No. 15-112841-A

IN THE
COURT OF APPEALS OF THE
STATE OF KANSAS

STATE OF KANSAS
Plaintiff-Appellee

vs.

PABLO ALBERTO GONZALEZ
Defendant-Appellant

BRIEF OF APPELLANT

Appeal from the District Court of Pottawatomie County, Kansas
Honorable Jeff Elder, Judge
District Court Case No. 14 CR 01

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Table of Contents

Nature of the Case

A jury convicted Pablo Gonzalez of unintentional second-degree murder. The district court imposed a 123-month prison sentence. This is Mr. Gozalez' direct appeal from conviction.

Statement of the Issues

Issue #1: **Because, as amended and construed, there is no articulable difference between unintentional second-degree murder and involuntary manslaughter, the statute defining unintentional second-degree murder is unconstitutionally vague.**

Issue #2: **Because the record does not include evidence to support that Mr. Gonzalez acted with extreme indifference to the value of human life, it does not support a conviction for unintentional second-degree murder.**

Issue #3: **The district court failed to give a meaningful answer to the jury's question when it asked for clarification of the difference between unintentional second-degree murder and involuntary manslaughter.**

Issue #4: **The district court improperly conducted discussions about the jury's question off the record and, presumably, outside the presence of Mr. Gonzalez. This ex parte communication violated the Due Process Clause, the Confrontation Clause, and the Public Trial Clause.**

Issue #5: **The district court failed to give a limiting instruction regarding uncharged bad act evidence admitted at trial.**

Issue #6: **Cumulative error denied Mr. Gonzalez a fair trial.**

Statement of Facts

Pablo Gonzalez and his friends celebrated New Year's Eve in the traditional way, getting together at parties and drinking and playing games. (R.5, 128-36, 159-68; R.7, 372). L.B. was one of Mr. Gonzalez' friends. (R.7, 371). After being at a party, Mr. Gonzalez and L.B. and two others drove out of town and did some shooting with Mr. Gonzalez' hand gun. (R.7, 373). Mr. Gonzalez and the others were quite intoxicated;

approximately three hours after the accident resulting in L.B.'s death, Mr. Gonzalez had a blood alcohol content of .25. (R.6, 284). Unfortunately, the lack of judgment resulting from this intoxication culminated in L.B.'s death.

After shooting in the country, the men drove back into town. (R.7, 374). The other men had mostly passed out in the back seat, when they heard a gunshot go off and heard Mr. Gonzalez exclaim that they needed to get help. (R.5, 138, 169).

Mr. Gonzalez testified that while they had been driving back into town, he had the handgun out and pointed at his own head. (R.7, 374). L.B. said "Don't do that"; Mr. Gonzalez responded that it wasn't loaded and pointed it at L.B., pulled the trigger, and the gun discharged. (R.7, 374). Mr. Gonzalez testified that he didn't think the gun was loaded. (R.7, 374). At first, Mr. Gonzalez thought and hoped that L.B. was okay, but then saw him bleeding and coughing and yelled that they needed to get help. (R.7, 374). He tried to call 911 on his cell phone, but was too drunk to complete the call. (R.7, 374). At trial, Mr. Gonzalez acknowledged that he pulled the trigger, but testified that he did not know the gun was loaded and did not intend to shoot L.B. (R.7, 377-78).

Mr. Gonzalez immediately proceeded to a nearby police station where a police officer saw Mr. Gonzalez hurry up to the entrance franticly seeking help and saying he "just shot his boy in the face." (R.5, 102-03). The officer found a handgun on the ground with one round in the chamber. (R.5, 107-08). L.B. was dead on the scene. (R.5, 119). The coroner testified that L.B. died from a gunshot wound to the neck and from the markings around the wound, the coroner testified that gun must have been nearly against L.B.'s neck. (R.6, 306, 314). The coroner also noted that L.B. had a blood alcohol content of .212. (R.6, 312).

The state charged Mr. Gonzalez with intentional second-degree murder and aggravated assault.[1] (R.1, 26). A jury convicted Mr. Gonzalez of unintentional second-degree murder, given as a lesser-included offense, and acquitted him of aggravated assault. (R.1, 75). The district court imposed a 123-month prison sentence. (R.1, 84).

Arguments and Authorities

Issue #1: Because, as amended and construed, there is no articulable difference between unintentional second-degree murder and involuntary manslaughter, the statute defining unintentional second-degree murder is unconstitutionally vague.

Reviewability and standard of review

Appointed counsel did not object to application of K.S.A. 2012 Supp. 21-5403(a)(2) on vagueness grounds. But this Court can and should reach an issue for the first time on appeal if it: (1) involves only a question of law arising on proved or admitted facts that is finally determinative of the case or (2) if consideration is necessary to serve the ends of justice or to prevent denial of fundamental rights. *State v. Puckett*, 230 Kan. 596, 598-99, 640 P.2d 1198 (1982). The instant claim satisfies both prongs of this test. The constitutionality of a statute is purely a question of law over which this Court exercises de novo review. *See State v. Laturner*, 289 Kan. 727, 735, 218 P.3d 23 (2009). And conviction under a vague statute offends the core of the Due Process Clause, a fundamental right.

Test for vagueness

The United States Supreme Court recently reiterated its vagueness test under the Due Process Clause:

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[1] The aggravated assault charged stemmed from allegations by another acquaintance that, at another point in the evening, Mr. Gonzalez had been asking for some cigarettes and during the interaction was pointing a gun and being stupid. (R.6, 203-05). Because Mr. Gonzalez was acquitted of this offense, it is not included in any detail in the statement of facts.

> The Fifth Amendment provides that "[n]o person shall ... be deprived of life, liberty, or property, without due process of law." Our cases establish that the Government violates this guarantee by taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement. *Kolender v. Lawson*, 461 U.S. 352, 357–358, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983). The prohibition of vagueness in criminal statutes "is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law," and a statute that flouts it "violates the first essential of due process." *Connally v. General Constr. Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed. 322 (1926). [*Johnson v. United States*, 135 S. Ct. 2551, 2556-57 (2015)].

In *Johnson*, the United States Supreme Court tested the residual clause of the Armed Career Criminal Act, which enhanced a sentence upon a judicial finding that a prior offense "otherwise involves conduct that presents a serious potential risk of physical injury to another." The majority opinion noted that this definition "leaves grave uncertainty about how to estimate the risk posed by the statute" and at the same time "leaves uncertainty about how much risk it takes to qualify as a violent felony." 135 S.Ct. at 2557-58. *Johnson* clarified that a statute has to describe prohibited conduct in terms that can be articulated by a court for a judge or a jury.

Prior cases

In 1997, the Kansas Supreme Court considered whether the definitions of unintentional second-degree murder and involuntary manslaughter failed to have non-vague distinctions that a jury could understand:

> Both depraved heart murder and reckless involuntary manslaughter require recklessness—that the killing be done under circumstances showing a realization of the imminence of danger and a conscious disregard of that danger. Depraved heart murder requires the additional element that the reckless killing occur under circumstances manifesting extreme indifference to the value of human life. The question is whether the jury, from looking at the instructions, would know that the two statutes, depraved heart murder and reckless involuntary manslaughter, do not

> punish the same thing. The phrase in the depraved heart murder statute requiring the "extreme indifference to the value of human life" indicates, as the legislature intended, that this statute requires a higher degree of recklessness than that required by the reckless involuntary manslaughter statute. If a jury is given a lesser included instruction on reckless involuntary manslaughter, then the jury must assume that some killings fall under this crime. Thus, the jury is put on notice that it must determine whether a reckless killing involves an extreme degree of recklessness and is depraved heart murder or involves a lower degree of recklessness and is involuntary manslaughter. The jury does this by determining whether a particular reckless killing indicates an extreme indifference to the value of human life which is beyond that indifference present in all reckless killings. Thus, the two statutes (depraved heart murder and involuntary manslaughter) are distinguishable and do not unconstitutionally violate due process or equal protection. [*State v. Robinson*, 261 Kan. 865, 876-77, 934 P.2d 38 (1997)(citations omitted)].

See also State v. Cordray, 277 Kan. 43, 50, 82 P.3d 503 (2004)(following *Robinson*). *Robinson* and *Cordray* are not controlling in this case for three reasons: (1) because the Kansas Supreme Court has subsequently clarified that the recklessness involved in reckless homicide refers to the risk of death, (2) because the statute defining recklessness has been amended since *Robinson* and *Cordray*, and (3) because *Johnson v. United States*, decided last year, makes it clear that statutes that turn on an unguided finding regarding a crime being worse than another hypothetical crime are too vague to withstand a vagueness challenge.

How is extreme indifference different than a gross deviation?

