

Case No. 08-101127-A

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

**STATE OF KANSAS
Plaintiff-Appellee**

v.

**JAMES LEWIS
Defendant-Appellant**

BRIEF OF APPELLEE

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

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APPROVED
OCT 13 2009
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BY YDA S. Ct. Rule 6.1b

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TABLE OF CONTENTS

NATURE OF THE CASE1

STATEMENT OF THE ISSUES.....1

STATEMENT OF FACTS.....1

ARGUMENTS AND AUTHORITIES.....5

**I. THE DISTRICT COURT DID NOT ERR IN DENYING LEWIS’
MOTINO FOR A MISTRIAL**.....5

A. Standard of Review5

State v. Ransom, 288 Kan. 697, 207 P.3d 208 (2009) 5-6

 K.S.A.22-3414(3).....5

B. Discussion6

State v. Reid, 286 Kan. 494, 186 P.3d 713 (2008).....7

**II. THE DISTRICT COURT DID NOT LACK JURISDICTION
WHEN IT ORDERED LEWIS TO PAY RESTITUTION**.....8

A. Standard of Review8

Foster v. Kansas Dept. of Revenue, 281 Kan. 368, 130 P.3d 560 (2006)....8

B. Discussion8

State v. Cooper, 267 Kan. 15, 977 P.2d 960 (1999)..... 8-10

State v. Bryant, 37 Kan. App. 2d 924, 163 P.3d 325 (2007)9

State v. Ortiz, #96,988, 2007 WL 2819991 (Kan. App.)10

**III. LEWIS’ SIXTH AND FOURTEENTH AMENDMENT
RIGHTS WERE NOT VIOLATED WHEN THE DISTRICT COURT
INCREASED HIS SENTENCE**10

A. Standard of Review10

Apprendi v. New Jersey, 530 U.S. 466, 147 L. Ed. 2d 435,
 120 S. Ct. 2348 (2000).....10

<i>State v. Fewell</i> , 286 Kan. 370, 394, 184 P.3d 903 (2008)	10
<i>B. Discussion</i>	10
<i>State v. Ivory</i> , 273 Kan. 44, 41 P.3d 781 (2002).....	10
<i>State v. Hardesty</i> __ Kan.App.2d ____, 213 P.3d 745 (2009).....	11
CONCLUSION	11
CERTIFICATE OF SERVICE	12
APPENDIX	13

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 APPELLEE

NATURE OF THE CASE

Defendant James Lewis (hereinafter "Lewis") was convicted of battery, aggravated assault, simple assault and criminal restraint. He was sentenced to 83 months in prison and ordered to pay \$6,507.92 in restitution. Lewis appeals his convictions and the district court's order to pay restitution.

STATEMENT OF THE ISSUES

- I. **THE DISTRICT COURT DID NOT ERR IN DENYING LEWIS' MOTION FOR A MISTRIAL.**
- II. **THE DISTRICT COURT DID NOT LACK JURISDICTION WHEN IT ORDERED LEWIS TO PAY RESTITUTION.**
- III. **LEWIS' SIXTH AND FOURTEENTH AMENDMENT RIGHTS WERE NOT VIOLATED WHEN THE DISTRICT COURT INCREASED HIS SENTENCE.**

STATEMENT OF THE FACTS

Tina Kerley (hereinafter "Kerley") was a manager and entertainer at Shaker's gentleman's club, which Lewis owned. (R. XVII, 387-388.) Kerley was working at Shaker's on the night of January 2, 2007. (R. XVII, 399.) Kerley decided to leave early that night because she had learned from the other entertainers that Lewis, with whom Kerley was romantically involved, had been cheating on her. (R. XVII, 400.) As she was being dropped off at her home, Lewis approached her in his truck. (R. XVII, 401.) Lewis began screaming at her and demanding that she get into his truck. (R. XVII, 402-403.)

Kerley eventually got into Lewis' truck and was driven back to Shaker's. (R. XVII, 403.) Once back at Shaker's, Lewis forced Kerley to tell him in front of the other entertainers what they had told her about Lewis' infidelity. (R. XVII, 404-405.) After Kerley spoke, Lewis began hitting her. (R. XVII, 406.) Lewis then went into the kitchen area of Shaker's and came back with a knife and acted as if he were going to stab Kerley. (R. XVII, 407-408.) Kerley pleaded with Lewis not to stab her. (R. XVII, 409.) After threatening Kerley with the knife, he began beating her with his fists. (R. XVII, 409-410.) Kerley tried several times to get away, but each time Lewis would grab her, pull her back, beat her some more and threaten to kill her. (R. XVII, 411-414.)

