NOT DESIGNATED FOR PUBLICATION

No. 125,062

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellant,

v.

DAVORIOUS R. HOLLOMAN,
Appellee.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; DAVID J. KAUFMAN, judge. Opinion filed April 28, 2023. Affirmed.

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

Randall L. Hodgkinson, of Kansas Appellate Defender Office, for appellee.

Before GREEN, P.J., GARDNER, J., and PATRICK D. MCANANY, S.J.

PER CURIAM: The State appeals the criminal history score the district court used to determine Davorious R. Holloman's sentence after he pleaded guilty to two counts of aggravated indecent solicitation of a child. The district court excluded two prior Kansas criminal threat convictions from Holloman's criminal history score that the State argues should have been included. Yet, we find no error and affirm.

Factual and Procedural History

In the spring of 2021, the State charged Holloman with one count of off-grid attempted aggravated criminal sodomy and one count of felon in possession of a firearm. Holloman later agreed to plead guilty to two counts of aggravated indecent solicitation of a child, contrary to K.S.A. 2020 Supp. 21-5508(b)(1). The plea agreement stated the State anticipated Holloman's criminal history score was A. Holloman pleaded guilty in accordance with the agreement.

Holloman's presentence investigation (PSI) report showed that he had a criminal history of A. This score resulted from three prior person felony convictions: a 2017 aggravated domestic battery conviction (17 CR 2416), a 2017 criminal threat conviction (also 17 CR 2416), and a 2018 criminal threat conviction (18 CR 979). All three were Sedgwick County cases.

Before he was sentenced, Holloman objected to his criminal history score. He argued that the district court should exclude his two prior criminal threat convictions because the Kansas Supreme Court had found our reckless criminal threat statute unconstitutional. See *State v. Boettger*, 310 Kan. 800, 822-23, 450 P.3d 805 (2019). Holloman argued that his two prior criminal threat convictions resulted from pleas and the record of those pleas failed to specify whether he pleaded guilty to reckless or intentional criminal threat.

Holloman renewed his objection at the sentencing hearing. The State countered that criminal threat is an alternative means crime that requires a super sufficiency of evidence that would support both the reckless and intentional means of the crime because both were charged. According to the State, in both of Holloman's prior criminal threat convictions, he was charged with and pleaded guilty to both alternative means of criminal threat—reckless criminal threat, which was found unconstitutional in *Boettger*, 310 Kan.

at 822-23, and intentional criminal threat, which remains sound. Thus, the State argued, he was guilty under both alternative means and the reckless means should simply "fall away," leaving the intentional criminal threat convictions in each case. In support, the State offered transcripts of Holloman's pleas for his two prior criminal threat convictions, which the district court admitted.

After considering the parties' arguments and the transcripts from Holloman's pleas in his prior criminal threat cases, the district court found that Holloman's prior criminal threat convictions should not count in his criminal history score. The district court noted the plea in the 2017 case appeared to accept factual admissions on both mental states, so it might stand as a prior person felony, but the 2018 plea did not have a bifurcated admission of both intentional and reckless mens rea. The district court judge noted the need for additional appellate guidance, but it ultimately found neither criminal threat conviction should remain in Holloman's PSI report. It thus found his criminal history score was D.

The plea agreement called for the high range sentence. The court honored this agreement, then applied a lower anticipated criminal history score, and sentenced Holloman to a controlling sentence of 89 months' imprisonment. Had the district court counted Holloman's two prior criminal threat convictions in his criminal history score as person felonies, his criminal history score would have been A, leading to a higher presumptive sentencing range. See K.S.A. 2022 Supp. 21-6804(a); K.S.A. 2022 Supp. 21-6809.

The State timely appeals.

The District Court Properly Excluded Holloman's Prior Two Criminal Threat Convictions from His Criminal History Score.

