No. 22-125,166-A

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

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**STATE OF KANSAS,**
Plaintiff-Appellant

vs

**YADIRA ANDAZOLA,**
Defendant-Appellee

vs.

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# BRIEF OF APPELLANT

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Appeal from the District Court of Douglas County, Kansas
Honorable James T. George, District Judge Pro Tem
District Court Case No. 2021-CR-000663

ORAL ARGUMENT REQUESTED

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No. 22-125,166

IN THE COURT OF APPEALS
OF THE STATE OF KANSAS

STATE OF KANSAS

vs

YADIRA ANDAZOLA

## Nature of the Case

Defendant Yadira Andazola was found guilty of domestic battery of her 18-year-old son and criminal damage to property following bench trial. Defendant admits she slapped her son and damaged the mobile phone he used but appeals the district court's conclusion that her acts constituted crimes under the circumstances.

## Statement of the issues

I. **Defendant is entitled to the defense of parental discipline when her 18-year-old son lives in her home, attends high school, and submits to household rules and expectations.**

II. **The District Court erroneously construed a mobile phone as a gift to Defendant's son rather than Defendant's property.**

## Statement of the Facts

Miguel Andazola ("Miquel") testified that he lived with his mother, Defendant Yadira Andazola ("Andazola") on July 23, 2021. (R. III, 4-5.) He had been out with friends in Eudora and returned home late, "past midnight for sure." (R. III, 4.) He testified that he and his mother got into an argument after he got home late, "past a curfew." (R. III, 5.) She wanted the car key and phone and, he assumed, to "ground" him, but he kept the keys and phone. (R. III, 5.) He was 18 years old at the time. (R. III, 6.) He testified that when he would not hand over the phone and

keys, she started yelling and "just smacked him" at least three times. (R. III, 6.) At some point Andazola reached into Miquel's pocket to get the car key and pulled out the phone while he kept the key. She threatened to smash the phone if he did not give her the key. He did not, so she "smashed it," shattering the screen and cracking the case, leaving it unusable. (R. III, 7-8.) He testified he paid $450 for the phone. (R. III, 9.)

On cross-examination, Miguel agreed that he had been at work earlier in the evening but got off early, called his mother for permission to go to Lawrence for dinner with friends, naming a person who was familiar to his mother. (R. III, 10-11.) He also agreed that she had tried to contact him throughout the evening and said she was just checking on him. (R. III, 11.) He agreed that that he would not say who he was with and that he was not in Lawrence, where he had told his mother he would be. (R. III, 11-12.)

As to his actual location, he testified as follows:

"Q. (By Ms. Clary) And throughout the evening, your mother attempted to, or did contact you several times; is that correct?

A Just checking up, but, yes, correct.

Q And asked where you were?

A Un, I think it—no, it was just checking on here [sic], Are you okay? Yes.

Q And you had told her you were going to Lawrence?

A Uh-huh.

Q Did you ever tell her, no, I am in Eudora?

A I told her I was going around Eudora, it wasn't in—it was technically Eudora, but it was closer to Lawrence, and it was just in between, more or less.

Q And she asked you who you were with?

A I—Aaron. She did ask me who I was with, sorry.

Q And you said friends?

A Yes.

Q Okay. And you wouldn't ever tell her who you were with?

A I didn't think she would know who I was with, so I didn't feel the need to give her first and last names. All right." (R. III, 11-12.)

Miquel testified on cross examination that he left about eight in the evening and got home about two in the morning. (R. III, 12-13.) He agreed both that his mother "would" worry and that he was driving her car. (R. III, 14.) He testified that his mother continued to ground him after he turned 18 and agreed that he was expected to follow the rules while he lived at home and that he was still in high school. (R. III, 16.)

On cross examination, Miquel denied his mother paid for the phone and explained that he gave her cash and she paid with her card and said he paid his share of the phone service each month. (R. III, 14.)

Deputy Travis Warren testified that he responded to a call for a domestic disturbance at Defendant's home and spoke with Defendant. He testified she told him that she and Miquel argued because she was trying to find out where he was and he kept texting different locations and would not tell her where he was. When he arrived, she tried to get her car keys, and when he would not surrender them, she tried to get them from pocket but grabbed the phone instead and threw it on the ground breaking it. He further testified she told him she slapped Miguel several times in the course of the argument for calling her names, including "whore." (R. III, 20.)

