No. 13-109624-A

IN THE
COURT OF APPEALS OF THE
STATE OF KANSAS

STATE OF KANSAS
Plaintiff-Appellee

vs.

RICKY EUGENE ROLAND
Defendant-Appellant

BRIEF OF APPELLANT

Appeal from the District Court of Shawnee County, Kansas
Honorable Cheryl Rios Kingfisher, Judge
District Court Case No. 11CR1171

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Statement of the Case

Ricky Eugene Roland was convicted by a jury of one count each of possession of methamphetamine, a severity level 4 drug felony, pursuant to K.S.A. 21-36a06(a); possession of drug paraphernalia, a class A nonperson misdemeanor, pursuant to K.S.A. 21-36a09(b)(2)(e)(3); driving under the influence, a class B nonperson misdemeanor pursuant to K.S.A. 8-1567(d); failure to report an accident with injury or damage to property, a class A nonperson misdemeanor pursuant to K.S.A. 8-1606; and leaving the scene of an accident, a class A nonperson misdemeanor pursuant to K.S.A. 8-1602. He was given a controlling sentence of 11 months in the Department of Corrections with 6 months consecutive jail time and 12 months postrelease. That sentence was suspended in favor of 18 months probation with drug treatment. Mr. Roland now appeals from his convictions and sentence.

Statement of the Issues

Issue I: **The district court erred by allowing a KBI scientist who did not physically perform the drug testing to testify in violation of Mr. Roland's constitutional confrontation rights.**

Issue II: **The State presented insufficient evidence to convict Mr. Roland of failure to report an accident.**

Issue III: **The State committed reversible misconduct during closing argument.**

Issue IV: **The district court erred in instructing the jury that a glass pipe found during the search of Mr. Roland constituted drug paraphernalia.**

Issue V: **The district court committed reversible error when it answered a jury question in violation of Mr. Roland's right to presence, his right to an impartial judge, and his right to a public trial.**

Issue VI: **The district court erred when it ordered a $1,000 DUI fine without considering the method by which Mr. Roland should pay that fine.**

Statement of the Facts

On the night of June 18, 2011, Dana Webber was driving her 2007 Toyota Sienna minivan Southbound down Topeka Boulevard when she spotted a yellow pickup truck driving Northbound on the other side of the road. (R. IX, 173, 176, 177). She looked away for a moment, but when she looked back, the truck was now in her lane, directly in front of her, still traveling Northbound. (R. IX, 177-178). The pickup and Ms. Webber's minivan hit each other. (R. IX, 177-178).

Ms. Webber's airbag went off and her van came to a stop. (R. IX, 177-178). She was taken by ambulance to the hospital and complained of chest pain from the impact with the airbag. (R. IX, 178-179). The truck continued Northbound after the accident, eventually moving back over into the correct lane. (R. IX, 189-190). Several drivers who saw the impact or heard the accident realized that the driver of the truck (identified as a white male) was not stopping. (R. IX, 190-191). As a result both drivers followed the yellow pickup truck. (R. IX, 190-191). One of the drivers following the pickup truck identified the truck as a yellow Chevy Colorado, but was unable to get close enough, due to other traffic on the road, to get to the license plate number. (R. IX, 190-191).

The drivers called 911 and gave dispatch their location as they followed the truck. (R. IX, 192, 195). They eventually followed the truck into a trailer park, but stopped after dispatch told them that they needed to stop following the truck. (R. IX, 195). Officers arrived at the trailer park and began searching for the yellow Chevy Colorado, which reportedly now had damage to the passenger side as a result of the accident. (R. IX, 219-220). While the police were searching the trailer park, dispatch got a phone call from a woman in the same trailer park, reporting that her estranged husband was sitting

outside of her home and that she wanted him removed. (R. IX, 220-222). He was reportedly sitting outside in his yellow pickup truck. (R. IX, 221). The Sheriff's officers responded to the domestic call and found a white male, passed out in the front seat of a yellow Chevy Colorado pickup truck with damage on the passenger side. (R. IX, 222, 224, 226-227). They approached the man and tried to speak with him, but he appeared to be inebriated to the point of being incoherent and unconscious. (R. IX, 227-228). Officers noted a distinct smell of alcohol on him and that the keys to the truck were in his lap. (R. IX, 238, 258). The officers removed the man, later identified as Ricky Roland, from the truck with great difficulty and had him sit down in the grass because he was unable to stand. (R. IX, 230-231, 254). After attempting to communicate with Mr. Roland unsuccessfully, the officers arrested Mr. Roland for driving under the influence, failure to report an accident, and leaving the scene of an accident. (R. IX, 264).

After his arrest, the officers patted him down, finding a glass smoking pipe in the front pocket of his jeans. (R. IX, 264). Later on, during intake at the jail, a jail officer found a metal canister in Mr. Roland's jeans pocket that contained a crystal-like white substance in a baggie. (R. X, 298-299). That substance was later tested and identified as methamphetamine by the KBI. (R. I, 86; R. X, 290). Based on the incident that night, Mr. Roland was charged with possession of methamphetamine, possession of drug paraphernalia, driving under the influence, failure to report an accident, and leaving the scene of an accident. (R. I, 13-15).

At trial, the State put on evidence of the KBI's lab confirmation that the substance found in Mr. Roland's pocket was methamphetamine through a KBI lab technician. (R. IX, 124-129). However, the technician put on by the State was a supervisor who oversaw

the testing and was not the actually trainee who physically conducted the testing on the alleged methamphetamine. (R. IX, 132-133). Defense counsel objected to the witness and to the admission of the lab report, raising Mr. Roland's confrontation clause rights, but the district court overruled that objection and allowed the testimony as well as the lab report itself into evidence. (R. IX, 134-135; R. X, 277-290).

