

2011 WL 1368869 (Kan.App.) (Appellate Brief)  
 Court of Appeals of Kansas.

STATE OF KANSAS, Plaintiff-Appellee,  
 v.  
 Kim PELSOR, Defendant-Appellant.

No. 10-105080-A.  
 February 25, 2011.

Appeal from the District Court of Franklin County, Kansas  
 Honorable Thomas Sachse, Judge District Court Case No. 09 CR 167

**Brief of Appellant**

Lydia Krebs, #22673, Kansas Appellate Defender Office, Jayhawk Tower, 700 Jackson, Suite 900, Topeka, Kansas 66603, (785) 296-5484, Attorney for the Appellant.

**\*ii TABLE OF CONTENTS**

|   |  |
|---|--|
| <i>Nature of the Case</i> .....   | 1  |
| <i>Statement of Issues</i> .....  | 1  |
| <i>Statement of Facts</i> .....   | 1  |
| <i>Arguments and Authorities</i> .....  | 4  |
| <b>Issue I: The district court erred in admitting evidence of Ms. Pelsor's prior crimes</b> .....   | 4  |
| <br>  |  |
| <i>State v. Hart.</i> ___ Kan. App. ___ 242 P.3d 1230 (2010) .....  | Kan. App. ___ 242 P.3d 1230 (2010) 4, 12 |
| <i>State v. Reid.</i> 286 Kan. 494, 186 P.3d 713 [2008].....  | 4  |
| <i>State v. Wells.</i> 289 Kan. 1219, 221 P.3d 561 [2009].....  | 4, 7-8                                   |
| <i>State v. Dukes,</i> 290 Kan. 485, 231 P.3d 558 (2010) .....  | 4-5                                      |
| K.S.A. 60-404 .....   | 5-6                                      |
| <i>Davin v. Athletic Club of Overland Park.</i> 32 Kan. App. 2d<br>1240, 96 P.3d 687 (2004) .....   | 5  |
| <i>State v. Plunkett.</i> 261 Kan. 1024, 934 P.2d 113 (1997) .....  | 5  |
| <i>State v. Prouse.</i> 244 Kan. 292, 767 P.2d 1308 [1989].....   | 5  |
| K.S.A. 60-455 .....   | 6, 12, 14                                |
| <i>State v. Riojas.</i> 288 Kan. 379, 204 P.3d 578 (2009) .....   | 7  |
| <i>State v. Carapezza.</i> 286 Kan. 992, 191 P.3d 256 (2008) .....  | 7  |
| <i>State v. Jordan.</i> 250 Kan. 180, 825 P.2d 157 [1992].....  | 7  |
| <i>State v. Ruebke.</i> 240 Kan. 493, 731 P.2d 842, <i>cert. denied</i><br>483 U.S. 1024, 97 L. Ed. 2d 770, 107 S. Ct. 3272 [1987].....     | 7  |
| <i>State v. Myrick&amp;Nelms.</i> 228 Kan. 406, 616 P.2d 1066<br>(1980) .....   | 7  |
| <i>State v. Engelhardt</i> 280 Kan. at 128-29, 119 P.3d 1148<br>(2005) .....  | 7  |
| P.I.K. 3d 52.06 .....   | 8, 11                                    |
| Note, Evidence of Other Crimes in Kansas, 17 Washburn L.<br>J. 98 (1977) .....  | 8  |
| <i>State v. Russell,</i> 117 Kan. 228, 230 Pac. 1053 (1924) .....   | 8  |
| Slough, Other Vices, Other Crimes: <i>Kansas Statutes</i><br><i>Annotated Section 60-455 Revisited,</i> 26 Kan. L. Rev. 161<br>(1978) ..... | 8, 11                                    |
| <i>State v. Davidson.</i> 31 Kan. App. 2d 372, 65 P.3d 1078<br>(2003) .....   | 9  |