Master Deputy Bryon Revell testified that he responded to the call and spoke with Miguel. (R. III, 23-25.) He testified that Miguel appeared fine, with no visible injuries, his clothes were not in disarray, and his demeanor was "fine, normal." (R. III, 25, 28.)

Andazola testified the household consisted of herself, her 15-year-old son, and Miguel, who was 18 but still in school. He was a senior at the time of trial. (R. III, 32). She later added that, as a single mother, she had raised two biological sons on her own and the third who was adopted. (R. III, 35.)

She testified that when he turned 18, Miguel had said he could move out and rent a friend's shed, to which she responded that if he would pay rent somewhere else, he should start paying some "around here" and paying his own phone bill. (R. III, 32-33.) They agreed on $100 per month. Her purpose was for him to start learning responsibility, but it was never consistent. (R III, 33.)

Andazola testified that Miguel worked about 25 to 30 hours per week, which he was able to do during the school year because he had opted out [of attending in person] because of COVID and took his classes online. (R. III, 34.) She further testified that he was expected to live under her rules and while he had to ask permission to use her car, he did not need to ask permission to go somewhere, but he typically reported where he was and when he would be home. (R. III, 34.) As a mother, she was concerned when he, a new driver, was out with the car but said "he's a good kid" and she trusted his character and judgment. (R. III, 35.)

Andazola testified that she bought the phone because she wanted him to have it with him for security and emergencies when he was out driving her car. (R. III, 36.) She testified that he had paid her one time for his cell phone bill and $100 once for rent, and on another occasion, he gave her two to three hundred dollars in cash but not specifically for the phone. (R. III, 36.)

Andazola testified that she was not under the influence of anything at the time of the incident, that she did not drink, did not smoke, and had never "done anything" in her life. (R. III, 36-37.) Miguel had asked if he could go to dinner with his friend Nakos and his girlfriend. Andazola was familiar with Nakos, and the boys spent nights at each other's homes. (R. III, 37.) He said they would go to Lawrence and be back around midnight. (R. III, 38.)

Andazola testified she texted between 10:00 and 11:00 "checking up," which the normal pattern with Miguel and her other boys, and he answered he was fine and would be home later. (R. III, 38-39.) Around 12:30, she started calling Miguel, but he was not answering. When he finally did, around 1:00 or 1:30, she asked where he was but did not get a clear answer, and he said he was with friends but did not name Nakos or anyone else, which she thought was odd. (R. III, 39.)

Andazola testified that she was tired and had to work the next day, and when Miguel arrived home after two, she said "just give me the key to the car." (R. III, 39-40.) Miguel said "no," and she said, "I need the key," and again he answered, "no." (R. III, 40.) They continued to argue over the key, and Miguel said, "Oh, just go to bed, we'll talk abut it tomorrow." (R. III, 40.) Andazola felt her teenager son was disrespecting her by sending her to bed. R. III, 40.)

Andazola testified, "At some point I reached for his pocket to try to get the key out of his pocket, and, um, there was no keys in his pocket. Um, I grabbed ahold of his phone that was in his pocket. . . . At that point, the tables had turned. He said, Oh, give me my phone," and she demanded the car key. They were yelling back and forth at each other, and she said, "Well, this is my phone. If I want to break it, I can break it" and tossed it across the floor. (R. III, 40-41.)

Andazola testified Miguel responded, "Fuck you" and she slapped him. He said "Fuck you," and she slapped him again, and he said, "Fuck you, you fucking whore," and she slapped

him again. She thought it was a total of four slaps, one for each "Fuck you" and another for "Fuck you, you fucking whore." (R. III, 41.) She said he had never disrespected her or cussed around her. (R. III, 40.)

Andazola testified she later found the key in the ashtray of the car. (R. III, 43.)

Andazola further testified that she considered the phone hers, and she permitted him to use it but never expected payment from him. (R. III, 43.)

The court sustained the State's objection to relevance when Andazola was asked about her views on corporal punishment for the discipline of a child, agreeing with the State that "There is no corporal punishment for an adult." (R. III, 44.) However, the court did overrule the State's objection to a question about what Andazola would have expected if she had spoken to her parent that way when she was 18. (R. III, 45.) Andazola said that when she was 18, she was a single mother, living in her own home, but she was taught to respect her parents and not talk to them a certain way or else "we would get slapped," and if Miguel had spoken to her that way six or eight months earlier, she would have slapped him. (R. III, 45, 49.) She did not consider that she was slapping an adult. Miguel did not have a full-time job, was a full-time student, and was still her dependent, living in her house under her rules. He was a teenager and she was in mother mode and not thinking he was 18. (R. III, 45.)