In 2012, the Kansas Supreme Court clarified its previous case law regarding the state-of-mind requirement for reckless homicide:

> Notwithstanding the contrary language in this court's previous decisions, today we hold that K.S.A. 21–3402 focuses culpability on whether a killing is intentional or unintentional, not on whether a deliberate and voluntary act leads to death. [*State v. Deal,* 293 Kan. 872, 885, 269 P.3d 1282, 1290 (2012)].

Using this test, the line between unintentional second-degree murder and involuntary

manslaughter blurs. After July 1, 2011, the Kansas legislature amended the state of mind requirements and declared that a person acts "recklessly" if he or she: "consciously disregards a substantial and unjustifiable risk that circumstances exists or that a result will follow and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation." K.S.A. 2011 Supp. 21-5202(j). The "result" that is the subject of a reckless homicide case is that a death will occur. As a result, involuntary manslaughter is consciously disregarding an unjustifiable risk *that a death will occur* when such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation.

Unintentional second-degree murder requires a reckless homicide "under circumstances manifesting extreme indifference to the value of human life." K.S.A. 2012 Supp. 21-5403(a)(2) But every time a person disregards an unjustifiable risk that a death will occur in gross deviation from the reasonable standard of care, it will show extreme indifference to the value of human life on some level. If "extreme indifference to the value of human life" is not qualified in some way there is no way for a jury or a court to delineate the two crimes.

Non-vague statutes must be able to be tested

As noted above, the *Robinson* held that the two offenses were not vague because if the jury determines "whether a particular reckless killing indicates an extreme indifference to the value of human life which is beyond that indifference present in all reckless killings." 261 Kan. at 876-77. This exact kind of analysis was rejected by the United States Supreme Court in *Arizona v. Johnson*, 135 S.Ct. 2551 (2015).

In *Johnson*, describing the flaws in the residual clause of the Armed Career Criminal Act, the Court noted that defining a crime in terms of "a judicially imagined 'ordinary case' of a crime" creates grave uncertainty:

> How does one go about deciding what kind of conduct the "ordinary case" of a crime involves? "A statistical analysis of the state reporter? A survey? Expert evidence? Google? Gut instinct?" To take an example, does the ordinary instance of witness tampering involve offering a witness a bribe? Or threatening a witness with violence? Critically, picturing the criminal's behavior is not enough; as we have already discussed, assessing "potential risk" seemingly requires the judge to imagine how the idealized ordinary case of the crime subsequently plays out. [135 S. Ct. at 2557-58].

This same flaw appears in this Court's analysis in *Robinson*. To the extent that unintentional second-degree murder requires something "which is beyond that indifference present in all reckless killings," it would require a jury to make a determination of the "ordinary" reckless killing. But on what basis would it do that? Does the prosecutor have to put on evidence of other reckless killings for comparative purposes? If not, on what basis would a particular jury be able to compare the degrees of recklessness?

Additionally, the *Johnson* Court explained that an appellate court should not be blind to reality regarding a confusing statute. The United States Supreme Court made multiple attempts to find a non-vague construction of the Armed Career Criminal Act as it applied to various circumstances. But cases kept arising. The *Johnson* Court held that "this Court's repeated attempts and repeated failures to craft a principled and objective standard out of the residual clause confirm its hopeless indeterminacy." 135 S. Ct. at 2558.

In *State v. Cordray*, a jury asked for clarification of the phrase "under circumstances showing extreme indifference to the value of human life." 277 Kan. at 49.

In 2004, the *Cordray* Court followed *Robinson* and held that, because the phrase "extreme indifference to the value of human life" was not constitutionally vague, further definition was not required. 277 Kan. at 50. And yet, as evinced in the instant case, juries continue to ask for clarification of the difference between the two crimes. In the instant case, the jury asked the district judge to " provide more clarification of the differences between the murder in the second degree, committed unintentionally and the Involuntary Manslaughter?" (R.9). If juries are explicitly telling district courts they need clarification of the difference between the two crimes, it should be a signal to the appellate courts that *Robinson* is wrong.

As amended and construed by the Kansas Supreme Court, the difference between unintentional second-degree murder and involuntary manslaughter is one that makes no real distinction. And to the extent that any distinction relies upon a jury's comparison to a hypothetical "ordinary" reckless homicide, the United States Supreme Court has held that such a distinction results in "hopeless indeterminacy." As a result, this Court should hold that K.S.A. 2012 Supp. 21-5403(a)(2) is unconstitutionally vague and reverse the unintentional second-degree murder conviction.

Issue #2: Because the record does not include evidence to support that Mr. Gonzalez acted with extreme indifference to the value of human life, it does not support a conviction for unintentional second-degree murder.

Reviewability

Mr. Gonzalez pleaded not guilty. (R.1, 28). Therefore, the state had the burden to prove "every material fact alleged in the charge." K.S.A. 22-3209(3); *State v. Farmer*, 285 Kan. 541, 545, 175 P.3d 221, 225 (2008)("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.)

Standard of Review

The standard of review for a sufficiency challenge 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 [Mr. Gonzalez] guilty beyond a reasonable doubt." *State v. Johnson*, 266 Kan. 322, 326, 970 P.2d 990 (1998). *See also In re Winship*, 397 U.S. 358 (1970)(conviction on insufficient evidence violates Due Process Clause).

Discussion

As argued above, because no Kansas court has ever articulated a distinction between unintentional second-degree murder and involuntary manslaughter, a sufficiency analysis is somewhat difficult. The only real description of a difference between the two statutes was stated by the Kansas Supreme Court in *State v. Robinson*, quoted above: "whether a particular reckless killing indicates an extreme indifference to the value of human life which is beyond that indifference present in all reckless killings."

As reasoned in *Robinson*, if these crimes are not vague, there must be some articulable set of circumstances that would support a conviction for involuntary manslaughter but not support a conviction for unintentional second-degree murder. The Kansas Supreme Court has never articulated those circumstances, except to note that whatever "extreme indifference to the value of human life" it is something that must be "beyond that indifference present in all reckless killings." 261 Kan. 876-77. Therefore, the question in this case is: did the state present evidence that any recklessness in this case exceeded the "indifference present in all reckless killings?"

The state did not put on any evidence regarding other cases involving "ordinary" recklessness in an involuntary manslaughter case from which a jury might compare any alleged recklessness stemming from Mr. Gonzalez' conduct. Nor did the state present any expert testimony regarding what constitutes "ordinary" recklessness in an involuntary manslaughter case.

Furthermore, the facts in this tragic case do not show recklessness "beyond that indifference present in all reckless killings." Viewed in a light most favorable to the state, Mr. Gonzalez knew that he pointed the gun at L.B. and knew that he pulled the trigger. But there is no evidence to support that he knew that the gun was loaded. Mr. Gonzalez explicitly testified to the contrary. Although the state introduced some evidence that Mr. Gonzalez had chambered a round in the gun at an earlier point on New Year's Eve, (R.6, 1893), it did not show that he had any recall of such a fact, even if true. Mr. Gonzalez testified that he originally was pointing the gun at his own head, which is not conduct by a person who understands that a gun might be loaded; it shows a person engaged in drunken horseplay. (R.7, 374). The state did not show any motive as to why Mr. Gonzalez would point a loaded gun at L.B. at short range. On the contrary, Mr. Gonzalez and L.B. were friends. (R.7, 371). The state presented no evidence that Mr. Gonzalez and L.B. were engaged in some conflict. On the other hand, even in his drunken state, Mr. Gonzalez' first reaction to the accident was to seek to get help for L.B. at a nearby police station. (R.7, 375). None of those circumstances support a conclusion that Mr. Gonzalez knew that the gun was loaded; it is clear that he was surprised and dismayed that the gun discharged, killing his friend.

Engaging in horseplay with a gun may be reckless. Unfortunately, though, many people die from gunshot wounds that are the result of horseplay or other mistakes regarding whether a gun is loaded. If the facts of this case can support a conviction for unintentional second-degree murder, every person who accidentally shot someone while cleaning a gun—thinking it was unloaded—would be guilty of unintentional second-degree murder. If these facts can support a conviction for unintentional second-degree murder, it is difficult to articulate circumstances that would not support a conviction for unintentional second-degree murder, but still support a finding of ordinary recklessness. Even the *Robinson* Court acknowledges that such cases must exist.

Because the state did not present evidence of recklessness that case exceeded the "indifference present in all reckless killing," the record cannot support a conviction for unintentional second-degree murder. As a result, this Court should reverse.

Issue #3: The district court failed to give a meaningful answer to the jury's question when it asked for clarification of the difference between unintentional second-degree murder and involuntary manslaughter.

