No. 12-108792-A

IN THE COURT OF APPEALS OF THE
STATE OF KANSAS

STATE OF KANSAS
Plaintiff-Appellee

v.

CATHY L. HENDRY
Defendant-Appellant

BRIEF OF APPELLEE

Appeal from the District Court of Franklin County, Kansas
Honorable Judge Thomas Sachse, Judge
District Court Case No. 12 CR 21

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Nature of the Case

The defendant, Cathy Hendry, was convicted of one count of attempted first degree murder and required to register as an offender pursuant to the Kansas Offender Registration Act. She appeals from her conviction and the court's order requiring registration.

Statement of the Issues

Issue I: **There was ample evidence to support a jury verdict of guilty.**

Issue II: **The district court did not abuse its discretion in denying the defendant's motion for a mistrial during voir dire.**

Issue III: **The district court did not violate the defendant's rights under *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), by requiring her to register as an offender.**

Statement of the Facts

The defendant and the victim in this case, Joseph Soppe, began a romantic relationship in September of 2011. (R. Vol. IX, p. 193). Soppe stayed at the defendant's home on numerous occasions between October, 2011 and January, 2012. (R. Vol. IX, pp. 193-94). During that time frame, Soppe moved some of his property into the defendant's home, but he maintained his separate residence. (R. Vol. IX, pp. 193-95, 199; R. Vol. X, pp. 427-28).

In mid January, 2012, Soppe had a change of heart about the relationship and decided to move most of his belongings out of the defendant's residence on January 15th while she was at church. (R. Vol. IX, pp. 194-95). Soppe testified that the only item of his that remained at the defendant's residence was his daughter's inflatable bounce house and blower. (R. Vol. IX, p. 195, 200). He further testified that after he moved his belongings out, the defendant "just showed up" at his house in

Burlingame, Kansas as if she "popped up out of nowhere[.]" (R. Vol. IX, p. 197; R. Vol. X, p. 433). Soppe and the defendant continued to call and text each other and saw each other in person on a few occasions between January 15 and January 25, 2012. (R. Vol. IX, pp. 195-96; R. Vol. X, pp. 435-42).

On the evening of January 25, 2012, Soppe decided to end the relationship with the defendant. (R. Vol. IX, pp. 196). Soppe was at work in Topeka and responded to texts from the defendant asking him what he wanted out of the relationship. (R. Vol. IX, pp. 196-97). Soppe chose to break up with the defendant via text because he was at work and unable to talk on the phone, and also because he was uncomfortable with the defendant's previous decision to show up unannounced at his home in Burlingame approximately 10 days earlier. (R. Vol. IX, pp. 197-98). The defendant was upset by Soppe's decision to break up with her; it was "painful" and "hurtful" and she "felt rejected[.]" (R. Vol. X, p. 446). She also felt like her "heart had been ripped out of [her] chest" and that it was "very cruel" that Soppe informed her of the breakup via text. (R. Vol. X, p. 447). However, she claimed she was never angry with Soppe, despite not wanting the relationship to end and the fact that she felt betrayed. (R. Vol. X, pp. 470-71). Soppe testified that the defendant sent a long text "chewing [Soppe] out" and calling him selfish. (R. Vol. IX, p. 198).

The next morning, January 26th, Soppe got off work at 7 a.m. and texted the defendant to ask if Soppe could come get his daughter's bounce house and blower. (R. Vol. IX, pp. 198-200). Soppe notified the defendant that he was on his way from Topeka to retrieve his remaining property, and she responded that she was not ready for him to come over. (R. Vol. IX, p. 201). According to Soppe's testimony, the

defendant's reason for not being ready was that her kids did not yet know that the couple was breaking up, and the defendant did not want the kids to be at the house when Soppe arrived. (R. Vol. IX, pp. 201-02). The defendant also stated that she didn't want Soppe to come over that morning because she had a job class to go to at 9 a.m. (R. Vol. X, pp. 472-73). Soppe agreed to wait until the kids had left for the day and asked the defendant to place his daughter's bounce house on the driveway outside so that he could just pick it up and leave. (R. Vol. IX, p. 202; R. Vol. X, p. 453).

After learning that Soppe would be coming over, the defendant instructed her son, Joseph Hendry, to go upstairs with her to his bedroom. There, the defendant told the younger Hendry that she and Soppe were breaking up and that she wanted one of her son's guns; she also told her son that she loved him. (R. Vol. IX, pp. 165-67). Although the defendant saw that Joseph Hendry had his .22 rifle lying on his bedroom floor, along with boxes of ammunition for it, she asked him to give her the 20 gauge shotgun that was located on his gun rack on the wall. (R. Vol. IX, pp. 167, 171; R. Vol. X, pp. 476-77). Joseph testified that his mother was familiar with the .22 rifle and that she had shot it before; he also noted that the rifle was operable at the time of this incident. (R. Vol. IX, pp. 164, 183-84).

