 16, 2010. (R. X, 11). Finally, the State, itself, presented evidence that Mr. Eden was not simply permitted

to walk into the Shawnee County Sheriff's Department at any time during his registration month and complete his required registration; he had to have an appointment. (R. X, 31).

Because (1) the facts of this case are undisputed, (2) the claim involves a question of law, and (3) the claim would be determinative of the case, the first exception applies. *Gomez*, 290 Kan. at 862. This Court can review this issue for the first time on appeal.

ii. Consideration of the claim is necessary to prevent the denial of fundamental rights.

Additionally, this issue is reviewable for the first time on appeal to prevent the denial of a fundamental right. As explained below, this issue involves a claim that Mr. Eden's prosecution and subsequent conviction violated the Due Process Clause of the Fourteenth Amendment of the United States Constitution because Mr. Eden relied on the State's implicit misrepresentations that he could register after November 30, 2010, and still be in compliance with the law. Because Mr. Eden's due process rights are implicated, review of this issue is necessary to prevent the denial of Mr. Eden's fundamental right to due process of law. *See State v. Foster*, 290 Kan. 696, 702 233 P.3d 265 (2010) (Foster's due process concerns warrant review, though raised for the first time on appeal); *State v. Shopteese*, 283 Kan. 331, 339, 153 P.3d 1208 (2007) (though not raised below, the competency issue merited addressing because a court's acceptance of a plea by an incompetent defendant implicates due process); *Denning v. Johnson County, Sheriff's Civil Service Board*, 46 Kan. App. 2d 688, 707, 266 P.3d 551 (2011) (because Mr. Mauer's argument implicated due process rights, the issue may be addressed for the first time on appeal); *State v. Black*, 45 Kan. App. 2d 168, 175-76, 244 P.3d 1274 (2011) (Because Mr. Wurtz' vagueness argument concerns his due process rights, the court can decide the issue for the first time on appeal to prevent the denial of fundamental rights).

Finally, the United States Supreme Court has reversed convictions on the grounds raised here even when the issue was not raised either in the district court or in the appellant's brief. In *Cox v. State of Louisiana*, 379 U.S. 559, 568-69, 13 L. Ed. 2d 487, 85 S. Ct. 476 (1965), a United States Supreme Court case address this issue raised here, the due process issue was not raised in the district court or in the appellant's brief. Rather the issue was recognized and raised by the Supreme Court. *Cox*, 379 U.S. at 568-69. Such procedure by the United States Supreme Court supports the assertion review of this issue for the first time on appeal is necessary to prevent the denial of Mr. Eden's fundamental right to due process of law.

Analysis

A. Mr. Eden's conviction of an offender registration violation violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution because a defendant may not be convicted based upon taking an action that the State leads him to believe complies with the law.

The United States Supreme Court has recognized that prosecution of a defendant who acts in reliance on statements from the State that his conduct is not illegal violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution. *Raley v. State of Ohio*, 360 U.S. 423, 425, 3 L. Ed. 2d 1344, 79 S. Ct. 1257 (1959). In *Raley*, the defendants were charged and convicted of refusing to answer certain questions put to them at sessions of the "Un-American Activities Commission" of the State of Ohio. *Raley*, 360 U.S. at 424. During the hearings, the chairman of the commission had told each of the defendants, either explicitly, or implicitly, that they could invoke their Fifth Amendment privilege against self-incrimination. *Raley*, 360 U.S. at 426-431.

However, the State of Ohio had a statute that granted immunity to any person appearing before a legislative committee from prosecution "on account of a transaction,

matter, or thing, concerning which he testifies.” *Raley*, 360 U.S. at 431. Based on the existence of this immunity statute, the self-incrimination privilege was not available to the defendant’s because their answers could not have incriminated them as they would not have subjected them to prosecution. *Raley*, 360 U.S. at 432. As a result, the defendants were convicted of failing to answer questions at a congressional hearing. *Raley*, 360 U.S. at 432-33.