Reviewability

Discussion of whether this issue was raised below is difficult because, if there was any discussion about the jury's question, it was not on the record. An excerpt of the transcript from the time the jury received the case for deliberation to verdict is attached as an appendix to this brief. Although there was some discussion and record of an in-court readback of some testimony, there was no discussion on the record of a jury question. (R.8, 438-441). The record on appeal does include a written question from the jury and a typed answer signed by the district judge. (R.9). These documents are also attached as an appendix to the brief.

The next issue involves possible procedural problems with having ex parte communications with the jury or at least communications about a jury question outside of Mr. Gonzalez' presence and outside of open court. This issue involves a claim about the substantive deficiency of the Court's answer. Under K.S.A. 22-3414(3), this Court may review a claim regarding an instruction for the first time on appeal. *See State v. King*, 288 Kan. 333, 348, 204 P.3d 585 (2009)(noting that statute allows instructional claim for first time on appeal).

Standard of Review

This Court reviews the legal appropriateness of jury instructions de novo. *State v. Williams*, 295 Kan. 506, 516, 286 P.3d 195 (2012). Pursuant to K.S.A. 22-3420(3), while the district court has some discretion, if the jury desires to be informed about the law arising in the case, the district court is required to provide a meaningful answer. *See State v. Myers*, 255 Kan. 3, 5, 872 P.2d 236 (1994)(adopting Court of Appeals opinion).

Discussion

After this case was submitted to the jury, it made the following request for information about the law:

> Can you provide more clarification of the differences between the murder in the second degree, committed unintentionally and the Involuntary Manslaughter? [(R.9).]

The district court responded in writing as follows:

> Your question is whether I can provide more clarification of the differences between the murder in the second degree, committed unintentionally and the Involuntary Manslaughter. Please refer to the instructions provided to you. [(R.9).]

This response did not answer the jury's question in any meaningful way. Obviously, the jury had read the provided instructions and those instructions did not

provide sufficient information regarding the difference between unintentional second-degree murder and involuntary manslaughter. This is likely because, as argued in previous issues, there is no meaningful difference between unintentional second-degree murder and involuntary manslaughter.

But to the extent that previous cases holding that these statutes provide non-vague guidance to the jury regarding the difference between the two crimes, the district court could have given the jury that guidance. As held by the Kansas Supreme Court: "If a jury is given a lesser included instruction on reckless involuntary manslaughter, then the jury must assume that some killings fall under this crime. . . . The jury [determines] whether a particular reckless killing indicates an extreme indifference to the value of human life which is beyond that indifference present in all reckless killings. *State v. Robinson*, 261 Kan. at 876-77.

Thus, a meaningful answer to the jury's question may have been along the lines of:

> You must assume that some reckless killings are involuntary manslaughter. You must determine whether a particular reckless killing involves an extreme degree of recklessness or involves a lower degree of recklessness. You do this by determining whether a particular reckless killing indicates an extreme indifference to the value of human life which is beyond that indifference present in all reckless killings. If you have a reasonable doubt between the two offenses, you cannot convict Mr. Gonzalez of unintentional second-degree murder.

Assuming arguendo that *Robinson* provides a non-vague distinction between unintentional second-degree murder and involuntary manslaughter, the district court should have provided that distinction to the jury.

Mr. Gonzalez acknowledges that these facts are very similar to *State v. Cordray*, where a jury asked for clarification of the phrase "under circumstances showing extreme

indifference to the value of human life." 277 Kan. at 49. The *Cordray* Court held that, because the phrase "extreme indifference to the value of human life" is not constitutionally vague, further definition was not required. 277 Kan. at 50. *Cordray* should not control this case for several reasons. First, the jury in the instant case did not request a definition of "under circumstances showing extreme indifference to the value of human life," it asked for clarification of the *difference between* unintentional second-degree murder and involuntary manslaughter. The *Robinson* Court attempted to articulate that difference and, if that difference means anything, there is no reason that it should be hidden from the jury. If the district court (and this Court) cannot meaningfully articulate a difference between unintentional second-degree murder and involuntary, it certainly supports Mr. Gonzalez' vagueness claim stated in previous issues.

The instant case is also distinguished from *Cordray* because defense counsel in that case acquiesced in the response drafted by the district court and the *Cordray* Court held that this "weighs heavily against this court finding any abuse of discretion in the response). In the instant case, because there is was no discussion on the record regarding the jury's question, there is no record of defense counsel acquiescing or even having knowledge of the district court's response.

Reversal

In the instant case, the primary disputed issue was Mr. Gonzalez' state of mind. He did not dispute pulling the trigger; he did testify that the death was an accident. (R.7, 374, 378). The jury apparently had a reasonable doubt that Mr. Gonzalez intended to kill L.B. because it acquitted him of intentional second-degree murder. (R.1, 75). That left the jury deciding between unintentional second-degree murder and involuntary

manslaughter; this was the critical issue before the jury in this case. If the district court had meaningfully responded to the jury's question regarding the difference between these two offenses, there is at least a real possibility that it would have returned a different verdict. If just one juror would have formed a reasonable doubt regarding whether the conduct in this case "indicates an extreme indifference to the value of human life which is beyond that indifference present in all reckless killings," the jury would have returned a verdict for the lesser offense.

Because the district court failed to provide a meaningful answer to the jury's inquiry on the most critical issue in the case, this Court should reverse and remand for a new trial.

Issue #4: The district court improperly conducted discussions about the jury's question off the record and, presumably, outside the presence of Mr. Gonzalez. This ex parte communication violated the Due Process Clause, the Confrontation Clause, and the Public Trial Clause.

Reviewability and standard of review

Discussion of whether this issue was raised below is difficult because, if there was any discussion about the jury's question, it was not on the record. An excerpt of the transcript from the time the jury received the case for deliberation to verdict is attached as an appendix to this brief. Although there was some discussion and record of an in-court readback of some testimony, there was no discussion on the record of a jury question. (R.8, 438-441). The record on appeal does include a written question from the jury and a typed answer signed by the district judge. (R.9). These documents are also attached as an appendix to the brief.

According to K.S.A. 22-3414(3), the "court reporter shall record all objections to the instructions given or refused by the court, together with modifications made, and the rulings of the court." If the record does not explicitly record whether a defendant was present for in-chambers discussion, this Court should proceed on the assumption that he or she was not present. *See State v. Betts*, 272 Kan. 369, 391, 33 P.3d 575 (2001), *overruled on other grounds by State v. Davis*, 283 Kan. 569, 158 P.3d 317 (2006)("Where the record does not affirmatively reflect the presence of the defendant, this court will presume that the defendant's constitutional right to be present was violated."). Because the transcript does not disclose any discussion regarding the jury's question, appellate counsel is proceeding on the presumption that it was not disclosed or discussed with trial counsel and, certainly, that Mr. Gonzalez was not present. If Mr. Gonzalez and/or his counsel was not made aware of the jury's question, he certainly cannot be precluded from appeal for failure to object.

Even if defense counsel was notified of the jury's question and proposed answer but did not object to the procedure used by the district court, this Court can and should still reach this issue if it: (1) involves only a question of law arising on proved or admitted facts that is finally determinative of the case; or (2) if consideration is necessary to serve the ends of justice or to prevent denial of fundamental rights. *State v. Puckett*, 230 Kan. 596, 598-99, 640 P.2d 1198 (1982). The instant claim satisfies both prongs of this test. The legal propriety of the district court's procedure is purely a question of law over which this Court exercises de novo review. *See State v. King*, 297 Kan. 955, 305 P.3d 641, 652-53 (2013); *State v. Cox*, 297 Kan. 648, 655, 304 P.3d 327 (2013)(review of Public Trial claim unlimited). And the claim advanced in this issue involves denial of

Mr. Gonzalez' rights to be present and to a public trial, both fundamental rights under the Sixth Amendment, the Due Process Clause, and the Kansas Constitution Bill of Rights.

Ex parte discussion violate the Due Process Clause and the Confrontation Clause

> K.S.A. 22–3405, as well as the Sixth Amendment's Confrontation Clause 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 juror. *Crease v. State*, 252 Kan. 326, 333, 845 P.2d 27 (1993); *State v. Lovely*, 237 Kan. 838, 843–44, 703 P.2d 828 (1985). *See also State v. Garcia*, 233 Kan. 589, Syl. ¶ 2, 664 P.2d 1343 (1983) (holding that a defendant's constitutional and statutory right to be present includes the right to be present whenever the court communicates with the jury). . . . Thus, there is no question that the trial court's ex parte communication with the jury violated the defendant's constitutional right to be present at all critical stages of the trial. The question, therefore, is whether this error requires reversal. [*State v. McGinnes*, 266 Kan. 121, 127, 967 P.2d 763 (1998)].

