

NOT DESIGNATED FOR PUBLICATION

No. 124,171

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,  
*Appellee,*

v.

SAMUEL IBARRA-CHU,  
*Appellant.*

MEMORANDUM OPINION

Appeal from Geary District Court; COURTNEY D. BOEHM, judge. Opinion filed May 26, 2023.  
Affirmed.

*Kristen B. Patty*, of Wichita, for appellant.

*Kristofer R. Ailsieger*, deputy solicitor general, and *Derek Schmidt*, attorney general, for appellee.

Before MALONE, P.J., GREEN and ISHERWOOD, JJ.

PER CURIAM: A jury convicted Samuel Ibarra-Chu of 2 counts of conspiracy to commit first-degree murder, 2 counts of criminal solicitation, and 17 counts of violation of a protective order. Ibarra-Chu appeals one of the conspiracy convictions, claiming the jury instruction was clearly erroneous because the language of the instruction was broader than the crime charged. Ibarra-Chu asks this court to reverse the conspiracy conviction at issue. Finding no error, we affirm the district court's judgment.

## FACTS

On April 13, 2018, Ibarra-Chu was arrested for selling drugs to a confidential informant (CI). Assistant Geary County Attorney Tony Cruz charged Ibarra-Chu with distribution of cocaine, three counts of distribution of morphine, distribution of marijuana, and four counts of no drug tax stamp. Ibarra-Chu was released on bond.

Ibarra-Chu eventually found out who the CI was and tried to run the informant off the road with his vehicle. Cruz filed a second case against Ibarra-Chu on behalf of the State charging him with two alternative counts of aggravated assault and aggravated intimidation of a witness. Ibarra-Chu was placed in custody and could not post bond.

While in custody, Ibarra-Chu would call his girlfriend, Amanda Edison. The district court eventually issued a no-contact order between Ibarra-Chu and Edison. Ibarra-Chu began calling Edison's daughter instead. Edison's daughter would place the calls on speaker phone and would relay messages between Edison and Ibarra-Chu to get around the district court's no-contact order. At one point, Ibarra-Chu suggested passing information through the mail that appeared to be from his attorney so the jail staff would not look at the content of the letters.

Ibarra-Chu met Gregory Eliase Rodriguez, an inmate at the Geary County jail, while he was in custody. Ibarra-Chu asked Rodriguez to kill the "snitch" who performed a controlled buy on him. Rodriguez later testified that Cruz' name also came up and Ibarra-Chu also wanted to kill Cruz. Ibarra-Chu offered heroin and money in exchange for Rodriguez to kill both the CI and Cruz.

Upon Rodriguez' release from jail, Ibarra-Chu wanted him to contact Edison and give her a code so she would know to trust him. Once Rodriguez was released, he contacted Edison to discuss the plan for the CI and Cruz as well as payment. Rodriguez

testified Edison did not appear surprised by the plan. In fact, Edison had told Rodriguez the only way to get Ibarra-Chu out of jail and have his case dropped was to get rid of the CI and Cruz. Rodriguez also testified Edison would pay him with drugs that were being transported from Oklahoma. Edison gave Rodriguez \$200 to purchase an untraceable firearm off the streets and overdrew her bank account many times to pay Rodriguez.

Edison later testified that she gave Rodriguez \$300 and some tools to kill the CI so the CI could not testify against Ibarra-Chu. Edison claimed that Rodriguez was the one who first brought up Cruz. Edison also testified that she did not know the plan with respect to Cruz but that Rodriguez had told her if Cruz was killed, Ibarra-Chu would be released in four months. Rodriguez eventually relayed the murder for hire plot to his probation officer and law enforcement.

Law enforcement obtained a search warrant for Edison's home and recovered a cellphone in an air vent underneath a couch. A forensic extraction of the data on the cellphone revealed that Edison had searched the internet to determine: "How to get a prosecutor to drop charges"; "When getting charged with a crime can they use code words against you"; and "My boyfriend was calling me from jail on a recorded line and now I have conspiracy charges." Edison was arrested.

In August 2018, the State charged Ibarra-Chu in 2018CR634 with 2 counts of conspiracy to commit murder in the first degree, 2 counts of criminal solicitation, and 12 counts of violation of a protective order with Edison. The State amended its complaint several times related to the charges of violation of a protective order.