Kerley eventually lost consciousness from the beatings that Lewis delivered. (R. XVII, 416.) When Kerley regained consciousness, Lewis ordered her back to his office, where he reached into his safe and produced a gun. (R. XVII, 417.) Lewis put the gun to Kerley's head and told her he was going to kill her. (R. XVII, 418.) He then took

the gun and put it to her neck, then stuck the gun into Kerley's ribs and repeated that he was going to kill her. (R. XVII, 418.)

Kerley made her way back into the bar area, where Lewis began beating her with his fists again. (R. XVII, 418-419.) As Kerley attempted to leave the premises, Lewis again produced the gun, pointed it at her and told her she would be dead if she walked out the door. (R. XVII, 419-421.) Lewis told Kerley that he would throw her dead body in a dumpster and then would go and kill Kerley's mother and Kerley's children. (R. XVII, 421.) Eventually there was a knock at the front door of Shaker's which frightened Lewis, and allowed Kerley to make her escape to a neighboring business. (R. XVII, 421-422.) Once Kerley was away from Shaker's, she immediately telephoned 9-1-1 whereupon paramedics and police arrived. (R. XVII, 423-427.)

On January 4, 2007, Lewis was charged with aggravated battery, aggravated intimidation of a witness, two counts of aggravated assault and criminal restraint. (R. I, 17-18.). A jury trial was held on March 19, 2007. (R. I, 6.)

During a recess in the trial, a physical altercation between the mother of one witnesses and Lewis's sister occurred outside of the courtroom. (R. XVII, 374-378.) When the trial resumed, the district court reminded the jury once again that the only evidence to be considered were statements from witnesses testifying under oath and exhibits that are admitted. (R. XVII, 277.) The jury was also specifically told to disregard anything else that they may have seen or heard. (R. XVII, 277.) Three separate witnesses subsequently testified on behalf of the State. After the three witnesses testified, Lewis made his motion for a mistrial based in part upon the altercation between his sister and another witnesses' mother. (R. XVII, 374-375.)

In support of his motion, Lewis' trial counsel stated that, "I cannot honestly say if all of the jurors were able to observe the commotion in the hallway." (R. XVII, 374.) Lewis' counsel also stated that, "I don't know what, if anything, the jurors may have heard" and "I think that might affect their deliberations." (R. XVII, 375.) After hearing arguments from the State, Lewis' attorney said, "Now, I don't know. That has to have some effect on a juror. I don't know what effect it may have, but it has to have some." (R. XVII, 379.)

The district court took the motion for mistrial under advisement. (R. XVII, 382.) Prior to recalling the case, the district court noted that it had already given a prophylactic instruction to the jury. (R. XVII, 382.) The district court also stated that it did not believe that what occurred outside of the courtroom was prejudicial to either party. (R. XVII, 382.) Finally, the district court noted that the altercation did not involve any party or witness to the proceedings. (R. XVII, 382-383.)

At the conclusion of the jury trial, Lewis was found guilty of battery, aggravated assault, simple assault and criminal restraint. (R. I, 6-7.) After the trial, the district court ultimately issued a written memorandum decision and order denying Lewis' motion for a mistrial on March 26, 2007. (R. II, 91.) In its decision, the district court stated the following:

[T]here was no allegation that the individuals involved in the altercation said anything related to charges against the defendant or to the events leading up to the charges against the defendant. With the agreement of the state and the defendant's counsel, the court reminded jurors that the only evidence for them to consider was the evidence presented in court and that they were to disregard any statement or comments heard elsewhere.

Based on the court's findings above, the court finds that the conduct that occurred during the course of the trial was not prejudicial to the defendant nor did the conduct make it impossible for the court to

continue with the trial without injustice to either the defendant or the prosecution.

(R. II, 91-92.)