During trial, Mr. Roland's wife testified, saying that she did not actually know when Mr. Roland pulled up to her home or how long he had been there when she called the police. (R. X, 328-329). She testified that she was notified that he was outside in his truck by a neighbor who noticed him sitting there and called to tell her. (R. X, 329). The police acknowledged that none of them placed their hand on the hood of the truck to determine whether it was still warm from having been recently used. (R. IX, 238, R. X, 319). None of the officers actually saw Mr. Roland drive the truck and the keys were not in the ignition. (R. X, 319). At trial, none of the witnesses of the accident were able to positively identify the driver of the truck from the hit-and-run, other than to say he was a white male, and none of them were able to provide the police with a plate number of the suspect vehicle. (R. X, 353-354, 359; R. IX, 191).

During the instructions conference, the defense objected to the language of the instruction on drug paraphernalia, saying that it was worded in a way that instructed the jury that that the glass pipe necessarily qualified as drug paraphernalia, even though that was a decision that was supposed to be left up the jury. (R. X, 380-382). The district court overruled that objection and instructed the jury that drug paraphernalia included glass smoking pipes. (R. X, 382-388).

During closing arguments, the prosecutor told the jury that they could assume that because Ms. Webber testified that her minivan was "totaled," that the property loss (for the purpose of the failure to report an accident charge) was more than $1,000. (R. X, 422).

Prior to a verdict, the jury asked a question regarding the driving under the influence charge and circumstantial evidence, which was responded to by the district court in writing rather than in open court. (R. X, 433-435). The jury ultimately convicted Mr. Rolland of all five charges. (R. X, 436-437).

Mr. Roland was given a controlling sentence of 11 months in the Department of Corrections, with 6 months in the county jail run consecutive to that prison sentence with 12 months postrelease. (R. II, 159-171). That sentence was suspended in favor of 18 months probation with drug treatment after serving a mandatory 45 day jail sentence. (R. II, 159-171). Mr. Roland was also ordered to pay a $1,000 DUI fine, but was not given any options on how he might pay that fine. (R. XI, 15). Mr. Roland filed a timely appeal from his convictions and sentence. (R. II, 172).

Arguments and Authority

Issue I: The district court erred by allowing a KBI scientist who did not physically perform the drug testing to testify in violation of Mr. Roland's constitutional confrontation rights.

Introduction and Preservation

At trial, the only evidence that the substance found in Mr. Roland's pocket during the jail search was methamphetamine was the KBI lab report. That report was admitted into evidence based upon the testimony of a KBI forensic scientist. However, during questioning, it became clear that the KBI scientist who was endorsed and called as a

witness by the State was not the actual scientist who physically performed the tests on the methamphetamine, but was instead a supervisor who oversaw the testing and approved of the findings in the report. The actual testing on the methamphetamine in this case was conducted by a trainee under the witness' supervision.

Mr. Roland's counsel objected to the admission of the lab report at trial, arguing that because the trainee who physically conducted the tests was not at trial and available for cross-examination, Mr. Roland's Confrontation clause rights had been violated. (R. IX, 134-135). After a lengthy examination of the witness, the trial court ultimately concluded that the supervising scientist, who had been present and watching all of the testing conducted by the trainee, was sufficient to satisfy Mr. Roland's confrontation clause rights and admitted the lab report over defense counsel's objection. (R. X, 290).

Standard of Review

The appellate courts employ an unlimited standard of review when addressing issues pertaining to the Confrontation Clause of the Sixth Amendment to the United States Constitution. *State v. Noah,* 284 Kan. 608, 612, 162 P.3d 799 (2007). Any issue of statutory interpretation is likewise subject to de novo review. *State v. Ortega–Cadelan,* 287 Kan. 157, 164, 194 P.3d 1195 (2008); *State v. Bryan,* 281 Kan. 157, 159, 130 P.3d 85 (2006).

Argument

The Confrontation Clause of the Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." That guarantee applies to criminal defendants in both federal and state prosecutions. See *Pointer v. Texas,* 380 U.S.

400, 406, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965) (Sixth Amendment applicable to states via Fourteenth Amendment).

In a landmark decision, *Crawford v. Washington,* 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), the United States Supreme Court significantly overhauled the application of the Confrontation Clause. *Crawford* clarified that a witness' testimony against a defendant is inadmissible unless the witness appears at trial or, if the testimonial witness is unavailable to testify at trial, the defendant had a prior opportunity for cross-examination. *Crawford,* 541 U.S. at 59, 124 S.Ct. 1354; see *Melendez–Diaz v. Massachusetts* 557 U.S. 305, 129 S.Ct. 2527, 2531, 174 L.Ed.2d 314 (2009).

Subsequently, the United States Supreme Court specifically found that a laboratory analyst's certificate, offered to prove the substance which defendant had possessed was cocaine, fell within the "core class of testimonial statements" subject to the Confrontation Clause. *Melendez–Diaz v. Massachusetts,* 129 S.Ct. at 2532. Based on that decision, the Kansas Supreme Court concluded that the forensic examiner reports are testimonial statements for the purposes of the Confrontation clause. *See State v. Leshay,* 289 Kan. 546, 549, 213 P.3d 1071 (2009).

Clearly, based on these cases, Mr. Roland had a Sixth Amendment right to confront the lab analyst who actually conducted the testing and prepared the report that indicating that the substance in his pocket was methamphetamine. The lab report was clearly testimonial in nature and there was no showing by the State that the trainee (the actual analyst who conducted the testing) was unavailable. Because the State failed to meet the threshold requirement for providing as a witness someone other than the person who actually conducted the testing (i.e., because they failed to show that the trainee was

unavailable for trial), the district court's decision to admit the testimony and the lab report should be overruled, Mr. Roland's convictions reversed, and his case remanded for a new trial.

However, even if this Court moves beyond the State's failure to show that the key witness was unavailable, this issue still merits reversal. At trial, the crux of the State's argument for why the supervisor who oversaw the testing and was conducting the training of the trainee was a sufficient witness was basically because that witness' testimony was as good as the trainee's testimony, sufficient to satisfy Mr. Roland's confrontation rights. But the KBI analyst who testified wasn't good enough to satisfy Mr. Roland's right to confront the witnesses against him. Although that supervisor testified that she closely monitored the trainee's performance at every step along the way and that she agreed with the lab report conclusions independent of the trainee's conclusions drawn from the testing, she still was not the person who actually physically conducted the testing. Although the supervisor can insist on the stand that all the proper procedures and testing protocols were followed, that still does not replace the need to have the actual person who conducted the tests there to confirm that fact.

