NOT DESIGNATED FOR PUBLICATION

No. 115,172

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

BILLY SARTIN,
Appellant.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; JOHN J. KISNER JR., judge. Opinion on remand filed November 15, 2019. Affirmed.

Caroline M. Zuschek and *Kimberly Streit Vogelsberg*, of Kansas Appellate Defender Office, for appellant.

Lance J. Gillett, assistant district attorney, *Marc Bennett*, district attorney, and *Derek Schmidt*, attorney general, for appellee.

Before GARDNER, P.J., MALONE and ATCHESON, JJ.

PER CURIAM: When the district court sentenced Billy Sartin to 604 months in prison, it calculated his sentence using a criminal history score of A, which included five prior felony convictions from Illinois. Sartin appealed. On appeal, we considered the merits of only one prior conviction. On review, the Kansas Supreme Court affirmed our finding that the district court properly scored that conviction as a person crime. But the Kansas Supreme Court remanded, instructing us "to consider and rule on the merits of the person offense classification of the other four Illinois convictions" we had not addressed on the merits. *State v. Sartin*, 310 Kan. 367, 374-75, 446 P.3d 1068 (2019). We do so

now. Based on the Supreme Court's handling of Sartin's prior felony conviction and on its other recent decisions, we apply the "closest approximation" test in deciding Sartin's criminal history. Using that test, we find no error and affirm.

Factual and Procedural Background

Because the facts leading to this appeal have been stated twice before, we find it unnecessary to recite them at length again. Instead, we set forth the facts from the Kansas Supreme Court's recent opinion in this case, pre-remand:

> "Following his 1995 convictions for aggravated kidnapping, aggravated criminal sodomy, sexual battery, aggravated robbery, and robbery, Billy Sartin was sentenced to 604 months in prison. His sentence was calculated using a criminal history score of A, which included five prior felony convictions from Illinois: two convictions in 1987 for aggravated criminal sexual battery, two 1987 convictions for home invasion, and one 1993 conviction for aggravated criminal sexual abuse. The robbery conviction was remanded on direct appeal and the State opted against re-prosecuting it; Sartin's sentence was reduced to 570 months. *State v. Sartin*, No. 74,791, unpublished opinion filed November 15, 1996 (Kan. App.). The mandate issued February 7, 1997.
>
> "In June 2015, Sartin filed a pro se K.S.A. 22-3504 motion to correct an illegal sentence, arguing that one of his Illinois convictions, for aggravated criminal sexual abuse, should be scored as a nonperson felony pursuant to *State v. Murdock*, 299 Kan. 312, 323 P.3d 846 (2014) (*Murdock I*), *overruled by State v. Keel*, 302 Kan. 560, 357 P.3d 251 (2015), which had held that all prior out-of-state convictions must be scored as nonperson crimes.
>
> . . . .
>
> "The Court of Appeals affirmed the district court's denial. On the merits, the panel found that, for KSGA criminal history scoring purposes, the Illinois crime of aggravated criminal sexual abuse was comparable to the Kansas crime of aggravated

> sexual battery, K.S.A. 1994 Supp. 21-3518, which was a person felony. *State v. Sartin*, No. 115,172, 2017 WL 462696, at *4 (Kan. App. 2017) (unpublished opinion). But the panel declined to consider the merits of Sartin's challenge to his other four Illinois convictions because he had not specifically mentioned them in his pro se K.S.A. 22-3504 motion, albeit his brief to the Court of Appeals contested all five prior convictions. *Sartin*, 2017 WL 482696, at *2." *Sartin*, 310 Kan. at 368.

Sartin petitioned for review and our Supreme Court accepted review. On review, the Supreme Court determined that the pre-*Wetrich* "closest approximation" test applied to Sartin's criminal history offenses. 310 Kan. at 372. Using that test, it found the Illinois crime of aggravated criminal sexual abuse, Ill. Stat. Ch. 38, ¶ 12-16 (1992), was comparable to the Kansas crime of aggravated sexual battery, K.S.A. 1994 Supp. 21-3518. 310 Kan. at 372-73. Thus, our Supreme Court affirmed our finding that the district court had properly scored Sartin's 1993 prior conviction for aggravated criminal sexual abuse as a person felony in calculating his KSGA criminal history score. 310 Kan. at 374.

