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No. 08-101300A

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

STATE OF KANSAS
Plaintiff-Appellee

vs.

CORY T. ELKINS
Defendant-Appellant

BRIEF OF APPELLANT

Appeal from the District Court of Douglas County, Kansas
Honorable Michael J. Malone, Judge
District Court Case No. 07CR776

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Statement of the Case

Cory Elkins was convicted by a jury of four counts of rape pursuant to K.S.A. 21-3502(a)(1)(A), a severity level two felony at the time of the alleged offenses, and three counts of aggravated criminal sodomy pursuant to K.S.A. 21-3506(a)(3)(A), also a severity level two felony at the time of the alleged offenses. He was given a controlling sentence of 576 months in the Department of Corrections, with 24 months post release. Mr. Elkins now appeals from his convictions and his sentence.

Statement of the Issues

- Issue I:** The district court violated Mr. Elkins' Sixth Amendment Right to Confrontation when it admitted evidence of a DNA CODIS database match without proving the CODIS analyst unavailable or providing an opportunity for the defense to cross examine that analyst.
- Issue II:** Mr. Elkins was denied his right to a fair trial when his defense was compromised due to the State's failure to comply with defense discovery requests for documentation to support Sindey Schueler's conclusion that she likely contaminated the evidence in E.L.'s case in 1996.
- Issue III:** The district court erred when it denied Mr. Elkins' motion for a mistrial after evidence was presented to the jury that suggested that he had unspecific prior criminal history that ultimately led to the discovery that his DNA might be linked to J.L. and E.L.'s rape cases.
- Issue IV:** The State committed prosecutorial misconduct when it attempted to improperly shift the burden of proof to the defense during cross-examination of the defense's expert witness.
- Issue V:** The combination of errors in this case deprived Mr. Elkins of his right to a fair trial.
- Issue VI:** The district court erred when it used Mr. Elkins' prior convictions to enhance his sentence without that criminal history first being put to a jury and proven beyond a reasonable doubt.
- Issue VII:** The district court erred when it assigned Mr. Elkins an aggravated sentence within the guidelines grid box on all seven of his convictions without first putting those aggravating factors to a jury or proving

them beyond a reasonable doubt.

Statement of the Facts

During the night of July 10, 1994, and into the early morning hours of July 11th, J.L. was sleeping on the couch of her new apartment at 840 Maine in Lawrence. (R.VI, 239-240, 242-243). She woke and discovered a man on top of her. (R.VI, 243). The man vaginally penetrated J.L. by force three times and anally penetrated her twice over the course of an attack that lasted several hours. (R. VI, 247-256). J.L. immediately reported the attack to the police and submitted to a sexual assault examination and a rape kit at Lawrence Memorial Hospital. (R. VI, 264,-266). J.L. was unable to identify her attacker. (R. VII, 299).

On September 22, 1995, E.L. came to Lawrence to visit some friends that lived at 11th and Ohio. (R. VII, 398-399). After going out that night, she returned back to her friends' house in the early morning hours of September 23, 1995, alone. (R. VII, 400-401). She later awoke to a man on top of her, holding her mouth shut. (R. VII, 402). The man forcefully penetrated E.L. vaginally and anally. (R. VII, 407-408). E.L. immediately reported the attack to Lawrence police and submitted to a sexual assault examination and a rape kit at Lawrence Memorial Hospital. (R. VII, 411-413). E.L. never saw her attacker's face. (R. VII, 405).

The KBI extracted a DNA profile for unknown possible suspects from the biological evidence in J.L. and E.L.'s rape kits. (R. IX, 558, 583). That profile was then placed into the national DNA database system called CODIS. (R. IX, 558, 585). In 2006, the two unknown profiles from J.L. and E.L.'s cases hit on each other, indicating for the first time that the suspect might be the same person in both cases. (R. IX, 560-

561). Then, in 2007, an additional hit came back from the CODIS system, indicating a possible match with a man named Cory Elkins. (R. IX, 570-571, 586).

Lawrence Police officers went to California to find Mr. Elkins and took a sample of his DNA for testing. (R. VII, 456-457). The Kansas Bureau of Investigation (KBI) lab later matched Mr. Elkins' DNA profile with the unknown suspect profiles in both J.L. and E.L.'s cases. (R. IX, 572-574, 587). Mr. Elkins was eventually charged with three counts of rape and two counts of aggravated criminal sodomy in J.L.'s case and one count each of rape and aggravated criminal sodomy in E.L.'s case. (R. I, 39-40).

Prior to trial, the KBI analyst who conducted the DNA testing in J.L. and E.L.'s cases, Sindy Schueler, admitted that she contaminated the DNA slides in E.L.'s case with her own DNA at some point during her analysis. (R. XIV, 35-38). This information, along with other documents indicating that the KBI conducted tests on both J.L. and E.L.'s biological evidence on the same day, led the defense's DNA expert witness to conclude that, in addition to the admitted contamination by the analyst, there was the high likelihood of cross-contamination between the DNA samples in J.L. and E.L.'s cases. (R. X, 960-961, 966-967, 978).

