

No. 08-100604-A

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

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**CAROL G. GREEN
CLERK OF APPELLATE COURTS**

STATE OF KANSAS
Plaintiff-Appellee

vs.

CLIFFORD W. BAUGHMAN
Defendant-Appellant

BRIEF OF APPELLANT

Appeal from the District Court of Pottawatomie County, Kansas
Honorable Michael Ireland, Judge
District Court Case No. 07 CR 511

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Oral Argument: 15 minutes

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Nature of the Case

Clifford Baughman was charged with two counts of aggravated indecent liberties with a child and one count of sexual exploitation of a child in Pottawatomie County, Kansas. On March 20, 2008, a jury found the defendant not guilty of one count of aggravated indecent liberties with a child and guilty of the second count of aggravated indecent liberties with a child. The judge granted the defendant's motion for a directed verdict and dismissed the count of sexual exploitation of a child. On May 15, 2008, the district court sentenced the defendant to a term of 68 months incarceration and 36 months post-release supervision. Pursuant to Supreme Court Rule, the alleged victim in this case is referred to by the initials D.K.

Statement of Issues

Issue I: Reversible error was committed when the state produced evidence of multiple acts regarding the July incident, but the state failed to elect the act upon which it was relying and the court failed to give a unanimity instruction

Issue II: The trial court committed reversible error when it gave the deadlocked jury instruction, PIK Crim.3d 68.12, over defense counsel's objection.

Issue III: The District Court committed reversible error when it refused to allow the defense to impeach D.K. with evidence of a prior inconsistent statement.

Issue IV: The trial court did not adequately investigate Clifford's request to remove his trial counsel based on his claims that he had a conflict with Mr. Roe.

Statement of Facts

The following evidence was presented at trial. Clifford Baughman met D.K. through a mutual friend in March 2007. (R. I, 129-30). Clifford was twenty-three and D.K. was fifteen. (R. VI, 90). In April 2007, they began corresponding through

Facebook. (R. VI, 130). In June, they agreed to meet behind the Gas 4 Less in Wamego. (R. VI, 103). D.K. and two of her friends were babysitting two children that weekend. (R. VI, 142-43). Around 1:00 or 2:00 on Sunday morning, June 10, 2007, D.K. sneaked out of the house where she was babysitting to meet Clifford. She walked to the Gas 4 Less. (R. VI, 143). D.K. alleged that Clifford digitally penetrated her vagina during this meeting. (R. VI, 146). After two or three hours, she walked back to the house at which she was babysitting. (R. VI, 147). This incident in June 2007 was the basis for Count I charging aggravated indecent liberties with a child. (R. I, 24). Clifford was acquitted on Count I. (R. VI, 420).

Clifford and D.K. continued corresponding on the internet and talking to each other on the phone after this incident in June. (R. VI, 150-51). D.K. also alleged that in July of 2007 Clifford penetrated her vagina both digitally and with his penis. (R. VI, 254). The evening of July 14, 2007, D.K. stayed the night at a friend's house along with two other friends who were all minors. (R. VI, 154-55). She lied to her parents and told them that she was staying with her friend's sister even though the sister and her friend's parents were away from home camping. (R. VI, 155). Around 10:00 p.m., that night D.K. and some friends went to a party in the country where they all consumed alcohol. (R. VI, 156-58). They drove back to her friend's house after D.K. got a call from Clifford around 2:00 a.m. (R. VI, 160). At about 3:00 or 4:00 a.m., one of her friends drove her to the Gas 4 Less where she met Clifford. (R. VI, 161, 163). They talked and kissed. At one point while Clifford was sitting behind D.K., while they were fully clothed. Clifford allegedly put his hand down the front of the shorts D.K. was wearing and put his finger in

D.K.'s vagina. (R. VI, 118-19, 165). A short time later D.K. removed her shorts and underwear and Clifford took his penis out of his pants. They moved a short distance to a nearby truck and unsuccessfully attempted to have sexual intercourse. Then they moved to a different location, laid on the ground, and Clifford allegedly put his penis in D.K.'s vagina. (R. VI, 121, 165). All of these acts were consensual. (R. VI, 167). After about an hour, D.K. walked back to her friend's house. (R. VI, 163, 168). The following morning, she told one of her friends what had happened the night before. (R. VI, 178). Subsequently, another friend found out and told D.K. that if she did not tell her parents what had happened with Clifford that she would tell. (R. VI, 179). D.K. told her parents the following Tuesday, July 17, 2007. (R. VI, 178).

