No. 125,695

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

DIANNA L. CLINGERMAN,
Appellant.

SYLLABUS BY THE COURT

1.

The contemporaneous objection rule under K.S.A. 60-404 requires a timely and a specific objection to the admission of evidence for the question of admissibility to be considered on appeal. When the rule is properly applied, counsel gives the trial judge the opportunity to control the trial without the admission of tainted evidence, and thus avoid a possible reversal and a new trial.

2.

K.S.A. 60-404 directs that a verdict shall not be set aside, nor the judgment reversed, without a timely objection.

3.

When a defendant does not make a timely and specific objection to the admission of evidence at trial, the defendant has failed to preserve that issue on appeal.

4.

Under the facts of this case, the use of a Zoom format of the trial did not violate the defendant's right to a fair trial.

Appeal from Butler District Court; PHYLLIS K. WEBSTER, magistrate judge. Opinion filed September 15, 2023. Affirmed.

Chris J. Pate, of Pate & Paugh, LLC, of Wichita, for appellant.

Brett Sweeney, assistant county attorney, and *Kris W. Kobach*, attorney general, for appellee.

Before ARNOLD-BURGER, C.J., GREEN and HILL, JJ.

GREEN, J.: Dianna L. Clingerman appeals the district court's denial of her motion for a new trial. She argues that one witness failed to audibly acknowledge the oath and, thus, his testimony was unsworn. Because Clingerman failed to make a timely and specific objection at trial to the disputed testimony, she has failed to preserve this issue on appeal. Thus, we affirm.

FACTS

The State charged Clingerman with disorderly conduct, in violation of K.S.A. 2020 Supp. 21-6203(a)(3). Clingerman pleaded not guilty, and the case proceeded to a bench trial via a Zoom format before a magistrate judge.

The State's first witness at trial was Officer Peyton Heidebrecht of the Rose Hill Police Department. The trial court swore in Heidebrecht before he testified, but audio difficulties disrupted the process. Although the trial court administered the oath, Heidebrecht's affirmation was not audible. The trial court noted that it did not hear Heidebrecht's response but did not readminister the oath. Clingerman did not object.

After Heidebrecht's testimony, the trial court received testimony from Kelly McReynolds, a neighbor. McReynolds explained that the neighborhood had a block party, but there was drinking involved. When another man punched Clingerman's

husband, Clingerman became "pretty heated" about the fight and started yelling at the neighborhood. McReynolds testified that Clingerman said that she had guns in the basement of her home and that she knew how to use them. McReynolds estimated that Clingerman yelled for 30 minutes to an hour. Alycia McReynolds testified that she was afraid to go home to her sleeping daughter because it required her to walk past Clingerman, who was shouting threats to shoot people. Another neighbor, Travis Cagle, testified that he was walking with a small group of people and Clingerman yelled at them that she had "a houseful of guns" and she would "just shoot us in the head."

Based on all the evidence, the trial court found Clingerman guilty of disorderly conduct, sentencing her to 6 months of non-reporting probation with an underlying jail sentence of 30 days and a $50 fine.

Clingerman moved for a new trial, claiming she was deprived of her right to a fair trial. She argued that Heidebrecht's testimony was unsworn since he never responded audibly to the oath. The trial court denied the motion, finding that Heidebrecht clearly accepted the oath despite his response being inaudible. The trial court additionally held that because Heidebrecht was the reporting officer who took witness statements, he would not have been the person who witnessed Clingerman's alleged disorderly conduct and fighting words. Thus, the magistrate judge ruled that testimony of the other witnesses was sufficient to convince her of Clingerman's guilt, even if the trial court disregarded Heidebrecht's testimony as unsworn.

Clingerman timely appeals.

ANALYSIS

Did Clingerman fail to preserve her claim related to unsworn testimony?

Clingerman argues that the trial court erred in considering Heidebrecht's unsworn testimony and in denying her motion for a new trial. The State argues that Clingerman's conviction cannot be set aside because she did not make a timely and specific objection to the evidence at trial.

K.S.A. 60-404 generally precludes an appellate court from reviewing an evidentiary challenge absent a timely and specific objection made on the record. *State v. Ballou*, 310 Kan. 591, 613-14, 448 P.3d 479 (2019) (discussing K.S.A. 60-404 in detail).

