Case No. 109124

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,

Plaintiff / Appellee,

v.

RANDALL CAPONE,

Defendant / Appellant.

Appeal from the District Court of Johnson County
Honorable Thomas H. Bornholdt, District Judge
District Court Case No. 2011-CR-849

BRIEF OF THE APPELLANT

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ORAL ARGUMENT REQUESTED

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Nature of the Case

This is a direct appeal in a criminal case.

On October 1, 2012, in case number 11-CR-00849, a jury in the District Court of Johnson County, Kansas, found Appellant Randall Capone guilty of driving while under the influence of alcohol ("DUI") (K.S.A. § 8-1567). The state had charged that this was Mr. Capone's third DUI offense under K.S.A. § 8-1567, making the charge a nonperson, nondrug felony. Before trial, Mr. Capone also had pleaded guilty to refusing a preliminary breath test (K.S.A. § 8-1012, infraction).

On December 6, 2012, holding (over Mr. Capone's objection) that the DUI charge was a nonperson, nondrug felony, the district court sentenced Mr. Capone to 12 months in jail, which it stayed during probation after 90 days. It ordered Mr. Capone to spend ten of the 90 days in jail and the remaining 80 days on house arrest. The court also ordered Mr. Capone to pay respective fines of $1,500.00 for the DUI and $105.00 for the refusal of a breath test.

Mr. Capone appeals the district court's judgment of conviction and sentence against him.

Statement of the Issues

I. The trial court erred in finding probable cause to suspect Appellant Randall Capone had committed the offense charged, felony driving while under the influence of alcohol due to two previous DUI convictions, because K.S.A. § 8-1567 limits its "look-back" period for prior DUI convictions only to those from *after* July 1, 2001. At the preliminary hearing, the only evidence of Mr. Capone's prior offenses was two previous convictions for driving while under the influence of alcohol that both occurred *before* July 1, 2001.

II. The trial court erred in sentencing Appellant Randall Capone for driving while under the influence of alcohol as a third-time felony, because K.S.A. § 8-1567 limits its "look-back" period for prior DUI convictions only to those from *after* July 1, 2001. At the sentencing hearing, the only evidence of Mr. Capone's prior offenses was two previous convictions for driving while under the influence of alcohol that both occurred *before* July 1, 2001.

III. The evidence was insufficient to prove beyond a reasonable doubt that Appellant Randall Capone operated or attempted to operate a motor vehicle. The only evidence was that two people had seen Mr. Capone from afar entering the driver's side of his truck, which then drove off. But given that the undisputed evidence was that the truck's back seat was accessible only through that door, Mr. Capone was so intoxicated that he could not even sit or stand, and the police could not find the truck's keys, it was not a reasonable inference that he operated or attempted to operate the truck. As a matter of law, the only reasonable inference was that someone else had operated Mr. Capone's truck.

Statement of Facts

A. Incident and Investigation

In February 2011, Randall Capone was living in a hotel while addressing a serious mold problem at his home (Record Volume VI p. 155). On the evening of February 13, 2011, in an effort to brighten his mood, he decided to go to Danny's Bar and Grill in Lenexa, Kansas (R. VI 156). Danny's was located in the corner of an "L"-shaped strip mall on the northeast corner of College Boulevard and Pflumm Road (R. VIII Ex. A). Attached to Danny's was a Mr. Goodcents, a Chinese restaurant, and various other shops (R. III 11; VIII Ex. A). Also within the strip mall, across the parking lot, was a QuikTrip gas station and convenience store (R. VIII Ex. A). Five rows of parking and three medians separated Danny's from the QuikTrip (R. VIII Ex. A).

Mr. Capone arrived at Danny's around 11:00 p.m. (R. VI 156). He parked his black 2007 Chevy Silverado crew cab pickup truck, which he used in his home remodeling business, about 20 parking spaces from the entrance to Danny's (R. VI 110). Because a band was playing at Danny's that night, Mr. Capone stopped outside the door to pay a cover charge and then continued past Nick Baggett, the doorman, to enter the main front room of the bar (R. VI 99, 106). After walking through the bar and into the back room, Mr. Capone was pleasantly surprised to find his friend, Brett Roberts (R. VI 156). The two decided early on that they would stay and play pool in the bar's back room (R. VI 157). Mr. Roberts planned to drive them both home, so Mr. Capone gave Mr. Roberts the keys to his truck (R. VI 160).

Throughout the night, several waitresses served Mr. Capone and Mr. Roberts beer and shots of liquor, for which Mr. Capone paid (R. VI 158). They two mostly stayed in

the back room, but, occasionally, one or the other would go to the bar to order drinks (R. VI 157). Around 12:30 a.m., Mr. Capone had begun to show the effects of his drinking and Mr. Roberts started thinking about going home (R. VI 159). He talked to Mr. Capone about leaving, but Mr. Capone was not yet ready (R. VI 159-60). Mr. Roberts, already having the keys to Mr. Capone's truck, decided to head for the truck anyway and wait for Mr. Capone there (R. VI 160). Mr. Roberts walked out of Danny's, walked through the parking lot, and got into the driver's seat of Mr. Capone's truck (R. VI 160). He waited about 30 minutes for Mr. Capone (R. VI 160).

Meanwhile, inside Danny's, Mr. Capone headed to the bar around 1:00 a.m. for another beer, where Dawn Watson, a bartender and manager, served him (R. VI 82). Ms. Watson testified that she soon came to the belief Mr. Capone had had too much to drink, so she took away his beer, poured it out, and cut him off (R. VI 84, 96-97). She said she offered to call Mr. Capone a cab, but he refused, so she followed him out the front door and into the parking lot (R. VI 84-85). At that point, Mr. Baggett, the doorman, was seated just outside the front door (R. VI 100). He said that, after exiting the bar, Mr. Capone, visibly intoxicated, stumbled across the parking lot to his truck (R. VI 100). Ms. Watson said she yelled at Mr. Capone from the door that, if he got into the truck, she would call the police (R. VI 85). Mr. Baggett said he followed Mr. Capone halfway to the truck but did not talk to Mr. Capone (R. VI 110). Both Ms. Watson and Mr. Baggett testified that Mr. Capone opened the driver's side door of the truck and got in (R. VI 86, 101).

As Mr. Roberts explained, what Ms. Watson and Mr. Baggett could not see in the dark across the parking lot was that Mr. Roberts was already in the driver's seat of Mr.

