IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 123,783

STATE OF KANSAS,
Appellee,

v.

MARNEZ L. SMITH,
Appellant.

SYLLABUS BY THE COURT

1.

K.S.A. 2022 Supp. 21-5839(a)(2) does not contain alternative means of committing a computer crime because both clauses in K.S.A. 2022 Supp. 21-5839(a)(2)—executing a scheme "with the intent to defraud" and obtaining money "by means of false or fraudulent pretense or representation"—require an individual to engage in fraudulent behavior to induce a condition to facilitate theft.

2.

The invited error doctrine does not bar an appellant from raising an issue on appeal when he or she merely acceded to—but did not affirmatively request—the error. The doctrine applies only when a defendant actively pursues and induces the court to make the error.

3.

The appropriate amount of restitution is that which compensates the victim for the actual damage or loss caused by the defendant's crime. Substantial competent evidence must support every restitution award.

Review of the judgment of the Court of Appeals in an unpublished opinion filed April 1, 2022. Appeal from Sedgwick District Court; ERIC WILLIAMS, judge. Opinion filed April 7, 2023. Judgment of the Court of Appeals affirming the district court is affirmed in part and reversed in part. Judgment of the district court is affirmed in part and vacated in part, and the case is remanded with directions.

James M. Latta, of Kansas Appellate Defender Office, argued the cause and was on the briefs for appellant.

Julie A. Koon, assistant district attorney, argued the cause, and *Marc Bennett*, district attorney, and *Derek Schmidt*, attorney general, were with her on the brief for appellee.

The opinion of the court was delivered by

STEGALL, J.: A jury convicted Marnez L. Smith of felony theft and unlawful acts concerning a computer. The district court ordered him to serve 18 months' probation and pay $4,100 in restitution. The Court of Appeals affirmed Smith's convictions and restitution, and we granted Smith's petition for review. Today we affirm Smith's convictions and remand for a restitution hearing because the amount of restitution awarded was not supported by substantial competent evidence.

FACTS

Because the parties do not dispute the accuracy of the statement of facts contained in the Court of Appeals' opinion, we will quote from that section of the opinion:

> "In July 2018, Smith was hired to work as teller for EquiShare Credit Union in Wichita. After a two-week training period, Smith went to work in EquiShare's main office. Smith's employment at EquiShare did not go well and did not last long. He was ultimately fired on August 31, 2018, after he approached another employee and asked to borrow money, which was a violation of EquiShare's employment policies. There had

also been several instances during his employment in which there were inconsistencies in Smith's drawer balance.

"In August 2018, an EquiShare customer, John Nash, received his monthly statement and noticed a $200 withdraw from his account, which neither he nor his wife had authorized. Nash reported the transaction to EquiShare, and EquiShare's senior vice president, Freda Reynolds, investigated the matter. Reynolds discovered Smith had been the teller for Nash's disputed transaction, and Nash had not signed for the withdraw. Reynolds reviewed all of Smith's register receipts for any withdraws that did not have a customer's signature and found three additional transactions. Reynolds looked at security footage from the time of the transactions and found neither Nash nor the other affected customers were present at the time of the withdraws. In total, Reynolds determined Smith withdrew $3,200 from the four affected accounts without the account holders' authorization.

"The State charged Smith with one count of felony theft and one count of unlawful acts concerning computers. A jury convicted him as charged. At sentencing, the district [court] imposed a 14-month prison sentence but placed Smith on probation from that sentence for 12 months. The district court also ordered Smith to pay $4,100 in restitution, to which Smith did not object." *State v. Smith*, No. 123,783, 2022 WL 983619, at *1 (Kan. App. 2022) (unpublished opinion).

Notably, the evidence at trial showed that Smith stole $3,200. But at sentencing the State requested $4,100 in restitution without providing a reason for the increase. Smith's counsel did not object and the court awarded $4,100 in restitution.

Before the Court of Appeals, Smith argued that (1) K.S.A. 2022 Supp. 21-5839(a)(2) contains alternative means and there was insufficient evidence to support his conviction under both means; (2) the district court erred in failing to give the jury a unanimity instruction on the felony theft charge; and (3) the district court erred in ordering restitution in excess of the actual harm caused by his crimes.

