NOT DESIGNATED FOR PUBLICATION

No. 124,987

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

WILLIAM THEADORE PATTON,
Appellant.

MEMORANDUM OPINION

Appeal from Crawford District Court; MARY JENNIFER BRUNETTI, judge. Opinion filed June 23, 2023. Affirmed.

Jennifer C. Bates, of Kansas Appellate Defender Office, for appellant.

Ryan J. Ott, assistant solicitor general, and *Kris W. Kobach*, attorney general, for appellee.

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

PER CURIAM: William Theadore Patton appeals his convictions for kidnapping, aggravated burglary, aggravated assault, aggravated battery, criminal deprivation of property, possession of a firearm by a felon, and fleeing or eluding law enforcement. He argues that the trial court erred in admitting hearsay evidence at trial and that the trial court failed to secure a jury trial waiver on one element of a charged crime. Because the trial court did not admit hearsay evidence during his trial, we affirm. Although the trial court erred when it failed to obtain a constitutionally sufficient waiver before Patton stipulated to being a convicted felon who was prohibited from possessing a firearm, this error was harmless. Thus, we affirm.

FACTS

In December 2019, Cheyenne McNaught was home in Pittsburg, babysitting her roommate's daughters, when she heard a loud noise at the back of the house between 3:30 and 4:30 p.m. McNaught told the girls, ages seven and two years, to stay in the bedroom while she went to check out the noise. McNaught saw a man in her kitchen, holding a black handgun. She testified that "[h]e was a boyfriend, so to speak, of my roommate that had left her children with me while she was doing her sanction in jail." McNaught testified that she had seen him once before, a week earlier, when her roommate asked her to go with him to pick up a car. She stated that she did not know him well. But she later identified the man as Patton.

McNaught testified that Patton took the SIM card from her cell phone and took her into her bedroom with the gun at her side. The girls came out of the bedroom, and Patton made them face the wall. McNaught convinced Patton to let the girls walk to a neighbor's house, and he let them go.

McNaught told Patton that she needed to pick up her three-year-old son from daycare in about an hour. She testified that Patton wanted to go with her to pick up her son. Eventually, Patton put McNaught's SIM card back in her phone so that she could call her mother and have her mother pick up her son.

After about 15 or 20 minutes, Patton wanted to leave the house in McNaught's car, but McNaught did not know why. She gave him the keys to her white 2015 Ford Fusion. He walked her out to the car with the gun at her back and had her get in the passenger seat so he could drive. Patton had not said much to McNaught at this point that would let her know his motivations. As they headed east, they passed McNaught's mother and son traveling west to McNaught's house. Patton turned the car around and parked behind

McNaught's mother in McNaught's driveway. McNaught convinced Patton to let her out of the car so she could get her son.

McNaught's mother came walking towards the car, yelling because McNaught had left her son at school and because someone else was driving the car that McNaught's mother insured. McNaught was able to tell her mother to go inside and call the police. McNaught opened the rear door of her mother's car to get her son out of his car seat. She put her son on the floorboard in the back, got on top of him, and closed the door. McNaught waited in her mother's car while Patton was still in the driver's seat of McNaught's car.

The police arrived shortly after, and Patton drove off in McNaught's car. The police turned on lights and sirens and tried to stop Patton. Police pursued Patton as he exceeded the speed limit, went through a stop sign, failed to yield to oncoming traffic, and drove through a red light. When the police located the car, no one was in it. The police searched the car and found a Glock 43 handgun and a 9-millimeter bullet.

Pittsburg Police Lieutenant Adan Nance was off duty but received a phone call stating that William Patton was the man that police were looking for. Nance testified on direct examination as follows:

"[Nance]: I was informed that some officers were looking for an individual and so I was unaware of what was going on, so I contacted an on-duty officer to kind of figure out what was going on.

"[Prosecutor]: And what happened next?

"[Nance]: Excuse me, I was informed who the individual was that we were looking for.

