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IN THE COURT OF APPEALS OF THE STATE OF KANSAS

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STATE OF KANSAS, Plaintiff/Appellee,

v.

ANTHONY SCOTT GUERRERO, Defendant/Appellant.

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**BRIEF OF APPELLANT**

---

Appeal from the District Court of Shawnee County, Kansas  
The Honorable Evelyn Z. Wilson, Judge  
District Court Case No. 08-CR-445

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Oral Argument Requested

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### NATURE OF THE CASE

This is defendant's direct appeal from conviction in Shawnee County District Court on the charge of Endangering a Child. Defendant seeks review of the denial of his motion to dismiss for speedy trial and the sufficiency of evidence for conviction.

### STATEMENT OF THE ISSUES

- I. **WHETHER THE DISTRICT COURT ERRED IN FAILING TO DISMISS FOR VIOLATION OF SPEEDY TRIAL?**
- II. **WHETHER THE STATE PRESENTED SUFFICIENT EVIDENCE TO SUPPORT THE CONVICTION?**

### STATEMENT OF FACTS

Defendant was charged with Child Endangerment in a Complaint filed March 13, 2008. **ROA**, Vol I, p. 10. On May 28, 2008, defendant was arraigned and a plea of not guilty was entered. The case was scheduled for misdemeanor pre-trial on July 17, 2008. **ROA**, Vol. I, p. 1.

On July 17, 2008, this matter was scheduled for Jury Trial to commence October 6, 2008. **ROA**, Vol. I, p. 1.

On September 26, 2008, after a pre-trial motion hearing, defendant waived his right to jury trial. **ROA**, Vol. II. After the court accepted defendant's waiver of jury trial, the court noted the issue of speedy trial. The Judge stated:

What I can do, counsel, is set this at nine o'clock next Wednesday and have it set for a court trial. I don't know what - - where we are speedy trial wise. Arraignment - - was he arraigned on the other - - on the misdemeanor charge? I'm assuming after a preliminary hearing - -

MR. FAKHOURY: I believe he was arraigned on May 28<sup>th</sup>.

JUDGE BRAUN: All right. That would mean by basically the end of November we'd have to have this tried. What we'll do Wednesday at nine o'clock is have the matter set for a court trial sometime before that date. Does that work?

MR. FAKHOURY: And Judge, does the defendant need to appear on October 1 or can we waive his appearance and I'll get it set and let him know?

JUDGE BRAUN: Let me do it this way. You have a right to be at any hearing, sir, and usually in misdemeanor cases attorneys can do a lot of things for their clients. If it's easier for you, you do - - do you want to give up your right of being there at the scheduling only?

MR. FAKHOURY: It's just to get the scheduling, you're welcome to come, I just - -

DEFENDANT GUERRERO: Yeah, that's fine.

JUDGE BRAUN: It would not, it would not - - it would be a hearing room but it would not have a court reporter. It would probably be 50 to 100 and people in the courtroom. I do the cases one by one and set them for trial and you can be there or you can - - I'll just leave it to you if you want to be excused I can - -

MR. FAKHOURY: We're good.

JUDGE BRAUN: All right. I'll leave it to you. Well, all I'm saying is Wednesday we're going to schedule a court trial between now and November 28<sup>th</sup> or whatever that date is; all right?

MR. FAKHOURY: Thank you, Judge.

JUDGE BRAUN: You understand, Mr. Guerrero what we're doing?

DEFENDANT GUERRERO: Yeah, I understand.

JUDGE BRAUN: All right. You got a question though, you don't sound - -

DEFENDANT GUERRERO: Yeah, I just - -

MR. FAKHOURY: He wants to get it over with as soon as possible, your Honor.

DEFENDANT GUERRERO: I thought it was October 6<sup>th</sup>, I mean, this matter needed to be resolved, I mean I just - - I don't know. November, that's a - - I mean this has been haunting me.

JUDGE BRAUN: Well, I understand. Right now you're set for a jury trial which you have a right to do. And that's set for October if - -

MR. FAKHOURY: October 6<sup>th</sup>.

JUDGE BRAUN: All right. And that - - the trial, the court trial schedule's a little bit different than that, that's all. I understand you may not like what's going on but you understand what's going on?

DEFENDANT GUERRERO: I understand what's going on.

JUDGE BRAUN: All right. So I'll see at least Mr. Fakhoury on the 1<sup>st</sup> of October and we'll go from there, all right?

**ROA**, Vol. II, p. 12, line 1 through p. 14, line 11. At the docket on October 1, 2008, the court scheduled this matter for court trial to commence on December 3, 2008. **ROA**, Vol. I, p. 1.

