Petition Appendix

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 114,325

STATE OF KANSAS,
Appellee,

v.

MURAD RAZZAQ,
Appellant.

SYLLABUS BY THE COURT

1.

Under K.S.A. 2018 Supp. 22-3402(b), a defendant is not subject to prosecution if the defendant is not brought to trial within 180 days after arraignment unless the delay happens as a result of the application or fault of the defendant.

2.

Under judicially created safeguards for the rights of defendants applicable when the State seeks to introduce evidence of other bad acts, a district court must weigh the probative value of such evidence against the danger of unfair prejudice from it.

Review of the judgment of the Court of Appeals in an unpublished opinion filed October 21, 2016. Appeal from Sedgwick District Court; BENJAMIN L. BURGESS, judge. Opinion filed April 19, 2019. The judgment of the Court of Appeals affirming the district court is affirmed. The judgment of the district court is affirmed.

Corrine E. Gunning, of Kansas Appellate Defender Office, argued the cause and was on the briefs for appellant, and *Murad Razzaq*, appellant, was on a supplemental brief pro se.

Matt J. Maloney, assistant district attorney, argued the cause, and *Marc Bennett*, district attorney, and *Derek Schmidt*, attorney general, were with him on the briefs for appellee.

The opinion of the court was delivered by

ROSEN, J.: Murad Razzaq challenges his conviction and sentence for one count of aggravated indecent liberties with a child. Finding no error, we affirm. This case presents issues in common with *State v. Boysaw*, 309 Kan. ___, ___ P.3d ___ (No. 112,834, this day decided), slip op. at 9: whether K.S.A. 2018 Supp. 60-455(d) constitutionally allows evidence showing the propensity of a defendant to commit crimes of a sexual nature.

FACTS

In 2005, Razzaq was convicted and sentenced in Missouri for one felony count of statutory sodomy and one misdemeanor count of child molestation. The victims were two girls under the age of 12. While still subject to the jurisdiction of the Missouri Department of Corrections, he spent time with his mother in Derby, Kansas.

At around 2 in the morning of May 27, 2011, the night before B.D.'s 15th birthday, B.D.'s mother noticed that her daughter was not in the girl's bedroom. The mother woke up her husband, T.D., and the two discovered that a window in B.D.'s bedroom was unlocked.

The parents started to call B.D.'s friends, including Murad Razzaq's brother, and eventually learned of a couple of addresses where she might be found. By early afternoon, the parents had checked out one of the addresses, located in a mobile home park, but it turned out to be incorrect. They called 911 and reported that their daughter was missing but that they were proceeding to an address where they thought they would

find her and wanted police assistance. They then drove to that address, where they found the front door ajar and saw B.D. standing in the living room. Razzaq, who was 27 years old at the time, was sitting on a couch, and two other men were sitting across from them. The father directed the mother to escort B.D. out to the car. The mother returned to the house, where her husband asked Razzaq if there had been sexual contact between Razzaq and B.D. Razzaq said, "Yes, I've had sexual relations with your daughter."

The police subsequently arrived and, after talking with different people at the scene, took Razzaq into custody. Initially reluctant to speak with detectives about whether sexual intercourse had occurred—saying that it was "none of their business"—B.D. eventually confirmed that she and Razzaq had engaged in sexual relations. Razzaq was taken to a local hospital, where, pursuant to a search warrant, clothing, swabs, and hair samples were collected from him. Testing later showed that swabs from Razzaq's penis had major contribution from B.D. and minor contribution from Razzaq.

B.D. was also taken to the hospital, where she cooperated with a nurse who conducted a physical examination of her. In response to the nurse's questions, B.D. said that she had been "intimate" with Razzaq, which she clarified to mean that she had sexual intercourse with him. She informed the nurse that she had sneaked out of her house through her bedroom window and that Razzaq picked her up and drove her to his mother's house at about 1 that morning. She said that she and Razzaq had sex at several places around the home. Testifying at trial, B.D. confirmed this account: she called Razzaq from her bedroom and then left through a bedroom window to meet him. She testified that she was under the influence of alcohol and drugs and that she and Razzaq engaged in sexual intercourse several times.

ANALYSIS

On June 1, 2011, the State filed a complaint charging Razzaq under K.S.A. 21-3504(a)(1) with one count of aggravated indecent liberties with a child who was 14 or more years of age but less than 16 years of age. On March 7, 2014, the State filed a motion seeking admission of evidence under K.S.A. 2013 Supp. 60-455(d). Razzaq countered with a motion asking the court to bar the presentation of any prior-acts evidence. Following a hearing, the court granted the State's motion, finding that the evidence was material and had probative value.

A jury found Razzaq guilty of aggravated indecent liberties. The court sentenced him to a midrange sentence of 176 months. Razzaq filed a timely notice of appeal. The Court of Appeals affirmed the conviction in *State v. Razzaq*, No. 114,325, 2016 WL 6139148 (Kan. App. 2016) (unpublished opinion). This court granted review on all issues.

Probative Value of Prior Convictions Versus Prejudicial Effect

After a witness testified that he had determined that Razzaq had been convicted of two sex crimes in Missouri, the court interjected a lengthy explanation to the jury. The court gave the statutory definition of the Missouri crimes:

> "'A person commits the crime of statutory sodomy in the first degree if he has devious sexual intercourse with another person who is less than 14 years old.' The crime of child molestation, second degree, is defined by statutes in the state of Missouri as follows: 'A person commits the crime of child molestation in the second degree if he or she subjects another person, who is less than 17 years of age, to sexual contact.'"

The court went on to state that the evidence could be considered for its bearing on Razzaq's disposition or propensity to commit a crime such as the one charged in the case at bar. The court informed the jury that it was the jury's prerogative to decide how much weight to give the evidence. The court cautioned the jury that Razzaq was not on trial for other crimes and it should not convict him based solely on the evidence of the other crimes.

Razzaq argues on appeal that the district court abused its discretion when it allowed the State to introduce, through a witness, the fact of his prior convictions in Missouri for sex crimes. This issue is similar to an issue raised in *Boysaw*, 309 Kan. at ___, slip op. at 9. The discussion below incorporates but does not repeat all aspects of the *Boysaw* analysis.

This court reviews for abuse of discretion a district court determination that the probative value of evidence outweighs its potential for producing undue prejudice. A district court abuses its discretion when: (1) no reasonable person would take the view adopted by the judge; (2) a ruling is based on an error of law; or (3) substantial competent evidence does not support a finding of fact on which the exercise of discretion is based. *State v. Bowen*, 299 Kan. 339, 348-49, 323 P.3d 853 (2014).

As noted in *Boysaw*, this court has created safeguards for defendants when the State seeks to introduce evidence of other bad acts. These safeguards resemble those of Federal Rule of Evidence 403, and they require a district court to weigh the probative value of such evidence against the danger of unfair prejudice from it. See, e.g., *State v. Gunby*, 282 Kan. 39, 48, 144 P.3d 647 (2006).

No single test exists for weighing probative value against prejudicial effect. The Tenth Circuit has suggested certain factors to be considered, such as the similarity of the

prior acts to the acts charged, the closeness in time of the prior acts to the charged acts, the frequency of the prior acts, the presence or lack of intervening events, and the need for evidence beyond the testimony of the defendant and alleged victim. See, e.g., *United States v. Guardia*, 135 F.3d 1326, 1331 (10th Cir. 1998).

In *State v. Prine*, 297 Kan. 460, 478, 303 P.3d 662 (2013), this court referred favorably to *United States v. Benally*, 500 F.3d 1085, 1090-91 (10th Cir. 2007), which incorporated other tests into the weighing test for propensity evidence in sex crimes. Citing prior decisions, the *Benally* court recommended considering specific factors in analyzing the two elements to be weighed.

In evaluating the probative value, the district court should consider, among other factors: how clearly the prior act was proved; how probative the evidence is of the material fact sought to be proved; how seriously disputed the material fact is; and whether the government can obtain any less prejudicial evidence. In considering the possible prejudicial effect, the district court should consider: the likelihood that such evidence will contribute to an improperly based jury verdict; the extent to which such evidence may distract the jury from the central issues of the trial; and how time consuming it will be to prove the prior conduct. *Benally*, 500 F.3d at 1090-91.

In the present case, Razzaq's attorney argued several reasons why he considered the evidence either weakly probative or strongly prejudicial: consent was not an issue in his case; the victims in the Missouri case were girls six years of age and the facts of the cases were therefore dissimilar; and simply reading the fact of conviction and the relevant Missouri statutes would give the jury little or misleading information about Razzaq's propensity to commit such crimes.

The district court made two explicit findings: the Missouri convictions were relevant, and the Missouri convictions had probative value in helping to prove that Razzaq committed the crime of aggravated indecent liberties in the case at bar. The court found that the elements of the Missouri crimes were sufficiently similar to those being charged in Kansas to give the evidence probative value. The court noted the balancing test at the beginning of its explanation of its decision and admitted the evidence. Although the district court did not explicitly determine that the probative value outweighed the prejudicial effect, this court may presume that the district court made all the necessary factual findings to support its judgment in the absence of an objection to inadequate findings. *State v. Neighbors*, 299 Kan. 234, 240, 328 P.3d 1081 (2014). We conclude that the district court implicitly rejected Razzaq's argument of prejudice when it denied his motion.

The *Benally* factors to be evaluated for prejudicial effect include the likelihood that such evidence will contribute to an improperly based jury verdict; the extent to which such evidence may distract the jury from the central issues of the trial; and how time consuming it will be to prove the prior conduct. 500 F.3d at 1090-91.

In the present case, it was unlikely that the evidence contributed to a jury verdict based on improper evidence or law. The State presented a day and a half of witness testimony tending to prove guilt. The evidence of the Missouri convictions made up a small part of the State's case, and it was presented in just a few transcript lines. The court instructed the jury not to base its verdict solely on that evidence.

Although the district court would not have known at the time of its ruling the defense that Razzaq would raise if he chose to testify, his testimony gave the propensity evidence greater probative value. Razzaq apparently thought he could prove that he had not done what B.D. and the biological evidence said he did. He testified at trial that he

never had sexual relations with B.D. He testified that he repeatedly told T.D. that he did not have sex with B.D. and finally said that he did only when T.D. became so verbally abusive that Razzaq feared he might become the victim of violence. Razzaq also testified that, in his opinion, a great conspiracy had taken place among police, laboratory workers, and other witnesses to place him in criminal jeopardy. He further testified that it was likely that B.D. made up her allegations against him because she was "transferring" her parents' and the police accusations. These claims of a conspiracy bolstered the case for admitting the evidence of the Missouri convictions. The evidence made it less likely that everyone involved in the process was engaged in a great conspiracy and made it more likely that Razzaq was somebody who liked to have sex with underage girls and tried to get away with it.

The district court implicitly weighed the probative value of the evidence of the Missouri convictions against the danger of undue prejudice and did not abuse its discretion in admitting the evidence.

The Constitutionality of K.S.A. 2018 Supp. 60-455(d) Under the Kansas Constitution

This issue is much the same as the one addressed in *Boysaw.* As did Boysaw, Razzaq conflates federal and Kansas due process law. The *Boysaw* analysis is not repeated here: the history of "lustful disposition" evidence in Kansas suggests that K.S.A. 2018 Supp. 60-455(d) does not violate the Bill of Rights contained in the Kansas Constitution. Razzaq offers this court no explanation of why the analytical pattern for determining the constitutionality of K.S.A. 2018 Supp. 60-455(d) under the Kansas Constitution should differ from that under the United States Constitution. As we explain in *Boysaw*, 309 Kan. at ___, slip op. at 14, the historical development of prior-crimes evidence in Kansas leads us to conclude that K.S.A. 2018 Supp. 60-455(d) satisfies the due process requirements of the federal Constitution. To the extent that Razzaq asserts

that other states have found state constitutional violations in their bad-acts evidentiary statutes, he fails to show that those state constitutions have similar wording, origins, or histories of construction as the Kansas Constitution. If the Kansas Constitution calls for a more strict review than or an analysis otherwise at odds with the federal Constitution, Razzaq does not present this court with support for such a proposition. As argued in this case, we find no violation of the Kansas Constitution.

Asserted Speedy Trial Violations

With the permission of the Court of Appeals, Razzaq filed a supplemental brief in which he raised a speedy trial issue, and the State filed a supplemental reply brief in response. The Court of Appeals held that Razzaq failed to demonstrate error. This court granted Razzaq's petition for review, including an argument that the Court of Appeals inadequately addressed the issue raised in the supplemental brief.

The violation of a defendant's right to a speedy trial is a question of law subject to de novo review. *State v. Sievers*, 299 Kan. 305, 307, 323 P.3d 170 (2014).

The district court held a hearing and then engaged in a detailed breakdown of the delays in bringing Razzaq to trial. The district court detailed Razzaq's numerous claims of ineffective assistance of counsel, the dismissals of counsel, and continuances granted to bring new counsel up to speed. The court concluded that 1,222 days elapsed between arraignment and trial. Of those, 1,062 days were attributed to the defendant, leaving 160 days counted against the State. Razzaq was in the custody of Missouri for a significant portion of the time, and he obtained an appearance bond when his Missouri term expired. The 160 days was well within the statutory 180-day requirement of K.S.A. 2018 Supp. 22-3402(b).

In his brief, Razzaq argues that the speedy trial statute contains mandatory language: in the event that a person charged with a crime is not brought to trial within 180 days after arraignment, "such person shall be entitled to be discharged from further liability to be tried for the crime charged . . . ." K.S.A. 2018 Supp. 22-3402(b). He ignores the language of the same sentence, "unless the delay shall happen as a result of the application or fault of the defendant . . . ."

The Court of Appeals deemed the argument waived because Razzaq did not provide citations to the record identifying errors, and it is this conclusion that he raises on review. The Court of Appeals went on to note, however:

> "The statute clearly provides any error by the district court in charging the delay to Razzaq may not be used by him to support dismissal of the charges. Here, the delays were attributable to Razzaq's direct requests—continuances required as he went through seven attorneys between arraignment and trial—and he cannot now use his requested continuances during the 3-1/2 years between arraignment and trial to support dismissal of the charges. Razzaq's speedy trial claim is without merit." *Razzaq*, 2016 WL 6139148, at *5.

Neither in his briefing nor in his petition for review does Razzaq identify any error in the district court's calculations of days attributable to the parties, and he does not identify any particular delays that were improperly attributed to him or any particular days that were counted incorrectly. Razzaq makes only bald assertions that the statutory time was exceeded and that he did not consent to any of the delays. A review of the records shows, however, that he was present at hearings on replacement of counsel and that the delays were necessitated by his and his attorneys' requests.

The district court and the Court of Appeals correctly determined that the record does not support Razzaq's speedy trial claims.

Use of Prior Convictions to Enhance Sentences

Finally, Razzaq asks this court to reconsider our holding in *State v. Ivory*, 273 Kan. 44, 45-47, 41 P.3d 781 (2002) (right to a factual determination by a jury does not apply when sentence based in part on defendant's criminal history score). As in *Boysaw*, we decline to do so here.

CONCLUSION

Razzaq fails to convince us that any error occurred in the conduct of his trial that requires reversal. We therefore affirm the judgment of the Court of Appeals and the judgment of the district court.

NOT DESIGNATED FOR PUBLICATION

No. 114,325

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

MURAD RAZZAQ,
Appellant.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; BENJAMIN L. BURGESS, judge. Opinion filed October 21, 2016. Affirmed.

Corrine E. Gunning, of Kansas Appellate Defender Office, and *Murad Razzaq*, pro se, for appellant.

Matt J. Maloney, assistant district attorney, *Marc Bennett*, district attorney, and *Derek Schmidt*, attorney general, for appellee.

Before MALONE, C.J., SCHROEDER, J., and WALKER, S.J.

Per Curiam: Murad Razzaq appeals his jury conviction for aggravated indecent liberties with a child raising three issues: (1) Pursuant to K.S.A. 2015 Supp. 60-455(d), the district court erred in admitting evidence of his prior Missouri convictions for statutory sodomy and child molestation to show his propensity to commit this crime; (2) the district court improperly used his criminal history to determine his sentence; and (3) the district court violated his right to a speedy trial. We find no error and affirm.

FACTS

On May 27, 2011, B.D., a 14-year-old female, snuck out of her parents' house. Razzaq picked up B.D. and drove her to his mother's house where he was staying. They both smoked marijuana and engaged in sexual intercourse. Razzaq was 27 years old at the time.

B.D.'s parents, Timothy and Mary, noticed B.D. was missing early that morning. They searched for her and ultimately found her at Razzaq's mother's house that afternoon. When they arrived at the house the front door was partially open, and Timothy was able to see B.D. sitting with Razzaq. Timothy entered the home, ordered B.D. to wait outside with her mother, and confronted Razzaq. Timothy asked Razzaq whether he "had fucked [his] daughter." Razzaq stated he had "relations" with B.D., then admitted to having sex with her.

B.D. was interviewed by police shortly thereafter and admitted she and Razzaq engaged in sexual activity. She then underwent a sexual assault examination. B.D. told the sexual assault nurse, Christie Stoner, she and Razzaq had sexual intercourse several times. Stoner collected swabs from B.D. for DNA testing. Stoner also collected swabs from Razzaq. Laboratory testing detected B.D.'s DNA on the swabs taken from Razzaq's penis and scrotum.

Prior to trial, the State moved to admit evidence of Razzaq's prior sex crime convictions pursuant to K.S.A. 2015 Supp. 60-455(d). Razzaq's criminal history reflected two Missouri convictions in 2005—one for statutory sodomy, a felony, and the other for child molestation, a misdemeanor. Both convictions were based on sexual contact with underage girls. The State sought to admit the evidence to show Razzaq's propensity to have sex with underage girls. Razzaq responded to the State's motion arguing the 2009 amendments to K.S.A. 60-455 allowing the admission of prior bad acts as propensity

evidence in sex offense cases was unconstitutional. Razzaq also argued the probative value of the evidence was outweighed by its prejudicial effect. The district court ruled the evidence would be admissible at trial.

The evidence was admitted during the testimony of Detective Virgil Miller. Miller testified he discovered, as part of his research, "[i]n 2005, the defendant was convicted of statutory sodomy, a felony, and child molestation, a misdemeanor, in Jefferson County, Missouri. . . . [T]he victims were two girls under the age of 12." Razzaq made a contemporaneous objection "pursuant to pretrial motions." Immediately after Miller's testimony, the district court provided the jury with a limiting instruction on how to consider the prior conviction evidence. Razzaq did not object to the limiting instruction.

Razzaq testified on his own behalf at trial. He denied having sex with B.D., but he could not explain how her DNA was found on the swabs taken from his penis and scrotum. He generally asserted that B.D., her parents, Nurse Stoner, and law enforcement all conspired against him. He further claimed they manipulated the evidence but offered no specific points or proof on how they manipulated the evidence.

The jury convicted Razzaq of aggravated indecent liberties with a child. A presentencing investigation report was prepared showing Razzaq's criminal history score was E. His 2005 Missouri conviction for statutory sodomy was not used in calculating his criminal history score because the district court used it as an adult felony elevator to enhance his sentence. The district court sentenced Razzaq to 176 months' imprisonment.

Razzaq timely appealed.

ANALYSIS

K.S.A. 2015 Supp. 60-455(d) is constitutional.

Standard of Review

Determining a statute's constitutionality is a question of law subject to unlimited review. Appellate courts presume statutes are constitutional and must resolve all doubts in favor of a statute's validity. If there is any reasonable construction that would maintain the legislature's apparent intent, the court must interpret the statute in the way that makes it constitutional. *State v. Soto,* 299 Kan. 102, 121, 322 P.3d 334 (2014).

Discussion

Razzaq argues K.S.A. 2015 Supp. 60-455(d) violates § 10 of the Kansas Constitution Bill of Rights. He also incidentally raises a due process challenge under the United States Constitution; however, he fails to argue the issue. An argument raised incidentally in a brief and not argued therein is deemed waived and abandoned. *State v. Sprague*, 303 Kan. 418, 425, 362 P.3d 828 (2015). Accordingly, this court will only consider Razzaq's challenge under the Kansas Constitution.

Razzaq's arguments are identical to those raised in *State v. Boysaw*, 52 Kan. App. 2d 635, 372 P.3d 1261 (2016), *petition for rev. filed* May 6, 2016. He argues *Boysaw* was incorrectly decided and should not be relied on by this court. Razzaq's arguments are unpersuasive. This court finds the *Boysaw* reasoning persuasive.

K.S.A. 2015 Supp. 60-455(d) states:

> "Except as provided in K.S.A. 60-445, and amendments thereto, in a criminal action in which the defendant is accused of a sex offense . . . , evidence of the defendant's commission of another act or offense of sexual misconduct is admissible, and may be considered for its bearing on any matter to which it is relevant and probative."

The *Boysaw* court held K.S.A. 2015 Supp. 60-455(d) did not violate the Kansas Constitution. In reaching its decision, the *Boysaw* court analyzed and distinguished the Missouri and Iowa cases Razzaq now relies on from prior Kansas caselaw that allowed the admission of evidence reflecting a lustful disposition. 52 Kan. App. 2d at 646-49. In resolving this issue, we find the analytical framework relied on in *Boysaw* applies and does not need to be repeated.

As the *Boysaw* court found, the 2009 amendments to K.S.A. 60-455 did not undermine traditional protection afforded defendants by allowing evidence of prior sex offenses to be admitted to prove propensity. Instead, the legislature's amendments more accurately reflect Kansas' common-law tradition, including the use of a defendant's prior sexual crimes, to prove the defendant's lustful disposition as an exception to the general prohibition of using prior crimes to prove propensity. 52 Kan. App. 2d at 647.

Boysaw's reasoning is sound and should be applied here. K.S.A. 2015 Supp. 60-455(d) does not violate § 10 of the Kansas Constitution Bill of Rights. 52 Kan. App. 2d at 646-49. The district court did not err in allowing the State to introduce evidence of Razzaq's prior convictions to show his propensity to commit similar crimes.

No undue prejudicial effect when evidence of Razzaq's prior convictions was admitted.

Razzaq argues "the probative value of the 2005 Missouri convictions was greatly outweighed by its prejudicial effect." Razzaq seems to acknowledge the prior convictions are relevant. However, a trial court has the discretion to exclude relevant evidence when the court finds its probative value is outweighed by its potential for producing undue prejudice. See K.S.A. 2015 Supp. 60-445. An appellate court reviews any such determination for an abuse of discretion. See *State v. Lowrance*, 298 Kan. 274, 291, 312 P.3d 328 (2013). A judicial action constitutes an abuse of discretion if the action is (1) arbitrary, fanciful, or unreasonable; (2) based on an error of law; or (3) based on an error of fact. *State v. Marshall*, 303 Kan. 438, 445, 362 P.3d 587 (2015).

In *State v. Prine*, 297 Kan. 460, 478, 303 P.3d 662 (2013) (*Prine II*), the Kansas Supreme Court assumed without deciding that the district court must balance the probative value of prior crimes against the threat of undue prejudice. It noted, however, that federal cases interpreting Federal Rules of Evidence 413, 414, and 415—upon which K.S.A. 2015 Supp. 60-455(d) was modeled—provided guidance and cited *United States v. Benally*, 500 F.3d 1085 (10th Cir. 2007), with approval. *Prine II*, 297 Kan. at 478. Subsequent cases indicate district courts must balance the probative value against the threat of undue prejudice. See *State v. Remmert*, 298 Kan. 621, 628, 316 P.3d 154 (2014), *disapproved on other grounds by State v. Jolly*, 301 Kan. 313, 342 P.3d 935 (2015); *State v. Spear*, 297 Kan. 780, 789, 304 P.3d 1246 (2013).

In determining whether to admit evidence of prior acts, the Tenth Circuit Court of Appeals in *Benally* held the district court should consider:

> "1) how clearly the prior act has been proved; 2) how probative the evidence is of the material fact it is admitted to prove; 3) how seriously disputed the material fact is; and 4) whether the government can avail itself of any less prejudicial evidence. When analyzing

> the probative dangers, a court considers: 1) how likely it is such evidence will contribute to an improperly-based jury verdict; 2) the extent to which such evidence will distract the jury from the central issues of the trial; and 3) how time consuming it will be to prove the prior conduct." 500 F.3d at 1090.

The Tenth Circuit also provided a list of factors a court may consider when analyzing the probative value of prior acts, including: "(1) the similarity of the prior acts and the charged acts, (2) the time lapse between the other acts and the charged acts, (3) the frequency of the prior acts, (4) the occurrence of intervening events, and (5) the need for evidence beyond the defendant's and alleged victim's testimony." *Benally*, 500 F.3d at 1090-91. Razzaq cites a similar list of factors from *United States v. LeMay*, 260 F.3d 1018, 1027-28 (9th Cir. 2001), which were analyzed by a panel of this court in *State v. Young*, No. 102,121, 2013 WL 6839328, at *15 (Kan. App. 2013) (unpublished opinion), *rev. denied* 300 Kan. 1108 (2014). Though the wording of the factors differ slightly, the factors are substantively the same.

Here, the probative value of the evidence was extremely high. Razzaq's prior convictions both involved sexual contact with young girls whose ages were close to B.D.'s. The elements of the Missouri offenses cover conduct substantially similar to aggravated indecent liberties with a child in violation of K.S.A. 2015 Supp. 21-5506(b)(1). Given the evidence and arguments presented at trial, Razzaq's prior convictions were highly probative, particularly considering his complete denial of sexual contact with B.D. despite admission to her father and the DNA evidence recovered from him.

The risk of undue prejudice did not substantially outweigh the probative value of the evidence. The evidence was limited to a scripted presentation detailing only the fact Razzaq was convicted in Missouri, the crimes of conviction, and the age of his victims. The jury was not provided with unnecessary extraneous details, and the district court gave a proper limiting instruction immediately after the State presented the evidence.

Razzaq argues that by "[failing] to consider the specific facts underlying [his] Missouri convictions," the district court "allowed the jury to create its own factual bases when considering the evidence of the prior convictions." He does not explain the factual context of his prior convictions, let alone how providing the jury with such context would somehow have made the evidence less prejudicial. Razzaq's argument is without merit. The district court did not err.

No Apprendi *violation.*

Razzaq also argues the district court violated his rights under the Sixth and Fourteenth Amendments to the United States Constitution when it used his prior convictions to enhance his sentence without proving those convictions to a jury beyond a reasonable doubt, contrary to the United States Supreme Court's guidance in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). Razzaq recognizes the Kansas Supreme Court rejected this argument in *State v. Ivory*, 273 Kan. 44, 46, 41 P.3d 781 (2002), but includes the issue to preserve it for federal review. Because there is no indication the Kansas Supreme Court is departing from this position, this court is duty bound to follow established precedent. *State v. Meyer*, 51 Kan. App. 2d 1066, 1072, 360 P.3d 467 (2015). The district court properly used Razzaq's criminal history to establish his sentence.

Razzaq's speedy trial rights were not violated.

Razzaq filed a pro se supplemental brief in which he argues his statutory and constitutional speedy trial rights were violated based on numerous pretrial delays over 3-1/2 years. The record reflects that after arraignment, Razzaq went through seven attorneys and each new attorney needed the trial continued to review all the evidence and prepare for trial. Each time counsel was replaced—at Razzaq's request—the district court informed him it would cause the then current trial date to be continued.

Razzaq's arguments are, in large part, a series of conclusory allegations unsupported by the record. Razzaq prefaces his argument by stating: "Appellant-Pro Se is not comprised [*sic*] of the transcripts, therefore cites to the record by dates and proceedings." Kansas Supreme Court Rule 6.02(a)(5) (2015 Kan. Ct. R. Annot. 41) requires an appellant to provide specific citations to the record on appeal. Without such citation to the record, the appellate court must presume the district court was correct. See *State v. Bryant*, 285 Kan. 970, 980, 179 P.3d 1122 (2008) (appellant claims that are not properly keyed to the record will not be considered on appeal); *State v. Scheuerman*, 32 Kan. App. 2d 208, 213, 82 P.3d 515 (2003) (material statements not keyed to the record on appeal presumed unsupported by record). Our Supreme Court has held Rule 6.02(a)(5) is to be strictly enforced. *State v. Godfrey*, 301 Kan. 1041, 1043-44, 350 P.3d 1068 (2015). An appellant who fails to comply with this rule risks a ruling that the issue is improperly briefed and will be deemed waived and abandoned. See *State v. Williams*, 298 Kan. 1075, 1085, 319 P.3d 528 (2014).

