

NOT DESIGNATED FOR PUBLICATION

No. 120,994

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,  
*Appellee,*

v.

PAUL GUEBARA,  
*Appellant.*

MEMORANDUM OPINION

Appeal from Finney District Court; ROBERT J. FREDERICK, judge. Opinion filed February 24, 2023. Affirmed in part and reversed in part.

*Paul Guebara*, appellant pro se.

*Brian R. Sherwood*, assistant county attorney, *Susan Lynn Hillier Richmeier*, county attorney, and *Derek Schmidt*, attorney general, for appellee.

Before ARNOLD-BURGER, C.J., GREEN and MALONE, JJ.

ARNOLD-BURGER, C.J.: Paul Guebara was convicted by a jury of attempted first-degree murder and criminal possession of a weapon. On appeal, he challenges the district court's finding that his counsel did not provide ineffective assistance, the refusal of the district court to grant a new trial when evidence was presented that the lead detective and the primary witness entered into a sexual relationship after his conviction, various trial errors, and the overall sufficiency of the evidence. After a thorough review of the record we find none of Guebara's claims require reversal except for one. The State failed to present sufficient evidence to support Guebara's conviction for criminal possession of a

weapon. We therefore reverse that conviction. Because the reversal will not affect Guebara's sentence, there is no need to remand the case. Affirmed in part and reversed in part.

#### FACTUAL AND PROCEDURAL HISTORY

We will summarize the facts based on the evidence presented at trial. More facts may be added as they relate to particular issues raised.

On the night of February 24, 2015, Raul Tapia went to Eliseo Ramos-Beleta's house to play cards. Erlinda "Linda" Rios, Paul Guebara's girlfriend, was also present. Rios and Tapia often played cards or dice together at Eliseo's house. Rios provided home health care services to Eliseo, who was often bedridden. Guebara entered Ramos' apartment and asked Rios for the keys to her truck and then left without talking to Tapia. Tapia had known Guebara for many years. Tapia left in his truck about 30 minutes later. Sometime later, he saw another vehicle following him and flashing its lights at him from behind. He stopped to see who it was and when he exited the car, he was shot in the leg and scrotum. Tapia got back in his truck and drove to the hospital. While being questioned at the hospital, he identified a long-haired Hispanic male as the shooter. Neighbors in the area reported hearing loud male and female voices followed by several gunshots.

Tapia gave a few more details when interviewed by police two days after the shooting. Tapia told Special Agent Robert Jacobs that he had been playing cards before the shooting with a woman named Sophina when Guebara entered the apartment they were in. Guebara took Sophina outside and Tapia heard her crying. He went outside but Sophina told him to leave, so he left. He told Jacobs that he thought Guebara had a handgun in his waistband. Tapia then reported that after he left Ramos' house, he noticed someone following him and flashing their lights. Tapia pulled over and exited his vehicle.

Then, Guebara fired five shots at him. Tapia thought Guebara might be jealous of his relationship with Sophina. Police were never able to identify who Sophina was or if she even existed. Tapia denied Rios was in the truck with Guebara.

The police obtained a search warrant for Guebara's residence a couple of days after the shooting. Gabriel Andrade answered the door at the house they believed Guebara had just entered. Andrade's girlfriend, Verna Rodriguez, was also present. Rodriguez was Guebara's aunt. Although Andrade advised police that he had not seen Guebara, Guebara exited the bathroom of the residence and officers arrested him. Detective Freddie Strawder found a phone in the bathroom. Andrade and Rodriguez said it was not their phone. Andrade told Strawder that Guebara had been on the phone in the bathroom, texting and making calls, though he did not know the content of the communication.

Next, Detective Strawder went to speak with Rios. She said that the night before the shooting she was playing cards at Ramos' apartment and there was an argument between her and Guebara that Tapia witnessed. Rios said she knew Tapia had been shot and Guebara arrested but denied knowing more about the incident. Detective Strawder testified that during this conversation Rios was shaking uncontrollably and did not act like she wanted to talk to him. She declined his invitation to talk at the law enforcement center and he could not reach her again.

At this point the gun used in the shooting had not been located.

A couple of weeks later, out of the blue, Nathan Cook contacted police. He identified himself as a family acquaintance of Guebara and claimed to have information about the gun used in the shooting. It turns out Cook was the fiancé of Silvia Dawn Gillespie, Guebara's daughter. Cook said that Jacob Fajardo had called him and asked him to go pick up the gun that Guebara had used in the shooting. Jacob Fajardo's

girlfriend and the mother of his child is Katie Guebara, Guebara's niece. Fajardo is also the half-brother of Guebara's nephew. Fajardo explained that it was supposed to be hidden under a wood stack in a field behind an address Fajardo provided to Cook—which was where Guebara was living with his mother. Fajardo said that Guebara called him before his arrest to ask him to dispose of the gun, but Fajardo could not do so because he was in North Dakota for work. Fajardo also told Cook that he had bought Guebara some .357 ammunition at Guebara's request. After this, Gillespie and Cook decided to go to the authorities. They had children and felt they had too much to lose to get involved.

A trip with Cook and police to the area Fajardo suggested the gun would be located did not result in the discovery of a gun, although two expended .357 Magnum shell cartridges were found.

Detective Strawder asked Cook if he could call Fajardo and put him on speakerphone. Cook called Fajardo and told him that he could not find the gun. Fajardo said he thought he was the only person who knew where the gun was so it should have been there. The phone call was not recorded.

The next day Cook called Detective Strawder with more information. Strawder met with Cook and Guebara's daughter, Gillespie. They told Strawder that Silvia Cordes, Guebara's sister, admitted to moving the gun.

Gillespie also revealed to Strawder that on the morning of the shooting she was with her father, Guebara, at his mother's house—her grandmother—Susana Guebara, where Guebara lived. Guebara commented to Gillespie "that he just wanted to kill somebody," specifically Gillespie's ex-husband John because John had been abusive to Gillespie. Guebara also asked Gillespie to buy him some .357 ammunition. Cook said he knew Guebara used to have a 1911-style handgun but believed he traded it for a .357

revolver. Gillespie drove to Dillons with Guebara to get gas and then they got drinks at Sonic. She did not see him for the rest of the day.

Gillespie told Strawder that two or three days after Guebara's arrest, Rios called her from Colorado and said she was present when Guebara shot Tapia. Rios told Gillespie that the men had an argument because Tapia had bought Rios some jewelry for her birthday which upset Guebara.

Detective Strawder asked Cook and Gillespie if they would be willing to work in an undercover capacity to help track down the gun. They agreed and so began a series of recorded phone calls revealing a conspiracy among family and friends to get rid of the gun that Guebara allegedly used to shoot Tapia.

Cook called Fajardo and Detective Strawder recorded the call. Cook let Fajardo know that Silvia Cordes had found the gun and taken care of it. Fajardo acknowledged on the call that he had asked Cook to find the gun and expressed relief when Cook told him "Aunt Silvia" had gotten it. A recording of the call was played for the jury over defense counsel's objection.

Fajardo had another conversation with Detective Strawder that was recorded in which he admitted that Guebara asked him to retrieve the gun. He denied purchasing ammunition for Guebara on the day of the shooting. When he was later arrested, a receipt for the purchase of ammunition on the day of the shooting was found in Fajardo's wallet. Yet it did not appear to be for the purchase of ammunition for a .357 revolver. Detective Strawder also checked Guebara and Fajardo's phone records and found several calls between the two in the hour preceding Guebara's arrest.

Detective Strawder also arranged for Gillespie to contact Rios. Gillespie recorded their conversation. Rios described Guebara as jealous and said he had a bad temper.

Guebara had accused Rios of "[m]essing around" with other men, especially Tapia. At the same time, she said she was not present during the shooting.

Later that day, Gillespie and Cook met with Silvia Cordes—Guebara's sister—at UPS where she worked. This conversation was also recorded. Silvia told them that Andrade heard Guebara talking to someone on the phone right before he got arrested. Silvia said she was at someone's residence when she heard that person's husband say something about the location where the gun could be found. Between what she heard there and what she heard from Andrade she "put two and two together." Silvia then, and in the middle of the night, went out with a flashlight to search for the gun in the wood pile across the alley from where Guebara lived. She found the gun and took to her husband, Scott Cordes (Scott), to destroy. Silvia also said it was a very nice gun and she bet that her brother, Guebara, stole the gun from Uncle David—who is also Guebara's brother.

The parties began talking about Rios. Silvia said that Rios told her that she had been with Guebara during the shooting. She said that before the shooting they were playing cards and Guebara and Tapia had an argument. The argument was about things Tapia had done to Guebara's family, including running someone's truck off the road. Then Guebara left with Rios. Tapia followed them so Guebara pulled over and asked him what he was doing. Tapia said he thought Guebara was mistreating Rios. Guebara said he was not mistreating Rios and told Rios that he would kill Tapia. When Guebara pulled out his gun, Rios pushed his hands down which is why Tapia's gunshot wounds were so low. Silvia also reported that Rios said she went to Colorado to burn the clothing that Guebara wore during the shooting.

A recording of the conversation between Gillespie, Cook, and Silvia Cordes was played for the jury over defense counsel's objection.