Andazola testified she was surprised that her son was acting that way and when she calmed down, she began to think he was with "new friends" and maybe trying something new because his behavior was "not like him." (R. III, 46.)

Andazola testified she was trying to teach her son and that she would never hurt her kids. (R. III, 50.)

## Argument and Authorities

### I. Defendant is entitled to the defense of parental discipline when her 18-year-old son lives in her home, attends high school, and submits to household rules and expectations despite the son's chronological age.

Evidence was undisputed that Defendant slapped her son, causing no visible injury, in response to his disrespectful conduct and language. Evidence was undisputed that Miguel was 18 years old but lived at home, was still in high school, and was generally expected to comply with household rules and subject to consequences if he failed to do so. The trial court ruled that the affirmative defense of parental discipline was not available to Defendant because Miquel was 18 years old and therefore not a child.

**Standard of Review**: Whether an affirmative defense exists to a criminal charge presents a legal question that we must review independently, without any required deference to the district court. *State v. Branson,* 38 Kan. App. 2d 484,Syl. ¶ 1, 167 P.3d 370 (2007).

Andazola was charged with domestic battery, in violation of K.S.A. 21-5414(a)(2)(c)(1)(A). In order to prove that charge, given the undisputed relationship of the parties and the subsection, the State had to prove that she unlawfully and knowingly caused physical contact with her son in a rude, insulting, or angry manner. The charge differs from a simple battery charge only in the relationship of the parties. See K.S.A. 21-5413(a)(2).

Kansas courts have long recognized the common law privilege of a parent to use reasonable corporal punishment to discipline a child as a defense to battery or even murder charges. See, e.g., *State v. Severns*, 158 Kan. 453, 148 P.2d 488 (1944)(reversing conviction of capital murder of defendant's eight year old niece and holding that defendant was entitled to an instruction on his theory of defense, discipline of a child *in loco parentis*, as well as lesser included offense instructions justified by the same theory despite egregious nature of physical discipline); *State v.*

*Wade*, 45 Kan. App. 2d 128; 245 P.3d 1083 (Kan. App. 2010), *rev. den'd*, *State v. Wade,* (2011)(reversing defendant's conviction of battery of his girlfriend's son, holding that the trial court erroneously refused to instruct the jury on the affirmative defense of parental discipline, depriving defendant of a fair trial).

Although each of these cases involves a child under the age of 18, there is no specification of an age limit in Kansas cases. The pattern jury instruction also does not specify any applicable age of the child. It merely says, "It is a defense to the charge of (battery)(aggravated battery) if a parent's use of physical force upon a child was reasonable and appropriate, and with the purpose of safeguarding the child's welfare or maintaining discipline." PIK Crim. 3d 54.311. This appears to be an issue of first impression in Kansas.

Decisions from other states offer limited guidance. Ohio courts have held the defense inapplicable to charges involving children over the age of 18 who are not physically or mentally handicapped. See, e.g., *State v. Miller*, 134 Ohio App. 3d 649, 652, 731 N.E.2d 1192 (1999)(affirming conviction of a father who struck his eighteen-year-old daughter across the legs with a belt in an effort to punish her for failing to return home to care for her young brother). However, the rational is based on the provisions of R.C. 2919.22(B), which defines child abuse and endangerment of a child under the age of 18 or a mentally or physically handicapped child under the age of 21 and explicitly includes only cruel or excessive physical punishment, discipline, or restraint. 134 Ohio App. 3d at 652. In *State v. Miller*, the dissent argued, as the appellant had, the defense should be available to any parent who retains the legal responsibility to support the child. The dissenting judge opined,

> "Because neither the legislature nor the Ohio Supreme Court has defined when the parental right to discipline a child ends, we must do so in this case. My colleagues' choice of the magic age of eighteen, as set out in the child-endangering statute, [footnote omitted] has some merit in that it establishes a 'bright-line rule.' But the bright line is somewhat blurred

> by the fact that it also applies after eighteen (and under twenty-one) if the child is mentally or physically handicapped. Thus, the anomaly exists that had the person here been handicapped, the defense would apply.
>
> Instead, we should choose as a bright line the language in the support statute [footnote omitted] that also applies between the ages of eighteen and twenty-one if the person is still a high- school student. A parent supporting a high-school student should have the defense of reasonable parental discipline available. Of course, whether corporal punishment is appropriate in any instance is debatable. But, in the absence of injury to the child, we should leave that decision to the parents." *State v. Miller*, 134 Ohio App. 3d 649, 653-54; 731 N.E.2d 1192 (1997).

