NOT DESIGNATED FOR PUBLICATION

No. 109,124

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

RANDALL L. CAPONE,
Appellant.

MEMORANDUM OPINION

Appeal from Johnson District Court; THOMAS H. BORNHOLDT, judge. Opinion filed January 24, 2014. Affirmed.

Jeremiah Kidwell, of Kidwell & Conkright, of Kansas City, Missouri, and *Jonathan Sternberg*, of Jonathan Sternberg, Attorney, P.C., of Kansas City, Missouri, for appellant.

Shawn E. Minihan, assistant district attorney, *Stephen M. Howe*, district attorney, and *Derek Schmidt*, attorney general, for appellee.

Before PIERRON, P.J., BUSER, J., and BUKATY, S.J.

Per Curiam: Randall L. Capone appeals his conviction and sentence for felony driving under the influence of alcohol (DUI). Capone argues the district court erred by binding him over and sentencing him for felony DUI and there was insufficient evidence of DUI. We affirm.

Capone committed his current DUI offense on February 13, 2011. He had been convicted of DUI before—once in Bourbon County in 1997 and again in Johnson County

in 2000. On April 22, 2011, the State charged Capone with felony DUI, third offense, under K.S.A. 2010 Supp. 8-1567. At the preliminary hearing, Capone lodged a continuing objection to his case proceeding as a felony rather than a misdemeanor. But the district court found there was probable cause to believe Capone had committed a felony DUI and bound him over for trial.

Before trial, Capone filed a motion for arrest of judgment, arguing he was a first-time DUI offender because DUI convictions that occurred before July 1, 2011, are not taken into account under the new look-back provision in K.S.A. 2011 Supp. 8-1567(j)(3).

On October 1, 2012, a jury trial was held at which the following evidence was presented. Dawn Watson, the manager of Danny's Bar & Grill, was working on February 13, 2011. Watson testified Capone had been at the bar for about an hour and she testified she had served him a few beers. Because Capone was not acting normally, Watson poured him a beer but then took the beer and dumped it out and cut him off at around 1 a.m. Capone was stumbling around, so Watson offered to call him a cab. Capone refused, left the bar, and proceeded to stumble through the parking lot to his truck. Watson followed Capone and told him at least three times that if he got into his truck, she would call the police. But Capone got into his empty truck on the driver's side, started the engine, and drove away while she was on the phone with police. The truck swerved, almost hit the back end of a parked car, and pulled into the QuikTrip gas station, which is between 500 and 1,000 feet away from the bar. Watson did not see Capone get out of his truck.

Nick Baggett was working the door at Danny's on the night in question. Baggett testified he saw Capone stumble out of the bar with Watson close behind. Baggett could see that Capone was not fit to drive. Baggett joined Watson in telling Capone the police would be called if he drove. Capone's truck was parked 20 parking spaces away. From 10 parking spaces away, Baggett saw Capone get into his truck on the driver's side and drive

through the parking lot to the gas station. Baggett did not see anyone else inside the truck as it passed him, but he could not be 100 percent sure because it was dark and the windows were tinted. Baggett did not see Capone get out of his truck either.

Gary Knaus was working at the QuikTrip on the night in question. Knaus testified he saw Capone approach the store from the direction of his truck. Knaus could not see anyone else in the truck. Capone staggered into the store, stumbled over everything, and made a mess at the nacho stand, dumping cheese and chili onto the dip tray and eating nachos from it. No other customers were in the store at the time. Capone eventually fell down in the store, and Knaus could not get a verbal response from him. Knaus reported in his written statement that Capone had walked into the store from the driver's side of his truck.

Corporal Ryan Sumner of the Lenexa Police Department responded to the QuikTrip. Corporal Sumner testified that upon entering the store, he saw Capone lying on the floor, highly intoxicated and moaning. In Corporal Sumner's opinion, Capone was not capable of safely driving a vehicle. Corporal Sumner helped Capone to his feet, escorted him out of the store, and sat him on the curb. Corporal Sumner noticed Capone's truck parked in the middle of two parking spaces, one of which was reserved for handicapped persons. The front doors of the truck must be opened before the back doors can be opened. Pictures of the truck, showing its extended cab doors and the botched parking attempt, were admitted into evidence. Corporal Sumner smelled an extremely strong odor of alcohol emanating from Capone's person. Capone had difficulty sitting and speaking. When asked who drove his truck to the gas station, Capone responded, "You tell me." Capone also denied that he had been drinking and refused to submit to field sobriety testing.