A sentencing hearing was held on March 31, 2008. (R. I, 14). At sentencing, the State asked for restitution in the amount of \$6,507.92. (R. VIII, 61-62.) During the pronouncement of Lewis' sentence, the district court said that it was going to hold open the issue of restitution, and wanted to put restitution on a "higher priority" than attorney's fees or application fees. (R. VIII, 90.) On April 15, 2008, the State filed a motion to for hearing on restitution to "determine the amount of restitution to be paid by Defendant." (R. III, 207.) On May 12, 2008, a hearing was held on restitution. After hearing evidence and argument from both sides, the district court ordered Lewis to pay restitution in the amount of \$6,507.92. (R. XIX, 1, 53.) Lewis never objected or asserted that the district court lacked jurisdiction or that the restitution proceeding was improper. (R. VIII.) This appeal followed.

ARGUMENTS AND AUTHORITIES

I. THE DISTRICT COURT DID NOT ERR IN DENYING LEWIS' MOTION FOR A MISTRIAL.

A. Standard of Review

The appropriate standard of review in the denial of a motion for a mistrial is abuse of discretion. *State v. Ransom*, 288 Kan. 697, 715, 207 P.3d 208 (2009). A trial court has discretion to order a mistrial at any time if it finds it 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." K.S.A. 22-3423(1)(c). A

defendant must show substantial prejudice before an appellate court will find the district court abused its discretion in denying a motion for mistrial. 288 Kan. at 715.

B. Discussion

Lewis makes the charge that it was error to deny his motion for mistrial because he was substantially prejudiced due to the altercation in the hallway involving his sister and the mother of a witness. Lewis is wrong for several reasons.

First, the altercation did not take place between any of the parties or any of the witnesses. Yet, Lewis suggests that because the altercation involved his sister and the mother of a witness, it would “unquestionably cause prejudice to Mr. Lewis and his case.” (Appellant’s Brief, 5.) However, there is nothing the record that reflects any of the jurors knew of Lewis’ or the witness’ relationship to the participants involved in the confrontation. More importantly, Lewis never argues in his brief that any of the jurors knew of Lewis’ or the witness’ relationship to the participants involved in the confrontation. The logical leap taken by Lewis in suggesting that the jury would automatically know that it was his sister and a witness’ mother involved in the confrontation, with nothing more, is absurd.

Lewis also alleges that since he was “referred to” during the altercation, he was prejudiced. (Appellant’s Brief, 5.) However, a review of the record and the facts cited by Lewis show that he, at worst, was referred to, but never by name. The alleged reference to Lewis was that the witness’ mother, according to Lewis’ attorney, yelled “something like ‘I didn’t call you. I didn’t ask you to come work over there at Shaker’s and he asked me to work at Shakers.’” (R. XVII, 375; Appellant’s Brief, 4.) It is indisputable that the altercation, if it indeed actually happened as Lewis’ attorney

described, never mentioned Lewis by name and the crime or the circumstances surrounding it were never discussed.

In addition, at trial even Lewis' attorney was not certain what the jurors actually saw or how it would affect them. He stated that he did not know what, if anything, the jurors actually heard or saw. He thought it might have an effect on jury deliberations, but he did not know what that effect may be. (R. XVII, 374-375; 379.) Further, Lewis waited until the State had put on three different witnesses before he made his motion for mistrial. Lewis could not articulate substantial prejudice then, and based upon the exact same information, he cannot do so now. His arguments are based upon pure speculation, and nothing more. Thus, it cannot be said that the district court abused its discretion in denying Lewis' motion for mistrial.

Finally, any potential for prejudice was dispelled when the district court gave a prophylactic instruction, cautioning the jury that they were only to consider testimony and evidence heard in court. (R. XVII, 277.) A jury is presumed to have followed the instructions given to it. *State v. Reid*, 286 Kan. 494, 521, 186 P.3d 713 (2008). Lewis has not come forth with any evidence whatsoever that the jurors did not follow the instructions of the district court in only considering the testimony and evidence presented at trial.

Lewis cannot show prejudice, much less substantial prejudice, as this court requires before finding that a district court has abused its discretion in denying a motion for mistrial. The ruling of the district court in denying Lewis' motion should be affirmed.