On November 28, 2008, defendant filed a motion to dismiss alleging violation of speedy trial. **ROA**, Vol. I, p. 56. This matter proceeded to trial on December 3, 2008, and the motion to dismiss for speedy trial was taken up at a later time. The court denied the motion to dismiss finding that "the actions of the defendant in waiving a trial to a jury was an action that falls within K.S.A. 22-3402(3)." **ROA**, Vol. IV, p 9, line 21.

On December 3, 2008, this matter preceded to trial to the court. The State first called Officer Kim Hanika, of the Topeka Police Department. Hanika testified that she was dispatched to a domestic disturbance between the Defendant and Martha Hobbs. Upon arrival Hanika made contact with Martha Hobbs. Hobbs advised that Defendant had already left the scene. Hobbs advised that her daughter, Donnell, was locked in the basement. **ROA**, Vol. III, p. 8, line 12. Hanika found that the basement door was secured with a bungee cord attached to a stove. **ROA**, Vol. III, p. 8, line 22. Hanika opened the door to the basement and yelled for Donnell to come upstairs. **ROA**, Vol. III, p. 9, line 18. Hanika only went part way down the stairs into the basement. At the bottom of the stairs was a landing area with another door which goes directly outside into the back yard. **ROA**, Vol. III, p. 18, line 1-3. Donnell came upstairs. "She didn't appear that she even knew she was locked in the basement." **ROA**, Vol. III, p. 10, line 22-23.

Hanika spoke further with Martha Hobbs and advised Hobbs that Donnell would be taken to juvenile intake and would not be returning home tonight. **ROA**, Vol. III, p. 14, line 24 through p. 15, line 1. Hobbs became "extremely upset" and stated that defendant was the one responsible for Donnell being locked in the basement. **ROA**, Vol. III, p. 15, line 3-8. Hobbs reportedly said the judge would not be happy because this was the third child

taken away from her. **ROA**, Vol. III, p. 15, line 12-13. Hobbs blamed everything on defendant. **ROA**, Vol. III, p. 18, line 16-18.

Officer Hanika later interviewed Donnell. **ROA**, Vol. III, p. 11, line 4-5. Hanika testified that Donnell indicated that she had been locked in the basement off and on since Thanksgiving and that she believed it was defendant who locked her in the basement. **ROA**, Vol. III, p. 11, line 7-8; line 22-23. Hanika testified that Donnell said she had to urinate and defecate in a bucket until recently when the bucket was removed and she then had to use a cup. **ROA**, Vol. III, p. 12, line 20-22. She said she had to ask for permission to come up out of the basement to eat dinner and that she is only allowed upstairs with permission to eat dinner and sometimes to do the dishes. **ROA**, Vol. III, p. 14, line 8-11.

Detective Daryl Ludolph, of the Topeka Police Department, testified that he interviewed Donnell about three weeks after her removal from the home. Ludolph testified:

She said it was around Thanksgiving of '07 when she was moved to the basement, and then had to ask for permission when she was done with her homework to be able to come up and join the rest of the family, had to either ask her mom or Mr. Guerrero to be the one to decide. Sometimes, they would say yes, sometimes they would say no, and sometimes she didn't feel like being around the rest of the family and just stayed downstairs.

**ROA**, Vol. III, p. 25, line 7-16. Ludolph asked Donnell who made her use a bucket or a cup to use the restroom and Donnell stated

"She wasn't 100 percent sure, but she guessed it was her dad, Anthony." **ROA**, Vol. III, p. 38, line 4-5.

Detective Ludolph was able to inspect the home about three weeks after Donnell's removal. The family had abandoned the house and the power was shut off at that time. Ludolph testified that in the basement was a storage area, washer and dryer, clothes rack, bed set and some desks. **ROA**, Vol. III, p. 24, line 1-13. There were no bathroom facilities in the basement. **ROA**, Vol. III, p. 24, line 23-24. There was a door in the basement that opens to the outside. **ROA**, Vol. III, p. 26, line 22-23. "I don't think it required a key to unlock it, but I'm not a hundred percent for sure if it did, or not, at this point." **ROA**, Vol. III, p. 27, line 2-4. Ludolph testified that there were not any smoke detectors, fire extinguishers or other safety equipment in the basement at that time. **ROA**, Vol. III, p. 31, line 18-21.

Q. Having had the opportunity to be in the basement that Donnell was in, do you believe that it was dangerous to Donnell?

A. It could be. If there's a fire that started in the kitchen or in the back stairwell for whatever reason, an electrical fire, she would really have no egress to get out of the basement.

**ROA**, Vol. III, p. 42, line 2-8.

Q. Given Donnell's circumstances, in your opinion, do you believe that it was more dangerous for Donnell to eat in her room or more cruel for Donnell?

