No. 12-109118-A

IN THE
COURT OF APPEALS
OF THE STATE OF KANSAS

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STATE OF KANSAS
Plaintiff-Appellee

vs.

SANTINE WHITE
Defendant-Appellant

BRIEF OF APPELLANT

Appeal from the District Court of Geary County, Kansas
The Honorable Steven Hornbaker, Judge
District Court Case No. 10 CR 345

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ORAL ARGUMENT REQUESTED – 15 MINUTES

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STATE OF KANSAS
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BRIEF OF APPELLANT

Nature of the Case

Defendant-Appellant, Santine White, appeals his convictions for Possession of Cocaine With Intent to Sell Within 1000 Feet of a School, and No Tax Stamp, and from the denial of his Motion to Suppress Evidence.

Statement of the Issues

Issue I: The search of the Dodge Ram was in violation of the Fourth Amendment to the United States Constitution and Section 15 of the Kansas Bill of Rights; consequently, the district court committed reversible error in denying the Defendant's motion to suppress the evidence recovered as a result of that illegal search.

Issue II: The district court committed plain error in failing to instruct the jury on the lesser included offense of possession of cocaine; as there was some evidence which would reasonably justify a conviction of possession of cocaine, the failure of the court to instruct on the lesser included offenses constitutes plain error and requires reversal of Defendant's convictions.

Issue III: The prosecutor committed prosecutorial misconduct during closing argument by repeatedly referring to facts not in evidence and shifting the State's burden of proof. As a consequence of the prosecutor's misconduct, Defendant was denied a fair trial and his conviction must be reversed.

Issue IV: There was insufficient evidence to sustain Defendant's conviction for possession of cocaine with intent to sell within 1000 feet of a school.

Statement of the Facts

On April 27, 2010, Santine White, Defendant herein, borrowed a Dodge Ram truck from John Eakes, an individual who worked for Defendant. (R. IV, 66; V, 168-69). A sign on the truck read "T & J Sheet Metal," which was the business owned by Mr. Eakes. (R. II, 158-59; 163). At about 9:50 p.m., Defendant drove the Dodge Ram from a residence located at 815 S.W. 11th Street in Junction City and drove west on 11th Street.

At the same time, Sergeant Todd Godfrey with the Junction City Police Department was driving west on 11th Street. (R. V, 5). In the police car with Sgt. Godfrey were Alvin Babcock, a Junction City police officer, and Shawn Peirano, a police officer assigned to the Junction City/Geary County Drug Operations Group. (R. V, 4, 30).

The officers followed the Dodge Ram until it stopped at 11th Street and Eisenhower. After coming to a stop, the Dodge Ram signaled a right turn onto Eisenhower. Babcock later testified that this constituted a traffic violation because a turn signal must be activated within 100 feet of an intersection. (R. V, 17). The officers, however, did not stop the Dodge Ram at this time. In fact, no citation was ever given for this alleged violation. (R. IV, 61).

The officers continued to follow the Dodge Ram for about three blocks. Godfrey called in the tag numbers for the truck, and dispatch informed him that the tag came back to a Dodge Dakota. (R. V, 7). According to Peirano's affidavit, Godfrey activated the lights on his police

car, and the Dodge Ram pulled into a driveway on 1376 Parkside. (R. III, 240; V, 39). Godfrey would later testify that the activation of his lights was simultaneous with the Dodge Ram pulling into the driveway. (R. IV, 10).

Babcock approached the driver's side of the Dodge Ram while Peirano approached the vehicle on the passenger's side. (R. V, 7, 23). Defendant began to get out of the truck, and Babcock ordered him back inside. Defendant complied and stayed in the vehicle. (R. V, 6). Babcock had previous contact with Defendant about a month before when Babcock arrested Defendant's brother for possessing narcotics and a weapon. (R. IV, 11-12). The officers were apparently unaware that, at the time they stopped Defendant on April 27, the charges against Defendant's brother had been dismissed. (R. IV, 52).

Babcock told Defendant that he had been stopped for the tag violation, and asked Defendant for his license and registration. (R. IV, 12). Defendant told Babcock that this was not his vehicle and that he had borrowed it from Eakes. (R. IV, 23). He reached over and opened the glove box to retrieve the registration from the vehicle. Peirano, who was standing on the passenger side and shining a flashlight into the Dodge Ram, saw a "black solid oblong item" in the glove box. Peirano thought the object looked like a pistol grip or the magazine of a handgun. He did not say anything to Babcock at the time. (R. II, 230; V, 32).

Babcock checked the registration with the VIN number and found that they matched. He was then informed that dispatch had run the wrong tag number. (R. V, 8, 14-15, 22). Babcock then gave the registration paperwork back to Defendant and told him that everything checked out and he was "good to go." (R. V, 8).

The officers then drove down several blocks to a cul-de-sac where they met Officer Fisher who was sitting in a marked Tahoe. (R. V, 24). Peirano happened to mention that he thought he saw a magazine well of a firearm when Defendant opened the glove-box. Fisher told him that it was against a city ordinance to have a loaded firearm in a vehicle. (R. II, 147).

The officers then re-initiated contact with Defendant for the purpose of determining whether there was a loaded gun in the vehicle. (R. V, 27). This occurred within two to three minutes after their initial contact with Defendant. (R. II, 147-48). Defendant was outside of the Dodge Ram and looking behind a trash can that was located at the residence on 1376 Parkside. (R. II, 231).

Peirano asked if he could speak with Defendant for a minute, and Defendant walked back with Peirano to the driver's side of the Dodge Ram. Peirano told Defendant that he thought he saw a handgun in the glove box during their initial encounter. Defendant again stated that the truck did not belong to him, and that he did not know what was in the glove box. (R. II, 232). Peirano testified that he asked Defendant if the officer could search the vehicle for weapons. According to Peirano, Defendant stated that he could search the vehicle for weapons; however, Defendant indicated that he had lost the keys. (R. II, 232).

Defendant then called his wife to see if she could bring an extra set of keys to the location. His wife responded that she would meet him at the end of the block. (R. V, 33-34). Officers Peirano and Fisher both walked beside Defendant to the end of the block. (R. V, 11). Peirano then received a call from Godfrey that the keys had been located behind the trash can where Defendant had been looking. Godfrey then told Peirano to bring Defendant back to the Dodge Ram. (R. II, 233).

Thereafter, the officers called for a K-9 Unit to come to the location to perform a free-air sniff around the Dodge Ram. (R. V, 35). About thirty minutes later, the K-9 Unit arrived; however, the dog did not alert on the vehicle. (R. IV, 25; I, 44).

At this point, Peirano used the key-bob and unlocked the Dodge Ram. He searched the glove box of the vehicle and located a clip from an AK-47 which contained several rounds. A search of the passenger side turned up nothing else. (R. V, 36-37). At the time of the search, Officers Fisher and Babcock were guarding Defendant, who was standing about 10 feet from the truck. (R. II, 191-92).

Godfrey believed that there could be a weapon somewhere in the vehicle based upon finding the AK-47 clip in the glove box, and the fact that a Glock and a 9 mm pistol had been found when Defendant's brother was arrested one month before.[1] (R. V, 46). The AK-47 clip, however, would fit neither a Glock nor any other pistol. (R. V, 46).

Nevertheless, Godfrey searched the driver's side and the center console for a loaded firearm. (R. II, 184). When he lifted up the center console, Godfrey found a small, black felt bag. He opened the bag and saw what he believed to be packaged cocaine. (R. II, 185). Godfrey then ordered Defendant to be placed in handcuffs. (R. V, 60).

The small felt bag contained a plastic bag which itself contained three smaller bags of white powder that later tested positive for cocaine. The three bags contained 10.10 grams, 2.2 grams, and 2.08 grams of cocaine respectively for a total of 14.30 grams. In addition, there was no tax stamp affixed to the packages. (R. II, 202-203).

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[1]There was also evidence that Peirano observed a picture on Defendant's phone showing Defendant holding an AK-47 and a pistol; however, the record is not entirely clear regarding when Peirano actually observed the picture. (R. V, 47).

Defendant was subsequently charged with Possession of Cocaine With Intent to Sell Within 1000 Feet of a School and No Drug Tax Stamp. (R. I, 27-28). His motions to suppress the cocaine were subsequently overruled. Defendant's motion to dismiss the charge of possession with intent to sell within 1000 feet of a school was also denied. (R. I, 115-118).

Defendant was tried by jury on October 4-5, 2012. A KBI latent print examiner testified that she lifted two of Defendant's prints from the sandwich bag that contained the three smaller bags of cocaine. (R. II, 209-210). None of Defendant's prints were found on the bags that actually contained the cocaine. (R. II, 216-16).

Michael Life, a member of the Junction City/Geary County Drug Operations Group, testified that the manner in which the three bags were packaged established that they were possessed with the intent to sell. (R. III, 260-, 265).

Clarence Mahieu, an engineer assistant with Junction City, testified that the entire route between 815 W. 11th Street and 1376 Parkside Drive was within 1000 feet of a school or structures used by a school. (R. III, 255-56). No testimony or evidence was offered to show whether the structures used by the school, specifically ball fields, along this route were exclusively owned or leased by the school, or whether the school had permissive use of the facilities.

Defendant declined to testify and defense counsel did not put on any evidence. (R. III, 266-68).

In closing arguments, the prosecutor twice told the jury that Defendant was not driving home because Parkside Drive was not on his way home. (R. III, 297, 299). Previously during the trial, the prosecutor attempted to introduce, through Det. Babcock, that Parkside Drive was

nowhere near the route Defendant would have taken to drive to his home as an attempt to counter the defense that Defendant was on his way home when he pulled into the residence on Parkside. (R. III, 251). The district court sustained defense counsel's objection, and noted that the court had concerns about the relevancy of this testimony. *Id.*

The prosecutor further argued that Defendant was trying to get away from somebody or was trying to hide his sale of drugs from law enforcement because he turned his vehicle in a direction opposite from his home. (R. III, 299-300). Following that, he said Defendant was trying to avoid detection from whoever was behind him whether it was cops or somebody he owed money or drugs to. (R. III, 301-02).

Next, the prosecutor argued in regard to the fingerprint expert that because the defense didn't cross examine the expert that the defense could not legitimately argue the burden of proof had not been met. (R. III, 324). At that point defense counsel objected to the burden shifting argument. The district court overruled the objection. (R. III, 324). The prosecutor continued with the same burden shifting argument with the dog handler witness testimony as well as the testimony of Lieutenant Life. (R. III, 324-25).

Finally, the prosecutor insinuated that the defense theory was complete nonsense because attacking the credibility of officers is a classic pitch of last resort for defendants. (R. III, 325).

Defendant was subsequently found guilty by the jury as charged. (R. I, 169). His motions for new trial and judgment of acquittal were subsequently overruled. Defendant was sentenced to 49 months for the possession charge, and 6 months for the drug tax stamp charge to be served concurrent with one another. (R. VI, 62-63). Defendant's motion for dispositional

departure was sustained, and he was placed on probation under the supervision of community corrections for a period of 36 months. (R. VI, 62).

Defendant filed a timely notice of appeal. (R. I, 213). Additional facts will be related below in the discussion of the issues that are being raised on appeal.

Arguments and Authorities

Issue I: The search of the Dodge Ram was in violation of the Fourth Amendment to the United States Constitution and Section 15 of the Kansas Bill of Rights; consequently, the district court committed reversible error in denying the Defendant's motion to suppress the evidence recovered as a result of that illegal search.

In State v. McGinnis, 290 Kan. 547, 551, 233 P.3d 246 (2010), the Kansas Supreme Court set forth the applicable standard of review when an appellate court reviews a district court's ruling on a motion to suppress:

> [T]his court reviews the factual underpinnings of a district court's decision for substantial competent evidence and the ultimate legal conclusion drawn from those facts de novo. The ultimate determination of the suppression of evidence is a legal question requiring independent appellate review. [Citation omitted.] The State bears the burden to demonstrate that a challenged search or seizure was lawful.

In the present case, Defendant filed pre-trial motions to suppress the evidence seized from the Dodge Ram. (R. I, 29-84). A hearing was held on the motion on August 23, 2011. (R. IV, 1-86). The district court subsequently denied those motions in an order filed September 13, 2011. (R. I, 115-119). Prior to trial, defense counsel entered an objection to the admission of the cocaine during trial, and was granted a continuing objection to this evidence by the district court. (R. II, 110-11). In addition, at the time the State moved to admit the cocaine at trial, defense counsel again entered a contemporaneous objection. (R. II, 203).

A. Defendant was seized for Fourth Amendment purposes when law enforcement reinitiated their contact with him in determining whether he had violated the Junction City gun ordinance.

A seizure for Fourth Amendment purposes occurs when application of physical force is used to restrain movement or when a person submits to an assertion of authority. State v. Morris, 276 Kan. 11, 20, 72 P.3d 570 (2003). Defendant was "seized" for Fourth Amendment purposes when he submitted to the officers show of authority when they reinitiated contact with him.

In Florida v. Royer, 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983), police officers identified themselves as narcotics agents, told the defendant they suspected he was transporting narcotics, and asked the defendant to accompany them to the police room. The United States Supreme Court held that the defendant was "effectively seized for the purposes of the Fourth Amendment. These circumstances surely amount to a show of official authority such that 'a reasonable person would have believed he was not free to leave.'" at 501-02.

In the present case, Defendant was confronted by at least three police officers who had stopped him only minutes before. All of them were wearing vests with "POLICE" displayed on them, and Officer Fisher was in a marked patrol vehicle. Peirano informed Defendant that he saw a weapon in the glove box of the Dodge Ram and wanted to search it. Defendant was escorted by two police officers wherever he went, and complied when Godfrey ordered them back to the car after finding the keys. The keys were not returned to Defendant. Officer Peirano specifically testified that Defendant "was being detained" just prior to and during the search of the vehicle. (R. V, 47). As in Royer, Defendant was effectively seized by the officers show of

authority. Any reasonable person under these circumstances would not believe he or she was free to leave the scene.

B. Law enforcement lacked a reasonable, articulable suspicion that Defendant had violated the city gun ordinance; consequently, their seizure of Defendant violated the Fourth Amendment.

A limited seizure of an individual by law enforcement under Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1963), and its codification in K.S.A. 22-2402, requires "that the officer have a reasonable and articulable suspicion, based on fact, that the person stopped has committed, is committing, or is about to commit a crime." State v. DeMarco, 263 Kan. 727, 734, 952 P.2d 1276 (1998).

