No. 13-109624-A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS
Plaintiff-Appellee

v.

RICKY EUGENE ROLAND
Defendant-Appellant

BRIEF OF APPELLEE

APPEAL FROM THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
HONORABLE CHERYL KINGFISHER, JUDGE
DISTRICT COURT CASE NO. 11-CR-1171

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NATURE OF THE CASE

Ricky Eugene Roland (Roland) was convicted by a jury of one count of possession of methamphetamine, one count of possession of drug paraphernalia, one count of driving under the influence, one count of failure to report and accident with injury or damage to property, and leaving the scene of an accident. The district court sentenced Roland to a controlling sentence of 11 months in prison with six months of consecutive jail time and 12 months of postrelease supervision. The district court suspended that sentence and placed Roland on probation for 18 months with drug treatment. Roland appeals his conviction and sentence.

STATEMENT OF THE ISSUES

I. **The district court properly allowed the KBI scientist to testify about the testing of the methamphetamine and properly admitted the KBI lab report at trial.**

II. **The State presented sufficient evidence to convict Roland of failing to report an accident.**

III. **The prosecutor's comments were not outside the wide latitude afforded to prosecutors during closing argument and did not constitute prosecutorial misconduct.**

IV. **The district court correctly instructed the jury on the possession of drug paraphernalia.**

V. **The district court did not commit reversible error in giving a written answer to the jury's question.**

VI. **The district court did not properly consider Roland's financial resources and the nature of the burden that payment of the fine will impose in order to determine whether community service should be allowed to be used to pay off the mandatory fine.**

STATEMENT OF THE FACTS

On June 18, 2011, around 9:30 p.m., Roland was driving his yellow Chevy Colorado truck northbound on Topeka Boulevard. (R. IX, 177.) Dana Webber (Webber) was driving southbound on Topeka Boulevard in her minivan. (R. IX, 176.) Webber noticed Roland's "cute little yellow pickup truck" and then looked up to the right at the speed limit sign. (R. IX, 177, 182.) When Webber looked back to the road, Roland's truck was directly in front of her. (R. IX, 177.) Webber hit the brakes, but it was too late; the two cars collided. (R. IX, 177.) The front end of Webber's minivan hit the passenger side of Roland's truck. (R. IX, 178.) The airbags in Webber's minivan deployed and the impact of the crash hurt her chest. (R. IX 178.) Webber called 911 and reported that she had been hit and believed she was hurt. (State's Exhibit 1, R. IX, 180, 183-84.) Roland did not stop and drove away from the accident. (R. IX, 186, 207; R. X, 354.)

Tiffany Frame (Frame) was driving down Topeka Boulevard and witnessed the accident. Frame saw Roland driving down the wrong side of the road heading northbound and saw him hit Webber's minivan. (R. X, 354.) Frame also observed Roland drive away from the accident. (R. X. 354.) Frame called 911 to report that Roland drove away from the scene of the accident.

William Smith (Smith) and Lisa Newton (Newton) did not witness the accident, but heard it. (R. IX, 186, 207.) Smith saw a yellow Chevy Colorado pickup truck drive away from the scene of the accident. (R. IX, 186, 189.) Newton saw a yellow truck drive away from the accident at a very high rate of speed. (R. IX, 208, 213.) The two called 911 and stated that Roland drove away from the scene of the accident. (R. IX,

192, 209.) Smith and Newton followed Roland and watched him drive onto Ridgeview Drive, into a trailer park. (R. IX, 194, 202, 208-09.) Law enforcement then searched for Roland's truck.

Around 10:30 p.m., Janet Roland (Janet), Roland's then wife, saw Roland sitting in his yellow Chevy pickup truck in her driveway at 1213 Southeast 42nd Street. (R. X, 328-33.) Janet's address was in the Ridgeview Trailer Park area. (R. X, 329.) Janet had kicked Roland out of their house the night before, and called law enforcement to remove him from the property. (R. IX, 221; R. X, 329-32.) Corporal Scott Wanamaker (Wanamaker) arrived at the trailer park and saw Roland's yellow pickup truck parked in the driveway. (R. IX, 224.) Wanamaker approached the truck and attempted to make contact with Roland, but Roland was passed out behind the wheel. (R. IX, 227.) Wanamaker tried to wake Roland, but was unable to do so. (R. IX, 227.)

Deputy Nick Custenborder (Custenborder) also arrived at the scene and took over for Wanamaker. Custenborder made contact with Roland. Roland's movements were very slow, very lethargic, and he had very delayed responses to questions. (R. IX, 255-56.) Custenborder had to ask him at least ten times to get out of the truck. (R. IX, 256.) Roland eventually got out of the truck and was extremely unstable on his feet. (R. IX, 230, 258.) Custenborder helped Roland so he would not fall down. (R. IX, 258.) Roland's eyes were bloodshot and droopy, and he smelled strongly of alcohol. (R. IX, 258.)

Custenborder requested that Roland participate in field sobriety tests. However, Roland never gave Custenborder a definitive response nor did he perform any of the tests.

(R. IX, 259-62.) Custenborder and other officers helped Roland to the ground, and even while sitting, Roland had trouble balancing. (R. IX, 263.)

Custenborder and Wanamaker believed that Roland was involved in leaving the scene of the accident due to the description of and damage sustained to his truck. (R. IX, 253.) Roland was then arrested for driving under the influence, leaving the scene of an accident, failure to report an accident, and failure to yield. (R. IX, 264.) Custenborder searched Roland and found a glass pipe in his right side pants pocket. (R. IX, 264.) Roland stated he would take an Intoxilyzer test and was transported to the law enforcement center. (R. IX, 269.) But, Roland ultimately refused the test once he was at the law enforcement center. (R. IX, 269-70, 293.)

Roland was then transported to the jail where he was searched again during the intake process. (R. X, 337-39.) The officer found a metal pill container in Roland's pocket. (R. X, 341.) Inside the container there was a plastic baggie with a crystal like substance in it. (R. X, 344-45.) The substance tested positive for methamphetamine. (R. X, 290.)

Roland was ultimately charged with one count of possession of methamphetamine, one count of unlawful use of drug paraphernalia, one count of driving under the influence of alcohol and or drugs, one count of failure to report an accident, and one count of leaving the scene of an accident. (R. I, 13-16; R. X, 400.)

During the jury trial, the jury had a question during deliberations. The jury asked the district court, "[c]oncerning Count 3, define circumstantial evidence, and can or how can we use it to determine guilt or innocence?" (R. X, 433.) Roland's attorney suggested the jury should be referred to instruction number two, which refers to what the jury

should consider in its fact finding. (R. X, 434.) The district court responded by writing the following answer "The Court can only instruct that you consider each of the instructions already given in answering this question" and gave the answer to the jury. (R. X, 435.) The jury found Roland guilty of all the charges. (R. II, 146-50; R. X, 435.)

Roland was sentenced to an underlying sentence of 11 months in prison for the possession of methamphetamine count and a consecutive six month jail sentence for the remaining charges. (R. XI, 13.) The district court suspended the sentence and placed Roland on 18 months supervised probation with drug treatment. (R. XI, 13-14.) The district court also ordered Roland to pay a $1,000 fine for the driving under the influence count. (R. XI, 15.)

Roland appeals his conviction and sentence. (R. II, 172.) Additional facts will be discussed in the analysis as necessary.

ARGUMENTS AND AUTHORITIES

I. The district court properly allowed the KBI scientist to testify about the testing of the methamphetamine and properly admitted the KBI lab report at trial.

Roland first argues that the district court erred when it allowed the testimony of Kamala Hinnergardt (Hinnergardt), a forensic scientist for the Kansas Bureau of Investigation (KBI), and the admission of the Forensic Laboratory report at trial. Roland argues that his constitutional confrontation rights were violated because Hinnergardt testified at trial and was not the scientist who physically handled the substance. The actual handling of the substance and testing was done by a trainee, and Hinnergardt was supervising the trainee during the testing. The State contends that this is not a Confrontation Clause issue, as Hinnergardt's testimony was based on her own personal

observations and independent conclusions and the trainee had no impact on her ultimate determination that the substance was methamphetamine. Hinnergardt was available for cross examination; and therefore, Roland was not denied his right to confront the analyst who made the determination that the substance was methamphetamine.

Standard of Review

This court employs an unlimited standard of review when addressing issues pertaining to the Confrontation Clause of the Sixth Amendment to the United States Constitution. *State v. Noah*, 284 Kan. 608, 612, 162 P.3d 799 (2007). Any issue of statutory interpretation is likewise subject to de novo review. *State v. Ortega-Cadelan*, 287 Kan. 157, 164, 194 P.3d 1195 (2008); *State v. Bryan*, 281 Kan. 157, 159, 130 P.3d 85 (2006).

Analysis

The Confrontation Clause of the Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." That guarantee applies to criminal defendants in both federal and state prosecutions. *See Pointer v. Texas*, 380 U.S. 400, 406, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965) (Sixth Amendment applicable to states via Fourteenth Amendment).

In *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), the United States Supreme Court significantly overhauled the analysis and application of the Confrontation Clause. *Crawford* clarified that a witness' testimony against a defendant is inadmissible unless the witness appears at trial or, if the testimonial witness is unavailable to testify at trial, the defendant had a prior opportunity for cross-

examination. 541 U.S. at 59; *see Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S.Ct. 2527, 2531, 174 L.Ed.2d 314 (2009).

In *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S.Ct. 2527, 2532, 174 L.Ed.2d 314 (2009), the United States Supreme Court specifically found that a laboratory analyst's certificate offered to prove the substance which defendant had possessed was cocaine fell within the "core class of testimonial statements" subject to the Confrontation Clause. Based on that decision, the Kansas Supreme Court concluded that forensic examiner reports are testimonial statements. *State v. Leshay*, 289 Kan. 546, 549, 213 P.3d 1071 (2009). Roland argues that, based on these cases, he had a Sixth Amendment right to confront the trainee, who physically touched the substance and prepared the report indicating that the substance was methamphetamine.

Here, the State had Hinnergardt testify about analyzing the crystalline substance that was found in Roland's pocket. At that time, Hinnergardt stated she had a trainee working under her direct supervision. (R. IX, 131.) Hinnergardt stated that she checked out the evidence on July 19, 2011. (R. IX, 130-31.) Hinnergardt observed the trainee the entire time the substance was being tested. (R. IX, 132.) Hinnergardt took the evidence back to her work station where she watched the trainee actually open the sealed plastic bag. (R. IX, 132.) Then, a net weight of the crystalline substance was taken. (R. IX, 134, 137.) The net weight of the substance was 0.14 grams. (R. IX, 134, 137-38.) Hiinergardt personally observed the readout of the number on the digital scale. (R. IX, 137.) Hinnergardt observed the entire weighing process and stated it was performed in accordance with KBI procedure. (R. IX, 137.)

After the substance was weighed, a small portion of it was taken to use for sampling and the rest was placed in a Ziploc bag that was then sealed and taped. (R. IX, 138-39.) Hinnergardt placed her initials on the bag, and the trainee also placed their initials on the bag. (R. IX, 138.) Hinnergardt personally observed the trainee place a part of the substance in a glass test tube. (R. IX, 138.) The sample was then tested and Hinnergardt personally observed those tests. (R. IX, 139-40.)

A small amount of what was placed in the glass test tube was placed in second glass test tube. (R. IX, 139.) Hinnergardt and the trainee then performed the Marquis test or the color test. (R. IX, 139.) Hinnergardt personally viewed the substance change to an orange color. (R. IX, 139-40.) The remaining substance was placed in the gas chromatograph mass spectrometer, an instrument used to identify substances. (R. IX, 140.) Hinnergardt watched the trainee type all of the information into the instrument and place the plate onto the instrument. (R. IX, 141.) Hinnergardt checked to make sure the instrument was running. (R. IX, 142.) Hinnergardt then reviewed the printout of the results from the gas chromatograph. (R. IX, 142.) The trainee brought Hinnergardt the data, and they went over it together. (R. IX, 142.) Hinnergardt stated she relied on the information the instrument printed out when making her conclusions. (R. IX, 143.)

Hinnergardt then described the thin layer test, which was also performed on the substance. (R. IX, 143-45.) Hinnergardt was present during this test and observed it the entire time. (R. IX, 145.) The trainee prepared a lab report, and Hinnergardt reviewed the report for accuracy. (R. IX, 145.) Hinnergardt stated the report was accurate based on what she had personally observed from the testing. (R. IX, 145.) Hinnergardt relied on her own personal observations when making her conclusions on the report, not on the

trainee. (R. IX, 146.) Hinnergardt said she would have made the same conclusions had she handled the substance herself. (R. IX, 146.)

Although Hinnergardt could not remember every single second of the time period, she watched the trainee the entire time because she is ultimately responsible for the report and signed off on it. (R IX, 148.) Hinnergardt said, "[i]f my name is going on a report I'm watching what they are doing because this is my name and my reputation. So I can say for certainty that I know what took place..." (R. IX, 153.) Hinnergardt further stated that if she had to take a phone call she would have the trainee stop the testing process during that time. But, Hinnergardt did not remember answering the phone at any time during this testing. (R. IX, 133.)

The State asked Hinnergardt if the KBI lab report, State's Exhibit 22, was based on her own personal information and she answered, "[y]es." (R. IX, 170.) The State further asked, "[y]ou didn't rely on any information from the trainee in verifying that report?" Hinnergardt answered, "[n]o." (R. IX, 170.) Hinnergardt actually physically watched the trainee and looked at the read out of the test. (R. IX, 170.)

Roland first argues that since the State failed to show that the trainee was unavailable and had Hinnergardt testify, the district court erred when it admitted the lab report. However, the lab report was not signed by the trainee, as it was against KBI policy to do so, but was signed by Hinnergardt. Hinnergardt stated that she based the conclusions in the lab report on her own personal observations of the testing and did not rely on the trainee. (R. IX, 170.) Thus, the State did not have to prove that the trainee was unavailable; as it had another witness who personally observed the entire testing

process, made independent conclusions based on her observations, and signed the lab report.

Roland relies on *Bullcoming v. New Mexico*, ___ U.S. ___, 131 S.Ct. 2705, 180 L.Ed.2d 610 (2011), as support for his argument. In *Bullcoming*, the analyst who had performed a blood alcohol test on the defendant's blood sample was placed on unpaid leave shortly before trial. Over objection, the district court admitted the testing analyst's report as a business record through another testifying analyst. The other analyst was familiar with the testing device used to analyze Bullcoming's blood and with the laboratory's testing procedures, but had neither participated in nor observed the test on Bullcoming's blood sample.

The Supreme Court held that the introduction of a blood-alcohol analysis report, wherein a forensic analyst certified that defendant's blood-alcohol concentration was well above the threshold for aggravated driving while intoxicated under New Mexico law, through the surrogate testimony of a second analyst, who had not certified the report or performed or observed the testing, violated the Confrontation Clause as the testifying analyst could neither convey what the certifying analyst knew or observed about the particular test and testing process he employed, nor expose any lapses or lies by the certifying analyst. The Supreme Court concluded that the "surrogate testimony" of the kind the second analyst gave could not convey what the actual analyst who conducted the certification knew or observed. 131 S.Ct. at 2714-15.

The issue is not that there was "surrogate testimony" in this case, but that there were essentially two forensic scientists who made personal observations, witnessed the testing, and made independent conclusions, but the person who physically handled the

substance was not called to testify. Hinnergardt personally observed every phase of the testing. Hinnergardt was not just another forensic scientist from the KBI that had no knowledge of this specific case and was called to testify about it. Hinnergardt personally observed the testing and came to her own independent conclusions. She did not rely on the trainee's information or anything else besides her personal observations and analysis of the substance. Hinnergardt made an independent determination as to the results of the testing and was the person who certified and signed the lab report. This makes this case distinguishable from the scenario in *Bullcoming.*

Roland contends that the testimony of Hinnergardt could not convey what the trainee potentially knew or observed about the testing. However, the testimony of what the trainee knew and observed was not necessary here, as the State established that Hinnergardt knew the procedures and testing methods, personally observed the testing, came to her own independent conclusions, and then signed the lab report. Hinnergardt executed the Certificate of Analysis, thereby swearing under penalty of perjury that she was the person who analyzed the test results and attested that the conclusions on the lab report were accurate with reasonable scientific certainty. (State's Exhibit 22, to be added to the record on appeal.)

Additionally, in Justice Sotomayor's concurrence in *Bullcoming*, joined by two other Justices, she provides several situations in which their decision would not necessarily be applicable. Justice Sotomayor stated, "this is not a case in which the person testifying is a ***supervisor, reviewer, or someone else with a personal, albeit limited, connection*** to the scientific test at issue." 131 S.Ct. at 2722 (Sotomayor, J., concurring in part) (emphasis added). Justice Sotomayor stated that the Court was not

addressing what degree of involvement is sufficient because the second analyst that testified at trial was not involved with the test or report at all. 131 S.Ct. at 2722 (Sotomayor, J., concurring in part).

Unlike the analyst that testified in *Bullcoming*, Hinnergardt was personally familiar with all of the procedures and tests, personally observed the trainee perform the physical aspects of the testing the entire time, personally reviewed and analyzed the data, and came to her own independent conclusions that were included in the report she signed. The holding in *Bullcoming* regarding "surrogate testimony" is simply not applicable in this case. It was uncontested in *Bullcoming* that the surrogate witness in that case was not the supervisor in charge of conducting the scientific tests at issue and the witness had no knowledge as to the actual tests completed or the actual analyst's job performance. The concern addressed in *Bullcoming*, that the witness lacked knowledge of the testing process used by the certifying analyst, is not present in this case.

Moreover, it was against KBI policy for the trainee to sign off on the Forensic Laboratory Report or the Certificate of Analysis. The State called the witness who signed a sworn statement that the results of the testing were accurate and that the substance that was tested was methamphetamine. Because Hinnergardt was the person who signed the Forensic Laboratory Report and the Certificate of Analysis and because she supervised the trainee during the testing, Hinnergardt was the appropriate person to be called to testify about the results of the testing of the substance. The State was not required to produce the trainee in addition to Hinnergardt to satisfy Roland's confrontation rights. "[I]t is not the case, that anyone whose testimony may be relevant in establishing...authenticity of the sample, or accuracy of the testing device, must appear

in person as part of the prosecution's case." *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 at n. 1, 129 S.Ct. at 2532 n. 1, 174 L.Ed.2d at 322 n. 1 (2009). Hinnergardt was able to thoroughly respond to all questions posed about the testing and the meaning and significance of the results obtained. The State was not obligated to call the trainee.

Because Hinnergardt testified at trial and was subjected to cross-examination about the testing processes and procedures used under her supervision, along with the testimony that she came to her own independent conclusions based on her personal observations, there was no violation of Roland's right to confront the witnesses against him.

II. The State presented sufficient evidence to convict Roland of failing to report an accident.

Roland argues that his conviction for failing to report an accident must be reversed because the evidence was insufficient to support a finding of guilt on each of the alternative means for committing the crime on which the jury was instructed. The jury was instructed that Roland could be convicting of failing to report an accident if it found the accident resulted in injury to another person or the total damage to all property to an apparent extent of $1,000.00 or more. (R. II, 142.)

Standard of Review

When a jury is instructed on alternative means, the State must present evidence of each means to support a conviction. A jury is not required to unanimously agree by which means the crime was committed as long as there is sufficient evidence of each means of committing the crime. *See State v. Wright*, 290 Kan. 194, 201, 224 P.3d 1159 (2010). When the sufficiency of the evidence is challenged following a conviction, "the standard of review is whether, after a review of 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." *State v. McCaslin*, 291 Kan. 697, 710, 245 P.3d 1030 (2011). In determining whether there is sufficient evidence to support a conviction, the appellate court should not reweigh the evidence. *State v. Hall*, 292 Kan. 841, 859, 257 P.3d 272 (2011).

Analysis

In order to convict Roland of failing to report an accident the State had to prove that on or about June 18, 2011, in Shawnee County, Kansas:

(1) Roland drove a motor vehicle

(2) Roland was involved in a motor vehicle accident

(3) the accident resulted in injury to another person or total damage to all property to an apparent extent of $1,000 or more and

(4) Roland failed to immediately, by the quickest means of communication, notify the nearest office of police authority of the accident.

K.S.A. 8-1606(a); (R. II, 142.)

Roland argues that the third element of the crime, that the accident resulted in injury to another person ***or*** that the total damage to all property to an apparent extent of $1,000 or more, created alternative means. The State contends that these are not alternative means and Roland's conviction should be affirmed.

In *State v. Brown*, 295 Kan. 181, 284 P.3d 977 (2012), our Supreme Court held that when faced with an alternative means question, a court must determine whether the statute lists distinct material elements of the crime, that is, the necessary *mens rea, actus reas*, and in some statutes a causation element, or whether the statute merely describes a

material element or factual circumstance that would prove the crime. The listing of alternative material elements, when the list is incorporated into an elements instruction, creates an alternative means issue requiring super sufficiency of the evidence. However, merely describing a material element or a factual circumstance that would prove a crime does not create alternative means. 295 Kan. at 194. Additionally, "[i]dentifying an alternative means statute is more complicated than spotting the word 'or.'" 295 Kan. at 193

Under *Brown*, the language "the accident resulted in injury to another person or total damage to all property to an apparent extent of $1,000 or more" in the failing to report an accident statute does not set out distinct conducts, but merely describes the material element of being "involved in a motor vehicle accident." Being "involved in a motor vehicle accident" is the conduct or material element and "the accident resulted in injury to another person or total damage to all property to an apparent extent of $1,000 or more" simply describes the different factual circumstances that can prove that material element of the crime. The factual circumstances of the accident that either there was injury to another person or total damage to all property of $1,000 or more describes options within the means.

Therefore, the inclusion of the phrase "the accident resulted in injury to another person or total damage to all property to an apparent extent of $1,000 or more" in the instruction for Count 4 in this case did not require the State to prove both sets of factual circumstances that would support the accident element of the offense. Moreover, Roland concedes that there was sufficient evidence of injury to another person. Thus, Roland's conviction for failing to report an accident should be affirmed.

However, if this court determines that failing to report an accident is an alternative means crime, the State contends that there was sufficient evidence of both alternative means of failing to report an accident. Roland argues that the State failed to present evidence that the case involved apparent damage of $1,000 or more. Roland concedes that there was sufficient evidence of the other alternative means, injury to another person, through Webber's testimony that she suffered chest pain from the impact of the airbag during the accident. (R. IX, 177-78.) Webber also testified that she went to the hospital by ambulance to be treated immediately following the accident. (R. IX, 181.)

The State presented sufficient evidence that the total damage to all property was to an apparent extent of $1,000.00 or more through Webber's testimony. Webber testified that she was driving a 2007 Toyota Sienna XLE minivan. (R. IX, 176.) Webber stated the collision was so hard that the airbags deployed in the minivan. (R. IX, 177, 179.) Webber further stated that the minivan was "totaled completely" and her insurance had totaled the entire vehicle. (R. IX, 182.) When a vehicle is totaled it means that the vehicle has been completely destroyed. When Webber testified that her minivan had been totaled, the State presented sufficient evidence that there was damage to the property to an apparent extent of $1,000.00 or more. Webber's minivan was a newer model, only around five years old, which if completely destroyed, would easily be over a $1,000.00 worth of damage.

After a review of all the evidence, viewed in the light most favorable to the prosecution, the jury could have found Roland guilty of failing to report an accident beyond a reasonable doubt. Therefore, the State presented sufficient evidence of each means of committing failing to report an accident and reversal is not warranted.

III. The prosecutor's comments were not outside the wide latitude afforded to prosecutors during closing argument and did not constitute prosecutorial misconduct.

Roland next argues that the prosecutor committed misconduct by improperly commenting on facts not in evidence. The State contends that the prosecutor committed no misconduct in this case, and to the extent that there was any misconduct, it was harmless error.

Standard of Review

Review of alleged prosecutorial misconduct involves a two-step process. An appellate court first determines whether the comments were outside the wide latitude that a prosecutor is allowed in discussing the evidence. If the comments are found to be improper and therefore misconduct, the court next determines whether the comments prejudiced the jury against the defendant and denied the defendant a fair trial. *State v. Marshall*, 294 Kan. 850, 856, 281 P.3d 1112 (2012). In this step of the process, this court considers three factors: First, was the conduct gross and flagrant? Second, was the misconduct motivated by ill will? Third, was the evidence of such a direct and overwhelming nature that the misconduct would likely have had little weight in the mind of a juror? None of these three factors is individually controlling. 294 Kan. at 857.

In assessing this third factor, this court requires that any prosecutorial misconduct error meet the "dual standard" of both constitutional harmlessness and statutory harmlessness to uphold a conviction. *See State v. Tosh*, 278 Kan. 83, 97, 91 P.3d 1204 (2004) (before third factor can override first two factors, an appellate court must be able to say that the harmlessness tests of both K.S.A. 60-261 and *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705, *reh. denied*, 386 U.S. 987 (1967), have been met.)

Under both standards, the party benefitting from the error, here, the State, bears the burden of demonstrating harmlessness. *State v. Bridges*, 297 Kan. 989, 306 P.3d 244, (2013). That burden is more rigorous when the error is of constitutional magnitude. *See State v. Herbel*, 296 Kan. 1101, 1110, 299 P.3d 929 (2013). In other words, if the State has met the higher *Chapman* constitutional harmless error standard, it necessarily has met the lower standard under K.S.A. 60-261. Under the *Chapman* harmless error standard:

> The error may be declared harmless where the party benefitting from the error proves beyond a reasonable doubt that the error complained of will not or did not affect the outcome of the trial in light of the entire record, *i.e.*, where there is no reasonable possibility that the error contributed to the verdict. *State v. Ward*, 292 Kan. 541, 256 P.3d 801 (2011), *cert. denied* 132 S.Ct. 1594 (2012).

Analysis

During closing argument, the prosecutor told the jury:

> As far as leaving the scene of an accident, we have a nice new Chevy Colorado with the damage on the side of the vehicle that you'll see in the photographs. We have the Sienna Toyota driven by Dana Webber that was totaled because of this accident. *So it is apparent the property loss of a thousand dollars or more.* That's one of the elements. (R. X, 422.) (emphasis added.)

Roland argues that the prosecutor exceeded the bounds of fair argument went he made the above statement. Roland claims that the prosecutor improperly told the jury to consider information not in evidence when he told the jury that they could assume that if the minivan was totaled that the damage was over $1,000.00.

