NOT DESIGNATED FOR PUBLICATION

No. 124,928

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

JOSUE MANUEL ARITA,
Appellant.

MEMORANDUM OPINION

Appeal from Wyandotte District Court; WESLEY K. GRIFFIN, judge. Opinion filed June 9, 2023. Convictions reversed and sentences vacated.

James M. Latta, of Kansas Appellate Defender Office, for appellant.

Claire Kebodeaux, assistant district attorney, *Mark A. Dupree Sr.*, district attorney, and *Kris W. Kobach*, attorney general, for appellee.

Before MALONE, P.J., GREEN and ISHERWOOD, JJ.

PER CURIAM: The State charged Josue Manuel Arita with two counts of aggravated criminal sodomy and two counts of aggravated indecent liberties with a child, and a jury found him guilty of all four crimes. But the State charged Arita under the wrong subsections of both the aggravated criminal sodomy and aggravated indecent liberties statutes. At trial, the State presented evidence of the crimes Arita presumably committed, yet it presented no evidence of the crimes he was actually charged with committing. More specifically, the State presented evidence that Arita had personally

sexually abused his victims, but all four counts in the charging documents alleged that he had caused his victims to be abused by another person.

On appeal, Arita contends that the State presented insufficient evidence to support his convictions because the evidence did not match the charges levied against him. Arita is correct under controlling legal precedent from the Kansas Supreme Court. The language of the charging documents controls the criminal prosecution, and this type of error requires reversal of Arita's convictions for insufficient evidence.

FACTUAL AND PROCEDURAL BACKGROUND

In July and August 2019, E.M.A., a seven-year-old, and E.S.A., an eight-year-old, reported that Arita had been sexually abusing them. The children were living with their mother at that time, but they would sometimes visit Arita at his home. Both children were taken to Sunflower House where they were interviewed separately. During his interview, E.M.A. explained to the forensic interviewer that Arita had anally sodomized him. He recalled that the abuse happened more than once, whenever he would go over to Arita's house, and he explained that Arita was always drunk when the abuse occurred. He also remembered that Arita told him not to tell his mother.

In her interview, E.S.A. disclosed that Arita had sexually abused her many times, stating that he would touch her breasts and vagina, which she called her "bun." Much like her brother's recollections, she recalled that Arita was drunk when he abused her and that he warned her not to tell anyone because he would go to jail. Both children stated that the abuse occurred in Arita's bedroom. Neither child ever claimed that anyone other than Arita had ever touched them.

On September 9, 2019, the State charged Arita with two counts of aggravated criminal sodomy, under K.S.A. 2019 Supp. 21-5504(b)(1), and two counts of aggravated

indecent liberties with a child, under K.S.A. 2019 Supp. 21-5506(b)(3). The aggravated criminal sodomy charges alleged that on two separate occasions Arita "did unlawfully . . . cause a child under the age of 14 years, to wit: E.M.A. . . . to engage in sodomy, . . . *with another person*." (Emphasis added.) The aggravated indecent liberties charges alleged that on two occasions Arita "did unlawfully engage in lewd fondling or touching of the person of a child, to wit: [E.S.A.] . . . who was under 14 years of age, done with the intent to arouse or satisfy the sexual desires of either the child, the offender, or both."

At the preliminary hearing on November 22, 2019, the State asked the district court to permit the filing of an amended information so that changes could be made to the dates that the offenses were alleged to have occurred as well as to the initials of the alleged victims. The district court permitted the proposed amendments, and the amended information was filed on the same day as the hearing. But the amended information contained several changes beyond those made to the dates of the offenses and the initials of the alleged victims. First, the State changed the statutory subsection of the aggravated criminal sodomy charges from K.S.A. 21-5504(b)(1) to K.S.A. 21-5504(b)(2). Subsection (b)(1) prohibits an offender from personally engaging in sodomy, while subsection (b)(2) covers situations were a defendant causes a child to engage in sodomy with any person, i.e., someone other than the defendant. Compare K.S.A. 2022 Supp. 21-5504(b)(1) with K.S.A. 2022 Supp. 21-5504(b)(2). The statutory change tracked the language of the charges, which alleged that Arita had caused E.M.A. to engage in sodomy with "another person."

Second, the amended information specified the State was charging Arita with aggravated indecent liberties under K.S.A. 21-5506(b)(3)(B), which prohibits a defendant from soliciting a victim to engage in the unlawful touching of another—subsection (b)(3)(A) prohibits a defendant from personally touching or fondling the victim. Compare K.S.A. 2022 Supp. 21-5506(b)(3)(A) with K.S.A. 2022 Supp. 21-5506(b)(3)(B). The language of the aggravated indecent liberties charges was also altered to allege that Arita

"did unlawfully, . . . solicit a child under the age of 14 years, [E.S.A.], to engage in any lewd fondling or touching *of the person of another*, with the intent to arouse or satisfy the sexual desires of either the child, the offender or another." (Emphasis added.) Although the district court bound Arita over on all counts in the amended information, at no point did the State produce evidence at the preliminary hearing suggesting that anyone other than Arita sodomized, touched, or fondled E.M.A. and E.S.A. The State filed a second amended information during Arita's jury trial, but the only change made was the removal of Arita's middle name.

