NOT DESIGNATED FOR PUBLICATION

No. 106,119

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

MARK DERRINGER,
Appellant.

MEMORANDUM OPINION

Appeal from Graham District Court; WILLIAM B. ELLIOTT, judge. Opinion filed September 21, 2012. Reversed and remanded.

Jessica L. Dotter, legal intern, and *Randall L. Hodgkinson*, of Kansas Appellate Defender Office, for appellant.

Tony A. Potter, county attorney, and *Derek Schmidt*, attorney general, for appellee.

Before GREENE, C.J., PIERRON AND ARNOLD-BURGER, JJ.

GREENE, C.J.: Mark Derringer appeals his convictions of two counts of aggravated assault, challenging the sufficiency of the evidence to support these convictions and arguing jury instruction error, prosecutorial misconduct, and cumulative trial error. Although we conclude the evidence was sufficient, we conclude Derringer was denied a fair trial by reason of cumulative error; thus, we reverse his convictions and remand for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

Police were called after Derringer got into an argument with his brother Jason Derringer and his father Ed Derringer at the family home and, at some point, pointed a gun at the two of them. According to Ed, Derringer got into the argument and then "pulled a pistol out and pointed it at him and Jason." According to Jason, "most of the anger was directed toward my dad, but the gun was pointed at both of us." Ed testified that he called police "to calm [Derringer] down." Deputy Kevin Turner investigated the incident and took written statements from both Jason and Ed.

Derringer was charged with two counts of aggravated assault and was thereafter found guilty of both counts by a jury. He was sentenced to 12 months' imprisonment on each count, to be served concurrently.

Derringer appeals his convictions.

WAS THE EVIDENCE SUFFICIENT TO SUPPORT THE AGGRAVATED ASSAULT CONVICTIONS

Derringer's principal argument on appeal is that the evidence was insufficient to support aggravated assault because there was a dearth of evidence to show that neither his brother nor dad was ever placed "in apprehension of immediate bodily harm." When sufficiency of the evidence is challenged in a criminal case, the appellate court must consider all the evidence, viewed in the light most favorable to the prosecution, and determine whether a rational factfinder could have found the defendant guilty beyond a reasonable doubt. *State v. McCaslin*, 291 Kan. 697, 710, 245 P.3d 1030 (2011). Because it is the jury's function to weigh the evidence and determine the credibility of witnesses, this court will not reweigh the evidence. *State v. Cosby*, 293 Kan. 121, 134, 262 P.3d 285 (2011).

Aggravated assault is defined as "an assault, as defined in K.S.A. 21-3408 and amendments thereto, committed: (a) With a deadly weapon." K.S.A. 21-3410(a). Assault is defined as "intentionally placing another person in reasonable apprehension of immediate bodily harm." K.S.A. 21-3408.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution requires the State to prove beyond a reasonable doubt every element necessary to constitute the crime charged. *State v. Gould*, 271 Kan. 394, 411, 23 P.3d 801 (2001). "[A] conviction 'can be based entirely on circumstantial evidence and the inferences fairly deducible therefrom.'" *State v. Drayton*, 285 Kan. 689, 711, 175 P.3d 861 (2008) (quoting *State v. Bird*, 240 Kan. 288, 299, 729 P.2d 1136 (1986), *cert. denied* 481 U.S. 1055 [1987]). "'If an inference is a reasonable one, the jury has the right to make the inference.'" *Drayton*, 285 Kan. at 711 (quoting *State v. Ordway*, 261 Kan. 776, 804, 934 P.2d 94 [1997]).

Review of Relevant Trial Evidence

We review the evidence at trial for support of the element that the victims were intentionally placed in reasonable apprehension of immediate bodily harm.

Officer Turner was the State's key witness. He testified that after interviewing Ed and Jason, there was no question in his mind that they felt threatened by Derringer on the date in question, but the officer admitted that his offense report failed to say anything about the victims being threatened or in fear of bodily harm. The following colloquy took place during Officer Turner's direct examination:

> "Q. [Prosecutor]: Officer, when you returned to the Derringer residence . . . and you collected the written statements, did you discuss the case any further with Jason Derringer or Ed Derringer?