Razzaq does not cite to any authority permitting a pro se appellant to brief an issue without complying with Rule 6.02(a)(5). Because his claims of error are not keyed to an appropriate citation to the record, the issue is deemed waived and abandoned. *Godfrey*, 301 Kan. at 1044; *Williams*, 298 Kan. at 1085. With improper briefing, Razzaq's claim must be presumed unsupported by the record; therefore, this court must presume the district court decided the issue correctly when it found all of the continuances in this case were done at Razzaq's request. See *Bryant*, 285 Kan. at 980; *Scheuerman*, 32 Kan. App. 2d at 213.

Additionally, we note K.S.A. 2015 Supp. 22-3402(g) provides:

> "If a defendant, or defendant's attorney in consultation with the defendant, requests a delay and such delay is granted, the delay shall be charged to the defendant regardless of the reasons for making the request, unless there is prosecutorial misconduct

> related to such delay. If a delay is initially attributed to the defendant, but is subsequently charged to the state for any reason, such delay shall not be considered against the state under subsections (a), (b) or (c) and shall not be used as a ground for dismissing a case or for reversing a conviction unless not considering such delay would result in a violation of the constitutional right to a speedy trial or there is prosecutorial misconduct related to such delay."

The statute clearly provides any error by the district court in charging the delay to Razzaq may not be used by him to support dismissal of the charges. Here, the delays were attributable to Razzaq's direct requests—continuances required as he went through seven attorneys between arraignment and trial—and he cannot now use his requested continuances during the 3-1/2 years between arraignment and trial to support dismissal of the charges. Razzaq's speedy trial claim is without merit.

CONCLUSION

Kansas law pursuant to K.S.A. 2015 Supp. 60-455(d) now allows the admission of prior sex acts when a defendant is charged with a sexual offense and the prior sexual misconduct has been found by the district court to be relevant and probative, and the admission of such evidence does not violate § 10 of the Kansas Constitution Bill of Rights. Here, given Razzaq's prior criminal history, the district court properly used it to calculate his criminal history score and resulting sentence. Finally, there was no speedy trial violation as each continuance obtained between the time of arraignment and trial was requested by Razzaq and properly charged to him by the district court. We affirm.

Affirmed.

DC18

RRS/kjs

FILED

APP DOCKET NO. Vol

IN THE EIGHTEENTH JUDICIAL DISTRICT COURT
SEDGWICK COUNTY, KANSAS

2015 APR 23 P 3:40

CLERK OF DIST. COURT
18TH JUDICIAL DISTRICT
SEDGWICK COUNTY, KS

BY

2010 JOURNAL ENTRY OF JUDGMENT

SECTION I. CASE IDENTIFYING INFORMATION			Transaction Number: 3087G1180454
STATE v. MURAD M. RAZZAQ SSN: XXX-XX-9662 ADDRESS: 4560 South Hydraulic, A18 Wichita, KS 67216	☒ Male	Court O.R.I. Number KS087025G	K.B.I. Number 11301580

County	Court Case Number	Sentencing Judge	Sentencing Date
SEDGWICK	11CR1615	BENJAMIN L. BURGESS	04/16/15

Defense Counsel: ☒ Appointed Counsel Name: Patrick J. Mitchell

Type of Proceeding: ☒ Jury Trial

Date of Conviction: 12/17/14

Pre-Trial Status of Offender: ☒ In Custody

SECTION II. CRIMINAL HISTORY CLASSIFICATION

Offender's Overall Criminal History Classification as Found by the Court: ☒ E

Objections to Criminal History? ☒ No

SECTION III. CURRENT CONVICTION INFORMATION

Name of PRIMARY Offense of Conviction:

AGGRAVATED INDECENT LIBERTIES

Count No.: 1 Date Of Offense: 05/27/11

K.S.A. Title, Section, Subsection(s): 21-3504 (a)(1)

Grade of Offense: ☒ Felony, Severity Level 3 ☒ Person

Offense Category: ☒ Nondrug

THIS FORM MUST BE ACCOMPANIED BY A COPY OF THE PRESENTENCE INVESTIGATION FORM PURSUANT TO K.S.A. 2012 Supp. 22-3439 AND A DOCUMENT CONTAINING INFORMATION REQUIRED BY K.S.A. 2012 Supp. 22-3426.

S4F/soc/ksc/P. Mitchell

Presumptive Sentencing Range:

Mid 176 High 184 Low 164

☒ Presumptive Prison
☒ Special Rule Applies

SPECIAL RULE APPLICABLE:

☒ 5. Persistent Sex Offender

☒ Crime ***SEXUALLY MOTIVATED*** pursuant to Kansas Offender Registration Act, K.S.A. 2010 Supp. 22-4902(c)(14).

SENTENCE IMPOSED:

Guideline Range Imposed: ☒ Mid

Prison Term: KDOC 176 months ☒ Prison sentence imposed.

Postrelease Supervision Term: ☒ Lifetime Postrelease

SECTION IV. DEPARTURE INFORMATION

☒ Defendant's motion for departure overruled.

SECTION V. OTHER CONDITIONS

Costs Ordered:

Court Costs	$	195.00
DNA Database Fee	$	200.00
Extradition Costs	$	1,722.00
Witness Fees	$	40.00
BIDS Attorney Fees	$	Waived
BIDS Application Fee	$	Waived
Booking/Fingerprint Fee	$	33.00
B.F.A.W.	$	195.00
Sexual Assault Kit/Exam Fee	$	725.00
Mileage Fees	$	435.85

SECTION VI. RECAP OF SENTENCE

Sentence Imposed:

Total Prison Term (if sentence imposed is to prison): 176 months

Good Time Credit:

☒ For each count, the Court pronounced the complete sentence, including the maximum potential good time percentage. [K.S.A. 2010 Supp. 21-4704(e)(2) and 21-4705(c)(2)]
☒ 15%

Postrelease Supervision Term: ☒ Lifetime Postrelease

Jail Credit:

Location		Dates in Custody	Number of Days	Awarded/Not Awarded
J	Sedgwick County Jail	05/28/11 to 06/04/11	8	☒ A
J	Sedgwick County Jail	07/27/11 to 04/23/14	1,002	☒ A
J	Jefferson County Jail, MO	05/21/14 to 07/29/14	69	☒ A
J	Sedgwick County Jail	07/29/14 to 10/09/14	73	☒ A
J	Sedgwick County Jail	12/17/14 to 04/16/15	120	☒ A

Sentencing Date: 04/16/15 - Total Number of Days of Jail Credit Actually Awarded 1,272 = Sentence Begins Date: 10/22/11

Prior Case(s) to Which the Current Sentence is to Run Concurrent or Consecutive:

Case No. 23CR3042692 County Jefferson County, MO Sentence _____ ☒ Concurrent

Miscellaneous Provisions:

☒ Defendant informed of right to appeal within 14 days of this date. K.S.A. 22-3608.

☒ Defendant informed of potential rights of expungement under K.S.A. 2010 Supp. 21-4619(g).

☒ Defendant informed of the prohibition against carrying a firearm pursuant to K.S.A. 21-4204 and amendments thereto.

☒ Defendant informed of duty to register as an offender pursuant to the Kansas Offender Registration Act, K.S.A. 22-4901 et seq. K.S.A. 22-4905(b)(2)

SECTION A. REGISTRATION REQUIREMENT

14 Enter age of victim (K.S.A. 22-4904(a)(4))

☒ Offender required to register due to ***SEX OFFENDER*** status as indicated by any of the following:

Conviction of any of the following sexually violent crimes or adjudication as a juvenile offender for an act which if committed by an adult would constitute a sexually violent crime, UNLESS the court finds on the record that the act involved non-forcible sexual conduct, the victim was at least 14 and the offender not more than 4 years older than victim:

☒ Agg. Indecent Liberties With a Child – K.S.A. 21-5506(b)

SECTION B. REGISTRATION TERMS

Offender is subject to LIFETIME registration due to any of the following:

☒ 2nd or Subsequent conviction of an offense requiring registration

☒ Conviction of any of the following crimes:

☒ Agg. Indecent Liberties With a Child – K.S.A. 21-5506(b)

☒ Defendant must submit specimens of blood or an oral or other biological sample pursuant to K.S.A. 21-2511, if not previously submitted. K.S.A. 21-2511(c)

☒ Defendant has been processed, fingerprinted and palmprinted. K.S.A. 2010 Supp. 21-2501(b).

☒ Court remands defendant to custody of Sheriff to await transportation to the custody of the Secretary of Corrections.

☒ Defendant's financial resources and burden imposed by BIDS application and attorney fees considered by the court pursuant to K.S.A. 22-4513 and State v. Robinson, 281 Kan. 538, 132 P.3d 934 (2006).

SECTION VII. SIGNATURES

Ben Burgess	April 20, 2015
BENJAMIN L. BURGESS JUDGE OF THE DISTRICT COURT	DATE

ROBERT R. SHORT, II, #20763 **Assistant District Attorney** Address: Sedgwick County Courthouse 535 North Main Wichita, Kansas 67203 Phone No.: (316) 660-3600	**PATRICK J. MITCHELL, #20318** **Attorney For Defendant** Address: 604 N. Main, Suite D Wichita, Kansas 67203 Phone No.: (316) 264-8700

Kan. Stat. Ann. § 60-455(d)

***

(d) Except as provided in K.S.A. 60-445, and amendments thereto, in a criminal action in which the defendant is accused of a sex offense under articles 34, 35 or 36 of chapter 21 of the Kansas Statutes Annotated, prior to their repeal, or articles 54, 55 or 56 of chapter 21 of the Kansas Statutes Annotated, or K.S.A. 21-6104, 21-6325, 21-6326 or 21-6419 through 21-6422, and amendments thereto, evidence of the defendant's commission of another act or offense of sexual misconduct is admissible, and may be considered for its bearing on any matter to which it is relevant and probative.

ELECTRONICALLY FILED
2016 Mar 04 PM 2:56
CLERK OF THE APPELLATE COURT
CASE NUMBER: 114325

No. 15-114325-A

IN THE
COURT OF APPEALS OF THE
STATE OF KANSAS

STATE OF KANSAS
Plaintiff-Appellee

vs.

MURRAD RAZZAQ
Defendant-Appellant

BRIEF OF APPELLANT

Appeal from the District Court of Sedgwick County, Kansas
Honorable Benjamin Burgess, Judge
District Court Case No. 11 CR 1615

Corrine E. Gunning, #25519
Kansas Appellate Defender Office
Jayhawk Tower
700 Jackson, Suite 900
Topeka, Kansas 66603
(785) 296-5484
(785) 296-2689 fax
adoservice@sbids.org
Attorney for the Appellant

Table of Contents

Nature of the Case

A jury found Murad Razzaq guilty of one count of aggravated indecent liberties with a child pursuant to K.S.A. 21-3504(a)(1), a severity level three person felony. The district court sentenced Mr. Razzaq as a persistent sex offender pursuant to K.S.A. 21-6804(j)(1) and imposed a total 176-month prison sentence. Mr. Razzaq appeals his conviction and sentence.

Statement of the Issues

Issue 1: **The district court erred in admitting evidence of Mr. Razzaq's prior conviction to show propensity because the prejudicial effect of the evidence outweighed its limited probative value.**

Issue 2: **K.S.A. 60-455(d) unconstitutionally denies defendants the right to due process, the presumption of innocence, and to know the nature of crimes charged under the Kansas Constitution by permitting courts to admit evidence of a criminal defendant's prior convictions solely for the purpose of demonstrating the defendant has a propensity to commit the crime charged.**

Issue 3: **The district court violated Mr. Razzaq's Sixth and Fourteenth Amendment rights by imposing an enhanced sentence, based on prior convictions, without requiring the facts of those convictions to be included in the complained and proven beyond a reasonable doubt.**

Statement of the Facts

On the night of May 27, 2011, fourteen-year-old Bethany Davidson snuck out of her home. (R. 26, 33). After her parents learned she was not in her bed, they began searching for her. (R. 26, 33-36). Her parents ultimately discovered Bethany had gone to the home of Murad Razzaq and went to pick her up. (R. 26, 37). The parents called the police and requested the police meet them at Mr. Razzaq's home because they believed they would encounter difficulties at the home. (R. 26, 38).

When her parents arrived at the home where Mr. Razzaq lived with his mother, they saw Bethany through the open front door sitting in the living room with several people, including Mr. Razzaq. (R. 26, 40, 153-54). Bethany's mother removed Bethany from the home and her father confronted Mr. Razzaq, demanding to know whether Mr. Razzaq had sex with Bethany. (R. 26, 154-56). According to Bethany's father, Mr. Razzaq admitted having sex with Bethany and the police arrested him. (R. 26, 156-58).

During an interview with Detective Virgil Miller, Bethany admitted she had sex with Mr. Razzaq and agreed to have a sex assault exam. (R. 26, 130, 137-39). Officers also transported Mr. Razzaq to the hospital, where the nurse examiner coollected several swabs from Mr. Razzaq pursuant to a search warrant. (R. 26, 79-80). As a result of the brief investigation, the State charged Mr. Razzaq with one count of aggravated indecent liberties with a child pursuant to K.S.A. 21-3504(a)(1). (R. 1, 86)

Pre-trial Motion: K.S.A 60-455(d) Evidence

Prior to trial, the State moved to admit evidence of Mr. Razzaq's prior convictions under K.S.A. 60-455(d). (R. 1, 238-45). The State requested to admit Mr. Razzaq's 2005 Missouri convictions for "one felony sex crime and one misdemeanor crime." (R. 1, 238). The victims "were two 7-year-old girls who reported being fondled" by Mr. Razzaq. (R. 2, 122-23). The State specifically requested admission of the evidence of his prior convictions "to show [Mr. Razzaq's] propensity to have sex with underage girls." (R. 1, 242; R. 2, 125). Counsel for Mr. Razzaq argued (1) K.S.A. 60-455(d) was unconstitutional, and (2) under the general evidentiary standard, the prejudicial effect of the evidence outweighs any probative value. (R. 1, 273).

In deciding the motion, the court relied heavily on language from *State v. Prine*, 287 Kan. 713, 200 P.3d 1 (2009) (*Prine I*) and *State v. Prine*, 296 Kan. 460, 303 P.3d 662 (2013) (*Prine II*). (R. 23, 24-27). The court concluded "the elements of the Missouri crime as compared to the elements of the Kansas crime with which [Mr. Razzaq was] charged are very similar," as the Missouri statute "does involve sexual intercourse with another person who is less than 14 years old." (R. 23, 30). The court concluded: (1) 60-455 allows evidence of prior crimes to establish propensity, and (2) "there is relevance and probative value in allowing that evidence to be admitted." (R. 23, 30).

At trial, Detective Virgil Miller testified Mr. Razzaq had been convicted in Missouri in 2005 of "statutory sodomy, a felony, and child molestation, a misdemeanor," and "the victims were two girls under the age of 12." (R. 27, 9). Directly following this testimony, the court instructed the jury:

> This evidence may be considered for its bearing on the defendant's disposition or propensity to commit a crime such as those charged here.
>
> It is entirely up to the jury to determine what weight, if any, this evidence of prior criminal convictions deserves.
>
> The crime of statutory sodomy, first degree is defined by statutes in the state of Missouri as follows: And I quote the statute. A person commits the crime of statutory sodomy in the first degree if he has devious sexual intercourse with another person who is less than 14 years old, end quote.
>
> The crime of child molestation, second degree, is defined by statutes in the state of Missouri as follows: And I quote. A person commitments [sic] the crime of child molestation in the second degree if he or she subjects another person, who is less than 17 years of age, to sexual contact, end quote.
>
> In reaching your conclusion, you may consider all of the surrounding facts and circumstances and give that evidence such weight as you think it is entitled to receive in light of your experience and knowledge of human affairs. However, you are strongly cautioned that

> Mr. Razzaq is not on trial here for any acts or crimes which are not alleged in the complaint/information filed in this case.

(R. 27, 9-11). During closing argument, the State told the jury the convictions "only go to propensity or disposition, that's the only thing you can consider them for," and that "[t]he law allows [the jury] to have that kind of information in this case." (R. 27, 148).

Trial

At trial, Bethany testified she had sneaked out and went to spend time with Mr. Razzaq. (R. 27, 120-22). She explained her parents eventually arrived at Mr. Razzaq's house to get her, and her parents confronted Mr. Razzaq. (R. 27, 125-28). Bethany agreed to a SANE exam and also spoke with Detective Miller. (R. 27, 129-31). At the time of the interview with Detective Miller, Bethany admitted she was "still pretty high" from marijuana and "some pills" she had taken. (R. 27, 133). Bethany told the nurse examiner and Detective Miller – and testified at trial – that she had sex with Mr. Razzaq. (R. 26, 73, 126-27; R. 27, 13-15).

Bethany's father, Timothy Davidson, testified when he found Bethany at Mr. Razzaq's home he smelled marijuana and was angry when he pushed through the door into the home. (R. 26, 154). After he told Bethany to leave, Mr. Davidson confronted Mr. Razzaq, getting close to him and with a raised voiced asked if Mr. Razzaq "fucked" his daughter. (R. 26, 155-56). Mr. Davidson explained he believed the situation could get physical. (R. 26, 156). According to Mr. Davidson, Mr. Razzaq admitted to having sex with Bethany. (R. 26, 156).

Mr. Razzaq testified he did not have sex with Bethany. (R. 27, 105). He testified Mr. Davidson confronted him and demanded to know whether Mr. Razzaq had sex with Bethany. (R. 27, 110). Mr. Razzaq explained Mr. Davidson "demanded for a certain

answer, not whether it actually happened," and, despite Mr. Razzaq's repeated denials, pressed Mr. Razzaq until he received the answer he desired. (R. 27, 110-11). Mr. Razzaq testified he considered the fact that Mr. Davidson could get physically violent, but that Mr. Davidson had instead "verbally beat the answer" out of him. (R. 27, 111).

A forensic scientist testified about the results of DNA testing from swabs taken from Bethany's vagina and Mr. Razzaq's penis shaft and scrotal area as compared to saliva swabs from both individuals. (R. 27, 72). The forensic scientist testified the DNA profile from the vaginal swab was consistent with Bethany's DNA profile, but excluded Mr. Razzaq as the source. (R. 27, 74). She then testified that neither Bethany nor Mr. Razzaq could be excluded as contributors to the DNA profile from the penis shaft and scrotal swabs. (R. 27, 77-78).

The jury convicted Mr. Razzaq of one count of aggravated indecent liberties with a child. (R. 2, 185; R. 27, 161). Following his conviction, Mr. Razzaq requested a new trial or judgment of acquittal. (R. 2, 191, 206). In support of his request, he argued (1) the evidence was insufficient to prove guilt beyond a reasonable doubt, and (2) he was denied a fair trial under the U.S. and Kansas Constitutions. (R. 2, 191, 206). The court denied the requests. (R. 14, 90-91).

Sentencing

Prior to sentencing, defense counsel requested a downward durational departure sentence based on Mr. Razzaq's significant time in custody prior to trial, the availability of community resources to assist Mr. Razzaq, Mr. Razzaq's behavior while on bond during the pendency of the case, Mr. Razzaq's limited criminal history, and his strong family and community ties. (R. 2, 231-33). Counsel argued the purposes of incarceration

would be served by a lesser sentence and that neither the community nor Mr. Razzaq would benefit from the lengthy incarceration period. (R. 2, 232-33).

The district court denied the departure motion and sentenced Mr. Razzaq to 176 months in prison, doubling the presumptive sentence pursuant to K.S.A. 21-6804(j)(1). (R. 2, 247; R. 14, 102-05). Mr. Razzaq appealed. (R. 2, 251)

Argument and Authorities

Issue 1: The district court erred in admitting evidence of Mr. Razzaq's prior conviction to show propensity because the prejudicial effect of the evidence outweighed its limited probative value.

Introduction

The district court allowed the State to present evidence of Mr. Razzaq's 2005 Missouri convictions for statutory sodomy and child molestation, finding the evidence relevant and probative. Because the prejudicial effect of the evidence vastly outweighed its limited probative value, this Court must reverse the district court's finding.

Standard of Review and Preservation of the Issue

This Court reviews a district court's materiality determination de novo and the determination of probative value, as well as the weighing of probative value against the potential for undue prejudice, for abuse of discretion. *State v. Bowen*, 299 Kan. 339, 348, 323 P.3d 853, 861 (2014).

Prior to trial, the district court ruled on the admissibility of Mr. Razzaq's 2005 Missouri convictions, finding the convictions to be both relevant and probative to show propensity under K.S.A. 60-455(d). (R. 23, 30). At trial, counsel for Mr. Razzaq continued to object to the admission of the prior crimes evidence. (R. 26, 5; R. 27, 9).

Analysis

Trial Court Proceedings

The State charged Mr. Razzaq with aggravated indecent liberties with a child for acts occurring on May 27, 2011. (R. 1, 86). Prior to trial, the State filed a motion to admit evidence of Mr. Razzaq's 2005 Missouri sex crime convictions "to show his propensity to have sex with underage girls." (R. 1, 238, 242). Defense counsel argued (1) the State failed to prove the evidence was relevant to prove propensity and (2) the prejudicial effect of the evidence outweighed its probative value. (R. 1, 273-280).

At the hearing on the motion, the court considered the statutory language surrounding the Missouri convictions, and compared those crimes to the current crime charged against Mr. Razzaq. (R. 29, 21-22). The State argued Mr. Razzaq was an "opportunistic sex offender" and "his experiences in Missouri gave him the knowledge that the law does provide sexual boundaries in our society between adult men and female children." (R. 29, 22-23). The State argued the prior convictions demonstrated Mr. Razzaq's propensity to have sexual contact with under-aged girls. (R. 29, 28).

Defense counsel responded there was a significant difference between the Missouri convictions and the crime Mr. Razzaq was accused of in this case. Specifically, as acknowledged by the State, the Missouri crimes involved two seven-year-old girls who were "fondled" by Mr. Razzaq. (R. 1, 122-23; R. 29, 25). The current charge involved a fourteen-year-old girl who engaged in sexual intercourse with Mr. Razzaq. (R. 29, 25).

Additionally, defense counsel argued there was no adequate way to present the evidence to the jury that would not significantly prejudice Mr. Razzaq. The jury would simply be given the language of the Missouri statute, without any additional factual

context, and left to imagine what the underlying crime involved. (R. 23, 21-23). According to defense counsel, no limiting jury instruction could adequately safeguard Mr. Razzaq's right to a fair trial. (R. 23, 22-23).

The court ultimately allowed the State to present the evidence of the 2005 Missouri convictions, based in large part on its reading of *State v. Prine*, 287 Kan. 713, 200 P.3d 1 (2009) (*Prine I*) and *State v. Prine*, 297 Kan. 460, 303 P.3d 662 (2013) (*Prine II*). The court compared the elements of the statutes for the Missouri crimes with the elements of the statute under which Mr. Razzaq was charged in this case before it concluded "there is relevance and probative value in allowing that evidence to be admitted." (R. 23, 29-30).

Over defense counsel's objection, the court read a limiting instruction to the jury directly following the evidence of Mr. Razzaq's 2005 Missouri convictions. (R. 27, 9-11). This instruction stated, in part:

> I have allowed the State to offer evidence tending to prove that the defendant was convicted of crimes other than the present crime charged; that is, the crime of statutory sodomy, first degree, and child molestation, second degree, for which Mr. Razzaq was convicted in the state of Missouri.
>
> This evidence may be considered *for its bearing on the defendant's disposition or propensity to commit a crime such as that charged here.*
>
> It is entirely up to the jury to determine what weight, if any, this evidence of prior criminal convictions deserves.
>
> The crime of statutory sodomy, first degree is defined by statutes in the state of Missouri as follows: And I quote the statute. A person commits the crime of statutory sodomy in the first degree if he has devious sexual intercourse with another person who is less than 14 years old, end quote.
>
> The crime of child molestation, second degree, is defined by statutes in the state of Missouri as follows: And I quote. A person

> commitments [sic] the crime of child molestation in the second degree if he or she subjects another person, who is less than 17 years of age, to sexual contact, end quote.

(R. 27, 9-10). The court included a similar instruction in the written jury instructions, again instructing the jury it could use the prior crimes evidence "for its bearing on the defendant's disposition or propensity to commit crimes such as those charged here." (R. 2, 181).

The district court erred in admitting the evidence to show propensity

Pursuant to K.S.A. 60-455(d), "in a criminal action in which the defendant is accused of a sex offense . . ., evidence of the defendant's commission of another act or offense of sexual misconduct is admissible . . . for its bearing on any matter to which it is relevant and probative." In admitting evidence under this subsection, the court must first determine whether the evidence is relevant – i.e., material and probative. *Prine II*, 297 Kan. at 477. Materiality requires that whatever fact sought to be proved has a legitimate and effective bearing on the decision of the case and is in dispute; probative value requires the evidence has a logical tendency to prove the material fact. *Prine II*, 297 Kan. at 477. After determining relevance, the court must then determine whether the probative value of the evidence outweighs its potential for undue prejudice. *State v. Remmert*, 298 Kan. 621, 628, 316 P.3d 154 (2014).

In sex offense cases, while propensity evidence is material because it has a "legitimate and effective bearing" on a defendant's guilt, the prior crimes evidence may be unduly prejudicial. Factors the court must evaluate in determining whether to admit evidence of a prior act of sexual misconduct are: "(1) the similarity of the prior acts charged, (2) the closeness in time of the prior acts to the acts charged, (3) the frequency

of the prior acts, (4) the presence or lack of intervening circumstances, and (5) the necessity of the evidence beyond the testimonies already offered at trial." *United States v. LeMay*, 260 F.3d 1018, 1027-28 (9th Cir. 2001) (internal quotations omitted); *State v. Young*, No. 102,121, 2013 WL 6839328, at *17 (Kan. Ct. App. Dec. 27, 2013) (considering factors set out in *LeMay*).

In this case, the probative value of the 2005 Missouri convictions was greatly outweighed by its prejudicial effect. The prior convictions involved two seven-year-old females, whom Mr. Razzaq was accused of "fondling." (R. 2, 122-23). Mr. Razzaq apparently entered a guilty plea, based on these allegations, to one count of first degree sodomy and one count of second degree child molestation. Factually, the only common element between the convictions and the current charge was that the victims were females under the age of sixteen.

The court's analysis failed to adequately consider the prejudicial effect of the prior crimes when weighing it against the probative value of the prior convictions. Instead, the court seemed content to merely compare the statutory elements of the charged crime with those of the Missouri convictions, despite defense counsel's contention that such a comparison failed to adequately describe the actual conduct in the case. (R. 23, 21-22, 28-30). In doing so, the court failed to consider the similarity between the actual crimes committed and the current crime charged, let alone any additional factors related to the prejudicial effect of the evidence.

The instruction read to the jury after the evidence was introduced compounded the prejudicial effect of the evidence. As warned by defense counsel, the presentation of Mr. Razzaq's prior convictions with only the statutory definitions of the Missouri crimes, and

without further factual context, left the jury to use its imagination as to what the prior crimes actually involved. (R. 23, 22). In fact, the statutory definitions provided may include the same acts alleged in this case, providing the jury with reason to believe Mr. Razzaq's prior convictions involved identical conduct. Yet the elements of child molestation in Missouri, as provided by the court, may also have included conduct that is lawful in Kansas. *See* Mo. Rev. Stat. § 566.068.1 (prohibiting sexual contact with another person who is *less than seventeen years of age*).

As such, the district court erred when it utterly failed to consider the specific facts underlying Mr. Razzaq's Missouri convictions in relation to the facts in the current case to determine whether their effect was more prejudicial than probative. The court compounded this error when it again disregarded the factual basis for the convictions and instead allowed the jury to create its own factual bases when considering the evidence of the prior convictions.

The fact that the legislature amended K.S.A. 60-455 to allow propensity evidence in cases involving sex crimes does not mean, contrary to recent case law, that admission of the evidence should be automatic. The court, presumably, still serves a "gatekeeper" function that should preclude evidence that is highly prejudicial and outweighs its probative value. *See LeMay*, 260 F.3d at 1026 (balancing test still applies to admission of propensity evidence in sex offense cases). In this case, the district court failed to serve that role, utterly failing to give consideration to any prejudicial effect of the prior convictions. Instead, the mere existence of the convictions made them relevant and probative, sufficient for the court to allow their admission.

