

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,  
*Appellee,*

v.

DZUNG N. NINH,  
*Appellant.*

SYLLABUS BY THE COURT

1.

K.S.A. 2021 Supp. 21-5503(a)(1)(A), the statute defining rape when the victim is overcome by force or fear, is not rendered unconstitutionally vague by inclusion of language prohibiting a defendant from asserting that they "did not know or have reason to know that the victim did not consent to the sexual intercourse, that the victim was overcome by force or fear, or that the victim was unconscious or physically powerless." K.S.A. 2021 Supp. 21-5503(e). The statute gives fair warning of what is prohibited conduct and avoids arbitrary and unreasonable enforcement by leaving intact the State's burden to prove a victim was overcome by force or fear.

2.

K.S.A. 2021 Supp. 21-5503(b)(3)(A), the statute defining aggravated criminal sodomy when the victim is overcome by force or fear, is not rendered unconstitutionally vague by inclusion of language prohibiting a defendant from asserting that they "did not know or have reason to know that the victim did not consent to the sexual intercourse, that the victim was overcome by force or fear, or that the victim was unconscious or physically powerless." K.S.A. 2021 Supp. 21-5504(f). The statute gives fair warning of

what is prohibited conduct and avoids arbitrary and unreasonable enforcement by leaving intact the State's burden to prove a victim was overcome by force or fear.

3.

A victim's expressed fear that their family stability or structure would be harmed if they did not submit to being raped or sodomized is sufficient for a rational fact-finder to find the victim was overcome by force or fear to sustain a defendant's conviction for rape or aggravated criminal sodomy.

4.

The State is not required to prove the defendant made explicit threats of physical force or violence in order to prove the victim of rape or aggravated criminal sodomy was overcome by force or fear.

5.

In convicting a defendant for rape and aggravated criminal sodomy, a rational fact-finder may find that a victim was sufficiently overcome by an expressed fear of specific harm even when no evidence is presented that the defendant ever made verbal threats of that same specific harm.

6.

It is error for a prosecutor to misstate the law by characterizing "grooming" as a form of force sufficient to sustain a defendant's conviction for rape or aggravated criminal sodomy in violation of K.S.A. 2021 Supp. 21-5503(a)(1)(A) and K.S.A. 2021 Supp. 21-5504(b)(3)(A).

7.

The prosecutor's reference to the defendant as a rapist during closing argument was not error when arguing that the evidence presented demonstrates the defendant committed rape.

8.

The Sixth Amendment right to a jury trial in federal criminal cases is incorporated, via the Fourteenth Amendment, to state criminal prosecutions thus extending the Sixth Amendment right to a unanimous verdict in federal criminal proceedings to state court criminal defendants.

9.

The defendant's claim that the State both submitted evidence of multiple acts but failed to present sufficient evidence from which a jury could unanimously agree on the underlying act supporting each conviction, and that the unanimity instruction did not cure the multiple acts issue, is essentially a challenge to the sufficiency of the evidence and not a constitutional challenge to the unanimity of the verdict.

Appeal from Sedgwick District Court; JEFFREY SYRIOS, judge. Opinion filed February 10, 2023. Affirmed.

*Jennifer C. Roth*, of Kansas Appellate Defender Office, for appellant.

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

Before HURST, P.J., GARDNER, J., and PATRICK D. MCANANY, S.J.

HURST, J.: Dzung N. Ninh appeals what amounts to a life sentence in prison resulting from his multiple convictions including rape, indecent liberties with a child, and aggravated criminal sodomy related to allegations that over the course of more than four years he sexually assaulted, raped, and sodomized his victim. Ninh challenges his convictions on multiple grounds and claims specifically:

- (1) the Kansas rape and aggravated criminal sodomy statutes are unconstitutional;
- (2) the State presented insufficient evidence to sustain his convictions for rape and aggravated criminal sodomy;
- (3) the State committed reversible error in the opening and closing statements; and
- (4) the State violated his right to a unanimous verdict.

While this court does agree that the prosecutor misstated the law in closing arguments, such misstatement did not prejudice Ninh considering the totality and abundance of the State's evidence and Ninh's asserted defense. This court finds none of Ninh's claims availing. Ninh's asserted ambiguity does not make the Kansas rape and aggravated criminal sodomy statutes unconstitutional; the State presented sufficient evidence to support Ninh's convictions; Ninh's asserted prosecutorial errors do not constitute reversible error; and the State did not violate Ninh's right to a unanimous verdict. The jury's verdict is affirmed.

