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CAROL G. GREEN
CLERK OF APPELLATE COURTS

No. 12-108792-A

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

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**STATE OF KANSAS**
Plaintiff-Appellee

vs.

**CATHY L. HENDRY**
Defendant-Appellant

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# BRIEF OF APPELLANT

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Appeal from the District Court of Franklin County, Kansas
Honorable Thomas H. Sachse, Judge
District Court Case No. 12 CR 21

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## Nature of the Case

A jury convicted Cathy L. Hendry of one count of attempted first-degree murder, a severity level one person felony. (R. I, 43; X, 610.) The district court granted Ms. Hendry's motion for downward durational departure and sentenced her to forty-one months in prison. (R. I, 84; X, 33.) The district court also required Ms. Hendry to register as an offender pursuant to the Kansas Offender Registration Act. (R. I, 95-96; X, 35-37.) Ms. Hendry timely appealed. (R. I, 97).

## Statement of the Issues

**Issue 1:** **There was insufficient evidence of an overt act to support the conviction of attempted first-degree premeditated murder.**

**Issue 2:** **The district court erred in denying Ms. Hendry's motion for mistrial after a prospective juror's answers during jury selection revealed that Ms. Hendry was in custody.**

**Issue 3:** **The district court violated Ms. Hendry's Sixth and Fourteenth Amendment rights under *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), when it increased her punishment by requiring her to register as an offender.**

## Statement of Facts

The breakup of Cathy Hendry and Joseph Soppe's romantic relationship led to the events that resulted in the State charging Ms. Hendry with the attempted first-degree premeditated murder of Soppe. Ms. Hendry met Soppe in September, 2011, and the relationship quickly became serious. (R. IX, 257.) Ms. Hendry believed she had found the love of her life in Soppe. (R. X, 420.) The feeling was mutual; Soppe was planning a future together with Ms. Hendry and had brought up the subject of marriage. (R. IX 258.) In fact, he had found an engagement ring for her and was making payments on it. (R. IX, 257; X, 432.) Soppe was staying over at Ms. Hendry's home most of the time and had

moved many of his things into her home. (R. IX, 256; X, 427.) Soppe's daughter stayed with him at Ms. Hendry's home on the weekends. (R. X, 428.) Ms. Hendry's children became close with Soppe, and he had even discussed adopting Ms. Hendry's daughter. (R. IX, 257; X, 419, 424-25.)

Suddenly, things changed. On January 15, 2012, Ms. Hendry came home from church to find that Soppe had removed most of his belongings from her home, leaving his key to the house and a short note. (R. X, 431.)

After several efforts to get in touch with Soppe to find out what had happened, she went to his house. (R. X, 432-33.) They talked and Soppe reassured her that she did not have to worry, that he was never going to leave her. (R. X, 436.) Soppe explained that he had become concerned that living together was not consistent with his Christian principles. (R. IX, 262; X, 436.) Ms. Hendry admitted she had felt the same way. (R. IX, 262; X, 436.) Ms. Hendry left Soppe's house that day with the impression that things would work out. (R. IX, 261-62; X, 436.)

Over the next ten days, the couple saw each other and talked on the phone several times. At times, Ms. Hendry felt happy and reassured that everything was okay; other times, she felt him pulling away. (R. X, 437-44.) On Tuesday, January 24, Soppe called Ms. Hendry and invited her and her children over to his house for dinner and games the following Sunday. (R. IX, 263; X, 442.) The invitation caused her to feel hopeful for the relationship. (R. X, 443.)

But the next day, Wednesday, January 25, Soppe sent Ms. Hendry a text telling her that God was leading him to reevaluate the relationship. (R. IX, 264.) The pair texted back and forth, with Soppe eventually texting that the relationship was over and that he

wanted to be single. (R. IX, 265; X, 446.)

The next morning, January 26, Soppe sent Ms. Hendry a text asking if he could come over and get his daughter's inflatable bounce house. (R. IX, 199.) He asked her to just set it out in the driveway so he could get it and be gone. (R. IX, 201.)

Ms. Hendry then told her son that she and Soppe had broken up and asked him for a gun. (R. IX, 166.) Ms. Hendry wanted to know if his .20 gauge single shot shotgun worked and he said it did. (R. IX, 161, 168-69.) Ms. Hendry asked for two shells and asked him to show her how to load it, unload it, and shoot it. (R. IX, 169, 175; X, 449.) He showed her that in order to fire the gun, the hammer has to be pulled back before squeezing the trigger. (R. IX, 177.) Ms. Hendry then took the gun to her bedroom and put it behind the door. (R. X, 453.)