Corporal Sumner arrested Capone and placed him in another officer's patrol car. Corporal Sumner did not see another person in Capone's truck and no one reported

spending time with Capone that night. But police never recovered Capone's keys—they were not on his person, in his truck, or in the gas station. At the police station, Capone refused to submit to a breath test after being read the implied consent advisory. In any event, Corporal Sumner would have been unable to administer the test because Capone was either vomiting or sleeping.

Brett Roberts, Capone's friend of 11 years, took the stand for the defense. Roberts testified he was at Danny's on the night in question. Capone arrived at around 11 p.m. and the two played pool together. They had not planned to meet up. Capone was being forced to stay in a hotel for an extended period of time due to a serious mold issue at his house and he was not happy about it. Capone bought their drinks. During the first round, they decided that Roberts would drive home and Capone gave him the keys to his truck. At around 12:30 a.m., Roberts—who was drunk but not as drunk as Capone—decided it was time to leave because Capone had become belligerent.

Capone did not want to leave, so Roberts went out to the truck, got in, sat in the driver's seat, and smoked a cigarette. About 30 minutes later, Capone stumbled out to his truck, opened the driver's door followed by the back door, and dove into the back seat. Roberts drove the truck away from the bar, unsure of where he was taking Capone. Then Capone screamed belligerently for QuikTrip munchies, so Roberts pulled into the gas station at the last minute. After watching Capone stumble into the store and make a scene, Roberts realized the police would be arriving. Because he had been drinking and had a suspended driver's license, a pending DUI charge, and a warrant for absconding from probation for DUI, Roberts decided to leave the gas station on foot. Roberts, no stranger to long walks due to his suspended license, walked about 4 or 5 miles to his parents' house. Roberts took the truck keys with him to prevent Capone from driving and his truck from being stolen. Roberts admitted he had prior convictions for burglary and theft. David Langston, Roberts' former attorney, also took the stand to verify Roberts' history of drunk driving.

The district court used the current pattern instruction to instruct the jury on the elements of DUI. During deliberations, the jury's request for a read-back of the testimony of Watson and Baggett was granted. The jury also asked, "If a witness perjures himself and in doing so admits to a crime can he be prosecuted later?" The judge responded, "This is not an issue for your consideration." The jury ultimately found Capone guilty of DUI.

Before sentencing, Capone filed a motion for arrest of judgment, again arguing he was a first-time DUI offender for sentencing under K.S.A. 2011 Supp. 8-1567(j)(3). The district court denied the motion, finding that the 2011 amendments to K.S.A. 8-1567 were not retroactive under *State v. Reese*, 48 Kan. App. 2d 87, 283 P.3d 233 (2012), *petition for rev. granted* October 1, 2013.

On December 6, 2012, the district court sentenced Capone as a third-time DUI offender to 12 months' probation after serving 10 days in jail and 80 days on house arrest, with an underlying sentence of 12 months in jail. Capone timely appeals.

Capone first argues the new look-back provision for prior DUI convictions applies in his case because it was in effect at the time of his preliminary hearing, jury trial, and sentencing hearing, and it was a procedural rather than a substantive change.

Interpretation of a statute is a question of law over which an appellate court exercises unlimited review. *State v. Dale*, 293 Kan. 660, 662, 267 P.3d 743 (2011).

K.S.A. 2011 Supp. 8-1567(j)(3) took effect on July 1, 2011. Under that provision, only DUI convictions occurring on or after July 1, 2001, can be taken into account when determining whether a DUI conviction is a first, second, third, or subsequent conviction. This provision replaced K.S.A. 2010 Supp. 8-1567(o)(3), which counted all prior DUI

convictions occurring during a person's lifetime in that determination. Capone committed his current DUI on February 13, 2011, and his prior DUI convictions were in 1994 and 2000.

