

NOT DESIGNATED FOR PUBLICATION

Nos. 122,431

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,  
*Appellee,*

v.

DAMIAN I. HALLACY,  
*Appellant.*

MEMORANDUM OPINION

Appeal from Sedgwick District Court; JEFFREY E. GOERING, judge. Opinion filed April 14, 2023.  
Affirmed.

*Kristen B. Patty*, of Wichita, for appellant, and *Damian I. Hallacy*, appellant pro se.

*Matt J. Maloney*, assistant district attorney, *Marc Bennett*, district attorney, and *Derek Schmidt*, attorney general, for appellee.

Before ARNOLD-BURGER, C.J., BRUNS and HURST, JJ.

HURST, J.: A jury convicted Damian I. Hallacy of 25 counts of sex crimes related to numerous heinous acts with multiple underage victims over the course of several years. Hallacy appeals his entire conviction claiming the district court's denial of his day-of-trial request for self-representation constituted structural error requiring reversal. Additionally, Hallacy specifically challenges the sufficiency of the evidence supporting four of his charges. Finding no error, this court affirms.

## FACTUAL AND PROCEDURAL HISTORY

In 2018 the State charged Hallacy with 25 counts of various sex crimes including

- one count of rape;
- fourteen counts of sexual exploitation of a child;
- four counts of attempted sexual exploitation of a child;
- two counts of aggravated criminal sodomy;
- two counts of aggravated indecent liberties with a child; and
- two counts of aggravated intimidation of a victim or witness.

After a trial, a jury convicted Hallacy of each count, and the district court sentenced him to 3 consecutive hard-25 life terms plus 53 months in prison. Hallacy's charges stemmed from his actions related to several minor victims over the course of multiple years. The majority of the reprehensible accusations against Hallacy are irrelevant to his claims on appeal and are thus not included in this opinion.

### *Hallacy's Objections to Counsel and Day-of-Trial Request for Self-Representation*

Throughout this case, the district court appointed Hallacy several different attorneys in succession who had to withdraw due to conflicts, requests by Hallacy, or other issues. During the year and a half from when Hallacy was detained until his trial, he was appointed more than eight attorneys. By April 2018, at least five different appointed counsel had withdrawn for conflicts that were often not specified. At that time, Hallacy requested reappointment of counsel who had previously withdrawn due to a conflict, which was denied. Later in April 2018, Hallacy was appointed another attorney who represented him for several months and filed multiple pretrial motions on his behalf. In December 2018, the court set a jury trial date of April 22, 2019, but by January 2019 Hallacy sought that attorney's removal alleging she "has utterly lacked in competence, diligence, and promptness and communication." According to that counsel's motion to

withdraw, Hallacy expressed displeasure with her representation and asked her to withdraw. She explained to him that she did not have a conflict and could not withdraw but advised him that he could file a pro se motion seeking her removal and she would ensure it was set for a hearing. Shortly thereafter, that counsel received notice that Hallacy had filed a small claims action against her, and Hallacy's girlfriend had filed a complaint against her with the Kansas Disciplinary Administrator's Office, but no disciplinary action was taken against the attorney. These actions obviously created a conflict between Hallacy and his attorney, just four months before a trial involving 25 different counts and carrying a possible life sentence.

On January 30, 2019, the court ultimately appointed an attorney who, despite Hallacy's repeated efforts to have her removed, managed to represent him through trial. Because Hallacy's counsel was appointed less than four months before trial, she requested a continuance of the trial date to allow her to prepare and Hallacy agreed to continue the trial to August 26, 2019. In May 2019, Hallacy's trial counsel moved for another continuance of the trial date, citing her recent appointment to Hallacy's complex case, the large quantity of discovery she needed to review to prepare pretrial motions, and her additional responsibilities in other cases. At the hearing on the motion, although it appears his trial counsel initially believed Hallacy supported the continuance, Hallacy stated his strenuous objection to the continuance and "reassert[ed]" his right to a speedy trial and effective assistance of counsel. When the district court asked Hallacy if he wanted to proceed to trial in August despite his attorney's statement that she felt she would be unprepared, Hallacy argued that he could not be forced to decide between his constitutional effective assistance of counsel and speedy trial rights. He ended his argument by stating that the court had "a duty to protect [his] constitutional rights, and [could] do so by granting [a] continuance and charging it to the [S]tate." Finding Hallacy was "agreeing to assume [the] risk" of proceeding as scheduled, the district court found that trial would still proceed on August 26, 2019.

In the weeks leading up to trial, Hallacy filed a pro se motion to appoint new counsel making several arguments against his counsel. More than three weeks before trial at an August 1, 2019, hearing to consider pretrial motions, before the court could proceed Hallacy said, "[y]our Honor, before we begin, I object." Hallacy explained that he objected to the "[l]ack of a disinterested prosecutor" and wanted to "renew my objections from earlier as to constructive denial of counsel, denial of counsel and lack of an impartial judge." Hallacy then sought to read a letter from his attorney into the record that he believed demonstrated some failing on her part or on the part of the State—and after reading the letter silently—the court strongly cautioned Hallacy against reading the letter into the record because it contained confidential attorney-client privileged information and trial strategy. Hallacy explained "it's my right to do so" and that he would "waive any confidentiality that I feel I need, and I'll omit anything that I feel doesn't need to be given." In response to Hallacy's attempt to make these pro se arguments, the court offered Hallacy these options:

"THE COURT: Well, here's the thing, Mr. Hallacy. You have the right to represent yourself if you like. You have the right to be represented by counsel. But it's one or the other.

