NOT DESIGNATED FOR PUBLICATION

No. 105,029

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

SAMUEL WILSON,
Appellant.

MEMORANDUM OPINION

Appeal from Seward District Court; CLINTON B. PETERSON, judge. Opinion filed November 4, 2011. Affirmed in part, reversed in part, and remanded with directions.

Randall L. Hodgkinson, of Kansas Appellate Defender Office, for appellant.

Don L. Scott, county attorney, and *Derek Schmidt*, attorney general, for appellee.

Before STANDRIDGE, P.J., MCANANY and ARNOLD-BURGER, JJ.

Per Curiam: Samuel Wilson appeals from his convictions and sentences for one count each of attempted burglary, conspiracy to commit burglary, felony obstruction of official duty, and misdemeanor criminal damage to property.

FACTS

In the early morning hours of January 2, 2010, Liberal police officers were dispatched to El Chaparral, a Liberal department store, after a silent alarm was triggered at the store. Upon arrival at the scene, the officers observed two black males running as

they exited the El Chaparral parking lot. Officer Chad Miller identified himself and called out for the men to stop, but the men kept running. After a brief foot chase, Miller caught up with one of the individuals, later identified as Wilson, and placed him under arrest. Another officer apprehended and arrested the second individual. The man initially told law enforcement that his name was Daryn Jenkins and lied about his age, but he was later identified as Dontavious Heard.

Wilson and Heard both provided statements to the police. Wilson claimed he did not hear Miller's warning to stop. Wilson stated he and Heard were walking through the El Chaparral parking lot on their way to a friend's apartment but denied they stopped at the store. Heard had a different version of events. Heard told police he and Wilson had been walking home when Wilson stopped in front of El Chaparral and stated, "'I'm tired of being broke.'" Heard stated Wilson forced him to be a lookout while Wilson attempted to break into the store. Heard claimed Wilson threatened to beat him up if he did not comply.

Wilson subsequently was charged with one count each of attempted burglary, contrary to K.S.A. 21-3301 and K.S.A. 21-3715(b); conspiracy to commit burglary, contrary to K.S.A. 21-3302 and K.S.A. 21-3715(b); felony obstruction of official duty, contrary to K.S.A. 21-3808; and misdemeanor criminal damage to property, contrary to K.S.A. 21-3720.

At trial, Heard testified for the State. Heard testified that on the night in question, he and Wilson drank at a club and then walked toward Heard's fiancée's apartment. Heard claimed that on the way there, Wilson wanted to stop at El Chaparral and said, "'Fuck that. I'm tired of being broke.'" Heard further claimed that Wilson told him to be a lookout for the police while Wilson threw a rock at the store's door. Heard admitted he provided the rocks Wilson threw at the door. Consistent with Heard's testimony, the

windows on the front door of El Chaparral were damaged and law enforcement located a medium-sized rock next to the door.

During the defense's case-in-chief, defense counsel called Liberal Police Officer Chris Head to testify. Officer Head testified that he previously had been in contact with Heard in an unrelated case. When defense counsel asked the officer if he had investigated other burglaries, the State objected and the court ordered a sidebar conference. At the conference, the State argued defense counsel was attempting to introduce evidence of other burglaries carried out by Heard and such evidence was not relevant to the case being tried because the other burglaries occurred in different parts of town. Defense counsel responded that questions about the other burglaries were relevant because they would demonstrate that Heard had a history of bringing false allegations against Wilson. More specifically, defense counsel advised the court that Heard previously had implicated Wilson in the other burglaries but Wilson could not have been involved in them because he was in jail at the time.

Based on this discussion at the sidebar conference, the court allowed defense counsel to question the officer outside the presence of the jury. For its proffer, defense counsel elicited the following testimony from Officer Head:

"Q: In your investigations of other matters, did Mr. Heard ever speak to you about Mr. Wilson?

"A: Yes.