Detective Strawder also directed Gillespie and Cook to meet with Scott, Silvia Cordes' husband. Gillespie and Cook went to where Scott was living with recording devices. Scott was upset that Silvia was talking about the gun with so many people. Scott told them that Silvia had brought the gun to him in a box and asked him to get rid of it because it was Guebara's gun. Scott said he took the gun to "a white guy." A recording of the conversation was played for the jury over defense counsel's objection. By the trial date, Scott could not testify because he was receiving intensive care in the hospital. Guebara's attorney objected to the audio recording of Scott being admitted into evidence due to his unavailability for cross-examination, but the district court overruled his objection.

Finally, Gillespie and Cook met with Randy Miller (identified as the person Scott described as "a white guy") at his residence. During that meeting, Miller told Gillespie and Cook that he received the gun from Scott and had disposed of it on his property. The police executed a search warrant at Miller's house. When Detective Strawder told Miller they were there to execute a search warrant and they were looking for a gun, Miller told them the gun they were looking for was in the arm rest of a chair in his living room. Police found a stainless-steel revolver where Miller said it would be. Police recovered a second black revolver in Miller's bedroom. The black revolver had a blue finish. Both were Ruger GP100 revolvers in .357 Magnum caliber.

Miller told Detective Strawder that about two weeks earlier, Scott had come to his house with the gun and asked him to dispose of it. The revolver Scott gave him was a stainless-steel .357 revolver. Miller already owned a black .357 revolver. He admired the Hogue grips on the stainless-steel revolver, so he switched them with the grips of his black revolver. Miller also said that the stainless-steel revolver had been used to shoot someone. He was not acquainted with Guebara, but he was a close friend to Scott.

The same day, Detective Strawder met with Andrade. Andrade elaborated on the day of Guebara's arrest, specifically when Guebara was on the phone in the bathroom. According to Andrade, Guebara sounded like he was having an emergency. He could hear Guebara talking about the location of the gun somewhere past the alley by Guebara's house. Andrade said he told Silvia Cordes about what he overheard after she had claimed that Guebara had not been involved. A recording of the interview was played for the jury over defense counsel's objection.

Throughout the case, Detective Strawder made 41 reports. During his investigation, he heard of three women who were rumored to take part in the shooting. The first was Sophina, a name that Tapia provided to Special Agent Jacobs. During another interview, Tapia told Detective Strawder that Rios was with Guebara. Silvia Cordes also reported that there was another shooter, but she was the only source that Detective Strawder heard this from. Later, Tapia told Detective Strawder that the woman who was present was named Ophelia. Guebara remained the key suspect.

Eventually, the KBI analyzed swabs taken from Tapia's truck and the two revolvers recovered from Miller's house and compared the results to DNA taken from Miller, Guebara, Scott, and Silvia Cordes. The stainless-steel revolver matched Miller; the black revolver with the Hogue grips was inconclusive. Nothing in the testing came back to Guebara. A bullet was recovered from Tapia's truck, but it was too damaged for comparison. Forensic experts were able to determine that the fired shell cartridges recovered from the field matched the stainless-steel revolver recovered from Miller. No forensic evidence ever tied Guebara or the stainless-steel revolver to the shooting. Additionally, no witness ever saw Guebara with the stainless-steel revolver.

During their trial testimony, although several witnesses were given immunity due to their involvement in disposing of the gun, they still attempted to disassociate



themselves with many of their recorded statements by either denying them or not remembering them at all.

Near the end of trial, the State introduced an agreed stipulation and instruction. This stipulation between Guebara and the State provided: (1) within 10 years before February 24, 2015, Guebara had been released from prison for a felony crime; (2) Guebara was not found to be in possession of a firearm at the time of the prior crime; and (3) Guebara had not had the conviction expunged or been pardoned for the crime.

Guebara did not testify.

The jury found Guebara guilty of attempted first-degree murder and criminal possession of a weapon by a convicted felon.

*There was a flurry of postconviction activity.*

*Common posttrial motions were filed and denied.*

There was a good deal of posttrial activity. Guebara's sentencing did not occur until over three years after his conviction. Guebara, his trial counsel, and a new attorney appointed by the court all filed posttrial motions. These motions raised issues that included trial errors, claims of ineffective assistance of trial counsel, claims of new evidence providing grounds for a new trial regarding an alleged video of Rios shooting Tapia, and prosecutorial misconduct claims which will all be addressed below. The district court conducted a two-day evidentiary hearing on the motion for ineffective assistance of counsel. Many issues were discussed. After hearing oral argument, the district court issued a thorough decision denying Guebara's motion.

*Posttrial motions related to Brady/Giglio filings by the State were also denied.*

A couple of weeks after the district court issued its written order, Guebara filed a pro se motion asking the court to stay sentencing based on a new development. Guebara had learned through his attorney that Detective Strawder was having a sexual relationship with Guebara's daughter—Silvia Gillespie. This was followed by a notice of compliance with *Brady/Giglio* filed by the State. "[U]nder *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and *Giglio v. United States*, 405 U.S. 150, 153-55, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972), the State has a continuing duty to disclose evidence favorable to the defense, even after conviction, if the State knew of that evidence during trial." *State v. Robinson*, 309 Kan. 159, 160, 432 P.3d 75 (2019). The notice confirmed the relationship but stated that it did not begin until April or May 2017—after the trial in this case had ended. In a subsequent motion for new trial based on newly discovered evidence, filed through counsel, Guebara said he believed the relationship between Detective Strawder and Gillespie began earlier than reported. He acknowledged that he would need to present evidence to confirm this belief.

Guebara continued to file a series of pro se motions addressing the district court's ruling on his earlier posttrial motions and Detective Strawder's relationship with Gillespie. He asserted that upon inspection of his phone, the phone's passcode had been deleted. He asserted that Detective Strawder must have accessed his phone and deleted the passcode so he could delete the exculpatory video that Guebara claimed was on his phone.

Related to the *Brady* evidence, Guebara's attorney issued a subpoena to the Garden City Police Department (GCPD). When GCPD objected, the district court ordered an in camera inspection of GCPD file 18-22 and 18-25. On the day of sentencing the district court found that file 18-22 contained discoverable information and ordered that

information to be provided to Guebara. A week later, the court made similar findings about file 18-25.

*Several more posttrial motions were considered at sentencing.*

At sentencing, the district court sought to clarify what motions were outstanding and how the case would proceed. The district court asked Guebara's attorney whether he had yet determined whether to proceed on the motion for new trial based on *Brady* evidence. Counsel agreed that he would need to review the subpoenaed investigative files to determine "whether or not there is any meat on the bones" in regard to the motion for new trial. The court said that it intended to issue the order granting the subpoena allowing Guebara and his attorney to review at least some, if not all, of the investigative file. Then, if review of the file provided something that could "get this motion off the ground to a point where [counsel] really want[ed] to pursue it," then he could move for new trial at that time.

The district court next noted that Guebara filed a number of pro se motions and that his attorney had filed a request with the court asking it to clarify whether Guebara's pro se pleadings would be considered. The court recounted its previous ruling "a long time ago that the hybrid representation that Mr. Guebara was engaging in was going to come to a screeching halt, and that if there was something he wanted filed, it needed to come through [counsel]." The court observed that Guebara's motions fell into three categories: (1) reconsideration of the court's decision on his motion for ineffective assistance of counsel; (2) premature filings related to appeal; and (3) issues about the relationship between Detective Strawder and Gillespie. With that said, the court found that counsel adequately addressed Guebara's concerns about reconsideration of the district court's ruling on ineffective assistance of trial counsel. The court also said that Guebara would have two years after the final entry of judgment, which would be the journal entry of sentencing, to move for new trial based on newly discovered evidence if

his review of the GCPD files revealed a basis for such a motion. The district court determined that it had looked at all of Guebara's pro se filings and was unwilling to consider them.

The next outstanding motion the district court addressed was Guebara's motion to inspect Guebara's cell phone. The court granted the motion and ordered the parties to meet and inspect the evidence within 14 days. Other motions were addressed but are not relevant to the issues on appeal.

The district court sentenced Guebara to 586 months' imprisonment for attempted first-degree murder and a concurrent sentence of 8 months' imprisonment for criminal possession of a weapon.

*Postsentencing motions related to inspection of Guebara's cell phone*

Consistent with the district court's order at the sentencing hearing, Guebara inspected his cell phone. He followed this inspection by filing a motion to set aside his sentence. In this motion, he alleged that his inspection of the cell phone showed that someone had tampered with it and removed the passcode. Eventually, the district court found that despite two inspections of the phone, Guebara had come forth with no credible evidence that anything had been deleted from it. The court found it notable that Guebara did not raise the issue at trial. He did not attempt to introduce the video as evidence, and he did not testify. Only after the trial did Guebara disclose for the first time that there was potential exculpatory evidence on his phone.

Guebara's appeal followed. Although at first Guebara had appointed counsel, he was allowed to proceed pro se on appeal.

## ANALYSIS

### I. THE DISTRICT COURT DID NOT ERR IN DENYING GUEBARA'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS

Guebara's first claim on appeal is that the district court erred in denying his motions for a new trial based on ineffective assistance of counsel. He claims that Douglas Spencer, his trial counsel, failed in several ways: failing to interview and investigate key witnesses, failing to make objections, failing to offer certain evidence, and eliciting damaging testimony.

*A. We review factual findings for substantial competent evidence and legal conclusions de novo.*

When the district court conducts an evidentiary hearing on claims of ineffective assistance of counsel, we review the district court's factual findings using a substantial competent evidence standard. Appellate courts review the district court's legal conclusions based on those facts applying a de novo standard of review. *Khalil-Alsalaami v. State*, 313 Kan. 472, 486, 486 P.3d 1216 (2021).

