No. 08-100604-A

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

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STATE OF KANSAS
Plaintiff-Appellee

vs.

CLIFFORD W. BAUGHMAN
Defendant-Appellant

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**BRIEF OF APPELLEE**

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

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Nature of the Case

The defendant, Clifford W. Baughman, was charged by Information with two counts of Aggravated Indecent Liberties with a Child and one count of Sexual Exploitation of a Child. (I, 24) A jury trial was held March 19 – 20, 2008. (VI, 1) After the close of the state's case, the Court granted the defendant's motion for directed verdict as to Count 3: Sexual Exploitation of a Child. (VI, 376-88) The jury acquitted the defendant on count one (Aggravated Indecent Liberties with a Child) and convicted the defendant on count two (Aggravated Indecent Liberties with a Child). (I, 51) The defendant was sentenced May 15, 2008, to a term of 68 months incarceration and 36 months post release. (I, 57-64) The defendant timely appeals. (I, 54) Pursuant to Supreme Court Rule, the victim is referred to as D.E.K.

## Statement of the Issues

**Issue I:** **There was no reversible error committed by a failure to give a unanimity instruction, as the State did not rely upon multiple acts regarding the July incident. In the alternative, if the Appellate Court finds there were multiple acts relied upon and error was committed by not giving an unanimity instruction, then it was not "clear error" and does not require reversal.**

**Issue II:** **The District court did not commit reversible error by giving the deadlocked jury instruction.**

**Issue III:** **The District Court properly denied the defendant's request to "impeach" the victim/witness because she did not make an inconsistent statement.**

**Issue IV:** **The District Court did not abuse its discretion when it denied the defendant's request to remove trial counsel on the morning of trial.**

## Statement of the Facts

On July 24, 2007, the state filed a Complaint, initially charging the defendant with one count of Aggravated Indecent Liberties with a Child. (I, 6) The state filed an Amended Complaint August 9, 2007, charging the defendant with two counts of Aggravated Indecent Liberties with a Child (Count 1 and 2 respectively) and one count of Sexual Exploitation of a child (Count 3). (I, 14-15) The defendant waived preliminary hearing and an Information was filed based on the Amended Complaint. (I, 16) An Amended Information was filed January 23, 2008, charging the same offenses, but amending the date of offense on count 1. (I, 24-25) A jury trial was set to begin March 19, 2008, with a motions hearing set January 18, 2008. (IV, 1-3; VI, 1)

The State filed a Motion in Limine pursuant to KSA 21-3525 (the Rape Shield Doctrine) to exclude testimony of the victim's prior sexual contact with a teen-age boyfriend. (I, 20-22) Defense counsel filed a Motion to Withdraw based on lack of communication with his client and an inability to prepare for trial because of the lack of

communication. (I, 23) On the date of hearing, the defendant did not oppose the state's motion in limine because defense counsel conceded it had no grounds. (IV, 2) Further, defense counsel withdrew its motion to withdraw. (IV, 2) The matter proceeded to trial commencing March 19, 2008. (VI, 1)

On the morning of trial, the district court assembled all parties in his chambers. (VI, 4) Defense had filed an alibi notice to which the court took up at this time. (VI, 4-6) The district court acknowledged the receipt of proposed jury instructions from both parties. (VI, 6) At the conclusion of these matters, defense counsel indicated to the court that his client wished to "fire" him. (VI, 7) Upon inquiry by the court, the defendant indicated he wanted to release his attorney, Russ Roe, because Mr. Roe was calling him names and refused to talk to him. (VI, 7) Mr. Roe denied these statements. (VI, 7) The court reiterated Mr. Roe's extensive criminal and trial experience. (VI, 7-8)

The defendant stated that Mr. Roe was not reviewing evidence that he believed was important. (VI, 8) The court inquired as to what evidence he believed was not being reviewed. (VI, 8) The defendant mentioned a vehicle registration and a phone bill, but was not able to recall what was important about the phone bill. (VI, 8) Mr. Roe indicated that some of the problems the defendant spoke of was because he (the defendant) did not initially meet with him. (VI, 8) The court recalled Mr. Roe's prior motion to withdraw based on the defendant's failure to meet with counsel, and recalled that the parties had at least resolved that issue as they had met on many occasions as stated by the defendant. (VI, 9) The court denied the defendant's motion for new counsel because he found Mr. Roe was more than competent and the defendant did not have a basis in which to remove his current counsel. (VI, 10)