Capone's truck (R. VI 174). When Mr. Capone arrived at the truck, he opened the driver's side front door, which then allowed him to open the back door (as it was a crew cab truck), whereupon he fell into the back seat of the truck (R. VI 168). Mr. Roberts began to drive the truck away (R. VI 163). Ms. Watson and Mr. Baggett testified that they saw the truck drive away, but Mr. Baggett could not tell if anyone else besides Mr. Capone was in the truck (R. VI 101). Ms. Watson called the police, reporting an intoxicated man driving to the QuikTrip across the parking lot (R. VI 86, 88).

After pulling out of the parking space, Mr. Roberts headed north into the corner of the "L"-shaped shopping center — i.e. back toward Danny's — and then turned west toward Pflumm Road (R. VI 162-63). As Mr. Roberts drove through the parking lot, past the QuikTrip, Mr. Capone shouted that he wanted food (R. VI 163). In response, Mr. Roberts quickly pulled into a parking space in front of QuikTrip and let Mr. Capone out — again, by opening the front driver's side door, which allowed Mr. Capone to open the back door (R. VI 183).

As soon as Mr. Capone exited the truck, it was evident to Mr. Roberts that, due to the amount of alcohol Mr. Capone had consumed, it was only a matter of time before the police would be called (R. VI 165-66). Although Mr. Roberts had agreed to drive Mr. Capone home that night, he testified that he also had continued to drink, just not anywhere as much as Mr. Capone (R. VI 166, 172-73, 181-83). Mr. Roberts testified he had a suspended driver's license and prior burglary and theft convictions and was released on bond for a DUI charge in Camden County, Missouri (R. VI 166-67, 185). While Mr. Roberts did not believe he was over the legal blood alcohol limit to drive, he did not want to "stick around" to find out (R. VI 183). Not wanting to leave the keys in

Mr. Capone's truck for fear the truck might be stolen, Mr. Roberts removed the keys and left, deciding instead to walk to his parents' house (R. VI 167).

Gary Knaus, the sole QuikTrip employee at work at that time, watched as Mr. Capone staggered into the store (R. VI 115-16). Mr. Knaus said he did not see Mr. Capone exit the truck, but he did see Mr. Capone approach the store from the driver's side (R. VI 117, 119). Upon entering the store, Mr. Capone stumbled around, ate nachos out of a drip tray, fell into the bakery rack, and eventually wound up on the floor in a pool of chili (R. VI 115-16, 128-29). He could barely walk and could not talk (R. VI 115-16).

Corporal Ryan Sumner of the Lenexa Police Department was patrolling near the QuikTrip when the call came in from Ms. Watson at Danny's (R. VI 126-127). He responded to the Quik Trip and saw Mr. Capone's truck parked in front (R. VI 128; R. IX Exs. 1-6). No one was in the truck (R. VI 128). Upon entering the QuikTrip, Corporal Sumner found Mr. Capone in the chili (R. VI 128). He attempted to talk to Mr. Capone, but Mr. Capone only could moan (R. VI 128). Corporal Sumner had to help Mr. Capone stand (R. VI 129). He helped Mr. Capone exit the front door of the QuikTrip and sat Mr. Capone on the curb, where Mr. Capone had trouble sitting up (R. V. III 12; R. VI 129).

Corporal Sumner tried to ask Mr. Capone questions about the evening (R. VI 132). Mr. Capone denied drinking and driving (R. VI 132). Corporal Sumner asked Mr. Capone to stand and take standard field sobriety tests (R. VI 133-34). Mr. Capone struggled to his feet but refused to take any of the tests (R. VI 134). He also refused a preliminary breath test (R. III 13-14). Corporal Sumner then placed Mr. Capone under arrest and took Mr. Capone to the police station (R. VI 134-35).

At the police station, Corporal Sumner began to process Mr. Capone (R. VI 137). He attempted to talk to Mr. Capone and read him Kansas's implied consent notice (R. VI 137). But Mr. Capone could not do anything except throw up or sleep (R. VI 139). Mr. Capone again refused to take a breath test (R. VI 139). Corporal Sumner said Mr. Capone continued to exhibit signs of being extremely intoxicated (R. VI 142).

Corporal Sumner conceded he did not find the keys to Mr. Capone's truck anywhere in the truck, on Mr. Capone, or at the QuikTrip — they were never found (R. III 16; R. VI 140). There were no keys found on Mr. Capone's person during a search (R. III 16; R. VI 140). There were no keys found in the QuikTrip store (R. VI 140). There were no keys found in the QuikTrip parking lot (R. III 16). There were no keys found in the truck (R. III 16; R. VI 140).

B. Proceedings Below

On April 22, 2011, the State filed a criminal complaint against Mr. Capone in the District Court of Johnson County, Kansas (R. I 5). It charged Mr. Capone with two counts (R. I 5). Count One was operating a motor vehicle under the influence of alcohol with two or more prior convictions for driving under the influence, a felony, in violation of K.S.A. § 8-1567 (R. I 5). Count two was refusing a preliminary breath test, in violation of K.S.A. § 8-1012 (R. I 5). Mr. Capone had two prior convictions for driving under the influence, one from March 12, 1997, in Fort Scott, Kansas, and one from December 29, 2000, in Olathe, Kansas (R. I 8). Mr. Capone was released on a bond of $5,000 with conditions including abstaining from alcohol, drugs, and driving without a valid driver's license (R. I 6).

On July 1, 2011, K.S.A. § 8-1567 was amended as to which prior convictions would be considered in calculating whether to charge someone with felony violation of the statute, as opposed to a misdemeanor. K.S.A. § 8-1567 (amended by L. 2011, Ch. 105, §19, July 1, 2011). Under the amended § 8-1567, "only convictions occurring on or before July 1, 2001, shall be taken into account when determining the sentence to be imposed for a first, second, third, fourth or subsequent offender." K.S.A. § 8-1567(j)(3). Mr. Capone has no prior convictions that occurred after July 1, 2001, and thus had no prior convictions that would elevate his driving while intoxicated charge to a felony under the July 2011 version of K.S.A. § 8-1567 (R. IX Exs. 1-2).

The district court held a preliminary hearing on January 4, 2012 (R. III 1-19). Prior to the preliminary hearing, the court ruled on Mr. Capone's objection regarding the court's jurisdiction to charge him with a felony under amended K.S.A. § 8-1567, finding that the prior version of the law applied (R. III 4). At the preliminary hearing, Mr. Capone again asserted his objection to the court's jurisdiction to charge Mr. Capone with a felony; the court again disagreed (R. III 4).

