NOT DESIGNATED FOR PUBLICATION

No. 124,611

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

DAVID W. MOELLER,
Appellant.

MEMORANDUM OPINION

Appeal from Jefferson District Court; CHRISTOPHER ETZEL, judge. Opinion filed June 30, 2023. Affirmed.

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

Kristafer R. Ailslieger, deputy solicitor general, and *Derek Schmidt*, attorney general, for appellee.

Before COBLE, P.J., HILL and ATCHESON, JJ.

PER CURIAM: In a bench trial in July 2021, the Jefferson County District Court convicted David W. Moeller of one count of securities fraud for wheedling $9,500 from an acquaintance supposedly as seed money for a corporate venture. The money went elsewhere, and the venture never materialized. Before his lawyer filed an appellate brief, Moeller died. Because this appeal challenges the sufficiency of the evidence, it did not die with him. We find the conviction sufficiently supported and, therefore, affirm the judgment and the resulting sentence, including a substantial restitution order.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The evidence suggests Moeller serially engaged in small commercial transactions through a business he called Midwest Surplus Group. We begin with one of those transactions by way of explaining how he later came to solicit money from Diane Brunner, the victim of the securities fraud. Moeller purchased carpet remnants from a distributor in Kansas City and asked that his check not be cashed until he resold the carpet to a buyer he had lined up. According to Moeller, the carpet delivered to him was inferior to what he had agreed to purchase, and, in turn, his customer paid him only about half of their negotiated price. The check Moeller gave the distributor bounced. The Wyandotte County District Attorney's Office filed criminal charges against Moeller as a result.

In the meantime, Moeller ran into Brunner and Mike Maxie. Moeller knew them because Maxie used to work for him and Brunner had been Maxie's girlfriend. As they were visiting, Brunner said she had money she wanted to invest. At trial, Brunner explained that she had just closed a couple of IRA accounts. She testified that Moeller said he had an investment opportunity for her: He was starting a company to manufacture a product he called "Blade Caddy," a protective shield for knives he claimed to have patented years earlier. According to Brunner, Moeller said she would recoup her investment with a profit in several months. Brunner asked Maxie if the venture sounded like a good deal; Maxie said it did. Brunner gave Moeller a check for $9,500 and wrote "Blade Caddy" on the memo line. Brunner and Moeller had no written agreement, and Moeller never provided her with any documentation related to the startup company.

The trial evidence showed that Moeller used the money to pay off the Kansas City carpet distributor, prompting the dismissal of the criminal theft charge against him in Wyandotte County.

After hearing little from Moeller for about six months, Brunner began regularly inquiring about her investment. Over the next few months, Moeller gave Brunner several thousand dollars—money she testified he described as a return on her investment. But the money stopped coming, and a frustrated Brunner lodged a complaint with the Kansas Securities Commissioner's Office. An investigator from that office interviewed Moeller and testified that Moeller said Brunner made a private "investment" with him unrelated to Blade Caddy, an idea he came up with 20 years earlier and never pursued. The State charged Moeller in the alternative with felony theft by deception, a violation of K.S.A. 2013 Supp. 21-5801(a)(2), and with securities fraud, a violation of K.S.A. 17-12a501(3) punishable as a severity level 6 nonperson felony based on the amount involved. See K.S.A. 2022 Supp. 17-12a508(a)(2)(E) (sentences for criminal securities violations).

Brunner and the investigator, among other witnesses, testified during the bench trial. Moeller testified in his own defense and characterized the money he received from Brunner as a loan she made to him rather than an investment in a business opportunity. The district court convicted Moeller on the securities fraud charge. At a later hearing, the district court sentenced Moeller to a 27-month prison term followed by postrelease supervision for 24 months, a standard guidelines punishment given his criminal history, and placed him on probation for 24 months, a dispositional departure. The district court also ordered Moeller to pay Brunner $5,500 in restitution. Moeller's trial lawyer filed a notice of appeal, and the Kansas Appellate Defender Office took over the representation.