Furthermore, there was some serious questions about what would happen if the phone would ring in the laboratory during the testing process. (R. IX, 148, 150-151). The supervisor testified that when the phone rang, the trainee was expected to stop all work and handling of the drug while the supervisor stepped away to answer the phone. (R. IX, 150-151). While the supervisor could testify that that was what was *supposed* to happen, the actual trainee who conducted the testing still needed to be called to ensure that the trainee followed that procedure and did not actually handle the substance or conduct part

of the testing while not being directly supervised. The supervisor testified that she did not recall a time during the testing of this specific substance that she left to answer the phone or use the restroom. (R. IX, 133). However, she also admitted that because of the number of samples they work on, if she did not have the lab report, she would not remember this specific sample from any other sample she's tested. (R. IX, 152-153). Simply because there are rules that should be followed does not mean that the rules were *actually* followed. That is why it is imperative that a defendant have the ability to confront the *actual* person who conducted the test, not just someone familiar with the process or who watched some or most of the testing being conducted. The State failed to satisfy Mr. Roland's constitutional right to confront the witnesses against him when it failed to provide the actual trainee for cross-examination who conducted the testing in this case.

The United States Supreme Court recently considered the idea of "surrogate testimony" in the case of *Bullcoming v. New Mexico,* ___ U.S. ___, 131 S.Ct. 2705, 180 L.Ed 2d 610 (2011). In that case, a lab analyst who was on unpaid leave was replaced at trial by another analyst fully familiar with the testing process who essentially reviewed and confirmed the certification provided on the lab report by the other lab analyst. In reviewing the New Mexico Supreme Court's finding that this surrogate testimony was allowable under the Confrontation Clause, the United States Supreme Court said that the New Mexico Supreme Court's analysis of the issue raised "red flags." The Supreme Court concluded that surrogate testimony of the kind the witness was equipped to give could not convey what the actual analyst who conducted the certification knew or observed. 131 S.Ct. at 2714-2715.

As the United States Supreme Court said in *Bullcoming*:

> More fundamentally, as this Court stressed in *Crawford*, "[t]he text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts." 541 U.S., at 54, 124 S.Ct. 1354. Nor is it "the role of courts to extrapolate from the words of the [Confrontation Clause] to the values behind it, and then to enforce its guarantees only to the extent they serve (in the courts' views) those underlying values." *Giles v. California,* 554 U.S. 353, 375, 128 S.Ct. 2678, 171 L.Ed.2d 488 (2008). Accordingly, the Clause does not tolerate dispensing with confrontation simply because the court believes that questioning one witness about another's testimonial statements provides a fair enough opportunity for cross-examination.

Bullcoming, 131 S.Ct. at 2716.

Like in *Bullcoming*, the surrogate testimony of the kind that the supervisor in this case was equipped to give could not convey what the trainee potentially knew or observed about the actual testing in this case. Regardless of how closely the supervisor oversaw the trainee in this case, that observation does not justify dispensing with Mr. Roland's confrontation rights simply because the supervisor's statements regarding the trainee's work provide a "fair enough" opportunity for cross-examination.

In *State v. Anderson,* 287 Kan. 325, 197 P.3d 409 (2008), our Supreme Court set out the standard for evaluating a violation of the Confrontation Clause of the Sixth Amendment:

> Violation of the Confrontation Clause of the Sixth Amendment to the United States Constitution is subject to analysis under the federal harmless error rule. Under that rule, an error may not be held to be harmless unless the appellate court is willing to declare beyond a reasonable doubt that the error had little, if any, likelihood of having changed the result of the trial. Whether such error is harmless in a particular case depends upon a host of factors, all readily accessible to reviewing courts. These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, and, of course, the overall strength of the prosecution's case.

Anderson, 287 Kan. 325, Syl. ¶ 5.

In this case, the importance of the KBI analyst and the details of the testing that was done was imperative to the drug possession charge and substantially related to the drug paraphernalia charge. Specifically, there was a significant problem with the relative weight of the drugs. (R. IX, 134; R. X, 317). The drugs weighed by the police were twice as heavy as the drugs ultimately tested by the KBI lab. (R. IX, 134; R. X, 317). Although the State attempted to explain away the difference by making the point that the officers apparently weighed the drugs inside the baggie, while the lab weighed the drugs without the baggie, the jury still would have been left with serious questions regarding just how much a difference the absence of the baggie would have caused, given that there was no evidence presented by the State as to how much the baggie weighed without the drugs. Had the defense also been able to effectively cross examine the actual lab analyst who tested the drugs, instead of the supervisor who oversaw the testing, there is a very real possibility that the jury would have also have serious questions about the lab results themselves. If the jury was in doubt about the integrity of the drugs as well as the testing methodology of the lab, the jury may very well have negated the importance of the lab finding that the drug constituted methamphetamine.

Furthermore, the lab report itself was the only evidence presented by the State to support the finding that the drugs were actually methamphetamine. Even the lab analyst who testified did not technically testify to the conclusion that the drugs were actually methamphetamine. That came entirely from the report itself. Consequently, it was not duplicative evidence. It was the only evidence on that particular element of the crime of possession of methamphetamine. Additionally, the fact that the substance was actually

methamphetamine played a significant role in the jury's assessment of whether the glass pipe found in Mr. Roland's pocket constituted drug paraphernalia. A glass pipe with no other drugs found is much less likely to be considered "drug paraphernalia" than one located in the same pocket as methamphetamine.

Finally, the prosecution, no doubt, will argue that its case was strong and fully proved that Mr. Roland possessed methamphetamine. While clearly something was found in Mr. Roland's pocket that night, the difference in the weight of the drugs between the jail and what ultimately was tested by the KBI, and the fact that the trainee who actually tested the substance was not there to be cross-examined on the testing techniques or whether she handled the drug outside the supervisor's presence renders the reliability of that evidence suspect. The evidence in this case was not so overwhelming as to render any error harmless in this case.