|   |      |
|---|------|
| <i>State v. Grissom</i> . 251 Kan. 851, 840 P.2d 1142 (1992) .....  | 9-10 |
| <i>State v. Marquez</i> , 222 Kan. 441, 565 P.2d 245 [1977].....  | 9    |
| <i>State v. Jones</i> , 277 Kan. 413, 85 P.3d 1226 [2004] .....   | 11   |
| <i>State v. Damewood</i> . 245 Kan. 676, 783 P.2d 1249 [1989].....  | 11   |
| <i>State v. Wright</i> 194 Kan. 271, 398 P.2d 339 [1965].....   | 11   |
| <i>State v. Blaurock</i> . 41 Kan. App. 2d 178, 201 P.3d 728<br>(2009) .....  | 12   |
| <b>*iii Issue II: The district court erred in imposing attorney fees without specifying the amount of the fee imposed</b> ..... | 14   |
| <i>State v. Stevens</i> . 285 Kan. 307, 172 P.3d 570 (2007) .....   | 14   |
| <i>State v. Wiegand</i> , 275 Kan. 841, 69 P.3d 627 [2003].....   | 14   |
| K.S.A. 22-4513 .....  | 14   |
| K.S.A. 21-4603d .....   | 14   |
| <i>State v. Rogers</i> , 282 Kan. 218, 144 P.3d 625 [2006].....   | 14   |
| <i>State v. Robinson</i> , 281 Kan. 538, 132 P.3d 934 (2006) .....  | 14   |
| <i>State v. Stevens</i> . 36 Kan. App. 2d 323, 138 P.3d 1262 [2006].....  | 15   |
| <i>Conclusion</i> .....   | 15   |

### **\*1 Nature of the Case**

A jury convicted Kim Pelsor of one count of mistreatment of a dependent adult, a severity level six person felony. The district court ordered Ms. Pelsor to serve twenty-four months probation, with an underlying eighteen-month prison sentence. Ms. Pelsor appealed.

### *Statement of Issues*

**Issue I: The district court erred in admitting evidence of Ms. Pelsor's prior crimes.**

**Issue II: The district court erred in imposing attorney fees without specifying the amount of the fee imposed.**

### *Statement of Facts*

On May 13, 2009, the State charged Kim Pelsor with one count of mistreatment of a dependant adult, a severity level six person felony, alleging that, while she was an employee at the Christian Cottage Nursing Home, she forced Hazel Ames, a ninety-five-year-old resident of the home “to drink water against her will.” (R. I, 6).

Prior to trial, defense counsel filed a motion in limine, arguing that the district court should preclude the State from introducing evidence of “[a]ny alleged bad acts of defendant occurring before or after the incident alleged in the complaint.” (R. I, 17). The district court granted the defendant's motion. (R. I, 57). The district court also sent an email to both parties that stated, “All evidence which I have indicated is inadmissible constitutes the order; defense counsel need not make contemporaneous objections at trial and the State is ordered not to present or elicit this evidence.” Finally, the district court stated that the email would “serve as the ‘law of the case’ relative to the defendant's motion in limine.” (R. I, 57).

**\*2** On the first day of trial, however, the district court “corrected” the email to read, “All evidence which I have indicated is *admissible* constitutes the order; defense counsel need not make contemporaneous objections at trial and the State is ordered not to present or elicit this evidence.” (R. I, 57; R. VII, 11). (Italics added). The district court then reiterated, “So yes, you're not required to make contemporaneous objections to the subject matter that's contained in the[,] or discussed in the[,] motion in limine.” (R. VII, 11).

At trial, the jury heard the testimony of Christine Hiracheta, who had been undergoing her first day of training at the Christian Care Cottage on July 8, 2008. According to Hiracheta, an incident involving Ms. Ames, Ms. Pelsor, and Alice Jimerson, another employee at Christian Care Cottage, had begun at the dining room table during dinner that evening, when Ms. Ames refused to drink the glass of water that accompanied her meal. (R. VII, 165).

After dinner, the residents of the Cottage all moved to their recliners in the living room. (R. VII, 166). Ms. Pelsor again attempted to coax Ms. Ames to drink the rest of her water, but Ms. Ames refused to do so, “pushing [Ms. Pelsor] away saying, ‘I don't want it. I don't want it. I don't want to drink it.’ ” According to Hiracheta, Ms. Pelsor “got up on the edge of the recliner on [Ms. Ames'] right side, sat up there with her legs across [Ms. Ames'] lap and her arm kind of around her neck, and said, ‘You're going to finish this water,’ and held it up to her mouth and tried to make her drink it.” (R. VII, 167). When Ms. Ames continued to resist, Jimerson “kneeled down on the ground on the opposite side of [Ms. Pelsor], and they were both -- [Ms. Ames] was fighting, moving her hands, trying to get away, so [Jimerson] held her hands down while [Ms. Pelsor] \*3 pushed [Ms. Ames'] head back against the recliner so it was flat back and poured the water in her mouth.” (R. VII, 167-68). Instead of swallowing the water, however, Ms. Ames spit it out at Ms. Pelsor. At that point, Jimerson “lifted [Ms. Ames'] shirt above her mouth so if she did spit the water would go on her clothing.” Although Ms. Ames' shirt got wet, and although “there was a preacher coming to do a communion service for the residents that evening,” Ms. Pelsor did not change Ms. Ames' shirt for the service. (R. VII, 128, 170-71). Finally, Hiracheta testified that Ms. Pelsor had told Hiracheta, “ ‘Don't worry, we have to do this all the time.’ ” (R. VII, 170).