"[HALLACY]: Your Honor, I'm making an objection. I'm not representing myself.

"THE COURT: Well, then these are objections that need to be made by Ms. [ ] as your trial counsel.

"[HALLACY]: Your Honor, these pertain to my rights against [my trial counsel] and I have a right to be heard under the Constitution and under the judicial code of conduct."

Hallacy then continued to disagree with the court about his rights and objected to new evidence the State said it had but was not presented at the preliminary hearing. Hallacy alleged "[a]nd this goes to my previous objection as to collusion between the State and my attorney to manufacture evidence." Hallacy lodged additional complaints

about his counsel's failure to obtain certain discovery or their failure to disclose it to him, and the judge issuing a warrant without an affidavit of probable cause. Hallacy closed with "I'd move the Court again for reappointment of counsel and a change of venue." The district court denied Hallacy's motion for appointment of new counsel for the same reasons stated at the prior hearing on the same issue and noted his other objections.

On August 22, 2019—just four days before trial—Hallacy filed another motion to appoint new counsel. The district court addressed his filing on August 26, 2019—the first day of trial—immediately before jury selection. Hallacy argued the alleged deficiencies with his trial attorney's performance, which mirrored his objections previously filed with the court about his present trial counsel as well as previous counsel.

The court considered Hallacy's concerns and denied his request to appoint new counsel, which ultimately resulted in Hallacy's request for self-representation. Additional facts related to Hallacy's request are addressed below. The parties completed jury selection by the end of the day on August 27, 2019. On August 28, before the jury was sworn in, Hallacy renewed his motion to proceed pro se. Hallacy specifically referenced *State v. Bunyard*, 307 Kan. 463, 410 P.3d 902 (2018), for its finding that criminal defendants retained an unqualified right to self-representation until the start of the trial. The district court noted Hallacy's objection for the record.

### *The Allegations Concerning M.F.'s Three Minor Children*

The jury convicted Hallacy of attempted sexual exploitation of a child in counts 18, 19, and 20 for his alleged conduct related to M.F.'s children. M.F. and Hallacy were acquaintances during their teenage years but did not have much contact for many years until Hallacy messaged M.F. through Facebook seemingly out of the blue in May 2017. Through the course of a separate investigation involving Hallacy, a detective executed a

search warrant and obtained access to their Facebook messages and contacted M.F. in January 2018 regarding the messages.

At trial, M.F. confirmed that her messages with Hallacy were routinely sexual in nature, and she testified that he asked her to call him "Daddy." Through their messages, Hallacy repeatedly discussed his "M-D" fantasy, which was how he referred to his sexual fantasy involving mothers having sex with their daughters. M.F. testified that Hallacy would send her pornographic images and videos of older women with younger girls touching, kissing, having oral sex, and using vibrators. She said that she thought he sent her this pornography because he "wanted me to believe that this was common and it was a normal thing for him to want and to fantasize about, and that I should do it because everybody does it."

During the trial, M.F. testified about numerous messages between her and Hallacy. On July 12, 2017, after Hallacy sent M.F. mother-daughter themed pornography, they exchanged messages about food and M.F. made an innocuous comment that their family did not eat things that swim. She then clarified that "[w]ell, the girls do, I guess," referring to the fact that her minor daughters would eat things that swim. Hallacy responded with the message, "Sperm? Cum?" Then on July 13, 2017, M.F. messaged Hallacy about a book she was reading in which a character was having sex at the age of 17, and that led to a discussion regarding their beliefs about the appropriate age of consent for minors to have sex. M.F. confirmed that she indicated to Hallacy that she did not believe it was ok for her children to have sex as minors, and Hallacy responded that sexual desires can occur at a young age. M.F. testified that she believed he sent her messages about minors engaging in sexual acts and the age of consent "[t]o make [her] believe that it was normal." Later that evening, M.F. messaged Hallacy that her daughter had gotten a sunburn, and the following message exchange occurred:

Hallacy: "Aloe. You should help."

M.F. "I'm sure I will."

Hallacy: "Pics."

Later that same day after Hallacy suggested that M.F. should help her daughter with aloe on her sunburn, the following message exchange occurred:

Hallacy: "Thinking."

M.F.: "About?"

Hallacy: "Aloe. LOL."

M.F.: "LOL."

Hallacy: "Your hands all over her."

M.F.: "They won't be home for another day or two."

During this exchange M.F. understood Hallacy to be referring to him thinking about her "rubbing aloe on my daughter's sunburn."

M.F. testified that on July 16, 2017, she messaged Hallacy that "we just got done at the Y." He then asked her to send him pictures of "[a]ll of you in swimsuits." M.F. testified that, because Hallacy had previously asked for pictures of her daughters, she understood that he was asking her for pictures of her daughters in their swimming suits. Later that evening, the following exchange occurred:

Hallacy: "[y]ou need to cum."

M.F.: "I do."

Hallacy: "M-D?"

M.F.: "I also need a mani/pedi. No M-D."

Hallacy: "LMAO."

Hallacy: "Fine. Sure."

Hallacy: "LOL."

M.F.: "I want affection right now. Sigh. I hate it when that happens."

Hallacy: "[your daughter] loves affection."

At that time, the daughter Hallacy referenced was 10 years old.