At the defendant's request, Joseph showed his mother how the shotgun worked, including how to load and unload the weapon and the need to pull the hammer back for the gun to be ready to fire. (R. Vol. IX, pp. 175-77). Joseph testified that his mother asked for two shells for the single barrel shotgun, and he gave her two turkey loads. (R. Vol. IX, p. 169). He also testified that the shotgun was unloaded when he gave it to the defendant. (R. Vol. IX, pp. 162, 177). The

defendant testified that her son loaded one of the shells in the shotgun and she asked for a second one. She also claimed that, despite the fact that her son always kept his guns unloaded, he handed her the shotgun with a shell in the barrel. (R. Vol. X, pp. 478-79). In any event, the defendant admitted that she asked for a second shell because she wanted one for insurance. (R. Vol. X, p. 479). After he had given the defendant the shotgun and the two shells, Joseph Soppe saw the defendant take all of those items downstairs into her bedroom. (R. Vol. IX, p. 177). The defendant admitted that she took the shotgun to her bedroom and that she placed the second shell on the dresser behind the TV. (R. Vol. X, p. 480).

Soppe arrived at the defendant's house around 8:15 a.m. expecting to see the bounce house in the driveway, but the bounce house was not there. (R. Vol. IX, p. 205). Soppe texted the defendant from his car and she opened the overhead garage door and walked out to meet him. (R. Vol. IX, p. 206). The two had a five to ten minute conversation just inside the opened garage door about why the relationship was ending. (R. Vol. IX, pp. 207-08). During the conversation, Soppe noticed that the bounce house was not on top of the dryer in the garage, which is where it had always been stored. (R. Vol. pp. 200, 207-08). Joseph Hendry also testified that he had never seen the bounce house located anywhere in the house other than in the garage, on what he believed to be an old washing machine. (R. Vol. IX, pp. 158-59). Joseph Hendry further testified that the bounce house was difficult to move around because it was heavy. (R. Vol. IX, pp. 159-60).

During the course of their conversation, Soppe asked the defendant where the bounce house was; she told him that she moved it to the back room of the house, a

distance that Soppe estimated to be 70 to 75 feet away from the garage. (R. Vol. IX, pp. 208-10). The defendant's stated reason for moving the bounce house, instead of placing it in the driveway as Soppe had requested, was so she could put it in her car to take to Soppe's house. (R. Vol. IX, p. 208). This was despite the fact that the defendant's car was located in the garage, very near to where the bounce house had been stored. (R. Vol. IX, pp. 208-09). The defendant admitted that though the bounce house was "heavy" and "awkward," she was able to move it the length of the house because she had an "adrenaline rush" that morning, but she denied ever being angry with Soppe. (R. Vol. X, p. 475). She stated that she put the bounce house in the back bedroom with a plastic sack containing Soppe's other belongings. (R. Vol. pp. 475-76). Soppe testified that to his knowledge he had left no property at the defendant's house except for the bounce house and the blower. (R. Vol. IX, pp. 208-09).

Soppe followed the defendant from the garage and through the house and entered the back bedroom after the defendant indicated to him that she had placed the bounce house there. (R. Vol. IX, p. 211). This spare bedroom is directly across a hallway from the defendant's bedroom; there are no doors leading outside from the back bedroom. (R. Vol. IX, p. 210). As Soppe went into the spare bedroom, the defendant turned into her bedroom across the hall. (R. Vol. IX, pp. 212-13). Soppe needed to walk almost all the way into the bedroom, with his back to the doorway, in order to reach the bounce house. (R. Vol. IX, p. 213). Sitting next to the bounce house Soppe found a plastic sack containing items that he did not recognize; he picked up the sack to ask the defendant what was in it. (R. Vol. IX, pp. 214-17). As

