

FILED

AUG 10 2009

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

No. 08-101127-A

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

STATE OF KANSAS
Plaintiff-Appellee

vs.

JAMES LEWIS
Defendant-Appellant

BRIEF OF APPELLANT

Appeal from the District Court of Shawnee County, Kansas
Honorable Nancy Parrish, Judge
District Court Case No. 07 CR 10

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Nature of the Case

James Lewis was convicted of aggravated battery, aggravated assault, simple assault and criminal restraint. (R. XIV, 6-7). He was sentenced to 83 months in prison and ordered to pay \$6507.92 in restitution. (R. III, 232). Mr. Lewis appeals his convictions and his sentence. (R. III, 200).

Statement of Issues

- Issue I:** The district court committed reversible error and violated Mr. Lewis' right to a fair trial when it denied Mr. Lewis' motion for a mistrial after members of the jury witnessed an eyewitness called by the State have a verbal altercation with Mr. Lewis' sister and this eyewitness' mother attack Mr. Lewis' sister in the hallway of the courthouse during a recess.
- Issue II:** The district court lacked jurisdiction to order Mr. Lewis to pay restitution 42 days after his sentence was imposed.
- Issue III:** Mr. Lewis' Sixth and Fourteenth Amendment Rights, under *Apprendi v. New Jersey*, were violated when the court sentenced him to an increased sentence, based upon his prior criminal history, without requiring that it be put before a jury and proven beyond a reasonable doubt.

Statement of Facts

On January 2, 2007, James Lewis, got into a fight with his fiancé, Tina Kerley. (R. XIII, 125). Ms. Kerley managed and worked as a dancer at a gentleman's club owned by Mr. Lewis in Topeka, Kansas. (R. XVII, 387-88).

On January 2, 2007, other girls who worked at the club told Ms. Kerley that Mr. Lewis had cheated on her. (R. XVII, 400). Ms. Kerley decided to leave work and asked a co-worker to drive her home. (R. XVII, 400). Mr. Lewis found out that Ms. Kerley had

left, went after her, and brought her back to the club. (R. XVII, 401, 403). When they arrive back at the club, Mr. Lewis asked Ms. Kerley to repeat what the other girls had told her about him. (R. XVII, 404). Ms. Kerley repeated what the girls had told her, and a fight broke out between Ms. Kerley and Mr. Lewis. (R. XVII, 405).

The police were called about the fight, and they arrived and found Ms. Kerley in a video store next door to the club. (R. XVII, 427). Mr. Lewis was subsequently charged with severity level four aggravated battery, aggravated intimidation of a witness, aggravated assault with a gun, aggravated assault with a knife and criminal restraint. (R. I, 17-19).

During a recess on the second day of Mr. Lewis' trial, the mother of a state witness – Marsha Benson – and Mr. Lewis' sister had an altercation in the hallway outside the courtroom. (R. XVII, 374). A number of jurors were in the hallway at the time. (R. XVII, 374). The state witness, Ms. Benson yelled at Mr. Lewis' sister “something like ‘I didn't call you. I didn't ask your brother to come work over there at Shaker's and he asked me to work at Shakers.’” (R. XVII, 375). There was also a physical confrontation in the hallway when Ms. Benson's mother attacked Mr. Lewis' sister – an act defense counsel personally witnessed. (R. XVII, 378).

Immediately following the altercation in the hallway, Ms. Benson was called to testify. (R. XVII, 278). Ms. Benson's mother – who had been directly involved in the altercation during the recess – was present in the courtroom. (R. XVII, 278-79). Defense counsel, Wendell Betts, suggested that the court take a five-minute break so that the jury could go back to the jury room and the court could make Ms. Benson's mother leave because the jurors knew she was involved in the altercation in the hallway. (R. XVII,

279). The court proceeded with Ms. Benson's mother still in the courtroom. (R. XVII, 279).

At a recess later in the day, Mr. Betts moved for a mistrial based upon the jurors witnessing the altercation between Ms. Benson's mother and Mr. Lewis' sister. (R. XVII, 374). The court took the matter under advisement until the conclusion of trial and then issued a written memorandum decision and order denying the motion for mistrial. (R. II, 91).

