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No. 12-108615-A

IN THE COURT OF APPEALS
OF THE STATE OF KANSAS

STATE OF KANSAS
Plaintiff-Appellee

v.

JAMES EDEN
Defendant-Appellant

BRIEF OF APPELLEE

APPEAL FROM THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
HONORABLE MARK BRAUN, JUDGE
DISTRICT COURT CASE NO. 10-CR-2447

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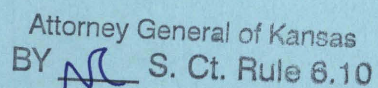

TABLE OF CONTENTS

NATURE OF THE CASE 1

STATEMENT OF THE ISSUES 1

STATEMENT OF FACTS 1-4

ARGUMENTS AND AUTHORITIES 4

I. EDEN'S CONVICTION DID NOT VIOLATE HIS DUE PROCESS RIGHTS BECAUSE EVEN IF EDEN RELIED ON THE INSTRUCTIONS OF THE SHAWNEE COUNTY SHERIFF'S OFFICE, HIS RELIANCE WAS UTTERLY UNREASONABLE 4

A. *Standard of Review* 4

State v. Becker, 36 Kan.App.2d 828, 145 P.3d 938 (2006) 4

State v. Ellmaker, 289 Kan. 1132, 221 P.3d 1105 (2009) 4-5

State v. Gomez, 290 Kan. 858, 235 P.3d 1203 (2010) 5

B. *Eden's conviction of the offender registration charge did not violate Eden's Due Process rights because Eden failed to demonstrate that: (1) the State actively misled him; (2) that there was actual reliance by him; and (3) that his alleged reliance was reasonable* 5

State v. Kidd, 293 Kan. 591, 265 P.3d 1165 (2011) 5

State v. Paul, 285 Kan. 658, 175 P.3d 840 (2008) 5

Nold ex rel. Nold v. Binyon, 272 Kan. 87, 31 P.3d 274 (2001) 5

Sup. Ct. R. 6.02(a)(5) 5

Raley v. Ohio, 360 U.S. 423, 79 S.Ct. 1257 (1959) 5

State v. Rogers, 234 Kan. 629, 675 P.2d 71 (1984) 5

State v. Swafford, 20 Kan.App.2d 563, 890 P.2d 368 (1995) 5-6

Raley v. Ohio, 360 U.S. 423, 79 S.Ct. 1257 (1959) 6

Cox v. State of Louisiana, 379 U.S. 559, 85 S.Ct. 476 (1965).......6, 7

U.S. v. Nichols, 21 F.3d 1016 (10th Cir. 1994)..............................7

U.S. v. Hardridge, 379 F.3d 1188 (10th Cir. 2004).................... 7-8

U.S. v. Gutierrez-Gonzalez, 184 F.3d 1160 (10th Cir. 1999).........8

U.S. v. Smith, 940 F.2d 710 (1st Cir. 1991)...............................8

U.S. v. Batterjee, 361 F.3d 1210 (9th Cir. 2004)..........................8

U.S. Benning, 248 F.3d 772 (8th Cir. 2001)...............................8

State v. Berriozabal, 291 Kan. 568, 243 P.3d 352 (2010).............8

1. *The State did not actively mislead Eden into believing that registering beyond the statutory imposed deadline was legal*..8

U.S. v. Nichols, 21 F.3d 1016 (10th Cir. 1994)..............................8

U.S. v. Smith, 940 F.2d 710 (1st Cir. 1991)...................................8

U.S. v. Ramirez-Valencia, 202 F.3d 1106 (9th Cir. 2000)..............8

U.S. v. Stewart, 185 F.3d 112 (3d Cir. 1999)..........................8-9

U.S. v. Gutierrez-Gonzalez, 184 F.3d 1160 (1999).........................9

Shevlin-Carpenter Co. v. State, 218 U.S. 57, 30 S.Ct. 663 (1910)...9

Illinois v. Lidster, 540 U.S. 419, 124 S.Ct. 885 (2004) 9

Raley v. Ohio, 360 U.S. 423, 79 S.Ct. 1257 (1959)..................9, 10

U.S. v. Batterjee, 361 F.3d 1210 (9th Cir. 2004)..................10-11

State v. Kidd, 293 Kan. 591, 265 P.3d 1165 (2011) 10-11

State v. Berriozabal, 291 Kan. 568, 243 P.3d 352 (2010)............11

2. *Because the State did not actively mislead Eden into believing that registering beyond the statutory imposed deadline was legal, there was no actual reliance by the defendant*.........11

U.S. v. Nichols, 21 F.3d 1016 (10th Cir. 1994).............................11

3. *Even if the State actively misled Eden and he actually relied on the State's actions, his reliance was nevertheless unreasonable*..13

U.S. v. Nichols, 21 F.3d 1016 (10th Cir. 1994).............................13

U.S. v. Baker, 438 F.3d 749 (7th Cir. 2006) 13

U.S. *v. West Indies Transp. Inc.*, 127 F.3d 299 (3d Cir. 1997).....13

U.S. v. Treviño-Martinez, 86 F.3d 65 (5th Cir. 1996)............. 13-14

U.S. v. Batterjee, 361 F.3d 1210 (9th Cir. 2004)........................14

U.S. v. Abcasis, 45 F.3d 39 (2d Cir. 1995) 14

K.S.A. § 22-4904(e)(2) 14

C. *Eden's failure to register on time was a result of his own negligence and not caused by the operating procedures of the Sheriff's Office*..15

State v. Gomez, 290 Kan. 858, 235 P.3d 1203 (2010)............15-16

State v. Berriozabal, 291 Kan. 568, 243 P.3d 352 (2010)..............16

Boddington v. Kansas City, 95 Kan. 189, 148 P. 252 (1915)........16

State v. O'Neil, 51 Kan. 651, 24 L.R.A. 555 (1893)....................16

State v. Cook, 286 Kan. 766, 187 P.3d 1283 (2008)................16-17

II. THE DISTRICT COURT DID NOT ERR IN REFUSING TO INSTRUCT THE JURY ON THE DEFINITION OF "GENERAL INTENT" BECAUSE EDEN'S INTENT WAS NOT SUBSTANTIALLY AT ISSUE..18

A. *Standard of Review* 18

State v. Plummer, 295 Kan. 156, 283 P.3d 202 (2012)..................18

B. *The State concedes the present issue was preserved for review on appeal*..18

State v. Moore, 230 Kan. 495, 639 P.2d 458 (1982).....................18

State v. *Gonzales*, No. 90,768, unpublished opinion filed Sept. 17, 2004, *rev denied*, Jan. 20, 2005..18

C. *Instruction PIK.CRIM.3d 54.01-A was not legally appropriate because of the evidence before the district court*......................18

State v. Plunkett, 261 Kan. 1024, 934 P.2d 113 (1997)........... 18-19

K.S.A. § 21-5202(a)..19

State v. Cummings, 45 Kan.App.2d 15 (2010) 19

K.S.A. § 21-5201 19

In re C.P.W., 289 Kan. 448, 213 P.3d 413 (2009)........................19

State v. Plunkett, 261 Kan. 1024, 1031, 934 P.2d 113 (1997).....19-20

In re C.P.W., 289 Kan. 448, 213 P.3d 413 (2009).........................20

Kan. Sup. Ct. R. 6.02(a)(4)...21

State v. Holman, 295 Kan. 116, 284 P.3d 251 (2012) 21

D. *Even if the evidence submitted to the district court is viewed in the light most favorable to Eden, the amount of evidence was not sufficient to warrant instruction PIK.CRIM.3d 54.01-A*............22

State v. Cummings, 45 Kan. App. 2d 15, 243 P.3d 697 (2010).....22

State v. Plummer, 295 Kan. 156, 283 P.3d 202 (2012)..................22

State v. Hall, 292 Kan. 841, 257 P.3d 272 (2011)........................22

E. *The district court's failure to submit PIK.CRIM.3d 54.01-A to the jury was a harmless error because the State can prove beyond a reasonable doubt that this error did not affect the outcome of the trial*..........24