The State called two witnesses at the preliminary hearing, Mr. Baggett and Corporal Sumner (R. III 2). Mr. Baggett said he saw a man leaving the bar who appeared to be intoxicated and tried to stop him (R. III 6). He said the man left in his truck and drove to the QuikTrip across the parking lot (R. III 6). Mr. Baggett could not be sure whether there were any other people in the truck when it drove away (R. III 8). Corporal Sumner said that, when he arrived at the QuikTrip he saw a truck parked in front (R. III 11). He said he entered the store and found Mr. Capone on the floor in a pool of chili (R. III 11).

Mr. Capone could barely walk and was having trouble sitting (R. III 12). Corporal Sumner did not see Mr. Capone drive the truck at any point that evening (R. III 12, 15). Corporal Sumner said Mr. Capone refused to take any sobriety tests and, when the police took him to the police station, was either throwing up or asleep (R. III 14). Corporal Sumner never found the keys to Mr. Capone's truck (R. III 14). At the close of the hearing, the court found probable cause and bound Mr. Capone over for trial (R. III 17). Mr. Capone pleaded not guilty to the charges and the court set the matter for a jury trial (R. III 18).

On January 27, 2012, Mr. Capone moved the court to continue the trial due to pending cases before this Court and the Supreme Court that addressed the jurisdiction of courts to charge defendants with a misdemeanor or a felony under K.S.A. § 8-1567 based on prior convictions before 2001 (R. I 11). The court denied the motion holding that, while several cases with facts similar to that of Mr. Capone's were currently pending before the Kansas appellate courts, in the amount of time it might take the appellate courts to decide the issue, Mr. Capone's case would "likely go stale, evidence could be lost, and memories will probably fade" (R. I 12).

Mr. Capone filed a pretrial motion in limine seeking the exclusion of any evidence concerning horizontal gaze nystagmus, his refusal of a preliminary breath test, playing unredacted portions of any police dashcam or booking videos at trial, and his criminal history (R. I 1; V 3). The court granted the motion (R. V 3). Additionally, before trial, Mr. Capone objected to the State's planned introduction of a video of his booking, which the State was not going to show during the trial, but desired to make available to the jury during deliberations to watch as it wished (R. V 3-4). The court

instructed defense counsel that, as long as the video was properly redacted, it would be admitted and the jury would have it available for viewing (R. V 5).

The case was tried before a jury on October 1, 2012 (R. VI 1). At the outset, Mr. Capone pleaded guilty to refusing to take a breath test, so that only the felony DUI charge went to trial (R, VI 67-68). Over the lunch recess, the court informed the parties that one of the twelve jurors was ill and could not continue jury service; both parties waived their right to a mistrial and decided to proceed with eleven jurors (R. VI 112-13). The State called four witnesses at trial: Ms. Watson, Mr. Baggett, Mr. Knaus, and Corporal Sumner (R. VI. 2).

During Corporal Sumner's testimony, the State introduced two videos into evidence: a police dashcam video of Mr. Capone outside the QuikTrip store and the booking video of Mr. Capone at the police station (R. VI 140, 141; IX Ex. 7, Ex. 10). The dashcam video was published to the jury and shown in the courtroom during the trial (R. VI 140; IX Ex. 7). But the booking video was never published to the jury or shown in the courtroom; instead, it only was made available to the jury during its deliberations (R. V 5; St. IX 10). At trial, Mr. Capone's defense was that, while he was indeed very intoxicated on the night of the arrest, he never drove (R. VI 76). While Mr. Capone did not testify, he called two witnesses on his behalf: Mr. Roberts and David Langston, Mr. Roberts's defense counsel (R. VI 2).

During its deliberations, the jury asked for a copy of the transcript of Ms. Watson's and Mr. Baggett's respective testimony (R. VI 219). The court informed the jurors that, while no transcript existed, if they desired, the testimony of the two witnesses could be read back to them (R. VI 219). The jury agreed (R. VI 219-220). Mr. Capone

waived his presence while the testimony was being read back to the jury (R. VI 220-221). The jury also posed this question to the court: "If a witness perjures himself and in so doing commits a crime, can he be prosecuted later?" (R. VI 221). The court refused to answer this question, reminding the jury that their duty was to decide guilt or innocence in the case at hand (R. VI 222-223).

After deliberation, the eleven-member jury unanimously found Mr. Capone guilty of driving while intoxicated (R. VI 224).

After trial, Mr. Capone moved for a judgment of acquittal, explaining the State's evidence was insufficient to prove beyond a reasonable doubt that he had driven (R. VII 63). He also moved for a new trial, explaining the booking video should not have been admitted, as it was not shown during the trial, the jury should not have been allowed to view it during deliberations, and the court reporter should not have been permitted to read back testimony to the jury outside of the defendant's presence (R. VII 68). He also moved for arrest of judgment, reasserting his claims that the court did not have jurisdiction to hear felony charges against him because his previous DUI convictions occurred before July 1, 2001 (R. VII 54). The motion also explained there was insufficient proof at the preliminary hearing to establish probable cause that Mr. Capone had driven while under the influence (R. 59-61). The court heard and denied all three motions on December 6, 2012 (R. VII 6, 7, 9).

Thereafter, the court held a sentencing hearing (R. VII 1). A presentence investigation report advised of the two prior DUI convictions (R. VII 10). Mr. Capone again objected to the court using the prior convictions to sentence him for a felony (R. VII 10, 13-14). The court disagreed, sentenced Mr. Capone to 12 months in jail, and

ordered him to pay a $1,500 fine on count one and a $105 fine on count two (R. VII 19). It stayed the 12 months of jail time for probation after 90 days, further ordering Mr. Capone to serve 10 of the 90 days in custody and the following 80 days on house arrest (R. VII 19).

Mr. Capone timely appealed to this Court (R. I 31).

Argument and Authorities

I. The trial court erred in finding probable cause to suspect Appellant Randall Capone had committed the offense charged, felony driving while under the influence of alcohol due to two previous DUI convictions, because K.S.A. § 8-1567 limits its "look-back" period for prior DUI convictions only to those from *after* July 1, 2001. At the preliminary hearing, the only evidence of Mr. Capone's prior offenses was two previous convictions for driving while under the influence of alcohol that both occurred *before* July 1, 2001.