On July 19, 2017, Hallacy messaged her "I told you things are different now. Even your daughters know a lot more than you think they do." M.F. responded that she knows they do and hoped they would trust her and feel comfortable talking to her "about that kind of thing," to which Hallacy responded, "Like M-D?" M.F. testified that she believed this was a reference to Hallacy's mother-daughter sexual fantasies. On that same day he messaged her "[w]hat if one of them told you that was their fantasy?" and repeatedly asked M.F. what she would do if one of her minor daughters expressed an interest in mother-daughter sex. Eventually, M.F. told him "[y]ou want me to say that I would have sex with my daughter and you want to have a conversation about me having sex with my daughter. I don't want to have that conversation. I told you before that I don't and we always end up fighting." M.F. testified that she thought Hallacy's repeated references and discussions about minors having sex and mother-daughter fantasies were his attempt to make her believe it was normal.

Shortly after the exchange where M.F. told Hallacy she would not talk to him about her having sex with her daughters, the following exchange occurred:

Hallacy: "How about the pics you promised long ago?"

M.F.: "The ones of my kids?"

Hallacy: "Yes."

M.F. "I thought we talked about how I'm uncomfortable with that."

Hallacy: "Okay."

At trial, M.F. explained that Hallacy had previously asked her to send him pictures of her three daughters' butts who were ages 8, 10, and 15 at the time. M.F. testified that Hallacy's request was simply that he wanted pictures of her daughters' butts, but he did



not state whether he meant clothed or unclothed. M.F. testified that Hallacy requested the photos of her daughters' butts after messaging her about his mother-daughter sexual fantasies.

A few days later, Hallacy messaged M.F. that Teen Vogue had an article about "how 11 to 17 . . . year olds, can safely have anal sex." M.F. responded that she disagreed with that, expressed disbelief that it referenced 11-year-olds, and said "[t]hat doesn't mean you should have sex with them." She testified that she thought he was trying to get her "to believe that sex with children in other cultures or the mother-daughter fantasy that he had was commonplace, and he tried to make [her] feel like it was acceptable." However, as part of the messages about the magazine article, Hallacy wrote "I definitely don't think kids should be having sex with anyone. My point is that they know a lot more than you think." When asked about this message at trial, M.F. testified that Hallacy "frequently asked me to have sex with my underage daughters," but also confirmed that the Facebook messages used at trial did not have any messages from Hallacy making such a comment. M.F. also testified that she did not keep all of her Facebook messages with Hallacy.

*Allegations Related to Hallacy's Unlawful Touching of an 11-year-old*

In Count 23, the State charged Hallacy with aggravated indecent liberties with a child for the lewd fondling or touching an 11-year-old victim, on or between May 27, 2011, and September 27, 2011. The victim testified that she lived with her aunt off and on between the ages of nine and eleven, and her aunt dated Hallacy between May 27-September 27, 2011, when the victim was 11 years old. She testified that during this period, she went to Hallacy 's apartment "a couple of times."

On the date of the incident, the victim had gone with her aunt to swim at the pool at Hallacy's apartment complex. The victim testified that after swimming she spent the

night at Hallacy's apartment in his son's room and was watching a movie when Hallacy entered the bedroom to ask if she wanted ice cream. Before he left the room, Hallacy changed the movie she was watching to a pornographic movie. The victim testified that she moved to the floor and tried to avoid looking at the television, and Hallacy returned with ice cream. She confirmed that the pornographic movie remained on the television while she ate the ice cream. She testified that during this time they discussed the sunburn on her chest, and Hallacy put his hand down her t-shirt, "trying to act casual." Although the victim recalled that Hallacy initially had his hand on her chest, he then moved his hand down to touch her directly on both of her breasts.

After the incident Hallacy told the victim not to tell anyone—a direction she followed for years until she finally told her middle school counselor about the incident. A police officer went to the school and interviewed the victim about the incident with Hallacy. Then when she was a junior in high school, the detective investigating the allegations which initiated this case against Hallacy contacted her about the incident.

When asked about the apartment at trial, more than seven years after the incident, the victim said that it was in Wichita, but she did not remember the precise location. She acknowledged that she had previously said she thought the apartment was in east Wichita, "[m]ost likely" near Andover. She also testified about what the apartment looked like, and said there were two or three bedrooms, including a master bedroom with its own bathroom. She confirmed that there was another bathroom between the other two bedrooms and described the bedroom where she stayed as having a bunkbed, flat screen TV, and a dresser.

Hallacy's son later testified that he recalled living in the apartment on the east side of town when Hallacy dated the victim's aunt. Hallacy's son described the apartment similarly to the victim's description, including the bunkbed. He confirmed that Hallacy lived in this apartment on the east side of town during the summer encompassing the

dates of May 27, 2011, through September 27, 2011. He testified that Hallacy previously lived in an apartment on the west side of town, but only remembered seeing the victim at the east side apartment. Both apartment complexes had swimming pools.

However, the investigating detective provided testimony regarding Hallacy's residency in 2011 and 2012 that may have conflicted with the testimony of the victim and Hallacy's son. The detective testified that the apartment complex on the west side of town sent a resident detail sheet that listed Hallacy's move-in date as May 27, 2011, and his move-out date as September 17, 2011. The detective testified that based on Hallacy's self-reported address to law enforcement in 2012 he lived in an apartment on the east side of town at that time, but he did not know when Hallacy moved in. Additionally, the police officer who interviewed the victim in 2014 after she reported Hallacy's unlawful touching to her school counselor testified that the victim told her the incident with Hallacy occurred approximately two years earlier, though she could not say for sure.

A jury convicted Hallacy of all charges, and he was sentenced to three consecutive "hard-25" life sentences and a consecutive term of 53 months in prison. Hallacy now appeals.