Because Mr. Roland's confrontation clause rights were violated when the State presented lab findings to the jury without providing the analyst who conducted the testing for cross-examination, and that evidence cannot be deemed harmless in this case because it was a vital part of the State's case and the evidence was not otherwise overwhelming Mr. Roland's convictions for possession of methamphetamine and possession of drug paraphernalia should be reversed and his case remanded for a new trial.

Issue II: The State presented insufficient evidence to convict Mr. Roland of failure to report an accident.

Introduction and Preservation

Mr. Roland was charged with failure to report an accident pursuant to K.S.A. 2010 Supp 8-1606. K.S.A. 8-1606(a) states:

> The driver of a vehicle involved in an accident resulting in injury to, great bodily harm to or death of any person or total damage to all property to an apparent extent of $1,000 or more shall give notice immediately of such accident, by the quickest means of communication, to the nearest office of a duly authorized police authority.

Under this statute, the State would need to prove that the accident in this case caused injury to someone in the vehicle or damage to property of an apparent extent of $1,000 or more. In this case, although the victim testified that she suffered chest pain as a result of the impact, the State failed to alternatively prove that the damage to the minivan was over $1,000 dollars. Because this statute, and the jury instructions in this case, provided alternative means for committing this crime, namely that there had to be injury or damage to property over $1,000, and the state filed to provide sufficient evidence of one of those means, Mr. Roland's conviction should be reversed. "There is no requirement that a criminal defendant challenge the sufficiency of the evidence before the trial court in order to preserve it for appeal." *State v. Farmer*, 285 Kan. 541, 545, 175 P.3d 221 (2008).

Standard of Review

This Court has unlimited review over questions of jury unanimity. *State v. Kesselring*, 279 Kan. 671, 678, 112 P.3d 175 (2005). Our Supreme Court has treated the alternative means issue as a "sufficiency of the evidence" issue, applying the following standard of review:

> 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.

State v. Wright, 290 Kan. 194, 224 P.3d 1159, 1164 (2010) (quoting *State v. Gutierrez*, 285 Kan. 332, 336, 172 P.3d 18 [2007]). To the extent this issue involves statutory interpretation, this Court also has unlimited review. *State v. Schow*, 287 Kan. 529, 535-36, 197 P.3d 825 (2008).

Argument

In order to protect a defendant's right to a unanimous jury verdict in an alternative means case, the State must present sufficient evidence to support *each* of the alternative means upon which the district court instructs the jury. *Wright*, 290 Kan. at 201, 206. In the present case, the district court instructed the jury on various alternative means by which it could find Mr. Roland committed the crime of failure to report an accident.

Before a driver involved in an accident bears a statutory duty to report an accident the accident must first result in 1) injury, or 2) property damage to an apparent extent of $1,000 or more. K.S.A. 8-1606(a). For that reason, the jury was instructed that in order to prove the charge of failure to report an accident, they had to find that (1) the defendant drove a motor vehicle; (2) the defendant was involved in a motor vehicle accident; (3) the accident resulted in the injury to another person, or total damage to all property to an apparent extent of $1,000 or more; (4) the defendant failed to immediately, by the quickest means of communication, notify the nearest office of police authority of the accident; and (5) the act occurred on June 18, 2011 in Shawnee County, Kansas. (R. II, 142).

An alternative means issue arises when a district court instructs a jury that "'a single offense may be committed in more than one way.'" *State v. Timley*, 255 Kan. 286, 289, 875 P.2d 242 (1994) (quoting *State v. Kitchen*, 110 Wash. 2d 403, 410, 756 P.2d 105

[1988]). Because the district court in the present case instructed the jury that failure to report an accident is an offense that "may be committed in more than one way," this case presents two alternative means issues. *Timley*, 255 Kan. at 289.

"[I]n order to protect a criminal defendant's right to a unanimous jury verdict" in an alternative means case, the State must present sufficient evidence to "support each alternative means upon which a jury is instructed." *Wright*, 290 Kan. at 201, 206. The question in this case, therefore, is whether, after reviewing all the evidence in the light most favorable to the State, this Court is convinced "that a rational factfinder could have found the defendant guilty beyond a reasonable doubt" of failing to report an injury accident or an accident involving $1,000 or more of property damage. *Wright*, 290 Kan. at 201, 206 (quoting *Gutierrez*, 285 Kan. at 336).

Mr. Roland respectfully argues that the State failed to prove, beyond a reasonable doubt, that this case involved apparent damage of $1,000 or more. The State presented evidence that Dana Webber was "injured" when she testified that she suffered chest pain from the impact of the airbag during the accident. (R. IX, 177-178). Although this evidence may have been sufficient to constitute one alternative means of failure to report, the State failed to present sufficient evidence that the damage to her minivan cost $1,000 or more. Dana Webber testified that on the day of the accident she was in a 2007 Toyota Sienna, XLE minivan. (R. VIII, 176). She also testified that the minivan was "totaled". (R. VIII, 182). However, there was no evidence admitted to indicate how much the pre-accident Toyota minivan was worth, what kind of shape it was in prior to the accident, or how much it took to "total" the minivan out. In order for the jury to find that the damage to the minivan was apparently $1,000 or more, there had to be some evidence in the

record to support that finding. Because there was no evidence to support that figure, the jury would have needed to assume facts not in evidence to find that the damage to the minivan was over the $1,000 threshold mark. When viewed in the light most favorable to the State, the evidence produced at trial was sufficient to support a jury finding that Mr. Roland failed to report an accident resulting in damage to property of $1,000 or more.

In *State v. Brown*, 295 Kan. 181, 184, 284 P.3d 977 (2012), the Kansas Supreme Court clarified alternative means, saying "...a statute—and any instruction that incorporates it—must list distinct alternatives for a material element of the crime, not merely describe a material element or a factual circumstance that would prove the crime, in order to qualify for an alternative means analysis and application of the super-sufficiency requirement." Here, the distinction between an injury accident and a mere property damage accident is significant enough to be distinct alternatives for a material element of the crime of failure to report an accident. The alternative means available to accomplish the crime of failure to report an accident describe *distinct* acts that amount to the same crime. That is, one can accomplish failure to report an accident by causing an injury accident (even one without property damage) and failing to report that accident or by causing an accident resulting in damage to property (but not injury) and failing to report that accident. In each alternative, the offender fails to report the accident, but his *conduct* in the type of accident caused varies significantly.

