COPY

No. 12-109118-A

IN THE COURT OF APPEALS
OF THE
STATE OF KANSAS

STATE OF KANSAS
Plaintiff-Appellee/Cross-Appellant

v.

SANTINE WHITE
Defendant-Appellant/Cross-Appellee

Brief of Appellee/Cross-Appellant

Appeal from the District Court of Geary County
The Honorable Steven Hornbaker
District Court Case No. 12-CR-345

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Plaintiff-Appellee

v.

SANTINE WHITE
Defendant-Appellant

Brief of Appellee

Appeal from the District Court of Geary County
The Honorable Steven Hornbaker
District Court Case No. 10-CR-345

NATURE OF THE CASE

The defendant was convicted at jury trial of Possession of Cocaine With the Intent to Sell, Deliver or Distribute within 1000 Feet of a School Zone, a drug severity level 2, nonperson felony and No drug Tax Stamp, a severity level 10, nonperson felony. The district court granted a dispositional departure to probation. The defendant now appeals his conviction and the State is appealing the granting of the dispositional departure to probation.

STATEMENT OF THE ISSUES

ISSUE I: **THE DISTRICT COURT DID NOT COMMIT REVERSIBLE ERROR IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS.**

ISSUE II: **THE DISTRICT COURT DID NOT COMMIT PLAIN ERROR IN FAILING TO INSTRUCT ON LESSER INCLUDED OFFENSE AS THE DEFENDANT CLAIMED THE COCAINE WAS NOT HIS.**

ISSUE III: **THE PROSECUTOR DID NOT COMMIT PROSECUTORIAL MISCONDUCT.**

ISSUE IV: **WHEN VIEWED IN THE LIGHT MOST FAVORABLE TO THE PROSECUTION, A REASONABLE FACT FINDER COULD HAVE THE DEFENDANT GUILTY AT JURY TRIAL.**

State's Issue on Cross-Appeal

ISSUE I: **THE SENTENCING COURT COMMITTED ERROR IN GRANTING THE DEFENDANT'S MOTION FOR A DOWNWARD DISPOSITIONAL DEPARTURE.**

STATEMENT OF FACTS

The following facts were elicited at the defendant's motion to suppress, held on August 23, 2011 (See Generally R. IV). The State admitted, without objection, the transcript of the preliminary hearing (R. IV, pp. 13-14). Det. Alvin Babcock, a nine year veteran of the Junction City Police Department, was in an unmarked police vehicle with Sergeant Todd Godfrey of the Junction City Police Department and Captain Shawn Peirano of the Grandview Plaza Police Department (R. IV, p. 7). Det. Babcock observed a white, Dodge Ram truck make two separate traffic violations (R. IV, pp. 7-9). Sergeant Godfrey called in the tag into dispatch and was advised that the tag returned on a Dodge Dakota (R. IV, pp. 9-10). The white Dodge ram then pulled into the driveway of a

residence located on Parkside Drive (R. IV, p. 10). After the vehicle pulled into the driveway, Sergeant Godfrey activated his emergency lights (R. IV, p. 10). Det. Babcock then approached the white Dodge Ram and made contact with the driver, Santine White (R. IV, p. 10). Captain Peirano walked around to the front passenger side of the white Dodge Ram (R. IV, p. 10). Det. Babcock immediately identified the driver as Santine White as he had previously had contact with the defendant and his brother, in which a firearm was located in the vehicle they were in (R. IV, pp. 11-12). Det. Babcock requested the registration paperwork from the defendant (R. IV, p. 12). The defendant advised that the truck did not belong to him (R. V, p. 8). Det. Babcock saw the defendant retrieve the registration paperwork out of the glove box (R. V, p. 8). While standing on the right, passenger side of the truck, Captain Peirano observed what he believed to be a "pistol grip or magazine well of a pistol" (R. V, p. 32). Capt. Peirano did not know it was illegal to have a loaded firearm in a vehicle, within the city limits of Junction City, so he did not mention that to Det. Babcock at the time (R. V, p. 32). After reviewing the registration documentation, Det. Babcock advised Captain Peirano, everything was in order (R. IV, p. 13). After the preliminary hearing in this case, Det. Babcock listened to the traffic stop audio recordings and believed that the dispatcher had inadvertently run the incorrect tag (R. IV, pp. 12-13). The officers departed the area and pulled into a cul-de-sac, 5-6 houses away from where they had left the defendant and met with Officer Fisher (R. IV, p. 13).

While the officers were talking, Captain Peirano mentioned that he had seen the magazine well of a pistol when the defendant opened the glove box (R. V, pp. 9, 27).

Sergeant Godfrey, exclaimed, "What?" (R. V, p. 9). Captain Peirano reiterated what he had observed, and the officers decided to return back to 1376 Parkside to make contact with the defendant, as having a loaded firearm was against the Junction City municipal code (R. V, pp. 9, 27). When the officers returned to 1376 Parkside, the defendant was bending over, near a trash can, in the driveway (R. V, p. 33). Capt. Peirano asked the defendant if he could speak with him and then explained why he wanted to speak to him (R. V, p. 33). Captain Peirano then asked for consent to search the truck and the defendant advised he had borrowed the truck, did not know what was in the glove box and that the officers could search the truck, but he had lost the keys (R. V, pp. 33-34). Capt. Peirano mentioned to the defendant that during the initial encounter, Capt. Peirano saw the defendant drop the keys and then bend over to pick them up (R. V, p. 34). The defendant admitted that had happened, but now could not find the keys (R. V,p. 34).

Captain Peirano advised Det. Babcock that the defendant claimed he lost the keys to the truck (R. V, pp. 10-11). The defendant then advised Capt. Peirano that he was going to call his wife to bring him a set of spare keys (R. V, pp. 28, 34). The defendant asked Capt. Peirano to accompany him as he began walking towards the intersection of Parkside and 14th Street (R. V, p. 34). Meanwhile, Det. Babcock began looking in the immediate area for the truck keys (R. V, pp. 10-11). Det. Babock estimated that 2-3 minutes had lapsed from the time they initially left the defendant at 1376 Parkside to the time they returned (R. V, p. 10). Det. Babcock found the keys behind a trash can next to front door to 1376 Parkside (R. V, p. 11). As they reached the intersection, Capt. Peirano was advised that Det. Babcock had found the keys (R. V, pp. 11, 35). The defendant and

Capt. Peianro, who at this time were joined by Officer Fisher, began walking back towards the white truck (R. V, p. 35).

The white truck was searched. While the truck was being searched, the defendant never withdrew or objected to the scope of the consensual search (R. V, p.p. 50-51). In the glove box, Capt. Peirano found a loaded AK47 magazine (R. V, pp. 36). Sergeant Todd Godfrey found a black felt bag in the center console, which contained three individual bags of suspected cocaine (R. V, pp. 59-60). The bags were tested and weighed by the Kansas Bureau of Investigation and weighed 14.30 grams and tested positive for cocaine (R. V, p. 60). The bags of cocaine were also tested for fingerprints and the defendant's prints were located on the bags of cocaine (R. V, pp. 62-63).

The court denied the defendant's motion to suppress (R. I, pp. 115-117). The defendant's jury trial was held on October 4-5, 2012 (See Generally R. II). Besides having officers Babcock, Peirano and Godfrey testify, the State elicited testimony from Lt. Mike Life, K.B. I. forensic scientists Stan Hefley and Kelly Woodward-Ohlstein and Junction City-city engineer, Clarence Mahieu (R. II, pp. 200-227, R. III, pp. 253-269).

Lt. Life testified that the 3 bags of cocaine, in the manner they were packaged, two bags weighing just over 2 grams and the third weighing over 10 grams, were consistent with bags of cocaine packaged for sale (R. III, pp. 258-261). Mr. Hefley testified that the substances in the three bags tested positive for cocaine (R. II, pp. 200-204, 224-227). Ms. Woodward-Ohlstein testified that the defendant's latent prints were found on a plastic bag containing other plastic bags and plastic bag corners (R. II, pp. 206-207). Ms. Woodward-Ohlstein was able to identify two fingerprints that matched the defendant's

fingerprints on the outer bag (R. II, pp. 208-223). Clarence Mahieu testified that the entire route the defendant drove, from 815 W. 11th Street to 1376 Parkside, was within 1000 feet of various structures used by USD 475, to include Westwood Elementary School, Al Simpler Stadium (used by the Junction City High School), and baseball fields (R. III, pp. 255-257). After closing arguments, the jury found the defendant guilty of possession of cocaine with the intent to sell within 1000 feet of a school zone and no drug tax stamp (R. III, p. 335). Prior to sentencing the defendant fired his trial counsel and hired new counsel. Prior to sentencing, new trial counsel filed various motions (R. I, pp. 176-187). At sentencing, the trial court denied the defendant's motion for Judgment of Acquittal and Motion for New Trial, however, the trial court granted the defendant's motion for a downward dispositional departure (See Generally R. VI). Without hearing any evidence, the trial court granted the defendant's motion for a downward dispositional departure and placed the defendant on probation for a period of 36 months (R. I, pp. 195-212). Both the defendant and State filed Notices of Appeal (R. I, pp. 213-214).

