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CLERK OF THE APPELLATE COURT
CASE NUMBER: 114682

No. 15-114682-S

IN THE

SUPREME COURT

OF THE STATE OF KANSAS

STATE OF KANSAS,

Appellee

vs.

DUSTIN HILT,

Appellant

BRIEF OF APPELLEE

Appeal from the District Court of Johnson County, Kansas
Honorable Charles Droege, District Judge
District Court Case No. 09CR2503

Jacob M. Gontesky, #24989
Assistant District Attorney
Tenth Judicial District
P.O. Box 728
Olathe, KS 66051-0728
(913) 715-3000
(913) 715-3050 (fax)
Jacob.Gontesky@jocogov.org
Attorney for Appellee

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STATEMENT OF FACTS

Dustin Hilt was convicted of first degree murder for the killing of Keighley Alyea. He was also convicted of related charges of aggravated kidnapping and aggravated robbery. Following an appeal, Hilt's case was remanded for the sole purpose of conducting a resentencing hearing before a jury. *State v. Hilt*, 299 Kan. 176, 206, 322 P.3d 367 (2014). The State sought a Hard 50 sentence.

Keighley and Hilt's Relationship

Keighley and Hilt were in a relationship for about a year and a half. (R.36, 30.) Keighley had Hilt's name tattooed on her neck and wore a ring given to her by Hilt at all times. (R.33, 52-53.) Jessika Conkilin, a friend of Keighley, described the relationship as rocky; unstable and abusive. (R.33, 57.) Keighley and Hilt were physically violent and fought frequently. (R.33, 70.)

Hilt frequently toyed with Keighley. Cell phone records indicated that Keighley and Hilt texted frequently on September 22. (R.33, 80.) Despite no longer being in a relationship, Hilt requested a ride from Keighley and she agreed. (R.33,

82.) On the evening of September 24 and the early morning hours of September 25, Keighley attempted to give Hilt a ride, but Hilt was not at the places he told Keighley to meet him. (R.33, 85-87.) In response to Keighley calling him a child, Hilt responded, "Quit spittin colors like a bitch mu [sic] are." (R.33, 90.) A few days before Keighley's murder, Hilt admitted to having sex with Keighley's sister, Cortney Bastel. (R.36, 31.)

The Night of Keighley's Murder

On September 29, Keighley had just received a paycheck from her employer, which she cashed. (R.33, 118). Conkilin stayed with Keighley that night. (R.33, 54.) Conkilin's boyfriend and Keighley both used Keighley's phone to text Hilt that evening. (R.33, 58.) Witnesses recalled Keighley was dressed in a tank top, grey sweatpants, and an American Eagle sweatshirt that night. (R.33, 61.) Keighley also carried prescription Seroquel to combat anxiety attacks in her purse. (R.33, 68-69.)

Meanwhile, Hilt spent much of the evening with Brittney Atkerson. (R.34, 10-11.) Hilt left Atkerson at approximately 10:00 pm. (R.34, 11.)

Cell phone records showed Keighley asked if Hilt wanted to hang out. (R.33, 98.) Before meeting, Keighley confronted him about having sex with her sister. (R.33, 99-100.) Keighley was directed to a street corner to pick up Hilt and Scott Calbeck, a co-defendant. (R.33, 100-02; R.36, 40.) Upon reaching the rendezvous location, Keighley also gave a ride to co-defendant Joe Mattox. (R.36, 40.)

Around 2:00 am, Hilt, Mattox, and Calbeck were recorded entering and leaving a Quik Trip convenience store. (R.33, 103.) Hilt was wearing dark jeans and white shoes. (R.33, 105.)

Cell phone conversations indicated Keighley was unhappy with her sister upon learning of the relationship with Hilt. Between 1:51 am and 2:14 cell phone records indicate two calls between Keighley and Bastel. (R.33, 102, 107.) A subsequent text from Keighley to a friend of Bastel read: "Cuz im her sister n imma whoop her ass." (R.33, 108.) Hilt testified that he and Keighley did not argue about Hilt having sex with Bastel. Keighley was not mad, he said, and actually found the situation to be funny. (R.36, 42.)

The last outgoing communication from Keighley's phone was sent at 2:50 am. Keighley's phone was never found. (R.33, 112.) Between 2:50 am and 3:45 am, there was no cell activity involving any of the codefendants, which was unusual compared to the relative frequency of communication over the past few days. (R.33, 112-13.)

As they continued to drive around that early morning, according to Hilt's testimony, Mattox "flipped out" over Keighley's statement that getting lost was wasting her gas. (R.36, 43-44.) After Mattox forcefully pulled Keighley from the front to the back seat of the vehicle, Hilt continued driving. (R.36, 44.) He did not think about stopping the vehicle or helping Keighley. Eventually, they came to a stop and pulled Keighley out of the back seat. After Mattox placed Keighley in the trunk, he told Hilt to drive toward Missouri. (R.36, 45.) On the way, Hilt began to hear Keighley bang on the trunk and call for help. (R.36, 46.)