"[Defense Counsel]: I'm going to object to hearsay, Your Honor.

"THE COURT: Sustained.

"[Nance]: I'm sorry.

"[Prosecutor]: So what did you do after you spoke with officers?

"[Nance]: Once I discovered who we were lo[o]king for, I was made aware that there was a potential location for him and I let officers know where he might be and who he was.

"[Prosecutor]: And who was that person?

"[Nance]: William Patton."

On cross-examination, defense counsel asked about the phone call as follows:

"[Defense Counsel]: But you were able to call Officer Cuppett and tell him that that was William Patton who had done all this; right?

"[Nance]: I told him that is what I was informed.

"[Defense Counsel]: Did you tell him who informed you?

"[Nance]: No.

"[Defense Counsel]: Did you tell—put that in your report to the Court who informed you?

"[Nance]: I'm sorry, did what?

"[Defense Counsel]: Did you put that in your affidavit of who informed you?

"[Nance]: I did not put the individual's name, no.

"[Defense Counsel]: Don't you think that Mr. Patton has a right to confront that witness?

"[Nance]: The witness to—

"[Defense Counsel]: Who identified him at the scene?

"[Nance]: From my understanding that witness was not on scene at the time.

"[Defense Counsel]: Oh, so somebody from somewhere identified him at the scene, that's what you put in your report then?

"[Nance]: Not that he was on scene, no.

"[Defense Counsel]: So let's back up. So let's find out how did you know that it was Mr. Patton who was there?

"[Nance]: I received a phone call that Mr. Patton was in a house describing the events that just took place.

"[Defense Counsel]: Really. Did you get the person's name?

"[Nance]: I'm sorry?
"[Defense Counsel]: Did you get the person's name who told you that?
"[Nance]: I'm familiar with them.
"[Defense Counsel]: Did you put that in your police report?
"[Nance]: I did not.
"[Defense Counsel]: Don't you think that Mr. Patton had a right to confront that witness?
"[Nance]: That individual did not witness the events that transpired that day.
"[Defense Counsel]: He had a lot of information about Mr. Patton, didn't he?
"[Nance]: Based on the conversation that Mr. Patton had, yes.
"[Defense Counsel]: Enough to convince you that he was the one who did that; right?
"[Nance]: I was just relaying the information to the officers on duty.
"[Defense Counsel]: That he's the one who committed that crime?
"[Nance]: That that's what I was informed, yes, sir."

Based on the phone call, Nance made sure that Patton was in the photo line-up shown to McNaught. The night of the incident, McNaught went to the police station and reviewed the photo line-up. The Kansas Bureau of Investigation (KBI) tested the gun found in McNaught's car for DNA. The swab of the trigger area matched Patton's DNA profile.

The jury found Patton guilty of kidnapping, aggravated burglary, aggravated assault, aggravated battery, criminal possession of a firearm by a convicted felon, criminal deprivation of property, and fleeing or eluding a law enforcement officer. Patton moved for a new trial, which the trial court denied. The sentencing court imposed a controlling prison sentence of 216 months (18 years).

Patton timely appeals.

ANALYSIS

Did the trial court err in admitting hearsay evidence?

Patton argues that the trial court erred in admitting hearsay statements of a confidential informant, in violation of his Sixth Amendment right under the United States Constitution to confront the witnesses against him. But Patton did not raise this exact issue below. Nevertheless, we will address this issue.

On the other hand, the State argues that the testimony was not hearsay evidence because it was not offered for the truth of the matter asserted. The State also argues that the trial court did not err because the evidence was elicited by the defense and argues that any error was harmless.