At trial, the State proceeded under the theory that Arita had personally sodomized E.M.A. and that he had personally touched or fondled E.S.A. All the evidence reflected the State's theory of the case, and the State presented no evidence that any other person participated in the sexual abuse of E.M.A. and E.S.A. Detective Kevin Wells, a child abuse detective with the Kansas City Police Department, explained that neither child provided any information suggesting that they had been abused by anyone other than Arita. Both children similarly testified that Arita had acted alone and that no one else had sexually abused them. The State also produced the video recordings of the children's interviews at the Sunflower House. During these interviews, E.M.A. and E.S.A. both stated that Arita was the only person who had abused them. At no point did the State seek to alter the charging document to conform to its evidence establishing that Arita had sodomized E.M.A. and that Arita had lewdly fondled or touched E.S.A. For his part, Arita argued that he had never touched either of the children and suggested that their mother had encouraged the children to accuse him of the crimes.

After the evidence was presented, and despite the language of the charging document, the district court instructed the jury on aggravated criminal sodomy as if Arita had engaged in sodomy with E.M.A. and on aggravated indecent liberties as if Arita had engaged in the unlawful fondling or touching of E.S.A. Neither the State nor Arita objected to these instructions. The jury convicted Arita of all four counts consistent with

the instructions and in accordance with the evidence. The district court sentenced Arita to serve a hard 40 life sentence for each conviction, with counts one and three running consecutive to each other. Arita timely appealed the district court's judgment.

On appeal, Arita first claims there was insufficient evidence to support his convictions. In the alternative, he claims the district court erred in imposing hard 40 prison sentences instead of the statutorily mandated hard 25 prison sentences.

SUFFICIENCY OF THE EVIDENCE

Arita argues that the State presented insufficient evidence to support his convictions because it charged him with causing his victims to be sodomized or fondled by another person but the evidence it presented only supports that he personally sodomized and fondled them. Arita contends the State charged him with one form of aggravated criminal sodomy and aggravated indecent liberties but then proved that he committed another form of each charge, leaving no evidence to support the charged crimes. He contends this court must reverse his convictions, vacate his sentences, and discharge him from the case.

The State responds that Arita is not actually raising a sufficiency of the evidence argument and that any issues with the charging documents constitute harmless typographical errors. Alternatively, the State asserts that the charging documents were impermissibly constructively amended by the jury instructions, and the error requires the less drastic remedy of reversal of the convictions and a new trial.

When a defendant challenges the sufficiency of the evidence to support a conviction, an appellate court must examine the evidence in a light most favorable to the State and determine whether a rational fact-finder could have found the defendant guilty beyond a reasonable doubt. In performing this review, an appellate court will not reweigh

evidence, resolve evidentiary conflicts, or make witness credibility determinations. *State v. Fitzgerald*, 308 Kan. 659, 666, 423 P.3d 497 (2018).

Arita's case does not present a typical challenge to the sufficiency of the evidence. We are not concerned here with whether the State's evidence met the elements of the crimes as instructed by the district court. We must instead decide whether the State proved the crimes it charged. A defendant need not challenge the sufficiency of the evidence before the district court to preserve the issue for appeal. *State v. Farmer*, 285 Kan. 541, Syl. ¶ 1, 175 P.3d 221 (2008).

As described below, the State's unfortunate error here is not novel. Many cases have addressed nearly identical charging document errors leading to deficiencies in the evidence presented at trial. See, e.g., *Fitzgerald*, 308 Kan. 659; *State v. Laborde*, 303 Kan. 1, 360 P.3d 1080 (2015); *State v. Dickson*, 275 Kan. 683, 695, 69 P.3d 549 (2003); *State v. Lacy*, 56 Kan. App. 2d 327, 429 P.3d 245 (2018). As the Kansas Supreme Court has explained, criminal prosecutions depend on the charging document—whether by complaint, indictment, or information—and that charging document "sets the outer limits of the conviction or convictions that can result." *Fitzgerald*, 308 Kan. at 665-66.

Arita's aggravated criminal sodomy convictions

The second amended information charged Arita with committing two counts of aggravated criminal sodomy with E.M.A. in violation of K.S.A. 21-5504(b)(2). The language of the charging document alleged that Arita caused E.M.A. "to engage in sodomy with another person." But all the evidence the State presented at trial established that Arita personally engaged in aggravated sodomy with E.M.A. The State presented no evidence that Arita caused E.M.A. to engage in sodomy with another person.

