No. 22-125,166-A

IN THE
COURT OF APPEALS OF THE
STATE OF KANSAS

STATE OF KANSAS
Plaintiff-Appellee

vs.

YADIRA ANDAZOLA
Defendant-Appellant

BRIEF OF APPELLEE

Appeal from the District Court of Douglas County, Kansas
Honorable James T. George, Judge Pro Tem
District Court Case No. 21CR663

Jon Simpson, #26455
Assistant District Attorney
Douglas County District
Attorney's Office
111 E 11th Street
Lawrence, Kansas 66044
Phone: (785) 841-0211
Fax: (785) 832-8202
jsimpson@douglascountyks.org
daappeals@douglascountyks.org

Attorney for Appellee

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NATURE OF THE CASE

Yadira Andazola repeatedly slapped her 18-year-old son, Miguel, after shattering his cellphone on the ground. Arguing she was within her rights to discipline her child and destroy her own property, she now appeals her bench-trial convictions for domestic battery and criminal damage to property.

STATEMENT OF THE ISSUES

I. **Andazola's legal right to physically discipline Miguel ended when he turned 18.**

II. **Sufficient evidence proves Miguel had an interest in the cellphone Andazola knowingly shattered.**

STATEMENT OF FACTS

"I don't regret...slapping him, and I don't regret...breaking his phone." (R. III, 49.)

After his evening work shift ended early, Yadira Andazola's eldest son, 18-year-old Miguel, called and told her he planned to go have dinner with his friend Nakos and Nakos' girlfriend before coming home. (R. III, 4, 6, 10–12, 15, 37–38.) Miguel was under no curfew, but he told Andazola he expected to return home sometime around midnight. (R. III, 13, 38.) A few hours after their "eight-ish" call, Andazola texted Miguel to make sure he was okay. (R. III, 11–12, 38–39.) Miguel texted back that he was fine and would be home later. (R. III, 11–12, 38–39.) When Miguel did not return home after midnight, like Andazola expected, she started calling him. (R. III, 4, 12–13, 38–39.) Her calls went unanswered until around 1:00 or 1:30 a.m. (R. III, 39.) Andazola asked Miguel where he was and never got "a clear answer." (R. III, 39.) Miguel, because he "didn't think she would know" the "new friends" he was with, said only that he was with "friends." (R. III, 4, 12, 39.)

When Miguel finally arrived home just after 2:00 a.m., Andazola was waiting for him. (R. III, 4, 12 –13, 39.) She told Miguel to hand over the key to her car. (R. III, 14, 20, 39–

40.) Miguel assumed Andazola intended to ground him. (R. III, 5–6, 13–14.) Hoping to talk things over before "just go[ing] straight to being grounded," he refused. (R. III, 5–6, 14, 20, 39–40.) Andazola then "started yelling and just lost her patience." (R. III, 6, 39–40.) When Miguel continued refusing to give her the key and even, in her view, "disrespect[ed]" her by telling her, "Oh, just go to bed, we'll talk about it tomorrow," she eventually reached into his pocket for the key. (R. III, 7, 14, 20, 40, 47.) What her hand found and removed instead, however, was "his phone." (R. III, 7, 20, 40, 47.) Each then having something the other wanted and each still refusing to give in, Andazola ultimately threatened, "Well, this is my phone. If I want to break it, I can break it." (R. III, 41.) And she threw the cellphone to the floor, shattering its front screen to an inoperable degree. (R. III, 7–9, 20, 25–30, 41, 47.) Seeing that, Miguel—uncharacteristically, by Andazola's account—told her, "Fuck you." (R. III, 41, 46, 48.) Andazola then slapped Miguel. (R. III, 6, 41.) Four or five times total, that sequence repeated: "He said, Fuck you,"—or, once, "Fuck you, you fucking whore"—"and [she] slapped him." (R. III, 6, 20–21, 25, 27–28, 41, 48.)

Miguel eventually distanced himself enough to borrow his brother's phone and call the police. (R. III, 6–7, 9.) Two deputies responded to the "domestic disturbance" call. (R. III, 18, 23–24.) When they arrived, Miguel appeared "fine" and without observable injury. (R. III, 25, 28.) Andazola appeared "distressed." (R. III, 19.)

Following her arrest, the State charged Andazola with misdemeanor counts of criminal damage to property and domestic battery. (R. I, 8–9; R. II, 3.) Eventually, she proceeded to a bench trial, at which Miguel, the two responding deputies, and Andazola testified. (*See* R. III, 2–50.)

"There is no corporal punishment for an adult." (R. III, 44.)

In defense against the domestic battery charge, Andazola asserted "the defense of parental discipline." (R. III, 52.) Though 18 years old and employed part-time, Miguel was still a high school student whom Andazola claimed as her dependent. (R. III, 6, 15–16, 32–34, 46.) He lived with her, drove one of her cars, and regularly paid none of the household's bills (other than his share of their cellphone bill, perhaps). (R. III, 5, 12, 14, 32, 35, 46.) From Andazola's perspective, "he was still living under [her] house with [her] rules." (R. III, 16, 34, 46.) While he "wasn't necessarily asking for permission," she expected him to—and he typically would—keep her informed of his comings and goings. (R. III, 13, 34–35.) Otherwise, she worried. (R. III, 13, 35.) And both before and after Miguel turned 18, she disciplined Miguel through grounding. (R. III, 16.)

That said, slapping Miguel was something she "d[id]n't regret." (R. III, 49.) Andazola generally regarded Miguel as "a good kid" and her "best friend." (R. III, 35.) But his actions once he arrived home "surprised" her. (R. III, 46.) She felt "he [had] disrespect[ed] [her] household and [her]self." (R. III, 40, 49.) Her parents had taught her to "respect" them and not "talk to [them] a certain way, or else [she] would get slapped." (R. III, 45.) So, when Miguel spoke to her as he did, she did "not . . . sit there and think, oh, he's 18, and I am gonna get in trouble for this." (R. III, 46.) In her mind, "he[was] a teenager." (R. III, 46.) She was "in the mother mode." (R. III, 46.) And eighteen or not, she felt she had "every right" "to teach" Miguel the same lesson her upbringing had taught her. (R. III, 45–46, 49–50.)

The State argued, and the district court agreed, that the law sees things differently. The issue first arose when the district court sustained the State's objection to defense counsel questioning Andazola about her "views on corporal punishment for the discipline of a child:"

> Defense: Now, let me ask you, what are your views on corporal punishment for the discipline of a child?

State: Objection, Your Honor, relevance.

Defense: It's directly relevant to the defense of parental discipline. Now, I realize that the young man has turned 18, but in his mother's mind he's living in her home as her child. She's still exerting a certain amount of control and discipline over him, which he expects, and from the standpoint of a mother's intent, it's relevant.

State: Your Honor, the reporting party in this case is 18 years old. There is no corporal punishment for an adult.

Court: That's correct. There is no corporal punishment for an adult, so . . .

Defense: According to the PIK Instruction there is no age limit on this, and that's 54.311.

Court: If you can show me a case, . . . because the PIK is not authority. I am not aware of any case which says corporal punishment is allowed on an 18-year-old, so the objection—

Defense: Well, off the top of my head I—

Court: I'm sorry?

Defense: Off the top of my head, I can't cite a case involving an 18-year-old.

Court: Well, you knew this issue would come up. So, I didn't. You did. So you don't have a case that tells me, there probably isn't one, so like I said, I have never seen one. So objection will be sustained.

(R. III, 43–44.) Then, in closing argument, defense counsel again "submit[ted] that the defense of parental discipline to a battery charge is not limited to a youth under the age of 18." (R. III, 52–53.) Though she was "undoubtedly angry," defense counsel argued, "[Andazola] was basically attempting to teach," "not hurt," Miguel. (R. III, 52–54.) The district court again ruled the defense unavailable to Andazola and convicted her of domestic battery:

> The evidence was unequivocal that the defendant lived with the victim, Miguel, that they were related. The evidence was undisputed that the defendant got mad when Miguel came home late, and their mood, and he cussed at her and called her names and she . . . slapped him at least three times.

> The defendant counters that she was his mother and he was 18, and he was living in her house and she was disciplining him, but the problem is, as far as corporal punishment is concerned, a parent doesn't really have any right to use that against an 18-year-old. If the law was different, I don't know where we would cut it off. Does a 60-year-old have a right to hit a 30-year-old and discipline that person if they happen to be living together? I don't think so. I think that pretty much goes to the definition of a child. I mean the law on that refers to the child getting punished.
>
> Well, when you're 18 you're not a child anymore, so that doesn't apply. As the State indicated, they can do a lot of things and they can do just about anything, contract, go into the military, quit school. The only think they can't do is have a beer, but regardless they're still an adult and they're emancipated at 18.
>
> And as Ms. Clary even mentioned, the cure really is if the parent obviously can't handle the child or doesn't want the child in the home, the parent has every right to demand that the child, who is not a child . . . as long as they're 18, they can leave. If there is no lease or anything like that, they can be trespassed out of the house, just like anybody else that's unwelcome can be trespassed out of the house. And there is nothing that DCF or anybody else could do about it because they're 18.
>
> So, I just don't find that that defense would apply, discipline or corporal punishment. So without that defense, there is obviously not a defense.
>
> . . . . It's totally an argument that she had a right to discipline her 18-year-old son, and I don't find that a correct statement of the law. So, given that, I will find defendant guilty of Count 2.

(R. III, 57–59.)

> **"Miguel definitely had an interest in using the phone and he can't use it anymore."** (R. III, 60.)

As for the criminal damage to property charge, Andazola disputed that Miguel had any "legal interest in the phone beyond a license." (R. III, 54–55.) By both their accounts, Miguel carried the phone. (R. III, 5, 35.) Also by both their accounts, Andazola purchased the cellphone from the retailer. (R. III, 14–15, 35, 47.) Miguel testified that she did so, however, on his behalf, according to "a verbal agreement" they reached after he paid her $450 cash. (R. III, 9, 14–15.) "[He] handed over cash." (R. III, 14.) She went to the store. (R. III,

14–15, 36.) She sent him pictures of different options for him to consider. (R. III, 14–15.) "He picked . . . out" the phone he wanted. (R. III, 14–15, 36.) And "she paid with her card." (R. III, 14, 36, 47.) In a similar fashion, he added, Andazola paid the phone-service provider, but he paid her his share of the bill "monthly." (R. III, 14.)

Andazola disputed Miguel's account. She claimed she paid for the phone, received no purchase money from Miguel, and "never expected him to pay [her] for the phone." (R. III, 35–36, 47.) She "wanted him to have a phone" for "[a]ny emergencies" that might arise from the new driving freedom her less-than-reliable car provided him. (R. III, 35, 48.) And she just did what "[she] felt . . . [she] needed to do as a parent." (R. III, 36.) She recalled that Miguel once gave her "like two to $300 in cash." (R. III, 36.) But she regarded that money as "help for the house"—a one-and-only attempt he made at paying her for his cellphone bill and "rent"—not as "necessarily for the phone." (R. III, 36, 47.) She considered the phone hers, but permitted Miguel to use it. (R. III, 43.)

Despite their conflicting accounts, the district court found sufficient evidence to convict Andazola of criminal damage to property:

> With respect to Count 1, which is the property damage case, both Miguel and his mother, the defendant, testified at various points and describe the phone as his phone. It's undisputed that the mother bought it. . . . There is a dispute as to whether Miguel gave her the money before she bought the phone, or according to her he didn't give it to her at all, but he did give her some money for groceries and things of that nature. That[wasn't] necessarily tied to the phone.
>
> But from all the evidence, I find clearly that the mother bought the phone for . . . her son, Miguel. And there is an issue as to whether it was paid for or not and by Miguel, but it was definitely bought for his use. And I think it almost comes to the point of being a gift. And even if it wasn't a gift, it was for his use and he had enough interest in it to support a claim for criminal damage to property.
>
> It's kind of analogous to where, and there are cases on this where people are living together, and one person has the lease and the other is living there

> basically as a guest, and the one who has the lease breaks the property. The cases are clear that the guest still has enough of an interest in using the property to support a criminal damage to property claim. This is the same thing, that Miguel definitely had an interest in using the phone and he can't use it anymore. It was rendered inoperable. And like I said, it almost sounds like a gift, and even if it wasn't a gift it was bought for his use.
>
> And I think there was enough shown by the testimony, like I said both he and his mother, the defendant, both referred to the phone numerous times as his phone. . . . [A]nd there is no dispute that the defendant grabbed the phone and threw it on the ground with knowing that it was going to be broken. So, I am going to find the defendant guilty of Count 1.

(R. III, 59–61.)

Following the district court's verdict, Andazola proceeded immediately to sentencing. (*See* R. III, 61–79.) The district court imposed concurrent 90-day jail sentences, but it suspended those sentences and ordered that Andazola complete six months of supervised probation. (R. I, 30–32: R. III, 71–73.) At a later date, the court further ordered that Andazola pay Miguel $200 in restitution. (R. I, 26, 30–32; R. III, 77–79.) She now appeals her convictions.

ARGUMENTS AND AUTHORITIES

I. Andazola's legal right to physically discipline Miguel ended when he turned 18.

Andazola first claims that this Court should reverse her domestic battery conviction because the district court erroneously denied her the affirmative defense of parental discipline. (Appellant's Br., 7–11, 14.) She finds no Kansas authority that addresses what rights a parent has to physical discipline their 18-year-old child. (*See* Appellant's Br., 8.) She finds no out-of-state authority that directly supports her position that the right exists; and in fact, she finds the opposite. (*See* Appellant's Br., 8.) So, what she argues instead is that neither legally nor factually was Miguel "an adult for all purposes." (Appellant's Br., 9–10.) And, making the policy argument that "the better rule" is to recognize a parent's authority to reasonably

discipline any high-school student that they "still ha[ve] responsibility for," she contends that, one way or another, the district court refused her a defense which would have negated the *mens rea* her conviction required. (Appellant's Br., 9, 11–12.)

Because Andazola's views conflict with Kansas statute and the defense's origins, however, her conviction must stand.

Standard of Review

Whether Kansas law affords Andazola a parental-discipline defense raises a question of law this Court reviews de novo. *State v. Roeder*, 300 Kan. 901, 914, 336 P.3d 831 (2014). To the extent answering that question necessitates statutory interpretation, that too presents a question of law over which this Court's review is unlimited. *State v. Angelo*, — Kan. —, 518 P.3d 27, 35 (2022).

Argument

On the surface, Andazola's claim has some appeal. Parents have a fundamental, constitutionally protected liberty interest in directing their children's upbringing. *Troxel v. Granville*, 530 U.S. 57, 66 (2000) (listing various, like cases); *Interest of P.R.*, 312 Kan. 767, 778, 480 P.3d 778 (2021). Kansas law indeed recognizes parental discipline as an available, common-law (i.e., judicially derived) defense to battery—domestic battery's lesser-included offense. *State v. Severns*, 158 Kan. 453, 459, 148 P.2d 488 (1944) (tacitly recognizing the defense); *State v. Wade*, 45 Kan. App. 2d 128, 136–38, 245 P.3d 1083 (2010) (expressly recognizing the defense); *State v. Harris*, 46 Kan. App. 2d 848, 851–52, 264 P.3d 1055 (2011) ("[B]attery is a lesser included offense of domestic battery.");Black's Law Dictionary 334 (10th ed. 2014) (defining "common law" as "[t]he body of law derived from judicial decisions, rather than from statutes or constitutions."). And "'[f]ew rights are more fundamental'" than

an accused's constitutional entitlement to present his or her own theory of defense. *State v. Evans*, 275 Kan. 95, 102, 62 P.3d 220 (2003) (quoting *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973)).

The appeal of Andazola's claim dissipates, however, with closer inspection.

Though constitutionally protected, the parent-child relationship is constitutionally subject to State control. *See Parham v. J.R.*, 442 U.S. 584, 603 (1979) ("[A] state is not without constitutional control over parental discretion in dealing with children"); *In re J.D.C.*, 284 Kan. 155, 166, 159 P.3d 974 (2007) ("That right"—the parent's right to control their child's upbringing—"is not absolute."). And the age at which the parent-child relationship terminates generally is a "state-law issue." *Stanton v. Stanton*, 429 U.S. 501, 501–04, n.4 (stating that, where its child-support legislation is concerned, so long as it treats "the two sexes . . . equally," "Utah is free to adopt either 18 or 21 as the age of majority;" that age-classification question is a "state-law issue for the state . . . to decide."); *see also Morrissey v. Perry*, 137 U.S. 157, 159 (1890) ("The age at which an infant shall be competent to do any acts or perform any duties, military or civil, depends wholly upon the legislatures."); *Jungjohann v. Jungjohann*, 213 Kan. 329, 334, 516 P.2d 904 (1973) ("'The rule is settled beyond a doubt that . . . the legislature has full power to fix and change the age of majority.'").

