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No. 16-115,609-A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,

Plaintiff-Appellee,

vs.

ANTHONY STEPHEN NICHOLS,

Defendant-Appellant.

BRIEF OF APPELLANT

Appeal from the District Court of Riley County, Kansas,

Honorable Meryl Wilson, Judge

District Court Case Nos. 13-CR-556

Gerald E. Wells, #06500
Jerry Wells Attorney-at-Law
Attorney for Defendant-Appellant
P. O. Box 641
Lawrence, Kansas 66044
785-856-3925 Phone ▪ 785-856-1583 Facsimile
jerrywells@sunflower.com

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NATURE OF THE CASE

This is a direct criminal appeal from the Defendant Mr. Nichols' conviction by jury of Attempted Murder.

STATEMENT OF ISSUES

Issue I: ***Did the District Court err by not suppressing the information gained by the State from the examination of the contents of Mr. Nichols' cell phone based on the original warrant?***

Issue II: ***Did the District Court err by denying Mr. Nichols' motion to suppress statements made by Mr. Nichols' in an interview with police officers?***

STATEMENT OF FACTS

On September 13, 2013, a Complaint was filed in the Riley County, Kansas, District Court, charging Mr. Nichols, the Defendant, with one count of Aiding and Abetting First Degree Murder. Mr. Nichols' co-defendants are listed as Christina Marie Love and James Christopher McKenith. (R.I, 20.)

A preliminary hearing was conducted by the Court on July 16, 2014, on the State's complaint against Mr. Nichols. (R.XI.) Christina Love, one of Mr. Nichols' co-defendants in the State's complaint, testified on behalf of the State. (R.XI, 24-63.) Elizabeth Hartman, who identified herself as a crime lab technician for the Riley County Police Department (R.XI, 3-23), also testified for the State. At the end of the evidence, the Court bound Mr. Nichols' over for trial on one count of premeditated first degree murder. (R.XI, 65-66.)

What follows is a flurry of motions from Mr. Nichols. (R.I, 46, 57, 61, 63, 67, 72, 74, 76, and 80.) The State responds to Mr. Nichols' motions. (R.I, 82, 84, 86, 88, 90, 92, 94, 96, and 101.) Mr. Nichols files additional motions. (R.I, 403*, 115, 120, 124, and 136; R.II, 1, 7, 11, 13, and 20.) [*Note: The Court should note that the Table of Contents shows Mr. Nichols' Motion for *Jackson Denno* Hearing is page 403 of R.I; however, the actual page number of that motion is page 103, R.I, 103.]

Most significant of Mr. Nichols' motions is his Motion for a *Jackson v. Denno* hearing (R.I, 403, or 103); a Motion to Suppress Search (R.I, 115-119); a second Motion

to Suppress Search (R.I, 120-123); a third Motion to Suppress (R. II, 7-10); a Motion to Suppress Search of Defendant's Facebook Account (R.II, 13-18); another Motion to Suppress (R.II, 20-22); and a Motion to Suppress Search of the Defendant's Phone. (R.II, 61-81.) The State responds. (R.II, 24, 28, 30, 32, 34 and R.II, 84-88.) The Court conducted three separate motion hearings. (R.XX, R. XXI, R. XXII.)

On October 8, 2014, the Court convened the first motion hearing. (R.XX.) At the hearing, the Court sustains Mr. Nichols' motion for discovery, but Mr. Nichols' objects to reciprocal discovery and the Court takes it under advisement. (R.XX, 3-6.) The Court sustains Mr. Nichols' motion to reveal any deals or plea bargains which were made by the State. (R.XX, 6.) The State does not object to Mr. Nichols' motion for prior convictions of any witnesses. (R.XX, 6.) The Court raises Mr. Nichols' Motion to Prohibit Antemortem Photographs (R.I, 63-66), the State concedes the motion (R.XX, 7). The Court orders a sequestration order. (R.XX, 8.) The Court takes up Mr. Nichols' motion for an information, sustains the motion, and orders the State to provide information on gang affiliation. (R.XX, 11.) As to the motion on jury database information, the State agrees to follow the statute regarding character evidence. (R.XX, 13.) Mr. Nichols' agrees to waive speedy trial on his motion for a continuance of the trial. (R.XX, 17-18.)

On February 4, 2015, the Court conducted a second motion hearing. (R.XXI.) At the beginning of the hearing, the parties announced that a number of motions are disposed of by agreement. (R.XXI, 3.) The State presents evidence through testimony on a search of property located in Kansas City, Kansas.

Daniel Bortnick, who identified himself as a Riley County police officer, testifies that he obtained Facebook records of Mr. Nichols' Facebook account, pursuant to a warrant, (R.XXI, 8-9.)

Officer William Arnold, a Junction City police officer, testified that he had investigated a homicide case of the murder of Anthony Nixon, and that he obtained Facebook records for Mr. Nichols. (R.XXI, 12-23.)

Alan Riniker testified on behalf of the State, he identified himself as an investigator for the Riley County Police Department, and he stated that he took part in a search of the residence in Kansas City, Kansas. He identifies a search warrant in that regard, which includes the search of a 1996 Chevrolet Suburban. At the search conducted on September 11, 2013, there were K.B.I. agents and Kansas City police officers present. (R.XXI, 24-26.) Riniker testified that a Detective Johnson had applied for, and received, a search warrant in Riley County. Kansas City officers obtained a hardcopy of the warrant, but in the meantime, the officers executed the warrant. (R.XXI, 26-27.) On cross-examination, Detective Riniker confirmed that he had received an email copy of the warrant on his cellphone. (R.XXI, 28-31.)

Patricia Giordano testified on behalf of the State. She identified herself as a Junction City detective who had contact with Mr. Nichols while he was in custody on September 11, 2013. (R.XXI, 33.) She testified that, while Mr. Nichols was alone in the interview room, Mr. Nichols was lying on the floor and appeared to be asleep. (R.I, 35.) A Kansas City detective woke Mr. Nichols up. Giordano identified a transcript of discussions she and a Detective Jager had with Mr. Nichols and states that she had received a copy of the transcript. (R.XXI, 37.) Detective Jager interviewed Mr. Nichols. The detectives were armed at the time. Ms. Giordano testified that she filled out a

Miranda form with Mr. Nichols, and that Mr. Nichols stated that he knew his rights and he recited them. She testifies further that Mr. Nichols said it was unnecessary to read him his rights, but Giordano read him the *Miranda* warning anyway. (R.XXI, 38-40.) She states that Mr. Nichols signed the *Miranda* warning; and that the officers interviewed Mr. Nichols for one hour and a half, but stopped and advised Mr. Nichols that officers were executing a search warrant at his house and that they would be back after the search. (R.XXI, 42.)

