2010 WL 5176274 (Kan.App.) (Appellate Brief)
Court of Appeals of Kansas.

STATE OF KANSAS, Plaintiff / Appellee,
v.
Joni Parsons ANDERSON, Defendant / Appellant.

No. 09-103484-A.
November 22, 2010.

Appeal from the Distritct Court of Saline County The Honorable Patrick Thompson, Judge, District Court Case No. 08-CR-955

Brief of Appellee

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*1 *Nature of the Case*

A jury convicted the defendant of one count of mistreatment of a dependent adult in violation of K.S.A. 21-3437(a)(2). She now appeals her conviction and sentence arguing that the evidence was insufficient, that evidence was admitted in violation of K.S.A. 60-455, that a jury instruction omission was clear error, that the State committed prosecutorial misconduct, and that her sentence violates the Sixth Amendment.

Statement of the Issues

I. Sufficient evidence supported the defendant's conviction because she did not have equal ownership of her mother's bank account, and even if she did, she still took unfair advantage of her mother's financial resources.

***2 II. Sufficient evidence supported each of the alternative means for committing mistreatment of a dependent adult.**

III. It was not clear error for the district court to decide not to give a limiting instruction after a brief mention of the defendant's unrelated assault charge.

IV. Failing to instruct the jury that it was not to be concerned with the disposition of the case, only with determining guilt, was not error.

V. The prosecutor did not commit prosecutorial misconduct when he explained that the victim was dead and asked the jury to return a guilty verdict.

VI. Using the defendant's criminal history to increase her sentence did not violate the Sixth Amendment.

Statement of Facts

In 2004, the defendant's mother was experiencing both physical and mental decline. The defendant, along with her two brothers, decided that the defendant should be made her mother's Durable Power of Attorney for healthcare decisions. (R. VIII, 346.) Also at this time the family decided that the defendant should be added to her mother's bank account to assist with her finances. (R. VIII, 346.)

In 2007, the defendant's mother had been a resident of several different nursing home facilities and had been in and out of the hospital for various complications with her health. (R. VIII, 347-349.) One of these facilities was Good Samaritan Nursing Home. (R. VII, 170.) Dawnie Plunkett, formerly the office manager for the facility, testified that she contacted the defendant by phone in August of 2007 to inquire into several past due payments owed to the facility for her mother's care. (R. VII, 169-172.) According to Mrs. Plunkett, the defendant told her several times during this conversation “to please not send her to jail.” (R. VII, 169-172.) Mrs. Plunkett told the defendant that if this past due amount was not paid her mother “would have to look for other placement.” (R. VII, ***3** 173.)

At trial, during opening remarks the prosecutor stated “You won't hear from the victim in this case. Sadly, she is deceased. Miss Hepford and I represent the State of Kansas, and we're bringing this action on her behalf. She has no voice.” (R. VII, 151-152.) Ending his opening remarks, the prosecutor stated “We're asking you to find her guilty of mistreatment of a dependant adult, Jo Jean Johnson, may she rest in peace.” (R. VII, 152.)

The State offered testimony of Megan Brennan, an auditor with the Kansas Attorney General's Office. Brennan had conducted an inquisition and review of the bank account in question. (R. VIII, 197.) Brennan testified that her analysis revealed several

transactions that were not likely to have been for the benefit of Jo Jean Johnson. (R. VII, 2008.) Those transactions included one cash withdrawal for $3,000.00 and three for $1,000.00. (R. III 130.)

The State next called Special Agent Danyle Smith to testify. Agent Smith stated that on May 22, 2008 she conducted an interview of the defendant in Olathe, Kansas. (R. VII, 241.) During direct examination, Agent Smith was asked a general question about the defendant's statement, "I just fell apart." (R. VII, 243.) Agent Smith clarified that the defendant told her that in the past two years she had lost her mom, lost an aunt, she had lost her job, and she had assault charges pressed against her and now this was coming up. (R. VII, 244.) Agent Smith also testified that during this interview the defendant admitted that her family had agreed to add her to the signature card of her mother's bank account to take care of mother's **finances**. (R. VII, 255.) Additionally, Agent Smith ***4** testified that the defendant stated "she did take the money from her mom," and knew that she should not have. (R. VII, 254, R. VIII, 359.) Agent Smith testified that at no time during the interview did the defendant state that the funds in the account were both hers and her mother's. (R. VII, 256.)