State v. Plummer, 295 Kan. 156, 283 P.3d 202 (2012)..........24

State v. Ward, 292 Kan. 541, 256 P.3d 801 (2011)..........24

1. *Because Eden failed to provide authority supporting the contention that failure to submit PIK.CRIM.3d 54.01-A implicates a right guaranteed by the United States Constitution, he has in effect waived and abandoned this last part of the analysis*..........24

State v. Houston, 289 Kan. 252, 213 P.3d 728 (2009)..........24-25

State v. Sappington, 285 Kan. 158, 169 P.3d 1096 (2007)..........25

State v. Berriozabal, 291 Kan. 568, 243 P.3d 352 (2010)..........25

U.S. v. Holly, 488 F.3d 1298 (10th Cir. 2007)..........25-26

Neder v. United States, 527 U.S. 1, 119 S.Ct. 1827 (1999)..........26

2. *Even if this Court accedes to review this issue, the evidence shows beyond a reasonable doubt that there was no impact on the trial's outcome because there was no reasonable possibility that the error contributed to the verdict*..........26

State v. Ellmaker, 289 Kan. 1132, 221 P.3d 1105 (2009)..........26

PIK.CRIM.3d 54.01-A..........26-27

III. THE STATE PRESENTED SUFFICIENT EVIDENCE TO SUSTAIN EDEN'S OFFENDER REGISTRATION CONVICTION..........27

PIK.CRIM.3d 54.01-A..........27-28

K.S.A. § 22-4903..........27-28

K.S.A. § 22-4905..........27-28

A. *Standard of Review* 28

State v. Qualls, 298 P.3d 311 (2013).......................................28

State v. Robinson, 256 Kan. 133, 883 P.2d 764 (1994)..................28

In re Winship, 397 U.S. 358, 90 S.Ct. 1068 (1970).......................28

In re C.P.W., 289 Kan. 448, 213 P.3d 413 (2009)..................28-29

IV. THE DISTRICT COURT DID NOT VIOLATE EDEN'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS WHEN IT USED EDEN'S PRIOR CONVICTIONS TO INCREASE HIS SENTENCE WITHOUT REQUIRING THE STATE TO PROVE THEM TO A JURY BEYOND A REASONABLE DOUBT...31

Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348 (2000)....31

State v. Fewell, 286 Kan. 370, 184 P.3d 903 (2008).......................31

State v. Morton, 38 Kan. App.2d 967, 174 P.3d 904, *rev. denied* 286 Kan. 1184 (2008)...31

State v. Ivory, 273 Kan. 44, 41 P.3d 781 (2002)............................31

State v. Fewell, 286 Kan. 370, 184 P.3d 903 (2008).......................31

CONCLUSION 32

CERTIFICATE OF SERVICE 33

NATURE OF THE CASE

On December 20, 2010, in Shawnee County, Kansas, the State charged James M. Eden ("Eden") with one count of a violation of the Kansas Offender Registration Act, a severity level 5 person felony. Eden was found guilty by a jury on May 15, 2012. At trial, Eden argued that his actions should be excused because they were the alleged result of complying with the Shawnee County Sheriff's Office's instructions. Eden was sentenced to an underlying sentence of 120 months with probation granted for a period of 36 months. Eden appeals his conviction and sentence.

STATEMENT OF THE ISSUES

I. EDEN'S CONVICTION DID NOT VIOLATE HIS DUE PROCESS RIGHTS BECAUSE EVEN IF EDEN RELIED ON THE INSTRUCTIONS OF SHAWNEE COUNTY SHERIFF'S OFFICE, HIS RELIANCE WAS UTTERLY UNREASONABLE.

II. THE DISTRICT COURT DID NOT ERR IN REFUSING TO INSTRUCT THE JURY ON THE DEFINITION OF "GENERAL INTENT" BECAUSE EDEN'S INTENT WAS NOT SUBSTANTIALLY AT ISSUE.

III. THE STATE PRESENTED SUFFICIENT EVIDENCE TO SUSTAIN EDEN'S OFFENDER REGISTRATION CONVICTION.

IV. THE DISTRICT COURT DID NOT VIOLATE EDEN'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS WHEN IT USED EDEN'S PRIOR CONVICTIONS TO INCREASE HIS SENTENCE WITHOUT REQUIRING THE STATE TO PROVE THEM TO A JURY BEYOND A REASONABLE DOUBT.

STATEMENT OF FACTS

Due to a conviction for attempted rape in 1999, Eden was subject to the Kansas Offender Registration Act ("the KORA"). (R. I, 11; X, 43.) In 2010, Eden was required to report in person to the Shawnee County Sheriff's Department ("Sheriff's Office") on the month of his birthday and on three other months during the same year. (R. X, 52-53.)

Eden's birthday month was November. (R. X, 52.) In 2010, however, Eden failed to register in November. (R. X, 18, 55-57.) Eden has been required to register since 2007 and was familiar with the process. (R. X, 52, 60.) This was also not the first time he was not in compliance with the KORA; the Sheriff's Office actually sent letters to Eden in 2008 and 2009 notifying him about his non-compliance in those years. (R. X, 73-76.)

At trial, the parties stipulated that Eden was previously convicted of a crime that required registration under the KORA. (R. X, 43.) Further, Eden testified that he was required to make an appointment before he could go to the Sheriff's Office and register. (R. X, 53.) He also admitted that it was his responsibility to register. (R. X, 60.) Nevertheless, he waited until the middle of the month of November to allegedly contact the Sheriff's Office by leaving a voice message. (R. X, 54-55.) Eden called again, after a few days, to set up an appointment. (R. X, 55.) The appointment was set for December 8, 2010. (R. X, 55.)

On the day of the appointment, Eden arrived at the Sheriff's Office approximately ten minutes late and was unable to register because another person was scheduled to be registered. (R. X, 56, 68-69.) The appointment was rescheduled for December 16, 2010. (R. X, 56.) Consequently, Detective Brian Wheeles, who was employed by the Topeka Police Department, began the investigation of Eden's failure to register as required by the KORA. (R. X, 14-16.) After making an attempt to contact Eden by telephone, Detective Wheeles went to Eden's listed address and took him into custody. (R. X, 19-20.) After Detective Wheeles informed Eden of his rights and acknowledged Eden's waiver of those rights, Detective Wheeles interviewed Eden. (R. X, 20.)

During the interview, Eden informed Detective Wheeles that he did not register because he did not have the $20 registration fee. (R. X, 20.) Eden also acknowledged that he was not in compliance and had not registered. (R. X, 21.) He also admitted he was told, when he was scheduling a date to register, that "he was out of compliance, and that he could be in trouble for that, and that that was a vital [part] of the law, and that he could be in trouble for that." (R. X, 20.) Further, Detective Wheeles reviewed the paperwork executed by Eden on the last time he registered, which was on July 27, 2010. (R. X, 21.) Eden confirmed that he read and signed numerous copies of the registered offender restrictions, was aware of the restrictions, and simply did not register during his mandatory registration month in November, 2010. (R. X, 21.)

Detective Wheeles also testified that the form offenders sign is very clear regarding the registration requirements. (R. X, 30.) The form required the offender to register in person with the Sheriff's Office and making a phone call to the Sheriff's Office did not meet the requirements set forth in the form signed by Eden. (R. X, 30.) The detective also indicated during his testimony that Eden "went on a brief rant about the registry being a bunch of BS, and that people had to live their lives and [Eden] didn't really think that he'd committed a crime, and that law enforcement agencies had better things to do than arrest people like him and that kind of stuff." (R. X, 24.)

