No. 13-109313-A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS
Plaintiff-Appellee

v.

BREONNA M. WILKINS
Defendant-Appellant

BRIEF OF APPELLEE

APPEAL FROM THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
HONORABLE RICHARD ANDERSON, JUDGE
DISTRICT COURT CASE NO. 11-CR-2200

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NATURE OF THE CASE

Breonna Wilkins (Wilkins) was found guilty of one count of aggravated intimidation of a witness. Wilkins was sentenced to eighteen months in prison and granted probation. Wilkins now appeals her conviction.

STATEMENT OF THE ISSUES

I. **There was sufficient evidence presented to convict Wilkins of aggravated intimidation of a witness.**

II. **The term "thwart or interfere in any manner with the orderly administration of justice" of K.S.A. 2011 Supp. 21-5909 is not unconstitutionally vague and the jury was properly instructed.**

STATEMENT OF THE FACTS

On July 21, 2011, Natalie Gibson was murdered and Lori Allison was shot outside their home at 307 Southwest Quinton. (R. VIII, 162-63; State's Exhibit 7, R. XII, 41.) During the investigation into the homicide, Detective Michael Barron (Barron) met with Bayate Covington (Covington) at a hospital in early August. (R. VIII, 165.) Covington told Barron that he had been beaten and robbed by Ronald Wakes (Wakes) and Anceo Stovall (Stovall). Covington further cooperated with law enforcement and told them that Jimmy Netherland (Netherland) was the shooter at the homicide scene. (R. VIII, 168-69.)

Nine people were eventually arrested and charged as co-defendants in connection with these crimes, including Covington. (R. VIII, 167.) Wilkins' brothers, Stovall, Daquan Wilkins (Daquan), and Kevin Wilkins (Kevin) and her cousin, Michael Wilkins (Michael), were among those co-defendants. (R. VIII, 170-75.) Wilkins' boyfriend, Wakes was also a co-defendant. F.W., a friend of Wilkins, was yet another co-defendant in the case. (R. VIII, 181.)

After Wakes was taken into custody, law enforcement monitored the phone calls that he made and received while at the jail. (R. VIII, 214.) Wilkins and Wakes spoke on the phone multiple times while Wakes was in custody on the homicide. (R. VIII, 201, 205, 214-21.) On August 28, 2011, Wakes told Wilkins, "[y]eah I'm saying if everybody keep their mouth shut, and can't nobody prove nothing..." (R. VIII 216; State's Exhibit 1(a) and 1(b), R. XII, 3, 6.)

Wilkins and Wakes also had a conversation about Covington, who was the first person to cooperate with law enforcement and eventually testified on behalf of the State as part of a plea agreement. On September 2, 2011, the two talked about Covington's location and how to get into contact with him. Wilkins stated, "[w]here you think he ... it's called protective custody." (State's Exhibit 2(a) and 2(b), R. XII, 7, 10.) Wilkins further told Wakes, "[n]obody knows where he's at." (R. XII, 10.) Wilkins stated she was going to write Covington, but he was not in Shawnee County. (R. XII, 10.) Wilkins then stated she was going to write him, and that she already started. (R. XII, 11.) Wakes told Wilkins "[g]ood" and "make him feel fucking miserable for lying." (R. XII, 11.)

These conversations took place prior to the combined preliminary hearing held for Stovall, Wakes, Michael, Kevin, and Covington. The preliminary hearing was held on November 10, 2011. (State's Exhibit 18, R. XII, 55; State's Exhibit 20, R. XII, 74-81; R. VIII, 180.) At that hearing, Covington testified on behalf of the State. (R. VIII, 181.) Another juvenile co-defendant, D.R., also testified at the preliminary hearing on behalf of the State. (R. VIII, 180.) D.R. was Wakes' cousin. (R. VIII, 179-80.)

