NOT DESIGNATED FOR PUBLICATION

No. 118,881

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

JORDAN R. LEWIS,
Appellant. MEMORANDUM

OPINION

Appeal from Sedgwick District Court; KEVIN J. O'CONNOR, judge. Opinion filed May 31, 2019. Affirmed.

Korey A. Kaul, 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 ARNOLD-BURGER, C.J., PIERRON AND MALONE, JJ.

PER CURIAM: The jury convicted Jordan Lewis of two counts of aggravated criminal sodomy, two counts of aggravated indecent liberties with a child, and possession of marijuana with intent to distribute. The district court sentenced Lewis to 330 months' imprisonment with lifetime postrelease supervision. Lewis appeals.

FACTS

On November 4, 2015, M.D., age 15, and J.W., age 16, left the Passages group home in Wichita. They planned on finding a ride to Olathe, where M.D. was from. They

walked around until dark and went to Sonic. At Sonic, Lewis approached M.D. and J.W. and asked if they were from around there and if they needed a ride. He also asked if they wanted to smoke marijuana. The girls got into the truck and smoked marijuana with Lewis. Lewis drove around then parked at the end of a dead-end road. Lewis told the girls they had to pay him for the ride, and they understood that to mean sex.

Lewis showed the girls a gun. Although he did not point it at them or threaten them with it, it made both girls nervous. Lewis left the gun in the front seat when he and J.W. got into the back seat with M.D. Lewis instructed the girls to take their clothes off and kiss each other and "touch each other." M.D. testified that Lewis had his pants down, penis erect, and asked her to have intercourse with him. She did not want to have sex with Lewis but she was afraid after he had shown them the gun. She testified he said the girls would have to do things to him or he would hurt them, but she could not remember the exact comment. However, J.W. testified that Lewis did not have intercourse with M.D., but instead had each of the girls perform oral sex on him. She did not want to perform oral sex on him or kiss M.D.

Lewis drove the girls to his house but told them they could not go inside because he lived there with his wife and kids. Instead, he took them to Shorty's house. Shorty's real name is Roderick Martin. M.D. and J.W. later found out Martin was a pimp. After Martin introduced himself to M.D. and J.W., he went to bed. Before leaving, Lewis took his pants down and asked both girls to perform oral sex on him as additional payment. In an interview, M.D. stated that when Lewis left, "he told us to stay. We weren't going to, but I noticed the freaking alarm system."

Shortly after Lewis left, Martin instructed M.D. and J.W. to sleep naked in his bed with him. After sleeping for a little bit, he woke M.D. up by touching her breasts. He then

had intercourse with her. She did not want to have sex with him but felt she did not have a choice.

On the morning of November 5, 2015, Martin provided M.D. and J.W. with marijuana and let them bathe. He talked to them about prostitution and provided them with a pamphlet entitled "A Better Escort Agency Guidelines," which provided the do's and don'ts of prostitution. Martin took them shopping, because as prostitutes they needed better shoes and clothes. He informed M.D. and J.W. that they could not work for any other services and he was going to charge clients $200 for them individually and $500 for them together. Martin gave M.D. the stage name "Lucky" and J.W. the name "Mercedes." Martin instructed M.D. and J.W. to put on lingerie and pose for pictures for him to post online and gain clientele for them. He gave the girls purses and a cell phone to share. After he had taken their pictures, Martin had M.D. and J.W. stay in the lingerie. They remained in the lingerie throughout the evening, even when other people were at the house.

In the evening, Lewis and Gwendolyn Brown, a.k.a. G-Money, went to Martin's house, where they all smoked marijuana and drank alcohol. Brown took pictures of the girls in the lingerie on her phone. While the girls were in the living room, M.D. heard Lewis, Martin, and Brown conversing in the kitchen. She heard them discussing how they would make money off M.D. and J.W. Though she could not tell who said what, she knew they had discussed business in Colorado, where Martin was going to take the girls.