"A. [Officer Turner]: Yeah. I asked them one more time to clarify if they felt threatened. I didn't know if this was just a confrontation or if it was criminal, and *they both assured me they were threatened when the gun was pointed at them.*

"Q. Did you specifically ask them whether or not they felt threatened by Mark Derringer on that date?

"A. I did.

"Q. And did they both answer in the affirmative?

"A. They did.

"Q. Did you note that in a report you made regarding this incident[]?

"A. I did." (Emphasis added.)

Ed's statement, Jason's statement, Officer Turner's offense report, and the probable cause affidavit were all admitted into evidence. Officer Turner read the following excerpts to the jury:

- From Ed's statement: "'Mark Derringer, my son, pulled into my driveway. We had some words, then he pulled a gun on me, wanted to know if I wanted a piece of him, pointed a gun at me, he then pointed the gun at his brother, then he left. He came back, left two guns torn up in my driveway.'"

- From Jason's statement: "'Mark Derringer, my brother, pulled into my parents' driveway and started yelling and calling my dad and I every name he could think of. Mark was trying to fight with us, and then he pointed a gun at both of us and kept calling us names and asking us to fight. Most of the anger was directed toward my dad, but the gun was pointed at both of us.'"

- From Officer Turner's report: "'I requested the assisting officer to wait with Mark while I went and spoke with the victims again. I

returned to Ed and Jason's house where I retrieved their written statements. *I affirmed that Mark had directly pointed the gun at them in a threatening manner, and they both insisted that he did.*'"
(Emphasis added.)

On cross-examination, Officer Turner admitted that both his offense report and the probable cause affidavit cited Derringer's "threatening manner" but failed to state anything about Ed or Jason being "afraid," "scared," "threatened," or "in fear of bodily harm."

The State also called Ed to the stand. Ed testified that he called 911 so an officer would be sent to calm Derringer down. Ed refused to admit that he had an "argument" with his son that day; he preferred the phrase "had words." Derringer was talking so fast that Ed could not understand him. While Ed admitted that his son had a gun, he claimed he could not remember whether Derringer pointed the gun at him; he did acknowledge using the word "pointed" in his written statement, but he explained that he did so without knowledge that he would be brought before a jury. The following colloquy took place during Ed's cross-examination:

"Q. [Defense counsel]: At any point during that conversation, that argument, however you want to characterize yours and Mark's interaction that day, at any point were you afraid?

"A. [Ed]: No.

"Q. At any point did you feel threatened?

"A. No.

"Q. At any time, were you concerned for your safety?

"A. No.

"Q. At any time, did you ever feel that you were in immediate, that you were in immediate bodily harm?

"A. No."

Jason testified for the defense. According to Jason, he contacted police so they would calm Derringer down. Officer Turner told Jason and Ed that if Derringer did not point the gun at them, then "he [the officer] wasn't going to do anything about it, he was wasting his time." Officer Turner "made sure" Jason's statement included that Derringer had pointed the gun at him, but the following colloquy took place during Jason's direct examination:

> "Q. [Defense counsel]: At any point that day, were you afraid?
>
> "A. [Jason]: No.
>
> "Q. At any point that day when Mark was upset and Mark had the gun in his hand, did you feel threatened?
>
> "A. No.
>
> "Q. At any time, were you ever concerned for your safety?
>
> "A. No.
>
> "Q. At any time, were you ever concerned for the safety of your father?
>
> "A. No.
>
> "Q. At any time that day, did you feel that you were in immediate bodily harm?
>
> "A. Absolutely not."

Jason admitted on cross-examination that his written statement was true, but he emphasized that he could not remember the details of the incident.