A. I would say maybe not dangerous, but maybe more cruel as a form of punishment.

**ROA**, Vol. III, p. 42, line 15-19.

The State next called the child Donnell to testify. She testified that the basement was her bedroom. "I had two mattresses on the floor and I had a desk and a dresser." **ROA**, Vol. III, p. 52, line 10-11. She testified that there were times she was not allowed to leave her room because she was in trouble.

Q. Okay. How long at any given period of time would you be locked in the basement? Was it as soon as you got home from school, or was it in the morning? What time of day would you be locked in the basement?

A. As soon as I got home after school.

Q. And how long would you remain locked in the basement?

A. Until I ate dinner.

Q. And were you always able to come up for dinner?

A. Yeah.

Q. When you came up for dinner, did you get to eat with the family, or did you - -

A. Eat with the family.

Q. You never had to eat your dinner in the basement?

A. Hun-uh.

Q. Okay. When you were locked in the basement, you said that you didn't have a way to get out.

A. Back door.

Q. Okay; and can you describe the back door?

A. It had a lock on it, and you could open, and you can step outside.

Q. Okay; and where did you step outside to?

A. The backyard.

**ROA**, Vol. III, p. 53, line 16 through p. 54, line 16. Donnell testified that at some point the bolt on the back door was changed to a key bolt and that she did not have the key. **ROA**, Vol. III, p. 56, line 5-15.

Q. Okay; and how often did they have the key bolt on the door?

A. They took it off, I don't know when, but they took it off.

**ROA**, Vol. III, p.56, line 25 to p. 57, line 3.

Q. Okay. Did the bungee cord work to keep you in the basement?

A. Yeah.

Q. So, you still couldn't get to the upstairs?

A. Hun-uh, I went out the back. I could have gone out the back door, because they took the key lock off.

Q. And when did they do that, then?

A. After Jahred left or something. I don't know. Before I moved down there, or something like that.

Q. Well, you - -

A. Way before, like, I got taken.

Q. Well, it can't be - -

A. I don't know when, but - -

Q. Okay. Then why didn't you go out the back door?

A. 'Cause I was sleeping downstairs; plus, there was clothes in the way.

Q. Okay, but if you had to go to the bathroom, would it have been easier to go out the back door?

A. Yeah.

Q. Why didn't you?

A. I didn't want to.

Q. Why didn't you want to?

A. I don't know.

**ROA**, Vol. III, p. 63, line 15 to p. 64, line 15.

Q. Okay; and you say you weren't locked in the basement all the time. How often would you say you were able to come and go from the basement in a given week?

A. Like, nighttime.

Q. And was that every night you could come and go from the basement?

A. Yeah, sometimes, but once in a while.

Q. Sometimes, but once in a while?

A. Uh-huh.

Q. Okay. Would there be periods of, perhaps, a week that you would be locked in the basement for the whole week?

A. No.

**ROA**, Vol. III, p. 57, line 10-23.

Q. Were you let out of the basement to use the shower in the morning?

A. Sometimes, yeah.

Q. Okay; and you say sometimes; how often were you able to shower?

A. Like, every morning, and, if it's cold, we wouldn't be able to.

Q. If it was cold you weren't able to? Do you know why you weren't able to?

A. We didn't want to get sick.

Q. Okay. So, was it like a wet-hair concern, then?

A. Uh-huh.

**ROA**, Vol. III, p. 69, line 6-18.

Donnell testified that all her toiletry supplies were upstairs in the bathroom where she showered almost every morning. Donnell acknowledged that she had access to a restroom "pretty much" whenever she wanted. **ROA**, Vol. III, p. 77, line 3-5.

Q. Now, you'd earlier testified that you sometimes peed in a cup down in the basement.

A. No.

Q. Had you peed in a cup in the basement a couple of times?

A. I don't remember.

A. Okay. If you peed in a cup in the basement, was that because - -

A. Somebody was using the bathroom.

Q. Somebody was already using the other one and you didn't want to wait. Is that correct?

A. Yeah.

Q. Did anybody force you to pee in a cup?

A. Hun-uh, no.

Q. Did you like your room in the basement?

A. Yeah.

Q. Did it give you some privacy?

A. Uh-huh.

Q. You liked that?

A. Uh-huh.

Q. It was a little bit quieter than the bedrooms upstairs?

A. Yes.

Q. And you liked that?

A. Yeah.

Q. You were involved in a lot of activities at school and so forth. Isn't that correct?

A. Yeah.

Q. Did you do other kinds of activities with church and things like that, as well?

A. Yeah.

Q. Can you tell us how many times you got punished and had to go to your room?

A. Not that much.

Q. A couple of times?

A. Yeah.

Q. Okay; and that was maybe a couple times in the whole time you lived in that house?

A. Uh-huh.

**ROA**, Vol. III, p. 77, line 6 to p. 78, line 19.

Q. ... Now do you remember the morning the police came and they took you out of the home?

A. Uh-huh.

Q. Do you know whether or not there was a bungee cord on the door that morning?

A. No.

Q. Or, I'm sorry, that evening. You didn't know the cord was even on there until they told you later. Is that correct?

A. Yes.

Q. Were you asleep downstairs?

A. Yeah.

Q. Yeah; and, again, anytime you wanted to get out, if the cord was there, you could go out the back door and come in the other door to the upstairs.

