NOT DESIGNATED FOR PUBLICATION

No. 111,608

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

VINCENT R. JARMON,
Appellant.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; BRUCE C. BROWN, judge. Opinion filed February 26, 2016. Affirmed in part, reversed in part, and remanded with directions.

Heather Cessna, of Kansas Appellate Defender Office, for appellant.

Matt J. Maloney, assistant district attorney, *Marc Bennett*, district attorney, and *Derek Schmidt*, attorney general, for appellee.

Before BUSER, P.J., LEBEN and BRUNS, JJ.

Per Curiam: Vincent R. Jarmon appeals his conviction and sentence for burglary in violation of K.S.A. 2015 Supp. 21-5807(a)(2). On appeal, he contends the district court erred in failing to instruct the jury on the elements of theft, failing to appoint substitute counsel after trial, and improperly calculating his criminal history score. We affirm Jarmon's conviction and sentence, but we reverse the denial of Jarmon's motion for substitute counsel and new trial. We remand for appointment of new counsel on Jarmon's collateral challenge to his conviction.

FACTUAL AND PROCEDURAL BACKGROUND

Larry Farmer and Tommy Luallen operate a business purchasing the contents of storage units at auction, sorting through the contents, and then selling the salvageable property. The property they purchase is stored in a building in Wichita. The building is jointly owned by Luallen and his mother.

On May 6, 2013, Farmer and Luallen discovered a hole in a weakened portion of the wall at the rear of the building. They propped some heavy items against the hole to cover it. The next morning, Farmer returned to the building at about 7:30 a.m. As he opened the front door, he heard a noise in the back and observed a light when no lights should have been turned on. He quietly left the building and called the police, who arrived shortly thereafter.

Wichita police officers entered the front door of the building and promptly encountered Jarmon inside. He was arrested. Upon inspecting the rear of the building, the officers discovered the apparent point of entry—a hole in the wall 4 to 5 feet above the hole that had been discovered the day before.

Inside the building, drawers had been pulled out and ransacked. Toolboxes were also opened and rummaged. Electronic devices had been pulled off the shelves. Many items were found dumped onto the floor from the shelves. A black bag found near the shelves had been filled with merchandise from the building. Farmer also discovered CDs, DVDs, stereo equipment, and over 100 Hot Wheels cars were missing.

Jarmon was wearing black or dark-colored clothing from head to foot and his clothes were covered with pieces of wood or insulation. Inside one of Jarmon's pockets were some screws, washers, and other hardware matching hardware scattered on the floor of the building. Jarmon also was wearing a faux ruby bracelet on his left wrist. Farmer

identified the bracelet as his property because the glass looked like a ruby and he carefully inspected it when it came into his possession. Farmer had kept the bracelet in a display case in the storage building.

Jarmon was charged with burglary of a nondwelling with the intent to commit theft. Jarmon did not file proposed jury instructions, however, the State filed the following proposed instruction for burglary:

> "In Count I, the defendant, Vincent R. Jarmon, is charged with Burglary. The defendant pleads not guilty.
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> "To establish this charge, each of the following claims must be proved:
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> "I. That the defendant entered a building that is not a dwelling;
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> "2. That the defendant did so without authority;
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> "3. That the defendant did so with the intent to commit a theft therein;
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> "4. That this act occurred on or about the 7th day of May, 2013, in Sedgwick County, Kansas."

The State's proposed burglary instruction did not set forth the elements of theft, and Jarmon did not object to the omission at the instructions conference. The trial court gave the jury the State's proposed burglary instruction. In closing arguments, Jarmon's counsel conceded her client had entered the building but she maintained he did so "with the intent to get shelter." On November 19, 2013, a jury convicted Jarmon of burglary.

On December 16, 2013, Jarmon filed a pro se motion for substitute counsel and a motion for new trial based on ineffective assistance of counsel. Jarmon contended his counsel "deliberatly [*sic*] and with intention sabbatoge [*sic*] the . . . jury trial." In particular, Jarmon specified that his counsel failed to make an opening statement or lodge certain objections to the evidence. While Jarmon's pro se motion was pending, his counsel filed a motion to depart from the guidelines sentence.