"Q: Did he ever inform you that Mr. Wilson was involved in some crimes or some burglaries when, in fact, you were able to learn later on that he was not?

"A: Yes.

"Q: And how were you able to learn that he was not?

"A: Through my investigation.

"Q: Was he not available at those times? Was he available at those times? Was he capable of committing those crimes?

"A: No."

After defense counsel elicited this testimony, the court ruled as follows:

"THE COURT: And . . . I'm going to sustain the State's objection simply because I can't find the proper foundation for these statements. From what I've heard, I can't come to a decision on what Heard allegedly said or didn't say, where he said he got the information, and whether or not—what he said would really have put him in—your client in custody to where he could have not committed these crimes. There's just not enough there to allow me to find that this is admissible evidence. So the State's objection is sustained.

"MR. GIPSON [defense counsel]: Your Honor would be able to hear that if I asked more questions then?

"THE COURT: Well, unfortunately, Mr. Gipson, you had your shot. And what you gave me just wasn't enough. So we're going to move on."

A jury ultimately found Wilson guilty as charged.

ANALYSIS

Wilson raises the following issues on appeal: (1) The district court violated his constitutional right to present a viable theory of defense with regard to the charges of attempted burglary, conspiracy to commit burglary, and criminal damage to property (burglary-related crimes) when it excluded evidence that Heard previously had made allegations against him that proved to be false; (2) the State failed to allege a specific overt act in furtherance of the conspiracy to commit burglary, which rendered the complaint against him fatally defective; and (3) the evidence presented by the State was insufficient to support his felony obstruction conviction. We address each of these issues in turn.

1. *Theory of Defense*

At trial, defense counsel attempted to obtain testimony from Officer Head regarding prior allegations Heard had made against Wilson that turned out to be demonstrably false. The State objected to Officer Head's testimony based on relevancy, but the court never ruled on that particular objection. On its own motion, the district court excluded the testimony based on defense counsel's failure to lay a proper foundation establishing Officer Head had personal knowledge of the subject matter over which he was being questioned. Defense counsel sought to lay additional foundation, but the district court refused. Wilson challenges the district court's ruling in this regard, arguing it erroneously excluded evidence that Heard had a history of bringing false allegations against Wilson, which was a fact critical to his theory of defense with respect to the burglary-related crimes.

"As a prerequisite for the testimony of a witness on a relevant or material matter, there must be evidence that he or she has personal knowledge thereof, or experience, training or education if such be required. Such evidence may be by the testimony of the witness himself or herself." K.S.A. 60-419. The question of whether evidentiary foundation requirements have been met is a question of fact and is left largely to the discretion of the district court. *State v. Rohr*, 19 Kan. App. 2d 869, 870, 878 P.2d 221 (1994).

> "Judicial discretion is abused if judicial action (1) is arbitrary, fanciful, or unreasonable, *i.e.*, if no reasonable person would have taken the view adopted by the trial court; (2) is based on an error of law, *i.e.*, if the discretion is guided by an erroneous legal conclusion; or (3) is based on an error of fact, *i.e.*, if substantial competent evidence does not support a factual finding on which a prerequisite conclusion of law or the exercise of discretion is based. [Citation omitted.]" *State v. Ward*, 292 Kan. 541, 550, 256 P.3d 801 (2011).

In this case, defense counsel elicited testimony from Officer Head that he had personally conducted an investigation into the burglaries on the other side of town and although Heard informed him in that investigation that Wilson had been involved in various other crimes or burglaries, Officer Head later learned that Wilson simply could not have been involved as Heard alleged. The court found Wilson's proffer insufficient to establish a proper foundation and thereafter excluded Officer Head's testimony. In support of this finding, the court stated: "I can't come to a decision on what Heard allegedly said or didn't say, where he said he got the information, and whether or not—what he said would really have put [Wilson] in custody to where he could have not committed these crimes."