he exited the spare bedroom, Soppe saw the defendant coming around her bedroom door holding a shotgun, walking toward Soppe. (R. Vol. IX, pp. 217-18). The defendant was holding the gun in both hands, one on the guard and one near the trigger; Soppe saw the defendant's finger was actually on the trigger. (R. Vol. IX, pp. 219-20). The defendant also admitted that she put her finger on the trigger. (R. Vol. X, p. 488). As the defendant walked toward Soppe, she held the shotgun at waist level. The gun was pointed at an angle across Soppe's body; first, it was pointed toward his head but as he got closer, the defendant moved the gun toward Soppe's abdomen. (R. Vol. IX, pp. 223-24). Soppe believed at this point he was approximately one foot away from the gun and that if it had gone off, he would have been shot in the abdomen. (R. Vol. IX, p. 224). Soppe testified that the defendant had a "pretty serious" look on her face and that she appeared "determined to do whatever she was going to do;" Soppe believed that the defendant was going to shoot him. (R. Vol. IX, pp. 224-25). At no point did the defendant point the gun at herself. (R. Vol. X, p. 491, 494). In fact, despite the elaborate planning the defendant had engaged in prior to Soppe's arrival, she testified that she had never even considered how she was going to use the shotgun to kill herself. (R. Vol. X, p. 455, 482). The defendant testified that her intention was to kill herself in front of Soppe so that he felt "the hurt that [she] had and the pain;" however, she still denied being angry or wanting to punish Soppe. (R. Vol. X, pp. 460, 471).

Soppe reacted quickly upon seeing the shotgun and pinned the defendant back against her bedroom wall, with the gun across her chest. (R. Vol. IX, p. 225; R. Vol. X, p. 457-58). As Soppe grabbed the barrel of the shotgun, the defendant started to

pull the trigger, maybe four or five times. (R. Vol. IX, pp. 226-27). The defendant then tried to pull the hammer back on the weapon during the struggle, but Soppe stopped her from doing so. (R. Vol. IX, pp. 225, 228). After several minutes of struggling, Soppe was able to operate the release mechanism, causing a shell to be ejected from the shotgun; the shell ended up behind the dresser in the defendant's bedroom. (R. Vol. IX, pp. 230-31). That shell, and the shell that the defendant had placed on her bedroom dresser, were both eventually located and seized by law enforcement. (R. Vol. X, pp. 340-46). Again, at no point during this struggle did the defendant point or attempt to point the shotgun at herself. (R. Vol. IX, p. 230).

Soppe eventually obtained control over the shotgun and walked out of the house, leaving through the door to the garage. Soppe walked to his car and locked the gun in the vehicle. (R. Vol. IX, pp. 233-34). The defendant followed him from her bedroom out to the car and tried to get the shotgun from Soppe. (R. Vol. IX, p. 234). Soppe tried to use his phone to call the defendant's grandmother, but the defendant tried to stop him and told him she did not want her grandmother called. (R. Vol. IX, p. 235). When Soppe told the defendant he was calling the police, she stated that she didn't want to go to jail. (R. Vol. IX, p. 236). After Soppe called the police, the defendant continued to fight to try to get to the shotgun and to try to prevent Soppe from leaving. (R. Vol. IX, p. 241). Soppe had to push the defendant down onto the ground in an attempt to get into his vehicle to drive away, but the defendant got up and grabbed the driver's side door as Soppe tried to close it. The defendant pulled so hard on the door that the door panel separated. (R. Vol. IX, pp. 241-42).

After Soppe drove away, the defendant's claimed suicidal crisis "passed." (R. Vol. X, pp. 460-61). Though she was aware that there was another gun in her son's bedroom, the defendant did not attempt to retrieve it to cause herself harm. (R. Vol. X, pp. 497-98). In fact, almost immediately after Soppe left her home, the defendant drove herself to a job skills class in Ottawa, approximately 15-20 miles away from her home. (R. Vol. X, pp. 498-99). The defendant admitted the class was designed to help her gain employment and better her life. (R. Vol. X, p. 499). At no point did the defendant reach out to her grandmother, other family, friends, or her job skills class teacher, despite the events that had taken place less than an hour before at her house. (R. Vol. X, pp. 499-500). The defendant was again suicidal when she was confronted in her classroom by law enforcement, when she appeared "nervous" and told deputies that she "want[ed] to die." (R. Vol. X, pp. 329-34, 500-01). The defendant was placed under arrest at this point. (R. Vol. X, p. 333).

During voir dire at the trial, counsel for the State asked panel members if any of them knew any of the attorneys on the case. Juror John Niccum responded that he works for the Franklin County Sheriff's Department. (R. Vol. IX, p. 29). Niccum stated that he recognized State's counsel, but that he would be able to be fair and impartial if he were selected as a juror. (R. Vol. IX, pp. 29-30). The district judge then asked Niccum if he had any knowledge of the allegations in the case; Niccum stated that he only knew what the charges were on the arrest report. (R. Vol. IX, p. 30). The court then asked if Niccum had had any interaction with the defendant as a result of the charges; Niccum replied, "Just interaction as far as providing for her daily needs." (R. Vol. IX, p. 30). The remaining panel members were not informed

further about any of Niccum's duties, nor was there any discussion about the custody status of the defendant at the time of trial.

Additional facts will be discussed in the analysis section as necessary.