Because the State failed to prove one of the instructed alternative means for committing the crime of failure to report an accident, this Court should vacate Mr. Roland's conviction for failure to report an accident.

Issue III: The State committed reversible misconduct during closing argument.

Introduction and Preservation

During closing arguments, the State told the jury, "As far as leaving the scene of an accident, we have a nice new Chevy Colorado with the damage on the side of the vehicle that you'll see in the photographs. We have the Sienna Toyota driven by Dana Webber that was totaled because of this accident. *So it is apparent the property loss of a thousand dollars or more.* That's one of the elements..." (R. X, 422). (Emphasis added).

Although Mr. Roland did not object during the State's closing argument, this issue is properly before the Court for review. A contemporaneous objection is not required to preserve questions of prosecutorial misconduct for comments made during closing argument. *State v. King*, 288 Kan. 333, 334, 204 P.3d 585, 588 (2009).

Standard of Review

> Appellate review of an allegation of prosecutorial misconduct involving improper comments to the jury requires a two-step analysis. First, the court determines whether the prosecutor's comments were outside the wide latitude the prosecutor is allowed in discussing the evidence. If misconduct is found, the appellate court must determine whether the improper comments constitute plain error; that is, whether the statements prejudiced the jury against the defendant and denied the defendant a fair trial.

State v. Smith, 296 Kan. 111, 129, 293 P.3d 669, 682 (2012)

Argument

The first prong – the prosecutor exceeded the bounds of fair argument.

In closing argument the prosecutor improperly told the jury to consider information not in evidence when he told the jury that they could assume that if the

minivan was "totaled" that the damage was over $1,000. (R. X, 422). Because there was no evidence presented about the pre-accident worth of the car or that the that the damage to the minivan that caused it to be totaled was more than $1,000, the prosecutor's remarks were improper as they were outside of the wide latitude prosecutors are allowed in discussing the evidence.

The prosecutor asked the jury to assume facts that were not in evidence when he said that the jury could basically assume the specific monetary amount of damage sustained by the minivan during the accident from the fact that it was "totaled." It is a fundamental rule that in argument, "a prosecutor must confine his or her comments to matters in evidence." *State v. Morris*, 40 Kan. App. 2d 769, 791, 196 P.3d 422 (2008). See also *State v. Duke*, 256 Kan. 703, Syl. ¶ 6, 887 P.2d 110 (1994) (In argument, prosecutors "may not introduce or comment on facts outside the evidence"); *State v. Ruff*, 252 Kan. 625, 636, 847 P.2d 1258 (1993) (prosecutors "must guard against anything that could prejudice the minds of the jurors and hinder them from considering only the evidence adduced").

There was no evidence presented at trial regarding the amount of damage to the vehicle, nor was there any evidence produced at trial regarding the pre-accident value of this particular minivan that the jury could then extrapolate the amount of damage from. The only evidence presented at trial was that this was a 2007 Toyota Sienna XLE minivan and that it was "totaled" from the accident. Without evidence of the actual damage amount or, at the very least, the pre-accident worth of the vehicle, the jury was left to guess as to the amount of damage caused by the accident. It was improper for the prosecutor to encourage the jury to engage in this sort of guesswork, since it was not

supported by the evidence. Thus, the prosecutor's remarks were an improper attempt to get the jury to consider information beyond what was presented as evidence at trial.

The second prong – the prosecutor's improper comments require reversal.

The second step requires the examination of three factors: (1) whether the misconduct was so gross and flagrant it denied the accused a fair trial; (2) whether the remarks showed ill will by the prosecutor; and (3) whether the evidence against the defendant was of such a direct and overwhelming nature that the prosecutor's statements would not have much weight in the jurors' minds. *State v. Smith*, 296 Kan. 111, 130, 293 P.3d 669 (2012). None of the three factors is controlling and the third factor can only override the first two factors if the appellate court is able to say that the harmlessness tests of both K.S.A. 60-261 (prosecutor's statements inconsistent with substantial justice) and *Chapman v. California*, 386 U.S. 18, 22, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) (error had little, if any, likelihood of changing the outcome of trial), have been met. *Smith*, 296 Kan. at 130. The heart of the harmless-error test asks whether the error affected the defendant's substantial rights, *i.e.*, affected the outcome of the trial. *Smith*, 296 Kan. at 130. Moreover, "the State, as the party benefitting from the alleged misconduct, bears the burden to establish that there is no reasonable possibility the error affected the verdict." *Smith*, 296 Kan. at 130.

An appellate court will consider a prosecutor's misconduct to be gross and flagrant if the prosecutor repeated or emphasized the misconduct. Similarly, the conduct will be considered to be motivated by ill will if it was deliberate and repeated, or demonstrated an indifference to court rulings. *State v. Chanthaseng*, 293 Kan. 140, 148-49, 261 P.3d 889 (2011). See also *State v. Cosby*, 285 Kan. 230, 251-52, 169 P.3d 1128

(2007) (prosecutor's misstatement of well-known law was gross and flagrant and demonstrated ill will).

By definition, the prosecutor's misconduct in this case was gross and flagrant and motivated by ill will. The State had an obligation to put on evidence to support the charges in this case. Despite having the owner of the car on the stand, the State failed to ask a question regarding the amount of damage beyond that it was "totaled." In an effort clearly intended to patch up this whole in their evidence, the prosecutor encouraged the jury to go outside the evidence presented at trial and assume facts not in evidence or conduct guesswork to come to a conclusion of Mr. Roland's guilt. These comments were not isolated remarks; they were calculated statements intended to distract the jury from the lack of evidence on one of the elements of the crime.