The panel affirmed Smith's convictions. It determined that (1) K.S.A. 2022 Supp. 21-5839(a)(2) contained only options within a means, and that sufficient evidence existed to convict Smith of one of those options; (2) any error in failing to give a unanimity instruction was harmless beyond a reasonable doubt; and (3) Smith invited the restitution error by failing to object to the amount of restitution requested by the State. 2022 WL 983619, at *2-7. We granted Smith's petition for review.

DISCUSSION

K.S.A. 2022 Supp. 21-5839(a)(2) does not contain alternative means for committing a computer crime.

Smith was convicted of a computer crime under K.S.A. 2022 Supp. 21-5839(a)(2) which criminalizes the use of "a computer, computer system, computer network or any other property for the purpose of devising or executing a scheme or artifice with the intent to defraud or to obtain money, property, services or any other thing of value by means of false or fraudulent pretense or representation." Smith argues this subsection contains alternative means.

An alternative means crime is one that can be committed via more than one set of elements. *State v. Rucker*, 309 Kan. 1090, 1094, 441 P.3d 1053 (2019). Whether a statute contains alternative means is a question of statutory interpretation subject to unlimited review. *State v. Cottrell*, 310 Kan. 150, 157, 445 P.3d 1132 (2019). An alternative means issue raised for the first time on appeal does not require us to engage in a preservation inquiry because it implicates whether there is sufficient evidence supporting the conviction. *State v. Foster*, 298 Kan. 348, 352, 312 P.3d 364 (2013).

"'Alternative means issues arise when the statute and any instructions that incorporate it list distinct alternatives for a material element of the crime.'" *Cottrell*, 310

Kan. at 158. To qualify for an alternative means analysis and application of the so-called "super-sufficiency" requirement, "a statute—and any instruction that incorporates it—must list distinct alternatives for a material element of the crime, not merely describe a material element or a factual circumstance that would prove the crime." *State v. Brown*, 295 Kan. 181, 184, 284 P.3d 977 (2012). If a statute contains alternative means and both means are submitted to the jury, "'sufficient evidence must support each of the alternative means charged to ensure that the verdict is unanimous as to guilt.'" *Rucker*, 309 Kan. at 1094.

We have previously laid out the following analytical path for determining whether a statute contains alternative means:

> "Identifying an alternative means statute is more complicated than spotting the word 'or.'
>
> "To determine if an 'or' separates an option that is not an alternative means or separates alternative means, there are several considerations.
>
> "First, as with any situation in which the courts are called upon to interpret or construe statutory language, the touchstone is legislative intent. . . .
>
> "To divine legislative intent, courts begin by examining and interpreting the language the legislature used. Only if that language is ambiguous do we rely on any revealing legislative history or background considerations that speak to legislative purpose, as well as the effects of application of canons of statutory construction. . . .
>
> "In examining legislative intent, 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.

. . . .

"'[A]s a general rule, [alternative means] crimes are set forth in a statute stating a single offense, under which are set forth more than one means by which the offense may be committed.' Typically . . . a legislature will signal its intent to state alternative means through structure, separating alternatives into distinct subsections of the same statute. Such structure is an important clue to legislative intent.

"Regardless of such subsection design, however, a legislature may list additional alternatives or options within one alternative means of committing the crime. But these options within an alternative do not constitute further alternative means themselves if they do not state additional and distinct ways of committing the crime, that is, if they do not require proof of at least one additional and distinct material element. Rather they are only options within a means if, as discussed above, their role is merely to describe a material element or to describe the factual circumstances in which a material element may be proven. In Washington at least, a '"means within a means" scenario does not trigger jury unanimity protections.'

"In Kansas, we accept this general concept, which we would describe as the legislature's creation of an option within a means. An option within a means scenario is another important clue to legislative intent because such options signal secondary status rather than an intent to create a material, distinct element of the crime. Options within a means—that is, the existence of options that do not state a material, distinct element—do not demand application of the super-sufficiency requirement.

. . . .

