No. 124,314

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

JOSHUA EVAN STOHS,
Appellant.

SYLLABUS BY THE COURT

1.

The sentencing rule contained in K.S.A. 2022 Supp. 21-5109(d) only applies when the prosecutor charges the defendant with multiple crimes for the same conduct.

2.

Interference with a law enforcement officer is not a more specific instance of identity theft. To the contrary, identity theft prohibits different conduct, to wit: possessing someone else's personal identifying information and using it to deceive someone for a benefit.

Appeal from Shawnee District Court; C. WILLIAM OSSMANN, judge. Opinion filed May 26, 2023. Affirmed.

Kai Tate Mann, of Kansas Appellate Defender Office, for appellant.

Jodi Litfin, deputy district attorney, *Michael Kagay*, district attorney, and *Derek Schmidt*, attorney general, for appellee.

Before ARNOLD-BURGER, C.J., BRUNS and ISHERWOOD, JJ.

ARNOLD-BURGER, C.J.: Joshua Evan Stohs was convicted by a jury of one count of identity theft after giving a police officer a social security card that belonged to someone else to hide his identity and thus avoid being arrested on outstanding warrants. On appeal, he argues that the charge of interference with law enforcement is a more specific crime related to the same conduct. Based on K.S.A. 2022 Supp. 21-5109(d)(2), he contends the court could only sentence him to the misdemeanor charge of interference with law enforcement. Because we find that K.S.A. 2022 Supp. 21-5109(d)(2) does not apply when only one crime is charged, Stohs' claim fails.

Second, Stohs argues that his conviction should be reversed because the district court gave a jury instruction that contained an element broader than the charging document. We agree that the instruction was erroneous, but we are not firmly convinced the jury would have reached a different verdict if the erroneous instruction had not been given. In other words, the error does not require reversal. We affirm the district court.

FACTUAL AND PROCEDURAL HISTORY

On July 2, 2019, City of Topeka police officers Derek Child and Bryan Stricklin stopped a man walking down the wrong side of a road. The man told them his name was Joshua Greemore and produced a social security card with that name on it, claiming that his other forms of identification had been stolen. The social security card listed the correct social security number for Joshua Greemore. Upon running that name through a driver's license database, Officer Child determined the man did not look like the photo depicted on the license and asked Officer Stricklin to look at the photo as well. When shown the photo, the man agreed the person in the photo was not him. The officers placed the man under arrest and transported him to the police station, where he revealed his real name was Joshua Stohs. The officers then learned Stohs had outstanding warrants.

Stohs was charged through grand jury indictment with one count of identity theft, a felony, under K.S.A. 2019 Supp. 21-6107(a)(1). In particular, the indictment alleged:

> "On or about the 2nd of July, 2019 in the State of Kansas and County of Shawnee, JOSHUA EVAN STOHS, did then and there, unlawfully, knowingly, and feloniously, obtain, possess, transfer, use, sell, or purchase any personal identifying information, or document containing the same, belong to or issued to another person, to-wit: name and/or date of birth and/or social security number of Joshua Greemore, with the intent to defraud that person, or anyone else, to-wit: Officer Child, in order to receive any benefit, or with the intent to misrepresent that person in order to subject that person to economic or bodily harm[.]"

Joshua Greemore testified at Stohs' jury trial that he did not know Stohs and never gave him his social security card nor allowed Stohs to use his identity.

During the jury instruction conference, Stohs proposed a defense instruction on interference with law enforcement as an alternative offense—not a lesser included offense. See K.S.A. 2019 Supp. 21-5904(a)(1)(C). The court declined and instructed the jury to consider whether:

> "1. The defendant obtained, possessed, transferred, or used any personal identifying information or document containing personal identifying information belonging to or issued to Joshua Greemore.
>
> "2. The defendant did so with the intent to defraud Officer Child and/or Officer Stricklin in order to receive any benefit.
>
> "3. This act occurred on or about the 2nd day of July, 2019, in Shawnee County, Kansas."