Conclusion

Because the prejudicial effect of the 2005 Missouri convictions outweighed its probative value, the district court erred when it admitted the convictions into evidence for the purpose of proving Mr. Razzaq's propensity to commit the crime with which he was charged. As such, he requests this Court reverse his conviction.

Issue 2: K.S.A. 60-455(d) unconstitutionally denies defendants the right to due process, the presumption of innocence, and to know the nature of crimes charged under the Kansas Constitution by permitting courts to admit evidence of a criminal defendant's prior convictions solely for the purpose of demonstrating the defendant has a propensity to commit the crime charged.

Introduction

K.S.A. 60-455(d) erodes a defendant's fundamental right to due process by eroding the presumption of innocence to allow a jury to punish a defendant for past acts. This Court should find this statute unconstitutional because it denies defendants the right to a fair trial under the Kansas Constitution.

Standard of Review and Preservation of the Issue

The constitutionality of a statute is a question of law over which this Court exercises unlimited review. *State v. Johnson*, 284 Kan. 18, 22, 159 P.3d 161 (2007).

Counsel for Mr. Razzaq did not specifically challenge the constitutionality of K.S.A. 60-455(d) before the trial court. Issues not raised before the district court generally may not be raised for the first time on appeal, even where the issue raises a constitutional question. *State v. Phillips*, 299 Kan. 479, 493, 325 P.3d 1095 (2014). Several exceptions to this rule exist:

1. The newly asserted theory involves only a question of law arising on proved or admitted facts and is determinative of the case;

2. Consideration of the theory is necessary to serve the ends of justice or to prevent the denial of fundamental rights; and

3. The district court is right for the wrong reason.

Phillips, 299 Kan. at 493. This issue involves an argument challenging the constitutionality of a state statute, and consideration is necessary to both serve the ends of justice and prevent the denial of fundamental rights.

Analysis

This Court presumes the constitutionality of a statute and resolves all doubts in favor of its validity. *State v. Williams*, 46 Kan. App. 2d 36, 41, 257 P.3d 849 (2011). "If there is any reasonable way to construe a statute as constitutionally valid, the [C]ourt has the authority and duty to do so." *Williams*, 46 Kan. App. 2d at 41 (citing *State v. Laturner*, 289 Kan. 727, 735, 218 P.3d 23 [2009]).

Prior Bad Acts Evidence

In 1963 the Kansas Legislature enacted K.S.A. 60-455 to prohibit admission of prior bad acts to show propensity, although the evidence may be admitted "when relevant to prove some other material fact." K.S.A. 60-455(a), (b).[1] Consistent with the federal courts, Kansas courts have traditionally held the use of prior bad acts to show propensity is improper. The Kansas Supreme Court explained admission of propensity evidence

> is likely to prejudice the jury and blind it to the real issue of whether the defendant is guilty of the crime charged. For example, the jury may feel unsure that the government has proven its case, but decide that the defendant is an evil person who belongs in prison anyway. The jury may wish to punish the defendant for the prior act, even if they are unconvinced that he committed the act charged. Moreover, the jury may

[1] The Kansas statute banning the use of prior bad acts to prove propensity predates the similar federal prohibition, as the Federal Rules of Evidence were enacted in 1975.

> be unconvinced that the defendant committed either act, but that he more than likely committed at least one of them and should be punished.

State v. Jones, 277 Kan. 413, 424, 85 P.3d 1226 (2004) (quoting *United States v. Peden*, 961, F.2d 517, 520 [5th Cir. 1992]).

The Kansas prohibition on the use of propensity evidence reflects the historical consideration of the issue. The U.S. Supreme Court explained in 1948:

> Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of guilt. Not that the law invests the defendant with a presumption of good character, but it simply closes the whole matter of character, disposition and reputation on the prosecution's case-in-chief. The State may not show [a] defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice.

Michelson v. United States, 335 U.S. 469, 475-76 (1948). The prohibition "disallow[s] resort by the prosecution to any kind of evidence of a defendant's evil character to establish probability of his guilt." *Old Chief v. United States*, 519 U.S. 172, 181 (1997).

The U.S. Court of Appeals for the Tenth Circuit echoed this sentiment, noting

> The due process arguments against the constitutionality of Rule 413 are that it prevents a fair trial, because of "settled usage" – that the ban against propensity evidence has been honored by the courts for such a long time that it "must be taken to be due process of law"; because it creates a presumption of guilt that undermines the requirement that the prosecution must prove guilt beyond a reasonable doubt; and because if tendered to demonstrate the defendant's criminal disposition it licenses the jury to punish the defendant for past acts, eroding the presumption of innocence in criminal trials.

United States v. Enjady, 134 F.3d 1427, 1432 (10th Cir. 1998) (internal cites omitted).

Propensity Evidence in Sex Crimes

"Lustful Disposition" Exception

Despite the historic ban on propensity evidence, Kansas appellate courts have recognized exceptions to the ban in sex offense cases. However, case law relating to this exception is slim. *See State v. Clements*, 241 Kan. 77, 734 P.2d 1096 (1987). In *Clements*, the State introduced evidence of the defendant's prior Alaska sex crime convictions, and argued it did so to show plan or scheme. *Clements*, 241 Kan. at 84. However, the State presented the evidence of the prior convictions without presenting any evidence of plan or scheme related to those convictions. *Clements*, 241 Kan. at 87-88. The Supreme Court concluded the use of the prior convictions violated the protections of K.S.A. 60-455 limiting propensity evidence, and this violation resulted in a denial of substantial justice requiring reversal. *Clements*, 241 Kan. at 88.

In a lone dissent, Justice Herd outlined the historical use of prior sex crimes where a defendant is charged with a sex offense to prove the "lustful disposition" of the defendant. *Clements*, 241 Kan. at 88-95 (Herd, J., dissenting). Justice Herd explained this exception existed prior to the implementation of K.S.A. 60-455, but continued to be used following the creation of the statute, albeit with narrowed effect. *Clements*, 241 Kan. at 93-94. However, in each of the cases cited, the purpose of the evidence was to prove something *other* than propensity, even if the purpose was not specifically delineated in K.S.A. 60-455. *Clements*, 241 Kan. at 93-95.

The Court has recognized that the list of material facts in K.S.A. 60-455 is "exemplary rather than exclusive," allowing for evidence to be admitted for purposes

beyond those specifically delineated. *State v. Gunby*, 282 Kan. 39, 56, 144 P.3d 647 (2006). The Court discussed the allowance of evidence to show the historical relationship between a defendant and victim, a continuing course of conduct on the defendant's part, and to corroborate the testimony of a witness. *Gunby*, 282 Kan. at 55-56. However, the Court recognized the approach to evidence not specifically listed in the statute had become "increasingly elastic" and was "overdue for correction," and delineated specific requirements for introduction of evidence under K.S.A 60-455. *Gunby*, 282 Kan. at 56. Doing so "put[] and end to the practice of admission of other crimes and civil wrongs evidence independent of" K.S.A. 60-455, and "recognize[d] that the list in the statute has always been inclusive rather than exclusive, and that the several ways around application of and safeguards attendant to K.S.A. 60455 must be abandoned, not only because they lack reliable precedent but *because they were never necessary in the first place*." *Gunby*, 282 Kan. at 57.

The Court explained prior bad acts evidence that "passes the relevance and prejudice tests . . . and is accompanied by an appropriate limiting instruction should always have been admissible" and "never actually required a specifically designed rule to admit it independent of the statute." *Gunby*, 282 Kan. at 57. Shortly after its decision in *Gunby*, the Court used the standard from *Gunby* to address admission of evidence to show plan or modus operandi, which required a finding that the prior act and current charge be "so strikingly similar in pattern or so distinct in method of operation as to be a signature." *Prine I*, 287 Kan. at 735 (internal quotations omitted). The Court noted this standard gave "appropriate deference to the current legislative choice of language in the

statute, language plainly selected to disallow evidence of prior bad acts admitted only to show propensity to commit a charged crime or crimes." *Prine I*, 287 Kan. at 735.

Applying its standard, the Court in *Prine I* concluded the district court erred when it admitted evidence of prior allegations of sex abuse in a prosecution of a sex crime because the prior crimes lacked similarity to the current crime charged. *Prine I*, 287 Kan. at 735-36. However, in dicta following the ultimate reversal of Prine's convictions, the Court was "compelled to make one final set of brief comments on the K.S.A. 60-455 issues raised." *Prine I*, 287 Kan. at 737. The Court expressed its opinion regarding the possible value evidence of prior sex crimes against children may have as propensity evidence in prosecutions for sex crimes against children. *Prine I*, 287 Kan. at 737.

Additionally, the Court addressed the allowance of evidence of prior sex crimes for propensity purposes in cases seeking civil commitment of sexually violent predators. The Court pondered that "[i]t is at least ironic that propensity evidence can be part of the support for an indefinite civil commitment, but cannot be part of the support for an initial criminal conviction in a sex crime prosecution." *Prine I*, 287 Kan. at 737. Following these musings, the Court acknowledged the state of the law was within the legislature's purview and noted "[i]t may be time for the legislature to examine the advisability of amendment to K.S.A. 60-455 or some other appropriate adjustment to the statutory scheme." *Prine I*, 287 Kan. at 737.

The legislature wasted little time in amending K.S.A. 60-455 to state "in a criminal action in which the defendant is accused of a sex offense . . . evidence of the defendant's commission of another act or offense of sexual misconduct is admissible, and may be considered for its bearing on any matter to which it is relevant and probative."

K.S.A. 60-455(d). The Kansas Supreme Court readily interpreted this statute and found "the legislature's intention to relax the prohibition on evidence of other acts or offenses of sexual misconduct to show propensity . . . is explicit in the statute's new subsection (d)." *Prine II*, 297 Kan. at 476.

Constitutional Application

Although the appellate courts have considered the application and used of subsection (d), the courts have not considered whether this amendment deprives defendants of their Kansas constitutional rights to the presumption of innocence, to a fair trial, and to due process of law – i.e., those rights which the ban on propensity evidence was intended to protect. Similar language in other states has been found unconstitutional under state constitutions, and Mr. Razzaq requests this Court consider those opinions persuasive in determining the constitutionality of K.S.A. 60-455(d).

Federal Interpretation

Mr. Razzaq first acknowledges that Congress similarly amended the Federal Rules of Evidence in 1994 to allow evidence of prior crimes "on any matter to which it is relevant" in certain instances. Fed. R. Evid. 413 (similar crimes in sexual-assault cases), 414 (similar crimes in child-molestation cases). Since their introduction, the U.S. Supreme Court has not addressed the constitutionality of these rules, and has, in fact, expressly reserved making any decision "on whether a state law would violate the Due Process Clause if it permitted the use of 'prior crimes' evidence to show propensity to commit a charged crime." *Estelle v. McGuire*, 502 U.S. 62, 75 n. 5 (1991).

Notably, "the members of two committees, consisting of 40 persons in all, and appointed by the Judicial Conference of the United States to examine Fed. R. Evid. 413

before its passage, all but unanimously urged that congress would not adopt the rule because of deep concerns about its fundamental fairness." *United States v. Mound*, 157 F.3d 1153 (8th Cir. 1998) (Arnold, J., dissenting from denial of rehearing en banc). The members worried the new rules would displace the "essential protections that have formed a fundamental part of American jurisprudence and have evolved under longstanding rules and case law." *Mound*, 157 F.3d 1153.

Despite the express concerns of the committee members, several federal courts have concluded the rules do not violate a defendant's rights to equal protection or due process under the U.S. Constitution. *See, e.g., LeMay*, 260 F.3d at 1025-31 (Rule 414); *United States v. Castillo*, 140 F.3d 874, 879-83 (10th Cir. 1998) (Rule 414); *United States v. Mound*, 149 F.3d 799, 800-01 (8th Cir. 1998) (Rule 413). In *LeMay*, the U.S. Court of Appeals for the Ninth Circuit concluded Rule 414 was constitutional. The Court explained "[a]s long as the protections of Rule 403 [balancing probative value of evidence against prejudicial effect] remain in place to ensure that potentially devastating evidence of little probative value will not reach the jury, the right to a fair trial remains adequately safeguarded." *LeMay*, 260 F.3d at 1026.

State Interpretations

Since the adoption of Rules 413 and 414, numerous states have enacted similar provisions allowing propensity evidence in cases involving certain sex offenses. Hathorn, Bryan C., Federal Rules of Evidence 413, 414, and 415: Fifteen Years of Hindsight and Where the Law Should Go From Here, 7:1 Tenn. J. L. & Pol'y 22, 69 (2014), *available at* http://trace.tennessee.edu/tjlp/vol7/iss1/4. When courts in those states have addressed the statutes, some have followed the federal courts to find the

statutes do not violate due process. *See, e.g., Belcher v. Texas*, 474 S.W.3d 840, 843-47 (Tex. Ct. App. 2015); *Illinois v. Donoho*, 788 N.E.2d 707, 714-21 (Ill. 2003); *California v. Falsetta*, 986 P.2d 182, 186-93 (Cal. 1999).

Other states have reached the opposite conclusion under their state constitutions. The Iowa Supreme Court considered a statute that read

> In a criminal prosecution in which a defendant has been charged with sexual abuse, evidence of the defendant's commission of another sexual abuse is admissible and may be considered for its bearing on any matter for which the evidence is relevant. This evidence, though relevant, may be excluded if the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. This evidence is not admissible unless the state presents clear proof of the commission of the prior act of sexual abuse.

State v. Cox, 781 N.W.2d 757, 761 (Iowa 2010) (citing Ia. Code § 701.11). The Court noted the statute allowed introduction of prior sexual abuse without limiting the evidence to specific categories such as "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *Cox*, 781 N.W. 2d at 761.

In examining the constitutionality of the Iowa statute, the Court examined both federal and state case law, noting the U.S. Supreme Court has "expressly reserved" the question of whether a state law admitting propensity evidence violates the due process clause. *Cox*, 781 N.W.2d at 762 (citing *Estelle v. McGuire*, 502 U.S. 72, 75 n. 5 [1991]). The Court also noted that, while federal courts have upheld the constitutionality of a similar rule contained in the Federal Rules of Evidence, these courts had done so because of the safeguards in the rules which "ensure that potentially devastating evidence of little probative value will not reach the jury." *Cox*, 781 N.W.2d at 763 (citing *U.S. v. LeMay* 260, F.3d 1018, 1026 [9th Cir. 2001]).

However, the Court noted historical practice in Iowa generally excluded propensity evidence, while recognizing "the historical practice with respect to the admissibility of prior sexual acts is ambiguous at best." *Cox*, 781 N.W.2d at 764 (quoting *State v. Reyes*, 744 N.W.2d 95, 101 [2008]). It explained several jurisdictions have created ways to allow evidence of prior sex acts to be admitted, but Iowa has required the evidence to meet other admissibility requirements beyond propensity – i.e., when identity, intent, or consent of victim are disputed. *Cox*, 781 N.W.2d at 765.

The Court disapproved of the federal courts' rulings allowing propensity evidence because of the "safeguard" requiring a trial judge to weigh the probative value against the prejudicial effect of the propensity evidence. The Court stated this "safeguard" amounted to stating "that which makes the evidence more probative – the similarity of the prior act to the charged act – also makes it more prejudicial." *Cox*, 781 N.W.2d at 769. The Court further emphasized "where a prior act is similar to the incident in question, it would be extremely difficult for jurors to put out of their minds knowledge" of the prior act and "not allow this information to consciously or subconsciously influence their decision." Following this analysis, the Court held:

> Based on Iowa's history and the legal reasoning for prohibiting admission of propensity evidence out of fundamental fairness, we hold the Iowa Constitution prohibits admission of prior bad acts evidence based solely on general propensity. Such evidence may, however, be admitted as proof for any legitimate issues for which prior bad acts are relevant and necessary.

Cox, 781 N.W.2d at 768.

Similarly, the Missouri Supreme Court, sitting en banc, examined a statutory provision allowing propensity evidence in cases for sex crimes against children under fourteen "unless the trial court finds that the probative value of such evidence is

outweighed by the prejudicial effect." *Missouri v. Ellison*, 239 S.W.3d 603, 606 (2007). The Court considered whether this provision violated the state constitutional requirement that a defendant be tried only for those offenses for which he or she is charged or indicted. *Ellison*, 239 S.W.3d at 605-06. The Court's prior case law prohibited evidence of prior crimes out of concern the evidence would violate a defendant's right to prosecution only for crimes charged and to demand the nature and cause of the accusation against him of her. *Ellison*, 239 S.W.3d at 606 (citing Missouri Constitution, §§ 17, 18[a]). This prohibition was based on the need to "avoid encouraging the jury to convict the defendant because of his propensity to commit such crimes without regard to whether he is actually guilty of the crime charged." *Ellison*, 239 S.W.3d at 606.

The Missouri Court acknowledged evidence of prior crimes may be admissible to show motive, intent, absence of mistake or accident, plan, or identity, but it was still subject to a relevance determination and a finding that its probative value outweighed its prejudicial effect. *Ellison*, 239 S.W.3d at 607. These purposes were "exceptions" to a general evidentiary prohibition of prior crimes for *any* purpose, but were not "exceptions to the ban on propensity evidence." *Ellison*, 239 S.W.3d at 607. The Court held the statute violated its state constitution based on its recognized prohibition on evidence of prior crimes for the sole purpose of showing propensity. *Ellison*, 239 S.W.3d at 607-08.

Kansas Constitution

The Kansas Constitution provides a guaranteed right to due process of law. Kan. Const., Bill of Rights, §§ 1, 2, 18. The Constitution also provides defendants "shall be allowed . . . to demand the nature and cause of the accusation against him." Kan. Const. Bill of Rights, § 10. These two rights are similar to those examined by the Courts in *Cox*

and *Ellison*. *Cox*, 781 N.W.2d at 761 (Iowa constitution guarantees "no person shall be deprived of life, liberty, or property without due process of law); *Ellison*, 239 S.W.3d at 606 (Missouri constitution guarantees "in criminal prosecutions the accused shall have the right . . . to demand the nature and cause of the accusation.").

The Kansas Supreme Court has routinely found the first two sections of the Kansas Constitution Bill of Rights have "much the same effect" as the Due Process Clause of the U.S. Constitution. *See Hodes & Nauser, MDs, P.A. v. Schmidt*, 2016 WL 275297, at *1, ___ P.3d ___ (Kan. Ct. App. 2016) (en banc) (collecting cases). The Court has also recognized the U.S. Constitution "does not limit a state's power to invest its citizen's with more, or greater, rights than the federal constitution's minimum guarantees" *State v. Carapezza*, 293 Kan. 1071, 1077, 272 P.3d 10 (2012). "A state may do this by its state constitution, court decision, or statutory enactment." *State v. Julian*, 300 Kan. 690, 693, 333 P.3d 172 (2014). As such, this court may determine that this issue should be interpreted differently under the Kansas Constitution in order to provide its citizens with greater protection than the federal courts have set as the minimum.

K.S.A. 60-455(d) violates a defendant's right under the Kansas Constitution to due process of law and to know the nature of the crime he is accused of. It undermines the fundamental concepts of fairness and presumption of innocence to allow defendants to be tried based on former bad acts and not only the acts underlying the current charge.

Under common law and as case law developed in this state, there was a well-recognized prohibition of the use of prior crime evidence to prove a person's propensity to commit the crime with which he was currently charged. *See Old Chief*, 519 U.S. at 191 (citing *Michelson v. United States*, 355 U.S. 469 [1948]). The federal government

and states developed rules to allow propensity evidence, but only if it is "relevant to prove some other material fact." Fed. R. Evid. 403; K.S.A. 60-455(b).

However, the legislature has undermined this protection of a defendant's rights and allowed evidence of prior sex offenses to be admitted for the sole purpose of proving propensity. K.S.A. 60-455(d). Although its admission is still subject to weighing the prejudicial effect of the evidence against its probative value, the court in *Cox* correctly recognized this analysis is flawed because the same thing that makes the evidence probative also makes it prejudicial. 781 N.W.2d at 769. The reason the evidence has bearing on determining the outcome of the case is the very same reason courts have historically guarded against allowing propensity evidence. Indeed, this evidence will very rarely be omitted from evidence even with the balancing test in place. *See, e.g.*, *State v. Spear*, 297 Kan. 780, 786-87, 304 P.3d 1246 (2013) (evidence of uncharged prior sexual misconduct with victim not admissible to prove intent or absence of mistake or accident but admissible as propensity evidence); *Remmert*, 298 Kan. at 626-28 (evidence of 1987 charge and subsequent diversion agreement for aggravated incest with stepdaughter admissible in 2009 prosecution for criminal sodomy to show general "propensity to sexually abuse a child").

While the Supreme Court suggested the legislature consider amending K.S.A. 60-455, this recommendation was based on its perceived irony that prior crimes could be used in civil commitment cases but not in criminal cases for an initial conviction. *Prine I*, 287 Kan. at 737. However, this characterization of civil commitment proceedings pursuant to the Kansas Sexually Violent Predator Act (KSVPA) simplifies understanding of the proceedings and fails to understand the inherent differences between civil

commitment and criminal incarceration. *See Kansas v. Hendricks*, 521 U.S. 346, 357 (1997) (recognizing states have ability to civilly detain people who are "unable to control their behavior and who thereby pose a danger to the public health and safety").

For SVPA commitments, the State must prove specific elements about an individual: (1) the individual suffers from a mental abnormality or personality disorder; (2) the individual is likely to commit repeat acts of sexual violence because of the abnormality or disorder; and (3) the individual has serious difficulty controlling his or her behavior. *In re Williams*, 292 Kan. 96, 106, 253 P.3d 327 (2011). The Court recognized the difference between SVPA commitment proceedings and criminal cases, and explained it was "hard pressed to see how [prior bad acts] evidence can be prohibited by K.S.A. 60-455 [in sexually violent predator cases] when it is an essential element of the required proof necessary for the decision-making process of the jury." *In re Miller*, 289 Kan. 218, 225, 210 P.3d 625 (2009). Indeed, "evidence of prior conduct [is] material to the question of likelihood that the respondent would engage in repeat conduct as well as to the element of conviction of prior conduct." *In re Miller*, 289 Kan. at 225. The Court has concluded evidence of *nonsexual prior crimes* in SVPA proceedings is admissible because it may be "probative and material of certain diagnoses and behavior patterns," a practice that certainly would not be allowed even in criminal sex crimes cases. *In re Care and Treatment of Colt*, 289 Kan. 234, 239, 211 P.3d 797 (2009).

In a criminal case, the State is required to prove a defendant committed a specific crime on a specific date. Any evidence of prior bad acts is generally not "essential element" of the crime or part of the findings the jury is required to make. Allowing evidence of prior crimes, based solely to prove propensity, diminishes the State's burden

and undermines the presumption of innocence, which is a core principle at the heart of criminal law. *Cox*, 781 N.W.2d at 767 ("A concomitant of the presumption of innocence is that a defendant must be tried for what he did, not for who he is. This concept is fundamental to American jurisprudence.").

This Court should follow the reasoning of the Iowa and Missouri supreme courts and find that K.S.A. 60-455(d) violates the Kansas constitutional guarantees of due process and to know the nature and cause of a criminal charge. There should not be any exceptions to the ban on evidence admitted to prove propensity only. Rather, propensity evidence, regardless of the type of crime charged, should only be allowed for the well-recognized purposes outlined in K.S.A. 60-455(b).

If this Court agrees that K.S.A. 60-455(d) is unconstitutional, the evidence of Mr. Razzaq's 2005 Missouri convictions was improperly admitted as propensity evidence. While the evidence may be admitted if it is "relevant to prove some other material fact," the State requested the evidence be admitted solely to prove propensity. (R. 1, 242; R. 2, 125). As such, this Court is unable to determine, for lack of information provided in the record, whether the evidence could legitimately be used for another purpose.

Harmless Error

If this Court determines K.S.A. 60-455(d) is unconstitutional, it must then determine whether, in Mr. Razzaq's case, admission of the evidence constituted harmless error. Where a constitutional right is implicated, this Court applies the constitutional harmless error standard. *State v. Santos-Vega*, 299 Kan. 11, 23-24, 321 P.3d 1 (2014). Under this standard "the error may be declared harmless when the party benefitting from the error proves beyond a reasonable doubt the error will not or did not affect the

outcome of the trial in light of the entire record, *i.e.*, when there is no reasonable possibility the error contributed to the verdict." *Santos-Vega*, 299 Kan. at 24. Under this test, the State cannot meet this high burden in this case.

The State charged Mr. Razzaq with one count of aggravated indecent liberties with a child, alleging he had sexual intercourse with a fourteen-year-old. (R. 1, 86). Although there was some physical evidence, it was arguably minimal. The DNA evidence collected from the exam of Bethany Davidson excluded Mr. Razzaq as its source. (R. 27, 74). Additionally, the forensic examiner testified only that Bethany Davidson and Mr. Razzaq "cannot be excluded" as contributors to the DNA evidence collected from Mr. Razzaq. (R. 27, 77-78).

Given the minimal weight that could be attached to the physical evidence, the case amounted to a credibility contest between Mr. Razzaq's testimony and that of Bethany Davidson and her parents. It is likely the evidence of Mr. Razzaq's 2005 Missouri convictions played a part in the minds of the jurors when determining whether to convict Mr. Razzaq in this case. When the evidence was presented to the jury, the court specifically instructed the jury it could consider the evidence "for its bearing on the defendant's disposition or propensity to commit a crime such as those charged here." (R. 27, 10). The court then simply informed the jury of the prior convictions and read the elements of the statutes, each which prohibited a wide variety of conduct. The way the information was presented allowed the jury to conclude the prior acts involved the same conduct involved in this case, and, therefore, that Mr. Razzaq had a propensity to commit the exact crime charged in this case. (R. 27, 9-11). The State cannot prove the admission of this evidence was harmless beyond a reasonable doubt.

Conclusion

Allowing admission of evidence of a defendant's prior sex crimes under K.S.A. 60-455(d) solely as propensity evidence violates a defendant's right to due process and "demand the nature and cause of the accusation" under the Kansas Constitution. The use of the evidence to prove a defendant's propensity to commit a particular set of crimes also undermines the fundamental right to a presumption of innocence.

Because of the obvious effect the evidence could have on the jury's consideration of the prior crimes evidence in this case, in light of the current charge, the State cannot prove the admission of the evidence was harmless beyond a reasonable doubt. As such, Mr. Razzaq requests this Court reverse his conviction and remand his case for a new trial.

Issue 3: The district court violated Mr. Razzaq's Sixth and Fourteenth Amendment rights by imposing an enhanced sentence, based on prior convictions, without requiring the facts of those convictions to be included in the complained and proven beyond a reasonable doubt.

Introduction

Mr. Razzaq's prior convictions were not included in the complaint, and the State was not required to prove those convictions to a jury beyond a reasonable doubt. Under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), any fact that increases the maximum penalty a defendant may receive must be included in the charging document, put before a jury, and proved beyond a reasonable doubt. Because the district court made the criminal history findings without requiring a jury to first make the findings, this Court must vacate Mr. Razzaq's sentence and remand for resentencing.

Standard of Review and Preservation of the Issue

Interpretation of the Kansas Sentencing Guidelines Act (KSGA) is a question of law over which this Court exercises unlimited review. *State v. Perez-Moran*, 276 Kan.

830, 833, 80 P.3d 361 (2003). No objection is necessary where the issue presents a question of law and this Court considers the application of *Apprendi*. *State v. Anthony*, 273 Kan. 726, 727, 45 P.3d 852 (2002).

Analysis

Although Mr. Razzaq's criminal history was used to enhance his sentence, it was not included in the complaint, nor was the State required to prove it beyond a reasonable doubt. The requirements set forth in *Apprendi* were therefore not met in Mr. Razzaq's case, resulting in a violation of his rights under the Sixth and Fourteenth Amendments. Mr. Razzaq acknowledges the Kansas Supreme Court has previously decided this issue. *See State v. Ivory*, 273 Kan. 44, 41 P.3d 781 (2002).

Conclusion

Because the district court increased Mr. Razzaq's sentence without proving the fact of his criminal history to a jury beyond a reasonable doubt, the court violated his Sixth and Fourteenth Amendment rights. Mr. Razzaq respectfully disagrees with the holding in *Ivory* and includes this issue now to preserve it for possible federal review.