At trial, D.E.K. testified that she had met the defendant through a mutual friend in March 2007. (VI, 89) The mutual friend was one year younger than D.E.K, who was 15 when she met the defendant. (VI, 89) The defendant was twenty-two when they met and turned twenty-three in July 2007. (VI, 90) DEK and the defendant struck up a correspondence through the internet. (VI, 90-91) The defendant had asked DEK how old she was and told her how old he was. (VI, 90) The defendant had expressed concern to DEK about her age. (VI, 108) They found they had another mutual friend, who was DEK's age, and the defendant's neighbor. (VI, 92) Most of the contact DEK and the defendant had prior to June 2007, was by internet. (VI, 133-36)

In June 2007, DEK was babysitting for the weekend at the home of Heather Andrews. (VI, 98) She and a friend, Samantha Bellinder, babysat Friday night, June 8, 2007, and another friend joined them on Saturday, June 9, 2007. (VI, 98-99) During this weekend, DEK testified that the defendant called her on her cell phone. (VI, 102, 136) DEK had previously given the defendant her phone number via their internet conversations. (VI, 102, 136) The defendant had called her and then began texting her over the weekend wanting to get together with her. (VI, 99, 102, 136)

DEK testified that she was "freaking" out and wanted to meet with the defendant, but knew she was babysitting. (VI, 104) Finally, she decided to meet with the defendant since her friends were at the house. (VI, 104) DEK and the defendant agreed to meet late Saturday night, early Sunday morning (June 9-10, 2007) at the Gas 4 Less located close to the defendant's home. (VI, 103) DEK testified the defendant chose this place because it was close to his home. (VI, 103) DEK walked to this location from where she was babysitting. (VI, 104)

When DEK arrived at the Gas 4 Less, she did not see the defendant initially because he was hiding from her. (VI, 105) When he finally came out of hiding, DEK stated they hugged and kissed and then talked behind the Gas 4 Less. (VI, 105-7) The two were together for approximately two or three hours. (VI, 106) At one point during this encounter, DEK testified the defendant had placed his hand down her pants and penetrated her vagina with his finger. (VI, 106) DEK stated this lasted for a few minutes and then he stopped. (VI, 106

During the time that DEK was with the defendant at the Gas 4 Less, they observed a vehicle pull into the parking lot. (VI, 109) The defendant told DEK to hide so they would not get in trouble. (VI, 109) DEK hid until the defendant called her, where he advised her that he had called the police and the vehicle was just someone delivering the mail. (VI, 109) DEK left the defendant shortly thereafter and returned to her babysitting house. (VI, 110) DEK told both her friends the next day what had happened when she met with the defendant. (VI, 110)

DEK testified that after this incident, she met the defendant a couple days later at the pool parking lot and hung out with some friends. (VI, 111, 150) The defendant had become upset with her because she told her friends about what happened at the Gas 4 Less. (VI, 151) DEK stated that the defendant denied that he had ever "fingered" her. (VI, 186-87) DEK testified that her family had installed a webcam on their computer. (VI, 93) After the incident in June at the Gas 4 Less, DEK testified that the defendant would ask her to masturbate for him while they chatted on the computer. (VI, 94-97; 139-41) She would rub her vaginal area over her clothing. (VI, 96) DEK stated the webcam remained on her face while she did this. (VI, 139) During these times, the

defendant would tell her that he was also masturbating as he watched her. (VI, 185) This occurred a couple of times. (VI, 97)

DEK testified that she and the defendant were not sexually physical again until July 2007. (VI, 111-21) On July 14, 2007, the town of Wamego, Kansas, had a motorcycle rally. (VI, 113, 289) DEK had hung out with some friends, Charlie Snyder, Katie Davis and Larry Boggs, for most of the day. (VI, 112) DEK stated that she called her parents and asked to stay the night at the Snyder residence. (VI, 113) DEK stated that her mother believed the Snyder's were home and she did not correct her. (VI, 113) DEK stated that she and Katie Davis had called the defendant at some time during the day to see if he would buy some alcohol and cigarettes, but he refused. (VI, 114)

DEK stated that she had called the defendant throughout the night. (VI, 114) At some point she and her friends went to a party around 10:00 p.m. and drank alcohol. (VI, 115) DEK did not drink much. (VI, 115-16; 157-58; 221) During the party, DEK called and sent text messages to the defendant. (VI, 115-16) He called her once and also texted her back. (VI, 116) DEK and the defendant made plans to meet again at the Gas 4 Less. (VI, 117) When DEK and her friends left the party, they returned to Charlie's house. (VI, 158) Shortly after arriving back at the residence, DEK asked Larry Boggs to give her a ride to the Gas 4 Less to meet with the defendant. (VI, 117) DEK believed that occurred around 2:00 a.m. (VI, 160)