Though judicially recognized, a rule of common law—affirmative defenses included—may be legislatively modified. *Tillman v. Goodpasture*, 313 Kan. 278, 293–94, 485 P.3d 656 (2021) ("Generally, the Legislature is empowered to modify the common law."); *State ex rel. Schneider v. Ligget*, 233 Kan. 610, 612–13, 576 P.2d 221 (1978) (discussing that neither the federal nor state constitutions "prohibit changes in the law which affect a person's rights as they existed at common law."); *see Clark v. Arizona*, 548 U.S. 735, 746–79 (2006) (holding that

Arizona constitutionally narrowed its insanity affirmative defense and the mens rea evidence a defendant may present towards that defense when it legislatively eliminated one component of the English-law-derived *M'Naghten* insanity rule). And "[w]hen a statute conflicts with the common law, the statute, of course, controls." *Bd. of Neosho Cnty. Comr's v. Cent. Air Conditioning Co.*, 235 Kan. 977, 981–82, 683 P.2d 1282 (1984).

And as "fundamental" as a defendant's right to present his or her chosen defense may be, that right remains "subject to statutory rules and case law." *Evans*, 275 Kan. at 102. A defendant has no right to raise a legally invalid, valid-but-inapplicable, or legislatively eliminated defense. *Roeder*, 300 Kan. at 914–19 ("[A] defendant is not entitled to present . . . a legally [in]sufficient theory of defense," such as "ignorance of the law;" nor is a defendant entitled to present a defense "the facts of th[e] case . . . unequivocally preclude."); *State v. Pennington*, 281 Kan. 426, 440, 132 P.3d 902 (2006) ("Although the evidence [defendant] sought to present . . . would have provided a defense under the former insanity defense standard, there is no constitutional right to present evidence relevant only to a defense that has been eliminated by the legislature.").

"[O]ur legislature has not statutorily established parental discipline as an affirmative defense," *Wade*, 45 Kan. App. 2d at 136, let alone expressly directed whether an 18-year-old's parent may claim that defense—but it has as good as done so.

On the broader subject of parental control, K.S.A. 38-141, first enacted in 1996, made our legislature's views clear. That provision addresses itself to "Parents' rights to exercise primary control over the upbringing of their children." K.S.A. 38-141. Therein, the legislature announces that this state's public policy is that "parents shall retain the fundamental right to exercise primary control over the care and upbringing of their children in their charge," but

"children shall have the right to protection from abuse and neglect." K.S.A. 38-141(b). Elsewhere in the statute, the legislature explains exactly who this intended "parent"-"child" relationship includes: a "'parent' mean[ing] a natural parent, an adoptive parent, a stepparent or a guardian or conservator of a child who is liable by law to maintain, care for or support the child;" and a "'[c]hild,' mean[ing] a person *under 18 years of age*." K.S.A. 38-141(a)(1)–(2) (emphasis added). By legislating that the right of parental control extends only to control over "person[s] under 18 years of age," K.S.A. 38-141 necessarily displaces any common-law notion—if ever at all one existed—that the law defends a parent's right to physically discipline an 18-year-old child.

The legislature's contrasting criminalization of abuse of a child and domestic battery does the same. Those crimes appear in separate articles, the former within "Crimes Affecting . . . Children," the latter within "Crimes Against Persons." *Compare* K.S.A. 21-5602 *with* K.S.A. 21-5414. Abuse occurs "against a child" if done against an individual "*under* 18 years of age." K.S.A. 21-5602(a) (emphasis added). And one abusive act the statute prohibits is "knowingly inflicting *cruel and inhuman* corporal punishment." K.S.A. 21-5602(a)(1)(B), (a)(3)(B) (emphasis added). By criminalizing only that "corporal punishment" inflicted "against a child under 18 years of age" which, at a minimum, is "cruel and inhuman," the legislature seemingly defined the abuse-of-a-child offense in terms that allow for reasoned and humane corporal punishment done against an individual under 18 years old. K.S.A. 21-5602(a)(1)(B), (a)(3)(B) (emphasis added); *see Bowers v. State*, 283 Md. 115, 127, 389 A.2d 341 (1978) ("By electing to restrict the criminal liability of parents under the statute only to those cases where the parent or custodian causes his child or ward to sustain physical injury as a result of cruel or inhuman treatment or as a result of other acts of malice, the Legislature

apparently intended the definition of abuse to correspond to that type of conduct which would have sufficed to destroy the privilege to discipline at common law."). Domestic battery, however, occurs only if against a "'family or household member'"—"children" included—who is "*18* years of age *or older.*" K.S.A. 21-5414(a)–(b), (e)(2) (emphasis added). And *any* "bodily harm" or objectively offense "physical contact" accomplishes the criminal act. K.S.A. 21-5414(a)–(b); *see also State v. Cooper*, No. 113,401, 2016 WL 4585096, *3 (Kan. App. 2016) (unpublished opinion) (stating that "an objective standard that looks to the manner in which the defendant acted, as perceived by a reasonable onlooker," governs the "rude, insulting or angry" element of battery). Thus, the two statutes show that the legislature disapproves of an offender causing their "18 years of age or older" live-in child any "bodily harm" or offensive "physical contact," but grants some allowance for reasonable corporal punishment of a child "under 18 years of age." *Compare* K.S.A. 21-5414(a)–(b), (e)(2) *with* K.S.A. 21-5602(a)(1)(B), (a)(3)(B).

And this makes sense. When, in *Wade*, a panel of this Court extended the parental-discipline defense its first express judicial recognition, it did so acknowledging that the defense originates from the jurisprudential precept that "'the parent of a *minor* child . . . [is] justified in using a reasonable amount of force upon a child for the purpose of safeguarding or promoting the child's welfare.'" *Wade*, 45 Kan. App. 2d at 136 (quoting *Bowers v. State*, 283 Md. 115, 126, 389 A.2d 341 (1978)) (emphasis added). One legal encyclopedia states the justification for the defense this way:

> A parent, being charged with the training and education of his or her child, has the right to adopt such disciplinary measures for the child as will enable him or her to discharge his or her parental duty. Furthermore, "legal custody" carries with it the right and obligation to make long-range decisions involving discipline. Accordingly, a parent or legal custodian has the right to correct the child by reasonable and timely punishment, including corporal punishment,

without being criminally liable.

59 Am. Jur. 2d, Parent and Child § 25. At least in part, therefore, the right to discipline has always issued from the legal responsibility a child's minority status places on its parent or custodian. In Kansas, minority status extends "to"—not past—"the age of eighteen." K.S.A. 38-101. At that point, nearly all the parent's legal obligations toward the child cease. *See* K.S.A. 38-141(a)–(b) (legislating that parents retain primary control over their children's upbringing until age 18); *In re Pace*, 26 Kan. App. 2d 538, 539, 989 P.2d 297 (1999), *superseded by statute on other grounds* ("[A] minor who has been emancipated as a matter of law under K.S.A. 38-101 is not subject to the provisions of the child in need of care code."). When those obligations end, so too ought the right to discipline.

This understanding of the defense is entirely consistent with the child-support and drinking-age provisions Andazola cites. To further her argument that "Miguel was not an adult for all purposes," Andazola emphasizes that, first, a parent's obligation to pay child support extends past a child's 18th birthday if and so long as he or she still attends high school, *see* K.S.A. 23-3001(b)(2), (c), and, second, a person under the 21-year-old drinking age may nonetheless drink alcohol with their parent's permission, provision, and supervision, *see* K.S.A. 41-727(e). (Appellant's Br., 9–10.) But the fact the legislature has determined that an 18-year-old child-of-divorce need not abandon their education for lack of resources, or the fact that it grants a parent the conditional *privilege*—not the "duty," as Andazola claims—to allow their underaged child to consume alcohol, does not mean it regards parental discipline—physical or otherwise—as legally necessary and thus protected. If "paying child support does not . . . entitle[a parent] to parenting time," *Matter of Marriage of Lewis and Bush*, 62 Kan. App. 2d 284, 289–90, 513 P.3d 494 (2022), and if "[t]he law clearly presumes that

people 18 years of age or older have reached a level of maturity that renders them fully culpable for the crimes they commit," *State v. Ruggles*, 297 Kan. 675, 685, 304 P.3d 338 (2013), then certainly neither extended child-support obligations nor an allowance made for underage drinking entitle a parent to physically discipline their 18-year-old child.

Miguel's general acquiescence to Andazola's parental authority cannot immunize her either. Citing an 147-year-old out-of-state case, Andazola suggests that Miguel's voluntary submission to her discipline and household rules made her actions legal. (Appellant's Br., 10.) In *State v. Chavez*, 310 Kan. 421, 430 34, 447 P.3d 364 (2019), the Kansas Supreme Court rejected this very sort of "implied waiver" argument. All the reasons that *Chavez* held "the protected person under a PFA order does not have the authority to unilaterally modify the court order by waiving its restraints or consenting to its violation" apply to Andazola's domestic battery of Miguel. *Chavez*, 310 Kan. at 434. The legislature made Andazola's conduct a crime—without provision for consent (something it provided for when defining her other crime of conviction). *See Chavez*, 310 Kan. at 43; *compare also* K.S.A. 21-5414(a)(2) (no mention of consent) *with* K.S.A. 21-5813(a)(1) (defining criminal-damage-of-property to extend only to damage done "without the consent" of the property-interest holder). And it not only made it a crime, it made it a crime apart from other forms of battery. Thus, K.S.A. 21-5414 reflects the legislature's unique concern for violence within the home. And though the criminalized act harms an individual, the crime occurs also "against the peace and dignity of the State of Kansas." *Chavez*, 310 Kan. at 431. The legislature's intended "protection of domestic violence victims is diluted, not promoted, by allowing a[batterer] to avoid prosecution . . . by claiming to have perceived that the victim's conduct manifested a consent to the violation." *Chavez*, 301 Kan. at 434. Andazola cannot use Miguel's consent to backdoor

an otherwise inapplicable defense of parental-discipline.

She also, finally, cannot prove the district court's rejection of her parental-discipline defense meant the court "refused to evaluate evidence of *mens rea* and only looked at *actus reus*." (Appellant's Br. 11.) In making this argument, Andazola claims that, without regard to Miguel's age, her parental-discipline mindset negated her crime's *mens* rea." (Appellant's Br., 11–12.) In so arguing, however, Andazola confuses the very nature of her claimed defense and her crime.

"[A] true affirmative defense does not serve to disprove an essential element of the crime, but merely consists of facts which might exonerate a defendant." *State v. Kershner*, 15 Kan. App. 2d 17, 19, 801 P.2d 68 (1990); *see also* Black's Law Dictionary 509 (10th ed. 2014) (defining "affirmative defense" as "[a] defendant's assertion of facts and argument that, if true, will defeat the . . . prosecution's claim, even if all the allegations in the complaint are true."). With respect to battery offenses like Andazola's, the defense of parental discipline operates as an affirmative defense rather than some evidence negating *mens rea*. *See Wade*, 45 Kan. App. 2d at 135–40 (recognizing and repeatedly identifying the defense of parental discipline as an "affirmative defense") ; *but cf. Risley on Behalf of Risley v. Risley*, No. 119,770, 2019 WL 4554756, *8 (Kan. App. 2019) (unpublished opinion) (suggesting that, where a crime requires the "*intent* to injure," the determination of "whether a parent went beyond appropriate parental discipline could go to the issue of the parent's intent because we see parental discipline as an effort by a parent to compel his or her child to act or not act in a certain way as opposed to an intent to injure.").

This is so because the "knowingly" *mens rea* of her crime required proving only that she acted aware that her conduct was reasonably certain to have caused physical contact with

Miguel. *See* K.S.A. 21-5414(a)(2); *State v. Murrin*, 309 Kan. 385, 396–97, 435 P.3d 1126 (2019) (discussing the meaning of "knowingly" in relation to the bodily-harm version of aggravated battery); *Cooper*, 2016 WL 4585096 at *2 (illustrating that the "knowingly" element of battery requires only that "[defendant] knowingly caused any physical contact"). She need not even have acted out of "actual[] ang[er]." *Cooper*, 2016 WL 4585096 at *3 (discussing that "an objective standard that looks to the manner in which the defendant acted, as perceived by a reasonable onlooker," governs the "rude, insulting or angry" element of battery). Thus, Andazola need not, as she suggests, have acted with "intent to harm her child" or "with[] awareness that the circumstances may have caused her right and responsibility to [protect Miguel and correct his behavior] to evaporate." (Appellant's Br. 11 –12.) Whether or not she acted "'in mother mode'" and only "to protect Miguel and correct his behavior," (Appellant's Br., 11), she *repeatedly*—and admittedly—slapped Miguel in the face. (R. III, 6, 20–21, 25, 27–28, 41, 48; *see also* R. III, 52 ("Ms. Andazola acknowledges that she slapped her son.")) She "felt [she had] every right to after the way he was disrespecting [her] household and [her]self." (R. III, 49.) She lacked no awareness of her actions.

The district court was right to rule the law afforded Andazola no right to physically discipline her 18-year-old son. (*See* R. III, 57–59.) Its ruling and her conviction should be affirmed.

II. Sufficient evidence proves Miguel had an interest in the cellphone Andazola knowingly shattered.

As for her criminal-damage-to-property conviction, Andazola disputes that the district court made adequate findings to convict her. She claims that the court avoided "weigh[ing] conflicting evidence as to ownership interest in the phone Miguel used" and erroneously "construed the phone as a gift to Miguel" "without any supporting evidence." (Appellant's

Br., 13.) And similar to her earlier *mens rea* argument, she asserts the court "failed to consider" that, "[i]f [she] considered the phone hers, she did not *knowingly* damage property in which Miguel had an interest." (Appellant's Br., 13 (emphasis added).)

Because Andazola's arguments misunderstand both the standard for reviewing her bench trial's evidence and her crime's "knowingly" element, however, she overlooks that sufficient evidence proves her guilt.

Standard of Review

When a defendant challenges whether sufficient evidence supports his or her conviction, an appellate court "review[s] the evidence in the light most favorable to the State to determine whether a rational factfinder could have found [him or her] guilty beyond a reasonable doubt." *State v. Aguirre*, 313 Kan. 189, 209, 485 P.3d 576 (2021). And it does so without "reweigh[ing] evidence, resolv[ing] conflicts in the evidence, . . . pass[ing] on the credibility of witnesses," or "distin[guising] between direct and circumstantial evidence in terms of probative value." *Aguirre*, 313 Kan. at 209.

Andazola recognizes this well-known standard as governing her claim. (*See* Appellant's Br., 12.) But rather than directing her arguments to the State's best evidence and what a rational factfinder could make of it, she disputes the reasons the district court gave for convicting her. And specifically, she criticizes the district court for construing the phone as a gift rather than settling on any one of, what in her view are, the only three possible interpretations of the evidence—that: Miguel either had a license to use the phone, which she revoked; she fronted the money for the phone and simply repossessed it; or Miguel paid for and owned the phone outright. (Appellant's Br., 13.) "[C]onvictions arising from bench trials and those arising from jury trials," however, "are reviewed . . . utilizing the same standards

on appeal." *State v. Frye*, 294 Kan. 364, 374–75, 277 P.3d 1091 (2012); *see also State v. Lewis*, 301 Kan. 349, 370–71, 344 P.3d 928 (2015). So, the issue for this Court is not, as Andazola's arguments suggest, whether the district court gave specific factually and legally supported *reasons* for convicting Andazola; it is whether the State's best evidence gave the district court a rational basis for convicting her. And that "light most favorable"-"rational factfinder" analysis makes the reasons the district court offered for convicting her irrelevant.

Argument

A State-favoring view of the bench trial's evidence plainly supports Andazola's conviction. To prove Andazola guilty of criminally damaging Miguel's property, the evidence needed to show that, "without [Miguel's] consent," and "by means other than by fire or explosive," she "knowingly damage[ed], destroy[ed], defac[ed] or substantially impair[ed] the use of . . . property in which [he] ha[d] an interest." K.S.A. 21-5813(a)(1); (*see also* R. I, 8.) Andazola seemingly disputes whether sufficient evidence proved Miguel had an interest in the cellphone she damaged and whether she acted knowingly. Sufficient evidence proved both.