A. Yeah.

Q. You always had access to a rest room, if you wanted one?

A. Uh-huh.

**ROA**, Vol. III, p. 80, line 9 through p. 81, line 2.

Q. So, anytime you wanted to, if you were down in the basement, you could get out of the basement, if you wanted to, anytime you wanted to, unless you were being punished. Is that correct?

A. Yeah.

Q. And anytime you wanted to use the rest room, you could always go up and use the rest room?

A. Sometimes.

Q. Was there ever a time you weren't allowed to go up and use the rest room?

A. If somebody was taking a shower and using it.

Q. So, it wasn't that you weren't allowed to, it was that somebody else was already on it. Is that correct?

A. Yeah.

**ROA**, Vol. III, p. 83, line 11 through p. 84, line 1.

Donnell testified that she had a fire extinguisher and a smoke detector in the basement bedroom. **ROA**, Vol. III, p. 58, line 9 to p. 59, line 11.

Donnell testified numerous times on direct and cross examination that she is not afraid of defendant.

Q. Donnell, do you have any reason to be afraid of Mr. Guerrero?

A. No.

**ROA**, Vol. III, p. 60, line 3-6.

Q. Okay. Do you have any reason to be afraid of Anthony now?

A. No.

Q. Did you have any reasons to be afraid of Anthony then?

A. Hun-uh, no.

**ROA**, Vol. III, p. 71, line 23 to p. 72, line 3.

The State next called Gerald Baker, a social worker with Kansas S.R.S., who interviewed Donnell Hobbs on February 18, 2009. **ROA**, Vol. III, p. 94, line 9-10. Baker testified:

she had told me that it was cold in the basement, only a heater downstairs. She had a TV that doesn't work. There's no bathroom, and that she had to use a bucket, and that she peed in a cup.

**ROA**, Vol. III, p. 95, line 15-19.

What she had told me is that it was [defendant's] idea for her to move to the basement after Jahred had been placed in foster care because the twins argued as to whose mess it was in their bedroom.

**ROA**, Vol. III, p. 9, line 17-20.

Q. And did you have an opportunity to ask Donnell whether or not she felt safe being downstairs?

A. Yes, sir, I did.

Q. And what was her response?

A. Her response was she did not feel safe as she does not know what is going on upstairs, and it is cold down there, and all she has is a small heater, and she does not want to move down to the basement, and she's also more fearful as to what will happen with her mother. Her mother needs help. Her mother had previously cut on herself, is suicidal, and has expressed to Donnell that she wishes that she was dead.

**ROA**, Vol. III, p. 96, line 2 through p. 97, line 11. Baker testified that Donnell said:

she was able to move up and down the stairs on Saturday before the incident, and was allowed to take food downstairs on Saturday, and she reported eating three peanut butter and jelly sandwiches, chips, and Ramen noodles on Saturday, and she did not eat on Sunday. ... She reports that there was a light bulb that was removed on Saturday, and that she was not allowed to use the bathroom -- the bathroom on Sunday.

**ROA**, Vol. III, p. 97, line 14-24. Baker testified that "[s]he reported to me that [defendant] removed the latches on the doors and restrained her via a bungee cord." **ROA**, Vol. III, p. 98, line 13-15. Baker indicated that he believed Donnell was in danger "because of the past history of an older sibling being alleged to have been locked in the basement, as well." **ROA**, Vol. III, p. 99, line 15-17.

Q. Was there anything about that basement that caused any kind of health or safety risk to somebody who might be using that as a basement bedroom?

A. From my recall, the basement was dark; however, I was not - - unable to locate the cup, nor was I able to locate the bucket that was said to have been removed. There was no heat.

**ROA**, Vol. III, p. 100, line 2 through p. 101, line 4. Baker testified that he did not observe a fire extinguisher or smoke detector in the basement. **ROA**, Vol. III, p. 106, line 15-20. Baker acknowledged that at the time he observed the basement bedroom there was no one living there. **ROA**, Vol. III, p. 101, line 5-10.

