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CAROL G. GREEN
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No. 2009-102714-A

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

STATE OF KANSAS
Plaintiff-Appellee

vs.

TAD N. KEPLEY
Defendant-Appellant

BRIEF OF APPELLANT

Appeal from the District Court of Shawnee County, Kansas
Honorable Jean M. Schmidt, Judge
District Court Case No. 07 CR 608

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Nature of the Case

Tad Kepley was charged and convicted of two counts of forgery. He now appeals his convictions.

Statement of the Issues

- I. **The district court erred in denying Mr. Kepley's motion to dismiss on speedy trial grounds.**
- II. **Because there was no evidence that the \$20.00 bill was forged "[o]n or about the 9th day of August, 2005," there was insufficient evidence to convict Mr. Kepley on count one.**
- III. **The district court erred in denying Mr. Kepleys' motion to arrest judgment.**
- IV. **The district court erred in allowing Special Agent Oesterreich to comment on the ultimate conclusion that the money was, in fact, counterfeit.**
- V. **The district court erred in giving a prior bad acts limiting instruction that did not properly explain to the jury the relationship between the prior bad acts, the K.S.A. 60-455 exceptions, and the facts.**
- VI. **The combination of errors denied Mr. Kepley his constitutional right to a fair trial.**

Statement of Facts

After filling his tank with gas, Patrick Callan entered the Kwik shop to pay in cash. (R.XII, 51). He paid the attendant with a one-hundred-dollar bill. (R.XII, 52). The attendant, believing the bill to be fake, contacted the police who, shortly thereafter, arrived on the scene. (R.XII, 73).

Callan was handcuffed and taken to the police station for questioning. (R.XII, 62). Detective Kent Biggs, along with a special agent for the secret

service, Justin Oesterreich, interrogated Callan. (R.XIII, 124). Callan told them that he had been two places that day; he went to Mr. Kepley's home where he had received money from Mr. Kepley and also to the bank where he opened a savings account. (R.XII, 53, 60).

On this information, Biggs and Detective Patrick McLaughlin went to Mr. Kepley's home. (R.XII, 91; R.XIII, 132). Biggs knocked on Mr. Kepley's front door but there was no answer. (R.XII, 92-93; R.XIII, 133). The officers drove around to the alleyway and watched the home. (R.XII, 92-93; R.XIII, 133).

A short time later, Mr. Kepley exited the back of the home, entered his minivan, and drove off. (R.XII, 93-94; R.XIII, 134-35). The officers pulled Mr. Kepley over and questioned him. (R.XII, 94; R.XIII, 134-35).

At some point during the stop, Biggs tried to open the passenger door. (R.XII, 94). It was locked, so he opened the driver's door and reached across to open the passenger door. (R.XII, 94). When he leaned over, he saw a \$20 bill on the center console. (R.XII, 94).

Mr. Kepley was interrogated. (R.XIII, 147). Biggs testified that Mr. Kepley told him that he made the money to pay off a debt for methadone he had received. (R.XIII, 147).

After the arrest, a search warrant was obtained and Mr. Kepley's home was searched. (R.XII, 97; R.XIII, 141). Several uncut counterfeit bills were found. (R.XIII, 141).

Mr. Kepley testified that the money had been created as part of an art project. (R.XIII, 201). He testified that the bills were made in Madison Wisconsin

in 2001. (R.XIII, 201).

Mr. Kepley was charged with two counts of forgery. (R.I, 14). He was subsequently convicted, at trial, on both counts. (R.XIII, 268). Mr. Kepley was sentenced to ten months on count one and eight months on count to two. (R.II, 159). He was then placed on probation. (R.II, 159).

Arguments and Authority

I. The district court erred in denying Mr. Kepley's motion to dismiss on speedy trial grounds.

Mr. Kepley was arraigned on August 24, 2007. (R.I, 4). He was not in jail during the pendency of this case. Mr. Kepley was not tried until April 14, 2008, 244 days after arraignment. Mr. Kepley's statutory speedy trial rights were violated when the State took 244 days to try him. This Court should vacate Mr. Kepley's convictions with prejudice.

1. Objection.

Mr. Kepley objected on speedy trial grounds. (R.I, 64).