Prior to trial, the defense objected to the admission of the CODIS match of Mr. Elkins' DNA with the unknown suspect profiles in J.L. and E.L.'s cases as a violation of his Confrontation Clause rights after the state refused to call the DNA examiner from California who conducted the CODIS tests. (R. XX, 30-32). That motion was overruled. (R. VI, 9-10). At trial, after it was discovered that the State had failed to disclose information regarding Schueler's handling of the biological samples in E.L.'s case in 1996, which subsequently had a negative impact on the defense's expert witness's

conclusions about possible cross-contamination between the two cases, the defense moved for a mistrial. (R. IX, 603-606). However, the district court overruled that motion. (R. IX, 603-606). Also at trial, evidence was admitted that tended to prove to the jury that Mr. Elkins had prior criminal convictions when the CODIS database was referred to by the State's witness as an "offender index." (R. IX, 567-568). The defense moved for a mistrial on that basis as well, but was overruled. (R. IX, 567-569). Finally, during the State's cross examination of the defense's expert witness, the defense objected that the state was attempting to improperly shift the burden of proof when the prosecutor suggested that the expert had an obligation to conduct his own DNA testing on the biological evidence in this case for his conclusions about the problems with the KBI testing to be considered valid evidence. (R. IX, 603-604). That objection was also overruled. (R. IX, 606).

At the end of trial, the jury found Mr. Elkins guilty of all four counts of rape and three counts of aggravated criminal sodomy. (R. XI, 1187-1188). Mr. Elkins was given a controlling sentence of 576 months in the Department of Corrections, with 24 months postrelease. (R. VIII, 42-43). He filed a timely appeal from his convictions and his sentence. (R. II, 277).

Arguments and Authority

Issue I: The district court violated Mr. Elkins' Sixth Amendment Right to Confrontation when it admitted evidence of a DNA CODIS database match without proving the CODIS analyst unavailable or providing an opportunity for the defense to cross examine that analyst.

Standard of Review

The appellate courts employ an unlimited standard of review when addressing a defendant's claim that his Sixth Amendment Confrontation Clause rights under the

United States Constitution have been violated. *State v. Noah*, 284 Kan. 608, 612, 162 P.3d 799 (2007).

Prior to trial, the defense attempted to prevent the State from putting on evidence of the CODIS match, complaining that the defense had not had an opportunity to cross-examine the person who conducted the DNA testing in California, in violation of Mr. Elkins' Sixth Amendment Confrontation Clause rights. (R. XX, 32). The district court overruled that motion prior to trial. (R. VI, 8-10). The defense then objected during trial to the admission of evidence of the CODIS database DNA "hit" on Mr. Elkins. (R. IX, 563-570). That objection was also overruled. (R. IX, 569-570). Defense counsel raised the Confrontation Clause issue again in his Motion for New Trial. (R. II, 204-221). The district court overruled that motion as well. (R. IV, 31-32).

Argument

The Sixth Amendment Confrontation Clause provides that " '[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.' " *Crawford v. Washington*, 541 U.S. 36, 42, 158 L. Ed. 2d 177, 124 S. Ct. 1354 (2004). The "Sixth Amendment is applied to the States through the Fourteenth Amendment." *State v. Henderson*, 284 Kan. 267, 276, 160 P.3d 776 (2007) (citing *Pointer v. Texas*, 380 U.S. 400, 403-06, 13 L. Ed. 2d 923, 85 S. Ct. 1065 (1965)). The Kansas Constitution also provides a criminal defendant the right "to meet the witnesses face to face." *State v. Henderson*, 284 Kan. at 276; Kan. Const. Bill of Rights, § 10.

Crawford "substantially altered the Confrontation Clause analysis" of *Ohio v. Roberts*, 488 U.S. 56. *State v. Meeks*, 277 Kan. 609, 613-14, 88 P.3d 789 (2004). In *Crawford*, the United States Supreme Court overruled *Ohio v. Roberts* by rejecting

reliability as the constitutional test, and instead focused on cross-examination to determine when out-of-court statements are “testimonial” in nature. *Crawford*, 541 U.S. at 67.

Crawford held that, under the Confrontation Clause of the Sixth Amendment, where a witness is unavailable and the defendant did not have a prior opportunity to cross-examine the witness, the testimonial statements of the witness should be barred. *Crawford*, 541 U.S. at 53, 54.

Does The CODIS Match Implicate The Sixth Amendment Confrontation Clause?

In this case, the district court ultimately concluded that the admission of the CODIS match evidence without the opportunity for cross-examination did not violate Mr. Elkins’ Sixth Amendment rights because the State was limited by the court from arguing that the CODIS DNA test was a “match.” (R. IV, 31-32). Instead, the State was limited to saying only that it was an “investigative lead” or a “hit” in the database. (R. IV, 31-32). The court concluded that the State never argued that the CODIS hit corroborated the KBI’s DNA analysis in these two cases. (R. IV, 31-32). In short, because the CODIS testing was not admitted with the intention of proving that Mr. Elkins’ DNA was a match, but instead to explain why, out of all the men in the United States, the Lawrence Police choose to test Mr. Elkins’ DNA in these cases, the court concluded that the Confrontation Clause was not implicated.

While it is true that the court attempted to limit the purpose of the CODIS “hit” evidence at trial, there was no limiting instruction ever given to the jury to specify that it was admitted solely for that purpose. Instead, the jury heard that there was some sort of national DNA database that managed to connect Elkins’ DNA with the unknown

suspect's DNA profiles in J.L. and E.L.'s criminal cases. While the term "match" was avoided per the court's order, albeit with a few slips by the prosecutor and her witnesses, it would not take a large number of intellectual somersaults for the jury to conclude that if there was a "hit" between Elkins' DNA and the unknown suspect in these cases, then that means that someone, somewhere matched Mr. Elkins' DNA in the CODIS system with these other DNA profiles. Using the term "hit" in place of "match" really was a distinction without a practical difference.

Is The Fact of a CODIS DNA Match a Testimonial Statement?