This court has rejected Capone's retroactivity argument. In *Reese*, the court found that the amendment only operated prospectively. Reese had committed his DUI on July 3, 2009. He was convicted on June 6, 2011, and sentenced after July 1, 2011. Under the lifetime look-back provision of the version of K.S.A. 8-1567 in effect when he committed his offense, he faced a sentence for felony DUI, fourth or subsequent. However, all of his prior offenses had occurred before July 1, 2001. Not surprisingly, he argued for retroactivity of the 2011 amendment. 48 Kan. App. 2d at 88.

The *Reese* court reiterated that a statute generally operates prospectively unless its language clearly indicates a legislative intent to apply it retrospectively or the statutory change is procedural or remedial in nature and does not prejudicially affect the parties' substantive rights. 48 Kan. App. 2d at 89; *State v. Jaben*, 294 Kan. 607, 612-13, 277 P.3d 417 (2012). Further, the court recognized the fundamental rule of criminal procedure in Kansas that a defendant is sentenced under the law in effect when the crime was committed. 48 Kan. App. 2d at 89; *State v. Williams*, 291 Kan. 554, 559, 244 P.3d 667 (2010).

Applying these basic rules to K.S.A. 2011 Supp. 8-1567(j)(3), the *Reese* court found there was nothing in the statutory language to suggest the legislature intended the provision to apply to all DUI offenders, regardless of the date of the offense, who were sentenced after the effective date of the provision. It also noted provisions in the same bill did provide for retroactive application of some other DUI-related provisions, confirming the legislature knew how to make this provision retroactive if that was its intent. The *Reese* court found the new look-back provision did alter substantive rights because it modified the severity of punishment for a DUI conviction. 48 Kan. App. 2d at 90. The

court concluded the district court did not err in refusing to apply the look-back provision of K.S.A. 2011 Supp. 8-1567(j)(3) in Reese's case. It held the amendment can only be applied prospectively to offenses occurring on or after July 1, 2011, the effective date of the statute. 48 Kan. App. 2d 87, Syl. ¶ 4.

This case is highly analogous to *Reese*. Capone had two prior DUI convictions. He was arrested prior to the effective date of the new look-back provision but sentenced after. Capone argues the amendment is procedural in nature and should apply retroactively. Although *Reese* is not final at this time because a petition for review has been granted, we find its arguments persuasive, as have other panels of this court. See, *e.g.*, *State v. Buckley*, No. 108,751, 2013 WL 5610253, at *3 (Kan. App. 2013) (unpublished opinion), *petition for rev. filed* November 8, 2013; *State v. Baker*, No. 108,510, 2013 WL 5507345, at *3 (Kan. App. 2013) (unpublished opinion), *petition for rev. filed* October 29, 2013; *State v. Keeler*, No. 106,656, 2013 WL 4729253, at *2-3 (Kan. App. 2013) (unpublished opinion), *petition for rev. filed* September 27, 2013; *State v. Hurt*, No. 108,290, 2013 WL 4404195, at *2-3 (Kan. App. 2013) (unpublished opinion); *State v. Ryherd*, No. 108,044, 2013 WL 4046411, at *2-3 (Kan. App. 2013) (unpublished opinion), *petition for rev. filed* September 9, 2013; *State v. Shafer*, No. 107,988, 2013 WL 2321186, at *2 (Kan. App. 2013) (unpublished opinion), *petition for rev. filed* June 13, 2013.

Capone does not present any new arguments that were not addressed in *Reese*. Because it does not operate retroactively, K.S.A. 2011 Supp. 8-1567(j)(3) is inapplicable in Capone's case.

The district court did not err by binding Capone over and sentencing him for felony DUI.

Capone also argues there was insufficient evidence of DUI because the State failed to present direct evidence that he operated his vehicle and it was unreasonable for the jury to infer that he did so.