After her son and daughter left for school, Ms. Hendry moved the bounce house from the garage to the spare bedroom. (R. X, 453.). She set it down in the back part of the room, next to a plastic bag that contained other items Soppe had left behind. (R. X, 453.)

Soppe arrived and found the bounce house was not out in the driveway. (R. IX, 205.) He texted Ms. Hendry and she came outside through the garage. (R. IX, 207.) They talked in the garage and Soppe told her that the relationship was over. (R. X, 454.) Ms. Hendry told Soppe the bounce house was in the spare bedroom. (R. IX, 211.) Soppe followed Ms. Hendry inside to get the bounce house. (R. IX, 210-11.) When Soppe went into the spare bedroom to retrieve the bounce house, Ms. Hendry went into the master bedroom, directly across from the spare bedroom. (R. IX, 211.)

Soppe was puzzled by the contents of the plastic bag and as he headed out of the spare bedroom to ask Ms. Hendry about it, he saw her heading toward him holding a

shotgun. (R. IX 217.) She was holding it at waist level and had one hand on the guard and a finger on the trigger. (R. IX 218-20, 223, 280.) The gun was not pointed at Soppe; it was pointed up and at a 45 degree angle away from him. (R. IX, 223, 284.)

Soppe's firearms training from his fifteen years in the military kicked in instantly. (R. IX, 221, 255.) He grabbed the gun and pushed Ms. Hendry up against the wall, pinning her with the gun across her chest and the barrel pointed up toward the ceiling. (R. IX, 225, 279; X, 458.) Ms. Hendry fought his attempt to wrest control of the gun. (R. IX, 226.)

He kept her pinned against the wall for about five minutes as he tried to get the gun away from her. (R. IX, 230.) During that time, the only thing Ms. Hendry said was that if she could not have him, she did not want to live. (R. IX, 229.)

According to Soppe, when he grabbed the gun, Ms. Hendry squeezed the trigger; she also squeezed it several more times when she was pinned against the wall. (R. IX, 225, 226-27.) He testified that the gun would not fire because the hammer had not been cocked and when Ms. Hendry realized that, she tried to pull the hammer back. (R. IX, 225.) Ms. Hendry denied squeezing the trigger and trying to pull the hammer back. (R. X, 459.)

Finally, Soppe was able to push the release and pop the barrel, which made the shell fly out of the shotgun. (R. IX, 226.) Soppe then talked Ms. Hendry down and when she stopped struggling, he pulled the gun away from her. (R. IX, 231.) Soppe then went outside with the gun, put it in his car, and locked the car. (R. IX, 233.) Ms. Hendry followed. (R. IX, 234.) While Soppe was trying to call the police, Ms. Hendry repeatedly tried to get into his car, saying she wanted the gun and that she wanted to kill herself. (R.

IX, 240, 289.) Eventually, Soppe was able to push Ms. Hendry away from the car and get in, and drive away. (R. IX, 242.) He pulled over about a mile down the road to wait for the police to arrive. (R. IX 244.)

Ms. Hendry was arrested and charged with one count of attempted first-degree premeditated murder. (R. I, 6.) Her defense at trial was that she did not intend to kill Soppe; rather, her intent was to kill herself in front of him.

Ms. Hendry testified that in the ten days after Soppe moved his belongings out of her home, she felt him pulling away and as a result became increasingly more depressed. (R. X, 444.) In the midst of her depression, she clung to his reassurances and conduct that suggested to her the relationship was not over. (R. X, 436, 439, 442.) She was especially hopeful when he invited her and the children to come over for dinner and to play games. (R. X, 443.) But when he ended the relationship by text the next day, she was devastated. (R. X, 447.) The next morning, when Soppe was texting her about picking up the bounce house, she felt hurt, rejected, and upset over all of the broken promises he had made. (R. X, 449.) That was when she decided to end her life. (R. X, 449.)

Ms. Hendry testified that when her son gave her the shotgun, there was already a shell in the gun, so she asked for another one in case the gun misfired or the first shot did not kill her. (R. X, 451.) She explained that she moved the bounce house inside because she wanted to force a conversation with Soppe. (R. X, 452-53.)

As it turned out, she was able to talk with him in the garage. (R. X, 454.) In that conversation, he made it clear the relationship was over. (R. X, 454.) She led him inside and down the hallway to the spare bedroom. (R. X, 454.) When he went in to get the bounce house, she went into her bedroom and got the gun from behind the door. (R. X,

455.) Her plan was that once he saw her with the gun, she would point it at herself and shoot herself in front of him. (R. X, 455, 460.) She wanted him to feel the hurt and pain she felt. (R. X, 460.)