In the instant case, the record does not indicate that the district court ever gave notice to the parties regarding the jury's question, whether there were any in-chambers discussion regarding the question, or whether Mr. Gonzalez was present for any discussion. From the transcript itself, this Court could not even divine that there was a question and answer, let alone these details. The court reporter in this case certified the transcript as "a true, correct and complete copy of all of the proceedings of my shorthand notes as reflected by this transcript." (R.8, 444). As a result, this Court cannot assume that there were on-the-record discussions regarding this question and answer. And in any case, pursuant to *Betts*, this Court must at least presume that Mr. Gonzalez was not present for any discussions regarding this question and answer. Like *McGinnes*, the question is whether this error requires reversal.

In *McGinnes*, the Kansas Supreme Court cited *Rushen v. United States*, 464 U.S. 114 (1983), for the proposition that improper ex parte communication with a juror or

jurors can be harmless and gleaned the following four-factor test to determine whether an error is harmless beyond a reasonable doubt: (1) the overall strength of the prosecution's case, (2) whether an objection was lodged, (3) whether the ex parte communication concerned a critical aspect of the trial or rather involved an innocuous and insignificant matter, and the manner in which it was conveyed to the jury, and (4) the ability of the post-trial remedy to mitigate the constitutional error. 266 Kan. at 132.

On the critical issue, the prosecution's case was not strong, as evinced by the jury's question itself. Although the prosecution may have had strong evidence of recklessness, the question of whether Mr. Gonzalez exhibited "extreme indifference to the value of human life" was not clear at all. Mr. Gonzalez testified that he did not know the gun was loaded. If the jury believed that testimony, it could have determined that the circumstances arose to recklessness, but not "extreme indifference to the value of human life." This factor weighs in favor of Mr. Gonzalez.

Because the record does not even disclose that defense counsel and/or Mr. Gonzalez were even notified of the jury's question and propounded answer, this Court cannot particularly evaluate the second factor. At worst, this Court would have to say this factor weighs equally. Or if this Court agrees that, in the absence of a record of discussions regarding the question, it must presume that defense counsel did not get notice and an opportunity to respond, it cannot hold that factor against Mr. Gonzalez.

The jury's question did not involve an innocuous and insignificant matter, it involved the critical question in the case: Mr. Gonzalez' state of mind. The answer to that question is the difference between a severity level 2 offense and a severity level 5

offense—the difference between 123 months presumptive prison and 34-months in a border box. K.S.A. 2013 Supp. 21-6804. This factor weighs in favor of Mr. Gonzalez.

Finally, in this case, there was no post-trial motion involving the jury question and response. In *Rushen*, the United State Supreme Court found that a post-trial hearing that had been held regarding possible prejudice resulting from an ex parte communication "created more than adequate support for the conclusion that [the juror's] presence on the jury did not prejudice defendant." 464 U.S. at 456-57. No such post-trial hearing occurred in this case. If the judge had questioned jurors in a post-trial hearing and determined that the response given did not affect the jury deliberation process, this factor might favor the state. But no such hearing occurred.

Because the prosecution's case was not strong on the critical issue of state of mind and because the ex parte communication in this case directly impacted that crticial issue and not some innocuous and irrelevant issue, this Court cannot declare beyond a reasonable doubt that the error was harmless.

Public Trial

"[U]nder the Sixth Amendment any closure of a suppression hearing over the objections of the accused must meet the tests set out in Press–Enterprise and its predecessors." [*Waller v. Georgia*, 467 U.S. 39, 47 (1984)]." *State v. Dixon*. 279 Kan. 563, 596, 112 P.3d 883 (2005) disapproved of on other grounds by *State v. Wright*, 290 Kan. 194, 224 P.3d 1159 (2010). The *Dixon* Court held that closure of the announcement of a verdict constituted a Public Trial Clause violation. 279 Kan. at 599. Closure of a courtroom for part of one witness' testimony constituted a Public Trial Clause violation.

State v. Cox, 297 Kan. 648, 655-56, 304 P.3d 327 (2013). These cases make it clear that even partial closure implicates the Public Trial Clause.

There is no logical reason that the right to be present would extend to a critical stage involving communication between a judge and jury, but that the right to a Public Trial would not. "The right [to a Public Trial], in the absence of legitimate reasons for limiting public attendance, extends to the entire trial including the judge's instructions to the jury." *Com. v. Patry*, 722 N.E.2d 979, 982-83 (Mass. App. Ct. 2000). Similar interests are involved: "The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions." 722 N.E.2d at 982 (quoting *In re Oliver*, 333 U.S. 257, 267 (1948)).

The instant case presents a different scenario than other cases where Public Trial claims have failed. In *State v. Womelsdorf*, 47 Kan. App. 2d 307, 274 P.3d 662 (2012), this Court rejected a claim that a readback of testimony to a jury in the jury room violated the Public Trial Clause under the following circumstances:

> the judge read the jury questions on the record, in the courtroom, and the judge and both counsel discussed how to respond to the questions. Womelsdorf does not contend that she was not present in the courtroom for that discussion or that the courtroom was not open to the public when the discussion took place. Nothing about the district court's written response to the jury question, which is now available to the public as part of the court file, was hidden from public view. Obviously, the public was not present when the bailiff delivered the written response to the jury room, but jury deliberations are never open to the public. Under the facts of this case, we conclude that the district court's procedure in responding to the jury question in writing did not violate Womelsdorf's constitutional right to a public trial. [47 Kan. App. 2d at 325.]

In the instant case, the transcript—certified as complete—does not reflect that the judge read the jury question on the record and the transcript—certified as complete—does not reflect that the judge discussed or even notified counsel of the questions. The record does not reflect that Mr. Gonzalez was present in court for any discussions that were open to the public. In fact, the jury's question and the district court's answer does not even appear on the certified appearance docket and are not noted in the district court's journal entry of jury trial. (R.1, 1-8, 74). If they had not been included in the record on appeal, there would have no way for appellate counsel, let alone members of the public, to know of the existence of this question and answer. Even assuming arguendo that *Womelsdorf* is correct, it is completely distinguishable from the instant case.

If closure of the announcement of a verdict is a Public Trial Clause violation, exclusion of the jury from provision of supplemental jury instructions (directly affecting the jury's deliberative process), must be a Public Trial Clause violation. And the right to a public trial is so fundamental that it is examined with structural error analysis on appeal. *See Waller v. Georgia*, 467 U.S. 39, 81 (1984)(right to a public trial). The district court's failure to present the jury question in open court in Mr. Gonzalez' presence constitutes such structural error and requires reversal and remand for a new trial.

Issue #5: The district court failed to give a limiting instruction regarding uncharged bad act evidence admitted at trial.

Reviewability

Defense counsel did not request a limiting instruction. But consideration of instructional claims for the first time on appeal is explicitly allowed by K.S.A. 22-3414(3). This Court must first consider whether there was an error. *State v. Williams*, 295

Kan. 506, 516, 286 P.3d 195 (2012). This Court reviews legal appropriateness de novo and factual appropriateness in a light most favorable to Mr. Gonzalez. *Williams*, 295 Kan. at 516.

Limiting instruction was legally and factually appropriate

"Admissibility of any and all other crimes and civil wrongs evidence will be governed by K.S.A. 60-455." *State v. Gunby*, 282 Kan. 39, 57, 144 P.3d 647 (2006). In the instant case, the district court admitted evidence independent of K.S.A. 60-455 pursuant to *State v. King*, 297 Kan. 955, 964, 305 P.3d 641 (2013). But even where evidence of an uncharged crime is not subject to K.S.A. 60-455, it may still be subject to the requirement of a proper limiting instruction. *See State v. Santos*, 2014 WL 3731916 (Kan. App. July 25, 2014)(unpublished)("While it is true that the evidence did not contravene K.S.A. 2013 Supp. 60-455, there was still mention of another crime that was not the crime being tried."). The state sought to admit this evidence to show intent and lack of mistake, which may have been appropriate. But such evidence is only relevant for that purpose and, therefore, a limiting instruction was legally appropriate.

In the instant case, the state sought to admit evidence regarding an incident with a person named John Syrokos on the New Year's Eve in question. Syrokos said that he encountered Mr. Gonzalez while walking home. (R.6, 193). Syrokos said that Mr. Gonzalez pulled out a gun and chambered a round and asked his identity. (R.6, 194). After speaking with Mr. Gonzalez, Syrokos said Mr. Gonzalez put the gun away, that they engaged in conversation lasting ten to fifteen minutes and, then, Syrokos walked on home and called the sheriff. (R.6, 194-95).

Prior to trial, the district court had denied the state's motion in limine seeking admission of other bad acts related to threats. (R.5, 147). During trial, the state moved the district court to reconsider that ruling and, over defense counsel's objection, the district court admitted evidence uncharged events on New Year's Eve. (R.5, 154). Therefore a limiting instruction was factually appropriate. Because a limiting instruction was legally and factually appropriate, the district court erred by failing to give it.