Mr. Nichols was transported to Junction City. At Junction City, Giordano, along with Detective Brown, interviewed Mr. Nichols. Giordano identified a transcript of the Junction City interview and stated it was accurate. She continued the interview with Mr. Nichols, but does not re-read Mr. Nichols his *Miranda* warning. She acknowledges that the first interview took place 6 ½ hours earlier in Kansas City. (R.XXI, 44-45.) On cross-examination, Giordano admitted that Mr. Nichols had stated to her, "I don't want to talk about it now." Giordano did not take the comment as not wanting to talk about the investigation. (R.XXI, 46.) Giordano admits that Mr. Nichols complained about the lack of sleep and "memory" issues. (R.XXI, 48.) Mr. Nichols also mentioned a head injury. (R.XXI, 48-49.) Giordano admits that no one administered the *Miranda* warning at the interview in Junction City, nor did anyone ask if Mr. Nichols remembered going over his *Miranda* rights in Kansas City. Giordano admits that Mr. Nichols was in custody. (R.XXI, 50-51.) Both parties argue the Motion to Suppress.

In its ruling, the Court notes that the officer present at the Kansas City search had a digital copy of the search warrant. (R.XXI, 60-61.) The Court admits that the Court had never been faced with a situation where a search had begun before the officers had received a hard copy of the warrant, but the Court determined that, under the

circumstances, a copy of the warrant was available on the officer's cellphone. The Court notes that the affidavit was lengthy. The Court denied Mr. Nichols' motion to suppress the search warrant. (R.XXI, 62-63.)

The Court takes up the search of the Facebook account of Mr. Nichols. The State argues that the warrant was issued based on a good faith belief by the officers that Mr. Nichols' Facebook account contained relevant information. (R.XXI, 63-65.) Counsel for Mr. Nichols counters that the warrant lacks specific information to show probable cause for a warrant, and, that the search of the Facebook account is a fishing expedition. (R.XXI, 65.) Additionally, Counsel argues that the warrant reaches too far. (R.XXI, 66.) The Court rules that the detective had a reasonable belief that the Facebook account had relevant information. The Court denies the motion to suppress Mr. Nichols' Facebook account records. (R.XXI, 68-69.)

The Court takes up the motion to suppress Mr. Nichols' statements to law enforcement. The State notes that there were three motions to suppress statements. The State argues that the Junction City interview was a continuation of the interview started in Kansas City, even though the interviews were 6 ½ hours apart. (R.XXI, 70.) The State asserts that Mr. Nichols' statement, "I don't want to talk about it now." was not a termination of the interview, only that Mr. Nichols' didn't want to talk about the guns. (R.XXI, 71.) Mr. Nichols, through Counsel, counters that Mr. Nichols was tired, had memory issues, and had suffered a prior gunshot wound to the head. Further, Mr. Nichols contended that the Junction City interview was concerning new material, and the officers did not re-mirandize Mr. Nichols, and should have re-mirandized Mr. Nichols, nor did the officers review the prior *Miranda* warning with Mr. Nichols. The, "I don't

want to talk about it now." remark, Mr. Nichols alleges is the invocation to stop the interview. (R.XXI, 72-74.)

The Court rules on the suppression motion. The Court notes that it was Mr. Nichols who struck up the conversation with Giordano, and that it was apparent that Mr. Nichols knew Giordano. It was clear to the Court that when Mr. Nichols indicated that he knew his rights and Giordano didn't have to read them, that Mr. Nichols fully understood his rights and waived them. The Court also notes that when Detective Jager asks Mr. Nichols if the officers could return to talk to them after the search warrant was executed, Mr. Nichols says yes. The Court further noted that Mr. Nichols did not have his rights re-read to him at Junction City some nearly 7 hours after the initial interrogation, however, the Court finds that the time period between interviews was reasonable, and, a continuation of the first interview, noting again that Mr. Nichols had agreed to speak to the officers after the conclusion of the search warrant. The Court further found that in context, the statement by Mr. Nichols, "I don't want to talk about it now.", was not an invocation of his right to cease the interview, but rather Mr. Nichols was indicating that he did not want to talk about the gun now. Finally, the Court denies Mr. Nichols' motion to suppress his statements. (R.XXI, 74-78.)

The Court takes up the State's motion to admit evidence that Mr. Nichols shot Anthony Nixon in Geary County. Mr. Nichols argues that whoever shot Nixon had nothing to do with Mr. Nichols' case where the victim is John Burroughs. The Court rules that the evidence is material to show that Mr. Nichols possessed the gun in both shootings. The Court denies Mr. Nichols' motion. (R.XXI, 78-88.)

The Court takes up the State's motion to admit Mr. Nichols' statements that he distributed drugs. Mr. Nichols objected, arguing that the information is more prejudicial

than probative. The Court rules a part of the statement can be admitted, but part is not probative and is not admitted. (R.XXI, 89-95.)

On March 5, 2015, the Court conducts a third hearing, this one on the seizure of Mr. Nichols' Facebook account records, and, the seizure and examination of Mr. Nichols' cellphone. (R.XXII). The Court first takes up the seizure of Mr. Nichols' cellphone, and the information obtained from that phone. Mr. Nichols argues that the original warrant allowed the cellphone to be seized, but did not allow the officers to go through the information on the cellphone. Mr. Nichols argues that the officers seized the phone and then, under that original search warrant, which Mr. Nichols believes is problematic, the officers go through the phone and review the contents. Based on the officers' review of the contents of the cellphone, the officers subsequently obtained a separate search warrant authorizing them to search the phone contents. Mr. Nichols' position is that it required a separate search warrant for the officers to be able to go through the contents of the cellphone, but regardless, the officer's searched the contents of the cellphone prior to getting that separate warrant, and as a result, the officer's search of the cellphone contents was not warranted and should be suppressed. In summary, Mr. Nichols argued that the seizure of the cellphone lacked probable cause, and, secondly, a separate warrant was necessary to at the information on the cellphone. (RXXII, 5-8.) The State counters that the warrant and affidavit were sufficient justification to support the officer's search of the contents of the cellphone, and, further, that if there isn't sufficient probable cause for the officer's to have search the cellphone, then allow the admission of the evidence based on good faith exception. (R.XXII, 8-11.) The Court rules there was probable cause for the officers to seize the cellphone and to look at the contents. The Court referenced that the

cellphone was unsecured and it was much like the plain view exception. The Court denied the motion to suppress the cellphone. (R.XXII, 11-12.)