DEK testified that Boggs dropped her off at the Gas 4 Less. (VI, 117) The defendant again hid, but DEK texted him and he told her that he could see her. (VI, 161) DEK and the defendant hugged and sat down with the defendant sitting behind DEK and she was sitting between his legs. (VI, 118) DEK testified that she and the defendant

talked a while and he had his hand on her "crotch." (VI, 118) He would move his hand and then he eventually put his fingers inside her shorts and digitally penetrated her vagina. (VI, 119) DEK stated he then told her to get up and they moved over to a garage and an old truck that was parked there. (VI, 119-20) Once behind the garage, DEK removed her shorts and panties and the defendant unbuckled his pants and pulled them down. (VI, 119) The defendant tried to have sexual intercourse with DEK in a couple of different positions, but was unsuccessful. (VI, 120) Eventually, the defendant had DEK lay on the ground and the defendant got on top of her. (VI, 121)

DEK stated that the defendant put his penis in her vagina, but did not force her. (VI, 121) She testified that it was painful and the defendant stopped a couple of times when she told him it hurt. (VI, 121) The defendant continued when the pain went away. (VI, 121) DEK thought it lasted about 15 or 20 minutes. (VI, 121-22) DEK did not think that the defendant ejaculated. (VI, 121) Afterwards, DEK stated she and the defendant talked a bit because she was afraid she would be pregnant, but the defendant assured her that she would not be because he did not finish. (VI, 122) Shortly thereafter, DEK walked back to Charlie Snyder's house and was let inside by Larry Boggs. (VI, 122-23; 229)

DEK testified that the next day she told Katie Davis what had happened. (VI, 123) She testified that she believed that Katie had figured out what had happened because DEK was experiencing vaginal pain and walking funny. (VI, 123; 178) DEK stated that she told Katie because it was her first time and it hurt. (VI, 123) DEK said that she told her parents what had happened after another friend threatened to tell her parents if she did not. (VI, 124-25) DEK testified that after she told her parents, they

called the police and she talked to Officer Coon. (VI, 125-26) DEK stated that she also received a medical examination as a result of the incident. (VI, 126)

During cross examination, defense counsel requested a hearing outside the presence of the jury to introduce evidence of DEK's prior sexual conduct. (VI, 168-69) Specifically, defense wanted to introduce evidence that DEK had experienced anal intercourse and digital penetration in the past. (VI, 170) Defense counsel argued that DEK had opened the door to allow this evidence because she testified on direct examination that it "was the first time and it hurt." (VI, 170) Defense believed that DEK had made an inconsistent statement and the evidence of her past sexual conduct went to her credibility. (VI, 170)

The state argued that DEK had not "opened the door" and in fact had not made any inconsistent statements. (VI, 170) The state argued the context in which DEK had made the statement that it was her first time and it hurt was in describing the vaginal intercourse. (VI, 170-71) The state argued defense was attempting to introduce evidence that had no relevance on this matter, as the prior sexual contact had been anal intercourse with a boyfriend who was the same age as DEK. (VI, 171) The state argued that DEK had made no inconsistent statements because she had not experienced vaginal intercourse and it was her first time and it hurt. (VI, 171)

The district court indicated that defense asked DEK if she had had intercourse before and she answered no. (VI, 172) Defense corrected the court and indicated DEK had merely said it was her first time. (VI, 172-73) The court believed that whether DEK had opened the door to allow the evidence was predicated on her mindset (i.e. what did she consider sex to be). (VI, 173) The state argued that whether someone opens the door

to override a motion in limine, that the statement must be viewed in relation to the context it was made. (VI, 173-74) DEK was asked to return to the courtroom and was asked what "sex" was to her, to which she indicated it was a penis to vagina context. (VI, 175) Based on DEK's response, the court overruled defense counsel's motion to admit the evidence of prior sexual conduct. (VI, 176)

Several witnesses were called by the state to show the consistency of DEKs recollection of the two incidents involving the defendant. (VI, 2) Samantha Bellinder testified that she had been with DEK babysitting the weekend of June 8 – 10, 2007. (VI, 192) She testified that she did not know the defendant but was aware that DEK had been texting him throughout the weekend they babysat. (VI, 193) She testified that on Saturday, DEK left the residence to go meet the defendant. (VI, 194-95) She testified that DEK told her that the defendant had digitally penetrated her. (VI, 196-97) On cross examination, Samantha testified that the only information she had of the incident in June is what DEK had told her. (VI, 198)

Katelyn (Katie) Davis testified that she had been with DEK the weekend of the motorcycle rally in July 2007. (VI, 204-05) She indicated that she knew the defendant through DEK. (VI, 202) Katie reiterated what DEK had testified to regarding the events of the day. (VI, 206-08) Katie indicated that DEK told her that she had lost her virginity to the defendant. (VI, 210) Katie understood that to mean that DEK and the defendant had sexual intercourse, which she defined as "penis in her vagina." (VI, 211) On cross examination Katie testified that the only information she had of the incident in July is what DEK had told her. (VI, 214)