She never got the chance. As Ms. Hendry stood in the doorway holding the gun—not pointed at Soppe—he rushed towards her, grabbed the gun, and pinned her up against the wall so quickly that she never even got a chance to point the gun at herself. (R. X, 457-58, 490.)

After Soppe got the gun away from her, they talked outside. (R. X, 461.) She tried to get the gun out of the car and asked Soppe, "If you don't care about me why should I live[?]" (R. X, 461.)

Ms. Hendry testified that after Soppe drove away, she regained her senses a little bit and decided to go to the job class she was scheduled to attend at the SRS office in town. (R. X, 462.) She was there when the sheriff's deputy arrived to arrest her. (R. X, 328-330.) When the deputy asked her how she was doing, she replied that she wanted to die. (R. X, 332.)

Ms. Hendry's depression and suicidal state of mind were corroborated by other witnesses. Ms. Hendry's grandmother, who was her confidant throughout the breakup of the relationship, testified to Ms. Hendry's spiraling depression. (R. X, 366, 372-73.) The social worker who did a mental health screening on Ms. Hendry the morning she was arrested reported that she was suicidal and suffering from major depression. (R. X, 379, 384, 402.)

Not only did Ms. Hendry testify she never had any intent to harm Soppe, she also presented character witnesses who knew her well to testify to her non-violent character.

(R. X, 407, 412-13, 460.)

The jury found Ms. Hendry guilty of attempted first-degree premeditated murder. (R. I, 43.) Because Ms. Hendry had no criminal history, the standard presumptive guidelines sentence was 155 months. (R. I, 67.) The district court granted Ms. Hendry's motion for downward durational departure and sentenced her to forty-one months in prison. (R. I, 84.)

## Arguments and Authorities

**Issue 1: There was insufficient evidence of an overt act to support the conviction of attempted first-degree premeditated murder.**

### Introduction

To prove that Ms. Hendry committed attempted first-degree premeditated murder, the State had to show beyond a reasonable doubt that Ms. Hendry had both the intent to kill Soppe and that she committed an overt act toward perpetration of that crime. Although the State can use circumstantial evidence to prove intent to commit even the most serious of crimes, where the State is trying to prove an attempted crime, the weaker the State's evidence of intent, the more strongly corroborative of that intent the overt act must be. Here, the State did not have strong and clear evidence of intent to kill. Ms. Hendry never made any threats to kill or even hurt Soppe and the evidence showed she never aimed the gun at him. Moreover, there was direct evidence Ms. Hendry had a different intent—to kill herself. In this context, the fact the Ms. Hendry was holding a loaded shotgun with her finger on the trigger at the point of interception is insufficient for a rational jury to conclude beyond a reasonable doubt that she had made an unequivocally direct movement toward committing murder.

Standard of Review

An appellate court considering a challenge to the sufficiency of the evidence must determine whether rational jurors could have found the defendant guilty beyond a reasonable doubt. *State v. McCaslin,* 291 Kan. 697, 710, 245 P.3d 1030 (2011). In its review, the appellate court construes the evidence in a light most favorable to State and does not reweigh the evidence generally or make credibility determinations. *State v. Raskie,* 293 Kan. 906, 919–20, 269 P.3d 1268 (2012).

Argument

"An attempt crime has three essential elements: the intent to commit the crime, an overt act toward the perpetration of the crime, and a failure to consummate the crime." *State v. Wilson*, 30 Kan.App.2d 498, 499-500, 43 P.3d 851 (2002); K.S.A. 2012 Supp. 21-5301(a) (defining attempt as "any overt act toward the perpetration of a crime done by a person who intends to commit such crime but fails in the perpetration thereof or is prevented or intercepted in executing such crime"). Thus, to find Ms. Hendry guilty, the jury would have had to determine that Ms. Hendry had both the intent to commit the crime of first-degree premeditated murder and that she committed an overt act toward the perpetration of that crime. *State v. Garner*, 237 Kan. 227, 238, 699 P.2d 468 (1985) (to convict a defendant of attempt, the State must show the commission of an overt act plus the actual intent to commit that particular crime).

An overt act "must be either the first or some subsequent step in the direct movement toward the commission of the crime after preparations are made." *State v. Peterman*, 280 Kan. 56, 61, 118 P.3d 1267 (2005). An overt act must "extend beyond mere preparations made by the accused and must sufficiently approach consummation of

the offense to stand either as the first or subsequent step in a direct movement toward the completed offense." *Peterman,* 280 Kan. 56, Syl. ¶ 2. It is clear, however, that it "does not have to be the last proximate act in the consummation of the crime[.]" *Peterman*, 280 Kan. at 61.