"[I]n determining if the legislature intended to state alternative means of committing a crime, a court must analyze whether the legislature listed two or more alternative distinct, material elements of a crime—that is, separate or distinct *mens rea*, *actus reus*, and, in some statutes, causation elements. Or, did the legislature list options

within a means, that is, options that merely describe a material element or describe a factual circumstance that would prove the element? The listing of alternative distinct, material elements, when incorporated into an elements instruction, creates an alternative means issue demanding super-sufficiency of the evidence. Often this intent can be discerned from the structure of the statute. On the other hand, the legislature generally does not intend to create alternative means when it merely describes a material element or a factual circumstance that would prove the crime. Such descriptions are secondary matters—options within a means—that do not, even if included in a jury instruction raise a sufficiency issue that requires a court to examine whether the option is supported by evidence. [Citations omitted.]" *Brown*, 295 Kan. at 193-200.

Smith was convicted under K.S.A. 2018 Supp. 21-5839(a)(2). Subsection (a) provides in full:

"(a) It is unlawful for any person to:

(1) Knowingly and without authorization access and damage, modify, alter, destroy, copy, disclose or take possession of a computer, computer system, computer network or any other property;

(2) use a computer, computer system, computer network or any other property for the purpose of devising or executing a scheme or artifice with the intent to defraud or to obtain money, property, services or any other thing of value by means of false or fraudulent pretense or representation;

(3) knowingly exceed the limits of authorization and damage, modify, alter, destroy, copy, disclose or take possession of a computer, computer system, computer network or any other property;

(4) knowingly and without authorization, disclose a number, code, password or other means of access to a computer, computer network, social networking website or personal electronic content; or

> (5) knowingly and without authorization, access or attempt to access any computer, computer system, social networking website, computer network or computer software, program, documentation, data or property contained in any computer, computer system or computer network." K.S.A. 2022 Supp. 21-5839(a).

The structure of this statute strongly suggests that subsection (a)(2) does not contain alternative means; rather, it gives us an important clue that the Legislature intended for each subparagraph in (a)(1)-(5) to constitute five alternative means of committing a computer crime. And while we recognize that the subsection design is not dispositive to the inquiry, we agree with the Court of Appeals that "there is no meaningful distinction . . . between 'intent *to defraud*' and 'intent to . . . obtain . . . [something] of value *by means of false or fraudulent* pretense or representation.'" *Smith*, 2022 WL 983619, at *3.

The panel focused on the fact that all prohibited activity under (a)(2) requires dishonest conduct. While we agree, we can state the distinction even more precisely.

K.S.A. 2022 Supp. 21-5839(a)(2) criminalizes the use of a computer for the purpose of executing a scheme "with the intent to defraud or to obtain money . . . by means of false or fraudulent pretense or representation." An "intent to defraud," as it is used in the first half of (a)(2), means an intention to deceive and to induce another to action. K.S.A. 2022 Supp. 21-5111(o). We disagree with Smith's argument that the second phrase in (a)(2) does not require inducement. Both pieces of (a)(2) contemplate an individual engaging in false or fraudulent behavior to commit the crime. The gravamen of false behavior is to induce a condition to facilitate theft. The latter phrase—obtaining money "by means of false or fraudulent pretense or representation"—requires inducement, just as does an intent to defraud. K.S.A. 2022 Supp. 21-5839(a)(2) does not present two alternative means of committing a computer crime.

To the extent that Smith argues the evidence is insufficient to show he induced any person to action (because he only induced an act by the bank itself), the statute plainly forecloses this argument. Under the statutorily defined terms, a "person" includes both individuals and "public or private corporation[s]." K.S.A. 2022 Supp. 21-5111(t). The evidence presented at trial showed that Smith, while logged in to the bank's computer, attributed his illegal withdrawals to bank customers that were not present at the time of the transactions. Stated another way, Smith engaged in fraudulent behavior to induce the bank—a "person" under K.S.A. 2022 Supp. 21-5111(t)—to release the money to him. This was amply supported by the electronically created withdrawal receipts attributed to individual customer accounts while Smith was logged in to the computer, the absence of the required signatures on those receipts, and the security camera footage which showed that none of the four affected accountholders were present at the time of the withdrawals.