Argument and Authorities

Issue I: There was ample evidence to support a jury verdict of guilty.

A. Standard of Review

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. *State v. McCaslin*, 291 Kan. 697, 710, 245 P.3d 1030 (2011).

B. Analysis

i. Premeditation and intent.

Per jury instructions in the present case, in order to prove the defendant guilty of attempted first degree murder, the State was required to provide proof beyond a reasonable doubt that the defendant: 1) performed an overt act toward the commission of the crime of murder in the first degree; 2) that she did so with premeditation and with the intent to commit the crime of murder in the first degree; and 3) that she failed to complete commission of the crime of murder in the first degree. The jury was also instructed on the elements of the completed crime of first degree murder. (R. Vol. I, p. 60). The instructions defined "premeditation" for the jury as having thought the matter over beforehand or to form the design or intent to kill before the

act. (R. Vol. I, p. 64). The defendant does not challenge the propriety of these instructions.

The evidence of the defendant's premeditation was overwhelming in this case. Mr. Soppe had broken off a relationship with the defendant via text message the night before the incident. The defendant felt that that was "very cruel," "painful," and "hurtful" and that she felt "very rejected". (R. Vol. X, pp. 446-47). The defendant purportedly felt betrayed to the point that she planned to kill herself in front of Soppe to make him feel "hurt" and "pain," yet she claimed she was never angry with him about the break up. (R. Vol. X, pp. 460, 470-71).

As previously stated on pages three and four of the facts section, once the defendant learned that Soppe wanted to retrieve his bounce house and blower the day after the break up, she devised a plan to lure him into her house to shoot him. The defendant told Soppe that he should not come over until after her kids had left for school. She then ordered her son to go to his room with her and she asked him to show her how his shotgun worked. The defendant also requested two shells for the single barrel shotgun, meaning that in order to fire both shells, she would be required to unload the spent casing and place the second shell into the weapon. After learning how to operate the shotgun, the defendant took the weapon downstairs and placed it behind her bedroom door. One shell was loaded in the gun, and the defendant placed the second shell on a dresser right next to the bedroom door. (R. Vol. IX, pp. 162-69, 175-77, 201-02; R. Vol. X, pp. 479-80).

Despite Soppe's request for the defendant to place the bounce house outside on the driveway, the defendant carried the "heavy" and "awkward" bounce house

from its usual storage place in the garage all the way to the back spare bedroom of the house due to an alleged "adrenaline rush." (R. Vol. X, p. 475). This was a spare bedroom with no exit, other than walking back down the length of the entire house. (R. Vol. IX, p. 210). The defendant told Soppe she did this so that she could load all of his property into her car to take it to him despite the fact that the bounce house was normally kept in the garage mere feet away from the defendant's car; by carrying the bounce house to the opposite end of the house, the defendant carried it as far away from the car as she could. (R. Vol. IX, pp. 208-10).

By luring Soppe to this back room, the defendant ensured that he had no escape route. Soppe also testified that the bounce house was not near the doorway of the spare bedroom; he needed to walk all the way into the room to reach it, and as he did that, his back was inevitably to the only door leaving the room. (R. Vol. IX, pp. 212-13). The defendant went with Soppe down the hallway and entered her bedroom, the same bedroom where she had hidden the shotgun and the extra shotgun shell. (R. Vol. IX, pp. 210-11). Clearly all of the planning by the defendant demonstrated sufficient evidence that she planned to have Soppe in a place where he could not escape and where she could have easy access to the shotgun. The defendant even planned ahead and had an extra shotgun shell; the only need for two shells was if the defendant at least intended the first shell for Soppe. This evidence clearly shows premeditation on the part of the defendant to kill Soppe.

The defendant's intent to kill is clear from some of the same evidence. Her argument at trial was that she did not want to hurt Soppe, but that she wanted only to commit suicide. There are several problems with this argument. First, the defendant

claimed she was hurt and felt rejected by the breakup, but that she was never angry with Soppe. However, she testified that she wanted Soppe to feel "the hurt that [she] had and the pain" by killing herself in front of him. (R. Vol. X. pp. 460-471). To want to hurt an ex-lover so much that one wishes to commit suicide in front of them to punish them, but to have no anger toward that person, strains credulity. Viewed in the light most favorable to the State, a jury could easily infer that the defendant had anger toward Soppe, despite her denial.