The United States Supreme Court reversed the convictions of three of the defendants. *Raley*, 360 U.S. at 437. In so reversing, the Supreme Court stated:

[H]ere the Chairman of the Commission, who clearly appeared to be the agent of the State in a position to give such assurances, apprised three of the appellants that the privilege [against self-incrimination] in fact existed, and by his behavior toward the fourth obviously gave the same impression. Other members of the Commission and its counsel made statements which were totally inconsistent with any belief in the applicability of the immunity statute, and it is fair to characterize the whole conduct of the inquiry as to the four as identical with what it would have been if Ohio had had no immunity statute at all... While there is no suggestion that the Commission had any intent to deceive the appellants, we repeat that to sustain the judgment of the Ohio Supreme Court on such basis after the Commission had acted as it did would be to sanction the most indefensible sort of entrapment by the State – convicting a citizen for exercising a privilege which the State clearly had told him was available to him.

Raley, 360 U.S. at 437-38. The Court went on to hold that the Due Process Clause does not permit convictions to be obtained under such circumstances. *Raley*, 360 U.S. at 439.

The United States Supreme Court reiterated this holding in *Cox v. State of Louisiana*, 379 U.S. 559, 13 L. Ed. 2d 487, 85 S. Ct. 476 (1965). In *Cox*, a group of African American protestors were told that they were allowed to protest across the street from the courthouse. *Cox*, 379 U.S. at 569-70. However, the defendant was arrested and convicted of protesting too near a courthouse. *Cox*, 379 U.S. at 560. The Supreme Court reversed the defendant’s conviction on the ground he was given an assurance by the State, through a police officer, that it was not a violation of the law to protest across the

street from the courthouse. To later convict Mr. Cox for protesting where he was told he could “would be to sanction an indefensible sort of entrapment by the State – convicting a citizen for exercising a privilege which the State had clearly told him was available to him. *Cox*, 379 U.S. at 571 *quoting Raley*, 360 U.S. at 426. The Supreme Court once again held that the Due Process Clause does not permit convictions to be obtained under such circumstances. *Cox*, 379 U.S. at 571.

There is no Kansas case law regarding the doctrine of entrapment by estoppel outlined in *Raley* and *Cox*. This is an issue of first impression in Kansas. This case is directly comparable to *Raley* and *Cox*. In the present case, Mr. Eden was convicted of an offender registration violation for failing to register before December 1, 2010. (R. I, 11; II, 88). However, the uncontroverted evidence in this case established (1) that Mr. Eden had to have an appointment to register, and (2) his appointment, which he made in November of 2010, was scheduled for December 8, 2010 – 8 days after the expiration of his required time to register. (R. X, 19, 31, 53, 54-55). The State, through the Shawnee County Sheriff’s Department, implicitly told Mr. Eden that it was okay for him to complete his registration after November 30, 2010, when it scheduled his appointment to register on December 8, 2010. Mr. Eden relied on that assertion by the State. To prosecute and convict him for failing to register prior to December 1, 2010, when the State scheduled his appointment to register on December 8, 2010, “would be to sanction an indefensible sort of entrapment by the State – convicting a citizen for exercising a privilege which the State had clearly told him was available to him. *See Cox*, 379 U.S. at 571; *Raley*, 360 U.S. at 426. Mr. Eden’s conviction violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

The State may attempt to argue that Mr. Eden’s conviction does not violate due process because Mr. Eden did not actually register on December 8, 2010. However, this

argument would ignore the fact that the only reason Mr. Eden did not complete his registration on December 8, 2010, was because the State of Kansas would not let him. (R. X, 20-21, 28-29, 54-56; XI, State's Exhibit 1). Mr. Eden was a few minutes late for his appointment and the State of Kansas, through the Shawnee County Sheriff's Department, would not allow him to register. (R. X, 54-56; XI, State's Exhibit 1). Mr. Eden immediately made another appointment to register, as he could not register without an appointment. (R. X, 31, 53, 54-56). The date for the second appointment he was given was December 16, 2010. (R. X, 54). Mr. Eden registered on December 16, 2010 – the first day that the State of Kansas would allow him to do so. (R. X, 11).

The fact that Mr. Eden did not complete his registration on December 8, 2010, does not defeat his claim that his conviction violates due process. The State of Kansas prevented Mr. Eden from complying with the law on December 8, 2010. It stands to reason that if a defendant's conviction resulting from relying on the misleading advise of the State cannot stand as it violates due process, a conviction that is based on the State actively preventing a defendant from complying with the law also cannot stand as it violates due process. *See Cox*, 379 U.S. at 571; *Raley*, 360 U.S. at 426.