Crawford did not offer a precise definition of what constitutes a "testimonial" statement. *State v. Lackey*, 280 Kan. 190, 200, 120 P.3d 332 (2005). It did, however, discuss that testimonial statements are made by witnesses who "bear testimony" and that "testimony" is defined as "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Crawford*, 541 U.S. at 51. The United States Supreme Court stated that "[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." *Crawford*, 541 U.S. at 51. The Court cited three useful "formulations of this core class of 'testimonial' statements":

- (1) ex parte in-court testimony or its functional equivalent - that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially,
- (2) extrajudicial statements ... contained in affidavits, depositions, prior testimony, or confessions, and
- (3) statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.

Crawford, 541 U.S. at 51, 52.

The United States Supreme Court further elaborated on “testimonial” statements in *Davis v. Washington*, 547 U.S. 813, 165 L. Ed. 2d 224, 126 S. Ct. 2266 (2006). The *Davis* Court held that a statement made in response to police interrogation is testimonial when its “primary purpose” is not to respond to an ongoing emergency but “to establish or prove past events potentially relevant to later criminal prosecution.” *Davis v. Washington*, 126 S. Ct. at 2274.

The Kansas Supreme Court has followed *Crawford*'s holding. “If the declarant is unavailable to testify at trial, and the declarant's statement is testimonial, then the testimony is not admissible unless the defendant had a prior opportunity to cross-examine the declarant.” *State v. Henderson*, 284 Kan. 267, Syl. ¶ 3 (2007) (ruling that a child's videotaped statement was testimonial). Additionally, the Kansas Supreme Court recently held that a forensic lab certificate from a KBI analyst concluding that a substance tested was actually cocaine was testimonial under the Confrontation Clause, entitling the defendant to the right to cross-examine the KBI analyst, applying recent United States Supreme Court precedent in *Melendez-Diaz*, ___ U.S. ___, 129 S.Ct. 2527, 174 L. Ed. 2d 314 (2009). *State v. Laturner*, ___ Kan. ___, 218 P.3d 23, Syl. ¶ 1 (October 9, 2009).

Clearly, under these cases, the California Lab examiner's DNA analysis that led to the initial match between Elkins' DNA in the CODIS system and the DNA in J.L. and E.L.'s cases constitutes a testimonial statement sufficient to invoke the Confrontation Clause. The California CODIS examiner's conclusion that Elkins was a match for the DNA of the unknown suspects in these two cases was a statement made under circumstances that would lead an objective witness to believe that conclusion would be

available for use at a later trial. After all, the entire purpose of the CODIS match was to locate a possible suspect for criminal prosecution in those cases.

Unavailability and Cross-Examination

Once the California CODIS lab examiner's conclusions about the DNA matches between Elkins and the DNA profiles in J.L. and E.L.'s cases is established as "testimonial" and therefore subject to the restrictions of the Confrontation Clause, the next question is whether that examiner was unavailable as a witness for trial and whether the defense had a prior, meaningful opportunity to cross-examine that examiner. *Crawford* re-emphasized that the burden is on the proponent of the extrajudicial statements to prove the unavailability of the declarant. *Crawford*, 541 U.S. at 57.

There was no allegation by the prosecution that the California examiner was unavailable to testify at trial. In fact, there was no evidence presented that the California examiner was ever even contacted by the State regarding this case. Furthermore, the defense was not afforded a prior opportunity to cross examine that examiner as a witness on this subject.

The jury heard evidence that a national database system managed to link Mr. Elkins to these crimes and the defense was given no opportunity to cross examine the DNA examiner that created that match. Consequently, the district court violated Mr. Elkins Confrontation Clause rights when it admitted the CODIS DNA match without giving Mr. Elkins the opportunity to cross-examine that examiner at trial.

Harmless Error Analysis

Confrontation Clause violations are subject to the harmless error test found in *Chapman v. California*, 386 U.S. 18, 24, 17 L. Ed. 2d 705, 87 S. Ct. 824 (1967). *State v.*

Henderson, 284 Kan. 267, Syl. ¶ 3. That test requires that before a Court may declare the admission of the erroneous evidence to be harmless, it must find that, beyond a reasonable doubt, that the error had little, if any, effect on the jury's verdict in this case.

In this case, it cannot be said that the admission of the CODIS match in violation of Mr. Elkins' Confrontation Clause rights had little to no impact on the jury's verdict. Neither J.L. nor E.L. could identify their attacker. The entire case against Mr. Elkins boiled down to whether the jury believed that the KBI's DNA testing was reliable when it matched Mr. Elkins' DNA to the DNA found in J.L. and E.L.'s rape kits, and there were serious questions presented at trial about contamination of the evidence in these cases and the methods that the KBI used to ensure their testing was accurate.

When the jury was deciding Mr. Elkins' guilt, it did not just have the KBI's matching of Mr. Elkins' DNA to these cases. It also had the initial CODIS hit, which appeared to validate the KBI's findings. For this reason, it cannot be said that, beyond a reasonable doubt, the admission of the CODIS match in violation of the defendant's Confrontation Clause rights had little to no effect on the outcome of the jury's verdict in this case. Mr. Elkins' convictions should be vacated and his case remanded for further proceedings.

Issue II: Mr. Elkins was denied his right to a fair trial when his defense was compromised due to the State's failure to comply with defense discovery requests for documentation to support Sindy Schueler's conclusion that she likely contaminated the evidence in E.L.'s case in 1996.