Larry Boggs testified that he had been with DEK the weekend of the motorcycle rally in July 2007. (VI, 221) He testified that he did not know the defendant. (VI, 220) Larry testified that when he, DEK, Katie and Charlie returned from the party, he took DEK to Gas 4 Less to meet the defendant. (VI, 223-24) He thought this was about 2:00 a.m. that he took DEK to Gas 4 Less. (VI, 229) Larry testified he waited up for DEK to come back to the residence, which he believed was about 6:00 in the morning. (VI, 228)

Christine Hazlett-Allen, a Physician's Assistant and Sexual Assault Examiner, testified that she performed the sexual assault examination on DEK, and collected evidence and a medical history. (VI, 249; 253-58) Ms. Allen testified that DEK had indicated she had been digitally penetrated and also had vaginal intercourse. (VI, 254) Ms. Allen indicated DEK identified the person to whom she had sexual contact with as Clifford Baughman. (VI, 254) Ms. Allen indicated that DEK had showered, brushed her teeth, used the bathroom and changed clothes prior to the examination. (VI, 255) Ms. Allen stated that when she did a vaginal examination of DEK, she used a colposcope, which was fitted with a camera. (VI, 256) Ms. Allen stated that she did find injuries to DEK's hymen, which was consistent with blunt penetrating trauma. (VI, 261) On cross examination, Ms. Allen stated that she was not able to say what caused the injury, but did indicate on re-direct that it was an injury consistent with what DEK reported. (VI, 264; 265)

Detective Matt Pfrang, with the Wamego Police Department, testified that he had executed a search warrant on the defendant's residence and seized the defendant's computer. (VI, 269; 271-72) Det. Pfrang testified that he confirmed that on June 10, 2007, at 3:09 a.m. the Wamego Police Department received a call regarding "suspicious

activity." (VI, 282-84) The reporting party was listed as Mr. Baughman with a call back number of 785-410-8060. (VI, 283) Det. Pfrang indicated this was the same phone number that the defendant had provided as his home phone at the time of his arrest. (VI, 283) The disposition of the call was a delivery person. (VI, 284) Det. Pfrang testified that he submitted the sexual assault kit and the victim's clothing to KBI, but no biological evidence was found. (VI, 292) The defendant's computer was also submitted to the KBI. (VI, 296)

Special Agent David Schroeder with the KBI testified that he did a forensic examination of the defendant's computer. (VI, 309-15) Agent Schroeder indicated that he was provided perimeters from Det. Pfrang to look for images of DEK that may have been sent via a webcam. (VI, 314) Agent Schroeder indicated he did not find any such images, but testified this was not unusual since the defendant's computer did not have a third party software that allowed one to save the live stream of the webcam. (VI, 314-15) On cross examination, Agent Schroeder testified that he did not find any images of DEK in a state of undress. (VI, 317)

Finally, Officer William Coon testified. (VI, 321) Officer Coon testified that he had been the primary officer on this matter and had interviewed DEK, the defendant, and several of the minors that had been present with DEK during the hours preceding the June and July 2007 events. (VI, 321-74) Officer Coon stated that on July 17, 2007, he had received a phone call from Clifford Baughman, who stated he wanted to inform the police that he (Baughman) had just been confronted by DEK's mother, accusing him of having sex with DEK. (VI, 323) Officer Coon told Mr. Baughman, that if a report came

in he would contact him. (VI, 323) Shortly thereafter, DEK's father called the Wamego Police Department and filed a complaint against Clifford Baughman. (VI, 322)

Officer Coon interviewed DEK, who told him exactly what she had already testified to regarding the July 15, 2007 incident. (VI, 325-32) Officer Coon testified that he had a second interview with DEK, whereby she had disclosed the details of the June 10, 2007, incident and the webcam. (VI, 332-36) Officer Coon stated that he also interviewed the defendant. (VI, 342) Officer Coon advised the defendant of his Miranda rights and recorded the interview. (VI, 342; 350; III, State's Exhibit 13) Initially the defendant denied any sexual contact with DEK on July 15, 2009. (VI, 355-56) Eventually, the defendant indicated he had had consensual sex with DEK, but he did not think they actually had sexual intercourse, which he defined as a man's penis in a woman's vagina. (VI, 345-47) Officer Coon indicated he did not interview the defendant about the June 2007 incident or the webcam allegations because that information came after the defendant's arrest regarding the July 15, 2007, incident. (VI, 349)