When a prosecutor argues facts not in evidence, the first prong of the prosecutorial misconduct test is met, and this court must consider whether the misstatement of fact constitutes plain error. *State v. Ly*, 277 Kan. 386, Syl. ¶ 4, 85 P.3d 1200, *cert. denied* 541 U.S. 1090, 124 S.Ct. 2822, 159 L.Ed.2d 254 (2004). However,

our Supreme Court has repeatedly held that in closing argument, a prosecutor may draw reasonable inferences from the evidence. *See State v. Murray*, 285 Kan. 503, 512, 174 P.3d 407 (2008). "A prosecutor 'is given wide latitude in language and in manner [of] presentation of closing argument as long as the argument is consistent with the evidence. [Citation omitted.]'" *State v. Warledo*, 286 Kan. 927, 947, 190 P.3d 937 (2008) (quoting *State v. Scott*, 271 Kan. 103, 114, 21 P.3d 516, *cert. denied* 534 U.S. 1047, 122 S.Ct. 630, 151 L.Ed.2d 550 [2001]).

Roland overlooks the fact that the prosecution is afforded wide latitude in arguing inferences from the evidence presented. *State v. Martinez*, 290 Kan. 992, 1013, 236 P.3d 481 (2010). The prosecutor did not ask the jury to assume facts that were not in evidence, but to make a reasonable inference that because the minivan sustained such heavy damage as to total the vehicle, that the total damage to all property was to an apparent extent of $1,000.00 or more. This is a reasonable inference based on the evidence that was presented.

Here, Webber testified that she was driving a 2007 Toyota Sienna XLE minivan. (R. IX, 176.) The collision was so hard that the airbags deployed in the minivan. (R. IX, 177, 179.) Webber further stated that the van was "totaled completely" and her insurance had totaled the entire vehicle. (R. IX, 182.) The prosecutor simply asked the jury to make an inference from Webber's testimony at trial. The common definition of the word "totaled" means that a vehicle has been completely destroyed. The inference that when a vehicle is deemed "totaled" by an insurance company the vehicle has been completely destroyed, making it more beneficial to simply replace the vehicle rather than get it repaired. Webber's minivan was a newer model, around five years old, and was so

substantially damaged that repairing the van would have been futile. Based on this evidence, the jury could make that reasonable inference and determine that the damage to the vehicle was to an apparent extent of $1,000.00 or more. The complete destruction of any newer model vehicle would result in $1,000.00 or more in damage. The prosecutor's comments on this point were permissible and do not constitute misconduct.

Additionally, in order to establish this element of failing to report an accident, the State needed only to prove that the total damage to all property was to an apparent extent of $1,000.00 or more. The State did not need to present evidence of an exact amount of the damage or the value of the vehicle prior to the accident. The State simply had to prove that the damage was evidently or obviously to the extent of $1,000.00 or more. When a car is considered totaled, it is obvious that the damage is over $1,000.00. The prosecutor was also using the direct language from the statute and jury instruction when informing the jury that it was apparent the property loss was greater than $1,000.00 in damage.

However, even if the prosecutor's statements were outside the wide latitude allowed, they were harmless error and not reversible. If the prosecutor's conduct is deemed misconduct, then this court must conduct the harmlessness inquiry under the second prong of the prosecutorial misconduct analysis. Within the second prong of the prosecutorial misconduct, there are three additional factors this court must analyze: (1) whether the prosecutor's conduct was gross and flagrant; (2) whether the conduct was motivated by ill will; and (3) whether the evidence was so direct and overwhelming that the conduct would likely have had little weight in the jury's mind. No one factor is controlling. *State v. Marshall*, 294 Kan. 850, 857, 281 P.3d 1112 (2012).

The prosecutor's conduct was not gross and flagrant in this case. When determining whether a prosecutor's conduct is gross and flagrant, this court consider whether the prosecutor "repeated or emphasized the misconduct." *State v. Simmons*, 292 Kan. 406, 417-18, 254 P.3d 97 (2011). A statement made in passing is not gross and flagrant. *State v. Adams*, 292 Kan. 60, 68-69, 253 P.3d 5 (2011). The comment was not deliberate, repeated, or emphasized by the prosecutor. There is no indication in the record that this isolated statement was calculated.

There was also no evidence of ill will by the prosecutor. Ill will may be found "when the prosecutor's comments were 'intentional and not done in good faith.' [Citation omitted.]" *State v. Miller*, 284 Kan. 682, 719, 163 P.3d 267 (2007). The brief comment made by the prosecutor was not intentional misconduct. Roland did not object to the statement made by the prosecutor in closing argument. The district court never admonished the prosecutor for the statement nor did the prosecutor ignore any orders from the district court. Also, there is no evidence in the record that the prosecutor intentionally made this comment in bad faith or against the order of the district court. Therefore, the prosecutor's comment did not exhibit ill will.

Lastly, when considering whether the evidence was direct and overwhelming so much so that the misconduct would likely have had little weight in the jury's mind, it is the State's responsibility to establish beyond a reasonable doubt that the error did not affect the defendant's substantial rights. In addition, this court should consider the prosecutor's comments in light of the circumstances and the entire record. *State v. Marshall*, 294 Kan. 850, 864, 281 P.3d 1112 (2012). The prosecutor's closing was a

proper argument based on the jury instructions, the elements of the crime, and the evidence presented to prove each element of the crime.

It cannot be said that these comments diverted the attention of the jury away from the evidence in this case. The evidence established that Webber's vehicle had been damaged to the point that it was deemed totaled by the insurance company. The jury was instructed that it could use common knowledge and experience in regard to the matter which a witness has testified. (R. II, 134.) The jury could use their common knowledge and experience regarding automobile accidents and the amount of damage necessary to deem a vehicle totaled. The damage to a vehicle would almost always be more than $1,000.00 in order for the vehicle to be totaled. There is no likelihood that the verdict would be different had the prosecutor not made the comments. There was direct evidence presented to find Roland guilty beyond a reasonable doubt of failing to report an accident.

Thus, there was overwhelming evidence of the damage so that the misconduct would likely have had little weight in the minds of the jury. Therefore, even if the prosecutor's statements constituted misconduct, it was harmless and did not deny Roland a fair trial.

IV. The district court correctly instructed the jury on the possession of drug paraphernalia.

Roland argues that his Fifth and Sixth Amendment rights were violated when the district court instructed the jury that drug paraphernalia included glass pipes in Instruction 13. Roland claims that this sentence of the instruction invaded the province of the jury and its determination of whether the glass pipe was drug paraphernalia.

During the jury instructions conference Roland did object to this sentence and argued that it definitively stated that pipes are drug paraphernalia. (R. X, 380.)

Standard of Review

Our Supreme Court summarized a four step process for jury instruction issues in *State v. Plummer*, 295 Kan. 156, 283 P.3d 202 (2012). In *Plummer*, this Court stated:

> In summary, for instruction issues, the progression of analysis and corresponding standards of review on appeal are: (1) First, the appellate court should consider the reviewability of the issue from both jurisdiction and preservation viewpoints, exercising an unlimited standard of review; (2) next, the court should use an unlimited review to determine whether the instruction was legally appropriate; (3) then, the court should determine whether there was sufficient evidence, viewed in the light most favorable to the defendant or the requesting party, that would have supported the instruction; and (4) finally, if the district court erred, the appellate court must determine whether the error was harmless, utilizing the test and degree of certainty set forth in *Ward*.

Analysis

In considering this claim, an appellate court is required to review the instructions in context and consider the instructions as a whole and not isolate any one instruction. *State v. Mitchell*, 269 Kan. 349, 355, 7 P.3d 1135 (2000); *State v. Appleby*, 289 Kan. 1017, 1059, 221 P.3d 525 (2009). The following instructions were given at trial regarding count two, the drug paraphernalia charge:

Instruction No. 11

> The defendant is charged in Count 2 with the crime of unlawfully possessing with intent to use drug paraphernalia. The defendant pleads not guilty.
>
> To establish this charge, each of the following claims must be proved:
>
> 1. That the defendant intentionally possessed with intent to use a glass pipe as drug paraphernalia to store, contain, conceal, inject, ingest, inhale or otherwise introduce into the human body methamphetamine; and

2. That this act occurred on or about the 18th day of June, 2011, in Shawnee County, Kansas.

Possession means having joint or exclusive control over an item with knowledge of and the intent to have such control or knowingly keeping some item in a place where the person has some measure of access and right of control.

Instruction No. 12

In determining whether an object is drug paraphernalia, you shall consider, in addition to all other logically relevant factors, the following:

Statements by a person in control of the object concerning its use.

The proximity of the object to controlled substances.

The existence of any residue of controlled substances on the object.

Any evidence that alleged paraphernalia can be or has been used to store a controlled substance or to introduce a controlled substance into the human body as opposed to any legitimate use for he alleged paraphernalia.

Instruction No. 13

"Drug paraphernalia" means all equipment, and materials of any kind which are used or primarily intended or designed for use in containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance.

Drug paraphernalia includes glass pipes. (R. II, 138-40.)

Instruction 12 makes clear that it is up to the jury to determine whether the item claimed by the State to be drug paraphernalia is drug paraphernalia under the facts of the case. Instruction 12 provided the jury with factors to consider when determining whether an object constitutes drug paraphernalia under the law. These factors, combined with Instruction 13 informed the jury that it must determine whether the glass pipe met the definition of drug paraphernalia.

Roland relies on *State v. Brice*, 276 Kan. 758, 80 P.3d 1113 (2003), as support for his argument. In *Brice*, the defendant shot the victim in the thigh, resulting in a "through and through injury" and was ultimately convicted of aggravated battery. Brice appealed his conviction, arguing that the district court erred in instructing the jury that "great bodily harm" means a "through and through bullet wound." 276 Kan. at 760. Brice claimed the instruction infringed on his right to have every element of the crime determined by the jury, including whether the victim's injury constituted "great bodily harm." Our Supreme Court agreed, and held that the instruction told the jury that the State had proven the "great bodily harm" element of aggravated battery. 276 Kan. at 767-74.

Roland argues that his case is analogous with *Brice*. However, this case is distinguishable from the circumstances in *Brice*. Unlike the instruction in *Brice*, Instruction 13 did not expressly define a glass pipe as being drug paraphernalia on its face. Instruction 13 is consistent with PIK 3d. 67.40, which specifically states that the district court should narrowly tailor the definition and identify only the specific items of paraphernalia that are supported by the evidence. It is not mandatory that district courts use PIK instructions, although it is strongly advised. *State v. Mitchell*, 269 Kan. 349, 355–56, 7 P.3d 1135 (2000). As our Supreme Court has stated:

> The pattern jury instructions for Kansas (PIK) have been developed by a knowledgeable committee to bring accuracy, clarity, and uniformity to jury instructions. They should be the starting point in the preparation of any set of jury instructions. If the particular facts in a given case require modification of the applicable pattern instruction or the addition of some instruction not included in PIK, the trial court should not hesitate to make such modification or addition. However, absent such need, PIK instructions and recommendations should be followed. *State v. Johnson*, 255 Kan. 252, Syl. ¶ 3, 874 P.2d 623 (1994).

The instruction listed the item that could be considered drug paraphernalia, the glass pipe. The inclusion of the last sentence of the instruction was necessary to inform the jury as to the object the State claimed was drug paraphernalia. This sentence did not improperly relieve the State from its burden to prove each element of the crime. The instruction did not unequivocally state that a glass pipe constitutes "drug paraphernalia," but that it could constitute drug paraphernalia if it met the definition.

There are several recent unpublished opinions by other panels of this court that are directly on point and have rejected this same argument. In *State v. Keel*, No. 106,096, 2012 WL 4373012 (Kan.App. 2012) (unpublished opinion), *petition for review granted* October 1, 2013, the defendant was charged with possession of drug paraphernalia. A panel of this court held that it was not error for the trial court to give the jury instruction as outlined by PIK 67.40. The panel found that the instruction

> did not literally and expressly state that the objects found in Keel's residence were drug paraphernalia. Rather, the instruction merely listed specific objects that could constitute drug paraphernalia. Such language was necessary to inform the jury which objects the State claimed to be drug paraphernalia. 2012 WL 4373012 at *5.

The panel further held that the instruction "neither improperly relieved the State of its burden to prove a necessary element of the crime nor invaded the province of the jury to determine guilt beyond a reasonable doubt." 2012 WL 4373012 at *11-12; *see also State v. Bowser*, No. 107,692, 2013 WL 1010579 (Kan. App. 2013) (unpublished opinion) (holding unlike the instruction in *Brice*, the instruction merely listed objects that could be considered drug paraphernalia and the language was necessary to inform the jury which objects the State claimed were drug paraphernalia).

Another panel of this court used the same rationale to determine that the instruction was not clearly erroneous in *State v. Sisson*, No. 106,580, 2013 WL 1688933 (Kan.App. 2013) (unpublished opinion), *petition for review granted* October 1, 2013. In *Sisson*, the panel held that the jury instructions did not literally and expressly state that the scale was drug paraphernalia, were necessary for the jury to determine which object the State claimed to be drug paraphernalia, and necessitated the jury to consider a host of factors when determining whether the scale was drug paraphernalia rather than to convict Sisson simply because he possessed a scale. 2013 WL 1688933 at *9; *see also State v. Sophaphone*, No. 102,472, 2010 WL 3324403, *1-3 (Kan.App. 2010) (unpublished opinion) (no clear error when jury instructed that the charge of drug paraphernalia required the State to prove "[t]hat the defendant knowingly possessed with intent to use drug paraphernalia, to-wit: a glass pipe for inhaling methamphetamine in the body").

Based on the same rationale, Instruction 13 was legally and factually appropriate and was not given in error in this case. Therefore, Roland's Fifth and Sixth Amendment rights were not violated and his conviction for drug paraphernalia should stand.

Harmless Error

Although *Brice* reversed and remanded without engaging in the harmless error analysis, the State contends that the harmless error analysis as stated in *Chapman v. California*, 386 U.S. 18, 87, S.Ct. 824, 17 L.Ed.2d 705, *reh. denied* 386 U.S. 987, 87 S.Ct. 1283, 18 L.Ed.2d 241 (1967), is applicable. Under the *Chapman* harmless error standard: "error may be declared harmless where the party benefitting from the error proves beyond a reasonable doubt that the error complained of will not or did not affect the outcome of the trial in light of the entire record, i.e., where there is no reasonable

possibility that the error contributed to the verdict." *State v. Ward*, 292 Kan. 541, Syl. ¶ 6, 256 P.3d 801 (2011), *cert. denied* 132 S.Ct. 1594 (2012).

The United States Supreme Court has held that the failure to submit an element of the crime to the jury was not structural error and subject to harmless error review. *Neder v. United States*, 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999); *see also State v. Daniels*, 278 Kan. 53, 91 P.3d 1147 (2004). In *Neder*, the defendant was convicted of filing false federal income tax returns, mail fraud, wire fraud, and bank fraud. The trial court determined that the evidence established the element of materiality without regard to the tax and bank fraud charges and found it was not a question for the jury. The United States Supreme Court affirmed, holding that the trial court's error in failing to submit the materiality element of the tax offense was harmless error. 527 U.S. at 4. *Neder* further considered whether a jury instruction that omits an element of the offense falls within that category of fundamental constitutional errors that require automatic reversal. The court noted that an erroneous jury instruction which omits an element of the offense "differs markedly" from other errors such as a biased trial judge, the denial of self-representation, and the denial of a public trial, all of which are structural errors. 527 U.S. at 8.

If this court finds that the instruction in this case took one element of the offense of possession of drug paraphernalia out of the jury's province, then it is similar to omitting an element of the offense, and the harmless error analysis should apply. Not having the jury find one element of an offense can be harmless error, contrary to any conclusion that can be read in *Brice*. Here, there was overwhelming evidence presented that the glass pipe was drug paraphernalia. The pipe was found in Roland's front right

pocket, where a metal pill box containing methamphetamine was also found. (R. IX, 264-65, 267; R. X, 341-42, 344, 348-49.) Custenborder testified that based on his training and experience in narcotics, the glass pipe was a pipe used to smoke methamphetamine. (R. IX, 266.) Custenborder stated the pipe had a bowl on the end where a person puts the drug itself and then use a lighter to smoke the drug. The pipe also had burn marks on the bowl portion of it. (R. IX, 266.) Based on this evidence, there is no real possibility that the jury would have rendered a different verdict had the last sentence of Instruction 13 been omitted. Thus, even if it was error to include this sentence in the instruction, it was harmless error.

V. The district court did not commit reversible error in giving a written answer to the jury's question.

Roland also argues that when the district court responded to the jury's question in writing it violated the statutory procedure set out in K.S.A. 22-3420(3), as well as his constitutional rights to be present at all critical stages of his trial, to an impartial judge, and to a public trial. During deliberations the jury asked the following question to the district court, "[c]oncerning Count 3, define circumstantial evidence, and can or how can we use it to determine guilt or innocence?" (R. X, 433.) Roland was present in the open courtroom while the parties discussed the question and the possible response the district court should provide. (R. X, 435.) Roland's attorney suggested the jury should be referred to instruction number two, which refers to what the jury should consider in its fact finding. (R. X, 434.) The district court responded by writing the following answer "The Court can only instruct that you consider each of the instructions already given in answering this question" and gave the answer to the jury. (R. X, 435.) Roland did not

object to the district court's procedure of responding to the jury in writing. (R. X, 433-35.)

Preservation

Roland raises this argument for the first time on appeal. The State contends that this court should not address this issue as it was not properly preserved for review. Generally, issues not raised before the district court, even issues affecting constitutional rights, cannot be raised on appeal. *State v. Coman*, 294 Kan. 84, 89, 273 P.3d 701 (2012). There are exceptions to this general rule, but, Roland fails to argue that any of the exceptions are applicable in this case. However, as noted by Roland, our Supreme Court has addressed this issue for the first time on appeal. *See State v. Bell*, 266 Kan. 896, 918-20, 975 P.2d 239, *cert. denied*, 528 U.S. 905 (1999); *State v. Womelsdorf*, 47 Kan.App.2d 307, 320, 274 P.3d 622 (2012), *rev. denied* 297 Kan. ___ (2013). Roland also mentions that the right to a public trial is a constitutional right that has been considered on appeal without a contemporaneous objection at trial.

The State contends that this issue is similar to the issue of whether a district court followed the proper statutory procedure in polling the jury. In *State v. Holt*, 285 Kan. 760, 175 P.3d 239 (2008), the Kansas Supreme Court refused to consider whether the manner in which the jury was polled, which allegedly violated the statute, violated the defendant's right to an impartial and unanimous jury. In denying the defendant's request to reach the issue "for the ends of justice," the Court noted that the right to a unanimous jury and the procedures laid out in K.S.A. 22-3421 were statutory rights, not constitutional rights. 285 Kan. at 766-67, 769-70. The Court then refused to address the issue because there was no showing that the jury's verdict actually harmed him.

Here, Roland argues this court should consider the argument as it has previously been raised for the first time on appeal. However, like in Holt a district court's procedure in responding to a jury question is not a constitutional right, but a statutory right. Moreover, Roland has failed to show that the district court's procedure in responding to the jury question in writing actually harmed him. This case is a clear example of why the rule requiring the issue to be preserved and raised before the district court exists. This court simply does not have the facts this court needs to review the issue. Here, had an objection been raised, there is no question that any issue regarding the procedure in which the district court answered the jury's question would have been appropriately addressed at that time. However, in the event this court decides to address the issue, the statutory and constitutional errors claimed by Roland do not require reversal.

Standard of Review

Resolution of this issue requires statutory and constitutional interpretation, which are questions of law over which this court has unlimited review. *State v. Womelsdorf*, 47 Kan.App.2d 307, 320, 274 P.3d 622 (2012), *rev. denied* 297 Kan. ___ (2013).

Analysis

Roland argues that the district court's procedure in responding to the jury's question in writing violated K.S.A. 22-3420(3) and his right to be present at every critical stage of the trial. A defendant has a constitutional and statutory right to be present at every stage of trial. U.S. Const. amend. VI; K.S.A. 22-3405. K.S.A. 22-3420(3) states:

> After the jury has retired for deliberation, if they desire to be informed as to any part of the law or evidence arising in the case, they may request the officer to conduct them to the court, where the information on the point of the law shall be given, or the evidence shall be read or exhibited to them in the presence of the defendant, unless he voluntarily absents himself, and his counsel and after notice to the prosecuting attorney.

Our Supreme Court has interpreted this statute to mean that any question from the jury concerning law or evidence pertaining to the case must be answered in open court in the defendant's presence unless the defendant is voluntarily absent. *State v. King*, 297 Kan. 955, 305 P.3d 641 (2013). However, *King* does not explicitly hold that a district court's procedure in giving the jury a written answer to their question is error; it does appear to implicitly make this finding.

That being said, panels of this court have interpreted the district court's failure to answer the jury's question in open court as error. However, the error is subject to the harmless error standard stated in *Chapman v. California*, 386 U.S. 18, 87, S.Ct. 824, 17 L.Ed.2d 705, *reh. denied* 386 U.S. 987, 87 S.Ct. 1283, 18 L.Ed.2d 241 (1967). Under the *Chapman* harmless error standard:

> The error may be declared harmless where the party benefitting from the error proves beyond a reasonable doubt that the error complained of will not or did not affect the outcome of the trial in light of the entire record, *i.e.*, where there is no reasonable possibility that the error contributed to the verdict. *State v. Ward*, 292 Kan. 541, 256 P.3d 801 (2011), *cert. denied* 132 S.Ct. 1594 (2012).

The State contends that the error in the district court's procedure of giving the jury a written answer to the question was harmless error in this case because there is no reasonable possibility that the written response could have affected the jury's verdict. The jury's question was a straightforward question of law and the district court correctly answered it. The district court did not state the law or provide any additional information that could have changed the jury's verdict. The response simply referred the jury back to the jury instructions that had been read to them in open court in the presence of Roland. The jury's presence in the courtroom would not have changed the outcome of the trial.

Therefore, this court should conclude that the State has met its burden and find that the error was harmless in this case.

Roland also argues that providing the jury with a written response to a question constitutes a structural error because it denies a defendant both the right to an impartial judge and the right to a public trial. The lack of an impartial judge and a violation of a defendant's right to a public trial are not subject to the harmless error analysis. *See Arizona v. Fulminante*, 499 U.S. 279, 308, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991); *Boldridge v. State*, 289 Kan. 618, 627-28, 215 P.3d 585 (2009); *Waller v. Georgia*, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984).

This argument has been addressed and rejected by a panel of this court in *State v. Womelsdorf*, 47 Kan.App.2d 307, 320, 274 P.3d 622 (2012), *rev. denied* 297 Kan. ___ (2013). In *Womelsdorf*, the district court responded to a jury question in writing, rather than calling the jury into the courtroom and reading the response in open court. With regard to Womelsdorf's claim that the trial court's procedure violated her right to an impartial judge, the panel explained:

> Here, the written answer to the jury denied it additional information it was seeking and reminded the jury to consider only the evidence admitted during trial.... Under the facts of this case, we conclude that the district court's procedure in responding to the jury question in writing did not violate Womelsdorf's constitutional right to an impartial judge. 47 Kan.App.2d at 324.

Concerning Womelsdorf's allegation of a violation of her right to a public trial, the panel concluded:

> As stated above, the judge read the jury questions on the record, in the courtroom, and the judge and both counsel discussed how to respond to the questions. Womelsdorf does not contend that she was not present in the courtroom for that discussion or that the courtroom was not open to the public when the discussion took place. Nothing about the district court's

> written response to the jury question, which is now available to the public as part of the court file, was hidden from public view. Obviously, the public was not present when the bailiff delivered the written response to the jury room, but jury deliberations are never open to the public. Under the facts of this case, we conclude that the district court's procedure in responding to the jury question in writing did not violate Womelsdorf's constitutional right to a public trial. 47 Kan.App.2d at 325.

Other panels of this court have adopted this rationale and rejected similar claims of the violation of the defendant's right to an impartial judge and a public trial. *See State v. Armstead*, No. 108,533, 2014 WL 349561, at *11 (Kan.App.2014) (unpublished opinion), *petition for review filed* February 28, 2014; *State v. Wells*, No. 108165, 2013 WL 3455798, at *9-10 (Kan.App.2013) (unpublished opinion), *petition for review filed* August 2, 2013; *State v. Bolze-Sann*, No. 105,297, 2012 WL 3135701, at *6-7 (Kan.App.2012) (unpublished opinion), *rev. granted* 298 Kan. ___ October 17, 2013.

Additionally, the fact that the judge did not read the answer to the jury's question in open court does not violate any of the protections that a right to a public trial seeks to protect. As explained by the United States Supreme Court, "'The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interest spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions.' [Citations omitted.] In addition to ensuring that judge and prosecutor carry out their duties responsibly, a public trial encourages witnesses to come forward and discourages perjury. [Citations omitted.]" *Waller v. Georgia*, 467 U.S. 39, 46, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984). Here, in open court, and Roland's presence, the district court discussed the response it was going to give the jury. The answer was then written down and given to the jury. It cannot be said that the failure to have the jury present for

the district court to read the response directly to the jury violated his right to an impartial judge or a public trial. Therefore, this court should similarly conclude that this issue has no merit.

VI. The district court did not properly consider Roland's financial resources and the nature of the burden that payment of the fine will impose in order to determine whether community service should be allowed to be used to pay off the mandatory fine.

Lastly, Roland argues the district court erred when it failed to consider his ability to pay the mandatory minimum fine of $1,000.00 for driving under the influence.

Standard of Review

This issue does not require the interpretation of a statute; rather the question is whether the district court properly sentenced Brown given the statutory requirements. The standard of review is abuse of discretion. *See State v. Backus*, 295 Kan. 1003, 1015, 287 P.3d 894 (2012) (application, rather than interpretation, of statute at issue); *see also State v. Ebaben*, 294 Kan. 807, 811-12, 281 P.3d 129 (2012) (interpretation of language of statute not at issue, but rather district court's decision under statute was analyzed for abuse of discretion.)

Analysis

K.S.A. 2011 Supp. 8-1567(b)(1)(A) requires a mandatory fine of $1,000.00 for a first DUI conviction. A sentencing court has discretion to allow a defendant to complete community service hours at a rate of five dollars per hour in lieu of payment of a fine. K.S.A. 2011 Supp. 8-1567(f). K.S.A. 21-4607(3) requires that when determining the amount and method of payment of a fine, the sentencing court must take into account the defendant's financial resources and the burden that its payment will impose.

