ELECTRONICALLY FILED
2015 Nov 25 PM 3:07
CLERK OF THE APPELLATE COURT
CASE NUMBER: 114574

No. 15-114574-A

IN THE
COURT OF APPEALS OF THE
STATE OF KANSAS

STATE OF KANSAS
Plaintiff-Appellant

Vs.

LAKENDRICK K. SMITH
Defendant-Appellee

BRIEF OF APPELLANT

Appeal from the District Court of
Shawnee County, Kansas
Honorable Mark S. Braun, District Judge
District Court Case No. 14 CR 2079

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NATURE OF THE CASE

The Defendant is charged with criminal threat and disorderly conduct. Prior to trial, the district court granted the Defendant's motion to suppress a firearm seized in a search of the Defendant's car and also ruled certain statements made by the Defendant to a police officer were inadmissible at trial. The State now appeals those rulings, prior to trial.

STATEMENT OF THE ISSUES

ISSUE I: **The district court erred in suppressing evidence of a firearm seized from the Defendant's vehicle because the search and seizure were justified by exigent circumstances.**

ISSUE II: **The district court erred in suppressing Smith's statement to Riggin because it was not the result of custodial interrogation and it was admissible under the public safety exception to *Miranda*.**

STATEMENT OF FACTS

On September 12, 2014, the Defendant, Lakendrick Smith, was at the Burger Stand in Topeka, Kansas making advances on a bartender named Heather Hodges. (R. I. 12). Smith eventually became agitated and said to people in the Burger Stand that he had a gun and "would not hesitate to shoot every motherfucker in this place." (R. I, 12.) Douglas Fehr, an off-duty Shawnee County Sheriff's Officer who was working as a private security officer, was summoned by the Burger Stand personnel to deal with an individual with a gun. (R. IV, 5, 7-8). An employee pointed out Smith to Fehr as the person they thought had a gun. (R. IV, 8). Fehr told Smith, and another man Smith was with named Jerico Sholl, that they had to leave the Burger Stand and they complied. (R. IV, 9-10, 34-35). While outside, Fehr told Smith the people inside said that he had a gun on him. (R. IV, 11). Smith responded that he did not have a gun; he had a concealed carry permit, but he did not have the gun on his person. (R. IV, 11-12). As he continued to talk to Fehr, Smith became agitated and told Scholl to go get the gun and Scholl moved towards the passenger side of the vehicle in which he and Smith had arrived. (R. IV, 12).

Topeka Police Department officers, including Victor Riggin and Sam Cartmill arrived at the scene. (R. IV, 32, 58-59) Riggin was advised by dispatch that a black male subject wearing a blue hoodie was talking about going and getting a gun; Cartmill was advised that there was a subject "threatening to shoot the place up." (R. IV, 32-33, 59). Riggin encountered three people outside the Burger Stand, two black males in blue hoodies (Smith and Scholl) and Fehr, whom he recognized as an officer. (R. IV, 33-34). Riggin began his investigation by patting down and talking to Scholl although he found no weapons on his person. (R. IV, 35,48).

Cartmill had contact with the Burger Stand bartender, Heather Hodges, and received information about what had happened inside. (R. IV, 60, 67). Based on that information he arrested Smith, informing him that he was arrested for disorderly conduct; however, he was also concerned about a possible criminal threat or a weapons violation. (R. IV, 60). Cartmill did not ask Smith any questions, but informed him of why he was being arrested then led him to the back of his patrol car. (R. IV, 61-62). Smith reacted angrily, yelling that he was being harassed because of his race and also stating that he had a concealed carry permit. (R. IV, 61). Cartmill did not ask Smith about weapons, but rather, patted him down and found no weapons. (R. IV, 66). Smith had been handcuffed and placed in the backseat of the patrol car, and the door was shut. (R. IV, 64-65, 67).

After Riggin had Scholl sit on the curb, Fehr told him that Smith told Scholl to get the gun and he pointed towards a blue Crown Victoria. (R. IV, 36-37, 49). Riggin approached the Crown Victoria, found it locked, and looked inside but could not see a gun in plain view. (R. IV, 38). While he was looking into the car an unknown bystander, later identified as Bret Micah Robinson, kept trying to get between him and the car. (R. IV, 49, 74-75). Robinson was interfering with Riggin's inspection of the vehicle trying to video record the events. (R. IV, 49, 71-72). Robinson began screaming at Riggin and was eventually arrested and placed into handcuffs. (R. IV, 71-72).

Riggin approached the passenger side back seat of Cartmill's patrol vehicle to speak with Smith. (R. IV, 37-38). At that point, Riggin believed he was investigating a criminal threat, committed by Smith, and the gun would have been part of the evidence of that crime. (R. IV, 38). The Burger Stand was full of people; there were several people outside, and there were others on the street watching the events. (R. IV, 11, 71). Riggin

was also concerned over the public safety implications of an unaccounted for firearm being somewhere in the area. (R. IV, 35, 39).