Although a court may reject the testimony of a witness due to lack of foundation if the court finds that no trier of fact could reasonably believe the witness had personal knowledge of the facts to which he or she is testifying, the evidentiary ruling here appears to have been based on a determination by the court that Heard's statements to Officer Head were unworthy of belief, not that Officer Head lacked personal knowledge of the facts to which he was testifying. If so, the court abused its discretion.

Even if this were not the case, however, we find an abuse of discretion in the decision to deny defense counsel's request to establish a proper foundation. Our finding is grounded in the following chronology of events taking place at trial:

- The State objected to Officer Head's testimony on grounds of relevancy;
- The district court permitted defense counsel to elicit testimony as a proffer to establish relevancy;
- Without ruling on the issue of relevancy, the district court raised foundation concerns on its own motion and thereafter held Officer Head's testimony was inadmissible for lack of foundation; and

- The district court thereafter denied defense counsel any opportunity to lay additional foundation and/or address the concerns raised *sua sponte* by the district court.

In finding an abuse of discretion, we necessarily conclude no reasonable person would have denied defense counsel any opportunity at all to respond to the foundation concerns raised by the district court. Our analysis, however, does not end here. If the district court abuses its discretion, the defendant has the burden of demonstrating resulting prejudice that warrants reversal. See *State v. McReynolds*, 288 Kan. 318, 329, 202 P.3d 658 (2009). If substantial justice has been done, viewed in light of the entire trial record, an error that does not cause prejudice to the defendant's substantial rights does not require reversal. *State v. Dixon*, 289 Kan. 46, 67, 209 P.3d 675 (2009).

To that end, Wilson asserts that had he had the opportunity to lay a proper foundation, the jury would have been able to consider the fact that Heard had a history of bringing false allegations against Wilson, which was a fact critical to his theory of defense on the burglary-related crimes given Heard was the only eyewitness to the crimes with which he was charged.

> "[A] defendant is entitled to present his or her defense, and a defendant's fundamental right to a fair trial is violated if evidence that is an integral part of that theory is excluded. [Citation omitted.] But that right is not unlimited. '[T]he right to present a defense is subject to statutory rules and case law interpretation of the rules of evidence and procedure.' [Citation omitted.] Furthermore, when a criminal defendant is allowed 'to present evidence supporting his or her theory of defense such that the jury could reach a conclusion on its validity, exclusion of other evidence is not necessarily error.' [Citation omitted.]" *State v. Wells*, 289 Kan. 1219, 1235, 221 P.3d 561 (2009).

Upon review of the record on appeal, we find the district court deprived Wilson of the opportunity to lay a proper foundation for Officer Head's testimony, which in turn

deprived Wilson of his fundamental right to present an integral part of his theory of defense, which in turn deprived Wilson of his constitutional right to a fair trial. Accordingly, we must reverse Wilson's convictions for the burglary-related crimes and remand the charges for a new trial.

2. *Conspiracy*

Wilson contends his conviction for conspiracy to commit burglary should be reversed because the State failed to allege a specific overt act in furtherance of the conspiracy, rendering the complaint fatally defective. Because Wilson challenges the sufficiency of the charging document to confer jurisdiction, the fact that we are remanding this charge for a new trial does not render the legal issue presented by Wilson moot.

In charging Wilson with conspiracy to commit burglary, the complaint stated:

> "That on or about the 2nd day of January, 2010, in Seward County, Kansas, Samuel Wilson, then and there being present did then and there contrary to statute or ordinance unlawfully, feloniously and willfully agree with another person to commit the crime of Burglary and an overt act in furtherance of the conspiracy was committed, to-wit: agreed to break into El Chaparral, 1009 S. Kansas, with co-conspirator, to-wit: Dontavious Heard, in violation of K.S.A. 21-3715(b) & 21-3302, Conspiracy to [Commit] Burglary, a severity level 10 nonperson felony."

