MOTIONS IN LIMINE

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Monica Cameron, Assistant District Attorney

I. INTRODUCTION

A motion in limine is a pretrial procedural device that is used to exclude prejudicial evidence before the evidence has been offered at trial. The motion gives the court a chance to rule on the relevance of evidence prior to trial, thereby avoiding lengthy argument and interruption at trial. *U.S. v. Cline*, 188 F. Supp.2d 1287, 1291 (Kan. 2002). A significant amount of time can be saved at trial by obtaining this advance ruling on the admissibility of evidence. This writing will address proper use of prosecutorial motions in limine and avoiding violations of defense motions.

II. STANDARD AND AUTHORITY

The court's authority to consider a motion in limine is set out in K.S.A. 22-3217. *State v. Bloom*, 273 Kan. 291, 300, 44 P.3d 305 (2002). The standard for motions in limine was established by *State v. Quick*, 226 Kan. 308, 597 P.2d 1108 (1979). While this case has been overruled as to other points of law, it continues to provide the foundation for motions in limine. *Quick* established that the purpose of a motion in limine is to assure all parties a fair and impartial trial by prohibiting inadmissible evidence, prejudicial statements, and improper questions by counsel. Its use should be strictly limited to accomplishing this purpose. *Id*. at 311. *See also State v. Krider*, 41 Kan App.2d 368, 374, 202 P.3d 722 (2009) (*citing State v. Abu-Fakher*, 274 Kan. 584, 594, 56 P.3d 166 (2002)).

An order in limine ensures that inadmissible evidence is not even offered in circumstances where the mere offer or mention of the evidence would result in prejudice. *State v. Heath*, 264 Kan. 557, 581, 957 P.2d 449 (1998) (*citing State v. Massey*, 242 Kan. 252, 265, 747 P.2d 802 (1987)). Consequently, an order in limine should only be granted if the trial court finds that (1) the evidence will be inadmissible at trial under the rules of evidence and (2) the mere offer of the evidence, or statements made during trial concerning the evidence, will likely prejudice the jury. *Krider*, 41 Kan App.2d at 374 (*citing State v. Horn*, 278 Kan. 24, 37, 91 P.3d 517 (2004)).

III. PROCEDURE AND IMPLEMENTATION

The *Quick* Court specifically outlined the following guidelines for using a motion in limine: (1) A proper written motion should be filed to identify the evidence to be protected against; (2) An order in limine should set forth the specific basis for exclusion or admission; (3) The order should be temporary in nature; (4) When a protective order has been granted, any offer of proof during the course of trial must be made in the absence of the jury; (5) When the motion is taken under advisement, the matter should not be raised in the presence of the jury; (6) To avoid errors arising out of a temporary protective order, it is necessary to make a motion to

reconsider at trial and proffer evidence a second time. *Id.* at 312. These guidelines will be discussed below.

A. TIMELY FILING OF MOTION IN LIMINE

Per K.S.A. 22-3217, a motion in limine may be made by the defense, the prosecution, or upon the court's own motion at any time after the complaint has been filed.

B. PROPER WRITTEN MOTION SHOULD BE FILED

As discussed above, motions in limine are limited to the purpose of preventing prejudice during trial. Therefore, it is important to file a proper written motion that pinpoints the evidence to be excluded, and that the trial court issue an order that specifies the basis for exclusion or admission. *State v. Crume*, 271 Kan. 87, 100, 22 P.3d 1057 (2001). The motion should "articulate with specificity the arguments supporting the position that the particular evidence is inadmissible on any relevant ground." *Cline*, 188 F. Supp.2d at 1292. A motion in limine may address material that is inadmissible under established rules of evidence or by statute. *Quick*, 226 Kan. at 311. A district court may deny a motion in limine solely on the basis that it "fails to identify the evidence with particularity or to present arguments with specificity." *Cline*, 188 F. Supp.2d at 1292.

C. HEARING ON MOTION IN LIMINE

In hearing a motion in limine, the "court should refrain from the undue speculation inherent in making evidentiary rulings before hearing the factual context at trial." *Cline*, 188 F. Supp.2d at 1291. If necessary to avoid making factual findings, the court should take the motion under advisement, as discussed below.

