

NOT DESIGNATED FOR PUBLICATION

No. 112,572

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

TAYLOR ARNETT,
Appellant.

MEMORANDUM OPINION

Appeal from Wyandotte District Court; MICHAEL A. RUSSELL, judge. Opinion filed November 6, 2015. Vacated in part and remanded with directions.

Samuel Schirer, of Kansas Appellate Defender Office, for appellant.

Alan T. Fogelman, assistant district attorney, *Jerome A. Gorman*, district attorney, and *Derek Schmidt*, attorney general, for appellee.

Before ATCHESON, P.J., SCHROEDER, J., and HEBERT, S.J.

Per Curiam: Taylor Arnett was convicted on her plea of guilty to the felony of conspiracy to commit burglary. She appeals from the order of the district court imposing restitution. She argues that the imposition of criminal restitution violates *Apprendi v. New Jersey*, 530 U.S. 466, 147 S. Ct. 2348, 147 L. Ed 2d 435 (2000), and also violates Section 5 of the Kansas Constitution Bill of Rights by allowing a judge rather than a jury to determine the amount of restitution. Alternatively, Arnett argues that the restitution order should be set aside for lack of substantial competent supporting evidence.

We find that restitution should not have been imposed upon Arnett, reverse the judgment of the district court, and vacate the order of restitution. Having so determined, we need not address the constitutional issues raised.

Factual and Procedural Background

In the late evening hours of January 8, 2013, two men burglarized homes in Edwardsville. During their investigation, the police learned that the car used in the burglaries belonged to Arnett's mother. Arnett admitted to the police that she loaned her mother's car to her boyfriend that night "to do 'a lick,'" which she said meant "robbing houses." Arnett further admitted her boyfriend gave her \$200 when he returned the car.

The State charged Arnett with felony conspiracy to commit burglary. She eventually pled guilty as charged after reaching a plea agreement in which the State agreed not to file additional charges and to recommend a mitigated controlling sentence. Payment of restitution was not part of the plea agreement. The district court imposed an underlying mitigated 5-month prison sentence and granted Arnett 12 months' probation.

The district court conducted a separate hearing regarding restitution. The prosecutor advised the district court that the parties agreed upon the amounts that the State attributed to the losses suffered by the victims as being \$31,646.66 for items taken from a tenant of one of the two burglarized homes; \$1,200 for property damage to the tenant's home; and \$402.17 for undisclosed "out-of-pocket" expenses for the other victim. The sole argument presented to the district court was whether Arnett was responsible "for all, part, or some amount of restitution."

The district court held Arnett jointly and severally liable with her codefendants for the entire amount of restitution—\$33,248.83—and imposed that obligation as a term of her probation. Arnett timely appealed.

The Order of Restitution Is Not Supported By Statute

We turn first to Arnett's argument that the order of restitution is not supported by substantial competent evidence. In raising her objection to the district court, Arnett has preserved the issue of whether she can legally be held liable for restitution, and we approach the question from that direction.

Standard of Review

Generally, "[t]he restitution amount and the manner in which restitution is to be made are reviewed for abuse of discretion." *State v. Alcala*, 301 Kan. 832, 836, 348 P.3d 570 (2015). Absent an error of fact or law, our appellate courts will find a district court abused its discretion only if its decision is arbitrary, fanciful, or unreasonable. *State v. Mosher*, 299 Kan. 1, 3, 319 P.3d 1253 (2014).

However, the issue presented here also implicates interpretation and application of K.S.A. 2014 Supp. 21-6607(c)(2), a statute which specifically addresses the imposition of criminal restitution as a term of probation. A question regarding the interpretation or application of a statute is subject to unlimited review on appeal. *State v. Vrabel*, 301 Kan. 797, 802, 347 P.3d 201 (2015).

The Statute

K.S.A. 2014 Supp. 21-6607(c)(2) provides in part that as a condition of probation, a defendant shall be ordered to "make reparation or restitution to the aggrieved party for the damage or loss caused by the defendant's crime." The controlling principle has recently been succinctly summarized in *State v. Miller*, 51 Kan. App. 2d ___, Syl. ¶ 1, 355 P.3d 716 (2015): "Restitution can be awarded only for damages or losses caused by the defendant's crime of conviction or otherwise agreed to by a defendant in a plea

agreement." Since Arnett did not enter into a plea agreement for payment of restitution, we must examine the nature of the crime to which she pled and was convicted.

The Crime

Arnett pled to the crime of conspiracy, as defined in K.S.A. 2014 Supp. 21-5302(a): "A conspiracy is an agreement with another person to commit a crime or to assist in committing a crime." K.S.A. 2014 Supp. 21-5107(f) provides that "[a]n offense is committed either when every element occurs, or, if a legislative purpose to prohibit a continuing offense plainly appears, at the time when the course of conduct or the defendant's complicity therein is terminated. Time starts to run on the day after the offense is committed." Thus, by definition, conspiracy is a completed crime upon the agreement and commission of any overt act in furtherance of the conspiracy; it does not require the actual commission of the object crime. That conspiracy is a separate offense apart from the object offense is made clear by the sentencing guidelines set forth in K.S.A. 2014 Supp. 21-5302(d)(1), which rank conspiracy at two severity levels below the appropriate level for the underlying or completed crime. Arnett was not charged with, nor did she plead guilty to, burglary, theft, or criminal damage to property in either an active or aiding and abetting role, charges which arguably could have been filed pursuant to K.S.A. 2014 Supp. 21-5210 relating to responsibility for crimes of another.

Arnett's alleged overt act of providing a car for the others to use may have furthered and completed the conspiracy but did not directly cause the actual burglaries, thefts, or damage to property. The record is undisputed that Arnett did not actually participate in those crimes.

Thus, we are constrained to conclude that there is no causal connection between Arnett's crime of conviction—conspiracy—and the amounts for which she was ordered to make restitution—the fruits of burglary, theft, and criminal damage to property. The

order of restitution is unsupported by K.S.A. 2014 Supp. 21-6607(c) and must be reversed and vacated.

The Constitutional Issues Need Not Be Addressed

"As a general rule, courts will not decide a constitutional question if there is some other ground upon which to decide or dispose of the case." *State v. Childs*, 275 Kan. 338, Syl. ¶ 2, 64 P.3d 389 (2003). First of all, there is a threshold question of whether the constitutional issues raised by Arnett, having not first been raised in the district court, are even appropriate for appellate consideration. See *e.g.*, *State v. Phillips*, 299 Kan. 479, 493, 325 P.3d 1095 (2014); *State v. Bowen*, 299 Kan. 339, 354, 323 P.3d 853 (2014).

In any event, having concluded as set forth above that Arnett is not liable for restitution based on her crime of conviction, addressing the constitutional issues would run afoul of the general rule that an appellate court does not decide moot questions or render advisory opinions. See *State v. Montgomery*, 295 Kan. 837, 840, 286 P.3d 866 (2012).

Order of restitution reversed and vacated.