On March 23, 2007, James Lewis was convicted of aggravated battery, aggravated assault, simple assault and criminal restraint. (R. XIV, 6-7). At the sentencing hearing held on March 31, 2008, Mr. Lewis was sentenced to a total of 83 months in prison. (R. VIII, 89-90). However, the district court tried to reserve jurisdiction so that restitution could be decided at a later date. (R. VIII, 90). On April 15, 2008, the State filed a motion for a hearing on restitution. (R. III, 207). That hearing was held on May 12, 2008 – 42 days after Mr. Lewis' sentence was imposed. (R. XIX, 1). Mr. Lewis was ordered to pay \$6507.92 to the Crime Victims Compensation Board. (R. XIX, 51). Mr. Lewis appealed. (R. III, 200).

Arguments and Authorities

Issue I: The district court committed reversible error and violated Mr. Lewis' right to a fair trial when it denied Mr. Lewis' motion for a mistrial after members of the jury witnessed an eyewitness called by the State have a verbal altercation with Mr. Lewis' sister and this eyewitness' mother attack Mr. Lewis' sister in the hallway of the courthouse during a recess.

During a recess on the second day of Mr. Lewis' trial, a State's eyewitness – Marsha Benson – and her mother had an altercation in the hallway outside the courtroom.

(R. XVII, 374). A number of jurors were in the hallway at the time. (R. XVII, 374).

Immediately after this altercation, Ms. Benson was called to testify against Mr. Lewis.

Because the prejudice of the juror's witnessing this incident could not be removed by an admonition to the jury, the district court erred in denying Mr. Lewis' motion for a mistrial.

A motion for mistrial is reviewed under an abuse of discretion standard, and the party alleging the abuse bears the burden of proving that his or her substantial rights to a fair trial were prejudiced. *State v. Albright*, 283 Kan. 418, 425-26, 153 P.3d 497 (2007).

K.S.A. 22-3423(1)(c) provides that "[t]he trial court may terminate the trial and order a mistrial at any time that he finds termination is necessary because . . . [p]rejudicial conduct, in or outside the courtroom, makes it impossible to proceed with the trial without injustice to either the defendant or the prosecution." "When an event of prejudicial misconduct, the damaging effect of which cannot be removed by admonition and instruction, is presented to the jury, the trial judge *must* declare a mistrial." *State v. Lewis*, 238 Kan. 94, 97, 708 P.2d 196 (1985). (Emphasis added).

The district court denied the motion for mistrial stating that there was "no allegation that the individuals involved in the altercation said anything related to the charges against the defendant or to the events leading up to the charges against the defendant." However, defense counsel, Wendell Betts, told the court that Ms. Benson yelled "something like 'I didn't call you. I didn't ask your brother to come work over there at Shaker's and he asked me to work at Shakers'" at Mr. Lewis' sister (R. XVII, 375). Shaker's is the name of the gentleman's club Mr. Lewis owned and at which Ms. Kerley worked. (R. XVII, 387). Shaker's is the place where all of crimes charged against

Mr. Lewis were alleged to have occurred. Shaker's was directly related to the charges against Mr. Lewis.

Additionally, the very nature of the confrontation – an eyewitness yelling at Mr. Lewis' sister and the eyewitnesses mother physically attacking Mr. Lewis' sister – was sufficient to cause prejudice to Mr. Lewis and deny him his right to a fair trial even if this Court were to find the altercation did not concern anything related to the case. The prejudice was compounded by the fact that immediately following the altercation in the hallway, Ms. Benson was called to testify and her mother Ms. Benson's mother – the woman who had physically attacked Mr. Lewis' sister – was permitted to be present in the courtroom in full view of the jury during her daughter's testimony against Mr. Lewis. (R. XVII, 278-79).

While the district court did admonish the jury that the only evidence it was permitted to consider was the testimony of the witnesses under oath in the courtroom, it is virtually impossible for people to erase a scene like that from their minds and not let it have any impact on their decision making process. (R. XVII, 277). It is impossible to know how the jurors who saw this altercation interpreted what they saw, but the fact that it involved Mr. Lewis, as Ms. Benson referred to him as she was yelling at Mr. Lewis' sister, unquestionably would cause prejudice to Mr. Lewis and his case.