Clear error

After determining that the district court failed to give a limiting instruction with the admission of uncharged bad act evidence, this Court moves to whether the failure is cause for reversal. 282 Kan. at 58. When the defense fails to object to the omission of a limiting instruction it must be clearly erroneous for this court to reverse. 282 Kan. at 58. "The current definition of clearly erroneous sets up the test to determine whether the instruction error requires reversal, i.e., whether the reviewing court is firmly convinced that the jury would have reached a different verdict had the instruction error not occurred." *Williams*, 295 Kan. at 516. This Court looks at the whole record and makes a de novo determination. 295 Kan. at 516. It is the defense's burden to firmly convince this Court that there is a real possibility that the jury's outcome would have been different without the error. 295 Kan. at 516.

Although *Gunby* reversed previous cases holding that erroneous failure to give a limiting instruction with regard to prior bad act evidence was automatically reversible, it still highlighted the inherent prejudice stemming from propensity evidence:

> First a jury might well exaggerate the value of other crimes as evidence proving that, because the defendant has committed a similar crime before, it might properly be inferred that he committed this one. Secondly, the jury might conclude that the defendant deserves punishment because he is

> a general wrongdoer even if the prosecution has not established guilt beyond a reasonable doubt in the prosecution at hand. Thirdly, the jury might conclude that because the defendant is a criminal, the evidence put in on his behalf should not be believed.'" [*Gunby*, 282 Kan. at 48].

Here, the district court did not give a limiting instruction related to the admission of evidence of another crime to the jury. The admission of Mr. Gonzalez' interaction with Syrokos should have been accompanied by a limiting instruction. Without that limiting instruction the jury very likely used Syrokos' testimony to conclude that Mr. Gonzalez had the propensity to commit other crimes involving firearms or just a general propensity to commit crimes. This would be an inappropriate use of this evidence and clearly could have influenced the jury's consideration of Mr. Gonzalez' case. The jury rejected much of the state's case and it is really possible that, if the jury used Syrokos' testimony for propensity evidence, that may have tilted the scales with regard to guilt and/or level of culpability. Therefore, the conviction should be reversed and remanded for a new trial.

Issue #6: Cumulative error denied Mr. Gonzalez a fair trial.

"Cumulative trial errors, when considered collectively, may be so great as to require reversal of the defendant's conviction. The test is whether the totality of circumstances substantially prejudiced the defendant and denied [him] a fair trial." *State v. Lumbrera*, 252 Kan. 54, 57, 845 P.2d 609 (1992). The Tenth Circuit set forth the following analysis of cumulative error in *United States v. Wood*, 207 F.3d 1222, (10th Cir. 2000):

> A cumulative error analysis aggregates all the errors that individually might be harmless, and it analyzes whether their cumulative effect on the outcome of the trial is such that collectively they can no longer be determined to be harmless. The harmlessness of cumulative error is determined by conducting the same inquiry as for individual error--courts look to see whether the defendant's substantial rights were affected. Thus

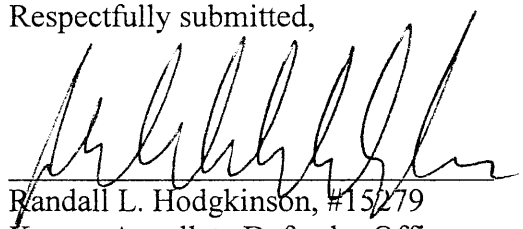
> our cumulative error analysis must focus on the underlying fairness of the trial.

Even if alone none of the errors asserted above are found to constitute reversible error, their cumulative effect was to deny Mr. Gonzalez a fair trial. The combination of errors substantially prejudiced Mr. Gonzalez, in that "when viewed cumulatively in the totality of the circumstances herein," it is evident that he did not receive a fair trial as guaranteed by the Fourteenth Amendment. *Lumbrera*, 252 Kan. at 57.

Conclusion

This Court should reverse the conviction and sentence for unintentional second-degree murder.

Respectfully submitted,



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Certificate of Service

The undersigned hereby certifies that service of the above and foregoing brief was made by mailing two copies, postage prepaid, to Sherri Schuck, Pottawatomie County

Attorney, P O Box 219, Westmoreland KS 66549-0219Go; and by e-mailing a copy to Derek Schmidt, Attorney General, at ksagappealsoffice@ag.ks.gov on the 26th day of August, 2015.

Randall L. Hodgkinson, #15279

Can you provide more clarification of ~~between~~ the differences between the murder in the second degree, committed unintentionally and the Involuntary Manslaug

Your question is whether I can provide more clarification of the differences between the murder in the second degree, committed unintentionally and the Involuntary Manslaughter.

Please refer to the instructions provided to you.

Judge Elder

IN THE DISTRICT COURT OF POTTAWATOMIE COUNTY, KANSAS

THE STATE OF KANSAS, Plaintiff,
vs.
PABLO ALBERTO GONZALEZ, Defendant.
Case No. 2014-CR-1

TRANSCRIPT OF PROCEEDINGS
JURY TRIAL
VOLUME FOUR OF FOUR

PROCEEDINGS had before the Honorable Jeff Elder, Judge of the District Court of Pottawatomie County, Kansas, and a jury of twelve, at Westmoreland, Kansas, on the 28th day of August, 2014.

APPEARANCES

The Plaintiff appears by Ms. Sherri Schuck, County Attorney, and Jason Oxford, Assistant County Attorney, Courthouse, 106 Main Street, Westmoreland, Kansas, 66549.

The Defendant appears in person and by his counsel, Mr. Ronald F. Evans, State of Kansas Death Penalty Defense Unit, 700 SW Jackson, Suite 500, Topeka, Kansas, 66603.

negate it. Doesn't negate it at all.

Being remorseful also doesn't mean that you didn't mean to do something, it means that you're sorry that you did it. We read stories every day in the news about people who do things like that who are so sorry that they killed this person or they hurt that person. Doesn't mean that it didn't mean to happen at the time that it did.

I can't tell you why Levi Bishop is dead but I can tell you that he is and I can tell you how he died, and he died because that young man put a gun against his neck. He pulled the trigger. That's why he's dead. This is not involuntary manslaughter, this is not negligence, this is intentional.

THE COURT: Thank you, Miss Schuck.

All right, ladies and gentlemen of the jury, bailiff will take you back to the jury room. We'll send the original instructions and verdict forms with you and you may begin your deliberations.

I'm going to have Mr. Atkinson and Mr. Debord stay, please.

(The jury retired to deliberate at 9:50.)

THE COURT: Gentlemen, as you can -- you can

be seated. As you can surmise, you are the two alternates. I didn't tell you that at the beginning of the trial because you might not have been an alternate by the time the trial was over, somebody could have gotten sick or had a flat tire or worse and you would have been one of the 12. Your role in this trial was very important and you have the thanks of the Court for being here, taking time to do so.

You are welcome to stay until the verdict is reached. You are also welcome to go if you need to. I can advise you that the attorneys may, today or tomorrow or next week may try to contact you to talk with you about the case. You can tell them as much or as little about what you think as you want to and if you don't want to talk to them you don't have to and if they keep bugging you after you tell them you don't want to talk, then you just go down to the Clerk's Office and make sure that I know about it and I'll take care of it from there.

So again, you have the thanks of the Court and you're free to go. Okay?

We are in recess.

(The proceedings were in recess.

At 10:30 the jury returned to the courtroom and the following proceedings were held.)

THE COURT: You may be seated. All right, we are back on the record in 2014-CR-1. Defendant's present. The jury is back. I understand the jury would like to have the testimony of Andrew Schindler read back to you. Is that correct?

MR. EBERT: Correct.

THE COURT: The entire testimony or just the direct or just the cross examination or the whole thing?

THE SPEAKER: Both, yes.

THE COURT: Okay. Court reporter will read that for you, then.

(The testimony of Andrew Schindler was read back by the reporter.)

THE COURT: All right. Ladies and gentlemen, you may go back to the jury room and continue your deliberations.

(The jury retired to deliberate at 10:43 and the proceedings were in recess until 1:45.)

THE COURT: We are back in session in 14-CR-1. Defendant is present. State is here.

The jury is back. Mr. Ebert, are you the jury foreman?

MR. EBERT: Yes, I am.

THE COURT: Has the jury reached a verdict.

MR. EBERT: Yes, we have.

THE COURT: Will you hand it to the bailiff, please.

Will the defendant stand. In the District Court of Pottawatomie County, Kansas. The State of Kansas, plaintiff, versus Pablo Alberto Gonzalez, defendant. Case No. 14-CR-1.