It can be difficult to determine the point at which acts in preparation become overt acts:

> A problem inherent in the law of attempts concerns the point when criminal liability attaches for the overt act. On the one hand mere acts of preparation are insufficient while, on the other, if the accused has performed the final act necessary for the completion of the crime, he could be prosecuted for the crime intended and not for an attempt. The overt act lies somewhere between these two extremes and each case must depend upon its own particular facts....

*State v. Gobin,* 216 Kan. 278, 281, 531 P.2d 16 (1975) (quoting comment, PIK Crim. 55.01, p. 105).

The Tenth Circuit has held that an overt act "must be strongly corroborative of the firmness of the defendant's criminal intent and must *unequivocally* mark the defendant's acts as criminal. (Emphasis added.)" *United States v. Ramirez*, 348 F.3d 1175, 1180 (10th Cir. 2003) (quoting *United States v. Smith*, 264 F.3d 1012, 1016 [10th Cir. 2001]). As the Arizona Supreme Court explained, this requirement is necessary to be certain that "the design will be carried into effect if not interrupted":

> The fundamental reason [for] the requirement of an overt act is that until such act occurs, there is too much uncertainty that a design is to be apparently carried out. Until that time the situation is equivocal; there is not sufficient certainty that the design will, if not interrupted, be fully completed. When by reason of the conduct of defendant the situation becomes unequivocal and it appears the design will be carried into effect if not interrupted, we have a condition that meets the test of overt acts intended to accomplish the purpose.

*State v. Mandel*, 78 Ariz. 226, 229, 278 P.2d 413 (1954) (citing *People v. Miller*, 2 Cal.2d 527, 42 P.2d 308, 98 A.L.R. 913).

It follows, then, that because the overt act serves to corroborate the intent, the stronger and more clear the intent, the farther the overt can be from the last proximate act and still meet that standard. Where there is strong, clear evidence of intent to commit the crime, a more equivocal overt act may be sufficient. See *State v. Mandel*, 78 Ariz. 226, 228, 278 P.2d 413 (1954) ("When an intent is clearly shown, slight acts in furtherance thereof will constitute an attempt"). Conversely, where the evidence of intent is weak, the overt act must be correspondingly closer to the last proximate act.

Of course, intent is a state of mind and therefore "difficult, if not impossible, to show by definite and substantive proof." *State v. Lassley*, 218 Kan. 758, 762, 545 P.2d 383 (1976). The law is clear that "'intent may be shown...by acts, circumstances, and inferences reasonably deducible therefore and need not be established by direct proof.'" *State v. Moody*, 35 Kan.App.2d 547, 555, 132 P.3d 985 (2006) (quoting *State v. Johnson*, 258 Kan. 61, 67, 899 P.2d 1050 [1995]). Moreover, as noted above, the overt act "does not have to be the last proximate act in the consummation of the crime[.]" *Peterman*, 280 Kan. at 61.

The point, however, is that there is necessarily a relationship between the strength of the evidence of intent and the proximity of the overt act toward consummation of the offense. Kansas law implicitly recognizes this, as what constitutes "an overt act is determined *in context*. (Emphasis added.)" *State v. Risinger*, 40 Kan.App.2d 596, 598, 194 P.3d 52 (2008) (whether a defendant has committed an overt act depends upon the particular facts of the case and the reasonable inferences the jury may draw from those

facts).

Here, the State's evidence of intent to kill was neither clear nor strong. Although the State alleged the overt act was the act of "pointing a loaded firearm at . . . Joseph Soppe and then subsequently pulling the trigger on said firearm multiple times while in a physical struggle . . . for control of the firearm," the evidence at trial, however, showed that Ms. Hendry never pointed the gun at Soppe. (R. I, 6; IX, 284, 286-87, 309.) When Ms. Hendry was coming out of her bedroom, she was pointing the gun at a forty-five-degree angle away from Soppe. (R. IX, 284). He then pushed the gun down, grabbed the barrel, and pinned Ms. Hendry against the wall with the shotgun pointing away from them, up toward the ceiling. (R. 286-87).

Not only was there no evidence that Ms. Hendry ever aimed the gun at Soppe, there was also no evidence that Ms. Hendry threatened to kill or even hurt Soppe. (R. IX, 282, 290.) There was never even an argument and they never exchanged hostile words. (R. IX, 217.)

Not only was the State's circumstantial evidence of her intent to kill Soppe weak, but there was direct evidence of a completely different, non-criminal, intent. Ms. Hendry's statements during and after the events showed that her focus was suicide. And that evidence was strong—Ms. Hendry expressed that intent during the struggle over the gun, said it again twice out in the driveway as she tried to get the gun out of the car, and again when she was arrested. Her statements were enough to cause Soppe to be concerned that she would act on her intent to commit suicide. (R. IX, 291.) And Ms. Hendry's suicidal state-of-mind was corroborated by the social worker who performed a mental health screening on Ms. Hendry when she was booked into jail.