At the jury instruction conference the defendant asked the district court to require the State to elect the means by which it alleged she had taken unfair advantage of a dependant adult. (R. VIII, 377.) The defendant argued that no evidence had been presented to support undue influence, harassment, or coercion. (R. VIII, 383). The district court struck coercion, harassment and duress from the instruction. (R. VIII, 383.) However, the district court ruled that the jury could find undue influence. (R. VIII, 383). During the State's closing remarks, the prosecutor asked that the jury return "the right verdict, a verdict of guilty." (R. VIII, 417.)

The jury found the defendant guilty of one count of mistreatment of a dependant adult, and the district court ordered her to serve twelve months probation with an underlying prison sentence of twelve months. (R. IX, 14-15.)

Arguments and Authorities

I. Sufficient evidence supported the defendant's conviction because she did not have equal ownership of her mother's bank account, and even if she did, she still took unfair advantage of her mother's financial resources.

Standard of Review

When the sufficiency of evidence to sustain a conviction is challenged, appellate courts are to "view the evidence in a light most favorable to the prosecution to determine whether a rational factfinder could have found the defendant guilty beyond a reasonable ***5** doubt" *State v. Trussell*, 289 Kan. 499, 503, 213 P.3d 1052 (2009) (citing *State v. Vasquez*, 287 Kan. 40, 59, 194 P.3d 563 (2008), and *State v. Saleem*, 267 Kan. 100, 104, 977 P.2d 21 (1999)). An appellate court is not to reweigh the evidence or reassess witness credibility. *Trussell*, 289 Kan. at 503 (citing *Ives v. McGannon*, 37 Kan.App.2d 108, 124-125, 149 P.3d 880 (2007)).

Argument

The defendant argues that the State presented insufficient evidence that she took unfair advantage of the **financial** resources of her mother. In 2004, Jo Jean Johnson's health was in decline and she required assistance managing her healthcare and **financial** needs. The defendant and her two siblings decided to grant the defendant a healthcare power of attorney so the defendant could assist in mother's care. Additionally, to help with her mother's **financial** matters, the family added the defendant's name to the signature card of her mother's bank account. The defendant argues on appeal that the addition to the signature card created a joint tenancy bank account and, as a result, the defendant and her mother owned the funds in the account equally.

To support this claim, the defendant relies solely on *Walnut Valley State Bank v. Stovall*, 223 Kan. 459, 460, 574 P.2d 1382 (1978). In *Walnut Valley State Bank*, the Kansas Supreme Court considered whether adding someone's name to the signature card on a bank account had the effect of creating a joint tenancy in the account. The court held that a "presumption of equal ownership should prevail in the absence of proof of ownership in some other proportion. Anyone attacking equal ownership

should assume the burden of proof." *Id*. at 463. However, key to the court's conclusion that the account ***6** was held jointly was the fact that Stovall had not only written checks from the account but had also contributed to the account in the form of several deposits. *Id*. at 462-463 (citing *Murphy v. Michigan Trust Co.*, 221 Mich. 243, 190 N.W. 698, 699 (1922)). Because Stovall had actually contributed to the account, she was unable to overcome the presumption that adding her name to the account created a joint tenancy.