Second, the jury could very easily reject the defendant's claim that the second shotgun shell was for "insurance." (R. Vol. X, pp. 451, 479). The more likely scenario, which the State argued at trial, was that the defendant may well have intended to commit suicide, but only after using the first shell to kill Soppe. The defendant would have had the jury believe that she would be able to go through the steps of shooting herself with a shotgun, breaking open the barrel, removing the spent shell, grabbing the second shell and loading it in the barrel, closing the breach, pulling back the hammer, repositioning the gun, and pulling the trigger, all while presumably having suffered at least some injury from a close range shotgun blast. Again, the jury could have very reasonably chosen to disbelieve the defendant's testimony and to have believed that the State's theory was more likely.

Third, it is important to note that at no point throughout the contact with Soppe did the defendant ever point the shotgun at herself. In fact, the only time it was pointed at any person was when it was pointed at Soppe, by the defendant. (R. Vol. IX, pp. 217-24; R. Vol. X, pp. 491, 494). The defendant admitted that despite all the planning she had done that morning, supposedly with the sole intent of

committing suicide in front of Soppe, she had never even considered how she was going to position the gun to complete the act. (R. Vol. X, pp. 455, 482). A reasonable jury could easily find that the defendant intended to kill Soppe, rather than herself.

Fourth, according to the defendant, her suicidal desires seemingly came and went at a moment's notice. Testimony, recounted on pages 5-8 of the facts section, about the defendant's behavior during the time she and Soppe were in the back hallway, bedroom, and out by Soppe's car indicated that the defendant had a very strong desire to obtain the shotgun and use it in Soppe's presence. Once Soppe left the scene, however, the defendant went back in the house and her claimed extreme suicidal crisis "passed." (R. Vol. X, pp. 460-61). The defendant knew that her son's .22 rifle was in his bedroom upstairs; she had access to it and she had used the weapon before. However, instead of following through with her plan to commit suicide, the defendant left her residence almost immediately to go to a *job skills class*. (R. Vol. X, pp. 461, 497-98) (emphasis added). This is wholly inconsistent with someone who just minutes before was in the deep throes of a depression so severe she devised an elaborate plan and had taken steps to end her life. (R. Vol. X, pp. 443-44, 451-55, 459-61). Conveniently, despite attending a class that was designed to better her life, the defendant was again suicidal once she was contacted by law enforcement in her classroom. (R. Vol. X, pp. 329-34, 500-01). The State suggests that there is ample evidence from which a jury could infer that the defendant's desires were homicidal, rather than suicidal, in nature; in fact, in light of all of the facts presented

at trial, the State contends that find to the contrary would be illogical. The defendant premeditated and had clear intent to kill Joseph Soppe.

ii. Overt acts.

In an attempt case, the State must show that the defendant committed an overt act toward the perpetration of a crime, with the intent to commit such crime, but that the defendant failed in the perpetration thereof or was prevented or intercepted in executing such crime. K.S.A. 2012 Supp. 21-5301(a). As noted in the defendant's brief, an overt act must be the "first or some subsequent step in the direct movement toward the commission of the crime after preparations are made." *State v. Peterman*, 280 Kan. 56, 61, 118 P.3d 1267 (2005).

Perhaps the strongest overt act was the defendant's action of pulling the trigger four or five times when Soppe was trying to wrestle the gun away from her. (R. Vol. IX, pp. 225-27). Prior to this even occurring, the defendant grabbed the shotgun from behind her bedroom door, with the knowledge that Soppe was mere feet away, across a hallway in the spare bedroom. (R. Vol. X, p. 488). She then leveled the gun in both hands, placed her finger on the trigger, and stepped out from behind her bedroom door. (R. Vol. X, p. 488). The defendant then moved nearer to the location where Soppe was, knowing that he would likely have his back to the door of the spare bedroom.

Before the defendant could reach the spare bedroom, Soppe turned around and was at or near the doorway to the spare bedroom. (R. Vol. X, p. 490). At this point, Soppe saw the gun pointed in his direction; he testified that the defendant held the gun at waist level and initially the weapon was pointed at an angle across his body.

As the defendant came through the doorway of her bedroom and Soppe approached her, the defendant started to move the gun from pointing around his head to pointing at his abdomen. (R. Vol. IX, pp. 223-24).

Only Soppe's actions prevented the defendant from being able to fire the shotgun at him. The defendant admitted that Soppe "came towards [her] very quickly" and pushed her against the wall. (R. Vol. X, pp.490-92). Even at this point, the defendant admitted she had her finger on the trigger. (R. Vol. X, p. 493). It was then that the defendant pulled the trigger of the weapon "maybe four or five" times as Soppe held the defendant against the wall and tried to get the gun from her. (R. Vol. IX, pp. 225-27). Soppe also observed the defendant attempt to pull the hammer back on the shotgun, which was necessary for the gun to fire. (R. Vol. IX, pp. 225, 228).