In another conversation, on November, 13, 2011, Wakes and Wilkins talked about Netherland. (State's Exhibit 6(a) and 6(b), R. XII, 37, 39.) Wakes suggested Wilkins

come talk to Netherland, but Wilkins rejected the idea. (R. XII, 39.) Wilkins stated it would make her look bad as she was "looking at the same shit [Wakes was] looking at 'cause [she was] connected to everybody in there." (R. XII, 39.) Wakes further told Wilkins, "whatever the hell he is doing, tell him to keep his fucking mouth shut" and "[i]t's better safe than sorry." (R. XII, 40.) Wilkins told Wakes she would look into it. (R. XII, 40.) Covington and D.R. also testified at the preliminary hearing for Daquan and Netherland. (R. VIII, 183-84.) That preliminary hearing was held in April, 2012. (R. VIII, 183.)

After F.W. was taken into custody, law enforcement also monitored her incoming and outgoing calls at the juvenile detention center. (R. VIII, 221-22.) F.W. was Covington's sister. (R. VIII, 183.) F.W. was dating Z.A. at that time. (R. IX, 261, 283.) During their conversation on September 21, 2011, Z.A. passed on some information she had been told by Wilkins. Wilkins told Z.A. that she had spoken with a couple of different lawyers and that the district attorney did not have enough evidence to prosecute the case, so the State was trying to get all of the co-defendants to enter into plea agreements. (R. IX, 263; State's Exhibit 4(a) and 4(b), R. XII, 22, 24.) Z.A. stated to F.W.,

> So, I was like okay. So she hands, uh, the phone over or whatever, and she was like automatically, she just asked about you like, do you know what Nookie's (F.W.) doing? I was like yeah, she's thinking about pleaing or whatever, and then she was like tell her not to because I've like talked to like, uh, a couple different lawyers, and they're saying all the DA is trying to do is get everybody to plea out because they don't have enough evidence against, and then she said the only one she knows of that has plead was Bayate. (R. XII, 24.)

Z.A. also testified that Wilkins asked if F.W. had taken a deal and Z.A. responded that F.W. was considering it. (R. IX, 263.) Wilkins told Z.A. to tell F.W. not to take a deal.

(R. IX, 263.) Z.A. testified, "[s]he (Wilkins) told me to tell her not to take a deal." (R. IX, 263.)

Z.A. and F.W. had another conversation on November 11, 2011, regarding the plea agreements that Covington and D.R. entered into with the State. (R. IX, 274.) Z.A. stated that she had read a newspaper article about D.R. testifying on behalf of the State. (R. XII, 34-35.) D.R.'s plea deal was to provide testimony for the State regarding his knowledge of the homicide case in exchange for being prosecuted as a juvenile. (R. IX, 278.) D.R. testified at preliminary hearings for some of the co-defendants on November 10, 2011. (R. VIII, 180; R. IX, 277-78.) Z.A. then asked if F.W. had taken a plea offer and that Wilkins had stated that she hoped F.W. had not entered into a plea agreement. (R. XII, 36.)

Fairly early on in the case, F.W. was offered a plea agreement in which the State would prosecute her as a juvenile in exchange for her truthful testimony regarding her knowledge of the homicide in the co-defendants cases. (R. VIII, 184-85; R. IX, 296, 303.) Those negotiations were not successful prior to the preliminary hearing held on November 10, 2011. (R. VIII, 181-82.) F.W. stated that she did not take advantage of the offer to remain in the juvenile court because she was told the State was unable to prove the case. (R. IX, 287.) F.W. was told this information from Z.A., who heard it from Wilkins. (R. IX, 287.) F.W. was then certified as an adult and her case was moved to the adult criminal court. (R. IX, 287; State's Exhibit 19, R. XII, 67-73.)

Following her certification to adult status, F.W. accepted a plea offer from the State. (R. VIII, 181; R. IX, 288.) By that time, Wilkins had lost the opportunity to be prosecuted in juvenile court. (R. 185.) The State agreed to recommend a 59 month

sentence and was open to recommend a further reduction of this sentence based on the number of times F.W. testified in all the homicide cases. (R. IX, 288.) As part of the plea agreement between the State and F.W., she was required to give testimony about her knowledge of the homicide. (R. IX, 295.) The State specifically asked F.W., "[a]nd as far as you know, as part of your entering into any kind of plea, whether it was when you were a juvenile or when you later entered into your agreement, was it always part of that, that you would appear and testify for the State?" (R. IX, 303.) F.W. responded, "[y]es."