Standard of Appellate Review

"When reviewing the district court's probable cause finding, an appellate court conducts a de novo review of the evidence." *State v. Horton*, 283 Kan. 44, 56, 151 P.3d 9, 18 (2007). "'Issues of statutory interpretation and construction … raise questions of law reviewable de novo on appeal.'" *State v. Newcomb*, No. 104,900, 2013 WL 1173928, at *2 (Kan. Mar. 22, 2013) (quoting *State v. Brown*, 295 Kan. 181, 193-94, 284 P.3d 977, 988 (2012)). It is "a question of law over which an appellate court exercises unlimited review." *State v. Arnett*, 290 Kan. 41, 47, 223 P.3d 780, 784 (2010).

* * *

To prove probable cause at a preliminary hearing sufficient to bind a defendant over for trial on charge of felony third driving while under the influence of alcohol, the State must prove the defendant was convicted of two prior offenses as defined by statute. K.S.A. § 8-1567 requires that only DUI convictions from after July 1, 2001, are applicable. In this case, the State only introduced evidence that the defendant had two prior DUI convictions from *before* July 1, 2001. Nonetheless, the trial court found probable cause. Was this error?

It is well-established that, in a felony third DUI case, "[t]o establish the basis for charging and trying a defendant for a felony, a determination of probable cause to believe that a felony has been committed must be made … by a judge after a preliminary hearing. Without a showing that the necessary prior convictions have occurred, the trial court would lack the jurisdiction to try the defendant for a felony." *State v. Seems*, 277 Kan. 303, 305-06, 84 P.3d 606, 607-08 (2004). Instead, "the case must be dismissed." *Id*.

Before July 1, 2011, K.S.A. § 8-1567(f)(1) provided that "the third conviction of" driving under the influence was "'a nonperson felony ….'" Effective July 1, 2011, however, Laws 2011, ch. 105, § 19 (2011 Senate Bill 6), took effect. In what became § 8-1567(b)(1)(D), the statute now provides that a third offense of driving under the influence is a felony only "if the person has a prior conviction which occurred within the preceding 10 years." Even then, this only includes convictions "occurring on or after July 1, 2001." K.S.A. § 8-1567(j)(3).

At the preliminary hearing in this case, on January 4, 2012, the State offered into evidence two journal entries of Appellant Randall Capone's prior convictions for driving under the influence (R. III 5). One was from Fort Scott, Kansas, in 1996 (charged in 1995), and the other was from Olathe, Kansas, in early 2001 (charged in 2000) (R. III 5). Neither was from within the past ten years, and neither was from after July 1, 2001. Mr. Capone objected to the evidence as irrelevant under K.S.A. § 8-1567(j)(3) (R. III 5). He moved that the case be dismissed (R. III 4). The trial court disagreed and found probable cause (R. III 17).

This was error. The version of K.S.A. § 8-1567 in effect during *all* proceedings below, including the preliminary hearing, barred Mr. Capone's pre-2001 offenses from

being sufficient to support the charge against him. As a result, the trial court erred in considering them as supporting probable cause. The State did not meet its burden to prove probable cause. This Court should reverse Mr. Capone's conviction and sentence and should remand this case with instructions to dismiss the charge against Mr. Capone.

The offense of which Mr. Capone is accused occurred in February 2011. He was charged by information on April 22, 2011. The Legislature passed SB6 in May 2011, and Governor Brownback signed it into law on June 1, 2011, whereupon it took effect. Thus, the present version of § 8-1567 was in effect at the time Mr. Capone underwent both his preliminary hearing on January 4, 2012, and his trial on October, 1, 2012.[1]

As a general rule, criminal statutes are "strictly construed in favor of the accused." *State v. Paul*, 285 Kan. 658, 662, 175 P.3d 840, 844 (2008). Any reasonable doubt as to the meaning of a statute is decided in favor of the accused.[2] *Id.* This "rule of strict construction of criminal statutes is subordinate to the rule that judicial interpretation must be reasonable and sensible to effect legislative design and intent." *Id*.

In *State v. Reese*, 48 Kan.App.2d 87, 283 P.3d 233 (2012), this Court held that SB6's amendment to § 8-1567 could not be applied retroactively to sentencing for a DUI offense of which the defendant had been committed, tried, *and* convicted before it took

[1] The Legislature further amended § 8-1567 effective July 2012, but that amendment did not affect the provisions of the statute at issue in this case. *See* Laws 2012, ch. 172, § 20.

[2] In deciding the effect of the amendment to the look-back provision of Alaska's felony DUI statute, the Alaska Court of Appeals held "we cannot presume that the legislature … intended the date of the offense, as opposed to the date of sentencing, to be controlling … [We] join those jurisdictions that have held that a defendant should receive the benefit of an ameliorative sentencing law in effect at the time he is sentenced, unless the legislature intended a contrary result." *State v. Stafford*, 129 P.3d 927, 932 (Alaska 2006). A number of states have echoed this, including California, Colorado, Hawaii, Indiana, Iowa, Michigan, Minnesota, Montana, Nebraska, New Jersey, New York, North Carolina, North Dakota, Rhode Island, and Utah. *Id*. at n.42.

effect.[3] The Court noted the "fundamental rule is that a statute operates prospectively unless its language clearly indicates that the legislature intended it to operate retroactively. An exception to the fundamental rule is that if the statutory change does not prejudicially affect the substantive rights of the parties and is merely procedural or remedial in nature, it applies retroactively." *Id.* at 235 (quoting *State v. Williams*, 291 Kan. 554, 557, 244 P.3d 667 (2010)). "'As related to criminal law and procedure, substantive law is that which declares what acts are crimes and prescribes the punishment therefor; whereas procedural law is that which provides or regulates the steps by which one who violates a criminal statute is punished.'" *Tonge v. Werholtz*, 279 Kan. 481, 487, 109 P.3d 1140 (2005). Put another way, "[a] statute is procedural when it provides for or regulates the steps to be taken in determining whether a person has violated a criminal statute." *State v. Booker*, 27 Kan. App. 2d 396, 399, 4 P.3d 1180, 1183 (2000).

In this case, no substantive rights of either party are affected by applying the version of § 8-1567 in effect at the time of the proceedings below. The State had no right to a particular charge. SB6's change in the law was merely procedural: previously, the State would have to show any two prior convictions, whereas now those convictions are limited. For this same reason, amendments to statutes of limitations have been held to be retroactive. *State v. Nunn*, 244 Kan. 207, 218, 768 P.2d 268 (1989); *see also Booker*, 27 Kan. at 399 (holding that, like *Nunn*'s analysis of the procedural nature of statutes of limitations, a standard of review is also considered procedural because it "does not redefine criminal conduct, nor does it lengthen the duration or increase the severity of the punishment for the conduct in question").