#### FACTUAL AND PROCEDURAL BACKGROUND

The underlying facts of this case are important to this court's analysis and as such, are included in some detail. In October 2017 the State charged Ninh with numerous sex crimes against the victim that allegedly occurred between August 15, 2013, and September 7, 2017. The facts supporting Ninh's charges are reviewed herein chronologically to assist with this court's analysis.

##### *1. The Victim's Trial Testimony About Incidents in 2013*

The victim turned 13 years old shortly after moving to the United States in the summer of 2013 and she started spending more time with Ninh. She said their relationship began to make her feel uncomfortable because Ninh started touching her and grabbing parts of her body "to the point where [she] didn't like it." She said the touching

escalated into Ninh grabbing her breasts. The victim explained that she would sit on Ninh's lap while he showed her things on his computer, and he would grab her breasts over her clothing. Later that summer, before school had started, Ninh started putting his hands under her bra or removing her bra and touching, playing with, and grabbing her bare breasts.

After school started in 2013, the victim testified that she would be home alone with Ninh for two to three hours in the evening, and he continued to touch her breasts during that time. Over the course of the 2013-2014 school year, she estimated Ninh touched her breasts 15 or 20 times. There were times where she pushed Ninh's hand off her breast or told him to stop; sometimes Ninh would stop and other times he would try to put his hand back on her breast.

The victim testified that during this same time, Ninh also began touching her vagina on the outside of her clothes while they were sitting in the computer area. The victim said that type of touching occurred five or six times during that school year. She explained that she would try to move Ninh's hand by grabbing it and pulling it away and asking Ninh to please stop. During that same school year, Ninh also began touching her vaginal area underneath her clothing, and she estimated that occurred five or six times during that school year.

At some point during that school year, Ninh made the victim promise not to tell anybody about how he touched her. At that time, the only person she had told about the touching was her younger sister because she believed her sister would not tell anyone. During this time, the victim felt like Ninh was monitoring her behavior and who she was talking to in order to make sure she did not tell anyone, and that monitoring made her fearful or concerned that Ninh would find out if she told anyone.

## *2. The Victim's Trial Testimony About Incidents from 2014 to 2015*

The victim testified that Ninh's molesting touches continued into the next school year, and that he began coming to her bedroom at night. The victim explained that Ninh would come into her room around 12:30 or 1 a.m. and come to her bed, lift the comforter and grab her breast, and would pull down her pants and touch her vagina—running his finger "in between" her vagina and massaging it.

The victim confirmed that during this time, when she was about 14 years old, she never asked Ninh to touch her, she did not consent to the touching, and she did not want it to continue. The victim said she did not know how many times Ninh touched her in this way during that school year—there were two- to three-day gaps of Ninh not touching her, "[a]nd then there are times where it would be two weeks, maybe three, and then it happened again." The victim considered telling her mother about what Ninh was doing but decided not to because she was worried it would hurt her family. "It was just constantly me thinking, well, should I tell my mom and entirely break up my family or should I let this happen so that my siblings actually grew up with a father."

## *3. The Victim's Trial Testimony About Incidents from 2015 to 2016*

The victim testified that Ninh continued touching her like he had the prior year—by putting his hand under her comforter, grabbing her breasts, pulling her pants down to put his finger "inside those flaps" of her vagina, and to massage her vagina. She said she started wearing a bra to bed at night to try to deter Ninh from touching her breasts and signal that she "didn't want this anymore."

The victim testified that Ninh's molestation progressed and that around January 2016, Ninh began using his mouth on her breasts. She explained that she would keep her comforter over her head to avoid seeing what Ninh was doing to her. She described her

shared bedroom as having enough space for a person to sit on the floor or rest on their knees over her bed without disturbing her sister's bed and she believed that is how Ninh positioned himself while she hid. She testified that Ninh would lift her shirt to her armpits, move or remove her bra, and he "sucked on [her] breast" while he would also touch her vagina. When asked how many times Ninh sucked her breasts during this time, the victim testified, "It's like once he gets access to this he starts doing it more often." She also testified that Ninh began using his mouth on her vagina at some point between 2015 and 2016.