The prosecutor's misconduct cannot be deemed harmless. The issue the jury had to decide was whether Mr. Roland failed to report an accident, either because of possible injury to the driver or due to the property damage sustained. The State's evidence failed to prove that crime. It was only through the State's encouragement to the jury to go outside the evidence in the case that the jury could have found guilt on that charge. Thus, the evidence was not of such a direct and overwhelming nature that the prosecutor's comments would not have weighed in the jurors' minds. Under these circumstances, the conduct was highly prejudicial. As the Utah Supreme Court has explained, "If the conclusion of the jurors is based on their weighing conflicting evidence or evidence susceptible of differing interpretations, there is a greater likelihood that they will be improperly influenced through remarks of counsel." *State v. Troy*, 688 P.2d 483, 486-87 (1984).

> Indeed, in such cases, the jurors may be searching for guidance in weighing and interpreting the evidence. They may be especially susceptible to influence, and a small degree of influence may be sufficient to affect the verdict.

Troy, 688 P.2d at 486-87.

The prosecutor's conduct in this case deprived Mr. Roland of his right to a fair trial and requires reversal.

Issue IV: The district court erred in instructing the jury that a glass pipe found during the search of Mr. Roland constituted drug paraphernalia.

Introduction and Preservation

In the district court's instructions to the jury, it explained in Instruction No. 13 that "'drug paraphernalia' includes glass pipes. (R.II, 140). By telling the jury that drug paraphernalia included glass pipes, the district court took away from the jury's providence whether the glass pipe was drug paraphernalia. This, in turn, violated Mr. Roland's Fifth and Sixth Amendment rights because the jury was not allowed to find beyond a reasonable doubt that what was found in Mr. Roland's pocket was drug paraphernalia.

Mr. Roland did object to the instruction at trial. (R. X, 380). However, the district court, after consideration of other alternatives, decided to include the offending language over the defense's objections. (R. X, 382-389).

Standard of Review

When a party has objected to a jury instruction at trial, an appellate court examines the instruction to determine whether it properly and fairly states the law as applied to the facts of the case and could not have reasonably misled the jury. *State v. Rivera*, 48 Kan. App. 2d 417, 442, 291 P.3d 512 (2012). In making this determination,

an appellate court is required to consider the instructions as a whole and not isolate any one instruction. *State v. Appleby,* 289 Kan. 1017, 1059, 221 P.3d 525 (2009).

Argument

Effectively, the district court told the jury that a glass pipe constituted drug paraphernalia, as opposed to allowing the jury to find that element beyond a reasonable doubt. As such, this Court should find that the instruction the district court gave to the jury in Mr. Roland's case constituted error. *State v. Brice*, 276 Kan. 758, 771-2, 80 P. 3d 1113 (2003).

By way of analogy, in *Brice*, the Kansas Supreme Court held that "instructing a jury that great bodily harm means what the State's evidence showed, the trial judge effectively instructed the jury the element had been proved." 276 Kan. at 768-9. The instruction in *Brice* is similar to the instruction in Mr. Roland's case, the jury was told that drug paraphernalia included glass pipes. K.S.A. 21-36a01(f), statutorily defines what can be considered drug paraphernalia. However, the language in PIK Crim. 3d 67.40 allows the court to list those specific items of paraphernalia that are supported by the evidence. But by indicating that drug paraphernalia included glass pipes, the district court went against the rule handed down in *Brice* and more importantly, took away Mr. Roland's constitutional right to have a jury decide all of the elements of the crimes the State charged him with. The inclusion of an indication that a particular piece of evidence actually was included in the definition of drug paraphernalia "went beyond the tailoring of a definition to the evidence." *Brice*, 276 Kan. at 772. There is little difference between the language here and the language in *Brice*, which was, great bodily harm means a through and through bullet wound. 276 Kan. at 762.

Brice established that instructions that violate the Fifth and Sixth Amendments are not just erroneous, but clearly erroneous. *Brice*, 276 Kan. at 775, *see also Francis v. Franklin*, 471 U.S. 307, 325 (1985). It is entirely likely that a jury could have come to a different conclusion had they not been told that a glass pipe was, in fact, drug paraphernalia, but the jury was not given that opportunity. When a jury is presented with evidence of items that are not per se contraband, the jury must make the finding that the defendant not only possessed the item, but possessed it with a certain mens rea. The instruction in the instant case entirely stripped that role from the jury in this case.

When looking at the jury instructions as a whole, Instruction No. 12 gives the jury factors to consider in deciding whether something is drug paraphernalia, but the instruction at issue, Instruction No. 13, told the jury that drug paraphernalia specifically included glass pipes. (R.II, 139-140). Rather than letting the jury use Instruction No. 12 in its considerations, the district court instructed the jury that what the state presented was, in fact, drug paraphernalia. As per *Brice*, Mr. Roland's conviction on the drug paraphernalia should be reversed because the court's instruction violated the Fifth and Sixth Amendments. *Brice*, 276 Kan. at 775, *see also Francis v. Franklin*, 471 U.S. 307, 325 (1985).

Issue V: The district court committed reversible error when it answered a jury question in violation of Mr. Roland's right to presence, his right to an impartial judge, and his right to a public trial.

Introduction and Preservation

Rather than require that the jury receive an answer in open court with the defendant, the judge, and the attorneys present, the district court merely responded in writing causing several violations of Mr. Roland's constitutional rights. This Court must,

therefore, reverse Mr. Roland's convictions and remand for a new trial.

Mr. Roland's attorney did not object to the judge's decision to submit her response to the jury's question in writing. (R. X, 433-435). The Kansas Supreme Court has previously addressed this issue for the first time on appeal in *State v. Bell*, 266 Kan. 896, 918-920, 975 P.2d 239, *cert. denied* 528 U.S. 905 (1999). Moreover, the constitutional right to a public trial is a fundamental right and such an issue may be considered on appeal even in the absence of a contemporaneous objection at trial. *State v. McNaught*, 238 Kan. 567, 577, 713 P.2d 457 (1986); *State v. Barnes*, 45 Kan. App. 2d 608, 251 P.3d 96 (2011).

Standard of Review

This issue deals with interpretation of a statute. As such, this Court exercised unlimited review. *State v. McGill*, 271 Kan. 150, 151, 22 P.3d 597 (2001).