When an event of prejudicial misconduct, the damaging effect of which cannot be removed by admonition and instruction, is presented to the jury, the trial judge *must* declare a mistrial." *Lewis*, 238 Kan. at 97. (Emphasis added). In the present case, the damaging effect of the misconduct on the part of a State eyewitness and her mother that was witnessed by jurors could not have been corrected by the admonition that was given

to the jury. The district court erred in denying Mr. Lewis' motion for a mistrial and Mr. Lewis' convictions should be reversed and his case remanded for a new trial.

Issue II: The district court lacked jurisdiction to order Mr. Lewis to pay restitution 42 days after his sentence was imposed.

The district court pronounced Mr. Lewis' sentence from the bench on March 31, 2008. At that point, the district court lost jurisdiction to increase or modify Mr. Lewis' sentence. However, 42 days later, the district court increased Mr. Lewis' sentence by ordering him to pay \$6507.92 restitution to the Crime Victims Compensation Board. The district court lacked the jurisdiction to make this order and thus, the restitution order must be vacated.

Whether jurisdiction exists is a question of law over which an appellant court's scope of review is unlimited. *State v. Denney*, 283 Kan. 781, 787, 156 P.3d 1275 (2007).

Our Supreme Court has held the Kansas Sentencing Guidelines Act do not vest a district court with continuing jurisdiction after a sentencing proceeding is concluded. *State v. Miller*, 260 Kan. 892, 900, 926 P.2d 652 (1996). Once a court has imposed a legal sentence, the district court has no jurisdiction to modify that sentence except to correct "arithmetic or clerical errors" pursuant to K.S.A. 21-4721(i). *State v. Trostle*, 41 Kan. App. 2d 98, 102, 201 P.3d 724 (2009).

The Supreme Court in *Love v. State*, 280 Kan. 553, 560, 124 P.3d 32 (2005), also held that "the judgment in a criminal case is effective upon its pronouncement from the bench, as the court's judgment and sentence in a criminal case does not derive its effectiveness from the journal entry." This issue has also been addressed in *State v. Royse*, 252 Kan. 394, 845 P.2d 557 (1993). The Court held "[i]n criminal cases, the

judgment must be rendered and sentence imposed in open court. The judgment in a criminal case, whether it imposes confinement, imposes a fine, grants probation, suspends the imposition of sentence, or imposes any combination of those alternatives, is effective upon its pronouncement from the bench." *Royse*, 252 Kan. at 395.

In *Royse*, the district court failed to address whether sentences should run consecutively or concurrently. The district court, realizing this, ordered the defendant to appear at a later date, at which time it ordered the sentences to be served consecutive to one another. *Royse*, 252 Kan. at 395. The Supreme Court specifically held "[o]nce a sentence is imposed, the district court is powerless to vacate that sentence and impose a harsher sentence. [citation omitted]." *Royse*, 252 Kan. at 398.

The fact that the district court stated that it would hold the issue of restitution open after the sentence was imposed does not change this situation. This Court recently held that jurisdiction may not be reserved by the district court to entertain modification of the sentence at some later date. *State v. Trostle*, 41 Kan. App. 2d 98, Syl. ¶ 5, 201 P.3d 724 (2009). In *Trostle*, the State appealed the district court's decision that it had "reserved" its jurisdiction to release defendant from jail prior to the completion of the 1-year jail sentence originally imposed. *Trostle*, 41 Kan. App. 2d at 99. The State contended that this was an unlawful modification of the defendant's sentence and the district court was without jurisdiction to take such action. *Trostle*, 41 Kan. App. 2d at 99. This Court agreed. *Trostle*, 41 Kan. App. 2d at 99.

Trostle is directly analogous to this case, because in the journal entry of judgment the district court specifically stated that "Ct. reserves jurisdiction to entertain mot for alternative sent after serving 9 mos." *Trostle*, 41 Kan. App. 2d at 100. The Court of

Appeals held that “[a] sentence is effective when pronounced from the bench, and the sentencing statutes give the district court no continuing jurisdiction after the sentencing proceeding is concluded”. *Trostle*, 41 Kan. App. 2d at 103, *citing Miller*, 260 Kan. at 900.