Reasonable suspicion is "a particularized and objective basis for suspecting the person stopped of criminal activity. . . Something more than an unparticularized suspicion or hunch must be articulated." *Id.* at 735. .

In the present case, Peirano "thought" that he saw a pistol grip or magazine clip in the glove box of the Dodge Ram when Defendant briefly opened the glove box to retrieve the registration. (R. II, 147) The officer said nothing, however, until after the initial traffic stop was over, and Peirano had joined the other officers several blocks down the street. It was at that time that Peirano was informed that a Junction City ordinance prohibited the carrying of a loaded firearm in a vehicle.

Peirano was not even sure whether what he saw in the glove box was the butt of a gun or an ammunition clip. However, having a gun or a clip in the Dodge Ram did not violate the city ordinance. The ordinance was violated only if a person carried "a pistol, revolver or other

firearm *with ammunition in the chamber or magazine* . . . in a motor vehicle." (R. I, 36). (Emphasis added).

Peirano had no idea whether what he saw in the glove-box was a loaded firearm or not. He clearly testified that the officers re-initiated contact with Defendant because "it *could* be a violation." (R. IV, 62) (emphasis added). This was simply speculation or a hunch on Peirano's part, and did not constitute a particularized and objective basis to believe that Defendant had violated the gun ordinance by carrying a loaded firearm in a vehicle. As such, the seizure of Defendant violated the Fourth Amendment, and required suppression of the cocaine.

C. Alternatively, the officers exceeded the scope and duration of the investigative seizure of Defendant by failing to diligently pursue their investigation of whether there was a loaded firearm in the Dodge Ram, and by detaining Defendant for more than thirty minutes to conduct a canine air-sniff for drugs.

Alternatively, if this Court determines that the officers' seizure of Defendant was constitutional, then the officers exceeded the scope and duration of that investigative seizure. The reasonableness of a seizure is analyzed under the principles of Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889, and K.S.A. 22-2402(1). The analysis under Terry has two parts: 1) "whether the officer's action was justified at its inception," and 2) "whether it was reasonably related in scope to the circumstances which justified the interference in the first place." 392 U.S. at 20.

With respect to the proper scope of a Terry stop, the Kansas Supreme Court in State v. Smith, 286 Kan. 402, 184 P.3d 890 (2008), set forth the analytical framework:

> In Florida v. Royer, 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983), the Court determined "[i]t is the State's burden to demonstrate that the seizure it seeks to justify on the basis of a reasonable suspicion was sufficiently limited in scope *and* duration to satisfy the conditions of an investigative seizure."

> (Emphasis added.) 460 U.S. at 500, 103 S.Ct. 1319. Regarding the limitation on the duration of the traffic stop, the Court stated that "an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. Similarly, the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." 460 U.S. at 500, 103 S.Ct. 1319.
>
> To determine whether law enforcement officers have complied with the temporal limitation articulated for evaluating the propriety of a Terry stop, courts must "take into account whether the police diligently pursue[d] their investigation." United States v. Place, 462 U.S. 696, 709, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983). Specifically, courts examine "whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant." United States v. Sharpe, 470 U.S. 675, 686, 105 S.Ct. 1568, 84 L.Ed.2d 605 (1985).

286 Kan. at 410. (Emphasis in original).

In the present case, the entire purpose of stopping Defendant the second time was to determine whether there had been a violation of the city firearm ordinance. The officers were required to diligently pursue a means of investigation that would either confirm or dispel their suspicions quickly. Assuming, *arguendo*, that Defendant consented to the search of the vehicle, law enforcement had the means of quickly confirming or dispelling their suspicion that a loaded firearm was in the Dodge Ram. When Godfrey found the keys to the vehicle, he had immediate access to the vehicle to look for any weapon in the glove box.

Instead, the officers waited for at least 30 minutes for a canine unit to come to the scene and conduct an open-air sniff for narcotics. The officers had no reasonable suspicion that drugs were in the vehicle, and the canine sniff was clearly not to determine whether there was a firearm in the vehicle. This was not a temporary stop that lasted no longer than was necessary to effectuate the purpose of the stop, i.e. to investigate the alleged gun violation. Instead, law enforcement deliberately delayed pursuing the means they had available to quickly investigate

this issue, and turned this investigatory stop for a weapon violation into a drug investigation. The drug investigation was not reasonably related to the scope of the stop, and prolonged the duration of the initial stop in an unreasonable manner. As the scope and duration of the Terry stop was unreasonably exceeded by law enforcement, Defendant's seizure violated the Fourth Amendment, and all evidence uncovered as a result of that illegal seizure should have been suppressed by the district court.

D. Defendant's "consent" to search the Dodge Ram was involuntary and constituted a mere submission to lawful authority; consequently, the search of the vehicle violated the Fourth Amendment, and should have resulted in the suppression of the cocaine.

In State v. Parker, 282 Kan. 584, 595, 147 P.3d 115 (2006), the Kansas Supreme Court discussed what constitutes voluntary consent under Fourth Amendment law:

> '[C]onsent "must be given voluntarily, intelligently, and knowingly." [Citation omitted.] "[I]t must be clear that the search was permitted or invited by the individual whose rights are in question without duress or coercion." "To be voluntary, the defendant's consent must be "unequivocal and specific." ' " Jones, 279 Kan. at 78, 106 P.3d 1. The court must also consider whether the individual was informed of his or her rights. Simply submitting to lawful authority does not equate to consent.

282 Kan. at 595-96.

In State v. Spagnola, 295 Kan. 1098, 289 P.3d 68 (2012), the Kansas Supreme Court again addressed the analytical framework in determining whether consent is voluntary:

> In order for a consent to search to be valid, two conditions must be met: (1) There must be *clear and positive testimony that consent was unequivocal, specific, and freely given*; and (2) the consent must have been given without duress or coercion, express or implied. Whether a consent was freely given is determined by the totality of the circumstances.

295 Kan. at 1107. (Emphasis added).

The Spagnola Court further held that the following non-exclusive list of factors is important in determining the voluntariness question: "the presence of more than one police officer, the display of a weapon, physical contact by the police officer, use of a commanding tone of voice, activation of sirens or flashers, a command to halt or to approach, and an attempt to control the ability to flee. This court has also noted that the presence of more than one police officer may strongly suggest 'a coercive atmosphere.'" 295 Kan. at 1108. (Citations omitted). The Kansas Supreme Court has also held that "no one factor is dispositive and relevant factors indicating coercion are much the same as those applied to determine if an encounter is consensual." State v. Thompson, 284 Kan. 763, 812, 166 P.3d 1015 (2007).

In the present case, the district court made no specific findings on the voluntariness of Defendant's purported consent to search the vehicle. (R. I, 117). When the district court does not make any findings regarding the voluntariness of a consent, this Court reviews the question by applying a de novo standard. *Id.* at 595.

The sequence of events in this case strongly suggest that Defendant never consented to the search of the Dodge Ram. After the police found the keys, they had ready access to immediately unlock the Dodge Ram and search it. Instead, they waited for at least thirty minutes to conduct a K-9 free-air sniff before unlocking the vehicle and searching it. It strains credulity to believe that officers, who purportedly had Defendant's consent to search the vehicle and the means to access it, would decline to conduct the search and wait for a K-9 unit to come on the scene to sniff for drugs. These facts alone make it likely that no consent was given by Defendant to search. Otherwise, law enforcement would have searched the car immediately after finding the keys.

Even if Defendant verbally agreed that law enforcement could search the Dodge Ram, however, his mere submission to lawful authority is insufficient to establish a knowing, voluntary, and intelligent consent to search. First, there were at least four police officers surrounding Defendant when the officers reinitiated contact with him. The presence of multiple police officers in uniform with flashlights and at least one marked police vehicle strongly suggest a coercive atmosphere. Spagnola, 295 Kan. at 1108.

In addition, Peirano told Defendant that he was suspected of carrying a loaded weapon in the Dodge Ram in violation of a city ordinance, and that the police wanted to search the vehicle for weapons. Two police officers walked with Defendant to the end of the street, thereby attempting to control Defendant's ability to leave the scene or flee. Defendant was escorted back to the vehicle upon the command of Godfrey, and the police did not return the keys to Defendant's possession, again controlling his ability to leave. There was testimony that, before the search of the vehicle, Defendant was being "detained."

Further, there is no evidence in this record that the police informed Defendant of his right to refuse to consent, which is a factor this Court must consider under Parker. *See also* State v. Blair, 31 Kan.App.2d 202, 209-210, 62 P.3d 661 (2002) (holding consent to search was not voluntarily given when defendant was not allowed to move without being accompanied by police officers, the officer did not explain to defendant that he had a choice to refuse consent, and the officer asked defendant questions about his purported drug use).

Moreover, Defendant's alleged "consent" was not specific and unequivocal. When Peirano asked if there was a loaded weapon in the glove box, Defendant stated that the vehicle was not his and he didn't know what was in the glove box. Defendant allegedly consented to

the search immediately after this exchange. Under the totality of the circumstances, no reasonable person in Defendant's position would believe he would be free to leave the scene without complying with law enforcement's insistence upon searching the vehicle. The factors weigh heavily against a finding that Defendant's consent was voluntarily, knowingly, and intelligently given.

Finally, part of the district court's rationale for upholding the consent search was that Defendant "did not retract his consent." (R. I, 117). However, the fact that Defendant did not retract his consent is not evidence the consent was voluntary. In State v. Kudron, 816 P.2d 567 (Ok. App. 1991), the Oklahoma Court of Appeals addressed this issue: "As the constitutional guaranty is not dependent upon any affirmative act of the citizen, the courts do not place the citizen in the position of either contesting an officer's authority by force, or waiving his constitutional rights; but instead they hold that a peaceful submission to a search or seizure is not a consent or invitation thereto, but is merely a demonstration of regard for the supremacy of the law." 816 P.2d at 571. *See also* State v. Stitzel, 2 Kan.App.2d 86, 88-89, 575 P.2d 571 (1978) (holding that the defendant's failure to refuse the officer's request to raise his arm did not constitute a voluntary consent to search).

The totality of the circumstances in this case establish that Defendant's "consent" to search was not given in a knowing, voluntary, and intelligent manner. The inherently coercive atmosphere with multiple law enforcement, the accusation of violating a city ordinance, the failure to inform Defendant of his right to refuse consent, and the clear restriction of Defendant's movements by law enforcement all point to the fact that Defendant's "consent" was, in fact, a mere submission to lawful authority. As there was no valid consent to search Defendant's

vehicle, and there was no probable cause to believe that Defendant had violated the ordinance, the search of the vehicle violated the Fourth Amendment, and all evidence seized as a result of that unconstitutional search must be suppressed.

E. Alternatively, if there was a voluntary consent to search the Dodge Ram for firearms, law enforcement exceeded the scope of that consent when they searched the small, felt bag that could not possibly contain a firearm.

In United States v. Ross, 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982), the United States Supreme Court articulated the scope of the automobile exception as follows:

> The scope of a warrantless search of an automobile thus is not defined by the nature of the container in which the contraband is secreted. Rather, it is defined *by the object of the search and the places in which there is probable cause to believe that it may be found.* Just as probable cause to believe that a stolen lawnmower may be found in a garage will not support a warrant to search an upstairs bedroom, probable cause to believe that undocumented aliens are being transported in a van will not justify a warrantless search of a suitcase. Probable cause to believe that a container placed in the trunk of a taxi contains contraband or evidence does not justify a search of the entire cab.

456 U.S. at 824. (Emphasis added).

The Kansas Supreme Court has recognized the limitation on the scope of the automobile exception articulated in Ross. In State v. Jaso, 231 Kan. 614, 648 P.2d 1 (1982), the Court held:

> The [Ross] Court was careful to point out, however, that not every probable cause search of a vehicle will justify the search of all containers in the vehicle...The court also pointed out that its ruling in Ross does not authorize the search of a container found in a vehicle, even though probable cause exists to believe contraband is located in the vehicle, if such container could not possibly contain the sought after contraband.

231 Kan. at 620-21.

Likewise, in State v. Richmond, 30 Kan. App. 2d 1008, 1011, 52 P.3d 915 (2002), this Court held as follows: "Once probable cause is established concerning the existence of contraband in a vehicle, then any container *capable of containing the contraband* may ordinarily

be searched." (Emphasis added). As to the standard for measuring the suspect's consent, the Richmond Court held:

> The standard for measuring a suspect's consent is one of "objective" reasonableness-what would the typical, reasonable person have understood by the exchange between the officer and the suspect.

30 Kan.App.2d at 1012.

In the present case, assuming for the sake of argument that Defendant's consent was voluntary, a typical, reasonable person would have understood that Defendant consented to the search of the Dodge Ram only for firearms. That the scope of the consent was limited to firearms was specifically testified to by both Peirano and Godfrey. (R. II, 232; II, 184).

Thus, the scope of the search of the Dodge Ram was limited by the object of the search - firearms - and any container capable of containing a firearm. The small, black felt bag that Godfrey located in the center console clearly could not have contained a firearm, or more specifically, an AK-47, due to the weight of the bag and it's dimensions.[2] His subsequent search of the bag exceeded the scope of the search and violated the Fourth Amendment.

In State v. Huether, 453 N.W.2d 778 (N.D. 1990), the North Dakota Supreme Court affirmed the suppression of drugs found in a paper bag as exceeding the scope of the defendant's consent to search his automobile for an open container. Noting that the holding in Ross has been applied to consent searches of vehicles, the Huether Court held that a paper sack pushed partly under the seat of the defendant's vehicle could not reasonably contain a bottle or can;

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[2]This particular bag (without the contraband) is the subject of a request for addition to the appellate record pursuant to Supreme Court Rule 3.02(d)(3) which has not yet been added due to an objection to the same by the Geary County Attorney's office. The matter remains pending in District Court for hearing before Judge Hornbaker.

consequently, the officers exceeded the scope of the search for open containers and the drugs found in the bag were properly suppressed. 452 N.W.2d at 782-83.

Other courts have likewise held that the scope of a search for weapons is unconstitutionally exceeded when the area searched could not reasonably contain a weapon. *See* State v. Younger, 305 N.J.Super. 250, 702 A.2d 477, 479–80 (Ct.App.Div.1997) (holding that the opening of a closed change purse, wherein heroin was found, exceeded the scope of a consent to search for a handgun); State v. Barnes, 58 Haw. 333, 339, 568 P.2d 1207, 1212 (1977) (holding there was nothing "in the nature and appearance of the brown paper bag, that could have led the officer reasonably to believe that it contained a weapon.")