ARGUMENTS AND AUTHORITY

ISSUE I: THE DISTRICT COURT DID NOT COMMIT REVERSIBLE ERROR IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS.

Standard of Review

An appellate court determines if the factual underpinnings of the trial court's decision are supported by substantial competent evidence. However, the ultimate conclusion drawn from those facts are legal questions requiring an appellate court to apply a de novo standard of review. An appellate court does not reweigh the evidence.

State v. Vandervort, 276 Kan. 164, 169, 72 P.3d 925 (2003). When material facts are not in dispute, the question whether to suppress is a question of law over which an appellate court has unlimited review. *State v. Boyd*, 275 Kan. 271, 273, 64 P.3d 419 (2003).

Arguments

A. The Defendant Gave the Officers Consent to Search The Truck During A Consensual Encounter.

The defendant claims that the defendant was seized during the second encounter with law enforcement. According to Capt. Peirano, he re-initiated contact after observing what he believed to be the pistol grip of a pistol in the glove box of the truck the defendant was driving. According to Capt. Peirano, "we returned to visit with Mr. White" (R. IV, p. 62). Capt. Peirano asked permission to speak with the defendant and to search the truck (R. V, p. 33). The defendant consented, though he advised he had lost the keys. The defendant then advised the officer that he had called his wife to pick him up and to bring him a spare set of keys for the truck, which was odd since the truck was borrowed (R. V, p. 34). According to Capt. Peirano, it was the defendant who asked Capt. Peirano to accompany him to intersection while he called his wife (R. V, p. 34). After Det. Babcock found the keys, they returned to the truck and opened it, in the defendant's presence. He never objected to the truck being searched.

Whether an encounter between an individual and law enforcement may be properly viewed as a consensual encounter turns on whether the law enforcement officer's conduct, viewed within the totality of the circumstances, would have permitted a reasonable person to feel free to refuse the requests of law enforcement or otherwise

terminate the encounter. *State v. Pollman,* 286 Kan. 881, 190 P.3d 234 (2008). The defendant even testified at the suppression hearing. He never claimed he was coerced or forced to give consent. He never testified he felt detained or was not free to leave. There is no evidence in the record to indicate that the consent given by the defendant was involuntary or coerced. *State v. Ransom,* 289 Kan. 373, 212 P.3d 203 (2009).

B. Officers Had Probable Cause to Search The Defendant's Truck For a Firearm.

Assuming arguendo that the defendant's consent was invalid, the officers had probable cause to search the truck for a firearm. Capt. Peirano's testimony throughout this case has been that he believed he saw a pistol or the bottom of a magazine in the glove box. After consulting with Sgt. Godfrey and Det. Babcock, the officers believed a loaded gun was in the glove box of the truck the defendant was driving. The officers also knew, that a month before, the defendant and his brother were stopped and arrested for having drugs and a 9mm pistol. The defendant argues that all Capt. Peirnao had was a "hunch" of a possible municipal code violation. Probable cause to search a vehicle is established when "under the totality of the circumstances," there is a fair probability that the vehicle contains contraband. *United States v. Nielsen*, 9 F.3d 1487, 1489-90 (10th Cir. 1993). In *State v. Doile*, 244 Kan. 493, 769 P.2d 666 (1989), our Kansas Supreme Court held that a short delay between observing contraband in a parked vehicle, and conducting a traffic stop based on the prior observation was lawful. In *Doile*, the officer observed what he believed to be marijuana in a parked vehicle. A short time later, the officer observed the vehicle leaving and stopped it. Without a warrant, the officer searched the vehicle. The seizure and warrantless search were upheld. See also *State v. Moretz*, 214

Kan. 370, 520 P.2d 1260 (1974)(Officer observed items in plain view during a routine traffic stop. The following day, he became aware that the items were possibly stolen. He observed the vehicle again, stopped it and received consent to search for other stolen property). The finding of a loaded magazine in a vehicle gave officer probable cause to continue searching for firearms and ammunition. See *United States v. Alvarado* (1994 WL 31466) (D. Kan) (Unpublished Opinion-Copy Attached).

C. The Officers Diligently Pursued Searching the Defendant's Truck.

The defendant argues the officers dragged out this investigatory stop by waiting 30 minutes for a canine to arrive. However, the only citation appellate counsel has been able to cite to the appellate record is a citation to a motion filed by trial counsel (R. I, p. 44). A reading of the record, indicates that while the officers were locating for the "lost" keys and waiting for the defendant's wife to arrive, a canine was called. But there is nothing to indicate that it took 30 minutes for a drug canine to arrive. Furthermore, if the officer already had the keys, they did not need to wait for a canine to alert to the odor of drugs, especially since they had probable cause to search and/or consent to search the truck.

D. The Consent to Search the Defendant's Truck Was Valid

The State has addressed part of this issue in subsection A, but will elaborate a bit further. The defendant has cited *State v. Blair,* 31 Kan.App.2d 202, 209-210, 62 P.3d 661 (2002), as support for his claim that the defendant was not allowed to move without a police escort. The uncontroverted evidence in this case is that the defendant requested

Capt. Peirano to accompany him while he called his wife. In *Blair*, officers smelled what they believed to be ether emanating from Blair's house. Officers admitted that Blair could not go back into his home without an officer being with him and restricted his movements by confining him to the front porch. No such facts are present in this case. The defendant was never restrained, except after cocaine was found in his vehicle. The defendant never voiced an objection to the search of the truck. The defendant also urges this court to find that the defendant's consent was not voluntary as the officers failed to advise the defendant of his right to refuse consent. The defendant has cited *State v. Parker,* 282 Kan. 584, 595, 147 P.3d 115 (2006). However, the defendant's reliance on a single sentence is misplaced.

> "Voluntariness is a question of fact to be determined based on the totality of the circumstances in each particular case. Whether the defendant knew that he or she had the right to refuse to consent to a search is a factor to be considered in making a voluntariness determination, but the State 'is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent.' " *State v. Thompson,* 284 Kan. 763, 783, 166 P.3d 1015 (2007) (quoting *Schneckloth v. Bustamonte,* 412 U.S. 218, 248–49, 36 L.Ed.2d 854, 93 S.Ct. 2041 [1973]).

As this court must use a totality of the circumstances analysis in determining whether the defendant's consent was valid, no single factor outweighs the others. Given the facts in this case, the defendant voluntarily consented to the search of his truck. He was not coerced, his movements were not restricted by law enforcement, and there is no evidence that the defendant was intimated by the officers. There is substantial competent evidence to support the trial court's finding that the defendant consented to the search of his truck.

E. The Officers Did Not Exceed the Scope of the Consent to Search.

Sgt. Godfrey testified at jury he was looking for both a loaded firearm and ammunition (R. II, p. 184). As ammunition and firearms go hand in hand, and the officers had already found a loaded AK 47 magazine and knew the defendant had been in possession of a Glock 9mm handgun just a month before, the search of the truck, to include a felt bag was not beyond the scope of the consent to search. As already cited by the State, the 10th Circuit has held that finding of loaded magazine and or ammunition is probable cause to continue searching a vehicle. *United States v. Alvarado* (1994 WL 31466)(D. Kan). Furthermore, the officer s were looking for any and all types of firearms, to include pistols. The Junction City Municipal code does not merely ban loaded AK 47s, but also includes loaded pistols. Sgt. Godfrey testified he was looking for firearms and ammunition. If he had found 9mm bullets in the felt bag, as opposed to cocaine, would it not be reasonable for him to look for a gun that fires 9mm ammunition? "The presence of ammunition would be indicative of the presence of firearms, the ultimate goal of the search." *U.S. v. Gaines*, 127 F.3d 1109 (10th Cir. Okl.)(1997)(Upholding the search of a Crown Royal bag for ammunition, in which cocaine was found instead).

ISSUE II: THE DISTRICT COURT DID NOT COMMIT PLAIN ERROR IN FAILING TO INSTRUCT ON LESSER INCLUDED OFFENSE AS THE DEFENDANT CLAIMED THE COCAINE WAS NOT HIS.

Standard of Review

"When a defendant has requested a lesser included instruction at

> trial, the standard of review for failing to so instruct is whether the evidence, when viewed in the light most favorable to the defendant, supported the instruction. The instruction need not have been given if the evidence would not have permitted a rational factfinder to find the defendant guilty beyond a reasonable doubt of the lesser included offense." *State v. Jones*, 279 Kan. 395, Syl. ¶ 1, 109 P.3d 1158 (2005).

Whether a crime is a lesser included offense of another is a question of law over which this court has unlimited review. *State v. Gallegos,* 286 Kan. 869, 873, 190 P.3d 226 (2008).