D.K.'s parents called the police that night to report the incident. (R. VI, 324). D.K. told the police about her involvement with Clifford and also that she had both anal and digital intercourse with another boy. (R. VI, 170-71). That evening she went to the hospital for an examination. (R. VI, 339). Christine Hazlett-Allen, a Sexual Assault Examiner, performed an exam with a sexual assault evidence kit and did a full physical examination. (R. VI, 256). Ms. Allen testified that D.K. had injuries to her hymen "consistent with a blunt penetrating trauma," but she could not say what caused the injury. (R. VI, 261-62). The KBI tested the evidence from the kit and the clothing that D.K. wore on July 14, 2007. (R. VI, 305). There was no seminal fluid found on any items. (R. VI, 305).

Officer Coon of the Pottawatomie County Sheriff's Department interviewed Clifford on July 19, 2007. (R. III, 1). Clifford initially admitted to only kissing D.K., but

after Officer Coon told him that he knew they had sexual intercourse and he only wanted to know if it was consensual or forcible, Clifford said he and D.K. had consensual sex. (R. III, 8-9). Clifford also told Officer Coon that D.K. told him she was sixteen. (R. III, 17-18).

Arguments and Authorities

Issue I: Reversible error was committed when the state produced evidence of multiple acts regarding the July incident, but the state failed to elect the act upon which it was relying and the court failed to give a unanimity instruction.

When jury unanimity is at issue, the appellate court must apply a three step test. The court must determine (1) whether the defendant's conduct was part of one act, or multiple acts constituting separate and distinct acts, (2) whether error was committed, either by the state's failure to inform the jury which act to rely on in deliberations, or by the court's failure to instruct the jury to unanimously agree upon a specific criminal act that constitutes the crime, and (3) if error exists, whether it is clear error that warrants reversal. *State v. Voyles*, 284 Kan. 239, 244-45 160 P.3d 794, 799-800 (2007).

Count II alleged that Clifford engaged in "an act of sexual intercourse with a child." (R. I, 24). The jury was instructed that "sexual intercourse means any penetration of the female sex organ by a finger, the male sex organ, or any object." (R. VI, 396-97). The state put on evidence that D.K's vagina was penetrated by a finger and the male sex organ during the July incident.

1. This is a multiple acts case.

"In a multiple acts case, several acts are alleged and any one of them could

constitute the crime charged.” *Voyles*, 284 Kan. at 244. Whether a case is a multiple acts case is a question of law for the reviewing court, with unlimited review. *Voyles*, 284 Kan. at 244. To determine whether the acts are separate and distinct, the court looks to whether the acts occur at or near the same time or same location, whether there is a “causal relationship between the acts,” whether there was an “intervening event,” and whether there is a “fresh impulse motivating some of the conduct.” *State v. Schoonover*, 281 Kan. 453, 497, 133 P.3d 48, 79 (2006).

The state presented evidence of two separate and distinct acts of sexual intercourse to establish Count II. D.K. testified that while she was fully clothed, Clifford put his fingers between her shorts and inserted his finger into her vagina. (R. VI, 118-19). The first act of sexual intercourse was digital intercourse. Sometime after that act was completed, D.K removed her shorts and underwear, moved to a nearby truck, and sat on the edge of the truck. (R. VI, 120). No penetration occurred at that location. (R. VI, 120). Later, she and Clifford moved to the ground and Clifford penetrated D.K’s vagina with his penis. (R. VI, 120-21). This was the second act of sexual intercourse. These acts were committed in different locations, at different times, and in completely different ways. The first act occurred while both persons were fully clothed; the second act while they were unclothed. The definition of sexual intercourse given to the jury provides different ways in which the act can occur. The separate acts here occurred in different ways, according to the definition of sexual intercourse. The second act was motivated by a fresh impulse and not caused by the first act. Both of these acts met the definition of sexual intercourse as submitted to the jury and both would independently meet the charge

in Count II of “sexual intercourse with a child.”