Upon a plain reading of the charges, we find the charging document defective. Rather than alleging an overt act in furtherance of the conspiracy, the charge alleges only the conspirators' agreement itself. See *State v. Sweat*, 30 Kan. App. 2d 756, 761, 48 P.3d 8, *rev. denied* 274 Kan. 1118 (2002) (In alleging a specific overt act committed in furtherance of the conspiracy, "[i]t is not sufficient to say merely that the defendant willfully agreed with another person to commit the crime or to assist in committing the

crime."); *State v. Crockett*, 26 Kan. App. 2d 202, 204-05, 987 P.2d 1101 (1999) (conspiracy conviction reversed where complaint failed to sufficiently allege an overt act).

Citing *State v. Marino*, 34 Kan. App. 2d 857, 126 P.3d 426, *rev. denied* 281 Kan. 1380 (2006), Wilson argues that the defect in the complaint is fatal. Wilson does not acknowledge or otherwise discuss this court's contrary opinion in *State v. Tapia*, 42 Kan. App. 2d 615, 214 P.3d 1211 (2009), *rev. granted* 290 Kan. 1103 (2010) (pending). Notably, the *Marino* and *Tapia* cases differ in their interpretation of our Supreme Court's decision in *State v. Shirley*, 277 Kan. 659, 89 P.3d 649 (2004). Thus, our analysis begins with a discussion of *Shirley*.

State v. Shirley

Similar to the present complaint, the charging document in *Shirley* failed to allege a specific overt act in furtherance of the claimed conspiracy to manufacture methamphetamine. 277 Kan. at 665. Shirley moved to arrest judgment based upon the defective complaint; the trial court denied relief. 277 Kan. at 662. At the close of the evidence, the court instructed the jury that the overt act of the conspiracy charge was established by proof that "'the defendant or any party to the agreement acted in furtherance of the agreement.'" 277 Kan. at 666. Shirley was convicted solely on the conspiracy charge and was acquitted of numerous related drug charges. 277 Kan. at 661.

On appeal, our Supreme Court discussed the standards for evaluating the sufficiency of a charging document before and after its decision in *State v. Hall*, 246 Kan. 728, 793 P.2d 737 (1990), *overruled in part on other grounds by Ferguson v. State*, 276 Kan. 428, 78 P.3d 40 (2003). 277 Kan. at 661-62. *Hall* distinguishes cases based on whether or not a defendant has moved to arrest judgment due to the defect in the charging document, holding that "[t]he longer it takes for the defendant to challenge the

sufficiency of the information, the greater the presumption of regularity." 246 Kan. at 761. When a motion to arrest judgment has been asserted before the district court, the pre-*Hall* standard applies: "If the charging document does not set out the essential elements of the crime, it is fatally defective and the conviction must be reversed for lack of jurisdiction." *Shirley*, 277 Kan. at 662. If no motion to arrest judgment was made before the district court and the issue is raised for the first time on appeal, the *Hall* standards apply: To obtain a reversal based upon a defective complaint, the defendant must demonstrate that the charge as written (1) prejudiced the defendant's preparation of a defense; (2) would impair the defendant's ability to plead the conviction as a bar to a later prosecution; or (3) limited the defendant's substantial rights to a fair trial. 277 Kan. at 662. The overriding test in *Hall* is one of common sense. The charging document is to be "construed liberally in favor of validity" and its sufficiency "should be determined on the basis of practical rather than technical considerations." *Hall*, 246 Kan. at 754, 764.

Because Shirley had moved to arrest judgment before the district court, the *Shirley* court applied the pre-*Hall* strict technical compliance standard and concluded that the complaint was fatally defective. Specifically, the court held that K.S.A. 2003 Supp. 22-3201(b) required the State to set forth the essential facts of the crime, and K.S.A. 21-3302(a) (Furse) required the pleading of a specific allegation of an overt act in furtherance of a claimed conspiracy. 277 Kan. at 665. The court also noted that the error in Shirley's complaint was aggravated by the jury instruction that permitted the jury to use conduct of Shirley's coconspirator to satisfy the overt act requirement when the State had specifically charged that it was Shirley who committed an overt act in furtherance of the conspiracy. 277 Kan. at 667.