The Court then takes up the motion in limine to limit the use of information derived from Mr. Nichols' Facebook account and any conclusions from that information. Mr. Nichols further argues that to do so is violative of case law that a prosecutor cannot make improper suggestions, insinuations, citing the *Morris* case. Further, the State, by use of the Facebook information, would be asking the jury to speculate in contraversion of case law. (R.XXII, 12-14.) The State argues that the test of admissibility is relevancy, and the Facebook information is relevant, and only asks the jury to draw reasonable inference. Finally, the State argues that it is not hearsay information, and is, therefore not excludable for that reason. (R.XXII, 15-19.) The Court concludes, basically, that the Court will not exclude evidence just because it is from the Facebook account, but the State will be required to show relevancy of each piece of evidence. (R.XXII, 20-21.)

The case proceeds to trial. [This Court will note that Mr. Nichols will provide a rather abbreviated statement of facts derived from the jury trial proceeding simply because the issues on this appeal will be argued more from the various motion hearings conducted by the Court (R.XX, R.XXI, and R.XXII), rather than the facts derived from the trial.]

David Jeffrey Kelley testified on behalf of the State that John Burroughs was an employee of a Country Club, he didn't show up for work, and it was later determined he was found dead. (R.XII, 137-140).

Tyrone Townsend testified that he was the first officer on the scene and he identified the position of a body, a male laying there, on the floor, on his right side, who he later learned was John Burroughs. (R.XII, 145.)

Vera McCullers testifies that she knew Mr. Nichols, and that in September of 2011 Mr. Nichols approached her and asked where "John" lived, and that she called Tina [Christina] Love on Mr. Nichols behalf. (R.XII, 148-153.) On cross-examination, Ms. McCullers states that Tina called her back and she advised Tina that Mr. Nichols was on his way over so Tina can show Mr. Nichols where John Burroughs lived. (R.XII, 154.) Ms. McCullers further stated that Tina told her that they thought she had killed somebody. (R.XII, 157.)

Christopher Briedenstein testified, on behalf of the State, that he was a Junction City police officer and responded to a "shots fired" call from a Mr. Douglas in the vicinity of where a body was found in Junction City, Kansas. (R.XXII, 163-166.) The body was determined to be that of Anthony Nixon. (R.XII, 166.)

Kirk Douglas testified on behalf of the State. He stated that he lives in Junction City, Kansas, and on the night Nixon's body was found, he saw an individual right before the gunshots were heard, and he identified the person to be Mr. Nichols. This person, Mr. Nichols, spoke to Mr. Douglas and then walked towards Claudette Ruble's house. On cross-examination, Mr. Douglas states he saw two people that night, and one person had a shotgun. He saw only one person get into a car. (R.XII, 170-179.)

Claudette Ruble testified on behalf of the State, that she lives with her husband on North Webster. She knew a man by the name of Anthony Nixon. She states that she knows Mr. Nichols, and that the night of the shooting she was on her porch with Anthony Nixon and a person called "Nae Nae". Claudette went inside of her house with Nae Nae and then she heard a gunshot. (R.XII, 182-185.) She went back out onto the porch, she sees Nixon on the ground, but did not see who shot Nixon. Mr. Nichols comes to Ms. Ruble's door and states everything will be okay. She identifies another man with Mr.

Nichols, but did not recognize him. (R.XII, 186-188.) Ms. Ruble acknowledges a fight occurred on her porch the night before the incident, but Mr. Nichols wasn't involved. (R.XII, 189-191.)

On July 29, 2015, the jury trial continued. The State called Robert Carl who identified himself as an officer with the Kansas City Police Department. He went to an apartment in Kansas City, Kansas, with other officers, and took Mr. Nichols into custody and secured the scene. (R.XIII, 200-208.)

Alan Riniker testified on behalf of the State. (R.XIII, 209-236.) Riniker identifies himself as an investigator with the Riley County Police Department, and identifies photographs, diagrams, and evidence identification regarding the death of John Burroughs. (R.XIII, 210-221.) Mr. Riniker identifies knife wounds on Burroughs' body. (R.XIII, 220-223.) Importantly, Riniker states that he took part in a search in Kansas City, Kansas. Mr. Nichols objects to the line of testimony, any discussion of the search warrants, based on prior agreements, and receives a "continuing objection". (R.XIII, 224-225.) Riniker recounts the search of Mr. Nichols' residence and who participated. A phone is collected and turned over to the Junction City Police Department. Photographs were taken of the residence. A firearm was recovered from a bucket. The officers searched a vehicle belonging to Mr. Nichols. A shotgun shell was recovered. (R.XIII, 225-236.)

The State presents the testimony of William R. Arnold. Mr. Nichols objects to Arnold's testimony and is granted a continuing objection based on previous argument. (R.XIII, 243.) Arnold describes the phone seized as a result of a search. Arnold testifies that he obtained records of a Facebook account. (R.XIII, 246-247.) He is an investigator with the Riley County Police Department. (R.XIII, 244.) Arnold states he is a cellphone

specialist and describes the cellphone and how a cellphone operates. (R.XIII, 251-260.) Arnold stated that the phone seized hit off a tower in Manhattan, Kansas. (R.XIII, 260.) Arnold testified about the records provided from Facebook. He further describes messages from the Facebook accounts attributed to Mr. Nichols. Mr. Nichols, through Counsel, objects on the admission of records based on prior arguments. (R.XIII, 262.) Certain information from the Facebook account is read into the record by Arnold. Mr. Nichols, again through Counsel, objects. (R.XIII, 262-270.) On cross-examination, Arnold admits that the account is a "dump" that contains 10,000 pieces of information. (R.XIII, 271-274.)