Upon reaching the field where Keighley's remains were ultimately discovered, Hilt opened the trunk and Keighley attempted to escape. (R.36, 47.) Hilt testified that he only attempted to help Keighley after Calbeck had struck her four or five times. Hilt claimed he attempted to get between Calbeck and Keighley, who was on her knees, crying in pain. (R.36, 48.) After leaving Keighley in Missouri, Hilt assisted with the cleanup of the car. (R.36, 56.) Although officers observed several injuries to Hilt's arms and abdomen, Hilt testified that the wounds were old and that his knuckles were always red. (R.36, 54.)

Hilt sent several text messages to Brittney Atkerson, his girlfriend, between 3:00 and 4:00 am, asking her to pick him up near her home in Merriam, despite cell phone records indicating his position near Harrisonville, MO. (R.33, 113-14.) The communications between Hilt's and Calbeck's phones traced a path to where Keighley's body was found and then back to Mission. (R.33, 115-16.)

The Days Following Keighley's Disappearance

On September 30, Atkerson met with Hilt and Mattox at Mattox's home. (R.34, 16.) Atkerson noticed that Hilt's wrists were swollen. Hilt claimed that he and Mattox had gotten drunk the night before and hit each other with sticks. (R.34, 17-18.) Atkerson noticed that some cash that Mattox handed to Hilt that day appeared to have blood on it. After Atkerson asked about the blood, Hilt simply wiped it off with his spit. (R.34, 18.) Several days later, Hilt admitted to Atkerson that the money had been stolen. (R.34, 19.)

After Keighley's disappearance, Atkerson observed several Seroquel pills in Mattox's house. Hilt stated that the pills had been stolen. (R.34, 23-24.) The following evening, Atkerson talked to Hilt on the phone regarding alleged infidelity. In the background, Atkerson heard Mattox say "You don't want to be dead like her" or "You don't want to be just like her." (R.34, 26, 32.) Hilt snickered at Mattox's comment. (R.34, 26.)

Hilt's Interviews with Police

Detectives interviewed Hilt at his parent's home in Shawnee on October 3. (R.29, 20.) Hilt told police that he had not talked to Keighley in a long time and did not know where she was. (R.29, 23.) Hilt initially attempted to tell officers that he had not talked to Keighley recently, but, when confronted with Keighley's phone records, admitted to texting with Keighley before her disappearance. (R.29, 25.) Hilt appeared laid back and did not seem to be concerned. (R.29, 31.)

On October 5, officers observed several injuries on Hilt's body. (R.34, 119.) Hilt had an abrasion on right forearm consistent with a fingernail scratch along with abrasions on the knuckles of both hands and scratches on his forearms and abdomen (R.34, 120, 122-23.) Mattox did not appear to have any injuries. (R.34, 129.)

Keighley's Car

Keighley's grandfather replaced the rear turn signal lamp in her car the day she went missing. (R.34, 147.) He took care to return the wiring harnesses to their

original locations. (R.34, 149.) While working in the trunk, he noticed no stains in the carpet and took some time to clean the car's trunk and interior. (R.34, 150-51.)

Keighley's car was found on October 4 in an apartment complex parking lot. (R.34, 38-39.) Officers found a white sweatshirt with reddish stains in the trunk. (R.34, 40.) Officers also found several Seroquel pills in the front seat along with Keighley's pay stub dated September 28. (R.34, 114.)

Various stains consistent with blood were found throughout both the front and back seats of the vehicle. (R.35, 15-18.) The sweatshirt found in the trunk was identified as an American Eagle hoodie, heavily stained with blood. The removal of the sweatshirt allowed officers to discover a knife in the trunk. (R.35, 21.) Investigators noted that the taillight assemblies were pulled loose. Blood was found on each bracket. (R.35, 24.)

All of the stains tested for DNA in the vehicle matched Keighley's DNA. *See* (R.35, 78, 82-90.) Additionally, the blood on the taillight connectors matched Keighley's DNA. (R.35, 118.)

Recovery and Testing of Clothing

During a search of Hilt's grandparent's house, officers discovered and seized a pair of Southpole jeans, a white shirt, and a dark-colored jacket, all belonging to Hilt. (R.33, 121.) Officers searching Mattox's home discovered a pile of ash containing several metal rings and the remains of Keighley's purse inside a smoker. (R.34, 133-34; R.38, 57.) A can of gasoline was present near the smoker. (R.34, 132.) Inside the residence, officers discovered a pair of bleach-stained jeans and a shirt

and a trash bag containing a white t-shirt, a navy jacket and a grey Southpole sweatshirt with bloodstains. (R.34, 137-39.)

The Southpole sweatshirt was tested for DNA. (R.35, 90.) Several stains showed Keighley as the single source of DNA (R.35, 90, 92, 93, 94.) Additionally, a mixed sample showed Keighley as the major contributor while Hilt could not be excluded as the minor contributor. (R.35, 91.) Blood spatter analysis showed spatter stains going from the right wrist to the right shoulder. (R.35, 181-82.) Several spatter stains were located on the back of the sweatshirt, likely the result of an impact pattern or cast-off. (R.35, 184.) This sweatshirt is consistent with the one worn by Hilt in as seen in the Quik Trip surveillance video. (R.35, 188.)