Conclusion

For the above reasons, this Court should reverse Mr. Razzaq's conviction or, in the alternative, vacate his sentence.

Respectfully submitted,

/s/ Corrine E. Gunning
Corrine E. Gunning, #25519
Kansas Appellate Defender Office
Jayhawk Tower
700 Jackson, Suite 900
Topeka, Kansas 66603
(785) 296-5484
(785) 296-2689 fax
adoservice@sbids.org
Attorney for the Appellant

Certificate of Service

The undersigned hereby certifies that service of the above and foregoing brief was sent by emailing a copy to Boyd Isherwood, Chief Attorney, Sedgwick County, Appeals Division, at appeals@sedgwick.gov; and by e-mailing a copy to Derek Schmidt, Attorney General, at ksagappealsoffice@ag.ks.gov on the 4th day of March, 2016.

/s/ Corrine E. Gunning
Corrine E. Gunning, #25519

FILED
APP DOCKET NO.

2015 APR 24 P 4:18

CLERK OF DIST. COURT
18TH JUDICIAL DISTRICT
SEDGWICK COUNTY, KS
BY

EIGHTEENTH JUDICIAL DISTRICT
CRIMINAL DEPARTMENT
MOTION MINUTES SHEET

State of Kansas vs. Murad M Razzaq

Date: 4/16/2015 TIME: 01:15 pm

MOTION: Criminal Motion

REASON: Request for New Trial and a Renewal of Motion for Judgement of Acquittal

CASE NO.: 2011-CR-001615-FE

ATTORNEYS:

FOR PLAINTIFF: Robert R Short II

FOR DEFENDANT: Patrick J Mitchell

☐ GRANTED ☒ DENIED ☐ WITHDRAWN

For reasons stated on the record.

ORDER

DATE: April 16, 2015

IT IS ORDERED:

☐ THAT _____ PREPARE A JOURNAL ENTRY/ORDER REFLECTING THE COURT'S ACTION

☐ THAT THIS DOCUMENT SHALL SERVE AS THE COURT'S ORDER WITHOUT FURTHER JOURNAL ENTRY OR ORDERS

Becky Fitzmier
RECORD TAKEN BY

JUDGE BENJAMIN L BURGESS, DIV. 7

APPROVED: ATTORNEY PLAINTIFF

APPROVED: ATTORNEY DEFENDANT

IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CRIMINAL DEPARTMENT

THE STATE OF KANSAS,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 11 CR 1615
	)	Appellate Court No.
	)	15-114325-A
MURAD M. RAZZAQ,	)	
	)	
Defendant.	)	
	)	

TRANSCRIPT OF MOTION FOR DISMISSAL; MOTION FOR NEW TRIAL; MOTION FOR JUDGMENT OF ACQUITTAL; MOTION FOR DEPARTURE; and SENTENCING

Proceedings had and entered of record before the Honorable Benjamin L. Burgess, Judge of Division 7 of the Eighteenth Judicial District, Sedgwick County, Kansas, at Wichita, Kansas, at 1:21 p.m. on April 16, 2015.

APPEARANCES:

For the State:
Mr. Robert Short
Assistant District Attorney
Sedgwick County Courthouse Annex
535 N. Main
Wichita, Kansas 67203

For the Defendant:
Mr. Patrick Mitchell
Beall & Mitchell, LLC
210 N. St. Francis
Wichita, Kansas 67202

INDEX PAGE

and -- and make proper decisions. Thank you, Your Honor.

THE COURT: Thank you, sir.

Mr. Mitchell, if you and Mr. Razzaq would either stand or come to the podium, I'll finish this process.

As I hear the arguments, Mr. Razzaq, I have some understanding, I think, of what the circumstances are. As it happens, I now, as you know from being in this courtroom on the fourth floor, I'm a family law judge, I deal with custody matters quite often. And one observation I make in the custody situations is to just observe that when people -- young people get into their teenage years, they do form the ability to think more for themselves, they can make decisions for themselves, they can form opinions. Oftentimes, their preferences should be given some deference. But yet, they are not ones who have the experience or the age or the maturity, either under the law or as a practical matter, to make many decisions for themselves.

I had a custody case recently where one of the parties wanted me to interview the young person. The other party opposed it. The arguments were, on the one hand, that if you allow that person to make the decision for themselves, you're pretty much putting

the pressure on them to make a choice.

In that particular instance, I did not have the young person -- did not interview the young person, but I did observe that, as I've said, they do at that age have the ability to make some decisions for themselves, but yet, they are still minors, they're still subject to parental control of authority, and many of the decisions, even though they might prefer otherwise, parents are the ones that make those decisions for them.

And I make the observation in these family law matters too that what I see is that when they get into their teenage years, they sometimes become the manipulators, that is, they become a wedge between the two parents instead of the parents using them as a pawn and, you know, keeping back and forth sort of thing.

The bottom line is, yes, this young lady did consent to the activity that occurred. But yet, she's not legally allowed, nor her experience or maturity, as a practical matter, just don't allow her to make those kinds of decisions without parental guidance and authority.

The thing that's troubling, of course, is the fact that this is not your first offense but your second,

and the fact that, again, I don't know what all the underlying circumstances were in the prior Missouri matter. I know it's a similar offense. The statutes are very comparable to the Kansas statutes. And all the evidence that I heard and everything I know about the case leads me to the conclusion that you took advantage of the situation.

With that said, as I've listened to the arguments, the statute has certain provisions and requirements that does allow a jury to consider that prior offense, and under instructions from the Court, I allowed them to consider that.

The statute also does provide for this doubling of the penalty. Mr. Mitchell argues for a durational departure down to 64 months. Even under the regular statute, it's 82, 88, 92 months, so he's wanting to even go below what the basic statute provides.

I would note that as part of this sentencing process, we used to have what's called indeterminate sentencing, people will be sentenced to, you know, 5 to 15 years or 3 to 10 or 15 to life, you know, different combinations of things, and there was a Kansas Parole Board that then had the discretionary authority to determine when the release would occur.

For a lot of reasons, the Kansas legislature, as

well as a lot of other states and the federal government, now have sentencing guidelines. And in Kansas, they did review thousands of cases for each criminal offense and tried to come up with a process or a range that was appropriate for the offense and the criminal history of the offender, and that's what we had to follow.

In my experience, Mr. Razzaq, I know that people who go to prison, every day makes a difference, and I say that just in terms of within the sentencing range that I have to consider, 184 months is the maximum sentence that I can impose. If I use the low number in the sentencing range, it's 164 months. That's a difference of 20 months, you know, a year and 8 months. And that's what I'm assessing, and I can tell you sometimes when I come out on these matters, I do not have any preconceived notion on what the ultimate outcome is going to be. I do want to hear what people have to say. I want to, you know, use my own judgment in making the assessment, and I say very -- you know, many, many times that in these settings especially, you can come into a courtroom and there can be four or five different people who have different opinions about what the outcome ought to be, and they can all be right.

Mr. Mitchell requests 64 months. I can't criticize him in a right or wrong fashion for making that request. Obviously, from your standpoint, you want to get the very lowest possible sentence.

The gentleman asked for the maximum, which is 184 months, and Mr. Short more or less defers to the father of the victim and thus, you know, his recommendation is 184 months.

One thing that I know from my experience is that 95 to 98 percent of the people who go to prison get out eventually. Eventually, you're going to get out of prison. And thus, from the standpoint of imposing sentence, you know, what is the optimum sentence that can be given in your case? I don't think there is an optimum sentence. It's just a matter that I have to make some determination about.

And in that regard, and in recognition of the fact that you are going to get out of prison, so it's just a matter of when, and taking into account that I can't make a determination on an optimum penalty to be imposed, I don't have a crystal ball as to what you're going to do while you're in prison or what you're going to do after you get out of prison, so in my handling of these cases, I just try to be fair on one hand and firm when necessary and take into account the

nature of the offense.

So what I'm going to do, Mr. Razzaq, is I'm going to impose the mid number, just the standard number, 176 months as the sentence. So that'll -- well, 8 months' difference between that and the maximum, so I'm giving you that much of a -- a break. I guess, you know, I see it that way.

Accordingly, taking into account the nature and circumstances of the crime, the history, character, and condition of the defendant and the lowest minimum sentence, which in the opinion of the Court is consistent with the public safety, the needs of the defendant, and the seriousness of the crime, I'll make the following findings and orders: I find the primary crime that controls the base sentence is Count 1, it is a severity level 3 person felony, criminal history is in grid box E. Based upon those findings and the recommendations and statements that have been made, I will impose a sentence of 176 months in the custody of the Secretary of Corrections.

You will be entitled to earn 15 percent good time credit.

You will be subject to the lifetime post-release supervision.

In that regard, there will also be a requirement,

Mr. Razzaq, that you register under the Kansas Offender Registration Act upon your release from prison. I'm not going to go into all the details of that act. I just want to plant a seed in your mind about the fact that when you're about to be released from prison, somebody's going to sit down with you, and they'll go through with you in pretty much -- a lot of detail about that act, what its requirements are. My admonition to you now is to pay very close attention to what they tell you. You will be subject to that act.

And in that regard, there's two things that happen if you fail to comply with the act. One is with this lifetime post-release supervision requirement, you go back to prison on this case, serve some additional time, and in addition, you subject yourself to having charges filed for that failure to register, which is a separate offense for which you can be given additional sanctions and prison time sentences.

I tell you these things not in any way to be intimidating or threatening, rather just to make sure that you understand what the -- there are requirements. You're the one that's obligated to follow them, and there are very stringent penalties if you fail to do so.

With regard to the Board of Indigent Defense Services fees, I will waive any requirement, either on the fee part or the administration fee, the $100 administration fee.

I assume Mr. Razzaq has been processed with mug shots and fingerprints in this case. If not, that is ordered.

I'm sure you're aware, Mr. Razzaq, that the felony conviction and this, of course, is one you have a prior felony conviction, but the bottom line is a convicted felon is prohibited by both state and federal law from owning, carrying, possessing firearms.

If it's not already been accomplished, I'll order that you submit blood and saliva specimens to the KBI, pursuant to KSA 21-2511.

Part of the order will be that you receive credit toward this sentence for time you've already spent incarcerated on this case.

You, of course, have a right to take an appeal. If you wish to pursue an appeal and cannot afford counsel, counsel can be appointed to represent you. Some of the costs can be paid. You have 14 days after today to file the notice of appeal.

At a later time, you may have the right to have

PATRICK J. MITCHELL, SC# 20318
BEALL & MITCHELL, LLC
210 N. St. Francis
Wichita, KS 67202
Telephone: (316) 267-8181
Facsimile: (316) 267-3175

IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT OF SEDGWICK COUNTY, KANSAS
CRIMINAL DEPARTMENT

THE STATE OF KANSAS,)
Plaintiff,)
vs.) Case No. 11 CR 1615
)
MURAD M. ABDEL-RAZZAQ,)
Defendant.)

REQUEST FOR NEW TRIAL AND
A RENEWAL OF MOTION FOR JUDGEMENT OF ACQUITTAL

COMES NOW the Defendant, Murad M Abdel-Razzaq, by and through his attorney, Patrick J Mitchell of Beall and Mitchell LLC, moves this court for an order granting him a new trial, pursuant to K.S.A. 22-3501, or an order and pursuant to K.S.A. 22-3419 (3), K.S.A. 21-5108, to enter a judgment of acquittal on all counts, for the following reasons:

1. That the State's trial evidence was insufficient to sustain a convictions beyond reasonable doubt that Mr. Abdel-Razzaq committed Aggravated Indecent Liberties, Severity Level 3, Person Felony

WHEREFORE, Defendant respectfully requests this Court grant him a new trial pursuant to K.S.A. 22-3501, or an order acquitting him of all charges in the above-captioned case for the above and foregoing reasons.

Respectfully submitted,

Patrick J Mitchell, SC#20318
Attorney for Defendant

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Motion was hand delivered to the Sedgwick County District Attorney's Office this _____ day of January, 2015.

Patrick J Mitchell, SC #20318
Attorney for Defendant

NOTICE OF HEARING

Please take notice and be advised that the foregoing Motion will be heard on January 16th, 2015 at 1:15 p.m. for sentencing in front of the Honorable Ben Burgess.

DEC 18

EP KLA

BEALL & MITCHELL, LLC
210 N. St. Francis
Wichita, KS 67202
Telephone: (316) 267-8181
Facsimile: (316) 276-3175
Email:

IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CRIMINAL DEPARTMENT

THE STATE OF KANSAS, Plaintiff,	)	
vs.	)	CASE NO. 11 CR 1615
MURAD RAZZAQ-ABDEL, Defendant.	)	

DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL

NOW COMES MURAD RAZZAQ-ABDEL, Defendant herein, by and through his attorney, Patrick J. Mitchell, of Beall and Mitchell LLC, and pursuant to K.S.A. 22-3419(3), K.S.A. 21-5108, and his rights to due process and a fair trial and against double jeopardy, as guaranteed under the Fifth and Fourteenth Amendments to the United States Constitution, and Sections Two and Eighteen of the Kansas Bill of Rights, moves this Court to enter a judgment of acquittal on all counts.

Respectfully submitted,

BEALL & MITCHELL, LLC

PATRICK J. MITCHELL, SC#20318
Attorney for Defendant

NOTICE OF HEARING

Please take notice and be advised that the foregoing motion will be heard at 1:15 on the 16th day of January, 2015.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing motion was hand-delivered or delivered by telefacsimile to the Office of the Sedgwick County District Attorney, this 24th day of December, 2014.

Honorable Ben Burgess
Judge of the District Court
Sedgwick County Courthouse
525 N. Main
Wichita, KS 67203

Robert Short
Assistant Sedgwick County District Attorney
535 N. Main
Wichita, KS 67203

Murad Razzaq-Abdel

PATRICK J. MITCHELL, SC#20318
Attorney for Defendant

FILED
IN THE EIGHTEENTH JUDICIAL DISTRICT APP DOCKET NO.
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CRIMINAL DEPARTMENT
DIVISION 7

2014 DEC 18 P 3:35

CLERK OF DIST COURT
18TH JUDICIAL DISTRICT
SEDGWICK COUNTY, KS
PY

THE STATE OF KANSAS, *Plaintiff*	)	
vs.	)	**Case No. 2011 CR 1615**
MURAD RAZZAQ, *Defendant*	)	

VERDICT

Count One:

1. We, the jury, find the defendant guilty of Aggravated Indecent Liberties.

12/17/14 — Date of this Verdict

Sarah J. Johnson — Presiding Juror

2. We, the jury, find the defendant not guilty of Aggravated Indecent Liberties.

_____ — Date of this Verdict

_____ — Presiding Juror

IN THE DISTRICT COURT OF SEDGWICK COUNTY, KANSAS
EIGHTEENTH JUDICIAL DISTRICT
CRIMINAL DEPARTMENT

STATE OF KANSAS, Plaintiff,	)	
vs.	)	Case No. 11 CR 1615
MURAD RAZZAQ, Defendant.	)	App. No. 114325-A
	)	VOLUME II

TRANSCRIPT OF JURY TRIAL

PROCEEDINGS had before the Honorable Ben Burgess, Division 7, Judge of the District Court of Sedgwick County, Kansas, on the 17th day of December, 2014.

APPEARANCES

The State of Kansas appeared by Mr. Robert Short, Assistant District Attorney, 535 North Main, Wichita, Kansas 67203.

The Defendant appeared in person and with counsel, Mr. Patrick Mitchell, of Beall & Mitchell, 210 N. St. Francis, Wichita, Kansas 67202.

I N D E X

E X H I B I T S

Q. Hyphen Abdel at the end of Razzaq?
A. Yes, sir.
Q. It's just another form of the same name for the same person?
A. Yes, sir.
Q. Did he provide you a date of birth?
A. Yes, sir.
Q. And what was that?
A. July 3, 1983.
Q. And are you familiar with the date of the incident in this case, 5-27-2011, do you know how old that would have made him on the date that the crime was alleged?
A. He said he was 27 that day.
Q. Did he provide you a marital status?
A. He told me he was single.
Q. Okay. And, lastly, on just that demographic information, did he provide you a current address?
A. It was on 79th Street. I don't remember the exact numbers on 79th Street.
Q. Okay. And did he provide you a past -- a prior address as well?
A. I believe he did. I don't recall what that past address was.
Q. That's fine.
I want to ask you another question regarding some

information that's part of your file there.
Detective, did you do any research into whether this defendant has any prior convictions for sexually motivated crimes?
A. Yes.
Q. Did you find any?
A. Yes.
MR. MITCHELL: Objection, your Honor, pursuant to pretrial motions.
THE COURT: Overruled.
Q. (By Mr. Short) What did you find, Detective?
A. In 2005, the defendant was convicted of statutory sodomy, a felony, and child molestation, a misdemeanor, in Jefferson County, Missouri. The victim -- the victims were two girls under the age of 12.
Q. Was that all that you found?
A. Yes.
THE COURT: Now, ladies and gentlemen, there is an instruction that I'm going to give to you now with regard to this evidence that you've just heard.
I have allowed the State to offer evidence tending to prove that the defendant was convicted of crimes other than the present crime charged; that is, the crime of statutory sodomy, first degree, and child

molestation, second degree, for which Mr. Razzaq was convicted in the state of Missouri.

This evidence may be considered for its bearing on the defendant's disposition or propensity to commit a crime such as those charged here.

It is entirely up to the jury to determine what weight, if any, this evidence of prior criminal convictions deserves.

The crime of statutory sodomy, first degree, is defined by statutes in the state of Missouri as follows: And I quote the statute. A person commits the crime of statutory sodomy in the first degree if he has devious sexual intercourse with another person who is less than 14 years old, end quote.

The crime of child molestation, second degree, is defined by statutes in the state of Missouri as follows: And I quote. A person commitments the crime of child molestation in the second degree if he or she subjects another person, who is less than 17 years of age, to sexual contact, end quote.

In reaching your conclusion, you may consider all of the surrounding facts and circumstances and give that evidence such weight as you think it is entitled to receive in light of your experience and knowledge of human affairs. However, you are strongly cautioned

that Mr. Razzaq is not on trial here for any acts or crimes which are not alleged in the complaint/information filed in this case.

The defendant may not be convicted of the crimes in the complaint and information if you were to find only that he committed other crimes at some other time.

You are admonished then at all times the State bears the burden of proving beyond a reasonable doubt that the defendant committed the offense charged in the complaint/information and such proof cannot be shown solely through the previous conviction of Mr. Razzaq in the state of Missouri.

So that's just an instruction, ladies and gentlemen, to kind of focus how you consider this type of evidence.

Please proceed.

MR. SHORT: Thank you, Judge.

Q. (By Mr. Short) Detective, I want to talk to you a little bit about your interview with Bethany Davidson. Do you recall doing that taped interview with her?

A. Yes.

Q. And yesterday were you able to watch her testimony in court?

A. Yes, sir.
Q. You know, briefly compare her demeanor yesterday and her appearance versus when three and-a-half years ago you interviewed her. What differences did you see yesterday?
A. Yesterday when she was sitting up here on the stand, she still didn't want to talk about the things that had happened, but she wasn't nearly as defiant -- she wasn't, you know -- this is all about me. I can make my own choices, you know, arms crossed, leaning back, you know, I don't, you know, I don't want to be here type, you know, type of attitude that she had when I was interviewing her in 2011.
Q. Was Bethany the first 14-year-old you ever had to interview?
A. No, sir.
Q. Was she the first defiant 14-year-old that was a mess that you ever had to interview?
A. No, sir.
Q. Are there -- what is your approach as an interviewing detective when you have to approach a situation like -- with a young teen who's got some problems going on in her life?
A. You have to try to build some rapport, come to, you know, a middle ground, find some place where, you

know, you can start agreeing. You know, a lot of people, including 14-year-olds, think that cops are just out -- if you're talking to a cop, you're the one in trouble. And, you know, you have to kind of get by that and be persistent to get the information that's pertinent to the case.

Q. As a law enforcement officer -- and specifically an EMCU detective -- are there -- is there a risk that you can plant information or suggest answers to a person who's being interviewed?

A. It's not as big a risk as a lot of people think. They've shown that, you know, teens are not susceptible.

MR. MITCHELL: Objection, your Honor. Witness is referring to they. Hearsay.

THE COURT: Sustained.

Q. (By Mr. Short) Let me rephrase that question. Do you often have to kind of get past upfront barriers that are thrown out by that person being interviewed when we're talking about a young teen?

A. Yes.

Q. And did you encounter that with Ms. Davidson?

A. Yes.

Q. Were you ultimately able to discuss with her some of her contact between her and Mr. Razzaq?

A. Yes.
Q. Initially, was she denying contact with him?
A. No.
Q. At some point, did she relate to you some details about her contact with Mr. Razzaq?
A. Yes.
Q. Is it a comfortable topic with young teenaged girls to talk about their sexuality?
A. No.
Q. Based on your interview with her the first time and the testimony you saw yesterday, in terms of consistencies or conflicts in that testimony, how would you describe those two statements from her?
A. Overall they were consistent. She had a hard time remembering some things that she told me back in 2011.
MR. MITCHELL: Objection, your Honor. Enters the province of the jury.
THE COURT: Overruled.
A. And that's what she said. But, you know, the overall sexual contact is what she described to me in our interview in 2011.
Q. (By Mr. Short) Did you feel that in your first interview with Ms. Davidson that you suggested answers to her or planted the information that you needed for your case?

A. No, sir.
Q. Did you, in fact, encourage her to do the SANE-SART exam at St. Joe?
A. Yes.
Q. Why would you want her to do that exam?
A. It would corroborate what I had been told by her after I was told, you know, what had been said by her parents. So, yeah, you know, the potential for evidence was there in a sexual assault exam.
Q. In what way can potentially that SANE-SART exam corroborate a statement or an allegation that's been made?
A. With the presence of DNA being there, sometimes there could be injury, you know, that's found by a Sexual Assault Nurse Examiner. There's -- and that evidence is quick lived. It needs to be gathered within 96 hours.
Q. And in the same way that cuts both ways, right, on the SANE-SART exam? Would you agree with that?
A. Yes.
Q. If there's an allegation made, it's possible that the SANE-SART exam refutes that; correct?
A. That is correct.
Q. You have no way to predict what's going to show up in that SANE-SART exam. Would you agree with that?

A. That is correct.
Q. All of these events in this case, in terms of Bethany Davidson sneaking out her window and her testimony she was picked up by the defendant and then the final, the arrest location on Hydraulic, are all of those here in Sedgwick County?
A. Yes.
Q. Finally, Detective, I want to ask you about one last area. There's been some mention made about her state of inebriation during that interview and your contact with her. Could you talk a little bit about the things that you observed during your contact with her?
A. There had been mention that she might have consumed some marijuana. I'm a drug recognition expert, and I noted that her pupils appeared to be dilated beyond the normal range and her pulse rate was above the normal range. Both of those signs are consistent with someone who has consumed a drug in the cannabis category.

As far as being too impaired to know what she was talking about and so forth, throughout the -- throughout our interview, she showed that she was -- she was tracking very well and she was remembering and she knew what -- you know, she knew what we were talking about.

extraction or a straight extraction. So in this case where I had the vaginal sample that had the presumptive test for prostate specific antigen present, I went ahead and tried to do what we call a differential, which is in case there was any sperm cells that didn't come off from the microscopic exam, stuck to the cotton swab, it would try to separate out any vaginal component or non-sperm component from the sperm cells.

And what we know about sperm cells is they have a hard case that makes them effective in biology in fertilizing an egg. And so what we do is we take and we add a mild buffer to the sample that then is strong enough to lyse off the non-sperm cells -- or the vaginal cells, which have a weaker outer coating. We then dip that off into the solution. We call that the F-1 solution. And then we add -- we do a series of wash steps, and then we add a more stringent buffer which has enough strength to then wipe off the rest of the cells. And we then call that the F-2 fraction -- or the sperm fraction.

And so what happens is you have one vaginal swab that then yields two different DNA profiles because we have tried to tease apart the sperm cells from the non-sperm sample. I did that procedure on the vaginal

sample.

On the swabs from the penis shaft and the swab scrotal area, I just did a straight extraction, which means one sample, one profile.

So we go through all of the process of obtaining the DNA profile from the samples, do the interpretation and the comparison, and then we report our findings in our report.

So the DNA profile -- profiles from the non-sperm and the sperm cell fraction of the vaginal swab is consistent with the profile of Bethany Davidson -- actually, there's a typo there. Sorry. It should say profile, not profiles -- of Bethany Davidson. Therefore, Bethany Davidson cannot be excluded as the source of these profiles. Murad Razzaq is excluded as the source of these profiles.

Q. Let me ask a follow-up question there. Did you find any DNA, other than Bethany's on her vaginal swab?

A. Not that I could detect with our current technology on this case.

What happens is on a sample where I did not see sperm cells on the microscope, if you have a large quantity of female DNA and a small quantity of male DNA, we can't always detect the foreign contributor there.

So the best example of this -- if I were to take my blood and Mr. Short's blood and I would mix them one to one, I would expect to see an even mixture of our two profiles. If I take one part my blood to five parts his blood, I would expect to see him at a stronger ratio in that mixture profile to my blood. If I take 10 parts his blood to one part my blood, I'm going to see mostly him and maybe little bits and pieces of me. By the time we reach the 20 to one mark, I'm probably not going to see my DNA at all in that mixture. And so when you have very large quantities of one person's DNA and very small quantities of someone else's DNA, we cannot pick up that minor person in that profile.

Q. And so on that vaginal swab from Bethany Davidson, clearly you found cells consistent with her DNA. And we've talked about the male protein that was present. But you did not find any other testable quantity of DNA in her vagina?

A. We have a step in our process called quantitation. It was where we try to estimate how much DNA is in the sample because the reaction that we use --

MR. MITCHELL: Your Honor, I'm going to object. It's unresponsive to the question. The question elicited a yes or no response.

THE COURT: It did. So I'll sustain the objection.

Please restate the question.

Q. (By Mr. Short) Okay. I believe my question was, so what we found on Bethany Davidson's vaginal swab was we had a positive on the male protein. We find cells consistent with her DNA, which is not surprising, but we did not find any other testable quantity of DNA of any other person on her vaginal swab.

THE COURT: Yes or no.

A. We did not detect a foreign contributor.

Q. (By Mr. Short) Okay. From anyone?

A. That's correct.

Q. Okay. And was that because there wasn't enough to meet your threshold of quantity to test or because there was just nothing else there?

A. It's due to a very large quantity of the female DNA to the low quantity of male DNA that was detected. But it is not enough to detect then that male contributor there.

Q. And that's consistent with your testimony about when you have a mixture that is so overwhelmed on one person's side it can almost obliterate a tiny sample from another person in that case?

A. That's correct.

Q. Okay. I just wanted that point of clarification.
I'll let you continue.
A. So then the next profile was the swabs labeled penis shaft. It was a mixture of at least two individuals. The major contributor is consistent with the profile of Bethany Davidson. Minor contributions were attributable to Murad Razzaq. Therefore, Bethany Davidson and Murad Razzaq cannot be excluded as contributors to this profile.
Q. Okay. Let me ask a clarifying question. We talked about different samples, sometimes it's a 50/50 mix of two people. One is greater than the other one. How did you see this break out on this particular sample from penis shaft?
A. I was able to deduce out a major contributor to the profile overall that would indicate that the major contributor was a female, and that I could -- I could pull out the major contributor very easily without having to look at any knowns or anything like that. And so that there was a very clear major contributor with a minor contributor at lower levels.
Q. Thank you.
A. The next profile is the swabs from the scrotal area. It was consistent with a mixture of at least two individuals and consistent with the combined profiles

of Bethany Davidson and Murad Razzaq. Therefore, Bethany Davidson and Murad Razzaq cannot be excluded as contributors to this profile.

Q. Okay. I don't have any questions on that slide.

A. Okay. So upon those conclusions being made, we issue a statistic, and the statistic was issued toward the major contributor on the profile from the penis shaft. So the probability of selecting an unrelated individual at random who exhibits a profile that is a potential major contributor to the mixture profile obtained from the swabs from the penis shaft is one in 125 quintillion in the Caucasian population. One in 3.65 sextillion in the black population. And one in 53.0 quintillion in the Hispanic population.

Q. What does that mean?

THE COURT: Good question.

