Case No. 14-111344-A

IN THE COURT OF APPEALS
FOR THE STATE OF KANSAS

---

STATE OF KANSAS,
Plaintiff/Appellant,

vs.

SHERRY L. HASKELL
Defendant/Appellee.

---

# BRIEF OF APPELLEE

---

Appeal from the District Court of Douglas County, Kansas
The Honorable Sally Pokorny, District Judge
District Court Case No. 2013 CR 720

---

Adam M. Hall, #23664
COLLISTER & KAMPSCHROEDER
Attorneys at Law
3311 Clinton Parkway Court
Lawrence, Kansas 66047-2631
Phone: (785) 842-3126
Fax: (785) 842-3878
E-mail: collkamp@sbcglobal.net

Attorney for Appellee

## TABLE OF CONTENTS

Case No. 14-111344-A

IN THE COURT OF APPEALS
FOR THE STATE OF KANSAS

---

STATE OF KANSAS,
Plaintiff/Appellant,

vs.

SHERRY L. HASKELL
Defendant/Appellee.

---

# BRIEF OF APPELLEE

---

Appeal from the District Court of Douglas County, Kansas
The Honorable Sally Pokorny, District Judge
District Court Case No. 2013 CR 720

---

## NATURE OF THE CASE & JUDGMENT APPEALED FROM

This is a criminal appeal by the State of Kansas from a judgment of dismissal entered by the district court on motion of the defendant.

## ISSUES TO BE DECIDED

I. **Whether the district court erred when it dismissed the State's case?**

## FACTUAL STATEMENT OF THE CASE

On June 13, 2013, Detective Jay Armbrister was tasked with conducting a follow up investigation into an incident that occurred on June 8, 2013 at a residence in Baldwin, Kansas. (R. Vol. 1, 6); *see also* (R. Vol. 1, 20-21) (identical framing of facts in motion to district court); *and* (R. Vol. 1, 30, ¶1) ("The State does not disagree with the facts as set forth by the defendant. . . ."). Deputy Vince Gonzalez had spoken with Mary

Armstrong and she stated that her son, Lukas Armstrong, had attended a party at this address and received severe burns to his upper torso and head as a result of an oil or gas can that exploded. (R. Vol. 1, 6). Deputy Gonzalez was previously told that Sherry Haskell is the owner of the property where the party happened and that Haskell lives on the property. (R. Vol. 1, 6). Haskell had been present at a party where numerous minors (including Lukas Armstrong) were consuming alcohol and Haskell was acting as the "DJ" and consuming alcohol herself. (R. Vol. 1, 6). Mary Armstrong indicated that a large jug of oil or gas had been knocked over into a campfire and her son had tried to grab it before it exploded and Lukas got burned as a result. (R. Vol. 1, 6).

Sherry Haskell lived at the location of the incident and, at the time of the incident, she was allowing her daughter to have a party at her house. (R. Vol. 1, 6). Haskell admitted to Detective Armbrister that she was present during the party and consuming alcohol. (R. Vol. 1, 6)

William VonBargen was present at this party and advised that this residence is considered a "safe" place to have parties because Sherry Haskell allowed them [i.e. minors] to consume alcohol and the police don't get called. (R. Vol. 1, 6)

Breanna Matana was present at this party and stated that Sherry Haskell was the "DJ" for the party and was consuming alcohol. (R. Vol. 1, 6). She also witnessed Haskell dancing with the young men at the party and "grinding up" on them. (R. Vol. 1, 6). She stated that if she had been Haskell's daughter during this incident, she would have been embarrassed by her actions. (R. Vol. 1, 6). Matana also described the party as a "parent's nightmare." (R. Vol. 1, 6).

Jake Abram was present at this party and indicated there was "lots of drinking going on" at the party and when asked about Sherry Haskell, he stated that she was "partying herself," meaning consuming alcohol. (R. Vol. 1, 7).

All the above occurred in Douglas County, Kansas. (R. Vol. 1, 7).