To support Andazola's conviction, Miguel's interest in the damaged cellphone need have been neither entire nor exclusive. *Fisher* recognized that, even without "evidence of a lease or . . . payment of rent," mere residence in a room of a home whose interior door defendant damaged satisfied K.S.A. 21-5813(a)(1)'s "an interest" requirement. *State v. Fisher*, 304 Kan. 242, Syl. § 5, 261–62, 373 P.3d 781 (2016), *disapproved of on other grounds by State v. Randle*, 311 Kan. 468, 462 P.3d 624 (2020). In *Wilson*, a panel of this Court found the statute covered "damage to *any* property *in which another has an interest*," "include[ing] . . . property partly owned by the defendant." *State v. Wilson*, 47 Kan. App. 2d 1, Syl. § 2, *4, 275 P.3d 51

(2008) (emphasis original) (determining that defendant's marital interest in the car she damaged did not prevent prosecuting her). And in *Martinez-Torres*, another panel of this Court applied Black's Law Dictionary's "bundle of rights" definition of "property" to determine that an individual may have a sufficient interest in property another legally owns. *State v. Martinez-Torres*, No. 114,405, 2016 WL 7428363, *6–*8 (Kan. App. 2016) (unpublished opinion) (listing "the right to possess and use, the right to exclude, and the right to transfer" as among the "bundle of rights"). Thus, *any* "possessory or . . . proprietary interest in the [damaged] property is sufficient." *Fisher*, 304 Kan. at 262.

The evidence "most favorable to the State" proves Miguel had such an interest. *Aguirre*, 313 Kan. at 209. Circumstantially by Miguel's account and directly by Andazola's account, Miguel alone carried and used the cellphone. (R. III, 5, 11–12, 35, 37–39, 43; *see also* R. III, 54 ("And with the cell phone, we agree that . . . Miguel carried it.")) Miguel's possession and use of the cellphone, in fact, was something "[Andazola] wanted." (R. III, 35.) And though she had her own private reasons for wanting Miguel to have a phone, no evidence indicates the cellphone was his to possess and use for those reasons alone. Even when she took the phone from Miguel, she did so not because he misused it or exceeded some sort of "license to use it for [her] intended purpose[s]," but because she felt disrespected by his refusal to return her car key. (Appellant's Br., 13; R. III, 40–41, 49.) Thus, regardless of the question of ownership, Miguel held an undisputed possessory interest in the property. *See* Black's Law Dictionary 1353 (10th ed. 2014) (defining "possessory interest" as "[t]he present right to control property, including the right to exclude others, by a person not necessarily the owner.") That interest alone sufficed to support Andazola's conviction. *See Fisher*, 304 Kan. at 262 (*any* "possessory . . . interest in the [damaged] property is sufficient").

But the State-favoring evidence shows Miguel's interest was more than possessory; it was, as Andazola puts it, "owne[rship] . . . outright." (Appellant's Br., 13.) According to Miguel, Andazola purchased the cellphone of his choice, on his behalf, after he paid her the phone's $450 price per a "verbal agreement." (R. III, 9, 14–15; *see also* R. III, 54 ("And with the cell phone, we agree that it was purchased used for $450.").) He testified he "monthly" paid Andazola "his fraction" of the phone bill. (R. III, 14.) He also even paid the $230 repair cost to undo Andazola's damage. (R. III, 9;) *see State v. Calisti*, No. 119,917, 2020 WL 858092, *6–*7 (Kan. App. 2020) (unpublished opinion) (considering evidence that KDOT maintained and repaired the fence defendant damaged as circumstantial proof of its interest in the fence). Andazola acknowledged she and Miguel had discussed him "paying . . . *his own* cell phone bill." (R. III, 36 (emphasis added).) And more than once, in fact, she directly or indirectly spoke of the cellphone as "*his* phone." (R. III, 40, 47, 49 (emphasis added)); *Calisti*, 2020 WL 858092 at *6–*7 (considering evidence that the involved officer "described th[e damaged] fence as a KDOT fence" to be circumstantial proof of KDOT's interest in the fence). A rational factfinder could view this evidence as proof Miguel had a "proprietary interest" in the cellphone Andazola damaged. *Fisher*, 304 Kan. at 262. Andazola's contrary arguments simply want the evidence reweighed in her favor—exactly the sort of thing an appellate court "does not" do. *Aguirre*, 313 Kan. at 209.

But even assuming none of this suffices, a rational factfinder could also approve the district court's alternative view that Andazola gifted Miguel the cellphone. (R. III, 60.) Accepting her testimony, Andazola "paid for the phone." (R. III, 36.) She "wanted [Miguel] to have [it]." (R. III, 35, 48.) She "never expected him to pay [her] for [it]." (R. III, 36.) And, though he accepted the phone, he never did. (R. III, 47.) In other words, she voluntarily

delivered the cellphone to Miguel, without compensation, intending that he have the phone and not compensate her. And, as above discussed, no evidence indicates she communicated an intention that Miguel's ownership end upon the occurrence or nonoccurrence of any condition. Even under her testimony, she legally gifted Miguel ownership over the cellphone. *See* Black's Law Dictionary 803 (10th ed. 2014) (defining "gift" as "[t]he voluntary transfer of property to another without compensation"); Restatement (Second) of Property, Don. Trans. §§ 31.1–31.2 (1992) (discussing and illustrating the principles of a gift with or without a retained reversionary interest); *Hudson v. Tucker*, 188 Kan. 202, 212, 361 P.2d 878 (1961) ("Where the relationship of the parties is such that the donee has a natural claim on the generosity of the donor, the courts look with favor on the claim of gift and, generally speaking, less evidence is required to support a gift to a close relative than would be necessary to sustain one to a stranger.")

As for whether Andazola "knowingly" damaged Miguel's cellphone, sufficient evidence proves that too. Andazola suggests that, to establish K.S.A. 21-5813(a)(1)'s required *mens rea*, evidence needed to prove she damaged Miguel's phone knowing he had an interest in the phone. (Appellant's Br., 13.) But the only *mens rea* that K.S.A. 21-5813(a)(1) actually requires is that the act of "damaging, destroying, defacing or substantially impairing the use of any property" be done "knowingly." "[S]o long as [her] actions" in grabbing and shattering Miguel's phone "were not accidental or involuntary, [s]he possessed the required culpable intent." *In re D.A.*, 40 Kan. App. 2d 878, 892–93, 197 P.3d 849 (2008).

Here, Andazola's own testimony undermines any suggestion she acted accidentally or involuntarily. Andazola took Miguel's phone from his pocket. (R. III, 7, 14, 20, 40, 47.) She withheld it from him hoping to leverage his compliance. (R. III, 41.) When that failed, she

threatened to break the phone. (R. III, 7, 41.) Then, she carried out her threat. (R. III, 7–9, 20, 25–30, 41, 47.) She not only knew her actions were reasonably certain to damage Miguel's phone, breaking his phone was what she intended. *See State v. Reed*, No. 123,974, 2022 WL 628132, *6–*7 (Kan. App. 2022) (unpublished opinion) (finding sufficient evidence that defendant knowingly damaged his former partner's car key because he reached for the key and yanked it "immediately after expressing an intent to prohibit her from leaving").

CONCLUSION

Andazola repeatedly struck her 18-year-old son, Miguel, after shattering his cellphone on the ground. Sufficient evidence shows she was not within her legal rights to do so. Respectfully, the State requests that this Court affirm the district court's decision ruling the parental-discipline defense unavailable to Andazola and uphold her convictions.

Respectfully Submitted,

/s/ Jon Simpson
Assistant District Attorney
111 E 11th Street
Lawrence, Kansas 66044
Phone: (785) 841-0211
Fax: (785) 832-8202
jsimpson@douglascountyks.org
daappeals@douglascountyks.org

SUZANNE VALDEZ
Douglas County District Attorney

KRIS KOBACH
Attorney General

Attorneys for Appellant

CERTIFICATE OF SERVICE

I, Jon Simpson, do hereby certify that a true and correct copy of the above motion for

remand was delivered on February 6, 2023, by electronic mail to Brenda Clary, attorney for the defendant, at BClary@sunflower.com.

/s/Jon Simpson
Jon Simpson, #26455

379 P.3d 1144 (Table)
Unpublished Disposition
This decision without published opinion is referenced in the Pacific Reporter. See Kan. Sup. Ct. Rules, Rule 7.04.
NOT DESIGNATED FOR PUBLICATION
Court of Appeals of Kansas.

STATE of Kansas, Appellee,
v.
James Tully COOPER, Appellant.

No.
113,401
|
Opinion filed September 2, 2016
|
Review Denied May 24, 2017

Appeal from Butler District Court; CHARLES M. HART, judge.

Attorneys and Law Firms

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

Joseph M. Penney, assistant county attorney, Brett D. Sweeney, assistant county attorney, and Derek Schmidt, attorney general, for appellee.

Before Arnold–Burger, P.J., McAnany and Gardner, JJ.

MEMORANDUM OPINION

Per Curiam:

**1 James Tully Cooper appeals his conviction in a bench trial of battery against a county correctional officer by challenging the sufficiency of the evidence. Viewing the evidence in the light most favorable to the State, we find sufficient evidence that Cooper acted knowingly and acted in a rude, insulting, or angry manner. Therefore, we affirm.

Procedural and factual background

Cooper, an inmate in the Butler County Detention Facility, was placed in segregation protective custody where he was confined to his cell 23 hours per day. After 5 months, Cooper wanted out of the segregation unit. After receiving no response to his written requests, Cooper decided to use other means to persuade Sergeant Regina Kearney to return him to the general population section of the jail.

Cooper's means of "prepar[ing] to find a way to talk to [Kearney] and negotiate with her" on January 10, 2014, were extreme. He made small metal knives he thought could be used for bargaining, smeared cream on his face to attract pepper spray away from his eyes, and cut plastic from his mattress to make a hood and leg coverings to block tasers from going through his jumpsuit. He believed that "once they realized that they weren't going to be able to just take [him] down with a taser, ... they would maybe start negotiating with [him]."

Cooper began his disruption in the dayroom, where officers responded after a sergeant noticed Cooper wearing "a bag" over his head. Kearney spoke with Cooper via intercom and Cooper told her he would surrender his weapons (the small knives he had made) if they reinstated his coffee privileges. Cooper then broke the handle off of a mop or squeegee and beat it against the walls, and Kearney stopped communicating with him.

Cooper then retreated to his cell. There, he took toilet paper, wrote "Eat me" on it, and placed it across the cell door window. He wrote "Pigs" on other toilet paper and covered his outside window with it. He also poured soap and water on the floor outside his cell to slow down and embarrass the officers entering his cell.

Officers' attempts to get Cooper to cooperate were futile. Cooper admitted he "was noncompliant" with the deputy's request to put his hands through the food service door of his cell for handcuffing. Instead, Cooper placed his mattress over the food service door of his cell to block tear gas. Accordingly, the deputies prepared to enter Cooper's cell to take him into custody.

Deputy Guadalupe Briseno entered first, bearing a clear plastic shield in front of him. Cooper, armed with two plastic meal trays he had wrapped in his sheet, jumped up on a table projecting from the wall, swung his trays at Briseno, and struck Briseno's shield or head. Cooper was eventually subdued and charged with battery of a correctional officer.

In a bench trial, the district court heard testimony from the defendant, four Butler county deputies, a sergeant, and a detective, all of whom were at the scene. The court also

viewed a surveillance video of the incident. The district court found (1) that Cooper knowingly caused physical contact with Briseno in a rude, insulting, and angry manner by striking a meal tray against his head; (2) that Briseno was a county correctional officer and was engaged in the performance of his duties; and (3) that Cooper was confined in the county jail at the time. The judge therefore found Cooper guilty of battery against a county correctional officer under K.S.A. 2014 Supp. 21–5413(c)(3)(D). Cooper timely appealed.

Sufficient evidence of battery

**2 Cooper argues that the State did not prove that he acted knowingly or that he acted in a rude, insulting, or angry manner. When sufficiency of the evidence is challenged in a criminal case, our standard of review is whether, after reviewing all the evidence in a light most favorable to the prosecution, we are convinced a rational factfinder could have found the defendant guilty beyond a reasonable doubt. We do not reweigh evidence, resolve evidentiary conflicts, or make witness credibility determinations. *State v. Daws*, 303 Kan. 785, 789, 368 P.3d 1074 (2016).

The district court found that Cooper's conduct met each element of battery, defined as: "knowingly causing physical contact with another person when done in a rude, insulting, or angry manner." K.S.A. 2014 Supp. 21–5413(a)(2). This definition of battery is explicitly included in the definition of the crime of battery upon a correctional officer. See K.S.A. 2014 Supp. 21–5413(c)(3)(D).

Acted knowingly

Cooper argues that the State failed to prove that he acted knowingly because conflicting evidence was presented. He argues that conflicting evidence cannot support a conclusion that he could "reasonably be certain that his conduct would result in a tray glancing off of Briseno's head."

Under Kansas law, Cooper need not have foreseen the specific harm that resulted. See *State v. Hobbs*, 301 Kan. 203, 211, 340 P.3d 1179 (2015). In *Hobbs*, the charge was aggravated battery, which requires "knowingly causing great bodily harm to another person or disfigurement." K.S.A. 2014 Supp. 21–5413(b)(1)(A). Our Supreme Court held that a defendant who acted "while knowing that *any* great bodily harm or disfigurement ... was reasonably certain to result from the action" met the mental culpability requirement of the statute. (Emphasis added.) 301 Kan. at 211.

The district court heard testimony regarding whether Cooper knowingly caused any physical contact with Briseno. Cooper testified that when he saw Briseno coming into his cell with the shield, he planned to use force against Briseno: "I was just going to use the same amount of force that he was going to use against me." Further, Cooper testified that when Briseno "tried to push me off the table I had no choice but to push or hit the—the sheet full of trays up against his shield." Cooper testified that he hit the bundle of trays against the shield with "[o]ne hard hit" and that "it did probably go over ... the top [of the shield], because of the force." He testified that, "I pretty much knocked his shield against him and hit him back and he went into Officer Wheatley."

Briseno testified that Cooper slammed the sheet full of trays onto the top of the shield then hit him on the top of the head with one meal tray. Another officer testified that "[t]he sheet and the trays hit Deputy Briseno" and that sometime later, Cooper "dumped the trays out of the sheet onto Deputy Briseno." One officer testified that Cooper swung at Briseno and that it appeared that whatever was in the sheet hit Briseno in the head.

Cooper cites no authority in support of his assertion that the officers' testimony could not support a conviction because it was inconsistent. The district court, as the factfinder in this case, had the ability to resolve conflicting testimony, weigh the evidence, and make credibility determinations. But even if we excluded the officers' testimony, the video and Cooper's admissions that he planned to use force against Briseno and that he swung the sheet-wrapped trays at him provide sufficient evidence for the district court to find that Cooper acted knowingly in causing physical contact with Briseno.

Acted in a rude, insulting, or angry manner

**3 We next address Cooper's claim that insufficient evidence shows that he acted in a rude, insulting, or angry manner.

Cooper argues that instead of anger, he acted out of fear. He testified that as the officers approached his cell, some made comments about what they would do and he had "the feeling that they were ... going to hurt [him]." He testified that after the incident, when he was handcuffed, somebody bent his fingers backward and broke his thumb and one finger. He contends this testimony shows his fear was well-founded, negating a conclusion that he acted in an angry manner.

The relevant statute does not require the State to prove that a defendant was actually angry. *State v. Brooks*, No. 105,358, 2012 WL 309075, at *4 (Kan. App. 2012) (unpublished opinion), *rev. denied* 296 Kan. 1131 (2013). Rather, the statute requires the State to show the defendant knowingly caused the physical contact "in a rude, insulting or angry manner." K.S.A. 2014 Supp. 21–5413(a)(2). Nothing in the plain language of the statute suggests that "rude, insulting or angry manner" is determined based solely on the defendant's subjective perceptions.

Instead, we apply an objective standard that looks to the manner in which the defendant acted, as perceived by a reasonable onlooker. *In re C.T.*, No. 107,841, 2012 WL 5205752, at *4 (Kan. App. 2012) (unpublished opinion). See *Brooks*, 2012 WL 309075 at *4, defining "'angry'" in this context as "'having a menacing or threatening aspect,'" citing Webster's II New Collegiate Dictionary 44 (2001).

Cooper's acts meet the statutory criteria. Officers testified that Cooper was cursing and hollering in the dayroom before he was approached by any of them, and that Cooper broke the handle off of a mop or squeegee and beat it against the wall of the dayroom with so much force that he broke some chunks out of the wall. Briseno testified that when he entered the cell, Cooper jumped up onto the metal table and swung the sheet and trays at him. From this testimony, a rational factfinder could reasonably find that Cooper acted in an "angry manner." We find it unnecessary to address the State's alternative argument that Cooper acted in an insulting manner.