The Southpole jeans and Stafford t-shirt were tested as well. (R.35, 95-96.) Keighley was identified as the sole source of DNA for several bloodstains on these items. (R.35, 98, 99, 100.) Keighley and Hilt could not be excluded from contributing to several other samples. (R.35, 99-100.) Blood stains were found on the white t-shirt from the collar to the chest area. (R.35, 192.) The shirt was consistent with the one Dustin Hilt was wearing in Quik Trip. The stains were also consistent with the manner in which Hilt wore his jacket. (R.35, 195.) Spatter stains were found on the front of both legs of the jeans. (R.35, 196.) All clothing worn by Hilt had spatter stains present. (R.35, 198.)

Keighley's Body

Keighley's body was discovered in a desolate field in Cass County, Missouri. (R.34, 46, 48.) The autopsy revealed that Keighley had been stabbed fifteen times in

the body with several incised cuts. (R.34, 69.) None of these wounds were immediately fatal. (R.34, 70.) The autopsy also revealed a total of 20 blunt and sharp force injuries to Keighley's head and neck. (R.34, 71.)

The medical examiner also noted signs of strangulation, including petechial hemorrhaging—an injury that usually results from three to four minutes of strangulation. (R.34, 90-1.) Defensive wounds were present on Keighley's arms and hands. (R.34, 97-98.) None of the wounds inflicted would have caused instantaneous death and Keighley might have survived with medical intervention. (R.34, 103-04.)

Juror Misconduct

During deliberations, the jury provided the district court with a question, seeking to know whether a juror should be excused for looking the defendant up in a yearbook. (R.38, 2.) The juror stated to the court that he looked at the photo of Hilt, but gathered no more information than seeing an old picture. (R.38, 6-7.) On follow-up questioning by counsel, when asked why he looked up Hilt, the juror responded that he had been looking for Atkerson, whose picture he also found. (R.38, 7.) The question arose in the jury room when the juror told others that he had seen pictures in his yearbook. (R.38, 10.)

Individual questioning of each juror revealed that the juror had looked in his sister's yearbook and had attempted to backpedal away from his statement when questioned about it. (R.38, 24, 38.) Based upon this information, Judge Droege removed the juror for violating the admonition and not being forthright with the court. (R.38, 54.)

AUTHORITIES AND ARGUMENTS

I. The district court did not abuse its discretion in concluding a juror had committed misconduct that warranted removal.

Introduction

When jurors wrote to the bailiff indicating concern over a fellow juror's comments regarding looking up the defendant in a yearbook, the district court properly paused deliberations to question each individual juror. After concluding that Juror #7 not only looked up information pertaining to the defendant and a witness in a yearbook, but further, was less than forthcoming with this information when he was called on it, the district court properly excused Juror #7 and replaced him with an alternate.

Standard of Review

A district court judge's decision to discharge a juror and substitute an alternate juror is reviewed for abuse of discretion. *State v. Hilt*, 299 Kan. 176, 186, 322 P.3d 367 (2014) (citing *State v. Stafford*, 255 Kan. 807, 824, 878 P.2d 820 (1994)). Judicial action constitutes an abuse of discretion when it is (1) arbitrary, fanciful, or unreasonable, (2) based upon an error of law, or (3) based upon an error of fact. *Hilt*, 299 Kan. at 186. The defendant bears the burden to demonstrate the existence of an abuse of discretion. Hilt argues specifically that (3) applies – the district court's removal of juror #7 was based on an error of fact.

Authorities & Argument

A trial judge must have "reasonable cause" to discharge a juror, such as if they are found to be unable to perform their duties. *State v. Minski*, 252 Kan. 806,

815, 850 P.2d 809 (1993). One such reasonable cause for discharge may stem from a violation of the court's admonition against consulting outside sources. *Hilt*, 299 Kan. at 187 (citing, among others, *People v. Daniels*, 52 Cal.3d 815, 865, 277 Cal.Rptr. 122, 802 P.2d 906 (1991) (judge may reasonably conclude a juror who read a newspaper account of the trial must be replaced because he "cannot be counted on to follow instructions in the future")). Our case law does not require more than a reasonable cause for replacement of a juror during deliberations. *State v. Fulton*, 269 Kan. 835, 841, 9 P.3d 18 (2000).

Reasonable Cause

A strikingly similar scenario played out in Hilt's original trial. In that trial, after deliberations had begun, jurors sent a note to the judge questioning how they should proceed when they believe a fellow juror had been "compromised." *State v. Hilt*, 299 Kan. 176, 183, 322 P.3d 367 (2014). After meeting with the presiding juror, the court became concerned the compromised juror had "violated the court's admonition by referencing information not admitted as evidence in the trial." *Hilt*, 299 Kan. at 183. When the juror in question denied violating the admonition, the district court interviewed the other 10 jurors. Each confirmed the presiding juror's original allegation. The district judge ultimately concluded that the compromised juror would be removed for violating the admonition. Hilt appealed, arguing the judge erred in dismissing the juror. *Id.*

This Court, in reviewing the circumstances of Hilt's original trial, held that although one indication that the dismissed juror may have been singled out by her

peers because of a minority view on the defendant's guilt was troubling, the consistency of stories told by the other jurors collectively supported the trial judge's conclusion that the juror at issue had committed misconduct worthy of replacement. This Court specifically found no abuse of discretion attributable to the factual basis for the trial judge's decision. *Hilt*, 299 Kan. at 188.