In the case at bar, as in the above-cited persuasive authority, the nature and appearance of the small felt bag found by Godfrey in the console of the Dodge Ram could not reasonably have contained a firearm, or in this case, an assault rifle. As a consequence, Godfrey's subsequent search of that bag exceeded the scope of the Defendant's consent to search the vehicle for firearms, and violated the Fourth Amendment. The district court committed reversible error in failing to suppress the cocaine seized from the bag.

Issue II: The district court committed plain error in failing to instruct the jury on the lesser included offense of possession of cocaine; as there was some evidence which would reasonably justify a conviction of possession of cocaine, the failure of the court to instruct on the lesser included offenses constitutes plain error and requires reversal of Defendant's convictions.

K.S.A. 22-3414(3) provides that "where there is some evidence which would reasonably justify a conviction of some lesser included crime as provided in subsection (b) of K.S.A. 21-5109, and amendments thereto, the judge *shall instruct the jury* as to the crime charged and any such lesser included crime . . . No party may assign as error the giving or failure to give an

instruction, including a lesser included crime instruction, unless the party objects thereto before the jury retires to consider its verdict stating distinctly the matter to which the party objects and the grounds of the objection unless the instruction or the failure to give an instruction is clearly erroneous." (Emphasis added).

Further, the failure to give a lesser included offense instruction is clearly erroneous if the instruction was legally and factually appropriate. State v. Jones, 295 Kan. 1050, 1059, 288 P.3d 140 (2012). In making that determination, this Court's review is de novo. *Id.*

In the present case, defense counsel initially requested possession of cocaine be given as a lesser included offense (R. III, 273); however, the district court declined to give the instruction mainly because the defense was the cocaine did not belong to Defendant. (R. III, 274). After the district court had already made its decision, defense counsel withdrew the instruction. (R. III, 281, 284).

As an initial matter, possession of cocaine is a lesser included offense of possession of cocaine with intent to sell within 1000 feet of a school pursuant to K.S.A. 21-5109(b)(2) because possession of cocaine is a crime where all of its elements are identical to some of the elements of the charged crime. Thus, the instruction was legally appropriate.

The instruction was factually appropriate as well. The only testimony indicating that the cocaine was possessed with intent to sell came from Officer Michael Life. He testified that the manner in which the three bags containing cocaine were packaged was consistent with an intent to sell. (R. III, 260). He testified that powder cocaine was sold in 16th of an ounce, which was 7.5 grams, and because the three bags were broken into 16th of an ounce portions, the cocaine was possessed with intent to sale. (R. III, 261, 265).

There are two problems with Life's testimony. First, the three bags contained 10.10 grams, 2.2 grams, and 2.08 grams respectively. (R. II, 203). Thus, none of the bags corresponded to a 16th of an ounce, and two of the bags contained far less than the amount Life testified was consistent with sale. In addition, packaging is insufficient to support an inference of an intent to deliver when the amounts involved suggest personal use. In State v. Campo, 103 Idaho 62, 644 P.2d 985 (1982), the Idaho Court of Appeals, held as follows:

> The last factor mentioned above – packages or containers – is much discussed in the cases, but appears insufficient to support an inference of intent to deliver, unless it is coupled with another factor. Thus, where the quantity and economic value of substances suggest personal use, the mere existence of packaging material will not provide an adequate basis to infer an intent to deliver. The packaging may be consistent with the defendant's purchase of the substances for personal use.

103 Idaho at 68. [Citations omitted.]

As noted in Campo, the amounts of cocaine found in at least two of the bags was inconsistent with an intent to sell, and may well have been consistent with purchase for personal use. (R. V, 118).

Further, law enforcement did not find any scales, needles or drug paraphernalia in the car or on Defendant's person. (R. II, 193). In State v. Smith, 4 Kan.App.2d 149, 151, 603 P.2d 638 (1979), this Court found the lack of any narcotics equipment in a car where a one pound brick of marijuana was discovered was significant in finding insufficient evidence of possession with intent to sell. The Court of Appeals also held that, because there was no evidence as to an amount reasonably necessary for personal use, "[w]e are not prepared to say that one pound is a little or a lot for defendant's personal use, and cannot believe the jury was any better equipped to make this determination than are we." *Id.*

In the present case, there was no evidence regarding what amount of cocaine was reasonably necessary for personal use. Two of the bags clearly contained far less than the amount that Life testified was indicative of an intent to sell. Life's testimony, contradictory as it was, certainly did not exclude a theory of guilt on simple possession. As there was some evidence which would reasonably justify a conviction for simple possession of cocaine, the trial court committed plain error when it failed to instruct the jury on the lesser included offense. Accordingly, Defendant's convictions must be reversed for a new trial.

Issue III: The prosecutor committed prosecutorial misconduct during closing argument by repeatedly referring to facts not in evidence and shifting the State's burden of proof. As a consequence of the prosecutor's misconduct, Defendant was denied a fair trial and his conviction must be reversed.

In State v. Richmond, 289 Kan. 419, 439, 212 P.3d 169 (2009), the Kansas Supreme Court set forth the standard of review for prosecutorial misconduct:

> Allegations of prosecutorial misconduct require a two-step analysis. First the appellate court must determine whether the comments were outside the wide latitude allowed in discussing the evidence. Second, the appellate court must decide whether those comments constitute plain error; that is, whether the statements prejudiced the jury against the defendant and denied the defendant a fair trial, thereby requiring reversal.

Under the second step of this analysis, this Court must consider the following three factors:

> (1) whether the misconduct is gross and flagrant; (2) whether the misconduct shows ill will on the prosecutor's part; and (3) whether the evidence against the defendant is of such a direct and overwhelming nature that the misconduct would likely have little weight in the minds of the jurors. None of these three factors is individually controlling. Before the third factor can ever override the first two factors, an appellate court must be able to say that the harmlessness tests of both K.S.A. 60261 (inconsistent with substantial justice) and Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) (conclusion beyond reasonable

doubt that the error had little, if any, likelihood of having changed the results of the trial), have been met.

289 Kan. at 440.

The prosecutor repeatedly referred to prejudicial facts not in evidence, (R. III, 297, 299, 300, 302, 303, 304, 377), shifted the burden of proof (R. III, 324), and denigrated the defense (R. III, 325). Although defense counsel only objected to the improper argument on one occasion (R. III, 324), "[t]his court's review of the issue is the same, however, whether or not an objection was made at trial if the claimed error implicated a defendant's right to a fair trial and denied the defendant his or her Fourteenth Amendment right to due process." State v. Davis, 275 Kan. 107, 122, 61 P.3d 701 (2003).

A. The prosecutor argued facts not in evidence.

In State v. Morris, 40 Kan.App.2d 769, 791-92, 196 P.3d 422 (2008), this Court reversed a defendant's aggravated indecent liberties conviction because the prosecutor argued facts not in evidence, including an imaginary script of what the child was thinking:

> It is well established that the fundamental rule in closing arguments is that a prosecutor must confine his or her comments to matters in evidence. When the prosecutor argues facts that are not in evidence, misconduct occurs, and the first prong of the test for prosecutorial misconduct has been met. In addition, when a prosecutor refers to facts not in evidence, such statements tend to make the prosecutor his or her own witness who offers unsworn testimony not subject to cross-examination. This unsworn testimony, " ' "although worthless as a matter of law, can be 'dynamite' to the jury because of the special regard the jury has for the prosecutor, thereby effectively circumventing the rules of evidence." Here, by giving the jury an "imaginary script" of what J.M. was thinking, the prosecutor asked the jury to speculate on facts that were not admitted into evidence at trial.
>
> [Citations omitted throughout.]

The Morris Court also found that it is "improper for a prosecutor to create an 'imaginary script' in order to create and arouse the prejudice and passion of the jury. 40 Kan.App.2d at 792. *See also* State v. Jeffrey, 31 Kan.App.2d 873, 75 P.3d 284 (2003)(aggravated indecent liberties conviction reversed based on the prosecutorial misconduct where the prosecutor argued facts not in evidence).

In the present case, the prosecutor on at least two occasions told the jury that Defendant was not driving home because Parkside Drive was not on his way home. (R. III, 297, 299). This is significant because the prosecutor attempted to introduce, through Det. Babcock, that Parkside Drive was nowhere near the route Defendant would have taken to drive to his home. This was an attempt to counter the defense that Defendant was on his way home when he pulled into the residence on Parkside. (R. III, 251). The district court sustained defense counsel's objection, and noted that the court had concerns about the relevancy of this testimony. *Id.*

Despite the fact that this testimony was excluded from evidence based upon speculation and relevancy, the prosecutor nevertheless was allowed present "unsworn testimony" to the jury that Defendant was not on his way home when he stopped on Parkside Drive. This argument played into a repeated theme from the prosecutor that Defendant's actions were an attempt to evade or distance himself from the police.

The prosecutor argued: "And look at the *facts*. He's trying to get away from somebody on this evening. Okay? If he's selling cocaine, the vehicle behind him being the cops, he either thinks it's the cops or thinks it's somebody else, so he starts speeding off Eisenhower. *And if he's going home to Bel Air, he's going in the opposite direction* . . . So why did he turn on there? Because he's trying to hide from the cops . . . so he was getting away . . .he's trying to distance

himself from that truck." (R. III, 299-300). (Emphasis added). Thereafter, the prosecutor told the jury: "The only thing that does make sense is, when he turned onto Parkside, he was trying to avoid who was behind him whether it was the cops, *whether it was perhaps somebody he owned money to, drugs to, who knows*." (R. III, 301-02).

This argument was completely improper. There was absolutely no evidence that Defendant previously sold cocaine or owed money to anyone. This was not only arguing facts not in evidence but it was also painting Defendant as a drug dealer who owed money or drugs to someone.

Next, the prosecutor speculated that the drug dog did not alert because Defendant had just put the cocaine in the vehicle. "Drugs were there maybe five minutes. Who knows? Is that enough time for drug canine to hit? Who knows? But does it really matter? Not really . . . And if you go with the whole, well, you know, it didn't have time to permeate, well, why not? Because the drugs had just been put in the car. Had the drugs been in there longer, the dog, would have more than likely hit on it. But if the drugs had been in the car for only a few minutes, like the amount of time it would have taken Mr. White to get in the truck and drive over to Parkside, that would explain why the dog didn't hit. Okay?" (R. III, 303-04).

B. Denigration of the defense.

During his closing argument, the prosecutor told the jury:

> And, folks, when we talk about criminal cases, in criminal cases, there's generally three ways to attack criminal cases. When you've got the law on your side, you argue the law. When you've got facts on your side, you argue the facts. And when all else fails, you blame the cops.

(R. III, 325).

This was an improper denigration of the defense and defense counsel. In United States v. Lopez, 414 F.3d 954, 960 (8th Cir. 2005), the Eighth Circuit found the prosecutor's reference to defense counsel's "slick tactics" was improper. And, in United States v. Holmes, 413 F.3d 770, 775 (8th Cir. 2005), the Eighth Circuit reversed a conviction on the grounds of prosecutorial misconduct because the prosecutor suggested to the jury defense counsel was distracting it with red herrings and insinuated the defense had been fabricated. An argument nearly identical to the one made by the prosecutor in this case was found by one panel of this Court to cross the line of acceptable argument. State v. Williams, No. 102,950, 2012 WL 2785910 (Kan.App.), at *22. (A copy of this unpublished opinion is attached in the appendix to this brief).

C. Shifting the burden of proof.

In State v. Tosh, 278 Kan. 83, 89–92, 91 P.3d 1204 (2004), the Kansas Supreme Court held that it was improper for the prosecutor to attempt to shift the burden of proof to the defendant. In Tosh, the Court held the prosecutor committed misconduct by shifting the burden of proof to the defendant in asking the following questions: "[I]s there any evidence that it didn't happen? Is there any evidence that the things she told you didn't happen?" 278 Kan. at 92.

Similarly, the prosecutor in the present case argued in regard to the fingerprint expert that "[t]here wasn't anything that she was asked that says, well, how were you able to do it, are you sure. No. They had the opportunity to cross-examine, and they chose not to. Now they're trying to flip it on me and say - -." (R. III, 324).

At that point defense counsel objected to the burden shifting argument. The district court overruled the objection. (R. III, 324). The prosecutor continued:

> Again, there was plenty of opportunities to cross-examine, not only Mr. Heffley, but Ms. Woodward, as to their findings. Okay? It was uncontroverted. The

> defendant's prints were on that bag, period. Okay? Mr. Rork wants to go, well, you know, today, there was some testimony about a drug dog, how do we know about a drug dog? Lieutenant Life testified. Was there any questions by the defense to say, well, how you know this, or how do you know this dog acts the same way? Nothing. *And then they want to throw it to us, well, you didn't present enough evidence. Well, if you don't ask the questions, how are we supposed to know what you're going to argue? We don't know.*

(R. III, 324-25). (Emphasis added).

The prosecutor insinuated that the defense could not argue that the State had not met its burden because the defense didn't take the opportunity to cross-examine some of the State's witnesses. These arguments were improper because they were a veiled attempt to shift the burden of proof to Defendant.

D. The prosecutorial misconduct prejudiced Defendant's right to a fair trial.

In Morris, *supra*, this Court, having found the "script" argument to be improper, proceeded to the second step of the analysis. The Court further found that the prosecutor's misconduct was gross and flagrant because the prosecutor's comments "exposed the jury to several fact-free personal opinions," and the jury "was allowed to believe that the prosecutor's improprieties were proper because the trial court never intervened to correct any of them. Indeed, the trial court gave no curative instructions." 40 Kan.App.2d at 794.

Likewise, in the present case, the prosecutor's argument repeatedly exposed the jury to his fact-free personal opinions, his denigration of the defense, and his attempt to shift the burden to Defendant. The district court never intervened to correct this clearly improper argument, and, in fact, overruled defense counsel's only objection to this improper argument. As in Morris, the prosecutor's misconduct was gross and flagrant and it was never corrected by the Court.