The State calls Calvin Sanders, who identifies himself as a detective with the Riley County Police Department. He testifies about the relationship between Tina Love and Nakisha Moore, her daughter. He obtained Ms. Moore's cellphone that he provided to Detective Bortnick. (R.XIII, 274-276.)

Daniel Bortnick testifies for the State that he is a detective with the Riley County Police Department, that he recovered a cellphone from the trailer of Mr. Burroughs, and downloaded the phone. Bortnick testified that there were calls made to Burroughs' cellphone from Nakisha Moore's phone number and Vera McCullers' phone number and a call from Burroughs' phone to Moore's phone. (R.XIII, 277-289.)

Nakisha Moore testifies, on behalf of the State, that she is very close to Mr. Nichols and she knew John Burroughs. (R.XIII, 290-291.) That on September 6th, she received a call from John Burroughs asking for her mother. Burroughs told Moore to tell her mother, Tina Love, that he had called. Moore testified that she advised her mother that John had called, and that her mother called John. She further testified that Vera McCullers called her mother She saw Mr. Nichols several days later at her house. He

took a walk with her mother and pulled up his shirt to show her mother something. (R.XIII, 292-299.) On cross-examination, Moore admitted correcting an earlier statement made to police officers. (R.XIII, 299-304.)

Paul Brown testified for the State and identified himself as the husband of Tina Love, and that he knows Mr. Nichols. He testified that he was home on September 6, 2013, with Kisha, Tina and Chris. Mr. Nichols came to his house at about 7:00 p.m. He went in the house, Tina and Mr. Nichols left. Tina came back late that night, she was sitting in the car and Tina said to Mr. Brown, "I think Choir [Mr. Nichols' nickname] killed my friend." Brown further testified that on Saturday morning Mr. Nichols came to the house, he pulled up his shirt and spun around, which Mr. Brown took to mean he didn't have a weapon, and said he wanted to talk to Tina. Brown observed Tina and Mr. Nichols talk on the corner. (R.XIII, 307-311.) On cross-examination, Mr. Nichols' Counsel points out inconsistencies between Brown's testimony and prior reports. (R.XIII, 311-314.)

Christina [Tina] Love testifies on behalf of the State. (R.XIV, 319-352.) She testifies that she had a relationship with John Burroughs when they both worked at a plant together. (R.XIV, 320-321.) The relationship ended in 2006. She admits having a drug problem, but testified that she doesn't use drugs now. Love admits that John Burroughs and she used drugs together and that Loves husband, Paul Brown, used drugs with her. Love and Burroughs began using crack cocaine on occasion. (R.XIV, 321-324.) Love testified that she has known Mr. Nichols for a long time and they had a mother-son relationship. On September 6, 2013, Love called Burroughs and Burroughs wanted her to come over and drink beer with him. Love went to Burroughs' house; her son drove her there. At Burroughs' house, Love saw Burroughs sitting on his porch.

Love testified that Burroughs gave her $50 bucks after masturbating Burroughs (R.XIV, 324), and that when she left afterward Burroughs was fine. Love further testified that she did not have sexual intercourse with Burroughs. She testified that Vera McCullers called her after she arrived back home from Burroughs. McCullers stated that "Nephew", a nick name for Nichols, was trying to get in touch with Tina. Mr. Nichols showed up at Love's house and that she went with Nichols in a red truck to Burroughs' house. Mr. Nichols parked near Burroughs' house. Love walked with Mr. Nichols to Burroughs house, which was a trailer. Love knocked on the door, Burroughs answered, and then Nichols asked her to go back to the car and wait. Love went back to the truck and had sat in the truck for 3 to 4 minutes when she heard a shot that came from the area of Burroughs' trailer. Mr. Nichols re-enters the truck, Love asked what happened, and Nichols replied, "Don't worry about it." (R.XIV, 324-333.) Love returns to her home and tells her husband, son and daughter what had happened. Love and her son returned to Burroughs' trailer. She testified that Burroughs was gasping for air and there was blood everywhere. Love said to her son that they should leave, and her son, Chris, starts stabbing Burroughs. Love didn't know her son Chris was going to do that. On the way home, Chris throws the knife away, and then they drive home.

Love further testifies that she later goes to Junction City with Sheila Scott. In Junction City, Love learns someone shot Anthony Nixon. Love goes to the police station. Love lied to the police. (R.XIV, 333-344.) Love testifies that later Nichols comes to her home, she speaks to Nichols and Nichols tells her that he shot "Banks" in the face. Love talks to the police again and she doesn't tell them anything, except that she had heard that Nichols shot Burroughs. Love was afraid that she might be next. Love was contacted by the police a third time. During that contact she tells the police

everything after her son, Chris, told her to tell them what happened at the police department. Love entered into a plea agreement with the State where she would plead to two counts of obstruction and two counts of hindering the apprehension of a suspect. (R.XIV, 333-351.) On cross-examination, Love admits to lies that she told the police on multiple occasions. (R.XIV, 351-374). Love acknowledges she will do 20 months in prison. (R.XIV, 379.)

The State presents the testimony of Patricia Giordano, who identifies herself as a detective with the Junction City Police Department. (R.XIV, 382.) She testified that she investigated the murder of Anthony Nixon, aka Banks, aka Ant, in Junction City. During the investigation, she came into contact with Claudette Ruble and Wanetta Watford. They each provided written statements. She testified that the police suspected the homicide involving Nixon might be connected to a homicide in Manhattan, Kansas. (R.XIV, 382-388.) Giordano had obtained information that Tina Love had implicated Anthony Nichols in the shooting in Manhattan. Later, she was informed that Nichols was in custody in Kansas City. Giordano and Detective Jager went to Kansas City to talk to Nichols. Giordano testified that she went to the interview room to meet with Nichols where he was being held. At this point, in Giordano's testimony, Nichols' Counsel interjects an objection to the testimony based on previous arguments. (R.XIV, 388-391.) The video of the Kansas City interview, State's No. 56, is introduced into evidence over Mr. Nichols' objection. (R.XIV, 392.) The Court allows State's No. 56, the Kansas City interview to be played, and then State's No. 55 is played, the Junction City interview. (R.XIV, 395-396.)