This seems to be the better rule. If a parent still has responsibility for the child, the parent should have the attendant authority to control the conduct of the child.

The defense is defined by common law, not by statute, and is well established in Anglo American jurisprudence as noted in *State v. Wade*, 45 Kan. App. 2d 128, 136-37, and cases cited therein. The age of majority has varied over time and the statutory age of majority still varies with the rights and responsibilities involved.

At the turn of the twentieth century, the age of majority in Kansas was 21 for males and 18 for females. Gen. Stat. Kan. 1899 Ch. 67, §1 (Dassler), and by 1949, the age of majority was 21 for both sexes, except with respect to contracts, property rights, and capacity to sue and be sued of legally married persons over the age of 18. Gen. Stat. Kan. Ann Ch. 38, §1 1949 (Corrick). K.S.A. 38-101 currently provides that the age of minority extends to the age of 18 years, except married persons over the age of 16 are considered of the age of majority with respect to certain rights and responsibilities relating to contracts, law suits, and property ownership.

While he had reached the current statutory age of majority and could have voted, entered into contracts, and sued and been sued in his own name, Miguel was not an adult for all purposes as the following examples demonstrate.

If Andazola had been obligated to pay child support, she would have been obligated by statute until June 30 following the school year in which Miguel turned 18 and possibly through the following school year. See K.S.A. 23-3001(b). Given the age requirement to start first grade, which is six years of age on or before August 31, K.S.A. 72-3118, most high school students will spend a significant portion of their senior year over the age of 18 and living in the family home just as they did at 17. Clearly, for the purpose of having a right of child support as a child who is a high school student, an eighteenth birthday does not mean the child ceases to be a child. The trial court's comment that if Defendant did not like Miguel's behavior, she could have "trespassed him out" of the house (R. III, 58-59) fails to consider Miguel's status as a high school student and Defendant's attendant responsibility to support him. Expecting a parent to kick a high school student out of the house rather than discipline him is poor public policy indeed.

An 18-year-old cannot buy alcohol in Kansas, K.S.A. 41-727(b), and can legally drink only in the presence of a parent or legal guardian who is permits the consumption. K.S.A. 41-727(e). Given that statutory law imposes that duty of supervision upon a parent of a child between 18 and 21, taking away the ability to discipline, and freedom to administer reasonable discipline as the parent sees fit, would be nothing short of irrational.

Furthermore, in this case, Miguel continued to submit himself to his mother's discipline and household rules. He believed he was about to be grounded when he returned home late. An old Iowa case reversed the conviction of battery of a teacher, holding that a student who voluntarily submits to a school's authority and rules, even if over the age of 21, can be disciplined with corporal punishment in accordance with those rules and the court should have proceeded to determine if the discipline was reasonable. *State v. Mizner*, 45 Iowa 248, 252, (Iowa Sup. 1876).

As noted in *State v. Wade*, 45 Kan. App. 2d 128, 136, 245 P.3d 1083 (2010), the defense is defined by the common law, not by statute. The privilege looks to relationship of the parties, reasonableness of the contact, and intent. Although frustration and anger may accompany any act of corporal punishment, the intent is to discipline, protect, and teach the child.

In refusing to consider the parental privilege to use reasonable corporal punishment as a defense, the trial court refused to evaluate evidence of *mens rea* and only looked at *actus reas*. The defense of parental discipline, without regard to age of the alleged victim, negates *mens rea*.

Andazola was charged with unlawfully and knowingly causing physical contact with Miguel in violation of K.S.A. 21-5414(a)(2)(c)(1)(A). In relevant part, the Kansas Criminal Code defines the culpable mental state of "knowingly" as follows

