



Advance Sheet



Kansas County and District Attorneys Association

May 2007

2007 KCDAA Legislative End of Session Report

By Richard Samaniego, Associate

The ceremonial last day of the 2007 legislative session, or “Sine Die” as it is referred to in statehouse lingo, was held May 22, 2007. The Legislature ended on a high note for the year by quickly working together to pass disaster relief legislation aimed at encouraging business re-development in the city of Greensburg. This session was low key for criminal law matters compared to the prior two years and will probably be remembered mostly for the gaming and deferred maintenance issues; however, a handful of significant criminal law bills were signed into law out of the 200 bills approved by the Governor. Conveniently, most of the bills that made their way through the legislative process this session were condensed into five or so bills in the Judiciary Conference Committee including HB 2062, the Omnibus Crime Bill. Some of the measures in these bills include new provisions for controlled substances regulation, clarification of district and municipal court jurisdiction, tougher penalties for repeat offenders, new crimes against unborn children, and corrections reform measures. The following is a brief summary and background of these issues signed into law during the 2007 Legislative Session.

Controlled Substances

- Reconciliation of State and Federal Controlled Substances Laws (HB 2062)

Section 11 through 13 contain provisions brought forward by law enforcement to reconcile the Matt Samuels Chemical Control Act with federal law, namely the USA Patriot Improvement and

Reauthorization Act of 2005, which also contains measures restricting the sale of precursor chemicals. More specifically, this legislation amends KSA 65-1643 to require the address of the person purchasing, receiving or otherwise acquiring ephedrine or pseudoephedrine to be properly recorded and verified by the seller in a log with the name and quantity of the controlled substance sold. Direct access to any ephedrine or pseudoephedrine and controlled substance is now prohibited and must be placed behind the counter or stored in a locked cabinet.

Section 13 amends K.S.A. 2006 Supp. 65-7006 to make it unlawful for any person to purchase, receive or otherwise acquire at retail any mixture containing more than 3.6 grams of pseudoephedrine base or ephedrine base in any single transaction or more than nine grams within any 30-day period.

- Controlled Substance Monitoring Task Force (SB 302/HB 2062)

SB 302 establishes an 11-member Controlled Substances Monitoring Task Force to develop a plan for the creation and implementation of a controlled substances prescription monitoring program and an electronic purchase log. The Law enforcement members of the task force include the Attorney General or designee and a member appointed by the director of the KBI.

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About this publication...

The Advance Sheet is the official publication of the Kansas County & District Attorneys Association. General members of the KCDAA include county attorneys, district attorneys, assistant county attorneys, and assistant district attorneys. City prosecutors, members of the Kansas Bureau of Investigation, and prosecutors with the Attorney General's office are eligible for associate membership with the Association.

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▪ Drug Paraphernalia (HB 2062)

Section 6 of HB 2062 adopts certain federal definitions of drug paraphernalia by amending the definition of drug paraphernalia in K.S.A. 2006 Supp. 65-4150 to include all equipment and materials of any kind which are *primarily* intended *and designed* for use with a controlled substance. Section 6 also adds to the non-exclusive list of examples of drug paraphernalia adding certain pipes, bongs, and other devices.

Section 7 of the bill contains provisions that will allow the courts to consider whether drug paraphernalia items were advertised to encourage, glorify, or advocate participation in illegal use, manufacture, sale, or cultivation of controlled substances.

The fact that an item has not been used or did not contain a controlled substance will not be a defense to a charge of drug paraphernalia possession (Sec. 8).

▪ Increased Penalties for the Sale of controlled Substance near Schools (HB 2062)

Section 9 of HB 2062 increases penalties for certain offenses regarding the sale, offering for sale, possession with intent to sell, delivering and possession with intent to deliver, manufacture with intent to deliver, or cause to be delivered controlled substances within 1,000 feet of a school. *HB 2062 went into effect upon publication in the Kansas Register and is now law.*

Amendments to Kansas Offender Registration Act

Section 1 of SB 204 amends KSA 22-4902 of the Kansas Offender Registration Act to include offenders convicted of the following crimes:

- Manufacturing or Attempting to Manufacture Methamphetamine unless the Court makes a finding on the record that the manufacturing, attempt, or possession was for personal use.
- Sale or distribution of opiate or narcotic drugs within 1,000 feet of school property.
- Attempt, Conspiracy, or Solicitation to commit Aggravated Trafficking (KSA 2006 Supp. 21-3447).

Section 2 of SB 204 clarifies that the jurisdiction for the prosecution of an offender's failure to register or report shall be held: (1) In the county in which the offender resides; (2) if the offender is temporarily domiciled in a county and is required to be registered, in such county; or (3) in the county in which the offender is required to be registered under the act. An offender, convicted in another state, who is moving to Kansas, is required to register for the same length of time required by that state or Kansas, whichever length of time is longer. This provision applies to convictions prior to June 1, 2006 and to persons who moved to Kansas prior to June 1, 2006. *SB 204 goes into effect in July upon publication in the statute book.*

Jurisdiction

▪ Elliot Fix (SB 31)

SB 31 clarifies the subject matter jurisdiction of municipal courts to allow the municipal court to hear and determine cases involving violations of city ordinances and specified violations that could be charged as a felony in district court. The felonies in which the municipal court and the district court would have concurrent jurisdiction are limited to those crimes which are contained in KSA 2006 Supp. 8-1567, Driving Under the Influence of Alcohol or Drugs; KSA 21-3412a, Domestic Battery; KSA 21-3701, Theft; KSA 21-3707, Worthless Checks; or KSA 65-4162, Possession of Marijuana. These provisions are retroac-

tive for ordinance violations committed on or after July 1, 2006. *SB 31 goes into effect in July upon publication in the statute book.*

- Immunity from prosecution (HB 2062)

Section 1 of HB 2062 amends KSA 21-3219 (last year's "stand and defend" bill) by adding a new section (c) authorizing a prosecutor to commence a criminal prosecution upon a determination of probable cause that the use of force was not justified. Addressing the potential unintended consequences of last year's bill was the top priority for the KCDAAs this session. Although this language was not the solution the Association advocated, the language was amended into the bill on the Senate floor to provide some legislative guidance on the issue of immunity from prosecution and surely will be revisited the KCDAAs Legislative Committee. *HB 2062 went into effect upon publication in the Kansas Register and is now law.*

New Crimes

- Criminal Use of Explosives (HB 2062)

Section 2 of HB 2062 contains the original language in HB 2062 before it became the vehicle for the Omnibus crime bill. The provisions in section 2 expand the definition of explosive to explicitly include materials that, when combined, cause a chemical reaction and explode. Violation of this section of the statute is a level 8, person felony. The penalty for a violation of this section is a level 6, person felony if the explosive is intended to be used for a crime, a public safety officer is placed at risk to defuse the explosive, or the explosive is placed in a building in which there is another person. The bill also makes the possession, creation, or construction of a simulated explosive device illegal. Violation of this section of the statute is a level 8, person felony. The bill excludes consumer fireworks, as defined in federal law, from the definition of explosive, except when the consumer fireworks are modified or assembled in a manner not intended by the manufacturer. The bill does not prohibit the construction or use of explosives or simulated explosive devices by authorized personnel for legitimate public safety training, demonstration, or exhibition.