II. THE DISTRICT COURT DID NOT LACK JURISDICTION WHEN IT ORDERED LEWIS TO PAY RESTITUTION.

A. *Standard of Review*

Whether jurisdiction exists is a question of law over which this court has unlimited review. *Foster v. Kansas Dept. of Revenue*, 281 Kan. 368, 369, 130 P.3d 560 (2006).

B. *Discussion*

Lewis would have this court believe that the district court lacked jurisdiction to order restitution after his original sentencing that occurred on March 31, 2008. Established case law shows that Lewis' argument is without merit.

This argument has been previously addressed by the Kansas Supreme Court in *State v. Cooper*, 267 Kan. 15, 977 P.2d 960 (1999). In *Cooper*, the district court sentenced the defendant to 2 years' probation, and the State gave notice it would request restitution. The State did not provide a specific restitution amount at the time of sentencing but informed the district court that it would furnish the necessary documentation within 30 days. The district court ordered the defendant to pay restitution, "with that amount to be determined within 30 days." 267 Kan. at 16. The district court further ordered the State to furnish defense counsel with documentation supporting restitution, and if the parties could not agree, the court would hold a formal hearing to determine the restitution amount.

Nearly six months later, the State filed a motion requesting the district court to determine the amount of restitution. The defendant objected on the ground the motion was untimely. The district court overruled the defendant's objection, and after hearing

statements from counsel and reviewing the documentation, the district court ordered the defendant to pay \$2,500 in restitution.

On appeal, the Kansas Supreme Court held the district court's restitution award was proper despite the delay in determining the amount. The court reasoned that the judge did not know the exact amount of restitution at the time of sentencing, but specifically retained jurisdiction to set the amount later. The defendant had been placed on notice at sentencing that he would be required to pay restitution. Even though the restitution amount was not determined within 30 days as initially ordered by the district court, the Supreme Court concluded it was within the district court's discretion to grant additional time to settle the restitution issue. 267 Kan. at 18.

The facts of Lewis' case are even stronger than those presented in *Cooper*. Here it is uncontroverted that the State requested restitution at the sentencing hearing, and actually requested a specific amount, based upon the Crime Victim's Compensation report from the Kansas Attorney General's office. (R. VIII, 61-62.) In *Cooper*, the State did not even provide a specific restitution amount at sentencing and yet the *Cooper* court still found that the order of restitution was valid. Further, in *Cooper*, restitution was finalized over six months after the initial sentencing, which the Kansas Supreme Court upheld. Here, there is only the minor delay of 42 days when compared to the six month delay in *Cooper*. Finally, it should be noted that in *Cooper*, the defendant actually lodged an objection at the trial court level regarding the delay in setting restitution. Here, the record is completely void of any objection by Lewis to his restitution being determined 42 days after his initial sentencing. See also *State v. Bryant*, 37 Kan. App. 2d 924, 927-929, 163 P.3d 325 (2007) (Following the precedent established in *Cooper*, a panel of this

court concluded the district court did not abuse its discretion in allowing the State more than 30 days from sentencing to determine the amount of Bryant's restitution.); *State v. Ortiz*, #96,988, 2007 WL 2819991 (Kan. App.) unpublished decision filed September 28, 2007, (concluding that based upon the *Cooper* decision, as long as the district court reserves issues pertaining to restitution or other recoupment issues at the sentencing hearing, those issues can be resolved later by the court.) Here there is no question that the district court, at a minimum, reserved the issue of restitution, and thus it was properly addressed at the later hearing. The decision of the district court in ordering restitution must be affirmed.

III. LEWIS' SIXTH AND FOURTEENTH AMENDMENT RIGHTS WERE NOT VIOLATED WHEN THE DISTRICT COURT INCREASED HIS SENTENCE.

A. Standard of Review

Lewis argues the district court erred in using his prior convictions without placing them in the complaint or proving them to a jury beyond a reasonable doubt in violation of *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000). (Appellant's Brief, 8.) This is essentially a challenge to the constitutionality of the Kansas Sentencing Guidelines Act, over which this court has unlimited review. *State v. Fewell*, 286 Kan. 370, 394, 184 P.3d 903 (2008).

B. Discussion

The Kansas Supreme Court has already decided this issue adversely against Lewis' position in *State v. Ivory*, 273 Kan. 44, 41 P.3d 781 (2002).

In *Ivory*, the Kansas Supreme Court held that the defendant's prior convictions do not have to be proven beyond a reasonable doubt to a jury to satisfy *Apprendi*. 273 Kan.