## ARGUMENTS & AUTHORITIES

### I. The district court did not err when it dismissed the State's case.

**STANDARD OF REVIEW: When the State appeals the dismissal of a complaint, an appellate court's review of an order discharging the defendant for lack of probable cause is de novo. *State v. Anderson*, 270 Kan. 68, Syl. ¶1, 12 P.3d 883 (2000). This court must view the sufficiency of the evidence as would a detached magistrate at a preliminary hearing. *Id.***

The defendant was charged with the crime of "unlawfully hosting minors consuming alcoholic liquor or cereal malt beverage." (R. Vol. 1, 4). Kansas law defines this crime as:

> ". . . recklessly permitting a person's residence or any land, building, structure or room owned, occupied or procured by such person to be used by an invitee of such person or an invitee of such person's child or "ward, in a manner that results in the unlawful possession or consumption therein of alcoholic liquor or cereal malt beverages by a minor"

K.S.A. 21-5608. At the district court level, the defendant argued that even if all of the allegations contained in the charging affidavit were proven beyond a reasonable doubt, the defendant could not be guilty of this crime because there is no evidence that the defendant's land was "used by an invitee" or "invitee of [her] child" because of the special legal meaning imparted by the word "invitee." (R. Vol. 1, 22). The ultimate conclusion begged by the defendant was that the charge was not supported by probable

cause, and it should be dismissed. *Id.* The Court accepted this conclusion, and it dismissed the case. (R. Vol. 1, 68).

### A. The district court faithfully, and properly, followed the plain language of K.S.A. 21-5608.

The State correctly observes that interpretation of a statute is a question of law. See (Br. Appellant, p. 2); and *Bluestem Tel. Co. v. Kansas Corp. Comm'n*, 33 Kan. App. 2d 817, 823, 109 P.3d 194, 199 (2005). "An appellate court is not bound by the district court's interpretation of a statute and is obligated to interpret a statute de novo." *Id.* Nonetheless, the defendant's interpretation of the statute is the proper one – and not a mere "flawed argument" as suggested by the State (Br. Appellant, p. 2) – so the defendant welcomes this Court's *de novo* review.

As the defendant argued below, the word "invitee" has a well-established legal meaning under Kansas law. (R. Vol. 1, 22). This word is part of a series of three words that describe the legal status of entrants upon land in Kansas. As explained by the Kansas Supreme Court in a tort context:

> "Under the present law of Kansas a trespasser is one who enters on the premises of another without any right, lawful authority, or an express or implied invitation or license. . . .
> ...
> A licensee is one who enters or remains on the premises of another by virtue of either the express or implied consent of the possessor of the premises, or by operation of law, so that he [or she] is not a trespasser thereon. . . .
> ...
> An invitee is one who enters or remains on the premises of another at the express or implied invitation of the possessor of the premises for the benefit of the inviter, or for the mutual benefit and advantage of both inviter and invitee. . . ."

*Jones v. Hansen*, 254 Kan. 499, 503, 867 P.2d 303, 306 (1994) (quoting *Gerchberg v. Loney*, 223 Kan. 446, 448-49, 576 P.2d 593 [1978]). These classifications are long-standing components of the common law. *Id.* They are relevant here because:

> "Under the law in this jurisdiction a social guest has the status of a licensee . . . ." (emphasis added).

*Id.* To rise to the level of an "invitee" under Kansas law, a guest would have to be fairly classified as a "business visitor." *See Gardin v. Emporia Hotels, Inc.*, 31 Kan.App.2d 168, 173, 61 P.3d 732, 737 (2003) ("As observed in comment a to Restatement (Second) of Torts § 344, the duty to protect others from the harmful acts of third persons is only owed to 'business visitors,' commonly known as invitees.") (emphasis added). The State never proffered any evidence suggesting that the entrants on the defendant's land were business visitors. *See* (R. Vol. 3, 9) ([THE COURT]: "There is no evidence that that is what happened. The evidence is that this was a social gathering.").