Throughout trial, there was no real dispute regarding the facts. Eden's defense focused on the lack of intent. According to Eden's defense theory, his failure to appear and report in person at the Sheriff's Office was not an intentional act. (R. X, 97-98). According to the defense, because the Sheriff's Office scheduled the appointment on December 8, 2010, Eden's acts were not voluntary. (R. X, 98.) Eden concluded by

indicating there was no issue on whether Eden was required to register, whether Eden's act occurred on or after December 1, 2010, or whether the act occurred in Shawnee County, Kansas. (R. X, 99-100.)

Eden proposed jury instruction 54.01-A, which defined "general intent." (R. I, 59; X, 77.) The main reason for Eden's request to include this instruction was that intent was directly at issue and the instruction assisted the jury. (R. X, 80.) The State's position was that all that is required to prove intent is that the person was aware of what he was doing. (R. X, 81.) Based on the facts, there was no actual dispute regarding the element of intent in this case.

Eden was convicted of a violation of the offender registration act. (R. II, 111.) The district court granted Eden's motion for departure and sentenced Eden, under a criminal history "B," to the standard term of 120 months in the custody of the Secretary of Corrections, but suspended the execution of the sentence by placing Eden on 36 months supervised probation with Community Corrections. (R. IX, 31-32.) Eden now appeals. (R. I, 109.) Additional facts will be discussed as necessary.

ARGUMENTS AND AUTHORITIES

I. EDEN'S CONVICTION DID NOT VIOLATE HIS DUE PROCESS RIGHTS BECAUSE EVEN IF EDEN RELIED ON THE INSTRUCTIONS OF THE SHAWNEE COUNTY SHERIFF'S OFFICE, HIS RELIANCE WAS UTTERLY UNREASONABLE.

STANDARD OF REVIEW

On appeal, "whether a defendant's due process rights were violated is a question of law over which an appellate court has de novo review." *State v. Becker*, 36 Kan.App.2d 828, Syl. 2, 145 P.3d 938 (2006). As a general rule, issues not raised before the district court may not be raised on appeal. *State v. Ellmaker*, 289 Kan. 1132, 1153,

221 P.3d 1105 (2009). However, the State concedes one of the exceptions to this general rule applies in this case; namely, "the issue involves a question of law based on admitted facts and is determinative of the case." 289 Kan. at 1153; *see also State v. Gomez*, 290 Kan. 858, 862, 235 P.3d 1203 (2010) (exceptions also apply to constitutional issues raised for the first time on appeal). Because Eden needs to succeed on only one of the exceptions to the general rule, the State's concession makes it immaterial to analyze whether another exception applies in this case. The State, however, does take issue with the merits of Eden's due process arguments.

A. Eden's conviction of the offender registration charge did not violate Eden's Due Process rights because Eden failed to demonstrate that: (1) the State actively misled him; (2) that there was actual reliance by him; and (3) that his alleged reliance was reasonable.

On appeal, the burden is on the appellant to designate a record to support a claim of error at the trial court. Ultimately, without such record, the claim of alleged error fails. *State v. Kidd*, 293 Kan. 591, 601, 265 P.3d 1165 (2011) (citing *State v. Paul*, 285 Kan. 658, 670, 175 P.3d 840 (2008)); *see also Nold ex rel. Nold v. Binyon*, 272 Kan. 87, 96, 31 P.3d 274 (2001) (appellants bear the burden to compile a record sufficient to support their arguments . . ."); Sup. Ct. R. 6.02(a)(5). Eden asserts for the first time on appeal the judge-made defense of entrapment by estoppel, which was first applied by the Supreme Court of the United States in *Raley v. Ohio*, 360 U.S. 423, 79 S.Ct. 1257 (1959). As a general matter, the defense of entrapment has been recognized in the State of Kansas. In fact, although this defense was not codified before the 1970's, its existence appears to have been first judicially recognized in Kansas in 1879. *State v. Rogers*, 234 Kan. 629, 632, 675 P.2d 71 (1984). *State v. Swafford*, 20 Kan.App.2d 563, 568 (1995) (Kansas also

recognizes defense of outrageous government conduct based on intolerable degree of governmental participation in criminal enterprise). Now, Eden advances a constitutionally-based doctrine of entrapment by estoppel as a defense and further declares this defense as an issue of first impression. Eden specifically argues that his conviction under the KORA violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution because Eden may not be convicted based upon taking an action that the State led him to believe that it complied with the law.

The inception of this judge-made rule of entrapment by estoppel is *Raley v. Ohio*, 360 U.S. 423, 437-38, 79 S.Ct. 1257 (1959), where the Court held that the Due Process clause could not permit convictions to be obtained where an agent of the State, who was in the position to give certain assurances, actively misled a defendant. 360 U.S. at 437-38. According to the Court in *Raley*, such convictions would effectively sanction the most indefensible sort of entrapment by the State. 360 U.S. 438. In *Raley*, the Chairman of Ohio's Un-American Activities Commission apprised three people and by his behavior toward the fourth gave the same assurance that they had a right to rely on a state constitutional privilege against self-incrimination. The state supreme court had held that they were presumed to know that under Ohio law an immunity statute had deprived them of the privilege. 360 U.S. at 437-38. Subsequently, in *Cox v. State of Louisiana*, 379 U.S. 559, 572, 85 S.Ct. 476 (1965), the Court further discussed the holding in *Raley* by stating, "this Court held that the Due Process Clause prevented conviction of persons for refusing to answer questions of a state investigating commission when they relied upon assurances of the commission, either express or implied, that they had a privilege under

state law to refuse to answer, though in fact this privilege was not available to them." 379 U.S. 559, 572, 85 S.Ct. 476 (1965).

Similarly, in *Cox*, the appellant was convicted for demonstrating "near" a courthouse in violation of a Louisiana statute. 379 U.S. at 568. In that case, state agents affirmatively granted permission to the appellants to demonstrate across the street from the courthouse steps. 379 U.S. at 569-70. The Court highlighted that due to the lack of specificity of the statute, it was foreseeable that a degree of "on-the-spot" administrative interpretation by officials charged with responsibility for administering and enforcing the statute would occur. 379 U.S. at 568. Consequently, it was apparent that the demonstrators in the case would be justified in relying on the administration of how *near* to the courthouse a demonstration could take place. 379 U.S. at 569.

The Tenth Circuit has expounded on this defense and concluded that entrapment by estoppel is implicated where "an agent of the government affirmatively misleads a party as to the state of the law and that party proceeds to act on the misrepresentation so that criminal prosecution of the actor implicates due process concerns under the Fifth and Fourteenth Amendments." *U.S. v. Nichols*, 21 F.3d 1016, 1018 (10th Cir. 1994). This defense requires "an 'active misleading' by the government agent." 21 F.3d at 1018. Also, there must be "actual reliance by the defendant." 21 F.3d at 1018. Further, the defendant's reliance must be reasonable in light of (1) the identity of the agent; (2) the point of law misrepresented; and (3) the substance of the misrepresentation. 21 F.3d at 1018.

Finally, the government agent must be one who is "responsible for interpreting, administering, or enforcing the law defining the offense." *U.S. v. Hardridge*, 379 F.3d

1188, 1192 (10th Cir. 2004). It is noteworthy, however, that at the federal level, "the courts invoke the doctrine of estoppel against the government with great reluctance." *U.S. v. Gutierrez-Gonzalez*, 184 F.3d 1160, 1166 (10th Cir. 1999). In the end, like our sister circuit has held, "entrapment by estoppel rests upon principles of fairness, not defendant's mental state." *U.S. v. Smith*, 940 F.2d 710, 714 (1st Cir. 1991).

A defendant bears the burden of proving entrapment by estoppel. *U.S. v. Batterjee*, 361 F.3d 1210, 1216 (9th Cir. 2004); *see also U.S. Benning*, 248 F.3d 772, 775 (8th Cir. 2001). Additionally, an argument that is not supported with pertinent authority is deemed waived and abandoned. *State v. Berriozabal*, 291 Kan. 568, 594, 243 P.3d 352 (2010). Although the State concedes the State agent, the Sheriff's Office, was the one responsible for administering or enforcing the law defining the offense, the State asserts there is insufficient evidence to show active misleading or reliance, and even if this Court finds reliance, such reliance was nevertheless unreasonable.