Verdict. We, the jury, find the defendant guilty of murder in the second degree committed unintentionally.

In the District Court of Pottawatomie County, Kansas. The State of Kansas, plaintiff, versus Pablo Alberto Gonzalez, defendant. Case No. 14-CR-1. Verdict. We, the jury, find the defendant not guilty of aggravated assault.

Is this the verdict of the jury?

MR. EBERT: Yes.

THE COURT: And does the State wish to have the jury polled?

MS. SCHUCK: No, Judge.

THE COURT: Does the defendant wish to have

the jury polled.

MR. EVANS: No, Your Honor.

THE COURT: All right. Ladies and gentlemen of the jury, you have now completed your duty as jurors in this case and you are discharged with the thanks of the Court. The question may arise whether you may discuss this case with the lawyers who presented it to you. For your guidance the Court instructs you that whether you talk to anyone is entirely your own decision. It is proper for the attorneys to discuss the case with you and you may talk with them but you need not. If you talk to them you may tell them as much or as little as you like about your deliberations or the facts that influenced your decision. If an attorney persists in discussing the case over your objections or becomes critical of your service either before or after any discussions have begun please report it to me.

Again, I want to thank you for your time. You are discharged. If you've left things in the jury room pick those up. You are free to go. Thank you.

(The jury exited the courtroom.)

THE COURT: All right, we will need to set

this for sentencing. Mr. Evans, are you available September 25?

MR. EVANS: That's a Thursday, Judge?

THE COURT: Yes.

MR. EVANS: I don't have anything set.

THE COURT: We can do it typically at 9:00 o'clock or we can do it in the afternoon. Which would you prefer?

MR. EVANS: Doesn't matter to me either, Judge.

THE COURT: I will set sentencing, then, for September 25, 9:00 o'clock. The defendant, Court Services will be notified to contact the defendant to begin the presentence report and should have that ready for sentencing on the 25th.

Is there anything else?

MR. EVANS: Not on behalf of Mr. Gonzalez, Judge.

MS. SCHUCK: No, Judge.

THE COURT: All right. He is returned to custody of the sheriff. And that sentencing is on the 25th of September.

(Proceedings concluded at 1:50.)

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C E R T I F I C A T E

STATE OF KANSAS)

COUNTY OF JEFFERSON) SS:

I, Candace K. Braksick, a Certified Shorthand Reporter in and for the State of Kansas, certify that I reported in machine shorthand the foregoing proceedings had on August 25-28, 2014.

I further certify that the foregoing transcript is a true, correct and complete copy of all of the proceedings of my shorthand notes as reflected by this transcript.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 29th day of October, 2014.

Candace K Braksick

Candace K. Braksick
Certified Shorthand Reporter
Kansas Supreme Court No. 0386

329 P.3d 557 (Table)
Unpublished Disposition
(Pursuant to Kansas Supreme Court Rule 7.04(f), unpublished opinions are not precedential and are not favored for citation. They may be cited for persuasive authority on a material issue not addressed by a published Kansas appellate court opinion.)
Court of Appeals of Kansas.

STATE of Kansas, Appellee,
v.
Jose **SANTOS**, Appellant.

No. 109,456. | July 25, 2014.

Appeal from Wyandotte District Court; Wesley K. Griffin, Judge.

Attorneys and Law Firms

Clay A. Kuhns, legal intern, and Randall L. **Hodgkinson**, of Kansas Appellate Defender Office, for appellant.

Mark A. Menefee, assistant district attorney, Jerome A. Gorman, district attorney, and Derek Schmidt, attorney general, for appellee.

Before STANDRIDGE, P.J., GREEN and ATCHESON, JJ.

MEMORANDUM OPINION

PER CURIAM.

***1** Jose **Santos** was arrested and charged with possession of cocaine, DUI, transporting an alcoholic beverage in an open container, failure to stop at a stop sign, and driving without a license. The driving without a license was dismissed, and **Santos** was convicted of all remaining charges except possession of cocaine at a jury trial. The jury was hung on the possession of cocaine. A second trial was held, and **Santos** was convicted of possession of cocaine. On appeal, **Santos** contends that the trial court erred during his second trial, when it improperly admitted K.S.A.2013 Supp. 60–455 evidence of another crime. In addition, **Santos** contends that if the 60–455 evidence was admissible in the second trial, the trial court erred in failing to give a limiting instruction concerning the alleged 60–455 evidence. Finally, **Santos** asserts that the trial court erred in admitting an exhibit that was more prejudicial than probative.

On July 22, 2011, **Santos** was driving his vehicle in Wyandotte County when he came to the intersection of 29th Street and Wood Avenue headed eastbound. He stopped behind a car that was already at the stop sign. Officer Shane Turner also came to the intersection, approaching it from the south headed north. The car in front of **Santos** drove on. When Turner began to execute his right turn, he heard an engine rev and tires squeal, and watched as **Santos** drove through the intersection. Turner followed **Santos** and pulled him over for failure to stop at a stop sign.

When Turner made contact with **Santos**, he noticed that **Santos** mumbled, slurred his speech, and had watery, bloodshot eyes. Turner also noticed a strong odor of alcohol emanating from **Santos'** breath and the interior of the vehicle. Turner asked **Santos** for his driver's license which **Santos** stated he could not find. Turner then asked **Santos** to get out of the vehicle. **Santos** complied, but Turner noticed that **Santos** left the vehicle very slowly. Moreover, Turner observed that **Santos** used the vehicle as support the entire time he was out of the vehicle, leaning on it as he walked to the back where he sat on the bumper. When Turner asked **Santos** if he had been drinking, **Santos** replied that he had had two beers. Turner then performed a Nystagmus test on **Santos**. Turner decided not to have **Santos** perform the one-leg-stand or walk-and-turn tests because Turner felt that **Santos** lacked the ability to perform those tests without falling and injuring himself.

Turner arrested **Santos** for DUI and performed a search incident to the arrest. While searching **Santos**, Turner found a meticulously folded dollar bill in the coin pocket of **Santos'** pants, which he then opened and found a powder that was later confirmed to be cocaine. A search of the vehicle produced **Santos'** driver's license and a bottle of beer on the passenger floor board in reach of the driver's seat that was cool to the touch. The bottle contained a small amount of beer.

After the arrest, **Santos** was transported to the county jail where his blood-alcohol content was measured by Officer David Weaver using the Intoxilyzer 8000. **Santos** blood-alcohol content was measured at .202.

*2 Santos was charged with possessing cocaine, DUI, transporting an alcoholic beverage in an open container, failing to stop at a stop sign, and driving without a license. The driving without a license charge was later dismissed.

A jury trial was conducted on February 28–29, 2012. During this trial, there was testimony from Officer Kenneth Garrett, who was testifying as the records custodian as to the operation and maintenance of records for the Intoxilyzer 8000 which was used to test Santos' blood-alcohol content. During his testimony, the State sought to introduce into evidence Exhibit 8, which was a log sheet from the Intoxilyzer 8000, showing the results of all the tests performed the same week as Santos' test. Santos objected to this sheet, claiming that it was improper for numerous reasons. First, Santos objected on the grounds that the other people listed on the sheet were not a part of the case and that it should be redacted. In the alternative, Santos offered to stipulate that the department kept an accurate log. Santos also objected on the grounds that since Santos had the highest blood-alcohol content listed on the sheet, that introduction of the record would be prejudicial. Santos also noted that the log was unnecessary because the testimony of Weaver had already established what Santos' blood-alcohol content was. The State argued that the evidence should be admitted to prove that Santos had actually taken the test on the day alleged, and that the fact that Santos had the highest blood-alcohol content on the log was his own fault, and that was just what the evidence reflected. The court overruled Santos' objection, and Santos objected to preserve the matter for appeal. Santos was ultimately convicted on all charges except for possession of cocaine (hung jury on this charge).

A second trial was conducted on the charge of possession of cocaine on July 12, 2012. Before voir dire, Santos and the State had a brief preliminary hearing. At this hearing, the parties and the court discussed how the issue of Santos' original traffic stop and arrest occurred because the DUI and other traffic charges had been resolved at the first trial. The State argued that it wanted to elicit testimony about the running of the stop sign as well as the DUI investigation that led to the discovery of the cocaine. Santos requested that any mention of alcohol or DUI be omitted. The State voiced concerns that it would be prejudicial to the State if the DUI or alcohol was not discussed as the jurors might take offense at a police officer removing and searching someone for failure to stop at a stop sign. The court determined that not allowing the DUI or alcohol to come in would be prejudicial to the State, and Santos objected. The objection was not clarified as a standing objection, and Santos did not request a standing objection.

