NOT DESIGNATED FOR PUBLICATION

No. 124,448

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

BREYON DARNELL MUKES,
Appellant.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; KEVIN J. O'CONNOR, judge. Opinion filed April 28, 2023. Affirmed.

Kristen B. Patty, of Wichita, for appellant.

Julie A. Koon, assistant district attorney, *Marc Bennett*, district attorney, and *Derek Schmidt*, attorney general, for appellee.

Before GREEN, P.J., GARDNER, J., and PATRICK D. MCANANY, S.J.

PER CURIAM: Breyon Darnell Mukes was convicted of aggravated criminal sodomy and attempted aggravated criminal sodomy, but those convictions were reversed and the case was remanded for a new trial due to prosecutorial error. On retrial, the district court granted Mukes' motion for a judgment of acquittal on the aggravated criminal sodomy charge, but the court submitted the attempted aggravated criminal sodomy charge to the jury, which resulted in Mukes' conviction on that charge.

Now, in Mukes' direct appeal from his conviction in the retrial of his case, he claims that on his direct appeal from his original convictions, his appellate counsel was

ineffective for not challenging the sufficiency of the evidence to support his convictions for both aggravated criminal sodomy and attempted aggravated criminal sodomy and, as a result, we should reverse his conviction at his retrial for attempted aggravated criminal sodomy.

While we normally would not consider such a claim for the first time on appeal, Mukes' case falls within an exception that permits us to do so. Because the issue turns on an issue of law that arises from undisputed facts, we have de novo review over whether Mukes' appellate counsel was ineffective for failing to contest Mukes' aggravated criminal sodomy and attempted aggravated criminal sodomy convictions on direct appeal of his original convictions. A claim of ineffective appellate counsel requires a showing of prejudice to the client. Here, we can say as a matter of law that Mukes was not prejudiced by his appellate counsel's conduct. With respect to the State's charge of aggravated criminal sodomy, there is no conviction to set aside so there is no relief we can provide. With respect to Mukes' attempted aggravated criminal sodomy conviction, if the issue had been raised on Mukes' initial direct appeal, there is no reasonable probability that the appellate court would have reversed that conviction. Accordingly, we find no merit in Mukes' claim of ineffective assistance of appellate counsel and affirm his conviction of attempted aggravated criminal sodomy.

FACTUAL AND PROCEDURAL HISTORY

On September 11, 2014, Mukes was caught in bed with a 12-year-old girl by the girl's older sister who turned on the light in the younger sister's bedroom and saw Mukes lying in bed next to the child. There was a condom over Mukes' exposed penis, which was positioned under the girl's gym shorts. The girl was lying with her back and exposed buttocks to Mukes. The older sister immediately pulled the child out of the bed and interrupted what appeared to be an imminent act of sodomy.

The Charges Against Mukes

In Count 1 of the complaint/information filed September 17, 2014, Mukes was charged with attempted aggravated criminal sodomy under K.S.A. 2014 Supp. 21-5504(b)(2). The crime of aggravated criminal sodomy is defined in subsection (b)(2) of the statute as "causing a child under 14 years of age to engage in sodomy with any person or an animal." This contrasts with section (b)(1) of the statute, which defines aggravated criminal sodomy as "sodomy with a child who is under 14 years of age." Though the facts described in Count 1 did not fit subsection (b)(2) of the cited statute, they did fit the definition of a charge of attempted aggravated criminal sodomy under subsection (b)(1) of the statute by describing the crime as Mukes having committed the overt act of being in bed with a 12-year-old with his condom-covered penis exposed with the intent to commit aggravated criminal sodomy but being prevented or intercepted in the execution of the crime.

The girl told the police, and later testified, that Mukes had sodomized her in the past. This was the basis of the charge in Count 2 of aggravated criminal sodomy as defined in K.S.A. 2014 Supp. 21-5504(b)(2), i.e., causing a child under 14 years of age to engage in sodomy with any person or animal when Mukes was 18 years of age or older. Count 2 charged Mukes with having committed this crime between August 26, 2014, and August 28, 2014.

There were also two unrelated gun charges against Mukes which have nothing to do with this appeal.