Claims of ineffective assistance of trial counsel are analyzed under the two-prong test set out in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and adopted by the Kansas Supreme Court in *Chamberlain v. State*, 236 Kan. 650, 656-57, 694 P.2d 468 (1985). To establish deficient performance under the first prong, the defendant must show that defense counsel's representation fell below an objective standard of reasonableness. Judicial scrutiny of counsel's performance in a claim of ineffective assistance of counsel must be highly deferential. *Khalil-Alsalaami*, 313 Kan. at 485. A fair assessment of counsel's performance requires that every effort be made to eliminate the distorting effects of hindsight, reconstruct the circumstances of the

challenged conduct, and evaluate the conduct from counsel's perspective at the time. 313 Kan. at 486. A court considering a claim of ineffective assistance of counsel must strongly presume that defense counsel's conduct fell within the wide range of reasonable professional assistance; that is, the defendant must overcome the strong presumption that, under the circumstances, counsel's action might be considered sound trial strategy. 313 Kan. at 486.

Under the second prong, the defendant must show that defense counsel's deficient performance was prejudicial. To establish prejudice, the defendant must show with reasonable probability that the deficient performance affected the outcome of the proceedings based on the totality of the evidence. A reasonable probability is a probability sufficient to undermine confidence in the outcome. A court hearing a claim of ineffective assistance of counsel must consider the totality of the evidence before the judge or jury. 313 Kan. at 486.

We will examine each claim in turn.

*B. Failure to Investigate and Interview Witnesses*

A major recurring point in Guebara's argument below and on appeal is that Spencer failed to investigate the case and interview witnesses. Had he done this, Guebara claims, Spencer would have been able to better cross-examine the witnesses, lodge more appropriate objections, and preserve Guebara's confrontation rights under the Sixth Amendment.

Although Guebara claims that the district court did not make findings about whether Spencer effectively investigated the case and interviewed witnesses this claim conflicts with the record. Guebara did not testify or provide an alibi witness, so the case was wholly based on what the State knew and how they knew it. From reviewing

Spencer's cross-examination and the evidence he presented, the district court found it evident that Spencer spent a proper amount of time with Guebara, the investigative reports prepared in the case, and the audio recordings the State presented at trial. The court then noted numerous ways in which Spencer "mudd[ied] the waters of the State's case."

The district court's factual findings on this point are supported by substantial competent evidence. Spencer testified about the steps he took before the trial to investigate and prepare for the case. Most of his preparation involved reviewing the extensive paper discovery and audio recordings from the State. He provided the discovery to Guebara and met with Guebara several times to talk about the discovery and evidence in this case. Spencer subpoenaed all important witnesses. He also sought to interview Rios and Fajardo before trial. Though he did not succeed, the district court correctly noted that the State was building its case around the materials disclosed in discovery, not around what the witnesses may state in their testimony.

Guebara also claims that Spencer failed to investigate his claim that he had a video of the shooting on his phone—a video showing Rios as the shooter. But Spencer testified that Guebara did not tell him about the video until after the trial. The district court found Spencer's testimony more credible, and this court does not disturb a district court's credibility determination.

### *C. Failure to Object to Evidence—Stainless-Steel Gun*

Guebara next claims that Spencer was ineffective for failing to object when the stainless-steel gun was presented to the jury. While the gun was not admitted into evidence, both the black gun and the stainless-steel gun recovered from Miller's residence were shown to the jury during Miller's testimony. Guebara claims Tapia told

investigating officers that a black gun was used. He also alleges that Cook planted the stainless-steel gun and shell casings when he went with officers to look for the gun.

The district court did not rule on this issue in its written order although the record shows that Guebara did raise this issue below. But there is no indication in the record that Guebara asked the district court to make findings on the issue. "In the absence of a request by a party to the district court for additional findings, though, we generally assume that the court made the findings necessary to support its ruling." *Douglas Landscape and Design v. Miles*, 51 Kan. App. 2d 779, 787, 355 P.3d 700 (2015).

Regardless, Guebara's arguments about the stainless-steel revolver go to the weight of the evidence, not its admissibility. "The admissibility of physical evidence is based on its relevance in connection with the accused and the crime charged. Unless physical evidence is clearly irrelevant, the object should be admitted, with the jury attributing such weight and effect as it sees fit." *State v. Pennington*, 276 Kan. 841, 847, 80 P.3d 44 (2003).

There was ample evidence to support the relevance of the stainless-steel gun to Guebara's charges of attempted first-degree murder and criminal possession of a weapon by a convicted felon. Tapia identified Guebara as the shooter. Andrade heard Guebara on the phone with Fajardo just before Guebara was arrested describing where he put the gun. When Andrade told Silvia Cordes, she found it in the location described. Silvia Cordes gave the gun to Scott who brought it to Miller where it was found by the police.

Spencer had no basis for objecting to the evidence presented about the stainless-steel gun. Even so, he was able to effectively point out problems to the jury with the State's evidence. For example, he elicited testimony from Officer Smith that Cook could have planted the gun and shell casings when they first went out to search for the gun. During closing, Spencer highlighted Silvia Cordes' contradictory testimony at trial—



which was the only testimony given under oath—that she got the gun from her Uncle Luis, not a woodpile. And he noted that none of the forensic evidence tied the stainless-steel revolver to the shooting or to Guebara.

This aligned with Spencer's trial strategy. At the evidentiary hearing on Guebara's ineffective assistance of counsel motion, Spencer testified that he was trying "not to emphasize that gun." He explained that he did not "want the jury to think I was terribly concerned about the gun, what was happening with it, since I said I knew that there wasn't any forensics that was going to tie it to my client." He was also trying not to make more objections than necessary. Strategic choices by counsel are "virtually unchallengeable" when they are based on a thorough investigation of the facts and law. *Flynn v. State*, 281 Kan. 1154, 1157, 136 P.3d 909 (2006).

In sum, Guebara has failed to establish that Spencer erred in how he handled the evidence pertaining to the stainless-steel gun.

*D. Failure to Object to Evidence—Gillespie's Testimony that Guebara Said, "He Felt Like Killing Somebody"*

Guebara's next argument is that Spencer was ineffective for failing to object to Gillespie's testimony that on the morning of the shooting Guebara said "he felt like killing somebody." Guebara asserts that Spencer failed in three ways related to this statement. First, he says Spencer should have objected based on relevance. Second, he claims that if Spencer would have investigated the case, he would have known that Gillespie was planning to say this. He also would have known that two other people, Gillespie's grandmother Susana Guebara and her cousin Jason Guebara, were present and he could have called them as witnesses.

Below, Guebara framed the issue as a failure to object to K.S.A. 60-455 evidence and the district court ruled on this point. K.S.A. 2022 Supp. 60-455(a) provides that "evidence that a person committed a crime or civil wrong on a specified occasion, is inadmissible to prove such person's disposition to commit crime or civil wrong as the basis for an inference that the person committed another crime or civil wrong on another specified occasion." The district court then held that "*wanting* to kill someone else is neither evidence of another crime nor another wrong. Instead, it is evidence only going to one's state of mind and seems entirely relevant to Guebara's mental culpability at the time of the shooting."

As with many of his issues, Guebara fails to specify where in the record he raised his arguments to the district court. It may have been in one of his many pro se motions that the district court said it would not consider. His argument is also conclusory and devoid of analysis. When an appellant fails to adequately brief an issue, the issue is considered waived or abandoned. *State v. Gallegos*, 313 Kan. 262, 277, 485 P.3d 622 (2021). Similarly, failure to support a point with pertinent authority is akin to failing to brief the issue. *State v. Meggerson*, 312 Kan. 238, 246, 474 P.3d 761 (2020).

Substantively, Guebara's claim suffers several weaknesses. First, at the time Gillespie testified that Guebara "felt like killing somebody" that evidence was already in the record. Detective Strawder had testified about Gillespie's statement the day before. So the jury already knew what Gillespie reported hearing.

Second, as the district court noted, the statement was relevant to proving Guebara's state of mind on the day of the shooting. This is especially true when the statement is considered alongside the other evidence that Guebara asked Gillespie to buy him .357 ammunition that morning. "Premeditation is a 'state of mind' relating to a person's reasons and motives for acting as he or she did. It is a necessary element of the offense of premeditated murder." *State v. Cravatt*, 267 Kan. 314, 328, 979 P.2d 679 (1999).

Premeditation may be proved by circumstantial evidence, and circumstances which may give rise to an inference of premeditation include the defendant's conduct and statements before a killing or attempted killing. *State v. Jamison*, 269 Kan. 564, 572, 7 P.3d 1204 (2000). Here, the statement was made on the day of the shooting. Gillespie felt alarmed when her father said this, which signifies it was not a joke. The jury may have believed that Guebara shot Tapia because he felt like killing someone.

Third, Spencer effectively dealt with Gillespie's statement when he cross-examined her. Spencer asked Gillespie whether Guebara had mentioned a name when he said he felt like killing somebody. Gillespie said that Guebara mentioned her ex-husband John Gillespie because he was abusive to her.

Guebara's claim that Spencer would have discovered Gillespie's statement and objected to it had he more thoroughly investigated the case is also unpersuasive. Spencer testified that he knew about the statement before trial because he heard it at pretrial. He said he did not want to object to the statement because Gillespie said the statement was about her abusive ex-husband. Spencer made sure this was clear on cross-examination.