The issue of mandatory fines in DUI cases was addressed in *State v. Copes*, 290 Kan. 209, 222, 224 P.3d 571 (2010). In *Copes*, the Kansas Supreme Court held that although the driving under the influence fine was mandatory, the district court was required to state on the record that the court had taken into account the financial resources of the defendant and the nature of the burden that payment of the fine will impose when the court had the option of allowing the defendant to pay the fine through community service under K.S.A. 8-1567(j). 290 Kan. at 223.

At sentencing, Roland informed the district court that he was not currently employed. (R. XI, 12.) However, there was no indication of whether Roland would be able to work or find employment in the future. It appears that Roland was not unable to work, but was simply not employed at that time. Roland even made a request for house arrest, if he was able to find a job within a few weeks. (R. XI, 15-16.)

The district court imposed the mandatory $1,000.00 fine for a first time DUI offender, but there was no apparent consideration of community service. (R. XI, 15.) Therefore, the case must be remanded to determine Roland's financial resources and the nature of the burden that payment of the fine will impose in order to determine whether community service should be allowed to be used to pay off the mandatory fine. 290 Kan. at 222-23.

CONCLUSION

For the above and foregoing reasons, the State respectfully requests that the Kansas Court of Appeals affirm Roland's convictions and sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that service of the above and foregoing **Brief of Appellee** was made by mailing **two (2) true and correct copies**, postage prepaid, on this 30th day of April, 2014, to:

Heather Cessna, #20974
Kansas Appellate Defender Office
Jayhawk Tower
700 Jackson, Suite 900
Topeka, KS 66603

and on that date **sixteen (16) copies** were hand delivered to the Clerk of the Appellate Courts.

Jodi Litfin, #24638
Assistant District Attorney

285 P.3d 1044 (Table)
Unpublished Disposition
(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.
Danny KEEL, Appellant.

No. 106,096. | Sept. 21, 2012.
| Review Granted Oct. 1, 2013.

Appeal from McPherson District Court; Carl B. Anderson, Jr., Judge.

Attorneys and Law Firms

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

David A. Page, county attorney, and Derek Schmidt, attorney general, for appellee.

Before GREENE, C.J., STANDRIDGE and BRUNS, JJ.

Opinion

MEMORANDUM OPINION

PER CURIAM.

***1** Danny Keel appeals from his convictions for possession of methamphetamine and possession of **drug paraphernalia**. Specifically, Keel argues there was insufficient evidence presented at trial to support his convictions and the jury was improperly instructed on the definition of **drug paraphernalia**. We are not persuaded by either of Keel's arguments and, therefore, affirm Keel's convictions.

FACTS

On May 14, 2010, Moundridge and McPherson County law enforcement officers executed a search warrant, which authorized a search for illegal **drugs** and **paraphernalia** at a residence Keel shared with his girlfriend, Shayna Wulf. Wulf answered the door and told the officers Keel was not home and she did not know when he would return. The officers, however, suspected Keel was inside. This suspicion was confirmed when the officers located Keel inside a "hidden entryway" near the kitchen. A doorway to the hidden room could not be seen from inside the residence because it was covered by a set of bookshelves; the bookshelves were fastened with a hinge and could be opened and closed. After kicking in an outside door, officers discovered Keel lying on the floor in the hidden room. Officers also discovered a surveillance system consisting of a camera and a monitor inside the hidden room.

During the search, the officers discovered drugs and suspected **drug paraphernalia**. The officers found a glass pipe containing residue on a shelf in the room where Keel was discovered; the pipe subsequently tested positive for methamphetamine. Officers also seized a black plastic bong in a closet located under a stairway leading upstairs; a makeup bag in an upstairs bedroom that contained a large glass pipe with black residue that later tested positive for tetrahydrocannabinol and a baggie containing a white granular substance that later tested positive for methamphetamine; and a small baggie lying in plain view on a desk near the hidden room containing a white crystal substance that later tested positive for methamphetamine.

The officers arrested Keel and Wulf. Wulf admitted that the makeup bag belonged to her but claimed that the methamphetamine inside the bag did not, stating that she would take responsibility for the "smoke" but not the "dope." Wulf later confirmed that "smoke" was a reference to marijuana and that "dope" was a reference to methamphetamine.

Keel was charged with one count each of possession of cocaine, possession of methamphetamine, and possession of **drug paraphernalia**. The cocaine charge was dismissed prior to trial.

At trial, Wulf testified on Keel's behalf. Contrary to her prior statement, Wulf testified that all the **drugs** and **drug paraphernalia** found in the residence belonged to her and that Keel had no knowledge of, or control over, any of the items. Wulf explained to the jury that she had been afraid at the time of her arrest to admit that all the contraband, including the methamphetamine, belonged to her because she "didn't want to take a charge for something so big." Notwithstanding this testimony, the jury found Keel guilty

of possession of methamphetamine and possession of **drug paraphernalia**.

ANALYSIS

***2** On appeal, Keel challenges the sufficiency of the evidence supporting his convictions by claiming the State failed to prove that he had knowledge of, or intended to possess, the **drugs** and **drug paraphernalia**. Keel also claims the district court violated his constitutional right to have a jury determine his guilt by instructing the jury on the definition of **drug paraphernalia** in a manner that defined pipes and bongs as **drug paraphernalia**. We address each of these claims in turn.

SUFFICIENCY OF THE EVIDENCE

To support his claim of insufficient evidence, Keel argues the mere presence of the contraband in his home does not support the State's theory that he constructively possessed the **drugs** or **drug paraphernalia**.

When the sufficiency of the evidence is challenged in a criminal case, we review all evidence, viewed in the light most favorable to the State, to determine whether a rational factfinder could have found the defendant guilty beyond a reasonable doubt. *State v. McCaslin,* 291 Kan. 697, 710, 245 P.3d 1030 (2011). In determining whether there is sufficient evidence to support a conviction, we do not reweigh the evidence or the credibility of witnesses. *State v. Hall,* 292 Kan. 841, 859, 257 P.3d 272 (2011).

At trial, the State relied on circumstantial evidence to show that Keel had constructive possession of the contraband found in the residence. A conviction for even the gravest offense may be sustained by circumstantial evidence. *McCaslin,* 291 Kan. at 710. A verdict may be supported by circumstantial evidence if the evidence provides a basis from which the factfinder may reasonably infer the existence of the fact in issue. Notably, however, the evidence need not exclude every other reasonable conclusion or inference. *State v. Scaife,* 286 Kan. 614, 618, 186 P.3d 755 (2008). The circumstances used to infer guilt must be proved and cannot be inferred or presumed from other circumstances. *State v. Richardson,* 289 Kan. 118, 127, 209 P.3d 696 (2009).

Keel was charged with possession of methamphetamine and possession of **drug paraphernalia**. Kansas law provides that "[i]t shall be unlawful for any person to possess any opiates, opium or narcotic drugs." K.S.A.2010 Supp. 21-36a06(a). Similarly, K.S.A.2010 Supp. 21-36a09(b)(2) prohibits the possession of **drug paraphernalia** for personal use. A drug possession charge requires not only that Keel have control over the contraband but also that he do so with knowledge of —and the intent to have—such control. *State v. Johnson,* 33 Kan.App.2d 490, 502, 106 P.3d 65 (2004); *State v. Cruz,* 15 Kan.App.2d 476, 489, 809 P.2d 1233, *rev. denied* 249 Kan. 777 (1991). "[P]ossession of a controlled substance may be ... constructive as where the drug is kept by the accused in a place to which he has some measure of access and right of control. [Citation omitted.]" *State v. Washington,* 244 Kan. 652, 654, 772 P.2d 768 (1989). Possession and intent may be proved by circumstantial evidence. Cruz, 15 Kan.App.2d at 489.

***3** Keel relies on *Cruz* to support his argument. In *Cruz,* we reversed the defendant's conviction for possession of cocaine with intent to sell, holding that the evidence presented did not support the conviction. 15 Kan.App.2d at 492. The *Cruz* court noted that in those cases where a defendant does not have exclusive possession of the premises upon which drugs are found, "more than mere presence or access to the drugs has been required to sustain a conviction." 15 Kan.App.2d at 489. The court held that in such cases, other incriminating circumstances must link the defendant to the drugs. Incriminating factors include the following: (1) the defendant's previous sale or use of narcotics; (2) the defendant's proximity to the area in which the drugs were found; (3) the fact that the drugs were found in plain view; and (4) the defendant's incriminating statements or suspicious behavior. 15 Kan.App.2d at 489.

To that end, Keel claims the State failed to come forward with positive evidence of any of the factors listed in *Cruz.* Specifically, Keel argues there was no evidence presented to establish that he had previous involvement in any drug sale or use, only the glass pipe was in close proximity to Keel, just one baggie of drugs was found in plain view, and the only suspicious behavior was Wulf telling the officers that Keel was not home. In addition, Keel argues there was evidence presented at trial that should have prompted reasonable doubt in the minds of the jury: Wulfs testimony at trial that none of the **drugs** or **paraphernalia** belonged to Keel and the State's failure to test any of the **drugs** or **paraphernalia** for fingerprints.

Keel's argument is without merit. Not only was the glass pipe containing methamphetamine residue on the shelf in the "hidden entryway" found in close proximity to Keel, but the baggie of methamphetamine was discovered in plain view on a desk near the entrance to the hidden room. Additionally, Keel's attempt to avoid discovery by burrowing away in a hidden room containing surveillance equipment certainly qualifies as suspicious behavior. Finally, the jury was able to assess Wulf's credibility and weigh her testimony at trial in light of the evidence that she had initially denied ownership of the methamphetamine. The fact that the jury convicted Keel reflects the jury's decision to believe the statement made by Wulf at the time she was arrested and reject the testimony she provided later at trial. It is not the function of an appellate court to reweigh the evidence or pass on the credibility of witnesses. *Hall,* 292 Kan. at 859.

Although Keel lacked exclusive control over the residence, when the evidence is viewed in the light most favorable to the State, we find other incriminating evidence that sufficiently linked Keel to the **drugs** and **drug paraphernalia** found inside. As such, there was sufficient evidence presented from which a rational factfinder could find Keel was in constructive possession of the **drugs** and **drug paraphernalia**.

Jury Instructions

***4** Keel argues the court deprived him of his constitutional right to have a jury decide his guilt when it instructed the jury on the definition of **drug paraphernalia** in a manner that explicitly defined pipes and bongs as **drug paraphernalia**. He claims that the instruction improperly removed from the jury's province the question of whether the items found at the residence were, in fact, **drug paraphernalia**.

We review a challenged jury instruction on appeal for clear error where, as here, the instruction was given without any objection from the defendant. See K.S.A. 22–3414(3); *State v. Trautloff,* 289 Kan. 793, 802, 217 P.3d 15 (2009). A jury instruction is clearly erroneous "only if the reviewing court is firmly convinced there is a real possibility the jury would have rendered a different verdict if the trial error had not occurred." 289 Kan. at 802. To the extent that Keel raises a constitutional due process challenge, however, we exercise unlimited review. *State v. Wade,* 284 Kan. 527, 534, 161 P.3d 704 (2007). In any event, when reviewing jury instructions, an appellate court is required to consider all the instructions together, read as a whole, and not to isolate any one instruction. *State v.* ***Brice,*** 276 Kan. 758, 761, 80 P.3d 1113 (2003).

Instruction No. 3, the challenged instruction, stated:

> " '**Drug paraphernalia**' means all equipment, products and materials of any kind which are used or intended for use in ingesting, inhaling or otherwise introducing into the human body a controlled substance in violation of the uniform controlled substances act. '**Drug paraphernalia**' shall include, but is not limited to:
>
> "(1) Pipes,
>
> "(2) Bongs."

Notably, the challenged instruction was followed by an instruction that provided factors to consider in determining whether an object is **drug paraphernalia**. Instruction No. 4 stated:

> "In determining whether an object is **drug paraphernalia**, you shall consider, in addition to all other logically relevant factors, the following:
>
> "Statements by a person in control of the object concerning its use.
>
> "The proximity of the object, in time and space, to a direct violation of the uniform controlled substances act.
>
> "The proximity of the object to controlled substances.
>
> "The existence of any residue of controlled substances on the object."

The crux of Keel's argument is that by stating **drug paraphernalia** "shall include" pipes and bongs, Instruction No. 3 removed an element of the charged crime from jury consideration in that it effectively told the jury that pipes and bongs constitute **drug paraphernalia** under K.S.A.2010 Supp. 21–36a09(b)(2). In support of this argument, Keel cites ***Brice,*** a case in which our Supreme Court reversed a conviction for aggravated battery because the jury was instructed that the term " 'great bodily harm" '—an essential element of the crime—meant " 'a through and through bullet wound" ' in the context of the case at hand. 276 Kan. at 762.

5** But the facts in ***Brice are readily distinguishable from those in this case. To that end, the statutory definition of **drug paraphernalia** applicable to the statute prohibiting

possession of **drug paraphernalia** is virtually identical to the definition of **drug paraphernalia** provided to the jury in Instruction No. 3. See K.S.A.2010 Supp. 21–36a01(f)(12)(B) and (L) (" '**Drug paraphernalia**' shall include ... [m]etal, wooden, acrylic, glass, stone, plastic or ceramic pipes ... [or] 'bongs."). Moreover, the pattern instruction in Kansas upon which Instruction No. 3 was based specifically recommends that the instruction identify those specific items of paraphernalia supported by the evidence. See PIK Crim.3d 67.40 (" '**Drug paraphernalia** [1] includes: [lists specific items].").

Despite Keel's claims to the contrary, Instruction No. 3 neither improperly relieved the State of its burden to prove a necessary element of the crime nor invaded the province of the jury to determine guilt beyond a reasonable doubt. Unlike the instruction in ***Brice***, the instruction here did not literally and expressly state that the objects found in Keel's residence were **drug paraphernalia**. Rather, the instruction here merely listed specific objects that *could* constitute **drug paraphernalia**. Such language was necessary to inform the jury which objects the State claimed to be **drug paraphernalia**.

Additionally, when considered in conjunction with Instruction No. 4, as our standard of review requires us to do, we find the jury was properly instructed to determine whether the pipe and bong found inside Keel's residence were, in fact, **drug paraphernalia**. Instruction No. 3 defined **drug paraphernalia**, while Instruction No. 4 provided the jury with factors to consider when determining whether an object constitutes **drug paraphernalia** under the law.

Even if Instruction No. 3 was issued in error, however, there was no real possibility the jury would have rendered a different verdict if the instruction had omitted the challenged language. Wulf testified—in response to questioning from defense counsel—that the pipe found in the hidden room was a "methamphetamine pipe." When asked what the pipe was used for, she stated, "To smoke meth out of ." Wulf also identified State's Exhibit 3 as "a bong." When asked what the bong was used for, she said, "A pipe to smoke weed out of it." Wulf clarified that the term "weed" meant marijuana. Keel's argument fails.

Affirmed.

Parallel Citations

2012 WL 4373012 (Kan.App.)

End of Document

296 P.3d 1140 (Table)
Unpublished Disposition
(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.
Aaron BOWSER, Appellant.

No. 107,692. | March 8, 2013.

Appeal from Clay District Court; Meryl D. Wilson, Judge.

Attorneys and Law Firms

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

Richard E. James, county attorney, and Derek Schmidt, attorney general, for appellee.

Before MALONE, C.J., McANANY, J., and KNUDSON, S.J.

Opinion

MEMORANDUM OPINION

PER CURIAM.

*1 Aaron Bowser was convicted by a jury of a number of drug crimes. In this appeal he claims the district court erred in instructing the jury in several respects. He did not object to any of these instructions at trial, so we examine the entire record for clear error. In doing so, we first examine each instruction for error. If we find error, we then must determine whether there was *clear* error; that is, whether we are firmly convinced that the erroneous instruction created a real possibility the jury would have rendered a different verdict if the error had not occurred. See *State v. Williams*, 295 Kan. 506,514, 286 P.3d 195 (2012).

Instruction No. 9

This instruction sets forth the elements of the crime of possessing a controlled substance with the intent to distribute and defines what constitutes distribution. Bowser contends that giving this instruction was error because he was not charged with possession with the intent to distribute; rather, he was charged with possession of methamphetamine "with the intent to sell or deliver." He argues that "distribution" is defined broadly in the instruction to include a sale, "but the converse is not necessarily true. A person who sells probably also distributes, but a person can distribute without sale or offer to sell."

But Bowser was charged with possession with the intent to sell *or deliver*. We can conceive of no scenario under the facts of this case in which a juror could conclude that Bowser possessed the drugs with the intent to distribute them, but not to deliver them. Nor does Bowser suggest one. In the context of this case, there is no difference between having the intent to distribute and having the intent to deliver.

Further, the evidence at trial was consistent with both the words "to sell" in the charging document and the words "to distribute" in this instruction. A police officer testified that the amount of methamphetamine found in Bowser's wallet was capable of being divided up and sold. He testified that the small plastic baggies and scales the police found are typically used to measure, divide, and store illegal drugs for sale. The evidence at trial only pointed to one possible act: that Bowser possessed the methamphetamine because he intended to sell it. We conclude that under the facts of this case "to distribute" was synonymous with "to sell" in the court's instructions. We are satisfied that there was no chance the use of the word "distribute" rather than the words "sell or deliver" affected the outcome of the case.

Instruction No. 11

In its charging document the State claimed that Bowser did "unlawfully, feloniously, intentionally, and willfully possess with intent to use drug paraphernalia, to-wit: multiple plastic baggies, and a set of scales, *to pack, repack, sell, or distribute* a controlled substance, to-wit: methamphetamine." (Emphasis added.) But Instruction No. 11 stated that the charge against Bowser was that he "intentionally possessed with the intent to use multiple plastic baggies and set of scales as drug paraphernalia *to test, analyze,* or distribute methamphetamine." (Emphasis added.) Based on the insertion of the words "test" and "analyze" in the jury instruction, Bowser claims the instruction impermissibly broadened the scope of the charges against him.

*2 "*To pack, repack, sell, or distribute*" methamphetamine is certainly a different series of acts from testing or analyzing methamphetamine. The State does not argue that the concepts are synonymous. We conclude that this instruction was given in error. The question is whether Bowser has met his burden to show that he was prejudiced by the error. See *Williams*, 295 Kan. 506, Syl. ¶ 5.

Our review of the trial transcript discloses that the only evidence at trial relevant to the baggies and scales related to their use in the sale or distribution of drugs, not any testing or analyzing of drugs. A police officer testified about the specific use of each piece of drug paraphernalia found. He explained that the plastic baggies "are used after the product, illegal drugs have been divided up and given to the people that purchase them." He said that the baggies appeared to be new, which indicated to him that they were going to be used to package illegal narcotics. He testified that scales are "used to measure out, weigh out the amounts of illegal drugs that would be put in the small baggies." He also said that weighing the drugs is an important part of distribution "[b]ecause typically when they sell these, they sell these in measured quantities like a gram, half a gram, quarter."

No evidence was presented to suggest Bowser intended to use the baggies and scales found in his car to test or analyze methamphetamine. The entirety of the evidence indicated Bowser intended to use the scales and baggies in the packaging, distribution, and sale of the drug. We find no real possibility that a juror could have voted to convict based on the determination that while Bowser did not use the baggies and scales to package, distribute, or sell methamphetamine, he did use them to test or analyze methamphetamine. This stands in marked contrast to the facts in *State v. Trautloff*, 289 Kan. 793, 801-03, 217 P.3d 15 (2009), where the weight of the evidence at the trial pointed to conduct listed in the jury instruction but not found in the charging document. Here, the erroneous inclusion of the words "test" and "analyze" in this instruction did not change the results of the trial. Bowser fails to show clear error.

Instruction No. 12

The State charged that Bowser did "unlawfully, intentionally, and knowingly possess with intent to use, drug paraphernalia, to-wit: marihuana [*sic*] smoking pipes, Zig Zag papers, *used to store, contain, inject, ingest, inhale, or otherwise introduce into the human body,* a controlled substance." Instruction No. 12 informed the jury that with respect to this charge the State had to prove that Bowser "intentionally possessed with the intent to use rolling papers and smoking pipes as drug paraphernalia to store, contain, *conceal,* ingest, inhale or otherwise introduce into the human body methamphetamine." (Emphasis added.)

Once again, the instruction erroneously varied from the charges against Bowser. The charging document did not accuse Bowser of possessing the rolling papers and smoking pipes to conceal methamphetamine. But once again, the issue is whether Bowser has shown prejudice from the erroneous instruction.

*3 At trial, one of the police officers testified that rolling papers are "used for rolling marijuana joints." On cross-examination, the officer acknowledged that the rolling papers also could be used to roll tobacco cigarettes. As to the pipes, an officer testified that they are "commonly used to smoke methamphetamine." These statements were the only evidence presented regarding the uses for rolling papers or pipes. There was no evidence suggesting that rolling papers or pipes could be used to conceal illegal drugs.

Based upon the evidence at trial, we find no possibility that a juror could have voted to convict Bowser on this charge based upon the notion that he used the rolling papers or pipes to conceal the drugs, rather than using them to smoke the drugs. While the instruction was given in error, we find no real possibility that this erroneous instruction changed the outcome of the case. Once again, Bowser has failed to bear his burden of proving prejudice.

Instruction No. 15

This instruction reads, in its entirety:

> " 'Drug paraphernalia' means all equipment and materials of any kind which are used or primarily intended or designed for use in processing, preparing, analyzing, packaging, repackaging, storing, containing, concealing, ingesting, inhaling, or otherwise introducing into the human body a controlled substance.
>
> " 'Drug paraphernalia' includes:
>
> "(1) Plastic baggies
>
> "(2) Pipes
>
> "(3) Scales, or
>
> "(4) Zig Zag rolling papers."

Bowser argues that because the State never charged him with processing, preparing, analyzing, or concealing methamphetamine, the inclusion of these words in the instruction allowed the jury to convict him of an offense not charged. This argument fails for the reasons discussed earlier in this opinion.

Bowser also argues that this instruction "essentially directed the jury that the specified items are drug paraphernalia." Bowser claims that the instruction infringed on his constitutional right to have the jury make its own determination whether these items were drug paraphernalia.

In considering this claim we must review the instruction in context. We are required to consider the instructions as a whole and not to isolate any one instruction. *State v. Mitchell,* 269 Kan. 349, 355, 7 P.3d 1135 (2000). This instruction immediately follows Instruction No. 14, which states in its entirety:

> "In determining whether an object is drug paraphernalia, you shall consider, in addition to all other logically relevant factors, the following:
>
> "Statements by an owner or a person in control of the object concerning its use.
>
> "The proximity of the object, in time and place, to a direct commission of a drug crime.
>
> "The proximity of the object to controlled substances.
>
> "The existence of any residue of controlled substances on the object.
>
> "Expert testimony concerning the object's use.
>
> "Any evidence that alleged paraphernalia can be or has been used to store a controlled substance or to introduce a controlled substance into the human body as opposed to any legitimate use for the alleged paraphernalia."

***4** Instruction No. 14 makes clear that it is up to the jury to determine whether the items claimed by the State to be drug paraphernalia really are drug paraphernalia under the facts of the case. Bowser had the opportunity to contradict the State's evidence that the items found in Bowser's car were drug paraphernalia. His attorney cross-examined one of the police officers on this very point when he established that rolling papers may be used for a perfectly legal activity such as for smoking tobacco.

Bowser relies on *State v. Brice,* 276 Kan. 758, 80 P.3d 1113 (2003). Brice was convicted of aggravated battery for shooting his lover's ex-boyfriend in the thigh. The doctor who treated the bullet wound described it as a "through and through injury," entering the thigh and exiting out the buttock. 276 Kan. at 760. Brice appealed his conviction, arguing that the district court erred in instructing the jury that "great bodily harm" means a "through and through bullet wound." 276 Kan. at 760. He claimed the instruction infringed on his right to have every element of the offense determined by the jury, including whether the victim's injury constituted great bodily harm. Our Supreme Court agreed, finding that the instruction told the jury that the State had proven the "great bodily harm" element of aggravated battery. 276 Kan. at 767–74.

The circumstances here are highly distinguishable from those in *Brice.* Instruction No. 15 follows the pattern instruction in Kansas, which specifically recommends that the district court identify items of paraphernalia supported by the evidence. See PIK Crim. 4th 57.180, Notes on Use. Our Supreme Court has stated that it is "strongly recommended" that the trial court follow the pattern instructions. *State v. Dixon,* 289 Kan. 46, 67, 209 P.3d 675 (2009). Unlike the instruction in *Brice,* the instruction here merely listed objects that could be considered drug paraphernalia. This language was necessary to inform the jury as to which objects the State claimed were drug paraphernalia. Instruction No. 15 did not instruct the jury that an element of felony or misdemeanor possession of drug paraphernalia had been met. We find no error in the giving of this instruction.

Affirmed.

Parallel Citations

2013 WL 1010579 (Kan.App.)

End of Document

298 P.3d 1138 (Table)
Unpublished Disposition
(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.
Cornelius SISSON, Appellant.

No. 106,580. | April 12, 2013.
| Review Granted Oct. 1, 2013.

Appeal from Saline District Court; Jerome P. Hellmer, Judge.

Attorneys and Law Firms

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

Jeffery Ebel, assistant county attorney, Ellen Mitchell, county attorney, and Derek Schmidt, attorney general, for appellee.

Before PIERRON, P.J., BRUNS and POWELL, JJ.

Opinion

MEMORANDUM OPINION

PER CURIAM.

***1** Cornelius Sisson raises three arguments in his direct appeal following his convictions for various drug-related and traffic violations. First, he argues that the district court abused its discretion by providing a misleading and nonresponsive answer to one of the jury's questions during its deliberations. Second, Sisson contends that the State committed reversible error by failing to provide him with exculpatory evidence before trial. Third, Sisson argues that the court committed clear error by instructing the jury that **drug paraphernalia** includes a digital scale. We disagree and affirm his convictions.

FACTS

At about 1:47 a.m. on December 4, 2010, Salina Police Department Officer Matthew Gawith watched Sisson's car fail to signal a right turn. Consequently, Gawith, who drove in a marked police car, activated his emergency lights and eventually his siren.

