NOT DESIGNATED FOR PUBLICATION

No. 117,687

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

GEARY F. WHEELER,
Appellant.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; JOHN J. KISNER JR., judge. Opinion filed January 11, 2019. Affirmed.

Heather Cessna, of Kansas Appellate Defender Office, for appellant.

Lance J. Gillett, assistant district attorney, *Marc Bennett*, district attorney, and *Derek Schmidt*, attorney general, for appellee.

Before GREEN, P.J., PIERRON and BUSER, JJ.

BUSER, J.: Geary F. Wheeler appeals his convictions and sentences imposed for the sexual abuse of his twin daughters, A.W. and K.W. On appeal, Wheeler raises four issues. First, he contends the district court erred in admitting hearsay statements from A.W. Second, he asserts the district court erred when it denied his challenge to K.W.'s competency to testify. Third, Wheeler argues the district court erred by not providing the jury with a limiting instruction relating to the admission of the State's rebuttal evidence. Finally, Wheeler claims the imposition of lifetime offender registration is cruel and

unusual punishment under the United States Constitution and the Kansas Constitution Bill of Rights.

Upon our review, we hold the district court did not commit reversible error in its evidentiary rulings or in sentencing. Accordingly, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In May 2015, twin five-year-old sisters A.W. and K.W. were participating in a group discussion in their prekindergarten class. During the discussion, one of the sisters commented that "her daddy's boy part was this big," and she indicated with her hands about a shoulder's width apart. The other sister said, "[N]o, it is more like this big," and she indicated by holding her hands somewhat closer together. The first sister agreed. The teacher, Barbara Holmes, noted the sisters' comments and continued with class.

Near the end of the school day, Holmes spoke separately with A.W. and K.W. about their earlier comments. A.W. told Holmes that her father "necked her." Holmes did not understand this reference and, while pointing to her own neck, asked A.W. if that is what she meant to say. A.W. responded, "No," pointed to "her private parts," and said, "No, my daddy necked me. He stuck his neck in me and it hurt and I screamed." A.W. continued talking with Holmes and mentioned that Wheeler had lotion. Holmes asked, "[W]hat lotion?" In response, A.W. mentioned a red and blue bottle of lotion.

Holmes then spoke with K.W. K.W. told Holmes that she was talking about Wheeler's penis "being in his panties [*sic*]." She advised that Wheeler "does touch it though sometimes. He gets out his lotion and he does this with it." K.W. then made masturbatory motions. K.W. added that Wheeler "sticks it in my bottom and in my mouth and that's disgusting when we get Xs." "Xs" were negative marks given to the children as part of the school's behavior plan. K.W. said that "[A.W.] got an X today, she's going to

have to spend a long time in the basement." At the end of the school day the sisters were released to go home.

School authorities called the Wichita Police Department and Officers Brandon Ham and Robert Kempf responded to the call. While Officer Ham interviewed Holmes, Officer Kempf contacted Wheeler at the family home and explained there was "an incident at school and detectives would like to speak with the family." Wheeler agreed to speak with the officer but he did not ask any questions inquiring about the nature of the investigation. Of note, during a search of Wheeler's residence, a bottle of lotion was found in the basement.

A.W. and K.W. were transported to the Exploited and Missing Child Unit for interviews. Ashton Gillett, a social worker with the State of Kansas, interviewed K.W. K.W. told Gillett that Wheeler put lotion on "his boy part" and would rub it up and down. As K.W. pointed to her vaginal area, she told Gillett that Wheeler "sticks it in me." K.W. then stood up and pointed to her buttocks. K.W. referred to Wheeler's penile penetration of her anus or vagina as "necking." According to K.W., Wheeler would neck her when she got an X at school. Gillett used anatomically correct diagrams and dolls to facilitate the interview. K.W. used the diagrams and dolls to identify sexual body parts and show Gillett what sexual contacts took place between Wheeler and K.W. During the interview, K.W. detailed instances of oral and anal sodomy and rape.

Gillett conducted another interview with K.W. later that month upon learning that K.W. lived at different locations prior to May 2015. During this occasion, K.W. told Gillett that Wheeler penetrated her anus and "swipe[d]" her, which was described as Wheeler touching her vagina without penetration, at her prior residence on Par Lane. According to the twins' mother, they lived at Par Lane for about one year during 2014 and 2015.

As part of the investigation, DNA swabs taken from Wheeler, A.W., and K.W. were compared and did not indicate any sexual contact between Wheeler and his twin daughters.

Lura Borsdorf, a clinical supervisor with the Kansas Children's Service League, provided therapy to A.W. and K.W. beginning in November 2015. In February 2016, K.W. came into Borsdorf's office with her sister and mother. K.W. was crying and screaming. K.W. told Borsdorf that Wheeler "put his private part in her mouth." Wheeler also put his "private part inside of her between her legs" and told her not to tell. A.W. told Borsdorf that Wheeler did the same thing to her.

In August 2016, A.W. and K.W. told Borsdorf that Wheeler used "his boy part" and "put it in our pee part and butt and in our mouth." K.W. made other statements about Wheeler touching her multiple times while her mother was asleep. She described one incident of oral sodomy where she stated that the liquid had a terrible taste.

Tammy Sheehan, a clinical psychologist, was retained on behalf of Wheeler to review video interviews of A.W. and K.W. and testify as an expert defense witness. After reviewing numerous case materials, including interviews and transcripts, Sheehan prepared a report about her expert opinions and testified at trial. Sheehan expressed her expert opinion that "the techniques [used by interviewers] have conceivably altered [A.W.'s and K.W.'s] autobiographical memories rendering their statements unreliable."

Wheeler testified in his own defense at trial. He said that when one of his daughters would get an X at school he would punish them by making them stand downstairs in a corner or with their nose against a wall for several minutes. He denied sexually abusing either one of his twin daughters.

Wheeler was convicted of three counts of rape of a child under 14 years of age when Wheeler was older than 18 years of age and two counts of aggravated criminal sodomy of a child under 14 years of age when Wheeler was older than 18 years of age. He was sentenced to life imprisonment with a mandatory minimum sentence of 25 years on each of the four convictions. One of the convictions was ordered to run consecutively, which resulted in a controlling life sentence with a mandatory minimum of 50 years imprisonment. He timely appeals.