On February 23, 2023, we issued an order directing the lawyers handling the appeal to make "independent inquiries" into whether Moeller had died and, if so, when. We also invited the lawyers' views on mootness of the appeal. We received timely responses and now conclude Moeller died on or about May 8, 2022, when he would have been 64 years old. The Appellate Defender Office provided a copy of a district court order filed after the record on appeal had been prepared terminating Moeller's probation because he had died. The State provided information confirming that a death certificate

for a David W. Moeller with the same birthdate and other identifying information as the defendant had been filed with the Kansas Department of Health and Environment, Office of Vital Statistics.

In its response, however, the Appellate Defender Officer disclaimed any ability to promptly investigate whether Moeller had died or to confirm the basis for the termination of his probation and simply assumed for the sake of argument that he was dead. We believe a court may properly inquire of a lawyer whether his or her client is alive or dead and may fairly expect an informed answer that typically would not equivocate. See *Kingara v. Secure Home Health Care, Inc.*, 489 Mass. 393, 396, 183 N.E.3d 1140 (2022) (recognizing "duty of candor" usually requires lawyer to inform court and opposing counsel of client's death); *In re Forrest*, 158 N.J. 428, 434-35, 730 A.3d 340 (1999); *Marentette v. City of Canandaigua*, No. 19-205-CV, 799 Fed. Appx. 48, 50 (2d Cir. 2020) (unpublished opinion); ABA Formal Op. 95-397 (September 18, 1995) (though inquiry posed in context of settlement negotiations in personal injury action, opinion recognizes broad duty of candor requiring lawyer to disclose client's death to court and opposing counsel).

We accept that verification might be difficult in unusual circumstances, such as a client gone missing without explanation or later communication with family, friends, or other associates. Here, however, a readily available online obituary for a David W. Moeller includes names of close relatives and their places of residence, providing an obvious avenue of inquiry to determine whether that person is also the defendant. There undoubtedly are other ways the Appellate Defender Office could have looked into the matter without expending a lot of time and then informed us of the results. This is not the first time the Appellate Defender Office has been less than forthcoming with this court about whether a client had died during an appeal. See *State v. Baker*, No. 119,832, 2020 WL 1649850, at *3-4 (Kan. App. 2020) (unpublished opinion).

ANALYSIS

Setting the Legal Scene

On appeal, Moeller raises two issues he casts as challenges to the sufficiency of the evidence. Assuming Moeller died last year—an assumption about which we harbor no real doubt—this appeal has not been rendered moot. See *State v. Hollister*, 300 Kan. 458, 458-59, 329 P.3d 1220 (2014). In *Hollister*, the court held that issues raised in a criminal defendant's appeal should not be dismissed on mootness ground despite the defendant's death if they would result in his or her exoneration, among other reasons. 300 Kan. at 458-59. A successful challenge to the sufficiency of the evidence supporting a conviction requires the reviewing court to enter a judgment of acquittal, effectively exonerating the defendant. See 300 Kan. at 467-68 (insufficient evidence results in exoneration); see also *State v. Baumgarner*, 59 Kan. App. 2d 330, 331, 481 P.3d 170 (2021) (court orders entry of judgment of acquittal when defendant established conviction not supported by sufficient evidence). Consistent with *Hollister*, we take up the merits of Moeller's points.

In considering a challenge to the sufficiency of the evidence, we construe the evidence in a light most favorable to the party prevailing in the district court, here the State, and in support of the judgment of conviction. An appellate court will neither reweigh the evidence generally nor make credibility determinations specifically. *State v. Aguirre*, 313 Kan. 189, 209, 485 P.3d 576 (2021); *State v. Jenkins*, 308 Kan. 545, Syl. ¶ 1, 422 P.3d 72 (2018); *State v. Butler*, 307 Kan. 831, 844-45, 416 P.3d 116 (2018); *State v. Pham*, 281 Kan. 1227, 1252, 136 P.3d 919 (2006). The issue for review is simply whether a rational fact-finder—either a juror in a jury trial or a district court in a bench trial—could have found the defendant guilty beyond a reasonable doubt. *Butler*, 307 Kan. at 844-45; *State v. Frye*, 294 Kan. 364, 374-75, 277 P.3d 1091 (2012) (outlining standard and noting its application to both jury and bench trials).