The defendant's interview was played for the jury. (IV, 351; III, State's Exhibit 13) At the close of the State's case, defense counsel moved for a directed verdict on count 3: Sexual Exploitation of a Child, based on lack of evidence. (VI, 376-88) After argument, the court granted the defendant's motion for directed verdict on count 3 and dismissed the charge. (VI, 388) Defense counsel indicated that after conferring with his client, the defense would present no evidence. (VI, 390) In chambers, defense objected to the inclusion of the deadlocked jury instruction. (VI, 392) The court overruled the

objection on the basis that he could not give the instruction after deliberations began. (VI, 393) Closing arguments were made by both parties. (VI, 403-17)

The jury returned a verdict of not guilty on count 1 (the June 9/10, 2007 incident) and guilty on count 2 (the July 15, 2007, incident). (VI, 420; I, 51)

## Arguments and Authorities

**Issue I:** **There was no reversible error committed by a failure to give a unanimity instruction, as the State did not rely upon multiple acts regarding the July incident. In the alternative, if the Appellate Court finds there were multiple acts relied upon and error was committed by not giving an unanimity instruction, then it was not "clear error" and does not require reversal.**

### Standard of Review

When jury unanimity is at issue, the standard of review is clear error. The threshold question of whether this is a multiple acts case is a question of law with unlimited review. *State v. Voyles,* 284 Kan. 239, 244, 252, 160 P.3d 794 (2007). The threshold analysis is whether the defendant's conduct is part of one act or represents multiple acts which are *separate and distinct* from each other. *Id.* at 244. The next question is whether error is committed by a failure to elect or to instruct. *See id.* at 252. The final step is to determine if the error warrants reversal. *See id.*

### Analysis

The defendant was charged in count two of the state's Amended Information with Aggravated Indecent Liberties with a Child. (I, 24-25) This required the state to prove that the defendant engaged in "an act of sexual intercourse with a child, to-wit: DEK (DOB/09/22/1991), who is 14 or more years of age, but less than 16 years of age." (I, 24) The defendant argues this is a multiple acts case because the act of sexual intercourse can occur in alternate means. The state believes that this is an alternative means case which does not require jury unanimity as to the means by which the crime was committed. *State v. Stevens,* 36 Kan. App. 2nd 323, 336, 138 P.3d 1262 (2006).

> In multiple acts cases, several acts are alleged and any one of them could constitute the crime charged. In these cases, the jury must be unanimous as to which act or incident constitutes the crime. *State v. Timley*, 255 Kan.

> 286, Syl. ¶ 2, 875 P. 2d 242 (1994) On the other hand, in an alternative means case, a single offense may be committed in more than one way. The jury must be unanimous as to guilt for the single crime charged. As long as substantial evidence supports each alternative means, jury unanimity is not required as to the means by which the crime was committed. *Timley*, 255 Kan. at 289, 875 P.2d 242.

*Id.* at 336.

The offense of Aggravated Indecent Liberties with a Child can occur in a variety of ways. One of the ways that it can occur is to engage in "*an act of sexual intercourse with a child who is 14 or more years of age but less than 16 years of age.*" KSA 21-3504(a)(1) (emphasis added). Sexual intercourse is defined by KSA 21-3501(1), as "*any penetration of the female sex organ by a finger, the male sex organ, or any object. Any penetration, however slight, is sufficient to constitute sexual intercourse.*" In the case at hand, there was substantial evidence to prove that an act of sexual intercourse had occurred.

DEK testified that on July 15, 2007, she met the defendant at the Gas 4 Less in Wamego, Kansas. (VI, 117) When she met with the defendant they sat on the ground with the defendant behind DEK and she sitting between his legs. (VI, 118) At some point, the defendant placed his finger into DEK's vagina and then told her to get up. (VI, 119) The two moved to a location behind the garage and an old truck where DEK removed her shorts and panties and the defendant pulled down his pants. (VI, 119) DEK testified that the defendant tried to have intercourse with her in a couple of different positions, but it did not work. (VI, 120) He then had her lay on the ground, where he got on top of her and penetrated her vagina with his penis. (VI, 121) DEK testified that the intercourse took approximately 15 to 20 minutes. (VI, 121-22)

Christine Hazleet-Allen, the SANE/SART examiner, testified that she located injury to DEK's hymen that was consistent with blunt force trauma. (VI, 261) Although she could not say that the injury was caused by a penis, she did state that the injury was consistent with what DEK had told her regarding the penile penetration. (VI, 264-65) Finally, the defendant had been interviewed by Officer Coon regarding his contact with DEK on July 15, 2007. (VI, 342; III, State's Exhibit 13)