That night, while Martin and J.W. were asleep, M.D. tried to leave the house. When she opened the back door, the alarm said, "The back door is open." She closed the door quickly for fear it would wake Martin. She had not tried to leave before because Martin had told the girls that they were his, but after overhearing about Colorado she was

afraid. After retrieving the cell phone from J.W.'s purse, M.D. went into the bathroom and called her mother. She told her mother that she was in trouble. She said she was in a house and the homeowner was going to take her to Colorado. M.D. explained that the doors had alarms and she could not get out, but she would try again.

M.D. went to the bedroom and woke up J.W. She told her they needed to leave because she was scared something was going to happen to them. They decided to use a knife to cut the screen on the bathroom window so they could climb out. However, cutting the screen made a loud noise and once M.D. got out the window with the cell phone, Martin awoke. J.W. quickly shut the window and closed the curtain so he could not see that M.D. had gotten out. J.W. testified Martin said "'What the fuck happened to [M.D.]?' And was like freaking out and calling her rude ass names, and told [J.W.] to go back to bed." M.D. hid under a car when Martin went outside to look for her. Once he went back inside, M.D. ran down the road. She called her mother again and told her she got out of the house but needed to go back for her friend. Her mother advised her to call police, tell them she had been kidnapped, and let the police help her friend.

Wichita Police Officer Alli Larison responded to the dispatch for a hysterical female who had just escaped from a house. Larison located M.D. and took her to the police station. Because the focus was on finding J.W., Sergeant Paul Kimble asked Larison to drive M.D. around the area to try to locate the house. After M.D. identified the house, Larison took her to the Exploited and Missing Children's Unit (EMCU) to talk to detectives. Following the interview, Larison took M.D. to the hospital for a SANE/SART exam then to Wichita Children's Home.

Meanwhile, Sgt. Kimble and other officers responded to Martin's house. When Martin answered the door, Kimble informed him the officers needed to enter the house

because they believed a crime victim was inside. In the bedroom, they found J.W. in the bed with the blankets pulled over her head.

That evening, Sgt. Kimble returned to Martin's neighborhood hoping to discover Lewis' identity because, at that time, they only knew his nicknames. Kimble spoke with a neighbor who provided the location of Lewis' neighborhood. When officers responded to the neighborhood, they found Lewis' truck, which matched the description M.D. and J.W. provided. Officer Larison showed both girls, separately, photo lineups that included Lewis' photo and each girl identified Lewis as the man in the truck.

Officers contacted Lewis at his house and he admitted that he had given two girls a ride from Sonic. When the crime scene investigators searched the truck, they discovered a white box containing 10 bricks—12.51 lbs.—of marijuana behind the driver's seat. Under the passenger seat, officers found a bra, which J.W. identified as hers.

The State charged Lewis with two counts of aggravated human trafficking; two counts of kidnapping; aggravated indecent liberties with a child; rape, or as an alternative, aggravated indecent liberties with a child; aggravated criminal sodomy, or in the alternative, criminal sodomy; aggravated criminal sodomy; and possession of marijuana with intent to distribute. Lewis proceeded to jury trial, beginning October 30, 2017. The parties rested their cases on Friday, November 3.

The following Monday, the parties reconvened for the instruction conference before closing arguments. Regarding instruction No. 18, which Lewis challenges, the district court stated: "And then the final one would be: 'When you retire to the jury room.'" Defense counsel responded, "No objection, Your Honor."

After a few hours of deliberation, the jury sent out two enumerated questions. First, it asked whether a 15- or 16-year old can legally consent to sex. Second, it asked

"Transcript [J.W.'s] Y or N about [M.D.] in back seat of truck[.]"Above the second question, the jury had written "Did [J.W.] say during trial [M.D.] & Lewis had sex?" The parties conferred, and the district court sent the second question back to the jury for clarification. The district court explained the purpose of the clarification was, "are they asking for a transcript of an interview of [J.W.], or were they asking for a readback? And I don't normally just tell them the readback is available. So it was important to know what they were asking for." The jury clarified by asking: "What was [J.W.'s] answer to question penis/vaginal sex [M.D.] & defendant back of truck during State & defense testimony @ trial?"