"Prior convictions of a crime defined by a statute that has since been determined unconstitutional by an appellate court shall not be used for criminal history scoring purposes." K.S.A. 2022 Supp. 21-6810(d)(9). In October 2019, the Kansas Supreme Court held "the portion of K.S.A. 2018 Supp. 21-5415(a)(1) allowing for a conviction if a threat of violence is made in reckless disregard for causing fear causes the statute to be unconstitutionally overbroad because it can apply to statements made without the intent to cause fear of violence." *Boettger*, 310 Kan. at 822. Thus, a defendant may be convicted only of intentional criminal threats. The State argues that Holloman's prior convictions for criminal threat should have been included in his criminal history despite the *Boettger* holding because Holloman's pleas show his guilt of both alternative means of criminal threat in his prior cases. Holloman disagrees, contending the record fails to show that he pleaded guilty only to intentional criminal threat in either prior conviction.

This court exercises unlimited review over the classification of a prior conviction for criminal history purposes. *State v. Ewing*, 310 Kan. 348, 351, 446 P.3d 463 (2019) ("The classification of prior offenses for criminal history purposes involves interpretation of the revised Kansas Sentencing Guidelines Act [KSGA], K.S.A. 2018 Supp. 21-6801 et seq. Statutory interpretation is a question of law subject to unlimited review. [Citation omitted.]"). The State bears the burden to establish a criminal defendant's criminal history score by a preponderance of the evidence. K.S.A. 2022 Supp. 21-6814(a); *State v. Obregon*, 309 Kan. 1267, Syl. ¶ 4, 444 P.3d 331 (2019).

"[T]he legality of a sentence under K.S.A. 22-3504 is controlled by the law in effect at the time the sentence was pronounced." *State v. Murdock*, 309 Kan. 585, 591, 439 P.3d 307 (2019). The Kansas Supreme Court decided *Boettger* in 2019, before Holloman was sentenced in 2022. So when the district court calculated Holloman's

criminal history score and when he was sentenced, reckless criminal threat convictions were unconstitutional. Thus, counting a prior criminal threat conviction based on reckless criminal threat would have made Holloman's sentence illegal.

K.S.A. 2018 Supp. 21-5415(a)(1) defines a criminal threat as:

> "any threat to . . . [c]ommit violence communicated with intent to place another in fear, or to cause the evacuation, lock down or disruption in regular, ongoing activities of any building, place of assembly or facility of transportation, or in reckless disregard of the risk of causing such fear or evacuation, lock down or disruption in regular, ongoing activities."

The statute provides "distinct alternatives for a material element of the crime," *State v. Brown*, 295 Kan. 181, 184, 284 P.3d 977 (2012)—the mental states of intentional and recklessness. Thus, the Kansas Supreme Court has found it is an alternative means crime as to the two mental states. *State v. Johnson*, 310 Kan. 835, 839-40, 450 P.3d 790 (2019).

With alternative means convictions, district courts may look beyond just the fact of the conviction to determine whether and how that conviction should be counted in a defendant's criminal history score. This modified categorical approach allows a district court to look at certain documents to determine which statutory alternative is the basis for the defendant's conviction. *Obregon*, 309 Kan. at 1274 (discussing modified categorical approach in relation to alternative means out-of-state crimes). This set of documents includes "charging documents, plea agreements, transcripts of plea colloquies, findings of fact and conclusions of law from a bench trial, and jury instructions and verdict forms." *Johnson v. United States*, 559 U.S. 133, 144, 130 S. Ct. 1265, 176 L. Ed. 2d 1 (2010). The district court properly considered the plea transcripts of each of Holloman's prior pleas, and they are in the record on appeal.

Other panels of this court have considered this issue in similar factual scenarios. Our reading of those cases shows that resolution of appeals involving classifying prior criminal threat convictions involves a highly fact-dependent inquiry. For example, in *State v. Oliver*, No. 123,767, 2022 WL 333733, at *4 (Kan. App.) (unpublished opinion), *rev. denied* 316 Kan. 762 (2022), a panel of this court found a prior criminal threat conviction was properly scored as a person felony because, during his plea colloquy, "Oliver explicitly stated that he intended to place [the victim] in fear by threatening violence without ever mentioning or characterizing his conduct as being reckless or bluster." On the other hand, in *State v. Martinez-Guerrero*, No. 123,447, 2022 WL 68543, at *4-5 (Kan. App. 2022) (unpublished opinion), a panel of this court found a prior criminal threat conviction should be excluded because the defendant had pleaded no contest to "'unlawfully and feloniously commit[ting] a threat to commit violence with the intent of placing [the victim] in fear or with reckless disregard of causing such fear.'"