The defendant initially admitted to being with DEK, but only kissing her. (VI, 355-56) After further questioning, the defendant admitted to having sex with DEK. (VI, 356) The defendant defined sex as a man's penis in a woman's vagina. (VI, 345-47) The defendant would later advise Officer Coon that he was not sure he actually penetrated DEK. (VI, 346-47)

Based on the evidence received by the jury, there was substantial evidence to support that an act of sexual intercourse had occurred between the defendant and DEK on July 15, 2007. The jury returned a unanimous verdict as to the defendant's guilt on count 2. (VI, 420; I, 51)

Alternatively, the state believes that if the Court does a multiple acts analysis in this matter, the case still does not rise to a multiple acts case. To determine whether acts are separate and distinct the court considers whether the acts occurred at or near the same time, whether the acts occurred at or near the same location, whether there is a causal connection, whether there is an intervening event and whether there is a fresh impulse motivating the conduct. *See State v. Schoonover*, 281 Kan. 453, 506-07, 133 P. 3d 48 (2006).

In the present case, the state asked DEK on direct to go through the events of the day and night of July 15, 2007. (VI, 111-22) DEK's testimony began with her meeting up with her friends and attending the motorcycle rally in Wamego. (VI, 112) She continued to go through the day and how she came to be with the defendant. (VI, 116-17) DEK was asked on direct what occurred when she met with the defendant. (VI, 118) DEK testified that she and the defendant sat and talked for a while. (VI, 118) She then testified that the defendant had placed his hand in her shorts while they were sitting down and penetrated her vagina with his finger. (VI, 118-19) She then said that he told her to get up and to lay down. (VI, 119) They moved a short distance to a location behind the Gas 4 Less. (VI, 119-20; III, State's Exhibit 1 & 2) The distance was marked in feet. (III, State's Exhibit 1 & 2)

Once they moved, DEK removed her shorts and panties and the defendant attempted to have sex with her on the truck and then with her bent over. (VI, 120) Neither of these positions worked, so he had her lay on the ground and he got on top of her. (VI, 120) In this position the defendant achieved penile penetration. (VI, 121)

Contrary to the defendant's assertions, there was no lapse in time between the digital penetration and the penile penetration. DEK testimony indicated one occurred almost immediately following the other. (VI, 119-21) Although the two moved to a different spot on the premises, the locations were separated by feet. (III, State's Exhibit 1 & 2) There was no intervening event between the two acts, and although the defendant agues there was a fresh impulse he does not indicate what that was. *Appellant's Brief* at 5. The defendant's actions were not separate and distinct, but rather one continuous action with one purpose.

In the event the court does find there were multiple acts, the state argues that no error was committed. In *Voyles,* the Kansas Supreme Court agreed with the Kansas Court of Appeals that error had been committed because "no election-actual or its functional equivalent-was made by the state" and no instruction was given. *Voyles,* 284 Kan. at 245. In the present case, the state argued that sexual intercourse had occurred between the defendant and DEK on July 15, 2007. (VI, 403-12) The focus of the State's argument was the penile penetration. (VI, 404-06)

Finally, in the event the court finds error, the state argues it is not reversible, because the defendant presented a unified defense, which was a general denial. (VI, 412-15) Although the defendant did not put formal evidence on, defense counsel's cross examination focused on no independent knowledge of these events by anyone other than DEK. (VI, 198; 214) Defense emphasized DEK's lying to her parents, sneaking out of the house, irresponsibility when babysitting; and drinking underage. (VI, 413) In closing, defense indicated that as to the event that was charged in count 1 (June 10, 2007), it was a "he said, she said" because his client denies anything happened. (VI, 414) His argument then was that if no one but DEK can say these events occurred and what little physical evidence there is does not indicate his client committed the act. (VI, 415) Since there was a unified defense, a reversal is not automatic and is not warranted in this case.

**Issue II: The District court did not commit reversible error by giving the deadlocked jury instruction.**

**Standard of Review**

When a defendant objects to instructions, an appellate court must consider the instructions as a whole and not isolate any one instruction. Even if erroneous in some way, instructions are not reversible error if they properly and fairly state the law as applied to the facts of the case and could not have reasonably misled the jury. *State v. Page,* 203 P.3d 1277, (2009)

**Analysis**

The defendant argues that his conviction should be reversed because the PIK instruction on the deadlocked jury contained an inaccurate statement of law and alternatively, because it contained a misleading and contradictory statement. *Appellant's Brief* at 9-13. First the defendant argues that the statement, "[l]ike all cases, it must be decided sometime," is an inaccurate statement of law. In *Scott-Herring*, the Kansas Supreme Court found that this statement was not "technically correct"; however, they did not believe this technical error warranted reversal. 284 Kan. 172, 181, 159 P.3d 1028 (2007). The Kansas Supreme court held that under the current standard of review "proper and fair instructions" were required, rather than "technically perfect instructions." *Id.*

The state recognizes the current case of *State v. Salts*, 288 Kan 263, 200 P. 3d 464 (2009). Because the defendant in *Salts* did not object to the deadlocked jury instruction, the *Salts* court used a clearly erroneous standard of review and concluded the error was not reversible because it found there was no real possibility the jury would have rendered a different verdict absent the error. *See id.* at 466.

