

NOT DESIGNATED FOR PUBLICATION

No. 125,691

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

JOHN C.T. BOESE,
Appellant.

MEMORANDUM OPINION

Appeal from Marion District Court; SUSAN ROBSON, judge. Submitted without oral argument. Opinion filed December 15, 2023. Conviction reversed and sentence vacated.

Michael P. Whalen, of Law Office of Michael P. Whalen, of Wichita, for appellant.

Steven J. Obermeier, assistant solicitor general, and *Kris W. Kobach*, attorney general, for appellee.

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

PER CURIAM: John C.T. Boese appeals from his conviction for violation of a protective order. He contends his conviction must be reversed because it is not supported by sufficient evidence. More specifically, he asserts the State presented insufficient evidence because the proof departed from the charging document: The State charged Boese under K.S.A. 2020 Supp. 21-5924(a)(1)—covering the violation of a protection from abuse order—but only presented evidence that he violated K.S.A. 2020 Supp. 21-5924(a)(6)—covering the violation of a protection from stalking, sexual assault, or human trafficking order.

Boese is correct under controlling legal precedent from the Kansas Supreme Court. The language of the charging document controls the criminal prosecution, and a defendant can be convicted only of the crime he or she is charged with committing. Because the State failed to prove the crime it charged Boese with committing and did not seek to amend its complaint to conform to the evidence, we must reverse Boese's conviction for insufficient evidence.

FACTUAL AND PROCEDURAL BACKGROUND

Boese and M.M. had three children together and a rocky, sometimes-loving-sometimes-violent relationship. Things came to a head in January 2021, when M.M. decided she needed to get away from Boese. Over the next several months, Boese sent her constant, unwanted emails, texts, and voice messages. By March, M.M. did not have anywhere else to go and began to live with Boese's mother. Boese's mother recalled that M.M. came to live with her after Boese threatened her life with a gun.

On the night of April 8, 2021, M.M. received several texts from Boese stating that he would kill himself or kill her. M.M. was frightened and called the sheriff to request a welfare check on Boese. The next day, M.M. received a temporary order of protection from stalking, sexual assault, or human trafficking against Boese. In seeking the order, she listed Boese's mother's home as her home address.

A week after the protection order was granted, Boese texted his mother; each of his messages referenced M.M. One of his messages stated in part:

"She can lie and convince friends and family she's abused tell the most outrageous lies and get the most ignorant people to believe them but when you swear out a PFA you can't make up outrageous life destroying lies so people will feel sorry for her that is a crime and Criminal

"Not going to bother you anymore please don't take out a PFA with your friend under the pretense I'm pointing guns at your head all the time that would be another crime & a prosecutable criminal act."

Boese's mother was upset and alarmed by her son's texts, and she showed them to M.M. They agreed that Boese was not in a mentally stable place and feared for their safety. A month later, Boese sent more text messages to his mother. The substance of these messages frightened Boese's mother and M.M. more. They believed Boese was possibly going to do something and felt they needed to be on guard and keep their doors locked. Although Boese did not send the messages to M.M., his mother shared them with her because she "knew the situation, and [M.M.] needed to know, for her own protection, . . . everything that was going on."

On June 1, 2021, Boese sent more frightening messages to his mother, which stated that he would celebrate his maternal grandmother's birthday by stepping on baby chicks and pointing guns at people's heads. She grew even more alarmed and took his statements to be credible threats. She recalled, "I know when my son's being sarcastic. I know when he is being threatening and trying to be intimidating and whatnot." Two days later, he texted yet again; Boese's mother shared the messages with M.M. because it seemed that Boese was blaming her for losing his job. On July 20, 2021, the district court issued a final protection from stalking, sexual assault, or human trafficking order against Boese. The final order remained effective until July 14, 2022.

On August 2, 2021, the State charged Boese with violation of a protection order under K.S.A. 2020 Supp. 21-5924(a)(1), (b)(1), a class A misdemeanor, alleging he had contacted M.M. either directly or indirectly in violation of the protective order. More specifically, the complaint alleged that Boese willfully and knowingly violated "[a] *protection from abuse order* issued pursuant to K.S.A. 60-3101 et seq." (Emphasis added.) The State later amended the complaint, changing the charge to specify: "John

Boese, sent messages to [his mother], who the protected person, [M.M.], is residing with" The amended complaint still identified the order Boese violated as a protection from abuse order and cited K.S.A. 2020 Supp. 21-5924(a)(1), (b)(1) as the statutory basis for the charge.