ADMISSIONS OF A.W.'S OUT-OF-COURT STATEMENTS

For his first issue on appeal, Wheeler contends the district court committed reversible error when it allowed Holmes and Borsdorf to testify about statements A.W. made to them regarding Wheeler's sexual abuse. Wheeler has two complaints. First, he asserts the admission of these out-of-court statements violated the Confrontation Clause of the Sixth Amendment to the United States Constitution. Second, he claims that admission of the statements violated K.S.A. 2017 Supp. 60-460(d)(3) and (dd).

In response, the State argues that because A.W.'s statements to Holmes and Borsdorf were not testimonial there was no violation of the Confrontation Clause. As to Wheeler's complaint that the admission of the statements violated the Kansas hearsay statute, the State argues that K.S.A. 2017 Supp. 60-460(d)(3) and (dd) permitted the statements to be introduced as trial evidence. We will separately address the constitutional and statutory complaints.

It is important to note three preliminary matters. First, on appeal, Wheeler is not challenging that A.W. was, in fact, unavailable to testify at trial due to concern about the effects that trial testimony could have on her mental health. Second, Wheeler is not appealing the trial court's admission of the comments made by A.W. and K.W. during the group class discussion earlier in the school day.

Third, immediately before Holmes and Borsdorf individually testified, the district court read the jury the following modified PIK Crim. 4th 51.120 instruction:

> "It is for you to determine the weight and credit to give the statement or statements claimed to have been made by [A.W.]. You should consider her age and maturity, the nature of the statement, the circumstances existing when it was claimed to have been made, any possible threats or promises that may have been made to her to obtain the statement and/or statements and any other relevant factors."

Prior to trial, the district court conducted an evidentiary hearing on the State's motion to admit A.W.'s out-of-court statements due to her unavailability as a witness at trial. Both Holmes and Borsdorf testified in support of the State's motion. After the hearing and argument, the district court filed a detailed order admitting the statements.

We begin the analysis with a summary of our standards of review that pertain to this issue. Appellate courts employ "an unlimited standard of review when addressing whether a defendant's right to confront witnesses under the Sixth Amendment has been violated." *State v. Williams*, 306 Kan. 175, 181, 392 P.3d 1267 (2017). Generally, the admission of hearsay statements under Kansas law is reviewed using an abuse of discretion standard. *State v. Chapman*, 306 Kan. 266, 276, 392 P.3d 1285 (2017). But, when the issue is whether the admission of hearsay evidence requires the court to interpret a statute; the court interprets the statute using a de novo standard. *State v. Gonzalez*, 282 Kan. 73, 80, 145 P.3d 18 (2006).

An abuse of discretion occurs when judicial action is arbitrary, fanciful, or unreasonable; is based on an error of law; or is based on an error of fact. *State v. Mosher*, 299 Kan. 1, 3, 319 P.3d 1253 (2014). The party asserting the district court abused its discretion bears the burden of showing such an abuse of discretion. *State v. Stafford*, 296 Kan. 25, 45, 290 P.3d 562 (2012).

Did A.W.'s Statements to Holmes Violate the Confrontation Clause?

Wheeler challenges the district court's legal conclusion that A.W.'s statements to Holmes in response to the teacher's questions at the end of the school day were nontestimonial. In particular, Wheeler argues that at that time "there was no on-going emergency and Mrs. Holmes' interview was primarily to establish facts about past acts that were likely to lead to a prosecution." In this regard, Wheeler points out that Holmes was a mandatory reporter. See K.S.A. 2017 Supp. 38-2223.

The State responds that A.W.'s statements were nontestimonial. In support, the State emphasizes that Holmes was concerned about protecting the twins from possible harm and was not seeking information for purposes of criminal prosecution.

At the pretrial hearing on the motion, Holmes indicated that when she was asking A.W. questions she was not attempting to preserve evidence for law enforcement. Instead, she wanted "to see if there was anything going on I might need to protect them from." In its order, the district court found the questions asked by Holmes were general and "were made in the context of an ongoing concern of possible child abuse that quickly turned into an 'emergency' situation. This concern involved possible risk to the other twin and possibly other children in the same home." As a result, the district court found that A.W.'s responses incriminating Wheeler were not of a testimonial character and did not violate the Confrontation Clause.

The Confrontation Clause of the Sixth Amendment provides that "'[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.'" *Crawford v. Washington*, 541 U.S. 36, 42, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). This constitutional guarantee includes state prosecutions. 541 U.S. at 42. The Confrontation Clause applies to "testimonial statements of a witness who did not appear

at trial unless he was unavailable to testify and the defendant had had a prior opportunity for cross-examination." 541 U.S. at 53-54.

The *Crawford* Court did not define what makes a statement testimonial but later cases have helped clarify what constitutes a testimonial statement. Our Supreme Court synthesized a list of factors previously used to determine whether a statement is testimonial in *Williams*. These factors include:

> "'(1) Would an objective witness reasonably believe such a statement would later be available for use in the prosecution of a crime?
>
> "'(2) Was the statement made to a law enforcement officer or to another government official?
>
> "'(3) Was proof of facts potentially relevant to a later prosecution of a crime the primary purpose of the interview when viewed from an objective totality of the circumstances, including circumstances of whether
>
> (a) the declarant was speaking about events as they were actually happening, instead of describing past events;
>
> (b) the statement was made while the declarant was in immediate danger, *i.e.*, during an ongoing emergency;
>
> (c) the statement was made in order to resolve an emergency or simply to learn what had happened in the past; and
>
> (d) the interview was part of a governmental investigation; and
>
> "'(4) Was the level of formality of the statement sufficient to make it inherently testimonial; *e.g.*, was the statement made in response to questions, was the statement recorded, was the declarant removed from third parties, or was the interview conducted in a formal setting such as in a governmental building?'" *Williams*, 306 Kan. at 182 (quoting *State v. Brown*, 285 Kan. 261, 291, 173 P.3d 612 [2007]).

