

No. 08-102714-A

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IN THE SUPREME COURT  
OF THE STATE OF KANSAS

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STATE OF KANSAS  
Plaintiff-Appellee

v.

TAD N. KEPLEY  
Defendant-Appellant

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BRIEF OF APPELLEE

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APPEAL FROM THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS  
JEAN M. SCHMIDT, JUDGE  
DISTRICT COURT CASE NO. 07-CR-608

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## NATURE OF THE CASE

Tad N. Kepley appeals his convictions for two counts of forgery arguing: 1) his statutory right to a speedy trial was violated; 2) there was insufficient evidence for his convictions; 3) the complaint was jurisdictionally defective; 4) Special Agent's Oesterreich's conclusion that the money was counterfeit was improperly admitted; 5) the district court erred in giving an insufficient K.S.A. 60-455 limiting instruction; and 6) the cumulative effect of the trial errors requires reversal.

## STATEMENT OF THE ISSUES

- I. **KEPLEY'S STATUTORY RIGHT TO A SPEEDY TRIAL WAS NOT VIOLATED.**
- II. **THERE WAS SUFFICIENT EVIDENCE TO SUPPORT KEPLEY'S FORGERY CONVICTION.**
- III. **THE DISTRICT COURT PROPERLY DENIED KEPLEY'S MOTION TO ARREST JUDGMENT.**
- IV. **KEPLEY FAILED TO PRESERVE ANY OBJECTION TO SPECIAL AGENT OESTERREICH'S TESTIMONY, BUT EVEN IF HIS TESTIMONY WAS IMPROPERLY ADMITTED, ANY ERROR WAS HARMLESS.**
- V. **THE DISTRICT COURT'S K.S.A. 60-455 LIMITING INSTRUCTION WAS PROPER.**
- VI. **KEPLEY'S CONVICTIONS ARE NOT SUBJECT TO REVERSAL UNDER A THEORY OF CUMULATIVE ERROR.**

## STATEMENT OF THE FACTS

On August 5, 2005, Pat Callan attempted to pay for his gas with what turned out to be a counterfeit \$100 that he had received from Tad N. Kepley. (R. XII, 50-52, 54.) The clerk noticed the bill was counterfeit, and law enforcement was contacted. (R. XII, 51.)

Kepley was subsequently stopped by law enforcement, and a \$20 counterfeit bill was found on the center dash of the console of his vehicle. (R. XII, 95-96.) Then, during questioning, Kepley admitted that he made the money to pay for methodone. (R. XIII, 147.)

However, during trial Kepley testified that he made the money as part of an art project in Wisconsin in 2001. (R. XIII, 201-02.) He further testified that he never gave the money to Callan. (R. XIII, 199-200.)

Based on the evidence, the jury convicted Kepley of two counts of forgery. (R. XIII, 268-69.) He timely appeals. (R. II, 115.)

Additional facts will be discussed as necessary.

### **ARGUMENTS AND AUTHORITIES**

#### **I. KEPLEY'S STATUTORY RIGHT TO A SPEEDY TRIAL WAS NOT VIOLATED.**

Kepley argues his statutory right to a speedy trial was violated when his first trial, during which he received a mistrial, did not occur within 180 days of his arraignment. Appellate courts exercise unlimited review over a district court's legal ruling regarding violations of a defendant's statutory right to a speedy trial. *State v. Vaughn*, 288 Kan. 140, 143, 200 P.3d 446 (2009).

Under K.S.A. 22-3402(2), the State was required to bring Kepley to trial within 180 days of his arraignment unless the delay beyond the required 180 days was attributed to Kepley or the court ordered a continuance. While Kepley was brought to trial beyond 180 days of his arraignment on August 24, 2007, any days beyond the 180 day limitation should be attributed to Kepley rather than the State.

It is undisputed that the time period from August 24, 2007 until October 16, 2007 must be attributed to the State. This time period amounts to 53 days being attributed to the State.

However, the remaining time between October 17, 2007 and April 14, 2008 is disputed. On October 17, 2007, Kepley filed a motion to dismiss under K.S.A. 22-3208(4). (R. I, 52.) On November 8, 2007, Kepley's motion was set for a hearing on November 28, 2007. (R. I, 4.) Although there is no record of the hearing, it is apparent from the record that a hearing on the motion was held on November 28, 2007. (R. IX, 4.) At this hearing, the district court asked the parties to provide any additional authority concerning their positions on the case. (R. IX, 5.) The parties were then given at least until December 3, 2007 to provide authority for their positions. (R. IX, 5-6; I, 68.)