Applying the precedent set forth in *Walnut Valley State Bank* to the present case, it is clear the State successfully rebutted the presumption that the account was owned equally by the defendant and her mother. During the trial, the State introduced the records of the account of Jo Jean Johnson, to which the defendant's name was added. (R. VII, 184.) For trial purposes, the date of these records began in March 2006 and ended October 2007. During the eighteen months represented by these records, the defendant made no deposits into the account. Supplementing the bank account records was trial testimony of the State's auditor, Megan Brennan, who verified that her analysis of the account records confirmed that the defendant had made no deposits into the account. (R. VII, 206, 214.) In fact, each month the account received only two deposits: Jo Jean Johnson's Social Security Income (SSI) check and her Kansas Public Employees Retirement System (KPERS) check. The defendant's reliance on *Walnut Valley State Bank* as authority to prove her equal ownership of the account is further discredited through her own testimony stating she never contributed to this account by depositing funds. (R. VII, 358.) This simply was not a jointly owned bank account. The defendant's name was added to the account for the sole purpose of managing her mother's **finances** and paying her bills, and that the defendant never contributed to the ***7** account underscores that her authority over the funds was not co-equal with her mother's.

Furthermore, it was not until trial that the defendant claimed a right to ownership of the account. If the defendant thought that she was entitled to "complete power of disposal" over the funds in the account, why would she expect her use of those funds to have legal repercussions? SRS employee Dawnie Plunkett testified that when she contacted the defendant regarding outstanding payments due to the nursing home caring for the defendant's mother, the first thing the defendant stated was "Please don't send me to jail. Please don't send me to jail." (R. VII, 169-172.) Special Agent Danyle Smith testified that at the outset of her interview of the defendant she stated "I took the money. I knew I shouldn't have." (R. VII, 254; VIII, 359.) The defendant went on to state that, as an agreement between her and the rest of her family, she was added to the signature card of the account to take of her mother's **finances**. (R. VII, 255.) Additionally, Agent Smith testified that at no time during the interview did the defendant state that the funds in the account were both hers and her mother's or that she had a right to use them for herself. (R. VII, 256.) These comments make clear that the defendant knew that the single purpose for which she was added to her mother's bank account and was to assist with the management of her **finances** as her mental capacity and health declined. It was not until after her mother's mental capacity had diminished and the defendant fell into economic and emotional hardship that she began using the funds in the account.

If this Court should find that the addition of the defendant to the signature card of the account did entitle her to unfettered use of the funds in the account, the evidence presented at trial still supports her conviction for mistreatment of a dependant adult. ***8** During a portion of the eighteen month time period depicted in the admitted bank records, the defendant was employed and had **finances** of her own, yet chose to use her mother's money instead. (R. VII, 370.) If both the defendant and her mother owned the account as joint tenants, then her mother's ownership interest in funds of the account were equal the defendant's. By depleting those funds, the defendant knowingly took unfair advantage of the **financial** resources of her mother, a dependant adult, for her own benefit. She knew that when she withdrew those funds, she was taking them away from her mother and putting her mother's **finances** in jeopardy. That is just the type of conduct that K.S.A. 21-3437 is designed to address.

In the present case, the defendant's theory that she was a joint owner of the account at issue and therefore had complete power of disposal over the funds in the account cannot be sustained. Through testimony and evidence entered at trial the State successfully rebutted the defendant's presumption that the account was owned equally between her and her mother. Alternatively, if the defendant was an equal owner of the account, the State has still presented adequate evidence at trial for a rational factfinder to convict the defendant of mistreatment of a dependant adult.

II. Sufficient evidence supported each of the alternative means for committing mistreatment of a dependent adult.

Standard of Review

In an alternative means case, a single offense may be committed in different ways. In *State v. Wright*, 290 Kan. 194, P.3d 1159 (2010), the Kansas Supreme Court held that an alternative means question should be treated as a sufficiency of evidence issue. The jury must be unanimous as to guilt for the single crime charged, but not as to ***9** the particular means by which the crime was committed. *State v. Timley*, 255 Kan. 286, 289, 875 P.2d 242 (1994). A conviction will be upheld in an alternative means case so long as substantial evidence supports each of the alternative means. *State v. Stevens*, 285 Kan. 307, 313, 172 P.3d 570 (2007). "Substantial evidence is evidence that has both relevance and substance and provides a substantial basis of fact from which the issues can reasonably be determined." *State v. Walker*, 283 Kan. 587, 594, 153 P.3d 1257 (2007).