According to our Supreme Court, these factors should not be "regarded as the exclusive or all-encompassing template for determining whether a statement made by an absent declarant qualifies as testimonial under the Sixth Amendment." *Williams*, 306 Kan. at 197. A "purely mechanical application of [the] factors in all instances threatens to

ignore that the class of testimonial statements . . . is broader than formal statements made to police during an interrogation to solve a crime." 306 Kan. at 197. Instead, courts should "generally seek to identify statements that are by nature substituting for trial testimony." 306 Kan. at 197.

The third factor mentions the importance of whether proof of facts potentially relevant to prosecuting a crime is the "primary purpose" of the interview. This factor is consistent with United States Supreme Court precedent. In *Davis v. Washington*, 547 U.S. 813, 822, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006), the Court stated:

> "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."

Additionally, our Supreme Court has relied on other United States Supreme Court precedent to expound on a reviewing court's responsibility to:

> "'determine the "primary purpose of the interrogation" by objectively evaluating the statements and actions of the parties to the encounter, in light of the circumstances in which the interrogation occurs. The existence of an emergency or the parties' perception that an emergency is ongoing is among the most important circumstances that courts must take into account in determining whether an interrogation is testimonial because statements made to assist police in addressing an ongoing emergency presumably lack the testimonial purpose that would subject them to the requirement of confrontation. . . . [T]he existence and duration of an emergency depend on the type and scope of danger posed to the victim, the police, and the public.'" *Williams*, 306 Kan. at 193 (quoting *Michigan v. Bryant*, 562 U.S. 344, 370-71, 131 S. Ct. 1143, 179 L. Ed. 2d 93 [2011]).

We find valuable precedent in resolving this issue in the United States Supreme Court opinion, *Ohio v. Clark*, 576 U.S. __, 135 S. Ct. 2173, 192 L. Ed. 2d 306 (2015). In *Clark*, a preschooler came to school with visible injuries. Teachers noticed the injuries and asked the child what happened and who hurt him. The questioning occurred in the school lunchroom and classroom. Based on the information provided, the teachers, who were mandatory reporters, alerted authorities that the child had identified Clark, a live-in boyfriend of the child's mother, as the abuser. Although the child went home with Clark, social workers removed the child and another minor from the home the next day.

At trial, the child's statements made to the teachers incriminating Clark were introduced but the child did not testify. Upon his conviction for multiple crimes, Clark appealed, claiming that his right to confront witnesses was violated because the child's statements were testimonial and he was not given an opportunity to confront the child as a witness in court. The Ohio Supreme Court agreed and reversed Clark's convictions. The United State Supreme Court granted the State's petition for certiorari. 135 S. Ct. at 2179.

In reversing the Ohio Supreme Court, the United States Supreme Court emphasized that reviewing courts should "consider 'all of the relevant circumstances'" when determining whether a statement is testimonial. 135 S. Ct. at 2180. One relevant circumstance, is "'whether an ongoing emergency exists.'" 135 S. Ct. at 2180. The formality of the statement is another factor to consider. 135 S. Ct. at 2180. The *Clark* Court noted that statements to individuals outside of law enforcement are "significantly less likely to be testimonial than statements to law enforcement officers." 135 S. Ct. at 2182.

With regard to the particular facts in *Clark*, the United States Supreme Court reasoned that the teachers' questions were "meant to identify the abuser in order to protect the victim from future attacks. Whether the teachers thought that this would be done by apprehending the abuser or by some other means is irrelevant." 135 S. Ct. at 2181. The

Clark Court held that the primary purpose of the questions was to protect the child. The teachers did not "inform [the child] that his answers would be used to arrest or punish his abuser. [The child] never hinted that he intended his statements to be used by the police or prosecutors. And the conversation between [the child] and his teachers was informal and spontaneous." 135 S. Ct. at 2181.

The United States Supreme Court also reasoned that the child's young age—three years old—"fortifie[d] our conclusion that the statements in question were not testimonial. Statements by very young children will rarely, if ever, implicate the Confrontation Clause. Few preschool students understand the details of our criminal justice system." 135 S. Ct. at 2181-82. "[A] young child in these circumstances would simply want the abuse to end, would want to protect other victims, or would have no discernible purpose at all." 135 S. Ct. at 2182.

Finally, and with particular relevance to the case on appeal, the *Clark* Court held that statements are not categorically testimonial when given to a mandatory reporter, such as a teacher. 135 S. Ct. at 2182-83. The *Clark* Court reasoned that a "teacher's pressing concern [is] to protect [a child] and remove him [or her] from harm's way." 135 S. Ct. at 2183. "[M]andatory reporting statutes alone cannot convert a conversation between a concerned teacher and her student into a law enforcement mission aimed primarily at gathering evidence for a prosecution." 135 S. Ct. at 2183.

Applying United States Supreme Court and Kansas Supreme Court precedent to the facts of this case convinces us that A.W.'s statements to Holmes were not testimonial.

First, the child's statements were not made to a law enforcement officer or other government official. See *Williams*, 306 Kan. at 182. Simply because Holmes was required under Kansas state law to mandatorily report the apparent criminal conduct did

not make her a law enforcement officer or an agent of the prosecution. See *Clark*, 135 S. Ct. at 2182-83.

Second, when viewing the totality of the circumstances, the primary purpose of the statements was not to develop or preserve testimonial evidence. Similar to *Clark*, A.W. was not informed that her statements might be used by the police or prosecution. Moreover, A.W., who was five years old, could not be expected to understand the concept of testimony or evidence or the workings of our criminal justice system in a way as to cast doubt on the purpose or reliability of her statements. See 135 S. Ct. at 2181-82.

From Holmes' perspective, at the evidentiary hearing she testified that her principal purpose in questioning A.W. was to address the teacher's concern about her student's safety. Moreover, she specifically denied that her questions were prompted by any law enforcement purpose. The questioning did not occur with any of the trappings of a law enforcement investigation. Instead, it was a casual conversation between the teacher and her student in the familiar and informal setting at the school. See 135 S. Ct. at 2178.