In Morris, the Court of Appeals found the prosecutor showed ill will because the prosecutor knew, or should have known that she was violating rules of professional conduct, in part, by referring to matters outside of evidence. 40 Kan.App.2d at 794. In the present case, the prosecutor knew, or should have known that arguing facts not in evidence violated the rules of professional conduct, and constituted ill will. Finally, with regard to the third factor, the Morris Court held as follows:

> The prosecutor's improper questions and comments, as stated earlier, called the jurors' attention to matters that would not have been proper for them to consider in arriving at their verdict. The possible effect that these improper and very prejudicial questions and comments had on the jury's consideration of Morris' credibility and the verdict is unknown. As a result, we cannot declare beyond a reasonable doubt that the errors were harmless in that they had little, if any, likelihood of having contributed to the verdict.

40 Kan.App.2d at 794.

In the present case, as in Morris, this Court cannot declare beyond a reasonable doubt that the prosecutorial misconduct in repeatedly arguing facts not in evidence, in denigrating the defense, and in attempting to shift the burden of proof had little, if any, likelihood of having contributed to the verdict. Accordingly, the Defendant's convictions must be set aside.

Issue IV: There was insufficient evidence to sustain Defendant's conviction for possession of cocaine with intent to sell within 1000 feet of a school.

In State v. Whitten, 45 Kan.App.2d 544, 251 P.3d 74 (2011), this Court set forth the applicable standard of review when the sufficiency of the evidence is challenged on appeal:

> When a defendant challenges the sufficiency of the evidence in a criminal case, the standard of review is whether, after reviewing all 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.

45 Kan.App.2d at 449.

Defense counsel filed a pre-trial Motion to Dismiss the possession of cocaine within 1000 feet of a school, and argued that the count should be dismissed under the holding of State v. Barnes, 275 Kan. 364, 64 P.3d 405 (2003). (R. I, 85-95). That motion was denied by the district court. (R. I, 116). Defense counsel renewed his motion for judgment of acquittal at the close of the State's case, which was also denied. (R. III, 266). Finally, Defendant's post-trial motion for judgment of acquittal was also denied prior to sentencing. (R. VI, 9-10).

In State v. Wilt, 273 Kan. 273, 44 P.3d 300 (2002), the Kansas Supreme Court reversed the defendant's conviction for possession within 1000 feet of a school because the defendant's possession with intent to sell was not 1000 feet from a structure located on school property; rather, it was within 1000 feet from ball diamonds that were used permissively by the school district. The Supreme Court held:

> K.S.A. 2001 Supp. 65-4163(b) clearly requires that the structure used for school purposes be located upon school property. The phrase "school property" implies something more specific than merely "property." Had the legislature intended otherwise it would have used the term " property." . . . As the Court of Appeals held in Prosper, the legal interest can be something less than outright ownership, i.e., a lease. But the property must be something more than a permissive right to use the property in order to rise to the level of "school property."

273 Kan. at 276-77.

In the present case, Clarence Mahieu, a city engineer, testified that the entire route traveled by Defendant from 815 W. 11th Street to 1376 Parkside Drive was within 1000 feet of a structure used by USD 475. (R. III, 255-56). Specifically, Mahieu testified that the residence located at 815 11th Street was within 1000 feet of the ball fields at Cleary Park and the 12th Street Community Center. (R. III, 255). Mahieu again referenced the ball fields as being within 1000 feet of the route traveled by Defendant. (R. III, 256).

As in Wilt, the public ball fields that may have sometimes been used by the school district is not school property. While the school may have permissively used these ball fields, that is insufficient, as a matter of law, to satisfy the "school property" element of the statute.

Mahieu testified that "coming closer" to 1376 Parkside Drive, Defendant would have passed within 1000 feet of Al Simpler Stadium, the athletic stadium for Junction City High School, and Westwood Elementary School. (R. III, 257).

However, the fact that Defendant fortuitously passed through a school zone while possessing cocaine does not violate the statute. In State v. Barnes, 275 Kan. 364, 64 P.3d 405 (2003), the Kansas Supreme Court affirmed the dismissal of a count charging the defendant with possession with intent to sell within 1000 feet of a school. The Court held: "We do not believe the Kansas Legislature intended the schoolyard statute to apply to an individual not apprehended within the school zone and where uninterrupted passage in an automobile through the school zone was fortuitous." 275 Kan. at 375.

The Barnes Court was particularly impressed with the reasoning of United States v. Alston, 832 F.Supp. 1 (D.D.C.1993). *Id.* In Alston, the police had the opportunity to stop the defendant before he entered a school zone. However, the police continued to follow the defendant and then stopped him in a school zone, where they subsequently discovered narcotics. The federal district court dismissed the charge of possessing a controlled substance within 1000 feet of a school. The court reasoned:

> [W]here the police had time to stop the Acura prior to it reaching a school zone, 21 U.S.C. Section 860(a), as interpreted by the D.C. Circuit, cannot be used to enhance Alston's sentence. To do so would encourage the police to chase drug suspects through school zones, or to delay arrests of suspected drug suspects until a school zone violation has occurred.

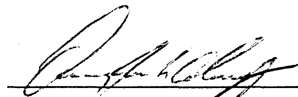
832 F. Supp. at 7.

In the present case, it is clear that at the beginning of Defendant's route, he was not within 1000 feet of school property as set forth previously. The officers purportedly observed Defendant commit two traffic violations; however, they did not activate their lights and stop Defendant until after he had passed through and stopped in a school zone. The officers had time to stop Defendant before he reached a school zone. Under the rationale of Barnes and especially the holding of Alston, which our Supreme Court found particularly impressive, application of the schoolyard statute under these facts is untenable. Accordingly, the district court erred in denying Defendant's motion to dismiss and subsequent motions for judgment of acquittal on the school zone violation. Defendant's conviction for possession of cocaine with intent to sell within 1000 feet of a school should be reversed.

CONCLUSION

For all of the foregoing reasons, Defendant requests that this Court reverse his convictions.

Respectfully submitted,



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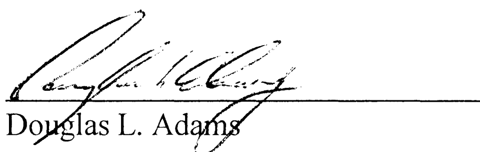
Certificate of Service

The undersigned hereby certifies that service of the above and foregoing brief was made by mailing two copies, postage prepaid, to Tony Cruz, Assistant County Geary Attorney, 801 N. Washington Street, Suite A, Junction City, KS 66441, and mailing one copy, postage prepaid, to the Attorney General, Kansas Judicial Center, Topeka, Kansas, 66612, on this 28th day of June, 2013.



Douglas L. Adams

APPENDIX

H

(Pursuant to Kansas Supreme Court Rule 7.04(f), unpublished opinions are not precedential and are not favored for citation. They may be cited for persuasive authority on a material issue not addressed by a published Kansas appellate court opinion.)

Court of Appeals of Kansas.

STATE of Kansas, Appellee,
v.
Felton WILLIAMS, Jr., Appellant.
No. 102,950.

July 6, 2012.
Review Denied Apr. 19, 2013.

Appeal from Reno District Court; Richard J. Rome, Judge.

Richard Ney, of Ney & Adams, of Wichita, for appellant. Keith E. Schroeder, district attorney, and Derek Schmidt, attorney general, for appellee.

Before BRUNS, P.J., McANANY and BUSER, JJ.

MEMORANDUM OPINION

PER CURIAM.

***1** Felton Williams, Jr., was convicted of second-degree intentional murder for killing Kenneth White. Williams and others fled Hutchinson after the killing and headed south. Later that morning, they were stopped in Oklahoma by Oklahoma state troopers who conducted a search of Williams' car, found a stolen weapon in the glove box, and arrested Williams and his companions.

When White's body was found in Hutchinson later that afternoon, one of the investigating officers overheard a comment that a Hi–Point 9 mm pistol was missing from White's residence. The officer recalled hearing earlier in the day that the Oklahoma Highway Patrol had arrested three men from Wichita who had a Hi–Point 9 mm pistol in their possession. The gun had been reported stolen in Hutchinson.

As a result, two Hutchinson police officers went to Oklahoma where they interviewed Williams and his companions. During the course of those interviews, Williams confessed to killing White. Williams was returned to Kansas where he repeated his confession and was charged with White's murder.

Williams moved to suppress the evidence found in the Oklahoma car search, claiming the search was unlawful. In a later motion he sought to suppress his confession, claiming it was involuntarily made. The district court denied Williams' motions. Now, on appeal, Williams claims the district court erred in denying his suppression motions and in other rulings which we will discuss in detail. First we need to provide a more detailed history of the events leading to Williams' conviction. In doing so, we refer to the testimony at the suppression hearings because that was the testimony the district court relied upon in ruling on Williams' suppression motions.

Sunday Night and Monday Morning

White spent Sunday night, August 31, 2008, celebrating the Labor Day weekend with his family and friends. His brother, Denzel White, drove him home sometime between 5 a.m. and 6 a.m. on Monday morning. When Denzel left his brother's residence, White was lying on a couch watching television with a Hi–Point 9 millimeter pistol on the coffee table next to him.

First Police Encounter

At about 10:30 that morning, Oklahoma State Trooper Brandon Harmon stopped Williams for speeding on I–35 in Oklahoma. Williams was driving, and Ronald Beard was also in the front seat. Aubrey Oliver was asleep in the back seat of the vehicle.

Williams did not know the name of his back-seat passenger and knew only the first name of his front seat passenger. Although neither Beard nor Oliver had identification, Harmon ran checks on their names and dates of birth, and the record checks "came back clean." Williams initially told Harmon that he was travelling to Guthrie, Oklahoma, but later told him that he was travelling to Oklahoma City (a short distance south of

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Guthrie on I–35) and was thinking about going to Dallas, which is further south on I–35.

Harmon noticed an odor of alcohol on Williams, but Harmon thought Williams was capable of safely driving a vehicle. Harmon did not smell any alcohol coming from the vehicle itself and did not observe alcoholic containers or illegal drugs in plain view. Harmon did detect an odor that he associated with Black and Mild cigars coming from the vehicle. In his experience, the cigars are sometimes used in association with marijuana. Harmon stated that Williams acted nervous in conversation. Harmon intended to conduct field sobriety tests on Williams, but his investigation was cut short when Harmon left to provide support for a fellow trooper who was pursuing another vehicle in the area. Harmon gave Williams a traffic citation and told him he was free to go.

Second Police Encounter

***2** A short time later, Williams, who continued south on I–35, turned around and located Oklahoma State Trooper Gabe Leach whose patrol car was parked in the median facing south on I–35. Williams stopped on the northbound shoulder of the highway, went over to speak to Leach, and inquired about his driver's license, which Williams apparently thought Harmon had failed to return to him in the initial traffic stop. When Williams learned that Harmon did not have his license, he drove some distance north on I–35, then made a U-turn and continued south.

Third Police Encounter

Shortly after 11 a.m., Oklahoma State Trooper Todd Hatchett observed Williams' car exit the interstate about 2 1/2 miles south of where Williams had stopped to talk to Trooper Leach. Hatchett saw Williams' car run through the stop sign at the end of the exit ramp. Hatchett also noticed that the driver and the front passenger were not wearing seat belts. Hatchett realized the vehicle was the same one he had seen stopped near Trooper Leach a few minutes earlier. Hatchett initiated a traffic stop and approached Williams' car. He noticed the odor of alcohol coming from Williams.

Hatchett contacted Trooper Harmon and asked if he had tested Williams during the first stop, and Harmon responded that he had not. Williams denied drinking anything that day and told Hatchett that the odor of alcohol was from alcohol he had consumed the night before. Hatchett did not see any signs that Williams was under the influence of alcohol or drugs.

During the course of the stop, Williams kept insisting that he was running out of gas and needed to go and offered to have Hatchett look at the vehicle's fuel gauge to confirm this. Hatchett did not consider this an invitation to search the vehicle.

Troopers Harmon and Leach arrived on the scene. Harmon told Hatchett that he smelled Black and Mild cigars in the car and "guaranteed" that there were drugs in the vehicle. Hatchett then told Harmon that he was getting ready to search the vehicle or, in the alternative, Harmon could search the vehicle.

As the traffic stop was coming to an end, Hatchett asked Williams, "Do you guys have anything illegal in your vehicle?" When Williams said no, Hatchett asked if he could search the car. According to Hatchett, Williams replied:

> "I am running on fumes. I'm going to the gas station. I'm going to go home. So I said okay. He said, I have been stopped three times, man.... I said, do you mind if we take a look? Uh. Yeah, I just want to go, man, and he—makes a gesture with both shoulders and right hand, pointing to his car like yes, go ahead."

Williams did not provide Hatchett with an unequivocal verbal yes, but Hatchett understood from Williams' physical response, "[b]y his body language when I asked the question and he kind of shrugged his shoulder like this, pointed his hand skyward, right hand pointed to his car," that he was giving Hatchett permission to search the car.

***3** Hatchett immediately patted Williams down and ordered him to stand in the ditch. The other troopers assisted by patting down Beard and Oliver and instructing them to stand with Williams. During the search, Hatchett

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confiscated two firearms from the glove box of the vehicle, an H & K .40 caliber Smith & Wesson pistol and a High–Point 9 mm. A computer check of the serial numbers of the firearms revealed that the High–Point had been stolen. Williams, Beard, and Oliver were arrested for transporting a loaded firearm and taken into custody.

Discovery of the Homicide

Back in Hutchinson, at about 1 p.m. that same afternoon, Evan Graham called White's residence to remind him of an upcoming social event. When she was unable to reach him, she drove to White's house at about 3 p.m., where she found the back door open. She entered and found White's body. White had been shot twice. The first shot was to White's left thigh and went through his femur. The fatal shot was fired with the gun placed directly against the back of White's head. Some of the pockets in White's pants were turned inside out. The mattress on White's bed "had been kind of off the box springs." An open gun case and another box were on the bed. Graham called White's brother, Denzel, who arrived shortly thereafter. Denzel noticed that the back door had been forced open. A flat screen television, the Hi–Point 9 mm pistol, a rifle, a set of keys, and a silver chain with a cross were missing.

Hutchinson police officers arrived and noted that the back door had been forced open. A shoeprint was visible on the outside of the door, and the molding around the doorframe was damaged. In the undisturbed pockets of White's pants the police found what appeared to be bags of marijuana, 1.77 grams of cocaine, and $670 in cash. Scales and packaging material consistent with selling drugs were found in White's kitchen.