Thus, once the defendant pulled the trigger multiple times, there can be no question that the defendant had performed a first or subsequent step in the direct movement toward the completion of the crime of murder. Therefore, it was reasonable for the jury to have concluded that the defendant did commit the overt act of pulling the trigger of the shotgun multiple times with the intent to kill Joseph Soppe, but that she was intercepted or prevented from completing the act of killing him. In fact, Joseph Soppe's actions are the only reason the defendant was unable to complete the crime of first degree murder.

The defendant exhibited premeditation, an intent to kill, and she engaged in acts designed to complete the act of murder; when viewed in a light most favorable to the State, the evidence presented at trial easily supports the jury's verdict of guilty. It is important to note that the district judge denied the defendant's motion for directed

verdict in this case, citing K.S.A. 22-3419. (R. Vol. X, p. 363). The trial court found that there was "legally sufficient evidence upon which a reasonable fact finder could conclude guilt beyond a reasonable doubt." (R. Vol. X, p. 363). The district court reiterated at sentencing that "there was [sic] certainly sufficient facts to support the jury verdict in this case." (R. Vol. XI, p. 32). The State urges this Court to find the same.

Issue II: The district court did not abuse its discretion in denying the defendant's motion for a mistrial during voir dire.

A. Standard of Review

Review of a district court's denial of a motion for mistrial is analyzed under an abuse of discretion standard. *State v. Race*, 293 Kan. 69, 80, 259 P.3d 707 (2011). Declaration of a mistrial is a matter entrusted to the trial court's discretion, and the judge's choice will not be set aside without an abuse of that discretion. *State v. Dixon*, 289 Kan. 46, Syl. ¶ 1, 209 P.3d 675 (2009). A party seeking mistrial has the burden to show that they have been substantially prejudiced by the error. *State v. McClanahan*, 259 Kan. 86, 92, 910 P.2d 193 (1996).

B. Analysis

i. There exists no "fundamental failure" in the trial, nor did the trial court abuse its discretion.

A district court abuses its discretion if judicial action is (1) 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. *Race*, 293 Kan. at 80 (citing *State v. Ward*, 292 Kan. 541, 550-51, 256 P.3d 801 (2011)). In applying K.S.A. 22-3423(1)(c), a district court must determine (1) whether there was a fundamental failure of the proceedings; and (2) if so, whether it is possible to continue the trial without an injustice. See *Race*, 293 Kan. at 80.

In the present case, the district judge specifically stated on the record that while the court should not have questioned juror Niccum about his knowledge of the case or his interaction with the defendant, this was not sufficient grounds for a mistrial. The court specifically referred to the mistrial statute and found that the colloquy during voir dire did not constitute prejudicial conduct, in or outside the courtroom, which made it impossible to proceed with trial without injustice to either the defendant or the prosecution. (R. Vol. IX, pp. 248-52); K.S.A. 2012 Supp. 22-3423(1)(c). The court noted on the record that the defendant was in street clothes and she was not in handcuffs. The court further noted that it would be a fair inference, given the severity of the charges, for a prospective juror to assume that the defendant had at some point been arrested and had some interaction with employees of the Franklin County Sheriff's Office. (R. Vol. IX, p. 252). Even assuming that prospective jurors were able to infer that juror Niccum was a jailer and that the defendant was in custody, the district court determined that these facts did not make it impossible for the defendant to get a fair trial. (R. Vol. IX, p. 252).

The district court's conclusion comports with numerous Kansas cases. See *Race*, 293 Kan. at 80, 83-84 (juror saw defendant being transported in handcuffs through courthouse hallway; no abuse of discretion in denying motion for mistrial);

State v. Mayberry, 248 Kan. 369, 380-81, 807 P.2d 86 (1991) *overruled on other grounds by State v. Gunby*, 282 Kan. 39, 144 P.3d 647 (2006) (prospective juror, through no fault of the State, spoke of prior conviction of defendant in front of jury panel and was excused for cause; no error in denying motion for mistrial on that basis); *State v. Baker*, 227 Kan. 377, 382-83, 607 P.2d 61 (1980) (juror's reading of newspaper articles pertaining to trial not grounds for mistrial unless articles are of such a character they might result in prejudice to losing party; motion for mistrial properly denied because newspaper articles contained same information provided by trial judge's remarks); *State v. McCorgary*, 224 Kan. 677, 687, 585 P.2d 1024 (1978) (no error found when prospective juror expressed strong feeling in front of other prospective jurors that what she had read in papers about the case was true; denial of motion for mistrial was proper); *State v. Rhodes*, 219 Kan. 281, 281-84, 546 P.2d 1396 (1976) (trial court has discretion to grant or deny mistrial; even when juror speaks to a witness, juror misconduct will not constitute grounds for reversal unless it is shown to have substantially prejudiced the rights of the defendant or the prosecution).