The district court held a bench trial on June 24, 2022. At the State's request, the district court took judicial notice of the temporary order of protection from stalking, sexual assault, or human trafficking, as well as the final order. Both Boese's mother and M.M. testified about the text messages from Boese, and the State introduced copies of two of the texts as exhibits. After hearing the evidence, the district judge found that Boese "knowingly violated the PFS, and I find him guilty of this." The district court sentenced Boese to serve 12 months in the county jail but granted him probation for 12 months. Boese timely appealed the district court's judgment.

DID THE STATE PRESENT SUFFICIENT EVIDENCE TO SUPPORT BOESE'S CONVICTION?

Boese argues the State presented insufficient evidence to support his conviction because it charged him with violation of a protection from abuse order under K.S.A. 2020 Supp. 21-5924(a)(1) but the evidence it presented only supports that he violated a protection from stalking order under K.S.A. 2020 Supp. 21-5924(a)(6). In other words, he contends the State charged him with one form of violation of a protective order and then it proved that he committed another, leaving no evidence to support the charged crime. Boese relies on *State v. Fitzgerald*, 308 Kan. 659, 666, 423 P.3d 497 (2018), a case in which the Kansas Supreme Court found insufficient evidence to support a conviction because the evidence proved a crime the defendant was not charged with committing.

For its part, the State asserts that Boese is inappropriately arguing that the complaint was defective, not addressing the sufficiency of the evidence. Alternatively, it contends that Boese's reliance on *Fitzgerald* is misplaced because K.S.A. 2020 Supp. 21-

5924 presents options within a means, not alternative means of committing the offense. The State asserts that the language in its complaint against Boese was broad enough to encompass a conviction under K.S.A. 2020 Supp. 21-5924(a)(6) instead of subsection (a)(1).

When a defendant challenges the sufficiency of the evidence to support a conviction, an appellate court must examine the evidence in a light most favorable to the State and determine whether a rational fact-finder could have found the defendant guilty beyond a reasonable doubt. In performing this review, an appellate court will not reweigh evidence, resolve evidentiary conflicts, or make witness credibility determinations. *Fitzgerald*, 308 Kan. at 666. Boese's case does not present a typical challenge to the sufficiency of the evidence. We are not concerned here with whether the State's evidence proved that Boese committed a crime—it did. We must instead decide whether the State proved the crime it charged Boese with committing. A defendant need not challenge the sufficiency of the evidence before the district court to preserve the issue for appeal. *State v. Farmer*, 285 Kan. 541, Syl. ¶ 1, 175 P.3d 221 (2008).

The State first contends that under K.S.A. 2022 Supp. 22-3208(4), Boese "waived any defenses and objections based upon any claimed defects in the amended complaint." But this assertion is misplaced. Boese does not argue that the complaint was defective in any way, it simply charged him with a different crime than the State ultimately proved. Both the complaint and the amended complaint contained an accurate description of one means of committing a violation of a protective order with an accompanying citation to the statutory subsection governing that means. Because Boese's argument concerns the sufficiency of the evidence to support his conviction—and not any defect in the complaint—the State's waiver argument under K.S.A. 2022 Supp. 22-3208(4) fails.

We now turn to Boese's insufficiency of the evidence argument. As described below, the State's unfortunate error here is not novel. Many cases have addressed

discrepant charging documents leading to deficiencies in the evidence presented at trial. See, e.g., *Fitzgerald*, 308 Kan. 659; *State v. Laborde*, 303 Kan. 1, 360 P.3d 1080 (2015); *State v. Dickson*, 275 Kan. 683, 69 P.3d 549 (2003); *State v. Lacy*, 56 Kan. App. 2d 327, 429 P.3d 245 (2018); *State v. Arita*, No. 124,928, 2023 WL 3912867 (Kan. App. 2023) (unpublished opinion). The core principle behind these decisions is that the State must prove the crime it charges. See *State v. Ward*, 307 Kan. 245, 259-60, 408 P.3d 954 (2018) (finding that the State failed to prove crimes charged, even if it may have proved another crime). As the Kansas Supreme Court has explained, prosecutions are based on the charging document—whether by complaint, indictment, or information—and that charging document "sets the outer limits of the conviction or convictions that can result." *Fitzgerald*, 308 Kan. at 665-66.