[3] *Reese* is presently pending a Petition for Review to the Supreme Court. *See* Docket in Case No. 106703 (Kan. App.).

The enactment of the present version of § 8-1567, barring the use of DUI convictions before ten years earlier and prior to July 1, 2001, is similar to a statute of limitations. For example, the complaint, filed against Mr. Capone on April 22, 2011, charges Mr. Capone using this language:

> COUNT I – That on or about the 13th day of February, 2011, in the City of Lenexa, County of Johnson, State of Kansas, RANDALL LEE CAPONE did then and there unlawfully and feloniously operate or attempt to operate a vehicle while under the influence of alcohol to a degree that rendered him incapable of safely driving a vehicle and RANDALL LEE CAPONE has two or more prior convictions for driving under the influence of alcohol or drugs, a non-grid, non-person felony, in violation of K.S.A. 8-1567. (driving while under the influence of alcohol)

(R. I 5; Appendix A7).

Under the present version of § 8-1567, the complaint would look the same. The elements of the DUI charge remain the same.[4] "[D]runk driving is a combination of two activities: (1) drinking and (2) driving." *Begay v. United States*, 553 U.S. 137, 154 (2008) (Scalia, J., concurring in the judgment). The only difference under the later version of § 8-1567 is how the crime is litigated, merely affecting the time period within which a prior conviction must occur if a pending matter is going to be treated as a first or subsequent conviction.

Reese is eminently distinguishable by the procedural posture of the case at the time the ten-year look-back provision of the present § 8-1567 took effect. In *Reese*, the defendant committed the crime, was charged, underwent his preliminary hearing, was tried, and was convicted *all* before the statutory change. In this case, however, the

[4] "[P]rior DUI convictions [are not] elements of the offense of DUI," and are an issue instead for sentencing. *State v. Masterson*, 261 Kan. 158, 163, 929 P.2d 127, 130 (1996) (clarified on other grounds by *State v. Larsen*, 265 Kan. 160, 958 P.2d 1154 (1998)).

statutory change occurred *before any* litigation in this case, including the preliminary hearing, the trial, the conviction, and the sentencing. Indeed, it was signed into law less than four months after Mr. Capone allegedly committed his offense and less than two months after he was charged. *Cf. Griffith v. Kentucky*, 479 U.S. 314, 328 (1987) ("a new rule for the conduct of criminal prosecutions is to be applied … to all cases, state or federal, pending on direct review or not yet final"). The *Reese* defendant had been convicted at the time the Legislature changed § 8-1567; Mr. Capone had not even undergone a preliminary hearing. The law of Kansas is that the present version of § 8-1567, the version already in place at the time of Mr. Capone's preliminary hearing, and which demonstrably only made procedural changes, applied at that hearing.

Thus, at the time of the preliminary hearing below, the law of Kansas already was that, in order to bind Mr. Capone over for trial on a charge of felony DUI, the State was required to prove he had two prior DUI convictions occurring after July 1, 2001. The State did not meet this burden. Under §8-1567(b)(1)(D) and (j)(3), there was insufficient evidence to prove probable cause that Mr. Capone had committed the felony of third DUI.

As such, "the case must [have been] dismissed." *Seems*, 277 Kan. at 306. The trial court lacked "jurisdiction to try [Mr. Capone] for a felony." *Id*. at 305. This Court should reverse the judgment below. It should remand this case with instructions to dismiss the DUI charge against Mr. Capone.

II. The trial court erred in sentencing Appellant Randall Capone for driving while under the influence of alcohol as a third-time felony, because K.S.A. § 8-1567 limits its "look-back" period for prior DUI convictions only to those from *after* July 1, 2001. At the sentencing hearing, the only evidence of Mr. Capone's prior offenses was two previous convictions for driving while under the influence of alcohol that both occurred *before* July 1, 2001.

Standard of Appellate Review

"Interpretation of a sentencing statute is a question of law, and an appellate court's standard of review is unlimited." *State v. Gracey*, 288 Kan. 252, 257, 1200 P.3d 1275, 1280 (2000). "'Issues of statutory interpretation and construction" are "questions of law reviewable de novo on appeal.'" *State v. Newcomb*, No. 104,900, 2013 WL 1173928 at *2 (Kan. Mar. 22, 2013) (quoting *State v. Brown*, 295 Kan. 181, 193-94, 284 P.3d 977, 988 (2012)). It is "a question of law over which an appellate court exercises unlimited review." *State v. Arnett*, 290 Kan. 41, 47, 223 P.3d 780, 784 (2010).

* * *

To sentence defendant for driving while under the influence of alcohol as a felony third offense, there must be evidence at sentencing that the defendant was convicted of two prior offenses as defined by statute. K.S.A. § 8-1567 provides that the trial court only may take into account DUI convictions from after July 1, 2001. In this case, there only was evidence that the defendant had two prior DUI convictions from *before* July 1, 2001. Nonetheless, the trial court sentenced defendant as a felon. Was this error?

When interpreting a statute, this Court looks to the statute's actual words and "ascertain[s] the legislature's intent through the statutory language it employs, giving ordinary words their ordinary meaning." *State v. Stallings*, 284, Kan. 741, 742, 163 P.3d 1232, 1234 (2007). "When a statute is plain and unambiguous," the Court should "give

effect to the legislature's expressed intent, resisting the temptation to determine what the law should or should not be." *Id*. at 742-43.

As explained in detail in Issue I, *supra* at 14-15, before July 1, 2011, K.S.A. § 8-1567 provided that "the third conviction of" driving under the influence was "a nonperson felony …," while the statute now provides that a third offense of driving under the influence only is "a nonperson felony if the person has a prior conviction which occurred within the preceding 10 years." § 8-1567(f)(1). The present version of § 8-1567, however, also speaks of *the trial court* "tak[ing] into account" only previous convictions "occurring on or after July 1, 2001" in "determining the *sentence to be imposed* for a first, second, third, fourth or subsequent offender" under the section. K.S.A. § 8-1567(j)(3) (emphasis added). The wording of the present version of § 8-1567(j)(3) is clear, plain, and unambiguous in its direction of the procedure to be applied during sentencing.

The Presentence Investigation Report in this case disclosed correctly that Mr. Capone had two prior convictions (R. VII 10). One was from Fort Scott, Kansas, on March 12, 1997, and the other was from Olathe, Kansas, on December 29, 2000 (R. III 5). Thus, neither one was from within the past ten years, and neither one was from after July 1, 2001.