B. The Shawnee County Sheriff Department's operating procedures prevented Mr. Eden from timely completing his offender registration with resulted in his conviction and denied him fundamental fairness as required by the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

The Due Process Clause of the Fourteenth Amendment of the United States Constitution necessarily includes a requirement of fundamental fairness. *Schad v. Arizona*, 501 U.S. 624, 637, 115 L. Ed. 2d 555, 111 S. Ct. 2491 (1991). It is fundamentally unfair to uphold Mr. Eden's conviction when it was the result of the internal operating procedures of the Shawnee County Sheriff's Department and not the

result of any desire or attempt on Mr. Eden's part to circumvent or avoid his registration requirement.

The argument is supported by the stated purpose of the Offender Registration Act. The purpose of the Offender Registration Act is not to create more criminals by making it unduly burdensome and difficult for an offender to comply with his registration requirements. Rather, the purpose of the Offender Registration Act is to protect the public safety by providing notice to the public about one who has committed a crime requiring registration. *State v. Mossman*, 294 Kan. 901, 911, 281 P.3d 153 (2012) citing *Smith v. Doe*, 538 U.S. 84, 99, 155 L. Ed. 2d 164, 123 S. Ct. 1140 (2003). This is the rationale that has been used time and time again to allow changes in the registration requirement to apply retroactively. *Doe*, 538 U.S. at 99; *Mossman*, 294 Kan. at 911.

If offenders are required to register to protect the public safety, it only stands to reason that the legislature did not intend for county sheriff's departments to make it difficult, if not impossible for offenders to comply with their registration requirements. However, that is exactly what the Shawnee County Sheriff's Department did in this case.

Mr. Eden does not contest that Shawnee County has a high number of registered offenders. However, the high number of registered offenders should not increase the burden upon each of the individual offenders to comply with the law. The procedures that the Shawnee County Sheriff's Department put into place to deal with this high number of registered offenders should not make it more difficult, if not impossible for a defendant to comply with the law. And most importantly, a defendant should not be held criminally responsible when he cannot comply with the letter of the offender registration law due to the internal procedures of a particular county sheriff's department.

The concept of fundamental fairness, which is embodied in the Due Process Clause of the Fourteenth Amendment to the United States Constitution, requires that Mr. Eden not be convicted of a severity level five person felony and subjected to 120 months in prison because the high number of registered offenders in Shawnee County and the internal operating procedures of the Shawnee County Sheriff's Department made it impossible for him to complete his registration before December 1, 2010.

Conclusion

Mr. Eden's conviction for an offender registration violation violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution for the reasons stated above. Mr. Eden's conviction must be vacated.

Issue II: The district court violated Mr. Eden's fundamental right to a fair trial when it refused to instruct the jury on the definition of "general intent" because Mr. Eden's intent was substantially at issue.

Introduction

Mr. Eden's defense at trial was that he did not intend to register out-of-time. As such, prior to closing arguments, Mr. Eden requested that the jury be instructed on the definition of "general intent". Because Mr. Eden's state of mind was substantially at issue in this case, the district court erred in refusing to give the requested instruction.

Standard of Review

When reviewing an issue relating to jury instructions, the standard of review is as follows:

(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 *Ward*.

State v. Plummer, 295 Kan. 156, 163, 283 P.3d 202 (2012).

Analysis

i. This issue was properly preserved for appeal.

Mr. Eden preserved this issue for appeal. During the instructions conference, Mr. Eden requested that the jury be instructed on the definition of “general intent” because Mr. Eden’s intent was a critical issue in the case. (R. I, 59; X, 77).

ii. The instruction was legally appropriate.

The specific instruction requested was the definition of general intent provided in PIK.CRIM.3d 54.01-A. (R. I, 59; X, 77). While this instruction is not recommended for general use, it is appropriate where the crime charged requires only a general criminal intent and the state of mind of the defendant is a substantial issue in the case. *State v. Ellmaker*, 289 Kan. 1132, 1141, 221 P.3d 1105 (2009).