In *Fitzgerald*, the State charged Fitzgerald with aggravated criminal sodomy by causing the victim, a child under 14 years old, to engage in sodomy with another person in violation of K.S.A. 2017 Supp. 21-5504(b)(2). But at trial, the State proved that Fitzgerald personally engaged in sodomy with the victim, as if Fitzgerald was charged under K.S.A. 2017 Supp. 21-5504(b)(1). The State presented no evidence that Fitzgerald caused the victim to engage in sodomy with another person. Our Supreme Court emphasized that criminal prosecutions depend on the charging document. Based on this fact, the court found that it was compelled to reverse Fitzgerald's conviction as unsupported by sufficient evidence of the crime the State charged Fitzgerald with committing. 308 Kan. at 666. The court's holding was clear: "If the State charges a defendant with aggravated criminal sodomy under K.S.A. 2017 Supp. 21-5504(b)(2) but proves aggravated criminal sodomy under K.S.A. 2017 Supp. 21-5504(b)(1), the defendant's conviction is reversible for insufficient evidence." 308 Kan. 659, Syl.

Here, the State's initial complaint charged Boese with one count of violation of a protection order under K.S.A. 2020 Supp. 21-5924(a)(1), alleging he "willfully and unlawfully violate[d] a Court order, to-wit: *A protection from abuse order* issued

pursuant to K.S.A. 60-3101 et seq." (Emphasis added.) The State subsequently filed an amended complaint, which specified that Boese had violated the protective order by sending messages to his mother, who M.M. was residing with—but it did not change the statutory subsection, K.S.A. 2020 Supp. 21-5924(a)(1), nor the corresponding statutory language that he had violated a protection from abuse order.

At trial, however, the parties proceeded with the case as though Boese had been charged with violating a protection from stalking order. At the State's request, the district court took judicial notice of the temporary order of protection from stalking, sexual assault, or human trafficking, as well as the final order. Both Boese's mother and M.M. testified about the text messages from Boese, and the State introduced copies of two of the texts as exhibits. After hearing the evidence, the district judge found that Boese "knowingly violated the PFS, and I find him guilty of this." The problem here is that this is not the crime Boese was charged with committing.

Under K.S.A. 2020 Supp. 21-5924(a)(1), the State was required to prove that Boese knowingly violated "[a] protection from abuse order issued pursuant to K.S.A. 60-3105, 60-3106 or 60-3107, and amendments thereto." But M.M. never obtained a protection from abuse order under K.S.A. 60-3105, 60-3106 or 60-3107. Instead, she received protection from stalking, sexual assault, or human trafficking orders under K.S.A. 60-31a05 and K.S.A. 60-31a06. Although the State alleges that Boese was sufficiently put on notice because he knew what type of protection order he violated, it nevertheless charged him with violating a protection from abuse order under K.S.A. 2020 Supp. 21-5924(a)(1), not for violating a protection from stalking order under K.S.A. 2020 Supp. 21-5924(a)(6).

To be clear, the problem here is not simply that the statutory citation in the amended complaint for the basis of the charge is inaccurate. The problem is that the amended complaint charged Boese with violating a protection from abuse order, but the

State presented no evidence at trial that he did so. And even though the State presented sufficient evidence that Boese violated a protection from stalking order—which would have supported a conviction under subsection (a)(6)—that evidence was not sufficient to support the crime that Boese was charged with committing under K.S.A. 2020 Supp. 21-5924(a)(1).

In its effort to defend Boese's conviction, the State argues that the subsections included in K.S.A. 2020 Supp. 21-5924(a)(1)-(6) are simply options within a means, not alternative means, of committing the crime of violation of a protective order. Under this rationale, the State asserts that the type of protective order Boese violated is immaterial: "Here [Boese's] actions may not have violated the protection from abuse option within means, but he did knowingly violate the protection from stalking statute option within means." Put simply, the State argues that the gravamen of the offense is simply that Boese knowingly violated a protective court order, and that the type of order that had been issued under the statute's six subsections is an immaterial option within a means.