2. Error was committed.

In a multiple acts case, either the State must inform the jury which act to rely upon in its deliberations or the court must instruct the jury to agree on the specific criminal act. *Voyles*, 284 Kan. at 244-45 (citing *State v. Dean*, 272 Kan. 429, 439, 33 P.3d 225 (2001)). The failure to elect or instruct is error. *Voyles*, 284 Kan. at 245.

The state did not inform the jury which act to rely upon in its deliberations and the court did not instruct the jury to agree on the specific criminal act. The court instructed the jury that its verdict needed to be unanimous, (R. VI, 402), but did not give PIK Crim. 3d 68.09-B or a similar instruction to the jury informing the jury that it needed to be unanimous on the specific underlying criminal act. Furthermore, the state presented evidence of both acts and did not inform the jury which act to rely upon in its deliberations. As a result, some jurors may have based their verdicts on the act of digital penetration while others based their verdicts on penetration with the male sex organ. Accordingly, there was error.

3. The error was clearly erroneous and warrants reversal.

To determine whether the error requires reversal, the court abandoned the formula previously enunciated in *State v. Hill*, 271 Kan. 929, Syl. ¶ 3, 26 P.3d 1267 (2001). *Voyles*, 284 Kan. at 252. The ultimate general test for harmlessness when a unanimity instruction was not requested or given is “clearly erroneous” as articulated by the Kansas Legislature in K.S.A. 2006 Supp. 22-3414(3). *Voyles*, 284 Kan. at 252-53. When a unanimity instruction was not requested or given and no unified defense, *e.g.*, a general

denial, was presented by the defendant, an appellate court may conclude that the failure to instruct the jury to agree on a specific criminal act warrants reversal under the clearly erroneous standard. *Voyles*, 284 Kan. at 253. “[C]ases not containing a unified defense are reversed because the reviewing court is firmly convinced that there is a real possibility the jury would have returned a different verdict if the instruction had been given.” *Voyles*, 284 Kan. at 253. If there is no unified defense, the court does tolerate verdict uncertainty in these cases. *Voyles*, 284 Kan. at 253.

The error warrants reversal because no unanimity instruction was requested or given and Clifford did not present a unified defense. Clifford did not testify or call any witnesses on his behalf. Instead, he left the state to its burden of proof. Defense counsel waived the opening argument and focused the brief closing argument solely on the testimony of the state’s witnesses. The defense did not present any general denial. Therefore, the failure to instruct the jury to agree on a specific criminal act warrants reversal under the clearly erroneous standard as articulated in K.S.A. 2006 Supp. 22-3412(3) and Clifford’s conviction of Count II, aggravated indecent liberties with a child, must be reversed.

If Clifford’s conviction is reversed based on this issue of multiple acts, he asserts that if the case is remanded for retrial he may not be charged with two counts of aggravated indecent liberties with a child. Such an action would be prohibited under the principle of compulsory joinder. K.S.A. 21-3108(2)(a) reads:

(2) A prosecution is barred if the defendant was formerly prosecuted for a different crime, or for the same crime based upon different facts, if such former prosecution:

(a) Resulted in either a conviction or an acquittal and the subsequent prosecution is for a crime or crimes of which evidence has been admitted in the former prosecution and which might have been included as other counts in the complaint, indictment or information filed in such former prosecution or upon which the state then might have elected to rely; or was for a crime which involves the same conduct, unless each prosecution requires proof of a fact not required in the other prosecution, or the crime was not consummated when the former trial began[.]

The Supreme Court has interpreted this statute:

“The purpose of the compulsory joinder clause of K.S.A. 21-3108(2)(a) is to prevent the prosecution from substantially proving a crime in a trial in which the crime is not charged and then, in effect, retrying a defendant for the same offense in a trial when the crime is charged.” *State v. Todd*, 262 Kan. 916, Syl. ¶ 2, 941 P.2d 1374 (1997).