As Riggin opened the patrol car door, Smith said to him that he did not know why he was sitting there. (R. IV, 39). Riggin said that they were told he was threatening people with a gun. (R. IV, 39). Riggin removed Smith's car keys which were hanging around his neck for the purpose of entering the car and finding the gun. (R. IV, 39-40). After Riggin removed the keys, without being asked, Smith said to him that he would find the gun in the glove box. (R. IV, 40). With the keys in hand, Riggin returned to the Crown Victoria, unlocked it, entered the glove box, and discovered a firearm which he seized. (R. IV, 40-41). Riggin asked Smith no further questions, and Smith made no further statements. (R. IV, 40-41).

Smith was charged with criminal threat and disorderly conduct. (R. I, 8-9). Prior to trial, Smith filed a motion to suppress evidence seized from Riggin's search of the Crown Victoria. (R. I, 18-20). On August 19, 2015, the case came before the district court for an evidentiary hearing on the motion to suppress and the State's request to determine the admissibility of Smith's statements under *Jackson v. Denno*. (R. II, 2-3; R. IV, 3-4).

On September 17, 2015, the district court announced its decision in open court, making several findings of fact. (R. III, 2-19). The district court ultimately granted Smith's motion to suppress, ruling that all evidence, including the firearm seized as a result of the search of Smith's car would be suppressed. (R. III, 26-27, 33). Regarding Smith's statements, the district ruled that Smith's statements to Fehr were non-custodial and therefore admissible at trial, subject to other objections. (R. III, 33). The district

court ruled that Smith's statements to Cartmill did not violate *Miranda* because they were not the result of custodial interrogation. (R. III, 28). The district court ruled that Smith's statement to Riggin, that the gun was in the glove box, was the result of custodial interrogation and a public safety exception did not apply. (R. III, 34).

Regarding the motion to suppress, the district court ruled that the search of the Crown Victoria was not justified by exigent circumstances because neither the crimes of criminal threat nor disorderly conduct require, as an element, the use or presence of a weapon. (R. III, 23). At a previous pre-trial hearing on September 10, 2015, the district court inquired of the State whether it intended to introduce the firearm into evidence at trial, and the State responded that it did. (R. II, 17-18). The district court stated: "I'm trying to find or determine what the relevance of the weapon is at the time an oral statement was made by Mr. Smith." (R. II, 18). The State proffered the following to the district court:

> "The evidence at trial will indicate that the defendant made statements to people in the Burger Stand that he was in possession of a firearm, that he had the firearm in his vehicle, that he had a concealed carry permit to possess a firearm and use the firearm, and he threatened to shoot people with the firearm inside the Burger Stand.
>
> "The State's argument is that the fact that the defendant – what the State has to prove is, that the defendant made those statements. The State's position is going to be that the fact that the firearm was in fact there and he did have it is corroborative of our witnesses's testimony that he made statements about a firearm and that he made threats to use the firearm." (R. II, 18).
>
> While ruling on the motion to suppress, the district court stated:
>
> "The Court notes that the defendant had waived his right to a preliminary hearing in this case. . .There was also a proffer at the last motion hearing by counsel for the State that the defendant possessed a firearm, that the firearm was in his vehicle, he made statements to that effect that he had a concealed carry permit to carry a firearm, to possess and carry and use the

firearm, and that he threatened to shoot people with the firearm in the business. There is no evidence that the Court has heard that the defendant ever had possession of a gun while in the business. There is no testimony that the defendant ever had a gun in the business, went out to the vehicle. The testimony or clear indication is that the defendant was in the business throughout this time frame, had no gun on him. Obviously, a gun was discovered later." (R. III, 18-19).

"The next issue becomes another exception that the State raised is the exigent circumstances in this case. And in – in the pleadings, there's discussion about, normally it's probable cause that evidence of a crime exists, and that here are exigent circumstances. There is some discussion about the automatic exigency of an automobile because of its mobility. Most of the cases that the Court has reviewed and seen and has been cited to deal with situations dealing with car stops, while that generally does not change the mobility of a particular case or the exigency issues, because warrantless searches are generally permitted if there is evidence of the crime in a vehicle, and I've got a couple of problems with that, and again, it may have been the way the evidence was presented or the information that was before the Court, but it's clear throughout the, again, with both Cartmill and Riggin, that the two crimes that were being dealt with were disorderly conduct and criminal threat. There is no evidence that the Court has seen, especially through Riggin, that the crime of criminal threat or disorderly conduct involves a weapon as an element or as evidence of the crime that was involved in this particular case. . ." (R. III, 22-23).