Application of Applicable Legal Principles from Caselaw

The question of "reasonable apprehension of immediate bodily harm" has frequently been a subject of appellate opinions in Kansas. Derringer relies principally on *State v. Warbritton*, 215 Kan. 534, 537-38, 527 P.2d 1050 (1974), where our Supreme Court reversed an aggravated assault conviction because the evidence failed to support the victim's "reasonable apprehension of immediate bodily harm." There, the court held that this apprehension "must be the fear of the victim—the person who is assailed—for

his or her own safety." 215 Kan. at 537. Additionally, the court refused to accept the State's argument that the circumstances alone could support a circumstantial basis for apprehension:

> "We might agree that the atmosphere was heavily fraught with danger and was threatening enough to have induced apprehension on the part of Mrs. Bailey for her personal safety. However, Mrs. Bailey consistently denied while she was on the stand that she had any fear for herself; that she thought Mr. Warbritton would not harm her. She testified she was not scared for herself because she knew the way she was holding the baby, that the defendant would hit it instead of herself, if he pulled the trigger. In the face of positive testimony such as this we cannot say, as urged by the district attorney, that the circumstances were such that, as a matter of law, Mrs. Bailey had fear for herself." 215 Kan. at 537-38.

Here, the State cites no caselaw but argues that we should endorse the view of dissenting Justice Fromme in *Warbritton* that apprehension is a question for the jury to decide rather than one turning on "what a person says about his fear or apprehension long after the incident." 215 Kan. at 538 (Fromme, J., dissenting). Indeed, Justice Fromme seems to have been endorsed to some extent by the court in other factual scenarios, but not without controversy. See, *e.g.*, *State v. Lessley*, 271 Kan. 780, 800, 26 P.3d 620 (2001) (dissenting Justices embraced *Warbritton* and concluded evidence insufficient when victim testifies in a manner that was "crystal clear" that she was not in fear of bodily harm); *State v. Nelson*, 224 Kan. 95, 96-99, 577 P.2d 1178 (1978). In a more recent opinion, our Supreme Court found that inconsistent testimony from the victim as to his apprehension was sufficient to support such a conviction. *State v. Hurt*, 278 Kan. 676, 688-89, 101 P.3d 1249 (2004).

What we glean from this review of our caselaw is that *Warbritton* is still good law in Kansas. But the facts before us are distinguishable because here we have clear testimony from the investigating officer that the victims both assured him they were

threatened when the gun was pointed at them. Perhaps one could argue that they never confirmed the threat was "of immediate bodily harm," but this would be illogical given a sense of threat from one pointing a deadly weapon at them. We recognize that by the time of trial these family victims were no longer willing to support their prior sentiments of feeling threatened, but the evidence from the officer was never itself disputed, and we are not in a position to reweigh that evidence on appeal. See *Cosby*, 293 Kan. at 134.

In light of all the evidence, when viewed in the light most favorable to the prosecution, we conclude that a rational factfinder could have found Derringer guilty beyond a reasonable doubt because of the victims' original statements that they indeed felt threatened by Derringer's conduct. The sufficiency challenge is thus rejected.

ALTERNATIVELY, WAS THERE CUMULATIVE ERROR THAT WOULD REQUIRE REVERSAL?

Derringer argues four additional issues on appeal: (1) The verdict form was clearly erroneous in directing or implying no consideration of lesser offenses unless there is no unanimous verdict on the principal charge, citing *State v. Miller*, 293 Kan. 46, 54, 259 P.3d 701 (2011), and *State v. Cribbs*, 29 Kan. App. 2d 919, 924, 34 P.3d 76 (2001); (2) The prosecutor engaged in reversible misconduct when he misinformed the jury that the statutory element of apprehension is not required to be experienced by the victims but by any reasonable person, citing K.S.A. 21-3408; (3) The prosecutor engaged in reversible misconduct when he vouched for the credibility of the investigating officer, citing *State v. Elnicki*, 279 Kan. 47, 105 P.3d 1222 (2005); and (4) The trial court's instructions were erroneous in explaining the reasonable doubt standard utilizing the term "any" rather than "each." We have examined each of these claims of error and conclude that the cumulative effect of these errors, when considered collectively, and especially given the slim and/or inconsistent evidence of apprehension discussed above, is that the totality of the circumstances substantially prejudiced the defendant and denied him a fair trial. See *State v. Edwards*, 291 Kan. 532, 553, 243 P.3d 683 (2010).