When an appellate court reviews a trial court's admission of evidence, it must first consider whether the evidence is relevant. *State v. Barney*, 39 Kan. App. 2d 540, 545, 185 P.3d 277 (2007). If the evidence is relevant, then appellate courts apply evidentiary rules governing admission and exclusion either as a matter of law or in the exercise of the trial judge's discretion. 39 Kan. App. 2d at 545 (citing *State v. Gunby*, 282 Kan. 39, 47, 144 P.3d 647 [2006]). Appellate courts apply de novo review when an appellant challenges "the adequacy of the legal basis on which the district court decided to admit or exclude evidence." *Barney*, 39 Kan. App. 2d at 545.

If an appellate court determines that the trial court erred in admitting hearsay evidence in violation of the defendant's Sixth Amendment right to confront witnesses against him, an appellate court applies the constitutional harmless error test. *State v. Kelley*, 42 Kan. App. 2d 782, 793, 217 P.3d 56 (2009). "Under the federal constitutional harmless error test, an error may not be held to be harmless unless the appellate court is willing to declare a belief that it was harmless beyond a reasonable doubt." 42 Kan. App.

2d at 793. Thus, an appellate court "must be able to declare beyond a reasonable doubt that the error had little, if any, likelihood of having changed the result of the trial." 42 Kan. App. 2d at 794.

Under K.S.A. 2022 Supp. 60-460, any "[e]vidence of a statement which is made other than by a witness while testifying at the hearing, offered to prove the truth of the matter stated, is hearsay evidence and inadmissible" unless it falls within an exception to the hearsay rule. Testimony that is not offered to prove the truth of the matter asserted is not hearsay evidence. *Barney*, 39 Kan. App. 2d at 545.

The Confrontation Clause of the Sixth Amendment to the United States Constitution states the following:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; *to be confronted with the witnesses against him*; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence." (Emphasis added.) U.S. Const. amend. VI.

The United States Supreme Court has held that the Confrontation Clause prohibits "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Crawford v. Washington*, 541 U.S. 36, 53-54, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

In *Crawford*, the United States Supreme Court clarified that the test for the Confrontation Clause begins with deciding whether the statements challenged as hearsay evidence are "[t]estimonial." 541 U.S. at 59. The *Crawford* Court did not provide a comprehensive definition of "testimonial" but did give examples of some statements

which would be included at a minimum. "Statements taken by police officers in the course of interrogations are also testimonial under even a narrow standard," as are "'pretrial statements that declarants would reasonably expect to be used prosecutorially,'" and "'statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'" 541 U.S. at 51-52.

The United States Supreme Court expanded on its discussion of "testimonial" statements in *Davis v. Washington*, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006). The *Davis* Court also avoided providing a comprehensive definition, but did supply a general test for when statements are "testimonial" as follows:

> "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." 547 U.S. at 822.

The United States Supreme Court expounded upon what it means to "'enable police assistance to meet an ongoing emergency'" in *Michigan v. Bryant*, 562 U.S. 344, 359, 131 S. Ct. 1143, 179 L. Ed. 2d 93 (2011). Police officers responded to a 911 call and found a gunshot victim who identified the defendant as his murderer before he died. The *Bryant* Court held that an ongoing emergency existed because an armed shooter mortally wounded the victim within the past few minutes and within a few blocks and the shooter's motive and location were unknown. 562 U.S. at 374. Thus, the victim's identification and description of the shooter and location of the shooting were not testimonial hearsay evidence. 562 U.S. at 377-78.

Our Supreme Court has applied the rule in *Crawford* to hold that a nontestimonial statement does not implicate the Confrontation Clause of the Sixth Amendment. *State v. Miller*, 284 Kan. 682, 713, 163 P.3d 267 (2007).