Elizabeth Hartman testifies, on behalf of the State, that she is a crime scene investigator for the Riley County Police Department, and that she investigated the

residence where Burroughs was killed. A number of items of evidence collected through Hartman are introduced. (R.XIV, 397-405.)

Altaf Hossain testifies as the pathologist who determined the cause of death by autopsy of Mr. Burroughs. (R.XIV, 405-431.) Hossain determined the cause of death to be both the gunshot wound and the stab wounds, that both contributed to Burroughs' death. (R.XIV, 422.) The State rests. (R.XIV, 432.)

Mr. Nichols moves for a directed verdict in favor of Mr. Nichols. (R.XIV, 433-434.) Mr. Nichols determines he will not testify. (R.XIV, 435.) The Court indicates that it will leave it up to the jury to determine the cause of death, the knife wounds or the gunshot wound. (R.XIV, 434.)

The State moves to amend from premeditated murder to attempted premeditated murder. Mr. Nichols' Counsel objects, but the Court permits the amendment. (R.XIV, 435-438.) The parties argue instructions. Mr. Nichols objects to the reasonable doubt instruction, based on the use of the word "may", the Court denies this objection, and goes with the PIK language. (R.XIV, 440-441.) The Court denies Mr. Nichols' request for an instruction on attempted voluntary manslaughter, which is denied. (R.XIV, 451.) Mr. Nichols reiterates his objection to both the amendment of the charge and the objection. (R.XIV, 453.)

Mr. Nichols objects to the verdict form, in that Mr. Nichols urges the Court to have the "not guilty" entry on the verdict form be listed first. The request is denied. (R.XIV, 455.)

The case goes to the jury after argument and the jury returns a guilty verdict. The jury finds Mr. Nichols guilty of attempted first degree murder and the jury is polled. (R.XIV, 526-527).

Mr. Nichols filed a motion to depart, a motion for acquittal and a new trial. (R.III, 57-61.) The State responded. (R.III, 65.)

On September 14, 2015, the Court conducts a hearing on Mr. Nichols' motion for acquittal and new trial, and motion for departure sentence, and sentencing. (R.XXIII.) The Court first denies Mr. Nichols' motion for acquittal and a new trial. (R.XXIII, 5.) Mr. Nichols argues for durational departure. (R.XXIII, 6-8.) The Court denies the motion and sentences Mr. Nichols to 620 months imprisonment. The sentence is ordered to run concurrent to Mr. Nichols' Geary County sentence. (R.XXIII, 13.) Mr. Nichols timely appeals. (R.XXIII, 68.)

ARGUMENTS AND AUTHORITIES

Issue I: Did the District Court err by not suppressing the information gained by the State from the examination of the contents of Mr. Nichols' cell phone based on the original warrant?

... The Standard of Review ...

"In reviewing a district court's decision regarding suppression, this Court reviews the factual underpinnings of the decision by a substantial competent evidence standard and the ultimate legal conclusion by a de novo standard with independent judgment. This Court does not reweigh evidence, pass on the credibility of witnesses, or resolve conflicts in the evidence." *State v. Ackward*, 281 Kan. 2, 8, 128 P.3d 382 (2006). "The ultimate determination of the suppression of evidence is a legal question requiring independent review." *State v. Toothman*, 267 Kan. 412, 416, 985 P.2d 701 (1999) (quoting *State v. DeMarco*, 263 Kan. 727, Syl. ¶ 1, 952 P.2d 1276 [1998]).

... Arguments and Authorities ...

The facts surrounding the seizure of Mr. Nichols' cellphone are largely not in dispute. Mr. Nichols filed a motion to suppress the search of his residence located in Kansas City, Kansas. (R.I, 115-119.) The motion alleged that a search warrant was granted for the search to seize, among other items, records "that may be on cellular phones, computers, electronic notepad, ..." (R.VIII, 3-5.) The motion concluded that the Court should suppress all items seized. (R.I, 118.) On March 5, 2015, the Court conducted a hearing on a number of motions, one of which was the motion to suppress the seizure of Mr. Nichols' phone. (R.XXII, 5). Mr. Nichols, through Counsel, argues, specifically, that although the warrant authorizes the seizure of Mr. Nichols' cellphone, it does not authorize a search of the "contents" of that phone, and, that if the police want to search the contents of the phone, then a separate search warrant is necessary. (R.XXII, 5-6.) This is the crux of Mr. Nichols' argument as to this issue. At the hearing, Mr. Nichols argued that a certain protocol was necessary, and if the contents were to be seized, then that had to be specified in the warrant. The State countered that there was sufficient probable cause in the Affidavit to justify searching the contents of the phone (R.XXII, 9), and, further, even if there wasn't sufficient probable cause, the "good faith exception" saved the search and seizure of the contents (R.XXII, 9-11). After argument, the Court held that the affidavit supporting the warrant showed sufficient probable cause to search the phone. The Court further held that the warrant was not a general warrant, but specifically described a cellphone. The Court further seemed to justify the contents search by noting that the cellphone was not locked, and that it was almost a "plain view" seizure. The Court denied Mr. Nichols' motion to suppress the seizure of the cellphone. (R.XXII, 12.)

What the Court and Counsel did not discuss in the suppression hearing of March 5, 2015, was the almost seismic shift in the law regarding the constitutional protection of the contents of a cellphone. This change came about through two decisions of the United States Supreme Court in 2014. In one case, in the U.S. Supreme Court's decision in *Riley v. California,* 573 U.S.___, 134 S. Ct. 2473, 189 L. Ed. 2d. 430 (2014) (Docket No. 13-132), the Riley Court considered the issue of whether a motion to suppress was lawfully denied. The Court noted in the Syllabus that warrantless searches are legal if the seized items are within the immediate control of the arrestee, when there may be a risk to an officer's safety, or risk to destruction of evidence, citing *Chimel v. California*, 395 U.S. 752, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969). The Court also noted that in *United States v. Robinson*, 414 U.S. 218 (1973), the Court extended *Chimel* to all custodial arrests, even if there was no specific risk to an officer's safety or risk of destruction of evidence. The Court concluded that *Robinson* should not be extended to the search of cellphones, pointing out that the balancing test of governmental interest versus privacy concerns of *Wyoming v. Houghton*, 526 U.S. 295 (1999), does not justify the search, and does not extend the government's interest discussed in *Chimel.* Finally, the Court stated, and, of singular importance in this case, "But a search of digital information on a cellphone does not further the government's interest identified in *Chimel*, and implicates substantially greater individual privacy interests than a brief physical search." *Riley*, Syllabus. Albeit *Riley* differs from Mr. Nichols circumstances because in *Riley* the cellphone was seized without a warrant and from the person of the arrestee. However, that difference cannot escape the clear message that cellphone information is intensely private and should be protected by the Fourth Amendment that requires a warrant for the contents. As the *Riley*

Court points out in its Syllabus, 90% of American adults who own a cellphone keep on their person a digital record of their lives. *Riley*, Syl. ¶ (2)(1).