No Kansas appellate courts have addressed whether the violation of a protective order statute, K.S.A. 2022 Supp. 21-5924(a)(1)-(6), contains alternative means. To interpret the statute and determine whether it contains alternative means, this court must look to the text, giving effect to its plain and unambiguous language. See, e.g., *State v. Arnett*, 307 Kan. 648, 653, 413 P.3d 787 (2018). In *State v. Brown*, 295 Kan. 181, 194, 284 P.3d 977 (2012), the Kansas Supreme Court explained that in examining legislative intent to determine whether a statute contains alternative means,

"a court must determine for each statute what the legislature's use of a disjunctive 'or' is intended to accomplish. Is it to list alternative distinct, material elements of a crime—that is, the necessary *mens rea*, *actus reus*, and, in some statutes, a causation element? Or is it to merely describe a material element or a factual circumstance that would prove the crime? The listing of alternative distinct, material elements, when incorporated into an elements instruction, creates an alternative means issue demanding super-sufficiency of

the evidence. But merely describing a material element or a factual circumstance that would prove the crime does not create alternative means, even if the description is included in a jury instruction."

Stated more succinctly, "[i]f the statute lists 'alternative, distinct, material elements' of a crime, then it creates alternative means." *State v. Cottrell*, 310 Kan. 150, 160, 445 P.3d 1132 (2019). Whereas "[o]ptions within a means describe secondary matters that 'do not state additional and distinct ways of committing the crime.'" *State v. Jordan*, 317 Kan. ___, 537 P.3d 443, 451 (2023). Our Supreme Court has noted that "[t]ypically . . . a legislature will signal its intent to state alternative means through structure, separating alternatives into distinct subsections of the same statute." *State v. Davis*, 312 Kan. 259, 265, 474 P.3d 722 (2020).

The violation of a protective order statute, K.S.A. 2020 Supp. 21-5924, contains six types of protective court orders that can be violated:

"(a) Violation of a protective order is knowingly violating:

(1) A protection from abuse order issued pursuant to K.S.A. 60-3105, 60-3106 or 60-3107, and amendments thereto;

(2) a protective order issued by a court or tribunal of any state or Indian tribe that is consistent with the provisions of 18 U.S.C. § 2265, and amendments thereto;

(3) a restraining order issued pursuant to K.S.A. [2020 Supp.] 23-2707, 38-2243, 38-2244 or 38-2255, and amendments thereto, or K.S.A. 60-1607, prior to its transfer;

(4) an order issued in this or any other state as a condition of pretrial release, diversion, probation, suspended sentence, postrelease supervision or at any other time during the criminal case that orders the person to refrain from having any direct or indirect contact with another person;

(5) an order issued in this or any other state as a condition of release after conviction or as a condition of a supersedeas bond pending disposition of an appeal, that orders the person to refrain from having any direct or indirect contact with another person; or

(6) a protection from stalking, sexual assault or human trafficking order issued pursuant to K.S.A. 60-31a05 or 60-31a06, and amendments thereto."

Each of these six subsections sets forth different elements of the offense depending on what kind of order the State alleges the defendant knowingly violated. The six types of protective orders are presented as a list, separated by semi-colons and an "or" from subsection (a)(1) to (a)(6). The statutory structure signals that the Legislature intended six separate and alternative means of committing the crime of violation of a protective order.

Depending on which type of order the defendant is alleged to have violated, the State must prove a distinct mens rea and actus rea because each requires an entirely different showing. Each subsection requires a knowing violation of a particular type of protective order, each of which is provided in distinct statutes and have differing requirements. Moreover, the mens rea and actus rea of a charge under each of the subsections requires a particular type of proof based on the type of order that is alleged to have been violated. As such, K.S.A. 2020 Supp. 21-5924 presents six alternative means of committing the offense, as delineated in subsections (a)(1) through (a)(6).

The State's argument that its failure to charge Boese under the correct subsection of the statute does not matter because the statute does not present alternative means of committing the crime is unavailing. Likewise, the State's argument that the language of the amended complaint against Boese was broad enough to encompass a conviction under subsection K.S.A. 2020 Supp. 21-5924(a)(6) instead of subsection (a)(1) lacks merit. The State alleged that Boese violated a protection from abuse order but never proved that he did so. Boese can be convicted only of the crime he was charged with committing. Thus, we must reverse Boese's conviction for insufficient evidence and vacate his sentence.

Conviction reversed and sentence vacated.