For roughly 10 years, Kansas appellate courts employed a multifactor system when determining whether an out-of-court statement by a nontestifying declarant is testimonial under the Confrontation Clause. Under this rubric, the factors were as follows:

> "(1) Would an objective witness reasonably believe such a statement would later be available for use in the prosecution of a crime?
> "(2) Was the statement made to a law enforcement officer or to another government official?
> "(3) Was proof of facts potentially relevant to a later prosecution of a crime the primary purpose of the interview when viewed from an objective totality of the circumstances, including circumstances of whether
> (a) the declarant was speaking about events as they were actually happening, instead of describing past events;
> (b) the statement was made while the declarant was in immediate danger, *i.e.*, during an ongoing emergency;
> (c) the statement was made in order to resolve an emergency or simply to learn what had happened in the past; and
> (d) the interview was part of a governmental investigation; and
> "(4) Was the level of formality of the statement sufficient to make it inherently testimonial; *e.g.*, was the statement made in response to questions, was the statement recorded, was the declarant removed from third parties, or was the interview conducted in a formal setting such as in a governmental building?" *State v. Brown*, 285 Kan. 261, 291, 173 P.3d 612 (2007).

But then our Supreme Court disapproved of this test in *State v. Williams*, 306 Kan. 175, 197, 392 P.3d 1267 (2017). The *Williams* court held that the multifactor test in *Brown* "should not be regarded as the exclusive or all-encompassing template for

determining whether a statement made by an absent declarant qualifies as testimonial under the Sixth Amendment." 306 Kan. at 197. The *Williams* court criticized a "purely mechanical application of its factors" because the category of testimonial statements is "broader than formal statements made to police during an interrogation to solve a crime." 306 Kan. at 197. "Instead, the inquiry should generally seek to identify statements that are by nature substituting for trial testimony." 306 Kan. at 197. After establishing that the *Brown* multifactor test is more of a guideline than an actual rule, the *Williams* court walked through an application of those factors. 306 Kan. at 201-03.

This court follows the *Williams* court's instruction that the *Brown* factors are a useful analytical aid which begin—but do not end—the analysis of testimonial statements and, thus, this court employs the *Brown* factors sparingly. See *State v. Brockenshire*, No. 118,136, 2018 WL 6005198, at *4-5 (Kan. App. 2018) (unpublished opinion) (applying the *Brown* factors).

Patton argues that Nance's statements—statements about the phone call identifying Patton—were testimonial hearsay evidence from a confidential informant, which should have been excluded as in *United States v. Silva*, 380 F.3d 1018 (7th Cir. 2004), and *United States v. Cromer*, 389 F.3d 662 (6th Cir. 2004). But *Silva* involved an extensive undercover operation that included a confidential informant, ground and aerial surveillance, and tape-recorded conversations. 380 F.3d at 1019. In short, the informant was actively working with law enforcement on an investigation in progress. The informant in *Cromer* similarly participated in an ongoing investigation. 389 F.3d at 666-67.

But none of Patton's record citations show that the caller was a confidential informant working with police. More importantly, the jury never heard any reference to the caller being a confidential informant. Patton's trial counsel repeatedly referred to the caller as a confidential informant, but a review of the record does not show that the caller

was actively assisting a police investigation as in *Cromer* or *Silva*. In short, Patton does not justify analyzing the caller as a confidential informant as opposed to, say, an anonymous tip or a "nontestifying declarant." *Williams*, 306 Kan. at 182.

A useful comparison between anonymous tips comes from the two different tips at issue in *Brockenshire*. Two different unidentified people tipped police about Brockenshire committing two different crimes at a bar. The *Brockenshire* court's evaluation of each tip helps to illustrate the issue in this case. The *Brockenshire* court held that the trial court erred in dealing with the first tip but not the second. The *Brockenshire* court remanded for a new trial based on the trial court's error with the first tip, holding that no error on the second tip would warrant a new trial.

The first item of testimony was a tip that a man wearing a tie-dyed shirt was snorting cocaine off the pool table in the bar. The trial court admitted the evidence as showing why police identified Brockenshire as a person of interest from his tie-dyed shirt. The trial court erred in denying Brockenshire's motion in limine, seeking to exclude the mention of cocaine in the anonymous tip. The *Brockenshire* court held that the tie-dyed shirt was sufficient to establish why the police singled out Brockenshire. The mention of cocaine was prejudicial and not relevant to prove the issue before the jury—that Brockenshire knowingly possessed the marijuana that police found in his pocket after a pat-down. 2018 WL 6005198, at *3.