This issue is controlled by *Fitzgerald*—a case almost identical to Arita's. The State charged Fitzgerald with aggravated criminal sodomy by causing the victim, a child under 14 years old, to engage in sodomy with another person in violation of K.S.A. 2017 Supp. 21-5504(b)(2). But at trial, the State proved that Fitzgerald personally engaged in aggravated sodomy with the victim, as if Fitzgerald was charged under K.S.A. 2017 Supp. 21-5504(b)(1). The State presented no evidence that Fitzgerald caused the victim to engage in sodomy with another person. Our Supreme Court emphasized that criminal prosecutions depend on the charging document. Based on this fact, the court found that it was compelled to reverse Fitzgerald's conviction as unsupported by sufficient evidence of the crime the State charged. 308 Kan. at 666. The court's holding was clear: "If the State charges a defendant with aggravated criminal sodomy under K.S.A. 2017 Supp. 21-5504(b)(2) but proves aggravated criminal sodomy under K.S.A. 2017 Supp. 21-5504(b)(1), the defendant's conviction is reversible for insufficient evidence." 308 Kan. 659, Syl.

Fitzgerald applied the Kansas Supreme Court's previous decision in *Dickson* that held that the use of the term "any person" in the identically worded predecessor statute to K.S.A. 2017 Supp. 21-5504(b)(2) means "a person other than the defendant." *Fitzgerald*, 308 Kan. at 664; see *Dickson*, 275 Kan. at 693. Because Fitzgerald was charged with committing aggravated criminal sodomy in violation of K.S.A. 2017 Supp. 21-5504(b)(2), he could not be found guilty based on evidence that he personally engaged in aggravated sodomy with the victim. Here, the State charged Arita with causing E.M.A. to engage in aggravated sodomy with "another person" rather than the "any person" language found in K.S.A. 21-5504(b)(2). Thus, the charging document made it even clearer the State needed to prove that Arita caused E.M.A. to engage in sodomy with another person, not with Arita himself.

A similar result is found in *Laborde*, 303 Kan. 1. In that case, the State charged Laborde with theft by deception, but the parties proceeded as though Laborde was on trial

under a different theory—theft by unauthorized control. The district court instructed the jury on theft by unauthorized control, and Laborde was found guilty. On appeal, Laborde argued there was insufficient evidence to convict her of the theft by deception that had been charged. Our Supreme Court agreed and reversed Laborde's conviction, observing that the State had failed to prove one of the elements of theft by deception even though the State had proved all the elements of theft by unauthorized control. 303 Kan. at 7-8.

Although the State presented ample evidence that Arita personally engaged in sodomy with E.M.A.—which would have supported convictions under K.S.A. 21-5504(b)(1)—that evidence was insufficient to support convictions for the crimes that Arita was actually charged with committing under K.S.A. 21-5504(b)(2). The State presented no evidence that Arita caused E.M.A. to engage in sodomy with another person. Under these circumstances, where the State charged Arita under the wrong subsection of the aggravated criminal sodomy statute and presented no evidence of the crimes Arita was charged with committing, this court is compelled to reverse Arita's convictions of aggravated criminal sodomy as unsupported by the evidence.

Arita's aggravated indecent liberties convictions

The State similarly cited and used language from the wrong statutory subsection in its two charges for aggravated indecent liberties with a child. The second amended information cited K.S.A. 21-5506(b)(3)(B), which prohibits a defendant from soliciting a victim to engage in the unlawful touching of another. And the language of the aggravated indecent liberties counts mirrored that subsection, alleging that Arita solicited E.S.A. "to engage in any lewd fondling or touching *of the person of another*, with the intent to arouse or satisfy the sexual desires of either the child, the offender or another." (Emphasis added.) As with the aggravated criminal sodomy charges, the State's evidence at trial showed only that Arita personally engaged in lewd fondling or touching of E.S.A.

Another case that is almost identical to Arita's case is *Lacy*, 56 Kan. App. 2d 327. In that case, the State charged Lacy with aggravated indecent liberties with a child by unlawfully soliciting a child under 14 years old to engage in lewd fondling or touching of another person in violation of K.S.A. 2015 Supp. 21-5506(b)(3)(B). But at trial, the State proved that Lacy personally engaged in lewd fondling or touching of the victim, as if Lacy was charged under K.S.A. 2015 Supp. 21-5506(b)(3)(A). The State presented no evidence at trial that Lacy solicited a child to engage in lewd fondling or touching of another person. This court observed that a conviction of aggravated indecent liberties with a child under K.S.A. 2015 Supp. 21-5506(b)(3)(B) requires the involvement of another person. 56 Kan. App. 2d at 331. Based on the controlling legal precedent, this court reasoned that if the State charges a defendant with aggravated indecent liberties with a child under K.S.A. 2015 Supp. 21-5506(b)(3)(B) but proves aggravated indecent liberties with a child under K.S.A. 2015 Supp. 21-5506(b)(3)(A), the defendant's conviction is reversible for insufficient evidence. 56 Kan. App. 2d at 331.