But the Kansas Supreme Court held that even though Sartin's K.S.A. 22-3504 motion to correct an illegal sentence challenged only his Illinois crime of aggravated criminal sexual abuse, the Kansas Court of Appeals had erred by not considering all five prior Illinois convictions that Sartin had challenged in his appellate brief. It remanded the case to this court "with instructions to consider and rule on the merits of the person offense classification of the other four Illinois convictions." 310 Kan. at 375. Given the change in the applicable legal analysis between the parties' initial briefing and the remand, we requested and received supplemental briefing from the parties.

Analysis

Sartin's four 1987 Illinois convictions, which we must determine the offense classification of, are:

- two counts of aggravated criminal sexual battery, and
- two felony convictions for home invasion.

These Illinois convictions were used for criminal history purposes when Sartin was sentenced in Kansas in 1995. Our record on appeal shows that one day in 1984, at around 2 a.m., Sartin and his codefendant broke into a home occupied by a mother, her 10-year-old son, and her 13-year-old daughter. Sartin and his codefendant were armed with guns. They beat the mother, threatened her life, threatened the son's life, and then took turns having forcible sexual intercourse with the mother and the daughter. Yet we decline the State's invitation to base our finding on the facts of Sartin's Illinois crimes, which occurred pre-*Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), rather than on the language of the Illinois and Kansas statutes.

Sartin underscored the Supreme Court's holding in *Murdock II* that a movant under K.S.A. 22-3504(1) "is stuck with the law in effect at the time the sentence was pronounced." *State v. Murdock*, 309 Kan. 585, 592, 439 P.3d 307 (2019) (*Murdock II*). *Sartin*, 310 Kan. at 372.

> "Sartin was sentenced in 1995. He contends that his sentence was subsequently rendered illegal by *Apprendi*'s prohibition on judicial fact-finding and subsequent decisions from this court, i.e., the law upon which Sartin relies to argue illegality of his sentence was not the law in effect when his sentence was pronounced. *Murdock II* precludes that subsequent-change-in-the-law argument. Further, as a matter of statutory law, in *State v. Weber*, 309 Kan. 1203, 1209, 442 P.3d 1044 (2019), this court held '*Wetrich* was a change in the law as contemplated by *Murdock II*'; therefore, Sartin is precluded from arguing '*Wetrich* makes his sentence, which was legal when it was imposed, illegal.' The legality of Sartin's sentence must be assessed by the comparability test applicable when his sentence was pronounced, i.e., the closest approximation test." *Sartin*, 310 Kan. at 372.

Under the closest approximation test, "the crimes need not have identical elements to be comparable for making the person or nonperson designation." *State v. Williams*, 299 Kan. 870, 873, 326 P.3d 1070 (2014) (citing *State v. Vandervort*, 276 Kan. 164, 179, 72 P.3d 925 [2003]), *overruled in part on other grounds by State v. Dickey*, 301 Kan. 1018, 350 P.3d 1054 (2015). To identify a comparable Kansas crime in the context of K.S.A. 2015 Supp. 21-6811(e), the Kansas crime that is "'the closest approximation' of the out-of-state crime [is] a comparable offense." *Williams*, 299 Kan. at 873. Rather than require identical elements, "[t]he essential question is whether the offenses are similar in nature and cover similar conduct." *State v. Martinez*, 50 Kan. App. 2d 1244, 1249, 338 P.3d 1236 (2014); see *State v. Barajas*, 43 Kan. App. 2d 639, 643, 230 P.3d 784 (2010).

The Kansas Supreme Court applied this "closest approximation" test in finding Sartin's 1993 Illinois crime for aggravated criminal sexual abuse comparable to the Kansas crime of aggravated sexual battery—a person crime.

> "The panel, citing to *Williams*' use of the 'closest approximation' standard, opined that Illinois' aggravated criminal sexual abuse was 'sufficiently similar in the nature and type of conduct prohibited' by Kansas' aggravated sexual battery to be a comparable crime for purposes of classifying the prior conviction as a person offense. *Sartin*, 2017 WL 462696, at *4. Sartin attempts to refute that comparability determination by describing hypothetical situations under which a person could be convicted of the Illinois crime, but not the Kansas crime. That tack would be compelling under *Wetrich*'s identical-or-narrower-elements test. But the test is closest approximation. In that vein, we agree that the gravamen of the Illinois crime closely approximates that of our aggravated sexual battery." *Sartin*, 310 Kan. at 374.

The Closest Approximation Test Applies to Sartin's Other Illinois Crimes.