Ms. Pelsor also testified at trial, explaining that, when she brought the glass of water to Ms. Ames' recliner, Ms. Ames drank “a little bit and then she started spitting it out,” so Ms. Pelsor asked Jimerson to bring her a towel. Because Ms. Ames was prone to [urinary tract infections](#), Ms. Pelsor continued to try to get Ms. Ames to drink the water, raising the glass to Ms. Ames' mouth “like you give a little kid a drink.” When Ms. Ames spit the water out “two or three times,” however, Ms. Pelsor eventually gave up and quit trying. (R. VIII, 276). Ms. Pelsor denied placing her hands on Ms. Ames' head or neck during the incident. (R. VIII, 281).

The jury ultimately convicted Ms. Pelsor of one count of mistreatment of a dependent adult, a severity level six person felony. (R. I, 126; R. VIII, 398). Based on her criminal history score of “I,” the district court ordered Ms. Pelsor to serve twenty-four months probation with an underlying eighteen-month prison sentence. (R. IX, 13, 17). The district court also ordered Ms. Pelsor to pay “five percent of the attorney's fees incurred and submitted by voucher.” (R. IX, 18). Ms. Pelsor filed a timely notice of appeal. (R.I, 109).

#### *\*4 Arguments and Authorities*

##### **Issue I: The district court erred in admitting evidence of Ms. Pelsor's prior crimes.**

###### *Introduction*

In the present case, the district court ruled, prior to trial, that the State could not introduce evidence of Ms. Pelsor's prior crimes. It further ruled that defense counsel need not lodge a contemporaneous objection if the State introduced evidence that violated the district court's ruling on the motion in limine. Nevertheless, the State proceeded to elicit testimony from Hiracheta at trial that Ms. Pelsor had stated, after forcing Ms. Ames to drink the water, “ ‘Don't worry, we have to do this all the time.’ ” (R. VII, 170). Because this statement constituted evidence of Ms. Pelsor's prior crimes, and because that evidence prejudiced Ms. Pelsor, this Court must reverse her conviction.

###### *Standard of Review*

This Court applies an [abuse](#) of discretion standard of review to a district court's determination that evidence has probative value, as well as its decision that evidence is more probative than prejudicial. This Court has unlimited review, however, over a

district court's decision that a fact is material or at issue. *State v. Hart*, \_\_\_ Kan. App. \_\_\_, 242 P.3d 1230, 1247 (2010) (citing *State v. Reid*, 286 Kan. 494, 505, 186 P.3d 713 [2008], *State v. Wells*, 289 Kan. 1219, 1226-27, 221 P.3d 561 [2009]).

### ***Preservation of the Issue***

“Generally, a party may not present an issue on appeal ‘where no contemporaneous objection was made and where the trial court did not have an opportunity to rule.’ ” *State v. Dukes*, 290 Kan. 485, 488, 231 P.3d 558 (2010). “The contemporaneous objection rule requires each party to make a specific and timely \*5 objection at trial in order to preserve evidentiary issues for appeal.” *Dukes*. 290 Kan. at 488 (citing K.S.A. 60-404).

In the present case, defense counsel did not lodge a contemporaneous objection to Hiracheta's testimony that Ms. Pelsor had admitted to “ ‘do[ing] this all the time.’ ” (R. VII, 170). This Court should reach this issue, however, because (1) the district court repeatedly informed defense counsel that he did not have to object to evidence at trial to “subject matter that's contained in the or discussed in the motion in limine”; and (2) the district court informed defense counsel that the district court's ruling on defense counsel's motion in limine constituted the “ ‘law of the case.’ ” (R. I, 57; R. VII, 11). “The law of the case doctrine is a *discretionary* policy which allows the court to refuse to reopen a matter already decided, without limiting its power to do so. The doctrine is applied to avoid relitigation of an issue, to obtain consistent results in the same litigation, and to afford a single opportunity for argument and decision of the issue.” *Davin v. Athletic Club of Overland Park*. 32 Kan. App. 2d 1240, 1242, 96 P.3d 687 (2004). (Italics added). In ruling that the “law of the case” doctrine applied to its rulings on Ms. Pelsor's motion in limine, the district court was exercising its discretion to refuse to reopen these matters, “without limiting its power to do so.”