To prove that Arita committed aggravated indecent liberties with a child under K.S.A. 21-5506(b)(3)(B), the State needed to present evidence that Artia solicited E.S.A. to engage in lewd fondling or touching of another person. See *Lacy*, 56 Kan. App. 2d at 331 ("[T]he 'another' person who is touched in the soliciting form of this offense must be a third party, not the defendant who solicits the act."). Here, nothing in the record suggests that Arita solicited E.S.A. to engage in lewd fondling or touching of another person. As a result, the State's evidence was insufficient to support Arita's convictions of aggravated indecent liberties with a child under K.S.A. 21-5506(b)(3)(B).

In a Supreme Court Rule 6.09 (2023 Kan. S. Ct. R. at 40) letter, the State cites *State v. Mukes*, No. 124,448, 2023 WL 3143653 (Kan. App. 2023) (unpublished opinion), as persuasive authority to supplement its brief. This unpublished opinion addresses the defendant's claim that his counsel in his direct appeal provided ineffective assistance because he failed to challenge the sufficiency of the evidence supporting the defendant's

convictions of aggravated criminal sodomy and attempted aggravated criminal sodomy. We need not engage in an extensive discussion of the facts and legal analysis in *Mukes* in this opinion. Suffice it to say we have reviewed the decision and find that it fails to support the State's argument that Arita's charging documents placed him on sufficient notice of the charged crimes. This court's analysis in *Mukes* does not alter the legal precedent in *Fitzgerald* and *Lacy*—decisions that are factually on point and control the outcome of Arita's appeal.

Typographical error or constructive amendment?

The State appears to concede that it failed to present evidence of the specific crimes outlined in the charging document, but it tries to defend its failure to charge Arita with the crimes that it showed he committed on two grounds: (1) harmless typographical error and (2) impermissible constructive amendment. Neither argument is availing.

The State first argues that any problems with the charging documents were typographical and cites K.S.A. 22-3201(b) to support its claim that the error is harmless. K.S.A. 22-3201(b) provides that any "[e]rror in the citation or its omission shall not be ground for . . . reversal of a conviction if the error or omission did not prejudice the defendant." But that statute applies only when a statutory citation is erroneous or missing—neither of which occurred here. All four charges in Arita's charging document contained an accurate description of one way to commit either aggravated criminal sodomy or aggravated indecent liberties with an accompanying citation to the statutory subsection governing that means. As a result, K.S.A. 22-3201(b) is not applicable.

Second, the State argues that this court should assess Arita's claim of error under the rubric of an impermissible constructive amendment. A constructive amendment occurs when the evidence presented at trial, together with the jury instructions, so alters the information as to charge a different offense. *State v. Hunt*, 61 Kan. App. 2d 435, 438,

503 P.3d 1067 (2021), *rev. denied* 315 Kan. 970 (2022). The State argues that based on the evidence presented at trial and the jury instructions, Arita was found guilty of charges that do not match those set forth in the charging document, and thus an impermissible constructive amendment occurred. Importantly, the State asserts that this error permits a retrial of Arita on remand—a starkly different outcome than is required based on a finding of insufficient evidence.

The State's argument may have some merit if the only problem we had in this case was an improper constructive amendment. But even if the charges here may have been constructively amended, the fact remains that the State presented insufficient evidence—actually no evidence—to support Arita's convictions under K.S.A. 21-5504(b)(2) and K.S.A. 21-5506(b)(3)(B). When a defendant's conviction must be reversed because the evidence presented at trial was insufficient to support the conviction, double jeopardy bars the State from retrying the defendant for that particular offense. See, e.g., *Bullington v. Missouri*, 451 U.S. 430, 442, 101 S. Ct. 1852, 68 L. Ed. 2d 270 (1981); *State v. Pabst*, 268 Kan. 501, 512, 996 P.2d 321 (2000). The State provides no justification that would permit this court to circumvent Arita's constitutional protection against double jeopardy.

Thus, the appropriate remedy here is to reverse Arita's convictions for insufficient evidence and vacate his sentences—consistent with the prior holdings in *Fitzgerald*, *Laborde*, *Dickson*, and *Lacy*. Based on this disposition, we need not reach Arita's alternative claim that the district court erred in imposing hard 40 prison sentences for each count instead of the statutorily mandated hard 25 prison sentences.

Convictions reversed and sentences vacated.