Arguments

A trial court is only required to give an instruction on a lesser included offense if there is some evidence that would reasonably justify a conviction for the lesser included offense. K.S.A. 22-3414(3). In this particular case, the defendant's entire defense was that the cocaine was not his. The truck the defendant was driving belonged to a third party. Lt. Life's uncontroverted testimony was that the three bags of cocaine were consistent with possession with the intent to sell. Det. Babcock testified that, when the defendant was arrested, officers did not find paraphernalia to ingest cocaine (R. III, p. 169). During the jury instruction conference, the State objected to the giving of an instruction for simple possession as there wasn't any evidence to support a simple possession conviction (R. III, pp. 272-274). The trial court agreed that there was no evidence to contradict the State's evidence that the cocaine was possessed with the intent to sell. A trial has the duty to instruct on a lesser included offense, even if the evidence is weak, inconclusive, and consists of only the defendant's testimony. *State v. Kirkpatrick,* 286 Kan. 329, 334, 184 P.3d 247 (2008). In this case, as no evidence was

admitted to suggest the defendant possessed cocaine for personal use, the trial court's refusal to instruct on a simple possession does not constitute plain error.

However, even if the instruction was legally appropriate, any error would have been harmless because of the evidence.

ISSUE III: THE PROSECUTOR DID NOT COMMIT PROSECUTORIAL MISCONDUCT.

Standard of Review

Appellate review of an allegation of prosecutorial misconduct requires a two-step analysis. First, an appellate court decides whether the comments were outside the wide latitude that a prosecutor is allowed in discussing the evidence. Second, if misconduct is found, an appellate court must determine whether the improper comments prejudiced the jury against the defendant and denied the defendant a fair trial. *State v. Marshall,* 294 Kan. 850, 281 P.3d 1112 (2012).

Arguments

> "When a prosecutor makes an improper comment during closing argument, an appellate court conducts a harmlessness inquiry, determining whether the misconduct was so prejudicial that it denied the defendant a fair trial. Three factors are considered. First, was the misconduct gross and flagrant? Second, was the misconduct motivated by ill will? Third, was the evidence of such a direct and overwhelming nature that the misconduct would likely have had little weight in a juror's mind? None of these three factors is individually controlling." *State v. Marshall*, 294 Kan. 850, 281 P.3d 1112 (2012).

A. Prosecutor's Comments During Closing Arguments Were based on Admitted Evidence .

The defendant alleges that the prosecutor made prejudicial and inappropriate

comments concerning evidence that was not admitted during trial. (Refer to defendant's appeal brief, pp. 23-24). The prosecutor's comments during closing arguments referred to evidence that was admitted into evidence, which included State's Exhibit #2, being an aerial map of the area. The prosecutor's comments also refuted defense counsel's "story line" during opening statements. This map will be added to the appellate record. The prosecution is allowed to offer rebuttal argument or to refute defense counsel's opening statements. *Pickens v. Gibson*, 206 F.3d 988, 999 (2000) (The 10th Circuit Court of Appeals held that as long as a prosecutor does not comment on the defendant's failure to testify, a prosecutor may comment on defendant's failure to call witnesses or present certain testimony). See also *People v. Harris*, 47 Cal.3d 1047, 255 Cal.Rptr. 352, 767 P.2d 619 (1989).

B. Prosecutor's Comments Did Not Denigrate the Defendant, Nor His Defense Counsel.

Furthermore, the defendant alleges the State denigrated the defense. However, in the case cited by the defense, *State v. Williams*, 279 P.3d 739 (2012), the comments were similar, but not identical to the prosecutor's comments in this case. However, this court found that the comments made by the prosecutor in Williams, did not constitute prosecutorial misconduct. These comments were in response to defense counsel's arguments concerning the State's witnesses. See *State v. Bradshaw*, 245 P.3d. 12 (2011) (Unpublished Opinion-Copy Attached)(Appellate court found prosecutor's comments refuting defense counsel's attack of State's witnesses as incompetent, during closing arguments, as proper rhetoric).

C. State Did Not Attempt to Shift the Burden to the Defendant.

The defendant also alleges the State attempted to shift the burden by arguing to the jury that the defense had failed to rebut the State's evidence. The prosecution is allowed to comment on the weakness of a defense theory. *State v. McKinney*, 272 Kan. 331, 33 P.3d 234 (2001). The defendant specifically points out to comments made by the prosecution of defense counsel's failure to cross- exam some of the State's witnesses. These comments were in response to trial counsel's arguments. See *State v. Naputi*, 293 Kan. 55, 260 P.3d 86 (2011)(Kansas Supreme Court held prosecution's comments about defense counsel's failure to subpoena witnesses did not constitute burden shifting). The same logic applies in this case. Defense counsel argued about the alleged deficiencies in the State's evidence, to include the latent fingerprint examination, "Did she show you a fingerprint card?" (R. III, p. 318). "But no. Don't rely on evidence, just rely on what I tell you." However, as noted by the record, trial counsel did very little cross-examination of the KBI scientists and Lt. Life to refute their testimony under direct examination, yet wanted to comment on the deficiencies in their testimony. As an advocate, is the prosecutor not expected to respond to such comments? Especially since trial counsel had the opportunity to use the State's witnesses to refute the State's evidence, yet chose to make closing arguments about thing not asked on cross-examination. As to the latent prints, trial counsel could have asked to see a fingerprint card and could have requested the examiner to show the jury the points on identification she used to positively identify the defendant's prints to those found on the plastic baggie. Yet, he chose not to. He chose to make arguments inferring the deficiency of the State's evidence, rather than eliciting

testimony to support his defense.

D. The Prosecutor's Comments During Closing Arguments Did Not Prejudice The Defendant's Right to A Fair Trial.

The defendant argues that the prosecutor's comments during closing arguments constituted a "script." Unlike the facts in *State v. Morris*, 40 Kan.App.2d 769, 196 P.3d 422 (2008), the prosecutor in this case never advised the jury he knew what the defendant was thinking. The comments made by the prosecutor were in response to the defense's theory as to the actions of the defendant on the evening he was arrested. In his opening statements, defense counsel alluded to several facts that were not admitted into evidence, however, they were presented to the jury as what the evidence was going to show (R. II, pp. 127-140). Such comments pointing out discrepancies between defense counsel's opening statements and the evidence admitted have been held permissible by our Kansas Supreme Court. See *State v. Deiteman*, 271 Kan. 975, 988, 29 P.3d 411 (2001) (The Court held that while opening statements are not evidence, they are a "story line" in which the evidence should fall into. It is appropriate to point out missing pieces). Defense counsel's entire opening statement suggested that the jury was going to hear a lot of evidence concerning the defendant activities the night he was arrested, such as where he had been, where he was heading (home), why he had borrowed the truck. Too many facts to list here, but they are all part of the record. None of those facts were admitted into evidence.

Even if these comments were improper, an appellate court conducts a harmless error inquiry, determining whether the misconduct was so prejudicial that it denied the

defendant a fair trial. *State v. Marshall*, 294 Kan. 850, 281 P.3d 1112 (2012). The three factors include: whether the misconduct was gross and flagrant; second, whether the misconduct was motivated by ill will; third, whether the evidence was of such a direct and overwhelming nature that the misconduct would likely have had little weight in the mind of a juror. The prosecutor's comments were in response to either the defendant's theory of defense or in response to defense counsel's opening statements, which the jury could have taken as evidence. The prosecutor was not I a position to object to defense counsel's opening statements at the time they were made, as the State was not in a position to know what evidence, if any, the defense was going to admit. Once the prosecutor became aware that defense counsel's opening statement's lacked any evidentiary support, he was permitted to refute defense counsel's comments. There is no indication of ill will on the part of te hprosecutor.

ISSUE IV: WHEN VIEWED IN THE LIGHT MOST FAVORABLE TO THE PROSECUTION, A REASONABLE FACT FINDER COULD HAVE THE DEFENDANT GUILTY AT JURY TRIAL.

Standard of Review

When the sufficiency of the evidence is challenged, the standard of review on appeal is whether, after review of all of the evidence, viewed in the light most favorable to the prosecution, the appellate court is convinced that a rational fact finder could have found the defendant guilty beyond a reasonable doubt. *State v. Graham*, 247 Kan. 388, 398, 799 P.2d 1003 (1990).

Arguments

The defendant urges this court to find that a rational fact finder could not find the

defendant guilty of Possession of Cocaine With Intent To Sell Within 1000 Feet of a School Zone. However, the defendant overlooks a key evidentiary fact, that being that 1376 Parkside was within 1000 feet of Westwood Elementary, a school used by U.S.D. 475. So even if this court finds that the other structures, such as the ball fields and the Junction City High School Football Stadium, do not fit the statutory definition of "school property," Westwood Elementary School clearly meets the statutory definition.

The defendant also urges this court to adopt the ruling from *State v. Barnes*, 275 Kan. 364, 64 P.3d 405 (2003). However, the facts in Barnes are not analogous to the facts in this case. In *Barnes*, the defendant passed through several school zones and finally came to a stop outside of a school zone. The Kansas Supreme Court held that merely passing through a school zone, did not constitute a violation of the school zone provision of K.S.A. 65-4161(d). However, in this case, the defendant did not merely pass through a school zone, he was apprehended in a school zone, so the holding in Barnes does not apply. Furthermore, it should be noted that Kansas does not require the specific intent that a person possessing drugs with the intent to sell or selling drugs in a school zone, have the specific intent to sell the drugs within the school zone. See *State v. Prosper*, 260 Kan. 743, 926 P.2d 231 (1996). There was no evidence that the officers intentionally delayed stopping the defendant until he was in a school zone, as they already knew he was in a school zone when he left 815 W. 11th Street. The officers began to pull the defendant over when dispatch advised the tag returned to a Dodge Dakota rather than a Dodge Ram. By the time the officers activated their emergency lights, the defendant was already either pulling into 1376 Parkside or was about to pull into 1376 Parkside. The

testimony by Det Babcock was that he would not activate his emergency lights to stop a vehicle if he were 4 blocks away (R. II, p. 172). Sgt. Godfrey testified that the defendant's vehicle began to speed away from them (R. II, p. 181).

