NOT DESIGNATED FOR PUBLICATION

No. 124,779

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

ALEX MICHAEL ALEXANDER,
Appellant.

MEMORANDUM OPINION

Appeal from Lyon District Court; MERLIN G. WHEELER, judge. Opinion filed September 8, 2023. Affirmed in part and remanded with directions.

Korey A. Kaul, of Kansas Appellate Defender Office, for appellant.

Carissa Brinker, assistant county attorney, *Marc Goodman*, county attorney, and *Kris W. Kobach*, attorney general, for appellee.

Before SCHROEDER, P.J., MALONE, J., and MARY E. CHRISTOPHER, S.J.

PER CURIAM: Alex Michael Alexander timely appeals from his convictions and sentences for battery and arson, arguing for the first time on appeal: (1) His trial testimony amounted to a stipulation of facts for which he should have been advised he was waiving his right to a jury trial on the arson charge; (2) the district court improperly restricted his cross-examination of the victim; and (3) the district court erred in calculating the jail credit awarded at sentencing. As more fully explained below, we affirm his convictions and sentences but remand for a nunc pro tunc journal entry to be entered correcting Alexander's jail time credit.

FACTS

Alexander and E.C. were coworkers who met in 2019 and subsequently began a dating relationship. In June or July 2020, Alexander and E.C. moved in together at an apartment in Emporia. At the time, E.C. was 16 and Alexander was 22. Their relationship did not go well.

On July 30, 2020, E.C. decided to move out of the apartment and began to pack her belongings while Alexander was at work. Alexander returned while E.C. was packing; they began arguing, and the arguments became physical. During the arguments, Alexander would leave the apartment and return, and the arguments would start again. At some point in their arguments, Alexander pushed E.C. onto a bed and began hitting and slapping her. During another argument, Alexander used a lighter to burn a hole in one of E.C.'s shirts. Alexander later pushed E.C. into a closet then stomped on her face and kicked her in the side, which left a shoe print on her face and a mark on her side. Alexander finally left, at which point E.C. called Alexander's mother and told her what happened. Alexander's mother then called law enforcement.

E.C. called a friend to help her finish packing. As they were packing, law enforcement arrived, and E.C. told the officer what happened. After they finished packing, E.C.'s friend took E.C. to her grandmother's house. Later that day, E.C. and Alexander discussed the report she made to law enforcement. Based on their discussion, E.C. decided to contact law enforcement to recant her prior statements. Initially, E.C. told law enforcement she made up the allegations against Alexander. She later met with law enforcement officers in person and told them the original allegations were true, but she changed her story because she wanted the charges dropped. At that time, E.C. gave law enforcement officers her phone and consented to a download and search of its contents, in which the officers discovered a video of Alexander and E.C. partially undressed.

The State charged Alexander with: (1) aggravated battery; (2) arson, or, in the alternative count, aggravated arson; (3) sexual exploitation of a child; and (4) aggravated intimidation of a witness/victim. Following a preliminary hearing, the district court bound Alexander over for trial on all counts except the alternative charge of aggravated arson.

At Alexander's jury trial in October 2021, the State called E.C., E.C.'s friend who helped her pack, and the investigating officers as witnesses. As part of his defense, Alexander testified. Alexander admitted they had been arguing but denied ever pushing E.C. onto the bed or punching or slapping her. Alexander also admitted to using a lighter to burn a hole in one of E.C.'s shirts after E.C. shoved him. Alexander said he then left the apartment for a time and when he came back, they resumed arguing. Alexander testified he told E.C. he had been cheating on her with other women, after which he claimed E.C. grabbed a hammer, threatened to hit him with it, and lunged at him with the hammer. Alexander admitted to pushing E.C. into a closet as she lunged at him. He claimed he tried to kick the hammer out of her hand but missed and struck her face instead. Alexander was able to get the hammer away from E.C. before leaving the apartment.

The jury convicted Alexander of arson and the lesser included offense of simple battery but acquitted him of the remaining charges. The district court sentenced Alexander to 27 months' imprisonment for arson concurrent with 6 months in jail for battery, with 12 months' postrelease supervision. The district court awarded Alexander 49 days' jail credit towards his sentence. Additional facts are set forth as necessary.