Jahred Hobbs, Donnell's older brother, was called as a witness by the State. He testified that he had lived in the basement bedroom before Donnell moved down to that room. He testified that he liked the basement bedroom. **ROA**, Vol. III, p. 109, line 1-5. He testified that defendant did not live at the house. **ROA**, Vol. III, p. 109, line 10-12. He testified that there was a fire extinguisher and two smoke detectors in the basement bedroom area. **ROA**, Vol. III, p. 109, line 13-24.

Martha Hobbs was called to testify by the defense. She is Donnell Hobbs' mother. She testified that defendant did not live at the house. She testified that she made statements to the police to try and get defendant into trouble.

I lied and made up stories to try to get him in trouble, which I didn't know it was going to go this far, to make him look bad so that he wouldn't get our daughters, you know.

**ROA**, Vol. III, p. 121, line 17-20.

Martha Hobbs testified that defendant did not lock the basement door. **ROA**, Vol. III, p. 121, line 23-25. He did not put a bungee cord on the door. **ROA**, Vol. III, p. 122, line 3-6. She testified that the bungee cord was placed on the basement door for safety reasons by defendant's sister Heather Toledo. **ROA**, Vol. III, p. 122, line 10-25.

Martha Hobbs testified that she allowed Donnell to come upstairs unless she was "on punishment" and sent to her room. **ROA**, Vol. III, p. 124, line 14-22. She testified that even when being punished Donnell was allowed to use the restroom and eat upstairs with her sisters. **ROA**, Vol. III, p. 124, line 23 through p. 125, line 5.

Martha Hobbs testified that the basement bedroom had a door going to the outside which did not require a key to open from the inside. She testified that door was never blocked or unable to be used. **ROA**, Vol. III, p. 126, line 1-8.

Martha Hobbs testified under oath that is was not a true statement when she told police that defendant would never let Donnell out of the basement. **ROA**, Vol. III, p. 126, line 17-20. She testified that Donnell was not forced to use a bucket or cup to go to the restroom. **ROA**, Vol. III, p. 126, line 21-23. "It was mainly I lied trying to hurt him so that he wouldn't get my twins, our twin daughters." **ROA**, Vol. III, p. 127, line 11-12. "I lied and said that [defendant] had put the bungee cord on,

which he didn't, because he was never at my house." **ROA**, Vol. III, p. 129, line 11-13.

Heather Toledo, defendant's sister, was called as a witness by the defense. She testified that she did not see defendant at the residence at all that day. She testified that she placed the bungee cord on the basement door "for the safety of the three-year-old and the two-year-old that I was baby-sitting," **ROA**, Vol. III, p. 135, line 6-17.

Heather Toledo testified that Donnell was not locked in the basement. **ROA**, Vol. III, p. 136, line 17-18. She testified that Donnell went up and down the stairs and was playing with the children she was watching upstairs. **ROA**, Vol. III, p. 136, 11-16. Heather was also up and down those stairs helping with laundry. She indicated that there was nothing about that basement bedroom that put Donnell's physical health at risk. **ROA**, Vol. III, p. 137, line 16-20.

Alisha Guerrero, defendant's daughter and sister of Donnell, was called as a witness for the defense. She testified that both she and Donnell wanted to move down to the basement bedroom. Her mother decided Donnell could have the room because she was older. It was not punishment for Donnell. **ROA**, Vol. III, p. 141, line 7-21. She testified that she was able to go up and down the basement stairs and could visit Donnell in the basement bedroom "all the time." **ROA**, Vol. III, p. 142, line 1-8. She testified

that she did not ever see Donnell locked in the basement or prevented from coming upstairs. "Only when she gets in trouble, she has to stay in her room just like all of us; when we get in trouble, we got to stay in our room." **ROA**, Vol. III, p. 142, line 18-23.

Q. Was - - if you know, was Donnell ever forced to eat her dinners downstairs?

A. Hun-uh, it's her decision.

Q. So, sometimes, she would eat downstairs if she wanted to?

A. Uh-huh.

**ROA**, Vol. III, p. 143, line 4-9.

Alisha Guerrero testified that defendant did not live with them but lived in Texas and visited them on the weekend a few times each month. **ROA**, Vol. III, p. 145, line 22 through p. 146, line 5. She testified that she never saw the basement door locked or secured with a bungee cord. **ROA**, Vol. III, p. 149, line 3-8. She testified that if there was a fire in the basement you could go out the back door from the basement. **ROA**, Vol, III, p. 150, line 18 through p. 151, line 3.

Sariah Guerrero, defendant's daughter and Donnell's sister, was called as a witness for the defense. She testified that she went down to the basement bedroom "all the time" to play games and watch movies with Donnell. **ROA**, Vol. III, p. 155, line 2-14. She testified that did not ever see Donnell being locked in the

basement and unable to get out of the basement. **ROA**, Vol. III, p. 155, line 22-25. She testified that defendant did not live with them. **ROA**, Vol. III, p. 156, line 1-3. She testified that her mother, Martha Hobbs, was the one who provided discipline at home. **ROA**, Vol. III, p. 156, line 4-6. She testified that she did not ever see Donnell being refused access to the bathroom. "[S]he was able to come up anytime." **ROA**, Vol. III, p. 156, line 12-17.