Since the defendant objected to the deadlocked jury instruction this court's burden is to determine whether the challenged instruction "properly and fairly stated the law as

applied to the facts and whether the instruction could have reasonably misled the jury." *Page*. 203 P.3d at 1279. The *Page* court agreed that the language "[a]nother trial would be a burden on both sides" is misleading, inaccurate and confusing. *Id.* In determining whether the instruction could have reasonably misled the jury, the *Page* court found that under the facts of the case, the erroneous language had a real possibility of influencing the jury. *Id.* Specifically, the jury had actually informed the court that a hung jury was possible. *Id.* The jury informed the court it actually was deadlocked on count 2. *Id.* The court recessed for the day and instructed the jury to return the next day and continue deliberations. *Id.* The jury requested a read back of certain testimony when it continued its deliberations. *Id.* Eventually, the jury convicted the defendant of two counts of rape. *Id.*

In the present case, the defendant objected to the use of the deadlocked jury instruction. (VI, 392-93) Under the current case law the instruction would be considered "misleading, inaccurate and confusing." However, under the current standard of review, this court must also find that the instruction could have reasonably misled the jury. Under the facts of this case, this burden cannot be sustained and therefore reversal is not warranted.

At the close of evidence, the jury received instructions regarding the elements of the two counts of aggravated indecent liberties that the defendant was charged with. (VI, 395-96; I, 47-50) In addition, they received the deadlocked jury instruction as well as other instructions. (VI, 400-01; I, 50) Unlike in *Page*, the jury made no announcements as to being deadlocked or hung in any manner. In fact, the jury came back with a split verdict. They found the defendant not guilty on count 1 and found the defendant guilty

on count 2. (VI, 420; I, 51) This clearly indicated that the jury discussed the evidence, weighed the evidence, and considered each offense separately and completely. They were not confused by the deadlocked jury instruction and reversal is not warranted.

**Issue III: The District Court properly denied the defendant's request to "impeach" the victim/witness because she did not make an inconsistent statement.**

**Standard of Review**

Admission of evidence lies within the sound discretion of the district court, and an appellate court's standard of review is abuse of discretion. *State v. Holmes,* 278 Kan. 603, 623, 102 P.3d 406 (2004). Judicial discretion is abused only when no reasonable person would take the view adopted by the trial court. *State v. Harris,* 262 Kan 778, 783, 942 P.2d 31 (1997). The party who asserts that the court abused its discretion bears the burden of showing such abuse. *State v. Jenkins,* 272 Kan 1366, 1378, 39 P.3d 47 (2002); see also *State v. Perez*, 26 Kan App. 2d 777, 780, 995 P.2d 372 (1999), *rev. denied* 269 Kan 939 (2000)(review standard is abuse of discretion where trial court excludes evidence under rape shield statute).

**Analysis**

Prior to trial, the state filed a Motion in Limine pursuant to KSA 21-3525. (I, 20-22) The state sought to exclude evidence that DEK had disclosed to law enforcement that she had previously had anal and digital intercourse with a prior boyfriend. (I, 21) The defendant did not challenge the state's motion. (IV, 21) The court granted the state's motion. (IV, 1-3)

During the trial, the state asked DEK to go through the events that occurred on July 15, 2007. (VI, 111-22) DEK testified that she and the defendant had vaginal

intercourse (penis to vagina). (VI, 121) She testified that during the vaginal intercourse with the defendant it had hurt and that he would stop each time she told him that it hurt. (VI, 121) DEK further testified that she told her friend Katie what had occurred with the defendant because "it was my first time and it hurt and so they noticed a little." (VI, 123)

During cross examination, defense counsel requested a hearing outside of the presence of the jury. (VI, 169) At this time, defense acknowledged that a "rape shield" was filed, but believed that DEK had opened the door to allow testimony of her prior sexual conduct as a "matter of credibility." (VI, 170) Defense counsel argued that DEK's statement that "it was her first time and it hurt" was an inconsistent statement. (VI, 170) The state argued that DEK had not opened the door because her statement was made in the context of her testimony about the vaginal intercourse, to which she had not engaged in and that the evidence of her prior sexual conduct was irrelevant. (VI, 170-74)

When looking at a district court's admission or exclusion of evidence, the appellate court must first determine relevance. *See State v. Gunby*, 282 Kan. 39, 47, 144 P.3d 647 (2006). All relevant evidence is admissible unless prohibited by law or court decision. *See id.*; see also KSA 60-470(f). Relevant evidence is evidence that has a reasonable tendency to prove any material fact. *See id.*; see also KSA 60-401(b). To establish relevance, there must be some material or logical connection between the asserted facts and the inference or result they are intended to establish. *See id.* The determination of relevancy is "more a matter of logic and experience than of law." *State v. Collier*, 259 Kan. 346, 353, 913 P.2d 597 (1996).