In Hilt's second trial, fellow jurors raised concerns about Juror #7 seeking out a yearbook and examining it for the photograph of the defendant. The trial court properly paused deliberations and sought out more information.

Throughout the trial, the jury was repeatedly admonished to avoid outside information. On Day 1, they were told to not google anything about the case and that they'd "have all the evidence that you need in this case presented in this courtroom." (R.28, 129). "So when you go home at night, you will be instructed not to do your own research, not to get on the internet, to do anything." (R.28, 129). "You're again to reach your verdict from everything that's given to you here in the courtroom." (R.33, 127). On Day 2, the jury was reminded to not do their own research on the internet. (R.34, 165). On Day 3, the jury was reminded "[d]on't discuss the case with anyone else," and "don't go out and inspect anywhere." (R.35, 227).

During deliberations, the jury sent out a note to the bailiff stating that one of the jurors had looked up Hilt in a yearbook and they needed to know "should that juror be excused?" (R.1, 169).

It was clear from subsequent questioning that fellow jurors believed Juror #7 had violated the mandate against seeking outside information. Recently, the Georgia Court of Appeals examined a trial court's decision to remove a juror when fellow jurors believed the admonition may have been violated. Review of the case revealed removal was proper "out of a concern that the other jurors had developed an impression—right or wrong—that the juror" had impermissible outside information. *Gilmer v. State*, 339 Ga.App. 593, 602, 794 S.E.2d 653 (2016).

Juror #7 was questioned and said after telling fellow jurors that he and the defendant went to the same high school, they asked him how he knew and he told them he looked at an old yearbook. (R.38, 6). He said that was the extent of the discussion. Then on questioning by defense counsel, the juror said he was prompted to look up Hilt when another witness said that she attended that same school. "I was originally looking for her, and I came across his name too." (R.38, 7). After sending the juror back so the court could assess the situation, the trial court said its impression was that the juror violated the admonition against seeking outside information. (R.38 15).

The other jurors were then each individually questioned and many confirmed not only that Juror #7 mentioned having sought out the yearbook, but he also appeared to backpedal when confronted with fellow jurors' concerns that this action constituted misconduct. One juror testified Juror #7 told them that his sister went to school with the defendant and when asked if his sister knew Hilt, she believed Juror #7 responded "no." (R.38, 24). Such a response would indicate that Juror #7

must have discussed the matter with his sister to learn that information. Another juror said that when Juror #7 was called out on his actions and others opined whether that may be grounds to excuse him, he backpedaled and said "I didn't do that." (R.38, 35). These actions support the district court's conclusion that Juror #7 committed misconduct. See *Bell v. State*, 46 Kan.App.2d 488, 497, 263 P.3d 840 (2011) (conduct of a juror in failing to honestly answer questions posed by counsel or the court during jury selection constitutes juror misconduct).

The next several jurors questioned likewise indicated Juror #7 denied having looked at the yearbook or otherwise backpedaled on his original admission. (R.38, 38, 41, 43, 45). Not only did Juror #7 attempt to cover his tracks, but the trial court found he was not forthcoming when questioned directly by the court about his actions. (R.38, 48, 54). While defense counsel objected to Juror #7's removal, he recognized the problems inherent with Juror #7 attempting to "backpedal" and the appearance that he violated the spirit of the admonition. "As an officer of the Court, I understand the Court's ruling, because he lied about it." (R.38, 50). The trial court ultimately removed Juror #7 for misconduct in violating the admonition and for not being forthright when he was asked about what occurred. The court replaced him with an alternate. (R.38, 54).

The trial court's factual determination that Juror #7 was untruthful and less than forthcoming in explaining the full scope of his actions is entirely justified by the record—including defense counsel's statements. The trial judge was in the best position possible to assess the credibility not only of Juror #7, but of the other 11

jurors that answered questions regarding Juror #7's actions. That credibility determination should not be impeached. *State v. Scaife*, 286 Kan. 614, 624 (2008) ("One of the reasons that appellate courts do not assess witness credibility from the cold record is that the ability to observe the declarant is an important factor in determining whether he or she is being truthful.").

Prejudice

Hilt argues prejudice resulted from the dismissal of Juror #7 because some indication existed that the Juror #7 may have been sympathetic to Hilt's defense theory. However, the only indication of such on the record was made by defense counsel in its motion for new trial. (R.30, 4). Defense counsel argued that they learned "from listening to the other jurors" (presumably after the verdict was rendered (see R.30, 11)) that "Juror No. 7 had a contrary opinion that the other jurors didn't share with regard to Mr. Hilt and that the other jurors saw an opportunity to latch on a way to get rid of" Juror #7. (R. 30, 4). The State reminded the trial court that these comments were not part of the evidence. (R.30, 7). The Judge recounted that, at the time the decision to remove Juror #7 was made, the Court did not have any information indicating Juror #7 "was hanging or holding up the juror or had any different opinion to how the jury would decide." (R.30, 10).