Argument

The defendant argues that the State presented insufficient evidence to support each of the alternative means by which the crime may have been committed. First, the defendant argues that the State failed to present any evidence that the defendant took unfair advantage of Johnson's **financial** resources through the use of undue influence. Second, the defendant argues that the State failed to present evidence that the defendant had taken unfair advantage of Johnson's **financial** resources for both her own personal or **financial** advantage.

As support for this argument, the Defendant cites the Dictionary.com definition of "influence." Relying on this definition, the Defendant contends that the State must have presented evidence that she took unfair advantage of her mother's **financial** resources by acting as a "compelling force" on her mother's "actions, behavior, opinions, etc." (Aplt.'s Br. 13.) The term 'undue influence' is not specifically defined in Kansas statutes or case law relating to **abuse** of a dependant adult.

Using the Dictionary.com definition as foundation, the defendant argues that the State presented no evidence that the Defendant compelled her mother to alter her actions ***10** or behavior or opinion regarding the disposal of the fluids in the account. However, there is no requirement that undue influence be through verbal or physical means. By spending the money in the account for her own personal or **financial** advantage, the defendant certainly exerted a "compelling force" on her mother's "actions." As a result, her mother was unable to pay for her nursing home expenses, prescriptions, and personal needs. But beyond that, the defendant unduly used her influence as her mother's daughter. In the probate context, the law has recognized that the parent and child relationship is one fraught with potential for undue influence. Dominic Campisi, *Joint Tenancy Accounts: An Un-Uniform Law*, Real Property, Probate and Trust Journal, Vol. 30, Issue 3, 399-442, 421 (1995). It goes without saying that there exists a trust between parent and child--or within a family--that does not extend to mere acquaintances. When an **elderly** parent puts her daughter in a position to manage her **finances**, she trusts the daughter to do the job not usually because she has some expertise with **financial** dealings, but simply because she believes her daughter to be worthy of that trust. But when Jo Jean Johnson gave the defendant the ability to withdraw money from her bank account, the defendant parlayed that mother-daughter influence into an opportunity to use the money for her own personal and **financial** benefit. The jury clearly could have found that the defendant used that undue influence as her mother's daughter to take unfair advantage of her **financial** resources.

The second insufficiency of evidence claim made by the defendant is that the State failed to present evidence that she took unfair advantage of Johnson's **financial** resources for both her personal and **financial** advantage. But the defendant testified that ***11** she used the funds in the account to make repairs on her home so she could sell it, and paid two homeless men to help her move. (R. VIII, 369.) There is no question that taking money from her mother's account was to the defendant's **financial** advantage, but in this case it was also to her personal advantage because she used it for personal expenses, such as improving her home so that she could sell it. While in some cases there may be some personal benefits to taking advantage of someone that would not be considered **financial** benefits, in this case the benefit that the defendant gained from her conduct was clearly both **financial** and personal. The jury could have easily relied on either option to convict the defendant.

III. It was not clear error for the district court to decide not to give a limiting instruction after a brief mention of the defendant's unrelated assault charge.

Standard of Review

Claims that admitted evidence violated K.S.A. 60-455 are reviewed on appeal using a bifurcated standard. Whether the evidence was relevant is reviewed for an **abuse** of discretion, while materiality is reviewed de novo. *State v. Reid*, 286 Kan. 494, 507-509, 186 P.3d 713 (2008). The district court's weighing of the probative value and prejudicial effect of the evidence is also reviewed for an **abuse** of discretion. *State v. Richmond*, 289 Kan. 419, 438, 212 P.3d 165 (2009) (citing *State v. Garcia*, 285 Kan. 1, 18, 169 P.3d 1069 (2007)). A court **abuses** its discretion only when its determination " 'is arbitrary, fanciful, or unreasonable.' " *Reed*, 282 Kan. at 280. Even if evidence was improperly admitted under K.S.A. 60-455, it may be harmless under K.S.A. 60-261 and not require reversal. *State v. Ventris*, 289 Kan. 314, 317, 212 P.3d 162 (2009).