A. So the best way that I have come up with in my career to explain this is, it lends a number to the discriminating nature of the profile. If you have a profile that is a mixture of at least four people, and the discriminating power can be very low. The random match probability may be one in one, one in four, or something like that. If you have something that is a partial profile, even if it's a single source, it might only one in 100,000. So it is just a

statistical estimation to help describe the discriminating properties of the profile basically.

Q. (By Mr. Short) In your experience in submitting these reports on the grand scale, like you said, you know, the chances of one in four all the way up to the numbers we have on the board at this point, where does that fall on the scale, in your experience?

A. That's very hard to say because every case is very different. When you have very good major contributor on a mixture, this type of a number is not uncommon. Sometimes for a single source profile, you get even more into the sextillion, septillion such as that. But we see numbers all the way, like I said, from one in one to one in a million.

Q. Okay. So the chances of finding that one person -- what is the -- do you know off the top of your head the population of the plant earth?

A. Actually, I did not go on and get the population as of morning. The populations that I have are from 2013. The current U.S. world -- or, excuse me, the current U.S. population is 315 million. And the estimate at that time in 2013 for the world was 7.06 billion.

Q. Okay. All of our -- all of the statistics you provided are -- you would require a larger pool than that to find -- just happen to find a random match?

THE DEFENDANT: Yes, your Honor.
THE COURT: And what is that?
THE DEFENDANT: I will testify, your Honor.
THE COURT: All right. We'll bring the jury out and we'll proceed.
And let me -- just so I'll know. Is there going to be any other defense evidence or witnesses?
MR. MITCHELL: No, your Honor.
THE COURT: All right. Very well.
Mr. Short, is that the lab examiner's computer?
MR. SHORT: No, that's a DA computer.
(The jury returns to the courtroom.)
THE COURT: All right. Mr. Mitchell, do you have any defense evidence to present?
MR. MITCHELL: Yes, your Honor. At this time the defense would call Murad Razzaq.

MURAD ABDEL-RAZZAQ,

called as a witness, on behalf of himself, after having been first duly sworn, testified as follows:

DIRECT EXAMINATION

THE COURT: Please proceed.
MR. MITCHELL: Thank you, your Honor.

BY MR. MITCHELL:

Q. Please state your name for the record.

A. Murad Abdel-Razzaq.

Q. And you are the defendant in these proceedings?
A. Yes, sir.
Q. And you have been present throughout these proceedings; correct?
A. Yes, sir.
Q. And you have chosen to testify?
A. Yes, sir.
Q. And have you ever met Timothy Davidson?
A. Not aside from that day.
Q. Did you know him before that day?
A. No, sir.
Q. And the day we're talking about is that May 27th, 2011?
A. Yes, sir.
Q. And have you ever met Mary Davidson?
A. Not aside from that day, sir.
Q. And, again, we're referring to May 27th, 2011?
A. Yes, sir.
Q. And did you ever know -- did you have any sexual relations with their daughter, Bethany Davidson?
A. No, sir.

MR. MITCHELL: I have no further questions, your Honor.

THE COURT: Cross-examination.

MR. SHORT: Thank you, Judge.

CROSS-EXAMINATION

BY MR. SHORT:

Q. Mr. Razzaq, how old are you today?

A. I'm 31, sir.

Q. Back when this occurred in 2011, do you recall how old you were when this incident occurred?

A. 27, sir.

Q. What was your marital status back then?

A. Single, sir.

Q. Single also today?

A. Yes, sir.

Q. How long have you -- let me withdraw that question. At the time this occurred, what was your address?

MR. MITCHELL: Your Honor, I'm going to object. It's beyond the scope of direct.

THE COURT: Sustained.

Q. (By Mr. Short) Prior to that occurrence where you said you'd met Mary and Tim Davidson, had you met their daughter Bethany prior to that?

A. No, sir.

Q. That was the first time you'd ever had contact with her?

A. Yes, sir.

Q. Were you present for her testimony that she had met you through two of your brothers?

found her in the presence of an adult male?
A. Upset, but not to the point of assault, sir.
Q. Okay. And then he also testified that he asked you very pointedly if you'd had sex with his daughter the night before. Do you recall that?
A. Asked is a weak word for it. He more demanded and pushed the issue.
Q. He demanded to know whether or not you'd had sex with his daughter, didn't he?
A. He demanded for a certain answer, not whether it actually happened.
Q. Okay. Well, how do you remember the question?
A. Well, after him pushing me down and standing over me, it was a lot of screaming and threatening.
Q. Okay. And his testimony was that he asked you if you'd had sexual relations with his daughter, and you said I did not disrespect your daughter; correct?
A. I believe so.
Q. And then he pressed the issue. He said, did you have sex with my daughter? And his testimony was that you said you did.
A. I also said that I didn't many times before that.
Q. Okay. And were you intimidated by him?
A. Most definitely.
Q. Did he appear to be upset?

A. Most definitely.
Q. And you know he testified he was a man who worked with his hands; right? And so did you consider the possibility that you could be -- that he could get physically violent with you?
A. Yes, sir.
Q. But he didn't, did he?
A. No, sir.
Q. So he didn't -- he didn't beat that answer out of you, did he?
A. He didn't beat the answer out of me, but he did verbally beat me out of it.
Q. He verbally beat you out of it?
A. Yes, sir.
Q. Okay. When Bethany's mother was present, did she yell at you a little bit, too?
A. Yes, sir.
Q. Did she verbally beat you up, too?
A. Not to the extent that he did. He was actually physical with me.
Q. Oh, he was physical with you?
A. Yes, sir.
Q. Tell me about that.
A. After he busted in the door, I got up to see what was going on, you know, to confront the situation. By

then he was already on me, pushing me down.
Q. Okay. So he put you back down in your seat?
A. From across the room, yeah.
Q. Okay. And then he started -- had a few questions for you; right?
A. I don't know if you'd -- I don't know if you could say questions. It was more this is what you need to say to be safe.
Q. And you were so verbally beat down by him that then you confessed to having sex with an underaged girl. Is that your testimony?
A. I did not confess.
Q. Okay. So did -- are you saying that he asked you and you denied it?
A. Yes, sir.
Q. And that you never admitted, yes, I did have sexual relations with your daughter?
A. Yes, I admit that I did not confess.
Q. Okay. So I must have misunderstood your earlier testimony. Are you testifying right now that you never admitted in front of Tim Davidson that you had sexual relations with Bethany?
A. Yes, sir.
Q. Okay. And you heard the mother testify that she heard the question and answer and heard you say you did.

what the evidence shows in this case. That's the responsibility he's got.

Thank you.

THE COURT: All right. Ladies and gentlemen, that completes the case. You may now retire to the deliberation room to begin your deliberations.

Ms. Walton, by predetermination you were determined to be the alternate juror. If you have belongings back in the jury room, of course you can retrieve them. And when you do so, Christine will get together with you and there's some options with regard to your involvement from here forward. But you, of course, as the alternate, will not get to deliberate. There's always the possibility that one of the jurors may, for some reason, not be able to finish, and we still need to have you available is the bottom line.

We will now have you retire to begin your deliberations. The exhibits will be brought back with you along with copies of the instructions.

And the court will be in recess subject to the will of the jury.

(At 3:08 p.m. the jury retires to the jury room to begin deliberations. At 3:41 p.m. we are back in the

courtroom to take a verdict.)

THE COURT: Ms. Johnson, I see you have a piece of paper in your hand that suggest to me you won the election to be the presiding juror.

MS. SARAH JOHNSON: Yes, sir.

THE COURT: If you'd hand the verdict to Christine, she'll bring it over to me to review.

(The Court reviews the verdict.)

THE COURT: I'll have Christine read the verdict. I approve the verdict form.

THE BAILIFF: In the State of Kansas vs. Murad Razzaq, Case Number 11 CR 1615.

Verdict, Count one. We, the jury, find the defendant guilty of aggravated indecent liberties. Dated 12-17-14 by Sarah J. Johnson.

THE COURT: And, Ms. Johnson, that was the unanimous verdict of each juror?

MS. SARAH JOHNSON: Yes, sir.

THE COURT: Nevertheless, I am going to poll the jury, which means I will obviously make the statement, you all heard the verdict read in open court and so I'll just go down individually and ask was that and is that your verdict.

And so beginning with you, Ms. Johnson, you heard the verdict read. Was that and is that your verdict?

MS. SARAH JOHNSON: Yes, sir, it is.
THE COURT: Ms. Troutman, was that and is that your verdict?
MS. CHRISTINE TROUTMAN: Yes, sir, it is.
THE COURT: Ms. Diec, was that and is that your verdict?
MS. MIRANDA DIEC: Yes, sir.
THE COURT: Ms. Wise, was that and is that your verdict?
MS. GINGER WISE: Yes, sir.
THE COURT: Mr. Vu, was that and is that your verdict?
MR. CHRISTOPHER VU: Yes, sir.
THE COURT: Mr. Bisek, was that and is that your verdict?
MR. MARK BISEK: Yes, sir.
THE COURT: Mr. Withers, was that and is that your verdict?
MR. GRANT WITHERS: Yes, sir.
THE COURT: Ms. Martens, was that and is that your verdict?
MS. CARLA MARTENS: Yes, sir.
THE COURT: Ms. Gerber, was that and is that your verdict?
MS. TANA GERBER: Yes, sir.

IN THE DISTRICT COURT OF SEDGWICK COUNTY, KANSAS
EIGHTEENTH JUDICIAL DISTRICT
CRIMINAL DEPARTMENT

STATE OF KANSAS, Plaintiff,	)	
vs.	)	Case No. 11 CR 1615
MURAD RAZZAQ, Defendant.	)	App. No. 114325-A
	)	VOLUME I

TRANSCRIPT OF JURY TRIAL

PROCEEDINGS had before the Honorable Ben Burgess, Division 7, Judge of the District Court of Sedgwick County, Kansas, on the 16th day of December, 2014.

APPEARANCES

The State of Kansas appeared by Mr. Robert Short, Assistant District Attorney, 535 North Main, Wichita, Kansas 67203.

The Defendant appeared in person and with counsel, Mr. Patrick Mitchell, of Beall & Mitchell, 210 N. St. Francis, Wichita, Kansas 67202.

I N D E X

Defendant's Witnesses:

NONE

E X H I B I T S

For the Defendant:

NONE

are today. The defendant is accused of having sexual contact with a 14-year-old runaway. In fact, I believe the evidence is going to show that he's the one who picked her up from the house that night and took her to another location. So you have an allegation now against him -- a 14-year-old making an allegation, and he's pled not guilty. And here we are.

So what did those swabs show? Do they support this allegation against Mr. Razzaq? Well, here's what the swabs showed when they were tested at the science center.

A swab taken from the shaft of the defendant's penis shows Bethany's DNA. A swab taken from the defendant's scrotum shows Bethany's DNA. A swab taken from Bethany's vagina shows the presence of a male protein. A male protein that's consistent with a man's pre-ejaculate.

And, you know, we're going to talk a little bit about how these swabs were collected and how they were tested. Those witnesses that know about that and have trained in that area, I'm going to talk about how those were collected and how they were tested. And how they are careful in these type of cases to avoid cross contamination. Because that's the single worse

thing a lab can do is start cross contaminating samples. Once you start doing that, you lose credibility as a lab, as a nurse, and as a professional.

Now, there is one other part of this case that you will have to consider. Another type of evidence. You are going to learn that the defendant has been convicted previously in Missouri of sexual contact with underaged girls. Why do I tell you that? I tell you that because it is something that you can consider when you consider his propensity or disposition to commit this type of crime. I will not ask you to convict him in this case because he's been convicted of something else in another state. You can only consider it as to his propensity to commit this crime.

So what is this crime? What is the evidence on this crime that I will have you consider?

Here is a brief summary of what I am going to ask you to consider in this case:

The defendant is found in the same residence with our 14-year-old girl. When confronted by the girl's parents, he stated to them that they had had sexual contact that night.

Our 14-year-old girl, the victim in this case, does tell the detective and the nurse at the hospital

that they had had sexual contact that night. Her DNA is on him, in intimate parts of his body. That male protein is present in her vagina.

At the end of the case, ladies and gentlemen, based on that evidence in this case, I'm going to ask you to find him guilty.

Thank you.

THE COURT: Mr. Mitchell.

MR. MITCHELL: Ladies and gentlemen of the jury, this case is about a very troubled young girl. As the State just articulated in its opening, her parents believed they had spoiled her. She was out of control. She was lying to them. She was sneaking out of the house.

They went to look for her on this particular evening and couldn't find her. So they don't call 911. They go back to the house. They wait for a later time to go look for her some more.

The evidence will show that the reason they didn't call 911 is because this is what she did routinely. She misrepresented to them where she was going to be. She would sneak out of the house. She would do things that made it difficult to parent. And they would try to do their best, but at the same time, understood that she was not always honest with them.

Q. And what are their age ranges?
A. Andrew is 25, going on 26. Timmy is 24. Seth is 22. And my daughter now is 18.
Q. And can I get you to slide that mic toward you a little bit so I can hear you just a little bit better?
A. Sorry.
Q. Very good.
A. Okay.
Q. Are you currently working right now?
A. No.
Q. Have you worked in the past?
A. Yes.
Q. And what have you done?
A. My last job I worked was for FEMA.
Q. Here in Wichita?
A. Yes.
Q. And does your husband work?
A. Yes.
Q. And what's he do?
A. Um, he currently is a supervisor at Overhead Door, and he is also a co-owner of Ark Valley Door.
Q. Very good.
I want to talk to you a little bit about Bethany. And I want to talk about the summer of 2011, around the end of May. Do you recall that time of your life?

A. Yes.
Q. How was your relationship with Bethany during that time?
A. I've always been really close to my daughter. Of course, teenagers are wonderful little creatures. And I was very close with her. I was sick with cancer. So we spent a great deal of time together.
Q. Okay. Was that -- was your illness and treatment, was that causing some stress for you? Do you think?
A. Yes.
Q. And you know why you're here today; is that right?
A. Yes, I do.
Q. I want to talk about May 27th, 2011. Did your daughter sneak out that night?
A. Yes.
Q. Tell the jury a little bit about kind of the events that led up to the point that you realized she had snuck out.
A. Like I had explained, I was sick with cancer. I went through treatment, and I was sick a lot. I would get up and throw up. I was up and down a lot out of the bed. And I was also recuperating from a back surgery. And so I didn't sleep well.

I believe it was probably around 2:00, maybe, in the morning, if memory serves me. I noticed my

daughter wasn't in her room in her bed. Her bedroom was adjacent to mine. And the bathroom was like right here. And I would always like peek in her room. And she wasn't home. And so I woke up my husband and said, Beth isn't here, and proceeded to be worried from that moment on. She was only 14.

Q. Did you check her room at that point?

A. Yes.

Q. And did you see any evidence of how she had gotten out of the room or out of the house?

A. Um, I looked around her room. I believe her window was unlocked. We usually lock all of the windows in the house because I just -- I naturally check that. Our front door was still locked. The sliding glass door was still locked. The garage door was down. So -- and we had an alarm on the house, as far as the front door goes.

Q. Did she have her cellphone?

A. I believe so.

Q. Do you recall?

A. Maybe not --

Q. I'm sorry?

A. Sorry. I'm having a hard time remembering if she had her cellphone on her or not, to be honest.

Q. Could she have been grounded from her cellphone at

that time?
A. It's very possible.
Q. Did you call 911 right away?
A. I woke my husband right away first thing, and then we decided, you know, we need to try to find her.
Q. And I wanted to ask you a little bit about what you did to find her.
Did you have a house phone at the time?
A. Yes.
Q. Do you recall telling the detective that you found the house phone in her room?
A. I'm having a hard time remembering whether or not I said that.
Q. Okay.
A. Um, I do believe that she left her phone -- her cellphone, though, at home, if I remember -- I do remember that.
Q. What efforts did you and your husband go to to find her that night?
A. Great lengths. We contacted all of her friends, of course, that was on her phone list. And she also had a notebook that had a list of all of her friends' names and phone numbers. We had even spoken with, I believe it was, the defendant's brother --
Q. Okay.

A. -- at some point.
Q. Did you -- you made phone calls from the house?
A. Um-hum. Yes.
Q. Were you ever able to locate or hear Beth when you were making those phone calls?
A. We were catching hints that she was, um, possibly around Murad through his brother. That was definitely a conversation that we had had that day with his brother. We had found --

MR. MITCHELL: Objection. Hearsay, your Honor.

THE COURT: Sustained.

Q. (By Mr. Short) Okay. I want to talk a little bit about that -- making those phone calls.

At any time you were making those phone calls that night, were you able to get Beth on the phone?
A. I don't believe so.
Q. And at any time that night, that early morning hours you said after 2:00 o'clock in the morning, in that time frame were you able to pinpoint exactly where she was?
A. Yes, I believe -- if I recall correctly, we had spoken on the phone and received information that she could be in this one place here.
Q. Okay. Still in the morning -- early morning hours --

A. Early --
Q. -- were you able to locate her?
A. -- early morning we had been given a couple of different addresses.
Q. Okay. At some point, do you recall you and your husband and another family member going out to look for her?
A. Yes.
Q. And what time of day was that?
A. I would say this was early afternoon, if memory serves me. This was four years ago. And we had went to one address that we were given, and that was a wrong address. And we had drove by another one, and checked there. And Bethany wasn't there.

And then when we went to the last address, we had called the police, I believe, from the QuikTrip. We were at the QuikTrip parking lot off of Hydraulic. There's like a mobile home park down the way.

Q. Okay. Prior to this night, did you know if Bethany had a friend named Murad?
A. I was aware that she was friends with his brother because they went to school together at one point.
Q. Okay.
A. And Murad was her friend's brother.
Q. And do you remember the brother's name of Murad?

A. I'm really bad, no, I don't.
Q. Okay. Had Murad or his brother ever been to your house?
A. I believe they had picked -- someone had picked her up from that family before because she had been over to his father's house.
Q. Okay.
A. Used to be the old orchard outside of Derby in Haysville.
Q. Had you met this Murad previously?
A. No.
Q. Okay. So I want to let you pick up the story kind of where you were. It's the day time now on May 27th. You said that you stopped at a QuikTrip on South Hydraulic and 911 call is made. What's that to report at that time?
A. To report that our daughter has been missing. We do believe that we've got an address where we believe she's at, and we would like some assistance.
Q. Do you remember where that address was that you were headed to?
A. I do not remember the exact address. I remember going there. It was a mobile home park off of -- it was like -- we were at 47th and Hydraulic at the corner there at the QuikTrip, and it was up a ways on

with her and kind, you know. That he had interviewed many young people that had been in the same situation. And that he would be careful with her feelings.

Q. Now, you were pretty angry when you got over to the mobile home and you saw your daughter inside; correct?

A. Yes.

Q. Now, that's where I got confused in your testimony. Your husband said to go around back because you were afraid she was going to run; correct?

A. My husband had seen my daughter standing right there in the living room because the front door was open. And he could see her. And he goes, go around back to make sure she doesn't run out the back door.

Q. Okay. So -- but you weren't able to see into the trailer; correct?

A. No, because my husband was standing there. He said, go around back because she's in the living room.

Q. So when did you see the people inside the trailer?

A. When I went around front and went inside.

Q. Okay. So you saw -- so you didn't view everything first. It would be your husband; correct?

A. That's correct, yes.

Q. Okay. Did your husband kind of push his way into the trailer?

A. No. The door was open.

Q. Was it his home?
A. No, sir.
Q. Okay.
A. But it was his daughter inside the home.
Q. So he went on inside the trailer, as best you know, without knocking or anything; is that correct?
A. The door was open.
Q. So was that a yes?
A. Yes, sir. The door was open. He went in.
Q. So was he angry, too?
A. Of course.
Q. Okay. And were you also angry at your daughter?
A. Of course. I was angry with the whole situation.
Q. Okay. And, in fact, was the -- Mr. Murad Razzaq was he nice and polite to you?
A. He seemed apologetic and nervous. He seemed as if he knew he had done something wrong, like he knew better, you know, being an adult and all.

MR. MITCHELL: I have no questions, your Honor.

THE COURT: Redirect.

MR. SHORT: No, your Honor.

THE COURT: Ms. Davidson, you can be excused. Thank you.

THE WITNESS: Thank you.

MR. SHORT: The State calls Sergeant Jeff Swanson.

JEFF SWANSON,

called as a witness, on behalf of the State, after having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SHORT:

Q. Tell me your name, sir.

A. Jeff Swanson.

Q. Where are you employed?

A. I'm a Sergeant for the Wichita Police Department, and Supervisor of the Kansas Internet Crimes Against Children Task Force.

Q. Okay. And how long have you been with the task force?

A. 28 years -- or with the task force, three years.

Q. Okay. And how long with law enforcement?

A. 28 and-a-half.

Q. Very good.

I want to ask you about May 27th, 2011, in the evening hours. Do you recall being on duty?

A. I do.

Q. Do you recall being dispatched to assist with a suspect at St. Joe that needed to be swabbed?

A. I do.

Q. Did you go to that location?

A. Yes.
Q. And did you do that with Bethany Davidson?
A. Yes, I did.
Q. Did she answer your questions?
A. Yes.
Q. Did she seem cooperative?
A. Yes.
Q. Do you recall kind of her alertness at that time, how she presented to you?
A. She was alert and answered the questions appropriately.
Q. Did she appear to be under the influence, --
A. No, she did not.
Q. -- if you recall?
A. She didn't appear to be that way with me.
Q. Did you ask her, do you know why you're here?
A. Yes.
Q. And did she give you an answer?
A. Yes, she did.
Q. What did she say?
A. May I look at my notes?
Q. Well, let me ask you this. Did you bring your report to refresh your recollection?
A. Yes.
Q. And if you looked at that, would that help you answer

that question?
A. It would.
Q. All right. Take a look and tell me if you can answer that question.
A. She said that her parents and the detectives thought that she should come there.
Q. Okay. Did you ask her if she had been involved in any type of sexual activity previous to your contact with her?
A. Yes.
Q. And what did she say?
A. She said, yes, that she had contact with Murad. She said that she was intimate, and she would clarify that with sexual intercourse.
Q. Did she say how she happened to be in Murad's company? How they happened to end up together?
A. Yes. She said that she snuck out of her bedroom window and he picked her up, and they went to his mother's house. And that's where they were intimate.
Q. Did she give you an approximate time that that occurred?
A. Yes, she said it was 1:00 o'clock in the morning.
Q. On what day?
A. On the 27th.
Q. And did she say how her contact with the person she

identified as Murad -- did she say how that ended?
A. Um, her parents came to the house and, as she said, busted down the door and came in and took her out of the room.
Q. You testified that you had -- did get -- had a clarifying question a little bit about the sexual contact.
A. Um-hum.
Q. Any other sexual contact that she described to you at that time?
A. Um, no. She just said that they had sex at several places in the house, and just said that -- when we ask a patient what they mean by sexual intercourse, she clarified that it was the penis in the vagina.
Q. She did that for you in this case?
A. Yes. Uh-huh.
Q. Those questions you asked, do they direct then your later exam as you examine that person based on what they tell you?
A. Yes, it did.
Q. And in this case how did that direct your exam then?
A. Well, then I would do an internal exam with a speculum to collect evidence from inside the vagina and around the cervix.
Q. Did you ask her some of, I guess, you know, kind of

Q. Does only one person's evidence go into a box?
A. Yes.
Q. Would you ever combine more than one person in one of those evidence boxes?
A. No.
Q. Are you wearing gloves during these examinations?
A. Yes, and we change gloves frequently. In between each area that we swab, we change our gloves.
Q. Are you careful not to even get your own DNA into a test?
A. Yes, we are.
Q. Let me take your attention then to the second patient you identified having contact with, which was -- I believe I asked you if it was a Murad Razzaq. Did you find notes that you had contact with him also?
A. Yes.
Q. Was that before or after you had contact with Bethany?
A. It was after.
Q. And do you know what the time frame would have been, the separation between those two patients?
A. There was about 15 minutes.
Q. And during that 15 minutes, what are you doing in anticipation of another patient?
A. I moved her stuff to another locked room, and then I cleaned the entire room and get new linens out and

change things and get ready for another patient.
Q. And why are you doing those things?
A. Because we don't want to contaminate anything from one patient to another.
Q. And is that 15 minutes enough time to sterilize that exam room?
A. Yes. The germicide that we use takes three minutes.
Q. And did you use that in this case?
A. Yes.
Q. Now, in your contact with Mr. Razzaq, was that the full -- full exam that you were completing on him, the same way you did with Bethany?
A. No, it was not.
MR. MITCHELL: Objection, your Honor. I'm going to object to pretrial motion in regards to any evidence obtained by this witness.
THE COURT: Overruled.
Q. (By Mr. Short) What was your function with Mr. Razzaq?
A. I just followed what the search warrant asked me to do, which were the swabs.
Q. Do you see that same patient here in court today?
A. Yes.
Q. And can you point him out for me?
A. Straight across there.

Q. Okay. Seated to my right?
A. Yes.
Q. And what -- just describe his clothing for me?
A. He has the striped shirt on, gray pants, white shoes.
Q. And so, specifically, what was your function when you had contact with him in that exam room?
A. Just to take swabs of the penile area and the scrotum, the head of the penis, and that was about it.
Q. Any other clippings or the combings?
A. We did -- I did the pubic hair pulling, and we have to pull it because we need the roots. And so I did that. Head hair. And we also did the dental floss. And sometimes we do that because if they had oral sex, then sometimes that other person's DNA will show up in their mouth.
Q. Very good.

And was his -- were these swabs collected, I guess, in the same manner and with the same protocols that the swabs were collected on Ms. Davidson?

A. Yes.
Q. And were they logged into a similar kit?
A. Um, yes.
Q. And was that kit also sealed?
A. Yes.
Q. Have you had a chance to review your reports that you

prepared on these two patients?
A. Yes.
Q. Do you see any evidence there that there was some problems with cross contamination or that somehow their property was ever mixed together?
A. Um, there was no -- there was no mixing of the property because one was in a different room, and this one was finished up in the main exam room, packaged, and then put away.
Q. Did you have an awareness while you were doing these two patients that their stuff needed to stay separate?
A. Yes. It's not uncommon for us to have more than one patient. And so we do make sure that they are both separate.
Q. And did law enforcement -- law enforcement notify you ahead of time, hey, these two are connected in the same case?
A. Yes.
Q. And were they identified to you as victim/suspect just for purposes of your exam?
A. Yes.
Q. Did you have that in your mind when you were cleaning that room and preparing for the next person to come in?
A. Yes.

Q. Okay. And FAFSA that's your financial aid application; is that right?
A. (Witness nods head up and down.)
Q. And so are you working right now?
A. I'm in between jobs actually.
Q. Okay. What's the last place you worked at?
A. Atwoods in Derby.
Q. Atwoods. Is that like a farm store?
A. Uh-huh.
Q. And how long had you worked there?
A. Um, oh, eight months, almost a year.
Q. Okay.
A. Somewhere around there.
Q. I want to take you back to the summer of 2011. Do you remember that summer?
A. (Witness nods head up and down.)
Q. How was your relationship with your mom and dad back in that summer of 2011?
A. I'd like to think like any normal child and parent relationship. I mean, we had our good days and bad days, but I thought we were pretty close.
Q. Okay.
A. At least me and my mom.
Q. You and your mom were pretty close?
A. Um-hum.

Q. I want to take your attention specifically to around May 27th. Do you recall your parents come to look for you because they couldn't find you?
A. (Witness nods head up and down.)
Q. And why was --
THE COURT: Is that a yes?
THE WITNESS: Yes.
A. Sorry.
Q. (By Mr. Short) Okay. You're doing fine.
Why was that? Why couldn't your parents find you?
A. Because I snuck out my window.
Q. Okay.
A. And --
Q. Go ahead.
A. And left no trace really, except for the phone on my bed.
Q. Did you have your cell -- let me withdraw that question. At the time, did your parents let you have a cellphone?
A. I think they took it away from me.
Q. Okay.
A. I think I had a house phone.
Q. What time of night was that that you snuck out, if you recall?
A. I don't remember the time, but it was dark out.