Not only is an examination of the thought process of the jurors after the verdict is rendered improper evidence to present in arguing prejudice resulted from the district court's actions, this information was properly not part of the calculus the district court utilized in determining whether to dismiss Juror #7. Both our

statutes and case law limit inquiry into the mental processes by which a jury arrives at a verdict. See K.S.A. 60-441 (upon an inquiry into the validity of a verdict, no evidence shall be received showing the effect of any information upon the mind of a juror as influencing him to assent or dissent from the verdict), *State v. Cook*, 281 Kan. 961, 973, 976-78, 135 P.3d 1147 (2006) (a verdict may not be impeached by questions concerning a juror's views or conclusions, the reasons for those views, or the factors used in arriving at those conclusions). Speculative statements allegedly made by jurors after rendering the verdict in this case—statements never documented in the record—cannot be the basis for concluding Hilt was prejudiced by the removal of Juror #7.

Kansas courts have held the "reasonable cause" necessary to remove a juror and replace him with a substitute is premised upon and similar to the federal rules of criminal procedure. See *State v. Haislip*, 237 Kan. 461, 468, 701 P.2d 909 (1985). Thus, it is instructive to "look to federal law for guidance in determining whether the trial court, in the case at bar, abused its discretion." *Haislip*, 237 Kan. at 469.

When a juror committed misconduct and was subsequently not forthcoming when questioned by the district court, the Ninth Circuit found such actions constituted good cause for removal. *U.S. v. Vartanian*, 476 F.3d 1095 (2007). After receiving a note from the jury expressing concern over one juror appearing to converse with the defendant's family during trial breaks, the trial court interviewed the other 11 jurors to verify such action did not influence their ability to decide the case. *Vartanian*, 476 F.3d at 1097. During an interview, one juror blurted out that

the juror at issue said the defendant was not guilty and that he was concerned the jury would hang.

The trial judge found that the juror had not been forthcoming and entirely truthful with the court and had minimized her misconduct. The federal rules permit removal of a juror for good cause. The Ninth Circuit held the record supported the district court's findings that the juror was "untruthful and untrustworthy" and removal was thus within the district court's discretion. 476 F.3d at 1099. The statements made by a fellow juror that the juror at issue believed the defendant was not guilty and would cause a hung jury could not be part of the basis for removing the juror and the district court properly ignored them. *Id.*

Here, even less egregious than the statements by the chatty juror in *Vartanian*, the district court had no reason to believe that Juror #7 held a minority view that risked causing a hung jury. That information was not gleaned by anyone until after the verdict was rendered. As such, there is no possibility it was improperly part of the district court's decision-making process regarding the removal of Juror #7. Furthermore, the post-verdict inquisition of jurors was not a proper basis for concluding Hilt suffered any prejudice as a result of the removal of Juror #7.

Conclusion

The district court had reasonable cause to remove Juror #7 when it came to the court's attention that the juror had sought out extraneous information pertaining to not only the defendant, but a witness. While one could argue this did

not constitute a clear violation of the jury's admonition against conducting outside research, the trial court properly considered his actions to be a violation of the spirit of the admonition. (R.38, 18-19).

The trial court's conclusion regarding misconduct was supported by the majority of fellow jurors who felt Juror #7's conduct rose to the level of necessitating informing the bailiff. Furthermore, Juror #7 was not truthful with fellow jurors when called out on his actions, nor was he forthcoming with the district court when examined by the judge and trial counsel. For these reasons, the district court properly excused Juror #7 and this issue fails to afford Hilt relief.

II. No reversible error occurred when the prosecutor recited, without objection, the general objective of the Hard 50 sentencing proceeding during closing argument.

Introduction

Hilt argues the state misstated the law pertaining to the jury's task, constituting reversible misconduct. He claims it was error for the State to argue the jury's task was, in part, to determine whether Hilt's actions justified a Hard 50 or a Hard 25 sentence. This statement was not contrary to the instructions the jury received. Further, the State went on to specifically and correctly reiterate that, in making their sentencing determination, the jury must determine whether the State satisfied it's burden in proving the aggravating factors and that those aggravators were not outweighed by mitigating circumstances. The jury was correctly instructed and the prosecutor did not misstate the law; simply stated, no error occurred.

Standard of Review

This Court recently revised the framework for analyzing claims of prosecutorial error. Appellate courts will continue to apply a two-step framework, albeit somewhat streamlined. These two steps can simply be described as error and prejudice. *State v. Sherman*, 305 Kan. 88, __, 378 P.3d 1060 (2016).

Error is determined by reviewing whether the acts complained of fall outside the wide latitude afforded prosecutors to conduct the State's case and attempt to obtain a conviction in a manner that does not offend traditional notions of a fair trial. *Id.* In evaluating the second step of prejudice, this Court will utilize the traditional constitutional harmlessness inquiry: the error will be deemed harmless if the State demonstrates beyond a reasonable doubt that the error complained of did not affect the outcome of the trial in light of the entire record. *Id.*

Authorities & Argument

The trial court read the instructions to the jury (R.36, 90-91), including several pertaining to the task that the jury had been assigned. Jurors were reminded that statements, arguments, and remarks of counsel are not evidence. (R.1, 152). In the primary instruction detailing for the jury what their task was, they were reminded that this was a separate proceeding from the guilt phase, "to determine whether the defendant shall serve a mandatory minimum 50 year term of imprisonment." (R.1, 154). Further, the State had the burden to prove beyond a reasonable doubt the existence of one or more aggravating circumstances and that

such circumstances were not outweighed by any mitigating circumstances the jury found. (R.1, 154).