Because evidence of both digital and penile sexual intercourse in the July incident was presented at Clifford’s trial, but the state charged only one count of aggravated indecent liberties with a child based on this incident, compulsory joinder would prohibit the charging of more than one count in any retrial.

Issue II: The trial court committed reversible error when it gave the deadlocked jury instruction, PIK Crim.3d 68.12 over defense counsel’s objection.

The standard of review for challenges to jury instructions requires the court to consider the instructions as a whole, and not isolate any one instruction. *State v. Mitchell*, 269 Kan. 349, 355, 7 P.3d 1135 (2000). However, even if the instructions are in some way erroneous, they will not constitute reversible error if they properly and fairly state the law as applied to the facts of the case, and a jury could not have reasonably been misled by them. *Mitchell*, 269 Kan. at 335.

During the instructions conference the following exchange occurred:

MR. ROE [defense counsel]: I don’t have any corrections. I’ve got

an objection to Instruction Number 14.

THE COURT: 14?

MS. SCHUCK [prosecutor]: It's the element instruction, Judge.

THE COURT: Okay. And why do you have an objection to it?

MR. ROE: I don't like the Allen instruction because I think it makes the jury hurry and it makes the jury decide that if they're hung they're not actually hung and they can go forward.

THE COURT: Well, the problem is that if the deliberate for awhile and then I try and give it then that's frown [sic] upon by the Supreme Court and Court of Appeals to do it that way.

MR. ROE: Which is stupid in my opinion.

THE COURT: I understand, but unfortunately they make the law. So I note your objection. Ms. Schuck, do you have any objections to it?

MS. SCHUCK: No, sir.

THE COURT: I note your objection but I'm going to leave it in.

(R. VI, 392-93).

The instruction, PIK Crim. 3d 68.12 was given to the jury as Jury Instruction 14. It read in pertinent part:

This is an important case. If you should fail to reach a decision, the case is left open and undecided. Like all cases, it must be decided sometime. Another trial would be a heavy burden on both sides. (R. I, 50).

This instruction presents two problems. First, this Court disapproved of the language "[l]ike all cases, it must be decided sometime" in *State v. Turner*, 34 Kan. App. 2d 131, Syl. ¶3, 115 P.3d 776 (2005). The court found that this language was an

inaccurate statement of law. Following *Turner*, this language was removed from the PIK instruction. PIK Crim. 3d 68.12. This Court did not find the erroneous language in the deadlocked jury instruction to be reversible error in *Turner*, concluding that there was no coercive effect because the deadlocked jury instruction had been given to the jury with the rest of the instructions prior to deliberations. Even though *Turner* was decided in 2005, the erroneous language was still present in the deadlocked jury instruction used in Clifford's 2008 trial. In *State v. Scott-Herring*, 284 Kan. 172, 180-81, 159 P.3d 1028 (2007), the Kansas Supreme Court directed courts to cease using the version of PIK Crim. 3d 68.12, which contains the language "[l]ike all cases, it must be decided sometime." The presence of the language in the deadlocked jury instruction in this case was in direct violation of *Scott-Herring* and *Turner*. Accordingly, the instruction was erroneous.

Second, the language "[a]nother trial would be a heavy burden on both sides" is problematic. In *State v. Salts*, Slip Opinion No. 99,533, Syl. ¶3 (February 6, 2009), the Kansas Supreme Court held "[i]nclusion of the language '[a]nother trial would be a heavy burden on both sides' in PIK Crim.3d 68.12 is error." The Supreme Court found the language was misleading and inaccurate because a second trial is not necessarily burdensome on one or both parties. It also noted that "the language is confusing" because "[i]t sends conflicting signals when read alongside Instruction 11 or a similar instruction that tells jurors not to concern themselves with what happens after they arrive at a verdict." Slip Opinion at 7-8.