Our Supreme Court has repeatedly held that “ ‘[a] litigant may not invite and lead a trial court into error and then complain of the trial court's action on appeal.’ ” *State v. Plunkett*. 261 Kan. 1024, 1033, 934 P.2d 113 (1997) (quoting *State v. Prouse*. 244 Kan. 292, 298-99, 767 P.2d 1308 [1989]). While this situation is not precisely analogous, it is similar: the district court informed Ms. Pelsor that she need not lodge a contemporaneous objection to evidence the district court had already addressed in its \*6 ruling on Ms. Pelsor's motion in limine. Thus, the district court “invited” defense counsel not to object, and “led” defense counsel into failing to comply with K.S.A. 60-404. To now allow the district court's actions to protect it from a claim of error would be tantamount to allowing a party to “lead a trial court into error and then complain of the trial court's action on appeal.”

### ***Analysis***

#### ***Introduction***

Under K.S.A. 60-455, “evidence that a person committed a crime or civil wrong on a specified occasion, is inadmissible to prove such person's disposition to commit crime or civil wrong as the basis for an inference that the person committed another crime or civil wrong on another specified occasion.” Evidence of a defendant's prior crimes is admissible, however, when it is “relevant to prove some other material fact including motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.” Such evidence is also “admissible to show the modus operandi or general method used by a defendant to perpetrate similar but totally unrelated crimes when the method of committing the prior acts is so similar to that utilized in the current case before the court that it is reasonable to conclude the same individual committed both acts.”

Analysis under K.S.A. 60-455 requires several steps. The court must determine that the evidence is relevant to prove a material fact. The court must also determine that the material fact is in dispute. The court must further determine that the probative value of the evidence outweighs the potential for producing undue prejudice. Finally, the court must give a limiting instruction informing the jury of the specific purpose for admitting whatever 60-455 evidence comes in.

\*7 *State v. Riojas*, 288 Kan. 379, 383, 204 P.3d 578 (2009).

**Motive**

“ ‘Motive is the moving power which impels one to action for a definite result... Motive is that which incites or stimulates a person to do an action.’ ” *State v. Carapezza*, 286 Kan. 992, 998, 191 P.3d 256 (2008) (quoting *State v. Jordan*, 250 Kan. 180, 190, 825 P.2d 157 [1992]) (quoting *State v. Ruebke*, 240 Kan. 493, 502, 731 P.2d 842, cert. denied 483 U.S. 1024, 97 L. Ed. 2d 770, 107 S. Ct. 3272 [1987]). Motive is typically at issue when the State seeks to explain why a defendant committed a particular crime. *Carapezza*, 286 Kan. at 999.

The present case differs from other cases in which Kansas Courts have held that evidence of prior crimes is admissible to prove motive. See, *State v. Myrick & Nelms*, 228 Kan. 406, 419-20, 616 P.2d 1066 (1980) (“[E]vidence of an outstanding robbery warrant was admissible as evidence of a defendant's motive for killing a highway patrol trooper who had stopped defendants' car. He simply wanted to avoid arrest on that charge.”) See also, *Ruebke*, 240 Kan. at 503 (“[E]vidence of [the] defendant's prior theft was admissible to show his motive” where “[t]he victims had discovered him as he was committing a theft, and he killed them allegedly to prevent his identity from being found and his probation revoked”); *State v. Engelhardt*, 280 Kan. at 128-29, 119 P.3d 1148 (2005) (“[Defendant's previous time in prison or his parole status was admissible as motive” where “[t]he State contended that [the] defendant killed his victim because he was afraid the victim was a snitch who would report him as a parole absconder.”) *Wells*, 289 Kan. at 1229; *Carapezza*, 286 Kan. at 999-1000 (Evidence of the “defendant's prior drug use and addictions” was admissible to prove “motive for the robbery, i.e., needing \*8 money to buy drugs.”) *Wells*, 289 Kan. at 1229-30.