As a procedural bar to appellate review, K.S.A. 60-404 requires a party to make a contemporaneous objection to issues involving the erroneous admission or exclusion of evidence. *State v. Hillard*, 313 Kan. 830, 839, 491 P.3d 1223 (2021); see also *State v. Gaona*, 293 Kan. 930, 956, 270 P.3d 1165 (2012) (characterizing contemporaneous-objection rule as a "prudential rather than jurisdictional obstacle to appellate review"). Kansas appellate courts have, on occasion, refused to strictly apply the contemporaneous-objection rule in some contexts upon finding the underlying purpose for the rule has been satisfied. See, e.g., *State v. Hart*, 297 Kan. 494, 510-11, 301 P.3d 1279 (2013); *State v. Spagnola*, 295 Kan. 1098, 1103, 289 P.3d 68 (2012); *State v. Breedlove*, 295 Kan. 481, 490-91, 286 P.3d 1123 (2012).

Clingerman argues that the admission of unsworn testimony deprived her of her constitutional right to confront the witnesses against her. And she argues that the trial court failed to follow K.S.A. 60-418, requiring every witness to "express his or her purpose to testify by the oath or affirmation required by law" before testifying. She

argues that the admission of the unsworn testimony tainted the trial court's view of the evidence.

Clingerman correctly notes that conducting trials by Zoom videoconferencing is a relatively new phenomenon and, therefore, there is no binding or persuasive precedent on this precise issue. And Clingerman further argues that "[w]ith the advent of trials by Zoom, and other electronic means, the issue we are faced with in this case has the likelihood of occurring again."

In *A.I.S. v. N.A.R.*, No. A-1972-21, 2023 WL 2959841 (N.J. App. 2023) (unpublished opinion), a New Jersey court simply neglected to swear in the plaintiff in a final restraining order hearing on the sixth Zoom appearance. The appellate court upheld the final restraining order, noting that defense counsel did not object and in fact cross-examined the unsworn witness. Also, both plaintiff and defendant had been sworn in and admonished to tell the truth at the five previous hearings. 2023 WL 2959841, at *4. Conversely, in *Grimes v. Commonwealth*, No. 2021-CA-1519-MR, 2023 WL 2542273 (Ky. App. 2023) (unpublished opinion), a Kentucky court conducted a probation violation hearing over Zoom and asked the probation officer what violations were at issue without administering an oath. The appellate court reversed and remanded, holding that the probation officer's verbal list of Grimes' violations was unsworn testimony and Grimes had no opportunity to cross-examine. 2023 WL 2542273, at *4-5. But seemingly no case from any federal, state, or other jurisdiction responds precisely to the question of an oath administered with no audible response.

Clingerman insists that a new trial is the remedy for Heidebrecht's inaudible response to the oath. The first flaw in her argument is that she confuses ontology (what is) with epistemology (knowledge of what is). See Engle, Ontology, Epistemology, Axiology: Bases for a Comprehensive Theory of Law, 8 Appalachian J.L. 103, 105 n.9-10 (2008). Four possibilities exist. Either Heidebrecht affirmed the oath or he did not,

regardless of whether it was picked up by a microphone (the ontological question). Then, an observer either knows or does not know the truth about Heidebrecht's affirmation (the epistemological question). On appeal, Clingerman consistently refers to Heidebrecht's testimony as unsworn, but Heidebrecht may have affirmed the oath even if only Heidebrecht knows it.

At the motion for new trial hearing, the magistrate judge answered the ontological question of whether Heidebrecht affirmed the oath. The magistrate judge ruled as follows:

> "[T]his motion raises concerns that the . . . answer to the sworn statement by the Court was not audible by the witness. And there was some trouble getting the witness' volume to project for his testimony. It was a deputy involved in the case.
>
> "But the Court had no doubt that it was a sworn statement. That the Court did receive his response—even if it was not audible on the video. And the Court made the comment that she needed to—that she couldn't hear him and that he needed to be audible. But—certainly, this Court can—and any . . . person—can tell the difference between an 'I do', or 'I swear' versus 'I don't' and so forth."

The magistrate judge's statements are not entirely clear about how she received Heidebrecht's response. It may have been through Heidebrecht nodding, through lip-reading, or through hearing at least some audio even if it was too low or distorted to make it into the transcript. But the record gives at least some evidence that Heidebrecht did in fact swear to tell the truth.