Before sentencing, Mr. Capone objected to the court considering these two prior convictions, as they were outside of the timeframe established in K.S.A. § 8-1567(j)(3) (R. VII 10). Rather, he explained the trial court should have sentenced him in accordance with the post-July 2011 version of § 8-1567 that by then was in effect (R. VII 14). The court disagreed and sentenced Mr. Capone as a third DUI felony offender (R. VII 19).

This was error. The version of K.S.A. § 8-1567 in effect during *all* proceedings below, especially including the sentencing hearing, barred the trial court from considering Mr. Capone's pre-2001 offenses when establishing for sentencing purposes whether he was a first, second, third, or subsequent offender. As a result, the trial court erred in considering them as support for sentencing Mr. Capone as a felon. This Court should reverse Mr. Capone's sentence and should remand this case with instructions to resentence Mr. Capone as a first-time DUI misdemeanant.

When, as here, "the legislature revises an existing law, it is presumed that the legislature intended to change the law as it existed prior to the amendment." *Hughes v. Inland Container Corp.,* 247 Kan. 407, 414, 799 P.2d 1011 (1990). It can be "assume[d] that a revision of a prior law was intended to supply some want and to fill some deficiency in existing legislation." *Curless v. Bd. of Cnty Com'rs of Johnson Cnty,* 197 Kan. 580 (1966).

In 2011, the legislature chose July 1, 2001, as the cut-off date for consideration of prior DUI convictions in an effort to fill a deficiency (namely the "lifetime look-back provision") in the then-existing version of § 8-1567. But, this was not the first time sweeping changes had occurred in the DUI laws. Previously, on July 1, 2001, the Legislature had recognized a problem with the five-year look-back provision of the version of § 8-1567 then in effect and amended that provision to put in place a *lifetime* look-back. *See* 2001 Kan. Sess. Laws, ch. 200, sec. 14. In the same way, the 2011 Legislature acknowledged the unfairness of considering prior convictions in sentencing, which the Legislature previously had assured offenders would not be considered. In the amendment, the Legislature chose July 1, 2001, as the cut-off for prior DUI convictions

to be considered, because that is when drivers would have been on notice that any DUI conviction could be considered.

As explained in detail in Issue I, *supra* at 15-16, generally "a statute operates prospectively unless its language clearly indicates that the legislature intended it to operate retrospectively." *State v. Reese*, 48 Kan.App.2d 87, 89, 283 P.3d 233 (2012). There is an exception to the general rule when "the statutory change does not prejudicially affect the substantive rights of the parties and is merely procedural or remedial in nature" and should thus apply retroactively. *Id*. While substantive law describes what acts are criminal and what the punishments for violation are, "procedural law is that which provides or regulates the steps by which one who violates a criminal statute is punished.'" *Tonge v. Werholtz*, 279 Kan. 481, 487, 109 P.3d 1140 (2005).

Although Mr. Capone recognizes this argument might be seen as slightly repetitious to that in Issue I, the manifestly *procedural* nature of the manner by which a trial court engages in sentencing is even more obviously retroactively applicable. The sentencing procedure changes to § 8-1567, which took effect in July 2011, merely describe the procedural process that a trial court must use when determining the level of the DUI offense. Neither the elements of the underlying crime nor the penalties prescribed for its violation are implicated by the change. Only the scope of which convictions the court may consider has changed. Because prior DUI convictions are not elements of driving under the influence of alcohol, *State v. Masterson*, 261 Kan. 158, 163, 929 P.2d 127, 130 (1996) (clarified on other grounds in *State v. Larsen*, 265 Kan. 160, 958 P.2d 1154 (1998)), but instead should be used only *after* conviction when "determining the sentence to be imposed," K.S.A. § 8-1567(j)(3), any change affecting

their consideration plainly is not substantive, but rather is procedural. The State had no right to a specific sentence. *State v. Johnson,* 286 Kan. 824, 846, 190 P.3d 207, 222 (2008) (appellate courts do not "doub[t] the authority of a judge to exercise broad discretion in imposing a sentence"). Even if it did, that right would not logically vest until the time of a defendant's sentencing, not his conviction.

In this case, no substantive rights of either party are affected by the retroactive application of § 8-1567 to Mr. Capone's sentencing proceedings. Especially as to sentencing, the Legislature's July 2011 change in the law was merely procedural: previously, in sentencing under § 8-1567, the court could "take into account" all prior convictions. Now, the procedure — the "steps by which one who violates a criminal statute is punished," *Tonge,* 279 Kan. at 487 (2005), — prescribes that the court only may take into account those convictions occurring on or after July 1, 2001.

Thus, at the time of Mr. Capone's sentencing hearing below, the law of Kansas already was that, in "determining the sentence to be imposed," "only convictions occurring on or before July 1, 2001, shall be considered." Nonetheless, the court considered Mr. Capone's prior DUI convictions, both of which were from well before the statutory timeframe. Under § 8-1567(b)(1)(D) and (j)(3), there was insufficient evidence on which to sentence Mr. Capone as a third-time felony DUI offender.

Thus, Mr. Capone should have been sentenced as a misdemeanant first-time offender under § 8-1567(b)(1)(A). This Court should reverse the sentence below. It should remand this case with instructions to resentence Mr. Capone in accordance with the version of K.S.A. § 8-1567 in effect at the time of sentence.

III. The evidence was insufficient to prove beyond a reasonable doubt that Appellant Randall Capone operated or attempted to operate a motor vehicle. The only evidence was that two people had seen Mr. Capone from afar entering the driver's side of his truck, which then drove off. But given that the undisputed evidence was that the truck's back seat was accessible only through that door, Mr. Capone was so intoxicated that he could not even sit or stand, and the police could not find the truck's keys, it was not a reasonable inference that he operated or attempted to operate the truck. As a matter of law, the only reasonable inference was that someone else had operated Mr. Capone's truck.

Standard of Appellate Review

This Court reviews the sufficiency of evidence in a criminal case for "whether, after review of all the evidence, viewed in a light most favorable to the prosecution, the appellate court is convinced a rational factfinder could have found the defendant guilty beyond a reasonable doubt." *State v. McCaslin*, 291 Kan. 697, 710, 245 P.3d 1030, 1040-41 (2011) (citation omitted). If the evidence was insufficient even as to one element of the offense, the conviction must be reversed. *State v. Dinh*, 296 Kan. 230, 290 P.3d 652, 658 (2012).