There was absolutely no reason that the State couldn’t have been ready to argue restitution at Mr. Lewis’ sentencing hearing. Twelve months and eight days passed between the time Mr. Lewis was convicted and the time he was sentenced. (R. XIV, 1; VII, 1). Alternatively, if the State wasn’t ready to present evidence on restitution on March 31, 2008, the appropriate procedure would have to be continue the sentencing hearing until the State was prepared.

Mr. Lewis’ sentence was effective when it was pronounced from the bench on March 31, 2008. The court did not have continuing jurisdiction to modify that sentence after that date. Because the district court did not have jurisdiction to change or increase Mr. Lewis’ sentence in any way on May 12, 2008, when it ordered Mr. Lewis to pay restitution, the district court’s restitution order is void. *See State v. Chatmon*, 234 Kan. 197, 205, 671 P.2d 531 (1983) (“A judgment is void where the court is without jurisdiction to decide the issue”). This district court’s restitution order must be vacated.

Issue III: Mr. Lewis’ Sixth and Fourteenth Amendment Rights, under *Apprendi v. New Jersey*, were violated when the court sentenced him to an increased sentence, based upon his prior criminal history, without requiring that it be put before a jury and proven beyond a reasonable doubt.

At sentencing, Mr. Lewis’ criminal history score of C was used to enhance his sentence. (R. III, 230). Mr. Lewis’ prior convictions were not proven to a jury beyond a

reasonable doubt. Any fact which increases the maximum penalty a defendant can receive must be included in the charging document, put before a jury and proven beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 490, 146 L. Ed. 2d 435, 120 S. Ct 2348 (2000). Because this was not done in Mr. Lewis' case, his Sixth and Fourteenth Amendment rights were violated. *Apprendi*, 530 U.S. at 490.

In 2000, the United States Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 490, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000). The Court noted that *Apprendi* did not challenge the use of prior convictions that increase the penalty for a crime and, as a result, the *Apprendi* decision expressly avoided the question and left intact the Court's prior ruling that prior convictions need not be submitted to the jury for determination beyond a reasonable doubt. *Apprendi*, 530 U.S. at 490 (citing, *Almendarez-Torres v. United States*, 523 U.S. 224, 140 L. Ed. 2d 350, 118 S. Ct. 1219 (1998)). As recently as January 2007, the United States Supreme Court reiterated that "any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge, and established beyond a reasonable doubt, not merely by a preponderance of the evidence." *Cunningham v. California*, 549 U.S. 270, 166 L. Ed. 2d 856, 127 S. Ct. 856, 863-64 (2007). Additionally in June 2004, the Court applied *Apprendi* to a state guidelines sentencing system and reiterated that "every defendant has the *right* to insist that the prosecutor prove to the jury all facts legally essential to the punishment." *Blakely v. Washington*, 542 U.S. 296, 313, 159 L. Ed. 2d 403, 124 S. Ct. 2531, 2543 (2004). Under a guidelines sentencing scenario like that used in Kansas, prior convictions are

facts legally essential to punishment.

The *Apprendi* majority clarified that *Almendarez-Torres* "represents at best an exceptional departure from the historic practice that we have described [regarding the right to jury trial.]" *Apprendi*, 530 U.S. at 490. The *Apprendi* majority also observed that "it is arguable that *Almendarez-Torres* was incorrectly decided, and that a logical application of our reasoning should apply if the recidivist issue were contested." *Apprendi*, 530 U.S. at 488.

The Court foreshadowed the potential application of the *Apprendi* rule to all facts, including prior convictions, in *Apprendi* itself. And in 2005, in *Shepard v. United States*, 544 U.S. 13, 161 L. Ed. 2d 205, 125 S. Ct. 1254 (2005), Justice Thomas observed that "a majority of the Court now recognizes that *Almendarez-Torres* was wrongly decided. The parties do not request it here, but in an appropriate case, this Court should consider *Almendarez-Torres*' continuing viability." *Shepard*, 544 U.S. at 27-28. (Thomas, J., concurring in part and concurring in judgment). A majority of the United States Supreme Court has now indicated that prior convictions that increase the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. *See Shepard v. United States*, 544 U.S. at 27-28. (Thomas, J., concurring in part and concurring in judgment).