Finally, Guebara's claim that Spencer should have called Susana (his mother) or Jason Guebara (his nephew) who were present when the statement was made to testify is conclusory and does not support his conclusion. Gillespie testified that Susana and Jason were in the room when her father made the statements about wanting to kill somebody and needing ammunition. But she never said whether they overheard the conversation. Even if they had heard the conversation, there is no evidence that they would have testified differently than Gillespie. Guebara had a chance to call him at the evidentiary hearing on this matter but failed to do so. Further, Guebara never asked Spencer to interview or subpoena Jason or Susana before trial.

*E. Eliciting Damaging Testimony—Andrade's Statement that Guebara Claimed to Be a Real Killer and Bragged About Having a Gun*

Guebara believes Spencer elicited damaging testimony from Detective Strawder when he asked whether Andrade reported that Guebara had bragged about being a real killer. He does not say much more about this claim other than it deviated from Spencer's trial strategy to create doubt in the jury's mind.

The district court found no error. It first noted that Andrade denied telling Detective Strawder that Guebara bragged to him about having a gun. As for Spencer's questioning of Detective Strawder, the court explained:

"When the subject was broached with Strawder a final time while he was testifying for the defense, attorney Spencer's manner of questioning and tone of voice were so dripping with sarcasm and skepticism that anyone present who actually cared to listen or see what was in fact going on, would have fully understood that all Spencer was trying to do was to show that Guebara was trying to make a big fish of himself in a very small pond. Nothing more, and nothing less."

The district court's decision is reasonable and supported by the evidence. It was the State who first brought up the issue of Guebara's bragging when it asked Detective Strawder about his interview of Andrade and whether Andrade had ever heard Guebara brag about having a gun. When Detective Strawder returned to the stand the next day, Spencer followed up on that line of questioning. He asked whether Andrade thought Guebara's bragging was "just bullshitting" and Andrade said yes. Spencer explained that he did this because he was trying to show that Guebara's comments were not serious. Looking at Spencer's questioning in context of the whole trial establishes that rather than eliciting damaging testimony, as Guebara claims, Spencer elicited curative testimony.

*F. Failure to Object to Evidence—Silvia Cordes' Testimony that Guebara Stole a Gun from Uncle David*

In another failure to object challenge, Guebara argues that Spencer was ineffective for failing to object to Silvia Cordes' testimony that Guebara stole a gun from Uncle David. He asserts that the testimony violated the motion in limine prohibiting K.S.A. 60-455 (other crimes and civil wrongs) evidence because stealing is a crime.

The first issue is determining whether Silvia Cordes' statement fell under K.S.A. 60-455 at all. This requires asking whether Silvia's testimony was "evidence that a person committed a crime or civil wrong on a specified occasion." See K.S.A. 2022 Supp. 60-455(a). Silvia did not definitively testify that Guebara stole a gun. It was clear that her testimony was speculative. In the recorded conversation with Cook and Gillespie, referring to the fact that it was a very nice gun, she said she "bet" Guebara stole the gun from Uncle David. She was insinuating that Guebara would not have had such a nice gun of his own. When the State asked her about it during the trial, Silvia said she "thought" Guebara got it from Uncle David and that it was "probably" stolen. Her use of these words suggested to the jury that she was speculating. She did not know of a specified occasion on which Guebara committed a crime. While Spencer may have objected on speculation grounds, that is not the issue before us.

Even if the testimony did fall under K.S.A. 60-455, the court found that any error was not prejudicial because "when pressed by attorney Spencer, Silvia Cordes readily admitted that she had no idea whatsoever how, or why Guebara may have been in possession of any handgun, let alone the one in question." The district court's assessment was accurate. It was Spencer's strategy to minimize objections. And rather than objecting, he effectively dealt with Silvia Cordes' claim on cross-examination. Through his questioning, it was revealed that Silvia assumed the gun was stolen. She did not have any proof. She concluded that she did not know whether the gun was stolen or not. The

danger of K.S.A. 60-455 evidence is "that the evidence will be considered to prove the defendant's mere propensity to commit the charged crime." *State v. Gunby*, 282 Kan. 39, 48, 144 P.3d 647 (2006). That danger was not present here, largely because of Spencer's effective cross-examination.

*G. Failure to Object to Evidence—Fajardo's and Scott's Hearsay Statements*

Next, Guebara argues that Spencer should have objected to hearsay statements attributed to Fajardo and Scott. These statements were offered through audio recordings and witness testimony. Scott could not testify at trial because he was hospitalized. Although Fajardo was called to testify, Guebara asserts that he was so nonresponsive to questioning that he effectively did not testify. By failing to object to statements made by Fajardo and Scott, Guebara argues, Spencer allowed Guebara's rights under the Confrontation Clause of the Sixth Amendment to the United States Constitution to be violated.

The district court had several reasons for finding that Spencer was not ineffective for failing to object to this testimony. First, it held that Fajardo and Scott, along with Guebara, Rios, Andrade, Silvia Cordes, and Miller, "were all part of a conspiracy with regard to the felony crimes of interference with law enforcement . . . and/or obstructing apprehension or prosecution . . . by aiding in varying degrees in the disposal of the handgun that Guebara used in shooting Tapia." Because they were engaged in a "criminal conspiracy, their statements would have been admissible under either K.S.A. 60-460(d) or K.S.A. 60-460(i)." Second, the court held that both Fajardo's and Scott's statements were nontestimonial. Third, in regard to Fajardo the court held that he was available to testify. Though "his answers may not have been the ones that were anticipated or desired, the fact of the matter is that he was responsive to questions asked and never refused to answer a question propounded to him." Finally, the district court held that even if Spencer had lodged a successful objection to Fajardo's hearsay statements, "the plot to

either destroy or permanently dispose of the gun was capable of being proved, and in fact was proved, without him or his participation." Similarly, a successful objection to Scott's hearsay statements would not have affected the outcome of the trial because "Silvia Cordes was there to place the handgun in her husband's hands and Randy Miller was there to receive it from him and then bury it in his backyard."

Guebara does not challenge the first component of the district court's holding—that Fajardo's and Scott's statements fell under the coconspirator exception to the hearsay rule. See K.S.A. 60-460(i) (providing an exception to the hearsay rule for a statement where "the party and the declarant were participating in a plan to commit a crime or a civil wrong and the statement was relevant to the plan or its subject matter and was made while the plan was in existence and before its complete execution or other termination"). Instead he focuses on unavailability as it relates to his rights to confrontation.

The Sixth Amendment to the United States Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.' This right is violated if an unavailable declarant's testimonial statements are brought into evidence against a person without a prior opportunity to cross-examine that declarant . . . . [Citations omitted.]" *State v. Logsdon*, 304 Kan. 3, 36, 371 P.3d 836 (2016).

Scott was not at the trial and was unavailable to testify due to his hospitalization. So the question for his statements will be whether they were testimonial. Jacob Fajardo did appear at trial, and he took the stand. But his limited testimony and frequent failure to recall information has led Guebara to challenge whether he was truly "available" for Confrontation Clause purposes. If he was available, the Confrontation Clause would not apply. If he was unavailable, then the question is whether his out-of-court statements were testimonial.

### 1. *Was Fajardo Available?*

Just because a witness takes the stand does not mean they are available for cross-examination for Confrontation Clause purposes. In *State v. Lomax*, 227 Kan. 651, 608 P.2d 959 (1980), the State presented testimony from Mary Ellen Bagby that she gave at one of the alleged co-conspirators' preliminary hearing. Appellants John Lomax and Danny Williams could not cross-examine Bagby at that preliminary hearing. When Bagby took the stand at Lomax and Williams' trial, she was evasive and in response to all questions about what occurred on the day of the crime, she testified that she remembered nothing. On appeal, Lomax and Williams argued that their Confrontation Clause rights were violated by the admission of the preliminary hearing testimony. Although Bagby remembered some events, "she claimed a complete loss of memory as to the identification of the three defendants and the happenings that occurred on" the day of the crime. 227 Kan. at 656.

The court reviewed Kansas caselaw on the subject. It concluded that a witness could be "unavailable" even if the witness was physically present. 227 Kan. at 660. The court also looked to federal caselaw which held "that where a prosecution witness refuses to take an oath or refuses to give testimony of any sort of response with answers such as, 'I don't recall' or 'I don't know,' his prior hearsay statements are not admissible under the constitutional confrontation rule." 227 Kan. at 660. The court found that Bagby's refusal to answer questions about the crime rendered her unavailable as a witness. 227 Kan. at 661. Accordingly, the admission of her prior testimony violated the defendants' rights to confrontation. 227 Kan. at 661-62.

*Lomax* can be contrasted with *State v. Osby*, 246 Kan. 621, 793 P.2d 243 (1990). At Michael Osby's trial, the State introduced evidence of witness Matthew Isaac's prior testimony. While testifying, Isaac claimed that he could not recall many things he said in the prior testimony. But he did answer a few questions about the day of the crime. The



court has summarized its holding as follows: "[I]f the declarant, while testifying at trial, answers some questions concerning the subject matter of the out-of-court statement, yet refuses or is unable to answer other questions, the declarant is considered 'available' for cross-examination and, accordingly, his or her prior out-of-court statement may be properly admitted into evidence under K.S.A. 60-460(a)." *State v. Stafford*, 296 Kan. 25, 49, 290 P.3d 562 (2012).