But the trial court did not entirely disagree with Brockenshire's motion in limine. The trial court allowed testimony about the anonymous tip mentioning cocaine but directed the State not to introduce evidence about bags found at the bar which contained cocaine. When a testifying officer mentioned seeing a white powdery substance on the pool table, this testimony compounded the effect of the trial court's error. The testimony was not stricken from the record, and the jury did not receive an admonition to disregard it.

Officers received a second anonymous tip about Brockenshire. They arrived at the bar to investigate the first tip, asked Brockenshire to step outside, and searched him, finding no drugs. Brockenshire went back inside the bar. The second tip was from an unidentified woman who told the officers that when Brockenshire came back in, he put a baggie in his pocket and headed out the back door. When one of the officers testified that this woman believed the baggie contained narcotics, Brockenshire objected, and the trial court properly sustained the objection. 2018 WL 6005198, at *4. Thus, a trial court errs when it allows in inadmissible hearsay evidence over the objection or motion in limine of one party, but a trial court does not err if it correctly sustains an objection to inadmissible hearsay evidence.

Unlike *Brockenshire*, Patton fails to identify what the trial court could or should have done differently. Brockenshire's appeal identified the trial court's denial of his motion in limine as erroneous. Patton does not specify which motion was denied or objection overruled in error. The trial court sustained Patton's objection as follows:

> "[Nance]: Excuse me, I was informed who the individual was that we were looking for.
> "[Defense Counsel]: I'm going to object to hearsay, Your Honor.
> "THE COURT: Sustained."

The State's next question moved further down the timeline of events. Rather than focus on what Nance heard before speaking with colleagues, the State asked Nance, "So what did you do after you spoke with officers?" The State properly followed the sustained objection with a question not designed to elicit inadmissible hearsay evidence.

Nance's response was the following: "Once I discovered who we were lo[o]king for, I was made aware that there was a potential location for him and I let officers know where he might be and who he was." Patton did not object, move to strike, request a jury

admonition, or move for a mistrial. Nance hid the source of his information behind the passive voice. Without an objection, the trial court had no opportunity to consider whether this would still be inadmissible hearsay evidence, like the first tip in *Brockenshire*. The question was not designed to elicit this response, and, in any event, Patton's claim is not prosecutorial error. Patton alleges trial court error but fails to specify how the trial court erred here.

Instead, Patton claims generally that the trial court should have kept hearsay evidence from the jury. He correctly asserts that the statements made to Nance helped to corroborate McNaught's testimony. But that information was presented to the jury on cross-examination.

"[Defense Counsel]:	Did you get the person's name who told you that?
"[Nance]:	I'm familiar with them.
"[Defense Counsel]:	Did you put that in your police report?
"[Nance]:	I did not.
"[Defense Counsel]:	Don't you think that Mr. Patton had a right to confront that witness?
"[Nance]:	That individual did not witness the events that transpired that day.
"[Defense Counsel]:	He had a lot of information about Mr. Patton, didn't he?
"[Nance]:	Based on the conversation that Mr. Patton had, yes."

Nance's comment, "Based on the conversation that Mr. Patton had, yes," is highly suggestive. The jury could potentially infer from this statement that Patton left the scene of the crime, met with another person, told that person what he had done, and that person called Nance to report the crime. But this statement came from the defense counsel's cross-examination and defense counsel obviously did not object to his own line of questioning. In denying Patton's motion for a new trial, the trial court stated: "The State did not solicit testimony about information from an unknown source, rather the Court's

recollection of the trial was that defense counsel extensively questioned Detective Adan Nance about statements made to him by an individual that implicated the defendant rather than the State . . . ." The trial court sustained the only objection that Patton made. Also, Patton points to no other action this court could review as erroneous.