Finally, the United States Supreme Court has rejected a claim that prior convictions are fundamentally different from other facts that can enhance a sentence: "We commonly speak of the 'fact of a prior conviction,' and an order vacating a predicate conviction is spoken of as a fact just as sensibly as the order entering it. In either case, a claim of such a fact is subject to proof or disproof like any other factual issue." *Johnson*

v. United States, 544 U.S. 295, 306-07, 161 L. Ed. 2d 542, 125 S. Ct. 1571 (2005). If prior convictions are subject to proof or disproof like any other factual issue, the Sixth and Fourteenth Amendments should apply to their proof just like any other factual issue.

Mr. Lewis' enhanced sentence depends directly on the continuing viability of *Almendarez-Torres*. Although the Kansas Supreme Court rejected this claim in *State v. Ivory*, 273 Kan. 44, 41 P.3d 781 (2001) (finding that *Almendarez-Torres* governs the issue), after a review of *Shepard and Johnson*, the *Ivory* Court's reliance on *Almendarez-Torres* is somewhat weakened. As Justice Thomas explained: "Innumerable criminal defendants have been unconstitutionally sentenced under the flawed rule of *Almendarez-Torres*, despite the fundamental 'imperative that the Court maintain absolute fidelity to the protections of the individual afforded by the notice, trial by jury, and beyond-a-reasonable-doubt requirements.'" *Shepard*, 544 U.S. at 28. (Thomas, J. concurring in part and concurring in judgment) (quoting, *Harris v. United States*, 536 U.S. 545, 581-82, 153 L. Ed. 2d 524, 122 S. Ct. 2406 (2002) (Thomas, J., dissenting)).

In the instant case, a jury did not find the facts of any prior convictions and those facts were not found beyond a reasonable doubt. If no criminal history had been counted against Mr. Lewis, he would have fallen in criminal history "I" and his maximum presumptive sentence would have been, at most, 43 months. K.S.A. 21-4704. Using his criminal history to enhance his sentence, he was sentenced to 71 months for his primary offense. (R. III, 231). Without question, the facts regarding prior convictions were essential to a determination of the maximum penalty in this case.

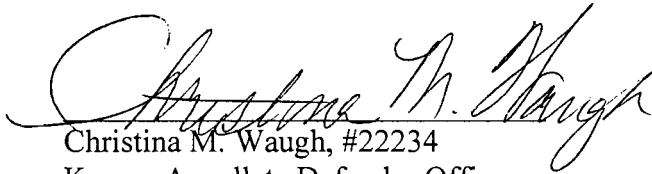
Conclusion

The district court erred in denying Mr. Lewis' motion for a mistrial and Mr. Lewis' convictions should be reversed and his case remanded for a new trial.

Alternatively, the district court was without jurisdiction to order Mr. Lewis to pay restitution when the order was made 42 days after Mr. Lewis' sentence was imposed. The restitution order should be vacated.

Additionally, the district court erred in using Mr. Lewis' criminal history to increase his sentence when the criminal history was not proved to a jury beyond a reasonable doubt and Mr. Lewis' sentence on his primary offense should be vacated and his case remanded for re-sentencing under criminal history score "I".

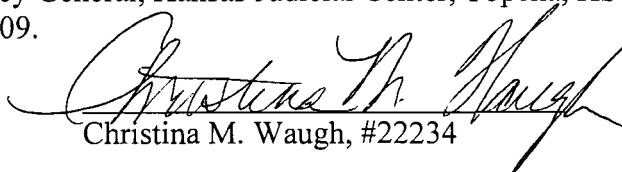
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Certificate of Service

The undersigned hereby certifies that service of the above and foregoing brief was made by mailing two copies, postage prepaid, to Chad Taylor, Shawnee County District Attorney, 200 SE 7th, Suite 214, Topeka, KS 66603-3922; and by hand delivering one copy to Stephen N. Six, Attorney General, Kansas Judicial Center, Topeka, KS 66612 on the 10 day of August, 2009.


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