Due process requires the State to prove every element of a crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Under the facts of this case, the weak evidence of intent to kill demands that Ms. Hendry's actions strongly corroborate that intent in order to prove she committed an overt act. Aiming the shotgun at Soppe would have sufficed—a point the State obviously recognized in the complaint when it alleged that Ms. Hendry aimed the shotgun at him. But the State failed to support that allegation at trial. In context, the act of merely holding a loaded shotgun that was not pointed at the alleged victim is not sufficiently proximate to consummation of the alleged crime to prove that Ms. Hendry committed an overt act.

Conclusion

Because no rational juror could have concluded beyond a reasonable doubt that Ms. Hendry had committed an overt act toward the commission of the crime of first-degree murder, this Court should vacate her conviction.

**Issue 2: The district court erred in denying Ms. Hendry's motion for mistrial after a prospective juror's answers during jury selection revealed that Ms. Hendry was in custody.**

Introduction

During jury selection, the prosecutor asked if any of the prospective jurors recognized him or his co-counsel. (R. IX, 28.) One of the prospective jurors responded that he did and identified himself as an employee of the Franklin County Sheriff's Department. (R. IX, 29.) After the prospective juror said his employment would not affect his ability to be a fair and impartial juror, the following exchange between the judge and the juror occurred:

THE COURT: I just want to follow up. Mr. [N], do you have any knowledge of the allegations of this particular case?
[JUROR]: Other than the charges in the arrest report, your Honor.
THE COURT: Okay. And have you had any interaction whatsoever with the defendant in this case as part of your duties?
[JUROR]: Just interaction as far as providing for her daily needs.

(R. IX, 30.)

The judge asked counsel to approach the bench. (R. IX, 30.) The judge said he probably should not have asked that last question. (R. IX, 30.) The judge asked if the prospective juror was a jailer, and the State affirmed he was. (R. IX, 30, 251.) Defense counsel moved for a mistrial, arguing that the prospective juror's response made it obvious that Ms. Hendry was in custody; thus, the panel was tainted and to proceed would prejudice Ms. Hendry's right to a fair and impartial jury. (R. IX, 31, 248-49.)

The district court denied the motion, finding the comment was not so prejudicial that it would be impossible to proceed with the trial without injustice to the defendant. (R. IX, 31, 252.) The district court found that the comment did not tell the jury that Ms. Hendry was currently in custody, but only that she had been arrested at some point in time. (R. IX, 31.) Additionally, the court reasoned that it was a very brief statement that would have little, if any, impact on the rest of the panel members. (R. IX, 252.)

Standard of Review

A district court's decision on a motion for mistrial is reviewed under the abuse of discretion standard. See *State v. Race*, 293 Kan. 69, 80-81, 259 P.3d 707 (2011) (quoting *State v. Dixon*, 289 Kan. 46, Syl. ¶ 1, 209 P.3d 675 [2009]) ("'Declaration of a mistrial is a matter entrusted to the trial court's discretion, and the judge's choice will not be set

aside without an abuse of that discretion.'").

The abuse of discretion standard is well settled.

> 'Judicial discretion is abused if judicial action (1) is arbitrary, fanciful, or unreasonable, *i.e.,* if no reasonable person would have taken the view adopted by the trial court; (2) is based on an error of law, *i.e.,* if the discretion is guided by an erroneous legal conclusion; or (3) is based on an error of fact, *i.e.,* if substantial competent evidence does not support a factual finding on which a prerequisite conclusion of law or the exercise of discretion is based.'

*Race*, 293 Kan. at 80 (quoting *State v. Ward,* 292 Kan. 541, 550–51, 256 P.3d 801 [2011]).

K.S.A. 22-3423(1)(c) provides that a trial court may order a mistrial because of "[p]rejudicial conduct, in or outside of the courtroom, [that] makes it impossible to proceed with the trial without injustice to either the defendant or the prosecution." Thus, the appellate court applies a two-part inquiry in determining whether the district court abused its discretion in denying a motion for mistrial:

> (1) Did the trial court abuse its discretion when deciding if there was a fundamental failure in the proceeding? and (2) Did the trial court abuse its discretion when deciding whether the conduct resulted in prejudice that could not be cured or mitigated through jury admonition or instruction, resulting in an injustice?

*Race*, 293 Kan. at 81.

Analysis

In this case, the district court focused on whether the colloquy resulted in prejudice of such a level that it would be an injustice to proceed. The district court concluded the first part of the inquiry was met—the colloquy was error and a fundamental failure in the trial. The district court conceded it had made a mistake in

bringing up the subject. (R. IX, 251.)