1. The State did not actively mislead Eden into believing that registering beyond the statutory imposed deadline was legal.

A defendant must prove there was an active misleading by a government agent before he can be entitled to use the entrapment by estoppel defense. *Nichols*, 21 F.3d at 1016, 1018 (10th Cir. 1994). As a practical matter, the inquiry is whether the defendant was advised by a government official that the act was legal; "entrapment by estoppel has been held to apply when an official assured a defendant that certain conduct is legal." See *U.S. v. Smith*, 940 F.2d 710, 714-15 (1st Cir. 1991); *see also U.S. v. Ramirez-Valencia*, 202 F.3d 1106, 1109 (9th Cir. 2000) (defendant must show that the government affirmatively told him the proscribed conduct was permissible); *U.S. v. Stewart*, 185 F.3d

112, 124 (3d Cir. 1999) (government official told defendant that certain criminal conduct was actually legal).

Limiting this defense to instances where the State agent actually told the defendant the proscribed actions would be legal, seems to be consistent with the general policy that courts invoke this doctrine with great reluctance. *U.S. v. Gutierrez-Gonzalez*, 184 F.3d 1160, 1166 (1999). Were this not so, the narrow exception of entrapment by estoppel would swallow the general rule and eviscerate the long-standing notion that ignorance of the law is no defense to a crime. *See Shevlin-Carpenter Co. v. State*, 218 U.S. 57, 68, 30 S.Ct. 663 (1910) (ignorance of the law is no defense).

Furthermore, as a general matter, general language in judicial opinions are often read "as referring in context to circumstances similar to the circumstances then before the Court and not referring to quite different circumstances that the Court was not then considering." *Illinois v. Lidster*, 540 U.S. 419, 424, 124 S.Ct. 885 (2004). The Court in *Raley* deliberately chose the phrase "active misleading" as a prerequisite to advancing an entrapment by estoppel defense. *Raley v. Ohio*, 360 U.S. 423, 438, 79 S.Ct. 1257 (1959). Accordingly, simply "misleading" a defendant is not enough. In this case, Eden fails to show how the State actively misled him into thinking that registering after the last day of November would be legal. The evidence fails to show the exact details of the conversations between Eden and the Sheriff's Office. (R. X, 54-55.) It is unknown whether Eden informed the Sheriff's Office that he needed to register in November or that he told the Sheriff's Office his registration date in December would be after his statutory deadline. Ultimately, Eden does not allege on appeal that he told the Shawnee County Sheriff's agent that his deadline was soon to expire or that the agent told him

Eden would be in compliance regardless of when he actually registered, nor is there any evidence to support that argument.

Moreover, it is apparent that in *Raley*, the Court extended the application of this defense to circumstances where the government agent explicitly gave assurances to three appellants that their actions were legal and implicitly gave the same impression of legality to the fourth appellant. 360 U.S. at 437. It appears uncontroverted that Eden has failed to present any support for the proposition that the Shawnee County Sheriff's agent explicitly told Eden that he would be in compliance regardless of when he registered. Therefore, given the facts of this case, the ultimate issue in this initial analysis is whether the State, through its agent, implicitly acknowledged or ratified the conduct of Eden as legal.

In *Raley*, it was clear the government agent acknowledged and ratified the legality of the fourth appellant's actions when "once [the fourth appellant] made it clear that he was claiming the privilege as to a question, [the fourth appellant] was never directed to answer." 360 U.S. at 431. This case is distinguishable, however, because it is unknown whether at any point during the first telephone conversation, Eden appraised the Shawnee County Sheriff's agent that his registration deadline was on November 30, 2010. If Eden had apprised the agent of this deadline and the agent subsequently had acknowledged or ratified Eden's registration date, then the facts would be the same as the facts in *Raley*; effectively, the agent would have actively misled Eden by implication.

Consequently, because the facts in this case are not sufficient to show explicit or implicit active misleading, the defense of entrapment by estoppel is unavailable to Eden. *See Batterjee*, 361 F.3d at 1216 (9th Cir. 2004) (defendant's burden to prove entrapment

by estoppel); *see also Kidd*, 239 Kan. at 601 (appellants bear the burden to compile a record sufficient to support their arguments); *Berriozabal*, 291 Kan. at 594 (an argument not supported with pertinent authority is deemed waived and abandoned).

2. Because the State did not actively mislead Eden into believing that registering beyond the statutory imposed deadline was legal, there was no actual reliance by the defendant.

The next requirement a defendant must meet to be entitled to assert entrapment by estoppel is to show actual reliance on the active misleading by the government. *U.S. v. Nichols*, 21 F.3d 1016, 1018 (1994). To find actual reliance as a result of the active misleading after Eden has failed to demonstrate the government actively misled him would be a logical *non sequitur*. The State, therefore, asserts there was no actual reliance by Eden in this case.

Alternatively, even if this Court finds the State actively misled Eden, ultimately, there was no actual reliance by Eden. Detective Wheeles testified that Eden admitted he was told, when he was scheduling a date to register, that "he was out of compliance, and that that was a vital [part] of the law, and that he could be in trouble for that." (R. X, 20). Eden also acknowledged during the interview with Detective Wheeles that he was noncompliant and had failed to register. (R. X, 21.) It appears, however, that he also did not tell Detective Wheeles that the State promised him he would be in compliance by registering after November.

Moreover, it is clear Eden was aware of the requirements mandated by the KORA. Eden confirmed to Detective Wheeles that he read and signed numerous copies related to the KORA during the last time he registered, admitted that he was aware of the restrictions, and confessed that he missed registration for his mandatory birthday month

in November. (R. X, 21.) Because Eden admitted to reading the numerous copies related to the KORA, he was obviously aware that making a phone call was not enough to be in compliance with the KORA. This is supported by Detective Wheeles's testimony that calling to the Sheriff's Office did not meet the compliance requirements which were explicit in the form that offenders sign when they register. (R. X, 30.) In fact, the form explicitly required offenders to register in person with the Sheriff's Office during the required months. (R. X, 30.) Therefore, it is illogical for Eden to say that when he was scheduling the appointments, he was under the impression that he was complying with the registration policies in the KORA. (R. X, 57.) Actually, this argument contradicts his prior testimony that he knew he was required to register in person and that making a call would not be enough for compliance. (R. X, 53.) This is apparent because he admitted during cross-examination that he was responsible for going to the Sheriff's Office to register and that he was responsible for remaining in compliance with the KORA. (R. X, 60.)

Furthermore, unlike the facts in *Cox*, where State agents had considerable discretion on determining which acts would be considered in compliance with the law, Eden testified that he was required to register since 2007. (R. X, 52, 60.) This means he knew the procedures and what he needed to complete in order to be in compliance. Eden knew that in 2010 he was required to register every three months and on the month of his birthday. (R. X, 52.) He was very much aware he was supposed to register before the month of his birthday ended and that he was to report in person. (R. X, 53.) In fact, he was aware that he needed to follow the process of making an appointment and that he could no longer just report to the Sheriff's Office without an appointment. (R. X, 53.)

Therefore, he knew he needed to give himself and the Sheriff's Office enough time to setup a registration date; after all, like he said, it was his responsibility to register.

Ultimately, the State contends that if there was any reliance, this occurred after Eden had already committed the crime. Eden may have erroneously believed that he was in compliance because he was not taken into custody when he went to the Sheriff's Office on December 8, 2010. (R. X, 62.) However, this reliance actually took place after November ended. This means he already committed the act of failing to register in November by his own volition.

Therefore, because Eden has failed to show actual reliance, he cannot avail himself of the defense of entrapment by estoppel.