- Alex's Law (HB 2062)

Section 4 of HB 2062 enacts Alex's Law dealing with crimes against unborn children. "Unborn child" would be defined to mean a living individual organism of the species homo sapiens, in utero, at any stage of gestation from fertilization to birth. Applicable crimes against an unborn child include: Battery at KSA 21-3412; Aggravated battery at KSA 21-3414; Murder in the first degree KSA 21-3401; Murder in the second degree KSA 21-3402; Voluntary manslaughter KSA 21-3403; Involuntary manslaughter KSA 21-3404; Vehicular homicide KSA 21-3405; Capital murder KSA 21-3439 and Involuntary manslaughter DUI KSA 21-3442. *These provisions went into effect upon publication in the Kansas Register and are now law.*

Sentencing and Penalties

- Presumptive Prison for Third or subsequent Burglary (HB 2062)

Section 3 of HB 2062 creates a special application in sentencing, which would make the sentence for a third or subsequent conviction for burglary a presumptive prison sentence. Additionally, a defendant convicted of burglary, with a prior criminal history of a burglary and an aggravated burglary, also would be presumptive prison. The sentence would not be considered a departure sentence and would not be subject to an appeal. This has been a long time policy position of the KCDAAs and was a legislative agenda item during this session. *This provision went into effect upon publication in the Kansas Register and is now law.*

- Driving Under the Influence (SB 35)

Several bills were introduced this session related to Driving under the influence, including a concerted effort to increase penalties for repeat offenders. These measures were combined in the Judiciary conference committee into one omnibus DUI bill, SB 35. However, county concerns of jail overcrowding led to the rejection of the bill in the Senate and a compromise version was eventually passed into law.

Enhanced Penalties: Section 2 of SB 35 amends K.S.A. 2006 Supp. 8-262 by adding amending (c) (1) to provide that a person found guilty of a class A non-person misdemeanor on a third or subsequent conviction shall be sentenced to not less than 90 days imprisonment and fined not less than \$1,500 if such person's privilege to drive a motor vehicle is canceled, suspended, or revoked due to a refusal to submit to any test requested by law enforcement (excluding the preliminary screening test); or was convicted of violating the provisions of K.S.A. 40-3104 relating to motor vehicle liability insurance; a murder or manslaughter crime resulting from the operation of a motor vehicle; or was convicted of being a habitual violator.

Section 9 amends K.S.A. 2006 Supp. 8-1567(h) enhancing the penalty for a person who had one or more children under the age of 14 years in the vehicle at the time of the offense. The enhancement is one month of imprisonment to be served consecutively to any other minimum mandatory penalty imposed not to exceed the maximum prescribed by law. During the service of the one month enhanced penalty, the judge may order the person on house arrest, work release, or other conditional release.

Custody of the Secretary of Corrections for Treatment: Section 9 amends K.S.A. 2006 Supp. 8-1567 to allow the court to order that the term of imprisonment imposed for third or subsequent violations be served in a state facility in the custody of the secretary of corrections while participating in a substance abuse treatment program designated by the secretary. The secretary may return custody to the sheriff upon completion of the person's discharge from the substance abuse treatment program. The determination by the secretary that the person either is not to be admitted into the designated facility or is to be transferred from the designated facility is not subject to review.

Section 9 also provides that a court shall require as a condition of parole that such person enter into and complete a treatment program for alcohol and drug abuse as provided by K.S.A. 8-1008, and amendments thereto.

Administrative Penalties: Section 3 of SB 35 amends K.S.A.

2006 Supp. 8-1001 prohibiting a person convicted of DUI from obtaining a class "C" driver's license for the operation of a motorized bicycle; requires a one-year suspension for an alcohol concentration of .15 or greater as well as for second, third, or fourth occurrence for an alcohol concentration of .08 or greater and permanently revokes the license for a fifth or subsequent occurrence.

Section 5 amends K.S.A. 2006 Supp. 8-1014 to require ignition interlock devices for a year after the suspension period for the first DUI test refusal, two years after the suspension for a second refusal and so on. The bill also provides for a one-year suspension for anyone under 21 years of age driving with a concentration of .08 or more as well as interlock device requirements explained above.

From now on all revocation hearings shall be held by telephone conference call unless a request is made that the hearing be held in person. *SB 35 goes into effect in July upon publication in the statute book.*

Juveniles

▪ Fingerprinting of Juvenile Offenders (HB 2072)

One of the first bills to be signed into law this year was HB 2074 relating to fingerprinting of juvenile offenders. This bill was brought forward by law enforcement in response to some unintended consequences of a bill passed last session, SB 261, which requires photographing and fingerprinting of a juvenile upon conviction. HB 2074 would only require fingerprinting and allow photographing of juveniles when taken into custody but before final sentencing for crimes that, if committed by an adult, would constitute a felony, a class A or B misdemeanor, or assault. The bill allows, but does not require photos to be taken at juvenile detention facilities and restricts their distribution. *The bill went into effect upon publication on the Kansas Register and is now law.*

▪ Clarifying amendments to Jessica's Law (SB 166)

Section 5 of SB 166 amends K.S.A. 2006 Supp. 21-4643 by expanding the list of sex offenses that would qualify as a second-time sex offender for a "hard 40" sentence. The new list of sex offenses that qualify a second-time sex offender for a life sentence with a mandatory minimum term of imprisonment of not less than 40 years (hard 40) now includes aggravated trafficking (if the victim is less than 14 years of age); rape of a child who is under 14 years of age; aggravated indecent liberties with a child under 14 years of age; aggravated criminal sodomy with a child who is under 14 years of age; promoting prostitution (if the prostitute is less than 14 years of age); sexual exploitation of a child who is under 14 years of age; or an attempt, conspiracy, or criminal solicitation of any of the above crimes. The "hard 40" provision of the bill does not apply to unlawful voluntary sexual relations.

The bill also clarifies that sexual exploitation of a child is a severity level 5 person felony, unless the child is under 14 years of age and the offender is 18 years of age or older. The latter is an off-grid personal felony. *The bill went into effect upon publication on the Kansas Register and is now law.*

▪ Juvenile Offenders (SB 166)

Section 7 of SB 166 authorizes imprisonment of a juvenile offender with the Secretary of Corrections if a juvenile offender, incarcerated in a Juvenile Correctional Facility, commits a new felony. The offender will now be subject to a new sentence imposed as a consecutive sentence or as a new conviction subject to the discretion of the court, even when the new crime otherwise presumes a non-prison sentence. The offender would be discharged from the Juvenile Justice Authority's custody for the new conviction.

▪ Unlawful Hosting of a Minor (SB 166)

Section 3 of SB 166 amends K.S.A. 2006 Supp. 21-3610c containing the crime of unlawfully hosting a minor to change the statutory language from "persons under the age of 18" to "a minor." *These provisions went into effect upon publication in the Kansas Register and are now law.*

Corrections Reform

▪ Good Time Credits (SB 14)

This was one of the last bills to make it through the legislative process in the Judiciary Conference Committee and was intended to be an alternate to prison expansion by offering certain grants and incentives to reduce recidivism. The bill was stalled due to its broad application, but was later modified in conference committee to remove certain high risk offenders from the bill by narrowing the credits to inmates convicted of drug severity level 3 or 4 crime or nondrug severity level 7 through 10 crimes. The bill provides for good time credits to be increased from the current 15 percent to 20 percent and provides certain grants to decrease revocation rates. Eligible inmates may also earn 60 days of good time credit on a one-time basis upon certain program completion (e.g. drug treatment or vocational training). Although SB 14 was touted as a measure to reduce recidivism rates and delay prison expansion, the approved budget does provide for 39 million bonding authority for prison expansion at the discretion of the Secretary.