The State argues that there was no hearsay evidence admitted at trial because Nance did not repeat the nontestifying declarant's statements at trial. A crucial requirement for a Confrontation Clause violation is that the declarant's challenged statements must be admitted at trial. *State v. Mallett*, No. 122,282, 2020 WL 7294282, at *2 (Kan. App. 2020) (unpublished opinion). The State argues as follows: "Nance testified that, once he learned about Patton, he informed the other officers who Patton was and where he might be found. Nance never testified as to what the unknown declarant told him."

The State relies heavily on Nance testifying that he "was informed" and "was made aware" that the person the police were looking for was Patton. Nance clearly described the information that he received. The State cites no case for its proposition that using only the passive voice can transform inadmissible hearsay evidence into admissible evidence. The information is substantively the same.

Generally, a police officer's testimony regarding secondhand suspect descriptions given to other officers is inadmissible hearsay evidence when the description names the accused. The suspect description identifies the accused and tends to establish the accused's guilt without allowing the accused to confront the anonymous tipster. See *State v. Stamps*, No. 113,071, 2016 WL 2809208, at *5 (Kan. App. 2016) (unpublished opinion) (explaining that descriptions are admissible only when the description is limited to what the suspect looked like and where the suspect was and why police officers took certain actions). But even if we were to assume without deciding that Nance's testimony was inadmissible hearsay evidence, Patton objected, and the trial court sustained the

objection. Patton contends no other error by the trial court. Thus, he has failed to show that his claim is correct. Because the trial court excluded the challenged testimony, we affirm.

Did the trial court err by not securing a jury trial waiver before accepting a stipulation on one element of a charged crime?

Patton argues that the trial court erred by accepting his stipulation to an element of criminal possession of a firearm. Patton contends that the trial court needed to obtain a knowing and voluntary waiver of his right to a jury trial before he stipulated to being a convicted felon prohibited from possessing a firearm. The State argues that the trial court did in fact inform Patton of his jury trial right before Patton waived his right.

"The Sixth Amendment to the United States Constitution and Sections 5 and 10 of the Kansas Constitution Bill of Rights guarantee a criminal defendant the right to a jury trial." *State v. Redick*, 307 Kan. 797, 803, 414 P.3d 1207 (2018). The right to a jury trial includes a right to "'a jury determination that [the defendant] is guilty of every element of the crime with which [the defendant] is charged, beyond a reasonable doubt.'" *State v. Johnson*, 310 Kan. 909, 918, 453 P.3d 281 (2019) (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 476-77, 120 S. Ct. 2348, 147 L. Ed. 2d 435 [2000]).

When a trial court fails to obtain a constitutionally sufficient jury trial waiver before a defendant stipulates to an element of a charged crime, Kansas appellate courts review under the constitutional harmless error standard. *State v. Bentley*, 317 Kan. 222, Syl. ¶ 2, 526 P.3d 1060 (2023). Constitutional errors are harmless when the party benefitting from the error shows beyond a reasonable doubt that the error did not affect the trial's outcome in light of the entire record, that is, when there is no reasonable possibility that the error contributed to the verdict. *State v. Corey*, 304 Kan. 721, 731-32, 374 P.3d 654 (2016).

Patton notes that he stipulated to an element of criminal possession of a firearm, with citations to the record. The State argues that Patton's citations omit the section of the trial transcript where the trial court engaged in extensive conversation with Patton before getting a valid waiver. The trial court had the following exchange with Patton, his counsel, and the State:

"THE COURT: All right. And you've had sufficient opportunity to discuss that stipulation with him. Is that a fair statement?

"[Defense Counsel]: It is, Your Honor.

"THE COURT: All right. Mr. Patton, do you feel—do you understand what is happening? I'm not sure what you are doing but you need to be focused up here.

"[Patton]: Yes, I am.