STATE'S ISSUE ON CROSS APPEAL

ISSUE I: THE SENTENCING COURT COMMITTED ERROR IN GRANTING THE DEFENDANT'S MOTION FOR A DOWNWARD DISPOSITIONAL DEPARTURE.

Standard of Review

An appellate court must determine whether the sentencing court's findings of fact and reasons justifying a departure(1) are supported by substantial competent evidence and (2) constitute substantial and compelling reasons for a departure as a matter of law. *State v. Eisele*, 262 Kan, 80, 83, 936 P.2d 742 (1997).

Arguments

The State urges this court to find that the sentencing court lacked substantial and compelling reasons to support the granting of the defendant's motion for a downward, dispositional departure to probation, as required by K.S.A. 21-4721(d). At the sentencing hearing, the defendant failed to provide any evidence to support the sentencing court's granting of a downward dispositional departure to probation. After hearing arguments from counsel, the sentencing court "found" that the defendant lacked any criminal history. This cannot be used as a factor for the granting of a departure. *State v. Murphy*, 270 Kan. 804, 807, 19 P.3d 80 (2001). The court found he "was a good guy, seems to be a good family guy..." (R. VI, p. 60). The sentencing court did not make any other findings (See Generally R. VI). The court's comments about being a good guy, despite the comments

made by law enforcement officers at his sentencing, of his extensive involvement with drugs, weapons, murder suspects, were not substantial compelling reasons to grant the downward dispositional departure. This court should vacate the defendant's sentence and remand the matter for re-sentencing.

CONCLUSION

The initial encounter with the defendant was lawful. The subsequent contact with the defendant constituted a consensual encounter. The defendant voluntarily consented to the search of the truck he was driving. Even if this court finds that the defendant's consent was involuntary, the officers had probable cause search the defendant's truck based on the officer's observations of a handgun in the glove box. The scope of the search was not exceeded as officers were allowed to search for firearms and ammunition.

The trial court did not err in failing to provide a lesser included instruction as to simple possession of cocaine as there was no evidence that the defendant merely possessed cocaine. The prosecutor's comments did not constitute prosecutorial misconduct and did not deprive the defendant of a fair trial. When viewed in the light most favorable to the prosecution, a rational fact finder could find the defendant guilty of Possession of Cocaine with Intent to Sell Within 1000 Feet of a School Zone.

The sentencing court committed reversible error in granting the defendant's motion for a downward dispositional departure to probation as the defendant failed to present any evidence nor did the court make any findings of fact that would constitute substantial compelling reasons. This court should uphold the defendant's convictions and

vacate the defendant's sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I delivered the original plus 16 copies to the Clerk of the Appellate Court on October 30, 2013 and delivered two (2) true and correct copies of the above and foregoing Brief of Appellee by U.S. Mail, first class, postage prepaid on this 30th day of October, 2013 to:

Doug Adams #16092
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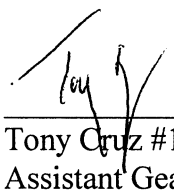

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Not Reported in F.Supp., 1994 WL 31466 (D.Kan.)
(Cite as: 1994 WL 31466 (D.Kan.))

Only the Westlaw citation is currently available.

United States District Court, D. Kansas.
UNITED STATES of America, Plaintiff,
v.
Edmundo Galindo ALVARADO and, Toribio Olivas, Defendants.

Nos. 92–40022–01–DES, 92–40022–02–DES.
Jan. 26, 1994.

Lee Thompson, U.S. Atty., Richard L. Hathaway, Asst. U.S. Atty., for the U.S.

Steven L. Woolard, San Angelo, TX., for Alvardo.

Steve W. Kessler, Topeka, KS., for Olivas.

MEMORANDUM AND ORDER

SAFFELS, District Judge.

***1** This matter is before the court on remand from the Tenth Circuit. Specifically, the Tenth Circuit made a limited remand of both defendants' appeals for findings. Since the case had not been severed at the time defendants moved to suppress the matter at issue, the court will make its findings on a consolidated basis.

PROCEDURAL HISTORY

On May 21, 1992, an indictment was returned against these defendants charging them with the following three counts: (1) conspiracy to possess with intent to distribute marijuana; (2) possession with intent to distribute marijuana; and (3) possession of a firearm during a drug trafficking offense.

Defendant Olivas filed a pre-trial motion to suppress any statements he made as being the result of "an illegal detention and search." Doc. 10 at p. 1. Olivas moved to suppress evidence on the basis that the search was conducted without a warrant and without probable cause, the alleged consent was not knowingly and voluntarily given, and the search exceeded the scope of the alleged consent. Doc. 11 at 1. The court allowed defendant Alvarado to join in these motions. Docs. 24 and 32.

On July 13, 1992, this court held an evidentiary hearing at which it summarily denied defendants' motions to suppress. The court did not file a Memorandum and Order setting forth reasons for the denial.

On August 7, 1992, this court granted Alvarado's motion to sever in order to provide Alvarado the benefit of Olivas' testimony. Doc. 43.

On August 13, 1992, Olivas proceeded to trial. He was found guilty on Count 2, not guilty on count 3, and a mistrial was ordered as to Count 1. Docs. 55 and 58.

On August 14, 1992, Alvarado proceeded to trial. He was found guilty on all three counts. Doc. 61.

Defendants perfected separate appeals. In separate orders, the Tenth Circuit made a limited remand of both cases for factual findings on the suppression issues.

On December 20, 1993, this court entered an order allowing the parties until January 14, 1994, to make any additional submissions or arguments they deemed appropriate. The court now has the submissions of all parties. After reviewing the record and carefully considering the parties' submissions and arguments, the court is prepared to enter its findings of fact and conclusions of law.

FINDINGS OF FACT

On May 13, 1992, Kansas Highway Patrol Trooper Rich Jimerson stopped a 1984 Chevrolet Caprice bearing Texas tags at milepost 196 on I–35 highway in Franklin County, Kansas. Defendant Alvarado was the driver and defendant Olivas was the passenger. Trooper Jimerson stopped the vehicle for speeding and changing lanes twice without signaling. Trooper Jimerson routinely stops vehicles that are traveling 71 miles per hour or more where the posted speed limit is 65. Trooper Jimerson also routinely stops vehicles that commit illegal lane changes. Initially, trooper Jimerson could not determine the race or nationality of the driver because he had a baseball cap pulled down to his eyebrows.

***2** The trooper told Alvarado why he had stopped him and asked to see his driver's license. Alvarado presented a Texas driver's license which identified him as Edmundo Alvarado. The trooper noted the "overwhelming" odor of air freshener. He also noted that Alvarado appeared to be extremely nervous and both Alvarado and Olivas avoided eye contact with him.

Additionally, Alvarado's hands were shaking when he presented his driver's license to Trooper Jimerson.

Olivas appeared more nervous than Alvarado. The seat belt across his chest was visibly rising due to his deep breathing. Trooper Jimerson asked Alvarado to step out of the car and go with him to his patrol car. Alvarado complied without any hesitation. Alvarado informed the trooper that Olivas owned the automobile and that they were traveling from Odessa, Texas, to Kansas City.

Trooper Jimerson then asked Alvarado to remain by his patrol car while he talked with Olivas, who was still seated in the right front seat of the Chevy Caprice. Olivas produced a Texas title for the vehicle which identified the registered owner as Lenore Luna of Odessa, Texas. Olivas also presented his driver's license which identified him as Toribio Olivas of Kansas City, Kansas.

While obtaining the vehicle registration and title from Olivas, Trooper Jimerson again noted that Olivas was breathing heavily, his hands were shaking, and he avoided eye contact.

After running driver's license and criminal history checks on Olivas and Alvarado, Trooper Jimerson learned that Alvarado's Texas driver's license had been "suspended for DUI" and that Alvarado had a history of weapons and narcotics charges.

Trooper Jimerson issued Alvarado a citation for driving with a suspended license. Additionally, Trooper Jimerson issued Alvarado warnings for speeding and failing to signal lane changes. Trooper Jimerson then returned Alvarado's driver's license.

Trooper Jimerson asked Alvarado if he could ask a couple of questions, to which Alvarado replied "yes." Trooper Jimerson asked Alvarado if he had any marijuana, guns, or money. Alvarado appeared to understand the questions and replied "no" to each question. Alvarado avoided eye contact with the officer when he answered each question.

Trooper Jimerson presented Alvarado with a consent to search form, printed in Spanish, and asked him to look at it. The English equivalent appeared on the inventory form filled out after the search. After reviewing the form, Alvarado nodded his head affirmatively.