Defendant does not have the right to confront witnesses at the motion hearing, even when the admissibility of testimony is the subject of a motion in limine. *See State v. Wood*, 230 Kan. 477, 479, 638 P.2d 908 (1982). Rather, these hearings are conducted through the proffer of anticipated evidence set forth in the motion. No admissions made by the defendant or his attorney at the motion hearing shall be used against the defendant, unless the admissions are reduced to writing and signed by the defendant and his attorney. K.S.A. 22-3217.

At the conclusion of the hearing, the court should prepare and file an order in limine. K.S.A. 22-3217. In practice, this order is rarely filed; rather, the court will simply make the notation on the minute sheet that the motion was granted. To remedy this, a well-prepared prosecutor should bring a proposed order to the hearing for signature. The order should mirror the written motion in terms of specifying the evidence that is ruled inadmissible and the grounds on which it is being excluded. The order should also specify how the order shall be implemented, in that the parties are prohibited from mentioning, referring to, or attempting to convey any manner, directly or indirectly, any statements or evidence regarding the matter to be excluded. The order should also specify that this preclusion applies to each and every witness, including the defendant himself, and counsel. *See generally State v. Williams*, 15 Kan. App.2d 656, 815 P.2d 569 (1991).

D. ORDER IN LIMINE SHOULD BE TEMPORARY IN NATURE

The order in limine should be temporary in nature. It is entered before trial and no one can know exactly what will occur later during the trial. Therefore, it is possible that events during the trial may support a change in the order. *Quick*, 226 Kan. at 311.

E. PROCEEDING AFTER AN ORDER IN LIMINE IS ISSUED

After a motion in limine has been granted, any attempt to admit evidence excluded by the order must be made in the absence of the jury. *Quick*, 226 Kan. at 311. In addition to risking a mistrial or appeal, an attorney also risks an ethical complaint for violating an order in limine. Under the Rules of Professional Responsibility, an attorney has a duty not to allude to any matter that he has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence. If an issue has been deemed irrelevant by an order in limine, an attorney cannot have a good faith reasonable belief that it is relevant despite, and in violation of, the court's order. *See Id.* at 312-313.

A motion in limine will not preserve an issue for appeal unless the issue is" fairly presented" to the trial court, is the type of issue that can be decided with finality prior to trial, and is ruled upon with certainty by the trial judge. Most objections are deemed to be dependent on trial context. *Cline*, 188 F. Supp.2d at 1292. Therefore, an order in limine does not remove the responsibility to make objections, raise motions to strike, or make formal offers of evidence during trial. *F.S.B. v. U.S. Bancorp*, 117 F. Supp. 2d 1078, 1081 (Kan. 2000). K.S.A. 60-404 requires a contemporaneous objection, which is an on-the-record "objection to the evidence timely interposed and so stated as to make clear the specific ground of objection." Consequently, any objections regarding an order in limine must be renewed at the time the evidence is introduced. *Cline*, 188 F. Supp.2d at 1292.

A temporary limine order cannot in and of itself constitute reversible error. Accordingly, the ruling on a motion in limine is not immediately appealable, and any claimed error based on the denial of the motion and subsequent admission of the evidence must be predicated on a renewal of the motion during the trial, giving the trial court an opportunity to rule on the admissibility of the evidence, and on timely and proper objection, when the evidence is offered at trial. *See generally Huls v. State*, 27 Ark. App. 242, 770 S.W.2d 160 (1989); *Mason v. State*, 539 N.E.2d 468 (Ind. 1989); *Meszar v. Bowen Implement Co*., 122 Ohio App. 3d 141, 701 N.E.2d 409 (1997). A continuing objection may preserve the issue for appeal, but a record must be made that the court has granted the party's request for a continuing objection. It is not enough for the trial court to make the general statement that it is allowing the admittance of evidence over an objection. The Kansas Supreme Court has made it clear that it is the responsibility of counsel to clarify whether a continuing objection has been granted or a contemporaneous objection is necessary. *See State v. Houston*, 289 Kan. 252, 269-271, 213 P.3d 728 (2009).

F. MOTION TAKEN UNDER ADVISEMENT

There are instances when a motion in limine may be taken under advisement, reserving the right to rule upon the matter when it arises at trial. In fact, the court has stated that "[t]he better practice is to wait until trial to rule on objections to admissibility of evidence when admissibility substantially depends upon what facts may be developed at trial" because the court is better situated to assess the value of the evidence at that time. *Cline*, 188 F. Supp.2d at 1291. Of course, as a practical matter, the parties are better able to prepare for trial if the court issues a temporary order in limine.