Officer Tyson Myers was assisting with the processing of the crime scene when he overheard Sergeant Dean Harcrow mention that a Hi–Point 9 mm pistol was missing. Myers recalled that he had been working in the command center earlier that morning when he received a call from dispatch advising him that the Oklahoma Highway Patrol had arrested three men from Wichita who were found to be in possession of a Hi–Point 9 mm pistol that had been reported stolen from a Hutchinson residence 2 months earlier. The Hutchinson detectives followed up on this information and discovered that White had been living near the residence from which the 9 mm had been stolen.

Hutchinson Detective Bobby Holmquist contacted the Oklahoma Highway Patrol and spoke to Trooper Hatchett. Hatchett told Holmquist that the troopers also recovered a .40 caliber handgun in Williams' vehicle. Holmquist knew that .40 caliber shell casings had been found next to White's body. Hatchett indicated blood and brain matter had been found on the clothing of one of the men and on a handgun.

The Interrogations

***4** The following day, September 2, 2008, Harcrow travelled with Hutchinson Police Detective Thad Pickard to the Stillwater, Oklahoma, Police Department to execute search warrants to seize the clothing and other items taken from Williams' vehicle and to interview Williams, Beard, and Oliver. Harcrow took the lead in the interrogations. Both officers were armed and wearing badges during the interrogations.

Harcrow first met with Oliver. Oliver denied knowing White and denied being in Hutchinson.

Harcrow next attempted to interview Beard, but Beard did not want to speak with him.

Then, about 24 hours after Williams' arrest, Harcrow sought to interview Williams. At that first interview, Williams was advised of his *Miranda* rights. Williams said he understood his rights and signed a waiver of those rights. Williams denied knowing anything about White's murder and denied being present in Hutchinson. Williams said he did not know anything about the guns confiscated from his car, and he denied that there was blood found on his pants. Williams admitted drinking and taking ecstasy pills on the night of August 31, 2008, which he claimed put him in a "blackout stage" of intoxication. Harcrow informed Williams that he would be in town for a couple of days and Williams could inform the deputies at the jail if he wished to speak with him again.

Oliver then agreed to speak with Harcrow. After

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waiving his *Miranda* rights, Oliver admitted being present in Hutchinson with Williams and Beard. Oliver stated that they went to White's house to smoke, drink, and "kick it." They also went there to scare White. They went to the back of a residence and kicked in the back door. Oliver said that Williams shot White in the leg and, about 20 seconds later, shot White in the back of the head.

Harcrow and Pickard then spoke with Williams a second time at 6:50 p.m. that same day, September 2, when Williams told the jailers he wished to speak with them. The interview lasted about 26 minutes. This time, Williams admitted shooting White in the leg and in the head using a .40 caliber gun he found in his vehicle.

Harcrow interviewed Williams a third time on September 5, 2008, after Williams was transported back to Hutchinson. This interview was 4 days after Williams had been arrested in Oklahoma. Williams was again notified of his *Miranda* rights and he waived those rights and agreed to this third interview. The purpose of the interview was to determine if a fourth person, Michael Mack, was also involved in White's killing. Williams denied Mack's involvement, but he again admitted that he kicked in the back door to White's residence and shot White in the leg and in the head.

Additional Investigation

When Beard was arrested in Oklahoma, he had in his possession items meeting the description of White's silver chain and cross and White's set of keys. Forensic testing by the Kansas Bureau of Investigation tied the blood on Williams' pants and on the .40 caliber pistol to White's DNA profile. Forensic ballistic testing connected the two spent shell casings in White's home and the two bullets recovered from his body to the .40 caliber pistol.

***5** Williams' vehicle was towed from Oklahoma to Kansas and searched a second time. The vehicle contained an aftermarket rear-viewing camera. Detective Pickard had heard the cameras referred to as "cop cams" and had previously noticed this type of camera system in vehicles of those involved in dealing drugs. A potato chip sack containing approximately 64 grams of cocaine was confiscated, as well as small pink baggies that Pickard thought were generally used to package drugs. A pair of boxer shorts was found in the truck of the vehicle and another pair was found in the rear passenger compartment. Williams said he used boxer shorts to cover his face when he entered White's house.

During the autopsy, a .40 caliber bullet was removed from White's sinus cavity and another .40 caliber bullet was removed from his left leg. Two Smith & Wesson .40 caliber spent shell casings were recovered at the scene. Later examination of the ammunition contained in one of the handguns revealed that it was the same type of ammunition and contained the same stamp filings as the spent shell casings found near White's body.

The Charges and Trial

Williams was charged with first-degree murder. Williams moved to suppress the items seized in the searches of his vehicle. He also moved to suppress his subsequent confessions to the Hutchinson police. After hearings on the motions, the district court denied them.

Oliver was also charged with first-degree felony murder. He pled guilty to the amended charge of conspiracy to commit first-degree murder in exchange for testifying truthfully at Williams' trial. At trial, Oliver testified inconsistently and stated that he could not remember many of the details that he provided to the officers during his interview.

Witnesses called by Williams testified they saw him drinking heavily during the night before the murder, to the extent that his speech was slurred and he had trouble standing during a party. According to his witnesses he was seen stumbling on the dance floor and sitting at the bar nodding off. When Williams left the bar when it closed at 2 a.m., he was stretched out in the back seat of a car that took him home. According to his girlfriend, Williams appeared to be still intoxicated at 7:30 the following morning, the morning of the homicide.

The jury found Williams guilty of the lesser included offense of intentional second-degree murder. Williams appeals his conviction.

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The Suppression Motions

Williams claims the district court erred in denying his suppression motions. He argues the search was conducted in violation of the Fourth Amendment to the United States Constitution and any evidence seized as a result of the unlawful search, including his confession to the police, should be suppressed. He also contends his confession was the product of the illegal search and also should be suppressed because it was not voluntarily made.

On a motion to suppress evidence, we review the factual findings to determine if they are supported by a substantial competent evidence, and we review de novo the ultimate legal conclusion drawn from those findings. In doing so, we do not reweigh the evidence. *State v. Walker,* 292 Kan. 1, 5, 251 P.3d 618 (2010). The State bears the burden to prove the lawfulness of the search and seizure. *State v. McGinnis,* 290 Kan. 547, 551, 233 P.3d 246 (2010).

***6** Whether probable cause existed to conduct a warrantless search of the vehicle is a question of law which we review de novo. *State v.. Bickerstaff,* 26 Kan.App.2d 423, 424, 988 P.2d 285, *rev. denied* 268 Kan. 889 (1999).

Choice of Laws

At the suppression hearing the State, relying on *State v. Blood,* 190 Kan. 812, 378 P.2d 548 (1963), claimed that Oklahoma law governed on whether the search and seizure was proper. The court agreed and announced it would apply Oklahoma law in determining the validity of the search of Williams' car. On appeal, the State concedes that *Blood* does not stand for the proposition that the standards for considering the constitutionality of a search and seizure under the Fourth Amendment to the United States Constitution depend upon in what state the search and seizure occurred.

Blood involved a burglary in Johnson County, after which the burglars fled into Missouri and were stopped and their car searched by a Missouri State Trooper. In considering the district court's denial of the defendant's suppression motion, the Kansas Supreme Court found that Missouri law was in tune with federal constitutional standards while Kansas law had yet to develop a line of cases consisting with emerging constitutional doctrine involving the Fourth Amendment. The analysis did not turn on where the search and seizure occurred because the federal constitutional standard applies throughout the nation. We will examine the district court's ruling in that light.

District Court Ruling: Search of Williams' Car

We have no journal entry memorializing the district court's ruling on the suppression motion regarding evidence taken from Williams' car. We do have, however, the district court judge's oral ruling from the bench at the conclusion of the evidentiary hearing. The judge ruled:

> "[B]ased on the law that is cited by Mr. Schroeder [the prosecutor] in his argument, and I further find that—that these officers—these Oklahoma Troopers had probable cause to—to search the car on the reasons given by the State. I think they—they had the odor of alcohol. They had the—the admission that he had been—that Williams had been drinking. They had his demeanor, his body language. Uh, almost bizarre behavior on the highway. Apparently not knowing where he was going and stopped twice for—for no seatbelt and speeding ninety-two miles an hour down I–35 and running a stop sign down there by near the intersection of—of 35 and—and 51, I believe it is, Oklahoma 51. All of these circumstances gave these Troopers the right to—to search this vehicle. And—and they had probable cause, and I am going to [deny] the motion to suppress this evidence. I adopt the arguments and—the arguments and the citations given by the State in its closing argument as the reasons for the Court to make its decision."

In summary, the facts determined by the district court at the evidentiary hearing which, according to the district court, support its ruling are:

***7** • The troopers detected the odor of alcohol
• Williams admitted drinking

• Williams' demeanor, his body language

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- Williams' almost bizarre behavior on the highway
- Williams did not know where he was going
- Williams was stopped twice; once for speeding and again for no seat belts and running a stop sign.

Because the district court adopted the arguments and cases relied upon by the State, we need to examine the State's position at the hearing.

The prosecutor spent considerable time at the suppression hearing eliciting testimony that Williams consented to the search. In his closing argument, the prosecutor pointed out various events during the course of the stop in which, according to the prosecutor, Williams consented to the search. But the prosecutor then argued:

"But, Judge, we can argue consent all we want all day long. It doesn't matter, either. We have wasted a lot of time talking about consent. Because the real issue is the fact that as a matter of law the officers had probable cause to search the vehicle. They didn't need consent. They didn't need to ask permission. They had probable cause to search this vehicle.

....

"... Judge, you have got all these factors you take into consideration. But I will tell you the one factor that just matters—the others, the others are just—just additional facts. The one factor that matters is the fact he had the odor of alcohol about him, Judge."

The prosecutor then argued the application of *Gomez v. State,* 168 P.3d 1139, 1142–43 (Okla.Crim.2007), which, he contended, stood for the proposition "that if there is odor of alcohol, that gives an officer probable cause to search the vehicle for open containers." He also argued that Kansas law is similar, as announced in *Bickerstaff,* 26 Kan.App.2d at 424. The prosecutor added:

"Judge, the bottom line is forget ... driving south and driving north and driving south and then running stop signs, not knowing the names of the people in your car, not knowing where you are going, slurred speech. Just the odor of alcohol in and of itself gave the Troopers authority to get in that car. They had probable cause. They didn't have to ask for consent. That gave them the probable cause, and where they were looking is a place where alcohol could be kept in a glove box. They find the guns in the glove box."

In rebuttal the prosecutor concluded:

"The State's not saying there is probable cause to believe the defendant's driving under the influence of alcohol. We never said that.... The issue is whether or not the defendant had drank, illegal transportation of liquor, illegal consumption of liquor in a vehicle."

Consent

The district court judge made no finding that Williams consented to the search. In its appellate brief the State makes no such argument. In oral argument before us, the State conceded that it has abandoned the issue of consent. This may be because "[a] consent to search must be unequivocal and specific.... It must be clear that the search was permitted or invited by the individual whose rights are in question without duress or coercion." *State v. Dwyer,* 28 Kan.App.2d 238, Syl. ¶ 3, 14 P.3d 1186 (2000), *rev. denied* 270 Kan. 900 (2001). Further, merely submitting to lawful authority does not equal a finding of consent. *State v. Parker,* 282 Kan. 584, 595–96, 147 P.3d 115 (2006). Williams' verbal response does not appear to have provided the unequivocal and specific response that was necessary to consent to the search. Finally, it does not appear that the traffic stop had turned into a consensual encounter. Hatchett never informed Williams that he was free to leave before asking for consent to search the vehicle. Thus, as invited by the parties, we will disregard the consent issue and look to the record to determine if, based upon the facts found by the district court, there was probable cause justifying the search without Williams' consent.

Probable Cause to Search Williams' Car?

***8** The Fourth Amendment to the United States Constitution protects the public from warrantless searches by the government. Under the Fourth Amendment,

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individuals have the right to be free from unreasonable governmental searches and seizures. *State v. Thompson,* 284 Kan. 763, 772, 166 P.3d 1015 (2007). Evidence obtained as the result of an unconstitutional search is inadmissible and must be suppressed. *Wong Sun v. United States,* 371 U.S. 471, 484–87, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

A traffic stop is a seizure within the meaning of the Fourth Amendment. See *Delaware v. Prouse,* 440 U.S. 648, 653, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979). There is no challenge here to the validity of Trooper Hatchett's stop of Williams' car for running the stop sign while exiting the interstate.

A warrantless search violates the Fourth Amendment unless a recognized exception applies. One of the long-accepted exceptions to the search warrant requirement is the district court's basis for its ruling in this case, the combination of probable cause plus exigent circumstances. *State v. Fitzgerald,* 286 Kan. 1124, 1127, 192 P.3d 171 (2008). The United States Supreme Court has recognized that an automobile, because of its mobility, may be searched without a warrant when there is probable cause. See *Chambers v. Maroney,* 399 U.S. 42, 48–52, 90 S.Ct. 1975, 26 L.Ed. 419 (1970). As stated in *Fitzgerald:*

> "Probable cause is the reasonable belief that a specific crime has been committed and that a specific person committed it. Probable cause exists when the facts and the circumstances within a law enforcement officer's knowledge and about which the officer has reasonably trustworthy information are sufficient in themselves to warrant a person of reasonable caution in the belief that an offense has been or is being committed. When determining whether probable cause exists, an appellate court considers the totality of the circumstances, including all of the information in the officer's possession, fair inferences therefrom, and any other relevant facts, even if they may not be admissible on the issue of guilt *State v. Abbott,* 277 Kan. 161, Syl. ¶ ¶ 2, 3, 83 P.3d 794 (2004). Evidence of probable cause need not reach the level necessary to prove guilt beyond a reasonable doubt, but it must constitute more than mere suspicion. [Citation omitted.]" 286 Kan. at 1128.

Under our standard of appellate review, we review the factual findings underlying the district court's suppression decision to determine if they are supported by substantial competent evidence, and we consider de novo the ultimate legal conclusion the district court has drawn from those factual findings. *Walker,* 292 Kan. at 5.

Here, the district court adopted the State's theory that the troopers had probable cause to search Williams' vehicle for an open container of alcohol. The district court based this conclusion on Williams' admitted drinking, his not knowing where he was going, and the court's generalized finding of "his demeanor, his body language ... [and] almost bizarre behavior on the highway," and his being stopped for a traffic infraction, an event often associated with an alcohol-related offense. In doing so, the district court apparently disregarded the fact that neither trooper involved in the search testified that the purpose of the search was to find an open container of alcohol.