Allowing the jury to become aware that the defendant is incarcerated "is contrary to the presumption of innocence[.]" *State v. Alexander*, 240 Kan. 273, 275, 729 P.2d 1126 (1986). The presumption of innocence entitles the defendant "to have guilt or innocence determined solely on the basis of evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial." *Ward*, 292 Kan. at 570-71 (quoting *Taylor v. Kentucky*, 436 U.S. 478, 485, 98 S.Ct. 1930, 56 L.Ed.2d 468 [1978]).

Here, the colloquy between the judge and the prospective juror provided enough information for the other panel members to conclude that Ms. Hendry was in custody at the jail during the trial. First, it is obvious that a sheriff's department employee who provides for the "daily needs" of a defendant involved in a criminal trial is a jailer. Second, the juror's comment about his interactions with Ms. Hendry was not past tense. He said his interaction consisted of "*providing* for her daily needs." That comment more clearly indicated an ongoing interaction, not a brief, single interaction at a time past, such as after arrest.

The jury heard information that any reasonable person would interpret as the same thing as saying Ms. Hendy was in custody. This was an error of law. See *Alexander*, 240 Kan. at 275 (holding that trial court erred in allowing jailer to testify about his observations of the defendant in jail, but concluding error was harmless under the facts of the case). *Cf.*, *Ward*, 292 Kan. at 576 (allowing witness to identify two individuals seated in courtroom in jail clothing as defendant's associates was a fundamental trial error; "jail clothing taints a trial, [and] a trial court almost always abuses its discretion to control the

courtroom when it allows a defendant, witness, or nonwitness to be brought before a jury in jail clothing"). Accordingly, the first part of the two-part inquiry is met. See *State v. Gonzales*, 290 Kan. 747, 755-56, 234 P.3d 1 (2010) (district court abuses its discretion when its decision is based on an error of law).

Moving to the prejudice question, the district court abused its discretion by finding that this error did not prejudice Ms. Hendry's right to a fair trial. First, the district court did not consider the propriety of curative or mitigating measures. See *Race*, 293 Kan. at 80 (district court "must analyze whether the damaging effect of any prejudicial conduct can be removed or mitigated by admonition or instruction to the jury"). Instead, the district court simply concluded the situation did not create a level of prejudice that would preclude proceeding with the trial. It is true that an admonition or instruction may have served only to draw more attention to the issue, but the district court should still consider whether anything can be done. See *Ward*, 292 Kan. at 576 ("In some cases, an admonition may not be advisable, but the pros and cons should be weighed.")

Second, this error implicated Ms. Hendry's constitutionally-guaranteed rights to a fair trial and to be presumed innocent. *Ward*, 292 Kan. at 543, Syl. ¶ 9. Consequently, the district court was required to apply the federal constitutional harmless error standard in determining whether the error prejudiced Ms. Hendry's substantial rights. *Ward*, 292 Kan. at 543, Syl. ¶¶ 5, 9. Under that standard, this error cannot be declared harmless unless the party benefitting from the error—here, the State—proves beyond a reasonable doubt that the error will not contribute to the ultimate verdict. *Ward*, 292 Kan. at 543, Syl. ¶ 9.

The district court did not apply this standard. Consequently, the duty falls on the appellate court to review the entire record and determine de novo if the fundamental

failure in the trial was harmless. *Ward*, 292 Kan. at 542, Syl. ¶ 8. The reviewing court applies the constitutional harmless error standard. *Ward*, 292 Kan. at 542, Syl. ¶ 6.

The State cannot show there is no reasonable possibility that this error contributed to the verdict. Ms. Hendry's entire defense challenged the allegation that she had the intent to kill. Her state of mind was the central issue, specifically, whether she was in a violent state of mind, *i.e.*, homicidal, or was instead suicidal. Ms. Hendry's defense depended upon her own testimony as to her non-violent state of mind, as well as character witnesses who testified that she was not and had never been a violent person. Evidence that she was incarcerated shattered her presumption of innocence and completely undermined her defense by permitting the jury to infer the court believed she had to be incarcerated during the trial because she was a dangerous person.

Conclusion

The State cannot show beyond a reasonable doubt that this constitutional error did not contribute to the verdict. Accordingly, if the Court does not reverse Ms. Hendry's conviction for insufficiency of the evidence, it should reverse on this ground.

**Issue 3: The district court violated Ms. Hendry's Sixth and Fourteenth Amendment rights under *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), when it increased her punishment by requiring her to register as an offender.**

Standard of Review

A constitutional challenge is a question of law over which an appellate court has unlimited review. *State v. Fischer*, 288 Kan. 470, 472, 203 P.3d 1269 (2009).