3. Even if the State actively misled Eden and he actually relied on the State's actions, his reliance was nevertheless unreasonable.

The last element required for the defense of entrapment by estoppel is a showing that Eden's reliance was reasonable in light of (1) the identity of the agent; (2) the point of law misrepresented; and (3) the substance of the misrepresentation. *U.S. v. Nichols*, 21 F.3d 1016, 1018 (10th Cir. 1994). Other circuits that include the prongs above have also required for the defendant to show the reliance on the alleged misrepresentations were reasonable and in good faith. *See U.S. v. Baker*, 438 F.3d 749, 755-56 (7th Cir. 2006); *see also* U.S. *v. West Indies Transp. Inc.*, 127 F.3d 299, 313 (3d Cir. 1997). Ultimately though, this is an objective standard and circuit courts have indicated that reasonable reliance means the defendant must establish that "a person truly desirous of obeying the law would have accepted the information as true, and would not have been put on notice to make further inquiries." *See West Indies Transp. Inc.*, 127 F.3d at 312-13; *see also*

U.S. v. Treviño-Martinez, 86 F.3d 65, 69 (5th Cir. 1996); *U.S. v. Batterjee*, 361 F.3d 1210, 1216-17 (9th Cir. 2004); *and U.S. v. Abcasis*, 45 F.3d 39, 44 (2d Cir. 1995). Altogether, the paramount principle behind these decisions appears to be that the reliance must be objectively reasonable.

It appears the KORA specifically gives the director of the Kansas Bureau of Investigation the authority to "adopt rules and regulations necessary to implement the provisions of the Kansas offender registration act." K.S.A. § 22-4904(e)(2). However, given the circumstances of this case where Deputy Emily Adams was the only deputy in charge of registrations and investigations of approximately 800 registered offenders in Shawnee County, Kansas, it is reasonable to conclude that Eden could have reasonably relied on the apparent authority of this State agent. (*See* R. X, 15.)

Most importantly, however, Eden's reliance was ultimately unreasonable in light of the point of law misrepresented and the substance of the misrepresentation. Eden cannot establish that his reliance was in good faith. He also cannot establish that a person truly desirous of obeying the law would have accepted the information Eden received as true and would not have been put on notice to make further inquiries given the circumstances of this case.

The State hereby incorporates all the arguments raised in the prior subsection when it asserted there was no actual reliance in this case and further contends it is simply unreasonable for Eden to blame the State for his noncompliance without presenting any evidence that would show the State telling Eden he would be in compliance even if he registered in December 2010. This argument is actually supported by Eden's uncontested testimony and admission that he was responsible for going to the Sheriff's Office to

register and that he was also responsible for remaining in compliance with the KORA. (R. X, 60.) Plus, by his own volition Eden testified that he knew he was required to register in person; therefore, making a telephone call would not be enough for compliance. (R. X, 53.) Finally, during the interview with Detective Wheeles, Eden admitted he was told, when he was scheduling a date to register for the first time, that "he was out of compliance, and that that was a vital [part] of the law, and that he could be in trouble for that." (R. X, 20).

Apparently Eden did not tell Detective Wheeles that the State promised him he would be in compliance by registering after November; in fact, Eden just told Detective Wheeles that he was not in compliance and had failed to register. (R. X, 21.) In the end, Eden cannot even make a subjective argument asserting that his naiveté led him to believe "it was ok" to register in December 2010. This was not the first time he had to register; he was required to register since 2007. (R. X, 52, 60.) It follows that he was likely aware that failing to follow the requirements could render him noncompliant. (R. X, 74-75.)

Consequently, because Eden has failed to show that his actual reliance was reasonable, he cannot avail himself of the defense of entrapment by estoppel.

B. Eden's failure to register on time was a result of his own negligence and not caused by the operating procedures of the Sheriff's Office.

In addition to the entrapment by estoppel claim based on the Due Process Clause, Eden attempts to bootstrap an argument based on fundamental fairness without demonstrating why it is reviewable for the first time on appeal. *See State v. Gomez*, 290 Kan. 858, 862, 235 P.3d 1203 (2010) (providing three exceptions to general rule that

issues cannot be raised for the first time on appeal). Most of the arguments raised in support of reviewing the entrapment by estoppel issue for the first time on appeal entailed reliance by Eden, not fairness of the operating procedures which prevented Eden from timely completing his offender registration. Therefore, Eden's failure to brief an exception has waived this issue. *See State v. Berriozabal*, 291 Kan. 568, Syl. ¶ 1, 243 P.3d 352 (2010) (if appellant fails to brief an issue, the issue is waived or abandoned).

Even if this argument is reviewable, Eden cites no authority in support of his contention that his conviction cannot stand because the Sheriff Office's operating procedures denied Eden fundamental fairness as required by the Due Process Clause. Eden cites no cases that reflect this argument having any merit or any authority that shows that this argument can result in a court order vacating a defendant's conviction. Consequently, Eden's argument fails because an argument not supported with pertinent authority is deemed waived and abandoned. 291 Kan. at 594. Eden needs to do more than simply raise this issue incidentally in his appellate brief. 291 Kan. at 594.

Moreover, Eden's argument is weakened by his own actions. Historically, the law tends to be apathetic towards individuals who are the authors of their own predicaments. *See generally Boddington v. Kansas City*, 95 Kan. 189, 189, 148 P. 252 (1915) (the law does not afford one redress against another for damages he has brought upon himself); *see also State v. O'Neil*, 51 Kan. 651, Syl. ¶ 4, 24 L.R.A. 555 (1893) (voluntary intoxication is no justification or excuse for crime). "Under a due process analysis, it is a basic principle that a criminal statute must give fair warning that it is criminalizing certain conduct." *State v. Cook*, 286 Kan. 766, 775, 187 P.3d 1283 (2008). In *Cook*, the Court determined the defendant had fair warning that he was engaging in

illegal conduct after the pertinent statute was amended, which meant the principles underlying the Ex Post Facto Clause did not apply to protect his failure to register after the amendments became effective. 286 Kan. at 776.

Here, Eden invited his own predicament by procrastinating and not contacting the Sheriff's Office in a timely manner. By way of his own testimony, he admitted that he was responsible for going to the Sheriff's Office to register and that he was responsible for remaining in compliance with the KORA. (R. X, 60.) Further, he has been registering since 2007. (R. X, 52.) Therefore, he was aware of the registration procedures used by the Sheriff's Office, which required in-person registration. (R. X, 52.) Nevertheless, Eden procrastinated and waited until the middle of November, 2010 to contact the Sheriff's Office. (R. X, 54-55.) He was not able to reach the person who could schedule his appointment. But, instead of remaining persistent until he was able to speak to someone who could schedule his appointment, he waited a "few days" or "a week" before he attempted to call again. (R. X, 55.) As a practical matter, he waited until approximately three-fourths of the month of November was over before he scheduled his appointment. This is not a case in which the registration procedures were changed without notice to Eden or was Eden's first time registering under the KORA. Eden was very much aware of the procedures and of his responsibility to register.

Consequently, Eden's argument fails. His conviction was not the result of unfair registration procedures, but rather the consequence of his own procrastination and lack of judgment.

II. THE DISTRICT COURT DID NOT ERR IN REFUSING TO INSTRUCT THE JURY ON THE DEFINITION OF "GENERAL INTENT" BECAUSE EDEN'S INTENT WAS NOT SUBSTANTIALLY AT ISSUE.

STANDARD OF REVIEW

Recently, the Kansas Supreme Court in *State v. Plummer*, 295 Kan. 156, 163, 283 P.3d 202 (2012), reiterated the progression of analysis and corresponding standards of review on appeal for instruction issues:

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

295 Kan. at 163.

A. The State concedes the present issue was preserved for review on appeal.

Presumably, Eden preserved this issue by submitting his proposed instructions to the Court and subsequently arguing for the submission of the instruction at issue in this appeal. (R. I, 49.) *See State v. Moore*, 230 Kan. 495, 498, 639 P.2d 458 (1982); *see also State v. Gonzales*, No. 90,768, unpublished opinion filed Sept. 17, 2004, *rev denied*, Jan. 20, 2005.