The second case is *United States v. Wurie*, 573 U.S. ___, 134 S. Ct. 999, 187 L.Ed.2d 848 (2014). Like *Riley*, *Wurie* concerns the seizure and search of an arrestee's cellphone without a warrant. In *Wurie*, the arrestee's cellphone was seized in an apparent drug sale arrest. At the station, officers opened the phone, accessed its call log and obtained information that led officers to Wurie's apartment where they seized drugs and guns. Wurie moved to suppress the seizure. (It was noted in the opening preamble in *Riley*, that certiorari was granted to both *Riley* and *Wurie*, in apparently the same writ.) As in *Wurie*, the Supreme Court in *Riley* held that the police may not, without a warrant, search digital information on a cellphone seized from an arrestee. *Riley*, Syllabus. Any fair comparison between *Riley* and *Wurie*, particularly the Syllabus from each case, clearly shows an identical ruling, *i.e.*, in a warrantless seizure officers must obtain a warrant to search the digital contents of the cellphone.

What is the implication of *Riley* and *Wurie* for Mr. Nichols circumstances? Although in the *Riley* and *Wurie* facts, the cellphone was seized by a warrantless search, whereas, in Mr. Nichols' case, the cellphone was seized by a warrant, the Supreme Court made it abundantly clear that a warrant was needed specifically to search the digital contents of a cellphone. So it is here, in Mr. Nichols' case. Nothing in the original warrant, authorizing a search of Mr. Nichols' apartment, authorized a search of the digital contents of the cellphone. The State, at the suppression hearing, attempts to justify the search by a general probable cause finding by the Court issuing the warrant, or, the good faith search by officers. The Court denies the motion to suppress, by borrowing from the State's probable cause argument, and noting that the cellphone was unlocked. (R.XXII,

12.) Neither the State's argument, nor the Court's justification, stand up to the Supreme Court's ruling in *Riley* and *Wurie*. The Supreme Court stated unequivocally that officers must obtain a separate warrant to search the digital contents of a cellphone. Mr. Nichols would suggest that rule must apply regardless of how the phone is seized, by warrant or by search incident to an arrest. The Court will recall that in the present case, the warrant only authorized the seizure of a cellphone, not the digital contents.

In further support of Mr. Nichols' position, this Court will note, firstly, that the Court commented during its ruling, "and it's almost .. I'm not saying it is, but it's almost like it was in plain view, based upon that, then they requested a further search warrant to determine what else might be on the phone." (R.XXII, 12.) In short, the Court approved an illegal search of the digital contents of the cellphone, to justify the application for another search warrant to further search the digital contents. (R.XIII, Ex. #3, #4 and #5.) This clearly shows the officers' apprehension that the unauthorized search of the digital contents of the cellphone might prove to be problematic for them. The State admits in argument that there were searches of the cellphone, relying entirely on "good faith". (R.XXII, 11.) This Court must conclude from the officers' activities that the illegal search of the digital contents led to another search of the digital contents, in violation of the Supreme Court's ruling in *Riley* and *Wurie*.

For these reasons, and, based on the *Riley* and *Wurie* decisions, Mr. Nichols prays this Court for an order reversing the District Court's denial of Mr. Nichols' motion to suppress the cellphone's digital contents, and, for a new trial as a result.

Issue II: Did the District Court err by denying Mr. Nichols' motion to suppress statements made by Mr. Nichols' in an interview with police officers?

... The Standard of Review ...

Normally, when a trial court conducts a full pretrial hearing on the admissibility of an extrajudicial statement by the accused, determines the statement was freely and voluntarily given, and admits the statement into evidence at trial, the appellate court accepts that determination if it is supported by substantial competent evidence. *State v. Lewis*, 258 Kan. 24, 36, 899 P.2d 1027 (1995). Police must warn a suspect that he has a right to remain silent, and a right to remain silent after the *Miranda* warnings is given. If the suspect indicates that he wishes to remain silent, the interrogation must cease. *Maryland v. Shatzer*, 130 S. Ct. 1213, Syl. ¶ 2, 78 USLW4159 (2010) (interpreting the 5th Amendment of the U.S. Constitution).

The rules applicable to the right of counsel regarding *Miranda*, applied as well to "where the right to remain silent is exercised". *State v. Matson*, 260 Kan. 366, 374, 921 P.2d 790 (1996). In analyzing whether a statement invoking his rights is ambiguous, only prior statements and the statement itself may be looked at. *Smith v. Illinois*, 469 U.S. 91, 83 L.Ed.2d 488, 105 S. Ct. 49 (1984).

The appellate court review of the district court's decision to admit a defendant's confession into evidence is a bifurcated standard. The district court's findings are subject to a substantial competent evidence standard. *State v. Tahah*, 293 Kan. 267, 280, 262 P.3d 1045 (2011). The ultimate legal question is reviewed using a de novo standard. *State v. Bridges*, 297 Kan. 989, 1001-02, 306 P.3d 244 (2013).

When the material facts on a motion to suppress evidence are not in dispute, the question of suppression is a question of law over which the appellate court has unlimited review. *Bridges*, 297 Kan. 1002.

... Arguments and Authorities ...

In Mr. Nichols' case, Mr. Nichols filed several motions questioning the constitutionality of Mr. Nichols' statements to police officers. On September 18, 2014, Mr. Nichols filed a motion for a *Jackson v. Denno* hearing, pursuant to K.S.A. 60-460(f). (R.I, 103 [mistakenly marked 403 in the table of contents]).