Wilkins was charged with two counts of aggravated intimidation of a witness in the alternative. (R. I, 9-11.) The jury found Wilkins guilty of both counts. (R. X, 437.) Those counts merged for the purposes of sentencing and the district court designated count one as the base count for sentencing. (R. XI, 3.) The district court sentenced Wilkins to eighteen months in prison, suspended the sentence, and placed Wilkins on 24 months' probation. (R. XI, 17, 20.) Wilkins now appeals. (R. II, 101.) Additional facts will be addressed as necessary.

ARGUMENTS AND AUTHORITIES

I. There was sufficient evidence presented to convict Wilkins of aggravated intimidation of a witness.

Wilkins first argues that the State did not present sufficient evidence to convict her of aggravated intimidation of a witness. Specifically, Wilkins argues that the State failed to present evidence that she attempted to dissuade F.W. from testifying.

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, the court is convinced that a rational factfinder could have found the defendant guilty beyond a reasonable doubt. *State v. McCaslin*, 291 Kan. 697, 710, 245

P.3d 1030 (2011). 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. *State v. Murray*, 285 Kan. 503, 540, 174 P.3d 407 (2008); *State v. Hall*, 292 Kan. 841, 859, 257 P.3d 272 (2011). Additionally, this issue deals with the interpretation of K.S.A. 2011 Supp. 21-5909. Interpretation of a statute is a question of law over which appellate courts have unlimited review. *State v. Arnett*, 290 Kan. 41, 47, 223 P.3d 780 (2010).

In order to convict Wilkins of aggravated intimidation of a witness the State had to establish that on or about August 28, 2011, and November 13, 2011, in Shawnee County Kansas, Wilkins 1) attempted to dissuade, F.W., a witness, from attending or giving testimony at any proceeding or inquiry authorized by law; 2) with the intent to thwart or interfere in any manner with the orderly administration of justice; 3) in furtherance of a conspiracy. K.S.A. 2011 Supp. 21-5909(b)(2). (R. II, 84.)

Or in the alternative, the State had to establish that on or about August 28, 2011, and November 13, 2011, in Shawnee County Kansas, Wilkins 1) attempted to dissuade, F.W., a witness, from attending or giving testimony at any proceeding or inquiry authorized by law; 2) with the intent to thwart or interfere in any manner with the orderly administration of justice; and 3) that F.W. was under the age of 18 years old. K.S.A. 2011 Supp. 21-5909(b)(2). (R. II, 88.)

Here, the State presented evidence of all of the required elements of the crime. In viewing the evidence in the light most favorable to the State, there was sufficient evidence to convict Wilkins of aggravated intimidation of a witness. The State first presented the conversations between Wilkins and Wakes to establish the conspiracy

element of the charge. The conspiracy was to try and keep the other co-defendants quiet and to not testify on behalf of the State in exchange for a plea deal.

Wilkins told Wakes, "I'm just worried about you know, what everybody else is saying." (R. XII, 5.) Wakes replied, "[y]eah, I'm saying if everybody keep their mouth shut, and can't nobody prove nothing..." (R. XII, 6.) Wakes and Wilkins also had conversations about Covington, Netherland, and D.R. Wakes asked Wilkins to make Covington "feel fucking miserable for lying." (R. XII, 11.) Also, in reference to Netherland, Wakes stated, "whatever the hell he is doing, tell him to keep his fucking mouth shut" and "[i]t's better safe than sorry." (R. XII, 40.) The two also talk about D.R. being happy as hell, and how D.R. thought he was going to be released from jail. (R. XII, 12.) D.R. had also cooperated with the State as a witness and provided testimony in exchange for a plea deal. (R. VIII, 183-84.)