The issue of the smell of alcohol and DUI was mentioned several times throughout the trial. During the opening statements, the State specficially mentioned the smell of alcohol as a reason for Santos' search. Turner testified that Santos was mumbling and slurring his words, that there was strong odor of alcohol, and that Santos was detained for a preliminary DUI investigation before the cocaine was found. The State again mentioned the odor of alcohol and a preliminary DUI investigation during their closing arguments. At no point in time during any of these references to the odor of alcohol or DUI investigations did Santos object. Santos also did not request a limiting instruction for the alcohol or DUI testimony. Santos was ultimately convicted on the charge of possession of cocaine.

*3 Santos was sentenced on October 10, 2012, to 40 months' imprisonment for the possession of cocaine. His remaining counts were to run concurrently. Santos filed the notice of appeal on October 16, 2012, 2 days after the 14–day deadline. Nevertheless, after a show cause briefing, this court has retained jurisdiction under *State v. Ortiz,* 230 Kan. 733, 640 P.2d 1255 (1982).

Did the Trial Court Improperly Admit Evidence of Other Crimes in the Second Trial?

Santos' first argues that the trial court erred when it allowed Turner to testify that the reason Santos was removed from the vehicle was to conduct a DUI investigation. Santos contends that allowing this testimony is in violation of K.S.A.2013 Supp. 60–455, which prohibits the use of other crimes evidence. Nevertheless, before considering the merits of this claim, we must first examine whether it is preserved for review.

As stated earlier, there was a short hearing before voir dire in the second trial in which the issue of the traffic stop and how the issue of the DUI investigation would be handled by the parties. During this hearing, Santos objected to the mention of the odor of alcohol and the DUI investigation, but that objection was overruled. Nevertheless, during the actual trial, Santos did not object to the mention of the DUI

investigation and the smell of alcohol when it was mentioned during the State's opening and closing arguments or when Turner testified that Santos was removed from the vehicle for a DUI investigation and that he had slurring, mumbling speech, and had the odor of alcohol on his breath. As a result, the **State** argues that this issue has not been preserved for appeal.

K.S.A. 60–404 **states**:

> "A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless there appears of record objection to the evidence timely interposed and so **stated** as to make clear the specific ground of objections."

Our Supreme Court has held that to satisfy this rule, a pretrial objection is not enough, and the pretrial objection must be renewed during the trial, if no standing objection was granted. ***State*** *v. Holman,* 295 Kan. 116, 127, 284 P.3d 251 (2012,) The rationale behind this rule is that the trial court is not in a position to fully consider admitting the evidence until it is offered because up until that point in time, the materiality may not be apparent until other evidence has been admitted. 295 Kan. at 126.

Here, there was no standing objection granted during the pretrial hearing, nor was one requested. There was also no objection made when the DUI investigation was discussed. This allegedly K.S.A.2013 Supp. 60–455 evidence does not change the analysis as the contemporaneous objection rule applies to K.S.A.2013 Supp. 60–455 evidence as well. ***State*** *v. Gaona,* 293 Kan. 930, 955, 270 P.3d 1165 (2012). Therefore, under *Holman,* this issue has not been preserved for appeal as the contemporaneous objection rule has not been met.

4** Nevertheless, the contemporaneous objection rule is not an absolute bar to appellate review as preservation is a prudential requirement rather than a jurisdictional bar to review. 293 Kan. at 956. In ***State *v. Hart,* 297 Kan. 494, 510–11, 301 P.3d 1279 (2013), our Supreme Court heard a claim that had not been preserved with a contemporaneous objection because the **State** had offered to stipulate to preservation with the hopes of gaining a definitive ruling on interpretation of an amended statute that had not been previously interpreted since amendment.

Our Supreme Court also did not follow the contemporaneous objection rule in ***State*** *v. Spagnola,* 295 Kan. 1098, 289 P.3d 68 (2012). In that case, the defendant was arrested for failing to stop at a stop sign and was then searched and found to be in possession of methamphetamine. Before trial, the defendant moved to suppress, which was denied. Immediately before trial, the defendant renewed his suppression motion, which also was denied after oral argument. The trial was then conducted without a jury and presided over by the same judge who had ruled on both suppression motions. During the trial, after testimony from the lab technician and the arresting officer, Spagnola objected to the introduction of the lab report and physical evidence. His objection was based on the grounds of his suppression motions. The trial court overruled his objections.

This court determined that the objections to the suppression issue were not timely; our Supreme Court, however, held otherwise. Our Supreme Court **stated** that because the same judge had ruled on both motions to suppress and understood that any further objections would be based on his previous rulings, the issue was clear. In that case, both parties were apprised of the rulings, and there was no jury to be swayed by the introduction of the evidence. 295 Kan. at 1102–03.

There is some similarity with *Spagnola* and the current case. In both cases there was a hearing held directly before trial on evidentiary matters and the same judge presided over the hearing and the trial, making all parties and the court aware of the rulings of the evidence, effectively putting all parties on notice as to the arguments and objections. Nevertheless, unlike *Spagnola,* we are not dealing with a late objection, but rather the absence of an objection altogether. Also, there was a jury in this particular case, where there was none in *Spagnola.* Moreover, the lack of a contemporaneous objection would have precluded the trial court from making a determination when the evidence was introduced whether it was more prejudicial than probative. As a result, we determine that the *Spagnola* holding is inapplicable to this case.

Nevertheless, assuming arguendo that this issue had been preserved, the issue is fatally flawed. K.S.A.2013 Supp. 60–455(a) **states** in relevant part: "Evidence that a person

committed a crime or civil wrong *on a specified occasion,* is inadmissible to prove such person's disposition to commit a crime or civil wrong as the basis for an inference that the person committed another crime or civil wrong *on another specified occasion.*" (Emphasis added). Therefore, according to the plain language of the statute, the testimony of Turner was not K.S.A.2013 Supp. 60–455 evidence at all. This was because the DUI and the possession of cocaine occurred simultaneously. As a result, the DUI was part of the circumstances and factually related to the possession of cocaine. Our Supreme Court has summed it up this way: "K.S.A. 60–455 does not apply if the evidence relates to crimes or civil wrongs committed as part of the events surrounding the crimes for which King was on trial—that is the res gestae of the crime." ***State*** *v. King,* 297 Kan. 955, 964, 305 P.3d 641 (2013).

5** This concept was also noted in ***State *v. Breeden,* 297 Kan. 567, 304 P.3d 660 (2013). In that case, the our Supreme Court noted that "other crimes" evidence that Breeden complained of were not prohibited by K.S.A.2013 Supp. 60–455 since they occurred at the same time as the crimes that were the basis of the trial. Nevertheless, because the **State** did not challenge the applicability of K.S.A.2013 Supp. 60–455 the court assumed it applied but noted that the case should not be cited as support for "application of a rule that was not meant to be determined by this decision." 297 Kan. at 577.

Nevertheless, res gestae evidence is not per se admissible. As **stated** in *King:*

> "[I]f a rule of evidence prohibits the admission of evidence, res gestae evidence does not become admissible simply because it establishes the circumstances surrounding the criminal act or civil wrong. On the other hand, res gestae evidence is not automatically inadmissible; rather, if the evidence is relevant it can be admitted unless a rule of evidence prevents its admission." 297 Kan. at 964.

As a result, the proper concern is whether the evidence was relevant. Relevant evidence is defined as evidence having any tendency in reason to prove any material fact. K.S.A, 60–401(b). For evidence to be relevant it must be material and probative. ***State*** *v. Stafford,* 296 Kan. 25, 43 290 P.3d 562 (2012). Materiality is determined by analyzing whether the fact at issue has a legitimate and effective bearing on the decision of the case and is in dispute. Moreover, evidence is probative if it has any tendency to prove a material fact. 296 Kan. at 43. Review of materiality is conducted on a de novo basis while probative value is reviewed for an abuse of discretion. ***State*** *v. Ultreras,* 296 Kan. 828, 857, 295 P.3d 1020 (2013).

Why **Santos** was asked to exit his vehicle for a DUI investigation was relevant. Here, the disputed fact was whether **Santos** possessed cocaine. The DUI investigation had a legitimate bearing on how Turner had come to find cocaine in **Santos'** possession. As a result, the DUI investigation was relevant in showing that the search was justified. Moreover, it was the detention and patdown which led to the discovery of the cocaine. Thus, this evidence meets the materiality standard as it goes directly to how the cocaine was discovered.

Further, K.S.A. 60–403 **states** that "[I]f upon the hearing there is no bona fide dispute between the parties as to a material fact, such fact may be proved by any relevant evidence, and exclusionary rules shall not apply, subject however to K.S.A. 60–455 and any valid claim of privilege." Here, the only claim of dispute is that the testimony was prohibited by K.S.A.2013 Supp. 60–455, which we rejected earlier. Because there was no dispute outside of K.S.A.2013 Supp. 60–455, the **State** was free to prove the circumstances of the stop because the matter was not in dispute.