## DISCUSSION

### I. THE DISTRICT COURT DID NOT COMMIT STRUCTURAL ERROR OR ACT ARBITRARILY WHEN IT DENIED HALLACY'S REQUEST FOR SELF-REPRESENTATION

Hallacy claims that he made a timely request for self-representation because the jury had not yet been impaneled, and thus the district court's denial of the request constitutes structural error requiring reversal. Hallacy is correct that criminal defendants generally possess a guaranteed, unqualified constitutional right to self-representation pursuant to the Sixth Amendment to the United States Constitution. See *State v. Vann*,

280 Kan. 782, 793, 127 P.3d 307 (2006). The United States Supreme Court has held that "the right to self-representation" is protected by the Sixth Amendment and incorporated into the protections afforded by the State through the Fourteenth Amendment. *Faretta v. California*, 422 U.S. 806, 819, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975); see *Bunyard*, 307 Kan. at 470. However, that right is not always unqualified under every circumstance. To retain the unqualified constitutional right to self-representation, the defendant must timely, clearly, and unequivocally assert the right. After such an assertion, the court must then ensure the defendant knowingly and intelligently relinquishes the benefits of representation by counsel. See *U.S. v. Mackovich*, 209 F.3d 1227, 1236 (10th Cir. 2000); see *Vann*, 280 Kan. at 793. "Although a defendant has a right to self-representation, that right is unqualified only if it is asserted before trial." *State v. Cromwell*, 253 Kan. 495, 505, 856 P.2d 1299 (1993). Therefore, when a defendant fails to invoke his right to self-representation before trial, the district court has discretion to grant or deny that request. 253 Kan. at 505; see also *Bunyard*, 307 Kan. at 472 (recognizing holding in *Cromwell* that the "right of self-representation unqualified if asserted before trial; after trial starts, district judge has discretion to grant request").

Therefore, whether Hallacy timely asserted his right to self-representation is crucial to this court's analysis. Whether Hallacy asserted his right *before* the trial had begun not only dictates the district court's analysis of the request but also this court's standard of review. Although the determination of when the trial begins carries substantial legal effect, this panel has not found any Kansas Supreme Court caselaw identifying the point in time when the trial has begun for purposes of analyzing the defendant's request for self-representation. See *Bunyard*, 307 Kan. at 477-78 (finding the district court's summary denial of the defendant's oral motion for self-representation made the Friday before the Monday trial setting constituted structural error requiring reversal); *Vann*, 280 Kan. at 792-95 (finding the trial court erred when it failed to consider the defendant's pro se motion for self-representation sent to the court several weeks before trial but then not raised again by the defendant at or before trial); *Cromwell*,

253 Kan. at 504-07 (finding the district court did not abuse its discretion in denying the defendant's oral motion for self-representation made during trial after three witnesses had testified). Notably, in *Bunyard*, a case heavily relied upon by Hallacy, the Kansas Supreme Court described the morning of the first day of trial: "[w]hen Bunyard's trial began on Monday, before jury selection began, the district judge and parties addressed several outstanding issues." 307 Kan. at 467. The court described—without deciding—that the first day of trial naturally constituted the start of the trial even before the jury was impaneled. This panel finds no need to deviate from that natural interpretation, which is also consistent with other panels of this court. See *City of Arkansas City v. Sybrant*, 44 Kan. App. 2d 891, 901-04, 241 P.3d 581 (2010) (reversing because the district court made an error of law, abusing its discretion, when it failed to inquire whether the defendant, prior to jury selection, knowingly and intelligently requested dismissal of counsel and to proceed self-represented); *State v. Cuddy*, 22 Kan. App. 2d 605, 609-11, 921 P.2d 219 (1996) (the district court did not abuse its discretion in denying the defendant's motion for self-representation made immediately before voir dire of the jury panel).

When a defendant's request for self-representation is "untimely," the district court is granted discretion in determining whether to grant or deny the request. See *Cromwell*, 253 Kan. at 505; *Sybrant*, 44 Kan. App. 2d at 901-02. In applying its discretion, the district court "may consider the reasons for the motion for self-representation; the quality of counsel's representation; the length and the stage of the proceedings; and the potential disruption and delay which could be expected from granting the motion." *Cuddy*, 22 Kan. App. 2d at 610. As explained by the *Cuddy* panel, allowing the district court discretion to deny motions for self-representation filed on the day of trial, "strikes the more reasonable balance between the right to self-representation and the public's interest in the efficient administration of justice." 22 Kan. App. 2d at 610. Further, the *Cuddy* court expressed that such a rule gave the trial court discretion to prevent the trivialization of the right to counsel and the right to be heard into game delay tactics. 22 Kan. App. 2d at 610.

Hallacy requested self-representation on the first day of trial, and only after the district court denied his motion for reappointment of counsel and refused to sua sponte continue the trial date and attribute the time to the State. The district court immediately noted that Hallacy's motion was untimely. Hallacy then stated that "as a representative of myself I could ask for a continuance." The district court then explained that it believed Hallacy's request was not made in good faith but was instead meant to obtain a continuance and charge the time to the State as Hallacy had previously requested. Hallacy expressly stated that his purpose in requesting to proceed pro se was "to take control of my own strategy." After a short recess, the district court returned and addressed the request using the criteria set forth in *Cuddy* for an untimely request—including Hallacy's reason for the request, the quality of his current representation, and the potential for delay associated with the request. The court also advised Hallacy of the dangers and disadvantages of self-representation to ensure he understood his right and the potential consequences of asserting it. See *State v. Lowe*, 18 Kan. App. 2d 72, 76-77, 847 P.2d 1334 (1993).