Finally, the State agrees with the defendant that this Court reviews this particular ***12** claim for clear error because no objection to the lack of a limiting instruction was made below. *State v. Gunby*, 282 Kan. 39, 58-59, 144 P.3d 647 (2006). The failure to give an instruction is clearly erroneous " 'only if the reviewing court is firmly convinced there is a real possibility that the jury would have rendered a different verdict if the error had not occurred.' " *Id* (quoting *State v. Shirley*, 277 Kan. 659, 666, 89 P.3d 649 (2004)).

Argument

The State concedes that any evidence of the defendant's assault charge was inadmissible under K.S.A. 60-455 because it was not relevant to prove a material fact at issue. However, the inadvertent admission of the evidence was harmless error, and the failure to give a limiting instruction was not clear error. The fleeting mention of the defendant's assault charge was not nearly enough to affect the outcome or the defendant's substantial rights.

For the same reason the assault charge was inadmissible, it was also highly unlikely to have any significant affect on the jury. An assault charge that happened after the charged crime occurred simply has no bearing on whether the defendant mistreated her mother by taking her mother's money and spending it for herself. The jury is not going to blow a fleeting mention of an assault charge so out of proportion that it overrides its duty to determine the facts of the case based on the evidence presented. Numerous instructions and admonitions made that duty clear in this case as in all others, and these few words were not enough to take the jury's eyes off the ball.

Beyond that, an assault charge is not the kind of criminal incident that often inflames the passions of ordinary people, much less those of jurors sworn to put passion ***13** aside. While no insignificant matter, an assault charge can arise out of any number of situations that most people would not find shocking. If fact, once apprised of the legal definition of assault, many people might realize that they had assaulted others themselves, either as unruly children or immature adults. Unlike a reference to a child **abuse** charge, or a sexual **abuse** charge, an assault charge reference is not likely to convince a jury that the defendant is simply a bad person who deserves punishment.

Finally, there was ample evidence in this case that the defendant was not simply a bad person disposed to commit crimes. There was evidence that she felt true remorse for having taking her mother's money, that she had helped her mother often over the years and had a very close relationship with her. (R. VIII, 348.) Even if the jury had tilted toward unreasonably condemning the defendant based on the brief mention of her assault charge, this type of evidence showed that she was not simply a bad person.

Agent Smith's brief reference to the defendant's assault charge was just too insignificant to have any effect on the outcome of the trial or the defendant's substantial rights. A limiting instruction highlighting that reference may very well have drawn the jury's notice to the assault charge when it otherwise merited little attention. The inadvertent admission of the evidence was harmless, and the lack of a limiting instruction was not clear error.

IV. Failing to instruct the jury that it was not to be concerned with the disposition of the case, only with determining guilt, was not error.

Standard of Review

The State agrees that because no objection was made on this jury instruction claim below, this Court reviews for clear error and before reversing must be firmly ***14** convinced that there was a real possibility of a different verdict had the proposed instruction been given. *State v. Richardson*, 290 Kan. 176, 178, 224 P.3d 553 (2010).

Argument

The failure to instruct the jury according to PIK Crim.3d 51.10 has never been held to be error by this Court or the Kansas Supreme Court, and it was not error in this case. The Kansas Supreme Court has said that refusing to instruct a jury that sentencing and punishment are concerns of the court only was not error because "it would have served only to raise additional questions in the minds of the jury as to what the . . . punishment might be." *State v. Osburn*, 211 Kan. 248, 254, 505 P.2d 742 (1973). In *State v. Alexander*, 240 Kan. 273, 729 P.2d 1126 (1986), the defendant argued that by omitting the second sentence of PIK Crim.3d 51.10 concerning the disposition of the case, "the trial court 'left the door open' for the jury to consider disposition of the case. *Id*. at 286. The court held that no door was left open and the jury knew well enough that sentencing was not its concern partly because the prosecutor made that clear and asked if everyone understood that division of duties. *Id*. at 287. In this case, the same is true: the State told the prospective jurors that sentencing was the court's duty, not the jury's, and asked if anyone had an issue with that. (R. VII, 26-27; see also Jury Instruction #2, VIII, 397.) Finally, in *State v. Zimbelman*, No. 90,715, 2004 WL 1715006, at *7 (Kan.Ct.App. July 30, 2004), the defendant argued that the absence of PIK Crim.3d 51.10 allowed the jury to improperly consider the prosecutor's comments regarding the possibility that the defendant might lose her job. Even in that context, with the added element of comments that could actually invite consideration of the effects of the verdict, this Court held that ***15** failing to give the instruction was not error. *Id*