At sentencing, the trial court first addressed Jarmon's pro se motion. The trial court clarified that Jarmon was seeking both the appointment of new counsel and a new trial. Jarmon told the court that his counsel failed to present "my defense was that I was homeless, which I was." The trial court asked Jarmon's counsel if she wished to add anything. Counsel said she was "willing to work with Mr. Jarmon" and then disputed aspects of Jarmon's pro se motion. With regard to Jarmon's request for substitute counsel, after finding no conflict of interest, and no irreconcilable conflict or complete breakdown in communications, the trial court denied Jarmon's motion.

The trial court then addressed Jarmon's pro se motion for new trial based on ineffective assistance of counsel. The judge, who had also conducted the jury trial, found that Jarmon's counsel "did an admirable job, was extremely effective, in my opinion." The trial court also concluded that Jarmon's specific allegations of ineffectiveness were without any basis.

The trial court then proceeded to sentencing. Neither Jarmon nor his counsel disputed his criminal history category of A. The trial court denied the motion for a departure sentence filed and argued by Jarmon's counsel and imposed a mid-range 32-month sentence.

Jarmon filed a timely appeal.

JURY INSTRUCTION ON BURGLARY

Jarmon contends the district court erred by omitting the elements of theft from the jury instruction which set forth the elements of the crime charged, burglary. Jarmon acknowledges that he did not object to the omission. We therefore apply a clearly erroneous standard of review. See K.S.A. 2015 Supp. 22-3414(3); *State v. Brown*, 299

Kan. 1021, 1036, 327 P.3d 1002 (2014); *State v. Berney*, 51 Kan. App. 2d 719, 722, 353 P.3d 1165 (2015).

Under the clearly erroneous standard of review, "we first consider whether the [trial] court erred in failing to give the instruction. A court errs when we determine, using unlimited review, the [omitted] instruction was both legally and factually appropriate. [Citation omitted.]" *State v. Clay*, 300 Kan. 401, 408, 329 P.3d 484, *cert. denied* 135 S. Ct. 728 (2014). Pertinent to the specific issue on appeal, "[w]hen a statute makes the commission of a crime or the intent to commit a crime an element of another crime, the jury instructions must set out the statutory elements of the underlying offense." *State v. Richardson*, 290 Kan. 176, 182, 224 P.3d 553 (2010); see PIK Crim. 4th 58.120. It is undisputed that the facts of this case supported an elements instruction on theft. As a result, the trial court erred by failing to give an instruction which was legally and factually appropriate.

Was the omission of the elements of theft as part of the burglary instruction harmless error? "The [trial] court's failure to instruct the jury on an element of the crime being prosecuted is error, but not structural error. The omission of an element from the jury instructions is subject to a harmless error analysis." *State v. Kemble*, 291 Kan. 109, Syl. ¶ 9, 238 P.3d 251 (2010). Kansas courts follow the harmless error analysis set out in *Neder v. United States*, 527 U.S. 1, 15-17, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999), which is an application of the federal constitutional harmless error test of *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705, *reh. denied* 386 U.S. 987 (1967). See *State v. Daniels*, 278 Kan. 53, 58-62, 91 P.3d 1147, *cert. denied* 543 U.S. 982 (2004). Wherever "the fundamental failure infringes upon a right guaranteed by the United States Constitution," as here, Kansas courts also place the burden of showing harmlessness on "the party benefitting from the error." *State v. Ward*, 292 Kan. 541, Syl. ¶ 6, 256 P.3d 801 (2011), *cert. denied* 132 S. Ct. 1594 (2012).

As explained by our Supreme Court:

> "Under the *Neder* test, 'where a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error, the erroneous instruction is properly found to be harmless.' 527 U.S. at 17. Stated another way, the reviewing court 'asks whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element.' 527 U.S. at 19. If the answer to that question is 'no,' the error may be held harmless." *Daniels*, 278 Kan. at 62.

Turning to the application of *Neder* to the present case, an instruction on theft would have required the jury to conclude beyond a reasonable doubt that (1) the proprietor and another individual were owners of the merchandise; (2) Jarmon exerted unauthorized control over the merchandise; (3) Jarmon intended to deprive the owners permanently of the use or benefit of their merchandise; (4) the value of the merchandise was less than $1,000; and (5) the act occurred on or about the 7th day of May 2013, in Sedgwick County, Kansas. See PIK Crim. 4th 58.010.