In the present case, the State theorized that Ms. Ames' refusal to drink her water was Ms. Pelsor's motive for “punishing” Ms. Ames. (R. VIII, 368). Unlike the above cases, the State did not argue that Ms. Pelsor committed the current crime to cover up, or avoid arrest for, her prior crimes. Nor did the State allege that Ms. Pelsor committed the current crime in order to obtain the means to commit another crime. Evidence that Ms. Pelsor may have committed the same or similar acts against Ms. Ames in the past was, therefore, not admissible to prove motive.

**Opportunity**

According to the “Notes on Use” for P.I.K. 3d 52.06, “Opportunity simply means that the defendant was at a certain place at a certain time and consequently had the opportunity to commit the offense charged. Note, Evidence of Other Crimes in Kansas, 17 Washburn L. J. 98, 112 (1977); *State v. Russell*, 117 Kan. 228, 230 Pac. 1053 (1924).” Opportunity may also include “the defendant's physical ability to commit the offense. Slough, Other Vices, Other Crimes: *Kansas Statutes Annotated Section 60-455* Revisited, 26 Kan. L. Rev. 161, 164 (1978).”

Opportunity was not at issue in the present case. Ms. Pelsor admitted to being present at the time and place of the alleged offense. (R. VIII, 271, 273-77). Similarly, she acknowledged that she had the physical ability to commit the crime. In fact, Ms. Pelsor testified that she had significant upper body strength and that, if she had really wanted to, she “could have forced Hazel Ms. Ames to drink all of her water.” (R. VIII, 284). Evidence that Ms. Pelsor may have committed a similar crime on a past occasion was, therefore, inadmissible to prove opportunity.

**\*9 Intent**

In *State v. Davidson*, 31 Kan. App. 2d 372, 382, 65 P.3d 1078 (2003), this Court recognized that “[t]he most recent cases from the Supreme Court and [this Court] seem to require the defendant to have asserted an innocent explanation before intent will be considered a disputed material issue.” In the present case, Ms. Pelsor did not admit to physically forcing Ms. Ames' mouth open and pouring water down her throat, and then offer an innocent explanation for her doing so. Instead, she stated that she did not remember “using [her] hands to touch [Ms. Ames'] neck or head,” and maintained that she only held the glass of water up

to Ms. Ames' mouth and encouraged her to drink it. (R. VIII, 281). Because intent was not at issue in the present case, evidence that she may have committed a similar crime in the past was not admissible to prove intent.

### ***Preparation***

“ ‘Preparation for an offense consists in devising or arranging means or measures necessary for its commission. [Citations omitted.] Accordingly, a series of acts that very logically convinces the reasonable mind that the actor intended that prior activities culminate in the happening of the crime in issue may have strong probative value in showing preparation. [Citation omitted.]’ ” *State v. Grissom*, 251 Kan. 851, 925, 840 P.2d 1142 (1992) (quoting *State v. Marquez*, 222 Kan. 441, 446, 565 P.2d 245 [1977]).

“Preparation also consists of arranging the means necessary to commit the crime.” *Grissom*, 251 Kan. at 925. In *Grissom*, our Supreme Court held that evidence that the defendant had previously attempted to abduct a woman was relevant in a murder case against him because, prior to the first attempted abduction, the defendant had obtained a master key to the woman's apartment complex, as well as a pellet gun he used in the \*10 attack. The State alleged that, in committing the crimes charged, the defendant had also used a master key to access the murdered women's apartments. *Grissom*, 251 Kan. at 871. Our Supreme Court agreed, holding that “[t]he defendant's prior conduct in relationship to [the first victim], specifically the master key and the pellet gun, is relevant to how he prepared to commit the crimes upon [the three murder victims].” *Grissom*, 251 Kan. at 925. Similarly, the Court concluded that the evidence that the defendant possessed “the pellet gun and master keys was relevant to show his opportunity to commit the crimes.” *Grissom*, 251 Kan. at 926.

In the present case, the State presented no evidence that Ms. Pelsor did anything to “prepare” to commit either the present crime or any prior crimes. Nor did the State present evidence that Ms. Pelsor committed the prior crimes in order to “devis[e] or arrang[e] means or measures necessary” for the commission of the current crime. If anything, it would seem that committing similar crimes in the past would have made it more difficult to commit the current crime, as it raised the possibility that Ms. Ames might report Ms. Pelsor's conduct to a friend or family member. Evidence that Ms. Pelsor committed similar crimes on past occasions was not, therefore, admissible to prove preparation.