The conflicting instruction that the Supreme Court referred to in *Salts* is the PIK instruction that reads in part: "Your only concern in this case is determining if the

defendant is guilty or not guilty. The disposition of the case thereafter is a matter for determination by the Court.” PIK Crim. 3d 51.10. The Supreme Court was concerned that while PIK Crim. 3d 51.10 instructs the jury that it should not be concerned with matters occurring after trial, PIK Crim. 3d 68.12 tells the jury what might happen after the trial and instructs the jury to consider those matters in reaching a verdict. The two instructions are irreconcilable; therefore, one of them must be erroneous. The error is in the language of PIK Crim. 3d 68.12, the deadlocked jury instruction that tells the jury “[a]nother trial would be a burden on both sides.” PIK Crim. 3d 51.10 was given to the jury in the instant case, coincidentally as Jury Instruction No. 11. (R. I, 49). The contradictory instructions present in *Salts* are present in this case. Thus, as in *Salts* there was error.

Additionally, the language “[a]nother trial would be a heavy burden on both sides” is inaccurate and unduly prejudicial to the defendant because it specifically states that another trial would be a burden on the state. Even if one argues that, with respect to a criminal defendant, the language only means that another trial would weigh heavily on the mind of the defendant, the same cannot be said for the supposed “heavy burden” on the state. The burden on the defendant is that if he loses his trial, he will suffer punishment, possibly including imprisonment. If, however, the state loses at trial, no one from that side will be punished. Accordingly, the burden of a second trial on the state is not the prospect of punishment; it must be something else.

The only reasonable conclusion is that the burden of a second trial on the state is the burden of time, money, and inconvenience. This is one reason why the language at

issue is so pernicious. Juries should not be invited to reach a verdict based on considerations of time, money, and inconvenience. First, one of the fundamental rules of jury verdicts is that a verdict should be based on the evidence produced at trial and the reasonable inferences that may be drawn therefrom. The cost in time, money, and inconvenience of a second trial is not part of the evidence produced at trial. Therefore, it should not be a part of the jury's consideration in reaching a verdict. Second, it is improper for counsel to attempt to persuade a jury based on the jurors role as taxpayers who foot the bill for trials. *See Tucker v. Zant*, 724 F.2d 882, 890 (1984) (holding it was an impermissible invitation to the jury to put a man to death because of the financial cost of incarcerating him by arguing that it would require "thousands and thousands of taxpayers' dollars" to support the defendant for the rest of his life). Moreover, a jury instruction that appeals to the financial interests of the jurors as taxpayers is coercive and constitutes reversible error. *See Neely v. Travelers Ins. Co.*, 141 Kan. 691, 693 (1935) (holding that instructing jurors that a hung jury was an "abhorrence to taxpayers" was "insufferably coercive" and constituted reversible error). PIK Crim. 3d 68.12 as it was given in the instant case was improper and illegal because it invited the jury to reach a verdict based on matters outside the evidence produced at trial, which a jury is prohibited from considering.

The deadlocked jury instruction is not only unduly coercive, it is misleading, confusing, and legally infirm because it allows the jury to consider matters outside the evidence produced at trial and improperly appeals to the financial interest of the jurors. Accordingly, the instruction is illegal.

The Supreme Court did not find reversible error in *Salts* because under the clearly erroneous standard of review there was no real possibility the jury would have rendered a different verdict if the error had not occurred. Slip Opinion at 8. However, the clearly erroneous standard of review does not apply here because unlike the defense counsel in *Salts*, Mr. Roe objected to the deadlocked jury instruction. Under the applicable standard in *Mitchell*, even if the instructions are in some way erroneous, they will not constitute reversible error if they properly and fairly state the law as applied to the facts of the case, and a jury could not have reasonably been misled by them. 269 Kan. at 355. This standard has been met in the case because the instructions as a whole did not properly and fairly state the law. The Supreme Court referred to the deadlocked jury instruction as “misleading and inaccurate” and “confusing.” *Salts*, Slip Opinion at 7. When one views the instructions as a whole, the problem is not cured because the deadlocked jury instruction is contradictory to another instruction given by the court. The deadlocked jury instruction is an illegal statement of the law and could have reasonably misled the jury. The Supreme Court called it “misleading” and “confusing.” Because it was illegal, contradictory to other instructions, and improperly appealed to the jurors’ financial interests, giving the instruction over defense counsel’s objection was reversible error.

Issue III: The District Court committed reversible error when it refused to allow the defense to impeach D.K. with evidence of a prior inconsistent statement.