The court found on the record that the discussion with juror Niccum was short in duration, that Niccum was excused for cause, and that the discussion had little to no impact upon the rest of the panel members; the court went so far as to say that it was confident that the other panel members were not tainted by the exchange. (R. Vol. IX, p. 252). To assert, as the defendant does in a conclusory statement in her brief, that the district court found that there was error or a "fundamental failure" in the trial is a clear misstatement of the trial court's statements on the record.

If there is no abuse of discretion by the district court in its conclusion that there was no fundamental failure in the trial, an appellate court will not need to reach the second question of whether prejudice was curable or whether injustice could otherwise be avoided with declaring a mistrial. *Race*, 293 Kan. at 84. Even if this Court finds that there was a fundamental failure, the district court noted on the record that the discussion had little to no impact on the other potential jurors and that it believed the jury pool was not tainted. Even if the exchange were somehow improper, any potential curative measures that the district court may have sought to provide would likely have brought even more attention to Niccum's comments. It is clear that the district court, which was in the best position to determine the impact of juror Niccum's statements, determined that any alleged prejudicial conduct was not so detrimental as to make it impossible for the defendant and the prosecution to obtain a fair trial.

The district judge analyzed uncontroverted facts under the applicable statute and determined that the discussion with juror Niccum did not entitle the defendant to a mistrial. This determination was not arbitrary, fanciful, or unreasonable; it was not based on an error of law; and it was not based on an error of fact upon which a legal conclusion was based. Accordingly, the court did not abuse its discretion in denying the defendant's motion for a mistrial.

ii. Even if error existed in this case, it was harmless error.

"A claim arising out of a defendant's right to a fair trial is based on the federal constitutional guarantee of due process. We therefore apply the federal constitutional harmless error rule." The party benefiting from the error, in this case,

the State, must prove "beyond a reasonable doubt that the error complained of did not [affect substantial rights, meaning it did not] contribute to the verdict obtained." *Race*, 293 Kan. at 81-82 (citing *Ward*, 292 Kan. 568-69 which cited *State v. Kleypas*, 272 Kan. 894, 1084, 40 P.3d 139 (2001)). Assuming, arguendo, that there was error resulting from the colloquy, it was harmless, even under the constitutional standard.

The defendant in her brief states that juror Niccum's statements made it "obvious that a sheriff's department employee who provides for the 'daily needs' of a defendant involved in a criminal trial is a jailer." Further, the defendant claims that Niccum's statement was in the present tense, indicating that the defendant was currently in custody. The defendant then asserts that this was an error of law. (Appellee's brief, p. 15). In support of this conclusion, the defendant cites *State v. Alexander*, 240 Kan. 273, 275, 729 P.2d 1126 (1986), which held that a jailer's testimony about his observations of the defendant in jail was error, though it was harmless under the facts of the case. The defendant also cites *Ward*, 292 Kan. at 576, in which a witness identified two individuals in the courtroom in jail clothing as the defendant's associates; this was also held to be error because "jail clothing taints a trial . . . ."

The defendant's argument fails for numerous reasons. First, it requires a reviewing court to engage in a leap of logic that a sheriff's department employee who has provided for a defendant's daily needs *must* be a jailer; at no point did juror Niccum mention that he was a jailer or that he had encountered the defendant while she was in custody. A second, and probably larger, leap is required for a potential juror to determine that the defendant was *currently* in custody. The defendant takes

juror Niccum's response out of context of the question propounded by the district court. The court asked Niccum, "have you had any interaction whatsoever with the defendant," to which he responded, "[j]ust interaction as far as providing for her daily needs[.]" (R. Vol. IX, p. 30). The tense used by the court and the response from juror Niccum do not clearly indicate that Niccum was currently providing for the defendant's daily needs.

Additionally, two witnesses testified that the defendant was taken into custody on the day of the incident. One of the defendant's witnesses, Robin Burgess, testified that the defendant was placed under arrest and was in custody, at least on the day of the incident. (R. Vol. X, pp. 404-05). Deputy Fredricks also informed the jury that the defendant was arrested the morning of the incident. (R. Vol. X, p. 333). It does not necessarily automatically follow that the defendant remained in custody at time of trial, approximately three and a half months later. Further, as stated above, the jury panel never saw the defendant in any sort of restraints, and she was always dressed in street clothes in the presence of the jury. After the colloquy with juror Niccum, and his subsequent dismissal for cause, counsel for the State concluded voir dire by asking the panel to wait to form an opinion until all of the evidence and testimony had been presented. (R. Vol. IX, pp. 85-86, 88). Finally, the jury was instructed by the district court that it was required to presume that the defendant was innocent unless the jury was convinced from the evidence that she was guilty. (R. Vol. X, p. 554). Contrary to the defendant's assertion, there was no prejudicial error.