2. Standard of review.

A claimed violation of the statutory right to speedy trial presents an issue of law over which the appellate court has unlimited review. *State v. Brown*, 283 Kan. 658, 661, 157 P.3d 624 (2007).

3. *Mr. Kepley's speedy trial rights, pursuant to K.S.A. 22-3402(1), were violated.*

The speedy trial statute requires a defendant, that is not in custody, to be tried within 180 days of arraignment. K.S.A. 22-3402(1).

- a. *08-24-07 to 11-08-07 (76 days): Arraignment till first criminal assignment docket.*

Mr. Kepley was arraigned on August 24, 2007. (R.I, 4). The court set the case on the criminal assignment docket for November 8, 2007. Mr. Kepley filed a motion to dismiss on October 17, 2007, arguing that the production of counterfeit money did not fall within K.S.A. 21-3710. (R.I, 4; R.I, 52). The State filed its response on October 19, 2007. (R.I, 54). On November 8, 2007, the district court set the issue for hearing on November 28, 2007. (R.I, 4).

Because this case was originally set for the November 8, 2007, criminal assignment docket, there was no delay in this case until that date when the case was set over till November 28, 2007, to address the motion. The 76 days are chargeable to the State.

- b. *11-08-07 to 11-28-07 (20 days): First criminal assignment docket till motion hearing on Mr. Kepley's motion to dismiss.*

The time from 11-08-07 to 11-28-07 (20 days) should be assigned to Mr. Kepley. Mr. Kepley's motion caused this delay.

- c. *11-28-07 to March 11, 2008 (103 days); Time between motion hearing and court setting the case on the criminal assignment docket.*

An informal hearing was held on November 28, 2007. (R.IX, 4). The court took the case under advisement, allowing either side to file additional authority. (R.IX, 5). There was no reason for the State to delay the setting of the trial date. The court could have set the trial for some time in December, January, February, and addressed the motion leading up to the trial. The State could have insisted that the trial be set in December, January, February, but it did not do so.

As an aside, the fact that the court allowed the parties to file additional caselaw after the November 28, 2007, hearing was irrelevant. Generally, a party can file additional caselaw any time leading up to the decision by the court. It is only when the court cuts off the date, that additional caselaw can be provided, that it becomes important. Nothing was stopping the court from rendering its decision shortly after the November 28, 2007, hearing. It should be noted that no additional authority was filed.

It is also important to note that court had 32 days between when the State's response (10-19-07) was filed and when the motion hearing was held to evaluate the motion.

The result of the failures of the State and the court, was the delay of almost four months before a hearing was held to decide the trial date. This time should be assigned to the State.

- d. *March 11, 2008 to April 14, 2008 (34 days); Time between placing of case on criminal assignment docket to the start of the trial.*

The next action in the case occurred on March 11, 2008, when the case was set on the criminal assignment docket for March 13, 2008. (R.I, 4). On March 13, 2008, the court set the case on the criminal assignment docket for March 24, 2008. (R.I, 4). At the March 24, 2008, hearing, the court set the trial date at April 14, 2008. (R.I, 5-6). Because the time between the criminal assignment docket and the trial would have been necessary, even without the delay, the time from March 13, 2008, to April 14, 2008, should be charged to the State.

- e. *State's burden to ensure Mr. Kepley's speedy trial rights are preserved.*

The State has the sole burden of ensuring that a defendant's speedy trial rights are not violated. *State v. Gore*, 39 Kan.App.2d 779, 184 P.3d 972 (2008).

This Court, in *Gore*, ruled:

Our 180-day speedy trial rule operates like a statute of limitations. The State, not *Gore*, was responsible for ensuring that *Gore* was tried before the statutory speedy trial deadline expired. See *Adams*, 283 Kan. at 370, 153 P.3d 512. *Gore* had no duty to bring himself to trial. Because the burden was on the State to comply with the statutory speedy trial rule, and because the trial court's findings were inadequate to show that the 56-day delay was caused by the fault of *Gore*, we determine that the 56-day continuance should have been attributed to the State.

Gore, 39 Kan.App.2d at 787. The State, and the court, had the ability to set the trial date on November 28, 2007. The failure to do so denied Mr. Kepley his statutory right to a speedy trial.