Here, the defendant points to no particular evidence that invited the jury to consider the disposition of her case instead of simply her guilt or innocence. Instead, she actually points out that her own trial counsel argued in closing that disapproval of the defendant's conduct was not enough to simply find her guilty so that she would be punished. (R. VII, 408.) Both the prosecutor and the defendant's counsel made clear that the jury was not to consider any possible punishment. If not giving PIK Crim.3d 51.10 in *Osburn*, *Alexander*, and *Zimbelman* was not error, then certainly it was not error in this case. Of course, even if it was error, this Court cannot be firmly convinced that there as a real possibility of a different verdict if the instruction had been given.

V. The prosecutor did not commit prosecutorial misconduct when he explained that the victim was dead and asked the jury to return a guilty verdict.

Standard of Review

The rules governing appellate review of prosecutorial misconduct claims are well known:
In general, appellate review of an allegation of prosecutorial misconduct involving improper comments to the jury follows a two-step analysis. First, the appellate court decides whether the comments were outside the wide latitude that the prosecutor is allowed in discussing the evidence. Second, the appellate court decides whether those comments constitute plain error; that is, whether the statements prejudiced the jury against the defendant and denied the defendant a fair trial. *State v. Albright*, 283 Kan. at 428, 153 P.3d 497.

In the second step of the two-step analysis, the appellate court considers three factors: "(1) whether the misconduct was gross and flagrant; (2) whether the misconduct showed ill will on the prosecutor's part; and (3) whether the evidence was of such a

direct and overwhelming nature that the misconduct would likely have had little weight in the minds of jurors. None of these three factors is individually controlling. Moreover, the third factor may not override the first two factors unless the harmless error tests ***16** of both K.S.A. 60-261 [refusal to grant new trial is inconsistent with substantial justice] and *Chapman v. California*, 386 U.S. 18, 87 S.Ct 824, 17 L.Ed.2d 705 (1967) [conclusion beyond a reasonable doubt that the error had little, if any, likelihood of having changed the result of the trial], have been met. [Citations omitted.]

State v. McReynolds, 288 Kan. 318, 323, 202 P.3d 658 (2009) (quoting *State v. Albright*, 283 Kan. 418, 428, 153 P.3d 497 (2007)).

Argument

The defendant argues that the prosecutor committed misconduct when he told the jury that the victim was deceased and that the State was bringing the case on her behalf (R. VII, 151-152), and when he asked the jury to return "the right verdict, a verdict of guilty" (R. VIII, 417). Neither comment was outside the wide latitude prosecutors are given to discuss the evidence and explain their theory of the case, and even if outside that latitude, neither comment constitutes clear error.

A. Explaining to the jury why the victim would not testify was not misconduct.

When the prosecutor explained that the victim was deceased, that she had no voice, and that the State was bringing the case on her behalf, he was merely attempting to explain to the jury why the victim would not be testifying. Any jury hearing a case in which the State alleges someone was mistreated will want to hear from the person who was allegedly mistreated. If the State had ignored that expectation and instead stayed silent on the gap in its witness list, the jury may very well have felt the State should have called the victim to testify and might have assumed that its failure to do so was the product of some weakness in its case. The prosecutor's comments addressed that situation clearly and without excessive embellishment. While it may not have been entirely necessary for the prosecutor to mention that the victim has no voice, or to say ***17** "may she rest in peace," those comments are not likely to inflame the passions of the jury. Instead, they merely show that the victim cannot appear to testify and that the prosecutor has a healthy respect for the deceased. The phrase "may she rest in peace" is often uttered to show respect for the dead without inflaming passions, and there is no reason to think that this jury was a special case. In fact, a jury properly instructed of its. duty to decide a case based on the facts is especially unlikely to be coaxed into unreasonable passion at hearing such an innocuous phrase.