Moreover, the situation here has characteristics of an emergency. Wheeler disputes that, noting that Holmes was "in no hurry" to follow up on the initial conversation and A.W. was released to go home with Wheeler at the end of the day. But spontaneous statements made by A.W. and K.W. in a group setting necessitated the need for Holmes to talk privately to the twins, when possible, later in the day. And in *Clark*, another emergency situation, the child went home and stayed another night before social workers removed him and a sibling from Clark's custody. In this case, the police were called right after school and the children were removed within an hour. We are persuaded that emergency circumstances were present at the time A.W. told Holmes about Wheeler's sexual abuse.

In summary, based on the totality of the circumstances and relevant caselaw, we find no error in the district court's legal conclusion that A.W.'s statements to Holmes were not testimonial and, therefore, not violative of the Confrontation Clause.

Did A.W.'s Statements to Borsdorf Violate the Confrontation Clause?

Wheeler also challenges A.W.'s statements to Borsdorf during therapy sessions. Wheeler argues that under the primary purpose factor, "the statements made to Ms. Borsdorf were made during the pendency of the prosecution in this case at a time when Mrs. Borsdorf knew she was likely to be a witness in the prosecution of Mr. Wheeler." In response, the State challenges Wheeler's claim by pointing out that the primary purpose of eliciting A.W.'s statements was to facilitate her therapy.

In the district court's order finding that the statements were nontestimonial, it noted that the incriminating statements were made after Wheeler had been arrested and prosecution had commenced. While true, the district court found "the primary reason for [A.W.'s] sessions are therapeutic and not part of any investigation." The district court concluded that the statements were made in the course of therapy and not with the purpose of providing evidence in the criminal prosecution of Wheeler. Given these findings, the district court concluded that the Confrontation Clause was not implicated.

At the outset, unlike the circumstances involving Holmes, it is apparent that no emergency existed at the time A.W. made her disclosures during therapy and that criminal prosecution against Wheeler had commenced. These circumstances do not favor a finding that the statements were nontestimonial.

On the other hand, as Wheeler candidly concedes, Borsdorf, "as the girls' therapist, was obviously in a position of treating the girls for the residual trauma left by the alleged incidents in this case." In particular, A.W. was being treated for posttraumatic stress

disorder, attention deficit hyperactivity disorder, and child sexual abuse. As Borsdorf explained, the disclosures occurred during play therapy that "is extremely nondirective, in which the conversation follows the fluidity of the child."

Borsdorf testified that A.W. was not purposely questioned to prompt disclosures of criminal conduct, but the conversations focused on the child's feelings of being safe. When Wheeler's counsel asked, "[W]hat's the primary purpose of you gathering these statements as you go through therapy with these children?" Borsdorf responded, "The primary is their care." Based on this evidence it is clear that the primary purpose of Borsdorf engaging A.W. in conversation was therapeutic not prosecutorial.

In *State v. Miller*, 293 Kan. 535, 264 P.3d 461 (2011), our Supreme Court provided some guidance in a case wherein a sexual assault nurse examiner testified to hearsay statements made by a child suspected of being a victim of sexual abuse who was unavailable at trial. From *Miller*, an important point of law was established:

> "The determination of whether a victim's statements to a sexual assault nurse examiner are testimonial is a highly context-dependent inquiry. The determination requires an objective analysis of the circumstances of the statements, considering such things as whether the sexual assault nurse examiner is a State actor or agent, whether there was an ongoing emergency, whether the encounter was formal, and whether the statements and actions of the victim and the sexual assault nurse examiner reflect the primary purpose of the questioning is for a use other than the later prosecution of a crime." *Miller*, 293 Kan. 535, Syl. ¶ 6.

Applying the law to these facts, our Supreme Court concluded:

> "Statements made by a 4-year-old victim to a sexual assault nurse examiner were not testimonial where the victim was complaining of discomfort, the victim's mother had decided to seek medical treatment for the child independent of any request by law enforcement for a forensic examination, and the sexual assault nurse examiner provided

treatment in addition to collecting evidence during the examination." 293 Kan. 535, Syl. ¶ 7.

We view the circumstances of *Miller* as somewhat analogous to the case on appeal. In both cases, a young child, unavailable for later trial, made statements incriminating a defendant while speaking to a health care professional whose primary purpose was to provide treatment, apart from any law enforcement-related participation.

Considering the United State Supreme Court precedent discussed in the previous section and applying the law from *Williams* and *Miller*, we are persuaded that the statements made by A.W. to Borsdorf were nontestimonial and, therefore, did not violate the Confrontation Clause.

Did A.W.'s Statements to Holmes Violate K.S.A. 2017 Supp. 60-460(d)(3) and (dd)?

Apart from Wheeler's Confrontation Clause complaint, he also contends A.W.'s statements to Holmes violated K.S.A. 2017 Supp. 60-460(d)(3) and (dd) and, as a result, the district court committed reversible error. In particular, Wheeler complains the district court erred because there was no evidence that A.W. knew the difference between a truth and a lie, and the district court had never observed A.W. in person. Wheeler also argues there was no evidentiary basis for a finding that A.W.'s statements were recently perceived and that her recall was clear. The State counters that Wheeler's arguments are not supported by legal precedent and that all of the statutory requirements to establish these two exceptions to the hearsay rule were met.

The district court considered whether the hearsay statements made by A.W. to Holmes were admissible pursuant to K.S.A. 2017 Supp. 60-460(d)(3). The district court concluded the statements "were recently perceived; that their recall was clear; they were

made in good faith prior to the commencement of this case; and there is no evidence to indicate any incentive to falsify or distort the truth."

With regard to whether A.W.'s statements made to Holmes while at school were admissible under K.S.A. 2017 Supp. 60-460(dd), the district court found that A.W. was an alleged crime victim who was unavailable as a witness and her statements were made under circumstances which indicated their reliability. The district court found: "There is no evidence of any motive from [A.W.] to falsify such statements or distort them."

Hearsay evidence is "[e]vidence of a statement which is made other than by a witness while testifying at the hearing, offered to prove the truth of the matter stated." K.S.A. 2017 Supp. 60-460. Hearsay evidence is inadmissible unless an exception exists. Two exceptions are at issue in the current case. The first exception is K.S.A. 2017 Supp. 60-460(d)(3):

> "(d) *Contemporaneous statements and statements admissible on ground of necessity generally*. A statement which the judge finds was made: (1) While the declarant was perceiving the event or condition which the statement narrates, describes or explains; (2) while the declarant was under the stress of a nervous excitement caused by such perception; or (3) if the declarant is unavailable as a witness, by the declarant at a time when the matter had been recently perceived by the declarant and while the declarant's recollection was clear and was made in good faith prior to the commencement of the action and with no incentive to falsify or to distort."