▪ Recodification of the criminal code (SB 14)

SB 391 was one of the last bills introduced in the Senate this Session and was later amended into SB 14, one of the last bills out of the Senate Judiciary conference committee. This legislation creates the Kansas criminal code recodification commission by essentially extending the Recodification Subcommittee of the now expired 3-Rs Committee to allow them to complete their work in recodifying the criminal code. Membership in the commission still includes a county attorney or district attorney appointed by the Kansas County and District Attorney Association. Judge White will remain the reporter for the commission along with Judge Brazil as assistant reporter. The final report of the commission would be due January 11, 2009. *SB 14 went into effect upon publication on the Kansas Register and is now law.*

Please visit www.kcdaa.org for links to the bills discussed above. For questions or comments you may contact Richard A. Samaniego at (785) 232-5855 or rsamaniego@kearneyandassociates.com.

Recent Opinions

HABEUS ISSUES

State v. Wilson, # 95,595/95,599
Dickinson Co., Not Published
Court of Appeals
Affirmed

Wilson appealed the district court's summary denial of his untimely motion to appeal. The Court affirmed finding substantial competent evidence to support the denial; Wilson signed a waiver to appeal his conviction and was informed of his right to appeal within 10 days.

State v. Schlesener, # 96,216
Dickinson Co., Not Published
Court of Appeals
Reversed and remanded with directions

Schlesener appealed from the district court's denial of relief sought under *Ortiz*. The Court reversed and remanded finding the defendant was not aware of the 10-day limitation on his right to appeal.

State v. Tonge, # 96,248
Geary Co., Not Published
Court of Appeals
Affirmed in part, reversed in part, and remanded with directions

Tonge appealed the district courts denial of his motion to withdraw his guilty plea prior to sentencing. The Court found no abuse of discretion in the denial. The plea was not made because of fraud, duress, mutual mistake, or lack of understanding of the charge. The Court reversed for assessment of BIDS in accordance with *Robinson*.

Ortega-Najera v. State, # 92,852
Ford Co., Not Published
Court of Appeals
Dismissed

The defendant appealed the district court's denial of his "writ of mandamus," arguing that the court reflected vindictiveness toward him in sentencing. The

Court dismissed finding no jurisdiction to hear the claim. The only appealable issues raised in the "writ" were waived on appeal and the issues raised on appeal were not addressed to the district court.

State v. Haverty, # 96,349
Anderson Co., Not Published
Court of Appeals
Sentence vacated and case remanded for re-sentencing

Haverty appealed from the district court's denial of his motion to appeal his sentence out of time under an exception set forth in *Ortiz* contending that neither the district court nor his counsel advised him of his right to appeal his sentence following his no contest plea. The Court found that the trial court erred in denying his motion to appeal out of time because he had not been informed of his right to appeal.

SENTENCING ISSUES

State v. Berreth, # 94,310
Butler Co., Not Published
Court of Appeals
Reversed and remanded with directions

The State appealed the district court's decision to re-sentence Berreth after the district court determined Berreth's conviction of aggravated kidnapping and aggravated criminal sodomy were multiplicitous. The Court reversed and remanded with directions for the district court to reinstate the defendant's original sentence finding that under the multiplicity definition found in *State v. Schoonover*, 281 Kan. 453 (2006), aggravated kidnapping and aggravated criminal sodomy are not multiplicitous.

State v. Korhn, # 92,733
Montgomery Co., Not Published
Court of Appeals
Affirmed

Korhn appealed his drug convictions

and the sentences imposed arguing the trial court erred in denying his motion to suppress. The Court found that because the defendant stopped in the middle of the road to ask the officer why he was being followed, so the defendant, not the officer, initiated the stop; therefore, the incident was not a seizure and not subject to Fourth Amendment protections. Also, the admittance of the defendant's prior marijuana conviction was not an abuse of discretion because it was used to dispute an issue of knowledge and intent with regard to the drug paraphernalia found by the officer. Finally, upon remand the trial court reduced one of the defendant's sentences from 178 months to 30 months, but required that it run consecutively and not concurrently with his other 11 month sentence. The Court found that this was not a violation and there is no presumption of vindictiveness because the controlling sentence is less severe than the original controlling sentence, regardless of whether the court changed from concurrent to consecutive sentences.

State v. Chapman, # 95,687
Riley Co., Not Published
Court of Appeals
Affirmed

The State appeals from the court's grant of a downward dispositional departure sentence of Chapman's indecent liberties with a child conviction. The Court held that due to the voluntary participation by the 14-year-old victim and the defendant's age of 19 the trial court did not err in its downward departure.

State v. Petry, # 95,746
Cloud Co., Not Published
Court of Appeals
Affirmed

Petry pled guilty to felony theft and was ordered to pay restitution almost 1 year after he was sentenced. He appealed claiming that the district court lacked jurisdiction to order restitution at such a

late date and the court abused its discretion in determining the amount. The Court found that because the defendant requested the district court to reserve the issue of restitution and the court specifically stated in the journal entry that it retained jurisdiction to determine restitution there was no error. Also, there is no requirement that the court hold a hearing to determine the restitution amount. The defendant improperly relied on KSA 22-3424(d), which allows for the victim to request a hearing, to make that assertion. Finally, the district court did not err in determining restitution by ordering the defendant to pay difference in the fair market value of the van prior to the theft and the value of the van after the theft.

State v. Keltner, # 95,754
Wyandotte Co., Not Published
Court of Appeals
Affirmed

Keltner appealed the district court's denial of his motion to withdraw his plea before sentencing. Keltner argued that he should be allowed to withdraw his plea because prior to entering the plea he was under the assumption that his conviction of furnishing alcohol to a minor was a non-person misdemeanor and his criminal history was a C, and on the day of sentencing the defendant was informed that the conviction might be a person misdemeanor, which would be his third misdemeanor raising his criminal history score to a B. He was sentenced to 336 months, 169 months more than the maximum allowed with a criminal history score of C. The Court relied on 2 cases in finding no abuse of discretion in the denial of the motion to withdraw, *State v. Solomon*, 257 Kan. 212 (1995), which held that defense counsel's inaccurate prediction regarding the penalty does not constitute ineffective assistance of counsel; and *State v. Ford*, 23 Kan. App. 2d 248 (1996), which held that, even though both defense counsel and the prosecution were incorrect about the defendant's criminal history, there is no recourse for a plea "unintelligently" made.

State v. Lamas, # 96,050
Ford Co., Not Published
Court of Appeals
Affirmed

Lamas was convicted of multiple drug crimes and was granted 36 months' probation. He was directed to report to an ISO. Lamas was deported back to Mexico straight from jail and never contacted his ISO. His probation was revoked and he was ordered to serve the underlying sentence. Lamas appealed claiming that because he was deported straight from jail to Mexico his probation never began; therefore, the court abused its discretion in revoking it. The Court found that because Lamas was never informed that he was to contact his ISO there was no violation of his probation, but affirmed the revocation because he did break the law when he illegally re-entered the United States.

State v. Limon, # 96,013
Miami Co., Not Published
Court of Appeals
Sentence vacated and case remanded with directions

Limon appealed the aspect of his sentence extending his term of post release supervision from 12 months to 36 months, arguing the extension was based upon a finding of fact by the court that his crime was sexually motivated, which is prohibited by *Apprendi*. The Court found that the crime of unlawful voluntary sexual relations-sodomy, KSA 21-3522(a)(2) is not a sexually motivated crime by definition; therefore, the district court's finding was in violation of *Apprendi*.

State v. Evans, # 95,276
Sedgwick Co., Not Published
Court of Appeals
Affirmed

Evans appealed his convictions and sentences for multiple crimes claiming the district court erred in instructing the jury and insufficient evidence. The Court found the defendant's argument with re-

gard to the jury instruction without merit because regardless of the definition used for "entered" with respect to burglary, the jury was still required to resolve the issue and conclude that the defendant did place some part of his body into the apartment. The Court also found there was sufficient evidence to support the rape despite the State's failure to conduct forensic testing on the genital swabs or hair samples; namely the defendant's saliva on the victim and the daughter's testimony that she saw a strange man in the apartment.