***9** The State suggests that other facts developed in the testimony support the district court's probable cause determination. But the problem is that none of those facts were found by the district court, and as an appellate court we do not engage in our own factfinding. For example, the State cites the testimony of Trooper Harmon that he smelled the odor of Black and Mild cigars in Williams' vehicle, which he associated with marijuana use. The district court made no finding regarding this testimony and based its ruling on the evidence of an alcohol-based crime. Thus, we must confine our analysis to the factual basis established by the district court, and we may not consider the odor of Black and Mild cigars as a factor justifying the search of Williams' car.

Our first task is to determine whether substantial competent evidence supports the district court's factual findings that

• The troopers detected the odor of alcohol

• Williams admitted drinking

• Williams' almost bizarre behavior on the highway

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- Williams' demeanor and his body language

- Williams not knowing where he was going

- Williams being stopped twice; once for speeding and again for no seat belts and running a stop sign.

We then must consider whether the district court correctly concluded from the evidence that the facts provided the troopers with probable cause to search the car for an open container.

There is certainly evidence that the troopers detected the odor of alcohol eminating from Williams, that he admitted drinking, that he identified several destinations for his trip, and that he was given tickets for traffic infractions. The finding of bizarre behavior relates to testimony about Williams turning around on I–35 to locate the trooper to attempt to retrieve his missing driver's license that had been taken at the time of his first encounter with the troopers.

With respect to Williams' demeanor and his body language, the district court did not specify what demeanor or body language. Because the district court heavily relied on the prosecutor's arguments, we turn to those arguments at the hearing. With respect to the issue of consent, the prosecutor referred to the trooper's testimony about "the inflection of the voice ... the defendant's demeanor and body language suggesting he had no objection to the search." Of course, that evidence is no longer material because the State has abandoned the consent issue.

The prosecutor then argued that when Williams was stopped he "appears nervous. He kept repeating himself." "You have what could be mumbling, rambling, slurred speech.... [T]he fact he was unable to—to follow simple directions, such as put your seatbelt on." This, of course, was before the prosecutor admonished the court that "[t]he one factor that matters is the fact he had the odor of alcohol about him, Judge." But for purposes of our analysis, we presume that the demeanor the court referred to in its findings was Williams' demeanor argued by the prosecutor.

***10** While there is some evidence to support these various findings, the threshold issue is whether this evidence is substantial; that is, whether the evidence possesses both relevance and substance so as to provide a substantial basis of fact from which the issues can reasonably be determined. Specifically, substantial evidence refers to legal and relevant evidence that a reasonable person could accept as being adequate to support a conclusion. *State v. Walker*, 283 Kan. 587, 594–95, 153 P.3d 1257 (2007).

Odor of Alcohol

On appeal, as it did at the suppression hearing, the State relies heavily on the holdings in *Gomez* and *Bickerstaff* as support for the proposition that the odor of alcohol coming from Williams' person alone gave the troopers probable cause to search his vehicle. In *Gomez,* the officer saw the defendant swerve over the center line, smelled the odor of alcohol coming from the vehicle, and observed two six-packs of beer within the defendant's car, with one bottle missing from one of the six-packs. Under these circumstances, the Oklahoma Court of Appeals held that the officer had sufficient probable cause to search the car for an open container of alcohol. 168 P.3d at 1141–42.

The *Gomez* court relied on *State v. Schuette*, 423 N.W.2d 104, 106 (Minn.App.1988), in which the Minnesota Court of Appeals held that an officer's detection of the odor of alcohol emanating from an car constitutes probable cause to search the car for an open container.

In *Bickerstaff*, 26 Kan.App.2d 426, Syl., a panel of this court found that the odor of alcohol emanating from the inside of a vehicle, combined with evidence that the driver was impaired, gave the officers probable cause to search the vehicle's interior for an open container. The *Bickerstaff* court relied on the fact that the odor of alcohol was coming from the defendant's vehicle as well as her person. Further, the defendant failed both a field sobriety test and an alcohol breath test, yet the defendant denied drinking. The court found the combination of factors gave the officers probable cause to believe that an open container was in the vehicle. 26 Kan.App.2d at 423–25.

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The facts of this case do not align with those of *Gomez* and *Bickerstaff*. Here, the troopers smelled alcohol on Williams' person while he sat in their patrol cars rather than from the interior of the vehicle. The troopers did not smell any alcohol in Williams' vehicle, and they did not observe any open containers in the vehicle. Although there was some discussion of field sobriety testing, both troopers testified that they did not believe that Williams was under the influence of alcohol or incapable of driving his vehicle safely. See *State v. Carson,* No. 101,242, 2009 WL 1591933, at *4 (Kan.App.2009) (unpublished opinion) (distinguishing *Bickerstaff* because the odor of alcohol was coming from the defendant's person rather than the vehicle and the officer stated that he did not suspect any illegal activity after defendant passed the field sobriety tests). Under the facts of this case, the odor of alcohol did not provide the troopers with probable cause to search Williams' vehicle for an open container.

Admitted Drinking

***11** In Williams' third encounter with the authorities that day, he told Trooper Hatchett that he had nothing to drink that day but had imbibed the night before. It is not a crime to drive an automobile after consuming alcohol. *State v. Wahweotten,* 36 Kan.App.2d 568, 589, 143 P.3d 58 (2006), *rev. denied* 283 Kan. 933 (2007). Hatchett testified he did not see any sign that Williams was under the influence of alcohol. Neither did any of the other troopers who had contact with Williams. Further, the odor of alcohol came from Williams' person, not from inside the car. Thus, Williams' admission of drinking the night before did not lead to a conclusion that the source of the odor could be an open container in the car that would justify a search of the car.

Bizarre Behavior

The bizarre behavior cited by the prosecutor was Williams turning around on I–35 and returning north to make contact with Trooper Leach to inquire about his driver's license. When Leach was unable to provide any information on the whereabouts of Williams' license, Williams continued on north on I–35 to a point where he could turn around and continue his journey south. Under the circumstances, actively seeking out law enforcement may evidence a degree of chutzpah, but it does not seem to evidence a guilty mind. But in any event it is not a fact that lends support for the notion that Williams may be carrying an open container of alcohol in his automobile.

Demeanor and Body Language

Body language was discussed with reference to the issue whether Williams' consented to the search. But the State abandoned that theory. But the district court apparently adopted the State's argument that when Williams was stopped he appeared nervous; kept repeating himself; and mumbled, rambled, and slurred his speech. We will discuss the prosecutor's reference to Williams not using his seat belt below. But nervousness alone is not enough to form reasonable suspicion; it must be coupled with other factors. See *State v. DeMarco,* 263 Kan. 727, 739–41, 952 P.2d 1276 (1998). Not only those guilty of a crime feel nervous when stopped by the police. Williams' initiating his second contact with the troopers that day seems to vitiate any suspicion that his nervousness was the product of a guilty conscience, a desire to hide evidence of a crime, or a fear of apprehension.

Trooper Harmon testified that Williams stammered, mumbled, and slurred his speech. But he also acknowledged that he was able to communicate with Williams appropriately and did not have to ask him to repeat himself. In any event, probable cause requires a reasonable belief that a specific crime has been or is being committed, not merely a generalized suspicion that the defendant must be up to no good. The troopers did not testify that there was something about Williams' demeanor that led them to believe that he had an open container of alcohol in his car. The State makes no effort on appeal to link Williams' demeanor to the basis for the search. Under the circumstances, there is no link to make. No testimony was presented at the suppression hearing that the troopers thought there was an open container in the car. Williams' demeanor would not cause a reasonable person to suspect that Williams had an open container in his vehicle.

Inconsistent Statements of Travel Plans

***12** In the first traffic stop Williams told Harmon he was going to Guthrie, Oklahoma, but later told him that he was going to Oklahoma City, further south of Guthrie on

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I–35, and was thinking about going to Dallas, yet further south on I–35. Unusual travel plans or inconsistent information can, in combination with other factors, contribute to reasonable suspicion justifying further police investigation. See *State v. Morlock,* 289 Kan. 980, 994–95, 218 P.3d 801 (2009). But while reasonable suspicion may support further police investigation, it does not support the search of Williams' car. Reasonable suspicion is a less demanding standard than probable cause which is needed to support a search.

Absent a consensual extension of a traffic stop, further questioning is permissible only if during the stop the law enforcement officer gains a reasonable and articulable suspicion that the driver is engaged in illegal activity. *State v. Moore,* 283 Kan. 344, 354, 154 P.3d 1 (2007). Although this is a less demanding standard than probable cause, the Fourth Amendment requires a minimum level of objective justification. The officer must be able to articulate more than an "inchoate and unparticularized suspicion" or more than a mere "hunch" of criminal activity. 283 Kan. at 354. An investigatory detention must be supported by specific and articulable facts which raise a reasonable suspicion that the person has committed, is committing, or is about to commit a crime. See K.S.A. 22–2401(1); *State v. Morris,* 276 Kan. 11, 24, 72 P.3d 570 (2003).

To repeat, probable cause requires a reasonable belief that a specific crime has been or is being committed. *Fitzgerald,* 286 Kan. at 1128. A reasonable person hearing Williams describe three different possible destinations, each one further south on I–35 than the last, would not form the belief based upon those statements that Williams probably had an open container in his car.

Multiple Stops for Traffic Offenses

The district court found that the two traffic stops—once for speeding and later for running a stop sign and not wearing seat belts—provided probable cause for the search. "Evidence of probable cause need not reach the level necessary to prove guilt beyond a reasonable doubt, but it must constitute more than mere suspicion. [Citation omitted.]" *Fitzgerald,* 286 Kan. at 1128. Traffic offenses, such as running of a stop sign in the middle of the day, do not favor the State in its quest to show probable cause. "The running of the stop sign is neutral on the question of whether probable cause to search the truck for drug evidence existed ." 286 Kan. at 1130. Once again, the State makes no effort to connect these traffic offenses to a reasonable belief that Williams had an open container in his car.

We conclude that the district court's findings do not support the conclusion that the Oklahoma troopers had probable cause to search Williams' vehicle. The physical evidence seized in the course of the search should have been suppressed.

The Exclusionary Rule—Williams' Confessions

***13** The search of Williams' car led to the discovery of two guns, one of which was the weapon used to kill White. The discovery of the weapons caused the Hutchinson police to travel to Oklahoma to interview the three suspects, during which Williams confessed to the crime. Williams repeated his confession several days later after he had been transported back to Kansas.

Generally, any evidence seized, either directly or indirectly, from an unreasonable search and seizure cannot be used against the defendant in a criminal prosecution. See *Herring v. United States,* 555 U.S. 135, 139–40, 129 S.Ct. 695, 172 L.Ed.2d 496 (2009); *Wong Sun,* 371 U.S. at 487–88. "The exclusionary rule has traditionally barred from trial physical, tangible materials obtained either during or as a direct result of an unlawful invasion ." 371 U.S. at 485. But a confession need not be suppressed if the connection between the search and a later confession was "so attenuated as to dissipate the taint." *Nardone v. United States,* 308 U.S. 338, 341, 60 S.Ct. 266, 84 L.Ed. 307 (1939).

Whether a defendant's confession must be suppressed as fruit of an illegal search depends on whether the confession was obtained "by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Wong Sun,* 371 U.S. at 488. Under the attenuation doctrine, our Supreme Court has held that the poisonous taint of unlawful activity dissipates when the connection between the unlawful police conduct and the challenged evidence becomes attenuated. *State v.*

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Martin, 285 Kan. 994, Syl. ¶ 3, 179 P.3d 457, *cert denied* 555 U.S. 880 (2008).

Williams filed two separate motions to suppress evidence obtained following the search of his car. Williams claimed in his first suppression motion that all evidence "verbal or otherwise" resulting from the illegal search of his car should not be admitted into evidence. But Williams' counsel advised the court at the hearing that "we filed the Motion to Suppress in this case, specifically asking the court to quash the stop, the search, the seizure of Mr. Williams' person as well as the vehicle that he was driving, the 2000 Cadillac." Williams' counsel did not raise any issue regarding Williams' confessions. The issue of Williams' confessions was not litigated at the hearing on the first suppression motion, and the district court did not include it in its ruling.

Over 2 weeks after he filed his first motion, Williams filed his second suppression motion, this one specifically directed to his confessions. In this second motion Williams did not base his argument on the application of the exclusionary rule for evidence obtained by an illegal search. He made no reference to it. His sole argument related to the voluntariness of the confessions.

The evidentiary hearing on Williams' second suppression motion was held over 2 weeks after the hearing on his first motion. The State's witness was Detective Harcrow of the Hutchinson Police Department, who testified about his interviews of Williams. There was no mention of the original search of Williams' car in his direct or cross-examination testimony. On cross-examination, Williams' counsel unsuccessfully attempted to raise an issue about a later search of Williams' car after it was returned to Kansas. But there was no reference to the original traffic stop and car search.

***14** Williams testified at the hearing about the copious amounts of liquor and drugs he consumed over the Labor Day weekend and prior to his arrest. He did not testify to any of the events leading to the initial search of his car. He claimed his confessions were involuntary because he was under the influence of drugs and alcohol. When the State inquired about Williams' statements to the Oklahoma troopers at the time of the traffic stop in which he denied he had consumed any alcohol that day, Williams' counsel objected, "Judge, getting outside the scope of direct at this point. I focused my direct simply on the amount of alcohol he consumed, excuse me, and whether or not the statements were voluntarily made.... Does not deal with veracity of the statements, judge." The court permitted the State to inquire about Williams' prearrest conduct to demonstrate that he was not intoxicated at the time. In closing, the State confined its argument to the voluntary nature of Williams' confession, never contending that the search that led to Williams' arrest and confession was a lawful search. In her closing argument, Williams' counsel argued the involuntary nature of the confessions but never contended that the confession was the product of an illegal search.

Now on appeal, and for the first time, Williams cites *State v. Hill,* 281 Kan. 136, 130 P.3d 1 (2006), and *State v. Kirby,* 12 Kan.App.2d 346, 744 P.2d 147 (1987), *aff'd* 242 Kan. 803, 751 P .2d 1041 (1988), for the proposition that a confession obtained as a result of an illegal arrest or an illegal search should be suppressed absent sufficient attenuation between the illegal police conduct and the confession. Williams claims the district court erred in not sustaining his suppression motion to bar admission of his confessions at trial.