#### *4. The Victim's Trial Testimony About Incidents from 2016 to 2017*

The victim testified that Ninh continued touching her breasts and vagina and using his mouth on her breasts and vagina during 2016 and 2017. She testified specifically about how Ninh would enter her bedroom when she was already in bed and, leaning over her bed, he would use his mouth on her breasts and then pull her pants down to her knees and move her legs open. He would use his mouth on her breasts and begin "licking" and using his mouth on her vagina. She testified that Ninh used his mouth on her vagina "once or twice" during 2016 and 2017, but he stopped coming into her room when she began dating someone. The victim was 16 when Ninh stopped coming into her room at night to sexually assault her. She testified that she "constantly" thought about telling her mom, but when Ninh stopped, she decided not to tell her mom to avoid something "big" happening to harm her family.

#### *5. The Victim's Trial Testimony About Incidents from 2017 to 2018*

In 2017, the victim was still dating the person that she dated in 2016. During the course of their relationship, she testified that her boyfriend "somehow knew that there was stuff happening," and asked her about it. The victim eventually told her boyfriend generally about how Ninh had been touching her and had "used his mouth on" her. Her

boyfriend said that she needed to tell her mother about the abuse, but she did not want to "destroy [her] family." Her boyfriend eventually convinced her, and she wrote her mother a letter stating that Ninh had been touching her, that she understood she should have told her mother sooner, but that she was scared. She testified that she was "afraid that this would do something to our family." She talked to her mother about the note the next day on the drive to school but did not discuss all the details of how Ninh had been touching her. She testified that she wanted to talk to her mom about the note on another occasion, but her mother seemed tired, and she did not want to bother her mother.

On September 7, 2017, the last incident occurred between Ninh and the victim. She testified that at approximately 11 p.m. she was doing her homework in the computer area while simultaneously on a video call with her boyfriend. Ninh came up to her and "grabbed [her] hand" and "pulled [her] over to [another] room." She said Ninh started doing "his routine"—the types of touching he had done with her before—except this time he penetrated her vagina with his penis. She testified that she left her laptop open while on the video chat with her boyfriend, which allowed him to see and hear most of the encounter. The next day, her boyfriend told the victim's mother that he witnessed the sexual encounter between the victim and Ninh the prior evening. Her mother then called the police.

#### *6. The Police Investigation*

On September 8, 2017, in response to the victim's mother's report, local police officer D.K. went to the family's home to investigate. Officer D.K. took various photos of the rooms and items inside the home and talked to the victim in her front yard. Officer D.K.'s Axon body camera recorded the conversation with her, and that footage was played for the jury. The body camera footage showed the victim briefly recount the escalating series of touching she said she experienced between 2013 and 2017. She said that "[Ninh] has violated [her] body." She explained that the abuse "started when [she]

was 13. . . . That was when [she] first came over here" from another country. She stated that she had never had a father figure before Ninh, and when he started touching her, she "did not" have any knowledge of whatever that is. "Like I don't know much because before I came over here the teachers in my country they don't teach that stuff." She explained that she did not understand that Ninh was doing something wrong until he made her promise she would not tell anyone what he was doing.

The victim told Officer D.K. that she "was freaked out" and that she "didn't know what to do" but she could not bring herself to tell her mom. While explaining the incidents to Officer D.K., she said, "[I]t was getting so bad to the point where I was scared to go to sleep, like I stayed up until 1 or 2 in the morning." When Officer D.K. asked her why she had not told her mom about the incidents, she said she was "scared, [she] felt ashamed," and she also "wanted to do anything [she] could to protect the family."

Later that evening, local Detective C.Z. with the Exploited and Missing Children's Unit (EMCU) interviewed the victim, and that interview was recorded and played for the jury. During that interview, she again recounted the various ways Ninh had touched her from 2013 to 2017. The allegations she made to Detective C.Z. tracked the allegations she made in her trial testimony, though the amount of touching and the timeline she told Detective C.Z. varied slightly from her trial testimony.

The victim told Detective C.Z. that Ninh began grabbing her breasts in July 2013. She told Detective C.Z. that she knew she needed to tell her mother about the touching, but she was scared because she had not lived with her mother for so long. Early in the abuse, Ninh was touching her and asked her to promise not to tell anyone what he was doing. She stated she did not know what to do after that request, so she promised him that she would not tell anyone about the abuse. As she got older, Ninh was busier and "wasn't

touching [her] that much" but he was still doing it occasionally, and she believed he touched her breasts and vagina "100 or more" times during 2013.

She told Detective C.Z. that from 2014 to 2015, Ninh started coming into her room at night and would touch her breasts under her shirt and he "started trying to put his finger inside my vagina," but it would hurt and she would pull away. She said Ninh came into her room to touch her breasts and vagina "50 or so" times from 2014 to 2015. She said from 2015 to 2016, Ninh continued touching her breasts and vagina with his hands, but also started using his mouth on her breasts and vagina. She estimated Ninh did this 30 or 40 times during this timeframe. She said Ninh continued coming into her bedroom around the time she started school in 2016 and would touch her breasts and vagina with his hands and mouth. When she started talking to her boyfriend in October 2016, Ninh stopped coming into her bedroom.