B. Instruction PIK.CRIM.3d 54.01-A was not legally appropriate because of the evidence before the district court.

The Kansas Supreme Court in *State v. Plunkett*, 261 Kan. 1024, 934 P.2d 113 (1997) held the general criminal intent instruction, PIK Crim.3d 54.01-A, "should be

used only where the crime requires a general criminal intent and the state of mind of the defendant is a substantial issue in the case." 261 Kan. at Syl. ¶ 4. The general criminal intent is an essential element of every crime. K.S.A. § 21-5202(a). It may be established by proof that the conduct of the accused was intentional. *State v. Cummings*, 45 Kan.App.2d 15, 18 (2010); K.S.A. § 21-5201. "Intentional conduct is defined as conduct that is purposeful and willful and not accidental." *In re C.P.W.*, 289 Kan. 448, 454, 213 P.3d 413 (2009). In effect,

> "[t]o prove general intent, it is not necessary for the State to prove that the defendant intended the precise harm or the result that occurred. Further, the State is not obligated to prove an intent to violate a particular statute but rather the intent to do the criminal act which violated the statute. In other words, *all that is required is proof that the person acted intentionally in the sense that he was aware of what he was doing.*"

289 Kan. at 454 (citations omitted) (emphasis added).

Failure to comply with the requirements of the KORA as defined in K.S.A. § 22-4903 is a general intent crime. 289 Kan. at Syl. ¶ 6. "Specific intent does not have to be proven." 289 Kan. at ¶ 6. Consequently, the State concedes the crime in this case required general criminal intent. Ultimately, however, the district court did not err in not providing the jury with PIK Crim.3d 54.01-A because Eden's state of mind was not a substantial issue in this case.

In *State v. Plunkett*, 261 Kan. 1024, 1031, 934 P.2d 113 (1997), the Court addressed a similar issue. The crime in *Plunkett* was rape, which was also a general criminal intent crime. 261 Kan. at 1031. The defendant's theory of defense was that the victim consented. 261 Kan. at 1032. The Court concluded that under the defendant's own theory, he appeared to concede that his sexual conduct was "willful and purposeful and, thus, intentional." 261 Kan. at 1032. Consequently, the defendant's state of mind

was not a substantial issue in that case. 261 Kan. at 1032. Although the remaining elements of the crime of rape concerned the state of mind of the victim, whether the defendant thought his victim consented or was not fearful was irrelevant if the State proved that she did not consent and was overcome by fear. 261 Kan. 1032.

By the same token, it is irrelevant in this case Eden's reasons for his failure to register within the statutory period. In order for Eden's state of mind to be a substantial issue in this case, the evidence presented should have casted doubt on whether Eden acted intentionally "in the sense that he was aware of what he was doing." *In re C.P.W.*, 289 Kan. at 454. Here, sufficient evidence existed of Eden's voluntary actions which constituted the crime charged. First, based on the testimony admitted at trial, his actions showed that he was aware of what he was doing. Second, even Eden's own arguments pertaining to the first issue on appeal support the conclusion that Eden's actions were voluntary, which dispel any notion that his state of mind was an issue, let alone a substantial issue, for determination at trial in this case.

At trial, Detective Wheeles testified that Eden confirmed, during his interview, that he missed his mandatory registration month in November 2010. (R. X, 20.) "[Eden] had called in and left a voice mail message saying that he didn't have the $20 registration fee and that's why he hadn't come in." (R. X, 20.) Eden also acknowledged that he was not in compliance and had not registered. (R. X, 21.) Eden actually confirmed that he had read and signed numerous copies of the registered offender restrictions, indicated he was aware of the restrictions, and admitted he missed the mandatory birthday month in November. (R. X, 21.)

Also, it is clear from the record that Eden's first appointment was on December 8,

2010. (R. X, 20, 55.) This means Eden was aware he was not going to be able to register in November 2010. No evidence was presented suggesting he was unaware of his actions; specifically, that he was not registering during the month of November 2010 or that his act of failing to register was accidental. Even though he was argumentative, Eden testified that he did not register in person in November 2010. (R. X, 61.) He was very much aware that he needed to register sometime between the first and the thirtieth of November 2010, and that it would take 15 to 20 minutes. (R. X, 60, 61).

Furthermore, as part of his first issue on appeal, Eden argued that he allegedly relied on the State's assertion that he could register beyond the statutory period. (Appellant Br. 12). In view of this contention, it follows that Eden was aware he was not registering in November 2010. He made a conscious act, not accidental, to not register within the statutory period. Arguments regarding the reasonableness of his reliance or whether his reliance on the alleged contentions made by the State has any relief are not relevant on the present issue. The ultimate question is whether his act was voluntary in the sense that he was aware of what he was doing.

Noteworthy, moreover, is Eden's failure to provide enough support for a finding that the instruction at issue was legally appropriate. Eden does not cite to the record for support. *See* Kan. Sup. Ct. R. 6.02(a)(4) (the Court may presume that a factual statement made without a reference to volume and page number has no support in the record on appeal); *see also State v. Holman*, 295 Kan. 116, 139, 284 P.3d 251 (2012) (a point raised incidentally in a brief and not argued there is deemed abandoned). Eden's two conclusory sentences in support of the point raised regarding the instruction's legal appropriateness are wanting.

Consequently, Eden's arguments in support of his contention that the instruction was legally appropriate fail due to Eden's failure to provide enough support on this point and because Eden's state of mind was not a substantial issue in the case; he was aware of what he was doing, which means his acts were not accidental.

C. Even if the evidence submitted to the district court is viewed in the light most favorable to Eden, the amount of evidence was not sufficient to warrant instruction PIK.CRIM.3d 54.01-A.

On appeal, "[w]hen considering the refusal of the trial court to give a specific instruction, the evidence must be viewed by the appellate court in the light most favorable to the party requesting the instruction." *State v. Cummings*, 45 Kan. App. 2d 15, 20, 243 P.3d 697 (2010). However, "deference is given to the factual findings made [by the trial court], in the sense that the appellate court generally will not reweigh the evidence or the credibility of witnesses." *Plummer*, 295 Kan. at 207-08 (citing *State v. Hall*, 292 Kan. 841, 859, 257 P.3d 272 (2011)).

The evidence in this case did not show Eden's failure to register as an involuntary act or accident, but rather it demonstrated that Eden's actions were done voluntarily and that he was aware of what he was doing. At no point during trial did Eden allege that his failure to register was accidental.

According to Detective Wheeles, Eden did not register in November 2010. (R. X, 18.) During the interview with Eden, Detective Wheeles testified that Eden confirmed he missed his mandatory registration month. (R. X, 20, 21.) He was aware he had failed to register. Detective Wheeles also indicated that Eden had left a voice mail message saying that he did not have the $20 registration fee, which was the reason he had not registered. (R. X, 20.) This tends to show that Eden may not have intended to register

because he did not have the money necessary to register. Eden also told the detective that he had scheduled an appointment for December 8, 2010. (R. X, 20.) Clearly, if Eden attended his appointment, then he did not intend to register in November 2010. This is supported by Eden's confession to the detective that he went to register on December 8, 2010, but missed his appointment because he was late. (R. X, 20-21.) Ultimately, Detective Wheeles testified during the State's case-in-chief and concluded by stating that it was his understanding Eden did not attempt to register in November 2010. (R. X, 21.)

Although the detective did not know whether Eden tried to call the Sheriff's Office in November 2010, Eden testified that he did call. (R. X, 54-55.) However, this is inconsequential on the issue of intent; specifically, whether Eden's failure to register was voluntary because he was aware of what he was doing. Ultimately, even though Eden argued he tried to register, he did admit during cross-examination that he did not register in person in November 2010. (R. X, 61.) It is also noteworthy in this respect that he also admitted that he was aware he was required to register in person. (R. X, 68.) It is obvious, therefore, that he knew he had to register in person.