The jury was also instructed that if they found the State had satisfied the above burden, "then you shall impose a mandatory minimum 50 year sentence of imprisonment before parole eligibility (Hard 50)." (R.1, 158). If the State failed to satisfy that burden, or if the jury could not reach a unanimous verdict, then Hilt would not receive a Hard 50, but rather would be sentenced to life with the possibility of parole after 25 years. (R.1, 158).

As a general rule, juries are presumed to have followed instructions given by the trial court. *State v. Sisson*, 302 Kan. 123, 131, 351 P.3d 1235 (2015). These instructions, in accordance with the statutory framework for the Hard 50, explicitly informed the jury that their task was to determine if aggravating circumstances existed beyond a reasonable doubt and whether those aggravators were outweighed by any mitigators found to exist.

Within that same instruction, the jury was informed that this determination would ultimately dictate whether the defendant received a hard 50 or hard 25 sentence. The impact their finding would have on the sentence was not a secret; it was not information that was excluded from the jury's consideration; after all, it was interwoven with the very instruction delineating their task.

Step 1: Error

In closing, the State reiterated the instructions the jury had just received. The prosecutor reminded the jury that this was a somewhat unique scenario in

which they were seated not to decide guilt, but rather, ultimately to decide whether his actions "support the sentence of life in prison without the possibility of parole for fifty years," or whether he should get the sentence of life with the possibility of parole after twenty-five years. (R.36, 92).

After elaborating on the evidence presented in court, the State reminded the jury that the verdict form had two choices for them to select from:

> The first one is if you find that the way that Keighley Alyea was killed in this case is heinous, cruel, and atrocious, you can check that box.
>
> If you find that the mitigators that he submits do not outweigh the aggravators, then you need to submit and check or sign that second box.
>
> If you sign both of these signatures on this page, the Defendant will serve a life sentence without the possibility of parole for fifty years.
>
> If you chose not to do that or you do not have a unanimous verdict on that, then you will sign this verdict form, and that will give him the possibility of parole after twenty-five years. (R.36, 103-4)

These statements drew no objection from the defendant. While a contemporaneous objection is not necessary to preserve prosecutorial error claims for appellate review, the lack of an objection is still relevant in that it demonstrates that the prosecutor's statements were not so egregious as to draw the ire of either defense counsel or the trial court.

These statements do not constitute error; they are a correct recitation of the law pertaining to the hard 50 sentencing scheme in Kansas. The defendant can cite to no authority indicating that the State is precluded from discussing the interconnected nature of the State's burden and the impact the jury's factual findings regarding aggravating and mitigating circumstances will have on the

ultimate sentence. No such authority exists because, pursuant to the statutory framework, such a discussion is not erroneous. The State's burden was never shifted; the factual findings required to support a hard 50 were never ignored or diminished.

Defense counsel, in closing, reiterated to the jury the task they had been assigned.

> If the state is unable to meet that burden and you're unable to unanimously decide that those aggravating factors are proven beyond a reasonable doubt and then that those aggravating factors outweigh the mitigating factors and then after you have considered mercy as a mitigating factor separate and apart than what we've got, then Mr. Hilt still serves a life sentence. He's still guilty. (R.36, 112).

Hilt also briefly takes issue with one statement the State offered later in closing argument. On rebuttal, the State briefly reminded the jury that their task was not to decide guilt—that ship had sailed. "[Y]ou do not have to determine which of the blows were inflicted by Dustin Hilt, which of them by Joe Mattox. That is not necessary for you to still find the Defendant guilty of the Hard 50." (R.36, 118). The statement drew no objection. This is not a misstatement of the law.

While Hilt certainly argued a mitigating circumstance was that his culpability was less than that of his co-defendants, the State's argument that the jury need not determine precisely which blows were inflicted by whom did not improperly eliminate the defendant's culpability argument from the jury's consideration. Rather, the State simply argued that such a precise determination was not a prerequisite to determining whether the mitigating circumstance argued

by the defendant existed or whether it outweighed the aggravating circumstances. This statement was not error.

Step 2: Prejudice

Hilt was not prejudiced by the statements made by the State. The jury received correct jury instructions from the Court before closing argument and received a proper recitation of the State's burden from both the State and defense counsel in closing. The State, in discussing the ultimate impact of the jury's decision-making on the sentence the defendant would receive, had no impact on them concluding that the crime was committed in a heinous, atrocious and cruel manner and, further, that this aggravating circumstance was not outweighed by any mitigating factors argued by Hilt.

In his final statement to the jury, the prosecutor reminded them of the question presented: "[w]e ask that you check the box that this was done in a heinous and cruel manner, and we ask you to check the box that the Defendant's mitigators fail to meet the aggravating circumstances in this case." (R.36, 126).

Beyond checking the box on the verdict form indicating the defendant committed the crime in an especially heinous, atrocious, and cruel manner, the jury took the additional step of elaborating, in writing, on the verdict form the numerous ways in which they found the evidence supported this factual determination. They did not write of simply deciding the defendant deserved the Hard 50, rather they wrote of their findings within the appropriate statutory framework. In the jury's own words, the defendant "acted in a cruel manner shown by his utter indifference

to the victim's suffering and exhibited a lack of pity by forgoing opportunities to help her . . . ." (R.1, 162). The jury specifically concluded that these aggravating circumstances "were not found to be outweighed by the mitigating circumstances." (R.1, 162).