At the time of his request for self-representation, Hallacy also requested a continuance and admitted that he was not ready to proceed with self-representation that day because he did not have access to the discovery. In fact, the voluminous discovery would have required redaction before it was given to Hallacy or left at the jail for him to review. The court concluded that because Hallacy had waited until the day of trial to request self-representation, the request was no longer unqualified, and the court could consider the potential disruption and delay that would result from granting his motion in addition to the reasons for Hallacy's request. Based on this analysis, the district court determined that Hallacy's request would cause a "significant delay" in trial proceedings due to the need to make redactions from 9,000 pages of discovery and denied Hallacy's request for self-representation.

Finding Hallacy's day-of-trial request for self-representation untimely is also consistent with the Tenth Circuit's analysis of this issue. While the Tenth Circuit has identified the entire time before the jury has been impaneled as before trial, it permits the district court to consider the defendant's motivation for the request in determining whether the request is timely and thus unqualified. "A motion for self-representation is timely if it is made before the jury is impaneled, *unless it is a tactic to secure delay.*" (Emphasis added.) *United States v. Tucker*, 451 F.3d 1176, 1181 (10th Cir. 2006). Under this framework, even requests made several days before trial could be considered untimely. See *United States v. Smith*, 413 F.3d 1253, 1280-81 (10th Cir. 2005) (finding a request for self-representation made six days before trial untimely when the defendant sought to delay the trial through the request). While this is not consistent with how the Kansas Supreme Court decided *Bunyard*, and thus this panel is not applying it here, the Tenth Circuit's methodology demonstrates the need to balance the factors considered in *Cuddy* when defendants make last minute requests for self-representation—particularly when it is clear the request is meant to disrupt the judicial process. In considering whether the defendant's request for self-representation is made as a tactic for delay, the Tenth Circuit has suggested the following factors: (1) the actual delay that would result if the motion were granted; (2) whether the delay could have been avoided if the defendant had earlier requested self-representation; and (3) whether the defendant had good reasons for not requesting self-representation earlier in the proceedings. *United States v. Simpson*, 845 F.3d 1039, 1053 (10th Cir. 2017).

Hallacy's day-of-trial request for self-representation was untimely because it was not made *before* trial—but was made on the day of trial—even though the jury had not yet been impaneled. Because Hallacy's request for self-representation was untimely, it was no longer unqualified and the district court had discretion to grant or deny the request. See *Cuddy*, 22 Kan. App. 2d at 609-11. Therefore, this court reviews the district court's denial of Hallacy's untimely motion for self-representation for an abuse of discretion. *Cromwell*, 253 Kan. at 505-06. A judicial action constitutes an abuse of

discretion if (1) it is arbitrary, fanciful, or unreasonable; (2) it is based on an error of law; or (3) it is based on an error of fact. *State v. Levy*, 313 Kan. 232, 237, 485 P.3d 605 (2021). The party asserting the district court abused its discretion bears the burden of showing such abuse of discretion. *State v. Crosby*, 312 Kan. 630, 635, 479 P.3d 167 (2021).

Prior to ruling on Hallacy's request for self-representation, the district court weighed, as outlined in *Cuddy* and *Cromwell*, the reasons for Hallacy's request, the quality of counsel's representation, the length and state of the proceedings, and the potential disruption and delay that would result from granting the motion. See *Cromwell*, 253 Kan. at 504-07; *Cuddy*, 22 Kan. App. 2d at 610. In the pretrial motion hearing on August 1, 2019, more than three weeks before trial, after the district court's inquiry, Hallacy denied wanting to represent himself. On the morning of the first day of trial, after initially expressing belief that Hallacy's request for self-representation was made for the purpose of delay, the district court accepted that Hallacy's reason for the request was to "take control" of his own defense. On August 1 the district court denied reappointment of counsel for the reasons stated in its July 17 hearing, where it found Hallacy's attorney's representation acceptable. Then again on the morning of trial, before Hallacy's request for self-representation, the district court evaluated and found the quality of representation made by Hallacy's attorney acceptable.

The district court heard Hallacy's complaints regarding his trial counsel including:

1. She had not visited him enough times;
2. he did not agree with her trial strategy;
3. she had too many other cases that prevented her from filing motions he felt had validity;
4. she "has ignored dozens of exculpatory facts that my girlfriend and sole witness [E.D.] has given her since February";
5. "[s]he never challenged the charges with [M.F.]";



6. she failed to challenge an issue that "multiple images on a single device should be only one charge";
7. she failed to challenge "the State's warrantless seizure of my person and the warrantless arrest shifting the burden to the State to prove it was legal";
8. she failed to subpoena witnesses, including his girlfriend;
9. she failed to obtain text messages showing the police tampered with evidence; and
10. she failed to maintain communication with him and his girlfriend.

Hallacy's trial counsel did not respond and the court explained that it could not inquire of his counsel without requiring her to divulge trial strategy, but explained that many of Hallacy's complaints could not be rectified by new counsel on the eve of trial. Hallacy countered that "if I had a different attorney, that attorney, with my confidence, could ask for a motion to continue." The court reminded Hallacy that he had previously objected to his current attorney's request for a continuance of the trial date—but Hallacy explained that his objection was because his attorney "didn't do anything" with a prior continuance—and he was certain a new attorney would satisfy his complaints and thus Hallacy would agree to a continuance.

