

NOT DESIGNATED FOR PUBLICATION

No. 112,939

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

DEBORAH LYNN WHITE,
Appellant.

MEMORANDUM OPINION

Appeal from Shawnee District Court; DAVID DEBENHAM, judge. Opinion filed March 25, 2016.
Affirmed.

Meryl Carver-Allmond, of Kansas Capital Appellate Defender Office, for appellant.

Jodi Litfin, assistant district attorney, *Chadwick J. Taylor*, district attorney, and *Derek Schmidt*, attorney general, for appellee.

Before PIERRON, P.J., BRUNS and GARDNER, JJ.

Per Curiam: Deborah Lynn White appeals her conviction for aggravated burglary under K.S.A. 2015 Supp. 21-5807(b). White argues the district court erred when it instructed the jury it only had to find she committed one of the elements of aggravated burglary intentionally in order to convict. Additionally, White argues the court erred in refusing to instruct the jury it had to find she knew she did not have authority to enter Walmart in order to convict her. Because these errors supposedly diluted the State's burden of proof and rendered her theory of defense irrelevant, White argues these errors were not harmless and her conviction should be overturned. We affirm.

On February 20, 2013, Christina Garwood, an asset protection associate, saw White place multiple packages of curtains into a blue reusable bag at the Walmart on 37th Street in Topeka, Kansas. Garwood watched White go to the customer service desk, place the bag at her feet, and ask the customer service associate some questions. White then picked up the bag, passed the last point of purchase, and headed towards the door without paying for the curtains. Garwood apprehended White before she was able to leave the store.

Garwood issued a ban on White as a result of this incident. The terms of the ban were printed in a form. The first paragraph of the form stated the recipient was prohibited from entering any Walmart properties. The second paragraph was an acknowledgement of receipt. Below this second paragraph were several signature lines, including a line for the recipient. There was also a blank to insert the effective date of the ban. The form did not provide a specified expiration date because bans are generally lifetime bans.

Garwood presented the form to White on February 20, 2013. Garwood summed up the contents of the form in her own words because she felt the form itself was difficult to understand. Garwood told White she was banned from all Walmart properties. Garwood then explained if White was caught on the premises it would be trespassing, and if another incident took place, it would be aggravated burglary. White wrote her name on the ban form and signed it. Garwood did not believe White read the form before signing it. Garwood also did not recall if she had filled out the effective date when White signed the form, but she believed she added the date sometime in the next 24 hours.

Amy Garinger, another Walmart asset protection associate, was also working on February 20, 2013. She heard Garwood tell White that White was banned from all Walmart properties. Garinger saw White receive the ban form, look at it, and then sign it.

The police issued a ticket to White for theft as a result of this incident. She later pled to disorderly conduct in municipal court on July 23, 2013.

On August 3, 2013, Garinger again saw White inside the Walmart on 37th Street. Another associate notified Garinger that White was in the store. Garinger saw White order five items from the deli. White took a bite of one of the items and then placed them all in a reusable bag. She cut through a register and attempted to leave the store without paying. Several customers and employees were inside the store at the time of the incident. Garinger stopped White and took her back to the loss prevention office. In the office, Garinger tried to talk to White about the incident. According to Garinger, White never contested that the store had banned her in February.

White was charged with aggravated burglary and theft for the incident on August 3, 2013. At trial, White testified that on August 3, 2013, she did not believe Garwood had banned her from the premises on February 20. She admitted she signed the ban form in February but said she had been unable to read it because of the poor copying and her poor vision. She could tell, however, that there were blanks for the effective date that Garwood had not filled in. White testified that because the date was blank, she believed the form was just a warning that she would be banned in the future if another incident occurred. She told the court she requested a copy of the form, but no one gave her one.

At the jury instructions conference, White objected to the elements instruction for the aggravated burglary charge and the theft charge. Both instructions stated the State must prove White committed "one of the elements of the crimes" of aggravated burglary and theft intentionally. Defense counsel argued the instruction might lead the jury to believe it only needed to find one of the elements in each case was intentional. The district court and the prosecutor agreed the instructions were confusing, but the court overruled White's objection. White also requested the aggravated burglary instruction be amended to make it clear the jury could only convict her if it found she "knew she had no authority to enter the building." The court denied White's request for the additional language relying on *State v. Acevedo*, 49 Kan. App. 2d 655, 666, 315 P.3d 261 (2013), which held "without authority" already implies the culpable mental state of "knowingly."

The jury convicted White of aggravated burglary and theft. White was sentenced to 36 months of probation with an underlying sentence of 36 months of imprisonment. White timely appeals.

White initially argues the district court's aggravated burglary instruction was not legally appropriate. She contends the instruction misstated the pattern instruction and misstated the law by turning aggravated burglary into a strict liability crime. The State argues the instruction was legally appropriate because the only required culpable mental state for aggravated burglary is "with intent to commit a felony, theft or sexually motivated crime therein."