A court's decision to limit the cross-examination of a witness is ordinarily reviewed by an abuse of discretion standard. *State v. Atkinson*, 276 Kan. 920, 925, 80 P.3d 1143 (2003). However, where the appellate court reviews a constitutional challenge

to the admission or exclusion of evidence, the federal harmless rule is applied. *Atkinson*, 276 Kan. at 925. Under the federal harmless rule, “an error may not be held to be harmless unless the appellate court is willing to declare beyond a reasonable doubt that the error had little, if any, likelihood of having changed the result of the trial.” *Atkinson*, 276 Kan. at 925 (citing *State v. Lyons*, 266 Kan. 591, 598, 973 P.2d 794 (1999)).

The state filed a Motion in Limine pursuant to K.S.A. 21-3525, the rape shield statute, to keep out evidence of D.K.’s sexual history. (R. I, 20-21). The motion sought to exclude evidence that D.K. “reported that she had sexual relations prior to the alleged incidents, with a teen-age boyfriend.” (R. I, 21). The report at issue included statements by D.K. given to law enforcement in which she stated that she had previously had anal and digital intercourse. (R. VI, 171). The defense did not challenge the motion because at that time D.K. had not yet testified at trial and there was no basis to challenge the motion. (R. VI, 170). D.K. subsequently testified at trial that intercourse with the male sex organ hurt, giving the jury the impression that it was her first time and that she was sexually inexperienced. (R. VI, 121). She also testified that “it was [her] first time and it hurt.” (R. VI, 123). Because of this testimony, Mr. Roe requested a conference with the court to discuss presenting evidence of her prior sexual acts as relevant to her credibility pursuant to K.S.A. 60-422. (R. VI, 169). However, the district court determined that whether the evidence of her prior sexual acts was relevant to her credibility should be decided by “the mind set of [D.K.]” not the legal definition of sex to which the jury was instructed. (R. VI, 173). The district court acknowledged to Mr. Roe that “[u]nder a legal definition you can be correct.” (R. VI, 173).

The trial court's ruling violated Clifford's statutory rights under the rules of evidence and his constitutional rights to a full and complete defense and to cross-examine the witness against him. The Kansas Supreme Court has previously recognized that "the [rape shield] statute does not preclude the admission of evidence that another person may have been guilty of the alleged sexual abuse or relevant evidence that impeaches the credibility and testimony of a witness." *Atkinson*, 276 Kan. at 927-28 (quoting *State v. Arrington*, 251 Kan. 747, 750, 840 P.2d 477 (1992)). Here, the evidence of D.K.'s prior sexual acts was relevant to impeach her credibility and testimony. She has previously told a police officer that she had anal and digital intercourse with a previous boyfriend, yet at trial she gave the impression that she was sexually inexperienced. This inconsistency directly affected her credibility at trial. Mr. Roe did not seek to admit this evidence to show that D.K. was promiscuous or had questionable sexual morals. Rather, he requested it for the permissible purpose to show that the impression D.K. gave the jury – that the alleged incidents with Clifford were her first sexual experience – was incorrect and her credibility should be questioned. The jury was instructed that "sexual intercourse means any penetration of the female sex organ by a finger, the male sex organ, or any object." (R. VI, 396-97). This is the appropriate standard to determine whether D.K.'s statements were inconsistent, not her understanding or state of mind. The jury was not informed that when D.K. said it was the first time she had sex that she was thinking sex meant penetration of the vagina with the male sex organ. The definition of sex was presented to the jury as the legal definition of sex, not the understanding of the alleged victim. It is by that standard that the consistency of D.K.'s statements should have been

measured. By that standard, her statements were inconsistent. Accordingly, the trial court committed reversible error when it refused to allow Mr. Roe to present evidence of D.K.'s inconsistent statements as relevant to her credibility because it denied Clifford his statutory rights under the rules of evidence and his Sixth Amendment right to put on a defense and cross-examine the witnesses against him.

The district court's error was not harmless beyond a reasonable doubt. D.K.'s credibility was important in this case because if the jury did not believe her testimony, the result of the trial would have likely been different. This Court cannot declare beyond a reasonable doubt that the jury would have found Clifford guilty even if they had heard D.K.'s inconsistent statements. As in most sexual assault cases, the credibility of the alleged victim was paramount. Therefore, the district court committed reversible error.