Standard of Review

The sanctions to be imposed for failure to comply with a discovery order are left to the sound discretion of the trial court, so the scope of appellate review is abuse of

discretion. *See State v. Davis*, 266 Kan. 638, 646, 972 P.2d 1099 (1999); *State v. Villa and Villa*, 221 Kan. 653, 656, 561 P.2d 428 (1977). Judicial discretion is abused when no reasonable person would take the view adopted by the trial court. *State v. Lopez*, 271 Kan. 119, 125, 22 P.3d 1040 (2001).

Prior to trial, defense counsel filed a motion in limine to prevent the State from putting on evidence that the KBI analyst responsible for testing E.L.'s biological slides more likely contaminated those slides in 2004, rather than in 1996, because defense counsel was provided with no documentation during discovery that the contamination could have occurred in 1996. (R. I, 132-36; R. XX, 19-27). The district court rejected the defense's motion, saying that was an evidentiary issue that it would address when it arose at trial. (R. VI, 4). At trial, when it became clear that there was evidence that the KBI analyst had handled the slides in 1996, and that the State had failed to provide the defense with that evidence during discovery, defense counsel moved for a mistrial. (R. IX, 603-606). The district court denied defense counsel's request. (R. IX, 606).

Argument

When a party fails to comply with discovery, "the court may order such party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, or prohibit the party from introducing into evidence the material not disclosed, or it may enter such other order as it deems just under the circumstances." K.S.A. 22-3212(g).

The defendant has a constitutionally protected privilege to request and obtain from the prosecution evidence that is either material to guilt or relevant to punishment to be imposed. *California v. Trombetta*, 467 U.S. 479, 485, 104 S.Ct. 2528, 2532, 81

L.Ed.2d 413 (1984). "Under the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness. We have long interpreted this standard of fairness to require that criminal defendants to afford a meaningful opportunity to present a complete defense." *Trombetto*, 467 U.S. at 485.

Prior to trial, defense counsel specifically requested discovery on any documentation upon which Sindey Schueler might have based her conclusion that her contamination of the DNA samples in E.L.'s case occurred in 1996, rather than in 2004. (R. I, 132-36; R. XX, 19-27). At the time, the prosecutor said the documentation from the 1996 testing was incomplete due to missing records at the KBI lab and that defense counsel had been provided with all the documentation that the district attorney had on that subject. (R. XIV, 44-45). Defense counsel filed a motion in limine to try and prevent the State from discussing those conclusions because of a lack of documentation however, the district court overruled that motion. (R. I, 132-136; R. VI, 4-6).

At trial, the State called Sindey Schueler to testify about the contamination. Schueler began to testify that she believed the contamination likely happened in 1996 because she knew that she handled the slides in 1996. (R. IX, 603-604). Defense counsel objected. (R. IX, 603-604). Defense counsel stated that he had been complaining for months that he needed documentation about the 1996 work, and that nothing he received from the State up to that point had indicated that Schueler ever handled the slides in question in 1996. (R. IX, 604). Defense counsel told the judge that from Schueler's testimony, it was clear that she had some sort of documentation that she had handled the slides in 1996, and that the documentation was never turned over to the defense during

discovery. (R. IX, 603-606). At that point, defense counsel moved for a mistrial. (R. IX, 604).

The prosecutor responded by stating that she had provided the defense with all of the documentation that the State had on the DNA tests and went on to say that what Schueler was about to testify to was actually the writing on the back of the evidence envelope containing the slides themselves, which Schueler indicated she had opened and looked at in 1996 and then marked with her initials and the date. (R. IX, 605). Defense counsel reminded the court that he had asked, as recently as the Friday before trial, for any and all documentation that might have been the basis of Schueler's conclusions that the contamination occurred in 1996, and that the information about the notations on the evidence envelope were not provided at that point either. (R. IX, 605-606). The State said that they had complied with the discovery requests because there was no documentation to provide since Schueler's note was contained on the evidence envelope itself. (R. IX, 606). The court noted the defense's objections for the record but did not grant the mistrial motion. (R. IX, 606). When it became clear that the defense had not received requested discovery that the State had in its possession, the district court should have granted the mistrial. By refusing to do so, the court abused its discretion and violated Mr. Elkins right to a fair trial.

The State's failure to disclose this evidence to the defense cannot be deemed harmless. During the testimony of the defense's expert witness, Dr. Stetler, it became clear why the question of whether Schueler handled those slides in 1996 was important to the defense. During his testimony, Dr. Stetler testified that the KBI testing of the slides in E.L.'s case in 1996 showed only E.L.'s DNA and no foreign (suspect) D.N.A. (R. X,

966). By the time the slides were tested again in 2004, however, suddenly Mr. Elkins' DNA was found where there was no suspect DNA before. (R. X, 966). Dr. Stetler opined, based primarily on the fact that there was no documentation that Schueler handled the slides in 1996, that any contamination of the slides had to have occurred in 2004. (R. X, 960-961). Dr. Stetler concluded that because there was no suspect DNA on those slides prior to 2004, and Schueler worked on both J.L. and E.L.'s cases on the same day in 2004, that there was likely cross-contamination between the two cases during the 2004 testing, resulting in Mr. Elkins' DNA appearing in E.L.'s case where it had apparently not existed before. (R. X, 967, 969, 978).

Of course, a substantial part of Dr. Stetler's opinion on the issue of possible cross-contamination was dependant upon the assumption that Schueler had not handled those slides in 1996. And at the time that Dr. Stetler issued his opinion, there was nothing in the defense's documentation that indicated that she had handled those slides in 1996. Despite repeatedly asking the State for discovery on this issue and requesting information for how Schueler had come to conclude in her contamination memo to her supervisor that the contamination most likely occurred in 1996 rather than 2004, the State failed to provide the defense with this necessary information. This omission misled the defense into pursuing an expert opinion and a theory of defense that was based on apparently erroneous assumptions about the lack of evidence in this case. For this reason, it cannot be said that, beyond a reasonable doubt, this omission in discovery had little, if any, impact on the outcome of the defendant's case. *See Chapman v. California*, 386 U.S. 18, 24, 17 L. Ed. 2d 705, 87 S. Ct. 824 (1967).