The district court noted that both Smith and Scholl were handcuffed and in separate patrol cars, then went on to state:

"This is a crime that the oral statements that were made are what constitute the criminal threat, and the conduct of the yelling out on the sidewalk with Officer Cartmill appears to be the disorderly conduct, and then I'm not sure how much of that collected further from other information that was there. But again, the gun, whether or not a gun exists is not evidence of the crime of whether or not oral statements or the criminal threat were made or the communicated threat was made. . .

". . .I have no evidence or information of communicating a threat where the gun was part of the crime. So, counsel, I do not believe that there was probable cause to search the vehicle for the evidence of the crimes involved, and there's some case law that does talk about it relating to the crimes involved as opposed to finding evidence of a crime versus crime of – evidence of the crime." (R. III, 24-25).

Regarding the issue of exigency and public safety, the district court stated:

"This is another part where Ms. Malin had to lead Riggin through some issues that weren't objected to, but at some point, Riggin was acknowledging that, gee, public safety might have been an issue and what he was trying to figure out about the gun was trying to figure out where the gun was. Indications apparently from Fehr was that the gun was in the Crown Vic. Again, the Defendant and Scholl, both people who had apparent access to the vehicle, were both handcuffed, both in the vehicle. Riggin had gone to that car, found it locked, walked around the car to see if he could find evidence of a weapon inside the car through plain view. He could not. There was testimony that one or more officers were a around the vehicle. There was an individual who was later arrested, I believe, for obstruction, but it was the gentleman who's a law student that testified, but that officers had flashlights, they were trying to see inside the car. No evidence of a gun or the gun was visible from outside the car." (R. III, 15-16).

"Officer Riggin went to Cartmill's car, where the defendant was, opened the door. Riggin believed that the defendant was intoxicated based on the odor of alcohol and the defendant's slurred speech. The defendant asked him at that time why he was sitting in the patrol vehicle. Riggin's response was along the lines that he had been threatening people with a gun. Riggin either took the keys from around the defendant's neck or a particular key from a lanyard around the defendant's neck. After the removal of the key or keys, the defendant made a statement to Riggin that the car, or that the gun was in the car in the glove box. Riggin used the keys to unlock the car, and the gun was found in the glove box. It was photographed and seized." (R. III, 17-18).

"The, and again, I look at the situation. I can understand why Riggin may want to know where the gun is, but the two people that – the whole issue with the gun and the exigent circumstances issue was eliminated almost immediately by dealing with having both of those people in custody, and both of them in separate vehicles. When I talked about Quarles, McKessler and Bailey, I realize those were more situations where statements were used, but in all three of those, it was clear from the get-go that a gun was used, that there were more public safety issues involved where the rape in Quarles occurred . . . I've looked at that whole idea of what the officers knew, what the – what Riggin testified as to what information he had, and again, his information was that somebody in a blue hoodie was going to get the gun. The first person he came into contact with a blue hoodie, there was not a weapon on him. There was a belief by Riggin the whole time that the gun was in the car, that the vehicle was locked. It certainly did not present a threat to anybody at the scene during that time." (R. III, 25-26).

The State now appeals the district court's pre-trial ruling suppressing evidence of from the search of Smith's vehicle and his statement to Riggin. (R. I, 95).

ARGUMENTS AND AUTHORITIES

ISSUE I: The district court erred in suppressing evidence of a firearm seized from the Defendant's vehicle because the search and seizure were justified by exigent circumstances.

Jurisdiction and Standard of Review

The State may file an interlocutory appeal when a judge of the district court suppresses evidence. K.S.A. 22-3603. Motions to suppress contain mixed questions of law and fact. *State v. Marx*, 289 Kan. 657, 660, 215 P.3d 601 (2009). The factual conclusions are reviewed by a substantial competent evidence standard. *Marx*, 289 Kan. at 660. The ultimate legal question is reviewed de novo. *Marx*, 289 Kan. at 660. But, the appellate "court does not reweigh evidence, pass on credibility of witnesses, or resolve conflicts in the evidence." *Marx*, 289 Kan. at 660 (quoting *State v. Ackward,* 281 Kan. 2, 8, 128 P.3d 382 (2006)).

Argument

The district court's decision to suppress the gun found in Smith's car was legally erroneous because it incorrectly concluded that the gun Riggin was looking for was not evidence of the crimes he was investigating. The crimes in question involved allegations that Smith was threatening to retrieve his gun from his car and shoot people; therefore, the gun was directly related to the matter that was under investigation. The district court appeared to conflate the issue of public safety exigency, which was raised regarding Smith's statements to Riggin, with the exigency necessary for a search of the vehicle. The gun was sufficiently related to the matters being investigated at the time; there was

probable cause to believe the gun was in the car, and a search on that basis was legally justified.

