

NOT DESIGNATED FOR PUBLICATION

No. 120,412

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,  
*Appellee,*

v.

AMBER LANEY BLACK,  
*Appellant.*

MEMORANDUM OPINION

Appeal from Reno District Court; TRISH ROSE, judge. Opinion filed February 14, 2020.

Affirmed.

*Randall L. Hodgkinson*, of Kansas Appellate Defender Office, for appellant.

*Andrew R. Davidson*, assistant district attorney, *Keith Schroeder*, district attorney, and *Derek Schmidt*, attorney general, for appellee.

Before SCHROEDER, P.J., MALONE and STANDRIDGE, JJ.

PER CURIAM: Following a jury trial, Amber Laney Black was convicted of one count of possession of methamphetamine and one count of possession with intent to use drug paraphernalia. The district court sentenced Black to 16 months in prison but released her on probation for a term of 18 months and ordered mandatory drug treatment. Black appeals from her convictions claiming: (1) the district court erred when it gave jury instructions that allowed her to be convicted based on a lesser culpable mental state and (2) the record contained insufficient evidence to support her conviction for possession of methamphetamine. Finding no error, we affirm.

## FACTS

On September 21, 2017, Black was charged with one count of possession of methamphetamine and one count of possession of drug paraphernalia with intent to use. She waived her right to a preliminary hearing and pled not guilty to both counts. The case proceeded to a jury trial on July 24, 2018, where the State called Jonathan Rosario as a witness. Rosario testified that on September 9, 2017, he was working as a part-time security officer at Hutchinson Regional Medical Center. In that role, Rosario was responsible for inventorying and safeguarding the property of patients who were admitted into the hospital. The purpose of this process was to make sure that high value items were protected and to prevent dangerous items from being brought into the hospital. If any illegal drugs were discovered during the inventory process, hospital policy required the security officer to turn the illegal drugs over to law enforcement.

At approximately 4 a.m. on September 9, 2017, Rosario came into contact with Black, who was in the process of being admitted to the hospital. He met her in the lobby and observed she had a purse with her. Rosario escorted her to a secured unit on the third floor of the hospital. Once he left her in the secured unit, Rosario searched her purse in accordance with the hospital's policy. As a result of that search, Rosario found miscellaneous items (wallet, keys, etc.) as well as needles and a small plastic baggie that contained a glass-like substance. Believing that they were illegal drugs and drug paraphernalia, Rosario took the needles and baggie into safekeeping and sought out a law enforcement officer. He eventually found Hutchinson Police Department Officer Scott Finster—who was at the hospital on a different case—and turned the items over to him.

Officer Finster also testified at trial. Finster confirmed that while he was on duty at Hutchinson Regional Medical Center in the early morning hours of September 9, 2017, he was approached by Rosario and given a number of diabetic needles and a baggie containing a crystal-like substance that Rosario claimed he confiscated from a patient.

Finster testified that the needles were of the type commonly used to inject methamphetamine and that he suspected the crystal-like substance was methamphetamine. He later confirmed that suspicion when he performed a NARK II test, which came back positive for methamphetamine. Finster was unable to speak with Black, however, because she already had been admitted to the hospital. Following Finster's testimony, Black stipulated that the baggie found in her purse contained 0.12 grams of methamphetamine.

Following Officer Finster's testimony, the State rested, and Black took the stand in her own defense. She claimed that when she went to the hospital on September 9, 2017, she was in a very dark place because she was "done with life," and "didn't want to live anymore." Her plan was to give herself "one big shot" of methamphetamine with the hope that she would overdose and die. But when that plan did not work out—due to her mistaken belief that she did not have any methamphetamine left—she went to the hospital because she had always been told that the hospital would help if you ever thought you were at risk of harming yourself or someone else. When she got there, she told the nurse that she had needles in her purse and asked that they be destroyed. Black testified she did not know about the methamphetamine in her purse because if she had, she would have used it to overdose and kill herself. Black also claimed that the baggie within which the methamphetamine was found in her purse was bigger than the baggies of methamphetamine she normally purchased and that she always kept her methamphetamine on her person, never in her purse. But, on cross-examination, Black admitted that she used methamphetamine approximately eight hours before going to the hospital and that she was still high when she got there.

