

No. 15-114574-A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS
Plaintiff-Appellant

v.

LAKENDRICK K. SMITH
Defendant-Appellee

REPLY BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
HONORABLE MARK S. BRAUN, JUDGE
DISTRICT COURT CASE NO. 14-CR-2079

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NATURE OF THE CASE

The State appealed the district court's granting of Smith's motion to suppress a firearm seized in a search of his car and ruling that certain statements made by Smith regarding the gun were inadmissible at trial. Smith submitted his brief and raised three separate issues. The State now submits this reply brief to address the new material contained in Smith's brief. See Supreme Court Rule 6.05.

STATEMENT OF THE ISSUE

- I. This court has jurisdiction to hear this appeal by the State.**

ARGUMENTS AND AUTHORITIES

- I. This court has jurisdiction to hear this appeal by the State.**

Smith alleges that this court does not have jurisdiction over this appeal because the suppression of the gun and Smith's statements do not substantially impair the State's ability to prosecute the case.

Whether jurisdiction exists is a question of law over which the appellate court has unlimited review. *State v. Ellmaker*, 289 Kan. 1132, 1147, 221 P.3d 1105 (2009), *cert. denied* 130 S.Ct. 3410 (2010). The right to appeal is entirely statutory and is not contained in the United States or Kansas Constitutions. Subject to certain exceptions, Kansas appellate courts have jurisdiction to entertain an appeal only if the appeal is taken in the manner prescribed by statutes. *State v. J.D.H.*, 48 Kan.App.2d 454, 458, 294 P.3d 343, *rev. denied* 297 Kan. 1251 (2013).

The State's authority to appeal in a criminal case is limited by statute. The State may elect from the limited jurisdictional bases in its appeal. *State v. Berreth*, 294 Kan. 98, 112, 273 P.3d 752 (2012). The appellate court has jurisdiction to entertain a State's

appeal only if it is taken within time limitations and in the manner prescribed by the applicable statutes. *State v. Sales*, 290 Kan. 130, 134, 224 P.3d 546 (2010).

The applicable statute is K.S.A. 22-3603, which provides:

When a judge of the district court, prior to the commencement of trial of a criminal action, makes an order quashing a warrant or a search warrant, suppressing evidence or suppressing a confession or admission an appeal may be taken by the prosecution from such order if notice of appeal is filed within 14 days after entry of the order. Further proceedings in the trial court shall be stayed pending determination of the appeal.

In addition, our Supreme Court held in *State v. Newman*, 235 Kan. 29, 34, 680 P.2d 257 (1984), that

the term “suppressing evidence” as used in [K.S.A. 22-3603] is to have a broader meaning than the suppression of evidence which is illegally obtained. It should include not only “constitutional suppression” but also rulings of a trial court which exclude State’s evidence so as to substantially impair the State’s ability to prosecute the case.

The *Newman* Court made it clear that the prosecution is not allowed to file an interlocutory appeal from every “run-of-the-mill pretrial evidentiary ruling” of a district court. 235 Kan. at 35. “Interlocutory appeals are to be permitted only where the pretrial order suppressing or excluding evidence places the State in a position where its ability to prosecute the case is substantially impaired.” 235 Kan. at 35; see also *State v. Sales*, 290 Kan. 130, 136, 224 P.3d 546 (2010) (quoting same).

Accordingly, “the prosecutor should be prepared to make a showing to the appellate court that the pretrial order of the district court appealed from substantially impairs the State’s ability to prosecute the case.” 290 Kan. 130, Syl. ¶ 5. “[I]n order to determine whether a trial court order substantially impairs the State’s ability to prosecute a case, the evidence available to the State must be assessed to determine just how

important the disputed evidence is to the State's ability to make out a prima facie case." 290 Kan. at 140.