The 76 days between August 24, 2007, and November 8, 2007, the 103 days between November 28, 2007, and March 11, 2008, and the 32 days between March 13, 2008, and April 14, 2008, for a total of 211, should be charged to the state. Because the district court failed to try Mr. Kepley within the mandatory statutory speedy trial period, this Court should vacate his convictions with prejudice.

II. Because there was no evidence that the \$20.00 bill was forged “[o]n or about the 9th day of August, 2005,” there was insufficient evidence to convict Mr. Kepley on count one.

To convict Mr. Kepley of forgery, the State was required to prove that the \$20.00 bill was created or altered “[o]n or about the 9th day of August, 2005.” There was, however, no evidence that the bill was made on or about the 9th of August, 2005, and, thus, there was insufficient evidence to convict Mr. Kepley of this crime. This Court should vacate both of Mr. Kepley’s conviction on count one.

1. Objection.

Mr. Carter contested the allegations by the State. He pled not guilty, made an oral motion for judgment of acquittal at trial, argued for his innocence during the closing argument, and made a post-trial motion for judgment of acquittal. (R.VIII; R.XIII, 185, 248; R.XV).

2. *Standard of review.*

The standard of review in cases involving sufficiency of evidence is whether, after review of all the evidence, viewed in the light most favorable to the state, a rational fact finder could have found the defendant guilty beyond a reasonable doubt. *State v. Graham*, 247 Kan. 388, 398, 799 P.2d 1003 (1990) citing *State v. Smith*, 245 Kan.381, 392, 781 P.2d 666 (1989).

3. *There was no evidence that these counterfeit bills were made on or about the 9th of August, 2005.*

To convict Mr. Kepley of the first count of forgery, the State was required to prove, beyond a reasonable doubt, that he “made or altered” the \$20.00 counterfeit bill “[o]n or about the 9th day of August, 2005.” (R.I, 97). The only evidence presented, however, was that the bill was created two months before.

Biggs testified that Mr. Kepley admitted to making the bill (R.XIII, 139). In fact, there were scraps and pieces of bills in the copier at Mr. Kepley’s home. (R.XIII, 141, 171).

Biggs testified that the bill was made two months prior to the interrogation of Mr. Kepley.

Q. Okay. I would like to get a little more details about the interview, back to the interview on August 9th with Mr. Kepley, as well as Agent Oudealink. He told you he made - - your testimony is that he made the copies using that copier. Did he tell you when he made them, when he made these copies, these bills?

A. I don’t recall specifically the time frame in which it had all taken place. I had been over, **I would say even maybe a couple months.** But exactly, I don’t recall, no.

(R.XIII, 171)(Emphasis added). The only other evidence was Mr. Kepley’s

testimony that the bill was made in 2001 in Madison Wisconsin. (R.XIII, 201).

The State had the burden to prove, beyond a reasonable doubt, that Mr. Kepley created the bill on or about August 9, 2005. The State's own witness, however, testified that it was created two months prior to the date. There was no evidence to convict and presented that this crime occurred on or about August 9, 2005. This Court should vacate count one with prejudice.

III. The district court erred in denying Mr. Kepleys' motion to arrest judgment.

After Mr. Kepley was convicted, he filed a motion for arrest of judgment because the complaint did not list the "person" who's name was forged on the document; namely the the U.S. Treasury. Because the charging document failed to list this fact, the district court erred in denying Mr. Kepley's motion for judgment of acquittal.

1. Objection.

Mr. Kepley filed a motion for arrest of judgment. (R.II, 105).

2. Standard of review.

The sufficiency of a charging document to confer jurisdiction is a question of law over which the court has unlimited review. *State v. Hooker*, 271 Kan. 52, 60, 21 P.3d 964 (2001). Because Mr. Kepley properly preserved this issue, the pre-Hall standard applies. See *State v. Shirley*, 277 Kan. 659, 661, 89 P.3d 649

(2004).

3. *Test.*

When a defendant properly preserves the issue regarding sufficiency of the complaint through a motion to arrest judgment, the following test controls: If the charging document omits one or more of the essential elements of the crime, it is fatally defective and the conviction must be reversed for lack of jurisdiction.