But if Heidebrecht affirmed his oath, that affirmation does not directly appear in the trial transcript. Whether a tree falls in a forest or a witness affirms his oath, it may be impossible for a potential observer to know that the event occurred. The magistrate judge provided her positive affirmation on the ontological question: that Heidebrecht's swore oath exists. To the extent there is epistemological doubt about how one can know the

existence of Heidebrecht's sworn oath, the statutory burden falls on Clingerman to erase that doubt. Under K.S.A. 60-404, the burden of ensuring that the testimony is properly admitted falls on Clingerman because she is the party complaining of error.

The transcript shows that Clingerman did not timely object to the admission of testimony, despite the defect in administering the oath.

> "THE COURT: Do you swear the testimony you're about to give shall be the truth, the whole truth, and nothing but the truth, so help you God? (No audible response from Witness Heidebrecht.)
>
> "DEFENDANT CLINGERMAN: Yes, ma'am.
>
> "THE COURT: Oh—officer—I'm addressing the officer. Thank you.
>
> "DEFENDANT CLINGERMAN: Oh.
>
> "THE COURT: I appreciate your cooperation. That's okay.
>
> "But Officer, I didn't hear your response. (No audible response.) We're gonna have to get your volume straightened out, I can't hear you. Not yet. I had that problem earlier today myself. I had to get assistance to help me out.
>
> "Missy, you didn't happen to notice what Mr. Keen did to get that volume started; did you?
>
> . . . .
>
> "THE COURT: Okay.
>
> "So Ms.—Officer Heidebrecht, do you see your microphone icon?
>
> "WITNESS HEIDEBRECHT: Yes. Does this sound better?
>
> "THE COURT: That's wonderful. Okay.
>
> "Please proceed, Mr. Sweeney.
>
> "MR. SWEENEY: Thank you, Your Honor.
>
> . . . .
>
> "Q. Would you please state your name for the Court please, sir.
>
> "A. Peyton Heidebrecht."

In other words, the transcript clearly shows that everyone present noticed the audio difficulties as they happened. The trial judge even declared, "I didn't hear your

response." But Heidebrecht began to testify, and Clingerman did not object to the testimony. Furthermore, Clingerman cross-examined Heidebrecht. In *A.I.S.*, the appellate court upheld the final restraining order because the defendant cross-examined the witness. 2023 WL 2959841, at *4. But in *Grimes*, the appellate court remanded because the probationer had no opportunity to cross-examine the probation officer at the revocation hearing. 2023 WL 2542273, at *4-5. Although Clingerman's ability to cross-examine Heidebrecht is not dispositive, it does undermine Clingerman's claim that she was unable to confront the witnesses against her.

K.S.A. 60-404 states:

> "A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless there appears of record objection to the evidence timely interposed and so stated as to make clear the specific ground of objection."

Clingerman's argument fails because she did not meet the K.S.A. 60-404 timely objection rule. This contemporaneous objection rule "requires timely and specific objection to the admission of evidence in order for the question of admissibility to be considered on appeal." *Baker v. State*, 204 Kan. 607, 611, 464 P.2d 212 (1970). When the rule is properly applied, counsel gives the trial judge the opportunity to control the trial without the admission of tainted evidence, and thus avoid a possible reversal and a new trial. 204 Kan. at 611.

K.S.A. 60-404 directs that the verdict "shall not" be set aside, nor the judgment reversed, without a timely objection.

Also, it is a well-settled rule that a timely and specific objection to the admission of evidence at trial must be made to preserve that issue on appeal. *State v. Sims*, 265 Kan.

166, 174-75, 960 P.2d 1271 (1998); see *State v. Horton*, 283 Kan. 44, 63, 151 P.3d 9 (2007). Here, Clingerman did not make a timely and specific objection to the admission of Heidebrecht's alleged unsworn testimony at trial. Thus, she has failed to preserve this issue on appeal.

Finally, we see no irregularities with the Zoom format of the trial that would have violated Clingerman's right to a fair trial. See *In re C.T.*, 61 Kan. App. 2d 218, 231-32, 501 P.3d 899 (2021) ("[T]he district court did not deprive Mother of due process by holding the termination of parental rights hearing through Zoom.").

If the trial court erred, was the error harmless?

Clingerman argues that the inclusion of Heidebrecht's unsworn testimony tainted the trial court's view of the evidence during the bench trial. The State argues that the evidence from the other witnesses was more important than Heidebrecht's testimony and was overwhelming, making any error harmless.