The second exception is K.S.A. 2017 Supp. 60-460(dd):

> "(dd) *Actions involving children*. In a criminal proceeding or a proceeding pursuant to the revised Kansas juvenile justice code or in a proceeding to determine if a child is a child in need of care under the revised Kansas code for care of children, a statement made by a child, to prove the crime or that a child is a juvenile offender or a child in need of care, if:

(1) The child is alleged to be a victim of the crime or offense or a child in need of care; and

(2) the trial judge finds, after a hearing on the matter, that the child is disqualified or unavailable as a witness, the statement is apparently reliable and the child was not induced to make the statement falsely by use of threats or promises."

The district court admitted A.W.'s statements to Holmes under both statutory exceptions to the hearsay rule, K.S.A. 2017 Supp. 60-460(d)(3) and (dd).

At the outset, Wheeler challenges whether there was a factual basis for the district court's legal conclusion that A.W.'s statements were admissible as an exception to the statutory hearsay rule. As noted earlier, generally, the admission of hearsay statements under Kansas law is reviewed using an abuse of discretion standard. *Chapman*, 306 Kan. at 276. It is Wheeler's burden to show that the district court's ruling was arbitrary, fanciful, or unreasonable. See *Mosher*, 299 Kan. at 3; *Stafford*, 296 Kan. at 45.

Preliminarily, we note that Wheeler has not favored us with any caselaw in support of his argument that it was necessary for the district court to personally observe A.W. in order to assess whether she had an incentive to falsify and whether her statements were reliable. Failure to support a point with pertinent authority or show why it is sound despite a lack of supporting authority is akin to failing to brief the issue. *State v. Pewenofkit*, 307 Kan. 730, 731, 415 P.3d 398 (2018). Moreover, neither K.S.A. 2017 Supp. 60-460(d)(3) nor (dd) require the district court to determine the credibility of the declarant based on personal observation.

For the exception to the hearsay rule to apply under K.S.A. 2017 Supp. 60-460(d)(3), the witness must be unavailable, the matter must be recently perceived, the witness' recollection clear, and there should be no incentive to falsify or distort.

The record on appeal supports the district court's findings. Wheeler does not contest that A.W. was unavailable. As to whether the statements were recently perceived and clearly recalled, especially given A.W.'s age, her detailed and descriptive account of the sexual abuse supported the district court's finding as to these two factors. This is particularly true given that what is considered recent is within the discretion of the district court. See *State v. Seacat*, 303 Kan. 622, 637, 366 P.3d 208 (2016).

We are also persuaded there was circumstantial evidence to support the finding that A.W. did not have an incentive to falsify or distort her statements to Holmes. A.W.'s initial disclosures were unprompted and spontaneously made in a group setting. As the district court found, A.W.'s later disclosures were in response to general questions by her teacher made in the familiar environment of the classroom. Once again, given A.W.'s tender years, her incentive to purposely falsify or distort statements made to her teacher about these matters is highly questionable. On the other hand, Wheeler does not show that A.W. harbored any motivation to falsify or distort. We are persuaded that the district court did not abuse its discretion in ruling that A.W.'s statements to Holmes were admissible under K.S.A. 2017 Supp. 60-640(d)(3).

Next, for the sake of completeness, we consider the propriety of the district court's ruling with regard to K.S.A. 2017 Supp. 60-460(dd). This hearsay exception requires a child to be the alleged victim of a crime, unavailable as a witness, and the statement to be apparently reliable and not induced to be false by the use of threats or promises. Our Supreme Court has said:

> "The determination of reliability and trustworthiness must be made on a case-by-case basis. Such factors as the age of the child; his or her physical and mental condition; the circumstances of the alleged event; the language used by the child; the presence of corroborative physical evidence; the relationship of the accused to the child; the child's family, school, and peer relationships; any motive to falsify or distort the event; and the

> reliability of the testifying witness can be examined." *State v. Myatt*, 237 Kan. 17, 25, 697 P.2d 836 (1985).

We incorporate our prior discussion with regard to K.S.A. 2017 Supp. 60-460(d)(3). Additionally, in accordance with *Myatt*, the reliability of A.W.'s statements was shown by the corroborating statements and later testimony of K.W., Borsdorf, and the discovery of the bottle of lotion located in the basement wherein the sexual assaults were alleged to have occurred. Finally, the reliability of Holmes to accurately relate A.W.'s disclosures was never challenged. In summary, in addition to our finding that the statements made to Holmes were admissible under K.S.A. 2017 Supp. 60-640(d)(3), we also find the district court did not err by ruling that the statements were also admissible under K.S.A. 2017 Supp. 60-460(dd).

Did A.W.'s Statements to Borsdorf Violate K.S.A. 2017 Supp. 60-460(d)(3) and (dd)?

In considering the admissibility of A.W.'s statements to Borsdorf, the district court ruled that because the incidents the child described were not recently perceived by her, K.S.A. 2017 Supp. 60-460(d)(3) did not provide an exception to the hearsay rule. The district court admitted A.W.'s statements to Borsdorf, however, under K.S.A. 2017 Supp. 60-460(dd). In particular, the district court noted that given the therapy setting and the child's mental health issues, and because there was no indication that A.W. was subject to any threats or promises, the totality of circumstances indicated "a sound level of reliability" in the truth of her statements.

On appeal, Wheeler argues that the State failed to produce "explicit evidence" that A.W. "understood the difference between a truth and a lie and understood that, at the time she made those statements, that she was obligated not to make any false claims." As noted earlier, Wheeler does not accompany his legal contention with reference to caselaw precedent.