Argument

The law governing the manner in which a court responds to questions of the jury asked during deliberation is set forth in K.S.A. 22-3420(3). That statute reads:

> After the jury has retired for deliberation, if they desire to be informed as to any part of the law or evidence arising in the case, they may request the officer to conduct them to the court, where the information on the point of the law shall be given, or the evidence shall be read or exhibited to them in the presence of the defendant, unless he voluntarily absents himself, and his counsel and after notice to the prosecuting attorney.

The Kansas Supreme Court has interpreted this statute to require,

> that once a jury has begun deliberations any questions from the jury concerning the law or evidence pertaining to the case must be answered in open court in the defendant's presence unless the defendant is absent voluntarily.

State v. McGinnes, 266 Kan. 121, Syl. ¶ 2, 967 P.2d 763 (1998).

The Confrontation Clause of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment require the defendant's presence at every critical stage of a trial, including a conference between a trial judge and a jury. See *State v. McGinnes*, 266 Kan. at 127.

Also,

> A criminal defendant has the constitutional and statutory right to be present at all critical stages of his or her trial. A conference between a trial judge and the jury is a critical stage and requires the presence of the defendant.
>
> A trial court's failure to answer the jury's question in the presence of the defendant violates the defendant's statutory and constitutional rights.

State v. Coyote, 268 Kan. 726, Syl. ¶¶ 1 and 3, 1 P.3d 836 (2000). See also K.S.A. 22-3405(1), (providing right of defendant to be present at trial).

The procedure used here by the district court to respond to the jury's question resulted in multiple violations of the law. It is clear that the district court did not follow the statutorily mandated procedure because the court's response was not given to the jury in open court. It is also clear that Mr. Roland's constitutional right to be present at every critical stage of his trial was violated because he was not present when the court's response to the jury's question was communicated to the jury. There is no indication in the record that Mr. Roland was voluntarily absent from any of these proceedings. Moreover, Mr. Roland's rights are not protected even if he was present when court and counsel discussed the appropriate response to be given to the jury, because he has constitutional and statutory rights to be present at the critical stage of the trial when the court actually communicates its response to the jury.

The right to be present at every critical stage of the trial can be waived if the defendant is voluntarily absent. *State v. Coyote*, 268 Kan. 726. The fact that this is a "voluntary" choice to be made by the defendant would indicate that this right is personal to the defendant and cannot be waived unilaterally by defense counsel. Moreover, because the defendant has a right to be personally and physically present at every critical stage of the trial, it seems logical that the defendant, and only the defendant, can waive that right. See *State v. Acree*, 22 Kan. App. 2d 350, 916 P.2d 61, rev. denied 260 Kan. 995 (1996). In this case, the district court just sent the response to the jury in the jury room without ever bringing the jury into open court to have the response given to it.

This issue, however, is not solely about Mr. Roland's right to be present at every critical stage of his trial. The procedure used by the trial court to respond to the jury's question also violated Mr. Roland's constitutional rights to an impartial judge and to a public trial. These constitutional rights are so fundamental that they are examined with structural error analysis on appeal. See *Arizona v. Fulminante*, 499 U.S. 279, n. 8, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991) at n. 8 (citing *Tumey v. Ohio*, 273 US 510, 47 S. Ct. 437, 71 L. Ed. 749 (1927)) (right to an impartial judge); *Waller v. Georgia*, 467 U.S. 39, 81, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984)(right to a public trial).

Because of the fundamental nature of the constitutional rights violated here, Mr. Roland asserts that his trial attorney could not unilaterally waive those rights. Instead, Mr. Roland must personally waive those rights.

A similar situation is found in a criminal defendant's right to a jury trial. In order for a criminal defendant to properly waive his right to a jury trial, he must personally waive this right in writing or open court for the record. "For a defendant to effectively

waive his or her right to a jury trial, two conditions must be met: (1) the trial court must advise the defendant of his or her right to a jury trial, and (2) the defendant must waive the right personally, either in writing or in open court for the record." *State v. Irving*, 216 Kan. 588, 590, 533 P.2d 1225 (1975). Defense counsel cannot waive the defendant's right to a jury trial on behalf of the defendant or through conversations outside the court's presence. *State v. Larraco*, 32 Kan. App. 2d 996, 1002, 93 P.2d 725, 729 (2004).

The rights to have a judge and the public present at trial are integral parts of a criminal defendant's right to a trial. Whether or not a jury is involved, a defendant has a right to have a judge and the public present. The waiver of such rights should be treated as the waiver of a defendant's right to jury trial; the waiver must be personally made by the defendant rather than by defense counsel, and the waiver must come after an advisement of the nature of the rights waived. In the instant case Mr. Roland was never advised of the rights he would be waiving if the trial court chose to respond to the jury's questions by delivering a written response to the jury in the jury room. He was never told that by having a note delivered the jury in the jury room he would essentially be waiving his right to have the judge and members of the public present at a critical stage of the trial. Moreover, he never personally waived those rights. His rights to an impartial judge and a public trial were violated.

Crucial to this issue is an understanding that the communication between the court and the jury is the critical stage of the trial. When the communication is in the form of a written note, delivered by the court to the jury in the jury room, that communication is not effected until the jury reads the note in the jury room. Accordingly, when the communication was actually made, Mr. Roland was not present, the trial court judge was

not present, and the public was not present.

A criminal defendant has a right under the Fourteenth Amendment to the United States Constitution to an impartial judge. *Ward v. Village of Monroeville*, 409 U.S. 57, 59-60, 93 S.Ct 80, 34 L.Ed.2d 267 (1972). The lack of an impartial judge is considered a structural error and is therefore not subject to harmless error review. *Arizona v. Fulminante*, 499 U.S. 279, 308 & n. 8, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991). If no judge is present at a critical stage of the trial, then no impartial judge is present. It is clear that because of the procedure used by the trial court to respond to the jury's question – a procedure that was contrary to the controlling law – Mr. Roland's right to an impartial judge was violated.