On appeal, Jarmon does not contend that the first, fourth, or fifth elements of the crime of theft were contested at trial. Indeed, there was clearly evidence offered by the State to prove these three elements. With regard to the second and third elements, however, during closing argument, Jarmon's counsel said that Jarmon entered the building to keep warm because he was homeless, and he did not have the intent to exert unauthorized control over merchandise or to deprive the owners permanently of it. But Jarmon did not testify about his intent or present evidence at trial supporting his attorney's argument that he entered the building in order to keep warm. On the contrary, as the prosecutor emphasized in his closing argument, there was no bedding, food, or other items found in the building to support the notion that Jarmon was seeking shelter because he was homeless.

On the other hand, the State's evidence tending to prove that Jarmon had entered the building with an intent to commit theft was substantial and convincing. Inside the building, drawers and toolboxes had been opened and ransacked. Electronic devices and other items had been removed from shelves and placed on the floor. Near the shelves, assorted merchandise from the building had been collected and put in a black bag, ready to be removed from the building. Valuables were also missing from the building.

Jarmon wore black or dark-colored clothing, and his clothes were covered with pieces of wood or insulation suggesting a recent entry into the building. Jarmon's pockets contained hardware which matched other hardware scattered on the floor of the building. Of particular relevance to prove that Jarmon's intent on entering the building was to commit theft was the faux ruby bracelet, owned by Farmer, and displayed in the building, which Jarmon wore at the time of his arrest.

Upon our review of the trial proceedings, the omitted elements of theft were both uncontested by contrary evidence and supported by overwhelming evidence. Stated another way, the record does not contain evidence that could rationally lead to a contrary finding with respect to the omitted elements. We are convinced the trial court's error in failing to instruct on the elements of theft was, therefore, harmless under the constitutional harmless error standard. See *Daniels*, 278 Kan. at 58-62.

DENIAL OF SUBSTITUTE COUNSEL

Next, Jarmon contends the district court erred in refusing to appoint substitute counsel after trial but before sentencing. Jarmon argues his counsel's "representation of him at the hearing on his motion to dismiss his counsel and motion for a new trial was a conflict of interest and that counsel's divided loyalties adversely affected her performance at that hearing." Jarmon asks us to reverse the trial court's rulings on his "motions and

remand to the [trial] court with directions to appoint conflict-free counsel and reconsider the motion to appoint new counsel and motion for ineffective assistance of counsel."

When a district court is presented with a potential conflict of interest between a criminal defendant and his or her attorney, the district court is required to make an appropriate inquiry into the conflict. If the district court conducts an appropriate inquiry into the alleged conflict, the court's decision regarding the appointment of new counsel is reviewed for an abuse of discretion. Judicial discretion is abused when the exercise of discretion is guided by an erroneous legal conclusion, is premised upon facts that are unsupported by the evidence of record, or is otherwise arbitrary, fanciful, or unreasonable. The party alleging an abuse of discretion bears the burden of establishing the abuse. *State v. Stovall*, 298 Kan. 362, 370, 312 P.3d 1271 (2013).

On appeal, the parties presume this issue implicates the Sixth Amendment to the United States Constitution. It is true the Sixth Amendment guarantees a criminal defendant the right to effective assistance of counsel, and the right encompasses the right to representation free from conflicts of interest. See *Wood v. Georgia*, 450 U.S. 261, 271, 101 S. Ct. 1097, 67 L. Ed. 2d 220 (1981); *State v. Brown*, 300 Kan. 565, 575, 331 P.3d 797 (2014). But the Sixth Amendment right to counsel only applies to critical stages of the criminal proceedings. See *State v. Sharkey*, 299 Kan. 87, 92, 322 P.3d 325 (2014). A timely motion for new trial is a critical stage of the criminal proceedings for Sixth Amendment purposes. See 299 Kan. at 96.

Here, Jarmon's motion for new trial was untimely. Under K.S.A. 2015 Supp. 22-3501(1), a motion for new trial on a ground other than the discovery of new evidence must be made within 14 days of the verdict or finding of guilty. Jarmon filed his motion 27 days after the jury returned its verdict. Even if we considered the date Jarmon indicated above his signature on the motion rather than the filing date, the motion was still overdue.