The court explained its evaluation of the attorney's representation as:

"[t]here's only so much that [the court] can do to interfere between you and your counsel with respect to trial strategy, with respect to which witnesses to call, which subpoenas to issue. All that stuff is within the purview of your attorney. And the fact that you and your attorney don't agree on trial strategy is nothing new. That's a common circumstance that happens in criminal cases all the time. . . . But at the end of the day I don't fix any of this stuff by changing the lawyer."

Hallacy disagreed, explaining that a new lawyer "could do the things I've asked her to do" and the court responded that "[n]ot in a half hour they can't" and Hallacy reiterated that

he would request a continuance once he got a new attorney. The district court again explained that Hallacy's complaints amounted to disagreements about trial strategy and did not warrant appointment of new counsel. While the court's analysis of trial counsel's effectiveness occurred immediately prior to—and likely resulted in—Hallacy's request for self-representation, it was included in the court's final decision to deny Hallacy's request for self-representation.

After the district court explained that Hallacy's complaints about his counsel's performance did not justify his request for new counsel, Hallacy requested to represent himself. The district court initially denied Hallacy's request for self-representation as untimely, and asked if there was "[a]nything else we need to take up before we bring a jury up?" In response, Hallacy stated that "as a representative of myself I could ask for a continuance" and that is when the district court explained that he believed Hallacy's request was "not made in good faith" and was for the purpose of "throwing sand in the gears." The district court stated that "[w]hat you want is a continuance but you don't want to ask for a continuance because you want the State to take the time and that's been the strategy all along is to somehow avoid an August 26th trial date, have that time charged to the State." Hallacy denied that he was using the request as a delay tactic and said "[m]y purpose is to take control of my own strategy." In addressing Hallacy's stated purpose, the district court noted that Hallacy's current complaints were of the same type as those in his previous motion made 45 days prior. Therefore, if Hallacy truly wanted to control his strategy, then he had time after the court previously denied his motion for new counsel and well before the day of trial to assert his right to self-representation.

Finally, the district court addressed the timing of Hallacy's request and its impact on the trial. As courts have repeatedly found, "the right of self-representation is not a license to disrupt the administration of justice." *Cuddy*, 22 Kan. App. 2d at 609 (citing *Faretta*, 422 U.S. at 834 n. 46). Hallacy waited to raise his request for self-representation until the morning of trial—only after the district court denied his other efforts to delay the

trial date. At the time of his request the venire jury members had convened for selection, and the witnesses were subpoenaed. Further, as the court noted, the discovery in the case was voluminous and was not available in a redacted form that Hallacy could review and possess in jail. The State estimated it would take several days to redact. The discovery was also only available on a USB drive which would require Hallacy to have access to a computer. Thus, if the district court granted Hallacy's day-of-trial request for self-representation the trial could not proceed as scheduled. Both prior to and during the discussion with the court regarding his request for self-representation, Hallacy made it clear that he was also seeking a continuance of the trial date, but Hallacy wanted the continuance to be credited to the State in an apparent effort to create a potential violation of Hallacy's right to a speedy trial.

On appeal, Hallacy claims that he feared his trial counsel was unprepared for trial and wanted to direct his own defense, but the district court reviewed trial counsel's performance on August 1, and found that her performance to that date did not warrant removal. Moreover, Hallacy's complaints related to trial strategy which was known to him far earlier than his request for self-representation. Hallacy sought removal of his trial counsel several weeks before trial, and although his counsel was originally worried she could not be prepared in time for trial, she notified the court in July that she rescheduled other commitments and would be prepared for trial. This was necessary because Hallacy had refused his attorney's request to continue the trial date and asserted his right to a speedy trial. On August 1, 2019, the court also offered Hallacy the option to request self-representation, but he denied wanting to represent himself. Even though Hallacy's complaints about his trial counsel were quite similar to those he made about his numerous prior counsel months before trial, he purposely waited until the first day of trial to request self-representation. A defendant's intentional use of the request for self-representation as a delay tactic not only disrupts the judicial process, but also undermines the importance of the right to self-representation.

The district court properly determined that Hallacy's day-of-trial request for self-representation was untimely, and thus properly considered the reasons for Hallacy's request, the timing of his request, the quality of his trial counsel's performance, and the potential disruption and delay to the trial when it denied Hallacy's request. This court finds no abuse of the district court's discretion in denying Hallacy's untimely request for self-representation.

II. HALLACY FAILED TO DEMONSTRATE THAT THE STATE PROVIDED INSUFFICIENT EVIDENCE TO SUPPORT HIS CONVICTIONS IN COUNTS 18, 19, AND 20.

Hallacy asserts a single challenge to the sufficiency of the evidence supporting his convictions for attempted sexual exploitation of a child in violation of K.S.A. 2016 Supp. 21-5510(a)(1),(b)(2). While Hallacy's argument here is brief, it appears that he claims only that because he did not explicitly request *nude* photographs of M.F.'s children, the State failed to present sufficient evidence to sustain his conviction for attempted sexual exploitation of a child.

In relevant part, the jury instruction provided that the State had to prove:

- "1. [Hallacy] performed an overt act toward the commission of Sexual Exploitation of a Child.
- "2. [Hallacy] did so with the intent to commit Sexual Exploitation of a Child.
- "3. [Hallacy] failed to complete commission of Sexual Exploitation of a Child.
- "4. This act occurred on or between the 1st day of March and the 31st day of August, 2017."

The jury instruction further explained that "[t]he elements of the crime of sexual exploitation of a child" include that "[t]he defendant with the intent to promote a performance, used [the child] to engage in sexually explicit conduct."