On August 16, 2016, the State filed its amended information which corrected the severity level of the attempted aggravated criminal sodomy charge in Count 1 from a level 1 person felony to an off-grid person felony. The remaining provisions of the original September 17, 2014 complaint/information remained unchanged.

The Trial

Mukes' case proceeded to trial on August 29, 2016. During the trial the State moved to file its second amended information to conform the complaint/information to the girl's evidence introduced at trial regarding when the prior aggravated criminal sodomies took place. Mukes objected that the amendment was prejudicial. His objection was overruled, and the State filed the second amended information. Count 1 stated the charge of attempted aggravated criminal sodomy occurred

> "in the County of Sedgwick, and State of Kansas, and on or about the 11th day of September, 2014 A.D., [Mukes] did commit any overt act, to-wit: in bed with [the twelve-year-old girl], year of birth: 2002, with exposed condom-covered penis, toward the perpetration of a crime, to-wit: Aggravated Criminal Sodomy, as defined by K.S.A. 2013 Supp. 21-5504(b)(2)(c)(3), and the said [Mukes] intended to commit such crime but failed in the perpetration thereof or was prevented or intercepted in executing such crime; [c]ontrary to Kansas Statutes Annotated 2014 Supp. 21-5301(a)(c)(1) and 2013 Supp 21-5504(b)(2)(c)(3), Attempted Aggravated Criminal Sodomy, Off-grid, Person Felony, Count One."

Count 2 stated the charge of aggravated criminal sodomy with the corrected dates. It was alleged they occurred

> "on or between the 1st day of March, 2014 A.D. and the 31st day of August, 2014 A.D., in the County of Sedgwick, and State of Kansas, [Mukes] did then and there unlawfully cause a child under fourteen (14) years of age, to-wit: [the twelve-year-old girl], year of birth: 2002, to engage in sodomy with any person or animal, at a time when the defendant was 18 years or older, . . . [c]ontrary to Kansas Statutes Annotated 2013 Supp 21-5504(b)(2)(c)(3), Aggravated Criminal Sodomy, Off-grid, Person Felony, Count Two."

Mukes' Direct Appeal

The jury convicted Mukes on all charges. Mukes appealed. On appeal, Mukes' appellate counsel made no claim that the evidence was insufficient to convict Mukes of violating the charged offenses. Nevertheless, a panel of this court determined that prosecutorial error required reversal of his convictions, and the case was remanded for a new trial. *State v. Mukes*, No. 117,082, 2018 WL 4264865, at *1 (Kan. App. 2018) (unpublished opinion).

The Retrial

At the retrial of the case in February 2021, Mukes' trial counsel moved for a judgment of acquittal at the close of the State's evidence. The district court granted the motion as to Count 2—aggravated criminal sodomy based upon K.S.A. 2014 Supp. 21-5504(b)(2). As noted earlier, that section of the statute required the State to prove that Mukes caused a child under 14 years of age to engage in sodomy with any person or animal when Mukes was age 18 or older.

The district court relied on *State v. Dickson*, 275 Kan. 683, 693, 69 P.3d 549 (2003), and *State v. Fitzgerald*, 308 Kan. 659, 664, 423 P.3d 497 (2018), in which our Supreme Court construed the phrase "'any person'" in K.S.A. 2017 Supp. 21-5504(b)(2) to mean another person "'other than the defendant.'" The district court reasoned that K.S.A. 2014 Supp. 21-5504(b)(2) required the defendant to cause a child under 14 years of age to engage in sodomy with a person other than Mukes or with an animal, whereas the State's evidence showed that Mukes himself had committed the sodomy with the child who was under 14 years of age.

The district court denied the motion as to Count 1—attempted aggravated criminal sodomy—because the overt act was sufficiently laid out in the State's complaint so as to

put Mukes on notice of the charge, and the evidence was sufficient to warrant a conviction for the attempted offense.

After the district court granted Mukes' motion with respect to Count 2, the State moved to amend the language of the attempt charge in Count 1 to reference K.S.A. 2014 Supp. 21-5504(b)(1), rather than subsection (b)(2). Defense counsel did not object to the amendment, conceding that the State can amend its complaint at any time. The district court agreed and allowed the State to amend Count 1 to refer to subsection (b)(1), which defines aggravated criminal sodomy as "[s]odomy with a child who is under 14 years of age."