Trooper Jimerson then presented Olivas with a consent to search form written in Spanish. Olivas appeared to read it, then signed it where the trooper placed an "X".

Trooper Moomau, who had intercepted Jimerson's radio communication concerning the criminal history check of Alvarado, arrived at the scene with his drug canine.

Trooper Jimerson conducted a pat down of Alvarado for safety reasons. Trooper Jimerson advised Alvarado that he was doing so to see if he had any weapons. Jimerson asked Olivas, in English, if he would open the trunk. Olivas retrieved the keys from the ignition and opened the trunk.

*3 Trooper Moomau was observing defendants. He noticed that, despite asking them to step back, they continued to inch toward the passenger compartment of the vehicle. Because of this behavior, Moomau looked into the passenger compartment where he observed a handgun in the split between the passenger and driver section of the front seat. He reported this to Trooper Jimerson. Trooper Jimerson retrieved the gun. Trooper Jimerson held the gun up and asked whose it was. Alvarado raised his hand and said it was his.

In the glovebox, Trooper Jimerson found one magazine, or "clip," for the weapon. This clip was loaded with 12 rounds. He found an additional clip, loaded with 9 rounds, in the ashtray between the passenger and driver seats.

The troopers observed fresh scratch marks on the neck of the Chevy Caprice's gas tank. They also noticed that the gas tank straps did not line up with the dirt marks on the gas tank. Trooper Moomau worked his drug canine around the vehicle and the dog gave a positive response that narcotics were located in the gas tank area. Trooper Moomau crawled under the car and observed that the bolts holding the gas tank to the car were new. Moomau removed the gas tank from the vehicle with tools taken from the trunk of the car. Within the gas tank was a compartment from which the troopers removed two brown plastic garbage bags. Alvarado and Olivas were then placed under arrest.

Further inspection revealed that one of the garbage bags contained 12 packages of marijuana and the other garbage bag contained 14 packages of marijuana. The total weight of the packages was approximately 15 kilograms. A field test of the packages was positive for the presence of marijuana. Alvarado and Olivas were then transported to the Franklin County Jail.

Trooper Rushmeyer met the defendants at the Franklin County Jail. Trooper Rushmeyer is a Spanish speaking trooper (he took Spanish courses in both high school and college and grew up in a bilingual neighborhood in California). He was accompanied by Carla Andre, a Spanish teacher. Prior to any interrogation, the defendants were advised of their *Miranda* rights in Spanish.

CONCLUSIONS OF LAW

Standing to contest a search is a threshold question. *United States v. Erwin*, 875 F.2d 268 (10th Cir.1989). Alvarado was merely the driver of the vehicle, not the registered owner. Alvarado did not assert any interest in the vehicle. Neither did he assert any knowledge of nor interest in the marijuana concealed in the vehicle. Accordingly, Alvarado has not manifested a subjective expectation of privacy in the vehicle which society would recognize as objectively reasonable. *United States v. Arango*, 912 F.2d 441 (10th Cir.1990), *cert. denied*, 499 U.S. 924, 111 S.Ct. 1318, 113 L.Ed.2d 251 (1991).

Although Alvarado lacks standing to contest the search of the vehicle, he has the right to challenge his seizure. *Id.* However, his seizure was justified by a lawful traffic stop. There is no evidence in the record which supports the argument that the stop was pretextual. The court notes that it is the policy of the Kansas Highway Patrol to stop vehicles traveling more than five to six miles an hour over the posted speed limit. *U.S. v. Deases*, 918 F.2d 118, 121 (10th Cir.1990). Trooper Jimerson testified at the suppression hearing that he routinely stops vehicles that were traveling 71 in a 65 mph speed zone. Additionally, Trooper Jimerson witnessed two illegal lane changes prior to stopping the vehicle. He testified that he routinely stops vehicles for illegal lane changes. The court concludes that it was objectively reasonable for the officer to make the stop in this case. See *U.S. v. Harris*, 995 F.2d 1004, 1005 (10th Cir.1993), citing *Deases*, 918 F.2d at 120.

*4 The court finds that Olivas consented to the search of the vehicle. If the search is conducted pursuant to a voluntary consent, it may be conducted without probable cause and without a warrant. *United States v. McKneely*, 6 F.3d 1447, 1452

(10th Cir.1993). The voluntariness of consent is a question of fact to be determined from the totality of the circumstances. *United States v. Werking*, 915 F.2d 1404, 1409 (10th Cir.1990), *cert. denied*, —— U.S. ——, 112 S.Ct. 230, 116 L.Ed.2d 187 (1991).

Olivas gave his consent after the trooper had returned all of defendants' papers, including the tickets that had been issued. The trooper's request for Olivas to consent to the search of the vehicle constituted an ordinary consensual encounter between a private citizen and a law enforcement official. *Id.* at 1408. The court finds that a reasonable person under these circumstances would believe that he was free to leave or disregard the officer's request for information. *McKneeley*, 6 F.3d at 1451.

The trooper provided a consent to search form to defendants that was accurately interpreted into Spanish [FN1] after noting that he was having difficulty communicating with Olivas in English. The form identified the item to be searched as the vehicle that Olivas claimed to own and lawfully possess. It advised that defendant had the right to refuse to consent to the search of the vehicle. Additionally, it stated that no promises, threats, force, or physical or mental coercion of any manner had been used to obtain the consent or to sign the form. Further, the form stated that the consent could be withdrawn, limited, or revoked at any time.

Olivas appeared to read the consent form and, when shown where to sign, signed the form.[FN2] When asked by the trooper to open the trunk, Olivas retrieved the keys from the transmission and did so. Defendants watched, without objection, while the search was conducted. When Olivas took the stand at his trial and was asked by his counsel whether the troopers asked his permission to search the vehicle, he replied, under oath, as follows: "[y]es they asked my permission."

The court can find no evidence of coercion in the record. On the contrary, the court finds from the totality of the circumstances that consent was freely and voluntarily given. *McKneely*, 6 F.3d at 1453.

Defendants also argue that even if the consent was freely and voluntarily given it would not allow the troopers to dismantle the gas tank. However, consent to search a vehicle means consent to search the entire vehicle, including whatever is in the vehicle, unless the consent is otherwise restricted. *Deases*, 918 F.2d at 122. The consent in this case was not restricted in any way or revoked at any time.

As for the suppression of statements made by defendants, *Miranda* [FN3] warnings do not need to be provided during questioning that takes place within the confines of a routine traffic stop. *Berkemer v. McCarty*, 468 U.S. 420 (1984). However, when actual or constructive arrest takes place, *Miranda* warnings must be given. In the instant case, the credible evidence establishes that defendants were given warnings consistent with *Miranda* prior to any substantive questioning following their arrest. In fact, defendants were given *Miranda* warnings by Spanish speaking trooper Lance Rushmeyer in the presence of a Spanish teacher who had accompanied him to the Franklin County Jail where the questioning took place. All statements of the defendants were properly admitted into evidence.

***5** Finally, even though the trooper apparently proceeded on the assumption that consent was required to search the vehicle, the court notes that there is an alternative basis to uphold the search in this case. So long as grounds exist in the record for a lawful search, the search need not be upheld only on the grounds relied on by the officer. *United States v. Rivera*, 867 F.2d 1261, 1265 (10th Cir.1989).

Initially, Trooper Jimerson was confronted with a routine vehicle stop. This routine stop escalated into an investigatory detention under the principles enunciated in *Terry v. Ohio*, 392 U.S. 1 (1968). As Trooper Jimerson explained [FN4] during the suppression hearing and at the trials, the escalation resulted from information that came to his attention after he first approached the vehicle. After stopping defendants, Trooper Jimerson became aware that Alvarado was driving with a suspended license and had a history of weapons and narcotics charges. Alvarado was accompanied by Olivas who claimed to be the owner of the vehicle but produced a title in another person's name. The trooper noticed that both defendants were extremely nervous. He also noticed the overpowering odor of air freshener, commonly used as a masking agent to conceal the existence of drugs. Trooper Jimerson promptly sought to dispel his suspicion that these individuals were involved in some form of illegal activity.

A *Terry* stop is a narrowly drawn exception to the probable cause requirement of the Fourth Amendment. *U.S. v. Sharpe*, 470 U.S. 675, 689 (1985). In *Terry,* the Supreme Court held that a police officer may stop an individual reasonably suspected of criminal activity, question him briefly, and pat down the individual for the officer's safety. 391 U.S at 22–24.

During a *Terry* stop, an officer may also conduct a protective search of the compartment of the vehicle in which a subject is riding. *Michigan v. Long*, 463 U.S. 1032, 1049 (1983). Trooper Moomau testified that the subjects kept moving toward the passenger compartment causing him to look inside and locate the semi-automatic firearm. Such furtive movements justify an officer's sweep of the compartment for his own protection. *U.S. v. Nash*, 876 F.2d 1359, 1360–61 (7th Cir.1989), *cert. denied,* 493 U.S. 1084 (1990). Defendants had just denied that there were any firearms in the vehicle. The troopers' further discovery of two clips of live ammunition, within reach of Alvarado, who had a history of weapons violations, justifiably raised the officers' suspicions to the level of probable cause, and they had legal authority to conduct a vehicular search.