The district court's failure to give a multiple acts instruction for the felony theft charge does not amount to reversible error.

We review unanimity instruction errors under a three-part framework. First, we conduct unlimited review in determining whether a multiple acts case is presented by asking whether jurors heard evidence of multiple acts, each of which could have supported conviction on a charged crime. If so, we then consider whether error was committed. An error was committed if the State or district court failed to inform the jury which act to rely upon or direct the jury that it must agree on the specific act for each charge. Finally, we determine whether the error was reversible or harmless. When the defendant failed to request a unanimity instruction, we apply the clearly erroneous standard found in K.S.A. 2022 Supp. 22-3414(3). *State v. De La Torre*, 300 Kan. 591, 596, 331 P.3d 815 (2014).

The State alleged Smith had committed four individual thefts and charged him under K.S.A. 2017 Supp. 21-5801(b)(5), which required the State to prove Smith had

stolen "property of the value of less than $1,500 . . . in two or more acts or transactions . . . constituting parts of a common scheme or course of conduct." Smith contends the panel should have found the district court's failure to give a sua sponte unanimity instruction warranted reversal. A unanimity instruction would have informed the jury it had to unanimously agree that Smith committed, at minimum, the same two thefts to convict him.

The panel assumed without deciding that a unanimity instruction was legally and factually appropriate but found that the error did not warrant reversal even under the high bar of the constitutional harmless error standard. See *State v. Ward*, 292 Kan. 541, 569, 256 P.3d 801 (2011) (no reasonable possibility the error affected the verdict). Because the State did not file a cross-petition for review, we only evaluate whether the assumed error was harmless. See Supreme Court Rule 8.03(c)(3)(A) (2023 Kan. S. Ct. R. at 57) (If the Court of Appeals assumes an outcome on an issue without deciding it, the State must file a cross-petition for review to preserve that issue for review.).

The panel carefully described how, in response to a jury question about the multiple acts charged, the district court allowed the parties to reopen closing arguments. At that time both parties clearly and explicitly explained to the jury that it must unanimously agree on two specific thefts to convict.

First, the State explained to the jury:

> "Then you move on to [paragraph] two, that the defendant exerted unauthorized control over the property. Whichever the property you unanimously identified, we have to prove the defendant exerted unauthorized control over that.
>
> "[Paragraph] three, that is—and that is an act of the defendant that we have to prove, so that's one.

"And then there is another act with respect to [paragraph] 3; 3a, 3b, and 3c and 3d. Those are four choices. You must unanimously find two—at least two. You can find all four. You can find three, but you must at least find two. If you don't find two, then you don't have a verdict or at least you don't have a verdict of guilty.

"With respect to [paragraph] 4, that's just referring you back to two or more at question three. Okay. But you still must find that.

"Let's say for example, you find 3a, that the defendant intended to deprive JSN permanently of the use or benefit of the property. If you find that unanimously, you must still have found that JSN owned that property. Does that make sense? It must correspond.

"In other words, if you find unanimously 3a you must have found unanimously 1a, and 2, that the defendant exerted control over it.

"You must also find unanimously that the facts were—I'm on [paragraph] five now—that the acts constituted a common scheme, course of conduct."

Smith's counsel also explained to the jury:

"[Paragraph] 4 explains that Mr. Smith—you must find—if you determine beyond reasonable doubt—you must find that Mr. Smith committed two or more of the acts described above.

"So you would need to describe two or more or find as to two or more of those. These have to be unanimous. That means all of you have to decide. Let's take for instance, or example, JSN, as to A. All of you would have to find as to A, and all of you would have to find as to one of the other examples. It couldn't be a split finding of two. And then that the acts were connected together or constituted a common scheme or course of conduct. That refers you back to the two if you were able to find two. And then, of course, the value which has already been explained and each of those would have to be a unanimous finding as well.

> "So in each step, it has to be a unanimous finding. And the burden should be applied to each element of each step within the instruction."

The panel concluded that these supplemental closing arguments properly explained to the jury its verdict had to be unanimous on which two acts of theft it believed occurred. It determined that Smith failed to explain how the supplemental explanations were insufficient to resolve any questions the jury had about the instruction. *Smith*, 2022 WL 983619, at *4-6.