It was clear based on these conversations that Wakes and Wilkins were trying to get into contact with the co-defendants and tell them to keep quiet and not testify on behalf of the State. The plan and effort to keep the co-defendants from testifying is evident. These conversations show Wilkins' intent to interfere with the orderly administration of justice. Wilkins had a strong motive to keep the other co-defendants from testifying as her own brothers and boyfriend were among those charged in the case. The State presented evidence that each of the co-defendants Wakes and Wilkins spoke of cooperated with the State and testified as State's witnesses.

When the conversations between Z.A. and F.W. are placed in this context, it is apparent that Wilkins statement to Z.A. telling F.W. not to "take the deal" was to attempt to dissuade F.W. from giving testimony and being a State's witness. Although there was

no direct contact between F.W. and Wilkins, there was evidence that through communications with Z.A., that Wilkins attempted to dissuade F.W. from taking a plea deal. Further, from the context provided, taking a plea deal or accepting an offer by the State meant that F.W. would testify as a witness for the State regarding the knowledge she had about the homicide, and likely implicating the other co-defendants. Thus, by telling Z.A. to tell F.W. not to take the deal, Wilkins attempted to dissuade F.W. from testifying on behalf of the State.

Wilkins claims because she never said the magic words, "do not testify," there was no evidence that she attempted to dissuade F.W. from testifying. However, this claim is unreasonable and if the court accepts it, defendants and others can use any other language or code words to dissuade a person from testifying, with the intent to interfere with the administration of justice and it would not be a crime. For example, a person who is attempting to dissuade a person from testifying but uses the language "do not rat them out," "don't squeal," "don't roll," or "don't take the deal" said with the intent to interfere with the administration of justice could not be charged with this crime because they failed to say the magic words "do not testify." This court should not be persuaded by this argument as all of the above phrases, when put into context, can be equivalent to dissuading a person from testifying.

The State specifically asked F.W., "[a]nd as far as you know, as part of your entering into any kind of plea, whether it was when you were a juvenile or when you later entered into your agreement, was it always part of that, that you would appear and testify for the State?" (R. IX, 303.) F.W. responded, "[y]es." (R. IX, 303.) The State established and argued that taking a plea deal was equivalent to testifying on behalf of the

State in exchange for some benefit. (R. X, 430-31.) This was a reasonable inference based on the evidence presented. Therefore, there was sufficient evidence that Wilkins attempted to dissuade F.W. from giving testimony at any proceeding.

Wilkins also argues it is incorrect to equate a citizen's advice to a defendant on whether to enter into a plea agreement with the State with having "the intent to thwart or interfere in any manner with the orderly administration of justice." Wilkins argues that such advice is not a crime because it is not done with the necessary intent required. The statute does not provide any definition for the "administration of justice" nor did the State find any case law interpreting the meaning of this portion of the statute.

Wilkins provides a hypothetical scenario where a defendant, if testifying truthfully, would confess to a crime, but who otherwise is unlikely to be convicted based on the evidence. If a defense attorney advises his client to exercise his right not to testify in the case, Wilkins argues that the attorney would be dissuading or attempting to dissuade a witness from testifying at trial and possibly guilty of a felony offense. Clearly, in this hypothetical such advice is not a crime because it is made between an attorney and his client, who have a professional relationship and privileged communication. The advice provided by an attorney to his client is not a crime because it is not made with the requisite intent "to thwart or interfere in any manner with the orderly administration of justice." The attorney's intent is to zealously represent his client and is bound to do so through their established professional relationship. The attorney's duty is to his client and the relationship between the two makes this hypothetical distinguishable from the facts in this case.

Similarly, a mother who tell their child, who is a defendant in a case, not to accept a plea deal, but take the case to trial because she believes her child is innocent and should exercise their right to trial does not have the intent to interfere with the administration of justice. The mother's intent is to protect her child.

Here, Wilkins and F.W. had no professional relationship. Wilkins was not F.W.'s attorney, nor did she have a duty to provide advice to F.W. Thus, the relationship between the parties is markedly different here than in Wilkins' hypothetical scenario. The difference turns on the intent of the person giving the advice. Wilkins intent was to dissuade F.W. and others from testifying at her brothers and boyfriend's preliminary hearing. This intent was to interfere with the orderly administration of justice.