Instead, *State v. Davidson*, 264 Kan. 44, 954 P.2d 702 (1998), is instructive in several respects. First, as to the standard of harmless error, a ". . . mere possibility of

prejudice from a remark of the judge is not sufficient to overturn a verdict or judgment." *Id.* at 51. In *Davidson*, the district judge instructed the jury that the defendant was in custody at the time of trial and that he was required to wear a leg brace to prevent any escape attempt. This was held to be error. *Id.* at 51-52. However, the error was harmless because the jury had been instructed on the presumption of innocence, and the jurors all swore an oath to try the case on the law and evidence presented. Further, in *Davidson*, defense counsel notified the jury that the defendant was in custody at the time of trial. *Id.* at 53.

In the present case, at no point was the jury panel informed that the defendant was currently in custody. The defendant was not handcuffed, shackled or forced to wear any sort of brace. The potential information provided to the jury panel was much less than that found in *Davidson*. However, like *Davidson*, the jury was instructed on the presumption of innocence and the jury was sworn to hear the evidence in the case. Also, as in *Davidson*, the jury learned from the defendant's own witness during the trial that she had been placed under arrest and taken into custody on the day of the incident. The alleged error in the present case was much less egregious, if it existed at all, than was the error in *Davidson*, and even in that case, the error was held to be harmless.

Any error ". . . will be declared harmless if this court concludes beyond a reasonable doubt that the error, in light of the whole record, had no reasonable possibility of changing the result of the trial." *Ward*, 292 Kan. 541, Syl. ¶ 6. Given the incredibly short duration of the colloquy with juror Niccum, the fact that his statements never indicated that the defendant was currently in custody, and the fact

that the defendant was always in street clothes and never handcuffed or shackled, it strains the imagination to conclude that any alleged error had any reasonable possibility of changing the result of the trial.

Issue III: The district court did not violate the defendant's rights under *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), by requiring her to register as an offender.

A. Standard of Review

The defendant argues that the district court's order requiring her to register under KORA violates her constitutional rights as provided for in *Apprendi v. New Jersey*, 530 U.S. 466, 490, 146 L.Ed.2d 435, 120 S.Ct. 2348 (2000). This constitutional challenge involves a question of law over which appellate review is unlimited. *State v. Allen*, 283 Kan. 372, 374, 153 P.3d 488 (2007).

B. Analysis

As conceded by the defendant, this issue has been decided against her in *State v. Chambers*, 36 Kan. App. 2d 228, 138 P.3d 405 (2006), *rev. denied* 282 Kan. 792 (2006). In *Chambers*, this a panel of this court held that KORA does not implicate *Apprendi* because offender registration does not constitute a sentence enhancement. 36 Kan. App. 2d at 238-39. Though the *Chambers* case dealt with registration for sex offenses, the registration requirement applied in the present case is located in the same statute, commonly known as the Kansas offender registration act (KORA). K.S.A. 22-4901 *et seq.;* see also *State v. Unrein*, 47 Kan. App. 2d 366, 369-72, 274 P.3d 691 (2012) (following *Chambers* in violent offender case involving firearm; no indication that Kansas Supreme Court intends to depart from *Chambers'* precedent).

Furthermore, *Apprendi* dealt with courts assessing harsher punishments than the statutory maximums based on facts not proven to a jury. KORA is not a sentencing statute; it is located at K.S.A. 22-4901 *et seq.* The Kansas sentencing guidelines are found at K.S.A. 21-6601 and K.S.A. 21-6801 *et seq.* Clearly, the fact that the sentencing guidelines and the registration act are in two separate chapters of the Kansas statutes indicates that the legislature does not consider registration to be a part of criminal sentencing.

The *Chambers* panel's reasoning is sound, as is the reasoning in *Unrein.* There is no indication that the Kansas Supreme Court plans to depart from the precedents set in those cases. The district court in the present case properly followed the existing law in requiring the defendant to register as an offender as part of her sentence, and the defendant's argument on this issue has no merit.

Conclusion

Based on all of the above assertions and arguments, the State respectfully requests this Court deny the defendant's appeal on all of the grounds and issues raised.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served two (2) complete copies of the above brief by depositing in the mail, postage pre-paid, the same to, Deborah Hughes, attorney for the Defendant-Appellant, at Appellate Defender Office, Jayhawk Tower, 700 Jackson, Suite 900, Topeka, KS 66603, on this 26th day of June, 2013.

Matt Franzenburg