Under the Fourth Amendment searches and seizures must be reasonable. A search or seizure without a warrant is per se unreasonable, subject to numerous exceptions. One such exception is known as the automobile exception, which holds that officers may search an automobile without a warrant so long as there is probable cause to believe that there is evidence within. *State v. Davis*, 31 Kan. App. 2d 1078, 1084, 78 P.3d 474 (2003). The law recognizes that an automobile presents an inherent exigency due to its mobility, and no additional exigent circumstances must be evident for this exception to apply. 31 Kan. App. 2d at 1084. Probable cause to search a vehicle is established if, under the totality of the circumstances, there is a fair probability that the car contains contraband or evidence. 31 Kan. App. 2d at 1084. The automobile exception applies even when there is no further exigency such as a probability of the vehicle actually being driven away. *United States v. Ludwig*, 10 F.3d 1523, 1528-29 (10th Cir. 1993). In *United States v. Johns*, 469 U.S. 478, 487-88, 105 S.Ct. 881, 83 L.Ed.2d 890 (1985), the Court held that a warrantless search of vehicles held in police custody for three days was justified by the fact that the investigators had probable cause to believe they would find evidence of a crime therein.

The concerns that the district court voiced about the lack of exigency, due to the fact that the suspects were in custody, were not legally relevant to the question of whether the automobile exception applied. The district court did not make any factual findings that Riggin lacked probable cause to believe that he would find Smith's gun in the car. The evidence on that point was substantial. Prior to conducting his search, Riggin had

been informed that Smith had beckoned Scholl to retrieve the gun from the Crown Victoria. Before entering the vehicle, Smith told Riggin that the gun was in car. At the time Riggin entered the Crown Victoria, there was probable cause to believe the gun was in car.

The district court's decision turned on a legal question of whether this information was sufficient probable cause that evidence of a crime was located in the vehicle. The district court applied an incorrect and overly restrictive definition of "evidence of a crime" to this test, apparently holding that for the gun to constitute evidence of a crime it would have to be an element of one of the charged offenses. Moreover, it appears that the district court concluded that the fact that Smith had the gun he mentioned in his earlier threat would not be relevant evidence at trial; therefore, Riggin had no basis to search for the gun.

The State's argument is that the gun was evidence of the crimes that the officers were investigating because it was logically related to the threats Smith is alleged to have made. The gun's presence in the vehicle, where Smith threatened it would be, was evidence that corroborated the eye witness statements regarding the specific threat Smith made. The State can find no caselaw directly on point, but there is a dearth of law on what constitutes "evidence of a crime." Most cases involving the automobile exception do not address corroborative evidence. However, applying generally accepted principles from the law indicates that "evidence of a crime" is not strictly limited to evidence that corresponds with a statutory element of a criminal offense.

In *Davis*, the defendant was observed taking merchandise from stores and placing it into the truck of a vehicle. The defendant was confronted by a police officer who

removed the car keys from the defendant's person, found the vehicle in question, searched the trunk and discovered the stolen merchandise. 31 Kan. App. 2d at 1080-81. When a defendant is charged with theft, as was the defendant in *Davis*, evidence of the stolen property is apparently relevant. The criminal act in *Davis* was obtaining unauthorized control over the merchandise and the evidence seized from the vehicle tended to prove the defendant actually took it and it was corroborative of the State's witnesses who saw the defendant take the property.

Evidence is relevant when it has any tendency in reason to prove any material fact. *State v. Hilt*, 299 Kan. 176, 189, 322 P.3d 367 (2014); K.S.A. 60-401(b). In *State v. Washington*, 226 Kan. 768, 770, 602 P.2d 1377 (1979), the Court held that the admission of evidence of a prior consistent statement of rape victim was admissible, over objections of improper bolstering, was admissible because it tended to corroborate the victim's later testimony. Corroborating evidence is, by definition, different or separate evidence, but it strengthens or confirms other evidence.

Here, the State bears the burden of proving that the defendant committed the act of communicating the threat that he had a gun in his car and he would not hesitate to shoot people. Just as prior consistent statements may corroborate or strengthen the in-court testimony of a witness, the presence of a gun in the defendant's vehicle corroborates that fact that Smith made this particular threat. If there should be any question as to whether the witness's trial testimony accurately recounts Smith's statements, the fact that the police did find a gun in his car has a tendency in reason to prove Smith actually made the threat.

Probable cause is to be determined by consideration of the information and fair

inferences therefrom known to the officer at the time of a search. *Burch v. Kansas Dept. of Revenue*, 282 Kan.764, 775-76, 148 P.3d 538 (2006) (*rev'd on other grounds by Sloop v. Kansas. Dept. of Revenue*, 296 Kan. 13, 290 P.3d 555 [2012]). The district court's analysis failed to consider this principle as it appeared to require the officer to make a determination about what charges were going to be filed and what evidence would be relevant to those charges. At the time Riggin conducted his search he, and the other officers, had received information that Smith was threatening to discharge a gun at the Burger Stand. They also had information that the gun was present at the scene, in Smith's vehicle. Viewed from the point of view of Riggin, with the information he possessed at the time, the gun was part of the evidence of the crime he was investigating.