The jury found Mukes guilty of attempted aggravated criminal sodomy, and the district court sentenced him to life in prison with the possibility of parole after 25 years. Mukes appeals.

ANALYSIS

The Issue

This is the time for Mukes to assert any claimed prejudicial trial errors in his retrial. He raises none. Mukes does not contend that the district court erred in denying his motion for judgment of acquittal on the charge of attempted aggravated criminal sodomy or in allowing the State to amend Count 1—the attempt charge—to a violation of K.S.A. 2014 Supp. 21-5504(b)(1), instead of subsection (b)(2). Rather, Mukes raises only one issue in this direct appeal: "[A]ppellate counsel in his first direct appeal rendered ineffective assistance by failing to argue that there was insufficient evidence presented in his first trial to support convictions of attempted and completed violations of K.S.A. 21-5504(b)(2), warranting the reversal of his conviction of Count 1 following his second trial."

According to Mukes, had he been adequately represented in his first direct appeal, he would have obtained an outright reversal of these two convictions rather than a reversal and remand for a new trial due to prosecutorial error in closing argument. After all, it was at that new trial that Mukes was again convicted of attempted aggravated sodomy—the conviction he seeks to reverse in this appeal.

The Legal Standard

To establish ineffective assistance of counsel on appeal, Mukes

> "'must show that (1) counsel's performance, based upon the totality of the circumstances, was deficient in that it fell below an objective standard of reasonableness and (2) [defendant] was prejudiced to the extent that there is a reasonable probability that, but for counsel's deficient performance, the appeal would have been successful.'" *Khalil-Alsalaami v. State*, 313 Kan. 472, 526, 486 P.3d 1216 (2021) (quoting *Holmes v. State*, 292 Kan. 271, 274, 252 P.3d 573 [2011]).

Preservation of the Issue for Review

Mukes raises this claim for the first time on appeal. As stated in *State v. Salary*, 309 Kan. 479, 437 P.3d 953 (2019):

> "'[G]enerally, the factual aspects of a claim of ineffective assistance of counsel require that the matter be resolved through a K.S.A. 60-1507 motion or through a request to remand the issue to the district court for an evidentiary hearing under *State v. Van Cleave*, 239 Kan. 117, 119-21, 716 P.2d 580 (1986).' [Citation omitted.]" *Salary*, 309 Kan. at 483 (quoting *State v. Galaviz*, 296 Kan. 168, 192, 291 P.3d 62 [2012]).

It takes a showing of extraordinary circumstances to warrant a deviation from the general rule expressed in *Salary*. As stated in *Wimbley v. State*, 292 Kan. 796, 807, 275

P.3d 35 (2011):

> "Only under extraordinary circumstances, *i.e.*, where there are no factual issues and the two-prong ineffective assistance of counsel test can be applied as a matter of law based upon the appellate record, may an appellate court consider an ineffective assistance of counsel claim without a district court determination of the issue."

Here, Mukes argues that we can consider his ineffectiveness claim because the "broad issue . . . arises on proved or admitted facts and is purely a legal question." We agree and will consider Mukes' sole claim of ineffective assistance of appellate counsel.

The Substance of Mukes' Claim

K.S.A. 2022 Supp. 21-5504(b) states: "Aggravated criminal sodomy is: (1) Sodomy with a child who is under 14 years of age; [or] (2) causing a child under 14 years of age to engage in sodomy with any person or an animal." Our Supreme Court interpreted the predecessor statute's "any person" language to mean "a person other than the defendant." *Dickson*, 275 Kan. at 693. Thus, when the evidence established that it was the defendant who committed the sex act rather than some third person, the defendant did not cause a person other than himself to commit the sodomy. 275 Kan. at 695; see also *Fitzgerald*, 308 Kan. at 666.

Mukes relies on *Dickson* and *Fitzgerald* to argue this court would have reversed both of his sodomy convictions—the completed and attempted aggravated criminal sodomy convictions—had appellate counsel for his direct appeal, Sam Schirer, challenged the sufficiency of the evidence for both convictions. If both convictions had been reversed in Mukes' first appeal, he would not have been re-tried and convicted on the attempt charge.