State v. Marino

In *Marino*, the case upon which Wilson relies, the defendant and his cousin were involved in an altercation with a bouncer at a local bar after they were denied entry to the

bar. Later that night, Marino and his cousin attacked the bouncer after he left work. Marino was charged with and convicted of aggravated battery and conspiracy to commit aggravated battery. The complaint failed to allege a specific overt act in furtherance of the conspiracy.

Marino's cousin invoked his Fifth Amendment right against self-incrimination and did not testify at Marino's preliminary hearing. The cousin subsequently pled guilty to conspiracy to commit aggravated battery, received a suspended sentence, and was deported to Mexico prior to Marino's trial. Because the cousin was unavailable to testify at Marino's trial, the State offered into evidence the journal entry memorializing that the cousin had pled guilty to conspiracy. The journal entry was admitted over Marino's objection. The trial court attempted to cure the flaw in the complaint by referring to specific overt acts in a jury instruction stating the elements of conspiracy. Marino did not move to arrest judgment based upon the defective complaint.

On appeal, Marino argued that despite his failure to move to arrest judgment, his conspiracy conviction was improper under K.S.A. 21-3302(a), which provides that "'[n]o person may be convicted of a conspiracy unless an overt act in furtherance of such conspiracy is *alleged and proved* to have been committed by such person or by a co-conspirator.'" (Emphasis added.) 34 Kan. App. 2d at 861. The *Marino* court found this argument to have merit and determined the complaint was fatally defective as measured by the pre-*Hall* standard, despite its acknowledgement that our Supreme Court in *Shirley* applied the pre-*Hall* standard of strict technical compliance because Shirley had moved to arrest judgment before the district court, while Marino had not. The *Marino* court treated the issue as a sufficiency of the evidence question and found that based on the complaint, the State had failed to prove that an overt act had been committed in furtherance of the conspiracy and, as a result, the *Hall* factors were not applicable to the case. 34 Kan. App. 2d at 861-64. The *Marino* court went on to note that even if the *Hall* standard did apply, one or more of the *Hall* factors were satisfied because the State's failure to allege a

specific overt act in the complaint deprived Marino of notice of the specific crime charged and, since K.S.A. 21-3302(a) requires proof of the commission of the overt act *alleged* in the complaint, it was impossible for the State to prove an overt act that was never alleged. 34 Kan. App. 2d at 864-66.

State v. Tapia

In *Tapia*, 42 Kan. App. 2d 615, the defendant and two other individuals were arrested after law enforcement found them in possession of several items that had been reported stolen from the victim's truck and garage. Tapia was charged with and convicted of nonresidential burglary, vehicular burglary, and conspiracy to commit burglary. Rather than alleging an overt act in furtherance of the conspiracy, the charging document merely alleged the conspirators' agreement itself. Tapia did not move to arrest judgment before the district court.

At trial, the two coconspirators testified against Tapia in exchange for diversion. They testified that it was Tapia's idea to break into the truck and garage, and stated that afterwards Tapia wanted to get his truck and return to the victim's house to "'wipe out'" the house and garage. 42 Kan. App. 2d at 617. The men were on their way to Tapia's house to get his truck when they were stopped by law enforcement.