The district court abused its discretion in not granting the defense's mistrial motion as a sanction for the State's failure to turn over crucial discovery evidence in this case. Because that abuse of discretion cannot be deemed harmless, Mr. Elkins' convictions should be vacated and his case remanded for a new trial.

Issue III: The district court erred when it denied Mr. Elkins' motion for a mistrial after evidence was presented to the jury that suggested that he had unspecific prior criminal history that ultimately led to the discovery that his DNA might be linked to J.L. and E.L.'s rape cases.

Standard of Review

The district court's ruling on a motion for mistrial is reviewed on appeal under an abuse of discretion standard. *State v. Albright*, 283 Kan. 418, 425-26, 153 P.3d 497 (2007); K.S.A. 22-3423(c). The district court abuses its discretion when no reasonable person would take the same view. *State v. Hebert*, 277 Kan. 61, 82 P.3d 470 (2004).

Defense counsel objected to the State's witnesses referring to the CODIS hit as an "offender" hit, and moved for a mistrial on that basis. (R. IX, 567-568). The district court instructed the prosecutor to not allow her witnesses to refer to the CODIS database as an "offender" database, but did not grant a mistrial or instruct the jury to disregard the witness's statements. (R. IX, 568-569).

Introduction

Under K.S.A. 22-3423(c), a district court has the discretion to terminate a trial and order a mistrial if prejudicial conduct occurs during trial that makes it impossible to proceed with the trial without resulting in injustice to the either party. However, in order to obtain reversal of a district court's refusal to grant a mistrial on appeal, the defendant must show that there was substantial prejudice before an abuse of discretion will be

found. *Albright*, 283 Kan. at 425-26.

During the course of testimony in this case, the KBI analyst told the jury that, after the unknown suspect DNA profiles from E.L. and J.L.'s cases were entered into the CODIS database system, that database "hit to a sample that was in the offender index." (R. IX, 564). The defense objected, telling the court that he was concerned that they were now talking about the CODIS database match as an "offender" hit. (R. IX, 564-565). The district court cautioned the prosecutor that he was not going to allow the witness to give the impression to the jury that Mr. Elkins had been previously arrested or convicted of a crime by talking about how his DNA sample got into the CODIS system in the first place. (R. IX, 566-567). However, when the defense counsel made a motion for mistrial on that basis, the court overruled that motion. (R. IX, 568-569). After taking a brief recess so that the prosecutor could instruct the witness not to use the term "offender" when describing the CODIS database, the trial resumed; the district court, however, never instructed the jury to disregard the witness' statements on that subject. (R. IX, 567-570).

As both parties and the district court readily acknowledged during the bench conference on the motion for mistrial, any evidence of Mr. Elkins' prior convictions was inadmissible at his trial on these charges. Relevant evidence is "evidence having any tendency in reason to prove any material fact." K.S.A. 60-401(b). Mr. Elkins' prior criminal history, and specifically, how his DNA got into the CODIS database in the first place, was irrelevant to any of the issues presented at trial. Furthermore, because the subject of a defendant's prior criminal history is so prejudicial, our rules of evidence severely limit the rare occasions when evidence of prior bad acts, including prior criminal history, can be brought into trial. *See* K.S.A. 60-455. Where the evidence against a

defendant is not overwhelming, the admission of evidence of prior bad acts, among other errors, can so substantially prejudice the defendant so as to warrant the reversal of a conviction. *State v. Pruitt*, 42 Kan. App. 2d 166, 172, 211 P. 3d 166 (2009).

Argument

By referring to the CODIS database as an “offender index,” the State’s witness left no doubt in the jury’s mind that Mr. Elkins had a criminal history, and that his criminal history had led to his DNA being placed in a national “offender index.” There can be no question that Mr. Elkins’ prior criminal history and the fact that he was included in that database due to his prior criminal history was inadmissible and highly prejudicial to his case, thereby denying Mr. Elkins his right to a fair trial. On this basis, the district court at the very least had a duty to admonish the jury to disregard the witness’s statement. And without an admonishment, the district court had an obligation to grant the defense’s motion for a mistrial at that point in the proceedings. The district court’s failure to grant the motion for mistrial in this case was an abuse of the court’s discretion.

Harmless Error Analysis

The evidence in this case was not overwhelming. The only evidence to link Mr. Elkins to these crimes was DNA evidence that was acknowledged to have been contaminated by the KBI lab. Consequently, it cannot be said that, beyond a reasonable doubt, the district court’s admittance of the prior crimes evidence and its failure to grant the defendant’s request for a mistrial had little, if any impact on the jury’s decision. *Chapman v. California*, 386 U.S. 18, 24, 17 L. Ed. 2d 705, 87 S. Ct. 824 (1967). Certainly, any indication that the defendant had an unspecified criminal history likely

impacted the jury's decision in this case as to the likelihood that he committed these crimes. Mr. Elkins' convictions should be vacated and his case remanded for a new trial.

Issue IV: The State committed prosecutorial misconduct when it attempted to improperly shift the burden of proof to the defense during cross-examination of the defense's expert witness.