When an *untimely* motion for new trial is presented, the trial court should treat it as a collateral challenge to the conviction under K.S.A. 60-1507. In that situation, the duty to appoint counsel depends on whether the motion raises substantial questions of law or triable issues of fact. See K.S.A. 22-4506(b); *Sharkey*, 299 Kan. at 95; *Stovall*, 298 Kan. at 370; *Robertson v. State*, 288 Kan. 217, 228, 201 P.3d 691 (2009).

A criminal defendant seeking to replace counsel based on a conflict of interest must establish the existence of an actual conflict and demonstrate the conflict adversely affected counsel's performance. *State v. Toney*, 39 Kan. App. 2d 1036, 1042, 187 P.3d 138 (2008) (citing *Mickens v. Taylor*, 535 U.S. 162, 174, 122 S. Ct. 1237, 152 L. Ed. 2d 291 [2002]). In the present case, the trial court permitted Jarmon's counsel to respond to her client's allegations of ineffective assistance of counsel during trial. Counsel's position with respect to the allegations was decidedly adverse to Jarmon's.

Toney presented a similar situation:

> "In order to faithfully and effectively represent [the accused] at the hearing, the public defender would be obligated to advocate and prove her own professional ineffectiveness. On the other hand, in order to defend herself against [the accused]'s allegations of ineffectiveness, the public defender would be required to advocate against her client's legal position.
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> . . . .
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> "[The conflict of interest] resulted in [the public defender's] failure to present evidence and to advocate in support of [her client]'s motion . . . . As a consequence, her conflicted representation necessarily undermined any possibility that [the accused]'s motion would be successful. Under these circumstances, we hold the divided loyalties of [the] public defender adversely affected her performance as [defense] counsel and created an actual conflict of interest." 39 Kan. App. 2d at 1042-44.

Toney is dispositive. We conclude the trial court's decision to deny Jarmon's request for appointment of substitute counsel to present his motion for new trial based on ineffective assistance of counsel was an abuse of discretion.

Finally, we note that on appeal Jarmon does not contest his counsel's performance at sentencing after the denial of the motion for substitute counsel. In particular, he does not allege that his counsel at sentencing took a position adverse to his interests or that there was a complete breakdown in communication. Nor does Jarmon claim any sort of prejudice with respect to his counsel's performance at sentencing. Moreover, Jarmon does not ask us to reverse and remand for resentencing based on any allegation of counsel's ineffectiveness. Jarmon has, therefore, waived any argument regarding his representation by counsel at sentencing. See *State v. Boleyn*, 297 Kan. 610, 633, 303 P.3d 680 (2013). We should note, however, that our independent review of Jarmon's sentencing proceeding confirms that Jarmon's counsel was not ineffective and did not exhibit any conflict in her representation of Jarmon at sentencing.

The trial court erred in denying Jarmon's motion for substitute counsel and new trial. Accordingly, we reverse that ruling and remand for appointment of new counsel on Jarmon's collateral challenge to his conviction based on ineffective assistance of trial counsel.

CALCULATION OF CRIMINAL HISTORY AT SENTENCING

Jarmon challenges the trial court's decision to sentence him under criminal history category A. In particular, Jarmon contends the trial court improperly classified three prior convictions as person felonies. This issue raises questions of law over which we exercise unlimited review. See *State v. Dickey*, 301 Kan. 1018, 1034, 350 P.3d 1054 (2015).

Relying on *State v. Murdock*, 299 Kan. 312, 323 P.3d 846 (2014), *modified by Supreme Court order* September 19, 2014, *overruled by State v. Keel*, 302 Kan. 560, Syl. ¶ 9, 357 P.3d 251 (2015), and *State v. Williams*, 291 Kan. 554, 562, 244 P.3d 667, (2010), *overruled by State v. Keel*, 302 Kan. 560, Syl. ¶ 9, 357 P.3d 251 (2015), Jarmon argues that his convictions in 1982 and 1991 should be classified as nonperson felonies. *Murdock* and *Williams*, however, are no longer good law in Kansas. See *Keel*, 302 Kan. at 588-90. *Keel* is dispositive of this issue. We conclude the trial court did not err by sentencing Jarmon under criminal history category A.

In summary, we affirm Jarmon's conviction and sentence. We reverse the trial court's denial of Jarmon's motion for substitute counsel and new trial. We remand for appointment of new counsel on Jarmon's collateral challenge to his conviction on the basis of ineffective assistance of trial counsel.

Affirmed in part, reversed in part, and remanded with directions.