Following Black's testimony, the defense rested and moved for dismissal of the case in its entirety. That motion was denied, and the trial proceeded to the jury instructions conference, where the district court's proposed instructions were approved

without objection. After deliberation, the jury found Black guilty on both counts. Black filed posttrial motions for a judgment of acquittal and a new trial, but both were denied.

## ANALYSIS

### *Jury instructions*

Black first argues that the district court erred by giving jury instructions that were not legally appropriate because they allowed the jury to convict her under a lesser culpable mental state. When analyzing jury instruction issues, appellate courts follow a three-step process:

"(1) determining whether the appellate court can or should review the issue, *i.e.*, whether there is a lack of appellate jurisdiction or a failure to preserve the issue for appeal; (2) considering the merits of the claim to determine whether error occurred below; and (3) assessing whether the error requires reversal, *i.e.*, whether the error can be deemed harmless.' [Citation omitted.]" *State v. McLinn*, 307 Kan. 307, 317, 409 P.3d 1 (2018).

In this case, there is no dispute that Black failed to properly preserve this issue for appellate review because she failed to lodge a timely and appropriate objection before the district court. That failure does not, however, prevent this court from addressing the merits of Black's claims. Rather, it affects the standard applied at the third step and requires Black to demonstrate clear error. See *State v. McLinn*, 307 Kan. 307, 317-18, 409 P.3d 1 (2018).

At step two, this court assesses the merits of Black's claim by first using an unlimited review of the entire record to decide whether the challenged instructions were legally appropriate. *State v. Johnson*, 304 Kan. 924, 931, 376 P.3d 70 (2016). If the instruction is legally appropriate, the court then generally looks at the evidence in the light most favorable to the requesting party to determine if the challenged instructions

were factually appropriate. *State v. Williams*, 303 Kan. 585, 598-99, 363 P.3d 1101 (2016). But here, Black makes no claim that the challenged instructions were factually inappropriate. As such, she has waived that issue, and we need only determine whether the given instructions were legally appropriate. See *State v. Williams*, 298 Kan. 1075, 1083, 319 P.3d 528 (2014) ("When a litigant fails to adequately brief an issue it is deemed abandoned."). To be legally appropriate, a jury "instruction must always fairly and accurately state the applicable law." *State v. Plummer*, 295 Kan. 156, 161, 283 P.3d 202 (2012).

In this case, Black is challenging jury instructions 6 and 9, both of which address the level of mental culpability required to convict her of possession of methamphetamine. Those instructions provided:

"NO. 6

"In Count One, Amber Black is charged with unlawfully possessing Methamphetamine. The defendant pleads not guilty.

"To establish this charge, each of the following claims must be proved:

"1. Amber Black possessed Methamphetamine.

"2. This act occurred on or about the 9th day of September 2017, in Reno County, Kansas.

"'Possession' means having joint or exclusive control over an item with knowledge of and the intent to have such control or knowingly keeping some item in a place where the person has some measure of access and right of control."

"NO. 9

"The State must prove that Amber Black committed the crime of possession of methamphetamine and possession of drug paraphernalia knowingly.

"A defendant acts knowingly when the defendant is aware of the nature of her conduct that the State complains about."

That language in both instructions is taken almost verbatim from PIK Crim. 4th 57.040 (2018 Supp.) and PIK Crim. 4th 52.010 (2015 Supp.) which, in turn, are based on K.S.A. 2018 Supp. 21-5706(a) and K.S.A. 2018 Supp. 21-5202(a), respectively.

Black does not, and cannot, argue that instructions 6 and 9's almost verbatim recitation of the PIK instructions are a misstatement of the statutes. Instead, she claims they are legally inappropriate because they allowed her to be convicted under the lesser culpable mental state of *knowing* rather than the more stringent culpable mental state of *intentional*. In support of this claim, Black points to the State's proposed jury instructions, one of which would have required the State to "prove that the defendant committed the crime Possession of Methamphetamine and Drug Paraphernalia intentionally. A defendant acts intentionally when it is the defendant's desire or conscious objective to possess marijuana and drug paraphernalia."

The jury instruction proposed by the State, however, was not given by the court. Relevant here, the statute defining possession of methamphetamine, K.S.A. 2018 Supp. 21-5706(a), does not prescribe a culpable mental state nor does it plainly dispense with the mental element. As such, the mental element is still an essential element of the crime but may be established by proof that Black's conduct was committed intentionally, knowingly, or recklessly. See K.S.A. 2018 Supp. 21-5202(a), (d)-(e).