During that interview, she told Detective C.Z. that Ninh did not touch her again until September 7, 2017, when Ninh penetrated her vagina with his penis. She did not tell Detective C.Z. that she and her boyfriend had planned for him to see the encounter on their video call but did say that her boyfriend was on a video call during the encounter and likely saw or heard what happened. She said that day after school, her boyfriend told her mother what happened, and her mother called the police.

A sexual assault nurse examiner conducted an examination on the victim late in the evening on September 8, 2017, to note any injuries and collect swabs for potential DNA testing. The nurse said the victim recounted what happened with Ninh the previous night, and then told her about the history between her and Ninh. The swabs were sent to the County Regional Forensic Science Center and were tested for DNA evidence. A forensic scientist with the County Regional Forensic Science Center testified that the DNA profile obtained from a swab of the victim's right breast was consistent with Ninh's DNA profile, meaning Ninh could not be excluded as the source of that DNA.

## 7. *Jury Trial and Sentencing*

The State charged Ninh with the following seven counts:

- (1) Aggravated indecent liberties with a child in violation of K.S.A. 2013 Supp. 21-5506(b)(3)(A), (c)(2)(C), (c)(3), for actions that occurred between August 15, 2013, and May 30, 2014;
- (2) Rape in violation of K.S.A. 2014 Supp. 21-5503(a)(1)(A), for actions that occurred between August 15, 2014, and May 30, 2015;
- (3) Rape in violation of K.S.A. 2014 Supp. 21-5503(a)(1)(A), for actions that occurred between August 15, 2014, and May 30, 2015;
- (4) Rape in violation of K.S.A. 2015 Supp. 21-5503(a)(1)(A), for actions that occurred between August 15, 2015, and May 30, 2016;
- (5) Aggravated criminal sodomy in violation of K.S.A. 2015 Supp. 21-5504(b)(3)(A), for actions that occurred between August 15, 2015, and May 30, 2016;
- (6) Aggravated criminal sodomy in violation of K.S.A. 2016 Supp. 21-5504(b)(3)(A), (c)(2)(A), for actions that occurred between August 15, 2016, and May 30, 2017; and
- (7) Rape in violation of K.S.A. 2017 Supp. 21-5503(a)(1)(A), (b)(1)(A), for actions that occurred on September 7, 2017.

After a five-day trial in January 2020, a jury found Ninh guilty of Counts 1-6 but acquitted Ninh on Count 7. The district court sentenced Ninh to a hard 25 life sentence, running consecutive to five concurrent 165-month prison sentences. Ninh appeals.

## DISCUSSION

Ninh appeals his convictions on four separate grounds, alleging: (1) the Kansas rape and aggravated criminal sodomy statutes are unconstitutional; (2) there was insufficient evidence to support his convictions for rape and criminal sodomy; (3) the State committed reversible prosecutorial error in its opening and closing statements; and (4) the State violated his right to a unanimous verdict.

### I. THE KANSAS RAPE AND AGGRAVATED CRIMINAL SODOMY STATUTES AT K.S.A. 21-5503(a)(1)(A) AND K.S.A. 21-5504(b)(3)(A) ARE NOT UNCONSTITUTIONALLY VAGUE

Ninh argues that the Kansas rape and aggravated criminal sodomy statutes are unconstitutionally vague, and thus his convictions for those crimes must be reversed. The jury convicted Ninh of three counts of rape, which is defined as "(1) Knowingly engaging in sexual intercourse with a victim who does not consent to the sexual intercourse under any of the following circumstances: (A) When the victim is overcome by force or fear." K.S.A. 2021 Supp. 21-5503(a)(1)(A).

The jury also convicted Ninh of two counts of aggravated criminal sodomy, which is defined as "(3) sodomy with a victim who does not consent to the sodomy or causing a victim, without the victim's consent, to engage in sodomy with any person or an animal under any of the following circumstances: (A) When the victim is overcome by force or fear." K.S.A. 2021 Supp. 21-5504(b)(3)(A).