Sisson, however, did not stop his car, and Gawith thus gave chase. During the chase, Gawith witnessed Sisson commit at least six moving violations: He ran a stop sign, drove 50 miles per hour (mph) in a 30 mph zone, twice failed to stay within his lane, and failed to signal a right turn at least twice.

Sisson, the sole person in the vehicle, stopped his car about 10 blocks from where the chase began. Police Officer Aaron Carswell, who joined the chase in a separate police car, helped Gawith arrest Sisson. The officers searched Sisson's person and car; they found a digital scale with white powdery residue—perhaps cocaine—and a bag apparently containing marijuana.

At about this time, Officer Crystal Gile began to retrace the route of the chase. A few blocks away from the scene of arrest, Gile found and confiscated nine bags apparently containing marijuana and one bag apparently containing crack cocaine.

On January 28, 2011, the State filed a 14–count amended complaint against Sisson in the Saline County District Court. The complaint alleged two distinct counts of marijuana possession: simple possession and possession with intent to sell. The complaint also alleged that Sisson possessed **drug paraphernalia**, fled and eluded police, possessed cocaine, possessed more than 28 grams of marijuana without a tax stamp, and possessed more than 1 gram of cocaine without a tax stamp. Like the original complaint, the amended complaint did not delineate which source of cocaine—the residue found on the scale or the bag found in the street—formed the evidentiary basis for the charge.

A preliminary hearing ensued. There, Gawith made a passing remark about a video recording of the chase. Specifically, when asked whether he could see Sisson throw anything from his car window, Gawith replied, "No, there was enough dust and stuff coming off the gravel, *and, if I may elaborate, I looked at the video later to see if I could see it and there was just too much dust ... to see on that particular street.*" (Emphasis added.)

Also at the hearing, Gawith twice referred to the residue on the scale that appeared to be cocaine. The State, however, did

not argue that the residue could satisfy the cocaine possession charge.

*2 Sisson's trial followed his preliminary hearing. After Gawith testified that a video camera located inside his patrol car recorded the entire chase, the State sought to admit the video recording into evidence. But Sisson objected, stating that "we've never been provided a copy of that video, so I've never had a chance to review it, I have no idea what's on it." In response, the State said that the video has been available "the whole time" and that the court had not issued a discovery order. Sisson, however, told the court that he had sent a request-for-discovery letter to the State. This letter has not been included in the appellate record.

Ultimately, the district court admitted the video into evidence but ordered the State to make the video available to defense counsel for review. The State then played the video to the jury. Interestingly, the video proved to be a help and hindrance to both parties. The State used the video to show that the car chase occurred and that Sisson had committed a host of moving violations. But defense counsel, particularly in closing argument, used the video to demonstrate that it failed to show when and where, if at all, Sisson threw drugs out of his car window. Indeed, the video highlighted an important weakness in the State's case against Sisson, in that none of the officers actually witnessed Sisson throw anything out from his car window.

Also at trial, the State elicited testimony from Cynthia Wood, a forensic chemist who confirmed that the bag found on Sisson's person contained marijuana and that the scale contained a small amount of cocaine residue that could not be weighed. With respect to the drugs found in the street by Gile, Wood testified that one of the bags contained cocaine and that three of the nine remaining bags she tested contained marijuana.

Following the State's case-in-chief, Sisson testified in his own defense. According to Sisson, he used the scale to measure the amount of seasoning in his cooking. Sisson previously gave this same explanation to police.

Afterward, the district court, without objection from Sisson, submitted its instructions to the jury. Jury Instruction Nos. 9, 10, and 11 concerned the **drug paraphernalia** charge. Instruction No. 11 stated that **drug paraphernalia** "means all equipment, and materials of any kind which are used or primarily intended or designated for use in preparing, packaging, repackaging a controlled substance." The instruction then stated that **drug paraphernalia** includes "scales." Jury Instruction No. 13, meanwhile, concerned the cocaine possession charge and required the State to prove, in part, that "Sisson intentionally possessed cocaine."

During deliberations, the jury asked the court the following question: "Re: possession of cocaine. Are we considering cocaine residue on the scale as an amount sufficient to allow [the State] to prosecute for possession?" Accordingly, the court discussed this question with Sisson and the State. Sisson told the court that he thought the cocaine possession charge was linked to the cocaine found in the road rather than the residue found on the scales. In rebuttal, the State argued that the court should instruct the jury that a conviction on the charge necessitated jury unanimity on at least one source of the cocaine possession—the cocaine residue found on the scale or the cocaine bag found in the road.

*3 The district court agreed with the State and thus responded to the jury: "You must find unanimously as to which item they believe to be cocaine."

Ultimately, the jury convicted Sisson of the following charges: possession of marijuana (simple possession), possession of **drug paraphernalia**, possession of cocaine, and fleeing and eluding a police officer while committing five or more moving violations. The jury, however, acquitted Sisson of the following charges: possession of marijuana with intent to sell, possession of more than 28 grams of marijuana without a tax stamp, and possession of more than 1 gram of cocaine without a tax stamp.

After trial, the district court ordered Sisson to serve a 58–month prison sentence. Sisson appeals his convictions.

DID THE DISTRICT COURT ERR IN RESPONDING TO THE JURY'S QUESTION ABOUT THE COCAINE RESIDUE?

Standard of Review

"A district court's decision to respond to a jury's request for additional information during deliberations is reviewed for an abuse of discretion." *State v. Murdoch*, 286 Kan. 661, 680, 187 P.3d 1267 (2008).

Analysis

Sisson claims the district court improperly responded to the jury's question about whether the cocaine residue could be sufficient to constitute possession. His argument is two-fold. First, he claims the court misled the jury by enabling it to convict Sisson for possessing cocaine residue even though the State based its prosecution on the cocaine found in the street. Second, he claims that the court's answer was nonresponsive and potentially restricted the jury from determining Sisson possessed and controlled the cocaine residue.

In rebuttal, the State contends that the court properly instructed the jury and, at worst, any error was harmless because the "jury clearly found that the substances located on the defendant were the basis for the convictions."

Sisson's two arguments are addressed below.

Did the district court enable Sisson to be convicted of an uncharged crime?

Here, Sisson claims that the district court erred in its response to the jury's question because the court, in essence, enabled the jury to convict him for possession of cocaine residue even though the State based its charge and prosecution upon the cocaine found on the street.

To the extent that Sisson argues the State based its prosecution upon the cocaine found in the street, he appears correct. Nonetheless, Sisson's argument fails because the district court —perhaps by the good graces of an attentive jury—properly informed the jury on unanimity.

Sisson persuasively argues that the State appeared to base its cocaine possession charge on the cocaine found in the street rather than the cocaine residue on the scale. Three parts of the record support this argument: The charging document, the State's conduct at the preliminary hearing, and the State's conduct at trial.

With respect to the charging document, the State did not specify in the document which source of cocaine formed the basis for the possession charge. Moreover, as Sisson contends, the parallels and differences between the cocaine- and marijuana-related charges suggest that the State intended to prosecute Sisson for the cocaine found in the street. Specifically, the State charged Sisson with possession of cocaine and possession of more than 1 gram of cocaine without a tax stamp—*i.e.,* an amount greater than mere residue found on the scale. The State, meanwhile, alleged that Sisson possessed marijuana with intent to sell, possessed more than 28 grams of marijuana without a tax stamp, and committed simple possession of marijuana—presumably the marijuana found on Sisson's person. This suggests that the State may have based its cocaine possession charge on the cocaine found in the street because the State's cocaine charges did not mirror the marijuana charges. In fairness to the State, Sisson did not request a bill of particulars to clarify the factual basis of the cocaine possession charge.

***4** Then, at the preliminary hearing, the State did not argue that the cocaine residue was evidence of the possession charge. Similarly, the State's efforts at trial to elicit testimony on the cocaine residue may have been intended to suggest that the scale was used as **drug paraphernalia** rather than, as Sisson testified, for measuring the amount of seasoning in his cooking. Or, as the State noted in closing argument, the cocaine residue on the scale linked Sisson to the cocaine found in the street to Sisson. Therefore, Sisson appears correct in his assertion that the State based its cocaine possession charge on the cocaine found in the street rather than the residue found on the scale.

Nevertheless, Sisson's argument fails. Initially, Sisson cites no cases to support his proposition that when multiple acts might satisfy one criminal charge, the criminal complaint must specify which particular act forms the State's basis for the charge. This proposition is not, as Sisson argues, supported by *State v. Trautloff,* 289 Kan. 793, 217 P.3d 15 (2009). *Trautloff* found a jury instruction to be clearly erroneous because the instruction expanded the scope of the crime charged in the criminal complaint. 289 Kan. at 802–03. Our Supreme Court noted that the jury instruction on the *elements of the crime* was broader than the crime specified in the charging document. 289 Kan. at 802–03. But in the instant case, the elements of the cocaine possession charge are the same in both the charging document and the jury instruction. Therefore, *Trautloff* does not support Sisson's argument.

Curiously, neither Sisson nor the State argues that this appears to be a multiple acts case. After all, the district court, in essence, responded to the jury's question with a last-minute unanimity instruction after the State and court discussed the holding in *State v. Schoonover,* 281 Kan. 453, 133 P.3d 48 (2006). Nonetheless, a brief word on multiple acts and unanimity instructions may help resolve this case.

A case involves multiple acts when factually separate incidents are alleged by the State in a single count of the

charging document or criminal complaint, even though the State could have prosecuted the defendant under multiple counts. See *State v. Voyles*, 284 Kan. 239, 244, 160 P.3d 794 (2007). When the State relies on multiple acts to support one charge, a unanimity instruction is generally required to ensure that all jurors have agreed that the defendant committed one of the specific acts alleged. *State v. Torres*, 294 Kan. 135, 146, 273 P.3d 729 (2012). Consequently, either the State must inform the jury which act to rely upon in its deliberations or the district court must instruct the jury to agree on the specific criminal act. *Voyles*, 284 Kan. at 244–45. Failure to elect or instruct is error. 284 Kan. at 245.

Here, the district court remedied error, if any, by properly answering the jury's question. The jury, rather perceptively, asked the court whether the cocaine residue on the scale could also satisfy the cocaine possession charge. Consequently, the court told the jury that it "must find unanimously as to which item they believe to be cocaine." If the jury did not ask its question, Sisson would probably have a pretty strong argument for clear error based on a lack of unanimity instruction, as the cocaine residue and cocaine found in the street constitute multiple acts of cocaine possession rather than merely multiple pieces of evidence of the same criminal act. See, *e.g.*, *Schoonover*, 281 Kan. at 508.

***5** But, in fairness to Sisson, if the State would have elected, before deliberations, only one act to serve as the factual basis for the cocaine possession charge, in all likelihood the State would have chosen the cocaine found in the street rather than cocaine residue. As stated above, Sisson raises a credible argument that he assumed the State based its possession charge solely on the cocaine found in the street.

Nonetheless, the district court did not abuse its discretion. Again, Sisson cites no cases to suggest that the State needed to specify, before jury instructions, which source of cocaine constituted the act of possession. If a unanimity instruction were required, the district court properly instructed the jury in response to the jury's question. This response, therefore, did not suggest to the jury that it could convict Sisson of an uncharged crime.

Was the district court's answer nonresponsive?

Sisson next argues that the district court's answer suggested to the jury that it could overlook two of the essential elements of drug possession: knowledge and control. In support of this argument, Sisson proffers two alternative responses to the jury's question:

> "The district court could have told the jury that residue could support a possession conviction so long as the jury found, beyond a reasonable doubt, that Mr. Sisson had knowledge and control of the cocaine. Or the district court could have simply referred the jury to the elements instruction defining possession."

This argument, however, potentially overlooks a longstanding rule of appellate practice: An appellate court must consider the jury instructions as a whole and not isolate any one instruction when considering whether the jury could have been misled. See, *e.g.*, *State v. Deal*, 293 Kan. 872, 888, 269 P.3d 1282 (2012). This rule suggests that the court's response to the jury's question would not be considered on its own but, rather, in unison with other jury instructions. And here, the court's response did not suggest to the jury that it should disregard the other jury instructions, which expressly required the jury to determine whether Sisson possessed cocaine.

The State also makes a persuasive argument that even if error occurred, the error would not be reversible because "the jury clearly found that the substances located on the defendant were the basis for his convictions." In support of this argument, the State cites to *State v. Mitchell*, No. 104,512, 2012 WL 1524025 (Kan.App.2012) (unpublished opinion), mandate issued May 31, 2012.

In *Mitchell*, the defendant drove away from police, fled from his vehicle on foot, and was eventually arrested. Police found a small amount of cocaine and marijuana on the defendant's person and a larger amount of cocaine in his vehicle. But at trial, the State failed to elect which source of cocaine would serve as the basis for the two cocaine possession charges: simple possession and possession with intent to sell. The district court, meanwhile, failed to instruct the jury on unanimity.

***6** On appeal, this court determined that though the defendant was entitled to a unanimity instruction, no reversible error occurred. In support, this court observed that the jury acquitted the defendant of possession of cocaine with intent to sell—suggesting the jury did not believe the defendant possessed the cocaine found in the car—but convicted the defendant of simple possession. Additionally,

the jury convicted the defendant of possession of marijuana, which further suggested that the jury believed the defendant possessed the drugs found on his person but not the drugs found in the vehicle.

Although an unpublished opinion, *Mitchell* nonetheless carries some weight as a persuasive authority. Here, the jury convicted Sisson of all three crimes in which the fruits of the crimes were found on Sisson's person: simple possession of marijuana; simple possession of cocaine, based on the residue; and possession of **drug paraphernalia**. The jury, meanwhile, acquitted Sisson of all crimes related to the drugs found on the street. Therefore, if the jury received a unanimity instruction before deliberations, the result would likely be the same.

DID THE STATE VIOLATE SISSON'S DUE PROCESS RIGHTS BY FAILING TO GIVE HIM, BEFORE TRIAL, A VIDEO RECORDING OF THE POLICE PURSUIT OF HIS VEHICLE?

Standard of Review

Unless a defendant's due process rights are implicated, the district court has discretion on whether to admit evidence not previously disclosed in discovery. See *State v. Rollins*, 46 Kan.App.2d 17, 25–26, 257 P.3d 839 (2011), rev. denied February 17, 2012. However, an appellate court exercises unlimited review on a district court's determination as to the existence of a *Brady* violation with deference given to district court's findings of fact. See *State v. Warrior*, 294 Kan. 484, Syl. ¶ 13, 277 P.3d 1111 (2012).

Analysis

Here, Sisson claims that the State's failure to disclose the video recording before trial constitutes a violation of both K.S.A.2012 Supp. 22–3212 and Sisson's due process rights articulated by *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

In rebuttal, the State argues that Sisson was made aware of the video at the preliminary hearing and therefore cannot claim he was unfairly surprised by its admission at trial. The State also argues that the video did not prejudice Sisson's defense because he was acquitted of all charges stemming from the illegal drugs he allegedly threw out from his car window.

Sisson's two arguments on this issue are addressed below.

Did the State violate K.S.A.2012 Supp. 22–3212?

K.S.A.2012 Supp. 22–3212(b)(1) is as follows:

> "*[U]pon request,* the prosecuting attorney shall permit the defendant to inspect and copy or photograph books, papers, documents, *tangible objects,* buildings or places, or copies, or portions thereof, which are or have been within the possession, custody or control of the prosecution, and which are material to the case and will not place an unreasonable burden on the prosecution." (Emphasis added.)

*7 Three additional subsections of the statute are of note: First, Subsection (d) states, "The prosecuting attorney and the defendant shall cooperate in discovery and reach agreement on the time, place and manner of making the discovery and inspection permitted, so as to avoid the necessity for court intervention." K.S.A.2012 Supp. 22–3212(d). Second, Subsection (e) permits a district court, upon a sufficient showing, to "order that the discovery or inspection be denied, restricted, enlarged or deferred or make such other order as is appropriate." K.S.A.2012 Supp. 22–3212(e). Third and finally, Subsection (g) authorizes a broad array of sanctions for violations of discovery orders in criminal cases, including permitting the discovery or inspection of materials not previously disclosed, granting a continuance, prohibiting the party from introducing into evidence the material not disclosed, or entering such other order as the court deems just under the circumstances. K.S.A.2012 Supp. 22–3212(g); *Rollins*, 46 Kan.App.2d at 25.

Sisson briefly argues that the State violated the provisions of K .S.A.2012 Supp. 22–3212 by failing to disclose the existence of the video recording before trial. This argument is without merit. Initially, Sisson had not included his request-for-discovery letter in the appellate record, and he also did not seek a pretrial order from the district court to ensure that the video or other similar evidence would be made available to him. Moreover, the State, albeit in passing, put Sisson on notice about the video when Gawith testified at the preliminary hearing that he reviewed the video and could not see Sisson throwing drugs out from his window. Therefore, even if the State violated the provisions of K.S.A.2012 Supp. 22–3212, Sisson failed to seek any remedy afforded under the statute before trial. This weakens his argument that the district

court abused its discretion. See *Rollins,* 46 Kan.App.2d at 26 (district court did not abuse its discretion by admitting evidence not disclosed in discovery when defendant failed to request to review evidence before trial, made no assertion that the contents of the evidence surprised him, and did not ask for a continuance to examine the evidence to more thoroughly).

Also, as discussed in the next section concerning the alleged *Brady* violation, admission of the video did not prejudice Sisson's defense.

Were Sisson's due process rights, under* Brady, *violated?

Sisson next argues that the State suppressed material exculpatory evidence, the video, and thus violated his due process rights under *Brady v. Maryland,* 373 U.S. 83. In rebuttal, the State argues that the *Brady* violation, if any, did not prejudice Sisson's defense and therefore does not constitute reversible error.

Preliminarily, review of the alleged *Brady* violation is hindered by a lack of an available record. Although Sisson objected to admission of the video because it was an unfair surprise, he did not cite *Brady* as a ground for objection. Similarly, the district court did not hold a hearing or make any findings of fact on whether a *Brady* violation occurred. Nonetheless, the substantive law and its application to the present case are discussed below.

***8** The State has a duty to disclose evidence favorable to the accused when the evidence is material either to guilt or to punishment, regardless of whether the prosecution acted in good or bad faith. See *Brady,* 373 U.S. at 87; *State v. Warrior,* 294 Kan. 484, Syl. ¶ 7, 277 P.3d 1111 (2012). There are three components or essential elements to a claim that a criminal defendant's rights, under *Brady,* have been violated: "(1) The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; (2) that evidence must have been suppressed by the State, either willfully or inadvertently; and (3) the evidence must be material so as to establish prejudice. [Citations omitted]."

Although Sisson can likely satisfy the first prong—and possibly the second prong—of the test, he probably cannot establish the prejudice requirement. With respect to the first prong, the video was exculpatory because it cast doubt on whether Sisson possessed the drugs found in the street. See *State v. Carmichael,* 240 Kan. 149, 153, 727 P.2d 918 (1986). Indeed, Sisson exploited this fact throughout trial and in closing argument. Resolution of the second prong is more difficult, especially because Gawith referenced the video at the preliminary hearing. Even assuming Sisson can establish that the State suppressed the video before seeking to introduce it at trial, his argument still fails because Sisson cannot satisfy the third element.

Sisson cannot satisfy the prejudice prong of the *Brady* test as articulated in *Warrior.* The State's failure to disclose exculpatory evidence before trial is not reversible error when the evidence becomes available to the defendant during trial and does not prejudice the defendant's ability to defend against the charges. See *State v. Humphrey,* 258 Kan. 351, 356, 905 P.2d 664 (1995). Here, the jury acquitted Sisson of all crimes related to the drugs found in the street; therefore, Sisson was not prejudiced on any of those charges.

Sisson, however, argues that the late disclosure and admission of the video "prevented defense counsel from proper investigation of the circumstances of the pursuit and prevented defense counsel from limiting publication of the recording to that portion that supported his theory of the defense." Arguably, the better practice would be for the district court to order a brief recess so that Sisson could review the video and prepare a defense before the State played the video to the jury. But, Sisson's argument for prejudice is so broad that essentially any late disclosure of evidence would constitute reversible error simply because it hindered defense counsel's preparation. And, as the State observes, even if the video had not been admitted into evidence, Gawith gave uncontroverted testimony that Sisson committed at least five traffic infractions—hardly a surprise to Sisson, the sole person in the vehicle that eluded Gawith—which would be sufficient to prove that Sisson fled from and eluded police. Therefore, even if the State's disclosure of the video violated the first two prongs of the *Brady* test, Sisson cannot prove that the disclosure prejudiced his defense, and therefore his conviction should be affirmed.

DID THE DISTRICT COURT ERR IN INSTRUCTING THE JURY THAT DRUG PARAPHERNALIA INCLUDES SCALES?

Standard of Review

***9** "An appellate court reviewing a district court's giving or failure to give a particular instruction applies a clearly erroneous standard where a party neither suggested an instruction nor objected to its omission." *State v. Martinez,* 288 Kan. 443, 451, 204 P.3d 601 (2009). See also K.S.A.

22–3414(3). "An instruction is clearly erroneous only if the reviewing court is firmly convinced there is a real possibility the jury would have rendered a different verdict if the trial error had not occurred. [Citation omitted.]" 288 Kan. at 451–52.

Analysis

In his final argument, Sisson claims that Jury Instruction No. 11, which told the jury that **drug paraphernalia** includes scales, was clearly erroneous because the instruction "essentially directed the jury that scales are paraphernalia." In support of his argument, Sisson largely relies on *State v. **Brice***, 276 Kan. 758, 80 P.3d 1113 (2003).

In rebuttal, the State cites a recent opinion by another panel of this court which, though unpublished, is directly on point and should apply here. See *State v. Keel,* No. 106,096, 2012 WL 4373012 (Kan.App.2012) (unpublished opinion), *petition for rev. filed* October 22, 2012. In *Keel,* the defendant, citing ***Brice***, argued that the district court committed clear error by instructing the jury that **drug paraphernalia** shall include but not be limited to a pipe or bong. That panel, however, found that the instruction

> "did not literally and expressly state that the objects found in Keel's residence were **drug paraphernalia**. Rather, the instruction merely listed specific objects that could constitute **drug paraphernalia**. Such language was necessary to inform the jury which objects the State claimed to be **drug paraphernalia**." 2012 WL 4373012, at *5.

Moreover, the instruction was not clearly erroneous because a separate jury instruction necessitated the jury consider various factors when determining whether an object constitutes **drug paraphernalia**. 2012 WL 4373012 at *5. Therefore, no clear error occurred.

The same rings true here: Sisson's jury instructions, like those in *Keel,* did not literally and expressly state that the scale was **drug paraphernalia,** were necessary for the jury to determine which object the State claimed to be **drug paraphernalia**, and necessitated the jury to consider a host of factors when determining whether the scale was **drug paraphernalia** rather than to convict Sisson simply because he possessed a scale. Therefore, the instruction was not clearly erroneous. See also *State v. Sophaphone,* No. 102,472, 2010 WL 3324403, *1–3 (Kan.App.2010) (unpublished opinion) (no clear error when jury instructed that charge of **drug paraphernalia** required the State to prove "[t]hat the defendant knowingly possessed with intent to use **drug paraphernalia**, *to-wit: a glass pipe for inhaling methamphetamine in the body* "), mandate issued December 8, 2010.

Sisson's convictions are affirmed.

Parallel Citations

2013 WL 1688933 (Kan.App.)

End of Document

236 P.3d 573 (Table)
Unpublished Disposition
(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.
Sanexay SOPHAPHONE, Appellant.

No. 102,472. | Aug. 20, 2010.

Appeal from Wyandotte District Court; Ernest L. Johnson, Judge.

Attorneys and Law Firms

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

Jennifer L. Myers, assistant district attorney, Jerome A. Gorman, district attorney, and Steve Six, attorney general, for appellee.

Before RULON, C.J., GREENE, J., and KNUDSON, S.J.

Opinion

MEMORANDUM OPINION

GREENE, J.

***1** Sanexay Sophaphone appeals his conviction for possession of drug paraphernalia, arguing that the district court's instruction error violated his constitutional rights to have a jury decide his guilt, and that the district court failed to consider his financial resources in imposing a $2,500 fine. We reject his argument on instruction error, but we vacate his fine and remand for resentencing.

FACTUAL AND PROCEDURAL BACKGROUND

Sophaphone was apprehended after he failed to report under an order of supervision by federal immigration authorities. He was immediately arrested, and during a search incident to arrest, officers found a glass pipe and baggies containing or believed to have earlier contained controlled substances. One of the baggies later tested positive for methamphetamine, and the glass pipe was found to have traces of methamphetamine residue.

Sophaphone was charged and convicted of one count of possession of methamphetamine and one count of possession of drug paraphernalia. He was sentenced to 34 months' imprisonment and a fine of $2,500. He now timely appeals his conviction of possession of drug paraphernalia and his fine.

DID THE DISTRICT COURT ERR IN INCLUDING WITHIN THE ELEMENTS INSTRUCTION A SPECIFIC REFERENCE TO THE GLASS PIPE AS DRUG PARAPHERNALIA?

Sophaphone argues that his right to have a jury decide his guilt was violated when the district court instructed the jury on the elements of the charged offense in a manner that referenced the glass pipe as drug paraphernalia. The challenged instruction stated:

> "Instruction No. 6:
>
> "The defendant is charged in Count Two with the crime of unlawfully possessing with intent to use drug paraphernalia in the form of a glass pipe. The defendant pleads not guilty.
>
> "To establish this charge, each of the following claims must be proved:
>
> 1. That the defendant knowingly possessed with intent to use drug paraphernalia, *to-wit: a glass pipe for inhaling methamphetamine into the body,*
>
> and
>
> 2. That this act occurred on or about the 9th day of September, 2008, in Wyandotte County, Kansas." (Emphasis added.)

Sophaphone's argument is that the italicized language improperly removed from the jury's province the question whether the glass pipe was, in fact, drug paraphernalia.

We review a challenged jury instruction on appeal for clear error where, as here, the instruction was given without any objection from the defendant. *State v. Trautloff,* 289 Kan. 793, 802, 217 P.3d 15 (2009). A jury instruction is clearly erroneous "only if the reviewing court is firmly convinced

there is a real possibility the jury would have rendered a different verdict if the trial error had not occurred." *Trautloff,* 289 Kan. at 802. Where the gravamen of an appellant's complaint is a constitutional due process challenge, our Supreme Court has instructed us to exercise unlimited review. *State v. Wade,* 284 Kan. 527, 534, 161 P.3d 704 (2007). In any event, when an appellate court reviews jury instructions, the court is required to consider all the instructions together, read as a whole, and not to isolate any one instruction. *State v. Brice,* 276 Kan. 758, 761, 80 P.3d 1113 (2003).