In the course of this review, this Court will not "reweigh evidence, resolve conflicts in the evidence, or pass on the credibility of witnesses." *Id.* A conviction "can be based entirely on circumstantial evidence and the inferences fairly deducible therefrom," but any such inference must be "reasonable." *Id.* (citation omitted). Reasonable inferences cannot be based solely on other circumstantial inferences. *State v. Richardson*, 289 Kan. 118, 127, 209 P.3d 696, 704 (2009).

* * *

To convict a defendant for driving while under the influence of alcohol, the State must introduce sufficient evidence to prove beyond a reasonable doubt that the defendant operated or attempted to operate a motor vehicle. Inferences based on inferences are

insufficient to prove this. In this case, the only evidence the State introduced was the testimony of two witnesses who, from afar, said they saw the defendant enter the driver's side door of his truck, which then drove off. But the undisputed evidence was that the truck's back seat was accessible only through that door, the defendant was so intoxicated that he could neither sit nor stand, and the police were unable to find the keys to the truck anywhere in its vicinity. Was it a reasonable inference that Mr. Capone, rather than someone else, had operated the truck?

"[D]runk driving is a combination of two activities: (1) drinking and (2) driving." *Begay v. United States*, 553 U.S. 137, 154 (2008) (Scalia, J., concurring in the judgment). K.S.A. § 8-1567(a) echoes this: the offense of driving under the influence of alcohol ("DUI") involves only these two elements: "[1] operating or attempting to operate any vehicle … [2] while … under the influence of alcohol to a degree that renders the person incapable of safely driving a vehicle."

In this case, Appellant Randall Capone did not question that he was under the influence of alcohol on the night in question such that he could not safely have driven a vehicle. Indeed, it was undisputed, both from all the State's witnesses and the defense, that Mr. Capone was *extremely* intoxicated.

Dawn Watson, the bartender at Danny's Bar, testified Mr. Capone was so drunk that she refused to serve him any more alcohol (Record Volume VI, pp. 84, 96-97). Mr. Capone's witness, Brett Roberts, testified that, as soon as Mr. Capone entered his truck, he "fell into" the back seat, and then was belligerent (R. VI 163, 168). It was evident to Mr. Roberts that Mr. Capone was so drunk that, upon leaving the truck to enter the QuikTrip, police undoubtedly would be called (R. VI 165-66). As soon as Mr. Capone

entered the QuikTrip, employee Gary Knauss observed him stumble about, eat nachos out of a drip tray, fall into the bakery rack, and then lie on the floor in a pool of chili (R. VI 115-16, 128-29). He said Mr. Capone could barely walk and could not talk (R. VI 115-16).

Lastly, Corporal Sumner, the arresting officer, testified that Mr. Capone was unable to speak coherently and rather only could "moan" (R. VI 128). Mr. Capone could neither stand nor walk without Corporal Sumner's help (R. VI 129). When he eventually got Mr. Capone outside and seated on a curb, Corporal Sumner said Mr. Capone had trouble sitting up (R. V. III 12; R. VI 129). These behaviors are obvious on Corporal Sumner's dashcam video (R. IX Ex. 7). On the police booking video, Mr. Capone visibly is unable to do anything except vomit or sleep, as Corporal Sumner also described (R. VI 139; IX Ex. 10).

Thus, instead of whether Mr. Capone was intoxicated within the meaning of § 8-1567(a), the sole question at trial was whether Mr. Capone had operated or attempted to operate a motor vehicle while in this condition. Given the plain language of § 8-1567(a), it is axiomatic that, "(1) to operate a vehicle as set forth in 8-1567(a) means to drive it; and (2) in order to be convicted of operating a vehicle under the influence, there must be some evidence, direct or circumstantial, that the defendant drove the vehicle." *State v. Kendall*, 274 Kan. 1003, 1009, 58 P.3d 660, 664 (2002) (citing *State v. Fish*, 228 Kan. 204, 205-06, 612 P.2d 180 (1980)). "[P]roof that [the defendant] drove (or moved) the vehicle [is] required to sustain the conviction …." *Id.* at 1011. The State must show beyond a reasonable doubt that the defendant "was 'in actual physical control' of the

vehicle – as its operator or driver" at the time alleged. *State v. Sanchez*, ___ Kan.App.2d ___, 296 P.3d 1133 (Feb. 22, 2013).

In this case, the State's evidence that Mr. Capone drove at the time in question was insufficient to meet its burden to prove this element beyond a reasonable doubt. At the outset, Mr. Capone's undisputedly extreme intoxication, which left him unable to sit, stand, walk, speak coherently, or do anything except vomit or sleep belies any reasonable notion that he drove. To reach this finding, one would have to conclude that, despite his condition, he had the wherewithal not only to turn on his truck, but also to pull it out of a parking space in a packed strip mall lot without hitting any other cars (R. VI 101), drive down the parking lot lane, turn left at the L-shaped turn in the lot (R. VIII Ex. A), which was the only way to get to the QuikTrip (R. VI 86, 88), turn left into the QuikTrip's lot (R. VIII Ex. A), *and* then park the truck perfectly in a parking spot in front of the QuikTrip (R. VI 128; R. IX Exs. 1-6). Simply put, this is too tenuous to be believed beyond a reasonable doubt at the outset, without examining any further evidence.

Supposing such a feat was even humanly possible, however, the State's only proof that Mr. Capone drove the truck at all was speculative and insufficient. It consisted of testimony from Ms. Watson and the doorman at Danny's, Nick Baggett. Ms. Watson said she followed Mr. Capone out the front door of Danny's and into the parking lot (R. VI 84-85). Mr. Baggett was seated just outside the front door (R. VI 100). He said that, after exiting the bar, Mr. Capone, visibly intoxicated, stumbled across the parking lot toward his truck, which was parked about 20 parking spaces from the entrance to Danny's (R. VI 100, 110).

Mr. Baggett said he followed Mr. Capone halfway to the truck (R. VI 110). Both Ms. Watson and Mr. Baggett testified Mr. Capone opened the driver's side door of the truck and got in (R. VI 86, 101). Both testified that, soon thereafter, they saw the truck drive away, but Mr. Baggett also said he could not tell whether anyone else besides Mr. Capone was in the truck (R. VI 86, 101). By the time Corporal Sumner responded to the QuikTrip and saw Mr. Capone's truck parked in front, Mr. Capone was inside the QuikTrip and no one was in the truck (R. VI 128; R. IX Exs. 1-6).