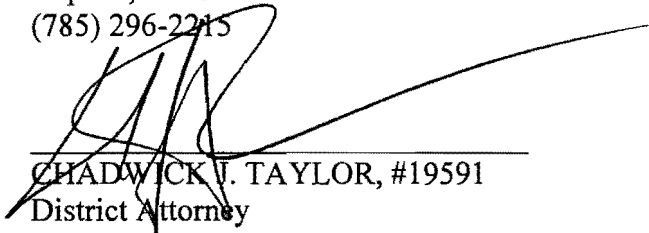
at 46. In *Fewell*, the Kansas Supreme Court recently reaffirmed its holding in *Ivory*, and a panel of this court recently acknowledged that it is duty bound to follow the Kansas Supreme Court's precedent on the issue, as there is no indication the court is departing from its previous position. *State v. Hardesty* __ Kan. App. 2d ___, 213 P.3d 745 (2009). Because it is clear that the Kansas Supreme Court is not departing from its precedent, Lewis' sentences must be upheld.

CONCLUSION

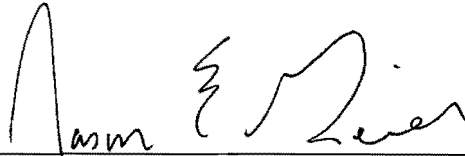
At every turn, Lewis' appeal must fail. First, he has failed to show substantial prejudice when his motion for mistrial was denied. Next, Kansas law is clear that restitution issues can be addressed after the initial sentencing. Finally, he has failed to show that the Kansas Supreme Court is departing from the precedent its precedent in *Ivory*. For all of these reasons, the decision of the district court should be affirmed.

Respectfully submitted,

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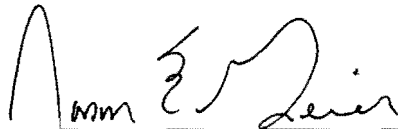
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that service of the above and foregoing **Brief of Appellee** was made by mailing **two (2) true and correct copies**, postage prepaid, on this 13th day of October, 2009, to:

Christina M. Waugh
Kansas Appellate Defender Office
Jayhawk Tower
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and on that date the **original and sixteen (16) copies** were hand delivered to the Clerk of the Appellate Courts.



JASON E. GEIER, #19842
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167 P.3d 387, 2007 WL 2819991 (Kan.App.)
 (Table, Text in WESTLAW), Unpublished Disposition
 (Cite as: 167 P.3d 387, 2007 WL 2819991 (Kan.App.))

C

(Pursuant to Kansas Supreme Court Rule 7.04(f), unpublished opinions are not precedential and are not favored for citation. They may be cited for persuasive authority on a material issue not addressed by a published Kansas appellate court opinion.)

Court of Appeals of Kansas.
 STATE of Kansas, Appellee,

v.

Joseph Mario **ORTIZ**, Appellant.
 No. 96,988.

Sept. 28, 2007.

Appeal from Shawnee District Court; Evelyn Z. Wilson, judge. Opinion filed September 28, 2007. Reversed and remanded with instructions. Kevin P. Shepherd, of Topeka, for appellant.

Jamie L. Karasek, assistant district attorney, Robert D. Hecht, district attorney, and Paul J. Morrison, attorney general, for appellee.

Before MARQUARDT, P.J., MCANANY, J., and BRAZIL, S.J.

MEMORANDUM OPINION

PER CURIAM.

*1 Joseph Mario Ortiz appeals the district court's order overruling his objection to the imposition of a \$400 KBI lab fee. We reverse and remand with directions to vacate the imposition of the KBI lab fee.

On March 14, 2005, Joseph Mario Ortiz was stopped for multiple traffic infractions. He submitted to and failed field sobriety tests, but he refused to submit to further breath or blood testing. At the Kansas Department of Corrections (DOC), police found a baggy of white powder in Ortiz' pocket

which later tested positive for cocaine.

Ortiz was charged with driving under the influence (DUI), failing to stop at a stop sign, failing to maintain a single lane, and failing to signal before turning. He initially pled not guilty to all the charges. However, he later pled no contest to the DUI charge and the other three charges were dismissed in accordance with a plea agreement.