The erroneous admission or exclusion of evidence is subject to review for harmless error under K.S.A. 2022 Supp. 60-261. *State v. Lowery*, 308 Kan. 1183, 1235-36, 427 P.3d 865 (2018). Nevertheless, if the error implicates a constitutional right, the effect of that error must be assessed under the constitutional harmless error standard. *State v. Thornton*, 312 Kan. 829, 832, 481 P.3d 1212 (2021) (applying constitutional harmless error standard to evidence obtained in violation of Fourth Amendment to the United States Constitution).

In *State v. Ward*, 292 Kan. 541, 565, 256 P.3d 801 (2011), our Supreme Court held that to find an error harmless under K.S.A. 60-261, K.S.A. 60-2105, and the United States Constitution, a Kansas court must be able to declare the error "did not affect a party's substantial rights, meaning it will not or did not affect the trial's outcome." Under

either test, the party benefiting from the error bears the burden of proving harmlessness. See *State v. McCullough*, 293 Kan. 970, 983, 270 P.3d 1142 (2012) (nonconstitutional error); *Ward*, 292 Kan. at 568-69 (constitutional error). The level of certainty by which a court must be convinced depends upon whether the error implicates a federal constitutional right. 292 Kan. at 565.

When an error infringes upon a party's federal constitutional right, a court will declare a constitutional error harmless only when the party benefiting from the error persuades the court "beyond a reasonable doubt that the error complained of will not or did not affect the outcome of the trial in light of the entire record, *i.e.*, proves there is no reasonable possibility that the error affected the verdict." *Ward*, 292 Kan. at 569 (citing *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 [1967]).

Clingerman argues that Heidebrecht's testimony was unsworn, and it unfairly bolstered the other witnesses' testimony. The obvious weakness of Clingerman's argument is demonstrated by the State's counter argument. There, the State argues that the testimony of the other witnesses did not need bolstering. And it argues that the neighbors' testimony was overwhelming evidence that would independently support Clingerman's conviction for disorderly conduct.

In denying Clingerman's new trial motion, the magistrate judge stated the following:

> "It is this Court's opinion that, although the officer[']s affirmation was not heard on the recording, that he did clearly accept the oath, or he would not have been allowed to proceed. But even if the Court were to find that his oath was not sufficient, and that his testimony cannot be relied upon, there is still ample evidence from the other witnesses that this crime was committed, beyond a reasonable doubt.
>
> "There were the witnesses that were the first-hand witnesses in this case that testified, clearly, under oath, to the charge of disorderly conduct/fighting words. The

> officer would not have been the one to hear those words in the first place. He was simply reporting what was told to him by the other witnesses at the scene. And those witnesses all confirmed, under oath testimony, that this defendant did behave in a disorderly fashion at the neighborhood block party.
>
> "So I am going to deny the motion."

In most cases, appellate courts reviewing for harmless error do not have the benefit of the fact-finder explicitly outlining which evidence was more persuasive and which evidence was less useful in arriving at a verdict. Clingerman cites *Ward* in support of her claim that the State had failed to satisfy the constitutional harmless error requirement. In *Ward*, Yvonne Ward claimed that she was prejudiced because two witnesses appeared in jail clothing at trial and other witnesses identified them by their orange jumpsuits. The *Ward* court reviewed the evidence against Ward and was convinced beyond a reasonable doubt that the error of identifying two witnesses by their jail clothing did not affect the outcome of the trial. 292 Kan. at 579.

But the *Ward* court did not have the benefit of on-the-record statements from the fact-finder, the jury in that case, saying that the error did not affect its outcome and that the verdict would have been the same without the error. Most harmless error review does not have the benefit of such explicit statements from the finder of facts. See, e.g., *State v. Smith*, 317 Kan. 130, 137-38, 526 P.3d 1047 (2023); *State v. Brown*, 316 Kan. 154, 163, 513 P.3d 1207 (2022). Here, the record provides the unusual benefit of having the fact-finder, the magistrate judge, explicitly state on the record the rationale behind the conviction and which evidence was most relevant to her factual conclusion. We know directly from the record that Heidebrecht's testimony—whether erroneously admitted or not—did not affect the verdict. Because there is no reasonable possibility that the error, if any, affected the verdict, we conclude that this is an independent alternative ground for affirming this decision.

Affirmed.