Additionally, plea agreements are commonly offered by the State in order to find an equitable resolution for a criminal case. The majority of criminal cases filed are ultimately resolved by way of a plea agreement between a defendant and the State. The "orderly administration of justice" is a broad term, which includes plea negotiations and plea agreements between the parties. Plea agreements and negotiations are part of the "orderly administration of justice." Just as exercising a statutory or constitutional right is part of the "orderly administration of justice," so too is the waiver of that right. A defendant who chooses to enter into a plea agreement with the State in exchange for truthful testimony regarding information about a crime is waiving their right not to testify, and taking part in the "orderly administration of justice."

A citizen, with no professional relationship to the defendant, who is not bound by the ethical duties of an attorney, and who encourages the defendant not to enter into a plea agreement in order to prevent them from testifying at a preliminary hearing is

interfering in the orderly administration of justice. Therefore, this court should affirm the conviction based on the sufficient evidence of Wilkins' intent to interfere with the orderly administration of justice in urging F.W. not to "take the deal."

II. The term "thwart or interfere in any manner with the orderly administration of justice" of K.S.A. 2011 Supp. 21-5909 is not unconstitutionally vague and the jury was properly instructed.

Wilkins next argues that K.S.A. 2011 Supp. 21-5909 is unconstitutionally vague. The appellate court exercises unlimited review over claims that a statute is vague or overbroad. *State v. Brown*, 280 Kan. 898, 899, 127 P.3d 257 (2006).

As noted by Wilkins, she did not object to the application of the statute on vagueness grounds or raise this argument before the district court. The general rule is that an issue not raised before the trial court cannot be raised on appeal. *State v. Leshay*, 289 Kan. 546, 553, 213 P.3d 1071 (2009). However, a constitutional issue may be raised for the first time on appeal if: (1) The newly asserted claim involves only a question of law arising on proved or admitted facts and is determinative of the case; (2) consideration of the claim is necessary to serve the ends of justice or to prevent the denial of fundamental rights; and (3) the district court is right for the wrong reason. *State v. Conley*, 270 Kan. 18, 30-31, 11 P.3d 1147 (2000).

Wilkins argues this issue meets the first two exceptions to the general rule. The State contends that this court should not address this issue as it was not properly preserved. However, the State recognizes that this court has addressed constitutional issues for the first time on appeal.

A claim that a statute is void for vagueness necessarily requires a court to interpret the language of the statute in question to determine whether it gives adequate

warning as to the proscribed conduct. A statute that either requires or forbids the doing of an act in language that is so vague that persons of common intelligence must guess at its meaning and will differ as to its application violates the Fourteenth Amendment to the United States Constitution and is thus void for vagueness. *State v. Richardson*, 289 Kan. 118, 124, 209 P.3d 696 (2009). In determining whether a statute is void for vagueness, two inquiries are appropriate: (1) whether the statute gives fair warning to those persons potentially subject to it and (2) whether the statute adequately guards against arbitrary and discriminatory enforcement. *City of Wichita v. Wallace*, 246 Kan. 253, 259, 788 P.2d 270 (1990).

Additionally, the constitutionality of a criminal statute is a legal question over which this court exercises unlimited review. *State v. Moore*, 274 Kan. 639, 652, 55 P.3d 903 (2002). A statute is generally "presumed constitutional and all doubts must be resolved in favor of its validity." *Martin v. Kansas Dept. of Revenue*, 285 Kan. 625, 629, 176 P.3d 938 (2008). Appellate courts have both the authority and the responsibility to "construe a statute in such a manner that it is constitutional," if such an interpretation can be achieved without contorting the legislature's intent for enacting it. 285 Kan. at 629-30.