***2** At the outset we note that the challenged instruction was followed by an instruction that defined drug paraphernalia and provided factors to consider in determining whether an object is drug paraphernalia. This instruction stated:

> "Instruction No. 8:
>
> " 'Drug paraphernalia' means all equipment, products and materials of any kind which are used or intended for use in inhaling a controlled substance in violation of the uniform controlled substances act.
>
> "In determining whether an object is drug paraphernalia, you should consider, in addition to all other logically relevant factors, the following:
>
> Statements by a person in control of the object concerning its use. The proximity of the object to controlled substances. The existence of any residue of controlled substances on the object."

Sophaphone argues that the inclusion of "to-wit: a glass pipe" in Instruction No. 6 removed an element of the charged crime from jury consideration. Namely, Sophaphone contends that the language effectively *told* the jury that a glass pipe constitutes drug paraphernalia under K.S.A.2008 Supp. 65–4152(a)(2), thereby removing that element of the crime from jury consideration in violation of his Fifth and Sixth Amendment rights, which require the jury to determine guilt beyond a reasonable doubt for every element of the charged offense. Sophaphone cites *Brice,* where our Supreme Court reversed a conviction for aggravated battery where the jury was instructed that the term "great bodily harm" meant "a through and through bullet wound" in that case. 276 Kan. at 762.

We recognize that the district court improperly modified the applicable elements instruction for this offense as provided at PIK Crim.3d 67.17. The proper manner of instructing elements of this offense was for the court to have identified the alleged paraphernalia only in the prefatory paragraph and then said at subparagraph 1 only that the following claim must be proved: "That the defendant knowingly possessed with intent to use drug paraphernalia to inhale methamphetamine into the human body." PIK Crim.3d 67.17. As stated in the Notes on Use by the PIK Advisory Committee, the instruction is for use when the charged conduct occurred prior to July 1, 2009. Moreover, when the charged offense is possession of drug paraphernalia, PIK urged the giving of PIK Crim.3d 67.18C, which is precisely what the district court did here in employing Instruction No. 8.

Despite Sophaphone's attempt to analogize his case with *Brice,* Instruction No. 6 neither improperly relieved the State of its burden to prove a necessary element of the crime nor invaded the province of the jury to determine guilt beyond a reasonable doubt. Unlike the instruction in Brice, the instruction here did not literally and expressly define a glass pipe as being drug paraphernalia on its face. See *Brice,* 276 Kan. at 762 ("Great Bodily Harm *means* ...." [Emphasis added.]). Instead, the instruction here was merely an elements instruction informing the jury of what the State must prove. This instruction tells the jury that Sophaphone is charged with possession of "drug paraphernalia" *in the form of* a glass pipe. Such language is necessary to inform the jury as to the object the State contends was drug paraphernalia. Thus, even before the jury confronted the language challenged by Sophaphone, it was told that it was their duty to determine whether Sophaphone possessed, and intended to use, drug paraphernalia—which the State contended was a glass pipe.

***3** Additionally, when considered with Instruction No. 8, as our standard of review compels us to do, it is apparent that the jury was properly instructed to determine whether the glass pipe was—in fact—drug paraphernalia. Instruction No. 8 defined drug paraphernalia and also provided the jury with factors to consider when determining whether an object constitutes drug paraphernalia under the law. The instruction implies that only certain objects are defined as drug paraphernalia and, in conjunction with Instruction No. 6, told the jury that it was their job to determine whether the glass pipe met the definition. Any ambiguity generated by the challenged language in Instruction No. 6 was clarified by Instruction No. 8, which reinforced to the jury that it was tasked with determining the legal status of the glass pipe.

Even if we were to conclude that the modification to the elements instruction was improper, we are unable to conclude

that there is any real possibility the jury would have rendered a different verdict if the instruction had omitted the challenged language. The evidence supporting a finding that the glass pipe was drug paraphernalia was overwhelming. The pipe was found in proximity of the baggies, the officers testified that they recognized the pipe as a "crack pipe," and the pipe was found to have residue of methamphetamine.

For all of these reasons, we reject Sophaphone's challenge to the instruction.

DID THE DISTRICT COURT ERR IN FAILING TO CONSIDER SOPHAPHONE'S FINANCIAL RESOURCES AND THE BURDEN OF A FINE IN IMPOSING THE $2,500 FINE?

Next, Sophaphone contends that the district court erred when it failed to take his financial resources into account when it imposed a fine under K.S.A.2008 Supp. 65–4152 and K.S.A. 21–4503a. Sophaphone concedes that he did not raise this issue below, but argues that his challenge involves an issue of law arising on proved facts determinative on the issue.

Generally, issues not raised below cannot be raised on appeal. *State v. Bastian,* 37 Kan.App.2d 156, 164, 150 P.3d 912 (2007). However, as Sophaphone points out, our courts make an exception where the newly asserted legal theory involves only a question of law arising on proved or admitted facts and is finally determinative of the issue. A review of the record indicates that the exception applies here. See 37 Kan.App.2d at 164 (applying the exception under similar circumstances).

During sentencing, the district court ordered that Sophaphone serve 12 months in jail for his conviction for possession of drug paraphernalia under K.S.A.2008 Supp. 65–4152. The district court continued, observing that Sophaphone "must be sentenced to not only the jail time, but a twenty-five-hundred-dollar fine must be imposed ." The court then concluded the assessment of the fine and went on to determine the issue of attorney fees.

Under K.S.A. 21–4607(3), the district court is required to make specific findings and to take into consideration a defendant's financial resources and the financial burden a fine would impose, on the record, prior to the imposition of a fine against him. See *Bastian,* 37 Kan.App.2d at 164; *State v. Edwards,* 27 Kan.App.2d 754, Syl. ¶ 7, 9 P.3d 568 (2000). Here, the district court clearly failed to take Sophaphone's financial resources into account or to consider the financial hardship the imposition of a $2,500 fine against him would inflict. The State acknowledges that the district court failed to do so and agrees with Sophaphone that the panel should remand back to the district court with directions to make the requisite findings.

***4** Accordingly, the $2,500 fine must be vacated and the case remanded to the district court with directions that in considering imposition of a fine, the court must make specific findings regarding Sophaphone's financial resources and the financial burden a fine would impose, all in compliance with K.S.A. 21–4607(3).

Affirmed in part, vacated in part, and remanded with directions.

Parallel Citations

2010 WL 3324403 (Kan.App.)

End of Document

317 P.3d 148 (Table)
Unpublished Disposition
(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.
Raheem Keron ARMSTEAD, Appellant.

No. 108,533. | Jan. 31, 2014.

Appeal from Leavenworth District Court; Gunnar A. Sundby, Judge.

Attorneys and Law Firms

Rick Kittel, of Kansas Appellate Defender Office, for appellant.

Adam Y. Zentner, assistant county attorney, and Derek Schmidt, attorney general, for appellee.

Before STANDRIDGE, P.J., SCHROEDER, J., and LARSON, S.J.

Opinion

MEMORANDUM OPINION

PER CURIAM.

***1** Raheem Keron Armstead appeals from his convictions for obstructing official duty and driving without a valid license. For the reasons stated below, his conviction for obstructing official duty is affirmed; but the district court's decision to amend the complaint is reversed, the conviction for driving without a valid license in violation of K.S.A.2011 Supp. 8–235(a) is reversed, and the case is remanded for trial on the charge of driving while suspended in violation of K.S.A.2011 Supp. 8–262(a).

FACTS

On the evening of November 2, 2011, Leavenworth Police Officer Shannon Brandau saw a silver Mustang parked in front of 616 North 5th Street. The car was registered to the parents of Krista Moppin, Armstead's girlfriend, but Officer Brandau had seen Armstead driving it a couple of weeks earlier. Officer Brandau believed that Armstead had a suspended driver's license and knew that there was an outstanding warrant for his arrest. Officer Brandau knew Armstead did not live at the house, but she parked down the street and waited to see if Armstead was in the house and would leave in the car.

After approximately 10 to 15 minutes, Officer Brandau had to return to the police station, so she called Officer Scott Ahlers to take over the watch. Within a few minutes of his arrival, Ahlers saw Moppin leave the house with a black male wearing a red hoodie. Ahlers was able to identify the man as Armstead. Ahlers watched as Armstead got into the driver's side of the Mustang and Moppin got into the passenger seat. Ahlers began following the Mustang and attempted to contact other officers for backup. He initiated a traffic stop after the Mustang signaled a right turn but instead made a left turn. After Ahlers activated his emergency lights and siren, the Mustang quickly pulled into a parking lot and came to a stop. Before Ahlers could pull into the parking lot, however, he was cut off by another car. Ahlers saw Armstead exit the Mustang and run through the breezeway of an apartment building and down an alleyway. Law enforcement searched the area for Armstead, but he was not located or arrested that night.

Armstead was subsequently charged with one count each of obstructing official duty under K.S.A.2011 Supp. 21-5904(a)(2) and driving while suspended in violation of K.S.A.2011 Supp. 8–262(a)(1). At trial, defense counsel questioned Officer Brandau about the status of Armstead's driver's license. Officer Brandau explained that Armstead had a system generated driver's license number assigned to him showing that his privilege to obtain a driver's license was suspended. She testified Armstead likely had not been issued a driver's license and that he probably was assigned a number because he had been ticketed before.

Following the State's evidence, Armstead moved for a directed verdict on the driving while suspended charge, arguing that the evidence established he did not have a driver's license, which necessarily meant he could not be convicted of driving with a driver's license that had been suspended. The district court agreed that based on the evidence, Armstead could not be convicted of driving while suspended. But instead of granting the motion for a directed verdict, the court amended the complaint "to conform to the evidence and law"

to charge Armstead with driving without a valid license. After Armstead objected to the amendment, the court reasoned that driving without a valid license was a lesser included offense of driving while suspended and that it was "of the same generic nature."

*2 The jury found Armstead guilty of obstructing official duty and driving without a valid license. The district court sentenced Armstead to a 14–month prison term for obstruction and imposed a $10 fine for driving without a valid license.

ANALYSIS

On appeal, Armstead argues the district court erred by: (1) denying his motion for directed verdict; (2) amending the complaint to conform to the evidence at the end of trial; (3) providing an incorrect oral instruction to the jury that violated his constitutional right to have the State prove all elements of his crimes beyond a reasonable doubt; and (4) providing a written response to the jury's questions that violated his statutory and constitutional right to be present at all critical stages of his trial, his right to an impartial judge, and his right to a public trial. Each of these arguments is addressed in turn.

The district court did not err by denying Armstead's motion for directed verdict.

Armstead alleges the district court erred in denying his motion for directed verdict because there was no evidence presented that he committed the crime of driving while suspended under K.S.A.2011 Supp. 8–262(a)(1). Armstead further alleges that the court's decision to amend the complaint to instead charge him with driving without a valid license under K.S.A.2011 Supp. 8–235(a) constituted a violation of his substantial rights because that crime is not a lesser included crime of driving while suspended.

"A motion for directed verdict at the close of the State's case is essentially a motion for judgment of acquittal and is judged by the standards of sufficiency of the evidence. [Citation omitted.]" *State v. Wilkins,* 267 Kan. 355, 365, 985 P.2d 690 (1999). In his motion for directed verdict, Armstead relied on *State v. Bowie,* 268 Kan. 794, 999 P.2d 947 (2000), where the Kansas Supreme Court addressed the question of whether a person who has never obtained a valid driver's license may be convicted of the crime of driving while suspended. The *Bowie* court reasoned that because Kansas law extends driving privileges only to those who have obtained a valid driver's license, a person who has never obtained a license does not possess any driving privileges that may be suspended or revoked for successive violations. See 268 Kan. at 800–01, 999 P.2d 947. In so holding, the court noted the State's persuasive argument that this interpretation "elevates an unlicensed driver to a legally superior position over a licensed driver and in doing so frustrates the legislature's intention to foster public highway safety." 268 Kan. at 801, 999 P.2d 947. Nevertheless, the court found that adopting the State's position on this issue would require reading the phrase " 'canceled, suspended or revoked' " to include driving privileges never granted, which the court declined to do. 268 Kan. at 801–02, 999 P.2d 947.

Presumably in response to the *Bowie* decision, the Kansas Legislature amended the driving while suspended statute to include the following emphasized language:

> *3 "Any person who drives a motor vehicle on any highway of this state at a time when such person's privilege so to do is canceled, suspended or revoked *or while such person's privilege to obtain a driver's license is suspended or revoked pursuant to K.S.A. 8–252a and amendments thereto,* shall be guilty of a class B nonperson misdemeanor on the first conviction and a class A nonperson misdemeanor on the second or subsequent conviction." (Emphasis added.) K.S.A.2011 Supp. 8–262(a)(1).

See L.2001, ch. 112, sec. 4.

At the same time, the legislature enacted K.S.A. 8–252a, in part, for the purpose of making unlicensed drivers subject to the same driving sanctions as licensed drivers. K.S.A. 8–252a(c). The relevant portion of the statute provides:

> "Whenever a ... person who is unlicensed is convicted of any offense or is subject to ... an order of the division which would require the revocation or suspension of such person's driving privileges, if the person had been issued a driver's license by the division, ... such unlicensed person's privilege of obtaining a driver's license issued by the division shall be revoked or suspended. Such revocation or suspension shall be for a period of time equal to the period of time that the driver's license of a licensed driver would be revoked or suspended." K.S.A. 8–252a(a).

See L.2001, ch. 112, sec. 1.

K.S.A. 8–252a(b) further authorizes the division to "create a record with an identifying number and other identifying information, including address and date of birth, if known" for any unlicensed driver. This record also includes information showing any revocation, suspension, or restriction and the reason for such action. If the unlicensed driver becomes a licensed driver, the information contained in the record is included in the person's driving record maintained by the division. K.S.A. 8–252a(b).

The legislature enacted K.S.A. 8–252a and amended the relevant portion of K.S.A.2011 Supp. 8–262(a)(1) in 2001, well before Armstead was charged and tried in this case. See L.2001, ch. 112, secs. 1, 4. Accordingly, Armstead could have been convicted of driving while suspended if the jury had been persuaded by the testimony of Officer Brandau, who stated that the system generated driver's license number assigned to Armstead showed that his privilege to obtain a driver's license was suspended. See K.S.A.2011 Supp. 8–262(a)(1); K.S.A. 8–252a. Because the State presented sufficient evidence from which a jury could have convicted Armstead of driving while suspended, we find no error in the district court's decision to deny Armstead's motion for directed verdict. See *Wilkins,* 267 Kan. at 365, 985 P.2d 690 (motion for directed verdict at close of State's case evaluated based on sufficiency of evidence).

The district court erred by amending the complaint to conform to the evidence at the end of trial.

Next, Armstead argues the district court erred by amending the original charge of driving while suspended to a charge of driving without a valid license after the State rested its case-in-chief. Under K.S.A. 22–3201(e), the district court "may permit a complaint or information to be amended at any time before verdict or finding if no additional or different crime is charged and if substantial rights of the defendant are not prejudiced." This court employs a two-step analysis in resolving this issue. First, we determine whether the amendment charged an additional or different crime. If so, we then determine whether the substantial rights of the defendant were prejudiced by the amendment. *State v. Spangler,* 38 Kan.App.2d 817, 824, 173 P.3d 656 (2007).

***4** We review the district court's decision to permit a complaint or information to be amended for abuse of discretion. *State v. Bischoff,* 281 Kan. 195, 205, 131 P.3d 531 (2006). A district court may be said to have abused its discretion if the result it reaches is "arbitrary, fanciful, or unreasonable." *Unruh v. Purina Mills,* 289 Kan. 1185, 1202, 221 P.3d 1130 (2009). An abuse of discretion may also occur if the district court fails to consider or to properly apply controlling legal standards. *State v. Woodward,* 288 Kan. 297, 299, 202 P.3d 15 (2009). A district court errs in that way when its decision " 'goes outside the framework of or fails to properly consider statutory limitations or legal standards.' " 288 Kan. at 299, 202 P.3d 15 (quoting *State v. Shopteese,* 283 Kan. 331, 340, 153 P.3d 1208 [2007]); see *State v. Ward,* 292 Kan. 541, Syl. ¶ 3, 256 P.3d 801 (2011), *cert. denied* —— U.S. ——, 132 S.Ct. 1594, 182 L.Ed.2d 205 (2012).

The court explained that its decision to amend the complaint was based on a finding that driving without a valid license is a lesser included crime of driving while suspended and, therefore, was not a different crime under K.S.A. 22–3201(e). By its own explanation, however, the court applied the wrong legal standard in making this decision. As set forth above, the district court's discretion to amend the complaint before the verdict is statutorily limited under K.S.A. 22–3201(e) to circumstances where no additional or different crime is charged and no prejudice is suffered; the statute does not make a similar exception for lesser included crimes. In fact, permitting the State to amend the complaint by charging a lesser included crime may, in some cases, run afoul of the statutory prohibition against amending a complaint if a different crime is charged. For example, suppose we have a hypothetical defendant charged with first-degree murder in violation of K.S.A.2011 Supp. 21–5402(a)(1). Murder in the first degree is defined under that subsection of the statute as the premeditated, intentional killing of a human being. Second-degree murder is a lesser included offense of first-degree murder. See PIK Crim.3d 69.01. Under K.S.A.2011 Supp. 21–5403(a)(1), murder in the second degree is an intentional killing. Under K.S.A.2011 Supp. 21–5403(a)(2), murder in the second degree is an unintentional but reckless killing under circumstances manifesting extreme indifference to the value of human life. Thus, although both intentional and unintentional second-degree murder are lesser included offenses of first-degree murder, the second-degree murder crimes clearly are different from the first-degree crime in that premeditation and intent are required elements under K.S.A.2011 Supp. 21–5402(a)(1), intent only is required under K.S.A.2011 Supp. 21–5403(a)(1), and neither premeditation nor intent is required under K.S.A.2011 Supp. 21–5403(a)(2).

Based on the clear language of K.S.A. 22–3201(e), we find the district court should have made its decision

about amending the complaint based solely on whether the amendment charged an additional or different crime and whether Armstead suffered prejudice as a result, regardless of whether the amendment charged a lesser included offense. But our finding in this regard does not necessarily require reversal, because we can uphold a district court's decision if it ultimately turns out to be right, even if for the wrong reason. See *State v. Vasquez,* 287 Kan. 40, 59, 194 P.3d 563 (2008).

***5** In this case, however, the offenses charged under K.S.A.2011 Supp. 8–262(a)(1) and K.S.A.2011 Supp. 8–235(a) ("[n]o person ... shall drive ... in this state unless such person has a valid driver's license") are clearly different crimes with different elements of proof, which necessarily renders the court's decision to amend the complaint an improper one. Although K.S.A.2011 Supp. 8–235(a) requires only proof that the defendant was driving without the privilege to do so, the offense of driving in violation of K.S.A.2011 Supp. 8–262(a)(l) requires proof that the defendant previously held a driver's license that has since been canceled, suspended or revoked or proof that the defendant's ability to obtain a driver's license has been suspended, or revoked. Because of the unmistakable difference in elements of proof and the clear language of K.S.A. 22–3201(e) limiting the circumstances under which a complaint may be amended before verdict to those where no different crime is charged, we conclude the district court abused its discretion in allowing the amendment to be filed. Based on this conclusion, we need not engage in the prejudice analysis. See K.S.A. 22–3201(e) (The district court "may permit a complaint or information to be amended at any time before verdict or finding if no additional or different crime is charged *and* if substantial rights of the defendant are not prejudiced." [Emphasis added.]).

Given the court's decision to amend the complaint was made in error, Armstead argues that his conviction on the charge of driving without a valid license should be reversed and that double jeopardy bars any subsequent prosecution for this incident. In support of his double jeopardy argument, Armstead asserts that the court's decision to amend the complaint to driving without a valid license at the close of the State's evidence was a de facto acquittal of driving with a suspended license.

Double jeopardy precludes the subsequent prosecution for a crime when there has been a previous judgment of acquittal on the charge of that crime. See U.S. Const. amend. V; Kan. Const. Bill of Rights, § 10; K.S.A.2011 Supp. 21–5110(a)(1). For purposes of double jeopardy, a judgment of acquittal can take the form of a jury verdict of not guilty or of a ruling by the court that the evidence is insufficient to convict. *United States v. Scott,* 437 U.S. 82, 91, 98 S.Ct. 2187, 57 L.Ed.2d 65 (1978); see also *United States v. DiFrancesco,* 449 U.S. 117, 132, 101 S.Ct. 426, 66 L.Ed.2d 328 (1980) ("It is acquittal that prevents retrial even if legal error was committed at the trial.").

But contrary to Armstead's argument, there has not been a judgment of acquittal on the charge of driving while suspended in violation of K.S.A.2011 Supp. 8–262(a)(1) that originally was filed against him. As Armstead himself acknowledges in his brief, the district court *denied* his motion for directed verdict on that charge. And, in affirming the district court's decision in that regard, we reviewed the record on appeal and decided the State presented sufficient evidence from which a jury could have convicted Armstead of driving while suspended. These decisions are wholly incompatible with Armstead's theory that amending the complaint to driving without a valid license at the close of the State's evidence was a de facto acquittal of driving with a suspended license.

***6** For the reasons stated above, we reverse the court's decision to amend the complaint, reverse the conviction for driving without a valid license in violation of K.S.A.2011 Supp. 8–235(a) based thereon, and remand the case for trial on the charge of driving while suspended in violation of K.S.A.2011 Supp. 8–262(a)(1).

The district court did not err in orally instructing the jury on reasonable doubt.

Next, Armstead argues the district court erred by providing the jury with an oral instruction on reasonable doubt that he claims lowered the State's burden of proof, thereby resulting in structural error.

Armstead concedes that he did not object to the district court's oral instruction. So this court must determine whether the instruction was clearly erroneous using a two-step process. See K.S .A.2011 Supp. 22–3414(3). First, the appellate court must "determine whether there was any error at all. To make that determination, the appellate court must consider whether the subject instruction was legally and factually appropriate, employing an unlimited review of the entire record." *State v. Williams,* 295 Kan. 506, Syl. ¶ 4, 286 P.3d 195 (2012). If the court finds error, it moves to the second step and

"assesses whether it is firmly convinced that the jury would have reached a different verdict had the instruction error not occurred. The party claiming a clearly erroneous instruction maintains the burden to establish the degree of prejudice necessary for reversal." 295 Kan. 506, Syl. ¶ 5, 286 P.3d 195.

Prior to deliberations, the district court read Jury Instruction No. 4 to the jury:

> "The State has the burden of proving the defendant guilty. The defendant is not required to prove he's not guilty. You must presume he's not guilty, unless you're convinced from the evidence that he is guilty. The test you must use in determining whether the defendant is guilty or not is this: If you have reasonable doubt as to the truth of any of the claims required to be proved by the State, you must find the defendant not guilty. *If you have no reasonable doubt as to the truth of the claims required to be proved by the State, you should find the defendant guilty.*" (Emphasis added.)

The district court also provided written instructions to the jury. The written version of Jury Instruction No. 4 was consistent with PIK Crim.3d 52.02 and read, in relevant part: "If you have no reasonable doubt as to the truth *of each* of the claims required to be proved by the State, you should find the defendant guilty." (Emphasis added.)

Armstead contends that when the instructions are viewed as a whole, they failed to properly instruct the jury. He claims the district court's failure to include the words "of each" in the final sentence of the oral instruction was erroneous and that this error was not cured simply by providing the jury with the correctly worded written instruction because the court never instructed the jury to disregard the oral instruction. For support, Armstead cites *State v. Castoreno,* 255 Kan. 401, Syl. ¶ 4, 874 P.2d 1173 (1994).

*7 But Armstead's reliance on *Castoreno* is misplaced. There, when orally instructing the jury on the crime of aggravated criminal sodomy, the district court omitted the essential element of consent and misstated the law regarding the victim being " 'overcome by force or fear.' " 255 Kan. at 409–10, 874 P.2d 1173. Additionally, the district court added language to the witness credibility instruction that improperly focused on the defendant's motivation to give false testimony. On appeal, the Supreme Court held that the cumulative effect of these errors required reversal of the defendant's convictions. 255 Kan. at 411, 874 P.2d 1173. In the present case, no essential element was missing from the oral reasonable doubt instruction, the omission of the words "of each" did not result in a misstatement of the law, and there is no allegation of multiple errors that could combine to warrant reversal.

Relying on *Miller v. State,* No. 103,915, 2012 WL 401601 (Kan.App.2012) (unpublished opinion), *rev. granted* 296 Kan. —— (March 4, 2013), Armstead also suggests that the omission of the words " 'of each' " from the final sentence of the oral instruction could have led the jury to believe that the use of the word " 'any' " earlier in the instruction should also be applied in the final sentence of the instruction, thereby allowing the jury to find him guilty if the State proved *any* of the elements of his crimes beyond a reasonable doubt.

In *Miller,* the trial court transposed the words "each" and "any" in giving a jury instruction based on the current version of PIK Crim.3d 52.02. 2012 WL 401601, at *2. The *Miller* panel held that by transposing these two words, the district court altered the burden of proof and allowed the State to obtain a conviction "with patently insufficient evidence." 2012 WL 401601, at *2. As a result, the panel found structural error, reversed the trial court's denial of Miller's K.S.A. 60–1507 motion, and remanded for a new trial, finding his original appellate counsel ineffective for failing to raise the argument. 2012 WL 401601, at *4–5,*9.

In *State v. Herbel,* 296 Kan. 1101, 299 P.3d 292 (2013), our Supreme Court recently considered whether a jury instruction using the word "any" in the final sentence of an instruction based on PIK Crim.3d 52.02 communicated to the jury that it could find the defendant guilty by only finding proof beyond a reasonable doubt of only one of the claims required to be proved by the State. The court determined that while it was not the preferred instruction, it was legally appropriate. 296 Kan. at 1124, 299 P.3d 292. The *Herbel* court rejected the defendant's attempt to compare the instruction language from *Miller* with the instruction provided at his trial. Unlike *Miller,* where the trial court transposed the words "each" and "any," the instruction in *Herbel* used "any" in both instances in the instruction. The court determined these instructions differed sufficiently and that *Miller* did not provide an appropriate analytical comparison. *Herbel,* 296 Kan. at 1122–23, 299 P.3d 292; *cf. Miller,* 2012 WL 401601, at *2.