The length of the stop was not unreasonable. Trooper Jimerson testified at the suppression hearing that 10 to 14 minutes elapsed between the initial stop and when he issued the tickets, and returned the driver's license, to Alvarado. In *Sharpe*, 470 U.S. 675 (1985), the Supreme Court upheld an investigatory detention that took 20 minutes, rejecting a per se rule based on a definite time limit. "Such a limit would undermine the equally important need to allow authorities to graduate their responses to the demands of any particular situation." *Sharpe*, 470 U.S. at 687 (quoting *U.S. v. Place*, 462 U.S. 696, 709 n. 10). The time following the traffic stop (that is, the time that would constitute the investigatory detention) until the gun, clips, and drugs were discovered was not unreasonable. This case does not involve any delay unnecessary to a legitimate investigation. Further, defendants presented no evidence that the officers were dilatory in their investigation. *Id.*

CONCLUSION

***6** In compliance with the directives of the Tenth Circuit, the court has set out its findings above. These findings adequately support the court's previous denial of defendants' motion to suppress. Therefore, the court reaffirms its previous decision not to suppress the challenged evidence.

IT IS SO ORDERED.

FN1. Olivas argues that it is a violation of his Sixth Amendment right for the court to consider the affidavit of Professor Ragsdale who provided the Spanish translation of the consent form to the Kansas Highway Patrol. Olivas cites no authority to support this argument. Since he was free to submit an affidavit if he so chose, and because he raised the issue of the validity of the Spanish version of the consent form for the first time on appeal, the court rejects the defendant's suggestion. Moreover, implicit in the opinions remanding this case is that the court should conduct

all appropriate proceedings to make findings and conclusions concerning the validity of the search and consent.

FN2. Even if the court determined that the consent form was invalid this is only one factor in determining if consent to search was freely and voluntarily given. For example, the refusal to sign a consent form does not preclude a finding of free and voluntary consent. See *U.S. v. Archer*, 840 F.2d 567, 573 (8th Cir.) cert. denied 488 U.S. 941 (1988); and, *U.S. v. Castillo*, 866 F.2d 1071, 1074, 1082 (9th Cir.1988) (en banc). In the absence of a valid consent form, this court would find from the totality of the circumstances that consent was freely and voluntarily given.

FN3. *Miranda v. Arizona*, 933 F.2d 812 (10th Cir.1991).

FN4. The court finds that the trooper was subjectively aware of the reasonable suspicion necessary to conduct an investigatory detention pursuant to *Terry v. Ohio*, 392 U.S. 1 (1968). He articulated these suspicions in his report and through his testimony. In any event the law enforcement officer need not be subjectively aware of the reasonable suspicion warranting an investigatory detention, provided that the court can find an objectively reasonable basis for the detention. *See, U.S. v. Hawkins*, 811 F.2d 210, 212–14 (3d Cir.), *cert. denied*, 484 U.S. 833 (1987).

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Not Reported in F.Supp., 1994 WL 31466 (D.Kan.)

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(Pursuant to Kansas Supreme Court Rule 7.04(f), unpublished opinions are not precedential and are not favored for citation. They may be cited for persuasive authority on a material issue not addressed by a published Kansas appellate court opinion.)

Court of Appeals of Kansas.
STATE of Kansas, Appellee,
v.
John C. BRADSHAW, Appellant.

No. 102,779.
Jan. 14, 2011.
Review Denied Apr. 25, 2011.

West KeySummary **Criminal Law 110 ⚿2175**

110 Criminal Law
110XXXI Counsel
110XXXI(F) Arguments and Statements by Counsel
110k2164 Rebuttal Argument; Responsive Statements and Remarks
110k2175 k. Inferences from and effect of evidence. Most Cited Cases

The prosecutor at defendant's trial did not commit prosecutorial misconduct when he repeatedly characterized defendant's theory of the case as "smoke and mirrors" during closing arguments. After defense counsel acknowledged that the "best evidence in [the] case" was the videotape of a police officer's pursuit of defendant's fleeing vehicle, counsel emphasized

alleged deficiencies of the officer's investigation into defendant's vehicle tag violation and repeatedly attempted to divert the jury's attention away from the prosecution's evidence of defendant's criminal conduct. As such, the prosecutor's fourteen uses of the phrase "smoke and mirrors" to describe defendant's defense were made in rebuttal and direct response to defense counsel's arguments.

Appeal from Jackson District Court; Michael Ireland, Judge.
Ryan Eddinger, of Kansas Appellate Defender Office, for appellant.

Douglas W. Fisher, deputy county attorney, Shawna R. Miller, county attorney, and Steve Six, attorney general, for appellee.

Before MALONE P.J., CAPLINGER and BUSER, JJ.

MEMORANDUM OPINION

PER CURIAM.

***1** John Bradshaw was convicted of multiple felonies and misdemeanors as a result of a high-speed police chase and shootout. He seeks reversal of his jury convictions and a new trial, arguing (1) the prosecutor committed reversible misconduct during closing arguments, and (2) the district court erroneously instructed the jury and made unduly coercive comments during jury deliberations. Bradshaw also claims two of his convictions were multiplicitous.

FACTUAL AND PROCEDURAL BACKGROUND

While patrolling U.S. 75 Highway, Pottawatomie Tribal Police Officer John Hurla initiated a traffic stop for a tag violation. Hurla activated his emergency lights, and when the driver failed to stop, he also activated his emergency siren. The driver, who later was identified as Bradshaw, continued driving northbound on U.S. 75 Highway for about 2 miles and then turned onto 214 Road, a gravel road.

While following Bradshaw on 214 Road, Hurla twice observed Bradshaw place his hand out of the driver's side window. Bradshaw then sped up, and Hurla's view was obstructed by dust from the gravel road. Although Hurla increased his speed to 65 to 75 miles per hour, he was unable to catch up with Bradshaw. After traveling approximately 4 miles, Bradshaw turned onto another unpaved road, drove through a marked intersection without stopping, and eventually came to a rolling stop. Hurla stopped his patrol car about one car length behind Bradshaw's car.

Hurla saw the driver's door of Bradshaw's car open and believed Bradshaw would attempt to flee. Therefore, he took his police service dog, Bowie, out of the patrol car and warned Bradshaw that he would release the dog if he tried to run. Hurla could not see Bradshaw's right hand so he ordered Bradshaw to get back inside his car and place his hands in the air. As Bradshaw did so, Hurla could see that Bradshaw held a black handgun in his right hand. In response to Hurla's order to place his hands in the air, Bradshaw placed his hands and feet outside the car but remained seated, and he appeared to turn around and speak to his passenger. Hurla ordered Bradshaw to throw away his gun and get out of the car and onto the ground, but Bradshaw failed to comply.

Hurla then released Bowie, who ran toward Bradshaw. Bradshaw kicked Bowie, and Bowie responded by lunging into Bradshaw's car and biting him. Hurla commanded Bowie to stand down, but Bowie did not respond. Hurla noticed that

Bradshaw was holding Bowie's collar. Eventually, Bowie freed himself, shook his head in a manner that appeared unusual to Hurla, and sat down outside the vehicle.

Officer Hurla again ordered Bradshaw to get out of his car, show his hands, and get on the ground. Bradshaw placed his hands and feet outside the car but remained in the driver's seat. At that point, Hurla saw Bradshaw reach downward with one of his hands and he warned Bradshaw that he would shoot him if he went for the gun. Nevertheless, Bradshaw moved both of his hands downward, grabbed his gun, and aimed it at Hurla, who ducked down and heard a gunshot. Hurla maintained cover behind the car and returned fire.

***2** Hurla then saw an object fly through the air and land near the front passenger side of his patrol car. Hearing no more gunshots, he returned to his position behind the driver's side door of his patrol car. There, he could see that Bradshaw was on the ground. Hurla ordered Bradshaw to remain on the ground and keep his hands visible. During this entire incident, Bradshaw's passenger, later identified as Nicole Miller, remained in Bradshaw's car with her hands in the air.

Shortly thereafter, Officer Mike Boswell arrived and took Miller into custody. Boswell took Bradshaw into custody after a third officer arrived.

Later that afternoon, Hurla discovered what appeared to be a small bullet hole in Bowie's neck. A veterinarian confirmed that Bowie had a bullet fragment in his neck, and surgically removed the fragments. Bowie remained off duty for about 4 weeks.

The State ultimately charged Bradshaw with attempted first-degree murder, criminal possession of a firearm, obstructing official duty, fleeing or attempting to elude an officer while engaging in reckless driving, inflicting harm to a police service dog, reckless driving, and a tag violation.

Prior to trial, Bradshaw pled no contest and was convicted of criminal possession of a firearm, a nonperson felony, and operating a vehicle with a license tag not assigned to that vehicle, an unclassified misdemeanor.

At the trial on the remaining charges, the State presented testimony from Officer Hurla, two detectives, the veterinarian, and Nicole Miller. The State also presented a video of the police chase and shootout recorded by Hurla's patrol car video camera; several photographs of the crime scene; spent shell casings and bullet fragments from Bradshaw's .22 caliber handgun and Hurla's .40 caliber handgun; Bradshaw's .22 caliber handgun; and the .22 caliber bullet fragment removed from Bowie's neck.