Wilkins' vagueness argument simply states the contention that an ordinary person would not be expected to know what constitutes the "orderly administration of justice." However, Wilkins fails to support this argument with any authority or further explain what makes this portion of the statute so ambiguous as to leave people guessing as to its meaning. Essentially, Wilkins argues if this court agrees that a citizen's advice to a defendant on whether to enter into a plea agreement with the State can establish "the

intent to thwart or interfere in any manner with the orderly administration of justice," then the statute is vague. Because Wilkins has not briefed the issue this court should consider it waived and abandoned. *Cooke v. Gillespie*, 285 Kan. 748, 758, 176 P.3d 144 (2008) (a point raised incidentally in a brief and not argued there is deemed abandoned); *State v. Berriozabal*, 291 Kan. 568, 594 243 P.3d 352 (2010).

However, even if this court addresses the issue, Wilkins' argument for vagueness fails. The "administration of justice" is commonly synonymous with the "administration of the law." The phrase "administration of justice" is clear and not ambiguous on its face. People of ordinary intelligence associate this phrase with the administration and procedure of the law. Moreover, Black's Law Dictionary defines "Justice" as "[t]he fair and proper administration of the law." Black's Law Dictionary 942 (9th ed. 2009).

Administration of the law is commonly known as the processing of a case through the court system. The administration of the law in a criminal case encompasses the court hearings, a jury or bench trial, a plea agreement and negotiations, and sentencing of the defendant. Put in the context of the entire language of the statute of aggravated intimidation of a witness, the ordinary person would not be left guessing as to what interfering with the "administration of justice" means. Although K.S.A. 2011 Supp. 21-5909 does not expressly define the term "administration of justice," its meaning is clear and is not susceptible to confusion, especially when it is read in context with the rest of the statutory language. The statute gives sufficient warning of prohibited conduct under common understanding and provides an adequate safeguard against arbitrary enforcement.

Furthermore, "[a] jury is expected to decipher many difficult phrases without receiving specific definitions, such as the term 'reasonable doubt.'" *State v. Robinson*, 261 Kan. 865, 934 P.2d 38 (1997). In *Robinson*, our Supreme Court addressed whether a jury could determine what the phrase "extreme indifference to the value of human life" meant or whether the phrase was so vague that a jury needed a definitional instruction to explain it. The Court concluded that the phrase "extreme indifference to the value of human life" in the elements instruction of unintentional second-degree murder was not so vague that a jury needs an explanation of it. 261 Kan. at 877. Similarly, here the jury did not need a separate definition for the phrase "orderly administration of justice." Therefore, K.S.A. 2011 Supp. 21-5909 is not unconstitutionally vague.

Lastly, Wilkins argues that if the statute is not deemed to be vague, the jury should have been instructed as to what "thwart or interfere in any manner with the orderly administration of justice" meant. Wilkins cites to *State v. Cummings*, 297 Kan. 716, 305 P.3d 556 (2013), as support for this contention, but provides no additional argument. Again, because Wilkins has only incidentally raised the issue, it should be deemed waived and abandoned and this court should not address it. *State v. Pratt*, 255 Kan. 767, Syl. ¶ 4, 876 P.2d 1390 (1994).

Even if the court addresses this last alternative argument, it should find it unpersuasive. In *Cummings*, our Supreme Court held that the district court's failure to define the term "reasonable probability" in the jury instruction of endangering a child was legally erroneous. 297 Kan. at 732. The phrase "reasonable probability" within the instruction was regarding the legal standard the jury must have applied in determining the defendant's criminal culpability. 297 Kan. at 733. However, here, the phrase "thwart or

interfere in any manner with the orderly administration of justice" was not instructing the jury as to the legal standard of Wilkins criminal culpability. This portion of the instruction was a factual circumstance to be determined by the jury.

Moreover, Wilkins fails to provide a definition that the jury should have been instructed or how this definition would have made the language more clear and understandable to the jury. Also, there is no indication in the record that the jury was confused or unclear about this phrase of the instruction. The jury did not submit any questions to the district court regarding the instruction. Therefore, the jury was properly instructed in this case and this court must affirm Wilkins' conviction.

CONCLUSION

For the reasons set forth above, the State of Kansas respectfully requests the Kansas Court of Appeals affirm Wilkins' conviction.

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 15th day of January, 2014, to:

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and on that date **sixteen (16) copies** were hand delivered to the Clerk of the Appellate Courts.

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