While discussing how to answer the jury's questions, the parties agreed the district court should answer the first question by referring the jury back to the instructions provided. Regarding the second question, the court proposed telling the jury:

> "[T]hey must rely upon their collective memory of the case. And I don't think I'll say anything more than that. I believe they have to specifically ask for things rather than me making suggestions to them. They may not necessarily be happy about that, but I think that's the appropriate answer[.]"

Defense counsel agreed with telling the jurors to rely on their collective memory.

When the jury returned to the courtroom, the district court answered the second question by saying:

> "Regarding the question about what [J.W.] said during trial, I can't answer that question for you. That would rely upon your collective memory; you, as a juror, as to what was said and what evidence was admitted at trial. So then you may be able to predict my answer is that I cannot provide you with a transcript. You must decide this case based upon the evidence that was admitted during the trial. And so I can't provide

> you with an answer to what [J.W.'s] answer was. That, too, would rely upon your collective memory of what occurred at trial or what people testified to."

After the jury exited the courtroom, the district court asked the parties if they wanted to put anything on the record. Defense counsel replied, "Defense has nothing, Your Honor." However, the State expressed concern that appellate courts would interpret the district court's statement, "I can't give you a transcript" as meaning it could not provide a readback. The court explained that the question was sent back to the jury for clarification, in part, for this reason.

> "And because a transcript to the parties and to myself is something different than a readback. A transcript, to me, so if a court is reviewing this, a transcript, to me – and words have meanings in trials. A transcript means that there is, an interview was done and somebody transcribed what was on the interview. For example, in this case the interview of [M.D.] and/or [J.W.], and the parties had that and were reading from it as the tapes ran, were played in court. And then there were questions asked of whatever witness introduced the various interview.
>
> "The request for clarification was sent back to try to determine whether they were asking for a readback or not. They sent out their clarification. It was basically a question asking to answer, so I don't think they have requested – and words have meaning, I guess. And they did not ask for a readback. And when given an opportunity to clarify what they were asking for, they asked a question, rather than saying 'Can we have,' which they can. They have the ability to ask for it. Nobody has told them they couldn't.
>
> "I see what the State is saying, but that specifically answers their question. They can't have a transcript. They could have a readback, but they didn't ask for a readback. And then I start – I think if I start trying to figure it out, then I'm, then telling them to ask for a readback, and I don't want to do that either, so that's why I said what I said."

Less than two hours later, the jury submitted a third question asking the legal definition of coercion. The district court answered the question by stating coercion does not have a specific definition in the instruction and told the jury that ordinary words should be given their ordinary meaning. Shortly after noon the following day, the jury

sent out a fourth question: "We have decided on eight counts. We are unable to come to an agreement on three counts, and do not perceive any agreement. How do we proceed?" The district court estimated the jury had deliberated for approximately 10 hours by that point. After ensuring that the jurors could not unanimously agree if given additional time, the court instructed the jury to fill out the verdict forms as guilty or not guilty for the charges it agreed on and write "hung or can't agree" on the verdict forms for the charges they could not agree on. The court stated it would accept the agreed upon verdicts.

The jury found Lewis guilty of two counts of aggravated indecent liberties with a child, two counts of aggravated criminal sodomy, criminal sodomy, and possession of marijuana. The jury found Lewis not guilty of two counts of kidnapping and were undecided about the two counts of aggravated human trafficking and one count of rape. The district court sentenced Lewis to 330 months' imprisonment with lifetime postrelease supervision. The court did not sentence Lewis for the charge of criminal sodomy because it was charged in the alternative to aggravated criminal sodomy, for which Lewis was also convicted.

Lewis appeals.

ANALYSIS

Did the District Court Misinform the Jury?