Here, the district court held that Fajardo responded to some questions so he was available for Confrontation Clause purposes. The district court explained:

"After answering questions about himself and his immediate family, he did not recall knowing Silvia Cordes, Scott Cordes, Gabriel Andrade, Verna Rodriguez, Susana Guebara, or whether Kristine Hands was related to the Guebaras. Although acknowledging that he worked and paid taxes in North Dakota, he could not recall specific information about his work schedule during March of 2015. He also did not recall knowing or being around either Nathan Cook or Sylvia Dawn Gillespie. Nor could he recall being detained by Garden City police on February 26, 2015. He did recall being detained by police in his juvenile years. He did not recall ever meeting Paul Guebara at 505 North 13th on February 26, 2015, sometime after 4:00 in the afternoon. He did not recall knowing Paul Guebara or receiving or making any phone calls to him on February 26, 2015. He also did not recall ever calling, receiving phone calls from, or talking to Nathan Cook or that he was trying to aid in the disposal of any handgun. He did not recall buying any ammunition for Paul Guebara on the day of the shooting, nor did he recall a phone conversation with Detective Freddie Strawder. Finally, he could not recall his phone number or who his service provider was."

The district court was correct in noting that Fajardo answered some questions. But answering some questions is not enough. The questions must concern the subject matter of the out-of-court statement to be offered.

Guebara does not identify the specific Fajardo statements to which he objects. But a review of the record reveals several salient facts provided through Fajardo's statements. Cook said that Fajardo told him that Guebara called him right before he was arrested and asked him to dispose of the gun. Fajardo then called Cook and asked him to dispose of the gun, providing him with a location. Fajardo also told Cook that he bought Guebara .357 ammunition. A recording of a phone call between Detective Strawder and Fajardo was played to the jury in which Fajardo repeated his statement that Guebara asked him to go get the gun.

The district court's summation of evidence—a fair and accurate summary—shows that Fajardo refused to answer all questions related to the subject matter of his out-of-court statements. That makes his testimony much more similar to that of Bagby's in *Lomax*. Bagby remembered some things during her testimony in that case but claimed she could not remember anything about the crime being tried. Accordingly, the district court erred in finding that Fajardo was available for Confrontation Clause purposes.

## 2. *Were Fajardo's or Scott's statements testimonial?*

Because both Fajardo and Scott were unavailable, the next question is whether their hearsay statements are testimonial.

The Confrontation Clause focuses on "'witnesses'" against the accused, which are people who "'bear testimony.'" [Citation omitted.] *Crawford v. Washington*, 541 U.S. 36, 51, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). In turn, "'[t]estimony' . . . is typically '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.'" 541 U.S. at 51. The court explained that "[t]he constitutional text, like the history underlying the common-law right of confrontation, thus reflects an especially acute concern with a specific type of out-of-court statement." 541 U.S. at 51.

The Supreme Court cited several examples of testimonial statements, although it left "for another day any effort to spell out a comprehensive definition of 'testimonial.'" 541 U.S. at 68. These examples included ex parte in-court testimony, affidavits, custodial examinations, prior testimony that the defendant could not cross-examine, other extrajudicial statements contained in formalized testimonial materials like depositions or confessions, and statements made under circumstances under which an objective witness would reasonably believe that the statement would be available for use at a later trial. 541 U.S. at 51-52. Notably, the court specifically stated that statements made in furtherance of a conspiracy are, by their nature, not testimonial. 541 U.S. at 56.

We begin with whether the statements that Cook attributed to Fajardo are nontestimonial. As the district court noted, the statements were made in furtherance of a conspiracy. Fajardo, at Guebara's request, was trying to get Cook to dispose of a gun used in a crime. When Fajardo made these statements to Cook, he would have no reason to believe that they would later be used in a trial. The statements were nontestimonial.

The statements that Fajardo made during his recorded interview with Detective Strawder are a little different. At the time Detective Strawder made this call to Fajardo, the gun had been found. Detective Strawder was merely seeking confirmation that Fajardo told Cook that Guebara asked him to dispose of the gun. Generally, "[s]tatements made by a witness to a police officer during an interview conducted as part of an investigation are testimonial." *State v. Hughes*, 286 Kan. 1010, 1014, 191 P.3d 268 (2008). Although on the recording Fajardo expressed surprise when he learned that Detective Strawder planned to include Fajardo's statements in his report, a reasonable person would have understood that Detective Strawder was collecting information that could be used at trial.

Even if the statements Fajardo made to Detective Strawder were testimonial, their exclusion would not have impacted the outcome of the trial. This is because statements to

a similar effect were introduced through Cook's testimony, and Cook was relaying nontestimonial statements. Thus, any error in finding that Fajardo was available as a witness and that his statements were all nontestimonial is harmless.

As to statements made by Scott, Guebara does not identify the specific statements attributed to Scott to which he objects. It is likely the recorded conversation between Gillespie, Cook, and Scott. In that conversation, Scott told Gillespie and Cook that Silvia Cordes brought him the gun and asked him to get rid of it. He also states that he gave the gun to a white person. Under the circumstances in which the conversation occurred, a reasonable person in Scott's position would not have believed that his or her statements would be available for use at a later trial. As far as Scott knew, Gillespie and Cook were talking to him at Silvia Cordes' direction and not at the direction of Detective Strawder. Scott's statements were not testimonial in nature.

Additionally, even if Scott's statements were testimonial their exclusion would not have impacted the trial. There was other evidence that Silvia Cordes gave the gun to Scott and that he in turn gave it to Miller. His recorded statement only served to bolster the weight of the other evidence admitted.

For these reasons, an objection to Fajardo's or Scott's statements on Confrontation Clause grounds would not have succeeded. An attorney is not ineffective for failing to raise an objection that would not be granted. See *State v. Coones*, 301 Kan. 64, 72, 339 P.3d 375 (2014).

#### H. *Failure to Discover Exculpatory Evidence*

Guebara also claims that Spencer was ineffective for failing to discover two pieces of exculpatory evidence. First, he claims that the relationship between Detective Strawder

and Gillespie began during the investigation. Second, he claims that Silvia Cordes was charged with attempted second-degree murder and that she was testifying under threat.

This issue was not raised below. Though Guebara may have mentioned it in his pro se filings, the district court told him that it would only consider issues raised in motions filed through counsel. His counsel informed the court that, at the time of sentencing, they did not yet have an evidentiary basis to proceed on the claim that Detective Strawder and Gillespie began their relationship earlier than the State reported. When counsel mentioned issues about Silvia Cordes, the district court said that the issues would need to be presented in a motion for new trial. But Guebara's counsel never followed up with a motion for new trial.

Accordingly, Guebara's argument that Spencer was ineffective for failing to discover Detective Strawder's relationship with Gillespie and his claim that Silvia Cordes' provided testimony in exchange for having charges dropped is not persuasive. This issue was not raised before the district court. And further, the only actual evidence on these issues in the record provides that Detective Strawder and Gillespie did not begin their relationship until after trial. Similarly, there was no evidence in the record to support Guebara's claim that the State charged Silvia Cordes with attempted second-degree murder to coerce her into testifying. Her testimony contradicted statements recorded during the investigation that were more damaging to Guebara's case. For example, she denied retrieving the gun from the wood pile.

#### *I. Failure to Object to Hearsay*

Guebara also makes a broad argument that Spencer was ineffective for failing to object to hearsay evidence. Rather than identifying the specific statements that Spencer should have objected to, he simply says that all hearsay testimony offered by Gillespie, Silvia Cordes, Scott, Cook, Andrade, Miller, and Fajardo was inadmissible. When

Guebara raised a similar objection below, the district court held that Guebara ignored the fact that Gillespie, Silvia Cordes, Cook, Andrade, and Miller were "called as a witness at least once if not multiple times during the course of the trial and each was available to be cross-examined with regard to any out-of-court statements they may have made to any other witness." Additionally, Silvia and Scott, Andrade, Miller, and Fajardo were part of a conspiracy and thus their statements were admissible under K.S.A. 60-460(d) or K.S.A. 60-460(i).

On appeal, Guebara challenges only one of the bases for the district court's ruling—K.S.A. 60-460(d). "When a district court provides alternative bases to support its ultimate ruling on an issue and an appellant fails to challenge the validity of each alternative basis on appeal, an appellate court may decline to address the appellant's challenge to the district court's ultimate ruling." *State v. Novotny*, 297 Kan. 1174, Syl. ¶ 1, 307 P.3d 1278 (2013). Here, the district court had three bases for its ruling, only one of which was K.S.A. 60-460(d). Thus, even if we considered the issue and found in Guebara's favor, the remaining, unchallenged rulings stand.

Finally, Guebara failed to identify the specific hearsay statements to which he objects. This court need not speculate about the statements Guebara seeks to challenge. See *State v. Robinson*, 293 Kan. 1002, 1027, 270 P.3d 1183 (2012).

#### *J. Failure to Introduce Fingerprint Into Evidence*

Finally, Guebara complains that Spencer was ineffective because he failed to introduce a latent fingerprint found on Tapia's truck into evidence. On this point, the district court held:

"Not only has Guebara presented no meaningful evidence with regard to this claim, he has failed to demonstrate how the conclusory claim itself has any relevance to any

defense he might have had. At trial, there was never even a remote suggestion that anyone other than the victim himself touched the victim's vehicle."