On appeal, Tapia, like Wilson, relied solely on *Marino* as support for his argument that the defective complaint warranted reversal of his conspiracy charge. 42 Kan. App. 2d at 618. The *Tapia* court discussed the *Shirley* and *Marino* opinions at length, disagreeing with the *Marino* court's application of K.S.A. 21-3302(a) to the State's complaint: "The *Marino* court treated noncompliance with K.S.A. 21-3302(a) as a *cause* for conducting a pre-*Hall* technical compliance analysis. The Supreme Court in *Shirley*, on the other hand, treated noncompliance with K.S.A. 21-3302(a) as grounds for reversal *after* it had determined that *Hall* did not apply." 42 Kan. App. 2d at 621. The *Tapia* court ultimately

concluded that because Tapia did not move to arrest judgment before the district court, *Shirley* mandated that the issue must be analyzed under the *Hall* standard. 42 Kan. App. 2d at 621. With respect to the first *Hall* factor, the *Tapia* court determined that the lack of specificity in the complaint did not prejudice Tapia in preparing his defense to the conspiracy charge because his coconspirators' statements were available to him well before trial. Second, the court held that the defect in the complaint would not impede Tapia's ability to plead his conspiracy conviction as a double jeopardy bar to any attempt by the State to prosecute him again for the same crime. Third and finally, the court found the complaint did not limit Tapia's substantial rights at trial, as there was overwhelming evidence of overt acts Tapia had committed in breaking into the truck and the garage. 42 Kan. App. 2d at 621-22.

In concluding that the defective complaint did not adversely prejudice Tapia and finding no reversible error, the *Tapia* court distinguished *Marino*. The court pointed out that Marino's coconspirator did not testify at trial and the State sought to prove the conspiracy by admitting a journal entry, while Tapia's coconspirators testified in person, giving Tapia ample opportunity to test their credibility before the jury. The court also noted that the district court had instructed the jury that the overt act necessary to convict Tapia of conspiracy was "'entering a 2005 Chevrolet pickup and/or a garage at 1226 N. Calhoun'" on the date of the burglary. 42 Kan. App. 2d at 622. The *Tapia* court found that because Tapia was also charged with burglarizing the truck and the garage, "this instruction did not impose any added burden on Tapia or expand the scope of his criminal liability under the conspiracy charge." 42 Kan. App. 2d at 622. Our Supreme Court granted review in *Tapia* on September 8, 2010.

Application of the Law to the Facts Here

Under the facts presented here, Wilson did not move for arrest of judgment before the district court; thus, we follow the *Tapia* court's well-reasoned analysis and review the

issue under the *Hall* factors, as required by *Shirley*. Thus, in order to prevail, Wilson must show that the charge as written (1) prejudiced the preparation of his defense; (2) would impair his ability to plead the conviction as a bar to a later prosecution; or (3) limited his substantial rights to a fair trial. See *Shirley*, 277 Kan. at 662. Wilson presents no arguments on appeal addressing the *Hall* factors.

A review of the record reveals no prejudice to Wilson from the defect in the complaint. First, the lack of a specifically alleged overt act in the complaint did not impede Wilson in the preparation of his defense to the conspiracy charge. Heard's testimony was no surprise to Wilson. Heard gave a statement to police on the night of his arrest that essentially mirrored his trial testimony. Heard's statement presumably was available to Wilson in discovery.

Further, the lack of specificity in the complaint will not impede Wilson's ability to plead his conspiracy conviction as a double jeopardy bar to any attempt by the State to prosecute him again for this same crime.

Finally, the defective complaint did not limit Wilson's substantial rights at trial. There was significant evidence presented of overt acts committed by Wilson in breaking into El Chaparral in the form of Heard's testimony and the damage done to the El Chaparral door. Additionally, unlike the situation in *Marino* where the coconspirator was not available to testify at trial, defense counsel in the present case had the opportunity to question and challenge Heard's credibility during cross-examination of him as a witness. Moreover, the district court instructed the jury that the overt act necessary to convict Wilson of the conspiracy was "trying to enter El Chaparral, 1009 South Kansas Avenue, Liberal, Kansas." Because he was also defending against charges of attempted burglary, this instruction did not impose any added burden on Wilson or expand the scope of his criminal liability under the conspiracy charge.