Mukes' Aggravated Criminal Sodomy Conviction

This argument makes sense when applied to Mukes' aggravated criminal sodomy conviction as charged under K.S.A. 2014 Supp. 21-5504(b)(2). Had this argument been advanced in Mukes' original direct appeal, the court would have ruled—as the district court did during the retrial—that *Dickson* and *Fitzgerald* controlled, and the evidence was insufficient to support a conviction of aggravated criminal sodomy.

But we fail to see how including Mukes' aggravated criminal sodomy conviction advances his cause. After all, the district court ultimately set aside this charge for want of sufficient evidence to support it. Because the district court ultimately granted a judgment of acquittal at the retrial, Mukes was granted the relief he claims should have been afforded in his first direct appeal. This renders moot any issue regarding appellate counsel's performance with respect to the aggravated criminal sodomy charge.

Our appellate courts do not render advisory opinions. Rather, they adjudicate controversies over legal rights in a manner that is operative, final, and conclusive. *State v. Roat*, 311 Kan. 581, 590, 466 P.3d 439 (2020). In considering appellate counsel's performance vis-à-vis the aggravated criminal sodomy charge, there is no operative order this court can enter. There is no conviction to reverse and there is no ongoing charge that could require a retrial.

Mukes' Attempted Aggravated Criminal Sodomy Conviction

Mukes assumes his argument based on *Dickson* and *Fitzgerald* would have applied equally to his attempted aggravated criminal sodomy conviction had it been raised in his first appeal. Based on this assumption, he argues the State would not have had the opportunity to retry him on that charge and to amend the charging document to reflect the correct statutory provision under K.S.A. 2014 Supp. 21-5504(b)(1).

In fact, had both these convictions been challenged in Mukes' direct appeal, the State's charge of attempted aggravated criminal sodomy would have survived and Mukes would have faced a retrial on that charge.

In *Fitzgerald*, the charging document asserted that the defendant committed aggravated criminal sodomy by feloniously causing the child under age 14 to engage in oral copulation with another person in violation of K.S.A. 2017 Supp. 21-5504(b). "Another person" had been defined in *Dickson* as "a person other than the defendant." 275 Kan. at 693. All the evidence in *Fitzgerald* was that the defendant—not some third person—was the one who engaged in oral copulation with the child. Thus, Fitzgerald was charged with causing the child to engage in oral copulation with a third party, but there was no evidence of such conduct. As a result, there was insufficient evidence to support Fitzgerald's conviction.

In our present case, unlike in *Fitzgerald* and unlike the charge against Mukes of aggravated criminal sodomy, the charging document spelled out Mukes' specific conduct which was the basis for the charge of attempted aggravated criminal sodomy.

The text of Count 2—aggravated criminal sodomy—charged Mukes with causing the child to engage in sodomy with any person or animal. The evidence did not establish this crime. All the evidence pointed to Mukes having been the perpetrator, not some other person as required in *Dickson* and *Fitzgerald*. Thus, the evidence was insufficient to support the charged crime.

In contrast, the text of Count 1 described the crime of attempted aggravated criminal sodomy as Mukes committing the overt act of being in bed with a 12-year-old child with a condom covering his exposed penis and with the intent to commit aggravated criminal sodomy but being prevented or intercepted in the execution of the crime. The

evidence introduced at trial established the facts charged. The testimony was that it was Mukes who was observed in the bed with the underage child, that his exposed condom-covered penis was positioned by the child's exposed buttocks, and that the child's sister interrupted what was about to be another incident of aggravated criminal sodomy.

The child's older sister testified that in the early morning hours of September 11, she got up to use the restroom and noticed a shadow coming from her younger sister's bedroom. This scared the older sister so she turned on the bedroom light. When the light came on, she saw Mukes lying next to the child in the bed. The older sister removed the blanket covering Mukes and the child and saw Mukes' penis sticking out of his boxer shorts with a condom over it, positioned under the child's gym shorts. She immediately pulled the child out of bed and alerted their aunt.

The child testified that she was 12 years old on the night of this incident. She recalled being awakened by her sister and seeing Mukes' body, and exposed penis, laying behind her and facing her direction.

Count 1 makes no reference to causing an underage child to engage in sodomy with "any person" (i.e., any person other than Mukes) or animal. Count 1 merely—and mistakenly—refers to K.S.A. 2013 Supp. 21-5504(b)(2) as the operative statutory provision.