Affirmed.

All Citations

379 P.3d 1144 (Table), 2016 WL 4585096

End of Document

448 P.3d 1082 (Table)
Unpublished Disposition
This decision without published opinion is referenced in the Pacific Reporter. See Kan. Sup. Ct. Rules, Rule 7.04.
NOT DESIGNATED FOR PUBLICATION
Court of Appeals of Kansas.

Amy L. RISLEY, ON BEHALF OF
Joseph RISLEY, a Minor Child, Appellee,
v.
Jeffrey H. RISLEY, Appellant.

No.
119,770
|
Opinion filed September 20, 2019

Appeal from Douglas District Court; BRANDEN SMITH, judge pro tem.

Attorneys and Law Firms

Jody M. Meyer, of Lawrence, for appellant.

No appearance by appellee.

Before Powell, P.J., Gardner, J., and Lahey, S.J.

MEMORANDUM OPINION

Powell, J.:

***1** Amy L. Risley sought a protection from abuse (PFA) order on behalf of her minor son, Joseph Risley (Joe), against Jeffrey H. Risley (Jeff), her ex-husband and Joe's father, after a skirmish between Joe and Jeff. The district court granted Amy's request and entered a PFA order. Jeff appeals, claiming insufficient evidence supports the order. After a careful review of the record and Jeff's arguments, we find no reversible error by the district court and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The following facts were brought to light at a one-day trial on Amy's petition for a PFA order on behalf of Joe against Jeff.

Amy and Jeff are the parents of three minor children, one of whom is Joe. Joe was adopted from Guatemala when he was 11 months old. Amy and Jeff divorced in May 2011 when Joe was 9 years old. At the time of the incident that led to the PFA order, Joe was 15 years old.

When Joe was 2 or 3 years old, Amy and Jeff noticed he became more defiant than typical toddler behavior. This defiant behavior accelerated when Joe started seventh grade. He began showing signs of depression, engaging in self-harm, and did not react normally to discipline. His emotional stress was usually related to social situations at school.

When Joe was in seventh grade, his parents put him in therapy due to his accelerating defiant behavior. He saw this therapist for approximately a year before that therapist recommended more advanced therapy.

Midway through his eighth grade year, Joe was expelled from school. After this expulsion, Joe became severely depressed and was hospitalized multiple times for self-harming behavior and threats of suicide. In February 2015, Joe went to live with Jeff for 30 days because Amy needed help getting Joe back on his feet after his expulsion.

In the spring of 2015, at the recommendation of his prior counselor, Joe did an intake evaluation at Bert Nash. The results of this intake evaluation qualified Joe for intensive SED (severely emotionally disturbed) services. This therapy assisted both Joe and his parents with practice skills where needed.

Tamara Henley, Joe's counselor at Bert Nash, testified that she was working to resolve conflict and discord between all family members. According to Tamara, Joe does not like authority and does not like to follow rules. When confronted about this behavior, his reaction can range from being defensive, to verbally aggressive, to shutting down, or to engaging appropriately to what happened. Tamara also testified that Joe is very empathetic and is easily drawn into emotional situations because of his desire to help others but then has difficulty withdrawing from the situation. She encouraged Jeff to be more positive and "softer" when dealing with Joe's explosive behavior.

Both Amy and Jeff characterized Joe's behavior as sometimes explosive because he occasionally goes into violent rages by screaming and yelling when he is disciplined. Telling Joe "no" can trigger or set off such behavior. Both parents have had difficulty handling Joe's explosive behavior. Nevertheless, Amy testified she is not concerned for her safety around Joe

because his behavior has never resulted in physical violence, nor has she witnessed him being physically threatening to anyone. At times when Joe was feeling suicidal he would scream, cause damage to the residence, and/or threaten suicide. This behavior often resulted in Amy or Jeff calling the police because of the suicide threats. Since 2016, Joe has been taken to the emergency room several times because of his mental health issues. Joe has never touched or physically harmed his parents or anyone else. Typically, when Joe is having an outburst he walks away or he internalizes, and his destruction of property, such as punching a wall, is "where it ends."

***2** Amy characterized Jeff's handling of Joe as very harsh and antagonistic. Jeff denied that he handles things by being violent and physically aggressive.

Joe's counselor advised Amy and Jeff that when Joe is triggered and starts to explode, it is best for them to walk away and not continue to yell at him so his behavior does not escalate and allow Joe to calm down. Jeff believes the best method for dealing with Joe's behavior is to stay calm. Sometimes when Joe is yelling and cursing at Jeff, Jeff will leave the room to give Joe space to calm down.

Joe started his freshman year of high school, and he routinely skipped class. As a result, he was failing in school. Joe also started having issues with substance abuse around this time.

In April 2017, Joe and Jeff had a verbal altercation that stemmed from Joe lying about doing homework at school after classes when he really was not doing homework. On the way to a restaurant Jeff confronted Joe about lying about doing his homework and skipping class. When they arrived at the restaurant, Joe became defiant by ordering extra food that Jeff thought Joe would not eat. Jeff spoke with Joe about ordering the extra food, asked him if he really needed it, and continued to discuss Joe's issues at school. Joe began yelling and cursing at Jeff, and Jeff reacted by yelling and cursing back at Joe. Joe screamed back at Jeff and walked out of the restaurant. Jeff testified that he yelled and cursed back at Joe "to try and play his own game to get him to stop."

With this background in mind, we now turn to the evening of May 11, 2017. Joe was upset about a social interaction from school. He had been upset about some girl drama for a couple of days. Joe was at Jeff's house that night. Jeff asked Joe about the issues, but Joe indicated he did not want to talk.

Joe's friend of a year-and-a-half N.M. contacted Joe that same evening to see how he was doing and asked if she could come over. Joe and N.M. were at some point romantically involved but not at the time of this incident. N.M. drove over to Jeff's house to see Joe. Joe did not ask Jeff if N.M. could come over, but Joe told N.M. that he had gotten his father's permission. When she arrived Joe went outside to N.M.'s car and got in the front passenger seat.

Jeff noticed that Joe went outside and got in a car that he did not recognize, so he went outside to find out who had arrived at the house. Jeff noticed that it was N.M. and went back inside. A little while later, as Joe's "lights out" time approached, Jeff went outside and told Joe to come inside. Joe ignored Jeff, and Jeff again went inside. Joe said that Jeff appeared to be a little angry; however, Jeff testified he was not angry.

Jeff went outside again about 20 minutes later, opened the car door, and told Joe to come inside. At first, Joe did not want to go inside, but he did so because he knew Jeff would become angrier. Joe went inside the house and went downstairs, and he was upset. Jeff followed Joe downstairs because he could hear Joe getting a little huffy. Joe started escalating, and Jeff said he was flustered in the basement because Joe was yelling at him. Jeff told Joe to calm down and tried to explain why Joe needed to come inside, but Joe became more explosive. Jeff told Joe they would talk about the situation when Joe was calm, and Jeff went upstairs.

***3** Once Jeff returned upstairs, he noticed N.M. was still outside. Unbeknownst to Jeff and Joe, N.M.'s car would not start because the battery had drained from the headlights being left on while she and Joe were sitting in the car and talking. Jeff went outside to help N.M. get her car started and went into the garage looking for jumper cables. A few moments later, Joe came outside through the front door. He was yelling at Jeff that he could make his own decisions. Joe went towards Jeff while they both argued. Jeff was facing away from Joe at the time. Joe said, "I've fucking had it," and he tensed up, clenching his fists. Jeff testified that Joe bumped into him, but Joe denied this in his testimony. Jeff turned around and grabbed Joe by the neck, choked him, dragged him about 7 feet across the driveway, threw him down on the grass, and walked away. Joe could not breathe for a few seconds after Jeff threw him to the ground.

Joe got up and started moving towards Jeff. N.M. saw this, got out of her car, and went to hold Joe back. According to Joe

and N.M., Jeff punched Joe in the face. As a result, both Joe and N.M. went to the ground. Joe got up and went towards Jeff again. As Joe moved towards Jeff, Jeff swung his fist at Joe and hit him again. Joe went to the ground for a third time. Jeff testified that he never hit Joe but did admit to grabbing Joe by the neck because that was the first thing he could get hold of and throwing him in the grass because he was fearful that Joe was going to attack him.

Jeff called the police. Joe got up and ran inside. N.M. later went inside and found Joe in Jeff's room with a knife held to his own neck. Joe told N.M. he wanted to end it and he was tired of "all the things his dad has been causing towards him and all the problems," including the current situation. Joe's sister entered the room, and both she and N.M. were able to convince Joe to give them the knife. After the police arrived they took Joe to the hospital because he had threatened suicide. Amy took him to her home shortly after.

On May 15, 2017, Amy filed a petition for a PFA order against Jeff on behalf of Joe. The district court issued a temporary PFA order and set the case for trial. After a continuance, a one-day trial was held on August 30, 2017, after which the district court took the matter under advisement. On October 23, 2017, the district court issued a written memorandum opinion that held Jeff's acts went beyond parental discipline and granted a permanent PFA order. The order was filed October 24, 2017.

After the district court issued its order, Jeff filed a motion for additional findings and a motion to alter or amend the judgment. Specifically, Jeff requested the district court make additional findings (1) regarding the use of self-defense rather than the single analysis of parental discipline; (2) that Joe told the therapist about the incident in question but only stated that that he was grabbed by his neck and never advised his therapist that Jeff hit him; and (3) that even if the evidence was credible that Joe was struck, no evidence was presented that Joe was injured in any fashion.

The district court denied Jeff's motion, stating:

> "The Court's findings set forth in its *Memorandum Decision* are sufficient to resolve the issues. Additionally, the findings are adequate to advise the parties, as well as an appellate court, of the reasons for the Court's decision and the standards the Court applied which governed its determination and persuaded it to arrive at the decision."

Jeff timely appeals.

Analysis

On appeal, Jeff raises three arguments. First, he argues the district court erred in denying his motion for additional findings of fact. Second, Jeff argues the district court erred in allowing the PFA order to expire on October 23, 2018, rather than on May 15, 2018. Third, Jeff argues that the PFA order was not supported by substantial competent evidence.

I. IS THIS CASE MOOT?

***4** Because the PFA order expired on October 23, 2018, we ordered Jeff to show cause as to why this case should not be dismissed as moot. Appellate courts generally do not decide moot questions or render advisory opinions. *Board of Johnson County Comm'rs v. Duffy*, 259 Kan. 500, Syl. ¶ 1, 912 P.2d 716 (1996). "An issue is moot where any judgment of the court would not affect the outcome of the parties' controversy." *Manly v. City of Shawnee*, 287 Kan. 63, Syl. ¶ 4, 194 P.3d 1 (2008). Stated another way, the mootness test has been described as a determination whether "it is clearly and convincingly shown the actual controversy has ended, the only judgment that could be entered would be ineffectual for any purpose, and it would not impact any of the parties' rights." *Wiechman v. Huddleston*, 304 Kan. 80, 84, 370 P.3d 1194 (2016). A justiciable controversy has "definite and concrete issues between parties with adverse legal interests that are immediate, real, and amenable to conclusive relief." *State ex rel. Morrison v. Sebelius*, 285 Kan. 875, 890-91, 179 P.3d 366 (2008).

However, mootness is not a question of jurisdiction, and there are exceptions to the mootness doctrine. *State v. Montgomery*, 295 Kan. 837, Syl. ¶ 2, 286 P.3d 866 (2012). One such exception is that "the court will proceed to judgment whenever dismissal of an appeal adversely affects rights vital to the parties, even where its judgment will not be enforceable because of lapse of time or other changed circumstances. [Citations omitted.]" *Gonzales v. State*, 11 Kan. App. 2d 70, 71, 713 P.2d 489 (1986).

Another panel of this court addressed a similar factual scenario in *Skillett v. Sierra*, 30 Kan. App. 2d 1041, 53 P.3d 1234, *rev. denied* 275 Kan. 965 (2002). In *Skillett*, the PFA order protecting a minor child from her father expired while the appeal was pending. Arguing against mootness, Skillett asserted that the doctrine was not applicable because his vital right to the possession of a firearm under federal and Kansas law was impacted by the PFA order. The *Skillett* panel disagreed with this argument because Skillett's rights to

possess a firearm were reinstated after the expiration of the PFA order. 30 Kan. App. 2d at 1047.

Here, Jeff argues that his vital right to parent his children is possibly implicated by the PFA order because the couple has two other minor children together and this PFA could be used against him in a future proceeding dealing with his custody and parenting time of those children. We are persuaded by this argument because "[a] father has a constitutional right to parent his child." *In re J.L.*, 57 Kan. App. 2d ——, ——, —— P.3d ——, 2019 WL 3242276, at *1 (No. 120,504, filed July 19, 2019). As the PFA order, whether current or expired, could possibly impact his vital right to parent his children in the future, we will consider the merits of Jeff's appeal. See K.S.A. 2018 Supp. 23-3203(a)(9) (evidence of domestic abuse to be considered in determining legal custody, residency, and parenting time of child).

II. DID THE DISTRICT COURT ERR IN DENYING JEFF'S MOTION FOR ADDITIONAL FINDINGS OF FACT?

Jeff argues that the district court erred in denying his motion for additional findings of fact. Below, Jeff moved for additional findings pursuant to K.S.A. 2018 Supp. 60-252(b). Specifically, Jeff requested the district court make additional findings (1) regarding the use of self-defense rather than the single analysis of parental discipline; (2) that Joe told the therapist about the incident in question but only stated that that he was grabbed by his neck and never advised his therapist that Jeff hit him; and (3) that even if the evidence was credible that Joe was struck, no evidence was presented that he was injured in any fashion.

Research has not revealed any Kansas authority that explicitly enumerates a standard of review for the denial of a motion for additional findings of fact.

***5** Under K.S.A. 2018 Supp. 60-252(b): "On a party's motion filed no later than 28 days after the entry of judgment, the court may amend its findings, or make additional findings, and may amend the judgment accordingly. The motion may accompany a motion for a new trial under K.S.A. 60-259, and amendments thereto." Such a request, while notably different, is akin to requesting the court to alter or amend its judgment because the movant is asking the district court to make additions to its already issued decision. See K.S.A. 2018 Supp. 60-259(f) ("A motion to alter or amend a judgment must be filed no later than 28 days after the entry of judgment."). The denial of a motion to alter or amend is reviewed for an abuse of discretion. *Exploration Place, Inc. v. Midwest Drywall Co.*, 277 Kan. 898, 900, 89 P.3d 536 (2004). Logic dictates that the same standard of review should be applied when an appellate court reviews the denial of a motion for additional findings of fact.

A judicial action constitutes an abuse of discretion if (1) no reasonable person would take the view adopted by the trial court; (2) it is based on an error of law; or (3) it is based on an error of fact. *Wiles v. American Family Life Assurance Co.*, 302 Kan. 66, 74, 350 P.3d 1071 (2015). "The party asserting an abuse of discretion bears the burden of showing such an abuse of discretion." *Northern Natural Gas Co. v. ONEOK Field Services Co.*, 296 Kan. 906, 935, 296 P.3d 1106, *cert. denied* 571 U.S. 826 (2013). To the extent resolution of this argument requires interpretation of a statute, this panel's review is de novo. *Neighbor v. Westar Energy, Inc.*, 301 Kan. 916, 918, 349 P.3d 469 (2015).

The district court denied Jeff's motion, stating that the findings in the memorandum opinion were sufficient to resolve the issues and were adequate to advise the parties, as well as an appellate court, of the reasons for its decision and the standards it applied to arrive at the decision.

K.S.A. 2018 Supp. 60-252(a), in part, requires:

> "In an action tried on the facts without a jury or with an advisory jury or upon entering summary judgment, the court must find the facts specially and state its conclusions of law separately. The findings and conclusions may be stated on the record after the close of evidence, or may appear in an opinion or a memorandum of decision filed by the court."

In *Andrews v. Board of County Commissioners*, 207 Kan. 548, 555, 485 P.2d 1260 (1971), the Kansas Supreme Court held K.S.A. 60-252(a) requires that findings

> "should be sufficient to resolve the issues, and in addition they should be adequate to advise the parties, as well as the appellate court, of the reasons for the decision and the standards applied by the court which governed its determination and persuaded it to arrive at the decision. These requirements are apparent in the statute itself."