When a motion in limine is taken under advisement by the court, parties should proceed as though the motion was granted by taking care not to raise the issues except in the absence of the jury. This care must be exercised because "prejudice may be implanted in the minds of the jurors by attorneys asking unanswered questions and by witnesses making statements which are subsequently stricken *Crume*, 271 Kan. at 101-102. Likewise, it is necessary to make a contemporaneous objection, as discussed above, if the defense attempts to admit evidence included in a motion in limine that is under advisement.

G. MOTION TO RECONSIDER

Because the order in limine can only be temporary in nature, it is subject to reconsideration. It is within the trial court's discretion to change its ruling on a limine motion at any time for any reason it deems appropriate, including its own judicial discretion. Some in limine rulings are "necessarily preliminary" because the issues may be reevaluated as the evidence is presented." *U.S. v. Tunkara*, 385 F. Supp. 1119, 1122 (Kan. 2005) (*quoting U.S. v. Martinez*, 76 F.3d 1145, 1152 (10th Cir. 1996). Therefore, in addition to making appropriate objections, an attorney may make a motion to reconsider based on factual developments and evidence presented at trial.

IV. PROSECUTORIAL MOTIONS IN LIMINE

The court cautions against the "overuse" of motions in limine, *Quick*, 226 Kan. at 312, specifying that in limine exclusion of evidence should be reserved for those instances when evidence "plainly is inadmissible on all potential grounds." *Tunkara*, 385 F. Supp.2d at 1121. This applies both to motions seeking the exclusion of evidence and to motions seeking the admission of evidence that would otherwise be inadmissible.

> While the list is not exhaustive, a motion in limine is proper where: (1) the trial court has directed that evidentiary issue be resolved before trial; (2) the evidentiary material is highly prejudicial or inflammatory and would risk mistrial if not previously addressed by the trial court; (3) the evidentiary issue is significant and unresolved under the existing law; (4) the evidentiary issue involves a significant number of witnesses or substantial volume of material making it more economical to have the issue resolved in advance of the trial so as to save time and resources of all concerned; or (5) the party does not wish to object to the evidence in the presence of the jury and thereby preserves the issue

> for appellate review by obtaining an unfavorable ruling via a pretrial motion in limine.

State v. Wright, 268 Wis.2d 694, 717 (2003). If the evidence is "shaky," but not inadmissible, vigorous cross-examination, presentation of contrary evidence, and careful instruction regarding the burden of proof are the appropriate means of attack, rather than a motion in limine. *Cline*, 188 F. Supp.2d at 1294. The following are a few examples of instances in which a prosecutor may wish to file a motion in limine.

A. ADMITTING EVIDENCE OF DEFENDANT'S BAD ACTS

It is well-recognized that a defendant may be prejudiced from the admission of evidence of his prior crimes or other bad acts.

> ...[A] jury might well exaggerate the value of other crimes as evidence proving that, because the defendant has committed a similar crime before, it might properly be inferred that he committed this one. Secondly, the jury might conclude that the defendant deserves punishment because he is a general wrongdoer even if the prosecution has not established guilt beyond a reasonable doubt in the prosecution at hand. Thirdly, the jury might conclude that because the defendant is a criminal, the evidence put in on his behalf should not be believed.

State v. Gunby, 282 Kan. 39, 48-49, 144 P.3d 647 (2006) (*quoting State v. Davis*, 213 Kan. 54, 58, 515 P.2d 802 (1973)).

Because of this danger of prejudice, evidence of the defendant's prior bad acts is to be excluded if its only purpose is to show defendant's disposition, inclination, attitude, tendency or propensity to commit crime, and this rule is to be strictly enforced. *See generally State v. Bly*, 215 Kan. 168, 173-174, 523 P.2d 397 (1974). Therefore, it is important that the prosecution make clear the purpose for admitting bad acts evidence to distinguish said purpose from those that are prohibited. Note that this also applies when the defense seeks to admit evidence of the defendant's *lack* of disposition to commit a particular crime. For instance, in *State v. Amodei*, 222 Kan. 140, 563 P.2d 440 (1977), the defendant denied the charge that he sold heroin, making the defense of entrapment unavailable. Consequently, the court excluded testimony regarding the defendant's lack of disposition to engage in drug traffic.