Because the defective complaint did not adversely affect Wilson under any of the *Hall* factors, the State's failure to allege a specific overt act in furtherance of the conspiracy does not constitute reversible error.

3. *Felony Obstruction*

Wilson challenges the sufficiency of the evidence supporting his conviction for felony obstruction of official duty. Specifically, he claims there was insufficient evidence to prove that (1) Officer Miller believed he was engaged in an official duty in a felony case, and (2) Wilson substantially hindered Miller in carrying out his official duty. In the alternative, Wilson contends the district court should have instructed the jury on the lesser included offense of attempted obstruction of official duty.

> """When the sufficiency of the evidence is challenged in a criminal case, the standard of review is whether, after review of all the evidence, viewed in the light most favorable to the prosecution, the appellate court is convinced that a rational factfinder could have found the defendant guilty beyond a reasonable doubt.'" [Citation omitted.]" *State v. McCaslin*, 291 Kan. 697, 710, 245 P.3d 1030 (2011).

"Obstructing legal process or official duty is knowingly and intentionally obstructing, resisting or opposing any person authorized by law . . . in the discharge of any official duty." K.S.A. 21-3808(a). Obstructing legal process or official duty in the case of a felony constitutes a felony. Obstructing legal process or official duty in the case of a misdemeanor or civil case constitutes a misdemeanor. K.S.A. 21-3808(b).

Whether a defendant obstructed official duty depends on the facts of each case. To sustain a conviction the State must prove: (1) The person obstructed was an identified law enforcement officer carrying out an official duty; (2) the defendant knowingly and willingly obstructed or opposed that officer in the performance of that official duty; (3) the defendant knew or should have known the person he or she opposed was a law

enforcement officer; and (4) the defendant's action substantially hindered or increased the burden of the officer in carrying out his or her official duty. See K.S.A. 21-3808(a); *State v. Parker*, 236 Kan. 353, 364-65, 690 P.2d 1353 (1984); PIK Crim. 3d 60.09. The jury was given an instruction consistent with these elements.

Officer Miller's knowledge

Wilson relies on *State v. Hudson*, 261 Kan. 535, 931 P.2d 679 (1997), to support his claim that he cannot be convicted of obstructing Miller in a felony investigation because nothing in the record indicates that Miller knew he was investigating a felony case. In *Hudson*, an officer attempted to stop the defendant because he ran a stop sign. Hudson would not stop his car and a high-speed chase began. After Hudson was apprehended, officers learned that his license was suspended and that he had outstanding warrants. Hudson was charged with felony obstruction of official duty, but the district court reduced the charge to a misdemeanor based on the fact that the officer believed he was stopping the defendant for a misdemeanor traffic offense, not a felony. 261 Kan. at 535-36. On appeal, our Supreme Court upheld the district court's ruling, agreeing that it is the officer's reason for approaching a defendant that determines the classification of the offense:

> "'[O]fficial duty' under K.S.A. 21-3808 is to be defined in terms of the officer's authority, knowledge, and intent. The touchstone for the classification of the offense is the reason for the officer's approaching the defendant who then flees or otherwise resists, and not the status of the defendant. . . . [T]he classification under K.S.A. 21-3808 depends on what the officer believed his duty to be as he discharged it." 261 Kan. at 538-39.

Wilson suggests that a silent alarm may be triggered as a result of misdemeanor crimes or by accident. He claims that without knowing Miller's subjective intent, he could not be convicted of felony obstruction. The State contends that because Miller was responding to a silent alarm at El Chaparral, a felony case could be inferred.

In order to convict an individual of felony obstruction of official duty, we have never required a law enforcement officer to have proof beyond a reasonable doubt of the felony offense at the time the officer approached the suspect. While it is true that Miller never specifically testified that he thought he was investigating a felony crime when he responded to the El Chaparral alarm, there is nothing in the record to indicate that Miller ever thought he was investigating a misdemeanor crime. Officers Kim Bowman and Miller were dispatched to El Chaparral at 3:41 a.m. after a silent alarm was triggered. They arrived in uniform and in marked patrol cars and observed two men running away from the crime scene. These are facts which could demonstrate that Miller was conducting an investigation of a serious felony—a building burglary.