The filing of Kepley's motion on October 17, 2007 stopped the speedy trial clock for a reasonable amount of time to allow the State to process the motion. *State v. Southard*, 261 Kan. 744, 748, 933 P.2d 730 (1997). In this case, the State responded to the motion on October 19, 2007. (R. I, 54.) Therefore, this 3 day time period must be attributed to Kepley rather than the State.

Meanwhile, Kepley correctly concedes that the time period between November 8, 2007 and November 28, 2007 is attributable to him. (Appellant's Brief, 4); *Southard*, 261 Kan. at 748-49. However, the State believes this time period encompasses 21 days rather than the 20 days Kepley has conceded he should be charged.

Furthermore, the district court's allocation of additional time for both parties to file additional authority was also caused by Kepley's motion. Thus, the time period between November 28, 2007 and December 3, 2007 must also be attributed to him.

*Southard*, 261 Kan. at 748-49. This amounts to an additional 4 days being attributed to Kepley rather than the State.

Furthermore, a reasonable amount of time taken by the court to decide the motion should be charged to Kepley. The Kansas Supreme Court has ruled that a reasonable amount of time is two to three weeks. *Southard*, 261 at 749. Because the issue in the motion had not been addressed by Kansas case law, it would be reasonable to allot three weeks for the district court to decide the motion in this case. (R. I, 52.) Therefore, an additional 21 days should be charged to the defendant.

Kepley filed another motion to dismiss on March 19, 2008. (R. I, 64.) The State responded on March 21, 2008, and the district court denied the motion at the March 21, 2008 hearing. (R. I. 64; IX, 5.) Once again, the State's and the district court's reasonable amount of time to process and rule on Kepley's motion must be attributed to Kepley. Thus, this 3 day time period must be attributed to Kepley. *Southard*, 267 at 748-49.

Furthermore, on March 21, 2008, Kepley requested a continuance of the March 24, 2008 trial setting because Kepley would have serious issues with being able to appear on March 24, 2008. (R. IX, 9, 11.) Based on Kepley's continuance, the trial was rescheduled for April 14, 2008. (R. IX, 11.) This 25 day time period must be attributed to Kepley. *State v. Brown*, 283 Kan. 658, 662, 157 P.3d 624 (2007).

Therefore, prior to the district court being allotted a reasonable amount of time to rule on Kepley's motions, only the following time periods are attributed to the State: August 24, 2007 through October 16, 2007, October 20, 2007 through November 7, 2007, and November 29, 2007 through March 19, 2007. These time periods amount to a total of 184 days. While the State believes that this court could properly allocate 3 weeks, or

21 days, to Kepley for the district court's consideration of Kepley's first motion to dismiss, the State only needs to have 4 days attributed to Kepley. With the subtraction of this very reasonable amount of time, it is clear that no speedy trial violation occurred.

## **II. THERE WAS SUFFICIENT EVIDENCE TO SUPPORT KEPLEY'S FORGERY CONVICTION.**

Kepley argues that his conviction on the first count of forgery is not supported by sufficient evidence because the State did not prove Kepley made the bill on or about August 9, 2005. (Appellant's Brief, 8.) "When the sufficiency of the evidence is challenged on appeal, this court must determine whether, after a review of all the evidence, viewed in the light most favorable to the prosecution, we are convinced that a rational factfinder could have found the defendant guilty beyond a reasonable doubt." *State v. Murray*, 285 Kan. 503, 536, 174 P.3d 407 (2008). In making this determination, this court does not reassess the weight and credibility of the evidence presented at trial because the weighing of the credibility of the evidence is solely the job of the factfinder. *Murray*, 285 Kan. at 540.

Kepley does not allege that time is an essential element of forgery. When time is not an essential element, the State is not required to prove the exact date on which an offense was committed, but rather the State is merely required to establish that the offense charged was committed on or about the date alleged and prior to the expiration of the statute of limitations. *State v. Smith*, 232 Kan. 128, 134, 652 P.2d 703 (1982). Furthermore, as long as the defendant is not misled or prejudiced in making his defense, the date is unimportant, and a conviction may properly follow upon sufficient proof of the commission of the crime at any time within the statute of limitations. *State v. White*, 1 Kan. App. 2d 452, 454, 571 P.2d 6 (1977).

Kepley is correct that the only evidence presented by the State regarding the time Kepley made the counterfeit money was that when Kepley was interviewed on August 9, 2005, Kepley admitted to making the money in within a couple of months of the interview. (R. XIII, 171.) Kepley does not argue that this time frame is outside of the statute of limitations. Furthermore, the time period of a couple of months is consistent with the requirement that State must establish that the offense was committed on or about the alleged date of the offense.