The State presented the above-described evidence at trial. Melanie Hoffman, an inmate in the Geary County jail who had befriended Edison while she was in custody, also testified and explained that Edison had talked about putting a "hit" on the prosecutor in Ibarra-Chu's drug case. Edison had told Hoffman that she planned the hits with her

boyfriend Ibarra-Chu and his friend. The State also presented evidence that Edison's daughter told law enforcement she heard Edison talk to Rodriguez about a prosecutor. Edison's daughter also told law enforcement that Edison provided money to someone about having a person disappear.

A jury found Ibarra-Chu guilty of 2 counts of conspiracy to commit murder in the first degree, 2 counts of criminal solicitation, and 17 counts of violation of a protective order. The district court sentenced Ibarra-Chu to consecutive terms of 117 months' imprisonment for each conspiracy conviction. The district court also sentenced Ibarra-Chu to concurrent terms of 59 months' imprisonment for each criminal solicitation conviction and 12 months in jail for each violation of protective order conviction, for a controlling sentence of 234 months' imprisonment. Ibarra-Chu timely appealed.

This appeal involves only Ibarra-Chu's convictions in 2018CR634, and he challenges only one of his conspiracy convictions involving the prosecutor, Cruz. Ibarra-Chu claims this conviction must be reversed because the language of the jury instruction on the elements of this crime was broader than the crime charged in the complaint.

#### ANALYSIS

Ibarra-Chu argues jury instruction No. 15, which provided the elements of count two of conspiracy to commit murder in the first degree of Cruz, was erroneous because it was too broad in relation to the charging document. More specifically, Ibarra-Chu contends the jury instruction was broader than the charging document because the criminal complaint contained the name of only one coconspirator, Rodriguez, while the jury instruction for conspiracy named two coconspirators, Rodriguez and Edison.

The State argues the identity of a coconspirator is not an element of the crime of conspiracy and, even if the jury instruction were broader than the charging document, the

jury would have reached the same verdict had the instruction named only Rodriguez as a coconspirator. The State suggests, if anything, that naming both coconspirators in the jury instruction increased the State's burden of proof by requiring the State to prove Ibarra-Chu conspired with both Edison and Rodriguez.

Ibarra-Chu frames the issue as an instructional issue. When analyzing jury instruction issues, appellate courts follow a three-step process: (1) determining whether the appellate court can or should review the issue, in other words, 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, in other words, whether the error can be considered harmless. *State v. Holley*, 313 Kan. 249, 253, 485 P.3d 614 (2021).

Whether a party has preserved a jury instruction issue affects the appellate court's reversibility inquiry at the third step. When a party fails to object to a jury instruction before the district court, an appellate court reviews the instruction to determine whether it was clearly erroneous. See K.S.A. 2022 Supp. 22-3414(3). For a jury instruction to be clearly erroneous, the reviewing court must be firmly convinced the jury would have reached a different verdict if the erroneous instruction had not been given. The party claiming clear error has the burden to show both error and prejudice. *State v. Crosby*, 312 Kan. 630, 639, 479 P.3d 167 (2021). Ibarra-Chu did not object to jury instruction No. 15 at trial and acknowledges he must convince this court that the instruction was clearly erroneous.

"A jury instruction on the elements of a crime that is broader than the complaint charging the crime is erroneous.' The reason for this is because 'the charging instrument sets out the specific offense alleged to inform the defendant of the nature of the accusation, to permit the development of a defense to meet that accusation, and to protect against conviction based on facts not contemplated in the accusation.' Accordingly, the State is bound by the wording of its charging document, and the prosecution and the

district court must use caution in conforming the jury instructions to the charges. [Citations omitted.]" *State v. McClelland*, 301 Kan. 815, 828, 347 P.3d 211 (2015).

Count two of the State's fourth amended complaint set forth the charge of conspiracy against Ibarra-Chu:

"That on or between July 11, 2018, and August 21, 2018, in Geary County, and State of Kansas, Samuel Ibarra-Chu did, then and there, unlawfully, feloniously and intentionally agree with another person, to-wit: *Gregory Eliase Rodriguez*, to commit or assist in the commission of the crime of Murder in the First Degree, as defined in K.S.A. 21-5402(a)(1), and amendments thereto, to wit: *Tony Cruz*, and Samuel Ibarra-Chu committed an overt act in furtherance of said agreement, to wit: *arranged payments to Gregory Eliase Rodriguez to commit said crime*, in violation of K.S.A. 21-5302(a) and amendments thereto; a severity level 2, person felony."