Ortiz moved for house arrest in lieu of jail, but the motion was overruled. On March 17, 2006, he was sentenced to county jail for 12 months with 12 months' post-release supervision. The sentence was suspended after 90 days' imprisonment. Ortiz was also ordered to pay a fine and court costs, including a \$400 KBI lab fee. The district court told Ortiz he had 30 days to object to the \$400 KBI fee if he deemed an objection appropriate.

The State prepared a proposed journal entry of sentencing and delivered it to Ortiz on April 13, 2006. Ortiz filed an objection to the journal entry on April 18, 2006, objecting to the imposition of the KBI lab fee. More specifically, he contended that the district court's order was contingent upon the State's providing proof the lab test was conducted and that the State failed to provide such proof. However, upon review of the record, there is no indication that the district court's order was contingent upon the State's providing proof of the testing.

On May 4, 2006, the State filed a request for Ortiz to pay the KBI lab fee pursuant to K.S.A.2006 Supp. 28-176 for the testing of the cocaine. The KBI analysis report was attached to the request. Ortiz contested the request and argued that the State failed to raise issues concerning the cocaine during the preliminary hearing or during plea negotiations.

On June 7, 2006, the district court overruled Ortiz' objection to the proposed journal entry of sentencing and assessed the \$400 KBI lab fee as part of

167 P.3d 387, 2007 WL 2819991 (Kan.App.)
 (Table, Text in WESTLAW), Unpublished Disposition
 (Cite as: 167 P.3d 387, 2007 WL 2819991 (Kan.App.))

his sentence.

Ortiz filed this appeal on June 14, 2006. He appeals “the ruling made by the trial court concerning the order imposing restitution of \$400 for the KBI lab fee which, was entered on June 7, 2006.”

Analysis

The **State** asserts that this court lacks jurisdiction to review **Ortiz'** appeal because it was not timely filed.

Whether jurisdiction exists is a question of law over which this court has unlimited review. *Foster v. Kansas Dept. of Revenue*, 281 Kan. 368, 369, 130 P.3d 560 (2006). The right to appeal in a criminal case is completely statutory. This court does not have jurisdiction to entertain a defendant's appeal unless the appeal is filed within the time prescribed by the statute that provides for such an appeal. *State v. Flynn*, 274 Kan. 473, 477, 55 P.3d 324 (2002). Furthermore, this court has only such appellate jurisdiction as is provided by law; therefore, this court must dismiss an appeal when the record discloses a lack of jurisdiction. *In re Condemnation of Land v. Stranger Valley Land Co.*, 280 Kan. 576, 578, 123 P.3d 731 (2005).

*2 The **State** contends that **Ortiz'** objection to the proposed journal entry did not toll the time allowed for **Ortiz** to directly appeal his criminal case. Accordingly, the **State** maintains that **Ortiz** filed his appeal outside the 10-day limit.

The United States Supreme Court recently determined that in federal court, statute based time limits are jurisdictional, while rule-based time limits are not jurisdictional and can be relaxed by a court using its discretion. *Bowles v. Russell*, 551 U.S. ___, 168 L.Ed.2d 96, 127 S.Ct. 2360 (2007). The Court held that treating statutory time limits as jurisdictional made good sense because “[w]ithin constitutional bounds, Congress decides what cases the federal courts have jurisdiction to consider. Because Congress decides whether federal courts can hear

cases at all, it can also determine when, and under what conditions, federal courts can hear them.” 127 S.Ct. at 2365.

Applying the same reasoning here, the Kansas Legislature created a statutory provision for the filing of criminal appeals: “For crimes committed on or after July 1, 1993, the defendant shall have 10 days after the judgment of the district court to appeal.” K.S.A. 22-3608(c). The Kansas Supreme Court has similarly held that the timely filing of an appeal is jurisdictional and if an appeal is not filed within the 10-day period fixed by statute, it must be dismissed. *State v. Phinney*, 280 Kan. 394, 400, 122 P.3d 356 (2005). In criminal cases, sentences are effective upon pronouncement from the bench, not upon the filing of a journal entry. *Love v. State*, 280 Kan. 553, 560, 124 P.3d 32 (2005).