But a party cannot lay in the weeds, not raise an issue before the trial court, and then claim on appeal that the trial court erred in not sustaining a motion on grounds never presented to the trial court. Claims such as this asserted for the first time on appeal are not properly before us for review. *State v. Warledo,* 286 Kan. 927, 938, 190 P.3d 937 (2008). The exclusionary rule is a prudential doctrine, not a personal constitutional right. *Davis v. United States,* 564 U.S. ––––, 131 S.Ct. 2419, 2427–28, 180 L.Ed.2d 285 (2011). But even if we were to consider it to be of constitutional magnitude, the issue still may not be raised for the first time on appeal. *State v. Gomez,* 290 Kan. 858, 862, 235 P.3d 1203 (2010).

There are several exceptions to the rule in *Gomez:* (1) when the newly asserted theory involves only a question of law arising on proved or admitted facts and is finally

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determinative of the case; (2) when consideration of the theory is necessary to serve the ends of justice or to prevent a denial of fundamental rights; or (3) when the judgment of the trial court may be upheld on appeal as being right for the wrong reason. 290 Kan. 858, Syl. ¶ 2.

***15** "[I]t is necessary for the party raising the constitutional issue to satisfy one of the three recognized exceptions to the general rule." *State v. McCullough,* 293 Kan. 970, 998, 270 P.3d 1142 (2012). Williams does not claim on appeal that any of these exceptions applies. Nevertheless, we will examine the issue.

Considering the *Gomez* exceptions in reverse order, exception (3) clearly does not apply. No one contends that the district court was correct in not suppressing the confessions but based its decision on the wrong reasons.

Exception (2) presents an exercise in circular reasoning. We cannot consider a newly raised claim unless its consideration is necessary to serve the ends of justice or to prevent denial of fundamental rights. Such a determination necessarily requires us to consider the very claim we are trying to decide whether we should consider. But in *State v. Ortega–Cadelan,* 287 Kan. 157, 160, 194 P.3d 1195 (2008), the court noted several circumstances in which an analysis under exception (2) would be appropriate. Based upon the record before us, we do not find any of those circumstances here.

Exception (1) applies when the newly asserted issue involves only a question of law arising on proved or admitted facts and is finally determinative of the case. Here, the question is whether the exclusionary rule should apply to bar the admission into evidence of two confessions Williams made to the Hutchinson police: the first confession on the day after Williams' arrest, and the second confession 4 days after Williams' arrest when he was transported back to Kansas from Oklahoma.

In discussing the exclusionary rule that ordinarily applies to "fruit of the poisonous tree," the court stated in *Davis,* 131 S.Ct. at 2426–27:

"The Fourth Amendment protects the 'right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.' The Amendment says nothing about suppressing evidence obtained in violation of this command. That rule—the exclusionary rule—is a 'prudential' doctrine.... [Citations omitted.] Exclusion is 'not a personal constitutional right,' nor is it designed to 'redress the injury' occasioned by an unconstitutional search. [Citations omitted.] The rule's sole purpose, we have repeatedly held, is to deter future Fourth Amendment violations. [Citations omitted.] Our cases have thus limited the rule's operation to situations in which this purpose is 'thought most efficaciously served.' [Citation omitted.] Where suppression fails to yield 'appreciable deterrence,' exclusion is 'clearly ... unwarranted.' [Citation omitted.]

"Real deterrent value is a 'necessary condition for exclusion,' but it is not 'a sufficient' one. [Citation omitted.] The analysis must also account for the 'substantial social costs' generated by the rule. [Citation omitted.] Exclusion exacts a heavy toll on both the judicial system and society at large. [Citation omitted.] It almost always requires courts to ignore reliable, trustworthy evidence bearing on guilt or innocence. [Citation omitted.] And its bottom-line effect, in many cases, is to suppress the truth and set the criminal loose in the community without punishment. [Citation omitted.] ... For exclusion to be appropriate, the deterrence benefits of suppression must outweigh its heavy costs. [Citations omitted.]"

***16** As stated in *State v. Hodges,* 252 Kan. 989, 1006, 851 P.2d 352 (1993) (quoting *Wong Sun v. United States,* 371 U.S. 471, 487–88, 83 S.Ct. 407, 9 L.Ed.2d 441 [1963]):

" 'We need not hold that all evidence is "fruit of the poisonous tree" simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt questions in such a case is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the

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primary taint. Maguire, Evidence of Guilt, 21 (1959).' "

In *State v. Knapp,* 234 Kan. 170, 671 P.2d 520 (1983), the district court found that there was sufficient attenuation between an illegal arrest and the defendant's subsequent confession to render the confession admissible. Knapp, a staff sergeant in the Army, was illegally detained by military police in Arizona and held overnight for questioning by agents of the Kansas Bureau of Investigation regarding the murder of his wife. The district court found, and the Supreme Court agreed, that the attenuation doctrine saved evidence obtained as a result of the illegal detention. The court reasoned that the Kansas authorities had no part in Knapp's arrest and did not seek to have him arrested. Knapp was not coerced in any manner. He was fully advised of his rights and understood them. Further, the military police acted in good-faith reliance on advice that their detention procedure was proper under military law. In ruling that attenuation had occurred, the court noted an observation by Justice Powell:

> "The basic purpose of the rule, briefly stated, is to remove possible motivations for illegal arrests.... If an illegal arrest merely provides the occasion of initial contact between the police and the accused, and because of time or other intervening factors the accused's eventual statement is the product of his own reflection and free will, application of the exclusionary rule can serve little purpose.' " 234 Kan. at 178 (quoting *Brown v. Illinois,* 422 U.S. 590, 610, 95 S.Ct. 2254, 45 L.Ed.2d 416 [1975] [Powell, J., concurring in part]).

In *Knapp* the trial court reached its conclusion after full inquiry into the applicability of the exclusionary rule. The four factors to be considered when determining whether a defendant's confession following an illegal arrest is admissible are: (1) whether *Miranda* warnings were given; (2) the proximity of the illegal arrest and the statement or confession; (3) the purpose and flagrancy of the officer's misconduct; and (4) other intervening circumstances. *Hill,* 281 Kan. at 153; see *Martin,* 285 Kan. at 1003.

In Williams' case, the trial court made no such analysis. At the conclusion of the hearing, the judge simply announced, "I find that from the totality of the circumstances that the, this confession, or confessions were voluntary and would overrule the motion to suppress ."

***17** Elements (2), (3), and (4) found in *Hill* are particularly troubling because of they are so fact intensive and the district court made no applicable findings of fact. Thus, it is impossible to apply *Gomez* exception (1) to consider the unpreserved issue regarding application of the exclusionary rule to Williams' two confessions because resolution of the issue turns on as yet undetermined facts. Williams told his Oklahoma jailers he wanted to talk to Harcrow and Pickard before they returned to Kansas. It was then that he made his first confession. He made a second confession 4 days after he was arrested and after he had been transported back to Kansas. There has been no determination of the intervening events. Those intervening events are matters of fact that are for resolution by the trial court, not the appellate court on appeal.

With respect to the conduct of the Oklahoma troopers at the scene of the arrest and search, the district court ruled on the first suppression motion based on the theory advanced by the State but which was inconsistent with the basis advanced by the troopers in their testimony. Consequently, to consider *Gomez* exception (1) we would have to engage in fact finding that is the province of the trial court, not us.

Finally, we have no information one way or the other whether the Hutchinson police would have connected Williams to White's death but for the illegal search of Williams' car and the seizure of the gun. See *Wong Sun,* 371 U.S. at 487–88.

We conclude that Williams' newly asserted claim does not involve only issues of law arising from proved or admitted facts. Thus, *Gomez* exception (1) does not apply. Even if Williams had claimed an exception to the rule that we do not consider newly raised issues on appeal, we are satisfied that none of the recognized exceptions applies. Accordingly, we will not consider this newly asserted

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claim on appeal.

Though the application of the exclusionary rule to Williams' confessions has not been preserved for appeal, the basis for barring admission of Williams' confessions asserted before the district court was that the confessions were involuntarily made. We now turn to that issue.

District Court's Ruling: Williams' Confessions

Williams argues that his statements and confessions to law enforcement following the illegal search of his car were not voluntary and violated the Fifth Amendment to the United States Constitution. He asserts the district court erred in denying his motion to suppress these statements. In the 16 lines of discussion of this issue in its appellate brief, the State provides no meaningful analysis.

In reviewing a district court's ruling on a motion to suppress a confession, we review the record to determine if the court's factual findings are supported by substantial competent evidence. We review de novo the district court's ultimate legal conclusion drawn from those facts. In doing so, we do not reweigh evidence, assess the credibility of the witnesses, or resolve conflicting evidence. *State v. Edwards,* 291 Kan. 532, 545, 243 P.3d 683 (2010).

***18** The State has the burden to prove the voluntariness of a confession by a preponderance of the evidence. 291 Kan. at 545. The court looks at the totality of the circumstances surrounding the confession and determines its voluntariness by considering the following nonexclusive factors:

> " '(1) the accused's mental condition; (2) the manner and duration of the interrogation; (3) the ability of the accused to communicate on request with the outside world; (4) the accused's age, intellect, and background; (5) the fairness of the officers in conducting the interrogation; and (6) the accused's fluency with the English language.' [Citation omitted.]" *State v. Johnson,* 286 Kan. 824, 836, 190 P.3d 207 (2008).

The district court held an evidentiary hearing and reviewed the videotape recordings of the interrogations. Williams testified that he was too intoxicated from the alcohol and drugs that he consumed to have voluntarily signed the waiver of *Miranda* rights. Williams further testified that even though he was no longer feeling the effects of intoxication during the third interview, which was many days after the crime, he claimed his statements were not voluntary because of the information he had disclosed in previous interviews.

On appeal, Williams also argues that his confession was involuntary because he was repeatedly threatened and coerced by the detectives and the detectives misrepresented the evidence. Williams complains about the following statements: Pickard told Williams that the decisions you make will "affect you for the rest of your life." He also told Williams that "you're going to work with us, or you're not going to work with us.... I want to go to the DA ... and be able to tell them, you know what, he's a stand up guy ." Pickard then talked to Williams about how taking a plea would affect Pickard talking to the DA. Pickard stated, "[I]f you're not going to work with us, we're not going to work with you." Pickard also stated that if Williams was not going to work with the detectives, then "we're going to want a trial in this case" and "[i]f you're not going to work with us we're going to go to the DA and say that ... you were not honest." Harcrow then told Williams that he did not want to see him go to prison for 40 years and that "we can work out these charges here in Oklahoma." Williams characterizes these statements as "clear threats." He cites *State v. Banks,* 260 Kan. 918, 925, 927 P.2d 456 (1996), for the following rule of law:

> "In order to render a confession involuntary as a product of a promise of some benefit to the accused, including leniency, the promise must concern action to be taken by a public official, the promise must be such as would likely cause the accused to make a false statement to obtain the benefit of the promise, and the promise must be made by a person whom the accused reasonably believed to have the power or authority to execute it. *State v. Norris,* 244 Kan. 326, Syl. ¶ 6, 768 P.2d 296 (1989)."

***19** However, as in *Banks,* there is no evidence of such a promise or benefit in this case.

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Williams also complains that the detectives repeatedly lied to him about the evidence and the cooperation of his codefendants. Police are free to lie about evidence, but it is a factor to be considered, in conjunction with others, when determining the fairness of the officers in conducting the interrogation. See *Johnson*, 286 Kan. at 836; *State v. Swanigan*, 279 Kan. 18, 32, 106 P.3d 39 (2005).

Williams has not raised any alarming issues which would render his confessions involuntary under the factors identified in *Johnson*, 286 Kan. at 836. Under the totality of the circumstances, and in light of the factors relevant to voluntariness, there is sufficient competent evidence to support a finding of voluntariness. The district court correctly ruled that Williams' statements were the product of his free and independent will.

Admission of Drug Evidence at Trial

Williams argues that drug evidence and other evidence relating to his prior bad acts were erroneously admitted at trial, constituting reversible error. The State argues the drug evidence was relevant to establish Williams' motive in shooting White.

In considering whether such evidence is admissible under K.S.A. 60–455, the trial court must first determine whether the evidence is relevant to prove a disputed material fact such as intent, motive, knowledge, or identity. On the issue of materiality, we review the trial court's ruling de novo. On the issue of relevancy, we review the district court's ruling using the abuse of discretion standard. If the evidence is relevant to prove a disputed material fact, the trial court must determine whether the probative value of the evidence outweighs its prejudicial effect. We examine the trial judge's ruling on this point using the abuse of discretion standard. If the trial court admits the evidence, it then must give the jury a limiting instruction identifying the specific purpose for admission of this evidence. *State v. Riojas*, 288 Kan. 379, 383, 204 P.3d 578 (2009).

Here, the district court gave a limiting instruction informing the jury that it could only consider the prior crimes evidence to prove Williams' motive. But it is undisputed that the district court failed to specifically address any of the factors in ruling that the evidence was admissible either at the hearing on the State's motion in limine or at trial. In *State v. Gunby*, 282 Kan. 39, 57, 144 P.3d 647 (2006), our Supreme Court stated that a district court's failure to follow its protocol for analyzing the admissibility of such evidence and to give a limiting instruction is error, although it may be harmless error. Here, the district court failed to undertake the proper analysis in admitting the evidence under K.S.A. 60–455.

Motion for a Continuance

Williams argues the district court erred in denying his motion for a continuance to investigate purportedly exculpatory evidence. We consider this claim using the abuse of discretion standard. *State v. Carter*, 284 Kan. 312, 318, 160 P.3d 457 (2007). The evidence that Williams points to is blood found on Beard's shoe. But it is undisputed that Beard was standing near White when Williams shot him. Thus, a spot of blood on his shoe would be expected and is not viewed as exculpatory evidence warranting a continuance. We find no abuse of discretion in the district court denying this motion.

Prosecutorial Misconduct

***20** Williams argues that he was denied his right to a fair trial by several instances of the State's misconduct. Because we are remanding the case to the district court for a retrial, these issues are moot. But because they are issues that may resurface during the retrial, we will consider them.