"THE COURT: You can remove your mask. Do you understand that it has been represented that you intend to stipulate that you were a convicted felon for purposes of Count 5, which would relieve the State of the obligation of proving that fact. Do you understand that?

"[Patton]: Are you saying—yes, that's fine, sorry. That I just wanted to make sure that you wasn't saying I was admitting Count 5 on this here, but, yes, that I was a convicted felon before.

"THE COURT: [Defense counsel] should have visited with you.

"[Patton]: Yes.

"[Defense Counsel]: I didn't say you would admit to anything. I said you are admitting that you are a felon and that you were convicted at that time.

"[Patton]: I get it, yes.

"[Defense Counsel]: I apologize, that's—

"THE COURT: One at a time to speak. Because again, it makes it difficult on [the court reporter] to take a record.

"[Patton]: Yes, ma'am, I understand.

"THE COURT: All right. I'm not saying that you are admitting you committed Count 5, but part of the burden for the State to prove beyond a reasonable doubt would be that they would have to establish that you are—were previously a convicted felon, and they have proposed an exhibit for that purpose, I believe it was—

"[The State]: It is [State's Exhibit] 14, Judge.

"THE COURT: Thank you. Certified sentencing journal for Case Number 13CR107P. Have you had the opportunity to visit with [defense counsel] about this stipulation and the impact it will have on Count 5?

"[Patton]: Yes, ma'am.

"THE COURT: All right. Do you have any questions for [defense counsel] or the Court?

"[Defense Counsel]: Yes, Your Honor.

"[Patton]: No, ma'am, I don't.

"[Defense Counsel]: Your Honor.

"[Patton]: Yes, Your Honor. No, I don't.

"THE COURT: All right. So is this your—you understand what you are doing?

"[Patton]: Yes, Your Honor.

"THE COURT: This is your free and voluntary act?

"[Patton]: Yes, Your Honor.

"THE COURT: And what I mean by that is no one is forcing you to stipulate that you were previously a convicted felon?

"[Patton]: Yes, Your Honor, I understand.

"THE COURT: All right. Pursuant to case law and the direction derived from that case law—anything else you wish to put on the record, [defense counsel], before I—

"[Defense Counsel]: No, Your Honor.

"THE COURT: The Court reviewed case law last night. I think the direction is that the—once the defendant offers a stipulation, the Court accepts the same, that he's a convicted felon and the State is relieved of the obligation of proving it, to the jury beyond a reasonable doubt. It will just be a stipulation. The Court had hoped that that would be in written form, but the Court will just direct the jury that that is—that they will find that he is a convicted felon based upon a stipulation, a prior stipulation.

"And then the State can submit Exhibit 14, it just won't go to the jury because they won't know the offense, they will just know that he's a convicted felon.

"[The State]: The issue I have, Judge, is in the PIK instructions they have to know what his underlying charge was.

"THE COURT: Right. And if the State had done research last night, you would see that the case law indicates that that just now becomes that he's a convicted felon and he stipulated so it is not required.

"And I understand the State's position is the same argument, and it is in the dissent of the opinion, *State* [*v.*] *Lee*[, 266 Kan. 804, 977 P.2d 263 (1999)]. I'm familiar with it, read over it. So unless somebody else wants to state something, this is how we are proceeding. The instruction will simply be altered to read that by stipulation Mr. Patton is a convicted felon. It will not say for what offense. That part of the prong the State will not have to prove.

"[The State]: Okay.

"THE COURT: Which is what the stipulation would cover and it should have been brought up at pretrial.

"Anything further?

"[The State]: No, Your Honor.

"[Defense Counsel]: None from me, Your Honor, thank you.

"THE COURT: All right. We will bring the jury in. Any other matters, I guess, before we do?

"[The State]: No, Your Honor.

"[Defense Counsel]: No, Your Honor."