When the sufficiency of the evidence is challenged in a criminal case, the standard of review is whether, after review of all the evidence, viewed in the light most favorable to the prosecution, the appellate court is convinced that a rational factfinder could have found the defendant guilty beyond a reasonable doubt. *State v. Stafford*, 296 Kan. 25, 53, 290 P.3d 562 (2012). In making this determination, an appellate court does not reweigh evidence, resolve evidentiary conflicts, or make determinations regarding witness credibility. 296 Kan. at 53.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution requires the State to prove, beyond a reasonable doubt, every element necessary to constitute the crime charged. *State v. Gould*, 271 Kan. 394, 411, 23 P.3d 801 (2001). "[A] conviction 'can be based entirely on circumstantial evidence and the inferences fairly deducible therefrom.'" *State v. Drayton*, 285 Kan. 689, 711, 175 P.3d 861 (2008) (quoting *State v. Bird*, 240 Kan. 288, 299, 729 P.2d 1136 (1986), *cert. denied* 481 U.S. 1055 [1987]); see *State v. Ward*, 292 Kan. 541, 581, 256 P.3d 801 (2011) (circumstantial evidence is evidence of events from which a reasonable factfinder may infer the existence of a material fact in issue), *cert. denied* 132 S. Ct. 1594 (2012); *State v. Ordway*, 261 Kan. 776, 804, 935 P.2d 94 (1997) (the jury has the right to make reasonable inferences). A DUI conviction, like any conviction, can be supported by circumstantial evidence. *State v. Perkins*, 296 Kan. 162, 167, 290 P.3d 636 (2012); (quoting *State v. Fish*, 228 Kan. 204, 210, 612 P.2d 180 (1980) ("'Proof of driving does not require an eyewitness to the driving. It may be shown by circumstantial evidence. . . .'".

Here, Capone was charged with violating K.S.A. 2010 Supp. 8-1567(a)(3), which provides: "No person shall operate or attempt to operate any vehicle within this state

while . . . under the influence of alcohol to a degree that renders the person incapable of safely driving a vehicle." See *State v. Kendall*, 274 Kan. 1003, 1009-11, 58 P.3d 660 (2002) ("operate" in 8-1567(a) means to drive, which requires some movement of the vehicle). The jury was appropriately instructed that the State was required to prove beyond a reasonable doubt that (1) Capone drove a vehicle; (2) he, while driving, was under the influence of alcohol to a degree that rendered him incapable of safely driving a vehicle; and (3) his act occurred on or about February 13, 2011. See PIK Crim. 3d 70.01. Elements two and three are undisputed. The question we must resolve is whether there is sufficient evidence that Capone drove his truck.

Because we usually do not reweigh evidence or make determinations regarding witness credibility, it is not controlling that Roberts testified he drove Capone's truck to the QuikTrip and the keys to the truck were never found. See *Stafford*, 296 Kan. at 53. When viewed in the light most favorable to the prosecution, the trial transcript contains direct and circumstantial evidence that Capone drove his truck. Watson and Baggett testified they saw Capone enter his truck on the driver's side, start the engine, and drive from the bar to the gas station. Because they were not asked on cross-examination whether they could in fact see Capone behind the wheel, their testimony that they saw him drive stands. Watson, Baggett, and Knaus also testified they did not see anyone else in Capone's truck. Knaus testified no other customers were in the store at the same time as Capone. Cpl. Sumner testified Capone never suggested anyone else had driven his truck.

Based on this testimony, a reasonable factfinder could infer that Capone was the person who drove his truck from the bar to the QuikTrip on the night in question. See *State v. Suter*, 296 Kan. 137, 150, 290 P.3d 620 (2012) (sufficient evidence of driving included fact that defendant was the only person present at the scene and he never suggested anyone else had driven his vehicle); *State v. Stevens*, 285 Kan. 307, 316-17, 172 P.3d 570 (2007) (sufficient evidence of driving included fact that defendant exited

the vehicle on the driver's side), *abrogated on other grounds by State v. Ahrens*, 296 Kan. 151, 290 P.3d 629 (2012).

There was sufficient evidence of DUI. We affirm.

Affirmed.