On November 5, 2014, Mr. Nichols filed a motion to suppress statements made by Mr. Nichols at Junction City, Kansas. When he was interrogated by police officers on September 11, 2013, alleging that the police officers failed to properly invoke his *Miranda* warning rights when he was interrogated in Junction City, Kansas, nearly seven hours after his initial interrogation in Kansas City, Kansas. (R.I, 121-122.)

On November 7, 2013, Mr. Nichols filed a motion to suppress statements made by him during his interrogation by police in Junction City on September 11, 2013, alleging that Mr. Nichols' physical condition prevented a knowing waiver of his *Miranda* warning rights. (R.I, 7.) The transcripts in question are of record. The September 11, 2013, Kansas City interview transcript (R.VIII, Ex. 9), and the September 11, 2013, Junction City interview transcript (R.VIII, Ex. 10).

On February 4, 2015, the Court conducted a hearing on several motions, including a motion to suppress several statements by investigator Riniker. Patricia Giordano testified. She is a detective with the Junction City Police Department. She testified that she had an initial contact with Mr. Nichols on September 11, 2013, at the Kansas City Police Department, and spoke to Mr. Nichols (R.XXI, 33-43), then, considerably later, spoke to Mr. Nichols again at the Junction City Police Department (R.XXI, 44-45). Giordano testified that she read Mr. Nichols his *Miranda* warning in Kansas City. (R.XXI, 42.) She then left Mr. Nichols sometime around 1:00 p.m. in Kansas City, and,

then contacted him again at 7:45 p.m. in Junction City. (R.XXI, 42-43.) She admits that she did not read Mr. Nichols his *Miranda* warning at the beginning of the second interview in Junction City, and, that it had been 6 ½ hours between the Kansas City interview and the Junction City interview. Giordano states that Mr. Nichols never invoked his right to speak to an attorney. (R.XXI, 45.) On cross-examination, Giordano admits that Mr. Nichols stated, "I don't want to talk about it now.", and, that the statement was made in Junction City. (R.XXI, 46.) Giordano further admits that Mr. Nichols told her that he was tired, had a lack of sleep, and that the lack of sleep caused him memory issues, and that he had a prior head injury. (R.XXI, 47-49.) Giordano confirms that Mr. Nichols was not given *Miranda* again in Junction City, Kansas, at the second interview, or even a reminder of *Miranda* at the second interview. (R.XII, 50-51.)

After argument, the Court took up the issue of the suppression of Mr. Nichols' statements. After a review of what factors the case law mandates the Court should consider (R.XXI, 74), the Court finds that Mr. Nichols was very aware of what his rights were, that a detective asked whether they could re-contact him after the search, that Mr. Nichols was not re-read his *Miranda* warning rights, and, finally, the Court concludes that the second interview was a continuation of the first interview (R.XXI, 76).

The Court takes up the statement, "I don't want to talk about it now." and whether that statement invoked Mr. Nichols' right to silence. The Court concludes that the, "I don't want to talk about it now." statement should be taken in the narrow context of a question asked of Mr. Nichols about a gun, and that Mr. Nichols knew from his experience what language would have been appropriate to stop the interview. The Court states that the officers were not required to stop the interview, and, the motion to suppress was denied. (R.XII, 76-77.)

At the jury trial, Mr. Nichols, through Counsel, contemporaneously objects to the introduction of the statements. During the testimony of Giordano, Counsel for Mr. Nichols objects to the testimony of Giordano's interviews when the State began to ask questions about the interview at Kansas City. (R.XIV, 391.) Mr. Nichols' Counsel objects again when the State asks for the interview transcripts to be admitted. (R.XIV, 394.)

It should be first noted by this Court that it is clearly the State's burden of proof to show that a defendant's custodial statements should be admitted. K.S.A. 22-3215(4). With that pre-requisite burden in mind, it is Mr. Nichols' position that when Mr. Nichols told Giordano, and other officers, "I don't want to talk about it now." he invoked his right of silence and/or his right to an attorney. For purposes of analysis, it triggers the same constitutional right under the 14th Amendment. *Matson* and *Smith v. Illinois*. The precise question, then, is did the words, "I don't want to talk about it now." invoke Mr. Nichols' right to silence, or, did Mr. Nichols' statement mean something in a narrower not invoking context, as the Court stated.

There is obviously no case law on the precise statement, "I don't want to talk about it now." However, case law does give guidance. Whether or not an ambiguous statement invokes a defendant's right of silence or right to counsel is a question of law. *State v. Donesay*, 265 Kan. 60, 959 P.2d 862 (1998) (citing *State v. Fritschen*, 247 Kan. 502, 606-08, 862 P.2d 558 [1990]), and, *Matson*.

The Court in *Fritschen* determined that it was not an invocation of the defendant's right to remain silent, because the Court took the statement to mean only that it hurt too much to talk about the murder, 247 Kan. at 606-08. There is no such easy qualifier on the end of Mr. Nichols statement, "I don't want to talk about it now." Mr. Nichols would

assert that it qualifies as an unequivocal statement to invoke his right to silence. Case law states that this Court is restricted to determining the meaning of the statement itself, not what happens after the statement. *Matson*. If this Court finds Mr. Nichols' statement to be ambiguous, what should make a difference in a semantical tie? Firstly, the statute governing the suppression of statements demands that it is the State's burden to prove the statements admissible. K.S.A. 22-3215(4). Secondly, it has long been the law that under the rule lenity, criminal statutes must be strictly construed in favor of the accused. Any reasonable doubt about the meaning must be decided in favor of anyone subjected to the criminal statute. K.S.A. 22-3215 must be construed in favor of Mr. Nichols. *State v. Paul*, 285 Kan. 658, 662, 175 P.3d 840 (2008). In any event, the standard of review seems to remain whether the Court's determination is supported by substantial competent evidence. *Lewis*. It is Mr. Nichols' position that the Court's admission of Mr. Nichols' statements is not supported by substantial competent evidence, particularly taken in the context of the State's burden and the rule or lenity. The Court, in its decision, relies upon the Court's opinion that Mr. Nichols had a heightened understanding of *Miranda*, and would have stated something more definitive if he wanted to stop the interrogation. However, Mr. Nichols would assert that logic cuts both ways. Assuming Mr. Nichols' knowledge of *Miranda*, Mr. Nichols knew he could stop the interrogation at any time, and he did so by stating the words, "I don't want to talk about it now."