Given how Moeller has framed his arguments, we recite the statutory language defining securities fraud as a foundation for analyzing them:

> "It is unlawful for a person, in connection with the offer, sale, or purchase of a security, directly or indirectly:
>
> "(1) To employ a device, scheme, or artifice to defraud;
>
> "(2) to make an untrue statement of a material fact, or omit to state a material fact necessary in order to make a statement made, in the light of the circumstances under which it is made, not misleading; or
>
> "(3) to engage in an act, practice, or course of business that operates or would operate as a fraud or deceit upon another person." K.S.A. 17-12a501(3).

Sufficiency of the Evidence: An Act of Fraud or Deceit

For his first attack on the conviction, Moeller contends there is insufficient evidence of "an act [of] . . . fraud or deceit"—a necessary element of a violation of K.S.A. 17-12a501(3). Again, we are obligated to view the trial record in the best light for the State, making this an easy claim to consign to the realm of the unpersuasive. Brunner testified she gave her money to Moeller on his representation she was investing in an incipient company that would produce and market blade caddies. But the evidence showed Moeller diverted the funds to pay the carpet distributer and to secure the dismissal of the criminal charge against him in Wyandotte County. Moeller's diversion of Brunner's "investment" to take care of his personal financial obligations amounted to a fraudulent or deceptive act, since it was wholly inconsistent with what he had told Brunner to separate her from her money. That's the definition of "fraud" or "deceit." Webster's New World College Dictionary 575 (5th ed. 2016) ("fraud" defined as "something said or done to deceive; trick; artifice"); Webster's New World Dictionary 382 ("deceit" defined as "a dishonest action or trick; fraud or lie").

In reading statutes, we typically should give the words the Legislature has used their ordinary or everyday meanings. *State v. Keys*, 315 Kan. 690, 698, 510 P.3d 706 (2022); *Baumgarner*, 59 Kan. App. 2d at 335. Those meanings may be gleaned from general dictionaries, as we have done here. *Midwest Crane & Rigging, LLC v. Kansas Corporation Comm'n*, 306 Kan. 845, 851, 397 P.3d 1205 (2017). That approach is bolstered in the governing statutory scheme. The Kansas Uniform Securities Act, K.S.A. 17-12a101 et al., including K.S.A. 17-12a501, has a slew of specially defined terms. See K.S.A. 17-12a102. The consolidated entry for "fraud," "deceit," and "defraud" does *not* purport to define them but simply states they "are not limited to common law deceit"—thus rejecting strict legal definitions of those words in favor of their regular meanings. K.S.A. 17-12a102(9).

Moeller further contends his representations to Brunner should have been charged under K.S.A. 17-12a501(2) as "an untrue statement of a material fact." But the contention takes too narrow a view of the deception in this case. Moeller said one thing and did something entirely antithetical. The saying part might have violated K.S.A. 17-12a501(2), but the doing part violated K.S.A. 17-12a501(3). And that supports the conviction here. Under K.S.A. 17-12a501(2), the State can, for example, prosecute substantive misstatements in an investment prospectus for an existing business. But Moeller went further, both misrepresenting his intent to start up a venture and acting deceptively in diverting the money he received based on that misrepresentation to his own benefit.

On this point, Moeller also contends Maxie was deceptive in endorsing the blade caddy venture to Brunner as a good investment. Maybe he was, and maybe he wasn't. But Maxie's comments, whatever their character, do not somehow insulate Moeller from the legal consequences of his own wrongful conduct. The argument advances no viable defense.

Sufficiency of the Evidence: A Security Covered under the Act

For his second principal point, Moeller asserts the transaction with Brunner did not constitute a security covered under the Act. We disagree.