Shirley, 277 Kan. at 661-62, 89 P.3d 649 (2004).

In addition, if the State fails to allege the facts supporting one of the elements, the complaint is fatally defective. The Kansas Supreme Court, in *State v. Shirley*, 277 Kan. 659, 665, 89 P.3d 649 (2004), reversed the defendant's conviction because the State failed to allege sufficient facts in the charging document.

K.S.A.2003 Supp. 22-3201(b) requires the State to set out the essential facts of the crime. The purpose for requiring a recitation of the essential facts is to ensure that the accused is informed of the charges against him or her so that he or she may prepare a defense. *Hall*, 246 Kan. at 754, 793 P.2d 737. "The test for sufficiency ought to be whether it is fair to require the defendant to defend on the basis of the charge as stated in the particular indictment or information." *Hall*, 246 Kan. at 754, 793 P.2d 737.

In this case, the State was required to prove that Mr. Kepley used another person's identity to pass the bills. The complaint, however, did not list who this person was. It did not state that the U.S. Treasury was the forged person on the documents. Because of this, the complaint in this case was fatally defective and this Court should vacate Mr. Kepley's convictions.

IV. The district court erred in allowing Special Agent Oesterreich to comment on the ultimate conclusion that the money was, in fact, counterfeit.

At trial, the State admitted testimony by Special Agent Oesterreich that the two bills were, in fact, counterfeit. This was opinion evidence that was improperly admitted and this Court should reverse Mr. Kepley's convictions and remand his case for a new trial.

1. Objection.

Mr. Kepley objected to the testimony of Oesterrich that these bills were, in fact, counterfeit, arguing that if Oesterrich was an expert the defense should have been notified and received information. (R.XII, 48, 65). The court ruled that the defense waived the argument because it was not raised in the previous trial. (R.XII, 66).

2. Standard of review.

Whether the district court erred in admitting the opinion testimony is a question of constitutional and statutory law and thus this Court has an unlimited scope of review. *State v. Mertz*, 258 Kan. 745, 748, 907 P.2d 847 (1995).

3. Relevancy and the introduction of opinion testimony.

It is the jury's function to weigh the evidence and find the facts. *State v. Fry*, 173 Kan. 536, 543, 249 P.2d 929. "The jury is the exclusive judge of all material questions of fact. (*State v. Jensen*, 197 Kan. 427, 441, 417 P.2d 273.)"

State v. Long, 210 Kan. 436, 502 P.2d 810 (1972). Generally, all relevant evidence is admissible. K.S.A. 60-407(f). Relevant evidence means evidence having any tendency in reason to prove any material fact. K.S.A. 60-401(b).

With this in mind, the Kansas Legislature has chosen, in specific circumstances, to limit the introduction of relevant evidence. For example, the Kansas Legislature has chosen to limit evidence dealing with credibility (K.S.A. 60-420 et seq.), privileged communications (K.S.A. 60-423 et seq.), character evidence (K.S.A. 60-446 et seq.), and prior bad acts (K.S.A. 60-455).

These limitations are rooted in medieval law where testimony was limited to personal or firsthand knowledge. See *The Impropriety of Expert Witness Testimony on the Law*, Thomas E. Baker, 40 U. Kan. L. Rev. 325, 326 (1992). The common law opinion rule established itself in the eighteenth century. 40 U. Kan. L. Rev. at 326. Borrowing from the common law rule prohibiting opinion testimony, the Kansas Legislature enacted K.S.A. 60-456:

60-456. Testimony in form of opinion.

(a) If the witness is not testifying as an expert his or her testimony in the form of opinions or inferences is limited to such opinions or inferences as the judge finds (a) may be rationally based on the perception of the witness and (b) are helpful to a clearer understanding of his or her testimony.

(b) If the witness is testifying as an expert, testimony of the witness in the form of opinions or inferences is limited to such opinions as the judge finds are (1) based on facts or data perceived by or personally known or made known to the witness at the hearing and (2) within the scope of the special knowledge, skill, experience or training possessed by the witness.

(c) Unless the judge excludes the testimony he or she shall be deemed to have made the finding requisite to its admission.