> "(a) Except as otherwise provided, a culpable mental state is an essential element of every crime defined by this code. A culpable mental state may be established by proof that the conduct of the accused person was committed "intentionally," "knowingly" or "recklessly."
> (b) Culpable mental states are classified according to relative degrees, from highest to lowest, as follows:
> (1) Intentionally;
> (2) knowingly;
> (3) recklessly. . . .
>
> (i) A person acts "knowingly," or "with knowledge," with respect to the nature of such person's conduct or to circumstances surrounding such person's conduct when such person is aware of the nature of such person's conduct or that the circumstances exist. A person acts "knowingly," or "with knowledge," with respect to a result of such person's conduct when such person is aware that such person's conduct is reasonably certain to cause the result. All crimes defined in this code in which the mental culpability requirement is expressed as "knowingly," "known," or "with knowledge" are general intent crimes. K.S.A. 21-5202

As Andazola testified, she was "in mother mode" and not thinking the fact that her son was 18 changed her relationship with him. She did only what her own upbringing and maternal instincts told her were appropriate under the circumstances, with no intent to harm her child, to protect Miguel and correct his behavior. She did so without awareness that the circumstances may

have caused her right and responsibility to do so to evaporate. The intended or anticipated result was the same as it would have been before Miguel's eighteenth birthday, and under all of the circumstances, that birthday had not altered the functional reality of their relationship and should not convert the otherwise reasonable disciplinary action of a mother into a crime. The undisputed evidence shows a mother doing what she believed she needed to do under the circumstances and the trial court erred in refusing to consider her defense. The conviction should therefore be reversed.

## II. The District Court erroneously construed a mobile phone as a gift to Defendant's son rather than Defendant's property.

**Standard of Review:**

> "When the sufficiency of the evidence is challenged in a criminal case, we review the evidence in a light most favorable to the State to determine whether a rational factfinder could have found the defendant guilty beyond a reasonable doubt. An appellate court does not reweigh evidence, resolve conflicts in the evidence, or pass on the credibility of witnesses." *State v. Potts*, 304 Kan. 687, 694, 374 P.3d 639 (2016).

Andazola was charged as follows: that she did "unlawfully by means other than fire or explosive, knowingly damage, destroy, deface or substantially impair the use of any property, to-wit: iPhone, in which another, to-wit: Miguel Andazola, has an interest, with the consent of Miguel Andazola, and to the extent of less than, $1,000.00, all in violation of K.S.A. 21-5813(a)(1)(c)(3)," a class B/non-person misdemeanor. (R. I, 8.)

In order to find Andazola guilty of criminal damage, the trial court had to find that Miguel had an interest in the mobile phone he carried, which Andazola admitted she damaged, and that Andazola did so "knowingly," with an awareness of the circumstances. See K.S.A. 21-5202(i).

Miguel testified he gave his mother cash and she bought the phone with her card. Andazola testified that she advanced the money and Miguel had repaid her little or nothing toward the cost of the phone and service. She testified that she considered herself the owner and intended that he

have the use of it but repay her. Rather than weigh conflicting evidence as to ownership interest in the phone Miguel used, the trial court construed the phone as a gift to Miguel. Neither party testified that it was a gift, although Andazola did testify that she advanced the money for it because she wanted Miguel to have it for safety and security once he, an inexperienced driver, was driving on his own.

Andazola clearly testified that she believed she owned the phone and could break it if she wanted to. From her testimony that she had wanted Miquel to have the immediate use of the phone for his safety and security, one could reasonably construe that Andazola purchased the phone and Miguel had a license to use it for the intended purpose and when he did not, she revoked the license and broke her own phone. Alternatively, assuming Miguel was to repay her for the cost of the phone, one could construe that she repossessed the phone for which she had advanced the purchase money. Accepting Miguel's testimony that he paid his mother cash in advance, one could find that Miguel owned the phone outright. The court found none of those possibilities to be fact but found, without any supporting evidence, that the phone was a gift.

Again, the Court's ruling failed to consider the missing element of *mens rea,* "knowingly." If Andazola considered the phone hers, she did not knowingly damage property in which Miguel had an interest.

The Court's finding resulted not only in a misdemeanor criminal conviction unsupported by the evidence but in a restitution order that required Andazola to pay for the phone a second time. (R. I, 25, 30-32.) This conviction should be reversed.

## Conclusion

The trial court erred in refusing to consider the defense of parental discipline and further erred in construing the phone as a gift without supporting evidence, and both convictions should be reversed.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that I filed a true and correct copy of the above and foregoing Brief of the Appellant with the Court's e-filing system on this 6th day of October 2022, causing notice of the filing to be delivered to the Douglas County District Attorney's Office and the Office of the Attorney General, and emailed a copies to daappeals@douglascountyks.org and ksagappealsoffice@ag.ks.org.

Brenda J. Clary