ANALYSIS

Alexander's Claim His Testimony Before the Jury Amounted to a Stipulation of Facts on the Arson Charge Was Not Raised Below and Properly Preserved

Alexander argues his trial testimony before the jury, in which he admitted to burning a hole in E.C.'s shirt, amounted to a stipulation of facts to the conduct underlying the arson charge and asserts he was not properly advised he was waiving his right to a jury trial.

Whether a defendant's stipulation of facts constitutes a knowing and voluntary waiver of his or her right to a jury trial on one or more elements of a charged offense is a question of law subject to unlimited review. *State v. Johnson*, 310 Kan. 909, 918, 453 P.3d 281 (2019).

Alexander admits he did not raise this issue before the district court. However, he argues the following exceptions to the preservation rule apply: (1) The issue raises a pure question of law arising on proved or admitted facts and is determinative of the case, and (2) considering the issue is necessary to serve the ends of justice or prevent the denial of a fundamental right. See *State v. Allen*, 314 Kan. 280, 283, 497 P.3d 566 (2021) (noting exceptions to preservation rule). Although Alexander is generally correct these exceptions would permit us to review his claim on appeal, we have no obligation to do so. *State v. Gray*, 311 Kan. 164, 170, 459 P.3d 165 (2020) (decision to review unpreserved claim is prudential). Here, we believe it would be a sound use of our discretion to decline review of his unpreserved claim.

Alexander's Cross-Examination Error Claim Was Not Properly Preserved

Alexander argues the district court improperly limited his cross-examination of E.C. when it sustained the State's objections to questions about E.C.'s prior statements to law enforcement alleging Alexander had abused her cats.

"A claim that a defendant was denied the constitutional right to present a defense raises a question of law subject to de novo appellate review." *State v. Maestas*, 298 Kan. 765, 780, 316 P.3d 724 (2014). Appellate courts review a district court's decision to limit the scope of cross-examination for an abuse of discretion. *State v. Thomas*, 307 Kan. 733, 739, 415 P.3d 430 (2018). "A judicial action constitutes an abuse of discretion if (1) it is arbitrary, fanciful, or unreasonable; (2) it is based on an error of law; or (3) it is based on an error of fact." *State v. Levy*, 313 Kan. 232, 237, 485 P.3d 605 (2021).

Criminal defendants have a constitutional right to cross-examine witnesses under the Confrontation Clause of the Sixth Amendment to the United States Constitution. *Davis v. Alaska*, 415 U.S. 308, 315, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974). But this right is not without limitations.

> "[T]rial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant. And as we observed earlier this Term, 'the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.'" *Delaware v. Van Arsdall*, 475 U.S. 673, 679, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986).

Because a restriction on cross-examination implicates a federal constitutional right, any error in the district court's ruling is subject to the constitutional harmless error

test. That is, the error may only be held harmless if the party benefiting from the error—here, the State—persuades us "beyond a reasonable doubt that the error complained of will not or did not affect the outcome of the trial in light of the entire record, *i.e.*, proves there is no reasonable possibility that the error affected the verdict." *State v. Ward*, 292 Kan. 541, 569, 256 P.3d 801 (2011) (citing *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705, *reh. denied* 386 U.S. 987 [1967]).

The State correctly argues the issue is not properly preserved for appeal because Alexander never proffered the expected testimony when the district court sustained the State's objections.

Alexander twice tried to ask E.C. questions on cross-examination about allegations she made that he had abused her cats. The State objected both times on the grounds the question was beyond the scope of direct examination. The district court sustained the objections on more than one ground, and Alexander moved on with his questioning without making a sufficient record by proffering the expected testimony at either time.