We thus review the relevant plea transcripts. In 17 CR 2416, when Holloman pleaded guilty to criminal threat the following exchange occurred:

> "THE COURT: Sir, let's visit briefly about why you think you are guilty of the charges.
>
> "The State alleges in Count 1 that on August 15th of 2017 you got into an argument or an altercation with someone with the initials SLH; is that what happened?
>
> "[HOLLOMAN]: Yes.
>
> "THE COURT: And the State alleges that at the time you placed pressure to the throat, neck, or chest of SLH during this argument; is that what happened?
>
> "[HOLLOMAN]: Yes, sir.
>
> "THE COURT: This was an intentional touching of SLH, it wasn't accidental?
>
> "[HOLLOMAN]: No, sir.
>
> "THE COURT: All right. So the contact that you had with—I mean, the State—I'll just read it to you. The State alleges that on August 15th of 2017 that you knowingly impeded the normal breathing and circulation of the blood by placing pressure to the throat, neck, or chest of SLH; is that what happened?

"[HOLLOMAN]: Yes, sir.

"THE COURT: All right. So this was a knowing thing, it wasn't accidental?

"[HOLLOMAN]: Yes , sir.

"THE COURT: All right. And this was done, would you agree, in a rude, insulting, or angry manner?

"[HOLLOMAN]: Yes, sir.

"THE COURT: And this happened in Sedgwick County?

"[HOLLOMAN]: Yes , sir.

"THE COURT: SLH, was that someone that you were living with at the time?

"[HOLLOMAN]: Yes, sir.

"THE COURT: All right. And then in Count 2, the State alleges that during this argument that occurred on August 15th of 2017 you threatened to commit violence to SLH; did you communicate that threat?

"[HOLLOMAN]: Yes, sir.

"THE COURT: And this was done with the intent to place SLH in fear?

"[HOLLOMAN]: Yes, sir.

"THE COURT: Or in reckless disregard, that she might be afraid of the things you were saying?

"[HOLLOMAN]: Yes, sir.

"THE COURT: All right. And this, again, occurred in Sedgwick County?

"[HOLLOMAN]: Yes, sir."

Holloman thus pleaded guilty to reckless criminal threat *or* to the intentional means of criminal threat. We decline the State's invitation to read the "or" as an "and." See *State v. Johnson*, 289 Kan. 870, 879, 218 P.3d 46 (2009) (stating "and" is ordinarily conjunctive while "or" is ordinarily disjunctive). We cannot find from this document that Holloman pleaded to both means of criminal threat so that we should just ignore the unconstitutional means. Although Holloman admitted that he communicated a threat of violence with the intent to place the victim in fear, in the next breath he admitted that he made the threat in reckless disregard of the consequences.

We recognize that it is *factually impossible* for a person not to intend to commit an act while simultaneously intending to commit the same act, yet the Legislature has made it *legally possible* for a person to be guilty of a reckless act by knowingly or intentionally committing that same act. See *State v. Chavez*, 310 Kan. 421, 427-30, 447 P.3d 364 (2019). See K.S.A. 2022 Supp. 21-5202(c) ("If recklessness suffices to establish an element, that element also is established if a person acts knowingly or intentionally.").

Still, a defendant can be convicted of only one crime when charged with two in the alternative. *State v. Garza*, 290 Kan. 1021, 1035-36, 236 P.3d 501 (2010). So Holloman's conduct can constitute only either a reckless or an intentional criminal threat. See *State v. Howell*, No. 124,650, 2022 WL 4003626, at *3 (Kan. App.) (unpublished opinion) ("[R]egardless of how one interprets this disjunctive plea language, conduct can only constitute—and give rise to a conviction of—either a reckless or an intentional criminal threat"), *rev. denied* 316 Kan. 761 (2022).