As Corporal Sumner testified, however, it was undisputed that the keys to Mr. Capone's truck were nowhere in the truck, on Mr. Capone, or at the QuikTrip; indeed, the police never found them (R. III 16; R. VI 140). They found no keys on Mr. Capone's person during a search (R. III 16; R. VI 140). They found none in the QuikTrip store (R. VI 140). They found none in the QuikTrip parking lot (R. III 16). They found no keys in the truck (R. III 16; R. VI 140).

The testimony of Mr. Baggett and Ms. Watson that they merely saw Mr. Capone stumble to his truck and enter the driver's side door, sometime after which they saw the truck drive off, is insufficient to meet the State's burden to prove that Mr. Capone, himself, operated the truck. Neither Mr. Baggett nor Ms. Watson was able to say that they actually saw Mr. Capone, himself, drive the truck (i.e. that Mr. Capone got behind the wheel, turned on the truck, and made it move). Instead, the State seeks to draw an inference from their testimony that, as Mr. Capone got into the truck and, thereafter, the truck moved, Mr. Capone must have caused the truck to move.

The law of Kansas is that such an inference, especially in these circumstances, is unreasonable and cannot properly be drawn. This Court adheres to "a rule against basing

an inference on an inference …." *State v. Cruz*, 15 Kan.App.2d 476, 491, 809 P.2d 1233, 1244 (1991) (citation omitted). It is "reversible error to allow the jury to speculate on unjustifiable inferences." *Id.* at 490. This is because "[g]uilt may never be based on inference alone. Presumptions and inferences may be drawn from facts established, but presumption may not rest upon presumption or inference on inference." *Id.*

"[W]hat is meant by the rule forbidding the basing of one inference upon another inference is that an inference cannot be based upon evidence which is too uncertain or speculative or which raises merely a conjecture or possibility." *Id.* at 491 (citation omitted). Rather, "Permissible presumptions or inferences, as understood in the law of evidence, must have substantial probative force as distinguished from surmise. While reasonable inferences may be drawn from the facts and conditions shown they cannot be drawn from facts or conditions merely imagined or assumed." *Id.* at 491-92 (citation omitted).

In this case, the inference the State seeks to draw – that Mr. Capone operated the truck – is mere conjecture or surmise. Mr. Baggett and Ms. Watson testified only that they saw Mr. Capone enter the driver's side of the truck and, thereafter, that they saw the truck move. The inference that this means Mr. Capone actually operated the truck depends on finding each of these four entirely separate inferences: (1) no one else drove the truck, (2) Mr. Capone sat in the driver's seat of the truck, (3) Mr. Capone possessed the instrumentality necessary to start the truck (i.e. its keys), and (4) Mr. Capone was physically capable of operating the truck.

As an inference based on other inferences, the law of Kansas is that it cannot be drawn. *Cruz*, 15 Kan.App.2d at 490-92. Even if that, alone, were permissible, the third

and fourth of these separate inferences – that Mr. Capone had the keys to the truck and physically could operate it – could not reasonably be reached given the rest of the undisputed evidence from the State's own witnesses detailing Mr. Capone's extremely intoxicated condition and the fact that Mr. Capone had no keys to the truck on his person, in or around the truck, or in the QuikTrip. The first and second inferences – that no one else drove the truck and that Mr. Capone sat in the driver's seat – are purely conjecture or possibility. And based on the State's evidence, both are further doubtable. The State's photographs (R. IX Ex. 1-6) show that the truck was of a crew cab design, meaning that the back seat is reachable only from the driver's side door; entering through the driver's side door does not necessarily equate to entering the driver's seat. And unless someone else possessed the keys (who was capable of operating the truck), the truck would have been inoperable.

Understandably, very few reported Kansas appellate opinions deal with the "operating or attempting to operate" element of DUI, rather than the "under the influence" element. Of those few in which the Court found that circumstantial evidence was enough to prove this element, none involve inferences based on inferences. None are tenuous and lacking. Rather, all have substantial inferences in favor of the conclusion. Indeed, in *every single one*, the keys either were found on the defendant or in the ignition, with the defendant alone. *See State v. Stevens*, 285 Kan. 207, 316-17, 172 P.3d 570 (2007) (keys found in ignition, defendant seen by witnesses physically seated in driver's side of car); *State v. Suter*, 296 Kan. 137, 290 P.3d 620, 629 (2012) (defendant admitted at some point to an officer that he was the driver and did not suggest anyone else drove); *State v. Adame*, 45 Kan.App.2d 1124, 1128-29, 257 P.3d 1266 (2011) (same); *State v.*

Riedl, 15 Kan.App.2d 326, 327, 807 P.2d 697 (1991) (same); *Sanchez*, 296 P.3d at 1133 (defendant, as a passenger, admitted to "grabbing the wheel" from the driver). The remainder involved the defendant having been found alone behind the wheel of the car or near the car with the engine running or the car wrecked. *See State v. Ward*, 233 Kan. 144, 146-47, 660 P.2d 957 (1983); *State v. Gregory*, 191 Kan. 687, 690, 383 P.2d 965 (1963); *State v. Dill*, 182 Kan. 174, 176, 319 P.2d 172 (1957); *State v. Hazen*, 176 Kan. 594, 595, 272 P.2d 1117 (1954).

Unlike in all those cases, here the State's evidence is far too questionable or conjectural to meet its burden to prove Mr. Capone operated the truck. Even if the jury disbelieved Mr. Capone's witness, Mr. Roberts, who explained in detail that *he* had driven the truck and then had fled the scene with the keys, what is left, standing alone, cannot legally support the conclusion the State seeks to draw. Indeed, the paucity of evidence caused the trial court to remark at sentencing, "I might have reached a different verdict had it been a trial to the Court …. I might have had a reasonable doubt" (R. VII 9).

Regardless of to whom the case was tried, however, the law of Kansas is that, based on all the evidence in a light most favorable to the prosecution, a rational factfinder could not have found the defendant guilty beyond a reasonable doubt. The evidence, dependent on an inference drawn from other inferences, was insufficient to prove Mr. Capone operated or attempted to operate a motor vehicle.

The Court should reverse the trial court's judgment of conviction and sentence against Mr. Capone for the DUI charge.

Conclusion

The Court should reverse the trial court's judgment of conviction and sentence against Mr. Capone for the DUI charge. Alternatively, the Court should reverse the district court's sentence against Mr. Capone on the DUI charge and should remand this case with instructions to resentence the DUI charge as a misdemeanor.

Respectfully submitted,

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Appendix