***8** Instead, the *Herbel* court adopted the reasoning set forth in *State v. Beck,* 32 Kan.App.2d 784, 88 P.3d 1233, *rev. denied* 278 Kan. 847 (2004). *Herbel,* 296 Kan. at 1123–24, 299 P.3d 292. The *Beck* panel rejected the argument that the use of the word "any" in the context of the instruction "could somehow create ambiguity or result in Beck being convicted if only one element of the crime is proven." 32 Kan.App.2d at 787, 88 P.3d 1233. The *Beck* panel further noted that any possible confusion was eliminated by the elements instruction that provided: " 'To establish this charge, *each* of the following claims must be proved....' (Emphasis added.)" 32 Kan.App.2d at 787–88, 88 P.3d 1233.

Armstead's contention that the jury could have inferred from the omission that it could find him guilty if the State proved *any* of the elements of his crimes is speculative. But even if the jury did make such an inference, it does not constitute error under the reasoning set forth in *Herbel.* Here, the judge simply omitted the words "of each" from his oral recitation of Jury Instruction No. 4. The district court's oral instruction did not alter the burden of proof like in *Miller* or substitute another word like in *Herbel.* The omission arguably had little to no effect on the jury, especially in light of the fact that the jury was provided with the proper written instruction. See *People v. Osband,* 13 Cal.4th 622, 717, 55 Cal.Rptr.2d 26, 919 P.2d 640 (1996) ("[A]s long as the court provides the jury with the written instructions to take into the deliberation room, they govern in any conflict with those delivered orally."), *cert. denied* 519 U.S. 1061, 117 S.Ct. 696, 136 L.Ed.2d 618 (1997); *People v. Gacy,* 103 Ill.2d 1, 99–100, 82 Ill.Dec. 391, 468 N.E.2d 1171 (1984) (harmless error when oral instruction was erroneous but written instructions and other oral statements properly stated applicable law), *cert. denied* 470 U.S. 1037, 105 S.Ct. 1410, 84 L.Ed.2d 799 (1985).

Additionally, the elements instruction for both charged crimes read: "To establish this charge, *each of* the following claims must be proved." (Emphasis added.) Any possible confusion suggested by Armstead as a result of the district court's oral instruction was cured by this statement. In *Herbel,* 296 Kan. at 1122–24, 299 P.3d 292, the court held that substitution of the word "any" does not constitute error. Under this reasoning, the district court's simple omission of the words "of each" in the final sentence of the oral reasonable doubt instruction also cannot constitute error. Armstead's claim necessarily fails.

The district court did not commit reversible err in providing a written answer to the jury's questions.

Armstead contends the district court committed reversible error when in response to the jury's questions submitted during deliberations, the district court responded in writing rather than calling the jury into the courtroom to communicate the answer. Armstead alleges that this resulted in a violation of his statutory and constitutional right to be present during every critical stage of the trial, his right to an impartial judge, and his right to a public trial.

***9** A defendant has a constitutional and statutory right to be present at every stage of trial. See U.S. Const. amends. VI & XIV; Kan. Const. Bill of Rights, § 10; K.S.A. 22–3405. A claim that a defendant was deprived of his or her statutory and constitutional right to be present during a portion of the trial raises legal questions that are subject to unlimited review on appeal. See *State v. Englehardt,* 280 Kan. 113, 121, 119 P.3d 1148 (2005).

During deliberations, the jury submitted the following questions to the district court: "How far away was Officer Ahler[s] from the vehicle when he first saw him getting into the car?"; "Were their cars facing the same way?"; and "Could we get a sketch of the route the two cars took during the 'chase?' " The judge read the questions on the record, in the courtroom, with both attorneys present. It is not clear from the record whether Armstead was also present. The judge informed the parties that he had prepared a written response titled Jury Instruction No. 15. After both parties indicated their agreement with the instruction, the judge stated "I'll respond by submitting my instruction back to them." Neither party objected to the procedure followed by the district court in responding to the jury's question. Jury Instruction No. 15 provided:

> "As to the written question # 1 from the presiding juror, the court refers you to instruction # 5 which states,
>
> "*In your fact finding you should consider and weigh everything admitted into evidence. This includes testimony of witnesses, admissions or stipulations of the parties, and any admitted exhibits. You must disregard any testimony or exhibit which I did not admit into evidence.*
>
> "I cannot give you a specific answer if there was testimony as to the distance between the vehicles or direction the vehicles were facing. You will have to rely on your

collective memories or have the reporter read back [Officer Ahlers'] testimony.

"There was no sketch admitted into evidence."

Before reaching the merits of Armstead's argument, we must note that Armstead failed to object to the district court's written answer to the jury's questions and he has raised this issue for the first time on appeal. Moreover, Armstead did not challenge the district court's procedure in responding to the questions in writing rather than calling the jury into the courtroom to communicate the answer. Generally, issues not raised before the district court cannot be raised for the first time on appeal. *State v. Warledo,* 286 Kan. 927, 938, 190 P.3d 937 (2008). Indeed, even trial errors affecting constitutional rights may be waived in the absence of a proper objection. See *State v. Gaudina,* 284 Kan. 354, 372, 160 P.3d 854 (2007).

Though Armstead arguably failed to preserve this issue for appeal, he argues our Supreme Court previously has addressed an identical issue for the first time on appeal. See *State v. Bell,* 266 Kan. 896, 918–20, 975 P.2d 239, *cert. denied* 528 U.S. 905, 120 S.Ct. 247, 145 L.Ed.2d 207 (1999). Our research reveals several cases decided after *Bell* that also addressed, for the first time on appeal, the identical issue Armstead raises in this case. See, *e.g., State v. Brown,* 272 Kan. 809, 812–13, 37 P.3d 31 (2001); *State v. Womelsdorf,* 47 Kan.App.2d 307, 321–23, 274 P.3d 662 (2012), *rev. denied* 297 Kan. —— (August 19, 2013). Accordingly, we will address the merits of Armstead's argument.

***10** Armstead first argues that the district court's manner of responding to the jury's questions was contrary to K.S.A. 22–3420(3) and violated his constitutional right to be present at every critical stage of trial. Armstead contends that even if he was present when the court and counsel discussed the appropriate response to the jury's questions, he was not present when the court's response to the questions was communicated to the jury—as the communication did not occur until the jury read the response in the jury room—and there is no indication that he voluntarily waived his right to be present at these proceedings. He cites *State v. Coyote,* 268 Kan. 726, 1 P.3d 836 (2000), for support.

K.S.A. 22–3420(3) provides:

> "After the jury has retired for deliberation, if they desire to be informed as to any part of the law or evidence arising in the case, they may request the officer to conduct them to the court, where the information on the point of law shall be given, or the evidence shall be read or exhibited to them in the presence of the defendant, unless he [or she] voluntarily absents himself [or herself], and his [or her] counsel and after notice to the prosecuting attorney."

Overruling prior precedent, the Kansas Supreme Court recently interpreted K.S.A. 22–3420(3) to mean that any question from the jury concerning the law or evidence pertaining to the case must be answered in open court in the defendant's presence unless the defendant is voluntarily absent. See *State v. King,* 297 Kan. 955, Syl. ¶ 3, 305 P.3d 641 (2013). Pursuant to *King,* the district court's failure to answer the jury's questions in open court and in Armstead's presence constituted an error.

However, the error is subject to the harmless error standard stated in *Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705, *reh. denied* 386 U.S. 987, 87 S.Ct. 1283, 18 L.Ed.2d 241 (1967). *King,* 297 Kan. 955, Syl. ¶ 4, 305 P.3d 641. Under this standard, error may be declared harmless where the party benefitting from the error proves beyond a reasonable doubt that the error complained of will not or did not affect the outcome of the trial in light of the entire record, *i.e .,* where there is no reasonable possibility that the error contributed to the verdict. *Herbel,* 296 Kan. at 1110–11, 299 P.3d 292; *Ward,* 292 Kan. 541, Syl. ¶ 6, 256 P.3d 801.

The State contends that any error in the district court's procedure was harmless under the totality of the circumstances present here because there is no reasonable possibility that the court's written response could have affected the jury's verdict.

The State's assertion is supported by the record. The jury's questions in this case were completely innocuous. The court responded by accurately stating the law, pointing the jury back to the jury instructions, reminding the jurors that they must decide the case based on the evidence as they remembered it or by requesting a readback of Officer Ahlers' testimony, and correctly informing them that no sketch had been admitted into evidence. The jury's presence in the courtroom would not have changed the answers to any of the posed questions. Moreover, the jury obviously had no difficulty understanding the court's response because it did subsequently request a readback of Ahlers' testimony,

for which the jurors were brought into the courtroom, and Armstead does not challenge his presence there. Under these circumstances, it is safe to conclude beyond a reasonable doubt that the error of not answering the jury's questions in open court was harmless.

***11** Armstead also claims that the district court's written response to the jury's questions was structural error because it violated his rights to an impartial judge and a public trial, which are guaranteed by the Sixth Amendment to the United States Constitution and § 10 of the Kansas Constitution Bill of Rights.

This argument has been addressed by this court in *Womelsdorf.* The *Womelsdorf* court distinguished *State v. Brown,* 362 N.J.Super. 180, 827 A.2d 346 (2003), a case where a defendant's right to an impartial judge was violated when a readback of the victim's testimony occurred in the jury room, without the judge or the defendant present:

> "The *Brown* court determined that the readback was a critical stage of the proceeding because it furnished the jurors with information they needed to decide the case. Here, the written answer to the jury denied it additional information it was seeking and reminded the jury to consider only the evidence admitted during trial. As the State points out, there is a distinct difference between the lengthy process of a readback, which also necessarily involves the court reporter, and the process of delivering a short written answer to a jury question which does not provide additional information. Under the facts of this case, we conclude that the district court's procedure in responding to the jury question in writing did not violate Womelsdorf's constitutional right to an impartial judge." *Womelsdorf,* 47 Kan.App.2d at 324, 274 P.3d 662.

The *Womelsdorf* panel also analyzed whether a written response to a jury question violates a defendant's right to a public trial:

> "As stated above, the judge read the jury questions on the record, in the courtroom, and the judge and both counsel discussed how to respond to the questions. Womelsdorf does not contend that she was not present in the courtroom for that discussion or that the courtroom was not open to the public when the discussion took place. Nothing about the district court's written response to the jury question, which is now available to the public as part of the court file, was hidden from public view. Obviously, the public was not present when the bailiff delivered the written response to the jury room, but jury deliberations are never open to the public. Under the facts of this case, we conclude that the district court's procedure in responding to the jury question in writing did not violate Womelsdorf's constitutional right to a public trial." 47 Kan.App.2d at 325, 274 P.3d 662.

Under this same analysis, the procedure used by the district court here—responding to the jury's questions in writing—did not violate Armstead's constitutional rights to an impartial judge or a public trial. The judge read the jury questions in open court and both counsel discussed how to respond. The written response, which is available to the public as part of the court file, merely referred the jury to an instruction previously given in open court in Armstead's presence and informed the jury that it could request a readback of Ahlers' testimony. The jury subsequently requested a readback of this testimony, which was done in open court, in the presence of both parties. Subsequent panels of this court have adopted the analysis set forth in *Womelsdorf* and rejected similar alleged violations of the defendant's right to an impartial judge and a public trial. See *State v. Wells,* No. 108,165, 2013 WL 3455798, at *9–10 (Kan.App.2013) (unpublished opinion), *petition for rev. filed* August 2, 2013; *State v. Deason,* No. 107,546, 2013 WL 3330535, at *6–7 (Kan.App.2013) (unpublished opinion), *petition for rev. filed* July 26, 2013; *State v. Hogan,* No. 106,220, 2012 WL 5364674, at *8–9 (Kan.App.2012) (unpublished opinion), *rev. denied* 297 Kan. —— (September 4, 2013); *State v. Bolze–Sann,* No. 105,297, 2012 WL 3135701, at *6–7 (Kan.App.2012) (unpublished opinion), *rev. granted* 298 Kan. —— (October 17, 2013).

***12** Armstead's conviction for obstructing official duty is affirmed; but the court's decision to amend the complaint is reversed, his conviction for driving without a valid license in violation of K.S.A.2011 Supp. 8–235(a) is reversed, and the case is remanded for trial on the charge of driving while suspended in violation of K.S.A.2011 Supp. 8–262(a)(1).

Parallel Citations

2014 WL 349561 (Kan.App.)

303 P.3d 726 (Table)
Unpublished Disposition
(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.
Michael Paul WELLS, Appellant.

No. 108,165. | July 5, 2013.
| Review Denied Aug. 29, 2013.
| Review Denied Feb. 18, 2014.

Appeal from Shawnee District Court; David B. Debenham, Judge.

Attorneys and Law Firms

Rick Kittel, of Kansas Appellate Defender Office, for appellant.

Jodi Litfin, assistant district attorney, Chadwick J. Taylor, district attorney, and Derek Schmidt, attorney general, for appellee.

Before STANDRIDGE, P.J., ARNOLD-BURGER and POWELL, JJ.

Opinion

MEMORANDUM OPINION

PER CURIAM.

***1** Michael Paul Wells appeals from his convictions for burglary, criminal damage to property, and theft. He raises four issues on appeal: (1) The district court erred in instructing the jury on reasonable doubt; (2) the district court prevented him from presenting a defense by limiting his direct examination on hearsay grounds; (3) the district court erred in answering the jury's question outside of his presence; and (4) the district court erred in setting the amount of restitution. For the reasons stated below, we affirm Wells' convictions, reverse and vacate the district court's judgment regarding restitution, and remand the case with directions to award restitution as specifically directed below.

FACTS

On March 26, 2011, Don and Stacy Kennedy visited their property at 330 Southeast 93rd Street in Shawnee County, Kansas. The property consists of 57 acres that includes a lake and a house that sits about 1/2 mile from the road. The house was vacant, as it had previously been damaged in a flood. The Kennedys went to the house that day to clean it after some recent vandalism.

As the Kennedys drove up to the house, they noticed that the garage door—normally kept shut—was open. They also saw a few bags of tools on the ground and what appeared to be wiring that had been cut out of their house piled up on a nearby blanket. The Kennedys looked around and observed that the wiring had, in fact, been cut out of the house. They took the tool bags and wiring, drove home to retrieve Don's gun and taser, and then drove back to the property. Upon arrival, the Kennedys saw a truck parked in front of the driveway gate that had not been there earlier. They recognized the topper on the truck as one that had previously been stolen from them. The Kennedys called law enforcement to report that someone was on their property.

While waiting for law enforcement to arrive, the Kennedys saw two men walking towards them from the direction of the house. The Kennedys recognized one of the men as Jason Jones, whose family from which they had purchased the property. They did not recognize the other man, who was later identified as Wells. The Kennedys had not given Jones or Wells permission to be on their property. Jones jumped over the gate and the Kennedys ordered him to get on the ground. Stacy raised the taser and pointed it at the men until law enforcement arrived.

Shawnee County Sheriff's officers arrived at the scene, where they observed miscellaneous sections of copper plumbing piping and electrical wiring in the back of the men's truck. The Kennedys later did a walk-through of the house with law enforcement and pointed out the new damage to the house.

Wells was subsequently charged with burglary, criminal damage to property, and theft. At trial, Wells testified that he had gone to the Kennedys' property with Jones to fish in the lake and that he thought Jones had permission to be on the property. Wells knew that Jones had previously lived there and that Jones' mother owned land on the other side of

the lake. Wells denied that he had stolen anything from the Kennedys' house and claimed he only went to the property to fish and to make some money by cleaning out Jones' mother's ditch.

*2 A jury convicted Wells as charged. The district court sentenced Wells to a 24–month term of probation and found him to be jointly and severally liable with Jones for restitution in the amount of $155,350.

ANALYSIS

On appeal, Wells asserts the following claims of error: (1) The district court erred in instructing the jury on reasonable doubt; (2) the district court prevented him from presenting a defense by limiting his direct examination on hearsay grounds; (3) the district court erred in answering the jury's question outside of his presence; and (4) the district court erred in setting the amount of restitution. Each of these allegations is addressed in turn.

1. *Reasonable Doubt Instruction*

Wells contends the district court erred in instructing the jury on reasonable doubt. The district court used an older version of PIK Crim.3d 52.02 when it instructed the jury:

> "The test you must use in determining whether the defendant is guilty or not guilty is this: If you have a reasonable doubt as to the truth of any of the claims required to be proved by the State, you must find the defendant not guilty. If you have no reasonable doubt as to the truth of *any* of the claims required to be proved by the State, you should find the defendant guilty." (Emphasis added.)

This instruction is identical to the new version of PIK Crim.3d 52.02 jury instruction except for one word. PIK Crim.3d 52.02 reads:

> "The test you must use in determining whether the defendant is guilty or not guilty is this: If you have a reasonable doubt as to the truth of any of the claims required to be proved by the State, you must find the defendant not guilty. If you have no reasonable doubt as to the truth of *each* of the claims required to be proved by the State, you should find the defendant guilty." (Emphasis added.)

Wells claims that the district court should have given the newer version of PIK Crim.3d 52.02 and that the error resulted in structural error warranting automatic reversal.

Wells did not object to the instruction, so any error requires reversal only if the error was clearly erroneous and we are firmly convinced that the jury would have reached a different verdict had the instruction error not occurred. See K.S.A.2012 Supp. 22–3414(3); *State v. Williams,* 295 Kan. 506, Syl. ¶¶ 3–5, 286 P.3d 195 (2012).

In our Supreme Court's recent decision in *State v. Herbel,* 296 Kan. 1101, 1124, 299 P.3d 292 (2013), the court rejected the argument made by Wells here, holding that "[w]hile the older PIK instruction used in Herbel's trial was not the preferred instruction, it was legally appropriate." *Herbel* controls. Because the instruction given was legally appropriate, there was no error and we need not conduct a reversibility inquiry. See *Williams,* 295 Kan. at 516 ("Only after determining that the district court erred in giving or failing to give a particular instruction would the reviewing court engage in the reversibility inquiry.").

2. *Fair Trial*

*3 Wells alleges the district court violated his right to a fair trial by depriving him of his right to present a defense when it excluded certain testimony as hearsay. During direct examination, Wells attempted to testify that Jones had told Wells that he wanted to go to the Kennedys' property to fish. Because Jones was unavailable to testify, the district court sustained the State's hearsay objections. Wells claims that the exclusion of this testimony was in error because it was admissible to explain his state of mind and intent for being on the Kennedys' property.

> "[A] defendant is entitled to present his or her defense, and a defendant's fundamental right to a fair trial is violated if evidence that is an integral part of that theory is excluded. [Citation omitted.] But that right is not unlimited. '[T]he right to present a defense is subject to statutory rules and case law interpretation of the rules of evidence and procedure.' [Citation omitted.] Furthermore, when a criminal defendant is allowed 'to present evidence supporting his or her theory of defense such that the jury could reach a conclusion on its validity, exclusion of other evidence is not necessarily error.' [Citation omitted.]" *State v. Wells,* 289 Kan. 1219, 1235, 221 P.3d 561 (2009).

Whether the district court's ruling interfered with Wells' right to present a defense is subject to unlimited review. See *Wells,* 289 Kan. at 1236.

When considering a challenge to a district court's evidentiary ruling, an appellate court must first consider whether the evidence is relevant. Evidence is relevant if it has any tendency in reason to prove any material fact. K.S.A. 60–401(b). To establish relevance, there must be some material or logical connection between the asserted facts and the inference or result they are intended to establish. The concept of relevance under Kansas law includes both whether the evidence is probative and whether it is material. On appeal, the question of whether evidence is probative is judged under an abuse of discretion standard; materiality is judged under a de novo standard. *State v. Dixon,* 289 Kan. 46, 69, 209 P.3d 675 (2009).

Once relevance is established, evidentiary rules governing admission and exclusion may be applied, either as a matter of law or in the exercise of the district court's discretion depending on the contours of the rule in question. When the adequacy of the legal basis of a district court's decision on admission or exclusion of evidence is questioned, an appellate court reviews the decision de novo. *Dixon,* 289 Kan. at 70.

Probative evidence " ' "furnishes, establishes or contributes toward proof." ' " *State v. Garza,* 290 Kan. 1021, 1027, 236 P .3d 501 (2010). For evidence to be material, the evidence must " ' "be significant under the substantive law of the case and properly at issue." ' " *State v. Reid,* 286 Kan. 494, 505, 186 P.3d 713 (2008). In order to convict Wells of the charged crimes, the State was required to prove that Wells had the specific intent to commit the crimes. Evidence relating to Wells' intent for being on the Kennedys' property was obviously probative and material to Wells' defense; therefore, testimony that Jones had told Wells that he wanted to go to the Kennedys' property to fish was relevant.

***4** Even though the evidence was relevant, however, it was not necessarily admissible. Jones was not available to testify at trial; therefore, the introduction of any statements made by Jones would constitute hearsay. Hearsay is "[e]vidence of a statement which is made other than by a witness while testifying at the hearing, offered to prove the truth of the matter stated." K.S.A. 60–460. "The theory behind the hearsay rule is that when a statement is offered as evidence of the truth of the matter stated, the credibility of the declarant is the basis for its reliability, and the declarant must therefore be subject to cross-examination." *State v. Becker,* 290 Kan. 842, 846, 235 P.3d 424 (2010) (citing *Boldridge v. State,* 289 Kan. 618, 634, 215 P.3d 585 [2009]). However, statements offered into evidence not to prove the truth of the matter asserted but "to show their effect on the listener" do not constitute hearsay. *Becker,* 290 Kan. at 847. A statement offered to prove the effect on the listener is admissible through the person who heard it. *State v. Harris,* 259 Kan. 689, 698, 915 P.2d 758 (1996).

An appellate court reviews a trial court's admission or exclusion of hearsay statements for an abuse of discretion. *State v. Miller,* 284 Kan. 682, 708, 163 P.3d 267 (2007). This review includes a determination over whether the district court's discretion was guided by erroneous legal conclusions. *State v. Race,* 293 Kan. 69, 76, 259 P.3d 707 (2011).

Wells was the sole witness to testify for the defense. During direct examination, defense counsel asked Wells why he had been on the Kennedys' property. Wells answered, "[Jones'] mom's land is right on the other side of the lake, and he was at my house and was just off-hand saying something about wanting to go fishing and—." The State objected, raising a hearsay objection because Jones had not testified. Defense counsel argued that the testimony was not hearsay because it was not offered for the truth of the matter asserted; rather, the testimony went to Wells' state of mind regarding his intent for being there. The district court sustained the State's objection. Thereafter, the following exchange occurred:

> "Q. (By Mr. Desch [defense counsel:]) [Wells], why were you there?
>
> "A. That's what I was—I wanted to do more fishing.
>
> "Q. Okay. Don't tell us what [Jones] told you. Just tell us what you thought you were going to do at this place.
>
> "A. Well, I've kind of got to tell you what he said, don't I? He said his mom had—"

The State raised another hearsay objection, which the judge again sustained, telling Wells, "[Y]ou can't testify as to what [Jones] told you ... because he's not here." Wells' testimony continued as follows:

> "Q. (By Mr. Desch) What was your purpose for going with Jason?
>
> "A. To check out the fishing. He said—

"Q. Wait. I'm sorry.

"A. I can't say he said, okay. It was half his mother's pond, her lake or pond.

*5 "Q. Was it your understanding that he used to live there?

"A. Yes.

"Q. Okay.

"A. He helped build the place.

"Q. Okay. Was it your understanding that he was supposed to be able to fish there?

"A. Yes.

"Q. Did you have any reason to believe he didn't have the permission to fish where he wanted to fish?

"A. No.

"Q. Did he give you—without saying what he said, did he give you any other general indication he was going to pirate fish?"

Thereafter, the district court once again sustained the State's objection. Defense counsel continued to question Wells about going to the Kennedys' property:

"Q. Okay. How did you end up—well, how did the truck end up in front of the Kennedy[s'] property—or in the Kennedy[s'] property?

"A. I still don't know because I was—he said he was going to run up to the barn to do something.

"[The prosecutor]: Judge, I'm going to object.

"MR. DESCH: I—

"THE COURT: Let me explain something. It's your witness. Your witness is testifying about what the other person did or said.

"MR. DESCH: He said he doesn't know.

"THE COURT: He said what?

"MR. DESCH: He said he doesn't know, so I'm getting there.

"THE COURT: No, let me explain, Mr. Desch.

"MR. DESCH: Yes.

"THE COURT: I understand the question you asked him is an appropriate question, but the witness is explaining what the other person said to him—

"MR. DESCH: Okay.

"THE COURT:—which is what I've already sustained an objection on hearsay ground. So why don't you—

"MR. DESCH: I'm trying.

"THE COURT:—ask another question."

Defense counsel went on to question Wells about what he and Jones did at the Kennedys' property. Wells denied that he had done any damage to, or stolen anything from, the property. Wells further testified as to his reason for going to the property:

"Q. It wasn't your conscious decision to go there, was it?

"A. No.

"Q. Okay. What was your actual goal when going out with [Jones]? What was it?

"A. To check out the fishing spot and clean out his mom's ditch—

"Q. Okay.

"A. —to make a little money."

Wells argues the district court erred in limiting his testimony because it denied him the opportunity to fully explain to the jury why he was on the Kennedys' property on March 26, 2011. Wells alleges that in order to fully explain his actions and prove his theory of defense, he needed to be able to tell the jury that Jones told Wells that he wanted to go to the property to fish and clean out his mother's ditch. Wells claims that Jones' statement to this effect was not offered to prove the truth of the matter asserted; rather, it was offered to show Wells' state of mind at the time the men went to the Kennedys' property.

For support, Wells relies primarily on *State v. Getz,* 250 Kan. 560, 830 P.2d 5 (1992). In *Getz,* the defendant was charged with theft of two horses. At trial, Getz testified

that one evening she returned home to discover the horses on her property. Getz claimed that she believed the horses belonged to Perry Patton, who was living with her. Getz sought permission to testify that Patton told her that he had purchased the horses and had asked her to sell the horses for him. Because Patton was not available to testify at trial, the trial judge found Patton's statements to Getz were inadmissible hearsay. On appeal, the *Getz* court found that the evidence had been improperly excluded, determining that the evidence was not offered to prove the truth of the matter, *i.e.,* whether Patton had bought the horses. Rather, Patton's statement was relevant to the question of Getz' intent. The court noted that had the jury considered Patton's statements to Getz, the jury could have concluded that Getz did not intend to permanently deprive the true owner of the horses and was therefore not guilty of theft. Thus, the court reversed the conviction finding that the erroneous exclusion of the evidence was not harmless error. 250 Kan. at 568–71.