Sexual exploitation of a child is defined as:

"(1) Employing, using, persuading, inducing, enticing or coercing a child under 18 years of age, or a person whom the offender believes to be a child under 18 years of age, to engage in *sexually explicit conduct* with the intent to promote any performance."  
(Emphasis added.) K.S.A. 2022 Supp. 21-5510(a)(1).

Sexually explicit conduct is defined as:

"actual or simulated: *Exhibition in the nude*; sexual intercourse or sodomy, including genital-genital, oral-genital, anal-genital or oral-anal contact, whether between persons of the same or opposite sex; masturbation; sado-masochistic abuse with the intent of sexual stimulation; or lewd exhibition of the genitals, female breasts or pubic area of any person." (Emphasis added.) K.S.A. 2022 Supp. 21-5510(d)(1).

Although the definition of the term "nude" may be obvious to most, the applicable statute defines it as:

"any state of undress in which the human genitals, pubic region, buttock or female breast, at a point below the top of the areola, is less than completely and opaquely covered."  
K.S.A. 2022 Supp. 21-5510(d)(4).

Hallacy does not challenge the jury instructions or make any argument regarding the children's knowledge of his requests for photos of their butts. He merely argues that he never stated he wanted the photos to demonstrate "sexually explicit conduct." Specifically, he claims that because his requests to M.F. that she send him photos of her children's butts did not explicitly state that he wanted their butts to be "less than completely and opaquely covered," the State failed to prove attempted sexual exploitation. According to Hallacy's only argument on appeal regarding this issue, the State failed to provide sufficient evidence to support his conviction on counts 18, 19, and 20 because

"Hallacy only requested 'pictures of my daughters' butts' and that he did not give her any details about what type of picture of their butts that he wanted, say whether they should be clothed or unclothed, naked or nude, or otherwise specify that they should be in any state of undress."

Although Hallacy cites to *State v. Liebau*, 31 Kan. App. 2d 501, 67 P.3d 156 (2003), for the proposition that his prurient desire alone cannot sustain his conviction, he only argues that there is insufficient evidence regarding the type of photos he requested. This court cannot use conjecture or assumptions to develop his arguments and can address only the claims submitted.

When evaluating the sufficiency of the evidence supporting a conviction, this court determines whether, when all the evidence is viewed in a light more favorable to the State than the defendant, a rational fact-finder could have found the defendant guilty beyond a reasonable doubt. A criminal conviction may be supported by circumstantial evidence, if such evidence provides a basis for a reasonable inference by the fact-finder regarding the fact in issue. Circumstantial evidence, in order to be sufficient, need not exclude every other reasonable conclusion. *State v. Colson*, 312 Kan. 739, 749-50, 480 P.3d 167 (2021); see also *State v. Pattillo*, 311 Kan. 995, 1003, 469 P.3d 1250 (2020) (a conviction of even the gravest offense can be based entirely on circumstantial evidence). An appellate court does not reweigh evidence, resolve conflicts in the evidence, or pass on the credibility of witnesses. *State v. Aguirre*, 313 Kan. 189, 209, 485 P.3d 576 (2021). "[O]nly when . . . no reasonable fact-finder could find guilt beyond a reasonable doubt should we reverse a guilty verdict." *State v. Meggerson*, 312 Kan. 238, 247, 474 P.3d 761 (2020).

The Kansas Supreme Court has differentiated between sexually explicit conduct under K.S.A. 21-5510(d)(1) and moments where a child may be photographed or recorded in a state of nonsexualized undress. See *State v. Zabrin*, 271 Kan. 422, 431,

24 P.3d 77 (2001). As a panel of this court explained, "[a]s we consider the phrase 'exhibition in the nude' in the context of the entire definition of 'sexually explicit conduct,' we must conclude that it means more than mere nudity." *Liebau*, 31 Kan. App. 2d at 505. An "exhibition in the nude" requires the child to have "some understanding or at least be of an age where there could be some knowledge that they are exhibiting their nude bodies in a sexually explicit manner." *Zabrinas*, 271 Kan. at 431. See also *Liebau*, 31 Kan. App. 2d at 505 (finding the 16-year-old was unaware her father was videotaping her in the nude and thus could not be engaging in sexually explicit conduct or an exhibition of nudity).

Here, Hallacy's request for a picture of M.F.'s daughters' butts included no specific direction that the photo be in a state of undress, or for the children to be posed in a sexual manner. In fact, the request did not indicate that the children even know the photograph was taken. However, Hallacy's request was not made in a vacuum—but occurred amid a torrent of sexually specific messages—including messages suggesting that M.F. engage in sexual acts with her daughters. Hallacy had spent numerous days telling M.F. of his mother-daughter sexual fantasies, sent M.F. mother-daughter pornography, sent M.F. messages attempting to normalize sexual activity between mothers and daughters, strongly suggested that he would enjoy it if M.F. touched one of her daughters in a sexual manner, and repeatedly requested pictures of M.F.'s interactions with her daughters and requested pictures of their butts. Hallacy contends that these circumstances are irrelevant, but the surrounding circumstances can be used to determine whether Hallacy's request constituted attempted sexual exploitation of a child. See *State v. Coburn*, 38 Kan. App. 2d 1036, 1068, 176 P.3d 203 (2008) (finding circumstantial evidence was sufficient to find the defendant guilty of sexual exploitation of a child); *State v. Anderson*, No. 117,637, 2018 WL 6713501, \*4 (Kan. App. 2018) (unpublished opinion) (sufficient circumstantial evidence existed to show the defendant possessed sexually explicit images of children with the intent required to be convicted of sexual exploitation of a child).