Introduction

The case against Mr. Elkins came down to whether the KBI's DNA analysis was trustworthy. The entire theory of defense in this case was that the KBI's testing methods caused contamination and possible cross-contamination of the DNA samples, resulting in unreliable results. To support that theory of defense, Dr. Stetler testified as an expert witness on DNA analysis for the defense. (R. X, 928). His testimony was that the KBI lab had insufficient quality control for their testing methods, which resulted in a high probability of contamination of the DNA samples that they were working with in Mr. Elkins' case. (R. X, 966-967, 978).

During the cross-examination of Dr. Stetler, the prosecutor asked Dr. Stetler, "Referring to the result in your report there in front of you, State's 36, did you conduct any kind of test to come up with your conclusions in that report?" (R. XI, 1040). Dr. Stetler answered, "No." (R. XI, 1040). The prosecutor went on to ask Dr. Stetler, "Did you ask for samples from either of these two cases, the [J.L.] or the [E.L.] case, to do your own testing or to send out to a lab to test?" (R. XI, 1041). Dr. Stetler answered, "No." (R. XI, 1041). After asking some questions about Dr. Stetler's own lab quality control precautions, the prosecutor had the following conversation with Dr. Stetler:

Q. And because you found fault with some of the results in this case, you didn't ask to retest any of the samples in either of these cases, did you?

- A: The critical samples, according to the documentation, do not exist for retesting.
- Q: My question—
- A: And even if they did exist, the suspicion is that they have been contaminated, so it wouldn't do us any good to retest those samples.
- Q: But my question was: Did you ask to retest any of the samples in either of these cases?

(R. XI, 1043). At that point, defense counsel objected, arguing that the prosecutor's questions were implying that the defense had an obligation to put on evidence, thereby improperly shifting the burden of proof. (R. XI, 1043-1044). The district court agreed with the prosecutor's argument, that because Dr. Stetler had indicated that he had done some retesting in past cases, and that retesting is often the best way to validate lab results, that these questions were proper cross-examination. (R. XI, 1044-1045).

Standard of Review

When reviewing an allegation of prosecutorial misconduct, this Court must first “decide whether the prosecutor's comments were outside the wide latitude allowed in discussing the evidence.” *State v. Elnicki*, 279 Kan. 47, 58, 105 P.3d 1222 (2005). Second, this Court should determine “whether the comments constitute plain error; that is, whether the statements are so gross and flagrant as to prejudice the jury against the defendant and deny him or her a fair trial, thereby requiring reversal.”

Elnicki, 279 Kan. at 58.

Defense counsel objected to part of the prosecutor's cross-examination of the defense's expert witness on the basis of improper burden-shifting. (R. XI, 1043-1044). The district court overruled that objection. (R. XI, 1044-1045).

Argument

When deciding whether the prosecutor's statements denied the defendant a fair

trial, the reviewing Court must consider three factors: (1) whether the misconduct was gross and flagrant; (2) whether the misconduct showed ill will on the part of the prosecutor; (3) whether the evidence was of such a direct and overwhelming nature that the misconduct would likely have had little weight in the minds of the jurors. *State v. Albright*, 283 Kan. 418, 428, 153 P.3d 497 (2007). None of these three factors is individually controlling. *Albright*, 283 Kan. at 428. The third factor may not override the first two unless the harmless error tests in K.S.A. 60-261 (where a refusal to grant a new trial would be inconsistent with substantial justice) and *Chapman v. California*, 386 U.S. 18, 22, 87 S.Ct. 824, 17 L.Ed. 2d 705 (1967) (finding must be made that, beyond a reasonable doubt, the error had little, if any likelihood of changing the result of the trial) have been satisfied. *Albright*, 283 Kan. at 428.

In this case, Dr. Stetler was testifying that the KBI's sloppy testing techniques had opened up the possibility of accidental cross-contamination of the rape kit samples, which may have had a serious effect on the outcome of the KBI's DNA testing to determine a suspect match in J.L. and E.L.'s cases. During cross-examination, the prosecutor asked Dr. Stetler about his own lab practices, including the retesting of biological samples. (R. IX, 1036). While general questions about Dr. Stetler's testing methods in his lab may have been relevant to his conclusions that the K.B.I. laboratory's practices fell short of what he maintained were acceptable professional standards, the prosecutor's subsequent questions regarding whether Dr. Stetler himself had actually attempted to retest the samples in this case were irrelevant.

Gross and Flagrant

The prosecutor's line of questioning was gross and flagrant because the

prosecutor should have known that the line of questioning was irrelevant. The Kansas legislature has defined relevant evidence as “evidence having any tendency in reason to prove any material fact.” K.S.A. 60-401(b). For the same reason Dr. Stetler stated at trial, questions regarding whether he attempted to retest the allegedly contaminated samples were irrelevant in this case because they had no tendency to prove any material fact at issue. If these samples were actually cross-contaminated (as the defense alleged) with each other or other cases that were tested at the same time, any testing *after* that contamination by Dr. Stetler would led to the same erroneous test results that the KBI lab developed during their post-contamination testing. Likewise, had those samples *not* been contaminated (as the State argued), then retesting of the samples also would have resulted in the same results as the KBI’s testing. Since retesting would have no tendency to prove (or disprove) the material fact of whether the KBI inadvertently cross-contaminated the DNA samples, questions about Dr. Stetler’s failure to retest these specific samples were irrelevant. The prosecutor showed ill will by continue down this line of irrelevant questioning.