The State acknowledged in its brief that our Supreme Court in *Johnson*, 310 Kan. at 918-19, held that "when a defendant stipulates to an element of a crime, the defendant has effectively given up his or her right to a jury trial on that element" as a result. A trial court is required to obtain a valid waiver of the defendant's right to a jury trial. 310 Kan. at 919. Although the State contends that *Johnson* was wrongly decided, it acknowledges that we are bound by Supreme Court precedent. On the other hand, Patton maintains that the trial court erred when it failed to obtain a waiver of his right to a jury trial with respect to his stipulation.

Before defendants waive the right to have a jury decide their guilt, a court must first obtain a constitutionally sufficient waiver. In *Bentley*, our Supreme Court declared: "A waiver is sufficient only if the court advises the defendant of their right to a jury trial, and the defendant then personally waives that right in writing or in open court on the record." 317 Kan. at 230.

The State correctly concedes that the trial judge did not tell Patton that he had a "'right to a jury trial'" during her exchange with him and his counsel. Thus, the trial court failed to obtain a constitutionally sufficient waiver before Patton stipulated to being a convicted felon who was prohibited from possessing a firearm.

Although the trial court erred in accepting Patton's waiver, our Supreme Court determined that any such error was harmless in *Bentley*, 317 Kan. at 236. In *Bentley*, a jury convicted Cory Wayne Bentley of two counts of possessing firearms by a felon and other charges. On appeal, this court reversed the firearms convictions because the trial court failed to obtain a jury trial waiver of the stipulated-to element before accepting the stipulation. On review, our Supreme Court reversed this court's decision, holding that any error related to the jury trial waiver was harmless error. The *Bentley* court reviewed whether there was a reasonable possibility that the failure to inform Bentley of his right to jury trial led to his decision to enter the stipulation. There was no suggestion that Bentley meant to defend his case based on the stipulated element—that he was a convicted felon. 317 Kan. at 236.

In the same way, Patton was convicted of the same crime that was at issue in *Bentley*. Also, Patton's previous convictions were easy to verify—and apparently were verified in State's Exhibit 14—and Patton would not have had a colorable defense to this element of a felon in possession of a firearm. Thus, even though the trial court's colloquy with Patton and his counsel was inadequate—because it failed to advise Patton of his constitutional right to a jury trial on the element involving his felon in possession of a firearm charge—this inadequacy was harmless.

For example, Patton made his waiver at the beginning of the second day of trial. And the trial court explained the stipulation process to Patton: "[O]nce the defendant offers a stipulation, the Court accepts the same, that he's a convicted felon and the State is relieved of the obligation of proving it, to the jury beyond a reasonable doubt." Here, the

trial court statement to Patton explained that his stipulation would relieve the State's burden to prove to the jury beyond a reasonable doubt that he was a convicted felon. During his exchange with the trial judge, Patton freely acknowledged that he previously had been convicted as a felon. He further acknowledged that he wanted to stipulate that he was a convicted felon:

> "THE COURT: You can remove your mask. Do you understand that it has been represented that you intend to stipulate that you were a convicted felon for purposes of Count 5, which would relieve the State of the obligation of proving that fact. Do you understand that?
>
> "[Patton]: Are you saying—yes, that's fine, sorry. That I just wanted to make sure that you wasn't saying I was admitting Count 5 on this here, but, yes, that I was a convicted felon before.
>
> "THE COURT: [Defense counsel] should have visited with you.
>
> "[Patton]: Yes.
>
> "[Defense Counsel]: I didn't say you would admit to anything. I said you are admitting that you are a felon and that you were convicted at that time.
>
> "[Patton]: I get it, yes."

Thus, there was no indication that Patton wanted to defend his case based on the stipulated element—that he was a convicted felon. See *Bentley*, 317 Kan. at 236.

We conclude that beyond a reasonable doubt the error did not affect Patton's decision to enter the stipulation and, so, the error did not affect the trial court's outcome.

For the preceding reasons, we affirm.