Argument

Ms. Hendry did not object to the district court's requirement that she register as an offender. (R. XI, 35-39.) An *Apprendi* argument, however, is an exception to the rule that

constitutional grounds asserted for the first time on appeal are not properly before this Court for review. See *State v. Gould*, 271 Kan. 394, 404, 23 P.3d 801 (2001) (citing *Pierce v. Brd. of Cnty Commissioners*, 200 Kan. 74, Syl. ¶ 3, 434 P.2d 858 [1967]).

The Kansas Offender Registration Act (KORA) provides that if the court makes a finding on the record that the defendant used a deadly weapon in the commission of a person felony, the defendant must register as a violent offender. *State v. Franklin*, 44 Kan. App. 2d 156, 234 P.3d 860 (2010) (citing K.S.A. 2009 Supp. 22-4902[a][7]).

In this case, at sentencing, the district court specifically found that Ms. Hendry committed the crime with a firearm and therefore required her to register for the next fifteen years upon her release from prison. (R. XI, 33, 34, 35-39.) The journal entry reflected this requirement. (R. I, 84, 95-96.)

In *Apprendi v. New Jersey*, the United States Supreme Court held that, "*[o]ther than the fact of a prior conviction*, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) (italics in original); *Blakely v. Washington*, 542 U.S. 296, 301, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

KORA requires registration of "any person who, on or after July 1, 2006, is convicted of any person felony" where the court makes a finding on the record that a deadly weapon was used in the commission of a crime of such person felony." K.S.A. 22-4902(a) (7). Thus, an attempted firs-degree murder conviction can subject the defendant to this enhanced penalty when a judge, rather than a jury, makes a finding that defendant committed the offense with a deadly weapon.

Determining whether a conviction was for a person felony and whether the defendant used a deadly weapon in the commission of the crime are questions of fact. *Cf.*, *State v. Patterson*, 25 Kan.App.2d 245, 247, 963 P.2d 436 (1998) (whether the trial court correctly determined the defendant's crimes were sexually motivated for purposes of sex offender registration presented a question of fact subject to review under the substantial competent evidence standard of review). Because registration results in an increased penalty, Ms. Hendry has the right, under the Sixth and Fourteenth Amendments as interpreted by *Apprendi*, to have a jury, not a judge, determine those questions of fact.

Counsel recognizes that in *State v. Chambers*, 36 Kan.App.2d 228, 235-39, 138 P.3d 405(2006), a panel of this Court rejected this argument. In *Chambers*, the panel confirmed that Kansas courts have ruled that offender registration is punishment, but nevertheless declined to apply *Apprendi*. *Chambers*, 36 Kan.App.2d at 235 (citing *State v. Myers*, 260 Kan. 669, 699, 923 P.2d 1024 [1996]). The panel reasoned that registration as a sex offender did not involve an increased sentence. The "punitive aspects inherent in the KORA do not implicate *Apprendi's* essential focus - [of] prohibiting a sentencing judge from imposing 'a more severe sentence than the maximum sentence authorized by the facts found by the jury.'" *Chambers*, 36 Kan.App.2d at 239 (quoting *State v. Gould*, 271 Kan. 394, Syl. ¶ 2.)

In its analysis, the *Chambers* Court noted that in *State v. Carr*, 24 Kan. 442, 53 P.3d 843 (2002), *State v. Garcia*, 274 Kan. 708, 56 P.3d 797 (2002), and *State v. Beasley*, 274 Kan. 718, 56 P.3d 803 (2002), the Kansas Supreme Court did not apply *Apprendi* because the district court's findings did not impose an increased sentence. *Chambers*, 36 Kan. App. 2d at 237-238. Those cases are distinguishable because they involved

decisions between imposing prison rather than probation. See *Carr*, 24 Kan. at 452, 53 P.3d 843 (2002) (addressing district court's decision to impose prison rather than presumptive probation); *State v. Garcia*, 274 Kan. at 711-12 (addressing district court's finding that crime was gang-related and its imposition of a prison sentence); *State v. Beasley*, 274 Kan. at 722-23 (addressing district court's finding that defendant used a firearm and its imposition of a prison term rather than probation).