Even if these comments were outside the wide latitude allowed a prosecutor, they were not plain error because there is absolutely no indication of ill will or gross and flagrant misconduct. Again, while the prosecutor may have been able to make his point more efficiently, his goal of explaining the victim's absence is not inappropriate, and it neither showed ill will nor was gross and flagrant. Further, the evidence that the defendant took unfair advantage of her mother's **financial** resources through undue influence, deception, or false pretenses was direct and overwhelming. The defendant admitted on several occasions that she should not have taken the money, and it was clear that her access to the bank account was for payment of her mother's bills, not for making personal improvements to the defendant's house.

Finally, the Kansas Supreme Court has stated that although an objection is not necessary to preserve a prosecutorial misconduct claim for appellate review, "the presence or absence of an objection may figure into our analysis of the alleged misconduct." *State v. King*, 288 Kan. 333, 349, 204 P.3d 585 (2009). Apparently the defendant's trial counsel did not find the prosecutor's comments particularly damaging ***18** because she made no objection. This Court should consider that fact and conclude that the prosecutor's comments regarding the victim's absence and death were simply not misconduct.

B. Asking for the "right verdict" was not misconduct

While the defendant is correct that a prosecutor must be careful not to place "the prestige of the State behind the prosecutor's personal assurances," *State v. Morris*, 40 Kan.App.2d 769, 787, 196 P.3d 422 (2008), the prosecutor's statement that the jury should return the "right verdict, a verdict of guilty," simply did not rise to that level.

First, by brining a case and appearing in court at trial, the jury certainly assumes in most cases that the prosecutor believes a guilty verdict is the right or correct verdict. To hear a prosecutor call a guilty verdict the "right" verdict should be no surprise to any juror, and that is all that happened here. That solitary fact does no more to sway the jury than bringing the case in the first place. And here, there was no personal vouching by the prosecutor. He did not assure the jury that he had personal knowledge of the defendant's guilt, and he did not attempt to persuade the jury to simply trust him because he is an agent of the State. Nor did he vouch for the credibility of a witness. He simply asked the jury to return the right verdict. And in the context of his closing argument, where he discussed the evidence and the problems with the defendant's theory of the case (R. VIII, 401-406 414-417), the prosecutor used the word "right" as a synonym of "correct," not in a moral sense. He was not arguing that the only just verdict was a guilty verdict, he was arguing that based on the evidence presented, a guilty verdict was correct because the State proved its case beyond a reasonable doubt. Every prosecutor necessarily makes this ***19** argument when closing--otherwise there is nothing to argue--and it is not misconduct.

But even if it was misconduct, there is no indication that it was the product of ill will or that it was gross and flagrant. It was one offhand use of the word "right;" it was not made in the context of some personal vouching or other assurance that prosecutor knew best and the jury should simply trust him. After the prosecutor asks the jury to "come back with the right verdict, a verdict of guilty," the jury knows nothing more than it already knew: the prosecutor believes a guilty verdict is appropriate. And as explained above, the evidence was strong enough that any improper effect of the prosecutor's comment would have little weight in the mind of the jurors.

VI. Using the defendant's criminal history to increase her sentence did not violate the Sixth Amendment.

Standard of Review

An appellate court's review of the constitutionality of a statute is unlimited. *State v. Laturner*, 289 Kan. 727, 735, 218 P.3d 23 (2009).

Argument

The defendant argues that using her prior convictions to increase her sentence violates her Sixth Amendment right to jury trial, but concedes that this issue has already been decided against her and is only making the argument to preserve the issue for federal review. (Aplt.'s Br. 28.) The State agrees that *State v. Ivory*, 273 Kan. 44, 41 P.3d 781 (2002), forecloses the defendant's argument. No good reason exists to depart from that settled and consistently supported precedent.

Conclusion

For the foregoing reasons this Court should affirm the district court.