The admission of evidence of bad acts is governed by K.S.A. 60-455. This statute applies to misdemeanors, felonies, uncharged crimes, and civil wrongdoing. *See State v. Forsyth*, 2 Kan. App.2d 44, 45, 574 P.2d 241 (1978). Therefore, it is clearly not a prerequisite that the defendant be convicted of the bad act that is being offered into evidence. *State v. Stephenson*, 191 Kan. 424, 430, 381 P.2d 335 (1963). Further, it is not necessary for the bad act to have occurred prior to the current crime. In *State v. Bell*, 239 Kan. 229, 718 P.2d 628 (1986), the court held that evidence of a murder conviction was admissible for the purpose of proving identity, even though the current charge occurred prior to the murder conviction. The time frame between the act and the current charge does not have any effect on admissibility; rather, it goes to the weight to be

given to the evidence. In *State v. Hedger*, 248 Kan. 815, 811 P.2d 1170 (1991), the lapse of nearly five years between prior violent acts between the defendant and the victim and the present homicide did not preclude the admission of relevant evidence showing the relationship of the parties.

Before admitting bad acts evidence pursuant to K.S.A. 60-455, the court must determine (1) that proposed evidence is relevant to prove a material fact, (2) that the material fact is disputed, and (3) that the probative value of the evidence outweighs its potential for producing undue prejudice. *State v. Prine*, 287 Kan. 713, 724, 200 P.3d 1 (2009). If the evidence passes this test, the court must then give a limiting instruction informing the jury of the specific purpose for admission to eliminate the danger that the evidence will be considered to prove the defendant's mere propensity to commit the charged crime. *Id*.

As a general rule, all relevant evidence is admissible. K.S.A. 60-407(f). Relevant evidence is defined as "evidence having any tendency in reason to prove any material fact." K.S.A. 60-401(b). This means that evidence is relevant if it renders the desired inference more probable than it would be without the evidence. *State v. Sexton*, 256 Kan. 344, 349 (1994). Evidence should not be excluded solely on the ground that it will prove another offense if it legitimately tends to support the charge or show intent. *State v. Whiters*, 206 Kan. 770, 772, 481 P.2d 992 (1971) (*citing State v. Wright*, 194 Kan. 271, 398 P.2d 339 (1965)). To establish the relevance of a prior bad act, a pattern or connection between the facts surrounding the prior offense and the current offense must first be shown. *State v. Donnelson*, 219 Kan. 772, 776, 549 P.2d 964 (1976).

Evidence is material to the offense if it tends to prove one of the following factors: intent, motive, opportunity, preparation, plan, identity, or absence of mistake or accident. K.S.A. 60-455(c). Evidence may also be material if it tends to prove "the modus operandi or general method used by a defendant to perpetrate similar but totally unrelated crimes when the method . . . is so similar . . . that it is reasonable to conclude the same individual committed both acts." K.S.A. 60-455(d). With some charges, evidence of prior a conviction is not only a material fact, but also an element of the offense (i.e. aggravated weapons violation). *See* K.S.A. 21-4202.

The factors listed in K.S.A. 60-455 are exemplary rather than exclusive, meaning that a trial court may find that evidence of prior crimes is relevant and admissible to prove a material fact other than those discussed above. However, "the evidence must be subjected to the same sort of explicit relevance inquiries, particularized weighing of probative value and prejudicial effect, and prophylactic limiting instruction that is required when any other such evidence is admitted." *State v. Elrod*, 38 Kan. App.2d 453, 461, 166 P.3d 1067 (2007). *See also Gunby*, 282 Kan. at 57. Evidence of past crimes is not admissible solely to rebut a possible affirmative defense. *Davis*, 213 Kan. at 55.

As previously noted, evidence of prior bad acts may be used to illustrate that the performance of the criminal act in question was intentional. *State v. Faulkner*, 220 Kan. 153, 156-157, 551 P.2d 1247 (1976). For instance, in a sale of cocaine case, testimony of a witness regarding his earlier drug dealings with the defendant was admissible as probative of the defendant's intent, despite the argument that intent was not placed in issue because the defendant

merely stood silent. *State v. Prosper*, 21 Kan. App.2d 956, 957, 910 P.2d 859 (1996). However, in a possession case, evidence that the defendant admitted using marijuana a month prior to his arrest is not material, and thus inadmissible, where the defense is a complete denial of knowledge that the marijuana was in the defendant's possession. *State v. Boggs*, 287 Kan. 298, 309-310, 197 P.3d 441 (2008).