The district court found defendant guilty of Child Endangerment. The court stated:

Court is aware that the standard is beyond a reasonable doubt, and in this case there was evidence that was inconsistent. It would be easiest for the Court to determine that because there are inconsistencies that no one can be believed, nothing can be believed; however, the Court believes that would be an abdication of its duty because one of the things the court must do in a case like this as the finder of fact is to attempt to determine whether a witness is telling the truth, whether a witness is not telling the truth, if the testimony of a witness or the statements of a witness are to be rejected in total, or believed in part and rejected in part.

The Court finds that based on the evidence presented, there are certain things that are believed. Part of the testimony the Court does believe, and part of the testimony and statements the Court does not believe, but based on the evidence presented, the Court does find that during this period of time, Donnell Hobbs was locked in the basement, that it was done intentionally by defendant, and that Donnell Hobbs was unreasonably placed in a situation by the defendant's actions in which there was a reasonable probability that her life, body or health would be injured or endangered; therefore, the Court specifically found to be credible evidence when Donnell Hobbs testified initially. When she sat down, the Court observed the demeanor of both Donnell Hobbs and the defendant at that time. When Donnell

Hobbs looked up at the defendant, she became extremely emotional, and, in fact, was unable to proceed for some period of time. In addition, the Court observed that, at that time, the defendant was extremely intimidating toward Donnell Hobbs, and that he looked at her, he smiled without warmth or humor, and, by those actions, Donnell Hobbs appeared to be terribly intimidated by the defendant. The Court inferred from that, despite her testimony, that she was extremely frightened of defendant. Afterwards, the demeanor of Donnell Hobbs improved, and, at that time, thereafter, she testified inconsistently with what she had stated both to the social worker and to the detective; therefore, the court finds that the statements that Donnell Hobbs made to the detective and to the social worker were more credible than those statements that she made on the witness stand. In addition, the Court also finds that the statements by Martha Hobbs made to the police officer on the night of February 17th were more credible than those statements that she made on the witness stand today.

The Court does find that Donnell Hobbs was at times during this period of time between November 20, 2007, and February 17, 2008, placed in a situation inside a locked basement where there - - and that this was done intentionally by the defendant. He unreasonably caused or permitted Donnell Hobbs to be placed in a situation where there was a reasonable probability that her life, body or health would be injured or endangered because she was locked in the basement with a space heater, and the Court does find credible that there was not a working smoke detector in the basement at that time; that there were times when Donnell Hobbs was in the basement all night while she was locked in the basement that was a situation dangerous to her life, body, or health. The fact that she did not lose her life or was not injured is not determinative of whether or not there was a danger. The Court finds, in fact, there was a danger, and that Donnell Hobbs was in that danger at that time.

Based on the evidence presented, the Court finds that the defendant is guilty of the crime charged of endangering a child, a Class A misdemeanor.

**ROA**, Vol. III, p. 170, line 20 through p. 173, line 17.

This appeal follows.

**ARGUMENTS AND AUTHORITIES**

**ISSUE I THE DISTRICT COURT ERRED IN FAILING TO DISMISS FOR VIOLATION OF SPEEDY TRIAL.**

This Court exercises unlimited review over a district court's legal rulings regarding violations of a defendant's statutory right to a speedy trial. State v. Vaughn, 288 Kan. 140, 200 P.3d 446 (2009) *citing* State v. White, 275 Kan. 580, 598, 67 P.3d 138 (2003).

A total of one-hundred-eighty-nine (189) days attributable to the State elapsed before defendant was brought to trial. Accordingly, his statutory right to a speedy trial has been violated. K.S.A. 22-3402 states:

(2) If any person charged with a crime and held to answer on an appearance bond shall not be brought to trial within one hundred eighty (180) days after arraignment on the charge, such person shall be entitled to be discharged from further liability to be tried for the crime charged, unless the delay shall happen as a result of the application or fault of the defendant, or a continuance shall be ordered by the court under subsection (5).

(3) If any trial scheduled within the time limitation prescribed by subsection (1) or (2) is delayed by the application of or at the request of the defendant, the trial shall be rescheduled within 90 days of the original trial deadline.

K.S.A. 22-3402(2)(3).

Defendant was released on an appearance bond during the time period in question. The language within K.S.A. 22-3402(2) is mandatory. If one-hundred-eighty days have passed, and this time is attributable to the State, then the accused "...shall be

entitled to be discharged from further liability..." Id. Furthermore, the language regarding delay mandates that any such delay must result from the application or fault of the defendant.