Finally, the State presented Miller's videotaped interview. In the interview, Miller told Detective Caviness that she was a passenger in Bradshaw's car during the pursuit and shootout and that she had been kidnapped. Miller said Bradshaw saw Hurla at a gas station before the traffic stop and told her he hoped he did not "have to shoot this cop." According to Miller, Bradshaw shot at Hurla during the pursuit and drove erratically; Miller reloaded Bradshaw's gun at his request and saw spent shell casings from the gun on the passenger side floorboard; Bradshaw shot at Hurla after the pursuit; and Miller believed Bradshaw shot Bowie.

Miller, who was married to Bradshaw by the time of trial, testified at trial that she agreed to testify truthfully as a State's

witness in exchange for a plea agreement, and that "the majority" of her statements to police were lies. Detective Caviness testified Miller's statements during the videotaped interview were consistent with physical evidence recovered from the scene.

***3** The jury found Bradshaw guilty of attempted second-degree murder, fleeing or attempting to elude a police officer while engaging in reckless driving, inflicting harm to a police service dog, and reckless driving.

The district court imposed an 80–month controlling prison sentence on the felony convictions, a concurrent 6–month jail sentence for the misdemeanor reckless driving conviction, and a $50 fine for the tag violation.

THE PROSECUTOR DID NOT COMMIT PROSECUTORIAL MISCONDUCT.

In this appeal of his convictions and sentence, Bradshaw first contends the prosecutor committed reversible misconduct by referring to the defendant's theories as "smoke and mirrors" on approximately 14 occasions during closing argument. Bradshaw argues the prosecutor's repeated use of the "smoke and mirrors" phrase was outside the permissible bounds of closing arguments, was prejudicial, demonstrated ill will, and was not harmless because the evidence against him "was not so overwhelming" that the prosecutor's conduct had little chance of altering the outcome of the trial.

The State contends the prosecutor's remarks were permissible, were made in direct response to defense counsel's closing argument, and did not constitute prosecutorial misconduct or violate Bradshaw's right to a fair trial.

We apply a two-step analysis to claims of prosecutorial misconduct committed during closing argument, regardless of whether the defendant objected to the challenged comments at trial. *State v. Foster*, 290 Kan. 696, 722, 233 P.3d 265 (2010). First, we consider whether the comments are outside the wide latitude allowed the prosecutor in discussing the evidence during closing argument. Second, if the comments were improper, we determine whether the misconduct constitutes plain error; that is, whether the comments prejudiced the jury against the defendant and denied the defendant a fair trial. *State v. McReynolds*, 288 Kan. 318, 323, 202 P.3d 658 (2009).

The second step of the analysis "requires examination of three factors: (1) whether the misconduct was so gross and flagrant it denied the defendant a fair trial; (2) whether the remarks showed ill will; and (3) whether the evidence against the defendant was of such a direct and overwhelming nature that the prosecutor's statements would not have much weight in the jurors' minds. [Citations omitted.]" *Foster*, 290 Kan. at 723, 233 P.3d 265.

"None of these three factors is controlling. Further, the third factor can never override the first two until the harmlessness tests of both K.S.A. 60–261 (prosecutor's statements were inconsistent with substantial justice) and *Chapman v. California*, 386 U.S. 18, 22, 87 S.Ct. 824, 17 L.Ed.2d 705 (error had little, if any, likelihood of changing the outcome of trial), *reh. denied* 386 U.S. 987 [1967]), have been met. [Citations omitted.]" *Foster*, 290 Kan. at 723, 233 P.3d 265. Further, prejudicial error generally does not occur when the prosecutor's questionable statements are provoked and made in response to prior arguments or statements of defense counsel. *McReynolds*, 288 Kan. at 325, 202 P.3d 658.

Closing arguments

***4** In the State's initial closing argument, the prosecutor essentially summarized the evidence presented at trial, related that evidence to the elements of each crime as instructed, and reminded the jury that many of Bradshaw's crimes were captured clearly on video.

In the defendant's closing argument, defense counsel essentially urged the jury to focus on Officer Hurla's incompetent investigation of the tag violation; his failure to follow procedures during the police pursuit or provide clear directions to Bradshaw following the pursuit; and his failure to maintain his composure during the shootout. Defense counsel further encouraged the jury to focus on the detectives' failure to submit evidence to the ICBI lab, to test Bradshaw's clothing for gunshot residue, or to thoroughly investigate the crime. Finally, defense counsel read nearly verbatim from Miller's plea agreement, presumably to convince the jury that Miller had testified truthfully at trial when she recanted the statements she had made to police the day of the incident.

In rebuttal, the prosecutor advised the jury that "part of defense counsel's job is to put up smoke and mirrors." The prosecutor then proceeded to address each of defense counsel's arguments, characterizing each argument as "smoke and mirrors." Defense counsel did not object to any of these references.

The prosecutor's comments were not improper.

On appeal, Bradshaw acknowledges that the use of the phrase "smoke and mirrors" during a prosecutor's closing argument generally has been upheld as fair rhetoric. See, e.g., *State v. Albright*, 283 Kan. 418, 429–30, 153 P.3d 497 (2007) (citing several cases); *State v. Morton*, 38 Kan.App.2d 967, 976–78, 174 P.3d 904, *rev. denied* 286 Kan. 1184 (2008) (same).

Nevertheless, Bradshaw argues this case is distinguishable because the prosecutor's repeated use of the "smoke and mirrors" phrase was unfair and prejudicial. Bradshaw equates the prosecutor's actions in this case to the prosecutor's actions in *State v. Elnicki*, 279 Kan. 47, 105 P.3d 1222 (2005) and *State v. Jackson*, 37 Kan.App.2d 744, 157 P.3d 660, *rev. denied* 285 Kan. 1176 (2007).

We find neither case analogous here. In *Elnicki,* the prosecutor committed reversible misconduct by repeatedly characterizing the defendant's version of events as a "yarn," "fairytale," "fabrication," "tall tale," and "spin." *Elnicki*, 279 Kan. at 58–59, 105 P.3d 1222. The *Elnicki* court compared the prosecutor's comments to those in *State v. Pabst*, 268 Kan. 501, 996 P.2d 321 (2000), where the prosecutor committed reversible misconduct by referring to the defendant as a liar 11 times during closing argument. *Elnicki*, 279 Kan. at 60–62, 105 P.3d 1222. The *Elnicki* court concluded the prosecutor's comments were improper because "the repeated reference throughout the closing argument to the defendant as a liar'—or the term's alleged euphemisms, as here—is itself improper." 279 Kan. at 63–64, 105 P.3d 1222.

***5** In addressing the second step of the prosecutorial misconduct analysis, the *Elnicki* court found the prosecutor's improper comments during closing argument constituted plain error. The court noted that the prosecutor made the comments to improperly bolster the credibility of the State's witnesses and also presented an unredacted videotaped interrogation in which the investigating officer repeatedly accused the defendant of lying. Further, the central issue in *Elnicki*—whether the victim and defendant had consensual sex—required the jury to determine whose version of events was more credible. We note that even under these circumstances, the court termed it a "close call" as to whether the prosecutor's misconduct required reversal. 279 Kan. at 64–67, 105 P.3d 1222.

In *Jackson,* the defendant testified he did not intend to harm anyone but himself when he fired approximately 30 shots at two police officers, wounding both officers and his daughter. The defendant further testified he wanted to commit suicide by forcing the officers to shoot him, he wore a bulletproof vest so they would shoot him in the head, and he stopped shooting because he had an out-of-body experience and the good angel told him to stop shooting. *Jackson*, 37 Kan.App.2d at 746, 157

P.3d 660. During closing arguments the prosecutor directly referred to the defendant's testimony as "two doozies," a "doozie of a statement," and "a crock." 37 Kan.App.2d at 747, 157 P.3d 660.

The *Jackson* panel determined the prosecutor's comments were improper, noting that Jackson's credibility was at issue in the case and the comments "amounted to a personal opinion about Jackson's credibility." 37 Kan.App.2d at 750, 157 P.3d 660. Nevertheless, the panel concluded the improper comments did not constitute plain error or require reversal because the comments were isolated and accompanied by a reference to the jury instruction on determining the credibility of witnesses. Further, the *Jackson* panel found the comments were not flagrant and did not demonstrate ill will, and the evidence against Jackson, specifically the evidence to support premeditation and intent, was "substantial if not overwhelming." 37 Kan.App.2d at 751–52, 157 P.3d 660.

Here, defense counsel conceded during both his opening statement and closing argument that the "best evidence in this case" was the videotape of the pursuit. Defense counsel's opening statement, cross-examination, and closing argument therefore emphasized alleged deficiencies in the police investigation and attempted to divert attention away from the State's evidence. The prosecutor's "smoke and mirrors" comments were made in rebuttal and in direct response to defense counsel's closing argument.