Preparation, in the context of evidence of prior bad acts, consists of devising or arranging means or measures necessary for the commission of a crime. "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." *State v. Marquez*, 222 Kan. 441, 446, 565 P.2d 245 (1997).

Evidence that defendant had committed similar offenses may be relevant to the issue of identity, K.S.A. 60-455, *State v. Cromwell*, 253 Kan. 495, 509-510, 856 P.2d 1299 (1993), in cases where the perpetrator's identity is disputed. *See State v. Mason*, 250 Kan. 393, 404, 827 P.2d 748 (1992). This evidence may be particularly relevant when an alibi defense is asserted. *See State v. Frizell*, 132 Kan. 261, 295 P. 658 (1931). When a prior conviction is offered for the purpose of proving identity, the evidence should disclose sufficient facts and circumstances of the other offense to raise a reasonable inference that the defendant committed both crimes. *State v. Williams*, 234 Kan. 233, 670 P.2d 1348 (1983). Similarity must be shown in order to establish relevancy; it is not sufficient simply to show that the offenses were violations of the same or similar statutes. *State v. Blackmore*, 249 Kan. 668, 671, 822 P.2d 49 (1991). *See also State v. Han*ks, 236 Kan. 524, 694 P.2d 407 (1985). However, the prior and the current offense do not have to be identical for the prior offense to be admissible to prove identity; it is sufficient if the offenses are similar. *Williams*, 234 Kan. at 234.

For instance, in *State v. Garcia*, 285 Kan. 1, 169 P.3d 1069 (2007), the court held that evidence of the defendant's prior convictions for rape and aggravated sodomy was sufficiently similar to the charged offenses of rape and felony murder to be admissible to establish identity because the victim of the prior crimes and the current victim were of similar age, victimized in the same manner, in their homes, with no sign of forced entry, and the keys were taken from both homes. Likewise, in *Mason*, 250 Kan. 393, a prior offense in which the defendant gained entry into the home of a 76-year-old victim to use the telephone and then raped her was ruled admissible to prove identity in a case in which the defendant gained entry to the home of an 89-year-old woman to use the telephone and attempted to rape her, even though the methods of attacking the victims differed.

Evidence of threats by a defendant against a victim may be admissible to prove intent, state of mind, and identity. *See State v. Anicker*, 217 Kan. 314, 536 P.2d 1355 (1975). For example, in a murder case wherein a defendant shot a doctor and visitor at a medical center, evidence of the defendant's prior conviction for attempted aggravated assault was admissible to show identity and intent because, in the prior case, the defendant went to the same medical center with a gun and threatened a therapist for the same reason that the defendant went to the medical center to shoot the murder victims. *State v. Boan*, 235 Kan. 800, 686 P.2d 160 (1984).

Before *Gunby*, evidence of res gestae and the relationship between the parties was admissible independent of K.S.A. 60-455 upon a finding of relevance. *State v. Leitner*, 272 Kan. 398, 412, 34 P.3d 42 (2001). However, res gestae is no longer an independent basis for admission of evidence. The fact that evidence may be part of the res gestae of a crime demonstrates relevance, but that relevance must be measured against any applicable exclusionary rules. *Gunby*, 282 Kan. at 63.

Evidence of prior acts between a defendant and a victim may be admissible to establish the relationship between the parties, the existence of a continuing course of conduct, or to corroborate the testimony of the complaining witness. *State v. Woolverton*, 35 Kan. App.2d 478, 485, 131 P.3d 1253 (2006). For instance, prior sexual encounters between a defendant and a child victim may be admissible to establish these factors. *State v. Bliss*, 28 Kan. App.2d 591, 595, 18 P.3d 979 (2001). The prior acts must be similar in nature and this requirement should not be narrowly construed. *Id*.