A "security" is expansively defined in K.S.A. 17-12a102(28) in keeping with the remedial purpose of the Act, as a blue sky law. Pertinent here, a covered "security" includes an "investment contract" defined as "an investment in a common enterprise with the expectation of profits to be derived primarily from the efforts of a person other than the investor." K.S.A. 17-12a102(28)(D). In turn, a "common enterprise" is "an enterprise in which the fortunes of the investor are interwoven with those of either the person offering the investment, a third party or other investors." K.S.A. 17-12a102(28)(D). The definition of "investment contract" codifies a set of factors the Kansas Supreme Court had adopted to describe the term as used (but not defined) in an earlier version of the Act. See *Activator Supply Co. v. Wurth*, 239 Kan. 610, 615, 722 P.2d 1081 (1986) ("investment contract" requires: [1] an investment; [2] in a common enterprise; [3] with the expectation of profits; [4] to be derived primarily from the efforts of a person other than the investor); see also *State ex rel. Owens v. Colby*, 231 Kan. 498, 502-04, 646 P.2d 1071 (1982) (adopting test for investment contracts United States Supreme Court recognized in *S.E.C. v. W.J. Howey Co.*, 328 U.S. 293, 301, 66 S. Ct. 1100, 90 L. Ed. 1244 [1946], under federal statutes regulating securities). An investment contract also must entail a risk of loss for the investor. *Aviator Supply Co.*, 239 Kan. at 617.

Moeller offers several unavailing arguments as to why he did not have an investment contract with Brunner. First, he argues he simply borrowed money from Brunner, so she made a loan not an investment. On appeal, Moeller, thus, parrots his trial testimony. His assertion depends on our crediting that testimony and rejecting Brunner's contrary testimony. Had the district court believed Moeller's testimony, it would have found him not guilty. To accept this challenge to the conviction, we would have to reject

the district court's implicit, though obvious, credibility finding favoring Brunner over Moeller. We can't and won't reweigh the evidence in that way.

Moeller next says the evidence was insufficient because he and Brunner had no detailed agreement. Although it's true the arrangement didn't spell out a lot of particulars and wasn't in writing, a regulated investment contract needn't be elaborate or written. Brunner understood she was investing in a new business to manufacture and sell blade caddies, and Moeller represented she could recoup her investment in a few months. Those are sufficient details to establish an investment contract. The venture amounted to an "enterprise" under K.S.A. 17-12a102(28)(D). The court has held the term extends to those endeavors dependent upon "proposed or promised future promotion or development, rather than on present tangible assets." *Owens*, 231 Kan. 498, Syl. ¶ 2. The court reiterated the principle in *Activator Supply*, 239 Kan. at 615. In short, a startup in no more than the conceptual stage constitutes an enterprise; and an investment contract for the startup would be a security under the Act.

Moeller similarly suggests the agreement may not have been a "common" enterprise with what he characterizes as "vertical" or "horizontal" commonality. Apart from some wordplay, the argument doesn't seem to lead anywhere. We suppose a vertical enterprise would link the investor's fortunes to the promoter of the opportunity, while a horizontal enterprise would link those fortunes with other investors. The language of K.S.A. 17-12a102(28)(D) requires the investor's fortunes be "interwoven" with the promotor, other investors, or a third party. The word "interwoven" essentially requires a close, though general, connection and, thus, embraces both vertical and horizontal commonality. See Webster's New World College Dictionary 762 (5th ed. 2016) ("interweave" defined as "to connect closely or intricately; intermingle; blend"). Moreover, Brunner's testimony showed that Moeller directly linked her financial success to his development of the blade caddy venture. Their interests, as Moeller represented them, were sufficiently interwoven to establish a "common" enterprise.

Finally, Moeller points to Brunner's testimony that she did not expect to lose money on her investment with him and says her expectation undercuts the requirement that a regulated investment contract carry a risk of loss. See *Activator Supply*, 239 Kan at 617. But Brunner's testimony proves too little. An investor's anticipation of a positive return does not itself create a risk-free venture any more than a betrothed's hope for a successful marriage guarantees he or she will never divorce. We may presume most investors intend to make money on their investments. So if the expectation of profitability were sufficient to keep an arrangement from being an investment contract covered under the Act (as Moeller posits), then only ventures undertaken as losing propositions could be regulated. The suggestion approaches the absurd. And we should not construe statutes to promote absurdity. *State v. James*, 301 Kan. 898, 903, 349 P.3d 457 (2015).

The State presented sufficient evidence at trial to show Moeller offered Brunner an investment contract satisfying the statutory definition of a security regulated under the Act, thereby imposing legal liability on him for fraudulent or deceitful acts such as diverting the money for his personal benefit.

Affirmed.