The problem here is that Jeff essentially asked the district court to make findings of fact contrary to its assessment of the evidence. K.S.A. 2018 Supp. 60-252(a) does not require the district court to make such findings. Our review of the

record reveals that the district court's findings of fact were sufficient to apprise us of the reasons for its decision and were sufficient to permit meaningful appellate review. The district court specifically enumerated 44 findings of fact and separately made conclusions of law based on those facts. Jeff's disagreement with the district court's findings of fact does not compel the court to make additional findings. See *Mendenhall v. Casner*, 121 Kan. 745, 748, 250 P. 328 (1926) ("[T]hese requested findings were evidentiary in their nature, were contrary to the evidence believed by the court, the nature and substance of which evidence is disclosed by the findings that were made. It was not error for the court to decline to make the requested findings.").

***6** Accordingly, the district court did not abuse its discretion by denying Jeff's motion for additional findings of fact.

III. DID THE DISTRICT COURT DETERMINE AN INCORRECT EXPIRATION DATE FOR THE PFA?

Jeff argues the district court erred in setting October 23, 2018, rather than May 15, 2018, as the PFA order's expiration date. Amy filed her initial petition on May 15, 2018, and a trial was conducted on August 30, 2017. The final PFA order was entered on October 24, 2017. Under K.S.A. 2018 Supp. 60-3107(e), a PFA may not be in place for longer than one year.

As previously discussed, "[a]n issue is moot where any judgment of the court would not affect the outcome of the parties' controversy." *Manly*, 287 Kan. 63, Syl. ¶ 4. Here, there is no relief we can grant Jeff if the district court erred on the PFA order's expiration date. The PFA order has expired, and we cannot give back the time that may have been lost due to an incorrect expiration date. This issue is moot.

IV. WAS THE PFA SUPPORTED BY SUBSTANTIAL COMPETENT EVIDENCE?

Jeff argues that the PFA order was not supported by substantial competent evidence. Specifically, he argues that he acted with the intent to discipline his son, not to injure him, and that whatever injuries Joe may have sustained did not amount to bodily injury as required by the Act. Jeff also argues he acted in self-defense against Joe.

To resolve Jeff's argument, we must review the trial court's findings of fact and conclusions of law.

> " 'Where the trial court has made findings of fact and conclusions of law, the function of an appellate court is to determine whether the findings are supported by substantial competent evidence and whether the findings are sufficient to support the trial court's conclusions of law. Substantial evidence is evidence which possesses both relevance and substance and which furnishes a substantial basis of fact from which the issues can reasonably be resolved. Stated in another way, "substantial evidence" is such legal and relevant evidence as a reasonable person might accept as being sufficient to support a conclusion.' *Tucker v. Hugoton Energy Corp.*, 253 Kan. 373, 377, 855 P.2d 929 (1993)." *Barnett v. Barnett*, 24 Kan. App. 2d 342, 348, 945 P.2d 870 (1997).

Moreover, "[w]e do not reweigh the evidence or make our own credibility determinations, and we generally view the evidence in the light most favorable to the party who prevailed in the district court." *Kerry G. v. Stacy C.*, 53 Kan. App. 2d 218, 221-22, 386 P.3d 921 (2016). In doing so, we must accept "all evidence and inferences that support or tend to support the [district court's] findings as true, and ... must disregard all conflicting evidence." *Frick Farm Properties v. Kansas Dept. of Agriculture*, 289 Kan. 690, 709-10, 216 P.3d 170 (2009).

In the context of PFA cases, we agree with another panel of our court which stated that we are to be highly deferential to the district court's findings:

> "[T]his court is extremely reluctant to involve itself in something as subjective as an order for protection from abuse. These matters frequently develop in emergency situations, and the ultimate judgment of the trial court in a case such as this may literally involve risk to the lives of all or some of the parties involved. Our view of these cases is a view based on the printed word as it comes to us in the record on appeal. We are quite reluctant to substitute our judgment based on that record for the much more objective judgment of the trial judge, who is there in the courtroom and is able to view the parties and make a real-life judgment on the situation that exists. It is only in a case of the most egregious breach of the trial court's discretion that this court would become involved in second-guessing a trial court's decision in entering a decree protecting one of the parties to a domestic relations action from abuse." *Trolinger v. Trolinger*, 30 Kan. App. 2d 192, 194, 42 P.3d 157 (2001), *rev. denied* 273 Kan. 1040 (2002).

***7** The Protection from Abuse Act (the Act), K.S.A. 60-3101 et seq., pertains to certain acts between intimate partners or household members when abuse as defined under the Act has occurred. *Kerry G.*, 53 Kan. App. 2d at 221. " 'Intimate partners or household members' " are "persons who are or have been in a dating relationship, persons who reside together or who have formerly resided together or persons who have had a child in common." K.S.A. 2018 Supp. 60-3102(b). Under the Act:

> "(a) 'Abuse' means the occurrence of one or more of the following acts between intimate partners or household members:
>
> (1) Intentionally attempting to cause bodily injury, or intentionally or recklessly causing bodily injury.
>
> (2) Intentionally placing, by physical threat, another in fear of imminent bodily injury." K.S.A. 2018 Supp. 60-3102(a)(1)-(2).

The Act permits a parent to seek relief on behalf of a minor child by filing a verified petition alleging abuse by a current or former household member. K.S.A. 2018 Supp. 60-3104(b). The Act is to be "liberally construed to promote protection of victims." K.S.A. 60-3101(b).

Jeff's principal defense is that he was engaging in parental discipline without an intent to injure and that Joe did not suffer bodily injury. In *Paida v. Leach*, 260 Kan. 292, 917 P.2d 1342 (1996), the Kansas Supreme Court applied the Act in the context of parental discipline. Acknowledging that the Act focused on protecting spouses, the court stated:

> "The discipline of children and the abuse of spouses share little common ground. Because these disparate family interactions fall under the same legislative enactment, the trial court can and should determine in light of all the circumstances in each individual case whether the plaintiff has shown abuse by a preponderance of the evidence. Those circumstances will include the age of the alleged victim and his or her relationship to the alleged abuser. Neither reason nor the limits clearly expressed by the legislature in the Act permits a trial court judge to overlook the infliction of bodily injury. However, the Act is not intended to dictate acceptable parental discipline or unnecessarily interfere in the parent/child relationship absent a clear need to protect the child. The State's intrusion should be limited to injunctive relief where parental conduct causes more than minor or inconsequential injury to the child." 260 Kan. at 300-01.

The court further noted that "[t]here undoubtedly are instances when discipline of children escalates into domestic violence which would warrant relief under the Act, but discipline of children is not the chief evil at which the Act was aimed. The principal purpose of the legislation was to provide relief for battered spouses or cohabitants." 260 Kan. at 300. As a result, the *Paida* court concluded that under the Act, bodily injury arising from parental discipline of a child must involve "substantial physical pain or an impairment of physical condition." 260 Kan. at 301. The court indicated that "defining bodily injury to exclude trivial or minor consequences ... would lessen the potential for the exercise of unbridled trial court discretion." 260 Kan. at 301. Applying this standard, it ultimately concluded that the teenage son's sore shoulder and a teenage daughter's small cuts to her lips from her braces after her father washed her mouth out with soap didn't constitute bodily injury. 260 Kan. at 301; see also *Barnett*, 24 Kan. App. 2d at 352 (parent's act of striking child with switch causing welts and hitting child in face causing reddening on cheek not substantial).

***8** However, over the years our Supreme Court's holding in *Paida* has been limited to cases only involving instances of alleged abuse by a parent against his or her child. *Palos v. Hernandez*, No. 106,202, 2012 WL 2620561, at *5 (Kan. App. 2012) (unpublished opinion); see *Trolinger*, 30 Kan. App. 2d at 197 (trial court not required to find substantial pain and impairment to find abuse of spouse). But see *Trolinger*, 30 Kan. App. 2d at 198 (application of different standard to stepson as opposed to spouse "not a workable solution"). Relying on the opinion of another panel of our court in *M.L. v. T.W.L.*, No. 113,634, 2016 WL 852974 (Kan. App. 2016) (unpublished opinion), the district court here went even further and held that *Paida*'s substantial pain and impairment standard need not be applied in instances where the parent's actions "went beyond parental discipline." In *M.L.*, the panel held the father's actions went beyond parental discipline when he pulled out his daughter's hair and struck her on the side of the head with his fists three or four times because he had already grounded her before the physical altercation ensued. It concluded that district court's abuse finding was proper because the father acted in anger rather than in an effort of parental discipline. 2016 WL 852974, at *3.

We disagree with the district court's holding on this point because it is contrary to our Supreme Court's declaration

in *Paida*: "[T]he Act is not intended to dictate acceptable parental discipline or unnecessarily interfere in the parent/child relationship absent a clear need to protect the child.... [I]t would be undesirable to have each judge freely imposing his or her own morality [or] notions of child rearing [on] litigants." 260 Kan. at 300-01; see also *Graham v. Herring*, 297 Kan. 847, 861, 305 P.3d 585 (2013) (one Court of Appeals panel has right to disagree with another); *Becker v. Knoll*, 301 Kan. 274, 275, 343 P.3d 69 (2015) (district court's conclusions of law are reviewed de novo). We concede that the determination of whether a parent went beyond appropriate parental discipline could go to the issue of the parent's intent because we see parental discipline as an effort by a parent to compel his or her child to act or not act in a certain way as opposed to an intent to injure. See 260 Kan. at 297 (willfully causing injury different from "accidentally inflicting injury while intentionally performing some action"). However, *Paida*'s substantial pain and impairment standard applies to any case under the Act where it is alleged that a parent intentionally or recklessly caused bodily injury to his or her child. 260 Kan. at 301; see K.S.A. 2018 Supp. 60-3102(a)(1). The district court erred in rejecting *Paida*'s application to this case.

However, the district court can be correct even if it is for the wrong reason. See *Gannon v. State*, 302 Kan. 739, 744, 357 P.3d 873 (2015). The Act's definition of abuse does not just include intentionally or recklessly causing bodily injury, but also includes intentionally attempting to cause bodily injury or intentionally placing, by physical threat, another in fear of imminent bodily injury. K.S.A. 2018 Supp. 60-3102(a)(1), (2). These latter two definitions of abuse do not require any bodily injury. See *Palos*, 2012 WL 2620561, at *5. As a result, *Paida*'s substantial pain and impairment standard has very limited or no application in cases under the Act involving an attempt to cause bodily injury or threats of placing someone in fear of imminent bodily injury. See 260 Kan. at 297 (no allegation parent willfully attempted to cause bodily injury). In our case, in addition to alleging abuse by intentionally or recklessly causing bodily injury, Amy also claimed that Jeff intentionally attempted to cause bodily injury to Joe.

Turning to the facts of this case, the district court found that because of the past incident at the restaurant and the yelling in the basement just before the confrontation here, Jeff appeared to have "lost it" and lashed out against Joe in anger rather than in a form of discipline. The district court found that Jeff chose to confront Joe about why he needed to come inside instead of letting Joe "burn himself out" in the basement, which was contrary to the counselor's recommendations that the best way to handle Joe's outbursts when he was triggered was to remain calm and/or leave the situation. Jeff was well aware of Joe's unique mental health issues and the counselor's recommendations as the family had been working on Joe's mental health issues for years. Jeff had already required Joe to leave N.M.'s car and chose to follow him to the basement and confront him while Joe was triggered. The district court concluded that Jeff was not imposing parental discipline when he choked Joe as he dragged him across the driveway, threw him to the ground, and then hit him. Instead, the district court found that Jeff was striking out in anger. It is clear that the district court viewed Jeff's actions as inconsistent with an intent to impose parental discipline and instead as demonstrating an intent to injure. See *State v. Griffin*, 279 Kan. 634, 638, 112 P.3d 862 (2005) ("[I]ntent, a state of mind existing at the time of an [incident] ... may be established by acts, circumstances, and inferences reasonably [drawn] from the evidence.").

***9** Ultimately, the district court found Jeff's conduct on May 11, 2017, constituted abuse. Specifically, the district court found that Jeff

> "intentionally or recklessly caused bodily injury to Joe when he grabbed Joe by the neck and dragged him about 7 feet across the driveway and threw him down on the grass to the point he could not breathe. This was followed by Jeff hitting him in the face. At the very least, Jeff attempted to cause bodily injury."

Under the facts of this case, and viewing that evidence in the light most favorable to Amy and Joe, substantial competent evidence supports the district court's holding that Jeff's actions, at a minimum, showed he intentionally or recklessly attempted to cause bodily injury to Joe. See *State v. Battles*, No. 113,086, 2016 WL 2610256, at *6 (Kan. App. 2016) (unpublished opinion) (holding choking satisfied requirement of infliction of bodily injury in kidnapping case).

Finally, Jeff also argues that he acted in self-defense. However, the district court heard Jeff's self-defense testimony and clearly did not find it credible. We are constrained by the district court's credibility determination of the witnesses. See *Wolfe Electric, Inc. v. Duckworth*, 293 Kan. 375, 407, 266 P.3d 516 (2011). Taking all inferences in favor of Joe, we must disregard any conflicting evidence. See *Frick Farm Properties*, 289 Kan. at 709-10. In accordance with our standard of review, we conclude Jeff's self-defense argument is without merit.

Affirmed.

All Citations

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386 P.3d 928 (Table)
Unpublished Disposition
This decision without published opinion is referenced in the Pacific Reporter. See Kan. Sup. Ct. Rules, Rule 7.04.
NOT DESIGNATED FOR PUBLICATION
Court of Appeals of Kansas.

STATE of Kansas, Appellee,
v.
Jose Manuel MARTINEZ-TORRES,
a/k/a Jose M. Martinez, Appellant.

No.
114,405
|
Opinion filed December 23, 2016
|
Review Denied September 28, 2017

Appeal from Ford District Court; VAN Z. HAMPTON, Judge.

Attorneys and Law Firms

Corrine E. Gunning, of Kansas Appellate Defender Office, for appellant.

Alexander C. Melin, assistant county attorney, Natalie Randall, county attorney, and Derek Schmidt, attorney general, for appellee.

Before Bruns, P.J., Green, J., and William S. Woolley, District Judge, Assigned.

MEMORANDUM OPINION

Per Curiam:

***1** Jose Manuel Martinez–Torres (Martinez) challenges the sufficiency of the evidence to convict him of endangering a child after Martinez broke the driver's side window of a Chevy Suburban with his fist while his common-law wife was backing it out of a parking space and while his son was in the front passenger seat. Martinez' wife had a protection from abuse (PFA) order against him at the time and she had been given possession of the Suburban in the PFA order.

In addition, Martinez challenges the sufficiency of the evidence to convict him of stalking after being served with a protective order, that is, by recklessly damaging the targeted person's property. Martinez contends that he was the sole owner of the Suburban and that it was not his wife's property. Therefore, he contends that he cannot be convicted of criminally damaging the Suburban under the stalking statute. With this, Martinez raises an issue of statutory interpretation of the criminal stalking statute.

In looking at the evidence in the light most favorable to the State, a reasonable factfinder could find Martinez guilty beyond a reasonable doubt of endangering a child. In addition, under the stalking statute Martinez' wife had a sufficient possessory interest in the Suburban, so that a reasonable factfinder could find Martinez guilty beyond a reasonable doubt of stalking after being served with a protective order. Thus, we affirm.

FACTS

The incidents in this case took place on October 6, 2013, between Martinez and his common-law wife, M.H.C., after M.H.C. had obtained a temporary PFA order against Martinez.

On September 20, 2013, M.H.C. obtained the temporary PFA order against Martinez. The order prohibited all contact between the two and gave M.H.C. exclusive possession of their residence and business. The order granted her sole legal custody of their two children and ordered that Martinez have no parenting time. Finally, the order stated: "[M.H.C.] can continue to drive the 2001 Chevy Suburban." M.H.C. testified the Suburban was owned by Martinez and only his name appeared on the title. M.H.C. was awarded the Suburban in the subsequent divorce.

On October 1, 2013, the district court extended the temporary PFA order with modifications that allowed Martinez to have parenting time with their children as provided in a schedule that included every other Sunday from 10 a.m. to 6 p.m. The modified order allowed contact between the couple "but only through text messaging and when the subject is the parties' children." All child visitation exchanges were to occur at the Dodge City Police Department. The parties did not follow this procedure on October 6, 2013, the day of the incident.

On Sunday, October 6, 2013, the children were with Martinez. On that day, Martinez' father was admitted to the hospital after an apparent heart attack, so Martinez went to the hospital with the children. When M.H.C. learned that the children were at

the hospital, she went to the hospital, arriving shortly after 5 p.m., 1 hour earlier than the usual 6 p.m. transfer time, and not at the Dodge City Police Department. At the hospital, M.H.C. started to take the two children from the hospital waiting room.