The jury found Stohs guilty of identity theft as charged.

At sentencing, the district court found Stohs' criminal history score to be A, without objection, and imposed a mitigated sentence of 19 months in prison.

Stohs timely appealed.

ANALYSIS

I. STOHS' SENTENCE WAS NOT ILLEGAL

Stohs challenges the sentence for his felony identity theft conviction under K.S.A. 2019 Supp. 21-5109(d)(2), arguing that misdemeanor interference with law enforcement is a more specific crime applicable to his conduct in giving a false name to the officers. As a result, he contends that the statute requires that he can be sentenced only under the more specific though uncharged crime, the misdemeanor. Although not raised before the district court, we have jurisdiction to decide this issue because an illegal sentence can be corrected at any time. K.S.A. 2022 Supp. 22-3504.

Our standard of review is unlimited.

Resolving Stohs' claim turns on interpretation of three statutes, which presents a question of law subject to unlimited appellate review. See *State v. Stoll*, 312 Kan. 726, 736, 480 P.3d 158 (2021). When interpreting a statute, this court must first seek to ascertain the legislative intent behind the language used by giving common words their ordinary meanings. *State v. Keys*, 315 Kan. 690, 698, 510 P.3d 706 (2022). When a statute is plain and unambiguous, an appellate court should not speculate about the legislative intent behind the clear language and it should refrain from reading something into the statute that is not readily found in its words. 315 Kan. at 698.

The law related to prosecutorial charging decisions is examined.

"It is often the case that a particular set of facts—if proven beyond a reasonable doubt—could support a conviction under several different statutes." *State v. Euler*, 314 Kan. 391, 395, 499 P.3d 448 (2021). The prosecuting attorney has broad discretion in discharging their duty. The scope of this discretion extends to the power to investigate and to determine who will be prosecuted and what crimes will be charged. *Comprehensive Health of Planned Parenthood v. Kline*, 287 Kan. 372, 408, 197 P.3d 370 (2008).

But prosecutorial power is not limitless. 287 Kan. at 408. The Legislature has restricted that power by adopting rules related to sentencing when the prosecutor has charged multiple crimes for the same act. For example, "[a] defendant may not be convicted of identical offenses based upon the same conduct." K.S.A. 2022 Supp. 21-5109(e). "Where identical offenses are involved, the question is not truly a matter of one being a lesser included offense of the other. Each has identical elements and the decision as to which penalty to seek cannot be a matter of prosecutorial whimsy in charging. As to identical offenses, a defendant can only be sentenced under the lesser penalty." *State v. Clements*, 241 Kan. 77, 83, 734 P.2d 1096 (1987). Stohs does not argue that the offenses of identity theft and the uncharged crime of interference with a law enforcement officer are identical.

Similarly, upon prosecution for a crime, the defendant may be convicted of either the crime charged or a lesser included crime, but not both. K.S.A. 2022 Supp. 21-5109(b). Stohs does not argue that interference with a law enforcement officer is a lesser included offense of identity theft.

And finally, the situation that Stohs argues governs his case:

> "[W]hen crimes differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct, the defendant:
>
> (1) May not be convicted of the two crimes based upon the same conduct; and
>
> (2) shall be sentenced according to the terms of the more specific crime."
>
> K.S.A. 2019 Supp. 21-5109(d).

Stohs argues that interference with a law enforcement officer is a more specific—though uncharged—crime applicable here, and therefore he can only be subject to the lesser misdemeanor sentence. We disagree.

The statutory rule is not favored, but we must apply it to these facts.

Before reaching this claim, we pause to note that our Supreme Court has rejected the rule of statutory construction that a general crime must give way to a more specific crime when applied to prosecutorial charging decisions. See *Euler*, 314 Kan. 391. Euler argued that the uncharged misdemeanor crime of unlawful use of a financial card was a more specific crime than identity theft, therefore she could be convicted only of the misdemeanor crime. The court declared that the court-adopted rule of the application of specific versus general crimes in the sentencing context was

> "an accidental 'rule' which was never intended to apply to two statutes with divergent elements. And importantly, as a tool of statutory interpretation to divine legislative intent, the rule appears to be an anachronism held-over from the days prior to our more rigorous insistence on the governing principle of statutory plain language." 314 Kan. at 397.