Issue IV: The trial court did not adequately investigate Clifford's request to remove his trial counsel based on his claims that he had a conflict with Mr. Roe.

A district court's refusal to appoint new counsel is reviewed under an abuse of discretion standard, which asks whether any reasonable person would take the view adopted by the district court. *State v. Sappington*, 285 Kan. 158, Syl. ¶ 4, 169 P.3d 1096 (2007). "Furthermore, to warrant substitute counsel, a defendant must show "justifiable dissatisfaction" with appointed counsel. Justifiable dissatisfaction includes a showing of a conflict of interest, an irreconcilable conflict, or a complete breakdown in communications between counsel and the defendant." *State v. Bryant*, 285 Kan. 970, 986, 179 P.3d 1122, 1133 (2008) (citing *State v. McGee*, 280 Kan. 890, 894, 126 P.3d 1110 (2006)). When the district court becomes aware of a possible conflict of interest

between an attorney and a defendant charged with a felony; the court has a duty to inquire further to insure that the defendant's Sixth Amendment right to counsel is not violated. *State v. Richardson*, 40 Kan.App.2d 602, 617, 194 P.3d 599, 610 (2008) (citing *State v. Vann*, 280 Kan. 782, Syl. ¶ 1, 127 P.3d 307 (2006)).

The trial court abused its discretion when it failed to adequately inquire into Clifford's request to have his defense counsel, Mr. Roe, removed from the case when there was a clear breakdown in communication. Before starting trial, the trial judge asked if there was anything else the court needed to be aware of. The following conversation took place:

MR. ROE: I think Mr. Baughman wants to fire me.

CLIFFORD W. BAUGHMAN, DEFENDANT: Actually I do.

THE COURT: Why is it that you want to fire Mr. Roe?

CLIFFORD W. BAUGHMAN, DEFENDANT: Because he's been calling me names, been calling me stupid and a fool and idiot for not taking the plea. He's telling me I'm screwed at everything. He refuses to talk to me about anything. I believe I have a paper—

MR. ROE: That's not true.

CLIFFORD W. BAUGHMAN, DEFENDANT: Yes, it is.

THE COURT: Well, having been a practicing attorney for twenty-six and a-half years, both as a county attorney and as a defense attorney, if Mr. Roe is doing his job he's being honest with you regarding the fact situation in which you find yourself, and if there has been a plea made to you that you have refused I am going to assume that he has reviewed all of the evidence and —

CLIFFORD W. BAUGHMAN, DEFENDANT: I don't believe that he has reviewed the evidence because this is stuff he didn't even

ask for.

THE COURT: And what is that stuff?

CLIFFORD W. BAUGHMAN, DEFENDANT: There is a notice of change of registration of the truck that I was supposed – this all supposedly happened in, and a phone bill. I don't know. I don't remember what it was for, but I brought it up and everything, but that's showing that he didn't want to be my lawyer at a certain point in time.

MR. ROE: That is because you didn't want to see these.

THE COURT: He had a Motion to Withdraw because I think he was having trouble with you meeting him, and his Motion to Withdraw says that he can not adequately prepare for the trial without your cooperation. I'm going to assume that at some point in time you and he must have met on at least a number of occasions because you've indicated that he's made comment to you which –

CLIFFORD W. BAUGHMAN, DEFENDANT: Those were all – All the comments he made to calling me names and stuff have all been here.

MR. ROE: Oh, Clifford.

CLIFFORD W. BAUGHMAN, DEFENDANT: Don't argue with me.

THE COURT: Yes, here's the problem. Mr. Baughman, I don't know that there's anybody else that can put on at this minute a defense any better than Mr. Roe can put on.

Now as the Court has been led to believe, you made a statement to law enforcement –

CLIFFORD W. BAUGHMAN, DEFENDANT: Yes.

THE COURT: –regarding your involvement in this; is that correct?

CLIFFORD W. BAUGHMAN, DEFENDANT: Yes.

THE COURT: And he basically figures –

CLIFFORD W. BAUGHMAN, DEFENDANT: But I was also drinking that day.