Ortiz argues that while the majority of his sentence was pronounced on March 17, 2006, the issue of the \$400 lab fee was unresolved. In effect, he is arguing that a portion of the sentence was reserved or retained by the court. In the alternative, he argues that he has the right to appeal the imposition of the lab fee because it is an illegal sentence.

Both of these arguments were addressed in *State v. Robinson*, 281 Kan. 538, 132 P.3d 934 (2006), when the court considered the assessment of the Board of Indigents' Defense Services (BIDS) fees under K.S.A.2005 Supp. 22-4513. The court held that such fees “are not intended to be punitive; they are not fines or, indeed, any part of the punishment or sanction for the defendant's criminal conduct.” 281 Kan. at 543. It characterized 22-4513 as a recoupment statute. The court went on to state that a failure to comply with 22-4513(a) did not render the associated sentence “illegal” under K.S.A. 22-3504 and that “it is not a punishment or part of the sentence at all.” 281 Kan. at 547. Finally, in observing that the imposition of BIDS fees normally occurs at sentencing, it inferred that they could be considered at some time other than at sentencing.

167 P.3d 387, 2007 WL 2819991 (Kan.App.)
 (Table, Text in WESTLAW), Unpublished Disposition
 (Cite as: 167 P.3d 387, 2007 WL 2819991 (Kan.App.))

We conclude that the same reasoning should apply to the imposition of a KBI lab fee under K.S.A.2006 Supp. 28-176. The fee is not a fine or any part of the punishment or sanction for the defendant's criminal conduct, and the statute can be characterized as a recoupment statute.

*3 The Supreme Court has recognized that once a sentence is fully pronounced and the sentencing hearing is concluded, the sentence cannot be thereafter modified by the district court. *State v. Miller*, 260 Kan. 892, 900, 926 P.2d 652 (1996). However, issues such as restitution can be finalized after the sentencing hearing and have been reviewed on appeal if a timely notice of appeal is from the final restitution decision. See *State v. Cooper*, 267 Kan. 15, 16, 977 P.2d 960 (1998) (rejecting claim that order of restitution imposed after sentencing hearing was illegal).

Based on these precedents, it appears that as long as the district court reserves issues pertaining to restitution or other recoupment issues at the sentencing hearing, those issues can be resolved later by the court. In such a circumstance, the later order assessing restitution, or in this case, KBI lab fees, becomes a distinct judgment-separate and apart from sentencing-under K.S.A. 22-3608(c) and, thus, may be appealed within 10 days.

In this case, Ortiz' sentence was pronounced from the bench on March 17, 2006. However, the district court kept the issue of the KBI lab fees open to give Ortiz an opportunity to review the requested fees. Although Ortiz' objection to the fees was not filed within 30 days after the sentencing, the 30-day period for objection allowed by the court was not jurisdictional and could be relaxed by the court in its discretion. See *Bowles v. Russell*, 551 U.S. at ____; see also *State v. Cooper*, 267 Kan. at 16-17 (allowing the State to seek restitution even though the State's request was made 6 months after sentencing, well beyond the 30-day period set by the district court).

Ortiz' notice of appeal is timely under K.S.A.

22-3608(c) from the district court's final ruling on the lab fee issue. Therefore, this court has jurisdiction to consider this issue.

The lab fee

Ortiz contends the district court incorrectly assessed the KBI lab fee against him and, in doing so, misinterpreted K.S.A.2006 Supp. 28-176(a). At issue here is K.S.A.2006 Supp. 28-176(a) which states:

“[a]ny person convicted or diverted, or adjudicated or diverted under a preadjudication program ... of a misdemeanor or felony contained in chapters 21, 41 or 65 of the Kansas Statutes Annotated, or a violation of K.S.A. 8-1567 and amendments thereto, shall pay a separate court cost of: (1) \$400 as a Kansas bureau of investigation laboratory analysis fee for each offense if forensic science or laboratory services are rendered or administered by the Kansas bureau of investigation in connection with the case.”

Additionally, K.S.A. 22-3801(a) allows a court to assess such fees when a criminal defendant has been convicted. See *State v. Likins*, 21 Kan.App.2d 420, 434, 903 P.2d 764, *rev. denied* 258 Kan. 861 (1995) (the KBI lab fees provided for in K.S.A.2006 Supp. 28-176[a] are part of the cost of a criminal trial when forensic testing is used; however, such fees are not restitution and can be imposed along with incarceration).