Once again guided by our Supreme Court's precedent in *Myatt*, the record reveals that the disclosures made by A.W. were spontaneously made during play therapy in an informal environment to a familiar therapist. Given her age, a reasonable person would not expect a child to purposely concoct a false, detailed, sexual assault narrative under the circumstances. Moreover, A.W.'s disclosures to Borsdorf were corroborated by the testimony of K.W., Holmes, and the discovery of the bottle of lotion. Finally, the reliability of Borsdorf to truthfully repeat A.W.'s disclosures was never challenged. In short, we conclude the district court did not abuse its discretion by ruling that A.W.'s statements to Borsdorf were admissible under K.S.A. 2017 Supp. 60-460(dd).

In conclusion, we note with approval the district court's instructing the jury before the testimony of Holmes and Borsdorf regarding the need to pay special consideration with regard to A.W.'s out-of-court statements. This instruction appropriately focused the jury's attention on those factors which Kansas law provides are important when considering out-of-court statements, especially made by children.

We hold that Wheeler has failed to meet his burden to show the district court abused its discretion by allowing A.W.'s statements to be admitted as evidence at trial pursuant to K.S.A. 2017 Supp. 60-460(d)(3) and (dd). We find no error.

COMPETENCY OF K.W. TO TESTIFY AT TRIAL

For his next issue on appeal, Wheeler claims that the "district court erred in denying [his] mid-testimony challenge to the competency of [K.W.] to testify." In particular, Wheeler argues that the district court erred by overruling Wheeler's objection that K.W. was incompetent to testify because the State did not establish that K.W. knew the difference between a truth and a lie.

During K.W.'s trial testimony, Wheeler's counsel interposed an objection that it was the State's "duty to prove that [K.W.] is capable to tell the difference between truth and false and that she knows the difference." At the time the objection was made, K.W. had already provided testimony which comprised six pages of transcript. This testimony included her comments, "Daddy went to jail because he was touching my bottom part because he also touched my own—my own pee-pee part and poopy part and that's why he went to jail."

The district judge considered the objection outside the presence of the jury and ruled:

> "THE COURT: Okay. Well, I think the law is that everybody is presumed, the witnesses are presumed and it would be, you know, it may go to the weight and credit that the jury gives the testimony, but I don't think there has been anything that indicates to the Court at this point that, first of all, there's a specific requirement on the State to prove even a child of this age understands their responsibility and I do believe it is the burden of the defense or whoever is challenging that to make that point and raise that issue. I'll take a quick look at the case law on it, but I think that that is the general law as I understand it, so I'll overrule the objection."

Whether a witness is qualified to testify is within the discretion of the district court. *State v. Cameron*, 300 Kan. 384, 391, 329 P.3d 1158 (2014). An abuse of discretion occurs when judicial action is arbitrary, fanciful, or unreasonable; is based on an error of law; or is based on an error of fact. *Mosher*, 299 Kan. at 3.

At the outset, the State argues that Wheeler failed to preserve this issue on appeal because he did not timely object to K.W.'s testimony. The State asserts that Wheeler was required to object prior to K.W.'s swearing to an oath and testifying. Generally, K.S.A. 60-404 precludes an appellate court from reviewing an evidentiary challenge absent a

timely and specific objection made on the record. *State v. Dupree*, 304 Kan. 43, 62, 371 P.3d 862, *cert. denied* 137 S. Ct. 310 (2016).

The common and preferred practice is for a party to object to competency prior to the subject witness' testimony. See, e.g., *Cameron*, 300 Kan. at 391 (defendant filed pretrial motion to disqualify child witness arguing child was incapable of understanding duty to tell truth). Still, under the circumstances on appeal, if the district court had sustained the tardy objection, K.W.'s testimony could have been halted and the jury instructed to disregard the prior testimony. In short, the late objection still permitted the trial court an opportunity to correct any error. As a result, despite questioning whether this issue was properly preserved for appeal, we will address the merits.

Under Kansas law "[e]xcept as otherwise provided by statute (a) every person is qualified to be a witness, and . . . (c) no person is disqualified to testify to any matter." K.S.A. 60-407. A witness may be found incompetent to testify, however, if: "the judge finds that (a) the proposed witness is incapable of expressing himself or herself concerning the matter so as to be understood . . . or (b) the proposed witness is incapable of understanding the duty of a witness to tell the truth." K.S.A. 60-417; *State v. Colwell*, 246 Kan. 382, 388, 790 P.2d 430 (1990).

In the district court, Wheeler's counsel incorrectly argued that he did not have the burden to show that K.W. was incompetent to testify. On appeal, however, Wheeler candidly concedes: "The burden of establishing the incompetence of a witness lies with the party challenging competence. *State v. Warden*, 257 Kan. 94, 123, 891 P.2d 1074 (1995). Age alone is not a valid criterion for disqualification. *State v. Winkel*, 243 Kan. 570, 573, 757 P.2d 318 (1988)." We agree that Wheeler has correctly summarized Kansas law applicable to this issue.

On appeal, Wheeler also acknowledges that at the time defense counsel interposed an objection to K.W.'s competency: "K.W. had not yet exhibited any specific evidence that she did not explicitly understand the difference between a truth and a lie." Upon our independent review of K.W.'s testimony, we agree with Wheeler's assessment. Moreover, we note that after taking the oath, K.W. testified, "I always tell the truth." This suggests that K.W. had some basic understanding of the importance of taking the oath.

It is also significant that during the trial, after K.W. testified, the district court allowed defense counsel to voir dire Borsdorf on the reliability of A.W.'s and K.W.'s statements to her. During this hearing, Borsdorf testified with regard to K.W. that the child was knowledgeable about the importance of telling the truth:

> "When you talk about the things that have happened, when you say—when you say to me about dad and that he did this and this, when you talk about this when you're honest you really think it happened. You remember it. When it is not honest, when you are dishonest, it means you're saying something you don't think it happened and you really don't remember it happening."

Wheeler complains that during K.W.'s testimony she incorrectly testified that she had not attended kindergarten and that she had been in school for "a hundred years." Wheeler protests that this testimony "suggests an exaggeration at best and at worst [a] bold-faced lie." In our view, while this particular testimony may suggest a witness with the mentality, maturity, and memory of a young child, it does not support Wheeler's claim that K.W. was intentionally lying. Regardless, the jury had the opportunity to observe K.W.'s demeanor, intellect, and credibility. See *State v. Kettler*, 299 Kan. 448, 471-72, 325 P.3d 1075 (2014). We have no basis to find the district court erred in denying Wheeler's late challenge to K.W.'s competency.