Q. Okay.
A. It was after my parents went to bed. So it had to be after 10:00 or 11:00.
Q. Did you have a plan when you went out, when you snuck out that night?
A. I didn't have one planned in advance, but I tried to as quickly as I can, but I didn't really succeed, I guess.
Q. Did anybody pick you up after you snuck out?
A. Murad.
Q. And you have to say that again.
A. Murad.
Q. Murad. And I noticed you gestured with your hand. Who did you gesture to?
A. Murad.
Q. Okay. And do you see the same person you said as Murad in court today?
A. Yeah.
Q. And can you tell me where he's sitting?
A. At the table to the far left.
Q. And can you tell me what color his shirt is?
A. Um, black and white striped, thinly striped.
Q. Okay. Would it be the person who is seated to my right at the counsel table?
A. Yeah.

Q. Do you remember what car he was driving?
A. I think it's red.
Q. Okay.
A. That's all I remember.
Q. How did he know to pick you up that night at your parents' house?
A. Because I called him.
Q. Okay. On the house phone?
A. I believe so.
Q. Do you recall where you went from that location?
A. In the car. I didn't really know my way around, so, no.
Q. Anybody else in the car when he picked you up?
A. No.
Q. Where did you end up after riding in the car, if you recall?
A. I think it was his mom's house or a trailer park.
Q. Did you know where that was from your house?
A. I think it's kind of by Seneca. I don't remember.
Q. How did you -- how do you know Murad?
A. Through some friends.
Q. How long do you suppose you had known Murad before he picked you up that night?
A. I wouldn't say too long. I mean, we met on a few different occasions just briefly.

Q. And you -- you testified you met him through some friends. Did you know any of Murad's other family members?
A. Yeah, I went to school with them.
Q. What family members of his?
A. Noor, his younger brother, I think. I don't know if he has any younger. And Aladdin.
Q. And you said Noor and Aladdin. And how are they related to Murad?
A. They're his brothers.
Q. Were they older or younger brothers?
A. Younger.
Q. And of Noor and Aladdin which one was -- was one of them closer to your age?
A. Noor, we were in the same grade.
Q. What grade would you have been that summer of 2011?
A. Sixth.
Q. And do you --
A. Yeah, sixth.
Q. And were you being home schooled at that time?
A. Um, at the end of the year I was pulled out, yeah.
Q. And do you remember how old you were that night you snuck out?
A. A day before I turned 15.
Q. Okay. So you would have been 14 that night?

A. Yep, worst birthday party ever the next day.
Q. When -- you testified you went to Murad's mom's house. When you got there, was anybody else home?
A. His mom and some dude.
Q. And did you know that other person?
A. Oh, no.
Q. Had you met his mom before?
A. Um, not that I remember, no.
Q. Was Noor or Aladdin there?
A. No.
Q. Did you know how old Murad was at the time?
A. (Witness nods head up and down.) Yes.
Q. How old was he?
A. 24 or 5.
Q. Okay.
A. It was around that age, I know that. I think I knew the age in 2011, but it's kind of foggy memory.
Q. Okay. You said 24 or 25. And if you believed he was in his 20's, is that fair?
A. (Witness nods head up and down.)
Q. You know, as best as you recollect, why did you sneak out that night?
A. I was stupid and young and I wanted to just have fun and get high I guess at the time. And now I realize how dangerous and wrong that is, and how stupid I was.

Q. How is your relationship with your mom and dad now?
A. We're a lot better.
Q. I want to jump ahead a little bit. At some point, did your parents come out to -- did your parents find you at Murad's mom's house?
A. Um-hum.
Q. And were you inside the house when they got there?
A. Yeah.
Q. Was Murad there?
A. Um-hum. Yes.
Q. Had -- had you slept that night before they got there?
A. No.
Q. Do you recall whether or not at some point you ended up at St. Joe in contact with a nurse there?
A. Yeah, I remember being at St. Joe.
Q. And do you recall at some point being interviewed by a Wichita police detective a little bit about what happened that night?
A. Yeah.
Q. Okay. Have you ever testified before?
A. No.
Q. Okay. I want to ask you a little bit about what happened that night at Murad's mom's house. Do you recall that night?
A. Um-hum. Yeah.

Q. Did you have feelings for Murad at the time?
A. I don't think I had any feelings at that time -- current time because I was pretty high, like stoned, I guess, so... it kind of affects everything.
Q. Despite the fact that you had -- or you were stoned that night, do you recall the events?
A. Um-hum. Yeah.
Q. Do you recall whether or not you or Murad had any physical contact between the two of you that night?
A. Yeah.
Q. What was the nature of that contact?
A. Can you define that a little more?
Q. Define that? Did you have any sexual contact with Murad that night?
A. Yeah.
Q. Did you kiss him?
A. Um-hum.
Q. Did he kiss you back?
A. Um-hum.
Q. Did your clothes come off at some point?
A. Um-hum.
Q. Was there any sexual contact between you and him that night?
A. Yeah.
Q. These are not easy questions, but you're going to have

to tell me the nature of that sexual contact. What happened?
A. Intercourse.
Q. Okay. And what do you mean by intercourse?
A. His penis entered my vagina.
Q. Okay. Did that happen more than one time?
A. Yeah.
Q. The other people that you mentioned that were at that mobile home, what happened to them during these times that you were with Murad? Do you know where they were?
A. They were in the back room.
Q. What part of that mobile home were you and Murad in when this occurred?
A. I'd like to say the living room, the front part.
Q. Do you know if he stayed there full time?
A. I didn't ask. I didn't know.
Q. Did you know your mom and dad were looking for you?
A. At the time, no. I thought I was getting away with it.
Q. What was your first clue that they were out looking for you?
A. There I didn't have any. I didn't have any -- I didn't have any clues that they were coming. It was just kind of no -- random, I guess.

Q. And describe that moment -- that random moment where you realized that somebody was looking for you?
A. When I heard knocking -- or pounding on the door and my mom's voice.
Q. Okay. What was she saying, if you recall?
A. Bethany Lorraine Katherine Davidson.
Q. Was she calling your name?
A. Yeah.
Q. Was your dad out there?
A. Well, yeah.
Q. What happened after you heard your mom's voice?
A. Well, she immediately got me, took me outside -- and, well, I don't know what happened after that. My dad was inside.
Q. Could you hear your dad's voice?
A. Well, yeah.
Q. And so --
A. I don't think there was any physical contact between my parents and him, though, that I recall.
Q. Could you tell they were pretty upset?
A. Oh, yeah. Well, what parent wouldn't be.
Q. What did they do with you then once you were taken out of the mobile home?
A. They put me in the car.
Q. And from there, where do you go, if you recall?

A. Downtown to the police -- the interviewing room.
Q. Had you slept at all that night?
A. No.
Q. And had you smoked marijuana that night?
A. Yeah.
Q. When you were talked to by the detective, did you tell him that you were tired, that you had smoked pot that night?
A. I believe so.
Q. Did -- but were you able to listen to his questions and answer them the best you could at that point?
A. At the time, I thought so, yeah. I was reviewing all what I told him, what he was asking me, and I just -- it's kind of foggy. I'll admit that, but I do remember parts.
Q. And, out of fairness, did you get the chance to review a transcript of your taped interview with the detective prior to court today?
A. Yeah. It refreshed me on some of the things that I wasn't so sure about and what I answered to.
Q. And were you there for any of your mom and dad talking to Murad -- or confronting Murad?
A. No, but I wanted to at the time. I was pretty upset because I didn't really know what was going on.
Q. Do you know if Murad used any type of protection in

terms of like a condom during your contact with him?
A. I don't think so.
Q. And I don't have a lot more questions for you.
Do you recall talking to the nurse a little bit at St. Joe where an exam was performed?
A. I remember taking a shower, and, yeah, and some type of an exam. I don't know what it was, though.
Q. Was the shower after or before the exam?
A. I think after.
Q. And did the nurse talk to you a little bit about what had happened in the last 24 hours?
A. Well, yeah, she -- she was checking for something -- I didn't know what it was. I'd never had anything like that happen to me in a doctor's visit. My mom was in the room asking her questions, and she was answering the questions for me. So I was just going along with it.
Q. You did agree to the exam?
A. Well, yeah.
Q. Okay. And then when you -- do you recall if you talked to the detective before or after you went to St. Joe?
A. Before?
Q. Okay. And if you don't recall, that's fine, too.
A. I don't recall, but I have a strong feeling it was

before.
Q. After that, all of those events at the mobile home and when you go to St. Joe, did you have any contact with Murad after that?
A. No.
Q. While you were at the hospital, did you see him or have any contact with him while you were there?
A. No.
Q. And I guess, just for the record, what is your -- what's your birthday?
A. May 28th, 1996.
Q. Bethany, I appreciate your time. The other attorney may have some questions for you.

THE COURT: Cross-examination.

CROSS-EXAMINATION

BY MR. MITCHELL:
Q. Before your testimony here today, you were given a copy of the transcript of your interview with Detective Miller?
A. Yeah.
Q. And when was that given to you?
A. Um, maybe a month ago, or three or four weeks ago.
Q. Okay. And did your parents also receive copies of their interviews?
A. Yeah.

questions over and over; correct?
A. Yeah.
Q. You were also very tired?
A. Yeah.
Q. Fair enough? Okay.
And after you said whatever, it was at that time then that he asked you again whether you engaged in sexual relations with Mr. Razzaq; is that correct?
A. Um-hum. Yes.
Q. And by that time through the interview you were just pretty sick of being interviewed. Would that be fair to say?
A. I was tired, yeah.
Q. And pretty beaten down. Is that fair to say, too?
A. I would say so.
Q. Okay. When you finally did state to Detective Miller -- or should I say answer Detective Miller, he said that if you had had sexual relations with Mr. Razzaq, was that more or less just to get him to quit asking you the questions?
A. Repeat that again.
Q. Well, at some point he continues and continues to ask you the same question over and over; --
A. Yeah.
Q. -- correct?

And you just finally say whatever; correct?
A. Yeah.
Q. And he says, so then you did engage in sexual relations with Mr. Razzaq; correct?
A. Yeah.
Q. And then you just said whatever and more or less agreed with him; correct?
A. Um-hum. Yes.
Q. And then from that point forward, you then were saying that you had had sex with Mr. Razzaq; is that correct?
A. Yeah.
Q. And, in fact, you'd actually told him that you hadn't had anything to eat for a while; is that correct?
A. Um, yeah. I made some eggs, but I didn't eat them -- for him.
Q. And he asked you if a gun was held to your head, and you said no?
A. Um-hum.
Q. And he said that he asked a knife, and you said no; correct?
A. Correct.
Q. And, in fact, he then asked, did he rip your clothes off, and you said no?
A. Um-hum.
Q. Correct?

A. Correct.
Q. And then you stated he did nothing wrong; correct?
A. Correct.
Q. And at one point he questioned you some more, and you stated to him that you weren't scared; is that correct?
A. Correct.
Q. So when you talked about the next morning, do you just remember going home and going to bed?
A. I'm pretty sure I was already passed out in the car on the way there -- on the way home.
Q. And when you did arrive home, do you know what you did the rest of the day?
A. Slept. I don't really recall so... I'm just assuming I slept.
Q. So you slept the rest of the day, you think? Can you give me an approximate time of what time of day when you may have woke up?
A. No, I can't.
Q. Okay. You didn't really want to go to the hospital, did you?
A. No.
Q. And, in fact, Detective Miller kept pushing you that direction. Is that fair to say?
A. Yeah.

Q. And when you were being interviewed, was there anyone else with you?
A. No. It was just me and him in the room.
Q. Did you kind of feel like he was leading the interview?
A. When do you mean? Can you define that?
Q. Well, I mean, he was suggesting things as you went along; correct?
A. No. He was just asking me questions, just in different forms of sentences, I guess.
Q. Okay. Trying to get you to answer them the way he wanted. Is that fair to say?
A. He was asking the same question in different ways to see if I could understand them better.
Q. Okay. And so even though you kept saying that nothing occurred between you and Mr. Razzaq, he just kept asking; correct?
A. Yeah, it's their job.
Q. Okay. Have you been in any drug treatment?
MR. SHORT: Objection.
THE COURT: Sustained.
Q. (By Mr. Mitchell) And did you not, at least a couple of times, talk about how tired you were getting during the interview?
A. Yeah.

Q. And yet the interview still continued; is that correct?
A. Yeah.
Q. So I just want to be clear -- and I may have made a mistake when I was writing this down. In 2011 -- on May 27th, 2011, you were 14?
A. Yeah.
Q. Okay.
A. Yes.
Q. And then on the 28th, you turned 15; is that correct?
A. Yes.
Q. And what grade were you in at that time?
A. Sixth.
Q. Sixth?
A. Yeah.

MR. MITCHELL: No further questions, your Honor.

THE COURT: Redirect.

MR. SHORT: Thank you, Judge.

REDIRECT EXAMINATION

BY MR. SHORT:
Q. Very quickly. Ms. Davidson, are these easy things to talk about?
A. No.
Q. Were you looking forward to testifying today?

A. Yes, I did.
Q. I don't want you to tell me what Aladdin said, but let me ask you it this way. Was there any information that Aladdin gave you that led you to another location?
A. Yes.
Q. Okay. What information did he give you that led you to go do something else?
A. The phone call that he made.
Q. And what was your understanding of the phone call -- who was he calling?
A. He was calling his brother.
Q. And was he attempting to locate him for you?
MR. MITCHELL: Objection. Hearsay, your Honor.
THE COURT: Overruled.
Q. (By Mr. Short) Was Aladdin attempting to locate Murad for you?
A. Yes.
Q. And was he able to provide you a location that then you went to to check?
A. Yes.
Q. And what was that next location?
A. The mobile home park on -- near 47th and Hydraulic.
Q. And what was your understanding of what that address

was? Who lived there?
A. His mother.
Q. So did you go to that mobile home park?
A. Yes.
Q. Were you immediately able to locate your daughter then?
A. Not immediately. I was given the wrong lot number. Then I went to the mobile home park manager lady and asked just quaintly, oh, I forgot where Mrs. Razzaq lived. Can you tell me which one? And she was able to identify that lot number for me.
Q. And do you remember what that was off the top of your head?
A. No, sir.
Q. So did you end up going to that lot?
A. I went to that lot number.
Q. Now, who was all with you at this time?
A. Me and my wife.
Q. Was your son with you?
A. And my son, yes.
Q. Is that still Seth?
A. That is still Seth.
Q. What did you find when you got there?
A. I walked up to the door. The door was partially open. Before I knocked, I could see my daughter sitting

there on the couch on the east wall.
Q. Could you see anybody else?
A. I could -- no. I mean, I could see -- I could see remnants of people. I mean, you know, like their legs, you know, like -- I could just see my daughter sitting there.
Q. Was Murad there?
A. Yes.
Q. Where was he?
A. He was -- as looking at them, he was to the left of my daughter.
Q. What was going on as you approached the door?
A. Clarify.
Q. What was your impression of what people were doing in there as you approached the door?
A. I could smell marijuana.
Q. What did you do at the door once you see the scene?
A. I knocked.
Q. What was your state of mind at that point?
A. Angry. I pushed open the door after I knocked because I seen my daughter. I told her to get out in the car.
Q. How did she react to you coming through the front door?
A. Startled.
Q. Did she do what you told her to do?

A. Initially, no. I -- because I think she was too -- I believe she was too startled.
Q. What was Murad's reaction to you coming through the front door?
A. Startled.
Q. What about anybody else in that mobile home?
A. Two gentlemen sitting on either a chair or a love seat on the west wall just to the right of the door.
Q. Did they do anything?
A. Startled. They were startled.
Q. Eventually, did you get Beth out of the mobile home?
A. Yes.
Q. Was anything said by you while you were -- after your daughter had gone out and you were still present in that mobile home?
A. Yes.
Q. What did you say, and who were you saying it to?
A. I was saying it to Murad.
Q. Okay. And what were you saying?
A. I asked if he had -- may I say the word I said?
Q. If you recall exactly what you said, I want you to tell us what that was.
A. I asked him if he had fucked my daughter.
Q. Were you upset?
A. Yes.

Q. Was your voice raised?
A. Yes.
Q. Were you concerned that this situation could get physical?
A. Yes.
Q. And how far away were you from Murad when you confronted him?
A. Pretty close.
Q. And did it appear that you had his attention at that point?
A. I had his attention.
Q. Was he standing or seated?
A. He was sitting at that time.
Q. How did he respond to that question that you posed to him?
A. He told to me, yes, he had sexual relations with my daughter.
Q. Did you have to ask him more than once?
A. Yes.
Q. Why, as a dad in that situation, did you want to know the answer to that question?
A. So I knew how to respond to my daughter's needs, I guess.
Q. Let me back away from this scene just for a moment. Had you up to this point if you recall -- had you

contacted law enforcement with any of these possible locations for your daughter?
A. Yes.
Q. At this point?
A. At that point, yes.
Q. And when did you do that?
A. I walked out because I was so angry. I told my wife to stay in there -- no, I told my son to stay in there, and I told her to call the police right away. And she did. And then I went back in.
Q. There was some testimony previously that at some point you stopped at a QuikTrip on Hydraulic and a call was made there. Do you recall if the police were called from the QuikTrip about some possible locations for Beth? And if you don't recall --
A. I -- I don't remember that, sir. I'm sorry.
Q. But it's your recollection that 911 was called at the scene by somebody once you found Beth?
A. Yes.
Q. Did police respond?
A. Yes.
Q. And do you recall officers taking a statement from you at the scene?
A. Yes.
Q. So after this confrontation, you said you stepped out.

And then what -- describe kind of what happens next in this scene.
A. I know I told my wife and son to stay in there. I had called another gentleman friend of mine named John Hines, who is kind of a rock to me, and he had arrived. The police -- I do remember the police showing up. And, basically, at that point my wife and son had come outside. I -- it just -- from there he got arrested.
Q. Okay. You were present when police had contact with him?
A. Yes.
Q. What -- what do you and your family do from that scene then?
A. Do from that scene?
Q. Where --
A. We took our daughter to the emergency room to have her tested straight away.
Q. Okay. Did you want her to submit to an examination at the hospital?
A. I did.
Q. Did the detective talk to you about that, wanting to do that?
A. He did.
Q. And do you know if Beth did submit then to some

IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CRIMINAL DEPARTMENT

STATE OF KANSAS, Plaintiff,	
vs.	Case No. 11CR1615
MURRAD RAZZAQ, Defendant.	

TRANSCRIPT OF MOTIONS

Transcript of proceedings had and entered of record in the above-entitled case on December 14, 2014, before the Honorable Ben Burgess, Judge of Division No. 7 of the Eighteenth Judicial District of Kansas.

APPEARANCES:

The State of Kansas appeared by and through its attorney, Mr. Robert Short, Office of the District Attorney, 535 North Main, Wichita, Ka sas, 67203.

The Defendant, Murrad Razzaq, appeared in person and by his attorney, Mr. Patrick Mitchell, Attorney at Law, Wichita, Kansas.

CARRI L. MILES, CSR
OFFICIAL COURT REPORTER

discuss focusing only on whether Prine's other sexual misconduct was relevant and probative of his propensity to abuse AMC.

Had the State done so, the district judge would still have been called upon to determine relevance, i.e. materiality and probative value for propensity. And as of today, at least, he would still have needed to conduct a weighing of probative value and undue prejudice.

There were some other cases that were submitted that I considered, one of the cases that one of the parties cited was State vs. Bowen, it's a May, 2014 Kansas Supreme Court opinion, the Pacific 3d site is 323 P 3d 853, I don't have the Kansas cite, but that's a case, obviously, just recently decided. And in that case there is a discussion about the admission of that evidence and the Court discusses in Bowen's case, referring to it as a different case, the district court carefully considered how this evidence was presented, it decided it would allow the State to admit only a journal entry of conviction, considered the similarity of the offenses and excluded witness and victim testimony, which it considered more prejudicial.

Moreover, presentation of this evidence was not time consuming, as it was admitted in trial as a written stipulation given the jury, rather than through testimony, together with an instruction cautioning the jury that a guilty verdict could not be based on the prior crime evidence alone.

Quite honestly, when I read that discussion in this Supreme Court opinion I looked back and I saw that it was an appeal from Marion County District Court, Michael Powers was the judge, I called Judge Powers and asked him to provide me with the instructions that he gave in that case and the limiting instruction that he gave in that case and those are the documents that I provided to counsel.

So the question is whether or not the prior conviction of Mr. Razzaq has any relevance a d probative value in proving the crime of aggravated indecent liberties in this case. And I would note that Mr. Razzaq was convicted in the State of Missouri, the offenses occurred between July -- well, in July, of 2004, he was convicted of statutory sodomy in the first degree, convicted of child molestation in the

second degree. In the journal entries that Mr. Short, I think, submitted, they do make reference to the statutory citations for those offenses.

A d I would note that the crime of statutory sodomy in the first degree is defined by the Missouri statutes as a person who commits the crime of statutory sodomy in the first degree, if he has deviant sexual intercourse with another person who is less than 14 years of age. In this case he's charged with aggravated indecent liberties, which in the language of the complaint is that he unlawfully, intentionally engaged in sexual intercourse with a child, to wit: BLKD, age 14, who was 14 years or more years of age, but less than 16, who was not then married to Mr. Razzaq.

So the elements of the Missouri crime as compared to the elements of the Kansas crime with which he's charged are very similar. The only distinction being is in the Missouri statute that he was convicted under he was convicted of a crime involving deviant sexual conduct. And I have provided counsel with a copy of the Missouri statute that defines

deviant sexual conduct and it is the Missouri way of describing what in Kansas would be described as sodomy, but it does involve sexual intercourse with another person who is less than 14 years old. In this case he's charged with having sexual intercourse with a child between 14 and 16 years of age.

So number one, I find that 60-455 does allow evidence of prior crimes to establish propensity; and number two, I find that there is relevance and probative value in allowing that evidence to be admitted and that evidence will be admitted.

The only question that remains then is the form of evidence that is to be admitted. In item number six Mr. Short has provided a question and answer colloquy that he intends to submit to get that prior conviction into evidence before the jury. And in informal discussions I have asked Mr. Short whether he intends to offer the testimony of any of the Missouri witnesses to establish these elements that show the similarity and the propensity. I understand he does not intend to do that.

In that Bowen case there was a stipulation

Robert R. Short II, 20763
Assistant District Attorney
Sedgwick County Courthouse Annex
535 North Main
Wichita, Kansas 67203
(316) 660-3732

DC 18

FILED
APP DOCKET NO.
2014 NOV 20 A 9:42
CLERK OF THE DISTRICT
18TH JUDICIAL DISTRICT
SEDGWICK COUNTY, KANSAS

IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CRIMINAL DEPARTMENT

THE STATE OF KANSAS,
Plaintiff,
vs.
MURAD RAZZAQ,
Defendant.

Case No. 11CR1615

SUPPLEMENT TO STATES MOTION FOR ADMISSION OF EVIDENCE PURSUANT TO K.S.A. 60-455(d)

COMES NOW, the State of Kansas, by and through Robert R. Short II, Assistant District Attorney and hereby files its Supplement to its Motion for the Admission of Evidence Pursuant to K.S.A. 60-455(d). In support of this notice and motion, the State sets forth as follows:

FACTUAL BACKGROUND

On June 1, 2011, Defendant was charged in Sedgwick County Case No. 11CR1615 with one count of Aggravated Indecent Liberties with a Child, a Severity Level 3, Person Felony. Defendant is alleged to have had sexual intercourse with a runaway 14-year-old girl who lived near his south-Wichita neighborhood on or about May 27, 2011.

Prior to his arrest in Wichita, Defendant was arrested for First Degree Statutory Sodomy of a child under 14 in Missouri on September 4, 2004. Defendant was sentenced on one felony sex crime and one misdemeanor crime on December 5, 2005, and ordered to register as a sex offender. The victims in that case were two 7-year-old girls who reported being fondled by

Defendant.

The State asks the Court to incorporate by reference its prior Motion for Admission of Evidence Pursuant to 60-455(d) in considering the arguments and authorities in this supplemental motion.

PREPONDERENCE EVIDENCE UNDER K.S.A. 60-455(d) DOES NOT HAVE TO BE STRIKINGLY SIMILAR IN NATURE OR RECENT IN TIME TO BE ADMISSIBLE

Several recent examples in Kansas case law show that a Defendant's prior sexual misconduct is admissible at a trial on new sex charges, even when Defendant's prior conduct did not result in a court conviction, occurred decades earlier and/or involved victims of a different gender or age.

In State v. Remmert, 298 Kan.621, 316 P.3d 154, (2014), the Kansas Supreme Court reiterated its position on 60-455(d) in paragraph two of its syllabus: "Under the plain language of K.S.A. 2009 Supp. 60-455(d), the legislature carved out an exception to the prohibition on admission of certain types of other crimes and civil wrongs evidence to prove propensity of a criminal defendant to commit the charged crime or crimes for sex crime prosecutions. As long as the evidence is of another act or offense of sexual misconduct and is relevant to propensity or any matter, it is admissible, as long as the district judge is satisfied that the probative value of the evidence outweighs its potential for undue prejudice."

Remmert was charged with receiving oral sex from a 5-year-old boy. Remmert at 157. The trial court allowed the State to admit evidence of a prior sex act outlined in a diversion agreement involving Remmert's similarly-aged stepdaughter more than 20 years earlier. Remmert at 158. Remmert objected at trial and later appealed, but the Supreme Court held that, "[c]ontrary to Remmert's assertion, his prior diversion agreement was admissible under K.S.A. 2009 Supp. 60-

455(d) to show that he had the propensity to sexually abuse a child—an issue that was relevant to determining Remmert's guilt in this case." Remmert at 160.

In State v. Prine, 297 Kan. 460, 303 P.3d 662 (2103), uncharged allegations of sexual misconduct by Defendant, some of it dating as far back as 26 years prior to Defendant's trial in 2009, was presented to the jury from various witnesses. The admissibility of the evidence was upheld on appeal as proper under 60-455(d) as it was relevant to Prine's propensity to abuse the victim in the current case.

In State v. Smith, ____ Kan. ____, 327 P.3d 441 (2014), released in June, the Court ruled that 15-year-old prior sex crime convictions were properly admitted at Defendant's trial, and that remoteness in time was not a valid reason to keep the prior sexual misconduct out. Smith was accused of having improper sexual contact with a 15-year-old and a 13-year-old at a photo shoot in 2008. Smith's prior convictions from 1993 for aggravated indecent liberties with a child, aggravated criminal sodomy and rape were admitted. "We are compelled to point out that in sex crime cases K.S.A. 2009 Supp.60-455(d) permits admission of evidence of a defendant's prior sexual misconduct for any relevant and probative matter, including proving the defendant's propensity to engage in the charged conduct." Smith at 449.

In State Bowen, 299 Kan. 339, 323 P.3d 843 (2014), released in May, the court ruled that defendant's prior convictions for sexual battery and aggravated indecent solicitation were admissible as propensity evidence. The Court held that Defendant's prior convictions for sexual battery against a 12–year–old girl and aggravated indecent solicitation of an 11–year–old girl were admissible as propensity evidence in prosecution for rape and aggravated criminal sodomy of a 14–year–old girl. The Court further held that using the journal entries of conviction were a proper method of introducing the information. Bowen at 862.

In State v. Dean, 298 Kan. 1023, (2014), the Kansas Supreme Court reaffirmed the admissibility of propensity evidence in a child sex case and also noted the absence of a requirement for a limiting instruction. Dean at Syl. ¶ 1 and 2, "2. When evidence is admitted under K.S.A. 2009 Supp. 60-455 for its bearing on a defendant's propensity to reoffend, the district court is not required to issue a limiting instruction restricting the jury's consideration of the evidence."

The defendant in the Dean case was accused of rape and other charges involving a 10-year-old girl. The Supreme Court held that the trial court properly allowed the state to admit a prior conviction for indecent liberties with a child from 1984 to prove Dean's propensity to assault young girls.

CONCLUSION

WHEREFORE, The State seeks to admit evidence of Defendant's prior conviction and the underlying facts from his prior sex crimes in Missouri to show his propensity to have sex with underage girls. The probative nature of this evidence is significant in that it goes to prove the defendant's propensity to commit the crime with which he has been charged. The State respectfully requests the Court grant an order allowing the introduction at trial of the evidence listed and described above, either wholly or in part, as the Court deems fit and proper, pursuant to K.S.A. 60-455(d).

Respectfully submitted,

Robert R. Short II, #20763
Assistant District Attorney

NOTICE OF HEARING

Please take notice and be advised that the above Motion will be heard at 9 a.m. on Dec. 5, 2014, in Division 7 of the Eighteenth Judicial District, the Hon. Judge Ben Burgess presiding.