*4 Interpretation of a statute is a question of law, and this court has unlimited review. This court is not bound by the district court's interpretation. Furthermore, the fundamental rule when construing a statute is to ascertain the legislative intent. The legislature is presumed to have expressed its intent through the statutory language. Accordingly, statutes should not be read to add language or to exclude language contained in the statute. When a statute is plain and unambiguous, this court must give effect to the legislature's expressed intent

167 P.3d 387, 2007 WL 2819991 (Kan.App.)
 (Table, Text in WESTLAW), Unpublished Disposition
 (Cite as: 167 P.3d 387, 2007 WL 2819991 (Kan.App.))

rather than determining what the law should or should not be. *State v. Bryan*, 281 Kan. 157, 159, 130 P.3d 85 (2006). Finally, statutes are construed to avoid unreasonable results because it is presumed that the legislature does not intend to enact useless or meaningless legislation. *Pieren-Abbott v. Kansas Dept. of Revenue*, 279 Kan. 83, 89, 106 P.3d 492 (2005).

Criminal statutes are generally construed in favor of the accused and, therefore, words are given their ordinary meanings. Any reasonable doubt about the meaning of a statute is decided in favor of the person subjected to the statute. Nonetheless, this rule is subordinate to the rule that judicial interpretation must be “ ‘reasonable and sensible to effect legislative design and intent.’ [Citation omitted.]” *State v. McCurry*, 279 Kan. 118, 121, 105 P.3d 1247 (2005).

Ortiz relies on *State v. Goeller*, 276 Kan. 578, 579, 77 P.3d 1272 (2003), in which defendant pled guilty to possession of methamphetamine and marijuana and misdemeanor DUI. A test of defendant's blood revealed the presence of various drugs, but no alcohol. The district court ordered defendant to pay the KBI lab fees for each offense in which the test was conducted. On appeal, defendant argued that it was error to impose the KBI lab fees. However, the Kansas Supreme Court determined that the words “for each offense” in K.S.A.2006 Supp. 28-176(a) meant each count on which defendant was convicted and held that it did not matter that multiple offenses were charged in one case. 276 Kan. at 584.

In this case, Ortiz argues that unlike in *Goeller*, he was charged with four offenses, none of which involved cocaine. He refused to submit to blood or breath tests; therefore, those could not have been tested. He also argues that the State did not contend the white powder was cocaine until sentencing and asserts that the cocaine was not connected to the case because it appeared throughout the case that Ortiz was convicted of driving under the influence of alcohol, not drugs.

Nonetheless, the State contends that because Ortiz was charged with driving under the influence of alcohol or drugs, his DUI conviction was directly related to the cocaine found on his person. The State alleges the KBI fees were related to the prosecution because it was necessary to test the cocaine.

Ortiz was charged with DUI of “alcohol or drugs with a blood or breath alcohol concentration ... of .08 or more and/or to a degree that rendered the said Defendant incapable of safely driving a vehicle.” The officer's affidavit which described the events of March 14, 2005, indicated that Ortiz smelled of alcohol and admitted to having a few drinks. Ortiz submitted to and failed standardized field sobriety tests. However, he refused to submit to further breath or blood testing. Finally, the cocaine was found on Ortiz' person only after his arrest and after being taken to the DOC.

*5 Ortiz was not charged with possession of cocaine or with any crime involving cocaine. He pled no contest and was convicted of DUI; the other three charges were dismissed. At sentencing, the State admitted that Ortiz had not received a copy of the KBI lab report. A copy of the report was later attached to the State's request for the KBI fee. Furthermore, the record fails to disclose whether the State raised any matters concerning the cocaine prior to sentencing.

The KBI fee was erroneously imposed. Ortiz pled no contest and was convicted of felony DUI, and the record appears to base that conviction on alcohol, not drugs. Moreover, the State did not raise any issues pertaining to the cocaine until the sentencing hearing when it requested the \$400 KBI lab fee.

Reversed and remanded with directions to vacate the imposition of the KBI lab fee.

Kan.App.,2007.
 State v. Ortiz
 167 P.3d 387, 2007 WL 2819991 (Kan.App.)

167 P.3d 387, 2007 WL 2819991 (Kan.App.)
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