In this case the record is clear defendant was not waiving speedy trial. Defendant's waiver of jury trial did not entitle the State to an additional ninety (90) days within which to commence trial. At the time of the waiver there was fifty nine (59) days remaining on speedy trial. It is unreasonable to attribute the next sixty-eight (68) days until trial to the defendant.

The burden of compliance with the statute is on the State. "The burden of bringing an accused to trial within the allotted time is on the State. **A defendant is not required to take any affirmative action to see that his right is observed.**" State v. Dreher, 239 Kan. 259, Syl. ¶ 1, 717 P.2d 1053 (1986). Emphasis added. Furthermore, "...the ultimate responsibility for management of the trial calendar is in the trial court." State v. Higby, 210 Kan 554, 556, 502 P.2d 740 (1972). See also City of Dodge City v. Rabe, 14 Kan. App. 2d 468, Syl ¶ 2, 794 P.2d 301 (1990).

"Where criminal statutes are concerned, the rule of strict construction applies, and any ambiguities must be resolved in favor of the accused." State v. Gee, 27 Kan.App.2d 739, 740, 8 P.3d 45 (2000), citing State v. Kelly, 14 Kan.App.2d 182, 186,

786 P.2d 623 (1990). K.S.A. 22-3402 should be strictly construed against the State.

A period exceeding one-hundred-eighty (180) days is attributable to the State for purposes of speedy trial in this case. Defendant's waiver of jury trial did not relieve the State of its obligation to bring defendant to trial within the requirements of K.S.A. 22-3402(2). Defendant did not request any continuance, only a waiver of jury trial. Defendant's request was for a court trial rather than a jury trial. He was asking for less, not more. Everything was available to proceed as scheduled. The judge, prosecution and defense were available, we just did not need the jury panel.

In State v. Dreher, 239 Kan. 259, 717 P.2d 1053 (1986), our Supreme Court addressed a similar issue. The sole issue on appeal was whether delay resulting from a defense demand for jury trial caused the delay beyond the 180-day speedy trial provisions within K.S.A. 22-3402(2). Id. at 260. The Supreme Court held that the time between the bench trial setting and the jury trial setting were not attributable to the defense.

[E]ven though Dreher's request for a jury trial necessitated a continuance, it is unreasonable to charge him with the additional sixty-five days remaining within the 180-day period on February 4, 1985. The court had sufficient time to reschedule the trial and comply with the statute.

Id. at 261-62. See also State v. Lawrence, 38 Kan.App.2d 473, 167 P.3d 794 (2007) (citing *Dreher* and noting that the court must reschedule trial within a reasonable time).

Additionally, the record is clear in this case that the district court did not consider the waiver of jury trial as a waiver of speedy trial. At the time of the waiver the district court clearly noted the arraignment date and affirmed the 180-day time line applied. The district court stated directly to defendant "we're going to schedule a court trial between now and November 28<sup>th</sup> or whatever that date is." **ROA**. Vol. II, p. 13, line 8-10. However, at the docket October 1, 2008, the matter was scheduled to commence on day one-hundred-eighty-nine (189). At the docket this date other cases were being set for court trial well within the requirement for speedy trial in this case, indicating that dates for trial to commence were available which would have been within the applicable speedy trial deadline. The court had sufficient time to reschedule the trial and comply with the statute.

Defendant did not waive his right to a speedy trial when he waived his right to a jury trial. Defense counsels acceptance of the new trial date was neither an acquiescence to a continuance nor a waiver of speedy trial. See State v. Adams, 283 Kan. 365, 370, 153 P.3d 512 (2007).

Issue II. **THE STATE FAILED TO PRESENTED SUFFICIENT EVIDENCE TO SUPPORT THE CONVICTION.**

When the sufficiency of the evidence is challenged in a criminal case this Court must determine "whether, after review of all of the evidence, viewed in the light most favorable to the prosecution, the appellate court is convinced that a rational factfinder could have found the defendant guilty beyond a reasonable doubt." State v. Gutierrez, 285 Kan. 332, 336, 172 P.3d 18 (2007). If there is evidence to support a finding that each of the elements of a crime has been met, this court should uphold a defendant's convictions even when the evidence was entirely circumstantial. State v. Scott, 271 Kan. 103, 107, 21 P.3d 516, cert. denied 534 U.S. 1047 (2001). However, "[c]onvictions based upon circumstantial evidence ... can present a special challenge to the appellate court" because "'the circumstances in question must themselves be proved and cannot be inferred or presumed from other circumstances.'" State v. Williams, 229 Kan. 646, 648-49, 630 P.2d 694 (1981) (quoting 1 Wharton's Criminal Evidence § 91, pp. 150-51 [13<sup>th</sup> Ed. 1972]).