FAILURE TO GIVE A LIMITING INSTRUCTION REGARDING THE STATE'S REBUTTAL EVIDENCE

Next, "Wheeler now argues that the district court's failure to give a limiting instruction [as] to rebuttal evidence of [A.W.'s] interviews was reversible error." In particular, Wheeler claims it was reversible error not to inform the jury that it "should only consider the evidence of [A.W.'s] testimony for the purpose of rebutting the defense[] expert witness[]' assertion that the interview techniques in that evidence tainted . . . [A.W.'s] later statements that had been previously admitted at trial."

In its appellate brief, the State misreads Wheeler's issue on appeal. According to the State's understanding: "[Wheeler] claims that the district court erred in not issuing a limiting instruction regarding video interviews of [A.W.] *and* [*K.W.*] admitted as rebuttal evidence." (Emphasis added.) This mistake is understandable, given that in the district court, Wheeler requested a limiting instruction that applied to the State's rebuttal testimony which was comprised of two videotaped interviews each of A.W. and K.W.

Although Wheeler's defense counsel requested a limiting instruction regarding two interviews of A.W. and two interviews of K.W., in this appeal, Wheeler has not raised the issue of the district court's failure to give a limiting instruction regarding the two interviews of K.W. As a result, Wheeler has waived or abandoned any claim of instructional error pertaining to the rebuttal evidence of K.W.'s videotaped interviews. Issues not adequately briefed are deemed waived or abandoned. *State v. Arnett*, 307 Kan. 648, 650, 413 P.3d 787 (2018). We will, however, analyze the merits of Wheeler's claim of instructional error pertaining to the rebuttal evidence of A.W.'s videotaped interviews.

A summary of background facts is necessary to resolve this issue. Sheehan reviewed the two videotaped interviews of A.W. and two videotaped interviews of K.W. These interviews were conducted by social workers and law enforcement officers shortly

after the disclosures made to Holmes. In addition to watching the interviews, Sheehan reviewed other interview transcripts, court hearing transcripts, charging documents, police reports, and therapy records. Sheehan then prepared a 12 page, single-spaced report detailing her expert opinions and testified at trial.

Sheehan testified that her purpose in conducting the expert review was "to review certain video statements of the children and *determine the reliability, if you will, of what the children have said*." (Emphasis added.) Towards this end, Sheehan criticized various techniques employed by the interviewers that, in her opinion, were not conducive to obtaining reliable information from A.W. and K.W. about their alleged sexual abuse.

For example, Sheehan was concerned that at the beginning of A.W.'s first interview "there was nothing about telling the truth as opposed to a lie or allowing the child to practice demonstrating that they know the difference between truth and a lie." In A.W.'s second interview, Sheehan disparaged the interviewer's admonition that "we're only going to talk about what's real. Well, to a preschooler Santa Claus is real." According to Sheehan, another "obvious concern" with regard to A.W. was that she was restless and wanted to play during the interview. As a result, "[Y]ou couldn't really tell if she had any idea of what was being asked of her . . . ."

Sheehan also disparaged the interviewers' use of closed-end questioning. She testified that a "free narrative response elicits the fewest errors about what really occurred in the child's life." For example, A.W. was asked, "[H]ave you ever seen your daddy put his neck in somebody else?" Sheehan testified this question "assumes that daddy put his neck somewhere in someone else. And, again, there is this interviewer bias that doesn't just creep in. It is there."

Sheehan disapproved of the interviewers' use of anatomical dolls. She testified that

> "when you give a doll to a child that has a penis and a hole in it and you can stick your finger in the hole and they do things. . . . [T]hey are curious and children also like to play. . . . [A]nd we know that when [interviewers] use anatomical dolls *that elicits false reporting* and it also elicits exaggeration even if abuse did occur, it invites an exaggeration of something *that may or may not have happened*." (Emphases added.)

At the conclusion of her testimony, Sheehan provided her expert opinion in response to defense counsel's question:

> "Q. Ma'am do you have an opinion to a reasonable degree of certainty as to the techniques used by these [interviewers] in examining these two children?
> "A. Yes.
> "Q. What is it?
> "A. My opinion is that the techniques [used by interviewers] have conceivably altered [A.W.'s and K.W.'s] autobiographical memories *rendering their statements unreliable*." (Emphasis added.)

After Wheeler rested his case, the parties held an in camera hearing to discuss the State's offer of the four videotaped interviews as rebuttal evidence. Wheeler objected. During this discussion, the district court characterized Sheehan's testimony as "a very broad attack by the defense upon the methodology of the entire interview, of all four interviews . . . and certainly the attack was not only on those interviews but may be more relevant for this jury what the two girls said subsequently to the therapist, Ms. Borsdorf."

The district court admitted the four interviews to "give the jury the opportunity to view those and weigh those in comparison to the testimony that Ms. Sheehan presented with regard to her professional expert opinion as to the way the interviews were conducted."

Wheeler's counsel informed the district court:

> "And I would think that—one last thing and I'll shut up. If you let [the State] play the tapes then you got to instruct the jury that they are played for the purpose of impeaching Ms. Sheehan and they are not played for the truth of what's contained within them and they cannot so use them. Seems like much ado about nothing."

The prosecutor countered that the evidence should be admitted for whatever purpose the jury determines "because [Sheehan] has attacked the truthfulness of those very statements, so the jury has got to be able to decide if they are true or not." The district court agreed with the State and declined to give a limiting instruction.

As always, we begin the analysis with our standard of review:

> "When analyzing jury instruction issues, an appellate court follows a three-step process:
> "'(1) determining whether the appellate court can or should review the issue, *i.e.*, whether there is a lack of appellate jurisdiction or a failure to preserve the issue for appeal; (2) considering the merits to determine whether error occurred below; and (3) assessing whether the error requires reversal, *i.e.*, whether the error can be deemed harmless.' [Citation omitted.]" *State v. Pfannenstiel*, 302 Kan. 747, 752, 357 P.3d 877 (2015).