The rape and aggravated criminal sodomy statutes under which the jury convicted Ninh contain substantially similar subsections limiting the defendant's ability to use a lack of knowledge as a defense. Those subsections provide that:

"[I]t shall not be a defense that the offender did not know or have reason to know that the victim did not consent to the sexual intercourse, that the victim was overcome by force or

fear, or that the victim was unconscious or physically powerless." K.S.A. 2021 Supp. 21-5503(e).

"[I]t shall not be a defense that the offender did not know or have reason to know that the victim did not consent to the sodomy, that the victim was overcome by force or fear, or that the victim was unconscious or physically powerless." K.S.A. 2021 Supp. 21-5504(f).

Ninh argues that these subsections render both the rape and aggravated criminal sodomy statutes unconstitutional. Specifically, he claims that these subsections deny him, and any accused, notice that their actions could be criminal, and fail to provide explicit standards for statutory enforcement. See K.S.A. 2021 Supp. 21-5503(e); K.S.A. 2021 Supp. 21-5504(f).

Ninh preserved this issue for appeal by objecting to the inclusion of the "it is not a defense" language in the jury instructions, arguing it was unconstitutionally vague. He also raised this vagueness argument in his motion for a new trial and at the sentencing hearing. In any event, Ninh's constitutional challenge satisfies exceptions to the general prohibition against raising constitutional challenges for the first time on appeal because it involves only a question of law and will be determinative of the case, and review of the claim is necessary to preserve Ninh's fundamental rights. See *State v. Johnson*, 309 Kan. 992, 995, 441 P.3d 1036 (2019) (outlining the exceptions permitting appellate review of constitutional challenges brought for the first time on appeal).

### 1. *Standard of Review*

This court exercises unlimited review to interpret a statute in response to a challenge that the statute is unconstitutionally vague. *State v. Jenkins*, 311 Kan. 39, 52, 455 P.3d 779 (2020). Appellate courts use a two-prong test to determine whether a statute is unconstitutionally vague, first asking whether the statute gives fair warning to those potentially subject to it, and second, whether the statute sufficiently guards against

arbitrary and unreasonable enforcement. In doing so, this court must determine whether a person of ordinary intelligence can understand what conduct is prohibited by the challenged statutory language. 311 Kan. at 53. Kansas courts have long held that a statute will not be declared unconstitutionally vague where "it employs words commonly used, previously judicially defined or having a settled meaning in law." *In re Brooks*, 228 Kan. 541, 544, 618 P.2d 814 (1980). Moreover, this court presumes statutes are constitutional and resolves all doubts in favor of the statute's validity. Ninh, as the party challenging these statutes' constitutionality, bears the burden to overcome this presumption. *Jenkins*, 311 Kan. at 53.

It appears that Ninh's specific argument has not yet been addressed by the Kansas Supreme Court, and whether the challenged language makes the statute vague presents a question of first impression.

## 2. *Vagueness Analysis*

Ninh couches his argument as one alleging statutory vagueness—but in reality, he objects to these criminal statutes creating strict liability offenses. He also does not argue that the statutory language defining the criminal, prohibited conduct uses uncommon, vague, or unclear words such that a person of ordinary intelligence would not understand the prohibited conduct. Instead, he appears to argue the statutes permit arbitrary or unreasonable enforcement because an accused is not permitted to claim lack of notice of "what was in [the victim's] mind" as a defense. Ninh asserts that because the Kansas Supreme Court assumes the rape statute creates a strict liability crime that does not require mens rea, the Legislature's inclusion of the "it shall not be a defense" subsection makes the entire rape and aggravated criminal sodomy statutes unconstitutionally vague. See *State v. Thomas*, 313 Kan. 660, 663-64, 488, P.3d 517 (2021) (finding that the statute criminalizing rape was not required to have a mens rea component, and the Legislature is not prohibited from creating strict liability criminal offenses with lengthy or harsh

sentences). This court sees no difference in Ninh's argument than the one made by the defendant in *Thomas*, which the Kansas Supreme Court rejected.

In *Thomas*, a defendant convicted of rape argued that the "it is not a defense" subsection of the Kansas rape statute effectively made rape a strict liability crime, eliminating the crime's mens rea element and thus violating his due process right to notice. The court rejected Thomas' argument, finding that it was not unconstitutional for the Legislature to adopt strict liability criminal offenses, even when the statute carried a lengthy potential sentence, and the statutes did not violate the defendant's constitutional due process rights. 313 Kan. at 663-64. This court is bound by the precedent in *Thomas*. See *Snider v. American Family Mut. Ins. Co.*, 297 Kan. 157, 168, 298 P.3d 1120 (2013) ("Court of Appeals is duty bound to follow Kansas Supreme Court precedent, absent some indication this court is departing from its previous position").