Since *Newman*, both our Supreme Court and this court have repeatedly examined the State's interlocutory appeals to determine whether the order of suppression or exclusion substantially impairs the State's case. See *Sales*, 290 Kan. at 134–41 (tracing history of this requirement, determining that the excluded evidence did not substantially impair the State's prosecution, and dismissing for lack of jurisdiction); *State v. Griffin*, 246 Kan. 320, 323–26, 787 P.2d 701 (1990) (noting *Newman* requirement and proceeding to examine the merits of the issue); *State v. Huninghake*, 238 Kan. 155, 156–57, 708 P.2d 529 (1985) (noting *Newman* requirement and finding that the suppression substantially impaired the State's case); *State v. Galloway*, 235 Kan. 70, 73–74, 680 P.2d 268 (1984) (same); *State v. Bradley*, 42 Kan.App.2d 104, 105–06, 208 P.3d 788 (2009) (noting *Newman* requirement and proceeding to examine the merits of the issue); *State v. Bliss*, 28 Kan.App.2d 591, 594–95, 18 P.3d 979 (noting *Newman* requirement and finding that the suppression substantially impaired the State's case), *rev. denied* 271 Kan. 1038 (2001); *State v. Nuessen*, 23 Kan.App.2d 456, 458–59, 933 P.2d 155 (1997) (same).

Moreover, in *State v. Huninghake*, 238 Kan. 155, 157, 708 P.2d 529 (1985), the court elaborated on the definition of "substantially impairs" and held that "[s]uppression rulings which seriously impede, although they do not technically foreclose, prosecution can be appealed under K.S.A. 22-3603." The suppression of the gun and statements by Smith substantially impairs the State's ability to prosecute its case under the facts presented.

Smith was charged with one count of criminal threat alleging that Smith communicated a threat to commit violence with reckless disregard of the risk of causing fear in another. K.S.A. 21-5415(a)(1). In order to convict Smith of criminal threat, the State must establish that he made a threat to commit violence with reckless disregard of the risk of causing fear in another. Smith's state of mind is critical to the crime. The State disagrees with Smith that the gun and his statements regarding the gun have "minor corroborative value."

The gun and statements regarding the gun are important to the State's case as it is the only corroborative evidence to support the criminal threat and goes to the element of his state of mind. There was no confession here by Smith and Smith told Officer Riggins that he did not have a gun and did not know why he was being arrested. Although evidence of the ability to carry out threat is not required, it is of substantial importance to the State's case in chief. The State still had to prove that Smith acted recklessly and the fact that he actually had a gun in the car helps establish his state of mind when he made the threat.

In *State v. Bliss*, 28 Kan.App.2d 591, 18 P.3d 979 (2001), the State brought an interlocutory appeal of the district court's order prohibiting admission at trial of other instances of sexual misconduct between the defendant, who was charged with two counts of aggravated indecent liberties with a child, and the complaining witness. A panel of this court held that it had jurisdiction to hear the appeal because the evidence was "of substantial importance" to the case as the evidence tending to establish the defendant's continuing wrongful sexual relationship with the complaining witness and corroborated the witness' testimony. 28 Kan.App.2d at 597. Similarly, here the evidence corroborated

the witness's testimony that there was a criminal threat and that Smith did, in fact, have a gun on the premises. Although the evidence did not technically foreclose the prosecution, as in *Bliss*, the evidence was of substantial importance to the case as it corroborated the witness's testimony and helped establish Smith's state of mind as well as impeach the credibility of his initial statement to law enforcement.

The consideration of Smith's statements regarding the gun and the gun itself after the threat had been communicated was part of the totality of the evidence which must properly be considered in determining whether Smith's statements were made in reckless disregard of the risk causing fear in another. "All circumstances surrounding the communication in issue is a terroristic threat." *State v. Miller*, 6 Kan.App.2d 432, 435, 629 P.2d 748 (1981); see also *State v. Cope*, 273 Kan. 642, 44 P.3d 1224 (2002).

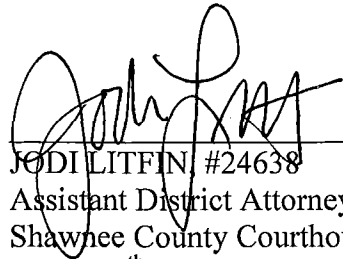
CONCLUSION

For the above and foregoing reasons, the State respectfully requests that the Kansas Court of Appeals reverse the district court's ruling and remand the case for further proceedings.

Respectfully submitted,

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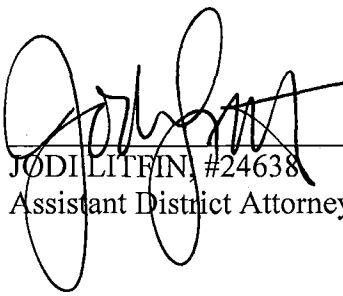
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that service of the above and foregoing Reply Brief of Appellant was made by email on this 17th day of February, 2016, to:

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