The transcripts of Mr. Nichols' case presents another troublesome fact scenario. Detective Giordano's testimony makes it clear that when Mr. Nichols was approached by officers, including Giordano, he had been awake for a number of hours, had been sleeping on the floor of the interrogation room in Kansas City when first approached by Giordano and had to be awakened by a Kansas City Detective. Mr. Nichols also stated

that his memory was not good because of these factors, that he had suffered a head wound, which appeared to affect his cognitive skills. These circumstances were not denied by Giordano. (R.XXI, 47-49.) It is Mr. Nichols' position, given his physical circumstances, the nearly seven hour time that elapsed between interview (R.XXI, 45), and the failure of Giordano, or anyone else, to re-read Mr. Nichols his Miranda warning, or even remind him of the prior warning, had the cumulative effect of denying Mr. Nichols his 5th and 14th Amendment rights. (R.XXI, 50-52.)

Detective Giordano concedes several points in her testimony at the motions hearing that are crucial to the issue of whether Mr. Nichols' statements at the Junction city interview should be suppressed. She concedes that Mr. Nichols was not *Mirandized* at the Junction City interview, that the first *Miranda* warning was never mentioned, and, that there had been a six and one-half hour time difference between Giordano's original contact with Mr. Nichols in Kansas City and her second contact with Mr. Nichols in Junction City. It is Mr. Nichols' position that these factors raise a significant question of the constitutionality of Mr. Nichols' Junction City interview. In the case of *State v. Straughter*, 261 Kan. 481, 932 P.2d 387 (1997), our Supreme Court discussed those factors which a court should consider in determining the admissibility of statements made by arrestees in custodial interrogations. The *Straughter* Court discusses the implications of the right to remain silent in the context of an accused's right to remain silent and right to counsel. *Straughter* cited with approval the *Matson* case, which in turn cited the case of *Michigan v. Mosley*, 423 U.S. 96, 46 L.Ed.2d 313, 96 S. Ct. 321 (1975). The *Mosley* case gave rise to a set of factors for an appellate court to consider when an accused invokes his *Miranda* right to remain silent or his right to an attorney. Mr. Nichols has asserted that he invoked his right to remain silent when Detective Giordano observed Mr.

Nichols to say, "I don't want to talk about it now." (R.XXI, 46.) The *Mosley* factors to consider are whether questioning ceased upon request; whether a significant period of time passed before the second questioning on an unrelated matter; and whether *Miranda* rights were given again. In Mr. Nichols case, it is undisputed the subsequent to his initial interrogation by officers in Kansas City, he was transported to Junction City where he was interrogated again, six and one-half hours later. Mr. Nichols was not read his *Miranda* warning again in Junction City prior to the detectives' interrogation of him, nor, was the initial Miranda warning ever mentioned. All according to Giordano's testimony. Applying the *Mosley* factors, it is clear that officers did not stop interrogating to him even after he invoked his right to remain silent, that they did not read him his Miranda warning or even remind him of his prior warning, and, the two interviews were different as to what was discussed with Mr. Nichols, and related to two entirely different crimes. The initial interview in Kansas City was a rambling, often incoherent, rant by Mr. Nichols. (R.VIII, Ex. #9.) The second interview was more focused on the murder of "Ant" Anthony Nixon. (R.VIII, Ex. #10.) Upon review, the two interviews have very little in common, except the participants. In summary, given that the two interviews were six and one-half hours apart, that Mr. Nichols invoked his right to silence, the complete lack of a *Miranda* warning at the second interview, the different subject matters of the two interviews, the search of Mr. Nichols' house in-between the two interviews, Mr. Nichols exhausted physical condition, and the application of the *Mosley* factors, the District Court cannot justify allowing the statements into evidence. There is simply not sufficient competent evidence to support the Court's decision under the *Lewis* standard. The Court erred in not sustaining Mr. Nichols' motion to suppress the statement in Junction City from the point Mr. Nichols invoked his right to silence through the entirety of the

Junction City interview. Mr. Nichols would assert that the entirety of the Junction City interview should be suppressed.

The *Lewis* test is whether under these circumstances the Court's admission of Mr. Nichols' statement to officers is supported by substantial competent evidence.

It is Mr. Nichols' position, given the tainted process of conducting the two interview (R.VIII, Ex. #9 and #10), not only is there no substantial competent evidence to support the Court's findings, there is competent evidence to conclude the opposite; that Mr. Nichols was deprived of his constitutional rights, and his statements do not meet the *Lewis* factors and should have been suppressed. The Court erred in not suppressing the statements. For these reasons, Mr. Nichols prays this Court for an order reversing the District Court's denial of Mr. Nichols' motion to suppress his statements, and, for a new trial as a result.

CONCLUSION

In conclusion, Mr. Nichols prays this Court for an order reversing the District Court's order denying Mr. Nichols' motion to suppress the cellphone's digital contents, based on the *Riley* and *Wurie* decisions, and, for a new trial as a result; and/or for an order reversing the District Court's order denying Mr. Nichols' motion to suppress Mr. Nichols' statements made to officers during the Junction City interview, and for an order vacating Mr. Nichols' conviction, and remanding the case for a new trial.

Respectfully submitted,

/s/ *Gerald E. Wells*

Gerald E. Wells #06500
Jerry Wells Attorney-at-Law
P. O. Box 641
Lawrence, Kansas 66044
(785) 856-3925 Phone
(785) 856-1583 Facsimile
jerrywells@sunflower.com
Attorney for the Defendant

CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of October, 2016, I electronically filed the foregoing with the Clerk of the Court using the Kansas Courts Electronic Filing System which sent notification of such filing to all counsel of record, and was served by email to:

Kansas Attorney General
120 S.W. 10th Ave., 2nd Floor
Topeka, KS 66612
general@ag.ks.org
Plaintiff-Appellee

Riley County Attorney
105 Courthouse Plaza
Manhattan, KS 66502
bwilkerson@rileycountyks.gov
785-537-6390
Attorney for Plaintiff-Appellee

And a true and correct copy of the foregoing was also served by deposit in the U.S. Mail, postage prepaid, to:

Mr. Anthony Stephen Nichols, #68294
Lansing Correctional Facility
P. O. Box 2
Lansing, KS 66043
Defendant-Appellant

/s/ *Gerald E. Wells*
Gerald E. Wells #06500