Consequently, in order for Eden's intent to be substantially at issue, evidence must exist showing that his failure to register was accidental. Whether Eden called the Sheriff's Office in November 2010 is irrelevant; the law required him to register in person and he testified he was aware of this requirement. It is clear that Eden's intent was to not register in November 2010 because he was told to register in December 2010.

D. The district court's failure to submit PIK.CRIM.3d 54.01-A to the jury was a harmless error because the State can prove beyond a reasonable doubt that this error did not affect the outcome of the trial.

Even if the instruction was legally appropriate and supported by sufficient evidence, the district court's error was harmless under the facts and circumstances of the instant case. The Kansas Supreme Court in *Plummer* explained this last part of the analysis in the following manner:

> "[b]efore a Kansas court can declare an error harmless it must determine the error did not affect a party's substantial rights, meaning it will not or did not affect the trial's outcome. The degree of certainty by which the court must be persuaded that the error did not affect the outcome of the trial will vary depending on whether the error implicates a right guaranteed by the United States Constitution. If it does, a Kansas court must be persuaded beyond a reasonable doubt that there was no impact on the trial's outcome, *i.e.*, there is no reasonable possibility that the error contributed to the verdict. If a right guaranteed by the United States Constitution is not implicated, a Kansas court must be persuaded that there is no reasonable probability that the error will or did affect the outcome of the trial. "

Plummer, 295 Kan. at 162-63 (citing *State v. Ward*, 292 Kan. 541, 565, 256 P.3d 801 (2011)). In the case at bar, the State challenges Eden's position on a procedural ground and further maintains the error was harmless even though the error at issue, arguably, implicated a right guaranteed by the United States Constitution.

1. Because Eden failed to provide authority supporting the contention that failure to submit PIK.CRIM.3d 54.01-A implicates a right guaranteed by the United States Constitution, he has in effect waived and abandoned this last part of the analysis.

Eden correctly asserts a defendant has a fundamental right to present his theory of defense. However, he cites no authority supporting the contention that failure to submit to the jury PIK.CRIM.3d 54.01-A contravenes Eden's fundamental right to present his theory of defense. In *State v. Houston*, 289 Kan. 252, 261, 213 P.3d 728 (2009) the Court

acknowledged precedent that a defendant is entitled to present his defense and that his fundamental right to a fair trial is violated if evidence that is an "integral part" of the theory is excluded. 289 Kan. at 261. It made no reference to the instruction at issue.

Similarly, Eden also cites *State v. Sappington*, 285 Kan. 158, 164-65, 169 P.3d 1096 (2007) for the proposition that a defendant's right to present his theory of defense includes the right for the jury to be instructed on a defendant's theory of defense. (Appellant Pet. 17.) In *Sappington* the Court asserted that it was fundamental to a fair trial that the accused be afforded the opportunity to present his or her theory of defense. 285 Kan. at 165. However, the focus was on the implications of having the trial court impose a defense upon a defendant which was arguably inconsistent with the one upon which he completely relied at trial. 285 Kan. at 165. The Court concluded that providing the jury a defense instruction that neither party requested was "akin to denying the defendant the meaningful opportunity to present his chosen theory of defense." 285 Kan. at 165. The instruction at issue pertained to voluntary intoxication, not PIK.CRIM.3d 54.01-A. *See* 285 Kan. at 165.

Consequently, because Eden has failed to provide authority in support of the proposition that failure to provide PIK.CRIM.3d 54.01-A is a violation to Eden's fundamental right to present his theory of defense, Eden has effectively waived and abandoned the issue of whether the district court's alleged error was harmless. *Berriozabal*, 291 Kan. 568, 594, 243 P.3d 352 (2010) (an argument not supported with pertinent authority is deemed waived and abandoned). The State does note, however, "like most constitutional violations, an instructional error on an element of the offense is generally subject to harmless error review." *U.S. v. Holly*, 488 F.3d 1298, 1305 (10th

Cir. 2007). While in *Neder v. United States*, 527 U.S. 1, 119 S.Ct. 1827 (1999), the Court only addressed the application of "harmless error review to a jury instruction that omitted an element of the offense, its holding applies with equal force to the misdescription of an element." *See Holly*, 488 F.3d at fn. 1(citations omitted).

2. Even if this Court accedes to review this issue, the evidence shows beyond a reasonable doubt that there was no impact on the trial's outcome because there was no reasonable possibility that the error contributed to the verdict.

The State hereby incorporates all the arguments raised in the prior subsection when it asserted there was no sufficient evidence to warrant the instruction at issue. Further, in this case, the district court submitted to the jury PIK.CRIM.3d 54.01, which has been held to be an inference of intent instruction that pertains to the presumption of intent which is merely a rule of evidence. *State v. Ellmaker*, 289 Kan. 1132, 1143 (2009). The instruction, however, was designed to make it crystal clear that the presumption was only a permissive inference, leaving the trier of fact free to consider or reject it. 289 Kan. at 1143. In fact, the district court in this case instructed the jury, "[y]ou may accept or reject [the inference] in determining whether the state has met its burden to prove the required criminal intent of the defendant, and this burden never shifts to the defendant." (R. X, 92.) This means the trier of fact could have easily rejected the inference and determined the State failed to meet its burden.

On the other hand, submitting to the jury the instruction in dispute would only have helped convict Eden. The instruction stated "[i]n order for the defendant to be guilty of the crime charged, the State must prove that (his)(her) conduct was intentional. Intentional means willful and purposeful and *not accidental*. Intent or lack of intent is to be determined or inferred from all of the evidence in the case." PIK.CRIM.3d 54.01-A

(emphasis added). This instruction explicitly stated that an intentional act meant it was not accidental. Eden did not present any evidence showing that his failure to register was accidental. In fact, he admitted that he simply failed to register in person in November 2010. (R. X, 61.) Moreover, it was uncontested that he was given a date to register in December. According to the State's evidence, Eden told the detective that he had scheduled an appointment for December 8, 2010. (R. X, 20). Additionally, Eden himself testified that when he spoke with the Sheriff's Office he was given a date to register on December 8, 2010. (R. X, 55).

In the end, if the district court submitted PIK.CRIM.3d 54.01-A to the jury, this would have only helped the State convict Eden. As explained previously, there was no evidence that Eden's failure to register was accidental and it has always been Eden's position that intent was the only element in dispute. (R. X, 97; Appellant Pet. 10.)

Consequently, the district court's failure to submit PIK.CRIM.3d 54.01-A to the jury was harmless. The evidence shows beyond a reasonable doubt that the district court's error would not have impacted the trial's outcome. In fact, it would only have reassured the State's ability to convict Eden by instructing the jury that the State only needed to prove the failure to register was an intentional act, which meant it was not accidental.

III. THE STATE PRESENTED SUFFICIENT EVIDENCE TO SUSTAIN EDEN'S OFFENDER REGISTRATION CONVICTION.

In this case, the State was required to prove beyond a reasonable doubt the following elements: (1) that the defendant had previously been convicted of a crime that required registration under the KORA; (2) that the defendant failed to report in person during the month of his birthday to the Sheriff's Office; and (3) that this act occurred on

or about the 1st day of December, 2010, in Shawnee County, Kansas. PIK Crim.3d 54.01-A; K.S.A. § 22-4903; K.S.A. § 22-4905. On appeal, Eden takes issue mostly with the element of the required intent to commit the crime charged. (Appellant 's Brief, 19-21.) Even at trial, Eden argued during closing arguments that the only element in dispute was whether Eden "failed to register in the month of November at the Sheriff's Office." (R. X, 97.) Consequently, whether the State proved beyond a reasonable doubt its case is ultimately centered on the element of intent because the other elements were, in effect, uncontested.