It emphasized that "when a criminal statute by its plain language unambiguously applies to a given set of facts, there can be no conclusion under our current rules of statutory interpretation other than that the Legislature *intended the statute to apply*." 314 Kan. at

397. But the court was not presented with a statutory claim in *Euler*, so the court "express[ed] no opinion on the possible applicability of [K.S.A. 2020 Supp. 21-5109(d)]" to the claims made by Euler. 314 Kan. at 396. Here we must address the statutory claim.

K.S.A. 2022 Supp. 21-5109(d) has no application when only one crime is charged.

Statutory interpretation presents a question of law over which appellate courts have unlimited review. *Stoll*, 312 Kan. at 736. The most fundamental rule of statutory construction is that the intent of the Legislature governs if that intent can be ascertained. *State v. LaPointe*, 309 Kan. 299, 314-15, 434 P.3d 850 (2019). An appellate court must first attempt to ascertain legislative intent through the statutory language enacted, giving common words their ordinary meanings. *State v. Ayers*, 309 Kan. 162, 163-64, 432 P.3d 663 (2019).

Reviewing the language in the statute it is clear that it applies only when the prosecutor charges multiple crimes based on the same conduct. The statute prohibits a defendant from being "convicted *of the two crimes* based upon the same conduct" and instructs that the defendant can be sentenced only to the terms of the more specific crime. (Emphasis added.) K.S.A. 2022 Supp. 21-5109(d). There would be no reason to caution prosecutors if only one crime was charged. This provision applies only when the prosecutor exercises their discretion to charge multiple crimes based on the same conduct, discretion that is recognized earlier in the statute. K.S.A. 2022 Supp. 21-5109(a) ("When the same conduct of a defendant may establish the commission of more than one crime under the laws of this state, the defendant may be prosecuted for each of such crimes.").

In other words, if the prosecutor stacks the charges based on the same conduct, the sentence will be based on the more specific statute, which may carry a significantly reduced sentence. It does not prevent a prosecutor from charging a crime that carries a

stiffer penalty than other crimes the prosecutor could have charged. That is purely a prosecutorial decision. See *State v. Dixon*, 60 Kan. App. 2d 100, 136-37, 492 P.3d 455, 481 (2021) ("The discretion to decide what charges to file in any situation is an important tool reserved to the prosecutor, and courts should not try to interfere with such discretion, nor do we have the power to do so."), *rev. denied* 314 Kan. 856 (2021).

And if the evidence supports the crime with the stiffer penalty, and the defendant is convicted, the defendant is subject to the stiffer penalty regardless of how many other crimes the prosecutor could have charged that had lesser penalties. Because Stohs was only charged with one crime, felony identity theft, and he does not question the sufficiency of the evidence supporting his conviction of that charge, K.S.A. 2019 Supp. 21-5109(d) has no application.

Interference with a law enforcement officer is not a more specific instance of identity theft.

Even if we accepted Stohs' position that even when only one crime is charged, he cannot receive a sentence any greater than the most specific—though uncharged—statute criminalizing his conduct, interference with a law enforcement officer is not a more specific instance of identity theft.

To determine whether one crime is more specific than another, we first look to the language of the statute which instructs us to examine whether one crime prohibits a designated kind of conduct generally and the other crime prohibits "a specific instance of *such conduct*." (Emphasis added.) K.S.A. 2022 Supp. 21-5109(d). So we first examine the conduct or behavior criminalized in each statute.

A person commits identity theft by "obtaining, possessing, transferring, using, selling or purchasing any personal identifying information . . . with the intent to . . .