For this reason, the testimony was not precluded by K.S.A.2013 Supp. 60–455 since the testimony did not refer to a crime that occurred on a separate occasion than the possession of cocaine. Further, it was relevant as it was probative to prove the circumstances leading to a valid search and recovery of the cocaine.

Did the Trial Court Err by Not Giving the Jury a Limiting Instruction on the DUI Evidence?

***6** As his second point of appeal, **Santos** argues that the trial court erred by not giving a limiting instruction to the testimony relating to the DUI investigation.

Our standard of review for jury instructions issues was recently summed up by our Supreme Court to encompass the following:

"For jury instruction issues, the progression of analysis and corresponding standards of review on appeal are: (1) First, the appellate court should consider the reviewability of the issue from both jurisdiction and preservation viewpoints, exercising an unlimited standard of review; (2) next, the court should use an unlimited review to determine whether the instruction was legally appropriate; (3) then, the court should determine whether there was sufficient evidence, viewed in the light most favorable to the defendant or the requesting party, that would have supported the instruction; and (4) finally, if the district court erred, the appellate court must determine whether the error was harmless, utilizing the test and degree of certainty set forth in *State v. Ward,* 292 Kan. 541, 256 P.3d 801 (2011), *cert. denied* 132 S.Ct. 1594 (2012)." *State v. Plummer,* 295 Kan. 156, Syl. ¶ 1, 283 P.3d 202 (2012).

Santos did not request a limiting instruction regarding the DUI evidence at trial, and he did not make an objection to the missing instruction. K.S.A.2013 Supp. 22–3414(3) states that a party may not assign error for failing to give a jury instruction absent an objection, unless the failure to give the instruction is clearly erroneous. See *State v. Williams,* 295 Kan. 506, 515–16, 286 P.3d 195 (2012).

Santos argues that a limiting instruction is appropriate here, contending that the mention of the DUI investigation mention was prohibited under K.S.A.2013 Supp. 60–455. Nevertheless, as discussed earlier, K.S.A.2013 Supp. 60–455 did not apply in this case under *King,* 297 Kan. at 964. As a result, we are left to evaluate the missing nonrequested instruction without viewing it in the lens of other crimes evidence.

Here, a limiting instruction may have been legally appropriate. While it is true that the evidence did not contravene K.S.A.2013 Supp. 60–455, there was still mention of another crime that was not the crime being tried. There is at least a possibility that the jury could have inferred that **Santos** had the propensity to commit other crimes because he was being investigated for a DUI. Nevertheless, because the instruction was not requested and the lack of instruction was not objected to, the reversibility analysis does not follow the analysis as set out in *State v. Ward,* 292 Kan. 541, Syl. ¶ 8, 256 P.3d 801 (2011), *cert. denied* 132 S.Ct. 1594 (2012). Instead, for this court to reverse, **Santos** bears the burden of convincing this court that the lack of the instruction was clearly erroneous. He must firmly convince this court that the jury would have reached a different verdict if the instruction would have been given based upon a review of the entire record on de novo review. See *Williams,* 295 Kan. at 516.

*7 Here, while the DUI was discussed by the testimony of Turner, it was extremely brief, comprising less than a page of trial transcript. The testimony was not extended and was limited to testimony that **Santos** used the car for support when asked to exit the vehicle, that he had slurred and mumbled speech, and that there was a strong odor of alcohol coming from his breath and the vehicle. Moreover, Turner conducted a preliminary DUI investigation and detained him for the investigation. There was no mention of his eventual conviction, nor was there any other evidence of intoxication or DUI discussed.

In contrast, the **State** presented evidence that **Santos** had cocaine in his pocket, that lab reports confirmed that the powder was cocaine, and that it was maintained under a chain of custody. Given that the testimony regarding the DUI investigation was extremely brief, we determine that the jury would not have reached a different result.

Was State's Exhibit 8, a Cumulative Log of Intoxilyzer 8000 Test Results From the Week Santos Was Tested, More Prejudicial Than Probative?

Finally, **Santos** contends that **State's** Exhibit 8 was more prejudicial than probative. During the first trial, the **State** called Officer Kenneth Garrett, the custodian of records for the Intoxilyzer 8000 to testify to the accuracy of the records and results of **Santos'** Intoxilyzer 8000 test. Earlier in the trial, Officer David Weaver, the officer who actually administered **Santos'** Intoxilyzer 8000 test, testified without objection that **Santos'** blood-alcohol content was .202. Garrett testified to the accuracy of the records kept pertaining to the use of the machine. During his testimony, he was shown **State's** Exhibit 9, which was the test strip from **Santos'** test. Garrett testified the test strip was from one of the machines for which he was responsible. Exhibit 9 was identified at this time but was not admitted. Garrett further testified that the machine was operational and certified by the **State** on the date of **Santos'** test, and a certificate from the **State** showing it was operational was admitted into evidence. He also testified as to the maintenance of the machine and a report, **State's** Exhibit

7, that showed the machine was fully operational on the date of **Santos**' test. Exhibit 7 was admitted. Garrett continued to testify that the **State** and the Kansas City, Kansas, police department were required to keep a log of all tests performed. Moreover, he indicated that a weekly log sheet would show all the tests that were administered from this machine from the date that **Santos** was tested.

At this point **Santos** objected. **Santos** first objected that the log sheet had the names of other people who were not involved in this trial. Moreover, **Santos** offered to allow a redacted copy or to stipulate that the department kept accurate records. The **State** countered that it wanted to admit the log sheet to show that **Santos** was tested on the particular day in question. When the trial court overruled this objection, **Santos** offered an objection that the exhibit was prejudicial since **Santos**' blood-alcohol content was the highest on the log. The court admitted the evidence without considering whether it was more probative than prejudicial. After a discussion at the bench, the **State** showed Exhibit 8 to Garrett and then admitted it over **Santos**' objection. Exhibit 9, the test result from **Santos**' particular test, was then admitted.

***8 Santos** claims on appeal that Exhibit 8 was more prejudicial than probative. The **State** contends that the exhibit is not more prejudicial than probative because the exhibit was used to demonstrate that the Intoxilyzer 8000 was properly monitored and the records maintained. The **State** also argues that the exhibit was admitted as foundation for Exhibit 9, the results from **Santos**' particular test.

A court must determine if evidence is more probative than prejudicial even if the evidence is both probative and material. ***State*** *v. Wilson,* 295 Kan. 605, 612, 289 P.3d 1082 (2012). This court reviews the determination that evidence is more probative than prejudicial for an abuse of discretion. 295 Kan. at 612. Judicial discretion is abused if the action is arbitrary, fanciful, or unreasonable, or is based on an error of law or an error of fact. *Ward,* 292 Kan. at 550. Nevertheless, an abuse of discretion can also occur "if the trial court's decision goes outside the framework of or fails to properly consider statutory limitations or legal standards." ***State*** *v. Woodward,* 288 Kan. 297, 299, 202 P.3d 15 (2009) (citing ***State*** *v. Shopteese,* 283 Kan. 331, 340, 153 P.3d 1208 (2007).

Here, Exhibit 8 was indeed more prejudicial than probative. The **State** had admitted evidence that the Intoxilyzer 8000 was properly calibrated and functioning normally on the date through the use of Exhibits 6 and 7. **Santos**' blood-alcohol content of .202 was established by Weaver and was again established by Exhibit 9, which was later admitted. **Santos** offered to stipulate to the fact that the records were properly maintained, and even if this option was not chosen, there was already substantial evidence that the machine was fully functional and monitored through the testimony of Garrett and Exhibits 6 and 7. Exhibit 8 added very little to the case that the machine was properly calibrated, and functionality had already been admitted into evidence.

Finally, **Santos** had the highest number that was listed in the "Result" column. While there was a higher number appearing on the log sheet, the result from that test is DEF, a term which is not defined. As it is, **Santos**' result was .013 higher than the next highest number recorded in the "Result" column. Therefore, Exhibit 8 was prejudicial as it portrays **Santos** to be the worst offender on the list.

The trial judge admitted Exhibit 8 only by **stating**, "If the document is identified as being proper, et cetera, all foundation is laid, I will allow it." Here, the trial court did not specifically weigh the probativeness of the evidence against its prejudicial effect. While it may be inferred that the court conducted this balancing test, it was nowhere in the record. As a result, the trial court failed to consider the legal standard, which was an abuse of discretion.

Even so, we find no reversible error because the DUI evidence against **Santos** was overwhelming.

Affirmed.

All Citations

329 P.3d 557 (Table), 2014 WL 3731916

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