*2 Martinez testified that M.H.C. told him she had dismissed the protective order. When he asked for proof, Martinez said M.H.C. told him it was in the 2001 Chevy Suburban in the hospital parking lot. When she started to leave with the children, M.H.C. testified that Martinez grabbed her by the shoulder to try to stop her from leaving the hospital. Martinez testified that he followed her to the parking lot.

Martinez testified that he realized that M.H.C. was lying about dismissing the PFA order, so he started to leave the hospital parking lot. He said, however, he returned to the Suburban to return a bag belonging to their daughter. M.H.C. was in the driver's seat; their 14–year–old son, J.M.T., was in the front passenger seat and their daughter was in the back seat.

The two began to argue. M.H.C. started to back the Suburban out of the parking space. According to Martinez, M.H.C. rolled up her window, trapping his arm, and he punched the driver's window to free his trapped arm. J.M.T. testified that Martinez "came at" the Suburban and broke the window. Both M.H.C. and J.M.T. testified that Martinez hit the window, causing it to crack. Martinez hit the window a second time, breaking it and causing broken glass to be spread over M.H.C.

M.H.C. testified she stopped reversing the Suburban, went forward into the parking spot, parked the car and went inside to the hospital where she called the police. M.H.C. and J.M.T. each sustained injuries because of the broken glass, injuries that were captured in police photographs and admitted into evidence at the jury trial. J.M.T.'s actual injuries were to his hand when he reached over to help his mother. J.M.T. testified that it was his mom's Suburban they were in when the incident took place.

As a result of this incident, Martinez was charged with aggravated endangering a child pursuant to K.S.A. 2015 Supp. 21–5601(b)(1), a severity level 9 person felony; stalking after being served a protection order pursuant to K.S.A. 2015 Supp. 21–5427(a)(3), a severity level 9 person felony; domestic battery causing bodily harm pursuant to K.S.A. 2015 Supp. 21–5414(a)(1), a Class B person misdemeanor; and criminal damage to property pursuant to K.S.A. 2015 Supp. 21–5813(a)(1), a class B misdemeanor.

The jury convicted Martinez on the stalking and domestic battery charges. Martinez was acquitted of aggravated endangering a child but was convicted of the lesser included crime of endangering a child, pursuant to K.S.A. 21–5601(a), a class A misdemeanor. Martinez was acquitted on the charge of criminal damage to property.

Martinez filed a timely notice of appeal, challenging only the child endangerment and stalking convictions.

ANALYSIS

Standard of review

When a criminal defendant challenges the sufficiency of evidence on appeal, we review all of the evidence in the light most favorable to the prosecution. *State v. Daws*, 303 Kan. 785, 789, 368 P.3d 1074 (2016). Appellate courts do not reweigh the evidence, resolve evidentiary conflicts or make witness credibility determinations. A conviction will be affirmed if the court is convinced that a rational factfinder could have found the defendant guilty beyond a reasonable doubt based on that evidence. 303 Kan. at 789.

Sufficiency of the evidence—endangering a child

Martinez contends that there was insufficient evidence to convict him of the crime of endangering a child.

Martinez was charged with aggravated endangering a child, a severity level 9 person felony, but he was convicted of the lesser offense of endangering a child, a class A misdemeanor, under K.S.A. 2015 Supp. 21–5601(a), (c)(1). The instruction for the lesser offense, endangering a child, was modeled after PIK Crim. 4th 56.010 which instructed that for child endangerment, the State had to prove beyond a reasonable doubt that Martinez "knowingly and unreasonably caused or permitted [J.M.T.] to be placed in a situation in which there was a reasonable probability that [J.M.T.'s] life, body, or health would be endangered."

*3 The Kansas Supreme Court has directed that trial courts must define the term "reasonable probability" in the instructions to the jury. *State v. Cummings*, 297 Kan. 716, 731, 305 P.3d 556 (2013). Accordingly, the district court gave the jury the clarifying language from *Cummings*, which is now included in PIK Crim. 4th 56.010. The instruction reads as follows:

> "In determining if there was a reasonable probability that [J.M.T.'s] life, body, or health would be injured or endangered, you should consider along with other relevant factors: One: The gravity of the threatened harm; and Two: The likelihood that harm to [J.M.T.] would result or that he would be placed in imminent peril. Likelihood means more than a faint or remote possibility."

We note, as a preliminary matter, that the criminalization of child endangerment in K.S.A. 2015 Supp. 21–5601 is intended to prevent harm to children; accordingly, the State is not required to prove that a child actually suffered harm or was in danger in order to support a conviction under that statute. See *Cummings*, 297 Kan. at 722–23. The misdemeanor statute at issue in *Cummings* required only that the child be unreasonably placed in a situation in which the child *may be* injured or endangered. 297 Kan. at 722; see K.S.A. 2015 Supp. 21–5601(a).

Child endangerment prosecutions are extremely fact sensitive. See *State v. Sharp*, 28 Kan. App. 2d 128, 130, 13 P.3d 29 (2000) (examining the prior statute where "reasonable probability" was not an explicit element but caselaw interpreted the statute using that as the standard).

Martinez contends that the gravity of the threatened harm to J.M.T. was low; that there was only a faint or remote possibility that his actions would harm J.M.T. or place him in imminent peril; or, alternatively, that he did not knowingly place J.M.T. in imminent peril.

(1) The gravity of the potential harm

We first consider the gravity of the potential harm. This first *Cummings* factor focuses on the potential nature and severity of the harm if it were to happen. This inquiry is distinct from a separate inquiry on the likelihood that such harm would actually occur. *State v. Laird*, No. 110,756, 2014 WL 6676136, at *5 (Kan. App. 2014) (unpublished opinion). The actual harm to J.M.T. was a small cut on one hand, a minor injury.

Martinez focuses his argument on the fact that the smashed window was made of safety glass and the fact that J.M.T. was seated in the front passenger seat on the other side of the Suburban. In closing arguments, Martinez' counsel argued to the jury that "[t]hey call it safety glass for a reason," implying that it is designed to minimize the possibility and gravity of injury when it breaks. Additionally, Martinez argues that the severity of potential injury is reduced when a person is sitting some distance away from the source of the flying glass.

The jury reviewed the photographs of where the broken glass landed after Martinez broke the window with his fist. Officer Anthony Rich, a responding officer, testified that while "some" glass reached the front passenger side of the Suburban, the amount was "not nearly as much" as on the driver's side. J.M.T. testified that the cut to his hand occurred only when he reached over to the driver's side to help his mother, not from glass on the passenger side.

**4 Finally, Martinez argues that the actual harm, J.M.T.'s cut on his hand, was minor. He contends this demonstrates that the gravity of the potential harm was low.

Martinez contends each of these factors does not support a finding that there was a reasonable probability that he endangered J.M.T. by breaking the driver's side window.

It is important to note that *Cummings* does not hold that the potential harm must be grave for a defendant to be found guilty of endangering a child. "Grave harm" is not an element of endangering a child. See K.S.A. 2015 Supp. 21–5601(a). The gravity of the potential harm is only a factor the jury considers to determine the reasonable probability that J.M.T. would be endangered by Martinez' actions.

The jury had the opportunity to consider all the evidence concerning the broken glass and where it might have ended. However, broken glass is not the only factor in reviewing the gravity of the potential harm.

Martinez struck the window twice, with his children in the car, while it was moving in reverse. He struck the window once while the vehicle was moving in reverse, causing a crack in the window. Then, Martinez struck the window again, causing it to shatter.

Fortunately, M.H.C. was able to stop the vehicle in spite of Martinez' actions at her window. But Martinez cannot escape the evidence that the Suburban was moving and moving in reverse gear. A jury could conclude this evidence increases the gravity of the potential harm to all the passengers. The gravity of the potential harm would increase to both passengers if she had been incapacitated and had been unable to stop the vehicle. Alternatively, the gravity of the potential harm would have been worse if M.H.C. had stepped on the

gas pedal while in reverse, either out of mistaken surprise or due to incapacity.

In reviewing the evidence in the light most favorable to the prosecution, there was sufficient evidence for a rational factfinder to determine, beyond a reasonable doubt, that the gravity of the threatened harm was enough to support a finding that there was a reasonable probability that J.M.T. would be endangered.

(2) The likelihood of harm to J.M.T.

Martinez argues there was insufficient evidence to prove the likelihood of harm to J.M.T. The second part of the reasonable probability instruction directed the jury to consider "[t]he likelihood that harm to [J.M.T.] would result or that he would be placed in imminent peril. Likelihood means more than a faint or remote possibility."

Martinez acknowledges that J.M.T. received a cut on his finger but contends that the actual harm, on its own, does not prove a likelihood of harm sufficient to determine that there was a reasonable probability that J.M.T. would be endangered. Essentially, Martinez argues that actual harm can occur even where the likelihood that it would occur is faint or remote and that the jury cannot be allowed to reason backward from the actual occurrence of harm to find a significant likelihood of harm to J.M.T.

Conversely, the State argues that the fact that J.M.T. was actually injured demonstrates that the possibility of endangerment was not fanciful or impossible. The State's use of the word "impossible" is not consistent with the controlling standard of "more than a faint or remote possibility" prescribed in *Cummings*. 297 Kan. at 731. If the standard was the "impossibility" of injury, this *Cummings* factor would be satisfied in every case where injury actually occurred, regardless of whether the likelihood was high or remote. This analysis would make this *Cummings* factor unnecessary.

***5** Ultimately, the practical result of Martinez' argument would be that the jury should not be allowed to hear evidence of and arguments on actual injury because this evidence could be improperly used to weigh how faint or remote the possibility was of J.M.T.'s endangerment. The same logic could be applied to the jury's consideration of the gravity of the potential harm. We are not convinced that a jury would improperly use this evidence. While we agree the standard is not the "impossibility" of injury as suggested by the State, the fact of injury allows the jury to consider how remote or imminent the possibility was of J.M.T.'s endangerment. The jury can and should be allowed to consider the injury and determine whether the actual injury was a "once in a lifetime" injury, a "likely to happen every time" injury, or somewhere in between.

We note that in this case, however, the jury was allowed to hear the evidence and arguments on the fact of actual injury, because Martinez was charged with and the jury instructed on aggravated endangering a child. A "faint or remote" possibility is not a consideration for determining if J.M.T. *was* endangered. See PIK Crim. 4th 56.020 (Aggravated Endangering A Child).

Additionally, Martinez argues we should apply our court's decision in *State v. Hernandez*, 40 Kan. App. 2d 525, 193 P.3d 915 (2008) to the facts of this case. In *Hernandez*, the defendant was charged with recklessly endangering a child. She had left her 2–year–old son in the front yard to play with older children while she was inside cooking dinner. She looked away for a moment and all the children were gone. The children had left to go play at a nearby Dillons parking lot and its adjoining retaining water pool. Hernandez was charged with aggravated endangering a child, which required proof that her child *was* endangered. At the preliminary hearing, the district court dismissed the charge, finding this was nothing more than an accident and there was no reckless conduct on the part of Hernandez. 40 Kan. App 2d at 526.

In addition, Martinez cites to *Laird* as persuasive authority on the issue of likelihood of harm. In *Laird*, the defendant was left in charge of his 4–year–old daughter while his wife went out for the evening. The mother returned to find that Laird was not there, the door was unlocked and the daughter was home alone sleeping in her bed. Laird was charged with endangering a child. The only evidence presented regarding the length of his absence indicates he was gone for about 5 minutes; thus, the window of time for potential harm was small. See *Laird*, 2014 WL 6676136, at *7. We found there was insufficient evidence to support the defendant's conviction for endangering a child because the risk of serious harm to the child was nothing "other than a faint or remote possibility" when the defendant left her sleeping in her bed while he left the house. *Laird*, 2014 WL 6676136, at *7.

Conversely, as we noted in *Laird*, we have upheld endangerment convictions where the risk of harm is imminent or foreseeable. See *State v. Ramos–Beleta*, No. 105,941, 2012 WL 5519119, at *7 (Kan. App. 2012) (unpublished opinion)

(court upheld conviction for endangering a child based on evidence that the ex-husband broke into the ex-wife's house and attacked her by stabbing her in the leg with a knife and cutting her hand with a screwdriver in front of their children after the mother called them in to help her).

In *Hernandez* and *Laird*, the defendants' charges were based upon their alleged lack of properly supervising their children. There were no violent acts directed at or near the children. Whereas, in *Ramos–Beleta*, the defendant's charges were based upon alleged violent acts directed at his ex-wife with their children in close proximity.

Martinez' actions in this case were not those of inattentive supervision. As the defendant did in *Ramos–Beleta*, Martinez violently directed his frustration against M.H.C. with his children in close proximity. He punched the window next to M.H.C. while the car was moving, in reverse gear, not once, but two times, with sufficient force to ultimately shatter the glass, with her children in close proximity.

***6** In reviewing the evidence in the light most favorable to the prosecution, there was sufficient evidence for a rational factfinder to determine, beyond a reasonable doubt, that the likelihood of the harm or imminent peril was enough to support a finding that there was a reasonable probability that J.M.T. would be endangered.

(3) Knowingly

Martinez briefly contends that the evidence fails to demonstrate Martinez knew of any danger posed to J.M.T. by his actions. As stated in the jury instruction, the State had to prove Martinez "knowingly and unreasonably caused or permitted [J.M.T.] to be placed in a situation in which there was a reasonable probability that [J.M.T.'s] life, body, or health would be endangered."

A defendant acts knowingly when he "is aware that [his] conduct is reasonably certain to cause the result" complained about by the State. K.S.A. 2015 Supp. 21–5202(i). As we noted above, the criminalization of child endangerment in K.S.A. 2015 Supp. 21–5601 is intended to prevent harm to children; accordingly, the State is not required to prove that a child actually suffered harm in order to support a conviction under that statute. See *Cummings*, 297 Kan. at 722–23. The statute at issue in *Cummings* required only that the child be unreasonably placed in a situation in which the child *may be* injured or endangered. 297 Kan. at 722.

Therefore, the "result" complained about by the State, *i.e.*, the result this statute is trying to prevent, is a person acting in such a way a child may be endangered. Thus, the State would have to prove that Martinez was aware his conduct was reasonably certain to place J.M.T. in a situation where J.M.T. *may be* endangered. Martinez did not have to know he was endangering J.M.T., he only had to know his actions may be endangering J.M.T.

As we stated above, Martinez took violent actions against M.H.C.'s window. As he repeatedly hit the window, a jury could conclude Martinez knew his actions were reasonably certain to break the window. Once the window was cracked with the first hit, Martinez was put on notice that further strikes may cause the window to break and potentially shower broken glass on the people in the vehicle. As with the defendant in *Ramos–Beleta*, Martinez' repeated strikes against the window were intentional and not the result of negligent supervision. With this in mind, a jury could conclude Martinez knew his actions were reasonably certain to place J.M.T. in a situation where J.M.T. may be endangered.

In reviewing this evidence in the light most favorable to the prosecution, there was sufficient evidence for a rational factfinder to have found beyond a reasonable doubt that Martinez acted knowingly.

In conclusion, in reviewing the evidence in the light most favorable to the prosecution, there was sufficient evidence for a rational factfinder to have found beyond a reasonable doubt that Martinez was guilty of endangering a child.

Sufficiency of the evidence—stalking after being served a protective order

Martinez was convicted of stalking after being served with a PFA order, pursuant to K.S.A. 2015 Supp. 21–5427(a)(3), for breaking the window of the Chevy Suburban. K.S.A. 2015 Supp. 21–5427(a)(3) provides:

"(a) Stalking is:

....

> "(3) after being served with, or otherwise provided notice of, any protective order included in K.S.A. 21–3843, prior to its repeal or K.S.A. 2015 Supp. 21–5924, and amendments

> thereto, that prohibits contact with a targeted person, recklessly engaging in at least one act listed in subsection (f)(1) that violates the provisions of the order and would cause a reasonable person to fear for such person's safety, or the safety of a member of such person's immediate family and the targeted person is actually placed in such fear."

*7 Martinez does not dispute that he was served with the PFA order.

To be found guilty, the jury must find that Martinez engaged in at least one of the acts listed in K.S.A. 2015 Supp. 21–5427(f)(1). In this case, the complaint alleged a violation of K.S.A. 2015 Supp. 21–5427(f)(1)(D), which reads: "A course of conduct shall include, but not be limited to, any of the following acts or a combination thereof: ... (D) causing damage to the targeted person's residence or *property* or that of a member of such person's immediate family." (Emphasis added.)