[d]efraud that person, or anyone else, in order to receive any benefit." K.S.A. 2022 Supp. 21-6107(a)(1). The key unlawful behavior as it applies to these facts is the actual possession of personal identifying information with intent to defraud or deceive someone (law enforcement) to receive a benefit (not be arrested on a warrant).

Interference with a law enforcement officer is falsely or deceptively reporting to a law enforcement officer "any information, knowing that such information is false and intending to influence, impede or obstruct" such officer's duty. K.S.A. 2022 Supp. 21-5904(a)(1)(C). The key unlawful behavior is reporting any false information that would impede or obstruct the officer in performing the officer's duty.

We have no hesitancy in concluding that interference with a law enforcement officer is not a more specific instance of identity theft. To the contrary, identity theft prohibits different conduct, to wit: possessing someone else's personal identifying information and using it to deceive someone. Although interference with a law enforcement officer may be specific as to who the information must be given to, it is not criminalizing "a specific instance" of identity theft.

II. ALTHOUGH THE DISTRICT COURT ERRED IN INSTRUCTING THE JURY, THE ERROR WAS NOT REVERSIBLE

Stohs also challenges his conviction for identity theft by arguing that the district court expanded the scope of the charged offense by including both officers in the jury instruction for identity theft. Like the first issue, Stohs did not challenge the instruction in district court. But we still have jurisdiction to hear his claim, albeit under a different standard of review than had he raised it before the district court. See K.S.A. 2022 Supp. 22-3414(3) ("No party may assign as error the giving or failure to give an instruction . . . unless the party objects thereto before the jury retires to consider its verdict . . . unless the instruction or the failure to give an instruction is clearly erroneous.").

First, we consider whether the instruction was legally and factually appropriate, using an unlimited standard of review of the entire record. *State v. Holley*, 313 Kan. 249, 254, 485 P.3d 614 (2021). Here, the State concedes that the identity theft instruction was erroneous because it did not conform to the elements of the crime charged in the indictment. See *State v. McClelland*, 301 Kan. 815, 828, 347 P.3d 211 (2015) (holding that a jury instruction on the elements of a crime that is broader than the complaint charging the crime is erroneous). Although the indictment charged Stohs with intending to defraud either Greemore or Officer Child, the district court instructed the jury to find Stohs guilty if the State proved he acted "with the intent to defraud Officer Child and/or Officer Stricklin." As a result, the question we must answer is whether that error is reversible.

When a party does not object to a jury instruction before the district court, an appellate court reviews the instruction to determine whether it was clearly erroneous. K.S.A. 2022 Supp. 22-3414(3). For a jury instruction to be clearly erroneous, the court must be firmly convinced the jury would have reached a different verdict if the erroneous instruction had not been given. The party claiming clear error has the burden to show both error and prejudice. *State v. Crosby*, 312 Kan. 630, 639, 479 P.3d 167 (2021).

Stohs contends he was prejudiced by the erroneous instruction because it tripled the number of ways the jury could find him guilty since there were now two possible victims and he lacked adequate notice to defend against the charge. See *State v. Hart*, 297 Kan. 494, 509, 301 P.3d 1279 (2013) (noting that prejudice can result from overbroad instruction because of "lack of notice about the accusation that must be defended"). To say that the instruction "tripled" the number of victims is not quite accurate, however, since the jury instruction omitted Greemore while adding Officer Stricklin. Stohs also fails to show how the erroneous instruction hindered his defense in any way. As the State notes, Stohs' defense consisted of arguing (1) that he was guilty of interference with law enforcement, and (2) that the evidence failed to show he intended to receive any benefit.

Put simply, neither defense required the jury to believe Stohs specifically intended to defraud only Officer Child—the only way the jury could have acquitted him if given the correct instruction. The available evidence shows that a jury would have still found him guilty if instructed to focus on whether Stohs intended to defraud Officer Child.

In sum, we are not firmly convinced the jury would have reached a different verdict if the erroneous instruction had not been given.

Affirmed.