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Motion was mailed to Pat Mitchell, 210 N. St. Francis, Wichita, KS, 67202 on November 20th, 2014.

Robert R. Short II, #20763
Assistant District Attorney

IN THE 18TH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CRIMINAL DEPARTMENT

FILED
APP DOCKET NO. NA
2014 APR 11 P 3:31
CLERK OF DIST. COURT
18TH JUDICIAL DISTRICT
SEDGWICK COUNTY, KS
BY

STATE OF KANSAS,
Plaintiff
vs.
MURAD RAZZAQ-ABDEL,
Defendant

CASE#11CR1615

RESPONSE AND OPPOSITION TO PROSECUTION'S MOTION TO ADMIT ALLEGATIONS OF PRIOR BAD ACTS PURSUANT TO K.S.A. 60-455

Now comes the Defendant, MURAD RAZZAQ-ABDEL, by and through defendant's attorney, Patrick Mitchell, Defense Counsel, and responds in opposition to the prosecution's motion to admit allegations of prior bad acts pursuant to K.S.A. 60-455.

In support of this response, defendant states as follows:

PROCEDURAL POSTURE

1. The accused is charged in one count(s) of Aggravated indecent liberties (K.S.A. 21-3504(a)(1) (SL3PF).
2. The matter is set for trial March 31, 2014.
3. Bond is at least $50,000, as set July 28, 2011.

LEGAL AUTHORITY

4. K.S.A. 60-401 indicates: "(a) "Evidence" is the means from which inferences may be drawn as a basis of proof in duly constituted judicial or fact-finding tribunals, and includes testimony in the form of opinion, and hearsay. (b) "Relevant evidence" means evidence having any tendency in reason to prove any material fact."
5. Under K.S.A. 60-407, "Except as otherwise provided by statute [. . .], and (f) all relevant evidence is admissible."

DC 18

6. K.S.A. 60-455(a, b, c, and d) provide as follows:

> "(a) Subject to K.S.A. 60-447, and amendments thereto, evidence that a person committed a crime or civil wrong on a specified occasion, is inadmissible to prove such person's disposition to commit crime or civil wrong as the basis for an inference that the person committed another crime or civil wrong on another specified occasion.
> (b) Subject to K.S.A. 60-445 and 60-448, and amendments thereto, such evidence is admissible when relevant to prove some other material fact including motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.
> (c) Subject to K.S.A. 60-445 and 60-448, and amendments thereto, in any criminal action other than a criminal action in which the defendant is accused of a sex offense under articles 34, 35 or 36 of chapter 21 of the Kansas Statutes Annotated, prior to their repeal, or articles 54, 55 or 56 of chapter 21 of the Kansas Statutes Annotated, or K.S.A. 2012 Supp. 21-6104, 21-6325, 21-6326 or 21-6418 through 21-6421, and amendments thereto, such evidence is admissible to show the modus operandi or general method used by a defendant to perpetrate similar but totally unrelated crimes when the method of committing the prior acts is so similar to that utilized in the current case before the court that it is reasonable to conclude the same individual committed both acts.
> (d) Except as provided in K.S.A. 60-445, and amendments thereto, in a criminal action in which the defendant is accused of a sex offense under articles 34, 35 or 36 of chapter 21 of the Kansas Statutes Annotated, prior to their repeal, or articles 54, 55 or 56 of chapter 21 of the Kansas Statutes Annotated, or K.S.A. 2012 Supp. 21-6104, 21-6325, 21-6326 or 21-6418 through 21-6421, and amendments thereto, evidence of the defendant's commission of another act or offense of sexual misconduct is admissible, and may be considered for its bearing on any matter to which it is relevant and probative."

7. K.S.A. 60-445 provide as follows: "Except as in this article otherwise provided, the judge may in his or her discretion exclude evidence if he or she finds that its probative value is substantially outweighed by the risk that its admission will unfairly and harmfully surprise a party who has not had reasonable opportunity to anticipate that such evidence would be offered."

8. K.S.A. 60-446 provide as follows: "When a person's character or a trait of his or her character is in issue, it may be proved by testimony in the form of opinion, evidence of reputation, or evidence of specific instances of the person's conduct, subject, however, to the limitations of K.S.A. 60-447 and 60-448."

9. K.S.A. 60-447 provide as follows:

> "Subject to K.S.A. 60-448 when a trait of a person's character is relevant as tending to prove conduct on a specified occasion, such trait may be proved in the same manner as provided by K.S.A. 60-446, except that (a) evidence of specific instances of conduct other than evidence of conviction of a crime which tends to prove the trait to be bad shall be inadmissible, and (b) in a criminal action evidence of a trait of an accused's character as tending to prove guilt or innocence of the offense charged, (i) may not be excluded by the judge under K.S.A. 60-445 if offered by the accused to prove innocence, and (ii) if offered by the prosecution to prove guilt, may be admitted only after the accused has introduced evidence of his or her good character."

10. K.S.A. 60-448 provide as follows: "Evidence of a trait of a person's character with respect to care or skill is inadmissible as tending to prove the quality of his or her conduct on a specified occasion."

CONSTITUTIONAL AND STATUTORY PROTECTIONS

11. The United States Constitution, Fourth Amendment to the Bill of Rights provides, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

12. The United States Constitution, Fifth Amendment to the Bill of Rights provides,

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

13. The United States Constitution, Sixth Amendment to the Bill of Rights provides,

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

14. The Kansas Constitution affords citizens similar protections.

15. K.S.A. 21-5108 reminds us, "(a) In all criminal proceedings, the state has the burden to prove beyond a reasonable doubt that a defendant is guilty of a crime. This standard requires the prosecution to prove beyond a reasonable doubt each required element of a crime. (b) A defendant is presumed to be innocent until proven guilty. When there is a reasonable doubt as to which of two or more degrees of a crime the defendant is guilty, the defendant shall be convicted of the lowest degree only. When there is a reasonable doubt as to a defendant's guilt, the defendant shall be found not guilty. [. . .]"

SIGNIFICANT DEFINITIONS OF TERMS

16. Black's Law Dictionary defines the following terms of importance here:

    a. "relevant, adj. (16c) Logically connected and tending to prove or disprove a matter in issue; having appreciable probative value — that is, rationally tending to persuade people of the probability or possibility of some alleged fact. Cf. MATERIAL (2), (3). [Cases: Criminal Law 338; Evidence 99.] "The word 'relevant' means that any two facts to which it is applied are so related to each other that according to the common course of events one either taken by itself or in connection with other facts proves or renders probable the past, present, or future existence or non-existence of the other." James Fitzjames Stephen, A Digest of the Law of Evidence 2 (4th ed. 1881)."

    b. "probative (proh-b<<schwa>>-tiv), adj. (17c) Tending to prove or disprove. • Courts can exclude relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice. Fed. R. Evid. 403. [Cases: Criminal Law 338(1), 338(7); Evidence 99, 146.] — probativeness, probativity, n."

    c. "material, adj. (14c) 1. Of or relating to matter; physical <material goods>. 2. Having some logical connection with the consequential facts <material evidence>. [Cases: Criminal Law 382; Evidence 143.] 3. Of such a nature that knowledge of the item would affect a person's decision-making; significant; essential <material alteration of the document>. Cf. RELEVANT. — materiality, n."

d. "prejudice,n. (14c) 1. Damage or detriment to one's legal rights or claims. See dismissal with prejudice and dismissal without prejudice under DISMISSAL. legal prejudice.(18c) A condition that, if shown by a party, will usu. defeat the opposing party's action; esp., a con-dition that, if shown by the defendant, will defeat a plaintiff's motion to dismiss a case without prejudice. • The de-fendant may show that dismissal will deprive the defendant of a substantive property right or preclude the defendant from raising a defense that will be unavailable or endangered in a second suit. [Cases: Federal Civil Procedure k1700; Pretrial Procedure 510.] undue prejudice.(17c) The harm resulting from a fact-trier's being exposed to evidence that is persuasive but inad-missible (such as evidence of prior criminal conduct) or that so arouses the emotions that calm and logical reasoning is abandoned. 2. A preconceived judgment formed with little or no factual basis; a strong bias. [Cases: Judges 49.] — preju-dice,vb. — prejudicial,adj."

e. "dangerous-tendency test.(1938) A propensity of a person or animal to inflict injury. • The test is used, esp. in dog-bite cases, to determine whether an owner will be held liable for injuries caused by the owner's animal. — Also termed dangerous-propensity test. [Cases: Animals 66.2, 66.5(2).]"

17. In Kansas prior acts evidence is required to be relevant to some material fact which is in dispute. According to K.S.A. 60-401(b), "Relevant evidence means evidence any tendency in reason to prove.a material fact." (K.S.A. 60- 401[13D, or if it renders the desired inference more probable than it would be without the evidence. (State v. Baker, 219 Kan. 854, 549 P.2d 911.) Materiality, on the other hand, is largely a question of law. 22A C.J.S. Criminal Law, § 637 (1961); Slough, Relevancy Unraveled, 5 Kan. L. Rev. 1 (1956). Materiality requires that the fact proved be significant under the substantive law of the case and properly at issue. Professor Slough makes this distinction:

"... Though an evidential fact be relevant under the rules of logic, it is not material unless it has a legitimate and effective bearing on the decision of the ultimate facts in issue." (Slough, Relevancy Unraveled, 5 Kan. L. Rev. 1, 5 [1956])

18. The materiality requirement of K.S.A. 60-455 was discussed in State v. Bly, 215 Kan. 168, 523 P.2d 397, in these terms: "... Probative value consists of more than logical relevancy. Evidence of other crimes has no probative value if the fact it is supposed to prove is not substantially in issue-...." (Id. 176, 523 P.2d 404.)

19. "In Bly we held, in effect, that "materiality," for purposes of K.S.A. 60-455, contemplates a fact which has a legitimate and effective bearing on the decision of the case and is in dispute. If the fact is obvious from the mere doing of an act, or if the fact is conceded, evidence of other crimes to prove that fact should not be admitted because it serves no purpose to justify whatever prejudice it creates. (See 31A C.J.S. Evidence, §§ 159, 166 [19641)" State v. Faulkner, 220 Kan. 153, 155-56 (1976).

FEDERAL CASE LAW REGARDING PRIOR BAD ACTS ALLEGATIONS

20. Federal Rule(s) of Evidence (F.R.E.) 404, 413, 414, and 415, more than a decade ago, set up similar evidentiary rules to what now exists in Kansas under K.S.A. 60-455.

21. The general rule is, "Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait." F.R.E. 404(a). But like K.S.A. 60-455(d), F.R.E. 413, 414, and 415 modify this general rule to permit prior sexual conduct evidence in sexual assault and child sexual abuse cases. Of note is the legislative history attached to F.R.E. 413, discussing the reservations of the Judicial Conference about passing the law changes in 1994. Among the items discussed were the need for eventual mini-trials, as well as concerns of compromised protections for individuals accused of crimes.

22. In United States v. David Guardia, M.D., 135 F.3d 1326 (10th Circuit, 1998), the Court discusses the architecture of decision making standards in a case involving improper

conduct by a medical Dr., and F.R.E. 413:

> "Fed.R.Evid. 413(a). Thus, evidence offered under Rule 413 must meet three threshold requirements before a district court can admit it. A district court must first determine that "the defendant is accused of an offense of sexual assault." Id.; cf. Fed.R.Evid. 413(d) (defining an "offense of sexual assault"); Frank v. County of Hudson, 924 F.Supp. 620, 625 (D.N.J.1996) (noting similar requirement for Rule 413's companion Rule 415). Second, the court must find that the evidence proffered is "evidence of the defendant's commission of another offense of ... sexual assault." Fed.R.Evid. 413(a); see also Frank, 924 F.Supp. at 625. The district court implicitly recognized these requirements in its hearing on the motion in limine and in its written opinion. See United States v. Guardia, 955 F.Supp. 115, 117, 119 (D.N.M.1997); Tr. of Mot. Hr'g, December 30, 1996, passim. The third requirement, applicable to all evidence, is that the evidence be relevant. See Fed.R.Evid. 402 ("Evidence which is not relevant is not admissible.")."

23. United States v. David Guardia, M.D., then sets out the balancing test:

> "*1330 Thus, in United States v. Meacham, 115 F.3d 1488, 1495 (10th Cir.1997), we found that evidence proffered under Rule 414, which concerns prior acts of child molestation and uses language identical to Rule 413, is subject to Rule 403 balancing. See also United States v. Sumner, 119 F.3d 658, 661 (8th Cir.1997) (concluding that Rule 403 applies to Rule 414); United States v. Larson, 112 F.3d 600, 604–05 (2d Cir.1997) (same). Following Meacham, and for the above reasons, we hold that the 403 balancing test applies to Rule 413 evidence.
>
> III. The 403 Balancing Test and Rule 413
> [6] In accordance with the above, after the district court resolves the three threshold issues, including a finding that the proffered evidence is relevant, it must proceed to balance the probative weight of the Rule 413 evidence against "the danger of unfair prejudice, confusion of the issues, or misleading the jury, or ... considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed.R.Evid. 403. We hold that a court must perform the same 403 analysis that it does in any other context, but with careful attention to both the significant probative value and the strong prejudicial qualities inherent in all evidence submitted under 413."

24. Finally, the Court in United States v. David Guardia, M.D., discusses the concerns of prejudice:

> "While Rule 413 removes the per se exclusion of character evidence, courts should continue to consider the traditional reasons for the prohibition of character evidence as "risks of prejudice" weighing against admission. For example, a court should, in each 413 case, take into account the chance that "a jury will convict for crimes other than those charged—or that, uncertain of guilt, it will convict anyway because a bad person deserves*1331 punishment." Old Chief, 519 U.S. at ——, 117 S.Ct. at 650 (citations and internal quotation marks omitted). A court should also be aware that evidence of prior acts can have the effect of confusing the issues in a case. See Michelson v. United States, 335

U.S. 469, 476, 69 S.Ct. 213, 218–19, 93 L.Ed. 168 (1948). These risks will be present every time evidence is admitted under Rule 413. See United States v. Patterson, 20 F.3d 809, 814 (10th Cir.1994) ("Evidence of prior bad acts will always be prejudicial."). The size of the risk, of course, will depend on the individual case."
"[7] When balancing Rule 413 evidence under 403, then, the district court should not alter its normal process of weighing the probative value of the evidence against the danger of unfair prejudice. In Rule 413 cases, the risk of prejudice will be present to varying degrees. Propensity evidence, however, has indisputable probative value. That value in a given case will depend on innumerable considerations, including the similarity of the prior acts to the acts charged, see United States v. Edwards, 69 F.3d 419, 436 (10th Cir.1995), cert. denied, 517 U.S. 1243, 116 S.Ct. 2497, 135 L.Ed.2d 189 (1996), the closeness in time of the prior acts to the charged acts, see id., the frequency of the prior acts, the presence or lack of intervening events, see United States v. Wacker, 72 F.3d 1453, 1469 (10th Cir.), cert. denied, 519 U.S. 848, 117 S.Ct. 136, 136 L.Ed.2d 84 (1996), and the need for evidence beyond the testimony of the defendant and alleged victim. Because of the sensitive nature of the balancing test in these cases, it will be particularly important for a district court to fully evaluate the proffered Rule 413 evidence and make a clear record of the reasoning behind its findings. See United States v. Roberts, 88 F.3d 872, 881 (10th Cir.1996) (per curiam) (requiring findings for analysis of Rule 404(b) evidence under Rule 403)."

25. The 10th Circuit again revisits similar issues in United States v. Kerry Enjady, 134 F.3d 1427 (10th Circuit, 1998) in a decision unfavorable to the defendant:

"[4] The Supreme Court has explained the rationale for the historical ban on use of prior bad acts as propensity evidence:
'The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice.'
Michelson, 335 U.S. at 475–76, 69 S.Ct. at 218 (footnotes omitted)."

26. United States v. Kerry Enjady, then features a discussion of the historic concerns:

"The due process arguments against the constitutionality of Rule 413 are that it prevents a fair trial, because of "settled usage"—that the ban against propensity evidence has been honored by the courts for such a long time that it "must be taken to be due process of law," Hurtado v. California, 110 U.S. 516, 528, 4 S.Ct. 111, 117, 28 L.Ed. 232 (1884); because it creates a presumption of guilt that undermines the requirement that the prosecution must prove guilt beyond a reasonable doubt, see Estelle, 502 U.S. at 78, 112 S.Ct. at 485 (O'Connor, J., concurring); and because if tendered to demonstrate the defendant's criminal disposition it licenses the jury to punish the defendant for past acts, eroding the

presumption of innocence that is fundamental in criminal trials. See Sheft, supra, at 77–82."

27. But, United States v. Kerry Enjady, reaches a position to make a factors based analysis:

> "Rule 403 balancing in the sexual assault context requires the court to consider: '1) how clearly the prior act has been proved; 2) how probative the evidence is of the material fact it is admitted to prove; 3) how seriously disputed the material fact is; and 4) whether the government can avail itself of any less prejudicial evidence. When analyzing the probative dangers, a court considers: 1) how likely is it such evidence will contribute to an improperly-based jury verdict; 2) the extent to which such evidence will distract the jury from the central issues of the trial; and 3) how time consuming it will be to prove the prior conduct.' Sheft, supra, at 59 n. 16.
>
> [10][11] We agree with David Karp, who drafted Rule 413, that similar acts must be established by "sufficient evidence to support a finding by the jury that the defendant committed the similar act," citing Huddleston v. United States, 485 U.S. 681, 685, 108 S.Ct. 1496, 1499, 99 L.Ed.2d 771 (1988) (Rule 404(b) case). The district court must make a preliminary finding that a jury could reasonably find by a preponderance of the evidence that the "other act" occurred. See D. Karp, Evidence of Propensity and Probability in Sex Offense Cases and Other Cases, 70 Chi.–Kent L. Rev. 15, 19 (1994)."

KANSAS CASE LAW REGARDING K.S.A. 60-455 PRIOR BAD ACTS ALLEGATIONS

28. Kansas Courts have noted with concern the problems of admitting prior bad acts allegations.

29. In Kansas v. Jeremy Wells, 221 P.3d 561 (Kan., 2009), the Court reversed and remanded, with an opinion including the following:

> "As we noted in Jones, 277 Kan. at 424, 85 P.3d 1226:
> " '[A]dmission of prior wrongful acts simply to show the defendant's bad character, notwithstanding that one pos-sessed of a bad character is more likely to commit a crime than one who is not, is likely to prejudice the jury and blind it to the real issue of whether the defendant is guilty of the crime charged. For example, the jury may feel unsure that the government has proved its case, but decide that the defendant is an evil person who belongs in prison anyway. The jury may wish to punish the defendant for the prior act, even if they are unconvinced that he committed the act charged. Moreover, the jury may be unconvinced that the defendant committed either act, but that he more than likely committed at least one of them and should be punished.' " (Quoting United States v. Peden, 961 F.2d 517, 520 [5th Cir.1992].)
> Accordingly, Wells' conviction is reversed and the case is remanded for a new trial."

30. Kansas v. John Prine, 303 P.3d 662 (2013), also referred to as Prine II, brings the prior and current version of K.S.A. 60-455 analysis to a view of where it is today:

"Subsection (d) of the amended K.S.A. 60– 455 still requires, as the State admits, a district judge to perform a gatekeeping function. Under the language of the amended statute, the evidence of the other act or offense of sexual misconduct the State desires to admit must be "relevant and probative." This court's definition of those two terms makes the "and probative" portion of that phrase redundant; the concept of relevance encompasses both materiality and probative value. See K.S.A. 60–401(b); Prine I, 287 Kan. at 725, 200 P.3d 1. Materiality requires that whatever fact sought to be proved be in dispute or in issue between the parties to the case. See Garcia, 285 Kan. at 14, 169 P.3d 1069. The requirement of probative value demands that the evidence have a logical tendency to prove the material fact. See, e.g., State v. Reid, 286 Kan. 494, 505, 186 P.3d 713 (2008).

Under our cases construing and applying K.S.A. 60– 455 as it existed before the 2009 amendment, district judges were required to evaluate these concepts. See Prine I, 287 Kan. at 724–25, 200 P.3d 1 (under traditional rubric, ad-missibility of K.S.A. 60– 455 evidence depends on three factors: [1] evidence must be relevant to prove material fact; [2] material fact must be disputed; [3] probative value of evidence must not be substantially outweighed by risk of unfair prejudice); see also K.S.A. 60–403 (exclusionary rules inapplicable to undisputed material facts, except district court may weigh probative value, elect to exclude); State v. Leitner, 272 Kan. 398, 415, 34 P.3d 42 (2001) (although K.S.A. 60–445 requires district judge to balance probative value, prejudice only when opposing party claims surprise, balance may require exclusion "as a rule of necessity" when probative value substantially outweighed by the *674 risk of unfair prejudice, regardless of existence of surprise). Thus these concepts will be familiar as district judges apply the amended statute.

Under the prior version of K.S.A. 60– 455, we also required district judges to balance the probative value of other crimes or civil wrongs evidence against the threat of undue prejudice. See, e.g., State v. Vasquez, 287 Kan. 40, 49, 194 P.3d 563 (2008). Neither side in this appeal has suggested that we abandon this judicially created safeguard. We thus leave the question of whether the necessity of this weighing persists under new subsection (d) to another day. Assuming that it does persist, federal cases interpreting Rules 413, 414, and 415 on which subsection (d) was modeled provide helpful guidance on how the weighing is to be conducted. See United States v. Meacham, 115 F.3d 1488, 1492 (10th Cir.1997) (Rule 403 applies to Rule 414 evidence); see also United States v. Sturm, 673 F.3d 1274, 1284–85 (10th Cir.2012) (four-factor analysis under Rule 403 applies to prior crimes evidence: [1] how clearly prior act has been proved; [2] how probative evidence is of material fact it is admitted to prove; [3] how seriously disputed material fact is; and [4] whether government can avail itself of any less prejudicial evidence); Enjady, 134 F.3d at 1433 (setting forth Rule 403 test for Rule 413 evidence; noting exclusion of relevant evidence under test should be infrequent, reflecting Congress' legislative judgment that evidence of similar crimes should "normally" be admitted in child molestation cases); United States v. Benally, 500 F.3d 1085, 1090–91 (10th Cir.2007) (extending Enjady to Rule 414 evidence)."

ARGUMENT: LITIGATING PROPENSITY—CHANGES TO K.S.A. 60-455 SUBSEQUENT TO PRINE I SHOULD BE FOUND UNCONSTITUTIONAL

31. The relevant portion of the statute that the State now seeks to use in admit the allegations of prior bad acts is found at K.S.A. 60-455(d). This statute was created subsequent to Prine I [State v. Prine, 287 Kan. 713 (2009)].

32. During the 2009 Kansas Legislature, K.S.A. 60-455 was changed to include K.S.A. 60-455(d). Notable is the written opposition to HB 2250, offered February 11, 2009 by the Kansas Association of Criminal Defense Lawyers. Among the objections or concerns were the concern for departure, "from basic principles of both criminal law and the law of evidence [. . .]"

33. The new statutory changes as to sex related misconduct, undermines the previous language that generally evidence of other crimes or wrongs are not admissible to prove a defendant's disposition to commit another crime. K.S.A. 60-455.

34. There is no guidance in the new statute as to whether it opens the door to propensity evidence.

35. Admittedly, the federal statute is similar to the amendment and has been interpreted to allow propensity evidence. However, the federal statute has been called into question because it is based upon an *assumption* that if a defendant has a prior act, he has a propensity to commit the act presently accused. Federal Rule of Evidence 413 was passed fifteen years ago. Last year, scientific-evidence guru Edward J. Imwinkelried asked what light new psychological research sheds on the advisability of Rule 413 and its counterparts. *Reshaping the "Grotesque" Doctrine of Character Evidence: the Reform Implications of the Most Recent Psychological Research*, 36 SW. U. L. REV. 741 (2008). In *Reshaping the "Grotesque*," Professor Imwinkelried revisits the psychological underpinnings of Rule 413, and asks whether the rule's assumptions stand up given today's professional understanding of character and predictability. Importantly, he concludes that "the [psychological] literature

continues to raise doubts about the wisdom of Rules 413-15 at least when they are invoked to permit a trier of fact to infer an accused's prior character trait from a single instance of previous conduct. The statutes authorize lay triers of fact to perform an inferential task that all serious psychological researchers have seemingly abandoned." *Id.* at 767-68.

36. The State bears the burden of proving the prior act is actually relevant to the defendant's propensity to commit the alleged crime at hand. How is this not done without a discussion of whether the facts of the prior case are similar to the case at hand? Even though the legislature has removed this language – in hopes of avoiding the ruling of State v. Prine, 287 Kan. 713 (2009) – there must still be a finding that the evidence is relevant and probative to the factor the State seeks to prove, here propensity. Mere existence of a prior act is insufficient and the burden is on the State to prove otherwise. The State should be required to present some pre-trial evidence that, among other things: a) existence of a prior act statistically indicates propensity to re-offend, and b) the statistics demonstrate a propensity to re-offend in this manner – i.e., does a non-similar prior act statistically indicate a propensity to offend latter in a non-similar manner?

37. Previously, the appellate courts have held that defendant's are not allowed to present evidence during jury trial that the defendant had a sex offender evaluation and no signs of sexual deviance were found. *See State v. Price*, 30 Kan. App. 2d 569 (2002), *rev'd on other grounds*, 275 Kan. 78 (2003). The *Price* Court explained:

> "(1) evidence that defendant lacks the characteristics of a typical offender is not relevant to whether defendant committed the crime in question; and (2) the only inference which can be drawn from such evidence, namely that the defendant who does not match the child sexual abuser profile must be innocent, is an impermissible one. *Id.* at 581."

38. The new K.S.A. 60-455 significantly broadens the landscape of relevant evidence. If the state may offer propensity evidence, then the defendant must be allowed to rebut that evidence with anti-propensity evidence. The new statute opens up a whole can of worms because the defense will be allowed to rebut propensity evidence during extensive pre-trial

hearings and trial.

39. Because recidivism – aka propensity – is often a question for experts, a mere motion by the State will be insufficient to determine the issue. The court is now in the position to hold a mini-trial before trial that will likely resemble a commitment proceedings, requiring extensive expert testimony and perhaps multiple examinations of the defendant.

40. If the court decides that the state's proffered evidence of prior behavior is relevant to prove the defendant's propensity to commit the charged crime, the defendant will then have the right to confront the conclusion that it does in fact prove propensity at trial. Thus, additional time may be needed for the trial itself because it will turn into a battle of the experts. The defendant will have a right to present evidence that (1) the prior behavior didn't happen; (2) if it did, that behavior doesn't, as a statistical or behavioral matter, indicate any meaningful propensity to commit the charged behavior; and/or (3) if it did, the defendant has reformed since the prior behavior. The real focus of the trial will quickly be lost in this battle over the existence and the meaning of the prior behavior.

41. Even should propensity evidence be allowed, it is still subject to the other rules of evidence. The admission of propensity evidence is subject to other evidentiary rules, such as the constitutional and statutory rules against hearsay, and the "rule of necessity that the trial court may exclude any evidence which may unfairly prejudice a jury." State v. Davis, 213 Kan. 54, 57-58 (1973); State v. Gunby, 282 Kan. 39, 63 (2006) ("relevance must still be measured against any applicable exclusionary rules"); United States v. Enjady, 134 F.3d 1427, 1433 (10th Cir. 1998) ("without the safeguards embodied in Rule 403 we would hold the rule unconstitutional"). It took years of litigation to establish this simple point as to the original K.S.A. 60-455, *see* Gunby; the amendment should make the point explicit. The evidence of the prior act cannot merely be summarized for the jury by an officer, they must hearing from the previous complaining witnesses unless some evidentiary rule otherwise allows. In effect, this trial will be two trials in one.