The district court was correct. There was no error in Spencer's failure to introduce evidence that would have not mattered to the case. There was no evidence that the shooter touched Tapia's vehicle.

## II. THE DISTRICT COURT DID NOT ERR BY FAILING TO GIVE A LIMITING INSTRUCTION

Guebara also asserts that the district court committed reversible error by not giving a limiting instruction on K.S.A. 60-455 evidence. Under K.S.A. 60-455, "evidence of a prior crime or civil wrong is generally inadmissible solely to show propensity in criminal cases not involving a sex crime. When such evidence is admitted for other purposes, a limiting instruction is required." *State v. Chavez*, 310 Kan. 421, 435, 447 P.3d 364 (2019). Guebara claims that Silvia Cordes' testimony, in which she said she thought Guebara "probably stole" a gun from Uncle David, should have resulted in a limiting instruction. He also claims that the district court should have instructed the jury that the stainless-steel gun could not have been the gun used in the shooting.

*A. Our review is unlimited on whether a jury instruction is legally and factually appropriate.*

This court employs an unlimited standard of review over whether a jury instruction is both legally and factually appropriate. In determining whether an instruction was factually appropriate, courts must determine whether there was sufficient evidence, viewed in the light most favorable to the defendant or the requesting party, that would have supported the instruction. *State v. Holley*, 313 Kan. 249, 255, 485 P.3d 614 (2021). When a party asserts an instruction error for the first time on appeal, the failure to

give a legally and factually appropriate instruction is reversible only if the failure was clearly erroneous. *State v. Butler*, 307 Kan. 831, 845, 416 P.3d 116 (2018).

The first question is whether Silvia Cordes' testimony constituted "evidence that a person committed a crime or civil wrong . . . as the basis for an inference that the person committed another crime or civil wrong on another specified occasion" so as to bring it under the purview of K.S.A. 60-455. This issue was examined earlier in this section. Because of Silvia Cordes' vague language and lack of specificity, her statement does not fall under K.S.A. 60-455.

Even if the evidence did fall under K.S.A. 60-455, Guebara would still need to show that the district court's failure to give a limiting instruction was clearly erroneous. "Instructions are clearly erroneous only if the reviewing court is firmly convinced there is a real possibility that the jury would have rendered a different verdict if the error had not occurred." *State v. Vasquez*, 287 Kan. 40, Syl. ¶ 6, 194 P.3d 563 (2008). As explained above, any error in admitting Silvia Cordes' statement was harmless because she readily admitted that she did not know if Guebara stole it.

Guebara also challenges the admission of the stainless-steel gun into evidence and argues that at the very least the court should have instructed the jury that the stainless-steel gun could not be considered the gun used in the shooting. He asserts that the evidence showed a black gun was used in the shooting and that nothing connected Guebara to the stainless-steel gun.

There are a couple of problems with Guebara's argument. First, his brief discussion of the issue fails to establish how K.S.A. 60-455 is related to the stainless-steel gun evidence. Guebara seems to be using K.S.A. 60-455 as a way to raise a general admission of evidence issue. K.S.A. 60-404 requires a timely and specific objection to admission of evidence at trial to preserve issues arising from that admission for appellate



review. Guebara did not object. A party may not raise an admission of evidence issue under the guise of K.S.A. 60-455. See *State v. Rojas-Marceleno*, 295 Kan. 525, 538, 285 P.3d 361 (2012); see also *State v. Breeden*, 297 Kan. 567, 580, 304 P.3d 660 (2013) (holding that appellant's K.S.A. 60-455 jury instruction challenge was not a disguised evidentiary argument because appellant's arguments were distinct from any complaint he may have had about the admission of evidence).

The second issue is that there was evidence connecting the stainless-steel gun to Guebara which rendered it relevant. The evidence shows that Guebara called Fajardo just before his arrest. He described the location of the gun and asked Fajardo to get it. Fajardo then relayed this request to Cook. Meanwhile, Andrade had overheard Guebara's conversation. Through Andrade, Silvia Cordes discovered where the gun was and retrieved it. Silvia Cordes and Cook described the same location for the gun. She then gave it to Scott and Scott gave it to Miller. Miller readily told the police that the stainless-steel gun was given to him by Scott and that it was used to shoot someone. Because this evidence related to the stainless-steel gun was relevant to establishing both of Guebara's charges, it would have been improper for the district court to instruct the jury to disregard it.

Guebara has failed to show error on either point raised.

### III. THE DISTRICT COURT PROPERLY INSTRUCTED THE JURY ON PREMEDITATION

Guebara raises another jury instruction issue, asserting that the jury instructions inadequately explained the premeditation element of first-degree murder.

The standard of review for jury instruction issues was set forth in the previous section. Guebara did not object to the given instruction, so any error is reversible only if the jury instruction was clearly erroneous.

The relevant jury instruction provided:

"As used in this instruction, 'premeditation' means to have thought the matter over beforehand. In other words, to have formed the design or intent to kill before the act. Although there is no specific time period required for premeditation, the concept of premeditation requires more than . . . the instantaneous, intentional act of taking another's life."

This jury instruction mirrors PIK Crim. 4th 54.150(d).

Guebara claims that this definition is insufficient to distinguish premeditated first-degree murder from intentional second-degree murder. He asserts that premeditation must be deliberate and that the jury instruction did not adequately convey that. Yet the Kansas Supreme Court recently addressed this issue in *State v. Uk*, 311 Kan. 393, Syl. ¶ 4, 461 P.3d 32 (2020), and determined that the instruction "accurately defines premeditation and adequately distinguishes premeditated intentional conduct from nonpremeditated intentional conduct." The Kansas Court of Appeals is duty bound to follow Kansas Supreme Court precedent unless there is some indication that the Supreme Court is departing from its previous position. *State v. Rodriguez*, 305 Kan. 1139, 1144, 390 P.3d 903 (2017). There is no such indication here. As a result, the instruction was legally appropriate and no error occurred.

#### IV. THERE WAS INSUFFICIENT EVIDENCE TO CONVICT GUEBARA OF CRIMINAL POSSESSION OF A WEAPON

Guebara argues that the State failed to present sufficient evidence to convict him of criminal possession of a weapon.

"When the sufficiency of the evidence is challenged in a criminal case, we review the evidence in a light most favorable to the State to determine whether a rational

factfinder could have found the defendant guilty beyond a reasonable doubt." *State v. Potts*, 304 Kan. 687, Syl. ¶ 1, 374 P.3d 639 (2016). This court "does not reweigh evidence, resolve conflicts in the evidence, or pass on the credibility of witnesses." 304 Kan. 687, Syl. ¶ 1.

Guebara's conviction arose under K.S.A. 2014 Supp. 21-6304. Among other things, this statute criminalizes possession of a weapon by a person convicted of a felony under K.S.A. 21-3401 (murder in the first degree) within the preceding 10 years. K.S.A. 2014 Supp. 21-6304(a)(3)(A). The Kansas Supreme Court has held that the 10-year period begins to run either on the date of the felony or on the date of release from prison for the felony. *State v. LaGrange*, 294 Kan. 623, 630, 279 P.3d 105 (2012).

Guebara argues that the State presented insufficient evidence that he possessed a gun at all, as well as insufficient evidence that he committed a felony within the prior 10 years.

There was sufficient evidence at trial to support the jury's finding that Guebara possessed a weapon. Tapia testified that Guebara shot him. There was also the evidence, summarized in an earlier section, that connected Guebara to the stainless-steel revolver eventually recovered at Miller's residence.

Guebara's arguments related to the gun focus on discrepancies in the evidence. While the evidence was inconsistent at times, it is not the role of this court to reweigh the evidence or reassess witness credibility. So the evidence, when viewed in the light most favorable to the State, was sufficient to support this element.

Guebara also challenges the evidence on the 10-year element of the offense. On this point, he and the State agreed to the following stipulation which was read to the jury:

"The following facts have been agreed to by the parties and are to be considered by you as true. 1. Defendant within ten years preceding February 24, 2015, had been released from prison for a felony crime; 2. The defendant was not found to be in possession of a firearm at the time of the prior crime and has not had the prior conviction expunged or been pardoned for such crime."

Guebara cites *State v. Hunt*, No. 104,529, 2011 WL 5027097 (Kan. App. 2011) (unpublished opinion), for the proposition that the State must prove the specific date of the defendant's prior felony conviction. There, Rodney Hunt argued that his conviction for criminal possession of a weapon should be overturned because the State presented no evidence about the date of his prior conviction. This court reversed his conviction because the State had not established when the relevant felony occurred. The specific date was immaterial, but the State had to establish that the previous felony had been committed within the past 10 years. 2011 WL 5027097, at \*1, 3. *Hunt* does not support Guebara's argument. The statute does not require that the State establish a specific date that the prior crime was committed. The statute only requires the State to establish that the prior crime was "within the preceding 10 years." K.S.A. 2014 Supp. 21-6304(a)(3)(A).