Lewis contends the district court erroneously informed the jury that it could not provide a transcript or answer for the second mid-deliberation question. He claims the court's answer was an abuse of discretion and possibly chilled the jury from asking

further questions about testimony. He asserts such chilling improperly tainted the trial and he asks us to reverse his convictions and remand the case for a new trial.

Standard of Review

A district court's response to a mid-deliberation question is reviewed under the abuse of discretion standard. *State v. Lewis*, 299 Kan. 828, 856, 326 P.3d 387 (2014). A judicial action constitutes an abuse of discretion if (1) no reasonable person would take the view adopted by the district court; (2) it is based on an error of law; or (3) it is based on an error of fact. *State v. Marshall*, 303 Kan. 438, 445, 362 P.3d 587 (2015). Lewis claims the district court abused its discretion by providing a response based on error of law and fact.

The appellate court exercises unlimited review in determining whether the district court's response was legally erroneous. *Lewis,* 299 Kan. at 856. When determining which legally appropriate response the district court should have provided, we give the district court deference in considering whether no reasonable person would have given the response adopted by the district court. 299 Kan. at 856.

If the district court's response was erroneous, the appellate court then applies the clearly erroneous standard of reversibility because Lewis failed to object. 299 Kan. at 855. "'Clearly erroneous' is not a standard of review, *i.e.*, a framework for determining whether error occurred. Rather, it supplies a basis for determining if an error requires reversal." 299 Kan. at 856 (citing *State v. Williams*, 295 Kan. 506, 510-16, 286 P3d 195 [2012]). Under the clearly erroneous framework, to reverse the convictions, we must be firmly convinced the jury would have reached a different verdict had the erroneous response not been given. *Williams*, 295 Kan. at 516. If the error was not clearly erroneous, it is not reversible error.

Invited Error

Whether the doctrine of invited error applies is a question of law, subject to unlimited review. *State v. Hankins*, 304 Kan. 226, 230, 372 P.3d 1124 (2016). "A defendant is not permitted to join in a request for specific language to be used in answering a jury's question and then, on appeal, claim that the trial court erred in using the language." *State v. Cramer*, 17 Kan. App. 2d 623, Syl. ¶ 2, 841 P.2d 1111 (1992).

The State contends that because Lewis participated in choosing the language of the district court's response, the issue is precluded from appellate review under the invited error doctrine. Here, the jury initially asked: "Did [J.W.] say during trial [M.D.] & Lewis had sex?" and "Transcript [J.W.'s] Y or N about [M.D.] in back seat of truck[.]" The parties conferred and asked for clarification, at which point, the jury provided the question: "What was [J.W.'s] answer to question penis/vaginal sex [M.D.] & defendant back of truck during State & defense testimony @ trial?" The district court explained the purpose of asking for clarification was to determine whether the jury sought a transcript of an interview with J.W. or a readback of her testimony.

The district court proposed to respond to the jury's question by saying: "I just intend to tell them that they must rely upon their collective memory of the case. And I don't think I'll say anything more than that." Lewis agreed with the proposed answer, stating, "'Rely on your collective memory.' I think that's about all we should be doing in this case." However, after informing the jury as agreed, the court expanded on the agreed upon statement in telling the jury to rely on its collective memory "as to what was said and what evidence was admitted at trial." The court further explained it could not provide a transcript or the answer to the question. Lewis contends the additional statements chilled the jury from asking further questions about testimony.

Lewis only agreed to the specific language "Rely on your collective memory," not to language that the jury must rely on what was said and what evidence was admitted, or that the district court could not answer the question or provide a transcript. Though the additional language does not contradict the agreed upon answer, it is not the same answer as agreed upon and so any error was not invited.

Error of law

Lewis contends the district court's response was based on error of law by including "what was said and what was admitted at trial," "I cannot provide you with a transcript," and "I can't provide you with an answer to what [J.W.'s] answer was." He complains that the court's broad statement that it could not provide answers about the content of J.W.'s testimony was legally incorrect because the court could have provided the jury with a readback of her testimony.