"The most fundamental rule of statutory interpretation and construction, to which all other rules are subordinate, is that the intent of the legislature governs if that intent can be ascertained." *Bd. of Cnty. Comm'rs of Leavenworth Cnty. v. Whitson*, 281 Kan. 678, 685, 132 P.3d 920, 926 (2006). This Court "must give effect to that intent, which the legislature is initially presumed to have expressed through the language it used." *Id.* When a statute is plain and unambiguous, there is no need to resort to statutory construction. *Id.* A Court merely interprets the language as it appears; it is not free to speculate and cannot read into the statute language not readily found there. *GT, Kansas, L.L.C. v. Riley County Register of Deeds,* 271 Kan. 311, 316, 22 P.3d 600 (2001).

Under the legislatively-established rules of interpretation, "[w]ords and phrases shall be construed according to the context and the approved usage of the language, but technical words and phrases, and other words and phrases that have acquired a peculiar and appropriate meaning in law, shall be construed according to their peculiar and appropriate meanings." (emphasis added). K.S.A. 77-201. Here, the legislature used a word with a "peculiar and appropriate meaning in law," and, upon applying this rule, the statute is plain and unambiguous. The interpretation requested by the defendant is the proper one without need for further construction. In fact, any further construction of the statute in the face of these mandates would be improper. *See Coe v. Sec. Nat. Ins. Co.*, 228 Kan. 624, 629, 620 P.2d 1108, 1112 (1980) ("A court has no right to enlarge the scope of the statute or to amend it by judicial interpretation.").

As an invitation to this Court to become involved in the process of legislation by interpretation and violate the principle of separation of powers, the State argues that:

> "the clear meaning and plain language K.S.A. 21-5608 does not exclude the application of the statute to the defendant, because in Kansas, since 1994, the term invitee has not solely meant 'business visitor.' The term 'business visitor' is nowhere to be found in the statute."

(Br. Appellant, p. 3).

The State's assertion that "in Kansas, since 1994, the term invitee has not solely meant 'business visitor'" is simply wrong. The State's analysis of this issue appears at pages 4-7 of its brief. Essentially, the State implicitly concedes that the word "invitee" at least used to mean "business visitor" under Kansas law, until tort law principles of premises liability were modified by the Kansas Supreme Court in *Jones v. Hansen*, 254 Kan. 499, 509, 867 P.2d 303 (1994). (Br. of Appellant, p. 5). The State correctly

observes that in *Jones* the Court abolished the disparate duties of care owed to "invitees" and "licensees" as entrants upon land in Kansas. (Br. of Appellant, p. 5); *Id.* However, the State then goes on to conclude that this abolition of disparate duties to an "invitee" and "licensee" for tort premises liability purposes means that "'social guests' are now considered 'invitees' under *Jones*." (Br. of Appellant, pp. 5-6). This conclusion is a *non sequitur*, and it should be rejected as such.

Certainly "social guests" (i.e. "licensees") and "invitees" are both owed the same duty of care as entrants on land in Kansas after *Jones*, but it does not follow that the Kansas Supreme Court endorsed the idea that a "social guest" is now a legal "invitee." In fact, in recent premises liability tort cases, the Kansas Supreme Court still acknowledges the existence of a semantic distinction between a "licensee" and "invitee" notwithstanding that the standard of care is the same for both. *E.g. Wrinkle v. Norman*, 297 Kan. 420, 422, 301 P.3d 312, 313 (2013) ("A landowner's duty to both invitees and licensees is one of reasonable care under all the circumstances."); *and Elstun v. Spangles, Inc.*, 289 Kan. 754, 756, 217 P.3d 450, 453 (2009) ("The duty owed by an occupier of land to invitees and licensees alike is one of reasonable care under all the circumstances.").

Here, the district court followed the legislature's mandate to construe "technical words and phrases, and other words and phrases that have acquired a peculiar and appropriate meaning in law" by their peculiar and appropriate meanings. K.S.A. 77-201. It undertook no further construction of the statute. The resulting construction was proper.