This handwritten statement on the verdict form offers this Court rare precision by the jury in fully explaining their verdict, conclusively demonstrating they applied the proper legal standard and was not improperly influenced by any statements the defendant now claims were erroneous.

Conclusion

The fact that the State argued, correctly, that the jury's task was ultimately about determining the appropriate punishment for the offense which Hilt had been convicted simply was not error; it was the law. The jury applied the proper standard, as evidenced by their verdict form. Simply stated, the statements at issue did not prejudice Hilt.

III. The district court sufficiently pronounced sentence from the bench and to the extent the journal entry further specified the particular sentence, such clarification of an ambiguity was not improper.

Introduction

The defendant contends the district court failed to announce Hilt's sentence on the record, failing to comply with the statutory requirements and is thus void. Further, he argues the sentence that was not announced violated Hilt's right to be present at sentencing. However, a close review of the district court reading of the verdict and sentencing demonstrates the district court sufficiently and specifically

sentenced Hilt to the hard 50 sentence. Hilt raises the issue for the first time on appeal.

Standard of Review

Whether a sentence is illegal is a question of law, which can be raised at any time. This court exercises unlimited review of such claims. An illegal sentence is one imposed by a court without jurisdiction, does not conform to the statutory provision, or one which is ambiguous with regard to the time and manner in which it is to be served. *State v. Deal*, 286 Kan. 528, 529-30, 186 P.3d 735 (2008). To the extent this issue concerns Hilt's right to be present for all critical stages, this court is faced with a question of law over which it should exercise unlimited review. *State v. Burns*, 295 Kan. 951, 955, 287 P.3d 261 (2012).

Authorities & Argument

In his first trial, Hilt was convicted by a jury and then presented evidence in mitigation of his sentence. The trial judge sentenced him to a hard 50 for Alyea's murder. *Hilt*, 299 Kan. at 184. His conviction was affirmed on appeal, though the sentence was vacated for resentencing before a jury, pursuant to *Alleyne v. United States*, 570 U.S. __, 133 S.Ct. 2151 (2013). *Id.*

Upon remand and resentencing, the jury returned a verdict indicating they found, unanimously and beyond a reasonable doubt, that the State had proven the aggravating circumstance existed and that that circumstance was not outweighed by ay mitigating circumstances found to exist. (R.26, 4). Upon this verdict, the trial

court indicated it was preparing a custody slip to send the defendant to KDOC to serve his sentence.

There is no dispute that, pursuant to statute and case law, the defendant has a right to be personally present when sentence is pronounced. K.S.A. 22-3405. Hilt was present both when the verdict was read and when the trial court judge orally stated that the jury had spoken, "they have imposed the hard 50 sentence on the defendant, then the Court will impose that based upon the jury's verdict." (R.26, 13).

The jury's verdict mandated the Hard 50 and the trial court imposed it

In a traditional durational departure sentencing proceeding, a jury is tasked with determining whether aggravating circumstances have been proven beyond a reasonable doubt. K.S.A. 21-6817. If the jury makes such a finding, and only then, "the defendant *may* be sentenced pursuant to K.S.A. 21-6815 through 21-6818 [outlining the boundaries of and procedures utilized in departure scenario]," otherwise, the defendant shall be sentenced as provided by law." K.S.A. 21-6817(b)(7) (emphasis added). This provision clearly demonstrates the jury's finding of an aggravating circumstance does not mandate the imposition of a departure sentence; rather it affords the district court judge discretion to sentence above and beyond the presumptive sentence if the judge sees fit to do so. Similarly, in a capital case, the sentencing jury makes a recommendation to the trial judge; a recommendation the trial judge has discretion to accept or decline.

In such discretionary scenarios, for obvious reasons, it would be imperative for a district court judge to state on the record whether he is imposing the departure (or capital) sentence in accordance with the jury's finding, or if he is sentencing within the presumptive range, even though the jury made the necessary upward departure finding.

Contrary to the discretionary directives of durational sentencing procedure applicable to on-grid crimes or the procedure applicable to capital sentencing, the hard 50 sentencing procedure has a mandatory directive for the district court. K.S.A. 21-6620(e)(5) requires that, if the jury unanimously finds, beyond a reasonable doubt, that one or more of the aggravating circumstances exist, and that the existence of such circumstances is not outweighed by mitigators found to exist, "the defendant *shall* be sentenced pursuant to K.S.A. 21-6623." (emphasis added). K.S.A. 21-6623 in turn requires that when a person is sentenced pursuant to this section, for crimes committed after July 1, 1999, the person "*shall* not be eligible for parole prior to serving 50 years' imprisonment, and such 50 years' imprisonment shall not be reduced by the application of good time credits." (emphasis added). These sentencing provisions demonstrate the mandatory nature of the hard 50 sentence upon the jury's verdict in this case.