It was obvious at the time DEK made the statement in direct testimony that she was referring to the vaginal intercourse as being her first time. Throughout DEK's

description of the vaginal intercourse, she had indicated that the defendant would stop each time she told him that it hurt. (VI, 121) The jury had already heard DEK testify as to the first incident involving herself and the defendant whereby digital penetration was achieved, so they would not have been misled to believe that this was the first time she had experienced digital penetration when she testified as to the events that occurred on July 15, 2007. (VI, 111-22)

The district court properly excluded the evidence finding that DEK had not opened the door and that it was irrelevant. (VI, 173-74) The defendant has the burden to show the abuse of discretion and he has failed to sustain that burden.

**Issue IV: The District Court did not abuse its discretion when it denied the defendant's request to remove trial counsel on the morning of trial.**

**Standard of Review**

The decision to grant a criminal defendant new appointed counsel depends heavily upon the circumstances presented in a given case, and the district court possesses broad discretion in determining whether to appoint new counsel. *State v. McCormick,* 37 Kan. App. 2d 828, 836, 159 P.3d 194 (2007)(*rev. denied* September 27, 2007)(citing *State v.Cromwell*, 253 Kan. 495, 856 P.2d 1299 (1993)). An appellate court will reverse a judgment of the district court for an abuse of discretion only when no reasonable person would have adopted the view of the district court. *Id.* (citing *State v. Moses,* 280 Kan. 939, 945, 127 P.3d 330 (2006). To warrant substitute counsel, a defendant must show "justifiable dissatisfaction" with appointed counsel. Justifiable dissatisfaction sufficient to merit substitution of counsel includes a conflict of interest, an irreconcilable conflict, or a complete breakdown in communications between counsel and the defendant. *State v.*

*Jasper,* 269 Kan. 649, 654, 8 P.3d 708 (2000).

**Analysis**

The defendant argues that the district court abused its discretion by refusing to appoint substitute counsel, but fails to show how that discretion was abused. On the morning of trial, the parties were in chambers to discuss any last minute motions or details. (VI, 4) Defense had filed a Notice of Alibi which was taken up in chambers. (VI, 4-6) At the conclusion of that matter, Mr. Roe informed the court that the defendant wished to "fire" him. (VI, 7)

The court made inquiry into why the defendant wished to have substitute counsel. (VI, 7-11) The defendant stated that Mr. Roe called him names and refused to talk to him. (VI, 7-11) Mr. Roe denied the claim. (VI, 7) The defendant then indicated that Mr. Roe had not reviewed some evidence, specifically a vehicle registration and a phone bill. (VI, 8) The defendant claimed the vehicle registration was germane to the case, but could not recall why the phone bill was important. (VI, 8) The defendant also indicated that Mr. Roe had not wanted to be his attorney at one point. (VI, 8-9; I, 23)

The court acknowledged Mr. Roe's previous motion to withdraw, which was filed because the defendant was not meeting with his attorney. (VI, 9) That motion was withdrawn at the January 17, 2008, motions hearing as moot. (IV, 3) The court reiterated Mr. Roe's extensive criminal experience and indicated that he was "not at this late date going to fire Mr. Roe, unless you have competent counsel prepared to go forward." (VI, 9)

Contrary to the defendant's claim, the court made adequate inquiry into his request for substitute counsel. The defendant was unable to articulate a justifiable

dissatisfaction with his counsel beyond name calling. "Not all disagreements between counsel and defendant's constitute irreconcilable conflicts or lead to complete breakdowns in communication." *McCormick*, 37 Kan. App. 2d at 836.

**Conclusion**

Therefore, for the reasons stated above, the State respectfully requests the Court to affirm the defendant's jury trial conviction for aggravated indecent liberties with a child.

Respectfully submitted,

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## Certificate of Service

The undersigned hereby certifies that the original and sixteen (16) copies of Appellee's Brief were delivered on the 14th day of July, 2009, to the following:

Clerk of the Appellate Courts
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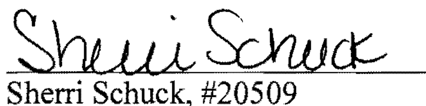

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