**B. Even if this Court undertook a further construction of the statute, the rule of lenity would require that this Court adopt a narrow construction of this criminal statute.**

Assuming, *arguendo*, that the legislature's use of the word "invitee" rose to the level of a legitimate "ambiguity" requiring construction of the statute, in the criminal law context the rule of lenity requires that any ambiguity be resolved in favor of the accused. *State v. Allen*, 260 Kan. 107, 113, 917 P.2d 848, 852-53 (1996). As stated in *State v. Braun:*

> "A special rule, the rule of lenity, guides us when determining the meaning of an ambiguous criminal statute. When there is a reasonable doubt about the statute's meaning, we apply the rule of lenity and give the statute a narrow construction. *State v. Chavez,* 292 Kan. 464, 468, 254 P.3d 539 (2011); *State v. Reese,* 42 Kan.App.2d 388, 390, 212 P.3d 260 (2009)."
>
> "Two important policies are served by the rule of lenity. First, people should have fair notice of conduct that is criminal. *Reese,* 42 Kan.App.2d at 390, 212 P.3d 260. Second, narrow interpretation when there is some reasonable doubt about a criminal statute's meaning best respects the legislature's role in defining what constitutes a crime. Kansas has no common-law crimes, K.S.A. 21–3102(1), so something is a crime only if the legislature says so by statute. If the courts broadly interpreted ambiguous criminal statutes, we might inadvertently overstep our role and make something criminal even though the legislature had not intended that result. See *State v. Knight,* 44 Kan.App.2d 666, 681, 241 P.3d 120 (2010), *rev. denied* 292 Kan. 967 (2011)."

47 Kan.App.2d 216, 217, 273 P.3d 801, 802 (2012). Therefore, even if the legislature's use of the word "invitee" created a legitimate ambiguity, the interpretation requested by the defendant would still be the proper one because it is more narrow.

It is true that "this rule of strict construction is subordinate to the rule that judicial interpretation must be reasonable and sensible to effect legislative design and intent." *State v. Trautloff*, 289 Kan. 793, 797, 217 P.3d 15, 19 (2009). But here, the

result of a narrow construction would not be unreasonable or insensible because even the more narrow construction suggested by the defendant would have a legitimate sweep. As observed by the district court:

> "...the plain meaning of this is basically they are prohibiting you from telling people to come over and buy a cup, a red Solo cup, for $5, which would make you an invitee, and then let you drink, while you are underage, however much you want, for that $5 out of the keg at their party."

(R. Vol. 3, 8-9).

The district court properly recognized its role in the interpretation of the law, and it applied the law of Kansas faithfully. The district court's refusal to overstep its role may be frustrating to the State, but as the Kansas Supreme Court has observed, "[n]o matter what the legislature may have really intended to do, if it did not in fact do it, under any reasonable interpretation of the language used, the defect is one which the legislature alone can correct." *Kenyon v. Kansas Power & Light Co.*, 254 Kan. 287, 293, 864 P.2d 1161, 1165 (1993). This Court can offer the State no relief.

**CONCLUSION**

For the foregoing reasons, Ms. Haskell respectfully requests that this Court affirm the judgment of the district court.

Respectfully submitted,

COLLISTER & KAMPSCHROEDER
Attorneys at Law
3311 Clinton Parkway Court
Lawrence, Kansas 66047-2631
Phone: (785) 842-3126
Fax: (758) 842-3878
E-mail: collkamp@sbcglobal.net

Adam M. Hall, #23664
ATTORNEY FOR DEFENDANT/APPELLEE

**CERTIFICATE OF SERVICE**

I hereby certify that two (2) true and correct copies of the foregoing Brief of Appellee were mailed to the following named persons at their respective addresses, by depositing same in the United States mail, postage prepaid, on the 7 day of May, 2014:

Patrick J. Hurley
Assistant District Attorney
Judicial & Law Enforcement Center
111 E. 11th Street
Lawrence, KS 66044

Derek Schmidt, Attorney General
Criminal Litigation Division
120 SW 10th, 2nd Floor
Topeka, KS 66612

Adam M. Hall #23664