The fourth amended complaint named Rodriguez—and only Rodriguez—as a coconspirator. Ibarra-Chu contends the district court erred when it also included Edison's name in the relevant jury instruction. Jury instruction No. 15 reads, in relevant part:

"The defendant is charged in count two with conspiracy to commit murder in the first degree. The defendant pleads not guilty.

"To establish this charge, each of the following claims must be proved:

"1. The defendant agreed with Amanda Lynn Edison and Gregory Eliase Rodriguez to commit or assist in the commission of murder in the first degree of Tony Cruz.

"2. The defendant did so agree with the intent that murder in the first degree be committed.

"3. The defendant or any party to the agreement acted in furtherance of the agreement by arranging payments to Gregory Eliase Rodriguez to commit said crime.

"4. This act occurred on, about or between the 11th day of July, 2018 and the 21st day of August, 2018, in Geary County, Kansas.

.....

"A conspiracy is an agreement with another or other persons to commit a crime or to assist in committing a crime, followed by an act in furtherance of the agreement. The agreement may be established in any manner sufficient to show understanding. It may be oral or written or inferred from all the facts and circumstances."

The problem with Ibarra-Chu's argument, as the State points out, is that the identity of the coconspirators is not an element of the crime of conspiracy. K.S.A. 2018 Supp. 21-5302(a), applicable to Ibarra-Chu's conspiracy charge, defines conspiracy as: "[A]n agreement with another person to commit a crime or to assist in committing a crime." There is nothing in the statutory language requiring the coconspirator to be identified. K.S.A. 2018 Supp. 21-5302(a) also states: "No person may be convicted of a conspiracy unless an overt act in furtherance of such conspiracy is alleged and proved to have been committed by such person or by a co-conspirator." Thus, the alleged overt act in furtherance of the conspiracy *is* an element of the crime.

The State relies on *State v. Toland*, No. 114,658, 2017 WL 658537, at \*7 (Kan. App. 2017) (unpublished opinion), for the proposition that the names of the coconspirators need not be set forth in the complaint. In *Toland*, the defendant argued the jury instruction was too broad because the criminal complaint contained the names of the coconspirators while the jury instruction related to the conspiracy charge did not name the coconspirators. This court rejected Toland's argument and determined from the statutory language and the language of the jury instructions that "the names of coconspirators are not an element of conspiracy itself." 2017 WL 658537, at \*8.

The district court here could have simply instructed the jury that the State needed to prove that Ibarra-Chu agreed with "another person" or "others" to commit or assist in the commission of murder in the first degree of Cruz. It was unnecessary for the names of the coconspirators to be included in either the complaint or the jury instruction because the identity of the coconspirators is not an element of the crime of conspiracy. In fact, by

identifying both Rodriguez and Edison as coconspirators in the jury instruction when only Rodriguez was named as a coconspirator in the complaint, the language of the jury instruction was more specific than the charging document, not broader.

As stated, the alleged overt act in furtherance of the conspiracy is an element of the crime. K.S.A. 2018 Supp. 21-5302(a). The fourth amended complaint alleged Ibarra-Chu committed an overt act toward conspiracy, to wit: "*arranged payments to Gregory Eliase Rodriguez to commit said crime.*" Jury instruction No. 15 informed the jury the State needed to prove that Ibarra-Chu acted in furtherance of the conspiracy "by arranging payments to Gregory Eliase Rodriguez to commit said crime." The overt act identified in the jury instruction was not broader than the overt act identified in the complaint.

Thus, we find that the district court did not err in instructing the jury on the conspiracy charge involving Cruz. But even if the district court erred by identifying Edison as a coconspirator in the jury instruction, such error was harmless. An error is harmless if it "did not affect a party's substantial rights, meaning it . . . did not affect the trial's outcome." *State v. Ward*, 292 Kan. 541, 565, 256 P.3d 801 (2011). As the State points out, identifying Edison as a coconspirator in the jury instruction when the complaint only identified Rodriguez increased the State's burden of proof at trial by requiring the State to prove Ibarra-Chu conspired with both Edison and Rodriguez. Ibarra-Chu fails to show that the jury instruction was clearly erroneous.

Affirmed.