At the second step, "'we consider whether the instruction was legally and factually appropriate, employing an unlimited review of the entire record.'" If the district court erred, and the error did not violate a constitutional right, the error is reversible only if the court determines that there is a "'reasonable probability that the error will or did affect the outcome of the trial in light of the entire record.'" *State v. Plummer*, 295 Kan. 156, 168, 283 P.3d 202 (2012) (quoting *State v. Ward*, 292 Kan. 541, 569, 256 P.3d 801 [2011].

With regard to the first factor, it is undisputed that Wheeler preserved this instructional error for our review. As to the second factor, we consider whether Wheeler's proposed limiting instruction was legally appropriate.

On appeal, Wheeler contends a limiting instruction was legally appropriate because

> "the jury's consideration of the [S]tate's rebuttal evidence should not have included the full consideration of the truth of everything that was included in [A.W.'s] interviews (i.e., the truth of her actual statements to the police and social workers) but rather only the consideration of whether the interview tactics that were used were so prejudicial as to make her other, previously admitted statements less believable."

In response, the State highlights Sheehan's expert opinion that "'the techniques have conceivably altered [A.W.'s and K.W.'s] autobiographical memories rendering their statements unreliable.'" According to the State, Sheehan did not simply attack the interview techniques employed during the four interviews, but "interjected her opinion as to all of [A.W.'s] and [K.W.'s] statements, calling them unreliable. . . . [Wheeler] wanted his expert to essentially tell the jury that [A.W.] and [K.W.] were liars who cannot be trusted."

Kansas law provides:

> "'Rebuttal evidence is that which contradicts evidence introduced by an opposing party. It may tend to corroborate evidence of a party who first presented evidence on the particular issue, or it may refute or deny some affirmative fact which an opposing party has attempted to prove. It may be used to explain, repel, counteract, or disprove testimony or facts introduced by or on behalf of the adverse party. Such evidence includes not only testimony which contradicts witnesses on the opposite side, but also corroborates previous testimony.'" *State v. Sitlington*, 291 Kan. 458, 464, 241 P.3d 1003 (2010) (quoting *State v. Willis*, 240 Kan. 580, 583, 731 P.2d 287 [1987]).

Wheeler candidly concedes that he opened the door to the admission in evidence of the interviews in rebuttal. See *State v. Birth*, 37 Kan. App. 2d 753, 762-63, 158 P.3d 345 (2007). The sole issue is whether the jury should have been instructed that it could not consider the content of A.W.'s interviews for the truth of the matters she asserted.

At the outset, Wheeler has not favored us with any legal precedent that requires a district court to provide a limiting instruction under these circumstances, or any circumstances for that matter, with regard to rebuttal evidence. While we can conceive of certain situations wherein a limiting instruction may be necessary, Wheeler has failed to show that a limiting instruction was legally appropriate under this factual scenario.

As detailed earlier, Sheehan's expert testimony was a broad-based attack on the techniques used in the four interviews, which resulted in A.W.'s and K.W.'s incriminating statements made during those interviews. As a consequence, Sheehan's ultimate expert opinion was that the sisters' memories were altered which caused their interview statements to be unreliable and also caused their later statements to be untrue. This would include the sisters' statements to Borsdorf and K.W.'s trial testimony. In short, if Sheehan's expert opinion was believed, A.W.'s and K.W.'s statements (excluding those made to Holmes) were not the truth.

Given this background, Wheeler argues that the jury should have been instructed that the interviews could not be considered for the truth of the matters A.W. asserted. But there were numerous reasons to admit the videotaped interviews as rebuttal evidence. Rather than rely on Sheehan's description and characterization of the interviews, the jury was able to view them and arrive at its own conclusions about Sheehan's opinions, her veracity, and the sisters' responses to the questions.

Significantly, the statements made by A.W. and K.W. during the four interviews generally corroborated the statements made to Holmes prior to these interviews and the

later statements made to Borsdorf and K.W.'s trial testimony. This corroboration tended to disprove Sheehan's expert opinion that A.W.'s incriminating statements were unreliable. More importantly, the consistency of the statements made before, during, and after the four interviews corroborated or tended to prove the truth of A.W.'s accounts of sexual abuse made in the videotaped interviews. For these reasons, it was appropriate for the jury not to be restricted from considering whether A.W.'s interview statements were true.

Moreover, a limiting instruction informing the jury that the videotaped interviews should not be considered for the truth of the matters asserted by A.W. would have been highly prejudicial to the State. Sheehan's opinion was that A.W.'s statements could not be considered truthful. Any instruction limiting the jury from considering the truthfulness of A.W.'s statements could have been construed as the district court's imprimatur or grant of approval for the jury to believe Sheehan's expert testimony and disbelieve A.W.'s incriminating statements. The danger of providing such a limiting instruction under these unique circumstances—especially given a dearth of legal precedent to support such an instruction—is another reason why the district court did not err in instructing the jury to consider the rebuttal evidence as it would all of the trial evidence.

We hold the district court did not err in declining to give the requested limiting instruction.

LIFETIME OFFENDER REGISTRATION

For his final issue, Wheeler contends the district court's imposition of lifetime offender registration is cruel and unusual punishment under the United States Constitution and the Kansas Constitution Bill of Rights. He acknowledges that our Supreme Court has previously addressed this issue adversely to his legal position.

The Court of Appeals is duty bound to follow Kansas Supreme Court precedent, absent some indication the Supreme Court is departing from its previous position. *State v. Meyer*, 51 Kan. App. 2d 1066, 1072, 360 P.3d 467 (2015). The Kansas Supreme Court has held that lifetime registration for sex offenders under the Kansas Offender Registration Act does not constitute punishment in violation of the Eighth Amendment to the United States Constitution and § 9 of the Kansas Constitution Bill of Rights. *State v. Petersen-Beard*, 304 Kan. 192, Syl. ¶¶ 1-2, 377 P.3d 1127, *cert. denied* 137 S. Ct. 226 (2016). Our Supreme Court has continued to adhere to the holding in *Petersen-Beard*. See *State v. Rocheleau*, 307 Kan. 761, Syl. ¶ 4, 415 P.3d 422 (2018).

Petersen-Beard is dispositive of this issue. We find no violation of the United States or Kansas Constitutions in the district court's imposition of lifetime registration.

Affirmed.