42. The State must still demonstrate that the evidence is still more probative than prejudicial. This is where the similarity of the two instances is necessary – despite omission of language in the statute – to the Court's analysis. How is the Court to determine probative value if not to compare the specifics of the previous case? Further, if the issue is propensity, how is the Court to determine whether the previous act is probative without some evidence of recidivism and statistics? The Court acts as a gatekeeper and, again, a mere assertion by the State that the prior exists is insufficient to overcome the inherent prejudice.
43. Further, propensity evidence is or should be unconstitutional. Should the accused be tried upon evidence that distracts a jury of the true issue – his guilt or lack of guilt in this case – it robs him of his rights of Due Process and Fair Trial. Should the Court grant the State's motion and allow the evidence without testimony that the prior act indicates recidivism (propensity), the accused is robbed of his rights of Due Process and Fair Trial. By preventing the defendant from rebutting the same in a pre-trial hearing and at trial, he will be robbed of his rights of Due Process and Fair Trial.
44. Finally, should the State be allowed to utilize this unconstitutional statute, it will rob the accused of his rights to Due Process and Fair Trial. It cannot be stated enough. In the Prine decision, the case that prompted the legislature to pass the amended statute, Justice Breir stated that it was up to the legislature to remedy the law surrounding admissability of this evidence, but challenged them to do so in a way that did not do "unconstitutional violence" to the defendant's rights.
45. The legislature's remedy was remedial – it merely omitted the language that offended them. The amendment did nothing to safeguard a citizen's Constitutional rights. The accused asserts herein that the 2009 K.S.A. 60-455 violates the Fifth and Sixth Amendments to the United States Constitution and Sections Five and Ten of the Kansas Constitution Bill of Rights because it does not require the State to make a showing of propensity before such is allowed at trial, allows him to be tried on propensity evidence which seriously undermines

his presumption of innocence unless found guilty beyond a reasonable doubt based upon facts that would support the charge at hand.

46. The use of propensity evidence in this case will deprive the accused of a fair trial.

ARGUMENT: MERE ALLEGATIONS OF SIMILAR PRIOR CONVICTIONS SHOULD NOT BE ADMISSIBLE

47. The prosecution sets forth criminal history of the accused. However the prosecution does not offer how that criminal history may in fact be distinguishable from the present allegations.

48. Further, the prosecution asks the Court at the District Court (by mentioning it), to consider the abuse of discretion standard that is only significant on appeal. The prosecution sets the burden for decision making at an unfair hurdle. At the District Court level, neither abuse of discretion, nor harmless error, nor any other appellate standard of review should be the basis for decision, nor anticipated protection for a decision. Instead the Court must review using the legal principles for the issues of K.S.A. 60-455, applicable at the District Court level.

ARGUMENT: PREJUDICIAL DANGER

49. If a single jury is forced to hear evidence of prior sexual allegations against the accused, alongside the pending case, there is a significant risk they will shift from evaluating the burden of proof in the pending case, to the punishment of the defendant for all offenses. How often has the Court experienced debriefing a jury after a trial verdict, whereupon the jurors learned of the extensive priors of a criminal defendant—and thereupon noted a significant interest by the jurors in the fact that they were not told the prior criminal history of the defendant. Jurors are not told, because they cannot compartmentalize the information and remain fair and impartial.

50. The worse the prior bad acts allegations are, the greater the risk of prejudicial danger (conviction based upon a bad character inference). In this case, the prior bad acts allegations, if they were true, could fairly be characterized as very bad.

51. It is important for the Court to review definitions of prejudice, such as those found in Black's Law Dictionary, and employ such definitions—as opposed to what definitions appear to be outcome oriented views of prejudice, as can be located in Kansas v. Nathan Inkelaar, 293 Kan. 414, at 425, 264 P.3d 81 (Kan., 2011), which discusses Kansas v. Hollingsworth, 289 Kan. 1250 at 1259, 221 P.3d 1122 (Kan., 2009) and decisions about prejudice oriented toward the, "wrong result," and by implication, the right result.

ARGUMENT: PROBATIVE VALUE

52. The prosecution that the prior bad acts are true and valid prior convictions, but even if they are, there is no proof that they are probative of the pending allegations.

53. Prior bad acts evidence is not relevant evidence because it has no tendency in reason to prove any of the elements of any of the charged offenses. Prior bad acts allegations evidence and propensity submissions merely invite a fallacy to stand in as a substitution for evidence, reason, and logic.

54. The Court should consider factors of distinction as well as similarity. Are the actual acts similar? How do the complaining witnesses appear—similar or different?

55. In Kansas v. Robert Longstaff, the Court examines the similarity requisite for admission of prior allegations, when compared to the pending allegations, and decides in the defendant's favor on the issue—but overrides the decision on a K.S.A. 60-261 harmless error analysis:

> "[13][14] While we agree there are similarities between the crimes, these similarities do not rise to the level of being so strikingly similar in pattern, or so distinct in method of operation, as to be a signature as required under Prine. As we noted in Torres, for crimes to be strikingly similar, the similarities "must be something more than the similarities common to nearly all sexual-abuse cases." 294 Kan. at 141, 273 P.3d 729. On appeal, we review a district court's decision under the "signature" standard for an abuse of discretion. Prine, 287 Kan. at 735, 200 P.3d 1. Judicial dis-cretion is abused if *895 "judicial action (1) is arbitrary, fanciful, or unreasonable, i.e., if no

> reasonable person would have taken the view adopted by the trial court; (2) is based on an error of law, i.e., if the discretion is guided by an erroneous legal conclusion; or (3) is based on an error of fact, i.e., if substantial competent evidence does not support a factual finding on which a prerequisite conclusion of law or the exercise of discretion is based." State v. Ward, 292 Kan. 541, 550, 256 P.3d 801 (2011), cert. denied —— U.S. ——, 132 S.Ct. 1594, 182 L.Ed.2d 205 (2012).
> In this case, the district court based its decision on an incorrect legal standard when it found the prior conviction was "substantially similar" with the crimes charged. Our caselaw instead requires using a "strikingly similar" standard, which the facts of this case do not meet. Accordingly, the district court abused its discretion in admitting evidence of Longstaff's previous conviction for attempted aggravated incest."

56. The decision in Kansas v. John Prine, 303 P.3d 662 (2013) appears to in no way compromise the standard of comparing the present charges against the prior bad acts allegations or convictions, to see if there is a comparison at a level that can be characterized as a signature or strikingly similar conduct.

CONCLUSION

57. K.S.A. 60-455 is an area highlighted with District Court judicial error. At some point, the Kansas Appeals Courts could stop finding what appears to be a concentration of harmless error, and alternatively acknowledge that the Appellate Courts will not reweigh the evidence to ratify errors as harmless. When an accused is on trial for a serious felony, and at risk of imprisonment, no error feels harmless for the defendant.

58. If the Court grants the prosecution motion to allow prior bad acts allegations as evidence, the prosecution should be required to first prove the prior bad acts allegations, beyond a reasonable doubt, before a jury, in a mini-trial. In the mini-trial, no prior bad acts allegations should be permitted. However, in the mini-trial, extensive expert testimony on the question of propensity should be allowed as a second bifurcated question—only after a verdict (if one of guilt is reached). Then, and only then, if the prosecution has been successful, should there be a new and different jury selected, for the consideration of this pending case, where in prior bad acts allegations, which have been proven at a constitutionally sufficient level,

could be admitted. And even if the Court adopted such a procedure, the defense would object to the prejudice to the rights of the accused.

WHEREFORE, defendant moves this Court to enter an order prohibiting the admission of evidence as requested by the prosecution.

Respectfully submitted,

Patrick Mitchell #20318
Defense Counsel
Beall & Mitchell, L.L.C.
210 N. St. Francis
Wichita, Kansas 67202
beallandmitchell@sbcglobal.net
316-267-8181

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Motion will be or was delivered in person to the office of the Sedgwick County District Attorney this filing date.

Defense Counsel

NOTICE OF HEARING

Please take notice and be advised that the foregoing Motion will be heard at 9:00 AM on the April ~~March~~ 25, 2014, before Judge _____.

Robert R. Short II, 20763
Assistant District Attorney
Sedgwick County Courthouse Annex
535 North Main
Wichita, Kansas 67203
(316) 660-3732

DC 18

FILED
APP DOCKET NO.
2014 MAR -7 P 3:21
CLERK OF DIST. COURT
18TH JUDICIAL DISTRICT
SEDGWICK COUNTY, KS
BY

IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CRIMINAL DEPARTMENT

THE STATE OF KANSAS,
Plaintiff,
vs.
MURAD RAZZAQ,
Defendant.

Case No. 11CR1615

STATES MOTION FOR ADMISSION OF EVIDENCE PURSUANT TO K.S.A. 60-455(d)

COMES NOW, the State of Kansas, by and through Robert R. Short II, Assistant District Attorney and hereby files its Motion for the Admission of Evidence Pursuant to K.S.A. 60-455(d). In support of this notice and motion, the State sets forth as follows:

FACTUAL BACKGROUND

On June 1, 2011, Defendant was charged in Sedgwick County Case No. 11CR1615 with one count of Aggravated Indecent Liberties with a Child, a Severity Level 3, Person Felony. Defendant is alleged to have had sexual intercourse with a 14-year-old girl who lived in his south-Wichita neighborhood on or about May 27, 2011. Prior to his arrest in Wichita, Defendant was arrested for First Degree Statutory Sodomy of a child under 14 in Missouri on September 4, 2004. Defendant was sentenced on one felony sex crime and one misdemeanor crime on December 5, 2005, and ordered to register as a sex offender.

K.S.A. 60-455 PRIOR TO AMENDMENT

Unless prohibited by statute, constitutional provision, or court decision, all relevant

evidence is admissible. Evidence is relevant if it has any tendency to prove any material fact. To establish relevance, there must be some material or logical connection between the asserted facts and the inference or results they are intended to establish. State v. Reid, 186 P.3d 713, Syl. ¶ 1 (June 28, 2008).

Once relevance is established, evidentiary rules governing admission and exclusion may be applied either as a matter of law or in the exercise of the district judge's discretion, depending on the rule in question. State v. Reid, 186 P.3d 713, 721. K.S.A. 60-455 states in pertinent part: "Subject to K.S.A. 60-447, evidence that a person committed a crime or civil wrong on a specified occasion, is inadmissible to prove his or her disposition to commit crime or civil wrong as the basis for an inference that the person committed another crime or civil wrong on another specified occasion, but, subject to K.S.A. 60-445 and 60-448 such evidence [that a person committed a crime or civil wrong on a specified occasion] is admissible when relevant to prove some other material fact, including motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident." K.S.A. 60-455. State v. Reid, 186 P.3d 713, 721.

This list however, is exemplary, not exclusive. It is possible that other crimes and civil wrongs evidence is relevant and admissible to prove a material fact other than the eight listed in the statute. State v. Gunby, 282 Kan. 39, 56 (2006).

The Kansas Supreme Court has clarified the analysis of 60-455 evidence in State v. Prine, 287 Kan. 713 (2009) (Prine I). In Prine I, the Court outlined a three-step analysis for the introduction of 60-455 evidence:

> A court must determine that proposed evidence is relevant to prove a material fact. The court must also determine that the material fact is disputed and that the probative value of the evidence outweighs its potential for producing undue prejudice. Finally, the court must give a limiting instruction informing the jury of the specific purpose for admission. Id., syl. 1.

Decisions of the trial court will be met with mixed review levels. The question of "probative" is reviewed under an abuse of discretion standard; "materiality" is reviewed de novo; "whether the fact is at issue at trial" is reviewed de novo; and "probative vs. prejudicial" is reviewed under a deferential standard. Id. at 9-10. Even so, a failure of the trial court to conduct such inquiries is not fatal and may be considered "harmless error". Id. at 10 (citing to State v. Vasquez, 287 Kan. 40, 194 P.3d 563 (2008)).

AMENDMENT OF K.S.A. 60-455

"Under the plain language of K.S.A. 2009 Supp. 60-455(d), the legislature carved out an exception to the prohibition on admission of certain types of other crimes and civil wrongs evidence to prove propensity of a criminal defendant to commit the charged crime or crimes for sex crime prosecutions. As long as evidence is of "another act or offense of sexual misconduct" is relevant to propensity or "any matter," it is admissible, so long as the district judge is satisfied that the probative value of the evidence outweighs its potential for undue prejudice." State v. Prine, ___ Kan. ___, 303 P.3d 662, Syl. ¶ 3 (2013) (Prine II).

K.S.A. 2009 Supp. 60-455(d), states, "Except as provided in K.S.A. 60-445, and amendments thereto, in a criminal action in which the defendant is accused of a sex offense under articles 34, 35 or 36 of chapter 21 of the Kansas Statutes Annotated, prior to their repeal, or articles 54, 55 or 56 of chapter 21 of the Kansas Statutes Annotated, or K.S.A. 21-6104, 21-6325, 21-6326 or 21-6418 through 21-6421, and amendments thereto, evidence of the defendant's commission of another act or offense of sexual misconduct is admissible, and may be considered for its bearing on any matter to which it is relevant and probative."

An Act or offense of sexual misconduct is defined in K.S.A. 2009 Supp 60-455(g) as:

> (1) Any conduct proscribed by article 35 of chapter 21 of the Kansas Statutes Annotated, prior to their repeal, or article 55 of chapter 21 of the Kansas

Statutes Annotated, or K.S.A. 21-6419 through 21-6421, and amendments thereto;
(2) the sexual gratification component of aggravated human trafficking, as described in subsection (a)(1)(B) and (a)(2) of K.S.A. 21-3447, prior to its repeal, or subsection (b)(1)(B) or (b)(2) of K.S.A. 21-5426, and amendments thereto;
(3) exposing another to a life threatening communicable disease, as described in subsection (a)(1) of K.S.A. 21-3435, prior to its repeal, or subsection (a)(1) of K.S.A. 21-5424, and amendments thereto;
(4) incest, as described in K.S.A. 21-3602, prior to its repeal, or subsection (a) of K.S.A. 21-5604, and amendments thereto;
(5) aggravated incest, as described in K.S.A. 21-3603, prior to its repeal, or subsection (b) of K.S.A. 21-5604, and amendments thereto;
(6) contact, without consent, between any part of the defendant's body or an object and the genitals, mouth or anus of the victim;
(7) contact, without consent, between the genitals, mouth or anus of the defendant and any part of the victim's body;
(8) deriving sexual pleasure or gratification from the infliction of death, bodily injury or physical pain to the victim;
(9) an attempt, solicitation or conspiracy to engage in conduct described in paragraphs (1) through (8); or
(10) any federal or other state conviction of an offense, or any violation of a city ordinance or county resolution, that would constitute an offense under article 35 of chapter 21 of the Kansas Statutes Annotated, prior to their repeal, or article 55 of chapter 21 of the Kansas Statutes Annotated, or K.S.A. 21-6419 through 21-6421, and amendments thereto, the sexual gratification component of aggravated human trafficking, as described in subsection (a)(1)(B) and (a)(2) of K.S.A. 21-3447, prior to its repeal, or subsection (b)(1)(B) or (b)(2) of K.S.A. 21-5426, and amendments thereto; incest, as described in K.S.A. 21-3602, prior to its repeal, or subsection (a) of K.S.A. 21-5604, and amendments thereto; or aggravated incest, as described in K.S.A. 21-3603, prior to its repeal, or subsection (b) of K.S.A. 21-5604, and amendments thereto, or involved conduct described in paragraphs (6) through (9).

In State v. Remmert, ___ Kan. ___, 316 P.3d 154, (2014), the Kansas Supreme Court reiterated its position on 60-455(d) in paragraph two of its syllabus: "Under the plain language of K.S.A. 2009 Supp. 60-455(d), the legislature carved out an exception to the prohibition on admission of certain types of other crimes and civil wrongs evidence to prove propensity of a criminal defendant to commit the charged crime or crimes for sex crime prosecutions. As long as the evidence is of another act or offense of sexual misconduct and is relevant to propensity or any matter, it is

admissible, as long as the district judge is satisfied that the probative value of the evidence outweighs its potential for undue prejudice."

Remmert was charged with receiving oral sex from a 5-year-old boy. Remmert at 157. The trial court allowed the State to admit evidence of a prior sex act outlined in a diversion agreement involving Remmert's similarly-aged stepdaughter more than 20 years earlier. Remmert at 158. Remmert objected at trial and later appealed, but the Supreme Court held that, "[c]ontrary to Remmert's assertion, his prior diversion agreement was admissible under K.S.A. 2009 Supp. 60-455(d) to show that he had the propensity to sexually abuse a child—an issue that was relevant to determining Remmert's guilt in this case." Remmert at 160.

Act of Sexual Misconduct

The State seeks to admit evidence of Defendant's prior conviction and the underlying facts from his prior sex crimes in Missouri to show his propensity to have sex with underage girls.

Defendant's conduct in Missouri fits within the Chapter 35 offenses that are within the exception outlined in K.S.A. 60-455(g)(1). So long as the Court finds this evidence is relevant and probative, it should be admitted in the State's case in chief at trial.

Relevant and Probative

"Under the language of the amended statute, the evidence of the other act or offense of sexual misconduct the State desires to admit must be 'relevant and probative.' This court's definition of those two terms makes the 'and probative' portion of that phrase redundant; the concept of relevant encompasses both materiality and probative value. Materiality requires that whatever fact sought to be proved be in dispute or in issue between the parties in the case. See Garcia, 285 Kan. at 14, 169 P.3d 1069. The requirement of probative value demands that the

evidence have a logical tendency to prove a material fact. See, e.g. State v. Reid, 286 Kan. 494, 405 186 P.3d 713 2008." Prine II, at 673.

Essentially, the Kansas Supreme Court has laid out the analysis of K.S.A. 60-455(d) evidence in a way that is similar to, and borrows case law from, the prior Gunby/K.S.A. 60-455 analysis.

In this case, the material disputed fact is the defendant's propensity to commit crimes similar to that with which he has been charged. This fact is clearly in dispute between the parties as contemplated by the Kansas Supreme Court in Prine and Garcia. If it were not, this litigation would not be on going.

Additionally, the evidence the State seeks to admit is probative as it has the logical tendency to prove a material fact. In the Missouri case, Defendant had prohibited sexual contact with an underage girl. In the present case, Defendant is accused of having prohibited sexual contact with an underage girl. The probative nature of this evidence is significant in that it goes to prove the defendant's propensity to commit the crime with which he has been charged.

More Probative than Prejudicial

Under a regular K.S.A. 60-455 analysis, the final step is for the district court to determine if the evidence is more probative than prejudicial. "Clearly evidence of Garcia's previous crimes was prejudicial because "[a]ll evidence that is derogatory to the defendant is by its nature prejudicial to the defendant's claim of not guilty. Evidence that actually or probably brings about the wrong results under the circumstances of the case is '*unduly prejudicial.*'" State v. Garcia, 285 Kan. 1, 18 (2007).

In Prine II, the Kansas Supreme Court leaves unanswered the question of whether or not this is necessary when evidence is being admitted for purposes of propensity under K.S.A. 60-455(d). The Court does, however, suggest that if that were to be necessary in the future, looking to the

federal cases pertaining to FRE 403, 413, 414, and 415 (the rules after which this statute was drafted), would be helpful. It suggests the four factor analysis laid out under Rule 403. 1) How clearly the prior act has been proved; 2) how probative evidence is of material fact it is admitted to prove; 3) how seriously disputed the material fact is; and 4) whether government can avail itself to any less prejudicial evidence. Prine II at 674.

Additionally, the Court notes, the exclusion of relevant evidence under this test should be infrequent, reflecting Congress' legislative judgment that evidence of similar crimes should "normally" be admitted in child molestation cases. United States v. Benally, 500 F.3d 1085, 1090-91. (1985).

If the federal analysis were to be performed in this case, out of an abundance of caution, the Court would find, 1) the prior acts in Missouri resulted in a conviction; 2) the evidence is extremely probative of the defendant's propensity to commit similar crimes; 3) the disputed fact is Defendant's guilt in the present case, which is seriously disputed by both parties; 4) there is no less prejudicial evidence to which the State can avail itself.

Limiting Instruction

It is worth noting under K.S.A. 60-455(d), no limiting instruction is required by statute or case law. The Kansas Supreme Court addresses this briefly in Prine II, and notes the limiting instruction is essentially useless because under K.S.A. 60-455(d), the evidence *is* being admitted for the *sole purpose* of proving up the defendant's propensity to commit the crimes with which he has been charged. A limiting instruction fashioned in the way it has been previously used with K.S.A. 60-455 evidence is unnecessary, as it cautioned juries against using that evidence to consider the defendant's propensity. Prine II at 674.

In the very recent case of State v. Dean, ___ Kan. ___, (2014), published online on February 28, 2014, under opinion no. 105,625, the Kansas Supreme Court reaffirmed the admissibility of propensity evidence in a child sex case and also noted the absence of a requirement for a limiting instruction. Dean at Syl. ¶ 1 and 2, "2. When evidence is admitted under K.S.A. 2009 Supp. 60-455 for its bearing on a defendant's propensity to reoffend, the district court is not required to issue a limiting instruction restricting the jury's consideration of the evidence."

The defendant in the Dean case was accused of rape and other charges involving a 10-year-old girl. The Supreme Court held that the trial court properly allowed the state to admit a prior conviction for indecent liberties with a child from 1984 to prove Dean's propensity to assault young girls. Dean at ___. While the trial court did give a limiting instruction, it was not required. Dean at ___.

CONCLUSION

WHEREFORE, the State respectfully requests the Court grant an order allowing the introduction at trial of the evidence listed and described above, either wholly or in part, as the Court deems fit and proper, pursuant to K.S.A. 60-455(d).

Respectfully submitted,

Robert R. Short II, #20763
Assistant District Attorney

NOTICE OF HEARING

Please take notice and be advised that the above Motion will be heard at 9 a.m. on March 28, 2014, in Division 17 of the Eighteenth Judicial District, the Hon. Judge John J. Kisner presiding.

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Motion was mailed to Pat Mitchell, 210 N. St. Francis, Wichita, KS, 67202 on March 7, 2014.

Robert R. Short II, #20763
Assistant District Attorney

FILED

APP DOCKET NO.

IN THE DISTRICT COURT OF KANSAS
EIGHTEENTH JUDICIAL DISTRICT
SEDGWICK COUNTY, CRIMINAL DEPARTMENT

2011 JUN -1 P 12: 17

CLERK OF THE DISTRICT
18TH JUDICIAL DISTRICT
SEDGWICK COUNTY, KANSAS

THE STATE OF KANSAS,
Plaintiff,

vs.

MURAD M. RAZZAQ,
W/M; DOB: XX/XX/1983,
SSN: XXX-XX-9662,
KDR: 3087G1180454,
LEO #: 11C035571,
Defendant.

Case No.

11CR 1615

COMPLAINT/INFORMATION

COUNT ONE

COMES NOW KRISTINA L. BARTON EDWARDS, a duly appointed, qualified and acting Assistant District Attorney of the 18th Judicial District of the State of Kansas, and for and on behalf of said State gives the court to understand and be informed that in the County of Sedgwick, and State of Kansas, and on or about the 27th day of May, 2011 A.D., one MURAD M. RAZZAQ did then and there unlawfully and intentionally engage in sexual intercourse with a child, to-wit: BLKD, age: 14, year of birth: 1996, who was fourteen (14) or more years of age but less than sixteen (16) years of age, who was not then married to MURAD M. RAZZAQ;

Contrary to Kansas Statutes Annotated 21-3504(a)(1), Aggravated Indecent Liberties, Severity Level 3, Person Felony

all of the said acts then and there committed being contrary to the statutes in such cases made and provided and against the peace and dignity of the State of Kansas.

KRISTINA L. BARTON EDWARDS, #20772
Assistant District Attorney

State Of Kansas)
) ***ss:***
Sedgwick County)

Virgil H. Miller Jr., being first duly sworn, states that I have read the above and foregoing Complaint/Information and know the contents thereof, and that the same is true in substance and in fact.

VIRGIL H. MILLER JR., C1468
Complaining Witness

SUBSCRIBED AND SWORN to before me on this 1st day of June, 2011.

NOTARY PUBLIC

State Of Kansas)
) ***ss:***
Sedgwick County)

KATHY J. ABSTON
Notary Public, State of Kansas
My Appointment Expires
10302011

VERIFICATION:

KRISTINA L. BARTON EDWARDS, Assistant District Attorney for the 18th Judicial District of Kansas, within and for said State, being first duly sworn states that I have read the above and foregoing Complaint/Information and know the content thereof, and that the same is true in substance and in fact to my best information and belief.

KRISTINA L. BARTON EDWARDS, #20772
Assistant District Attorney

SUBSCRIBED AND SWORN to before me on this 1st day of June, 2011.

JUDGE OF THE DISTRICT COURT

STATE WITNESSES:
CW: VIRGIL H. MILLER JR., C1468 WPD
B.L.K.D.
Mary A. Davidson
Timothy E. Davidson

kja/KLB
06/01/2011

IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS

DISTRICT CLERK ONLY FILED
APP DOCKET NO.
2011 JUN -7 A 11: 21
CLERK OF DISTRICT COURT
18TH JUDICIAL DISTRICT
SEDGWICK COUNTY, KANSAS
BY

STATE OF KANSAS :PLAINTIFF/PETITIONER

VS

ABDEL-RAZZAQ, MURAD M :DEFENDANT/RESPONDENT

CASE NO. 11CR1615

CRIMINAL
APPEARANCE BOND
PROFESSIONAL SURETY

BOOKED CASE 11J012934
ARRESTING AGENCY
CASE NO. 11C035571

WE, ABDEL-RAZZAQ, MURAD M AS PRINCIPAL, AND THE UNDERSIGNED AS SURETY, DO HEREBY BIND OURSELVES TO THE STATE OF KANSAS IN THE SUM OF FIFTY THOUSAND DOLLARS AND ZERO CENTS ($50,000.00) CONDITIONED UPON THE APPEARANCE OF THE PRINCIPAL ON THE **15TH DAY OF JUNE 2011 AT 9:00 AM SEDGWICK COUNTY KANSAS, COURT DIVISION 25** AND THEREAFTER BEFORE A JUDGE WHEN ORDERED TO ANSWER THE CHARGE OF:
AGG INDECENT LIBERTIES
AND FROM TIME TO TIME THEREAFTER AS THE COURT MAY REQUIRE UNTIL THE CASE IS TERMINATED. OTHER CONDITIONS OF THIS BOND ARE:
NO CONTACT WITH VICTIM OR STATE`S WITNESSES.
IF THE AMOUNT OF THE BOND REQUIRED FOR THE PERSON'S APPEARANCE OF THE OTHER CONDITIONS ARE MODIFIED FROM THE ABOVE AMOUNT OR CONDITIONS, THEN THIS BOND IS NULL AND VOID, AND A NEW BOND IN THE REQUIRED AMOUNT AND/OR WITH THE MODIFIED OTHER CONDITIONS MUST BE POSTED AT THE TIME.

WE THE UNDERSIGNED, STATE THAT THIS BOND IS CONTINUING IN NATURE.

FAILURE TO APPEAR AT THE TIME/DATE AND LOCATION LISTED ABOVE WILL RESULT IN A BENCH WARRANT FOR THE IMMEDIATE ARREST OF THE PRINCIPAL AND JUDGMENT AGAINST PRINCIPAL AND SURETY FOR THE AMOUNT OF BOND.

"I understand that intimidation of a witness is a crime and as a condition of this bond, I will not prevent or attempt to prevent; dissuade or attempt to dissuade; or seek to have someone on my behalf prevent, attempt to prevent, dissuade or attempt to dissuade---- any witness or victim from attending any proceeding or giving testimony in this matter. Further I will not encourage or cause others to encourage by any means any witness or victim to give false testimony in this matter. I understand that if I commit, cause to be committed or knowingly permit to be committed, on my behalf, any violation of this provision my bond may be revoked and I may be charged with other crimes. I further understand that willful violation of this condition is also subject to the sanction provided by subsection (c) of K.S.A. 21-3835, and amendments thereto, whether or not I am the subject of an order under K.S.A. 21-3834, and amendments thereto."

PREPARED BY: DHO PRINCIPAL: X
DATE: 06/04/11 SURETY: #304
ADDRESS: Big Fish Bail Bonds
SURETY:
APPROVED: ADDRESS: X 1506 E 79th Haysville 67060
WARREN M. WILBERT
JUDGE OF DISTRICT COURT. DIV 25

FOR SEDGWICK COUNTY DETENTION FACILITY USE ONLY
BOND SET BY JUDGE AT $50,000.00 ON 05/28/2011 AT 12:35 AM
INFORMATION TAKEN BY BARTH, CLAYTON

DISTRIBUTION: 1ST COPY: COURT FILE 2ND COPY: SHERIFF RECORDS 3RD COPY: SURETY/PRINCIPAL