K.S.A. 22-3201(b) states:

> "The complaint, information or indictment shall be a plain and concise written statement of the essential facts constituting the crime charged, which complaint, information or indictment, drawn on the language of the statute, shall be deemed sufficient. . . . The complaint, information or indictment shall state for each count the official or customary citation of the statute, rule and regulation or other provision of law which the defendant is alleged to have violated. *Error in the citation or its omission shall*

be not ground for dismissal of the complaint, information or indictment or for reversal of a conviction if the error or omission did not prejudice the defendant." (Emphasis added.)

In *State v. Wright*, 221 Kan. 132, 140, 557 P.2d 1267 (1976), our Supreme Court found the defendant was not prejudiced by the State's citation to an incorrect statute number in the complaint when the complaint contained language from the correct statute. Relying on the same plain language of K.S.A. 22-3201(b), the *Wright* court held:

"[D]efendant claims his rights to due process were denied because of alleged irregularities in the information and journal entry of judgment. His complaint in this regard stems from what appears to have been a typographical error in the information, wherein the statutory reference on the aggravated weapons charge was written K.S.A. 21-4204, instead of K.S.A. 21-4202. The erroneous citation was repeated in the journal entry. The information was properly drawn in the language of 21-4201 and 21-4202, and no complaint is made in this regard. Defendant does not contend that he was misled or in any manner prejudiced; he bases his contention solely on the technical error. Defendant's contention is without merit." 221 Kan. at 140.

Like in *Wright*, the language referenced in Count 1 of Mukes' complaint contains the language from the correct statute—K.S.A. 2013 Supp. 21-5504(b)(1)—despite the complaint's reference to the wrong statute—K.S.A. 2013 Supp. 21-5504(b)(2). K.S.A. 2013 Supp. 21-5504(b)(1) defines aggravated sodomy as "[s]odomy with a child who is under 14 years of age." Count 1 alleges that Mukes intended to commit sodomy with a child who was 12 years old.

In Mukes' retrial, the district court found no prejudice to Mukes from the incorrect statutory citation in Count 1. After granting Mukes' judgment of acquittal for Count 2, the district court stated:

"On Count 1 . . . [t]here is a reference to K.S.A. 21-5504(b)(2). But the overt act is specifically laid out. And the overt act is, in bed with [the 12-year-old] with exposed

> condom-covered penis, toward the perpetration of the crime. That overt act, as described in the Complaint/Information, describes aggravated criminal sodomy contrary [to] K.S.A. 21-5504(b)(1). And even though there's a reference to (b)(2), the overt act explained there clearly gives Mr. Mukes information as to what the State is alleging is the overt act. So regarding Count 1, based upon the evidence presented and admitted, viewed in the light of this standard, I'll find that the evidence presented and admitted is sufficient as a matter of law to warrant the conviction of the defendant for the offense of attempted aggravated criminal sodomy as set forth on Count 1 in the Second Amended Information, and I'll deny the motion for judgment of acquittal as it relates to that offense."

Mukes does not contend in this appeal that the district court erred in this analysis or in denying his motion for a judgment of acquittal with regard to Count 1. Had this argument raised at the conclusion of the evidence in Mukes' retrial been asserted by his appellate counsel in his initial direct appeal, we are confident the appellate court would have found it equally lacking.

Mukes seeks to characterize his appellate counsel's performance at the initial direct appeal as per se ineffective. But Kansas courts have held the failure of appellate counsel to raise an issue on appeal is not, per se, ineffective assistance of counsel. *Miller v. State*, 298 Kan. 921, 932, 318 P.3d 155 (2014). Thus, Mukes had to show that there was a reasonable probability that, but for his appellate counsel's claimed deficient performance, his initial direct appeal would have been successful. *Khalil-Alsalaami*, 313 Kan. at 526. He has failed to do so. As a result, he has failed to establish an essential element of his ineffective assistance claim: prejudice from appellate counsel's failure to raise this issue in Mukes' initial direct appeal. Thus, we find no merit in Mukes' claim of ineffective assistance of appellate counsel and affirm his conviction of attempted aggravated criminal sodomy.

Affirmed.