The court gave the jury the following verdict form on the stalking charge: "We, the jury, find the defendant guilty of stalking after being served with or given notice of a protective order, and ... Recklessly causing damage to [M.H.C.'s] vehicle." Both parties agreed on the language of the verdict form.

Martinez' name was listed as the sole owner on the title and registration of the Suburban. As such, he contends, and his attorney argued to the jury, that the Suburban was not M.H.C.'s property for purposes of the stalking statute. As a result, Martinez contends there is insufficient evidence for him to be found guilty of damaging a targeted person's property.

The issue is one of statutory interpretation. Statutory interpretation is a question of law to be reviewed de novo. *State v. Williams*, 298 Kan. 1075, 1079, 319 P.3d 528 (2014). The most fundamental rule of statutory construction is that the intent of the legislature governs if that intent can be ascertained. *State v. Jordan*, 303 Kan. 1017, 1019, 370 P.3d 417 (2016). An appellate court must first attempt to ascertain legislative intent through the statutory language enacted, giving common words their ordinary meanings. *State v. Barlow*, 303 Kan. 804, 813, 368 P.3d 331 (2016).

When a statute is plain and unambiguous, an appellate court should not speculate about the legislative intent behind that clear language and it should refrain from reading something into the statute that is not readily found in its words. *Barlow*, 303 Kan. at 813. Only if the statute's language or text is unclear or ambiguous does the court use canons of construction or legislative history to construe the legislature's intent. 303 Kan. at 813. We first examine the meanings of the words of the statute and then evaluate whether there is an ambiguity and how it should be resolved.

The stalking statute is silent as to what interest the targeted person must have in the damaged property—a proprietary or a possessory interest. Martinez argues that there is an ambiguity in the statute on this question, and asks that the rule of lenity be applied to interpret the statute in his favor, *i.e.*, as requiring ownership, citing *State v. Reese*, 300 Kan. 650, 653, 333 P.3d 149 (2014). Before the rule of lenity may be applied, there must be a reasonable doubt as to a criminal statute's meaning. *State v. Coman*, 294 Kan. 84, 97, 273 P.3d 701 (2012). In *Coman*, the Kansas Supreme Court discussed the rule of lenity extensively:

> "As a general rule, criminal statutes must be strictly construed in favor of the defendant. *State v. Paul*, 285 Kan. 658, 662, 175 P.3d 840 (2008). Any reasonable doubt as to the meaning of the statute is decided in favor of the accused, subject to the rule that judicial interpretation must be reasonable and sensible to effect legislative design and intent. *State v. Jackson*, 291 Kan. 34, 40, 238 P.3d 246 (2010). See also *State v. Bonner*, 290 Kan. 290, 296, 227 P.3d 1 (2010) (stating that strict construction 'simply means that the court reads words with their ordinary meaning,' and then decides any reasonable doubt in favor of the accused)." *Coman*, 294 Kan. at 96.

*8 Martinez focuses his argument on the statute's phrasing "targeted person's ... property" and notes correctly that the noun is in a possessive form with "property" as the object of possession. We agree that the word "possess" is not present in the statute. With this in mind, he argues that this creates an ambiguity in the statute. Martinez argues that because of this ambiguity, the rule of lenity must be applied.

The State argues that the focus should instead be on the word actually used in the statute, "property," and asks us to hold that a possessory interest in the sense of control or dominion,

or any level of proprietary interest, is "property" for purposes of the statute. If so, the State argues this is sufficient to invoke the protections of the statute. In support, the State cites the legal definition of property and a Kansas Supreme Court case holding that "an interest" in property need not be an ownership interest.

Black's Law Dictionary defines *property* as:

> "1. Collectively, the rights in a valued resource such as land, chattel, or an intangible. It is common to describe property as a 'bundle of rights.' These rights include the right to possess and use, the right to exclude, and the right to transfer.—Also termed *bundle of rights*. 2. Any external thing over which the rights of possession, use, and enjoyment are exercised <the airport is city property>." Black's Law Dictionary 1410 (10th ed. 2014).

We consider this definition as it may be applied to what M.H.C. was granted in the PFA order.

The PFA statute states what a court may place in a PFA order. K.S.A. 2015 Supp. 60–3107. One of the permissible orders is "[m]aking provision for the *possession* of personal property of the parties and ordering a law enforcement officer to assist in securing possession of that property, if necessary." (Emphasis added.) K.S.A. 2015 Supp. 60–3107(a)(8).

On page 2 of the September 20, 2013, temporary order of protection from abuse, the court ordered: "[Martinez] shall not abuse, molest, or interfere with the privacy or *rights* of the protected person(s) wherever they may be." (Emphasis added.) In this same order, on page 3, M.H.C. was given the right to continue to drive the Suburban. Thus, Martinez was put on notice that he could not take any action to interfere with M.H.C.'s rights, including her right to drive the Suburban.

The effect of the PFA order was to continue M.H.C.'s interest in the Suburban while limiting Martinez' interest. This order allowed her to exercise the rights of possession, use, and enjoyment of the Suburban. The order also gave her the right to exclude Martinez from the use and enjoyment of the Suburban. Although Martinez retained legal ownership of the vehicle, the PFA order temporarily deprived him of the right to the use, possession, and enjoyment of the Suburban. This order would also prevent him from selling the Suburban, as a sale would interfere with her rights to the Suburban. Finally and importantly, the PFA statute demonstrates that the property interest given by a PFA order to be so important the statute allows the court to direct law enforcement to assist the targeted party in securing possession of the property. See K.S.A. 2015 Supp. 60–3107(a)(8). In effect, the Suburban was Martinez' property in registration name only.

As such, M.H.C. had all the rights in the Suburban, other than the right to transfer the Suburban that are listed in the Black's Law Dictionary definition of property. Her rights were superior to Martinez' in almost every respect. With this in mind, there is no ambiguity requiring the court to apply the rule of lenity. From these definitions alone, we conclude that property interest granted to M.H.C. in the Suburban was "property" for purposes of the stalking statute.

"Property Interest" in the arson and the criminal damage statutes

***9** Both parties cite the arson and the criminal damage to property statutes that criminalize damage to property in which another person *has an interest,* without the consent of such other person. See K.S.A. 2015 Supp. 21–5812(a)(1)(A); K.S.A. 2015 Supp. 21–5813(a)(1).

Recently, the Kansas Supreme Court reviewed the type of interest that was necessary to be convicted of arson in *State v. Bollinger*, 302 Kan. 309, 316, 352 P.3d 1003 (2015), *cert. denied* 136 S. Ct. 858 (2016). The arson statute criminalizes fire or explosive damage against dwellings or property "in which another person has any interest." See K.SA. 2015 Supp. 21–5812(a). In *Bollinger*, the wife had a court order granting her temporary exclusive possession of the marital residence after she filed for divorce. The husband was accused of the arson to their marital residence. The court held that the wife had a "sufficient, cognizable legal interest ... to satisfy the statutory requirement" of a property interest in the couple's home derived from the court order and "from the legal rights inherent in a marital relationship." 302 Kan. at 315, 17.

Regarding the criminal damage to property statute, the State cites *State v. Fisher*, 304 Kan. 242, 373 P.3d 781 (2016), published after Martinez' brief was filed. In *Fisher*, the Kansas Supreme Court considered the nature of the interest required under the criminal damage to property statute which prohibits "knowingly damaging ... any property in which another has any interest without consent of such other person." K.S.A. 2015 Supp. 21–5813(a)(1). Fisher set fire to his home which had other residents. The court held that merely living in the home where damage occurred was a sufficient interest in the property under the criminal damage

to property statute, even without evidence of ownership. 304 Kan. at 262.

While the language in the stalking statute uses only the word "property," but the arson and criminal damage to property statute uses property with the additional qualifying language "in which another has an interest," the principle is the same. For purposes of the arson statute, the court in *Bollinger* recognized that the legal ownership interest of the husband was not superior to the wife's legal rights inherent in the marital relationship and given to her in the temporary order. See *Bollinger*, 302 Kan. at 315. For purposes of the criminal damage to property statute, the court in *Fisher* recognized the legal rights of the owner were not superior to the rights of one of the residents of the house. See *Fisher*, 304 Kan. at 262. In this case, Martinez' rights to the vehicle were in name only. At the time of the incident, M.H.C.'s rights to the Suburban were superior in every other respect.

The interpretation invokes policy considerations

Courts presume the legislature does not intend to enact useless or meaningless legislation. *State v. Frierson*, 298 Kan. 1005, 1013, 319 P.3d 515 (2014). While criminal statutes are to be construed in favor of the defendant, that rule is constrained by the rule that the interpretation of a statute must be reasonable and sensible to effect the legislative design and intent of the law. *Barlow*, 303 Kan. at 813. "Equally fundamental is the rule of statutory interpretation that courts are to avoid interpretations that yield absurd or unreasonable results." *Frierson*, 298 Kan. at 1013.

***10** The State argues that reading the statute to require that a targeted person must have more ownership rights than rights of use, possession, enjoyment, and to prevent transfer of the property would leave some targeted persons at risk. Martinez' definition of "property" under the statute would render the statute potentially meaningless as applied to married parties and meaningful only between unmarried parties. If the PFA order gave M.H.C. a less than complete interest in the property, the Suburban, but Martinez could damage the property because of his legal ownership in the property, that section would become meaningless when the PFA order was between married couples and meaningful only between unmarried parties. One spouse could recklessly damage personal property such as puncturing tires, breaking windows, contaminating the gasoline, and any other possible means that would interfere with the other spouse's temporary possessory property interest.

Martinez' theory would "absurdly narrow" the reach of the statute and grant a "free pass" for a stalker to place the targeted person in fear, so long as the property he or she damages is owned by someone other than the targeted person. See *Frierson*, 298 Kan. at 1014 (explaining how defendant's proposed interpretation of the burglary statute would absurdly narrow the reach of the statute and grant a free pass to defendants who remained within a structure, causing absurd results). In addition, with these limitations on Martinez' interest in the Suburban, it is problematic if he could legally recklessly damage marital property because of the legal title of the property.

The jury heard the evidence that the couple purchased the vehicle earlier in the marriage. They heard the testimony that only Martinez' name was on the title and registration. The jury heard the evidence that both Martinez and M.H.C. made the payments on the car loan. They heard the evidence that M.H.C. drove the vehicle. They heard J.M.T.'s testimony that the Suburban was her vehicle. They reviewed the PFA order. The jury heard Martinez' attorney's arguments on why the Suburban was not M.H.C.'s property.

In reviewing this evidence in the light most favorable to the prosecution, there was sufficient evidence for a rational factfinder to have found beyond a reasonable doubt that Martinez was guilty of stalking after being served a protective order.

Affirmed.

All Citations

386 P.3d 928 (Table), 2016 WL 7428363

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457 P.3d 949 (Table)
Unpublished Disposition
This decision without published opinion is referenced in the Pacific Reporter. See Kan. Sup. Ct. Rules, Rule 7.04.
NOT DESIGNATED FOR PUBLICATION
Court of Appeals of Kansas.

STATE of Kansas, Appellee,
v.
Robert Joseph CALISTI, Appellant.

No.
119,917
|
Opinion filed February 21, 2020
|
Review Denied August 31, 2020

Appeal from Jackson District Court; NORBERT C. MAREK JR., judge.

Attorneys and Law Firms

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

Natalie Chalmers, assistant solicitor general, and Derek Schmidt, attorney general, for appellee.

Before Arnold-Burger, C.J., Hill and Gardner, JJ.

MEMORANDUM OPINION

Per Curiam:

***1** Robert Joseph Calisti appeals his jury convictions for felony fleeing and eluding and for misdemeanor offenses stemming from a police chase. We are unpersuaded by Calisti's claims of erroneous jury instructions, insufficient evidence of criminal damage to property, and cumulative error. But we agree that his conviction for leaving the scene of an accident involving damage to attended property is not supported by sufficient evidence and must be reversed. We affirm his remaining convictions.

Factual and Procedural Background

In November 2017, Officer Eli Norris was on patrol when he learned that the license tag on a car was reported stolen out of Missouri. Because the tag was reported stolen, Norris presumed the car had also been stolen and initiated a felony stop. Calisti was driving that car.

After Norris activated the lights and sirens on his patrol car, Calisti pulled over but left the car running. While getting out of his patrol car, Norris pulled out his service gun and used his loudspeaker to direct the car's occupants to get their hands up and out of their windows. Everyone complied. But when Norris told Calisti to reach back into the car and turn the car off, Calisti put the car in gear and drove away. A chase ensued.

Norris pursued Calisti and radioed for backup. Eventually, Officer Joshua Peters and other officers joined the chase. The chase started fairly slowly and Calisti occasionally used his turn signals. But eventually Calisti sped, failed to yield to oncoming traffic, crossed the center line, failed to use his turn signals, failed to stop at stop signs, passed another car on the shoulder, drove through a residential yard, and drove through a fence maintained by the Kansas Department of Transportation (KDOT). Calisti also drove down a steep incline, through a ditch, and back up an embankment to the highway. He drove at high speeds near a school and almost caused an officer to lose control of his car due to the speed of the chase on gravel roads. Calisti eventually drove along a power line easement before getting his car stuck in a small stream. At that point, police were able to apprehend Calisti and his two passengers.

When police impounded the car Calisti had been driving, they found methamphetamine and drug paraphernalia in it. They also learned that the car, as well as its tag, had been stolen in Missouri.

A jury found Calisti guilty of the following charges:

- felony fleeing and eluding;
- criminal damage to property;
- driving while suspended;
- leaving the scene of an accident;
- failure to register the car; and
- several traffic infractions.

The district court sentenced Calisti to 14 months in jail for his misdemeanor convictions and 8 months in prison for the felony fleeing and eluding. It then suspended the prison term

and placed Calisti on 12 months' supervised probation for his felony conviction, which was to start after Calisti served his jail time.

Calisti now appeals.

Did the District Court Clearly Err in Providing no Jury Instruction on Misdemeanor Fleeing and Eluding?

***2** We first address Calisti's claims of error regarding jury instructions. Calisti concedes that he failed to object to the district court's alleged failures relating to jury instructions. Thus, we apply the clearly erroneous standard to each of his claims of instructional error. See K.S.A. 2018 Supp. 22-3414(3); *State v. Butler*, 307 Kan. 831, 845, 416 P.3d 116 (2018). Under this standard, we will reverse the district court only if an instruction error occurred and we are firmly convinced that the jury would have reached a different verdict had the error not occurred. Calisti, as the party claiming clear error, has the burden to demonstrate the necessary prejudice. See *State v. McLinn*, 307 Kan. 307, 318, 409 P.3d 1 (2018).

Legal and Factual Appropriateness of the Instruction

Calisti first claims that the district court should have instructed the jury on misdemeanor fleeing and eluding. We thus ask whether the instruction was legally and factually appropriate. *McLinn*, 307 Kan. at 318. We use unlimited review to determine whether an instruction was legally appropriate. *State v. Johnson*, 304 Kan. 924, 931, 376 P.3d 70 (2016).

The State concedes that an instruction regarding a lesser included offense is legally appropriate when the lesser crime is an included offense of the charged crime. See *State v. Plummer*, 295 Kan. 156, 161, 283 P.3d 202 (2012). That is the case here. All of the elements of misdemeanor fleeing and eluding are included within felony fleeing and eluding because it is a lesser degree of the same crime. Thus, misdemeanor fleeing and eluding is a lesser included offense of felony fleeing and eluding. See K.S.A. 2018 Supp. 8-1568(a)-(b); K.S.A. 2018 Supp. 21-5109(b). An instruction regarding misdemeanor fleeing and eluding would have been legally appropriate.

We next consider factual appropriateness under K.S.A. 2018 Supp. 22-3414(3). See *State v. Molina*, 299 Kan. 651, 661, 325 P.3d 1142 (2014).

> "The question of whether the instruction would have been factually appropriate is more difficult. See *State v. Molina*, 299 Kan. 651, 661, 325 P.3d 1142 (2014) (failure to instruct on lesser included crime erroneous only if instruction would have been factually appropriate). ' "[W]here there is some evidence which would reasonably justify a conviction of some lesser included crime ... the judge *shall* instruct the jury as to the crime charged and any lesser included crime." ' *Armstrong*, 299 Kan. at 432 ...; see also *State v. Story*, 300 Kan. 702, 710, 334 P.3d 297 (2014) (evidence must reasonably justify conviction of lesser included crime). If, after a review of all the evidence viewed in the light most favorable to the prosecution, we are convinced that a rational factfinder could have found the defendant guilty of the lesser crime, failure to give the instruction is error. *Armstrong*, 299 Kan. at 433." *State v. Fisher*, 304 Kan. 242, 257-58, 373 P.3d 781 (2016).