In *Hudson*, the officers discharged their duties upon observing misdemeanor traffic violations that ultimately resulted in the discovery of felony crimes or warrants. 261 Kan. at 535-36. In the present case, a felony investigation may be inferred by Miller's testimony and conduct. When viewed in the light most favorable to the State, a rational trier of fact could have found that Miller was discharging his official duty by investigating a felony burglary at El Chaparral.

"Substantially hindered"

Wilson also claims the evidence was insufficient to show that he "substantially hindered" Miller's discharge of his official duty. Although Wilson concedes Kansas courts have held that running from an officer can constitute obstruction of official duty, he contends his actions fell short of "substantially hindering" Miller. See, *e.g.*, *State v. Lee*, 242 Kan. 38, 41, 744 P.2d 845 (1987). In support of his argument, Wilson argues the foot chase "lasted at most fifteen seconds," after which Miller caught him and took him into custody without incident.

To obstruct means to "interpose obstacles or impediments, to hinder, impede, or in any manner intrude or prevent." *Parker*, 236 Kan. at 361. Kansas courts have broadly interpreted the obstruction statute in order to cover actions that might not otherwise be unlawful, but which obstruct or hinder law enforcement officers in carrying out their duties. See *State v. Latimer*, 9 Kan. App. 2d 728, 733, 687 P.2d 648 (1984).

Miller testified that he identified himself as a police officer and yelled at Wilson to stop. Wilson ignored his commands and kept running. Although it is arguable whether the short chase "substantially hindered" Miller's attempts to carry out his official duty, the State was only required to prove that Wilson's actions "substantially hindered *or* increased the burden of the officer in carrying out [his or her] official duty." (Emphasis added.) See *Parker*, 236 Kan. at 364; PIK Crim. 3d 60.09. Wilson's refusal to comply with Miller's order to stop and his actions in running away at the very least increased Miller's burden in carrying out his official duty. This evidence, when viewed in the light most favorable to the State, supports a finding that Wilson obstructed Miller in carrying out his official duty.

Jury Instruction on Attempted Obstruction

In the alternative, Wilson contends the district court should have instructed the jury on attempted obstruction of official duty because he tripped as he was running and was quickly apprehended by law enforcement thereafter. Thus, Wilson claims, the jury could have easily concluded that he intended to flee from the officers but failed to do so. Because Wilson did not request this instruction at trial, we review for clear error, whereby we must be able to declare there was a real possibility that the jury would have returned a different verdict if the trial error had not occurred. *State v. Martinez*, 288 Kan. 443, 451-52, 204 P.3d 601 (2009).

"[A]n attempt to commit the crime charged" is a lesser included offense. K.S.A. 21-3107(2)(c). Attempt is defined as "any overt act toward the perpetration of a crime done by a person who intends to commit such crime but fails in the perpetration thereof or is prevented or intercepted in executing such crime." K.S.A. 21-3301(a). Generally, an instruction on a lesser included offense is not proper if, from the evidence, a jury could not reasonably convict of the lesser offense. K.S.A. 22-3414(3); *State v. Kirkpatrick*, 286 Kan. 329, 334, 184 P.3d 247 (2008).

Here, the evidence established that the crime of obstructing official duty had been completed. Officer Miller testified that after he yelled at Wilson to stop, Wilson tripped on a curb and then got back up and started running again. Under these facts, the evidence failed to support an instruction for the lesser included offense of attempted obstruction. Because there was no evidence presented at trial to indicate that Wilson failed to commit the crime of obstruction, the district court did not commit clear error by failing to so instruct the jury.

Affirmed in part, reversed in part, and remanded with directions.