We cannot find from the sparse record before us that Holloman pleaded guilty to intentional criminal threat rather than to reckless criminal threat. The district court thus properly held that Holloman's 2017 conviction for criminal threat cannot be part of his criminal history.

In 18 CR 979, Holloman's plea hearing transcript reflects the following as to criminal threat:

> "THE COURT: Okay.
>
> "So this is generally my understanding, and basically what the State is factually alleging is that on April 16th of this year, 2018, there was a person whose initials are CSDW, [*sic*] and I'm gonna refer to the person now as 'CSW,' that you had interaction with this person, and I believe it was generally in the 1400 block of North Minneapolis, but it was certainly within Sedgwick County, Kansas. The relationship between you and CSW is I believe you are her brother, and both of you on this day are older than 18 years

> of age, and regardless of the circumstances that led to your all's interaction, you elevated or increased it by threatening to commit violence against your sister and it was done with the intent to put her in fear, or you had reckless disregard of that issue. Nobody at all is saying that you did any injury to her physically or anything happened to her physically. It was just that you—you made certain statements of violence against her that you were gonna maybe do something to her, you know, maybe you were gonna cut her, maybe you were gonna hit her, whatever, and your intent was to put her in fear; and again, if that wasn't the intent, you had reckless disregard of the risk of causing that fear. I can go into more detail 'cause I do have the affidavit in front of me. It's pretty specific. But just generally speaking, honestly, if you agree with those facts, and based on your all's relationship, both being over 18, it kind of falls under the heading of a criminal threat/domestic violence type crime. If you agree with these facts, honestly, you would be guilty of count Two; and just based on those facts, do you plead guilty?
>
> "[HOLLOMAN]: Yes, sir.
>
> "THE COURT: Okay.
>
> "Well, I'll certainly accept the plea of guilty. There's a factual basis for the same, and I'm required to adjudge you guilty in open court."

This evidence from the plea hearing transcript is not enough to establish whether Holloman intended to threaten his sister or whether he made his comment in the heat of the moment or in anger during their verbal altercation. Because we cannot be sure from the limited record whether Holloman's 2018 threat was intentional or reckless, we cannot find that his 2018 criminal threat conviction was for intentional conduct. Thus, the district court properly held that his 2018 conviction for criminal threat cannot be part of his criminal history.

Other panels have similarly held that an indiscriminate plea to both alternative means of criminal threat stated disjunctively leads to exclusion of a prior criminal threat conviction in a criminal history score. See, e.g., *Martinez-Guerrero*, 2022 WL 68543, at *1 (prior criminal threat conviction was improperly scored as a person felony when defendant pleaded no contest to "'unlawfully and feloniously commit[ing] a threat to commit violence with the intent of placing Jason Chase [a law enforcement officer] in

fear *or* with reckless disregard of causing such fear.'" [Emphasis added.]); *State v. Jackson*, No. 124,271, 2022 WL 1906940, at *5 (Kan. App.) (unpublished opinion) ("Because there was nothing in the record to support that Jackson's conviction was for the intentional version of criminal threat rather than the reckless version of criminal threat, the district court correctly found that the convictions could not be included in his criminal history score."), *rev. denied* 316 Kan. 761 (2022); *Howell*, 2022 WL 4003626, at *4 (same). We find those cases persuasive.

The State also argues that Holloman waived any argument to the classification of his prior criminal threat convictions by pleading guilty to those offenses, relying on the rule that when an offender pleads guilty, he or she waives "all nonjurisdictonal defects," including constitutional rights violations. See *State v. Edwards*, 281 Kan. 1334, 1341, 135 P.3d 1251 (2006). But Holloman is not attacking his underlying convictions or their constitutionality. In fact, he is not arguing any defects with the convictions at all. Rather, he is arguing they were improperly scored as a person felony for the calculation of his criminal history score. Kansas law explicitly allows such challenges, with no restrictions against convictions that result from a plea. See K.S.A. 2022 Supp. 21-6810(d)(9); K.S.A. 2022 Supp. 22-3504(a). So Holloman's past criminal threat plea did not waive his current sentencing challenge.

Affirmed.