A defendant has a constitutional right under the Sixth Amendment and Subsection 10 of the Kansas Bill of Rights to a "public" trial. The right to a public trial, guaranteed by the Sixth Amendment and Subsection 10 of the Kansas Bill of Rights, is so fundamental to fairness that its "infraction can never be treated as harmless error." *Arizona v. Fulminante,* 499 U.S. 279, 308, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991); *Waller v. Georgia*, 467 U.S. 39, 81, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984). As such, its violation constitutes structural error, and it must always result in reversal. *Arizona v. Fulminante*, 499 U.S. at 308. Again, the procedure used by the court to respond to the jury's question violated Mr. Roland's right to a public trial.

Although it may be more convenient for the court to simply submit a written response to the jury, such a procedure is insufficient to protect a defendant's constitutional and statutory rights. This is not a matter of the court's discretion. There is a statutory procedure that exists and should be followed. It is important that the statutory procedure be followed. The statutory procedure ensures the presence of the defendant

when the court communicates with the jurors. Also, the process of bringing the jurors into open court to simultaneously hear the response of the court ensures that there is uniformity in the information received by the jurors, and allows the jurors to immediately, and in the presence of the defendant, ask for further clarification or follow-up questions if necessary. It also allows the district court to preside over and control the situation. If a written response is simply taken by the bailiff to the deliberation room, there is no guarantee that all jurors will see the response or have a common understanding of the response. And, of course, in such a situation the defendant is not present in the deliberation room to see the jury receiving communications from the court, or to detect if the jury is having difficulties related to the court's response.

Mr. Roland has a right to be present when the court communicates with the jury. Mr. Roland's presence at a discussion between court and counsel in the absence of the jury does not satisfy his constitutional right to be present when the jury receives the response to its question. A discussion between court and counsel is not the same thing as a communication between the court and the jury. It is clear under the law that these are not the same thing and, in fact, an accused's rights are much greater concerning any communication between the court and the jury. While it is clear that an accused has a constitutional right to be present at every critical stage of the trial, including the communication of the court to the jury in response to the jury's questions, an accused does not have a right to be present when court and counsel are discussing instructions to be given to the jury. See *State v. Mantz*, 222 Kan. 453, Syl. ¶ 6, 565 P.2d 612 (1977). Accordingly, Mr. Roland's presence at the conference between court and counsel, an event with which Mr. Roland had no associated constitutional rights, cannot substitute for his presence when the court communicates its response to the jury, an event for which Mr. Roland does have a constitutional and statutory right to be present.

Mr. Roland's fundamental rights to an impartial judge and to a public trial have been violated. These are structural errors affecting the framework in which the trial proceeded. They occurred when the court abandoned its role as the presiding officer at trial, and allowed the trial to proceed in its absence and in the absence of members of the public. Harmless error review should not be applied. Accordingly, the proper remedy in this case is automatic reversal of conviction.

When the "totality of the circumstances substantially prejudice the defendant," the reviewing court must reverse for cumulative error. *State v. Lumbrera*, 252 Kan. 54, 56-57, 845 P.2d 609 (1992). See also *State v. Pruitt,* 42 Kan. App. 2d 166, 175, 211 P.3d 166 (2009). Thus, even if the multiple statutory and constitutional violations that occurred in this case, taken individually, do not rise to the level of reversible error, a matter which is not conceded here, the cumulative effect of these errors – the violation of K.S.A. 22-3405, of K.S.A. 22-3420, of Mr. Roland's federal and state constitutional rights to be present at every critical stage of his trial, of his federal and state constitutional rights to fair trial before a neutral judge, and of his federal and state constitutional rights to a public trial – operated to deny Mr. Roland a fair trial, requiring a reversal of his convictions.

Issue VI: The district court erred when it ordered a $1,000 DUI fine without considering the method by which Mr. Roland should pay that fine.

Introduction

The Kansas Supreme Court has stated that, before a district court can impose a fine for a conviction for driving under the influence, it must consider the defendant's ability to pay. *State v. Copes*, 290 Kan. 209, 224 P.3d 571, 580 (2010). Here, the district court simply announced that the defendant had to pay the fine. (R. XI, 15). Because the

Court failed to consider Mr. Roland's ability to pay, he respectfully requests that this Court reverse his sentence and remand with directions to comply with *Copes*.

Standard of Review

Because this case involves the interpretation of K.S.A. 8-1567(f), K.S.A. 8-1567(j); and K.S.A. 21-4607(3), this Court has unlimited review. *State v. Storey*, 286 Kan. 7, 9-10, 179 P.3d 1137 (2008).

Analysis

At sentencing, the district court ordered Mr. Roland to pay a $1,000 fine. (R. II, 161; R. XI, 15). K.S.A. 21-4607(3) provides that "[i]n determining the amount and method of payment of a fine, the court *shall* take into account the financial resources of the defendant and the nature of the burden that its payment will impose." (Emphasis added.) The district court failed to take into account Mr. Roland's financial resources and the burden of the $1,000 fine when considering the method of payment of the fine; therefore, the district court erred in ordering Mr. Roland to pay this fine.

In *State v. Copes*, 290 Kan. 209, 222, 224 P.3d 571 (2010), the Kansas Supreme Court recognized that, "The community service option provided in K.S.A.2009 Supp. 8-1567(j) [the DUI statute] creates an alternative method of payment."

> Consequently, applying K.S.A. 21-4607(3), we hold that a district court must take into account the defendant's financial resources and the burden of the fine when considering the method of payment of a fine for a fourth or subsequent DUI offense, i.e., whether the defendant must pay a monetary fine or provide community service under K.S.A.2009 Supp. 8-1567(j).

Copes, 290 Kan. at 223.

The district court in this case never considered the financial resources of Mr. Roland when imposing the $1,000 fine. (R. XI, 15). As a result, this matter must be

reversed and remanded for the trial court to properly consider the method of payment.

Conclusion

For the foregoing reasons, Mr. Roland respectfully asks this Court to vacate his convictions and sentence and remand his case back to the district court for further proceedings in accordance with the above listed issues.

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, Chad Taylor, Shawnee County District Attorney, 200 SE 7th, Suite 214, Topeka, KS 66603-3922 and by mailing through building mail one copy to Derek Schmidt, Attorney General, 120 SW 10th Ave., 2nd Floor, Topeka, KS 66612, on the 26th day of February, 2014.

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