State v. Garcia, # 95,996/96,471
Ford Co., Not Published
Court of Appeals
Affirmed

Garcia appealed the district court's revocation of his probation for violating conditions of his house arrest, arguing that the court abused its discretion by not considering whether mitigating circumstances outweighed the gravity of any violation of conditions. The Court found there was at least one violation to support the revocation. Also, there were no mitigating circumstances offered for consideration.

State v. Raimey, # 96,053
Shawnee Co., Not Published
Court of Appeals
Affirmed

Raimey appealed the revocation of his probation arguing the trial court's order requiring him to serve the underlying term rather than placing him in a drug treatment program is an abuse of discretion. The Court found KSA 22-3716(e) did not apply to his situation because he was the beneficiary of a dispositional departure; therefore, the trial court did not err.

State v. White, # 96,450
Lyon Co., Not Published
Court of Appeals
Affirmed

White appealed the denial of his motion to withdraw his guilty pleas arguing he did not knowingly and voluntarily enter into his pleas. After reviewing the record, the Court found that the defendant was informed of all his rights, he made the plea knowingly, and the denial was proper.

State v. Hoppe, # 96,180
Barton Co., Not Published
Court of Appeals
Affirmed

Hoppe appealed his sentence after a no contest plea for non-residential burglary arguing: 1) his 1993 juvenile adjudication for burglary was erroneously classified as a person felony in his criminal history, 2) the trial court erred in including his prior convictions in his criminal history without submitting these prior convictions for proof to a jury beyond a reasonable doubt, and 3) the trial court erred in including his juvenile adjudications in his criminal history. The Court affirmed finding: 1) Hoppe stipulated to his criminal history at sentencing and failed to object to the classification before sentence was announced, 2) this argument was rejected in *State v. Ivory*, and 3) this argument was rejected in *State v. Hitt*.

State v. Wright, # 96,682/96,881/96,882
Reno Co., Not Published
Court of Appeals
Affirmed

Wright appealed the revocation of his probation. The Court found that because he tested positive for marijuana, a violation of his probation, the revocation was within the court's discretion.

State v. Newman, # 96,743
Lyon Co., Not Published
Court of Appeals
Affirmed in part, reversed in part, and remanded with directions

Newman appeals his felony DUI sentence contending that the trial court erred in using prior DUI convictions to enhance his sentence. The Court found no error because his four prior DUI convictions were included in the PSI and he did not contest their inclusion. The Court reversed for review of BIDS order in accordance with *Robinson*.

State v. Yoke, # 95,158/95,159/95,160/
95,161
Sedgwick Co., Not Published
Court of Appeals
Appeal dismissed

Yoke appealed multiple sentences from a consolidated case. They held found no abuse of discretion in the imposition of consecutive sentences.

State v. Myers, # 96,898
Butler Co., Not Published
Court of Appeals
Affirmed

Myers appealed his probation revocation. The Court found the defendant had not shown that the trial court abused its discretion in revoking his probation, he stipulated to the probation violations.

State v. Lenz, # 95,498
Reno Co., Not Published
Court of Appeals
Affirmed

Lenz appealed the denial of his motion to correct an illegal sentence claiming his sentence for aggravated escape from custody was illegal because the underlying felony conviction for which he was in custody was included in his criminal history for sentencing on the escape charge. The Court found that his prior conviction was not an element of the charge and was not an abuse of discretion to include

it in his criminal history.

State v. McCartney, # 95,591
Sedgwick Co., Not Published
Court of Appeals
Affirmed

McCartney appealed the district court's revocation of his probation and its failure to consider placing him at Labette prior to revoking his non-prison sanction. The Court held that his revocation could not be based solely on his failure to inform the district court about a letter. Furthermore, since the letter was written prior to the revocation and reinstatement of his probation, it may not be used to prove a violation of his re-instated probation. However, the district court's finding that McCartney affirmatively misrepresented himself at the probation violation hearing supported the revocation. The Court also found no abuse of discretion by not considering Labette.

State v. Middleton, # 96,817
Leavenworth Co., Not Published
Court of Appeals
Sentence vacated and case remanded with directions

Middleton appealed her sentence for possession of methamphetamine and possession of a switchblade arguing that the district court erred in refusing to apply KSA 21-4729 requiring mandatory drug treatment under her circumstances. The Court vacated finding that the Missouri cases were pending and were not convictions that would have disqualified the defendant from the drug treatment.

State v. Winters, # 96,978
Sedgwick Co., Not Published
Court of Appeals
Affirmed in part and dismissed in part

Winters appealed her sentence, which was rendered after she pled no contest and was found guilty of felony theft. The Court found that because it was presumptive it was in not in violation of *Apprendi*.

State v. Hempler, # 95,738
Sedgwick Co., Not Published
Court of Appeals
Affirmed in part, vacated in part, and remanded with directions

Hempler appealed his DUI sentence claiming the district court violated due process when it sentenced him for his fifth conviction of DUI after he pled guilty to a complaint that charged him as a third-time violator. The Court, finding *State v. Moody*, 282 Kan. 181 (2006) controlling, held that the court did not violate due process because it had first advised Hempler of the correct penalty before his plea.

State v. Cox, # 96,047
McPherson Co., Not Published
Court of Appeals
Affirmed

Cox appealed the sentence he received after pleading guilty to one count of manufacture of methamphetamine arguing he should have been sentenced as a severity level 4 offender for possession with intent to use paraphernalia to manufacture a controlled substance. The Court disagreed finding the Kansas Supreme Court has decided this issue against Cox.

State v. Pannell, # 96,562
Sedgwick Co., Not Published
Court of Appeals
Affirmed in part, dismissed in part, vacated in part, and remanded with directions

Pannell appealed the courts refusal to grant her motion for a downward sentencing departure. The Court found that because her sentence fell within the presumptive sentencing range, it possessed no jurisdiction to consider the claim. The Court reversed for assessment of BIDS in accordance with *Robinson*.

EVIDENTIARY ISSUES

State v. Garcia, # 94,966
Seward Co., Not Published
Court of Appeals
Affirmed in part, reversed in part, and remanded for resentencing

Garcia was convicted of rape and aggravated indecent liberties with a child. He appealed the convictions and sentences arguing that there was insufficient evidence to sustain his conviction of rape, and that the district court erred in providing the jury with a modified *Allen* instruction. He also claimed the sentence imposed by the court for his conviction of aggravated indecent liberties with a child was illegal. The Court found that his 117-month sentence for aggravated indecent liberties was incorrect because it was outside the presumptive range of 55-61 months, and that there was sufficient evidence to support the rape including, seminal fluid in the vaginal area and statements from both the defendant and a witness. With regard to the *Allen* instruction, because it was given prior to the commencement of jury deliberations and there was no evidence that the jury was pressured to reach a verdict it was properly and fairly given.

State v. Morehouse, # 93,787
Sedgwick Co., Not Published
Court of Appeals
Affirmed in part, reversed in part and remanded with directions

Morehouse appealed his felony theft conviction arguing the evidence was insufficient to support his conviction and that the trial court failed to consider his financial resources when ordering him to reimburse BIDS. The Court found that the evidence, the testimony of the two store clerks who caught him stealing, was sufficient to support his theft conviction, but reversed and remanded for the trial court to take into consideration the defendant's ability to repay BIDS.