Evidence of gang affiliation may be relevant to demonstrate the relationship between witnesses if the gang evidence was part of the criminal events at issue. *State v. Goodson*, 281 Kan. 913, 923-924, 135 P.3d 1116 (2006). Similarly, evidence that a defendant is a gang affiliate or is associated with gang-related activity may be relevant if the evidence provides a motive for an otherwise inexplicable act, forms a part of the events surrounding the commission of the crime, or shows witness bias. *State v. Tatum*, 281 Kan. 1098, 1106, 135 P.3d 1088 (2006). Evidence of gang membership may also be admissible as probative of witness bias; proof of bias is "almost always relevant." *State v. Roberts*, 261 Kan. 320, 324, 931 P.2d 683 (1997). *Compare State v. Mims*, 264 Kan. 506, 956 P.2d 1337 (1998).

For evidence of gang affiliation to be admissible, there must be sufficient proof that the gang membership or activity is related to the crime charged. *State v. Winston*, 281 Kan. 1114, 1125, 135 P.3d 1072 (2006). If no attempt is made to tie the evidence to a statutory basis for admission, the evidence will be construed as being utilized to prove only propensity or bad character. *Goodson*, 281 Kan. at 924. However, the court has upheld a prosecutor's inquiry regarding a law enforcement officer's assignment to a gang unit, maintaining that the officer's assignment does not necessarily link the defendant to a gang. *State v. Bowen*, 254 Kan. 618, 622-623, 867 P.2d 1024 (1994).

B. EXCLUDING EVIDENCE OF BAD ACTS OF WITNESSES

Evidence of a witness's convictions for crimes involving dishonesty is admissible for the purpose of impairing his or her credibility. K.S.A. 60-421. However, the admission of prior acts evidence pursuant to K.S.A. 60-455 (discussed above) applies only to defendants, and not to other witnesses. *Haislip v. Roberts*, 788 F. Supp. 482, 485 (Kan. 1992) (*citing State v. Bryant*, 228 Kan. 239, 613 P.2d 1348 (1980)). K.S.A. 60-455 has no applicability to evidence offered to impeach the credibility of a witness. *State v. Johnson*, 219 Kan. 847, 852, 549 P.2d 1370 (1976). Defense and prosecution witnesses are both entitled to these same protections. Therefore, the State may file a motion in limine to preclude the defense from attempting to use prior bad acts evidence to impeach the State's witnesses. Likewise, the Defendant may be entitled to an order precluding the prosecution from referencing crimes or misconduct by defense witnesses. *U.S. v.*

Gressett, 773 F.Supp. 270, 279 (Kan. 1991). If there is some dispute over whether a crime constitutes a crime of dishonesty, the State may wish to file a motion in limine pursuant to K.S.A. 60-421 requesting a preliminary ruling regarding the admissibility of the crime.

If the defendant chooses to testify, his prior bad acts may be used for impeachment purposes pursuant to K.S.A. 60-421 also. To be entitled to appellate review of an order in limine allowing the use of prior bad acts to impeach the defendant, the defendant must testify. The court will not speculate on the prejudicial effect of an order in limine without a record of the defendant's specific testimony. *See Luce v. U.S.*, 469 U.S. 38, 43, 105 S. Ct. 460 (Tenn. 1984).

C. EXCLUDING EVIDENCE OF THE VICTIM'S SEXUAL HISTORY

A victim's sexual history generally is not relevant and has no bearing on her truthfulness. *See State v. Lackey*, 280 Kan. 190, 219-220, 120 P.3d 332 (2005); *State v. Atkinson*, 276 Kan. 920, 926, 80 P.3d 1143 (2003). The only time that a victim's sexual history has the potential to be relevant is in a prosecution for a sex offense, and under the limited circumstances outlined in the Rape Shield Statute, K.S.A. 21-3525. Consequently, the prosecution may file a motion in limine to prohibit the defense from attempting to admit evidence of the victim's sexual history.

D. EXCLUDING EVIDENCE OF UNAVAILABLE DEFENSES

The trial court must instruct the jury on the law applicable to all theories for which there is supporting evidence. *State v. Wilburn*, 249 Kan. 678, 681 (1991) (*citing State v. Hunter*, 241 Kan. 629 (1987)). In *State v. Bradley*, 223 Kan. 710, 713, 576 P.2d 647 (1978), the court found that an in limine motion had been used to exclude relevant and material information regarding the defense, thereby violating the defendant's right to a fair trial. "While it is true that motion in limine may not be used to choke off legitimate defense," the defendant has no legal right to present a defense that is without merit. *State v. McBride*, 24 Kan. App. 2d 909, 914, 955 P.2d 133 (1998) (citations omitted).