Although it does not appear that there are any Kansas cases construing on or about to include a couple of months prior to the alleged date, other courts have held that dates which were a few months off of the alleged date of the offense were sufficient to support the conviction. One such example is the 10<sup>th</sup> Circuit, which applies the standard that the date must be "reasonably near" to the alleged date. Applying this standard, the court found that sometime in the summer was reasonably near to June of 1994. *U.S. v. Castillo*, 140 F.3d 874, 885 (10<sup>th</sup> Cir. 1998). Therefore, the time span of a couple of months prior to the alleged date of the offense meets the requirement that the State prove the crime happened on or about August 5, 2005.

In addition, Kepley's defense was not prejudiced by the time frame proven by the State. Kepley's defense was that although he made the counterfeit bill, he made the bill in Wisconsin in 2001, and that the State did not prove he made the bill on or about August 5, 2005. (R. XIII, 201, 249, 251-52.) Therefore, his defense did not center on the exact date of August 5, 2005 or even anytime within the statute of limitations. Thus, his defense was not prejudiced.

Because the State proved that the crime occurred on or about August 5, 2005, and Kepley was not prejudiced by time frame proven by the State, there was sufficient evidence to convict Kepley on the first count of forgery.

### **III. THE DISTRICT COURT PROPERLY DENIED KEPLEY'S MOTION TO ARREST JUDGMENT.**

Whether a complaint is sufficient to give the district court jurisdiction is a question of law over which this court has unlimited review. In analyzing this issue when a motion for arrest of judgment has been filed, this court applies the pre-*Hall* standard. Under this standard, a complaint that omits one or more of the essential elements of the crime it attempts to charge is jurisdictionally and fatally defective, and a conviction based on the complaint must be reversed. However, even under the pre-*Hall* standard, a complaint is sufficient: "if it substantially follows the language of the statute or charges the offense in equivalent words or others of the same import so long as the defendant is fully informed of the particular offense charged and the court is able to determine under what statute the charge is founded. [Citation omitted.]" *State v. Scott*, 286 Kan. 54, 62-63, 183 P.3d 801 (2008).

Furthermore, the complaint "should be read in its entirety, construed according to common sense, and interpreted to include facts which are necessarily implied." [Citation omitted.]...'[T]he day [has] passed in this jurisdiction when criminals can hope to go unwhipped of justice because of the want of a technical recital in a criminal information which neither misled nor prejudiced them in the preparation or management of their defense.' [Citation omitted]." *Scott*, 286 Kan. at 64.

Kepley argues the complaint was jurisdictionally defective on both counts because the State did not explicitly list the United States Treasury as the forged person on

the counterfeit bills. However, the fact that the United States Treasury was the forged person is easily ascertained from the facts alleged by the State that the \$20 and \$100 bill were counterfeit. (R. I, 14-15.) Therefore, when the complaint is construed according to common sense and interpreted to include facts which are necessarily implied, it is clear that Kepley would infer that the United States Treasury was the forged person on counterfeit bills. Therefore, even if the listing of the person who actually has authority to issue valid money was an essential element in forgery, the complaint is not jurisdictionally defective.

**IV. KEPLEY FAILED TO PRESERVE ANY OBJECTION TO SPECIAL AGENT OESTERREICH'S TESTIMONY, BUT EVEN IF HIS TESTIMONY WAS IMPROPERLY ADMITTED, ANY ERROR WAS HARMLESS.**

Kepley argues Special Agent Oesterreich's testimony that the bills were counterfeit should not have been admissible as lay or expert testimony because the testimony embraced the ultimate issue that the money was counterfeit. (Appellant's Brief, 11, 13-14.) This court reviews whether the admission of expert or layman testimony was proper pursuant to K.S.A. 60-456 under an abuse of discretion standard. *State v. Carapezza*, 286 Kan. 992, 1003, 191 P.3d 256 (2008); see *Pullen v. West*, 278 Kan. 183, 210, 92 P.3d 584 (2004).

However, in order for this court to even review Kepley's argument, Kepley must have made a timely and specific objection to the admission of the evidence at trial in order to preserve the issue for appeal. *State v. Anthony*, 282 Kan. 201, 206, 145 P.3d 1 (2006). Here, Kepley did not object until after he finished re-cross-examining Special Agent Oesttereich, and after the State had called its next witness. (R. XII, 48.) Furthermore, Kepley only objected on the basis that the State had never given Kepley

Special Agent Oestterreich's curriculum vitae. (R. XII, 48, 66.) This differs from what Kepley is now asserting on appeal, and a party may not object at trial to the admission of evidence on one ground and then argue a different objection on appeal. *State v. Engelhardt*, 280 Kan. 113, 131, 119 P.3d 1148 (2005). Therefore, this issue is not properly before this court.