But more importantly, the stipulation stated only that Guebara was previously convicted of a felony—it does not specify what felony supported Guebara's conviction. K.S.A. 2014 Supp. 21-6304(a) provides four scenarios in which a person is prohibited from possessing a weapon. First, a person can never possess a weapon if he or she was convicted of a person felony and was found to have possessed a firearm at the time of the commission of the crime. K.S.A. 2014 Supp. 21-6304(a)(1). Second, a person cannot possess a weapon for five years after committing a felony, other than the felonies specified in subsection (a)(3)(A), if the person was not found to have possessed a firearm at the time of the commission of the crime. K.S.A. 2014 Supp. 21-6304(a)(2). Third, a person cannot possess a weapon for 10 years after committing a felony enumerated in subsection (a)(3)(A) of the statute (this includes murder which was Guebara's previous

crime of conviction) if the person was not found to have possessed a firearm at the time of the commission of the crime. K.S.A. 2014 Supp. 21-6304(a)(3)(A). Fourth, a person cannot possess a weapon for 10 years after committing a nonperson felony if he or she was found to be in possession of a firearm at the time the crime was committed. K.S.A. 2014 Supp. 21-6304(a)(3)(B).

The State proceeded under K.S.A. 2014 Supp. 21-6304(a)(3)(A) which required it to prove that Guebara's previous felony was one enumerated in the statute. But the stipulation merely states that Guebara was convicted of a felony. It contains no indication that the felony was one specified by the statute. That Guebara was released from prison for a felony within the previous 10 years also does not fall under the other three scenarios in the statute. It does not fall under the first or fourth scenarios because the stipulation states that Guebara was not found to be in possession of a firearm at the time of the prior crime. It does not fall under the second scenario because the stipulation does not provide that the crime was committed or that Guebara was released from prison within the five years before his current crime.

In *State v. Valdez*, 316 Kan. 1, 18, 512 P.3d 1125 (2022), the Kansas Supreme Court considered the same issue. As in this case, the stipulation the State provided to the jury provided that the defendant had been convicted of a felony within the 10 years before the date of the crime being tried. The stipulation did not specify the defendant's prior crime. And as in this case, the State provided the district court with a copy of the journal entry of the defendant's prior conviction, but that document was not provided to the jury. The Kansas Supreme Court held, for the same reasons explained in the previous paragraph, that the State's failure to specify the nature of the defendant's prior crime rendered the evidence insufficient to support a conviction under the relevant statutory provision. 316 Kan. at 20.

While the statute prohibits anyone convicted of a felony, regardless of his or her crime of conviction, from possessing a weapon for five years, it only prohibits persons convicted of certain felonies specified in the statute from possessing a weapon for 10 years. The State's failure to specify the statute that supported Guebara's prior conviction meant the jury lacked sufficient evidence to convict Guebara of criminal possession of a weapon as charged. His conviction should be reversed. That said, remand for resentencing is not required. Criminal possession of a firearm was not Guebara's primary conviction, his sentences for both convictions run concurrent, and the applicable postrelease supervision term is not affected. See 316 Kan. at 20.

Based on this holding, we need not address Guebara's argument that the district court's acceptance of his stipulation without obtaining a jury trial waiver violated his constitutional right to jury trial.

#### V. THE STATE DID NOT COMMIT PROSECUTORIAL ERROR DURING CLOSING ARGUMENT

Guebara also raises several claims of prosecutorial error. These claims are based on alleged misstatements of the evidence as well as the State's decision to play audio recordings containing statements by Fajardo and Scott.

##### A. *Our standard of review is mixed.*

This appellate court uses a two-step process to evaluate claims of prosecutorial error: error and prejudice. *State v. Sherman*, 305 Kan. 88, 109, 378 P.3d 1060 (2016).

"To determine whether prosecutorial error has occurred, the appellate court must decide whether the prosecutorial acts complained of fall outside the wide latitude afforded prosecutors to conduct the State's case and attempt to obtain a conviction in a manner that

does not offend the defendant's constitutional right to a fair trial. If error is found, the appellate court must next determine whether the error prejudiced the defendant's due process rights to a fair trial. In evaluating prejudice, we simply adopt the traditional constitutional harmless inquiry demanded by *Chapman* [*v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)]. In other words, prosecutorial error is harmless if the State can demonstrate 'beyond a reasonable doubt that the error complained of will not or did not affect the outcome of the trial in light of the entire record, *i.e.*, where there is no reasonable possibility that the error contributed to the verdict.' [Citation omitted.]" *Sherman*, 305 Kan. at 109.

B. *The prosecutor's statement that Guebara wanted to kill somebody "today" was not reversible error.*

Gillespie testified that on the morning of the shooting, Guebara said "he felt like killing somebody." Detective Strawder relayed a similar statement from Gillespie. Neither testified that Guebara said he felt like killing someone *today*. But during closing argument, the prosecutor was discussing the evidence that supported the element of premeditation and said: "[W]e also have evidence that we've presented to you from Silvia Dawn [Gillespie] that he was thinking, I want to kill somebody today."

The prosecutor did misstate the evidence because Gillespie did not use the word "today." The error, however, was minor and did not prejudice Guebara's right to a fair trial. From the circumstances of the statement, it can be reasonably inferred that Guebara was describing a present state of mind, meaning one that he had that day. So the way the prosecutor phrased the testimony was not a stretch from the record. Additionally, throughout the several days of evidence presented, including Tapia's testimony that Guebara shot him and testimony from multiple people who were involved with attempting to dispose of the gun, the stray comment was unlikely to have a significant impact in the jury's mind.

*C. The prosecutor's rallying cry of "one for all, all for one, all for Paul Guebara" would not have inflamed the passions of the jury.*

Near the beginning of closing argument, the prosecutor stated:

"You know, when I was preparing my—when I was kind of going over the closing arguments, I was trying to think of a phrase or some kind of motto that would kind of fit this case. And one of them that came to mind was, one for all, all for one, all for Paul Guebara."

On this point, Guebara says the prosecutor was intending to inflame the jury to influence them to find Guebara guilty. He says: "[A] juror not wanting to find Paul guilty, may not want to be seen as someone in the group of all for one, one for all, all for Paul [G]uebara."

From the context of the statement, it was not about the jurors. Rather, the prosecutor was trying to describe how many witnesses worked to find and dispose of the gun used in the shooting. Nothing in the statement would inflame or prejudice the jury.

*D. The assertion that Guebara's plan had been "brewing for some period of time" did not misstate the evidence.*

Next, Guebara asserts that the prosecutor misstated the evidence when he was discussing premeditation and said that "this is not necessarily an instantaneous case. This has been something that's been brewing for some period of time." Guebara complains that there was no evidence in the record to support the prosecutor's statement.

A review of the record reveals that this statement is supported by the evidence, and thus no error occurred. In Gillespie's and Rios' recorded conversation, Rios said



Guebara was jealous and had a bad temper. He had accused Rios of "'messing around"' with other men, especially Tapia. Gillespie also testified that Rios told her Guebara was upset with Tapia because Tapia bought Rios jewelry for her birthday. Silvia Cordes, in the recorded conversation with Gillespie and Cook, also mentioned ongoing issues between Guebara and Tapia, including an alleged incident where a truck was run off of a road. The prosecutor therefore did not erroneously misstate the evidence. There was evidence that Guebara's dislike of Tapia and his jealousy had been ongoing.

*E. The statement that "Guebara is the one that put these things in motion" did not misstate the evidence.*

Guebara next claims that the prosecutor misstated the evidence by saying: "What happened with Silvia Cordes, Scott Cordes, and Randy Miller. Mr. Guebara is the one that put these things in motion." Guebara characterizes this as "unsworn [*sic*] testimony given by prosecution" and says there was no evidence that he "talked to anyone about doing anything."

Guebara did not need to talk to the Cordeses or Miller to set things in motion. The evidence shows that Guebara called Fajardo and told him where the gun was. That call set things in motion. Because of that call, Silvia Cordes was able to find the gun and give it to Scott who then gave it to Miller. The prosecutor did not misstate the evidence.

*F. Playing the recordings of Fajardo and Scott during closing was not error.*

Finally, Guebara complains that the prosecutor played recordings of Fajardo and Scott Cordes. He argues that the recordings should not have been played because the witnesses were unavailable to testify and the recordings contained testimonial statements. Whether these recordings were admissible was discussed above and we determined that there was no error in admitting the recordings. Accordingly, they were not improperly

admitted and were fair game to be used during closing statements. Guebara makes no other argument on this point.

VI. GUEBARA FAILS TO SUPPORT HIS CLAIM THAT THE STATE NEGLECTED TO DISCLOSE EXCULPATORY EVIDENCE

Guebara argued that the State failed to disclose two key pieces of exculpatory evidence. First, he claimed that Silvia Cordes was charged with attempted second-degree murder and that this was done to intimidate her into testifying the way the State wanted her to testify. Second, he asserts that the State knew Detective Strawder was in a relationship with Gillespie during the investigation phase of the case.

Guebara made essentially the same argument in his ineffective assistance of counsel claim. The result here is the same. Guebara never moved for new trial on either of these bases. He presented no evidence to support his claims. His conclusory assertion that the State withheld evidence fails because it is not supported by the record.

VII. HEARSAY TESTIMONY WAS NOT ADMITTED

Guebara again argues that it was error for the district court to permit hearsay evidence from Silvia Cordes, Gillespie, and Cook under K.S.A. 60-460(d)(2). This is the same argument he raised earlier when he argued that Spencer was ineffective for failing to object to hearsay evidence from Silvia Cordes, Gillespie, and Cook. As stated there, the district court presented three alternative bases for its ruling. Guebara challenges only one of those. Because Guebara abandoned any pursuit of the other two bases, the district court's ruling must stand.