***6** Wells asserts that *Getz* is applicable to the present case because like the statements in *Getz,* Jones' statement was not being introduced to prove the truth of the matter asserted, *i.e.,* whether Jones really wanted to go to the Kennedys' property to fish and clean out his mother's ditch. Rather, Wells contends, this statement was offered to show Wells' state of mind as he accompanied Jones to the Kennedys' property. Wells notes that criminal intent is an essential element of his crimes and therefore proving why he was on the property was vital to showing his lack of intent to commit the crimes. If the testimony had been admitted, Wells claims, the jury could have concluded that he did not intend to permanently deprive the Kennedys of their property. Wells concedes that he was allowed to testify as to the substance of his reason for being on the property, but he claims that the district court's rulings "significantly diminished" the full effect of the evidence that was presented in his defense because he was unable to establish a good-faith basis for his belief that it was okay to be on the Kennedys' property.

Wells' argument is persuasive, as it appears Jones' statement was not introduced to prove the truth of the matter asserted, *i.e.,* Jones' reason for going to the Kennedys' property. Jones' statement was offered instead to show its effect on Wells' intent and subsequent conduct. Therefore, the district court abused its discretion in excluding Jones' statement to Wells.

We must now determine whether this error was prejudicial or harmless. Because Wells is alleging a violation of his constitutional right to present a defense, we review the error under the constitutional harmless error standard. Under this standard, the State, as the party benefitting from the error, has the burden to establish beyond a reasonable doubt that the error "will not or did not affect the outcome of the trial in light of the entire record, *i.e.,* proves there is no reasonable possibility that the error affected the verdict." *State v. Ward,* 292 Kan. 541, 569, 256 P .3d 801 (2011), *cert. denied* 132 S.Ct. 1594 (2012).

To that end, the State asserts Wells was allowed to present evidence as to his reason for being on the Kennedys' property on March 26, 2011. Wells testified directly that he was there to fish and clean out Jones' mother's ditch and that Wells did not initiate the trip to the property. Wells further testified that he had no reason to believe that Jones did not have permission to fish on the property. By comparison, the information Wells hoped to add with the addition of Jones' statement would have added little to Wells' theory of defense and did not affect the outcome of the trial. "When a district judge allows a criminal defendant to present evidence supporting his or her theory of defense such that the jury could reach a conclusion on its validity, exclusion of other evidence is not necessarily error. [Citations omitted.]" *State v. Jones,* 287 Kan. 547, 555, 198 P.3d 756 (2008). Given the nature of the excluded evidence and the testimony at trial, we find the State has met its burden to prove beyond a reasonable doubt that the error "did not affect the outcome of the trial in light of the entire record." See *Ward,* 292 Kan, 541, Syl. ¶ 6. Because the erroneous exclusion of the hearsay testimony was harmless beyond a reasonable doubt, the district court's decision to exclude such evidence did not violate Wells' right to a fair trial and his right to present a defense.

3. *Jury Question*

***7** Wells argues that the district court committed reversible error when in response to a jury question submitted during deliberations, the district court responded in writing rather than calling the jury into the courtroom to communicate the answer.

During deliberations, the jury submitted the following question to the district court: " 'May we view Officer[s] Roberts['] and Rice's reports?' " The judge read the request on the record, in the courtroom, while both parties were present. The judge and both counsel discussed how to respond to the question. The judge then prepared a written answer to the question that stated: " 'These reports were not introduced into evidence. Please refer to Instruction Number 2.' " Instruction No. 2 provided, in relevant part: "You must disregard any

testimony or exhibit which I did not admit into evidence." Neither party objected to this answer, and the bailiff then delivered the written answer to the jury in the jury room. Neither party objected to the procedure followed by the district court in responding to the jury's question.

Wells now contends that the district court's procedure of sending a written answer to the jury's question violated K.S.A. 22–3420(3) and his constitutional rights. Specifically, Wells claims that responding to the jury's question in writing cannot be considered harmless because it constituted structural error, and the cumulative effect of the error denied him a fair trial, requiring the reversal of his convictions.

A claim that a defendant was deprived of his or her statutory and constitutional right to be present during a portion of the trial raises legal questions that are subject to unlimited review on appeal. *State v. Englehardt,* 280 Kan. 113, 121, 119 P.3d 1148 (2005).

Before reaching the merits of Wells' argument, we note that Wells has raised this issue for the first time on appeal. Wells failed to object to the district court's written answers to the jury's question. Moreover, Wells did not challenge the district court's procedure in responding to the question in writing rather than calling the jury into the courtroom to communicate the answer. Generally, issues not raised before the district court cannot be raised for the first time on appeal. See *State v. Warledo,* 286 Kan. 927, 938, 190 P.3d 937 (2008). There are exceptions to this general rule, but Wells does not argue that any of these exceptions apply. Indeed, even trial errors affecting constitutional rights may be waived in the absence of a proper objection. See *State v. Gandina,* 284 Kan. 354, 372, 160 P.3d 854 (2007).

Although Wells arguably failed to preserve this issue for appeal, our Supreme Court has previously addressed an identical issue for the first time on appeal. See *State v. Bell,* 266 Kan. 896, 918–20, 975 P.2d 239, *cert. denied* 528 U.S. 905 (1999). Additionally, a panel of this court recently reached the same decision in *State v. Womelsdorf,* 47 Kan.App.2d 307, 321, 274 P .3d 662 (2012), *petition for rev. filed May* 10, 2012 ("Because our Supreme Court has previously addressed this issue for the first time on appeal, we will address the merits of Womelsdorf's claim."). Thus, we will address the merits of Wells' allegation.

***8** Wells first argues that the district court's manner of responding to the jury's question was contrary to K.S.A. 22–3420(3) and violated his constitutional right to be present at every critical stage of trial. He cites *State v. Coyote,* 268 Kan. 726, 1 P.3d 836 (2000), for support.

K.S.A. 22–3420(3) provides:

> "After the jury has retired for deliberation, if they desire to be informed as to any part of the law or evidence arising in the case, they may request the officer to conduct them to the court, where the information on the point of law shall be given, or the evidence shall be read or exhibited to them in the presence of the defendant, unless he [or she] voluntarily absents himself [or herself], and his [or her] counsel and after notice to the prosecuting attorney."

Our Supreme Court recently rejected this same argument in *State v. Wells,* 296 Kan. 65, 290 P.3d 590 (2012). There, the defendant argued that despite the presence and participation of all the parties in answering the jury's question, the court deprived her of her constitutional and statutory rights to be present at all critical stages of trial when it responded to the jury question via a written note. The defendant cited both the language of K.S.A. 22–3420(3) and the *Coyote* decision to support her claim. The Supreme Court found the plain language of K.S.A. 22–3420(3) did not support the defendant's argument because the statute requires the presence of the defendant only if the jury, after making a request, is taken into the courtroom so that it can hear information from the district court on a point of law. The Supreme Court noted its holding in *Coyote* was based on the fact that the defendant was not present during the court's discussion with the attorneys on how to respond *in writing* to the jury's question. *Wells,* 296 Kan. at 91.

The Supreme Court discussed the protection necessary under the circumstances as follows:

> "[T]o ensure that a defendant's constitutional and statutory right to be present at critical stages of his or her trial is protected, a defendant must be present during the court's discussion with the attorneys and ultimate decision on how to respond to a written jury question. But there is no need that the court read the written answer it decided out loud to the jury in open court while the defendant is present. Simply delivering the answer the court decided

upon to the jury via written note is sufficient to satisfy the defendant's right to be present. See *Coyote,* 268 Kan. at 731 (noting that the district court's handling of a second written jury question complied with Kansas law; the court's conduct was described as follows: 'The court advised counsel and the defendant of the question, provided all with an opportunity off the record for input, and after the hearing, resolved the question submitted. Then the court, *in writing,* answered the jury question.'); accord *[State v.] Burns,* 295 Kan. [951,] 956–57[, 287 P.3d 261 (2012)] (approving of procedure outlined in *Coyote* for answering written question from jury)." *Wells,* 296 Kan. at 92.

***9** This court is duty bound to follow Kansas Supreme Court precedent, absent some indication the court is departing from its previous position. *State v. Ottinger,* 46 Kan.App.2d 647, 655, 264 P.3d 1027 (2011), *rev. denied* 294 Kan. —— (May 4, 2012). Wells was present during the district court's discussion with the attorneys and ultimate decision on how to answer, in writing, the jury's question. Based on the Supreme Court's holding in *Wells,* the district court did not violate Wells' constitutional and statutory rights to be present at all critical stages of his trial when it answered the jury's question with a written note instead of answering the question in open court while Wells was present.

Wells also claims that the district court's written response to the jury question was structural error because it violated his rights to an impartial judge and a public trial, which are guaranteed by the Sixth Amendment to the United States Constitution and § 10 of the Kansas Constitution Bill of Rights.

This argument was addressed in *Womelsdorf.* The *Womelsdorf* court distinguished *State v. Brown,* 362 N.J.Super. 180, 827 A.2d 346 (2003), a case where a defendant's right to an impartial judge was violated when a readback of the victim's testimony occurred in the jury room, without the judge or the defendant present:

"The *Brown* court determined that the readback was a critical stage of the proceeding because it furnished the jurors with information they needed to decide the case. Here, the written answer to the jury denied it additional information it was seeking and reminded the jury to consider only the evidence admitted during trial. As the State points out, there is a distinct difference between the lengthy process of a readback, which also necessarily involves the court reporter, and the process of delivering a short written answer to a jury question which does not provide additional information. Under the facts of this case, we conclude that the district court's procedure in responding to the jury question in writing did not violate Womelsdorfs constitutional right to an impartial judge." *Womelsdorf,* 47 Kan.App.2d at 324.

The *Womelsdorf* panel also analyzed whether a written response to a jury question violates a defendant's right to a public trial:

"As stated above, the judge read the jury questions on the record, in the courtroom, and the judge and both counsel discussed how to respond to the questions. Womelsdorf does not contend that she was not present in the courtroom for that discussion or that the courtroom was not open to the public when the discussion took place. Nothing about the district court's written response to the jury question, which is now available to the public as part of the court file, was hidden from public view. Obviously, the public was not present when the bailiff delivered the written response to the jury room, but jury deliberations are never open to the public. Under the facts of this case, we conclude that the district court's procedure in responding to the jury question in writing did not violate Womelsdorf's constitutional right to a public trial." 47 Kan.App.2d at 325.

***10** We find the analysis in *Womelsdorf* persuasive. Thus, the procedure used by the district court here—responding to the jury's question in writing—did not violate Wells' constitutional rights to an impartial judge or a public trial. The judge read the jury question in open court and both counsel discussed how to respond. The written answer, which is available to the public as part of the court file, merely referred the jury to the instructions previously given in open court in Wells' presence. See *State v. Bolze-Sann,* No. 105,297, 2012 WL 3135701, at *6–7 (Kan.App.2012) (unpublished opinion) (adopting the *Womelsdorf* analysis and reaching same conclusion), *petition for rev. filed* August 24, 2012.

Finally, Wells argues that the cumulative effect of the errors alleged above entitle him to reversal of his convictions. Even if an individual error is insufficient to support reversal, the cumulative effect of multiple errors may be so great as to require reversal. Cumulative trial errors, when considered collectively, may require reversal of the defendant's conviction when " ' "the totality of circumstances substantially prejudiced the defendant and denied him [or her] a fair trial." ' " *Thompson v. State,* 293 Kan. 704, 721, 270 P.3d 1089 (2011). But "[c]umulative error will not be found when the record fails to support the errors raised on appeal

by the defendant." *State v. Cofield,* 288 Kan. 367, 378, 203 P.3d 1261 (2009). Because Wells cannot establish any error occurred with respect to the procedure followed by the district court in responding to the jury question, his cumulative error claim fails.

4. *Restitution*

Wells claims the district court erred in ordering him to pay restitution in the amount of $155,350. Specifically, Wells contends there is insufficient evidence to support the restitution amount and that the amount is excessive given the estimate to replace the wiring and plumbing in the house.

An appellate court reviews the imposition of restitution under an abuse of discretion standard. *State v. Dexter,* 276 Kan. 909, 912, 80 P.3d 1125 (2003). A judicial action constitutes an abuse of discretion if the action (1) is arbitrary, fanciful, or unreasonable; (2) is based on an error of law; or (3) is based on an error of fact. *Ward,* 292 Kan. at 550. Stated another way, an abuse of discretion will be found only when no reasonable person would have taken the view adopted by the district court. *State v. Sellers,* 292 Kan. 346, 353, 253 P.3d 20 (2011). The party asserting the district court abused its discretion bears the burden of showing such abuse of discretion. *State v. Martis,* 277 Kan. 267, 280, 83 P.3d 1216 (2004).

A district court is permitted to impose restitution for "damage or loss caused by the defendant's crime." K.S.A.2010 Supp. 21–4603d(b)(1). The appropriate amount of restitution is the amount required to reimburse the victim for the actual loss suffered. *State v. Hunziker,* 274 Kan. 655, 663–64, 56 P.3d 202 (2002). Proof of a victim's damage or loss in a criminal suit does not entail the same rigidity with respect to proof of value in a civil suit, and a district court has substantial discretion in determining the amount of restitution. 274 Kan. at 660; *State v. Phillips,* 45 Kan.App.2d 788, 794, 253 P.3d 372 (2011). However, "the district court's determination of restitution must be based on reliable evidence yielding a 'defensible restitution figure.' " 45 Kan.App.2d at 794. Additionally, in ordering an amount of restitution, the district court must have a causal link between the victim's damages and the defendant's unlawful conduct. *State v. Summons,* 276 Kan. 574, 575, 78 P.3d 470 (2003).

***11** After Wells was charged in this case, Don Kennedy filed a notice of intent to seek restitution in the amount of $52,319.50. Attached to the notice was an estimate of $32,419.50 for replacing the electrical wiring in the house and an estimate of $19,900 for replacing the plumbing system. At sentencing, the State presented testimony from Don about the estimates, as well as testimony from Tim Morstorf, owner of M & M Services, who had prepared the electrical estimate for Don.

Don testified that he had originally purchased the property for approximately $200,000 and later added horse corrals and a horse barn. Don stated that he had tried to sell the property for $250,000 after the flood damage. He lowered the price to $200,000 after windows were broken out and other property damage was sustained as a result of vandalism unrelated to the acts at issue in this case. The electrical and plumbing damage resulting from the vandalism at issue in this case was not part of the first vandalism. Don claimed the house became virtually unsellable after the electrical and plumbing damage and he did not have the money to repair it; thus, he was forced to take the house off the market. In light of this circumstance, Don claimed Wells' crimes damaged him in the amount of $200,000, the asking price of the house at the time the vandalism at issue here occurred.

On cross-examination at sentencing, defense counsel introduced into evidence a 2011 Shawnee County appraisal report and questioned Don about it:

"Q. Does that reflect an accurate depiction of what your property's valued by the appraiser's office?

"A. I really couldn't tell you if it is or it isn't.

"Q. Okay.

"A. It looks like based on this sheet it is.

"Q. Okay. Does that reflect that the house at—in 2011 was $44,000?

"A. I don't know if that's what it means or not. It doesn't specifically state that the house or—it doesn't say exactly.

"Q. Okay. I'll point you to this. Under the line improvement, what does that say?

"A. $41,130."

Don thereafter agreed that according to the report, the appraisal office had listed the house "as kind of a total loss after the flood" and that the estimates to replace the electrical and plumbing damage were higher than the total value of the house.

After presenting its evidence, the State requested restitution in the amount of $52,319.50 for the replacement of the plumbing and electrical wiring. The State further claimed that the Kennedys were also entitled to restitution in the amount of $160,000—the difference between the amount their house was listed for prior to the damage ($200,000) versus the 2011 appraisal (approximately $40,000).

In response to the State's request, defense counsel argued that the appraisal had been done after the flood, but before the electrical and plumbing damage occurred; that there was no causal link between Wells' conduct and the Kennedys' damages; and that the State failed to show the actual market value of the damages.

***12** The district judge later entered the restitution award, stating:

> "As far as restitution, both parties have made some valid arguments in this case. But [defense counsel] is right, fair market value of the property itself is what we look at in this case, and in that situation, what we look at is the fair market value of the property prior to the damage and the fair market value after the damage.
>
> "What I find based on the testimony that was presented by the parties and the exhibits in this case is that the fair market value of the property after the flood, but prior to the damage caused by [Wells], was $200,000. After the damage, the fair market value, based on the Shawnee County Appraiser report, is $44,650. That means the restitution that's owed is $155,000—$155,350, and that is what I will order in this case, and I'll order that jointly and severally...."

On appeal, Wells argues the district court erred in ordering restitution in the amount of $155,350 because the record is not clear as to how the court determined this amount. Specifically, Wells claims that the district court's finding that the 2011 appraisal of $44,650 was determined after the removal of the wiring and plumbing is not supported by the record. Wells also asserts that there was no evidence presented to show that the $200,000 list price for the property was the correct fair market value. Finally, Wells alleges that it was unreasonable for the court to find that the removal of the wiring and plumbing—estimated at $52,319.50—would cause the Kennedys' property to decrease in value by $155,350, an amount that greatly exceeds the Kennedys' actual loss.

Kansas courts have established rules for determining restitution in property crime cases involving the loss of or damage to personal property. See *State v. Smardo,* No. 101,194, 2009 WL 2506268, at *3 (Kan.App.2009) (unpublished opinion). The loss of the electrical wiring and plumbing in the Kennedys' house is more akin to real property than personal property. Although no specific formulas have been developed for calculating the value of real property partially damaged by a defendant, the rules pertaining to personal property are equally applicable in real property cases. See *Smardo,* 2009 WL 2506268, at *3 (applying personal property rules to valuation of a damaged barn); see also PIK Civ. 4th 171.10; PIK Civ. 4th 171.21 (applying same measure of damages to personal and real property when repairs can restore property to original condition).

When personal property is damaged and the property can be restored to its previous undamaged condition, "the measure of restitution is the reasonable cost of repairs plus a reasonable amount for loss of use of the property while repairs are made." *Phillips,* 45 Kan.App.2d at 795. When damaged property cannot be repaired, "the amount of restitution is the difference between the fair market value of the property immediately before it was damaged and the fair market value after it was damaged." 45 Kan.App.2d at 795. In either circumstance, however, " 'the restitution amount should not exceed the reasonable market value ... immediately before the damage.' " 45 Kan.App.2d at 795. Finally, in situations where an item of personal property has "no readily ascertainable fair market value ..., the district court may consider other factors in determining restitution, including the purchase price, condition, age, and replacement cost of the property, as long as the valuation is based on reliable evidence which yields a defensible restitution figure." *State v. Moloney,* 36 Kan.App.2d 711, 712, 143 P.3d 417, *rev. denied* 282 Kan. 794 (2006).

***13** In cases where the partially damaged real property may be repaired, the repair costs may properly guide restitution calculation. See *Smardo,* 2009 WL 2506268, at *3. Here, the district court based its award on fair market value, without first considering whether the property could be repaired. There is no indication that the damage done by the removal of the electrical wiring and the plumbing could not be restored to its previous undamaged condition; indeed, the State presented evidence that these repairs could be done for $52,319.50. Thus, the proper measure of restitution should have been "the reasonable cost of repairs plus a reasonable amount for loss

of use of the property while repairs are made." *Phillips,* 45 Kan.App.2d at 795.

Moreover, the district court's fair market value award is not supported by the record. Although the court determined that the 2011 appraisal was done after the electrical and plumbing damage occurred, there was no date on the appraisal. Additionally, it is unclear what the amount of the appraisal actually was. During Don's cross-examination at sentencing, defense counsel indicated that the house was valued at $44,000. Don noted that the appraisal did not specifically reference the house, but he agreed that the appraisal listed improvements in the amount of $41,130. The district court and defense counsel later appeared to agree that the property had been appraised at $44,650. In addition, the district court's reliance on the fact that the house had previously been listed for sale for $200,000 was speculative, as listing amounts are fluid and do not necessarily reflect fair market value. This court has defined fair market value as "the price that a willing seller and a willing buyer would agree upon ... in an arm's-length transaction." *State v. Baxter,* 34 Kan.App.2d 364, 366, 118 P.3d 1291 (2005). Given the previous damage to the house caused by the flooding and prior vandalism, it would be difficult to calculate the restitution award based on fair market value.

The purpose of restitution is to reimburse the victim for the actual loss suffered. *Hunziker,* 247 Kan. at 663–64. Here, the actual loss suffered by the Kennedys as a result of Wells' actions was the loss of their electrical wiring and plumbing. Returning the electrical wiring and plumbing to their original condition required their replacement. Under these circumstances, then, the replacement cost figure of $52,319.50 constitutes a fair starting point from which to assess an amount for restitution. Don testified that the house had to be taken off the market because he could not afford this cost. Presumably, after these repairs are done, he will be able to put the house back on the market.

The district court's determination of restitution was not based on reliable evidence that yielded a "defensible restitution figure." See *Phillips,* 45 Kan.App.2d at 794. Based on the district court's reasoning, the Kennedys would receive an award nearly three times the amount of the actual damages. Under these circumstances, the district court abused its discretion in calculating the restitution award and it must be vacated. For this reason, we vacate the district court's judgment regarding restitution and remand with directions to award restitution based on the reasonable costs of repairing the electrical wiring and plumbing, plus a reasonable allowance for the loss of use of the property during those repairs.

***14** Affirmed in part, reversed in part, and remanded with directions.

Parallel Citations

2013 WL 3455798 (Kan.App.)

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281 P.3d 597 (Table)
Unpublished Disposition
(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.
Michelle M. BOLZE–SANN, Appellant.

No. 105,297. | July 27, 2012.
| Review Granted Oct. 17, 2013.

Appeal from Shawnee District Court; Evelyn Z. Wilson, Judge.

Attorneys and Law Firms

Rick Kittel, of Kansas Appellate Defender Office, for appellant.

Jodi Litfin, assistant district attorney, Chadwick J. Taylor, district attorney, and Derek Schmidt, attorney general, for appellee.

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

Opinion

MEMORANDUM OPINION

PER CURIAM.

***1** Michelle M. Bolze–Sann appeals her convictions of one count of involuntary manslaughter and one count of aggravated endangering a child. Bolze–Sann was convicted by a jury after evidence was presented at trial that a 5–month–old child, Zachary Typer, died while in Bolze–Sann's care. It is undisputed that Bolze–Sann placed Zachary on a bed for a nap instead of in a crib or playpen and that Zachary was pinned between the bed's mattress and footboard. It was subsequently determined that Zachary died as a result of respiratory failure, secondary to positional asphyxia. Although Bolze–Sann raises several issues on appeal, we find none of them to require reversal of the jury's verdict. Thus, we affirm Bolze–Sann's convictions.

FACTS

Bolze–Sann was a licensed daycare provider who operated a daycare in her home. Zachary, who was born on January 4, 2007, began attending daycare at Bolze–Sann's residence on February 19, 2007. According to Zachary's parents, they discussed their son's increasing mobility with Bolze–Sann and told her not to put him on a bed for naps.

Unfortunately, on the morning of July 2, 2007, Bolze–Sann placed Zachary on a bed in her 15–year–old daughter Ashley's bedroom for a nap because one of her cribs was broken and the other one was occupied. When she placed him on the bed, Bolze–Sann put a ring of pillows and blankets around Zachary. Around 12:30 p.m., Bolze–Sann checked on Zachary and he was still asleep on the bed. Although he had moved a little, Zachary was still lying within the pillows and blankets at that time.

At some point after Bolze–Sann checked on Zachary, Ashley arrived home and heard him crying. Her mother told her not to go get Zachary because she had just laid him down for a nap. Later, Bolze–Sann's 5–year–old daughter, Sierra, told Ashley that Zachary was sleeping in the crib in Sierra's room. So Ashley took her 9–month–old infant cousin into her bedroom and lay down with her on her bed for a nap.

Ashley and her infant cousin slept for about an hour before Bolze–Sann came into the bedroom and asked where Zachary was. Ashley told her mother that Zachary was in the crib in Sierra's room. When Bolze–Sann went to look in the crib, however, Zachary was not there. Bolze–Sann then returned to Ashley's bedroom and found Zachary wedged between the mattress and the footboard.

Dispatch records show that 911 was called at 2:29 p.m. and that a police officer arrived at Bolze–Sann's home about 3 minutes later. When the police officer arrived, he saw Bolze–Sann giving CPR to Zachary in her living room. Shortly thereafter, the fire department and an ambulance arrived at the house.

A paramedic carried Zachary to the ambulance and hooked him up to a monitor, while continuing CPR. In the ambulance, the paramedic briefly stopped CPR to determine whether Zachary had any cardiac arrhythmia. Unfortunately, the monitor showed no cardiac activity and the resuscitation

efforts were ceased. Zachary was pronounced dead at 2:43 p.m.

*2 Shawnee County Deputy Coroner Dr. Altaf Hossain performed an autopsy and determined that Zachary had died of "respiratory failure secondary to positional asphyxia." Dr. Hossain explained that "if the respiratory passages are blocked, the baby cannot take respiration because of the position. The position of the baby is compromised. In other words, compressed or wedged between the two objects, that is called positional asphyxia." Moreover, Dr. Hossain determined the manner of death to be accidental.

Bolze–Sann was charged with one count of involuntary manslaughter and one count of aggravated endangering a child. The district court held a 5–day jury trial during which 11 witnesses testified for the State, including Zachary's parents and Dr. Hossain. Bolze–Sann called three witnesses to testified on her behalf. The defense witnesses included Michelle M. Good, who also sent her children to Bolze–Sann's house for daycare. After deliberating for approximately 4 hours, the jury returned a verdict of guilty on both charges.

On January 9, 2009, Bolze–Sann was sentenced to 32 months' imprisonment. At that time, restitution was left open for 30 days. Bolze–Sann filed a notice of appeal on January 22, 2009. Although 10 days had not passed since the sentencing, she also filed a motion to file notice of appeal out-of-time. On January 26, 2009, the State filed a motion for hearing on restitution, and on February 25, 2009, Bolze–Sann filed another notice of appeal.