The *Chambers* decision narrowly interpreted the rule in *Apprendi* by holding that it applies only to increased sentences, not increased punishment. Such a narrow interpretation has been called into question recently by the United States Supreme Court's decision in *Southern Union Co. v. United States*, 567 U.S. ___, 132 S.Ct. 2344, 2357, 183 L.Ed.2d 318 (2012). In *Southern Union*, the Court applied *Apprendi* to the imposition of criminal fines. In that case, the amount of the fine was tied to the number of days the statute was violated: $50,000 for each day of violation. The district court, not the jury, made a specific finding as to the number of days the violation occurred. Noting that "*Apprendi's* 'core concern' is to reserve to the jury 'the determination of facts that warrant punishment for a specific statutory offense[,]'" the Court held that the district court's factual finding as to the number of days the defendant committed the crime violated *Apprendi*. *Southern Union Co.*, 132 S. Ct. at 2350, 2352 (quoting *Oregon v. Ice*, 555 U.S. 160, 170, 129 S.Ct. 711, 172 L.Ed.2d 517 [2009]).

Because *Southern Union Co.* applied *Apprendi* to criminal fines, this Court should reject *Chambers's* narrow holding that *Apprendi* applies only to the duration of the defendant's sentence.

Further, *Apprendi* stated that prosecution "subjects the criminal defendant *both* to 'the possibility that he may lose his liberty upon conviction and ... the certainty that he would be stigmatized by the conviction.'" *Apprendi*, 530 U.S. at 466 (quoting *In re Winship*, 397 U.S. 363, 25 L.Ed. 368, 90 S. Ct. 1068 [1970]). "If a defendant faces punishment beyond that provided by statute when an offense is committed under certain circumstances but not others, it is obvious that both the loss of liberty and the stigma attaching to the offense are heightened[.]" *Apprendi*, 530 U.S. at 484. As a consequence, the defendant should not be "deprived of protections that have, until that point, unquestionably attached." *Apprendi*, 530 U.S. at 484.

Under *Apprendi*, because the defendant risks both the loss of liberty (prison) and the certain stigma attached to the offense (registration), procedural protections are necessary for both deprivations. In this case, offender registration is the stigma attached to the offense and is punishment. See *State v. Myers*, 260 Kan. 669, 699, 923 P.2d 1024 (1996) (despite the lack of punitive purpose on the legislature's part, the registration repercussions due to the public access provisions are great enough to be considered punishment); *State v. Scott*, 265 Kan. 1, 6, 961 P.2d 667 (1998) (explaining that while *Myers*'s dealt with an ex post facto situation, the Court would "not attempt to alter the *Myers* conclusion as to the punitive effect" of offender registration). Because of this, the registration order enhances Ms. Hendry's punishment, making it more severe than it would be without the registration requirement.

The *Chambers* Court also failed to discuss or acknowledge the punitive consequences that proceed from an order requiring registration as an offender. The decision merely referred to the act's punitive properties as a "mild sanction of

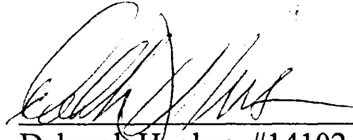
registration." *Chambers*, 36 Kan.App.2d at 238. Yet, an offender who violates any of the provisions of the act (including all duties set out in K.S.A. 22-4904 through 22-4907) is guilty of a severity level six person felony. K.S.A. 2011 Supp. 22-4903 (c)(1)(A). If convicted of violating the provisions of the Act, Ms. Hendry (who has a criminal history score of "I") would face an eighteen-month prison sentence, with presumptive probation. K.S.A. 21-6804. Additionally, every time she registers, which is a minimum of four times a year, she must pay a $20 fee to the respective sheriff's office. See K.S.A. 22-4904(e). These fees are additional punishment. See *Southern Union Co.*, 132 S.Ct. at 2352.

For all of the above reasons, this Court should conclude that the district court's finding was a factual determination prohibited by *Apprendi.* It should therefore reverse the district court's order requiring her to register under KORA and vacate that part of her sentence.

## Conclusion

The evidence was insufficient to prove beyond a reasonable doubt that Ms. Hendry committed an overt act and therefore her conviction must be vacated. Alternatively, the district court erred in denying Ms. Hendry's motion for mistrial, requiring that her conviction be vacated. Finally, and alternatively, this court should reverse the district court's order requiring her to register under KORA and vacate that part of her sentence.

Respectfully submitted,



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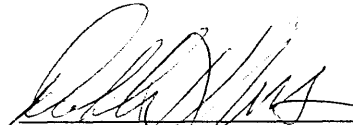
Certificate of Service

The undersigned hereby certifies that service of the above and foregoing brief was sent by mailing a copy, postage prepaid, to Stephen A. Hunting, Franklin County Attorney, 301 S. Main, Ottawa, KS 66067; and by delivering one copy by building mail to Derek Schmidt, Attorney General, 120 SW 10th Ave, 2nd floor, Topeka, KS, 66612 on the 6th day of March, 2013.



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