Under K.S.A. 2018 Supp. 22-3420(d), the district court must instruct the jury of the ability, requirements, and procedure to ask the court questions after retiring for deliberation. "In its discretion, the court may grant a jury's request to rehear testimony." K.S.A. 2018 Supp. 22-3420(d). The statute permits discretion in granting a *request* to rehear testimony but does not provide the court discretion to *offer* the jury a readback or require the court to inform the jury of the option of a readback. Because the jury initially requested a transcript, clarified by asking what J.W.'s testimony was, and the district court could not have provided the jury with a transcript or simply answered the jury's question, the answer was not legally erroneous.

When determining which legally appropriate response should have been provided, we consider whether no reasonable person would have given the response provided by the district court. *Lewis*, 299 Kan. at 856. While discussing the questions outside the jury's presence, the district court explained it was important to know what the jury was

asking for because it did not typically inform the jury of the option for a readback. The court clarified that it was under the impression the jury had to specifically ask for "things" and it could not make suggestions to the jury. Lewis agreed with the court telling the jury to rely on its collective memory and did not suggest the court offer a readback as an option or object to the court's inclination against informing the jury of the option. Because the statute explicitly requires the jury request to rehear testimony and the parties agreed that the court need not inform the jury of the readback option, the district court's response was one that a reasonable person could have provided.

Error of fact

Lewis contends the district court erred as a matter of fact because the jury clearly wanted to know how J.W. answered a question at trial. He claims the court's answer that it could not provide a transcript or an answer likely confused the jury. Lewis supports his assertion with the findings in *Avila v. State*, 781 So. 2d 413 (Fla. Dist. Ct. App. 2001), which is neither persuasive nor binding. In *Avila*, the District Court of Appeals of Florida found the trial court improperly misled the jury into thinking a readback was prohibited. The trial court had informed the jury that a transcript was not available when asked for a timetable provided in the alibi witnesses' testimony. Though the jury did not specifically ask for a readback, the trial court recognized the request was for a readback and the issue was whether the court could provide a partial readback or if the entire testimony of the witnesses had to be read back. The trial court denied the request as it believed it would be required to provide full readback of five witnesses' testimonies, which would have taken a whole day. 781 So. 2d at 414-15. *Avila* is not applicable.

Here, Lewis asserts the jury clearly wanted information about J.W.'s testimony about what happened in the back seat of the truck. This is an interpretation of one question, but the jury asked two questions simultaneously: "Did [J.W.] say during trial [M.D.] and Lewis had sex?" and "Transcript [J.W.'s] Y or N about [M.D.] in back seat of

truck." The district court stated the purpose of sending the question back to the jury for clarification was "are they asking for a transcript of an interview of [J.W.], or were they asking for a readback?"

The two questions appear to reference two different witnesses' testimonies. J.W. testified on the fourth day of trial as to her experiences between November 4 and 6, 2015. On the fifth day of trial, Anne Ellis, the Department for Children and Families social worker housed at the EMCU, testified about her interview with J.W. on November 6, 2015. The State admitted the DVD recording of the interview into evidence and played the recording in court. Then, while testifying, Ellis referred to the transcript of the interview and defense counsel directed her to specific lines and pages throughout cross-examination. The transcript was not admitted into evidence.

Given that the jury asked about what J.W. said at trial as well the transcript for what happened in the back seat of the truck, it was reasonable that the court could not decipher specifically what the jury wanted. Because the evidence provides for the different interpretations of the questions, the court did not operate on an error of fact. Significantly, off the record, the parties conferred about the question and agreed to send it back for clarification. Because that conversation was not on the record, we can only go by the district court's later statement that the parties agreed to seek clarification, which would lead us to believe Lewis understood the ambiguity in the jury's request.

Because the district court did not err in its response to the jury's questions, we need not analyze the district court's response under the clear error reversibility standard.

Jury Nullification

Lewis next contends the district court prevented the jury from exercising its inherent right of jury nullification by instructing it that the verdict "must be founded

entirely upon the evidence and law as given in the instructions." He asserts the use of the word "must" misstates the law and the court should have used the word "should," which would have permitted jury nullification.