There is authority a more expansive definition of "evidence of a crime" applies in the context of search warrants. In *Warden v. Hayden*, 387 U.S. 294, 296, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967), the defendant was convicted of armed robbery at a trial where evidence was admitted including a firearm, ammunition, and items of clothing. Police officers trailed the defendant, in hot pursuit from the scene of the crime, to a home which they entered and seized the evidence. The lower court had upheld the search and the seizure of the firearm; however, it held that the items of clothing were mere evidence of the crime and not subject to seizure. The Court upheld the seizure of the clothing, holding that the Fourth Amendment makes no distinction between the seizure of instrumentalities of a crime (such as the firearm) and evidence of the crime (such as the clothing.) 387 U.S. at 301.

The distinction in *Hayden* is important in this case because it differentiates between contraband and instrumentality of a crime and "mere evidence" which is neither

but may be relevant. This case presents a situation in which the gun Riggin was searching for was not the instrumentality of the crime; however, its presence in Smith's car was relevant to the crimes being investigated.

In *Messerschmidt v. Millender*, 132 S.Ct. 1235, 182 L.Ed.2d 47 (2012), police officers were sued under 42 U.S.C. 1983 for their execution of a search warrant at the plaintiff's home, alleging there was insufficient probable cause that items seized were evidence of a crime. There, Shelly Kelly reported to the police that she had been assaulted by her boyfriend, Jerry Bowen, and threatened with a firearm. Bowen had become enraged when he learned she had contacted the police for a civil standby while she retrieved her property from Bowen's home. In addition to the crime, Kelly reported that Bowen was a gang member. The police prepared a warrant seeking seizure of firearms as well as evidence indicative of gang membership. Occupants of the residence alleged in their civil suit that the warrant was invalid and the officers were not entitled to qualified immunity.

The 9th Circuit Court of Appeals, *en banc*, held that the officers were not entitled to qualified immunity and concluded that the warrant was unconstitutionally overbroad as it failed to establish, inter alia, that indicia of gang membership was evidence of a crime. 132 S.Ct. at 1244. The U.S. Supreme Court reversed the 9th Circuit, recognizing that gang indicia was evidence that could be seized:

> "Moreover, even if this were merely a domestic dispute, a reasonable officer could still conclude that gang paraphernalia found at the Millenders' residence would aid in the prosecution of Bowen by, for example, demonstrating Bowen's connection to other evidence found there. The warrant authorized a search for 'any gang indicia that would establish the persons being sought in this warrant,' and '[a]rticles of personal property tending to establish the identity of [the] person in control of the premise or premises.' Before the District Court, the

> Millenders 'acknowledge[d] that evidence of who controlled the premises would be relevant if incriminating evidence were found and it became necessary to tie that evidence to a person,' and the District Court approved that aspect of the warrant on this basis. App. to Pet. for Cert. 158–159 (internal quotation marks omitted). Given Bowen's known gang affiliation, a reasonable officer could conclude that gang paraphernalia found at the residence would be an effective means of demonstrating Bowen's control over the premises or his connection to evidence found there." 132 S.Ct. at 1248.

The holding in *Messerschmidt* underscores the principle advanced by the State in this case. The probable cause necessary to sustain a legal search need not strictly be limited to instrumentalities of a particular crime. As in *Messerschmidt*, officers may have probable cause to seize corroborative evidence that may strengthen or contextualize other evidence or assist in a prosecution of the suspect. There, the court saw the evidentiary value in gang material which could demonstrate identity, corroborate the victim's account, and demonstrate the suspect's dominion and control over her. Here, as argued above, the gun corroborates the witness's statements regarding Smith's threat.

The district court suppressed the gun on the basis of a legal conclusion that it had no evidentiary connection to the crimes being investigated. The district court's analysis on this point was far too narrow. Its approach adopted the discredited reasoning from pre-*Hayden* cases which limited seizures to contraband or instrumentalities. Under the Fourth Amendment, officers have the authority to seize evidence of the crime, even when that evidence is corroborative and not strictly contraband or instrumentalities. The district court's decision was legally erroneous, and it should be reversed.

ISSUE II: The district court erred in suppressing Smith's statement to Riggin because it was not the result of custodial interrogation and it was admissible under the public safety exception to *Miranda*.

Jurisdiction and Standard of Review

The State may file an interlocutory appeal when a judge of the district court suppresses evidence. K.S.A. 22-3603. When reviewing the district court's decision regarding the voluntariness of a defendant's statement the appellate court reviews the totality of the circumstances, reviewing the factual underpinnings of the district court's decision by a substantial competent evidence standard and the legal conclusions by a de novo standard. *State v. Bridges*, 297 Kan. 989, 1004, 306 P.3d 244 (2013).