Guebara also claims that the district court misstated evidence in its decision denying his motion for new trial based on ineffective assistance of counsel. These alleged

issues were alluded to in Guebara's motion for reconsideration of the court's ruling on his motion for ineffective assistance of counsel. When the motion was argued at sentencing, counsel reviewed the alleged misstatements with the district court. The district court held simply that Guebara's claims were unsupported.

Guebara's claim fails here for several reasons. First, he raises this issue under Kansas Supreme Court Rule 183(j) (2022 Kan. S. Ct. R. at 244). This rule addresses the procedure for K.S.A. 60-1507 motions and provides: "The court must make findings of fact and conclusions of law on all issues presented." Supreme Court Rule 183(j) (2022 Kan. S. Ct. R. at 244). Guebara's argument does not include a claim that the district court failed to make findings on each issue presented. Second, although he contends that the evidence did not support the district court's findings, what he is really arguing on some points is that the record contained evidence that contradicted the district court's findings. This court does not reweigh evidence. *Potts*, 304 Kan. 687, Syl. ¶ 1. Third, as will be discussed, there was support in the record for all material facts found by the district court.

Guebara challenges the following factual statements contained in the district court's memorandum decision and order on his motion for new trial based on ineffective assistance of counsel.

- "While playing cards [on the night of the shooting] Guebara showed up carrying a handgun in his waistband." Guebara says no testimony supports this statement. To the contrary, Tapia told both Detective Strawder and Special Agent Jacobs that Guebara had a gun in his waistband that night.
- The district court determined that on the night of the shooting "an altercation of some sort ensued between Guebara, Rios, and Tapia because Tapia had purchased jewelry for Rios in honor of her birthday. Exacerbating the situation even more so was a belief by Guebara that Rios may have been cheating on him with Tapia."

Gillespie testified that Rios told her these things. This statement has support in the record.

- "Sometime following this dust up, Tapia left the Ramos-Beleta residence alone, in his dark-colored Chevrolet pickup truck, and drove to the area of Bancroft and Walker en route to his home [on] Bancroft." The only minor error is that, while Tapia first said he lived on Bancroft, he corrected himself to say he lived on Finnup. The key facts are supported by the record.
- "Tapia also stated that a woman was present with Guebara. Albeit true, he first called her Sophina, he next called her Linda Rios, and lastly, he called her Ophelia, but only after that name had previously been suggested by Linda Rios herself." There was ample evidence in the record to support the idea that three women were suggested to be present at the time of the shooting. It is unclear why Guebara thinks this is prejudicial—if anything it casts doubt on Tapia's version of events.
- "At some point in time Rios drove Guebara to the hospital where Tapia was being taken care of. While Rios insists this happened prior to the shooting, and not after, her explanation for why this might be the case is completely lacking. For no apparent reason whatsoever, according to Rios, they were just there and neither of them went inside." Nothing suggests that this fact impacted the district court's decision. This was not a focal point at trial, it was just something mentioned in passing. And, the court's statement finds support in the record.
- The district court found that the shell casings found with the gun were fired from the stainless-steel revolver. It also found that police recovered a damaged bullet from Tapia's truck that could have been from either revolver recovered from Miller. Again, this evidence is supported by the record, specifically the testimony of the KBI firearm and tool mark examiner.

### VIII. CUMULATIVE ERROR DID NOT DENY GUEBARA A FAIR TRIAL

Finally, Guebara argues that the cumulative effect of three errors denied him the right to a fair trial: (1) failure to obtain a jury trial waiver as required by *State v. Johnson*, 310 Kan. 909, 453 P.3d 281 (2019); (2) the admission of Fajardo's and Scott's testimony; and (3) ineffective assistance of counsel by Spencer.

The cumulative error rule does not apply if there are no errors or only a single error. *State v. Gallegos*, 313 Kan. 262, 277, 485 P.3d 622 (2021). We have ordered Guebara's conviction for possession of a weapon to be reversed. That is the only error in the case, so his cumulative error argument fails.

Affirmed in part and reversed in part.

\* \* \*

MALONE, J., concurring: I agree with the majority opinion's resolution of all issues in this appeal, including its holding that Paul Guebara's conviction of criminal possession of a weapon must be reversed for insufficient evidence based on the Kansas Supreme Court's recent decision in *State v. Valdez*, 316 Kan. 1, 20, 512 P.3d 1125 (2022). But I offer this brief separate opinion to state my view that the holding in *Valdez* is misguided and conflicts with the Kansas Supreme Court's own precedent.

Under United States Supreme Court precedent, when the defendant's convicted felon status is an element of a charged crime, the State is *required* to accept the defendant's stipulation that he or she committed a prior felony to avoid unfair prejudice to the defendant. See *Old Chief v. United States*, 519 U.S. 172, 189-90, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997). Likewise, in *State v. Lee*, 266 Kan. 804, 808-16, 977 P.2d 263 (1999), the Kansas Supreme Court held that in a prosecution for criminal possession of a

firearm, the State must accept a stipulation that the defendant is a prior convicted felon, without further elaboration of the nature of the prior conviction.

In *Lee*, the defendant was charged with criminal possession of a firearm in violation of K.S.A. 21-4204(a)(4), which prohibited the possession of any firearm by a person who, within the preceding 10 years, had been convicted of certain prior crimes. This provision is substantially similar to K.S.A. 2014 Supp. 21-6304(a)(3)(A), the statute under which Guebara was convicted. The defendant wanted to stipulate to his prior aggravated battery conviction at the jury trial, but the district court allowed the State to present evidence of the conviction to establish the necessary element of the crime. The *Lee* court found the district court erred by rejecting the defendant's offer to stipulate to the prior conviction, although it found the error to be harmless. 266 Kan. at 814. After reviewing *Old Chief* and cases from other jurisdictions, the court held:

"(1) When requested by a defendant in a criminal possession of a firearm case, the district court must approve a stipulation whereby the parties acknowledge that the defendant is, without further elaboration, a prior convicted felon. (2) At the same time, the State may place into the record, at its discretion, the actual judgment(s) and sentence(s) of the prior felony conviction(s). (3) Neither these documents nor the number and nature of the prior convictions should be disclosed to the trial jury. (4) Out of the jury's presence and after consultation with counsel, the defendant should be required to personally acknowledge the stipulation and his or her voluntary waiver of his or her right to have the State otherwise prove the convicted felon status element beyond a reasonable doubt. (5) The defendant's stipulation of convicted felon status satisfies the prosecution's burden of proof for that element of the crime. (6) If the element of 'convicted felon' is established by stipulation, 'the judge may thereafter instruct the jury that it can consider the convicted felon status element of the crime as proven by agreement of the parties in the form of a stipulation.'" 266 Kan. at 815-16.

Here, the State substantially followed the stipulation procedure set forth in *Lee*. The State accepted Guebara's stipulation that he had been released from prison for a prior

felony conviction within 10 years of committing his new offense, without further elaboration of the nature of the prior conviction. The State then submitted to the district court a certified journal entry of Guebara's 1983 murder conviction as an exhibit that would not be made available to the jury. Guebara did not object to this procedure and asked the court to approve the stipulation. Under *Lee*, the stipulated evidence should have been sufficient for the jury to find Guebara guilty of criminal possession of a weapon.

Yet, in *Valdez*, our Supreme Court reversed the defendant's firearm conviction after the parties followed the stipulation procedure sanctioned in *Lee*. The defendant in *Valdez* was charged with criminal possession of a firearm in violation of K.S.A. 2018 Supp. 21-6304(a)(3)(A). The parties stipulated that the defendant had been convicted of a felony within 10 years of committing his new offense, and the State provided the district court with a certified copy of the prior conviction. But the *Valdez* court found there was insufficient evidence to support the conviction under K.S.A. 2018 Supp. 21-6304(a)(3)(A) because the subsection only applied to convictions of certain prior crimes and the stipulation failed to "specif[y] what Valdez' prior crime was." 316 Kan. at 20. The court observed that a certified copy of the prior conviction may have been submitted to the district court but found that "the court withheld this document from the jury, so it could not have played a role in its deliberations." 316 Kan. at 19. Curiously, the *Valdez* court did not discuss *Old Chief* or *Lee* in its analysis.

The Kansas Legislature substantially amended K.S.A. 21-6304 in 2021. But the statute still includes a subsection that prohibits the possession of any weapon by a person who, within the preceding eight years, has satisfied the sentence imposed for certain prior crimes. K.S.A. 2022 Supp. 21-6304(a)(3). Under the holding in *Valdez*, in a prosecution for criminal possession of a weapon, the jury must receive evidence of the defendant's specific prior crime to support a conviction under this subsection of the statute.

The holding in *Valdez* flies in the face of the holding in *Lee*. The whole point of the stipulation in Guebara's case was so the jury could hear evidence of his convicted felon status to establish the criminal possession of a firearm charge, but without the jury finding out that the prior conviction was for murder, which would have been highly prejudicial evidence in Guebara's current trial for attempted first-degree murder. Such a stipulation is required in *Lee*. But in *Valdez*, our Supreme Court now says that a conviction under one subsection of the criminal possession of a firearm statute cannot stand unless the jury receives evidence of the specific crime that led to the defendant's prior conviction. *Valdez* makes it impossible for the State to prosecute an offender for criminal possession of a firearm under at least one subsection of the statute. The Kansas Supreme Court needs to resolve the conflict between *Valdez* and *Lee*.