Defense counsel appeared to recognize the mandatory directive of the jury's verdict in this hard 50 sentencing scenario. Upon the jury returning its verdict in this case, defense counsel informed the court that, contrary to a capital case, after the jury has reached its verdict in this scenario, "we were done." (R.26, 10). "I read

it as the jury sentenced . . . ." (R.26, 10). The Court agreed, stating the case had been remanded "for the jury to decide on the hard 50." (R.26, 12). Following further discussion of the procedure, the Court stated "[t]he only thing I should be doing I suppose, is imposing it as the jury has delivered it." (R.26, 13). The State offered that to the district court that "[i]f you accept the jury's verdict and impose the sentence, then I agree with you that we don't need to have a subsequent hearing." (R.26, 13).

Hilt relies upon *State v. Sims* for the proposition that the trial judge's statements imposing "the sentence the jury has entered" were insufficient because, he argues, the jury's factual findings merely *support* a certain sentence, but did not mandate as much, leaving the court's order ambiguous with regard to the length of sentence. BRIEF OF APPELLANT at 20, citing *State v. Sims*, 294 Kan. 821, 824, 280 P.3d 780 (2012). However, *Sims* dealt not with the mandatory nature of a hard-50 sentence outlined by K.S.A. 21-6620-6624, but rather with whether the court sufficiently dictated whether multiple counts would be imposed consecutively or concurrently. Such a discretionary decision certainly requires a clear imposition by the district court judge. Such a discretionary function was not at issue in this case.

Regardless of the hard 50 mandate, the trial court specifically imposed the hard 50

Whether this Court finds convincing the argument that the reading of the jury's verdict and the court adopting of that verdict sufficiently specific to effectuate sentencing of Hilt, a close reading of the transcript demonstrates the trial judge did specifically impose the hard 50 and as such, this claim affords Hilt no relief.

Following the reading of the jury's verdict and a discussion with counsel regarding whether another hearing was necessary, the court then specifically imposed the hard 50 sentence: "the jury has spoken, they have imposed the hard 50 sentence on the defendant, then the Court will impose that based upon the jury's verdict." (R.26, 13). At this moment, the hard 50 sentence had been imposed. Sentencing occurs when the defendant appears in court and the judge orally pronounces sentence from the bench. *State v. Phillips*, 289 Kan. 28, 33, 210 P.3d 93 (2009).

The district court reiterated the same: "[T]his was the jury's decision and, therefore, I'm not going to upset the jury. I'm going to follow what the jury has entered and impose the sentence that the jury has entered. That would be done with the journal entry, of course . . . ." (R.26, 20). No one in the room sought further clarification of the sentence.

It is true that sentencing takes place when the judge pronounces the sentence in open court, not through a later written journal entry. *State v. Garcia*, 288 Kan. 761, 765, 207 P.3d 251 (2009). Here, the State does not lean on the journal entry to demonstrate the sentence that was imposed, but rather upon the statements announced by the trial court in open court in Hilt's presence. To the extent that anyone believes the district court's orally-pronounced sentence was insufficiently specific, the filing of the journal entry in this case was indeed relevant. "Clarification is not the same as modification, and a district court retains jurisdiction to file a journal entry of sentencing that clarifies an ambiguous or

poorly articulated sentence pronounced from the bench." *State v. Jackson*, 291 Kan. 34, 36, 238 P.3d 246 (2010).

Approximately one month later, the parties reconvened to hear the defendant's motion for new trial. (R.30, 1-12). Following the denial of the motions, the district court concluded "[s]o I think that leaves us – I have already pronounced sentence." (R.30, 11-12). The State then offered it was proper to now simply execute that sentence "that he receive the Hard 50 on that one sentence that was remanded for resentencing." (R.30, 12). When asked if defense counsel required anything else for his client, defense counsel concluded "No, Your Honor." (R.30, 12).

The journal entry which memorialized the hard 50 sentence imposed in this case did not surprise anyone because a full review of the record reveals the trial judge consistently intended to sentence Hilt to the hard 50 following the jury's verdict, finding aggravating circumstances present that were not outweighed by any mitigating circumstances.

Conclusion

When the district court orally stated "the jury has spoken, they have imposed the hard 50 sentence on the defendant, then the Court will impose that based upon the jury's verdict," the sentence was effectively pronounced. (R.26, 13). Hilt was present and no one sought clarification of the ruling; it was clearly understood by all. The claim that the district court failed to impose sentence from the bench in Hilt's presence fails to afford him relief.

CONCLUSION

For the above reasons, the State respectfully requests this court affirm Hilt's hard 50 sentence.

Respectfully submitted,

DEREK SCHMIDT
Attorney General

STEPHEN M. HOWE
District Attorney

JAMES CRUX
Legal Intern #4689

/s/ Jacob M. Gontesky 02/27/2017
Jacob M. Gontesky, KBN 24989
Assistant District Attorney
Tenth Judicial District
P.O. Box 728
Olathe, Kansas 66051-0728
(913) 715-3000
(913) 715-3050 (fax)
Jacob.Gontesky@jocogov.org
Attorney for Appellee

CERTIFICATE OF SERVICE

I certify that a copy of the Brief of Appellee was e-mailed to Kimberly Streit Vogelsberg at the Kansas Appellate Defender Office, Suite 900, 700 Jackson, Topeka, KS 66603, at adoservice@sbids.org on February 27, 2017.

/s/ Jacob M. Gontesky 02/27/2017
Jacob M. Gontesky, KBN 24989