(d) Testimony in the form of opinions or inferences otherwise admissible under this article is not objectionable because it embraces the ultimate issue or issues to be decided by the trier of the fact.

4. *Lay witness testimony.*

K.S.A. 60-456(a) allows a party to present lay witness opinion testimony only in specific instances. It states:

(a) If the witness is not testifying as an expert his or her testimony in the form of opinions or inferences is limited to such opinions or inferences as the judge finds (a) may be rationally based on the perception of the witness and (b) are helpful to a clearer understanding of his or her testimony.

In order to admit the lay witness opinion testimony, the witness must have been personally present. Oesterreich was present to analyze the bills.

The lay witness' opinion testimony must also be "helpful to a clearer understanding of his or her testimony." K.S.A. 60-456(a). Oesterreich's opinion testimony was not helpful to the jury. Oesterreich's testimony, on the various safeguards that are incorporated in our paper money, was relevant. Oesterreich properly described the various safeguards to the jury.

Once the jury understood the various safeguards, it was in as good of a position as the officer to take the next step of using his testimony to make a determination whether the bills were counterfeit.

The only relevance of Oesterreich's opinion testimony was to improperly bolster the State's case. This Court, in an unpublished decision in *State v. Dahlke*, 130 P.3d 1247, 2006 WL 851235 (Kan. App. 2006), cautioned parties on just this issue.

On the other hand, the purpose behind the rule that prohibits expert testimony seems designed to preserve the province of factfinding for the jury. A jury may attribute undue weight to the conclusions of a witness because of his or her expertise.

By allowing Oesterreich to tell the jury that these bills were counterfeit, it took away the jury's duty to make this factual finding. The jury simply had to rely on Oesterreich's testimony.

5. *Expert testimony.*

Although the State did not move to classify Oesterreich as an expert, it certainly wanted the jury to believe it. The State's only questions were related to whether these bills were counterfeit. (R.XII, 14-35).

The expert testimony provision of K.S.A. 60-456 requires a similar "helpful to the jury" requirement. Before an expert can testify to his opinion, that opinion must be outside the common knowledge of the jury:

Where the normal experience and qualifications of lay persons serving as jurors permit them to draw proper conclusions from given facts and circumstances, expert conclusions or opinions are inadmissible. *State v. Hodges*, 239 Kan. 63, 67, 716 P.2d 563 (1986). An expert's opinion, pursuant to K.S.A. 60-456, is admissible up to the point where an expression of opinion would require the expert to pass upon the credibility of witnesses or the weight of disputed evidence. *State v. Lash*, 237 Kan. 384, Syl. ¶ 1, 699 P.2d 49 (1985).

State v. Lumbrera, 257 Kan. 144, 158, 891 P.2d 1096 (1995). In this case, Oesterreich was asked to give his opinion on whether these bills were counterfeit. (R.XII, 14-35). As stated above, whether these bills were counterfeit was not outside the common knowledge or understanding of a lay juror.

6. *Prejudice to Mr. Kepley.*

The presentation of this evidence was detrimental to Mr. Kepley's case. The State was required to prove that these bills were counterfeit. By allowing this evidence, the State took this factfinding requirement from the jury. It also allowed the State to improperly bolster its own credibility by showing that an officer sided with it.

The district court erred in overruling Mr. Kepley's objection to Oesterreich's testimony. This Court should reverse Mr. Kepley's conviction and remand his case for a new trial.

V. The district court erred in giving a prior bad acts limiting instruction that did not properly explain to the jury the relationship between the prior bad acts, the K.S.A. 60-455 exceptions, and the facts.

After admitting prior bad acts evidence, the court gave a general limiting instruction that cautioned the jury that Mr. Kepley's prior bad acts could only be used for motive, intent, or absence of mistake. The general limiting instruction does not define the 60-455 exceptions, nor does it explain how the prior bad acts evidence relates to the exceptions. Because the limiting instruction was too broad, this Court should reverse Mr. Kepley's convictions and remand his case for a new trial.

1. *No objection.*

Mr. Kepley's counsel did not object to the limiting instruction.