Standard of Review

> "When analyzing jury instruction issues, we follow a three-step process: '(1) determining whether the appellate court can or should review the issue, *i.e.*, whether there is a lack of appellate jurisdiction or a failure to preserve the issue for appeal; (2) considering the merits of the claim to determine whether error occurred below; and (3) assessing whether the error requires reversal, *i.e.*, whether the error can be deemed harmless.' [Citation omitted.]" *State v. McLinn*, 307 Kan. 307, 317, 409 P.3d 1 (2018).

Whether a party has preserved the issue affects the appellate court's reversibility inquiry at the third step. 307 Kan. at 317; K.S.A. 2018 Supp. 22-3414(3) ("No party may assign as error the giving or failure to give an instruction . . . unless the party objects thereto before the jury retires to consider its verdict . . . unless the instruction or the failure to give an instruction is clearly erroneous."). At the second step, appellate courts consider whether the instruction was legally and factually appropriate, using an unlimited review of the entire record. 307 Kan. at 318.

Appellate Jurisdiction

Lewis acknowledges that he did not object below but contends the issue is not precluded under the invited error doctrine because he did not specifically comment on this instruction during the instruction conference. He asserts we should review the issue for reversibility under the clearly erroneous standard. Under the invited error doctrine, a defendant cannot challenge an instruction on appeal, even as clearly erroneous under K.S.A. 2018 Supp. 22-3414(3), when there has been an on-the-record agreement to the

wording of the instruction at trial. *State v. Peppers*, 294 Kan. 377, 393, 276 P.3d 148 (2012).

In Lewis's proposed jury instructions, he recommended the district court instruct the jury pursuant to PIK Crim. 4th 68.010:

> "When you retire to the jury room you will first select one of your members as Presiding Juror. The person selected will preside over your deliberations, will speak for the jury in Court, and will sign the verdict upon which you agree.
>
> "Your verdict must be founded entirely upon the evidence admitted and the law as given in these instructions.
>
> "Your agreement upon a verdict must be unanimous."

During the instruction conference, the district court stated the final instruction would be: "When you retire to the jury room." Lewis replied, "No objection, Your Honor."

In reading the instructions to the jury, the district court read:

> "Instruction No. 18: When you retire to the jury room, you will first select one of your members as presiding juror. The person selected will preside over your deliberations, will speak for the jury in court, and will sign the verdict form upon which you agree.
>
> "Your verdict must be founded entirely upon the evidence admitted and the law as given in these instructions. Your agreement upon the verdict must be unanimous."

The jury instruction provided to the jury to take into the jury room and the instruction Lewis proposed are verbatim. Here, Lewis both invited the error and failed to object. The doctrine of invited error precludes us from reviewing the merits of this issue.

Lewis argues that in *State v. Brammer*, 301 Kan. 333, 340-41, 343 P.3d 75 (2015), the inclusion of an allegedly erroneous instruction did not preclude consideration because the Kansas Supreme Court determined the proper time to register an objection to an instruction was at the instruction conference. However, in *Brammer*, the defendant's proposed instruction differed from the instruction provided at trial. Here, Lewis' proposed instruction was identical to the one provided at trial and he specifically said he had no objection to that instruction in the instruction conference. *Brammer* is inapplicable.

This court has found the invited error doctrine applied in an identical factual scenario in *State v. Johnson*, No. 117,828, 2018 WL 5305658, at *7 (Kan. App. 2018) (unpublished opinion), *petition for rev. filed* November 26, 2018. In *Johnson*, the defendant proposed the same instruction as is challenged here and failed to object. The panel found the invited error doctrine applied, and provided that even if it chose to ignore the clear application of the invited error doctrine, the defendant could not prevail on the merits. 2018 WL 5305658, at *7.

Affirmed.

* * *

MALONE, J., concurring: I concur in the result.