Sartin devotes most of his supplemental brief to arguing that the Kansas Supreme Court erred in holding that "the legality of Sartin's sentence must be assessed by the

comparability test applicable when his sentence was pronounced, i.e., the closest approximation test." 310 Kan. at 372. Sartin asserts that the "closest approximation" test did not become the law until 2003 in *Vandervort*, so that test did not exist when the district court sentenced *Sartin* in 1995. Sartin contends that before *Vandervort*, a dispute existed about which test applied, and *Vandervort* changed the law just as *Wetrich* did. Instead, Sartin contends *Wetrich*'s "identical or narrower elements" test should apply.

But we are not at liberty to revisit that issue. To the contrary, we are duty bound to follow the Kansas Supreme Court, generally. *State v. Meyer*, 51 Kan. App. 2d 1066, 1072, 360 P.3d 467 (2015). And we are doubly bound to follow our Supreme Court here, given the dictates of the law-of-the-case doctrine. See *State v. Kleypas*, 305 Kan. 224, Syl. ¶ 2, 382 P.3d 373 (2016) ("Under the law of the case doctrine, when a second appeal is brought in the same case, the first decision is the settled law of the case on all questions involved in the first appeal, and reconsideration will not normally be given to such questions."). This rule of practice promotes the finality and efficiency of the judicial process and avoids "'indefinite relitigation of the same issue, to obtain consistent results in the same litigation, to afford one opportunity for argument and decision of the matter at issue, and to assure the obedience of lower courts to the decisions of appellate courts.'" *State v. Soto*, 310 Kan. 242, 253, 445 P.3d 1161 (Kan. 2019) (quoting *State v. Collier*, 263 Kan. 629, Syl. ¶ 2, 952 P.2d 1326 [1998]).

Because Sartin was sentenced in Illinois before the Kansas Supreme Court changed the law in *Wetrich*, *Wetrich* does not apply. Instead, we apply the closest approximation test—the test in effect when Sartin's sentence was pronounced—as directed by the Kansas Supreme Court.

Sartin's 1987 Aggravated Criminal Sexual Battery Convictions are Comparable to Kansas Person Crimes.

Sartin alternatively argues, using the closest approximation test, that his four Illinois crimes were insufficiently similar to Kansas person crimes. We first examine his aggravated sexual battery convictions.

Sartin was convicted in 1987 of two aggravated criminal sexual battery convictions under this Illinois statute:

> "(a) The accused commits criminal sexual assault if he or she:
>
> (1) commits an act of sexual penetration by the use of force or threat of force; or
>
> (2) commits an act of sexual penetration and the accused knew that the victim was unable to understand the nature of the act or was unable to give knowing consent; or
>
> (3) commits an act of sexual penetration with a victim who was under 18 years of age when the act was committed and the accused was a family member or the accused was a person responsible for the child's welfare." Ill. Stat. Ch. 38, ¶ 12-13 (1984).

(The parties agree that Sartin was convicted under this statute which defines sexual "assault," although Sartin's records reflect sexual "battery.") See also Ill. Stat. Ch. 38, ¶ 12-12(f) (defining sexual penetration).

Criminal sexual assault becomes aggravated under Illinois law under any of these circumstances: the offender displays, threatens or uses a dangerous weapon or any object fashioned or utilized in the manner of a dangerous weapon; causes bodily harm to the victim; threatens or endangers the life of the victim; commits the sexual assault during the commission of any other felony; if the victim is 60 years of age or older at the time of

the sexual assault; or if the offense involved other age-related disparities of the offender and the victim. Ill. Stat. Ch. 38, ¶ 12-14(a)-(b) (1984).

The record does not reflect which subsection of this statute Sartin was convicted under. Thus the factual possibilities are many. Perhaps for that reason, the State's brief did not suggest a single Kansas crime as being comparable. Instead, it listed about 15 Kansas statutes that address the broad range of sexually violent conduct that could fall within this Illinois statute. These include the crimes of rape, sodomy, and sexual battery. The State includes K.S.A. 1994 Supp. 21-3408, K.S.A. 1994 Supp., 21-3415, and K.S.A. 1994 Supp. 21-3419, which essentially state that any assault, battery, or criminal threat in Kansas is a person offense. The State then concludes that "no matter which Kansas offense is chosen as comparable to the specific subsection of the Illinois statute under which defendant was convicted, the proper classification of defendant's prior Illinois aggravated sexual assault convictions for purposes of his criminal history in the instant case was, and must remain, person felonies." In January 1995, Kansas had comparable sexual offenses for every subsection of the Illinois aggravated sexual assault statute under which Sartin could have been convicted, and all of them were designated as person crimes.