Argument

The district court's decision to suppress Smiths's statement to Riggin (i.e. that the gun was in the car) was legally erroneous for two reasons: (1) the district court incorrectly concluded that Smith was subjected to custodial interrogation and (2) the district court did not correctly apply the public safety exception to *Miranda*. (R. III, 25-28, 33, 34).

Generally, unless the procedural safeguards of *Miranda* are followed, statements elicited from a defendant, through custodial interrogation, are not admissible. *State v. Herbert*, 277 Kan. 61, 68, 82 P.3d 470 (2004). Interrogation includes express questioning but it also includes statements or actions by the police that the officer should know are reasonably likely to elicit an incriminating response. 277 Kan. at 68. In *Herbert*, the court held that an officer's invitation to the defendant to tell his side of the story, while in custody and prior to *Miranda* warnings, was the functional equivalent of

questioning. 277 Kan. at 69-70.

In *Rhode Island v. Innis*, 446 U.S. 291, 301-02, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980), the Court held that the purpose of *Miranda* warnings were to provide protection from coercive police interrogation and practices that should be known to evoke an incriminating response are the functional equivalent of interrogation. The court noted that police cannot be held accountable for unforeseeable responses to their words or actions when they are not the kind that should be known to evoke an incriminating response. 446 U.S. at 301-02. There, the police had arrested the defendant for shooting a taxi driver, and he had invoked his right to counsel. There was a firearm involved which had not been located at the time of the defendant's arrest. While the officers transported the defendant to the police station, they engaged in a conversation between themselves in which they speculated about how dangerous it would be if some children found the firearm. The defendant interrupted the conversation and told them where the firearm was located. That statement was admitted at trial.

The Court held that the statement was not the result of interrogation because there was no express questioning and it was not the result of the functional equivalent because neither officer should have known the conversation would evoke the defendant's response. 446 U.S. at 302. The Court noted that the officer's conversation was short, only a few remarks, and the nature of the conversation was not evocative, i.e. they did not harangue the defendant. 446 U.S. at 302.

In *State v. Reimann*, 19 Kan. App. 2d 431, 435, 870 P.2d 1346 (1994), a panel of this court applied *Innis* in the context of questions asked by officers who were trying to prevent the defendant from killing themselves. There, this court noted that the officers'

purpose in speaking with the defendant was to prevent him from shooting himself and not to illicit incriminating evidence. In *State v. Speed*, 265 Kan. 26, 30-31, 961 P.2d 13 (1998), the defendant invoked his *Miranda* rights then asked to speak with a detective from Oklahoma and made several incriminating statements. The Oklahoma detective sat with the defendant with another detective from Kansas, and the defendant began to speak. On appeal, the defendant argued that the Oklahoma detective should have known that his presence would have been the functional equivalent of interrogation because they were both of the same race and the Oklahoma detective had earlier stated that he knew some of the defendant's family. The Court held there was no competent evidence that the Oklahoma detective should have known his conduct or statements would have evoked an incriminating statement. 265 Kan. at 36-37.

Here, the district court did not make a specific finding that there had been direct questioning, and there is no evidence in the record of such. The district court's finding was that Riggin approached the patrol car and Smith asked why he was arrested; Riggin responded that he had been threatening people with a gun; after removing Smith's car keys, Smith said the gun was in the car's glove box. The evidence showed that after Riggin made this statement Smith responded there was no further questioning or contact between them.

The district court did not make a finding that there had been the functional equivalent of questioning, and there was no legal basis for such a finding. Simply telling a suspect why he or she is under arrest, in response to a direct inquiry by the suspect, as it occurred here, is not the functional equivalent of questioning. Riggin's contact with Smith was like the contact in *Reimann* and *Speed*, insofar as Riggin did nothing that

could be reasonably foreseen to evoke an incriminating response. His purpose for having contact with Smith was not to interrogate him; but rather, to locate the gun. Riggin did not ask anything nor did he invite Smith to provide information. Riggin's statement to Smith was in response to his question about why he was being arrested. There is no reason to conclude that the act of removing the key from Smith's neck was an act that Riggin knew would evoke Smith to make any response, especially considering the fact that Riggin was already aware that Smith had already told Fehr that the gun was in the car. This encounter was distinguishable from the kind in *Herbert* because Riggin did nothing to solicit or encourage Smith to make a statement.

However, even if Smith were subject to custodial interrogation, his statements were admissible under the public safety exception to *Miranda*. *Miranda* is only a prophylactic rule, meant to protect the right against self-incrimination, and not a right in and of itself. As such, courts have recognized exceptions to the *Miranda* rule which permit admission of statements elicited through custodial interrogation when the warnings were not given.