State v. Seiler, # 95,120
Sedgwick Co., Not Published
Court of Appeals
Affirmed

Seiler appealed his convictions of driving while a habitual violator and failing to secure a load, challenging the sufficiency of the evidence. The Court affirmed the conviction finding that while no one testified as to witnessing Seiler drive the truck, the State presented substantial circumstantial evidence demonstrating that Seiler, in fact, drove it.

State v. Gutierrez-Turcios, # 95,527
Saline Co., Not Published
Court of Appeals
Affirmed in part and dismissed in part

The defendant appealed from multiple convictions arguing the court erred in denying his motion to suppress and that the methods officers used to subdue him violated his due process rights. The Court affirmed finding that the pat down of the defendant was reasonable due to the openly visible ammunition in the vehicle, the excessive movements by the defendant and the late hour of the night. The defendant's due process violation claim was not properly preserved for appeal.

State v. Staton, # 95,966
Johnson Co., Not Published
Court of Appeals
Reversed and remanded with directions

The State appealed the trial court's decision granting Staton's motion to suppress evidence, which challenged the knock and announce procedure employed by the officers arguing that because the officers expected to find a methamphetamine lab inside, exigent circumstances justified the officer's entry into the house after a 20-25 second wait. The Court reversed the district court finding that the circumstances were controlled by the recent case *Hudson v. Michigan*, 126 S.Ct. 2159 (2006) (holding that where the interests that are protected by the knock-and-announce requirement have nothing to

do with the seizure of the evidence, the exclusionary rule does not apply to violations of the knock-and-announce rule).

State v. Yearby, # 95,661
Shawnee Co., Not Published
Court of Appeals
Affirmed in part, reversed in part, and remanded

Yearby appealed multiple drug convictions contending the district court erred in denying his motion to suppress evidence found in his vehicle. The Court found the evidence was admissible as it was seized incident to arrest. The defendant was in his car at the time the officers approached him. The Court reversed for evaluation of BIDS reimbursement order.

State v. Brokenborough, # 96,311
Riley Co., Not Published
Court of Appeals
Affirmed in part, reversed in part, and remanded with directions

The defendant appealed his conviction of child abuse, arguing there was insufficient evidence to convict him and errors in sentencing. The Court found the testimony of two doctors supported the conviction, but reversed because of the imposition of BIDS without the proper proceedings by the district court.

State v. Mashaney, # 94,298
Sedgwick Co., Not Published
Court of Appeals
Convictions affirmed and case remanded with directions

Mashaney appealed his sodomy and aggravated indecent liberties with a child conviction arguing the prosecutor's remarks during opening and on cross-examination constitute prosecutorial misconduct. The Court found the prosecutor's reference to the defendant, as a "tyrant" in his opening was not prejudicial. He only used it once and there was overwhelming evidence against him. Furthermore, the comments on cross referred to admissible evidence. The

Court reversed for a BIDS evaluation in accordance with *Robinson*.

State v. Bozarth, # 95,828
Labette Co., Not Published
Court of Appeals
Reversed and remanded with directions

The State appealed from an order of the trial court dismissing the charge of possession of marijuana contending that the trial court erred in determining that the evidence was insufficient to establish probable cause. The Court found the evidence was sufficient to support probable cause, and the chain of custody, although not perfect, the ultimate issue of the sufficiency of the proof is to be determined by the jury.

State v. Pollman, # 93,947
McPherson Co., Not Published
Court of Appeals
Reversed and remanded

Pollman appealed his conviction of DUI contending officers did not have reasonable suspicion to detain him or probable cause to arrest him for DUI. The Court reversed finding no reasonable suspicion existed. The defendant had been riding his motorcycle along with another person. The other individual was stopped for failure to signal. Pollman stopped along side her and waited. After issuing a warning, the officer spoke with Pollman and smelled alcohol on his breath. The Court held this alone was insufficient to support reasonable suspicion.

State v. Saunders, # 94,672
Johnson Co., Not Published
Court of Appeals
Affirmed

Saunders appealed multiple convictions arguing the trial court erred in permitting the jury to consider his prior drug use in determining whether he possessed marijuana. Further, he challenged the sufficiency of the evidence to support his conviction for child endangerment. The Court found Saunders assertion he was

not aware of the presence of the marijuana made his knowledge relevant. Saunders argued that there was no evidence of child endangerment because he was only checking the mileage on his car when he was found outside the apartment, but the Court found a reasonable jury could have disregarded this version of the events and found he was not going to return to the 3-year-old child.

State v. Pennington, # 94,699/94,700
Johnson Co., Not Published
Court of Appeals
Affirmed

Pennington appealed her theft convictions claiming the district court erred by admitting at trial evidence of other crimes for which she was not charged. The Court found error in not offering a limiting instruction to the jury, but found it to be harmless due to the insurmountable evidence against the defendant.

State v. Thompson, # 95,110
Sedgwick Co., Not Published
Court of Appeals
Affirmed

Thompson appealed his felony DUI conviction challenging sufficiency of the evidence. The Court found the evidence, he admitted to drinking and he was passed out with the car running and in gear at a stop light, was sufficient for a jury to reasonably find he was intoxicated.

State v. Rummel, # 95,683
McPherson Co., Not Published
Court of Appeals
Affirmed

Rummel appealed various drug convictions claiming the district court abused its discretion in denying his motion to suppress because the officer conducted an improper inventory search. The Court found there was enough evidence to support the inventory search including, it was in a no parking zone, it had improper tags, there was no proof of insurance, and the true owner of the car was unknown.

State v. Robinson, # 95,840
Douglas Co., Not Published
Court of Appeals
Affirmed in part, vacated in part, and
remanded with directions

Robinson appealed his burglar and theft convictions challenging the sufficiency of evidence. The Court found there was enough circumstantial evidence to support the jury's finding.

State v. Glassock, # 96,109
Sedgwick Co., Not Published
Court of Appeals
Reversed and remanded with directions

Glassock appealed her conviction of possession of pseudoephedrine with intent to use the product to manufacture methamphetamine contending the evidence used against her was obtained from an illegal search and seizure of her person. The Court reversed finding the mere purchase of pseudoephedrine products did not establish suspicion to justify an investigatory stop of an individual.

State v. Pauls, # 95,344
Saline Co., Not Published
Court of Appeals
Affirmed

Pauls appealed his DUI conviction claiming insufficient evidence. The Court found there was sufficient evidence to support the conviction.

State v. Carter, # 95,576
Reno Co., Not Published
Court of Appeals
Affirmed

The defendant appealed claiming the district court erred in allowing in statements made after being *Mirandized*. The Court found the statements should have been suppressed, but held that the error was harmless. The only incriminating statement was not harmless because there was a substantial amount of evidence that would link her to the crime without the statement coming in.

State v. Sheppard, # 95,660
Saline Co., Not Published
Court of Appeals
Affirmed in part, reversed in part, and
remanded with directions

Sheppard appealed from a conviction for aggravated robbery, arguing his conviction was invalid as a matter of law, there was insufficient evidence to support his conviction, and there were errors in the jury instructions. The Court found there was sufficient evidence to support the conviction and because the defendant did not object to the jury instructions the argument was not properly before the Court. The Court reversed for an assessment of BIDS in accordance with *Robinson*.

State v. Montes-Mata, # 97,155
Lyon Co., Not Published
Court of Appeals
Affirmed

This was an interlocutory appeal by the State from an order suppressing the admission of evidence. The Court found the suppression was not an abuse of discretion. The officer arrested a driver and a passenger and returned 30 miles based upon a hunch that the car the defendant was driving was acting as a decoy for a vehicle that was transporting marijuana.