On August 18, 2009, the State filed a motion to withdraw its request for a hearing on restitution, stating that the parties agreed—at the request of Zachary's family—that there would be no restitution sought from Bolze–Sann. On September 10, 2009, the district court sustained the motion.

WAS THE EVIDENCE SUFFICIENT TO SUPPORT BOLZE–SANN'S CONVICTIONS?

Bolze–Sann contends that her convictions should be reversed because there was insufficient evidence presented at trial to support them. Specifically, Bolze–Sann argues that the State failed to prove she acted recklessly, which was an element of both involuntary manslaughter and aggravated endangering of a child. When a defendant challenges the sufficiency of the evidence to support a criminal conviction, we must review all of the evidence, viewed in the light most favorable to the prosecution, to determine whether a rational factfinder could have found the defendant guilty beyond a reasonable doubt. See *State v. McCaslin,* 291 Kan. 697, 710, 245 P.3d 1030 (2011).

In determining whether there is sufficient evidence to support a conviction, we do not reweigh the evidence or the credibility of witnesses. *State v. Hall,* 292 Kan. 841, 859, 257 P.3d 272 (2011). It is only in rare cases where the testimony is so incredible that no reasonable factfinder could find guilt beyond a reasonable doubt that a guilty verdict will be reversed. See *State v. Matlock,* 233 Kan. 1, 5–6, 660 P.2d 945 (1983). There is no requirement that a criminal defendant challenge the sufficiency of the evidence before the trial court to preserve the issue for appeal. *State v. Farmer,* 285 Kan. 541, 545, 175 P.3d 221 (2008).

*3 Both charges against Bolze–Sann required that the jury find she acted recklessly. For the involuntary manslaughter charge, the jury was instructed that it must find that Bolze–Sann killed Zachary (a) recklessly or (b) while in the commission of aggravated endangering of a child. See K.S.A. 21–3404. And for aggravated endangering of a child, the jury was required to find that Bolze–Sann recklessly caused Zachary to be placed in a situation where his life, body, or health was injured or endangered. See K.S.A. 21–3608a.

The jury was further instructed that "[r]eckless conduct means conduct done under circumstances that show a realization of the imminence of danger to the person of another and a conscious and unjustifiable disregard of that danger." See K.S.A. 21–3201(c). Recklessness requires a higher showing of mental culpability than negligence. See *State v. Remmers,* 278 Kan. 598, 601–02, 102 P.3d 433 (2004).

Specifically, Bolze–Sann argues that there was no evidence that she had a realization of imminent danger to Zachary. But the record is replete with evidence that Bolze–Sann knew she should not place such a young child on a bed for a nap. In fact, Zachary's father testified that he had discussions with Bolze–Sann regarding Zachary's mobility and had told her several times not to put Zachary on a bed.

There was evidence presented at trial that Bolze–Sann knew that Zachary had become increasingly mobile. There was also evidence presented that Zachary had been able to roll over since he was 3 months old and that he had been able

to "scooch" across the floor for a month prior to his death. Moreover, there was evidence presented that Zachary crawled for the first time the day before he died and that he was able to sit up.

Zachary's mother also testified that she had specifically told Bolze–Sann not to put Zachary on a bed because of his increased mobility. According to Zachary's mother, Bolze–Sann assured her that she was not laying Zachary on a bed for naps. Furthermore, Zachary's parents testified that they were never told that Bolze–Sann had a broken crib or playpen.

In addition, a reasonable jury could infer that Bolze–Sann placed Zachary in a ring of blankets and pillows when she placed him on the bed because she realized the potential for danger. The fact that she may have previously placed infants on a bed to nap multiple times "without incident" does not negate her recklessness or excuse her actions on this occasion. See *State v. Knight,* No. 105,092, 2012 WL 2325849, at *5 (Kan.App.2012) (unpublished opinion) (finding that harm to child by leaving her unsupervised for several hours at a public beach was imminent in the sense that drowning or abduction would have occurred quickly with horrific consequences").

Likewise, there was evidence that Bolze–Sann knew about K.A.R. 28–4–116(b)(2)(A), which required that children under the age of 18 months be placed in a crib or playpen for naps. Specifically, a child care licensing surveyor for the Shawnee County Health Agency testified at trial that Bolze–Sann was given a copy of the regulations pertaining to licensed child care facilities, including K.A.R. 28–4–116. The surveyor testified that at the time of the health agency's last survey of the daycare—which was conducted on February 20, 2007—Bolze–Sann had two playpens. Furthermore, the surveyor testified that when asked whether she understood that children under 18 months must sleep in a crib or playpen, Bolze–Sann answered "yes."

***4** Bolze–Sann argues that K.A.R. 28–4–116 was enacted "to prevent children from rolling off of beds and being trampled" and that she was aware of this danger, which was why she placed Zachary within a ring of blankets and pillows. To support her contention, Bolze–Sann relies on *State v. Stahlhut,* No. 73,866, unpublished opinion filed November 22, 1996 (Kan.App.). As an unpublished opinion, the holding in *Stahlhut* does not serve as precedent nor is it favored for citation. Although an unpublished opinion can be relied on if it has persuasive value concerning a material issue not addressed in a published opinion and if it assists the court in deciding the case, it is not binding on this panel. See Supreme Court Rule 7.04(f)(2) (2011 Kan. Ct. R. Annot. 57).

Regardless of why K.A.R. 28–4–116 was enacted, it clearly states that infants should not be allowed to sleep or nap on a bed. As such, even if Bolze–Sann did not know the intent of the regulation, she did know that infants of Zachary's age should be placed in a crib or playpen for a nap. At the very least, the regulation goes to the knowledge of imminent danger that Bolze–Sann possessed when she placed Zachary on a bed for a nap on July 2, 2007. See *State v. Gatlin,* 292 Kan. 372, 377, 253 P.3d 357 (2011) (In order for a defendant's conduct to be reckless, the defendant "must know that he or she is putting others in imminent danger ... but need not foresee the particular injury that results from his or her conduct. [Citations omitted.]").

Accordingly, based on our review of the record in the light most favorable to the State, we conclude that there was sufficient evidence presented at trial upon which a reasonable factfinder could conclude that Bolze–Sann acted recklessly when she put Zachary down for a nap on a bed instead of in a crib or a playpen.

DID THE DISTRICT COURT ERR IN DENYING BOLZE–SANN'S PRETRIAL MOTION TO DISMISS?

Bolze–Sann also contends that the district court erred in denying her pretrial motion to dismiss. Although Bolze–Sann was arraigned on May 9, 2008, she did not file her motion to dismiss until August 20, 2008. In her motion to dismiss, Bolze–Sann argued that she could not be found guilty of either involuntary manslaughter or aggravated endangerment of a child because there was not sufficient evidence of her acting recklessly.

In response, the State argued that the motion to dismiss was untimely under K.S.A. 22–3208(4), which states that a motion to dismiss "shall be made at any time prior to arraignment or within 20 days after the plea is entered." Here, the motion to dismiss was not filed until more than 90 days following the entry of Bolze–Sann's plea. Accordingly, we find that the filing of the motion to dismiss was untimely. Further, as to the merits of the motion to dismiss, we again note that there was sufficient evidence presented at trial upon which a reasonable factfinder could—and did—find Bolze–Sann guilty beyond a reasonable doubt of involuntary manslaughter and aggravated

endangering a child. Thus, we conclude that the district court did not err in denying the motion to dismiss.

WERE BOLZE–SANN'S CONSTITUTIONAL OR STATUTORY RIGHTS VIOLATED WHEN THE DISTRICT COURT ANSWERED THE JURY'S QUESTION DURING DELIBERATIONS?

***5** Next, Bolze–Sann argues that the district court erred in responding to a question presented by the jury during deliberations. Specifically, she argues that her constitutional and statutory right to be present at every critical stage of her trial was violated; that her constitutional right to a public trial was violated; and that her right not to have a critical stage of the trial occur outside the presence of the district judge was violated.

"A claim that a defendant was deprived of his [or her] statutory and constitutional right to be present during a portion of his [or her] trial raises legal questions that are subject to unlimited review on appeal. [Citation omitted.]" *State v. Martinez,* 288 Kan. 443, 449, 204 P.3d 601 (2009).

A review of the trial transcript shows that the jury sent the judge a written question during deliberations. The district judge informed counsel on the record that "[w]e have a question on count 1, part one: 'Is there any other alternate definition meaning to the verb, killed? Signed presiding Juror D.C [ ].' " After receiving input from the prosecutor and defense counsel, the district judge agreed that it would send a written response to the jury that stated: "There's nothing additional for the Court to add. Please refer to instructions already given.' "

Unfortunately, the trial transcript does not state whether Bolze–Sann was present when the district judge discussed the jury's question and her proposed response with the attorneys. Interestingly, Bolze–Sann never states in her brief that she was not present. Nevertheless, for the purposes of this opinion, we will assume that Bolze–Sann was *not* present when the district judge and counsel discussed this matter.

K.S.A. 22–3420(3) states:

> "After the jury has retired for deliberation, if they desire to be informed as to any part of the law or evidence arising in the case, they may request the officer to conduct them to the court, where *the information on the point of the law shall be given, or the evidence shall be read or exhibited to them in the presence of the defendant,* unless he voluntarily absents himself, and his counsel and after notice to the prosecuting attorney." (Emphasis added.)

In addition, the Sixth Amendment's Confrontation Clause and the Fourteenth Amendment's Due Process Clause require that a defendant be present at every critical stage of trial. See K.S.A. 22–3405. As K.S.A. 22–3420(3) states, information on a point of law given in response to a jury's question must be answered in open court in the defendant's presence, unless the defendant's absence is voluntarily. See *State v. Bell,* 266 Kan. 896, 919–20, 975 P.2d 239, *cert. denied* 528 U.S. 905 (1999).

Here, the record reflects that the district judge did not give any additional information on a point of law to the jury. Rather, after seeking the input of the prosecutor and defense counsel, she simply referred the jury back to the "instructions already given." Moreover, a review of the transcript reveals that the defendant was present when the jury was originally instructed. Thus, we do not find that the district judge committed error by simply referring the jury back to information on the point of law previously given in open court.

***6** As well, the Kansas Supreme Court has applied a harmless error test in cases where the defendant alleges the district judge violated K.S.A. 22–3405. See *Bell,* 266 Kan. at 919–20. An error is harmless unless it affected a party's substantial rights. K.S.A. 60–261. An error affects a party's substantial rights if it affected the outcome of the trial. *State v. Ward,* 292 Kan. 541, 565, 256 P.3d 801 (2011), *cert. denied* 132 S.Ct. 1594 (2012). When a party has alleged a constitutional error, the court must find beyond a reasonable doubt that the error had no impact on the trial's outcome. In other words, there must be no reasonable possibility that the error contributed to the verdict. 292 Kan. at 568–69.

In the present case, even if the district judge had violated K.S.A. 22–3405, the error would be harmless under the unique circumstances presented. The district judge's response to the jury's question did not misstate the law. In fact, it did not state the law at all or provide any additional information. Rather, the answer merely referred the jury back to information on the point of law that the jurors had already received when the instructions where read in open court in the presence of Bolze–Sann. We, therefore, conclude beyond a reasonable doubt that the alleged error had no impact on the trial's outcome.

Bolze–Sann also argues that providing a jury with a written response to a question constitutes a structural error because it denies a defendant both the right to an impartial judge during a critical stage of the trial and the right to a public trial. Bolze–Sann compares her case to *State v. Brown,* 362 N.J.Super. 180, 827 A.2d 346 (2003). In *Brown,* the Superior Court of New Jersey, Appellate Division, held that the read-back of testimony is a "critical stage of the criminal proceedings"; that a defendant had the right to be present; and that the read-back had to be conducted in open court, on the record, and under the supervision of the presiding judge. 362 N.J.Super. at 182, 188–89. The *Brown* court found that the read-back was a critical stage of the proceedings because "[i]t is furnishing [jurors] with information they need to decide the case." 362 N.J.Super. at 188–89.

The facts of the present case, however, are significantly different from the *Brown* case. Certainly, unless a defendant waives his or her right to be present, it would be inappropriate to conduct a read-back of testimony outside the presence of a defendant. See K.S.A. 22–3420(3). But this is not what happened in this case. Here, the issue presented does not involve the read-back of testimony nor does it involve giving a jury additional information as to a point of law.

Bolze–Sann's argument is similar to the argument made by the appellant in *State v. Womelsdorf,* 47 Kan.App.2d 307, 274 P.3d 662 (2012). In *Womelsdorf,* the district judge also responded to a jury question in writing, rather than by calling the jury into the courtroom to communicate the answer. The jury had requested a written transcript of an interview mentioned during trial and a copy of a diagram. Both counsel acknowledged that the transcript did not exist and the diagram was not admitted into evidence, so the district judge sent the jury a written response that stated: " 'A transcript of the Womelsdorf interview and a diagram of the home [are] not available. You must consider only the evidence admitted during the trial.' " 47 Kan.App.2d at 319.

*7 The *Womelsdorf* panel found the facts of *Brown* to be distinguishable, stating:

> "The *Brown* court determined that the readback was a critical stage of the proceeding because it furnished the jurors with information they needed to decide the case. Here, the written answer to the jury denied it additional information it was seeking and reminded the jury to consider only the evidence admitted during trial. As the State points out, there is a distinct difference between the lengthy process of a readback, which also necessarily involves the court reporter, and the process of delivering a short written answer to a jury question which does not provide additional information. Under the facts of this case, we conclude that the district court's procedure in responding to the jury question in writing did not violate Womelsdorf's constitutional right to an impartial judge." 47 Kan.App.2d at 324.

The *Womelsdorf* court also analyzed whether a district judge's written response to a jury question violated the defendant's right to a public trial guaranteed by the Sixth Amendment to the United States Constitution and § 10 of the Kansas Constitution Bill of Rights and found:

> "As stated above, the judge read the jury questions on the record, in the courtroom, and the judge and both counsel discussed how to respond to the questions. Womelsdorf does not contend that she was not present in the courtroom for that discussion or that the courtroom was not open to the public when the discussion took place. Nothing about the district court's written response to the jury question, which is now available to the public as part of the court file, was hidden from public view. Obviously, the public was not present when the bailiff delivered the written response to the jury room, but jury deliberations are never open to the public. Under the facts of this case, we conclude that the district court's procedure in responding to the jury question in writing did not violate Womelsdorf's constitutional right to a public trial." 47 Kan.App.2d at 325.

We find the analysis in *Womelsdorf* to be persuasive. Accordingly, we find that the procedure used by the district judge in the present case—responding to the jury's question in writing—did not violate Bolze–Sann's constitutional rights to an impartial judge or a public trial because the response simply referred the jury to the instructions previously given by the judge in open court in the presence of the defendant. Likewise, the response to the jury's question was also discussed in an open courtroom and the transcript is available to the public.

We, therefore, conclude that under the unique circumstances presented in this case, the district judge did not err in responding to the jury's question. Furthermore, we conclude that even if the district court erred, the error was harmless.

WAS BOLZE–SANN'S RIGHT TO A UNANIMOUS VERDICT VIOLATED BECAUSE THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT EACH ALTERNATIVE MEANS OF COMMITTING INVOLUNTARY MANSLAUGHTER?

***8** Bolze–Sann also contends that her right to a unanimous verdict was violated because the jury was instructed that it could find her guilty based on alternative means of committing involuntary manslaughter and there was insufficient evidence to support each alternative means. Bolze–Sann points out that the jury was instructed that it could find her guilty of involuntary manslaughter if it found Zachary's death was the result of recklessness or was committed during the commission of aggravated endangering of a child. Once again, she argues that there was insufficient evidence of recklessness.

The Kansas Supreme Court has held that a defendant's right to a unanimous verdict is not undermined if the State presented sufficient evidence at trial to support each alternative means for committing a crime. See *State v. Wright,* 290 Kan. 194, Syl. ¶ 2, 224 P.3d 1159 (2010); *State v. Timley,* 255 Kan. 286, 289, 875 P.2d 242 (1994). As we have previously found, there was sufficient evidence upon which a reasonable person could conclude that Bolze–Sann was reckless. Likewise, we find sufficient evidence to support the jury's finding that Bolze–Sann was guilty of aggravated endangering of a child. Therefore, because there was evidence of both alternatives, we conclude that Bolze–Sann's right to a unanimous verdict was not violated.

WAS IT CLEARLY ERRONEOUS FOR THE DISTRICT COURT NOT TO INSTRUCT THE JURY ON THE MEANING OF IMMINENCE?

In addition, Bolze–Sann argues that a definition of the word "imminence" should have been given in the jury instructions. Because Bolze–Sann did not request an instruction defining imminence at trial, we apply a clearly erroneous standard of review. See K.S.A. 22–3414(3); *Martinez,* 288 Kan. at 451. "An instruction is clearly erroneous only if the reviewing court is firmly convinced there is a real possibility the jury would have rendered a different verdict if the trial error had not occurred." *Martinez,* 288 Kan. at 451–52.

Here, the jury was appropriately instructed that "[r]eckless conduct means conduct done under circumstances that show a realization of the imminence of danger to the person of another and a conscious and unjustifiable disregard of that danger." The Kansas Supreme Court has held that in order to be imminent, "[t]he danger must be near at hand." *State v. White,* 284 Kan. 333, Syl. ¶ 9, 161 P.3d 208 (2007). Bolze–Sann contends that if the jury had been given an instruction with this definition, it would have returned a different verdict because there was evidence presented at trial showing that she had put infants on a bed to nap multiple times without incident. Hence, she argues that the jury could not have determined that the danger was near at hand.

Bolze–Sann cites a number of cases that have pointed out the difference between the words "imminent" and "immediate." See *White,* 284 Kan. at 350–57; *State v. Hernandez,* 253 Kan. 705, 711–13, 861 P.2d 814 (1993); *State v. Irons,* 250 Kan. 302, 307–09, 827 P.2d 722 (1992); *State v. Osbey,* 238 Kan. 280, 283–84, 710 P.2d 676 (1985). But none of these cases held that a jury must be instructed on what the difference is between immediate and imminent.

***9** If a word is widely used or easily comprehended by individuals of common intelligence, it does not require a defining instruction. See *State v. Roberts–Reid,* 238 Kan. 788, 789, 714 P.2d 971 (1986). Additional terms need to be defined only when the instructions, as a whole, mislead the jury or cause jurors to speculate. See *State v. Phelps,* 28 Kan.App.2d 690, 695, 20 P.3d 731, *rev. denied* 271 Kan. 1041 (2001). Hence, we conclude that the district court's failure to include a definition of the word "imminence" in the jury instructions was not clearly erroneous because the instructions—when viewed as a whole—did not mislead the jury or cause the jurors to speculate.

DID THE DISTRICT COURT ERR IN REFUSING TO GIVE BOLZE–SANN'S REQUESTED JURY INSTRUCTION?

Bolze–Sann further argues the district court erred in refusing to give a jury instruction she requested. When the district court refuses to give an instruction requested by the defendant, we must review the evidence in the light most favorable to the defendant. See *State v. Ransom,* 288 Kan. 697, 713, 207 P.3d 208 (2009).

Bolze–Sann requested that the jury be instructed as follows:

> "You are farther instructed that K.A.R. 28–4–116(b) is not intended to protect infants from suffocation and should not be considered by you in determining whether or not the defendant should have considered that the placing of the child in this manner down for a nap outside of a crib was a foreseeable danger and then taken steps to prevent or address that danger."

It appears that Bolze–Sann's requested this instruction in response to Jury Instruction No. 5, which stated:

> "During trial you heard testimony regarding Kansas Administrative Regulation 28–4–116, which provides:
>
> "(b) 'Napping and sleeping.
>
> [....]
>
> "[']](2) Napping facilities or sleeping facilities for evening and overnight care shall be provided as follows:
>
> (A) A crib or playpen with slats not more than 2–3/8 inches apart or equipped with bumpers shall be used for each child under 18 months.'
>
> "This regulation applies to licensed daycare providers and exists to promote the safety of young children. It governs napping during the day, and sleeping during the evening and overnight hours. Accordingly, the regulation applied to Ms, Bolze–Sann when she put Zachary Typer down for a nap during the daylight hours of July 2, 2007."

Bolze–Sann's objection to Instruction 5 was overruled. So she requested her own instruction regarding K.A.R. 28–4–116(b), which was based on the unpublished opinion from a panel of this court in *State v. Stahlhut,* No. 73,866, unpublished opinion filed November 22, 1996 (Kan.App.). On appeal, Bolze–Sann argues that her requested instruction was necessary to fully present the jury with the holding from *Stahlhut.* But, as discussed above, the *Stahlhut* decision does not serve as precedent and its holding appears to be fact specific. In *Stahlhut,* there was testimony that there were three possible ways in which the infant may have suffocated—two of which could have occurred in either a crib or a waterbed.

***10** Here, it was undisputed that Zachary died from "respiratory failure secondary to positional asphyxia" after being pinned between the mattress and the footboard of a bed. Although Dr. Hossain testified that it is possible for children to die of positional asphyxia in a crib as well as on a bed, there was no testimony suggesting that Zachary would have died had he been placed in a crib or playpen for a nap. Even if the instruction was a valid statement of the law, viewing the evidence in the light most favorable to Bolze–Sann, the evidence was insufficient to support the requested instruction. See *State v. Kidd,* 293 Kan. 591, 595–96, 265 P.3d 1165 (2011). Accordingly, we conclude that the district court did not err in denying the jury instruction requested by Bolze–Sann.

DID THE DISTRICT COURT ABUSE ITS DISCRETION IN DENYING BOLZE–SANN'S MOTION FOR A MISTRIAL BASED ON WITNESS INTIMIDATION?

Bolze–Sann asserts the district court abused its discretion in denying her motion for mistrial. We review a district court's decision denying a motion for mistrial under an abuse of discretion standard. Judicial discretion is abused if the judicial decision is (1) arbitrary, fanciful, or unreasonable; (2) based on an error of law; or (3) based on an error of fact. *Ward,* 292 Kan. at 550.

Bolze–Sann moved for a mistrial after a defense witness, Michelle Good, was allegedly threatened and intimidated by Zachary's father when she came to the courthouse to testify at trial. In response, the district judge called Good into the courtroom to testify regarding the incident outside the presence of the jury. Good testified that she was outside the courtroom when a man approached her and asked her if she was there for the Bolze–Sann trial. When she told him that she was, the man said, " 'You're here for that fucking bitch who killed my son. How dare you.' "

Good then realized that the man was Zachary's father. She did not respond and sat down on a bench in the hallway. According to Good, Zachary's father "continued to hover right around the courtroom door outside where [she] was sitting and [she] didn't make eye contact with him [and] didn't say anything to him."

Good testified that Zachary's father "was very angry, he was very red, and I immediately was afraid. I thought, oh, boy."

But Good also testified that she was never in fear that he might harm her physically. Instead, he kept watching her, which made her feel uncomfortable and even more nervous than she already was.

After hearing Good's testimony, the district judge offered to provide an escort for her while she was in the courthouse to make sure she was protected. The judge also asked Good whether she would feel comfortable if she had an escort. Good answered, "Yes." Good also stated that she would feel comfortable testifying truthfully at trial if Zachary's father was not present in the courtroom when she testified.

The district judge determined that granting a mistrial was not the appropriate remedy under the circumstances presented. Rather, the judge took action to make sure that Good was protected while she was in the courthouse. The judge also spoke to Zachary's father and admonished him that intimidation of a witness would not be tolerated. Moreover, the judge ordered that Zachary's father not be present in the courtroom during Good's testimony.

***11** On appeal, Bolze–Sann argues that Zachary's father's actions were sufficiently disruptive to deprive her of a fair trial. K.S.A. 22–3423(l)(c) states that a district judge may end a trial and order a mistrial at any time if it is determined that termination is necessary because "[p]rejudicial conduct, in or outside the courtroom, makes it impossible to proceed with the trial without injustice to either the defendant or the prosecution."

We find that the district judge appropriately handled a difficult situation with diligence. Likewise, we do not find the decision not to grant a mistrial was arbitrary, fanciful, or unreasonable. We also note that Bolze–Sann does not argue that Good's testimony in front of the jury was actually affected by the actions of Zachary's father. We, therefore, conclude that the district judge did not abuse her discretion in denying Bolze–Sann's motion for mistrial.

DID THE DISTRICT COURT ERR IN ACCEPTING THE JURY'S VERDICT WITHOUT INQUIRING INTO THE ACCURACY OF THE VERDICT?

Finally, Bolze–Sann contends that the district court erred in accepting the jury's verdict without inquiring into the accuracy of the verdict. Resolution of this issue requires us to interpret K.S.A. 22–3421, and interpretation of a statute is a question of law over which we have unlimited review. *State v. Arnett,* 290 Kan. 41, 47, 223 P.3d 780 (2010). Moreover, appellate courts exercise de novo review over issues of jury unanimity. See *State v. Dayhuff,* 37 Kan.App.2d 779, 784, 158 P.3d 330 (2007).

K.S.A. 22–3421, which sets out the procedure used by the district court when accepting a jury verdict in a criminal case, states:

> "The verdict shall be written, signed by the presiding juror and read by the clerk to the jury, and the inquiry made whether it is the jury's verdict. If any juror disagrees, the jury must be sent out again; but if no disagreement is expressed, and neither party requires the jury to be polled, the verdict is complete and the jury discharged from the case. If the verdict is defective in form only, it may be corrected by the court, with the assent of the jury, before it is discharged."

Here, the district judge immediately asked if either party wished to have the jury polled after the jury's verdict was announced. In response, defense counsel stated that he would like to have the jury polled. Each juror was then asked individually whether he or she agreed with the verdict, and each of them responded affirmatively.

This court has previously held that "polling the jury accomplishes the same purposes as having the trial judge inquire into the accuracy of the verdict, *i.e.,* ensuring jury unanimity and finality of the verdict." *State v. Dunlap,* 46 Kan.App.2d 924, 934, 266 P.3d 1242 (2011), *petition for rev. filed* December 30, 2011. Moreover, the *Dunlap* court found that a defendant's failure to object at trial to be similar to a waiver or invited error. 46 Kan.App.2d at 934.

***12** Accordingly, we conclude that the district judge did not err by failing to make a general inquiry into the accuracy of the verdict. Furthermore, we conclude that even if it was error for the district judge not to inquire of the jury, such error was harmless and was cured by the polling of the jury.

Affirmed.

Parallel Citations

2012 WL 3135701 (Kan.App.)

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