The first such case was *New York v. Quarles*, 467 U.S. 649, 104 S.Ct. 2626, 81 L.Ed.2d 550 (1984). In *Quarles*, police officers received a complaint from a woman who claimed she had been raped by a man, armed with a gun, who had entered a grocery store. 467 U.S. at 651-52. The officers located the suspect in the grocery store, restrained him and handcuffed him, noticed that he had an empty gun holster, then asked him where the gun was. 467 U.S. at 652. The suspect indicated to an area and said "the gun is over there" and the officers found the gun. 467 U.S. at 652.

Quarles was charged with criminal possession of a weapon and the trial court ruled that his answer to the question about the gun was inadmissible because no *Miranda* warning had been given. The case eventually reached the U.S. Supreme Court which reversed the trial court. The Court held that, in the absence of shocking police conduct calculated to overbear the will of an interrogant, the *Miranda* rule is subject to a public safety exception. The court explained:

> "We hold that on these facts there is a 'public safety' exception to the requirement that Miranda warnings be given before a suspect's answers may be admitted into evidence, and that the availability of that exception does not depend upon the motivation of the individual officers involved. In a kaleidoscopic situation such as the one confronting these officers, where spontaneity rather than adherence to a police manual is necessarily the order of the day, the application of the exception which we recognize today should not be made to depend on post hoc findings at a suppression hearing concerning the subjective motivation of the arresting officer. Undoubtedly most police officers, if placed in Officer Kraft's position, would act out of a host of different, instinctive, and largely unverifiable motives—their own safety, the safety of others, and perhaps as well the desire to obtain incriminating evidence from the suspect.
>
> "Whatever the motivation of individual officers in such a situation, we do not believe that the doctrinal underpinnings of Miranda require that it be applied in all its rigor to a situation in which police officers ask questions reasonably prompted by a concern for the public safety. The Miranda decision was based in large part on this Court's view that the warnings which it required police to give to suspects in custody would reduce the likelihood that the suspects would fall victim to constitutionally impermissible practices of police interrogation in the presumptively coercive environment of the station house. 384 U.S., at 455–458, 86 S.Ct., at 1617–1619. The dissenters warned that the requirement of Miranda warnings would have the effect of decreasing the number of suspects who respond to police questioning. Id., at 504, 516–517, 86 S.Ct., at 1643, 1649–1650 (Harlan, J., joined by Stewart and WHITE, JJ., dissenting). The Miranda majority, however, apparently felt that whatever the cost to society in terms of fewer convictions of guilty suspects, that cost would simply have to be borne in the interest of enlarged protection for the Fifth Amendment privilege.
>
> "The police in this case, in the very act of apprehending a suspect, were confronted with the immediate necessity of ascertaining the whereabouts

> of a gun which they had every reason to believe the suspect had just removed from his empty holster and discarded in the supermarket. So long as the gun was concealed somewhere in the supermarket, with its actual whereabouts unknown, it obviously posed more than one danger to the public safety: an accomplice might make use of it, a customer or employee might later come upon it.
>
> "In such a situation, if the police are required to recite the familiar Miranda warnings before asking the whereabouts of the gun, suspects in Quarles' position might well be deterred from responding. Procedural safeguards which deter a suspect from responding were deemed acceptable in Miranda in order to protect the Fifth Amendment privilege; when the primary social cost of those added protections is the possibility of fewer convictions, the Miranda majority was willing to bear that cost. Here, had Miranda warnings deterred Quarles from responding to Officer Kraft's question about the whereabouts of the gun, the cost would have been something more than merely the failure to obtain evidence useful in convicting Quarles. Officer Kraft needed an answer to his question not simply to make his case against Quarles but to insure that further danger to the public did not result from the concealment of the gun in a public area." 467 U.S. at 656-57.

Just as Kansas recognizes *Miranda*, it recognizes the *Quarles* exception to *Miranda*. In *State v. McKessor*, 246 Kan. 1, 785 P.2d 1332 (1990), a defendant claimed that the police illegally seized a gun by violating his right against self-incrimination. On August 7, the defendant committed a robbery with a handgun, and the victims were able to describe the defendant, the gun, and his car. Later that day, the defendant committed another robbery with the same or a similar gun. The victim of the second robbery was able to identify the defendant from a photo line-up. On August 10, a law enforcement officer tracked the defendant to a motel and observed him outside, re-entering a room. The officers forced their way into the room, restrained the defendant, and demanded to know where the gun was located. The defendant told them its location, and the officers seized the gun. 246 Kan. at 4. The court rejected the claim that the gun was illegal seized, citing *Quarles*:

> "The public safety exception outlined in *Quarles* is applicable to this case. The officers had reason to believe that McKessor was armed and they knew that some of the adjoining motel rooms were occupied. Because McKessor indicated that there was another man in the bathroom, the police acted in the interest of public safety by determining, without delay, the location of weapons in the room." 246 Kan. at 7.