This court is limited to reviewing the arguments presented on appeal. *State v. Davis*, 313 Kan. 244, 248, 485 P.3d 174 (2021) (an issue not briefed is deemed waived or abandoned). Here, the only issue is whether the State's failure to show evidence that Hallacy's message specifically stated that he wanted nude photos of the children's butts meant that he could not be convicted of attempted sexual exploitation of a child. This court cannot read the law so narrowly to prevent the use of the copious circumstantial evidence which a reasonable juror could view to demonstrate that Hallacy attempted to obtain sexually explicit photos of M.F.'s children. Hallacy's request for the butt photos was specific and apart from any other requests for photos of them engaging in nonsexual activities. M.F. testified that Hallacy had asked her to have sex with her daughters. To the extent Hallacy's request to M.F. for sexually explicit photos of her daughters can sustain a conviction for attempted sexual exploitation of a child—which has not been questioned here—the State's failure to demonstrate that Hallacy specifically stated that the photos be in the *nude* does not itself render the evidence insufficient to prevent a reasonable juror from finding beyond a reasonable doubt that Hallacy requested the photos be an "exhibition in the nude."

### III. THE STATE PRESENTED SUFFICIENT EVIDENCE TO SUPPORT HALLACY'S CONVICTION FOR INDECENT LIBERTIES WITH A CHILD WITHIN THE TIMEFRAME ALLEGED IN COUNT 23

In a pro se supplemental brief, Hallacy also alleges the State failed to prove he committed aggravated indecent liberties with a child within the timeframe alleged in Count 23. As with his prior claim, this court reviews Hallacy's claim challenging the sufficiency of the evidence in the light more favorable to the State to determine whether a rational fact-finder could have found Hallacy guilty beyond a reasonable doubt of aggravated indecent liberties with a child as charged. In doing so, this court does not reweigh evidence, resolve conflicts in the evidence, or pass on the credibility of witnesses. *Aguirre*, 313 Kan. at 209. "[O]nly when . . . no reasonable fact-finder could



find guilt beyond a reasonable doubt should we reverse a guilty verdict." *Meggerson*, 312 Kan. at 247.

Hallacy does not allege there was insufficient evidence to prove he inappropriately and unlawfully touched the victim, but only that the evidence does not prove he touched her in the timeframe alleged by the State. Hallacy argues that due to the evidence, including inconsistent witness testimony and a document from an apartment complex showing that he had an agreement to live in an apartment on the west side of town during the alleged timeframe, the State failed to prove beyond a reasonable doubt that the alleged actions occurred between August 9, 2011, and September 17, 2011.

The State's charging document alleged that Hallacy unlawfully touched the victim, a child under the age of fourteen, sometime between May 27 and September 27, 2011, when she was 11 years old. At trial the victim described the incident and testified that it occurred at Hallacy's apartment, which she believed was on the east side of town. However, there was conflicting testimony about when Hallacy lived in the east side apartment. The victim testified that Hallacy assaulted her in the apartment on the east side of town in 2011, and Hallacy's son confirmed that Hallacy lived on the east side apartment during that timeframe. But the investigating detective testified that the west side apartment complex sent a document indicating that Hallacy had rights to occupy it during the 2011 timeframe. Additionally, the police officer who went to the victim's middle school in 2014 to investigate her allegations against Hallacy testified that the victim had said she believed the incident occurred two years prior to that interview, but she could not be certain about the time period.

While it is true that the jury heard evidence that Hallacy lived in the east side apartment that the victim described in 2012, and he had an agreement to occupy the west side apartment in 2011, there was also evidence that he lived in the east side apartment in 2011. There could be many reasonable explanations for the conflicting evidence—but

this court need not opine on them—that was the jury's job. The State presented evidence supporting its contention that Hallacy inappropriately and unlawfully touched the victim when she was under the age of 14 during the timeframes identified, and the existence of conflicting evidence about the timeframe does not itself make the State's case insufficient. The jury was presented with the conflicting evidence regarding the date Hallacy allegedly groped the underage victim and made a credibility determination.

Evidence is sufficient to sustain a conviction even when conflicting evidence exists. When reviewing a challenge to the sufficiency of the evidence, this court must be convinced that a rational factfinder, after reviewing all of the evidence, could have found the defendant guilty beyond a reasonable doubt. *State v. Dull*, 298 Kan. 832, 840, 317 P.3d 104 (2014). And that burden is met here. "Conflicting evidence is not necessarily insufficient evidence." 298 Kan. at 841. The evidence presented "'need not rise to that degree of certainty which will exclude any and every other reasonable conclusion.'" *State v. Gonzalez*, 311 Kan. 281, 288, 460 P.3d 348 (2020). Viewing the evidence more favorably to the State, as is required, there was sufficient evidence for the jury to find Hallacy guilty of aggravated indecent liberties with a child as charged in Count 23.

#### CONCLUSION

The jury heard the abhorrent facts of this case, most of which are irrelevant to this review, and convicted Hallacy of twenty-five counts resulting in his lifetime imprisonment. Throughout the case Hallacy engaged in conduct designed to delay, thwart, and disrupt the administration of justice that exceeded the bounds of zealous advocacy. His day-of-trial request for self-representation was just one of many attempts to disrupt his proceedings, and the district court properly determined the request was untimely and considered the applicable factors when denying it. Moreover, this court finds none of Hallacy's arguments regarding the sufficiency of the evidence persuasive and affirms his convictions.

Affirmed.