We review this issue using a two-step analysis. First, we consider whether the prosecutor's conduct was proper and within the latitude allowed the prosecutor. If we find misconduct, we then determine whether the conduct requires us to reverse the case. In doing so, we consider (1) whether the misconduct was gross and flagrant, (2) whether the misconduct showed ill will on the prosecutor's part, and (3) whether the evidence was of such a direct and overwhelming nature that the misconduct would likely have had little weight in the minds of jurors, *State v. Inkelaar*, 293 Kan. 414, 427, 264 P.3d 81 (2011), and *State v. Tosh*, 278 Kan. 83, 85, 91 P.3d 1204 (2004), or whether the error "affected the outcome of the trial." *State*

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v. Ward, 292 Kan. 541, Syl. ¶ 6, 256 P.3d 801 (2011), *cert. denied* 132 S.Ct. 1594 (2012).

The State generally denies any misconduct but provides no argument as to the specific instances alleged by Williams.

As to Williams' assertions of evidentiary error, some of the questions or comments were objected to and some of them were not. A contemporaneous objection must be made to preserve an evidentiary claim for appeal, including objections to questions a prosecutor poses to a witness. See K.S.A. 60–404; *State v. Shadden,* 290 Kan. 803, 835, 235 P.3d 436 (2010). A contemporaneous objection is not required to address Williams' assertion of prosecutorial misconduct during closing argument. See *State v. Bennington,* 293 Kan. 503, 530, 264 P.3d 440 (2011).

Cross-examination of LaShira Williams

Williams claims the prosecutor engaged in misconduct in LaShira Williams' cross-examination. Williams preserved the issue with a timely objection to the prosecutor's questions. Williams claims the prosecutor repeatedly asked the witness whether Williams generally carried a gun and whether she saw him with a large amount of cocaine. Williams' use of the word "repeatedly" is a mischaracterization of the record. The prosecutor asked the questions a couple of times due to the interjection of Williams' objections. After the court overruled Williams' objections, the witness denied that Williams generally carried a gun and also denied seeing Williams with a large amount of cocaine. Williams also claims the prosecutor asked the witness to divulge the "gang nicknames" of Beard and Oliver, in direct violation of the court's order in limine. This is also a mischaracterization of the record. The prosecutor did not refer to a gang when asking LaShira if she knew Beard and Oliver by any other names.

Williams relies on *State v. Quick,* 229 Kan. 117, 122, 621 P.2d 997 (1981), and *State v. Lewis,* 27 Kan.App.2d 380, 384, 5 P.3d 531 (2000), to support his allegation of prosecutorial misconduct. However, the issues addressed in both *Lewis* and *Quick* were evidentiary rulings regarding the admissibility of evidence under K.S.A. 60–447 and K.S.A. 60–455. In neither case did the appellate court engage in an analysis of prosecutorial misconduct. Williams has not raised an evidentiary issue regarding the district court's ruling under K.S.A. 60–447. And we have already addressed Williams' assertions that certain evidence of prior bad acts was improperly admitted.

***21** Under a prosecutorial misconduct analysis, the prosecutor's inquiry regarding whether LaShira knew Beard and Oliver by any other name does not constitute prosecutorial misconduct. Despite Williams' assertion that the prosecutor elicited testimony from LaShira about the codefendants "gang nicknames," the prosecutor made no actual reference to gangs or their association with gangs during this line of questioning. The question was limited merely to whether LaShira knew the men by any other names. Williams' objection to this line of questioning was made in reference to the order in limine and not on the basis of relevance.

However, we hold the prosecutor committed misconduct by asking LaShira if Williams "commonly" carried a gun and further inquiring whether she saw Williams with a "large amount of cocaine." But such misconduct does not require reversal. Although the line of questioning could have prejudiced Williams in the eyes of the jurors by connecting him to criminal activity, Williams' confession to shooting White with a gun is evidence of such a direct and overwhelming nature that the improper line of questioning would likely have had little weight in the minds of the jurors. See *Inkelaar,* 293 Kan. at 427.

Closing Argument

Next, Williams complains that the State committed numerous instances of prosecutorial misconduct during closing argument. Williams complains the prosecutor improperly: (1) referred to this case as "cold-blooded business"; (2) argued that Williams showed no remorse; (3) referred to the killing as an assassination; and (4) denigrated the defense and defense counsel in his reference to the defense theory as a "common tactic."

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A prosecutor has the duty to refrain from making improper, leading, inflammatory, or irrelevant statements to the jury. *State v. Scott,* 286 Kan. 54, 77, 183 P.3d 801 (2008). We employ a two-step analysis in considering claims of prosecutorial misconduct: First, we must determine whether the prosecutor's statements were outside the wide latitude for language and manner a prosecutor is allowed when discussing the evidence.

Williams cites *Scott,* 286 Kan. at 81–82, to support his argument that the prosecutor's reference to the crime as "cold-blooded business" was improper. See *State v. Hooker,* 271 Kan. 52, 67, 21 P.3d 964 (2001). Williams refers us to the prosecutor statement, "This is a case about a cold-blooded business, and a legitimate business world." The prosecutor's meaning is unclear, but he was apparently commenting on the nature of the killing. In the cases Williams relies on, *Scott* and *Hooker,* the court considered comments in closing about the defendant having " 'cold-blooded killing eyes' " or being referred to as a " 'killer' ". The court in *Scott* stated:

> "The consistent rule to be taken from the cases is that a prosecutor may refer to the defendant as a murderer or killer in the course of arguing the evidence shows the defendant committed the murder. See *Cravatt,* 267 Kan. at 332–34. However, where such statements imply the prosecutor believes something other than the evidence shows the defendant to be a murderer, such as the prosecutor's belief the defendant 'looks like a murderer' or has 'cold-blooded killing eyes,' or the statements do not relate to the evidence but are simply made to inflame the jury, such as a comment telling the jurors they are 'eight feet from a killer,' the argument will be held improper. [Citations omitted.]" *Scott,* 286 Kan. at 81–82.

***22** We conclude that the remark made in closing was a fair comment on the evidence and not improper.

Williams further complains that the prosecutor made improper comments intended to inflame the passions of the jury when he stated that Williams showed no remorse and also referred to the murder as an assassination. Our Supreme Court has recognized that the wide latitude given to prosecutors concerning the language and manner of their closing argument allows for impassioned bursts of oratory and picturesque speech as long as it does not stray into facts not in evidence. See *State v. Rodriguez,* 269 Kan. 633, 643, 8 P.3d 712 (2000). The prosecutor's comment that Williams showed no remorse is supported by the tapes of Williams' statements and confession to police. Williams expressed regret for shooting White and getting caught, but he did not express remorse for taking White's life. And the prosecutor's characterization of the killing as an assassination is supported by the manner of the killing—evidence showed that the fatal shot occurred with the gun pressed against the back of White's head.

Williams further complains that the prosecutor denigrated defense counsel and the theory of defense. During closing arguments, defense counsel pointed to the evidence of the shoeprint on White's back door. Defense counsel stated that it was "uncontroverted" that Williams was wearing slippers the night of the murder. Defense counsel also commented on the failure of the State to tests the "so-called blood" on Beard's shoes and the failure of the State to do DNA tests of various articles collected by the police. With regard to the shoeprint on White's door, the prosecutor responded:

> "You were asked about there's no disputing the fact that Felton Williams was wearing slippers at the time that he went into the residence of Kenneth White, Says who? He says he had slippers on. Aubrey Oliver says, I don't pay attention to that kind of stuff. He was wearing slippers. Well, there's several possibilities. I'll tell you what, there's no disputing, there's no disputing that the defendant kicked open the door. You see him say that in his confession. So was he wearing something besides slippers, or perhaps could that shoeprint have been there from before? There's no disputing that he kicked open the door, Ladies and Gentlemen. There's a saying that if the **facts** are **against** you, you **argue** the **law**. If the **law** is **against** you, you **argue** the **facts**. If the **facts** and **law** are **against** you, you call people names and you yell."

We consider the last three sentences of the prosecutor's remarks to come close to, if not over, the line of acceptable argument by denigrating the defense and

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defense counsel. The prosecutor continued as follows, in an apparent response to defense counsel's criticism of the criminal investigation:

"It's a common tactic. In fact it is something that goes along with our culture. To attack the investigation done by law enforcement. I mean, T.V. tends to sometimes show law enforcement as being incompetent. They can't solve the crime unless a detective comes along, private detective and solves it. You know, robotic car or a dog, a bionic thing, person, or maybe a little old lady who writes mystery novels.... In this case, Ladies and Gentlemen, the Hutchinson Police Department did an excellent job. They collected the evidence. They made sure of the chain of custody. They submitted it to the laboratory. I will leave that for your determination."

***23** These comments by the prosecutor were in direct response to argument made by defense counsel and were not made to denigrate the theory of defense or defense counsel. We acknowledge the prosecutor's duty to refrain from making improper, leading, inflammatory, or irrelevant statements to the jury. Scott, 286 Kan. at 77. But we conclude that these comments, with the one noted exception, were within the wide latitude allowed in closing argument.

Alleged Intimidation of Aubrey Oliver

Finally, Williams complains that the prosecutor committed reversible misconduct by intimidating Oliver.

During Oliver's direct testimony, he needed to be repeatedly told to speak up and pull the microphone up to his mouth. On several occasions, Oliver testified that he could not remember the details of the shooting. After having Oliver declared a hostile witness, the State continued questioning. Oliver denied talking about the plan ahead of time and further denied knowing that "there was going to be a killing" at White's residence. The State continued:

"Q. So you pled guilty to a conspiracy and agreement to commit a murder, and you didn't have an agreement?

"A. I was scared.

"Q. You were scared when you went to the residence?

"A. Huh-uh. Twenty years I was going to do.

"Q. So you were scared of the charges?

"A. Yeah."

The transcript indicates that an off-the-record discussion was held. Back on the record, the prosecutor stated, "Judge, you want to take the morning recess? Give his attorney a chance to talk to him?" After the recess, Oliver continued his testimony and the State used the redacted portion of Oliver's statement to refresh his memory. Oliver's testimony continued, and he testified that he witnessed Williams shoot White in the leg and the back of the head.

Williams objected to the use of Oliver's statement to refresh his memory on evidentiary grounds, but the record does not reflect any objection to either the recess taken for the conference with Oliver's counsel or on the grounds that the State was intimidating Oliver. The issue has not been preserved for review. Further, the cases relied on by Williams include factual scenarios in which the allegation of prosecutorial misconduct had a basis for support in the record. See, *i.e., Webb v. Texas,* 409 U.S. 95, 93 S.Ct. 351, 34 L.Ed.2d 330 (1972).

Here, Williams claims are based solely on his allegation that

"the sequence of events recited previously strongly suggests that the prosecutor's request for a recess so Oliver's attorney could 'talk' to him led to Oliver's dramatic change in testimony, especially considering the recess was taken immediately after Oliver told the prosecutor he entered the plea agreement out of fear of going to prison for 20 years."

Williams then makes the conclusory allegation that prosecutorial intervention led to Oliver's change in testimony.

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Williams' conclusory allegation of prosecutorial intervention is not supported by the record on appeal. Williams' mere speculation about what occurred off the record cannot serve as a basis for reversible error.

***24** Regardless of the preservation issues, Williams does not show that any purported misconduct would have had any effect on the verdict in light of the overwhelming evidence presented to support the State's theory that Williams shot and killed White. Any misconduct does not amount to reversible error.

Jury Instructions—Lesser Included Voluntary Manslaughter

Finally, Williams argues the district court erred in refusing to give his requested instruction on the lesser included crime of voluntary manslaughter. He based this requested instruction on the theory that an argument spontaneously erupted and resulted in a heat of passion or sudden quarrel killing of White.

The trial court shall instruct the jury on lesser included offenses when there is some evidence that could reasonably justify a conviction for the lesser included crime. K.S.A. 22–3414(3); *State v. Kirkpatrick,* 286 Kan. 329, 334, 184 P.3d 247 (2008). This duty to instruct applies even if the evidence is weak, inconclusive, and consists solely of the defendant's testimony. 286 Kan. at 334.

Williams testified at trial that he forcibly entered White's residence looking for someone named "Fernando." White began "talking shit" and continued to threaten to "do this thing" to Williams and his cousin. Williams stated that his adrenaline took over and he did not even remember pulling the trigger. In addition, Oliver testified that there was some yelling and talking before the shooting, but he denied that White was yelling.

Neither Williams nor Oliver gave a recitation of events supporting a theory of a sudden quarrel. This is not a case of parties engaging in civil discourse when a sudden quarrel erupts. The testimony established that Williams, Beard, and Oliver forcibly entered White's residence by kicking in the back door with the intent to enter and to scare White. Once inside, it is reasonable to assume that White might respond to the unlawful intrusion with a forceful expression of his unhappiness with these events. A discussion ensued that led to the shooting. It is inconceivable that Williams' and Oliver's version of events could be viewed as evidence of a sudden quarrel. The district court did not err in refusing to instruct the jury on the lesser included offense of voluntary manslaughter.

Summary

In summary, when Williams moved to suppress the physical evidence obtained in the search of his car, the State abandoned any argument that he consented to the search. The district court ruled that there was probable cause to support the search of Williams' car based on the State's arguments. In arguing the motion, the State took the position that the search was valid because the troopers had probable cause to believe that there was an open container of liquor in the car. Therefore, we examined the evidence at the suppression hearing to determine whether there was substantial evidence to support the district court's findings and whether those findings support the conclusion that the troopers had probable cause to search the car for an open container. In our examination we discovered that the facts determined by the district court did not provide probable cause for the troopers to search the car for an open container. Therefore, we concluded that the physical evidence obtained in the search should not have been admitted at trial. Accordingly, we must reverse Williams' conviction and remand the case for a new trial, at which the physical evidence obtained in the search of Williams' car by the Oklahoma troopers in the course of the traffic stop will not be admitted.

***25** With regard to Williams' subsequent confessions to the Hutchison police, we conclude that the district court was correct in finding that the confessions were freely and voluntarily made and, therefore, admissible at trial. Williams claims for the first time on appeal that his confessions should be barred as the product of the illegal search of his car. But this contention was never presented to the district court for its consideration and has not been preserved for appeal and, therefore, we do not consider it.

With regard to the other claimed pretrial and trial

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rulings by the court and the claimed prosecutorial misconduct at trial, we urge the prosecutor and the district court on remand to be mindful of our analyses on these issues should they arise again.

Affirmed in part, reversed in part, and remanded for a new trial.

Kan.App.,2012.

State v. Williams
279 P.3d 739, 2012 WL 2785910 (Kan.App.)
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