It is well-established:

> "A party being limited by the exclusion of evidence must sufficiently proffer the substance of the evidence to preserve the issue on appeal. *State v. Hudgins*, 301 Kan. 629, 651, 346 P.3d 1062 (2015). In this regard, K.S.A. 60-405 has a dual purpose: (1) It assures the trial court is advised of the evidence at issue and the nature of the parties' arguments; and (2) it assures an adequate record for appellate review. *In re Acquisition of Property by Eminent Domain*, 299 Kan. 37, 41, 320 P.3d 955 (2014). When the party fails to provide a sufficient proffer of the substance of the evidence, appellate review is precluded because the appellate court lacks a basis to consider whether the trial court abused its discretion. *Hudgins*, 301 Kan. at 651 (citing *State v. Evans*, 275 Kan. 95, 99-100, 62 P.3d 220 [2003])." *State v. Swint*, 302 Kan. 326, 332, 352 P.3d 1014 (2015).

Here, Alexander did not proffer the expected testimony he wanted to elicit from E.C. We refuse to speculate on what the proffered testimony would have been. We deem the issue unpreserved due to Alexander's failure to proffer the expected evidence.

The District Court Erred in Failing to Award Alexander the Correct Jail Credit

Alexander argues the district court erred in failing to award the full amount of jail credit to which he was entitled. Curiously, the State failed to respond to Alexander's arguments on appeal involving his entitlement to jail credit. We agree with Alexander.

> "The right to jail time credit is statutory. *State v. Fowler*, 238 Kan. 326, Syl. ¶ 4, 710 P.2d 1268 (1985). 'Jail time credit' must be determined by the sentencing court and included in the journal entry at the time the trial court sentences the defendant to confinement. *Fowler*, 238 Kan. at 335. . . . Our standard of review is unlimited when interpreting a statute. *State v. Donlay*, 253 Kan. 132, Syl. ¶ 1, 853 P.2d 680 (1993)." *State v. Theis*, 262 Kan. 4, 7, 936 P.2d 710 (1997).

The statutory provisions regarding jail credit are mandatory. The district court has no discretion to decline to award jail credit. *State v. Harper*, 275 Kan. 888, 890, 69 P.3d 1105 (2003). K.S.A. 2022 Supp. 21-6615(a) provides:

> "In any criminal action in which the defendant is convicted, the judge, if the judge sentences the defendant to confinement, shall direct that for the purpose of computing defendant's sentence and parole eligibility and conditional release dates thereunder, that such sentence is to be computed from a date, to be specifically designated by the court in the sentencing order of the journal entry of judgment. Such date shall be established to reflect and shall be computed as an allowance for the time which the defendant has spent incarcerated pending the disposition of the defendant's case. In recording the commencing date of such sentence the date as specifically set forth by the court shall be used as the date of sentence and all good time allowances as are authorized by the secretary of corrections are to be allowed on such sentence from such

date as though the defendant were actually incarcerated in any of the institutions of the state correctional system."

At sentencing, Alexander requested the district court award him 148 days' jail credit, but the district court only awarded him 49 days' jail credit—July 31, 2020, through August 3, 2020, and December 1, 2021, through January 14, 2022. The State responded the presentence investigation (PSI) report reflected the additional days Alexander requested—August 9, 2020, through November 15, 2020—were awarded as jail credit in another case, 20CR475. The district court held Alexander was not entitled to the additional 99 days' jail credit because "those dates were credited against [his] prior sentence."

Alexander correctly points out the PSI actually reflects he was awarded 207 days' jail credit at a July 12, 2021 probation revocation hearing in 20CR475 for time spent in the Lyon County Jail from December 5, 2020, through June 30, 2021. This time was credited against his 12-month sentence in 20CR475, which he completed on November 30, 2021. The PSI reflects Alexander was in custody for this case and 20CR475 from July 31, 2020, through November 30, 2021. Alexander is correct it does not matter that he was in custody for both cases during the time in question. He is still entitled to jail credit in one of those cases. He was not awarded jail credit in 20CR475 for the time spent in custody between August 9, 2020, and November 15, 2020; therefore, the district court should have awarded it in this case. We remand to the district court with instructions to prepare a nunc pro tunc journal entry reflecting the correct jail credit calculation.

Affirmed in part and remanded with directions.