For instance, the diminished capacity and voluntary intoxication defenses are only available for the limited purpose of negating specific intent, *State v. Friberg*, 252 Kan. 141, 143, 843 P.2d 218 (1992). These defenses may not be used to remove criminal responsibility, *State v. Baker*, 255 Kan. 680, 689, 877 P.2d 946 (1994), nor to negate general intent. Therefore, the availability of the diminished capacity and voluntary intoxication defenses rests on whether the charged offense is a specific intent crime. K.S.A. 21-3201 provides that intentional criminal conduct is an essential element of every offense. "The distinction between a general intent crime and a specific intent crime is whether, in addition to the intent required by K.S.A. 21-3201, the statute defining the [charged offense] . . . requires further particular intent. . ." *State v. Bruce*, 255 Kan. 388, 394, 874 P.2d 1165 (1994) (*citing State v. Sterling*, 235 Kan. 526 (1984). *See also Gross v. State*, 24 Kan. App.2d 806, 808, 953 P.2d 689 (1998); *State v. McCoy*, 34 Kan. App.2d 185, 194, 116 P.3d 48 (2005).

Similarly, compulsion is the only defense to escape. *See* K.S.A. 21-3208, *et seq*. A defendant who escapes from custody cannot assert a compulsion defense unless the following

conditions exist: (1) the defendant was threatened with imminent infliction of death or great bodily harm; (2) there is no time for a complaint to the authorities or there has been a history of futile complaints which makes any result from such complaints illusory; (3) there is no time or opportunity to resort to the courts; (4) force or violence were not used towards prison personnel or other "innocent" persons during the escape; and (5) the defendant immediately reports to the proper authorities when he has attained a position of safety from the immediate threat. *State v. Irons*, 250 Kan. 302, 307, 827 P.2d 722 (1992). Whether the compulsion defense is available to a defendant is a matter of law determined by the court. *State v. Alexander*, 24 Kan. App.2d 817, 819, 953 P.2d 685 (1998). A defendant must present or proffer evidence to the court satisfying all five conditions before the defendant is allowed to present the defense to the jury. *State v. Harvey*, 41 Kan. App.2d 104, 109, 202 P.3d 21 (2009). The State may file a motion in limine requesting the proffer and an order precluding the defendant from asserting a compulsion defense if the conditions are not satisfied by the proffer. However, if these elements are satisfied, the defense is admissible and the State should not further seek to exclude evidence regarding defendant's motives for escaping. *Irons*, 250 Kan. at 309.

V. AVOIDING VIOLATIONS OF ORDERS IN LIMINE

A prosecutor must take great care to avoid violations of an in limine order because such violations could result in mistrial, appeal, and an ethical complaint. "Whether there is an order in limine or not," a prosecutor has the duty to warn his or her witnesses to refrain from making statements that may contain inadmissible evidence. *Crume*, 271 Kan. at 101 (2001) (*citing People v. Warren,* 45 Cal.3d 471, 482, 754 P.2d 218 (1988)).

> Although [a prosecutor's primary] obligation is to the public, it is not enough to be intent on the prosecution of the case; the prosecutor must never lose sight of the fact that a defendant, as an integral member of the [public], is entitled to a full measure of fairness. Put another way, the prosecutor's mission is not so much to convict as it is to achieve a just result. Although the accused must be prosecuted with earnestness and vigor, the prosecutor must always be faithful to the state's overriding interest that justice be done. . . Nonetheless, zeal in the prosecution of criminal cases is to be commended and not condemned. If convinced of the defendant's guilt, the prosecuting attorney should, in an honorable way, use every available power to secure the defendant's conviction. At the same time, it is the prosecutor's duty to remain under appropriate restraint and avoid misconduct which may tend to deprive the defendant of the fair trial to which he is entitled, and it is as much a prosecutor's duty to refrain from improper methods calculated to bring about a wrongful conviction as it is to use every legitimate means to bring about a just one.

Id. at 102 (*citing State v. Cady,* 248 Kan. 743, 811 P.2d 1130 (1991)).