We agree that a unanimity instruction would not have done anything beyond those lengthy supplemental explanations made in closing arguments. Consequently, we hold that there is no reasonable possibility the error affected the verdict.

The Court of Appeals erred by invoking the invited error doctrine to affirm the $4,100 restitution order when the State's evidence only proved $3,200.

The State sought $4,100 in restitution at sentencing. Yet the evidence presented at trial proved that Smith had stolen only $3,200. Defense counsel did not catch the discrepancy at the time the State made its request. She simply said: "I don't have an objection to that restitution amount given that we had the trial and the evidence [has] already been heard." The district court then ordered restitution in the amount of $4,100.

When Smith raised this issue on appeal, the panel held that the invited error doctrine precluded Smith from challenging the restitution order.

We exercise unlimited review when determining whether the doctrine of invited error applies. *State v. Stoll*, 312 Kan. 726, 735, 480 P.3d 158 (2021).

The invited error doctrine provides that a party "may not invite an error and then complain of the error on appeal." 312 Kan. at 735. The panel concluded that the doctrine

applied here because Smith "acquiesced" by "not objecting to the State's restitution amount and by failing to ask for an evidentiary hearing," and therefore "cannot complain now about such amount on appeal." *Smith*, 2022 WL 983619, at *7. Yet this ignores our ample precedent that clearly distinguishes between failing to object and affirmatively asking for the error.

A "defendant's actions in causing the alleged error and the context in which those actions occurred must be carefully reviewed in deciding whether to trigger this doctrine. There is no bright-line rule for its application." *State v. Sasser*, 305 Kan. 1231, 1235, 391 P.3d 698 (2017). "The ultimate question is whether the record reflects the defense's action *in fact induced* the court to make the claimed error." *State v. Douglas*, 313 Kan. 704, 708, 490 P.3d 34 (2021). "[W]hen a defendant *actively pursues* what is later argued to be an error, then the doctrine most certainly applies." (Emphasis added.) *Sasser*, 305 Kan. at 1236.

A defendant "must do more than just fail to object." 305 Kan. at 1235. We have repeatedly declined to apply the invited error doctrine "when counsel merely acceded to—but did not affirmatively request—a factually inappropriate instruction." 305 Kan. at 1236; see also *Douglas*, 313 Kan. at 708-09 (defense simply stating "I am not requesting any lesser included offenses" did not amount to defense counsel "inducing" the court to action).

Here, Smith clearly only consented to—but did not affirmatively request—the $4,100 restitution amount. The defense's actions did not induce the district court to make the error; the record does not reflect that defense did anything but acquiesce to the State's request. As a result, appellate review of Smith's challenge is appropriate, and the panel incorrectly sidestepped the issue by invoking the invited error doctrine.

The appropriate amount of restitution is that which compensates the victim for the actual damage or loss caused by the defendant's crime. The most accurate measure of this loss depends on the evidence before the district court. *State v. Hall*, 297 Kan. 709, 713-14, 304 P.3d 677 (2013). Substantial competent evidence must support every restitution award. See *State v. Arnett*, 307 Kan. 648, 653, 413 P.3d 787 (2018). Based on the record before us, we find that the restitution award was not supported by substantial competent evidence.

Typically, the State gets only one bite at the apple to prove up the amount of restitution. *State v. Dailey*, 314 Kan. 276, 278-79, 497 P.3d 1153 (2021) (remanding but directing the district court to base the new award only on the existing evidentiary record). Here, however, the State never got its "one bite" because the defense acquiesced to the requested amount, forestalling any restitution hearing. See K.S.A. 2022 Supp. 22-3424(d)(1) (directing district court to "hold a hearing to establish restitution" but that the "defendant may waive the right to the hearing and accept the amount of restitution").

The State should be afforded the opportunity to present evidence to support its requested restitution. Accordingly, we vacate the restitution order imposed by the district court and remand for a restitution hearing.

Judgment of the Court of Appeals affirming the district court is affirmed in part and reversed in part. Judgment of the district court is affirmed in part and vacated in part, and the case is remanded with directions.