MISCELLANEOUS AND MULTIPLE ISSUES

State v. Oetken, # 95,505
Barton Co., Not Published
Court of Appeals
Affirmed in part, reversed in part, and
remanded

Oetken appealed her conviction of possession of methamphetamine and possession of paraphernalia arguing the district court erred in convicting her of multiplicitous crimes, failed to give a unanimity instruction, failed to suppress evidence, and failed to assess her financial condition before assessing her BIDS fee. The Court reversed and remanded for new

trial finding the trial court erred in not suppressing evidence found in an illegal search. The Court found the search to be invalid because a reasonable passenger and owner of the stopped vehicle would not have felt free to leave. The officer had taken all of the occupant's identifications and had only returned Oetken her license and informed her that she was free to leave. The other occupants of the truck did not hear this conversation because Oetken and the officer were behind the truck. Under these circumstances the questioning and searching were improper extensions of the stop rendering it an illegal seizure. The Court also found the court to have erred in not assessing the defendant's financial condition before assessing her BIDS fees, but dismissed her other claims for lacking merit.

State v. Blazier, # 94,677
Saline Co., Not Published
Court of Appeals
Affirmed

Blazier was appealed his convictions of felony fleeing and eluding, felony obstruction, aggravated burglary, criminal threat, assault, and criminal damage, arguing: 1) the district court erred in admitting statements he made about not wanting to go back to prison; 2) that his convictions for felony fleeing and eluding and felony obstruction were multiplicitous; and 3) the evidence was insufficient to support his convictions for felony obstruction and aggravated burglary. The Court held 1) Blazier failed to object to the statements at trial, and even if he had objected the statements were properly admitted because they were relevant to prove motive; 2) the convictions for fleeing and obstruction were not multiplicitous because they did not originate from the same statute and each statute contains elements that are found in the other; 3) because the officer indicated he was investigating felony obstruction charges there was sufficient evidence to support felony obstruction. Blazier's argument that he did not know he was committing a felony when he broke into a house to hide from

police is not a valid defense.

State v. Bailey, # 95,378
Sedgwick Co., Not Published
Court of Appeals
Affirmed

Bailey appealed the district court's denial of his motion to set aside his conviction because he did not understand the consequences of entering a guilty plea due to his mental condition. The Court held there was no abuse of discretion in denying the motion because the defendant fully understood his rights at the time of his plea.

State v. Phillips, # 96,561
Miami Co., Not Published
Court of Appeals
Reversed and remanded

Phillips appealed his conviction of sale or delivery of methamphetamine arguing that the district court improperly coerced the jury into reaching its verdict by issuing a belated *Allen* instruction. The Court agreed because it found the instruction was given in order to break a deadlock after deliberations were in progress. The Court found that because the jury had found the defendant not guilty on the first three counts, decided prior to the *Allen* instruction, there was not overwhelming evidence of his guilt and a new trial was ordered.

State v. Fielden, # 95,798
Johnson Co., Not Published
Court of Appeals
Affirmed

Fielden appealed his two convictions of violation of a protection from abuse order arguing that the court erred in joining his three charges for a single trial because it violated his due process rights in presenting the jury with an extensive reminder that he had served time in a state penitentiary because five of the six witnesses were employed by the corrections facility. The Court found that the jury's acquitting the defendant of one of the charges showed

their ability to follow the court's instruction to compartmentalize the evidence for each charge separately. The defendant next argues that the prosecutor's improper statements made during opening and closing arguments prejudiced him, denying his right to a fair trial. The defendant failed to object to the statements made during opening statement. The Court found that the comments during closing might have appealed to the jury's emotions, but were an explanation of why the victim was under the protective order and were within the wide latitude allowed in closing argument.

State v. Stout, # 95,825
Mitchell Co., Not Published
Court of Appeals
Affirmed

The State appealed the district court's dismissal of criminal charges against Stout, arguing that the court erred in finding Stout's speedy trial rights were violated. The Court affirmed finding that the district court commenced the speedy trial clock on the date of arraignment but properly charged to the defendant all the time associated with the trial continuance requested by the defense.

State v. Ponder, # 94,108
Johnson Co., Not Published
Court of Appeals
Affirmed

Ponder appealed his conviction for aggravated criminal sodomy claiming his confession was not voluntary, portions of the videotape should have been excluded, and the *Allen*-type instruction was coercive. The Court held that while the officers in conducting the interview used subtle techniques, none of the tactics were illegal, and the confession was voluntary. Also, because the defendant failed to object to the videotape at trial, that issue was not preserved for appeal, and the *Allen* instruction was given before the jury retired for deliberations so it was not coercive.

State v. Mason, # 95,070
Shawnee Co., Not Published
Court of Appeals
Affirmed

Mason appealed his conviction of unintentional second-degree murder, claiming 1) the trial court abused its discretion in admitting photographs of the victim depicting injuries not caused by Mason; 2) the prosecutor misstated the law in closing argument, committing prosecutorial misconduct when he stated that self-defense is an excuse, not a defense; and 3) the trial court erred in giving the accomplice instruction because it singled out his sole witness. The Court held: 1) the photographs were relevant and admissible to assist the jury in understanding the medical testimony, and the district court did not abuse its discretion in admitting the photographs; 2) the statement was a misstatement of the law, but it did not prejudice the jury against the defendant so as to render the trial unfair; 3) this issue has previously decided against the defendant in *State v. Anthony*, 242 Kan. 493, 500-02 (1988).

State v. Alberty, # 95,169
Miami Co., Not Published
Court of Appeals
Affirmed

Alberty appealed his drug conviction arguing the district court erred in failing to comply with 22-3210 when it accepted his guilty plea and in denying him a speedy trial. He claimed the court failed to inform him that he was waiving his right to appeal the speedy trial issue or the length of his sentence. The Court held that no error occurred because the right to appeal is purely statutory and not constitutional and once a defendant has pleaded guilty to the charge the notion of a speedy trial has no application. Also, the defendant was told the range of his sentence would be 46 to 83 months and he was sentenced to 62 months. The Court found that he was informed of all the direct consequences of his guilty plea.

State v. Dreiling, # 95,318
Reno Co., Not Published
Court of Appeals
Affirmed

Dreiling appealed from his conviction of multiple drug charges alleging his speedy trial rights were violated, the district court erred in failing to give a requested jury instruction on compulsion, and the district court improperly denied his motion of acquittal. The Court held that his speedy trial rights were not violated because the defendant had waived his statutory right to a speedy trial by pleading insanity and the delay was reasonably occasioned by the assertion of the defense. The Court also found the compulsion claim to be without merit because the woman he claims he was doing the illegal activity to protect is not his spouse, parent, child, brother, or sister. She is an unrelated party, which are not included in the persons covered by the compulsion statute. The Court finally found the denial of his motion of acquittal to be valid because the evidence was clearly sufficient to support the conviction.

State v. Santacruz, # 95,354
Finney Co., Not Published
Court of Appeals
Affirmed

Santacruz appealed her conviction of possession of cocaine claiming the district court erred in refusing to give an instruction on general criminal intent, in failing to give a unanimity instruction, and prosecutorial misconduct denied her a fair trial because the prosecutor elicited statements regarding the defendant's credibility. The Court found, based on the defendant's testimony, that her state of mind regarding possession of the cocaine was not substantially in issue and one of the other instructions discussed the knowledge the defendant must have; therefore there was no abuse of discretion in not giving a general intent instruction. With regard to the unanimity instruction, the defendant did not request the instruction and the Court held that there

were no intervening events between the cocaine being on her nose and in the bag on the floor. Finally, the Court found the prosecutor did not elicit an opinion from the witness and the witness did not directly call her a liar and even if it had been outside the wide latitude granted prosecutors it was gross or flagrant.