An offender registration violation is a general intent crime. *In re C.P.W.*, 289 Kan. 448, 455-456, 213 P.3d 413 (2009). Therefore, the first prong of the test was met in this case. Additionally, Mr. Eden’s state of mind was a substantial issue in this case. In fact, it was the only issue in this case. In order to establish a “general intent”, the State need not prove that a defendant intended to commit a crime, but rather, it must prove that the defendant intended to do the act which constituted a crime. *State v. Kirtdoll*, 206 Kan. 208, 209, 478 P.2d 188 (1970).

In this case, it was uncontested that Mr. Eden did not register until December 16, 2010. (R. X, 11). The only question was whether he waited until December 16, 2010, to register because he intended to or because he was prevented by the Shawnee County

Sheriff's Department from registering on time. Mr. Eden's intent, his state of mind, was a substantial issue in this case.

iii. Sufficient evidence, viewed in the light most favorable to Mr. Eden, supported the instruction.

There was sufficient evidence presented to establish that Mr. Eden's state of mind was a substantial issue in this case; thus, the district court should have given the requested instruction. The evidence in this case was uncontroverted. Mr. Eden did not challenge the fact that he did not actually complete the registration process until December 16, 2010. (R. X, 11). However, he explained that he tried to register during the required time period, but was prevented from doing so. (R. X, 53-55).

Specifically, Mr. Eden testified that he called the Shawnee County Sheriff's Department to make an appointment to come in and complete his registration requirement in the middle of November. (R. X, 54). However, no one answered the phone so he left a message for Emily Adams, the deputy in charge of offender registration, to call him back so that he could make an appointment. (R. X, 54-55). Ms. Adams never called him back. (R. X, 54-55). A few days later, still in November, Mr. Eden once again called the Shawnee County Sheriff's Department to make an appointment to complete his offender registration requirement. (R. X, 54-55). This time he was given an appointment, but that appointment was not until after the expiration of his required registration time period. (R. X, 55). Mr. Eden was required to have an appointment to register. (R. X, 31, 53).

Mr. Eden went to the Shawnee County Sheriff's Department on December 8, 2010, to complete his offender registration requirement, but he was turned away and not allowed to register because he was a few minutes late for his appointment. (R. X, 55). He was not allowed to register until his next scheduled appointment on December 16, 2010.

(R. X, 11, 55).

The State's sole witness, Detective Bryan Wheelles, did not contest this evidence. (R. X, 14-24). Detective Wheelles confirmed that Mr. Eden had an appointment to complete his offender registration requirement on December 8, 2010. (R. X, 19). He did not contest that that appointment was made in November – during the time frame in which Mr. Eden was supposed to have completed his offender registration requirement. (R. X, 19, 27-29). He confirmed the fact that in Shawnee County an offender must have an appointment to complete his offender registration requirement. (R. X, 31).

The evidence presented in this case indicated that Mr. Eden intended to complete his offender registration requirement prior to November 30, 2010. He attempted to register in the middle of November when he called the Shawnee County Sheriff's Department to make an appointment. It was through no fault of Mr. Eden's that his call was not returned. However, when the call was not returned, Mr. Eden attempted once again to complete the act of registering, when he called back and received an appointment for December 8, 2010. It was through no fault of Mr. Eden's that his appointment time was not scheduled until after the expiration of his required registration time.

Mr. Eden once again attempted to register when he went to the Shawnee County Sheriff's Department on December 8, 2010. But because he was a few minutes late, he was not permitted to register. Mr. Eden did not intend to do the act which constituted a crime, because he had every intention of completing his offender registration requirement at the first opportunity provided him by the Shawnee County Sheriff's Department.

Sufficient evidence was presented to establish that Mr. Eden's intent was a substantial issue in this case. Thus, failing to give the instruction on the definition of "general intent" was error.

iv. *The error was not harmless.*

A defendant has a fundamental right to present his theory of defense. *State v. Houston*, 289 Kan. 252, 261, 213 P.3d 728 (2009). This includes the right for the jury to be instructed on a defendant's theory of defense. *State v. Sappington*, 285 Kan. 158, 164-65, 169 P.3d 1096 (2007). A defendant's fundamental right to a fair trial is violated when he is not permitted to present his theory of defense. *Houston*, 289 Kan. at 261. While Mr. Eden was not prevented from presenting the evidence that supported his theory of defense, the failure to instruct the jury on the definition of "general intent" deprived Mr. Eden the right of establishing the legal significance of the evidence presented. As such the error was not harmless.