Evidence of Ill Will

Furthermore, this line of questioning also show’s the prosecutor’s ill will. It is a well established principle of criminal law that the State bears the burden of proof at trial. *State v. Hobbs*, 248 Kan. 342, 350, 807 P.2d 120 (1991). Because neither J.L. or E.L. could identify their attacker, the State had to prove, beyond a reasonable doubt, that it was Mr. Elkins’ DNA found in the biological samples from J.L. and E.L.’s rape kits immediately after the attacks. The KBI acknowledged that their examiner had inadvertently contaminated some of the samples in these cases with her own DNA during

testing. The State, in an effort to recover from this weakness in its case, by asking these questions about why the defense's expert witness did not choose to test those samples himself, thus implying that for the defense's expert witness to have a valid opinion on the contamination issue, that Dr. Stetler had to conduct his own testing of the samples in this case. Certainly, the defense bears no burden to submit actual proof to the jury that there was contamination in order to successfully defend against the State's charges. Along those same lines, the defense had no obligation to test those samples in order to validate the defense's own expert witness's testimony. Any suggestion to that effect was highly prejudicial to the defendant's case.

The jury was instructed that it was the State's burden to prove the defendant guilty and that the defendant was not required to prove that he is not guilty. (R. II, 185). However, during closing arguments, the prosecutor further muddied the burden waters when she returned to Dr. Stetler's testimony, telling the jury,

And let me tell you the other thing. And not only could [Dr. Stetler] not give you evidence of it, every time he referred to cross-contamination, every time in his testimony, and in his report, it was "the risk," "the possibility," "the chance," "it could have happened." Never, "it did." Just a kind of possibility. Guesswork, maybe. Well, that's not evidence and that's not reliable evidence.

(R. XI, 1137). With these statements, the prosecutor returned to the idea that she initially planted during the questioning of Dr. Stetler, that in order for Dr. Stetler's opinion to be valid, he had to actually prove that the State's evidence was wrong.

Harmless Error Analysis

Finally, this erroneous line of questioning and the attempt at shifting the burden of proof to the defense cannot be deemed harmless error in this case. The only evidence of

who raped J.L. and E.L. was the DNA evidence tested by the KBI. Any improper burden shifting by the prosecutor's irrelevant questions cannot be deemed harmless. The prosecution's improper questioning that went to the heart of the State's case and Mr. Elkins' theory of defense was inconsistent with substantial justice and affected Mr. Elkins' substantial rights by potentially confusing the jury as to who bore the burden of proof at trial. See K.S.A. 60-261. For these reasons, this Court cannot say, beyond a reasonable doubt, that the prosecutor's statements had little, if any, likelihood of changing the result's of the jury's decision. *Chapman v. California*, 386 U.S. 18, 24, 17 L. Ed. 2d 705, 87 S. Ct. 824 (1967). Mr. Elkins' convictions should be reversed and his case remanded for a new trial.

Issue V: The combination of errors in this case deprived Mr. Elkins of his right to a fair trial.

Standard of Review

Cumulative trial errors may require reversal of a defendant's conviction "if the totality of circumstances substantially prejudiced the defendant and denied him a fair trial." *State v. Lumbrera*, 252 Kan. 54, 57, 845 P.2d 609 (1992) (reversal for cumulative trial errors).

Argument

Even if these issues alone do not rise to the level of requiring reversal, the entire set of proceedings in this case leaves enough concern regarding the fairness of Mr. Elkins' trial to require reversal. "When viewed cumulatively in the totality of the circumstances herein," it is evident that Mr. Elkins did not receive a fair trial as guaranteed by the Fourteenth Amendment to the United States Constitution or Section Ten of the Kansas Bill of Rights. *State v. Lumbrera*, 252 Kan. at 57 (reversal for

cumulative trial errors); *see also State v. Plaskett*, 271 Kan. 995, 27 P.3d 890 (2001) (same); *State v. Gammill*, 2 Kan. App. 2d 627, 585 P.2d 1074 (1978) (same); *United States v. Wood*, 207 F.3d 1222 (2000) (reversing involuntary manslaughter conviction even though evidence was sufficient to sustain conviction and nonconstitutional trial errors “might be harmless when viewed individually”; defendant’s “right to a fair trial was substantially impaired” by cumulative effect of errors). Mr. Elkins’ conviction should therefore be overturned and his case remanded for a new trial.

Issue VI: The district court erred when it used Mr. Elkins’ prior convictions to enhance his sentence without that criminal history first being put to a jury and proven beyond a reasonable doubt.

Standard of Review

Interpretation of the Kansas Sentencing Guidelines Act (KSGA) is a question of law, and as such, is subject to unlimited review on appeal. *State v. Perez-Moran*, 276 Kan. 830, 833, 80 P.3d 361 (2003). Although Mr. Elkins’ attorney did not object to his guidelines sentence in this case, no objection is necessary where the issue presents a question of law and this Court is asked to consider the application of *Apprendi v. New Jersey*, 530 U. S. 466, 477, 147 L. Ed. 2d. 435, 120 S. Ct. 2348 (2000). *State v. Anthony*, 273 Kan. 726, 727, 45 P.3d 852 (2002).

Argument

Mr. Elkins’ prior convictions were used to enhance his guidelines sentence but were not submitted to a jury or proven beyond a reasonable doubt. (R. II, 284-303).

Under *Apprendi v. New Jersey*, 530 U. S. 466 (2000), any fact that increases the maximum penalty a defendant can receive must be included in the charging document, put before a jury, and proved beyond a reasonable doubt. Because this was not done in

Mr. Elkins' case, his Sixth and Fourteenth Amendment rights under the United States Constitution were violated. Mr. Elkins acknowledges that this issue has previously been decided by the Kansas Supreme Court in *State v. Ivory*, 273 Kan. 44, 41 P.3d 781 (2002), where the Court held that prior convictions could be used for determining a defendant's placement on the sentencing guidelines without violating *Apprendi*. See *Ivory*, 273 Kan. 44. Mr. Elkins includes this issue now to preserve it for possible federal review.