THE COURT: I understand, and I'm sure Mr. Roe will bring that out that you may have been drinking, but if you gave a statement to law enforcement -- and I've not seen it. I don't know because I didn't do the preliminary hearing if there was one in this -- but if you gave a statement to law enforcement wherein you said you did certain things, and I don't know what it is that you said you did or didn't do, and they've made you an offer, he might have had serious doubts about your ability to process things, but I don't know because I know none of the evidence in this case.

CLIFFORD W. BAUGHMAN, DEFENDANT: I understand but --

THE COURT: But I am not at this late date going to fire Mr. Roe unless you have competent counsel prepared to go forward.

CLIFFORD W. BAUGHMAN, DEFENDANT: Well, I think I'm being denied my right to a fair trial because I don't believe he will do so.

THE COURT: Mr. Baughman, when these offers -- if you're acquitted it doesn't matter, they'll find you not guilty. If, on the other hand, that they find you guilty then I guess you'll have an appeal question as to whether or not you were properly represented by counsel, and that's a question that will have to be answered later. The only answer to that question is whether or not Mr. Roe does an adequate job, basically would be ineffective assistance of counsel, and that's something that a Court of Appeals would review to determine whether or not everything he did amounted to effective assistance of counsel.

CLIFFORD W. BAUGHMAN, DEFENDANT: I understand.

THE COURT: But we're going forward today.

(R. VI, 7-11).

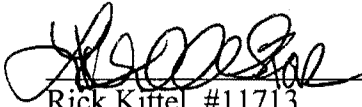
The trial judge did not adequately inquire into Clifford's claims supporting his request to remove Mr. Roe. First, the trial judge asserted that it could not determine

whether Mr. Roe was ineffective until there was a verdict. This is wrong because ineffective assistance of counsel can occur before a trial ever takes place. *See, e.g., Mullins v. State*, 30 Kan.App.2d 711, 46 P.3d 1222 (2002) (finding ineffective assistance of counsel based on inadequate pretrial investigation). Second, Clifford's claim was more accurately categorized as a claim of conflict with his attorney rather than ineffective assistance of counsel. The trial court abused its discretion when despite the obvious breakdown in communication between Clifford and Mr. Roe, it failed to inquire into Clifford's claim that he and Mr. Roe were unable to work together. Mr. Roe had previously filed a Motion to Withdraw based on his inability to communicate with Clifford. (R. I, 23). Mr. Roe subsequently withdrew the motion. (R. IV, 2). Additionally, right before trial Clifford asked that Mr. Roe be removed because of problems communicating. He specifically complained that Mr. Roe was not interested in working with him on his defense and that Mr. Roe called him names. Even during Clifford's request, he and Mr. Roe were arguing. (R. VI, 9). The obvious breakdown in communication showed that Clifford had "justifiable dissatisfaction" with his counsel. The trial court failed to inquire further to insure that the Clifford's Sixth Amendment right to counsel was not violated. Moreover, the court directed its limited inquiry at the issue of ineffective assistance of counsel rather the claims of conflict of interest, irreconcilable differences, and breakdown in communication that Clifford actually made. Accordingly, the case should be remanded to the district court for a full hearing on Clifford's claims that he had a conflict with his trial attorney.

Conclusion

Reversible error was committed because there was no juror unanimity in finding the specific act that constituted count II of the charging document. Reversible error was also committed when the trial court gave the deadlocked jury instruction over counsel's objection and when the trial court refused to allow defense counsel to present evidence of the alleged victim's prior sexual acts as relevant to her credibility. Moreover, the trial court failed to adequately investigate Clifford's claims that he had a conflict with his counsel, Mr. Roe. For these reasons, Clifford's conviction should be reversed.

Respectfully submitted,



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Certificate of Service

The undersigned hereby certifies that service of the above and foregoing brief was made by mailing two copies, postage prepaid, to Sherri Schuck, P O Box 219, Westmoreland, KS, 66549-0219; and by hand delivering one copy to Stephen N. Six, Attorney General, Kansas Judicial Center, Topeka, KS 66612, on the 10th day of March, 2009.



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