When the error complained of affects a right guaranteed by the United States Constitution, as this one does, this Court should apply the constitutional harmless error analysis defined in *Chapman v. California*, 386 U.S. 18, 17 L. Ed. 2d 70587 S. Ct. 824, *reh. denied* 386 U.S. 987, 18 L. Ed. 2d 241, 87 S. Ct. 1283 (1967), in which case the error may only be declared harmless where the State proves beyond a reasonable doubt that the error complained of did not affect the outcome of the trial in light of the entire record. *State v. Ward*, 292 Kan. 541, 569, 256 P.3d 801 (2011). In other words, the State must prove beyond a reasonable doubt that there was no reasonable possibility that the error affected the verdict. *Ward*, 292 Kan. at 569. In the present case, the State cannot prove that there was no reasonable *possibility* that had the jury would not have reached a different verdict had it been instructed on the definition of "general intent".

As explained above, the only issue in this case was whether Mr. Eden intended to do the act which constituted a crime; meaning, did he fail to register during November

intentionally. The uncontroverted evidence in this case supported a finding that Mr. Eden did not fail to register during November through any fault of his own, but rather because he was not permitted to register during November by the Shawnee County Sheriff's Department. The jury needed to be instructed that Mr. Eden's criminal act had to be intentional because of the State's arguments throughout the case.

In opening statement, the State told the jury:

This case is not a case about whether he wanted to register, it's not a case about whether he intended to register, this case is about whether did he register in November of 2010 as required by law, or did he not register in November of 2010 as required by law.

(R. X, 11). During closing argument, the State again argued that that Mr. Eden committed the crime simply by failing to complete his registration in November. (R. X, 96).

The jury needed an instruction to explain to it that it had to find that the act must be intentional. This is especially true given the fact that the elements instruction for the offender registration violation charge that the jury was given did not state that the jury had to find that Mr. Eden's conduct was intentional. (R. II, 88).

The error in failing to instruct the jury on the definition of "general intent" was not harmless. Because Mr. Eden's intent was the only issue in this case, the State cannot prove beyond a reasonable doubt that had the jury been instructed on the definition of "general intent" that there is no reasonable *possibility* that the jury would have reached a different verdict and acquitted Mr. Eden.

Conclusion

Because Mr. Eden's intent was substantially at issue, the district court erred in refusing to instruct the jury on the definition of "general intent". Mr. Eden's conviction should be reversed.

Issue III: The State failed to present sufficient evidence to sustain Mr. Eden's offender registration violation conviction.

Introduction

In order to convict Mr. Eden of an offender registration violation, the State had to prove, beyond a reasonable doubt, that he intentionally failed to complete his offender registration requirement in November of 2010. Because the State failed to present evidence to establish this, it failed to present sufficient evidence to sustain Mr. Eden's conviction.

Standard of Review

“When the sufficiency of the evidence is challenged in a criminal case, the standard of review on appeal is whether, after review of all of the evidence, viewed in the light most favorable to the prosecution, the appellate court is convinced that a rational factfinder could have found the defendant guilty beyond a reasonable doubt.” *State v. Davis*, 275 Kan. 107, 118, 61 P.3d 701 (2003).

Analysis

Under the Due Process Clause of the Fourteenth Amendment, the State has the burden to prove each element of a crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 25 L. Ed. 2d 368 364, 90 S. Ct. 1068 (1970). An offender registration violation is a general intent crime. *In re C.P.W.*, 289 Kan. 448, 455-456, 213 P.3d 413 (2009). In order to establish a “general intent”, the State need not prove that a defendant intended to commit a crime, but rather, it must prove that the defendant intended to do the act which constituted a crime. *State v. Kirtdoll*, 206 Kan. 208, 209, 478 P.2d 188 (1970). Intentional means “willful and purposeful”. PIK.CRIM.3d 54.01-A.

The State failed to present any evidence to establish that Mr. Eden failed to register in November on purpose. In fact, the State's evidence established that Mr. Eden intended to complete his offender registration requirement in November, but was unable to do so because of the Shawnee County Sheriff's Department.