The phrasing of questions presented during direct examination plays a central part in abiding by the trial court's order in limine. In *State v. Pruitt*, 42 Kan. App.2d 166, 211 P.3d 166 (2009), the court found that the prosecutor violated the trial court's order in limine (requiring the prosecutor to tell its witnesses not to mention any previous encounters they had with defendant

regarding other criminal activities) because the prosecutor asked a police officer whether he knew the defendant and the officer replied that defendant's name had come up in a prior incident. The court held that the prosecutor's question, "Are you familiar with him, yes?" was leading and suggestive and that the officer's answer showed a willingness by the prosecutor to violate the in limine order. However, in *State v. Fewell*, 286 Kan. 370, 184 P.3d 903 (2008), the court held that the prosecutor did not violate the court's order in limine (precluding reference to seized paraphernalia that did not lead to charges) when the prosecutor asked about the recovery of "any items that later led to charges in this case" because the question did not imply that additional items were seized.

If the order in limine is violated by the State, the trial judge must determine whether the material elicited in violation of the order substantially prejudiced the defendant's right to a fair trial. *State v. Heath,* 264 Kan. at 581. In making this determination, the court conducts the following analysis of the prosecutor's conduct: (1) Was the prosecutor's misconduct so gross and flagrant as to prejudice the jury against the defendant? (2) Does the admission of the statement indicate ill will by the prosecutor? (3) Is the evidence against the defendant so overwhelming there was little or no likelihood that the prosecutor's violation of the order in limine changed the result of the trial? *Crume*, 271 Kan. at 102 (*citing State v. Follin,* 263 Kan. 28, 45, 947 P.2d 8 (1997)). For instance, in *State v. Penn*, 41 Kan. App.2d 251, 201 P.3d 752 (2009), although the prosecutor's cross-examination of the defendant violated the order in limine, the violation did not substantially prejudice the defendant because the prosecutor did not exhibit ill will, the prosecutor's violation was very brief and occurred only once during the trial, and the evidence was "overwhelming."

VI. REMEDYING VIOLATIONS OF ORDERS IN LIMINE

Although an order in limine excludes evidence that, if admitted, would tend to prejudice the jury, a violation of the order does not always result in prejudice that cannot be remedied at trial. *State v. Douglas*, 274 Kan. 96, 109, 49 P.3d 446 (2002). When a party alleges that an order in limine has been violated, the district court must determine (1) whether the order has in fact been violated and, if so, (2) whether the party alleging the violation has established substantial prejudice resulting from that violation. *State v. Rivera*, 42 Kan. App. 2d 914, 920, 218 P.3d 457 (2009). *See also Pruitt*, 42 Kan. App.2d 166; *State v. Crum*, 286 Kan. 145, 184 P.3d 222 (2008); *State v. Drayton*, 285 Kan. 689, 175 P.3d 861 (2008); *State v. Humphrey*, 267 Kan. 45, 978 P.2d 264 (1999); *State v. McClanahan*, 259 Kan. 86, 910 P.2d 193 (1996). The defendant bears the burden of showing he was substantially prejudiced by the violation. *Bloom*, 273 Kan. at 300.

The trial court is in the best position to decide if its own order in limine has been violated and to determine the degree of prejudice a violation may have caused the defendant. *State v. Johnson*, 284 Kan. 18, 29, 159 P.3d 161 (2007). Therefore, the decision to declare a mistrial lies within the sound discretion of the trial court and will not be reversed absent a clear showing of abuse of that discretion. "Judicial discretion is abused when judicial action is arbitrary, fanciful, or unreasonable," *State v. Whitesell*, 270 Kan. 259, 276-277, 270 Kan. 259 (2000), and no reasonable person would agree with the position adopted by the trial court. *Leitner*, 272 Kan. at 408. For instance, it is not an abuse of discretion for the trial court to rule that the scope of a motion in limine prohibiting evidence relating to a victim's child would be limited to evidence of

the condition of the child. *State v. Parker*, 277 Kan. 838, 89 P.3d 622 (2004).

"One who asserts that the court abused its discretion bears the burden of showing such abuse of discretion." *State v. Whitesell*, 270 Kan. at 276-277. For instance, in appealing an order in limine in an escape from custody case, the defendant must show that the trial court abused its discretion by granting the motion, thereby denying the defendant the opportunity to present a defense. *State v. Benoit*, 21 Kan. App.2d 184, 197, 898 P.2d 653 (1995).