Issue VII: The district court erred when it assigned Mr. Elkins an aggravated sentence within the guidelines grid box on all seven of his convictions without first putting those aggravating factors to a jury or proving them beyond a reasonable doubt.

Standard of Review

Interpretation of a sentencing statute is a question of law subject to unlimited review on appeal. *State v. Ruiz-Reyes*, 285 Kan. 650, 653, 175 P.3d 849 (2008). Because Mr. Elkins' constitutional challenge to the sentencing statute involves a question of law, this Court has unlimited review. *State v. Allen*, 283 Kan. 372, 374, 153 P.3d 488 (2007). Although Mr. Elkins' attorney did not object to the imposition of the aggravated sentence on any of the counts in this case, no objection is necessary where the issue presents a question of law and this Court is asked to consider the application of *Apprendi v. New Jersey*, 530 U. S. 466, 477, 147 L. Ed. 2d. 435, 120 S. Ct. 2348 (2000). *State v. Anthony*, 273 Kan. 726, 727, 45 P.3d 852 (2002).

Argument

In order to impose the aggravated sentence listed in a grid box of the Kansas Sentencing Guidelines, K.S.A. 21-4704 requires the district court find aggravating factors justifying such a sentence. Under *Apprendi*, however, any fact used to increase the

defendant's sentence must be proved to a jury beyond a reasonable doubt. Because the district court sentenced Mr. Elkins to the aggravated sentence within the appropriate grid box on all seven counts without first requiring that the jury find the presence of any aggravating factors, the district court violated Mr. Elkins' rights under the Sixth and Fourteenth Amendments.

In *Apprendi*, the United States Supreme Court held that any fact that increases the maximum penalty a defendant can receive must be included in the information, put before a jury, and proved beyond a reasonable doubt. *Apprendi*, 530 U.S. at 490. In *Cunningham v. California*, 549 U.S. 270, 166 L. Ed. 2d 856, 127 S. Ct. 856 (2007), the United States Supreme Court relied on *Apprendi* in striking down California's sentencing guidelines. The Court held the guidelines were unconstitutional because they allowed the sentencing court to impose the aggravated sentence where it, not the jury, found the presence of aggravating factors. *Cunningham*, 127 S. Ct. at 856, 871.

Similarly, K.S.A. 2005 Supp. 21-4704(e)(1) allows a district court to impose the aggravated sentence in the grid box, but only if it finds aggravating factors that are insufficient to warrant a departure: "The sentencing judge *shall select* the center of the range in the usual case and *reserve* the upper and lower limits for aggravating and mitigating factors insufficient to warrant a departure." (Italics added). Thus, the statute requires that the district court impose the presumptive sentence unless it finds factors that support an aggravated sentence. Absent such factors, the district court is without authority to impose the aggravated sentence in the grid box.

The sentencing scheme in Kansas, like the scheme struck down by the Supreme Court in *Cunningham*, requires the district court to make such a finding in order to

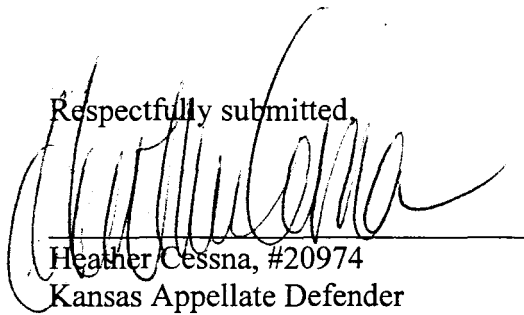
increase the defendant's sentence. Under *Apprendi*, such a finding is an element of the offense, and the State must put it to a jury and prove it beyond a reasonable doubt.

Under *Cunningham*, any factual findings required to increase a defendant's sentence must be put to a jury and proved beyond a reasonable doubt. Because that requirement was not met in the present case, this sentence violates Mr. Elkins' rights under the Sixth and Fourteenth Amendments to the United States Constitution, and this Court must remand for a new sentencing hearing with directions to the sentencing court to impose the mitigated or presumptive, middle of the box guidelines sentence. In making this argument, Mr. Elkins acknowledges the Supreme Court's decision in *State v. Johnson*, 286 Kan. 824, Syl. ¶ 5, 190 P.3d 207 (2008), but respectfully argues that *Johnson* was wrongly decided for the reasons stated above, and includes this issue to preserve it for federal review.

Conclusion

Mr. Elkins respectfully request that, for the foregoing reasons, his convictions and sentence be vacated and his case remanded back to the district court for further proceedings.

Respectfully submitted,

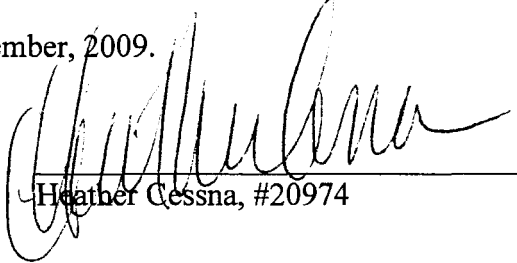


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Certificate of Service

The undersigned hereby certifies that service of the above and foregoing brief was made by mailing five copies, postage prepaid, to Charles E. Branson, Douglas County District Attorney, 111 E. 11th, Lawrence, KS 66044, and by hand delivering one copy to Stephen N. Six, Attorney General, Kansas Judicial Center, Topeka, Kansas 66612, on the 17th day of November, 2009.



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