Standard of Review

When addressing a challenge to jury instructions, an appellate court conducts a four-step analysis. First, the appellate court determines whether the issue is reviewable from both jurisdictional and preservation standpoints using an unlimited standard of review. Next, the court determines whether the instruction was legally appropriate using an unlimited standard of review. Third, the court determines if the instruction was factually appropriate by considering whether there was sufficient evidence, viewed in the light most favorable to the defendant or the requesting party, to support the instruction. Finally, if the district court erred by not giving a legally and factually appropriate instruction, the court must determine if the error was harmless. *State v. Woods*, 301 Kan. 852, 876, 348 P.3d 583 (2015).

White has properly preserved this issue for review. A party cannot claim error for the district court's giving or failing to give a jury instruction unless (1) the party objects before the jury retires, stating distinctly the matter to which the party objects and the grounds for the objection; or (2) the instruction is clearly erroneous. *State v. Smyser*, 297

Kan. 199, 204, 299 P.3d 309 (2013). During the instructions conference, defense counsel objected to the district court's instruction on aggravated burglary. Defense counsel specifically objected to the sentence on the culpable mental state, stating " the intentionally part is where the one comes in. I don't want [the jury] to think that they just have to find one of those elements" Because defense counsel specifically objected to the aggravated burglary instruction, this issue is properly before us.

The district court's jury instruction correctly configured the instruction on aggravated burglary. To be legally appropriate, an instruction must "fairly and accurately state the applicable law." *State v. Plummer*, 295 Kan. 156, 161, 283 P.3d 202 (2012). In this case, the State proposed an aggravated burglary instruction that listed the elements of aggravated burglary, then stated: "The State must prove that the defendant entered into or remained in Walmart with the intent to commit a theft. A defendant acts intentionally when it is the defendant's desire or conscious objective to do the act complained about, or cause the result complained about, by the State." The court changed the instruction to read:

"The State must prove that the defendant *committed one of the elements of the crimes of aggravated burglary and theft intentionally.*

"A defendant acts intentionally when it is the defendant's desire or conscious objective to do the act complained about by the State or cause the result complained about by the State." (Emphasis added.)

The court's modified instruction was given to the jury.

Based on the wording of the given instruction in this case, White believes the instruction was based on the pattern instruction on culpable mental state, PIK Crim. 4th 52.010, which reads:

"The State must prove that the defendant committed [one element of] the crime *insert one of the following:*

- intentionally.
- or
- knowingly.
- or
- recklessly.

[A defendant acts intentionally when it is the defendant's desire or conscious objective to *insert one of the following*:

- do the act complained about by the State.
- or
- cause the result complained about by the State."

The Notes on Use for PIK Crim. 4th 52.010 explain that "proof of a culpable mental state may be required by a particular element in some charges. In such cases, the bracketed option in the first paragraph should be used." The bracketed option in the first paragraph contains the words "one element of."

Based on the Notes on Use for PIK Crim. 4th 52.010, the district court's instruction accurately stated the requisite culpable mental state for aggravated burglary. The State charged White with aggravated burglary under K.S.A. 2015 Supp. 21-5807(b), which states:

"Aggravated burglary is, without authority, entering into or remaining within any building, manufactured home, mobile home, tent or other structure, or any vehicle, aircraft, watercraft, railroad car or other means of conveyance of persons or property in which there is a human being with intent to commit a felony, theft or sexually motivated crime therein."

The statute requires proof of the culpable mental state "with intent" for the element "to commit a felony, theft, or sexually motivated crime therein." Because aggravated burglary requires a culpable mental state for a particular element, the court correctly used the language in the bracketed option in the final jury instruction.

White argues, however, that the bracketed phrases in the instruction are not meant to be used verbatim. Instead, the district court must adapt the instructions to the case at hand. See, *e.g.*, *State v. Brown*, 6 Kan. App. 2d 556, 560, 630 P.2d 731 (1981) ("PIK Crim. 59.18 shows the alternative terms in parentheses "[entered][remained in]"). The Notes on Use for PIK Crim. 4th 52.010, however, make clear that in this instance the words in the bracket should have been used. Therefore, White's argument fails.

The instruction on aggravated burglary was also legally appropriate because it correctly stated the required culpable mental state for the recodified aggravated burglary statute. The Kansas Legislature adopted a recodification of the criminal code, which became effective on July 1, 2011. See L. 2010, ch. 136, sec. 1. One of the purposes of the recodification was to clarify culpability terms used in the code. Kansas Criminal Code Recodification Commission, 2010 Final Report to the Kansas Legislature, Vol. I, 6. The revised culpability terms are provided in K.S.A. 2015 Supp. 21-5202, which reads in relevant part:

"If the definition of a crime prescribes a culpable mental state with regard to a particular element or elements of that crime, the prescribed mental state shall be required only as to specified element or elements, and a culpable mental state shall not be required as to any other element of the crime unless otherwise provided." K.S.A. 2015 Supp. 21-5202(g).