Calisti argues that sufficient evidence showed that officers activated their lights and sirens but Calisti still drove away, so the jury could have found him guilty of misdemeanor fleeing and eluding. Under K.S.A. 2018 Supp. 8-1568(a), a driver is guilty of misdemeanor fleeing and eluding if the driver is given a visual or audible signal to stop but the driver "willfully fails or refuses to ... stop for a pursuing police car ... or otherwise flees or attempts to elude a pursuing police car."

The jury convicted Calisti of felony fleeing and eluding while driving recklessly. Our felony fleeing and eluding statute states:

> "(b) Any driver of a motor car who willfully fails or refuses to bring such driver's car to a stop, or who otherwise flees or attempts to elude a pursuing police car or police bicycle, when given visual or audible signal to bring the car to a stop, and who: (1) Commits any of the following during a police pursuit: ... (C) engages in reckless driving as defined by K.S.A. 8-1566, and amendments thereto; ...
>
> ***3** "(2) ... shall be guilty as provided in subsection (c)(2)." K.S.A. 2018 Supp. 8-1568(b).

After reviewing all of the evidence, instead of the little slice of evidence Calisti focuses on, we are not convinced that a rational fact-finder could have found Calisti guilty of misdemeanor fleeing and eluding. Calisti drove recklessly and committed seven other violations. Calisti sped while driving through town and while on gravel roads. And he made much of the chase more difficult and dangerous by traveling

on a two-lane highway. At trial, Norris testified that Calisti reached speeds of 75 mph in a 45 mph zone, 85 mph in a 75 mph zone, and 45 mph while in a high school parking lot—a 25 mph zone. In the video footage of Peters' dash camera, the officer can be heard stating Calisti was reaching speeds of 100 mph before slowing down. Officer Peters testified that he stayed at 100 mph as he chased Calisti by Jackson Heights High School. Peters also testified that he almost lost control of his patrol car because the chase occurred on a dirt road and at high speeds. Calisti also drove through a residential yard and a barbwire fence, into oncoming traffic to cross a highway. He committed several traffic violations such as failing to stop, failing to signal, and passing on the right shoulder. He was also driving on a suspended license and caused property damage. And Calisti's actions created a lengthy chase in which several officers had to join and risk their own safety.

In light of these circumstances, a misdemeanor fleeing and eluding instruction was factually inappropriate, so the district court did not err in not giving that instruction. See *State v. Cox*, No. 118,438, 2018 WL 6712287, at *3-4 (Kan. App. 2018) (finding misdemeanor fleeing and eluding instruction factually inappropriate where evidence showed Cox drove recklessly and committed 18 moving violations) *rev. denied* 310 Kan. —— (September 27, 2019).

Did the District Court Clearly Err by Instructing the Jury on the Definition of Reckless Driving?

Calisti next argues that the district court gave a definition for recklessness that was inconsistent with the statutory definition of reckless driving under which he was charged. The State argues that there was no error because the district court used the Pattern Instruction for Kansas (PIK) instruction for reckless driving and that instruction was in accord with the statutory definition for reckless conduct, citing *State v. Remmers*, 278 Kan. 598, 600, 102 P.3d 433 (2004).

"[A]n instruction must always fairly and accurately state the applicable law." *Plummer*, 295 Kan. at 161."A trial court has the duty to 'define the offense charged in the jury instructions, either in the language of the statute or in appropriate and accurate language of the court' and 'inform the jury of every essential element of the crime that is charged.' " *Butler*, 307 Kan. at 847.

Appellate courts consider " 'jury instructions as a whole, without focusing on any single instruction, in order to determine whether they properly and fairly state the applicable law or whether it is reasonable to conclude that they could have mislead the jury.' " *Butler*, 307 Kan. at 843.

***4** At trial, the district court gave the jury an instruction for fleeing and eluding, which required the jury to find Calisti was driving a vehicle in a reckless manner. The instruction included this definition for reckless driving: " 'Reckless' means driving a vehicle under circumstances that show a realization of the imminence of danger to another person or the property of another where there is a conscious and unjustifiable disregard of that danger." Notably, this instruction—Instruction 12—comports with PIK Crim. 4th 66.110 (fleeing or attempting to elude) and PIK Crim. 4th 66.060 (reckless driving).

Calisti was charged under K.S.A. 2017 Supp. 8-1568(b)(1)(C), which defines someone guilty of fleeing and eluding as:

> "(b) Any driver of a motor vehicle who willfully fails or refuses to bring such driver's vehicle to a stop, or who otherwise flees or attempts to elude a pursuing police car or police bicycle, when given visual or audible signal to bring the vehicle to a stop, and who: (1) ... (C) engages in reckless driving as defined by K.S.A. 8-1566."

K.S.A. 8-1566(a) defines a reckless driver as "[a]ny person who drives any vehicle in willful or wanton disregard for the safety of persons or property." Because this statutory definition requires "willful or wanton" conduct, and the jury was not instructed in those terms, Calisti argues that giving an instruction for reckless conduct was legally inappropriate. He asserts that the district court was required to give the specific statutory definition from K.S.A. 8-1566.

A panel of this court considered and rejected a similar argument in *State v. Ford*, No. 112,877, 2016 WL 2610259 (Kan. App. 2016) (unpublished opinion). Although the *Ford* panel first disposed of Ford's claim under the invited error doctrine, which does not apply here, the panel emphasized that the instruction given was "appropriate and accurate language from the PIK instruction, which is a practice approved of by our Supreme Court." 2016 WL 2610259, at *5. Calisti argues that this finding is beside the point. But our Supreme Court " 'strongly recommend[s] the use of PIK instructions, which knowledgeable committees develop to bring accuracy, clarity, and uniformity to instructions.' " *Butler*, 307 Kan. at 847.

Calisti relies on *State v. Richardson*, 290 Kan. 176, 224 P.3d 553 (2010). But the panel in *Ford* also found that reliance on

Richardson was misplaced because *Richardson* dealt with the need to instruct the jury on the specific underlying moving violations and their elements that the State was relying on in that case to convict Richardson of reckless driving. *Ford*, 2016 WL 2610259, at *6; see *Richardson*, 290 Kan. at 180-83. Using the *Ford* decision as guidance, we find that the definition given was not given in error because it is appropriate and accurate language still used in the PIK instruction.

The State adds that our Supreme Court's decision in *Remmers*, 278 Kan. at 600, also supports a finding that the district court did not commit error in instructing the jury as it did. In *Remmers*, our Supreme Court found that the language of the PIK instruction at issue was in accordance with how the term "reckless" was defined under the criminal intent statute at that time—K.S.A. 21-3201:

> "(c) Reckless conduct is 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 terms 'gross negligence,' 'culpable negligence,' 'wanton negligence' and 'wantonness' are included within the term 'recklessness' as used in this code."

After our criminal statutes were recodified, the wording of this definition changed. Now, "[a] person acts 'recklessly' or is 'reckless,' when such person consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation." K.S.A. 2018 Supp. 21-5202(j). This is the exact language that was provided to the jury. We are not persuaded that there is any substantive difference between the definition of reckless driving used here and that used in K.S.A. 8-1566(a) (driving a vehicle "in willful or wanton disregard for the safety of persons or property"). Because the instruction properly and fairly states the applicable law, it is not "legally infirm." *Plummer*, 295 Kan. at 161.

***5** Nonetheless, the plain language of K.S.A. 2018 Supp. 8-1568 requires the factfinder to find the defendant "engages in reckless driving as defined by K.S.A. 8-1566." But even if the instruction that defined reckless driving in other terms was given in error and an instruction including a definition for willful and wanton conduct was required, reversal is not necessary here. Calisti cannot establish clear error. The evidence presented at trial was more than enough to establish felony fleeing and eluding. The jury saw both Norris' and Peters' dash camera footage showing Calisti driving away from a stop and then fleeing for several minutes. The videos, coupled with the officers' testimony, establish that Calisti drove his car in willful or wanton disregard for the safety of persons or property.

At sentencing, Calisti told the district court that the reason he engaged in a high speed chase with the police is because he was fleeing for his life. Calisti said he had to run because the police had their guns drawn and he feared he would be shot. This fear, he said, stemmed from living in Kansas City. But Calisti never provided the jury with this explanation because he did not testify at trial. But in his opening remarks, Calisti's counsel told the jury that "not all of us have the same life experience with regard to law enforcement. Many of us have good experiences, many of us have mixed experiences, and some of us have only bad experiences with regard to law enforcement." In his closing statement, Calisti's attorney stated that the officer pointed a gun at the car when he first stopped Calisti. He then implied that the gun was the reason Calisti did not think properly and chose to flee. Even so, the jury found that Calisti drove recklessly under the definition provided. Considering this and the rest of the evidence presented at trial, we are not firmly convinced that the jury would have reached a different verdict had the error not occurred. See *McLinn*, 307 Kan. at 318.

Did the District Court Clearly Err by Instructing the Jury About the Mental State Necessary to Commit Fleeing and Eluding, Criminal Damage to Property, and Driving While Suspended?

Calisti next argues that the jury was not properly instructed on the required mental state for fleeing and eluding, criminal damage to property, and driving while suspended. He argues the district court gave conflicting instructions for the required mental states because Instruction 5 directed the jury to find that these crimes could be committed intentionally, knowingly, or recklessly.

Instruction 5 stated:

> "The State must prove that the defendant committed the crime(s) of Possession of Methamphetamine, Fleeing or Eluding a Police Officer, Possession of Drug Paraphernalia, Driving While Suspended, Failure to Remain at an Accident, Failure to Yield to an Emergency Car, Improper Registration, Improper Lane Change,

Improper Passing, Speeding and Criminal Damage to Property:

- Intentionally, or
- Knowingly, or
- Recklessly."

The mental state instruction comports with PIK Crim. 4th 52.010. The Notes on Use to that instruction state: "The Committee believes this instruction must be given in every case unless: 1. the definition of the crime charged plainly dispenses with a culpable mental state; or 2. a culpable mental state is otherwise excluded under K.S.A. 21-5203." PIK Crim. 4th 52.010 (2018 Supp.). Neither of those exceptions applies here. So, according to Calisti, the district court erroneously instructed the jury that it could find him guilty of these charges under a reckless culpable mental state even though a greater mental state was required for each offense.

But the jury was also provided with separate instructions for fleeing and eluding, driving while suspended, and criminal damage to property. The term "recklessly" was not included in the elements instructions for driving while suspended or criminal damage to property. Instead, the jury was instructed that each of those offenses required a knowing mental state. As a result, we find that although Instruction 5 listed the different mental states that might apply to all of the crimes Calisti was charged with, the jury was still properly instructed regarding the mental states that did apply for driving while suspended and criminal damage to property.

***6** Regarding the fleeing and eluding charge, Calisti argues that the relevant mental state was willingly. But willingness relates only to Calisti's failure to stop the car, not the recklessness of the driving. See K.S.A. 2018 Supp. 8-1568(b). The jury was properly instructed that it needed to find that Calisti "willfully failed or refused to bring the motor car to a stop for, or otherwise fled or attempted to elude, a pursuing police car."

We find that the district court did not err in giving Instruction 5—the mental state instruction.

Does Sufficient Evidence Support a Conviction for Criminal Damage to Property?

We next address Calisti's argument that insufficient evidence supports his conviction for criminal damage to property. He contends that the State failed to present testimony from KDOT to establish that it had an interest in the fence that was damaged and failed to present evidence that KDOT did not consent to that damage.

" 'When the sufficiency of evidence is challenged in a criminal case, this court reviews 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.' " *State v. Rosa*, 304 Kan. 429, 432-33, 371 P.3d 915 (2016). " 'In making a sufficiency determination, the appellate court does not reweigh evidence, resolve evidentiary conflicts, or make determinations regarding witness credibility.' " *State v. Dunn*, 304 Kan. 773, 822, 375 P.3d 332 (2016).

K.S.A. 2017 Supp. 21-5813(a)(1) required the State to prove that Calisti knowingly damaged, destroyed, defaced, or substantially impaired "the use of any property in which another has an interest without the consent of such other person."

Calisti argues that someone from KDOT was required to testify regarding its interest in and its lack of consent to damage the fence. But he fails to support that argument by citation to any authority. See *State v. Salary*, 309 Kan. 479, 481, 437 P.3d 953 (2019) (lack of pertinent authority is akin to failing to brief an issue).

Nonetheless, we review the evidence to see whether each element is supported by sufficient evidence. Generally, a verdict may be supported by circumstantial evidence, if such evidence provides a basis for a reasonable inference by the fact-finder regarding the fact in issue. Circumstantial evidence, in order to be sufficient, need not exclude every other reasonable conclusion. *State v. Logsdon*, 304 Kan. 3, 25, 371 P.3d 836 (2016). Here, we do not need direct testimony by the interest holder because circumstantial evidence of that interest may be sufficient. See *State v. Miller*, No. 117,840, 2019 WL 494349, at *1 (Kan. App.) (unpublished opinion) (finding sufficient evidence existed to establish that a person had an interest in a car, without the car owner specifically testifying that he had an interest in the car), *rev. denied* 310 Kan. —— (September 27, 2019).

The circumstantial evidence presented at Calisti's trial provides a basis for a reasonable inference by the jury that KDOT had an interest in the fence Calisti damaged. Norris described that fence as a KDOT fence. Norris also testified

that the fence was maintained by KDOT and that Calisti "drove through the KDOT fence." Likewise, Peters testified that Calisti damaged the fence when he drove through it and that the fence had been repaired before trial. This evidence is sufficient to establish that KDOT had an interest in the fence.

*7 The testimony did not, however, establish the nature of KDOT's interest in the damaged fence. Whether evidence must establish the nature of the interest depends on whether the interest was contested.

> "[W]hen the interest is not contested, the State 'is not required to establish exactly what the nature of the "any interest" is, be it a fee simple, a rental, or a tenancy, in order to satisfy the statutory requirement.' But when 'the interest is contested at trial, it may be incumbent upon the State to establish the nature' of the interest. [Citations omitted.]" *Fisher*, 304 Kan. at 262.

Calisti argues that KDOT's interest in the fence was contested at trial. Yet our review of the record shows no support for that assertion. Calisti did not cross-examine Norris or Peters about their testimony of KDOT's interest in the fence, and Calisti did not present any evidence tending to show that KDOT lacked an interest in the fence.

Because KDOT's interest in the fence was not contested, the State was not required to establish exactly what the nature of KDOT's interest was. It is enough that the State proved, through circumstantial or other evidence, that KDOT had a possessory or a proprietary interest in the damaged fence. See *Fisher*, 304 Kan. at 262.

Finally, Calisti is correct that no direct evidence showed KDOT's lack of consent. Nonetheless, the jury could reasonably infer from the evidence presented at trial that KDOT did not give consent for Calisti to damage its fence. Peters' testimony was uncontested that the fence was repaired after Calisti damaged it. A person could reasonably infer that KDOT would not have repaired the fence if it had given consent for Calisti to drive his car through it. See *State v. Boyd*, No. 116, 619, 2017 WL 2901179, at *2 (Kan. App. 2017) (unpublished opinion) (using repair as evidence of lack of consent). We find sufficient evidence to support this conviction.

Does Sufficient Evidence Support a Conviction for Leaving the Scene of an Accident Involving Damage to Attended Property?

Count eight charged Calisti with violating K.S.A. 2017 Supp. 8-1602(a), and the jury found him guilty of that charge. That subsection requires, in part, that a driver stop at the scene of damage to "any attended car or property." Calisti did not stop when he damaged the KDOT fence, yet the parties agree that no evidence showed that anyone "attended" or was present at the fence at the time of the damage.

Both the State and Calisti agree that Calisti's conviction for leaving the scene of an accident involving damage to attended property was based on insufficient evidence because the State failed to prove this element of the offense. Having reviewed the record in the light most favorable to the State, we find insufficient evidence to support this conviction. Accordingly, we reverse Calisti's conviction under K.S.A. 2017 Supp. 8-1602.

Did Cumulative Error Deprive Calisti of a Fair Trial?

Calisti argues the cumulative effect of the district court's errors were so prejudicial that this court should grant him a new trial. But we have found only one error, and that error has no impact on the rest of the issues Calisti raises. A single error cannot support reversal under the cumulative error doctrine. *Butler*, 307 Kan. at 868.

*8 We affirm in part and reverse in part.

All Citations

457 P.3d 949 (Table), 2020 WL 858092