### ***Plan***

Our Supreme Court has upheld the admission of evidence of other crimes to show plan under two separate theories. The rationale for admitting evidence under the first theory is that “the method of committing the prior acts is so similar to that utilized in the case being tried that it is reasonable to conclude the same individual committed both acts. In such cases the evidence is admissible to show the plan or method of operation and \*11 conduct utilized by the defendant to accomplish the crimes or acts. [Citation omitted.]” In other words, under the first theory, “[p]rior bad acts are only admissible to show “plan” when they are “ ‘so “strikingly similar” in pattern or so distinct in method of operation as to be a “signature.’ ” *Prine*, 287 Kan. at 735 (quoting *State v. Jones*, 277 Kan. 413, 423, 85 P.3d 1226 [2004]).

Under the second theory, the evidence is “admissible to show plan where there is some direct or causal connection between the prior conduct and the crimes charged.” *Jones*, 277 Kan. at 420 (quoting *State v. Damewood*, 245 Kan. 676, 681-82, 783 P.2d 1249 [1989]).

The evidence that Ms. Pelsor committed similar crimes in the past was not admissible under either theory. The State offered no evidence of the circumstances of the prior crimes, so it is impossible to determine whether the crimes were “strikingly similar.” Nor is there any indication that there was some causal connection between the past crimes and the current crime. The evidence was not admissible to prove plan.

### ***Knowledge***

According to the “Notes on Use” for P.I.K. 3d 52.06, Knowledge signifies an awareness of wrongdoing. Slough, *Other Vices, Other Crimes*, 20 Kan. L. Rev. at 419; *State v. Faulkner*, 220 Kan. at 156. Knowledge is important as an element in crimes that require specific intent, such as receiving stolen property, committing forgery (“*State v. Wright*. 194 Kan. 271, 275-276, 398 P.2d 339 [1965]”), uttering forged instruments, making fraudulent entries, and possessing illegal drugs (*State v. Graham*. 244 Kan. at 196-98; *State v. Faulkner*. 220 Kan. at 156.)

Mistreatment of a dependent adult is not a specific intent crime. Moreover, it is unclear how Ms. Pelsor's prior crimes would impact her “awareness of wrongdoing.” \*12 Evidence of those prior crimes was not, therefore, admissible to prove knowledge.

### ***Identity***

Identity is at issue where a defendant suggests that someone else committed the crime at issue. See, *State v. Blaurock*, 41 Kan. App. 2d 178, 199, 201 P.3d 728 (2009) (“[I]dentity was substantially in issue here where Blaurock identified someone else as engaging in sexual intercourse with C.S. and denied the charges filed against him.”) In the present case, Ms. Pelsor did not acknowledge that a crime occurred but claim that someone else committed it. Instead, she testified that she was present at the time of the alleged crime, but maintained that her actions did not constitute a crime. Because identity was not at issue in the present case, the evidence of Ms. Pelsor's prior crimes was inadmissible to prove that factor.

### ***Absence of Mistake or Accident***

Where a defendant does not offer an innocent explanation for his or her alleged acts, absence of mistake or accident is not at issue. *Hart*, 242 P.3d at 1253. Because Ms. Pelsor never argued that she “accidentally” held Ms. Ames' head back, pried her mouth open, and poured water down her throat, neither absence of mistake nor absence of accident were at issue in the present case, and evidence of Ms. Pelsor's prior crimes were not admissible to prove either factor.

### ***Modus Operandi***

Counsel for Ms. Pelsor could find no Kansas cases applying *K.S.A. 60-455(c)*, which states that.

in any criminal action other than a criminal action in which the defendant is accused of a sex offense under articles 34, 35 or 36 of chapter 21 of the Kansas Statutes Annotated, and amendments thereto, such evidence is admissible to \*13 show the modus operandi or general method used by a defendant to perpetrate similar but totally unrelated crimes when the method of committing the prior acts is so similar to that utilized in the current case before the court that it is reasonable to conclude the same individual committed both acts.

Nevertheless, in the absence of any evidence regarding the “method of committing the prior acts,” it is impossible to determine whether the method of committing those acts was “so similar” to the method Ms. Pelsor used in committing the current crime “that it is reasonable to conclude the same individual committed both acts.” The evidence of her prior crimes was, therefore, inadmissible to prove “modus operandi.”