As noted above, aggravated burglary requires the culpable mental state "with intent" for the element "to commit a felony, theft or sexually motivated crime therein." K.S.A. 2015 Supp. 21-5807(b). According to K.S.A. 2015 Supp. 21-5202(g), this mental state only applies to this particular element. Furthermore, under K.S.A. 2015 Supp. 21-5202(g), no mental state is required for any other element of the offense, and the aggravated burglary statute does not provide otherwise. See also *State v. Zimbelman*, No. 111,759, 2015 WL 4577693 (Kan. App. 2015) (unpublished opinion) ("[T]he only apparent requirement of intent in K.S.A. 2012 Supp. 21-5807[b] is that the defendant act with intent to commit a

felony, theft, or sexually motivated crime once the defendant is inside the building."). Thus, when the district court instructed the jury that it only needed to find one of the elements of aggravated burglary was committed intentionally, this was a correct statement of the law.

White argues the district court's instruction presented aggravated burglary as a strict liability offense, and K.S.A. 2015 Supp. 21-5202(g), when read in conjunction with other provisions of the criminal code, creates confusion as to what the required culpable mental state for aggravated burglary is. White points to several other provisions in the recodified Kansas criminal code in support of her argument. In addition to the above provision, K.S.A. 2015 Supp. 21-5202 provides:

"(a) Except as otherwise provided, a culpable mental state is an essential element of every crime defined by this code.

. . . .

"(d) If the definition of a crime does not prescribe a culpable mental state, a culpable mental state is nevertheless required unless the definition plainly dispenses with any mental element."

Another statute, K.S.A. 2015 Supp. 21-5203, addresses strict liability crimes: "A person may be guilty of a crime without having a culpable mental state if the crime is . . . (b) a felony and the statute defining the crime clearly indicates a legislative purpose to impose absolute liability for the conduct described." Contrary to White's argument, these statutes do not say every element of an offense must have a culpable mental state. Read together, they indicate a crime must have some culpable mental state unless the statute clearly says otherwise.

Additionally, failure to establish a required culpable mental state for every element of an offense does not create a strict liability offense. Kansas courts have long established that the fourth element of aggravated burglary (presence of a human being) does not require a culpable mental state. See *State v. Ramey*, 50 Kan. App. 2d 82, 104, 322 P.3d

404 (2014) (citing *State v. Watson*, 256 Kan. 396, 400-01, 885 P.2d 1226 [1994]). This did not, however, make aggravated burglary a strict liability offense. See *State v. Makthepharak*, 276 Kan. 563, 572, 78 P.3d 412 (2003) ("Aggravated burglary is a specific intent crime."). Because the recodified version of aggravated burglary provides a culpable mental state for at least one element, it satisfies K.S.A. 2015 Supp. 21-5202(a) and does not qualify as a strict liability offense under K.S.A. 2015 Supp. 21-5203.

White further argues this reading of the aggravated burglary statute is inconsistent with well-established caselaw regarding specific intent crimes. The Kansas Supreme Court has consistently held that specific intent crimes require a further particular intent in addition to the general intent required for all crimes. *In re C.P.W.*, 289 Kan. 448, 454, 213 P.3d 413 (2009). White argues that under this definition of specific intent, any required particular intent for one element does not eliminate the general intent required for the other elements. According to White, this is no longer clear under the recodification of the Kansas criminal code. White notes the Kansas Criminal Code Recodification Commission's final report indicates the new culpability terms were only meant to add clarity and not change substantive law as well. To construe the recodified criminal code in a way that substantively changes the law, White reasons, would go against the legislative intent of these statutes.

White is correct that the plain meaning of K.S.A. 2015 Supp. 21-5202(g) read together with K.S.A. 2015 Supp. 21-5807(b) appears to eliminate the need for a general intent requirement for specific intent crimes. This is inconsistent with prior caselaw and would constitute a substantive change. This does not, however, mean this is not how the statute should be read. As this court noted in interpreting the recodification, "we cannot interpret the statute based on the intentions of an advisory commission. We must look at the plain language of the statute and give the words their ordinary meanings." *State v. Howard*, 51 Kan. App. 2d 28, 45-46, 339 P.3d 809 (2014). Based on the plain language of these statutes, the only required culpable mental state for aggravated burglary is "with

intent to commit a felony, theft or sexually motivated crime." The district court's instructions, then, were a correct statement of law and thus legally appropriate.

Both White and the State agree this step of the analysis has little relevance because the argument centers on whether the instruction was legally appropriate. Because the State charged White with aggravated burglary and presented evidence that White committed the offense, a correct instruction on aggravated burglary is factually appropriate.

We agree with the rationale in *State v. Acevedo*, 49 Kan. App. 2d 655, and find it persuasive. The facts are nearly identical. Acevedo was told he was banned from the Walmart Store in Garden City or any other Walmart store. Two years later he returned to the same store and committed a theft. He was convicted of aggravated burglary and theft. Among other arguments he presented on appeal was, like the instant case, that PIK Crim. 3d 59.18, which was given to the jury, should have been changed by modifying the phrase "without authority" by adding the word "knowingly." The Court of Appeals found the PIK instruction was legally sound as written. 49 Kan. pp. 2d at 666-67.

Because the district court's given instruction in this case was both legally and factually appropriate, there is no error in this case on that issue.

Affirmed.