In *State v. Bailey*, 256 Kan. 872, 889 P.2d 738 (1995), the defendant, who had shot and killed his ex-fiancé, led law enforcement officers on a high-speed car chase. At the time the officers were aware of the shooting and had a description of the defendant's car. Their recognition of the car allowed them to confirm their suspicion that they were pursuing the suspect in the homicide. The defendant was eventually subdued and, prior to advising the defendant of *Miranda* rights, an officer asked about the whereabouts of the gun. The defendant replied that the gun was under his car seat. 256 Kan. at 878.

Search warrants were obtained which were based, at least in part, upon the defendant's pre-*Miranda* statements. On appeal, the defendant pressed his claim that the warrants were invalid; however, the court upheld the searches based on *Quarles*.

> "With respect to suppression of the gun, defendant's trial counsel argued that the gun was seized pursuant to a search warrant obtained in part based on defendant's statement at the time of his arrest and before he was *Mirandized* that the gun was under the seat of his car. The court also denied this motion, finding that Kindall's question asking defendant where the gun was occurred after a high-speed chase and a report that defendant was a suspect in a shooting and therefore fell within the 'public safety' exception to the requirement that *Miranda* warnings be given before a suspect's answers can be admitted into evidence. See [*Quarles*] . . . We agree.
>
> "The motion to suppress the fruits of the search warrant executed at defendant's residence was likewise denied because the search warrant was obtained based on defendant's statement, which the court had found was valid and admissible." 256 Kan. at 880.

When a police officer is dispatched on a complaint of a person threatening to shoot people with a gun and there is credible information that a gun is present, though its

whereabouts are not confirmed, officers have a legitimate need to locate the weapon to preserve public safety. This principle is recognized by *Quarles*, *McKessor*, and *Bailey*. Here the officers were confronted with that scenario along with a crown of people in and out of the Burger Stand, on the street, and at least one person, Mr. Robinson, who was inserting himself into the situation with alarming propinquity to the location of the gun.

The district court dismissed these concerns and found there was no danger to public safety because Smith and Scholl were in custody at the time Riggin conducted his search. The district court also concluded that public safety was not in issue to the same degree as in *Quarles*, *McKessor*, and *Bailey* and found those cases inapplicable. This constituted a legal error by the district court because it did not properly apply the holdings and reasoning of these cases.

The precise issue raised is whether statements made by a defendant in custody, without *Miranda* warnings, can be admissible at trial when the officer said or did something to elicit the statements and they were reasonably prompted to do so out of concern for public safety. The district court's reasoning seems to have been that since Smith and Scholl were in custody and the gun was locked in the car it posed no danger whatsoever. However, *Quarles*, *McKessor*, and *Bailey* all dealt with factual scenarios where defendants were in custody or otherwise subdued but the officers asked about the presence of weapons. All three cases recognize that when officers are aware that firearms are likely present, even when their suspect is restrained, public safety is still in issue.

Quarles indicated that the pressing concern in these scenarios is actually determining the whereabouts of a firearm. When firearms are involved, the police need

to be able to confirm where they are, if for no other reason, to definitely rule out that the firearm is elsewhere. Riggin and the other officers were called to a crowded scene, and there was some initial confusion about what was going on. Until Riggin seized Smith's gun, he was unable to definitely eliminate its potential dangerousness. *Quarles* and its progeny recognize that these situations are the kind where the need to restrain coercive questioning by law enforcement is outweighed by a pressing public need.

The district court's determination that there was no public safety concern was an ex post facto analysis starting from the end and working backward. As the officers were eventually able to find the gun and confirm that it was in the car, the district court concluded that there was never any danger. However, the district court failed to properly apply the holdings of *Quarles*, *McKessor*, and *Bailey* which recognize that the potential danger to public safety must be judged by what the officers definitely know at the time they ask the public safety questions.

Riggins contact with Smith was entirely reasonable and lawful, and the district court erred in ruling Smith's statements inadmissible at trial.

CONCLUSION

For the reasons set forth above, the district court erred in suppressing evidence of a gun seized in Smith's car and Smith's statements to Riggin. The State asks this Court to reverse the district court's ruling and remand the case for further proceedings.

Respectfully submitted,

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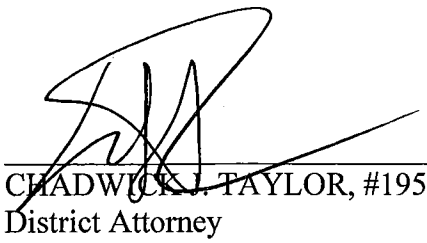

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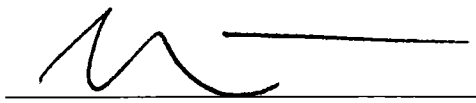

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the above and foregoing **Appellant's Brief** was served upon:

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