In this defendant's case the district court credited only the testimony supporting a conviction and disregarded testimony made under oath indicating the defendant did not commit the crime alleged. The district court relied on purported intimidation of Donnell Hobbs by defendant when he allegedly "looked at her [and] smiled without warmth or humor." **ROA**, Vol. III, p. 172, line 4-5.

"The Court inferred from that, despite her testimony, that she was extremely frightened of the defendant." ROA, Vol. III, p. 172, line 7-9. However, those alleged circumstances were never address by the State or defense at trial and certainly were not proven fact upon which the court could properly base its findings.

A conviction can only be sustained upon evidence which proves every element of a crime beyond a reasonable doubt. State v. Star, 27 Kan.App.2d 930, 934, 10 P.3d 37, rev. denied 270 Kan. 903 (2000).

The evidence presented by way of testimony of the witnesses did not support a finding of guilt. Officer Hanika testified that Donnell said "she **believed** it was Anthony Guerrero who locked her in the basement." ROA, Vol. III, p. 11, line 22-23 (emphasis added). Detective Ludolph testified that "She wasn't 100 percent sure, but she **guessed** it was her dad, Anthony" who made her use a cup to go to the restroom. ROA, Vol. III, p. 38, line 4-5. Donnell Hobbs, however, testified that she was always able to get out of the basement bedroom. Numerous witnesses testified that defendant did not live at the house, only visited occasionally and was not responsible for discipline or punishment at home. Martha Hobbs testified under oath that her statements to police blaming everything on defendant were not true. She testified that those statements were lies and stories to try to

get defendant in trouble. Both Martha Hobbs and Heather Toledo testified that defendant did not put the bungee cord on the door.

As to the evidence presented regarding a reasonable probability that the child may be injured or endangered, the testimony of the witnesses indicated there was no such reasonable probability. Detective Ludolph testified there could be a danger to Donnell **if** there was a fire and she could not escape. See **ROA**, Vol. III. P. 42, line 2-8. He agreed it would maybe not be dangerous for Donnell to eat in her basement bedroom. See **ROA**, Vol. III, p. 42, line 15-19. Donnell Hobbs testified that she was always able to get out of the basement bedroom if she wanted to. She testified that she always had access to a restroom in she wanted one. Jerry Baker testified that Donnell said she didn't feel safe in the basement because she was "fearful as to what will happen with her mother" because her mother was suicidal. **ROA**, Vol. III, p. 97, line 3-11. Several different witnesses who had been in the house while the family still was living there indicated that there was a fire extinguisher and smoke detector in the basement bedroom.

In State v. Fisher, 230 Kan. 192, 195, 631 P.2d 239 (1981), our Supreme Court held that the word "may" as used in K.S.A. 21-3608 means "something more than a faint or remote possibility; it means that there is a reasonable probability, a likelihood that harm to the child will result." The State merely presented

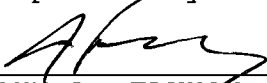
a faint or remote possibility of harm. Fisher indicated that the purpose of the statute is "to protect children, and to prevent their being placed where it is reasonably certain that injury will result." Id., 230 Kan. at 199.

There was not sufficient evidence for the court to find that there was a reasonable probability that Donnell's life, body or health may be injured or endangered because Donnell was locked in the basement by defendant.

#### **CONCLUSION**

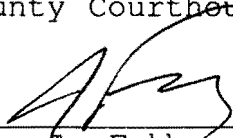
The district court erred in failing to dismiss for want of speedy trial. Additionally, the district court lacked substantial competent evidence upon which to base a finding of guilt. For the above and foregoing reasons, defendant respectfully requests this Honorable Court reverse the decision of the district court and further requests such other relief as this Court deems necessary to effectuate justice under the circumstances.

Respectfully submitted,

  
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**CERTIFICATE OF SERVICE**

I, the undersigned, do hereby certify that on the 12<sup>th</sup> day of August, 2009, I caused to be filed with the Clerk of the Appellate Courts, 301 SW 10<sup>th</sup> Ave, 3<sup>rd</sup> Floor, Topeka, Kansas 66612, sixteen (16) copies of the above and foregoing "**BRIEF OF APPELLANT,**" and two (2) conformed copies were hand delivered to the Attorney General, 120 SW 10<sup>th</sup> Ave., Second Floor, Topeka, Kansas 66612, and two (2) copies were hand delivered to the office of the Shawnee County District Attorney, to the attention of Chad Taylor, Shawnee County Courthouse, 200 SE 7<sup>th</sup>, Topeka, Kansas 66603.

  
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John A. Fakhoury, #20066