In this regard, we find the facts of this case to be more analogous to those in *State v. Duke*, 256 Kan. 703, 887 P.2d 110 (1994), and *State v. Albright*, 283 Kan. 418, 153 P.3d 497. There, the prosecutor characterized defense counsel's closing argument as "a lot of smoke" and "smoke and mirrors." *Duke*, 256 Kan. at 718, 887 P.2d 110. On appeal, the State argued the comments were made in response to defense counsel's "attempt[s] to cast doubt on the veracity of the State's witnesses and the quality of the investigation conducted by the police." 256 Kan. at 719, 887 P.2d 110. The *Duke* court agreed, concluding "the prosecutor's comments were within the bounds of permissible rhetoric in arguing the State's case." 256 Kan. at 720, 887 P.2d 110.

***6** In *Albright*, the court cited several cases in which the prosecutors' characterizations of defense counsels' arguments as "smoke and mirrors" or "smoke screens" were upheld on appeal. *Albright*, 283 Kan. at 429–30, 153 P.3d 497. Relying upon these cases, the *Albright* court concluded the prosecutor's characterization of the defendant's theories as the "SODDI" or "some other dude did it" defense and the prosecutor's use of an analogy based on a "Not Me" cartoon character were similar in nature, "more or less accurately characterized the defense theory of the case," and were not improper. 283 Kan. at 430, 153 P.3d 497.

Similarly, in this case the prosecutor's repeated characterization of defendant's arguments as "smoke and mirrors" in rebuttal closing argument more or less accurately characterized defense counsel's repeated efforts to divert the jury's attention away from the State's evidence and to encourage the jury to focus on the allegedly faulty police investigation. Under these circumstances, we conclude the prosecutor's comments were not improper. Accordingly, we need not determine whether the comments constituted plain error, and Bradshaw's first claim of error fails.

THE DISTRICT COURT DID NOT GIVE A CLEARLY ERRONEOUS JURY INSTRUCTION OR MAKE COERCIVE COMMENTS DURING DELIBERATIONS.

Next, Bradshaw claims the district court erred in giving an *Allen* instruction which included the language "[a]nother trial would be a heavy burden on both sides." See *Allen v. United States*, 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed. 528 (1896). Further, Bradshaw contends the district court compounded this error by making unduly coercive comments to the jury during

deliberations.

The State concedes the *Allen* instruction contained erroneous language but contends the instruction was not clearly erroneous. Further, the State argues the court's comments to the jury during deliberations were not coercive or prejudicial.

Facts related to this issue

On the third day of trial and prior to deliberations, the district court instructed the jury on the law of the case. In doing so, the court gave an *Allen* instruction that contained the statement "[a]nother trial would be a heavy burden on both sides." Defense counsel did not object to the instruction as given.

At some point after deliberations began, the court called the jury back to determine if the jurors wanted to break for lunch. It appears the jury took a lunch break, resumed deliberations, and later requested a read back of the testimonies of Officer Hurla and Dr. Tanner. Following the read back, the jury again resumed deliberations. The jury later requested a read back of Miller's testimony, listened to the requested testimony, and again resumed deliberations.

The court later called the jury back to determine whether it was making progress. When the jury foreperson responded affirmatively, the court commented:

> "Okay. Urn, some times [sic] this is not unusual to bring folks back and make certain that you're still churning through everything and you're making progress. So, uh, with that, uh, I will let you continue to deliberate as long as you feel that you're making progress. Urn, part of it is that, urn, I'm going to keep you for awhile, that doesn't sound right, um, I'm going to require that you deliberate perhaps a little longer than normal because of the fact of other obligations of other people tomorrow. That doesn't mean you should cut it short. It doesn't mean anything like that. Obligations can always be changed but I will probably keep you here at least till probably till 7:00 tonight to give you ... a chance to work through it, okay. Alright, um, with that, urn, if you need to have another, uh, break for a little fresh air, bathroom break, whatever, let Carol know and we'll take a ten, fifteen minute break. Court appreciates the fact that you are continuing to churn through it, so keep doing the good work and we'll see where we end up. Alright, thank you. Alright, we're in recess."

***7** At some point, the court was informed that some of the jurors needed a smoke break. The record does not indicate whether this request occurred before or after the court's comments. However, it is clear that sometime after the court's comments, the jury requested clarification on a jury instruction and after conferring with both parties, the court responded that the jury was required to interpret the instruction as written. The jury resumed deliberating for an unknown period of time and then notified the court it had reached a verdict on each charge.

The Allen *instruction was not clearly erroneous.*

The State concedes the district court erred when it instructed the jury that "[a]nother trial would be a burden on both sides." See *State v. Salts*, 288 Kan. 263, 266–67, 200 P.3d 464 (2009); *State v. Page*, 41 Kan.App.2d 584, 586–87, 203 P.3d 1277 (2009). However, as the State points out, this error does not require automatic reversal. Compare *Salts*, 288 Kan. at 266, 200 P.3d 464 (noting that even when a deadlocked jury instruction contains erroneous language, reversal is generally not required when the instruction is given prior to jury deliberations) with *Page*, 41 Kan.App.2d at 586–87, 203 P.3d 1277 (reversing defendant's conviction when deadlocked jury instruction containing erroneous language was given prior to jury deliberations and over defendant's objection, and the jury informed the court that a hung jury was a real possibility).

Here, as in *Salts,* the erroneous instruction was given prior to jury deliberations and Bradshaw failed to object to the instruction at trial. See *Salts,* 288 Kan. at 264–65, 200 P.3d 464. Therefore, we apply a clearly erroneous standard of review. Under this standard, reversal is not required unless we are firmly convinced that there is a real possibility the jury would have rendered a different verdict had the instructional error not occurred. K.S.A. 22–3414(3); *Salts,* 288 Kan. at 265–66, 200 P.3d 464.

Here, the jury viewed the videotape showing Bradshaw failing to pull over during a traffic stop, leading Officer Hurla on a high-speed chase, and shooting at Officer Hurla. The jury heard Officer Hurla testify consistent with the video; heard evidence that a bullet fragment matching the caliber of Bradshaw's gun had been removed from Bowie's neck the day after the shooting; and heard Miller's statements to police which incriminated Bradshaw and were consistent with physical evidence found at the scene. Based on the evidence presented at trial, it is highly unlikely the jury would have returned different verdicts had the instructional error not occurred. Thus, we conclude the *Allen* instruction was not clearly erroneous.

Even considered in light of the district court's comments during deliberations, the instructional error does not require reversal.

Bradshaw next argues that even if the instruction was not clearly erroneous, his convictions must be reversed because the instructional error was compounded by the district court's improper comments to the jury during deliberations. Specifically, Bradshaw claims the court's comments placed undue pressure on the jury to reach a verdict within the court's time frame.

***8** However, the record on appeal does not indicate the length of time the jury continued to deliberate either before or after the court made the allegedly coercive comments. Thus, it is difficult if not impossible to determine the coercive effect on the jury, if any, of the court's comments. The appellant bears the burden to designate a record sufficient to establish the errors claimed on appeal. Without such a record, the claim of alleged error fails. *State v. Paul,* 285 Kan. 658, 670, 175 P.3d 840 (2008).

Moreover, lacking any contextual clues, the district court's inquiry regarding the jury's progress, its notice to the jury that it could continue deliberations until 7 p.m., and its statement that the jury need not "cut it short" do not appear coercive. Accordingly, we conclude that even when combined with the *Salts* instructional error, the court's comments during deliberations were not coercive, reversal is not required, and Bradshaw's second claim of error fails.

TWO OF BRADSHAW'S CONVICTIONS ARE MULTIPLICITOUS.

Finally, Bradshaw claims his convictions for reckless driving and fleeing or attempting to elude a police officer while engaging in reckless driving are multiplicitous because reckless driving is a lesser included offense as it was charged in this case.

Based on a single course of conduct, the State charged Bradshaw with fleeing or attempting to elude a police officer while engaging in reckless driving in violation of K.S.A. 8–1568(b)(1)(C), and a separate count of reckless driving in violation of K.S.A. 8–1566. When charged under K.S.A. 8–1568(b)(1)(C), fleeing or attempting to elude a police officer requires proof (1) that a driver of a motor vehicle willfully failed or refused to stop for, or otherwise fled or attempted to elude, a pursuing police officer, (2) when the driver was given a visual or audible signal to do so, and (3) the driver *engaged in reckless driving as defined by K.S.A. 8–1566 and amendments thereto* (4) during a police pursuit. K.S.A. 8–1568(b)(1)(C). The jury convicted Bradshaw of both charges.

As the State appropriately concedes, reckless driving is a lesser included offense of fleeing or attempting to elude a police

officer while engaging in reckless driving in violation of K.S.A. 8–1568(b)(1)(C), because all of the elements of reckless driving are included within the elements of fleeing or attempting to elude a police officer while engaging in reckless driving. See K.S.A. 21–3107(2)(b); *State v. Rutledge,* No. 98,396, unpublished opinion filed October 31, 2008, *rev. denied* 288 Kan. 835 (April 7, 2009.

Because Bradshaw's convictions for fleeing and attempting to elude a police officer and reckless driving are multiplicitous, we reverse his reckless driving conviction and vacate his 6–month jail sentence on that count.

Affirmed in part, reversed in part, and the sentence for the reckless driving conviction is vacated.

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