State v. Jones, # 95,558
Wyandotte Co., Not Published
Court of Appeals
Affirmed

Jones appealed his conviction of rape pursuant to 21-3502(a)(2), sexual intercourse with a person under 14 years of age arguing that it is unconstitutional under the Due Process and Equal Protection Clauses of the 14th Amendment. The Court held that his argument has previously been decided in favor of the State in *State v. Taylor*, 33 Kan. App. 2d 284, 286 (2004). Also, the State clearly has a legitimate interest in protecting children.

State v. Owens, # 95,560
Cowley Co., Not Published
Court of Appeals
Affirmed

Owens appealed his conviction of aggravated assault on an officer, disorderly conduct and obstructing official duty arguing the district court erred in convicting him of multiplicitous and in failing to declare a mistrial based upon Owens' alleged incompetence to stand trial due to a severe toothache. The Court held the crimes were not multiplicitous because each conviction required the State to prove an element not necessary to the other offense. The court also held that because the defendant indicated to the court he was feeling better after a continuance and did not allege that either the toothache or pain medication adversely affected his constitutional right to participate, until his post-trial motion, that the district court did not abuse its discretion in failing to declare a mistrial.

State v. Alford, # 95,578
Sedgwick Co., Not Published
Court of Appeals
Affirmed

Alford appealed his conviction of one count of criminal threat claiming the jury instruction defining criminal threat was clearly erroneous and the district court committed reversible error in responding to the jury's question during deliberations. The Court found the jury instruction read as a whole was not clearly erroneous and the trial court did not err in responding to the jury's question orally because 22-3420(3) does not require the district court's response to a jury question be in writing.

State v. Marshall, # 95,590
Sedgwick Co., Not Published
Court of Appeals
Affirmed

Marshall appealed his conviction for theft arguing that it was clearly erroneous for the court to fail to give the jury the cautionary eyewitness instruction and that the court abused its discretion by limiting the time for closing argument. The Court found that reliability of identification was not an issue in this case and the defendant had not requested the cautionary instruction. Also, the defendant failed to object to the 10-minute limit for closing and upon review the Court found defense counsel adequately explained and presented the defendant's claim that he was not the candy bar thief.

State v. Baldrige, # 95,758
Reno Co., Not Published
Court of Appeals
Affirmed

Baldrige appealed his conviction of trafficking in a correctional institution claiming the State did not bring him to trial within the required time period under UMDDA. This was the defendant's second request for a disposition of detainer under the UMDDA. The district court dismissed the charges and then refiled.

The defendant claims the clock for speedy trial began to run on the date of the first request. The Court held the clock was reset by the first dismissal and began to run on the date of the second request; therefore, there was no violation of his right to a speedy trial.

State v. Quinton, # 93,538
Reno Co., Not Published
Court of Appeals
Affirmed

Quinton was charged with one count of rape and two counts of aggravated criminal sodomy. He appealed raising six issues: 1) whether the trial court improperly denied an independent psychological evaluation of the victim; 2) whether the State violated an order in limine; 3) whether the trial court improperly admitted improper statements made during a police interview with Quinton; 4) whether the trial court erred in admitting repetitive and cumulative testimony; 5) whether cumulative errors were made; and 6) whether the trial court sentenced Quinton in violation of *Apprendi v. New Jersey*. The Court held: 1) Quinton failed to show the court abused its discretion in denying the request for the psychological evaluation; furthermore, there was evidence that corroborated the victim's story and she had never made similar charges against other men that later turned out to be false; 2) the statement in question by the victim while she was on stand with regard to the defendant having previously been in jail was made in the emotion of testimony and was a violation of the motion in limine, but that it was not prejudicial. It was stricken from the record; 3) the defendant failed to object to the videotape at the trial; 4) the testimony from both officers that conducted the defendant's interview was not cumulative because it corroborated the victim's story; 5) the defendant failed to show any errors to support a cumulative error finding; 6) the *Apprendi* issue has previously been decided against the defendant in *State v. Ivory*.

State v. Glynn, # 93,124
Sedgwick Co., Not Published
Court of Appeals
Affirmed in part, reversed in part, and remanded with directions

Glynn appealed his multiple convictions making multiple claims. First, the Court found that his Miranda waiver was not coerced because the waiver was known and voluntary, and officers are allowed to make emotional appeals to defendants so long as they do not make either threats or promises. Next, the Court found that denial of a mistrial was not an error because the mention of a drug addiction was not prejudicial enough to affect the outcome of the trial. Then the Court found that photographs admitted into evidence showing the stab wounds after they had healed was not an abuse of discretion. The Court also found based on the totality of circumstances, mainly the fact the victim had independently recognized him from prior encounters, that the photo identification was not impermissibly tainted. Finally, the Court reversed the trial court's order for reimbursement of BIDS; all other issues were affirmed.

State v. Gatlin, # 95,270
Johnson Co., Not Published
Court of Appeals
Affirmed

Gatlin appealed his conviction of criminal threat claiming: insufficient evidence, improper denial of his motion for a mistrial, and he should have been charged with assault rather than criminal threat. The Court held there was sufficient evidence and the victim's testimony was credible and proper; even though the prosecutor violated the motion in limine, the denial of the motion to dismiss was proper because he was not substantially prejudiced by a single question regarding drug usage; and finally the charging issue was decided against Gatlin in *State v. Meinert*, 31 Kan. App. 2d 492 (2004).

State v. Tully, # 92,764
Johnson Co., Not Published
Court of Appeals
Affirmed

Tully appealed his conviction of rape contending the State improperly commented on his post-arrest silence, the court gave an improper jury instruction, the State's expert witness offered an opinion beyond her qualifications, and cumulative errors denied him a fair trial. The Court held allowing the State to comment on his post-arrest silence was not an abuse of discretion because Tully had created the impression that he was cooperative with police, and the State sought to rebut this testimony by questioning him about his silence. The Court found the jury instructions were proper. The only instruction that was not a PIK instruction correctly stated the law as applied to the facts of the case. The doctor's testimony was not improper because she did not give her opinion as to whether the victim was raped; she merely stated that a rape could have occurred even without evidence of physical trauma. The Court found no cumulative error.

State v. Cox, # 94,696
Sedgwick Co., Not Published
Court of Appeals
Affirmed

Cox appealed his conviction of criminal threat and battery contending there was not probable cause to support binding him over for criminal threat that his convictions are multiplicitous, and the trial court erred in not instructing the jury on multiple acts for the battery offense. Despite the defendant's argument that the victim did not feel terrorized, the Court found no abuse of discretion because the trial court could infer that Cox intended to terrorize when he communicated the threat. Applying the same-elements test the Court found the charges are not multiplicitous. Because the evidence showed there was one continuous incident comprised of several acts that were sufficient for a battery conviction, "jury unanimity

requires only that the jury agree to an act of the crime charged, not which particular act.” *State v. Zabrinas*, 271 Kan. 422 (2001).

State v. Hampton, # 94,576
Wyandotte Co., Not Published
Court of Appeals
Affirmed

Hampton appealed his rape conviction, arguing: 1) the evidence was insufficient to permit the jury to conclude the victim was incapable of giving consent due to her mental deficiency; 2) the district court erred in admitting certain testimony; and 3) the prosecutor committed misconduct during closing argument. The Court held: 1) based on the expert testimony the jury had an opportunity to consider testimony and evidence which addressed all of the factors deemed significant in *State v. Ice*, 27 Kan. App. 2d 1 (2000); 2) the statement by the victim’s brother that he had not watched pornographic videos at the defendant’s was hearsay, but was not objected to by the defendant. The defendant claimed that is where the victim got the idea of the sexual acts, this assertion and questioning by the defendant about other hearsay statements made by the victim’s brother opened the door had they been properly objected to; and 3) the prosecutor’s comments were not improper.