Instruction 6 informs the jury that Black has been charged with unlawfully possessing methamphetamine, and the State has the burden to prove the possession. The instruction goes on to define possession as "joint or exclusive control over an item with knowledge of and the intent to have such control *or* knowingly keeping some item in a place where the person has some measure of access and right of control." (Emphasis added.) This instruction, which allowed Black to be convicted based on her knowing conduct, is legally appropriate. Instruction 9 informs the jury that the State has the burden to prove "Black committed the crime of possession of methamphetamine and possession

of drug paraphernalia *knowingly*." (Emphasis added.) Again, this instruction allowed Black to be convicted based on her knowing conduct, which is legally appropriate.

In sum, the jury instructions that were given, including instructions 6 and 9, fairly and accurately stated the law and, as a result, are legally appropriate. Black's claims to the contrary are without merit. See *Plummer*, 295 Kan. at 161.

### *Sufficiency of the evidence*

Black next argues that there was insufficient evidence to support her conviction for possession of methamphetamine.

"When sufficiency of the evidence is challenged in a criminal case, the standard of review is whether, after reviewing all the evidence in a light most favorable to the prosecution, the appellate court is convinced a rational factfinder could have found the defendant guilty beyond a reasonable doubt. Appellate courts do not reweigh evidence, resolve evidentiary conflicts, or make witness credibility determinations.' [Citation omitted.]" *State v. Chandler*, 307 Kan. 657, 668, 414 P.3d 713 (2018).

It is only in rare cases where the testimony is so incredible that no reasonable fact-finder could find guilt beyond a reasonable doubt that a guilty verdict will be reversed. *State v. Torres*, 308 Kan. 476, 488, 421 P.3d 733 (2018). Further, a verdict may be supported by circumstantial evidence if such evidence provides a basis for a reasonable inference by the fact-finder regarding the fact in issue. Indeed, circumstantial evidence, in order to be sufficient, need not exclude every other reasonable conclusion, and a conviction of even the gravest offense can be based entirely on circumstantial evidence. *State v. Logsdon*, 304 Kan. 3, 25, 371 P.3d 836 (2016). There is no legal distinction between direct and circumstantial evidence in terms of their respective probative value. *State v. Lowery*, 308 Kan. 1183, 1236, 427 P.3d 865 (2018).

In this case, Black was charged with possession of methamphetamine in violation of K.S.A. 2018 Supp. 21-5706(a), which defines the offense as possessing "any opiates, opium or narcotic drugs, or any stimulant designated in K.S.A. 65-4107(d)(1), (d)(3) or (f)(1), and amendments thereto, or a controlled substance analog thereof." As noted above, K.S.A. 2018 Supp. 21-5706(a) does not specify a particular culpable mental state nor does it plainly dispense with the mental element of the crime. As such, the mental element is still an essential element of the crime but may be established by proof that Black's conduct was committed intentionally, knowingly, or recklessly. K.S.A. 2018 Supp. 21-5202(a), (d)-(e). Therefore, to be found guilty of possession of methamphetamine, the State had to prove beyond a reasonable doubt that Black possessed methamphetamine and that she did so intentionally, knowingly, or recklessly.

Black does not deny that she possessed the purse where the methamphetamine and needles were found. Instead she argues that there was insufficient evidence to show that she knew that the methamphetamine was in her purse; therefore, she could not have intentionally possessed it. But as noted above, the State is not required to show that Black acted intentionally. To satisfy the mental culpability element of the crime, the State only had to establish that she acted either knowingly or recklessly. And here, viewed in a light most favorable to the State, there is more than enough evidence to establish that Black knowingly possessed the methamphetamine and the needles. See *State v. Chandler*, 307 Kan. 657, 668, 414 P.3d 713 (2018); *Logsdon*, 304 Kan. at 25. This includes Black's own testimony that she possessed the purse where the methamphetamine was found when she arrived at the hospital and that she had used methamphetamine a few hours earlier. And while she denied knowing that the methamphetamine was in her purse, it is improper for an appellate court to reweigh the evidence or assess the credibility of witnesses. See *Chandler*, 307 Kan. at 668.



We have reviewed all the evidence in a light most favorable to the prosecution and are convinced a rational fact-finder could have found beyond a reasonable doubt that Black knowingly possessed the methamphetamine and needles found in her purse.

Affirmed.