Detective Wheelles testified in Shawnee County there are approximately 800 registered offenders. (R. X, 16). Because of the volume of offenders in Shawnee County, the Sheriff's Department required offenders to make an appointment in order to complete their registration requirement. (R. X, 31, 53). Detective Wheelles testified that Mr. Eden had an appointment on December 8, 2010, to complete his November registration requirement (R. X, 19). The State did not contest the fact that this appointment was made in November. (R. X, 19, 27-29). The State also did not contest that Mr. Eden attempted to contact the Shawnee County Sheriff's Department in the middle of November to make an appointment to comply with his registration requirement. (R. X, 27-29).

Thus, the evidence in this case established that Mr. Eden intended to comply with his November registration requirement. The evidence in this case established that Mr. Eden was prevented from complying with his registration requirement because his appointment to register was not scheduled until December 8, 2010. The evidence in this case established that Mr. Eden was not permitted to register on December 8, 2010, but did register at his next appointment, on December 16, 2010. (R. X, 11. 54-55).

While it is uncontested that Mr. Eden did not register until December 16, 2010, the State presented no evidence to prove, beyond a reasonable doubt, that Mr. Eden's registering 16 days late was due to an intentional act on his part. The State failed to prove every element of an offender registration violation. Thus it presented insufficient

evidence to support Mr. Eden's conviction.

Conclusion

The State failed to present evidence that Mr. Eden possessed the requisite criminal intent. As such, it failed to present sufficient evidence to sustain Mr. Eden's conviction and his conviction must be reversed.

Issue IV: The district court violated Mr. Eden's Sixth and Fourteenth Amendment rights when it used his prior convictions to increase his sentence without requiring them to be proved to a jury beyond a reasonable doubt.

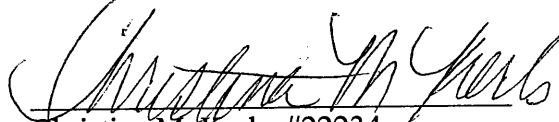
Mr. Eden's prior convictions were not included in the complaint, and the State was not required to prove those convictions to a jury beyond a reasonable doubt. Under *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000), any fact that increases the maximum penalty a defendant may receive must be included in the charging document, put before a jury, and proved beyond a reasonable doubt. Although Mr. Eden's prior criminal history was used to enhance his sentence, his criminal history was not included in the complaint, nor was the State required to prove his criminal history beyond a reasonable doubt. The requirements set forth in *Apprendi* were therefore not met in Mr. Eden's case, resulting in a violation of his rights under the Sixth and Fourteenth Amendments. Mr. Eden acknowledges that this Court has previously decided this issue, but includes it to preserve it for federal review. *State v. Ivory*, 273 Kan. 44, 41 P.3d 781 (2002).

Conclusion

The district court committed reversible error when it refused to instruct the jury on the definition of "general intent". Additionally, the State failed to present sufficient evidence to sustain Mr. Eden's conviction. Mr. Eden's convictions should be reversed.

Alternatively, the district court violated Mr. Eden's Sixth and Fourteenth Amendment rights when it used his prior convictions to increase his sentence without requiring them to be proved to a jury beyond a reasonable doubt. Mr. Eden's sentence must be vacated and his case remanded for resentencing under criminal history "I".

Respectfully submitted,

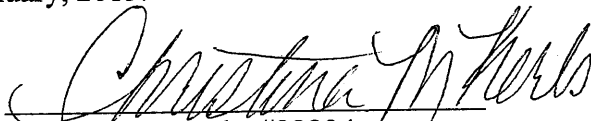


Christina M. Kerls, #22234

Kansas Appellate Defender Office
Jayhawk Tower
700 Jackson, Suite 900
Topeka, Kansas 66603
(785) 296-5484

Certificate of Service

The undersigned hereby certifies that service of the above and foregoing brief was made by mailing two copies, postage prepaid, to Chad Taylor, Shawnee County District Attorney, 200 SE 7th, Suite 214, Topeka, KS 66603-3922; and by delivering one copy by building mail to Derek Schmidt, Attorney General, 120 SW 10th Ave, 2nd floor, Topeka, KS, 66612 on the 28th day of January, 2013.



Christina M. Kerls, #22234