The State's supplemental brief was more specific, arguing that Sartin's aggravated criminal sexual battery/assault convictions, although perhaps comparable to rape, are at least comparable to Kansas' aggravated sexual battery under K.S.A. 1994 Supp. 21-3518. That statute criminalized:

> "(a) . . . the intentional touching of the person of another who is 16 or more years of age and who does not consent thereto, with the intent to arouse or satisfy the sexual desires of the offender or another under any of the following circumstances:
>
> (1) When the victim is overcome by force or fear;
>
> (2) when the victim is unconscious or physically powerless;

> (3) when the victim is incapable of giving consent because of mental deficiency or disease, or when the victim is incapable of giving consent because of the effect of any alcoholic liquor, narcotic, drug or other substance, which condition was known by, or was reasonable apparent to, the offender." K.S.A. 1994 Supp. 21-3518(a).

Sartin does not argue that the Illinois aggravated sexual offense statutes and Kansas sexual offense statutes do not cover the same type of conduct. Clearly, they do: both criminalize unwanted sexual touching of persons in vulnerable or fearful circumstances. Instead, Sartin contends that Kansas sex crimes statutes either require proof of an intent to satisfy a sexual desire, which Illinois does not, or require other narrower conduct than did his prior Illinois convictions for aggravated criminal sexual assault.

Here, as before, Sartin's attempt to refute the comparability determination by describing hypothetical situations under which a person could be convicted of the Illinois crime, but not the Kansas crime, is unsuccessful. "That tack would be compelling under *Wetrich*'s identical-or-narrower-elements test. But the test is closest approximation. In that vein, we agree that the gravamen of the Illinois crime closely approximates that of our aggravated sexual battery." *Sartin*, 310 Kan. 374. We find the conduct criminalized by the Illinois statute on aggravated criminal sexual assault closely approximates that of Kansas aggravated sexual battery, a person crime.

As a result, the district court properly classified Sartin's two 1987 Illinois convictions for aggravated criminal sexual assault as person offenses.

Sartin's 1987 Felony Home Invasion Convictions are Comparable to Kansas Person Crimes.

We next determine whether Sartin's two 1987 Illinois felony convictions for home invasion are comparable to Kansas person crimes. We recognize that as long as either Sartin's Illinois sex offenses or the home invasions are comparable to Kansas person crimes, Sartin's criminal history score will be A and other crimes will not affect his sentence. Nonetheless, because the Supreme Court instructed us on remand to rule on the merits of the classification of all four of Sartin's Illinois felonies, we do so.

The Illinois "Home Invasion" statute in 1995 provided:

> "(a) A person who is not a peace officer acting in the line of duty commits home invasion when without authority he or she knowingly enters the dwelling place of another when he or she knows or has reason to know that one or more persons is present and
>
> (1) While armed with a dangerous weapon uses force or threatens the imminent use of force upon any person or persons within such dwelling place whether or not injury occurs, or
>
> (2) Intentionally causes any injury to any person or persons within such dwelling place." Ill. Rev. Stat. 1979 Supp. ch. 38, ¶ 12-11(a).

Kansas did not have a home invasion statute in 1995. The State contends that Kansas' closest approximation to the Illinois home invasion statute is aggravated burglary. Burglary, a person crime, was defined in 1995 as:

> "[K]nowingly and without authority entering into or remaining within any:
>
> "(a) Building . . . which is a dwelling, with intent to commit a felony, theft or sexual battery therein." K.S.A. 1994 Supp. 21-3715(a).

A more severe offense, aggravated burglary, occurred when the burglary was committed in a structure in which there was a human being. K.S.A. 1994 Supp. 21-3716.

Sartin does not contend that the gist of the two statutes is different. Instead, he argues that the elements of Kansas burglary statutes are narrower than those in Illinois because Kansas burglaries require entering a dwelling with the intent to commit an illegal act, but Illinois burglaries lack that specific intent requirement. As a result, he contends the two crimes are not comparable. Here, as above, this approach is misplaced.

Under the closest approximation test, it matters not that the Kansas and the Illinois statutes are not identical. Kansas aggravated burglary is complete when a defendant makes an unauthorized entry into an occupied dwelling with the requisite intent, while Illinois home invasion is not complete until the offender, armed with a dangerous weapon, either uses or threatens force against someone inside or injures someone. But both statutes criminalize the invasion of a home where a person is present—a crime when physical or emotional harm to that person is most likely. We find the gravamen of the Illinois crime closely approximates that of our aggravated burglary statute, a person offense. Thus, the district court properly scored Sartin's Illinois convictions in 1987 for home invasion as person crimes.

Affirmed.