The Verdict Form

The verdict form employed by the district court without objection instructed the jurors not to consider the lesser included offense of assault until they had found Derringer not guilty of aggravated assault. We have held that an instruction that improperly prohibits the jury from considering lesser offenses unless and until it unanimously has found the defendant not guilty on the primary offense is clear error. *State v. Graham*, 275 Kan. 831, 839-40, 69 P.3d 563 (2003); see *State v. Cribbs*, 29 Kan. App. 2d at 923-24. This was not without consequence here, as the jury submitted a question of uncertainty regarding the difference between aggravated assault and assault, thus indicating some degree of confusion in how to consider the alternative charges. Although we might not find this error alone would render Derringer's trial unfair, it must be considered along with other errors in our cumulative error analysis.

Prosecutorial Misconduct in Misstating Applicable Law

Derringer argues the prosecutor materially misstated the law by the following excerpt from closing argument:

> "If the question is assault, and if *we are looking at whether or not a reasonable person would have had some apprehension* in this circumstance, is it reasonable to think that you have someone in front of you, angry, screaming, yelling obscenities, whatever you want to pick. You've got a gun in their hand, and they're pointing it at you. Is it reasonable to think that you're apprehensive?" (Emphasis added.)

Then, in rebuttal, the prosecutor again suggested that the reasonableness standard rather than the specific apprehension of these victims was the test, stating:

> "Let's say we're in an argument and you think that I'm using methamphetamines, and my voice is getting very loud, and I pick up a gun and I point it at you. Have I placed you in reasonable apprehension of immediate bodily harm? Should you be concerned?"

As noted in our discussion of sufficiency, the Supreme Court has been specific in holding that it "must be the fear of the victim—the person who is assailed—for his or her own safety," not a general reasonableness standard. *Warbritton*, 215 Kan. at 537. Here again, we may not find this misconduct alone deprived Derringer of a fair trial or otherwise met the standards for reversible misconduct, but it must be considered along with other errors in our cumulative error analysis. Moreover, the prosecutorial misconduct in this case was exacerbated by the fact that four of the jury instructions erroneously defined "reasonable apprehension of immediate bodily harm" as "an apprehension based on circumstance that would lead *a reasonable person* to experience that apprehension." (Emphasis added.)

Instruction Error

Derringer argues that the court's instructions misled the jury to believe that if it found the defendant guilty of just one of the claims or elements, it should find him guilty of the entire offense. The instruction at issue read:

> "The State has the burden to prove the defendant is guilty. The defendant is not required to prove he is not guilty. You must presume that he is not guilty unless you are convinced from the evidence that he is guilty.
>
> "The test you must use in determining whether the defendant is guilty or not guilty is this: If you have a reasonable doubt as to the truth of any of the claims required to be proved by the State, you must find the defendant not guilty. If you have no reasonable doubt as to the truth of *any* [each] of the claims required to be proved by the State, you should find the defendant guilty." (Emphasis added.)

Although we have consistently held that this error alone does not constitute reversible error, it must be considered along with other errors in our cumulative error analysis. See, *e.g.*, *State v. Womelsdorf*, 47 Kan. App. 2d 307, 330-34, 274 P.3d 662 (2012), *petition for review filed* May 10, 2012.

Cumulative Analysis

Even if an individual error is insufficient to support reversal, the cumulative effect of multiple errors may be so great as to require reversal. The test is "'whether the totality of circumstances substantially prejudiced the defendant and denied the defendant a fair trial. No prejudicial error may be found upon this cumulative effect rule, however, if the evidence is overwhelming against the defendant.' [Citation omitted.]" *State v. Edwards*, 291 Kan. 532, 553, 243 P.3d 683 (2010).

Here, our confidence in the jury's verdict has been undermined by the totality of the circumstances. First, we must recognize at the outset that the State has escaped the sufficiency challenge by our rather narrow and technical reliance on the officer's testimony despite clear and unequivocal denials of apprehension by both victims at trial. This dearth of evidence, coupled with errors in the instructions, verdict forms, and a serious misstatement of the law by the prosecutor causes us to conclude that Derringer was substantially prejudiced and denied a fair trial. For these reasons, we must reverse his convictions and remand for a new trial.

Reversed and remanded.