However, even if this court were to address this issue, any abuse of discretion by the district court would be harmless error. K.S.A. 60-261 requires this court to find the erroneous admission of evidence to be harmless error unless the error affects Kepley's substantial rights. *Carapezza*, 286 Kan. at 1005.

Here, the error is harmless because the fact that the bills were counterfeit was not in dispute. After all, Kepley's defense centered on the fact that the bills were obviously counterfeit and were never made or passed with the intent to defraud anyone. (R. XII, 13; XIII, 201, 249, 251.) In fact, Kepley admitted that he made the bills, but claimed to have made them in 2001 for an art project in Madison, Wisconsin. (R. XIII, 201.) Thus, any error in admitting the testimony of Special Agent Oestterreich's opinion that the bills were counterfeit could not have affected the result of trial.

**V. THE DISTRICT COURT'S K.S.A. 60-455 LIMITING INSTRUCTION WAS PROPER.**

Kepley argues the district court erred when it gave a K.S.A. 60-455 limiting instruction because the instruction was too broad. (Appellant's Brief, 15.) Because no objection was made regarding the instruction, this court reviews the instructions for clear error. Under the clearly erroneous standard, this court "will reverse only if it is firmly convinced that, without the alleged error, there was a real possibility the jury would have

returned a different verdict. [Citation omitted.]" *State v. Cofield*, 288 Kan. 367, 372-73, 203 P.3d 1261 (2009).

Here, the district court gave the following instruction: "Evidence has been admitted tending to prove that the defendant may have committed a crime (or crimes) other than the present crime charged. This evidence may be considered solely for the purpose of proving the defendant's motive, intent, or absence of mistake." (R. XIII, 241.) Kepley now argues that this instruction was too broad because there are multiple definitions of motive, intent, and mistake and because the exceptions were not linked to the prior bad acts evidence. (Appellant's Brief, 17-18.)

First, it is extremely doubtful that the jury would have been confused regarding the plain meaning of the words motive, intent, or mistake. Although Kepley is technically correct that there are multiple definition entries for the words, the entries do not support his conclusion that the words lack a commonly understood meaning. Because the jury would have a common understanding of the meaning of the words motive, intent, and mistake, and Kepley has not pointed out how the common meaning differs from any alleged legal meaning, the district court did not err in failing to *sua sponte* define the words.

Meanwhile, the State cannot guess at what Kepley believes would have been a more suitable instruction in order to link the exceptions to the prior bad acts evidence. However, even if this court finds that a more tailored instruction would have been ideal, it cannot be said that the instruction given in this case was clearly erroneous. After all, the instruction was tailored to instruct the jury on the specific purposes for which they could use the evidence regarding Kepley's prior drug use.

Finally, it is doubtful that a prior crimes limiting instruction was even required in this case. After all, K.S.A. 60-455 only prohibits the admission of criminal acts that occurred "on a specified occasion." *State v. Richmond*, 289 Kan. 419, 426-27, 436, 212 P.3d 165 (2009). Since the general references to drugs cannot be construed as a crime on a specified occasion, K.S.A. 60-455 did not apply to the admission of the evidence, and no limiting instruction was required.

Therefore, for all the above reasons, the district court's K.S.A. 60-455 limiting instruction does not require reversal.

**VI. KEPLEY'S CONVICTIONS ARE NOT SUBJECT TO REVERSAL UNDER A THEORY OF CUMULATIVE ERROR.**

When errors are considered collectively, they may be so great as to require reversal of a defendant's convictions. The cumulative error test is whether the totality of the circumstances substantially prejudiced the defendant to deny the defendant a fair trial. One error is insufficient to support reversal under the cumulative effect rule. *State v. Nguyen*, 285 Kan. 418, 437, 172 P.3d 1165 (2007). In this case, there is not more than one error by the district court. Therefore, reversal is not required.

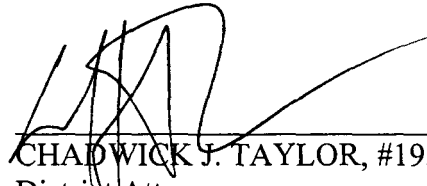
**CONCLUSION**


For the above and foregoing reasons, the State respectfully requests that the Kansas Court of Appeals affirm Kepley's convictions.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that service of the above and foregoing **Brief of Appellee** was made by mailing **two (2) true and correct copies**, postage prepaid, on this 15<sup>th</sup> day of April, 2010, to:

Shawn E. Minihan, #19861  
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and on that date the **original and sixteen (16) copies** were hand delivered to the Clerk of the Appellate Courts.

  
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