STANDARD OF REVIEW

On appeal, "[w]hen sufficiency of the evidence is challenged in a criminal case, the standard of review is whether, after reviewing all the evidence in a light most favorable to the prosecution, the appellate court is convinced a rational factfinder could have found the defendant guilty beyond a reasonable doubt." *State v. Qualls*, 298 P.3d 311, 315 (2013). Ultimately, "[a]ppellate courts do not reweigh evidence, resolve evidentiary conflicts, or make witness credibility determinations." 298 P.3d at 315.

It is well established that the due process "requires the State to prove every element of a crime beyond a reasonable doubt." *State v. Robinson*, 256 Kan. 133, 136, 883 P.2d 764 (1994) (citing *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068 (1970)). As previously stated, the failure to register as required by the KORA under K.S.A. § 22-4903 and K.S.A. § 22-4904 is a general intent crime. *In re C.P.W.*, 289 Kan. 448, 456, 213 P.3d 413 (2009). "Intentional conduct is defined as conduct that is purposeful and willful and not accidental." 289 Kan. at 454. The State only needs to prove that an intent to do the criminal act which violated the statute. 289 Kan. at 454. "[A]ll that is required is

proof that the person acted intentionally in the sense that he was aware of what he was doing." 289 Kan. at 454.

Here, the contested issue by Eden was the element of intent. At trial, Eden chose to stipulate his duty to register. The district court read to the jury, "[t]he parties in this case hereby stipulate that the defendant, James Michael Eden, was previously convicted of a crime that requires registration under the Kansas Registration Act." (R. X, 43). It was uncontested that Eden's appointment was eventually rescheduled for December 16, 2010. (R. X, 56-57.) Plus, on appeal, Eden asserts he eventually registered on December 16, 2010. (Appellant's Brief, 20.) Therefore, whether at the district court level or on appeal, Eden asserted that the only contested issue was whether he intentionally failed to register in November 2010.

At trial, during closing arguments, Eden indicated to the jury that the only element in dispute was whether Eden failed to register in the month of November at the Sheriff's Office. (R. X, 97.) However, no evidence was presented to show that Eden's failure to register was accidental or that he was not aware of what he was doing. Eden was aware that he was not going to register in November 2010. Eden told Detective Wheeles that he had scheduled an appointment for December 8, 2010. (R. X, 20.) Inevitably, if Eden was aware that he was going to register in December 2010, it follows that he was also aware that he was not going to register in November 2010. Moreover, it was uncontested that Eden did not register in November 2010. (R. X, 18, 61.) Eden did not plead ignorance as an excuse for his actions. Eden was aware of the procedures he needed to follow to remain complaint under the KORA because he admitted that he was registering under the KORA since 2007. (R. X, 60.) He even admitted that he was aware

that he was required to register in person. (R. X, 68.)

Even though there was more than one explanation why Eden failed to register in November 2010, these are ultimately inconsequential. During the State's case-in-chief Detective Wheeles testified that Eden had left a voice mail message saying that he did not have the $20 registration fee, which was the reason he had not registered. (R. X, 20.) This suggests Eden's financial complications may have prevented Eden from registering. Eden, however, indicated that he waited until the middle of November to set up an appointment to register. (R. X, 55.) He was unsuccessful during his first attempt to contact the Sheriff's Office, but he waited about a week before he called again. (R. X, 55.) This means, arguably, that he waited until the last week of November to set up an appointment. Eden was then scheduled to register on December 8, 2010. (R. X, 55-56.) Regardless of the reason why Eden failed to register, there is no question that he intended to do the criminal act; specifically, to not register in November 2010. It is clear that Eden was aware of what he was doing because he clearly intended to register in December 2010, which is the reason why he went to his appointment, however late, on December 8, 2010. (R. X, 56). By intending to register in December 2010, he intended to not register in November 2010.

Therefore, the State has met its burden in proving every element of the charge beyond a reasonable doubt. When the evidence is reviewed in the light most favorable to the prosecution, it is clear that the jury in this case could have found the defendant guilty beyond a reasonable doubt. In this case, unlike many others in the criminal spectrum, Eden's own admissions served as evidence that he did not register in November 2010 and that he was aware that he would not be registering on that month.

IV. THE DISTRICT COURT DID NOT VIOLATE EDEN'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS WHEN IT USED EDEN'S PRIOR CONVICTIONS TO INCREASE HIS SENTENCE WITHOUT REQUIRING THE STATE TO PROVE THEM TO A JURY BEYOND A REASONABLE DOUBT.

Eden argues that his Sixth and Fourteenth Amendment rights were violated when the district court used his prior convictions to enhance his sentence without requiring the State to prove them to a jury beyond a reasonable doubt in violation of *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000).

This is essentially a challenge to the constitutionality of the Kansas Sentencing Guidelines Act, over which this court has unlimited review. *State v. Fewell*, 286 Kan. 370, 394, 184 P.3d 903 (2008). Additionally, this court is duty bound to follow precedent of the Kansas Supreme Court, absent some indication the court is departing from its previous position. *State v. Morton*, 38 Kan. App.2d 967, 978-79, 174 P.3d 904, *rev. denied* 286 Kan. 1184 (2008).

Eden concedes that this court has previously decided this issue in *State v. Ivory*, 273 Kan. 44, 41 P.3d 781 (2002), but includes the issue to preserve it for federal review. In *Ivory*, the Kansas Supreme Court held that the defendant's prior convictions do not have to be proven beyond a reasonable doubt to a jury to satisfy *Apprendi*. 273 Kan. at 46. The Kansas Supreme Court has repeatedly reaffirmed its holding in *Ivory*, and this court is duty bound to follow the Court's precedent. See *Fewell*, 286 Kan. at 396; *Morton*, 38 Kan. App.2d at 978.

Based on the controlling authority of *Ivory* and because it is clear that the Kansas Supreme Court is not departing from its precedent, the district court did not violate

Eden's Sixth and Fourteenth Amendment rights. Therefore, Eden's sentence must be upheld.

CONCLUSION

For the above and foregoing reasons, the State respectfully requests that the Kansas Court of Appeals affirm Eden's conviction of violation of the offender registration act.

Respectfully submitted,

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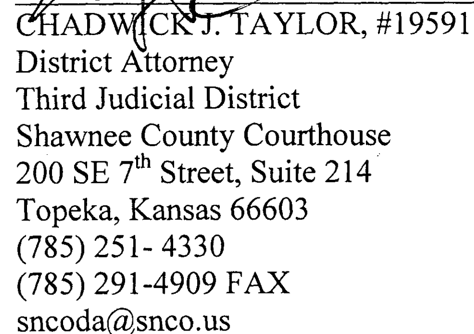

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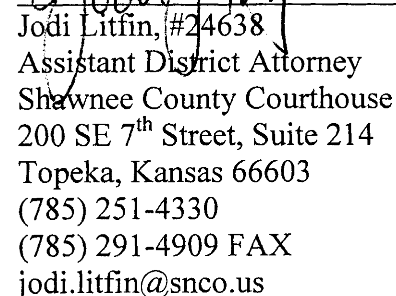

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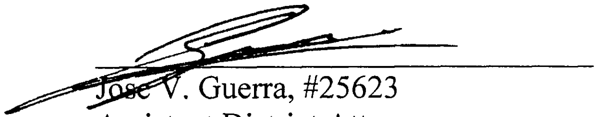

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that service of the above and foregoing **Brief of Appellee** was made by mailing **two (2) true and correct copies**, postage prepaid, on this 3rd day of June, 2013, to:

Christina M. Kerls
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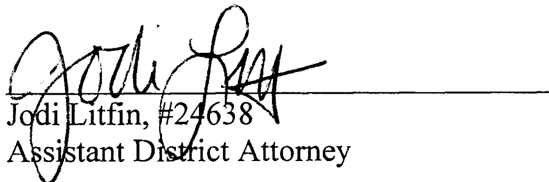

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