2. *Standard of review.*

The proper standard of review, where there is no specific objection, is whether the instruction is clearly erroneous. *State v. Decker*, 275 Kan. 502, 504, 66 P.3d 915 (2003). Instructions are clearly erroneous only if the reviewing court is firmly convinced that there is a real possibility the jury would have rendered a different verdict if the trial error had not occurred." *Decker*, 275 Kan. At 504.

3. *Prior bad acts evidence.*

The State moved to admit prior bad acts evidence against Mr. Kepley. The prior bad acts evidence were the statements made that Mr. Kepley created the money to trade for methadone. (R.XIII, 147).

4. *The jury instruction was too broad.*

After the State was allowed to present prior bad acts against Mr. Kepley, the court gave the following limiting instruction:

Evidence has been admitted tending to prove that the defendant committed a crime other than the present crime charged. This evidence may be considered solely for the purpose of proving the defendant's motive, opportunity, intent, preparation, plan, knowledge or identity.

(R.I, 51; R.VII, 310).

The district court sought to comply with the Kansas Supreme Court's holding in *State v. Gunby*, 282 Kan. 39, 144 P.3d 647 (2006) (trial court required to give limiting instruction when admitting prior crimes evidence under K.S.A. 60-455). Despite the good intention, the court gave a limiting instruction that was

too broad. The Kansas Supreme Court, in *Reid*, 286 Kan. at 503, ruled that a limiting instruction must inform the jury “of the specific purpose for admission whenever 60-455 evidence comes in.”

5. *Result of the too broad instruction.*

With an overbroad instruction, the jury would have no way of knowing what is meant by motive, intent, or absence of mistake. Merriam-Webster’s online dictionary has two separate definitions for “motive.” <http://www.merriam-webster.com/dictionary/motive>. It has three separate definitions for “intent” and four for “mistake.” <http://www.merriam-webster.com>.

Not only would the jurors have to know which definition was correct, they would have to know how those definitions applied in a court of law. The jurors would have to know what these exceptions meant in the context of Mr. Kepley’s use of the bills.

6. *Mr. Kepley was prejudiced by the overbroad instruction.*

This Court has previously recognized the prejudices associated with prior bad acts evidence and warned that a trial court should be conscious of the possibility of prejudicing the jury and vigilant in avoiding such results. See *State v. Davis*, 213 Kan. 54, 58, 515 P.2d 802 (1973). In this case, the district court should have been conscious of the prejudices associated with the prior bad acts evidence.

Without explaining what is meant by these exceptions and linking it to the prior bad acts evidence, the only reasonable deduction for the jury would be to use it as propensity evidence.

It was clearly erroneous to give an instruction that was wholly insufficient to meet the *Gunby* rule. Because of this, this Court should reverse Mr. Kepley's convictions and remand his case for a new trial.

VI. The combination of errors denied Mr. Kepley his constitutional right to a fair trial.

Even if Mr. Kepley has not raised one issue that requires reversal alone, the cumulative effect of the trial court's errors requires reversal in his case. This Court must reverse his 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).

It is evident that Mr. Kepley did not receive a fair trial as guaranteed by the Fourteenth Amendment to the United States Constitution and Section Ten of the Kansas Bill of Rights. *State v. Lumbrera*, supra, (reversal for cumulative trial errors); see also *State v. Plaskett*, 271 Kan. 995, 27 P.3d 890 (2001).

The district court erred in allowing Oesterreich to give his personal opinion on whether these bills were counterfeit. The district court also erred in allowing the prior bad acts evidence. Even if one of the errors was not sufficient to overturn Mr. Kepley's convictions, this Court should reverse Mr. Kepley's case because of the cumulative effect of the errors.

Conclusion

For the foregoing reasons, this Court should reverse Mr. Kepley's conviction on count 1 with prejudice. In the alternative, this Court should vacate Mr. Kepley's convictions because of the defective complaint. In the alternative, this Court should reverse Mr. Kepley's convictions and remand his case for a new trial.

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 two copies, postage prepaid, to Chad Taylor, Shawnee County District Attorney, 200 SE 7th, Suite 214, Topeka, KS 66603-3922; and by hand delivering one copy to Stephen N. Six, Attorney General, Kansas Judicial Center, Topeka, KS 66612 on the 20 day of January, 2010.

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