State v. Sanders, # 95,230
Sedgwick Co., Not Published
Court of Appeals
Affirmed in part, vacated in part, and remanded with directions

Sanders appealed his convictions of aggravated robbery and fleeing or attempting to elude a police officer claiming there was insufficient evidence to show the taking was done in the presence or from the victim. The Court held that even though the victim ran out of the store before the taking, she testified that she ran out of fear; therefore, a jury could reasonably conclude that Sanders took the cigarettes from the victim’s presence. The defen-

dant also contended it was error for the trial court not to instruct the jury on robbery and theft as lesser-included offenses of aggravated robbery. The Court found no error because the evidence at trial clearly excluded the lesser-included offenses, and the jury could not have reasonably convicted Sanders of robbery or theft. The Court reversed for assessment of BIDS in accordance with *Robinson*.

State v. Barber, # 95,038
Labette Co., Not Published
Court of Appeals
Affirmed

Barber appealed his conviction for attempted murder arguing he was denied a speedy trial, the trial court abused its discretion by denying a continuance, the trial court erred in refusing to disqualify the prosecutor, and improperly instructed the jury. The Court found that the four factors adopted in *Barker* were properly applied and the delay did not violate Barber’s rights. The defendant failed to provide a complete record for the Court to evaluate the issues of the continuance and refusal to disqualify the prosecutor. Finally, the Court found that the trial judge’s remarks did not encourage or sanction the forming of the jurors’ ultimate opinions on guilt or innocence and were not error.

State v. Hagen, # 96,337
Johnson Co., Not Published
Court of Appeals
Affirmed

Hagen appealed her conviction of DUI arguing the trial court erred in failing to grant her request for a new preliminary hearing following the State’s filing of an amended complaint, the trial court abused its discretion in denying her motion for mistrial based upon improperly admitted evidence, and the trial court erred in failing to instruct the jury regarding the inadmissibility of preliminary breath test results. The Court found that Hagen was aware of her prior Missouri

DWI convictions and this was sufficient notice of the charges against her; further, the evidence presented at the preliminary hearing was sufficient to support the complaint as amended. The Court also found that, while it was possible for the jury to infer that Hagen failed the HGN test, the possibility of an inference did not necessitate a mistrial. Finally, the Court found no error by the trial court refusing to instruct the jury as to the PBT.

State v. Bennett, # 95,630/95,631/95,632
Lyon Co., Not Published
Court of Appeals
Affirmed

Bennett appealed claiming the State violated a plea agreement to stand silent concerning Bennett’s request for a dispositional departure sentence. The Court found the State’s request for probation revocation in a separate case did not violate the agreement, even though the Court heard both cases on the same day. Furthermore, the State only agreed to stand silent on dispositional issues, not durational issues.

State v. Rodriguez, # 95,906
Sedgwick Co., Not Published
Court of Appeals
Affirmed in part, vacated in part, and remanded with directions

Rodriguez appealed his rape conviction arguing: 1) prosecutorial misconduct that prejudiced his right to a fair trial; 2) was improperly denied a mistrial after a State’s witness violated an order in limine, and; 3) the trial court committed reversible error when it would not allow evidence offered to show consciousness of innocence. The Court held: 1) even if the remarks by the prosecutor were somewhat improper, due to the limited nature of the comments, together with the trial court’s actions sustaining the objection and the nature of the evidence presented, any error was harmless beyond a reasonable doubt; 2) the witness’s comment about the victim’s sexual history went beyond

the prosecutor's question and the defendant was not prejudiced; 3) the Supreme Court has ruled against Rodriguez, and the exclusion of the offer to take a polygraph was proper. The Court reversed and remanded for assessment of BIDS in accordance with *Robinson*.

State v. Torres, # 96,071
Riley Co., Not Published
Court of Appeals
Affirmed

Torres appealed his conviction of aggravated indecent liberties with a child, challenging the district court's evidentiary rulings, failure to grant a continuance, and prosecutorial misconduct. The Court found the evidence admitted with respect to the defendant's inappropriate touching of another minor was irrelevant, but the error was harmless because the defendant's own testimony provided overwhelming evidence of his guilt; furthermore, the motion in limine limiting statements about the victim's sexual history and pregnancy after the rape were properly excluded as irrelevant and highly prejudicial, and did not warrant a continuance. Finally, the prosecutor's reference to the defendant as a predator was not misconduct.

State v. Wentz, # 97,080
Atchison Co., Not Published
Court of Appeals
Reversed

Wentz appealed his traffic conviction for violation of a no-passing zone, arguing the trial court abused its discretion by allowing the State to amend the complaint during closing arguments to change the statute. The Court reversed finding KSA 22-3201(e) controlling. The Court found that 8-1518, original charge, and 8-1520, amended charge, deal with substantially the same prohibited acts, but are different and are different crimes.

State v. Warren, # 94,404
Johnson Co., Not Published
Court of Appeals
Affirmed

Warren appealed his felony theft convictions, challenging amended and supplemental jury instructions, the sufficiency of evidence, and the court's ruling on his motion to strike certain jurors who were victims of theft. The Court held the jury instructions were proper; the defendant wanted the jury to be instructed on "ownership" as set out in the vehicle registration statutes. The district court properly used the criminal definition of "ownership." Also, there was sufficient evidence to support the convictions, and because defense counsel abandoned his argument with respect to the jurors the Court was precluded from review.

State v. Long, # 95,472
Sedgwick Co., Not Published
Court of Appeals
Affirmed in part, vacated in part, and remanded with directions

Long appealed his convictions and sentences for aggravated burglary and theft arguing the district court erred in denying his request for a lesser included, the judge improperly answered a question from the jury, and the judge gave an inappropriate Allen instruction. The Court found no error in not issuing the lesser included because the only issue was whether or not he was there. Also, because all parties agreed to the answer given to the jury the trial court did not abuse its discretion. With respect to the Allen instruction the Court found no error in requesting the jury to deliberate more after becoming deadlocked after only 2 ½ hours. The Court reversed for BIDS assessment in accordance with *Robinson*.

State v. Perez, # 95,752
Sedgwick Co., Not Published
Court of Appeals
Affirmed in part, reversed in part, and remanded with directions

Perez appealed his conviction and sentence for aggravated assault arguing the trial court erred in not giving his compulsion instruction. The Court found no abuse of discretion because Perez himself acknowledged there was no compulsion before the shots were fired because he claims he did not know Talavera was going to shoot, and his fear of Talavera arose only after Talavera began firing. The Court reversed for an assessment of BIDS in accordance with *Robinson*.

State v. Hayes, # 95,790
Shawnee Co., Not Published
Court of Appeals
Affirmed in part, reversed in part, and remanded

Hayes appealed the district court's denial of his motion to withdraw his no contest pleas. The Court found that the defendant failed to establish either that his counsel was ineffective or that his pleas were involuntary. The Court reversed for an assessment of BIDS in accordance with *Robinson*.

State v. Anderson, # 96,129
Saline Co., Not Published
Court of Appeals
Reversed and remanded

The State appealed the district court's dismissal of a criminal case arguing abuse of discretion. The Court reversed finding there was no evidence of the continuance the State requested due to a subpoenaed witness failing to show would prejudice the defendant.

Calendar of Events

KCDA 2007 Spring
Conference
June 10-12, 2007
Hyatt Regency Hotel
Wichita, Kansas

KCDA 2007 Fall
Conference
October 21-23, 2007
Capitol Plaza Hotel
Topeka, Kansas



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