### ***Harmless Error***

The district court's erroneous admission of evidence that Ms. Pelsor “did this all the time” was anything but harmless. Absent evidence that Ms. Pelsor had treated Ms. Ames similarly in the past, the jury was more likely to believe Ms. Pelsor's testimony

that she merely held the water glass up to Ms. Ames' mouth and encouraged her to drink. Once the jurors heard that she not only "did this all the time," but that she had no compunction admitting that fact, they were likely to conclude that she was the "type" of person who **abused elderly** women and was, therefore, likely guilty of the present crime. Similarly, even if the jurors did not believe that this particular instance rose to the level of mistreatment of a dependent adult, they may have convicted Ms. Pelsor (1) because they believed she deserved punishment for her prior acts, or (2) in order to prevent her from committing similar acts in the future. Because the admission of the prior crimes evidence prejudiced Ms. Pelsor, this Court must reverse her conviction.

#### **\*14 Conclusion**

Although the district court ruled, prior to trial, that any evidence of Ms. Pelsor's prior crimes was inadmissible, the State ultimately introduced evidence that Ms. Pelsor did this type of thing "all of the time." Because this evidence was inadmissible under [K.S.A. 60-455](#), and because it prejudiced Ms. Pelsor, this Court must reverse her conviction.

#### **Issue II: The district court erred in imposing attorney fees without specifying the amount of the fee imposed.**

##### *Standard of Review*

Although Ms. Pelsor failed to object to the imposition of attorney fees, the Kansas Supreme Court has held that our appellate courts may consider this issue for the first time on appeal because "consideration is necessary to serve the ends of justice." [State v. Stevens](#), 285 Kan. 307, 330, 172 P.3d 570, 587 (2007) (citing [State v. Wiegand](#), 275 Kan. 841, 844-45, 69 P.3d 627 [2003]).

Moreover, because this issue involves the interpretation of [K.S.A. 22-4513](#) and [K.S.A. 21-4603d\(i\)](#), this Court has unlimited review. [Stevens](#), 285 Kan. at 327 (citing [State v. Rogers](#), 282 Kan. 218, 222, 144 P.3d 625 [2006]).

##### *Analysis*

In imposing attorney fees, a district court must consider, on the record, the financial resources of the defendant and the nature of the burden that payment of the fees will impose. [State v. Robinson](#), 281 Kan. 538, 543, 132 P.3d 934 (2006). Our Supreme Court has held that, "[w]hen the trial court has failed to tax a specific amount claimed by BIDS, the trial court is unable to adequately evaluate the amount of such sum the defendant is able to pay." [Stevens](#), 285 Kan. at 330 (quoting **\*15** [State v. Stevens](#), 36 Kan. App. 2d 323, 138 P.3d 1262 [2006]).

In [Stevens](#), the district court questioned the defendant about his income before ordering him to pay attorney fees, but did not "state the specific amount of attorney fees to be reimbursed to BIDS." [Stevens](#), 285 Kan. at 328. Our Supreme Court held that "[w]hen the district court initially fails to tax a specific amount of attorney fees claimed by BIDS, then obviously that court is unable to adequately evaluate the amount of such unknown sum that the defendant is able to pay." [Stevens](#), 285 Kan. at 330. The Court then remanded to the district court with directions "to tax a specific amount of attorney fees claimed by BIDS and to determine the amount and method of payment of such sum that [the defendant] is able to pay." [Stevens](#), 285 Kan. at 330.

In the present case, as in [Stevens](#), the district court failed to specify the amount of the fee imposed. Instead, the district court simply ordered Ms. Pelsor to pay "5 percent of the attorney's fees incurred and submitted by voucher." (R. DC, 18). Under [Stevens](#), the failure to specify the amount of the fee imposed rendered the district court "unable to adequately evaluate the amount of such sum the defendant is able to pay." Because the district court failed to comply with the requirements set forth in [Robinson](#) and [Stevens](#), this Court must vacate the imposition of attorney fees and remand to the district court for a determination of the "specific amount of attorney fees claimed by BIDS," as well as the "amount and method of payment of such sum" Ms. Pelsor is able to pay.

*Conclusion*

For the aforementioned reasons, Ms. Pelsor respectfully requests that this Court reverse her conviction or, in the alternative, vacate the imposition of attorney fees and \*16 remand to the district court for further findings under *Robinson* and *Stevens*.

---

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.