While Ninh's constitutional objection is not exactly the same as that in *Thomas*, he objects to the same subsections of the rape and aggravated criminal sodomy statutes, claiming they unconstitutionally permit arbitrary and unreasonable enforcement of the crimes. Ninh contends the subsections permit charging someone with rape or aggravated criminal sodomy even if the accused was unaware their sexual partner was overcome by force or fear, thus prosecutors can charge defendants "knowing they do not have to prove the accused knowingly did anything other than have sex or sodomy." This argument holds no merit.

The police may only arrest, and the prosecutors may only charge, a defendant when evidence exists demonstrating the defendant committed the charged crime. The statutes require the State to prove more than the accused merely engaged in sexual intercourse or sodomy with the victim. That is, when the victim did "not consent to the" sexual intercourse or sodomy, and when that "victim is overcome by force or fear." K.S.A. 2021 Supp. 21-5503(a)(1)(A); K.S.A. 2021 Supp. 21-5504(b)(3)(A). While the

prosecutor is not required to prove the accused *knew* the victim did not consent and *knew* the victim was overcome by force or fear, the statute still requires proof that the victim in fact did not consent and was overcome by force or fear. The accused's inability to claim ignorance of the victim's nonconsent or being overcome by force or fear does not relieve the State from having to prove every material element of the crime, including that the victim did not consent and was overcome by force or fear.

The Kansas rape and aggravated criminal sodomy statutes use words commonly known and understood by persons of ordinary intelligence to provide fair warning to those subject to its provisions, and Ninh does not argue otherwise. Rather, he seems to argue that by not permitting a defendant to claim ignorance as to the victim's nonconsent or being overcome by force or fear, permits arbitrary or unreasonable enforcement—but that is a fallacy. To take Ninh's argument to its logical conclusion would prohibit the Legislature from creating strict liability offenses. The statutory language prohibiting the defendant from using ignorance of whether the victim consented or was overcome by force or fear does not negate any of the State's obligations to prove the essential elements of the crime—which Ninh does not object to as being vague—and thus does not permit arbitrary or unreasonable enforcement. This court presumes statutory validity, and Ninh has failed to overcome that presumption.

## II. SUFFICIENT EVIDENCE EXISTED FOR A RATIONAL FACT-FINDER TO CONVICT NINH OF RAPE AND AGGRAVATED SODOMY

Ninh's second claim is that the State presented insufficient evidence that the victim was "overcome" by force or fear because her only expressed fears related to consequences to her family or losing privileges—but not for her own safety. Ninh also argues that none of her alleged fears were reasonable because she never suffered any of the feared harm.

In reviewing the sufficiency of the evidence, this court must review the evidence available to the fact-finder in the light most favorable to the State "to determine whether a rational factfinder could have found the defendant guilty beyond a reasonable doubt." *State v. Aguirre*, 313 Kan. 189, 209, 485 P.3d 576 (2021). In performing this review, the court does not reweigh the evidence or make witness credibility determinations. 313 Kan. at 209.

In a rape case, the court looks to the record as a whole and considers the individual circumstances of each case in determining whether a rational fact-finder could have found beyond a reasonable doubt that an alleged victim was overcome by force or fear. *State v. Borthwick*, 255 Kan. 899, 911, 880 P.2d 1261 (1994). The Kansas Supreme Court has "refused to define in absolute terms the degree of fear required to sustain a rape conviction" because "fear is inherently subjective." *State v. Brooks*, 298 Kan. 672, 685, 317 P.3d 54 (2014) (quoting *Borthwick*, 255 Kan. at 913). A rape victim is not required to demonstrate a particularly high likelihood that the feared outcome would or could result. In other words, the reasonableness of the rape victim's fear is a credibility determination for the fact-finder—not a question of law for this court. See *Borthwick*, 255 Kan. at 904-05.

### 1. *The Victim's Fear of Physical Harm*

First, the record demonstrates that a rational fact-finder could find that the victim experienced fear, rendering Ninh's argument factually and legally inaccurate. The victim testified that she experienced fear for her safety, or that she would be hurt or injured if she refused Ninh's sexual contact. She testified that she was not more forceful in fighting back because "what usually would go through my head if I were to tell him off or something" is that "something might happen to me or my siblings." She also testified that if she told him to stop, she thought he was "going to try to do other things, like force me to do certain things or he'll just—I guess forcefully just do the things that he does to me."

She also agreed that if Ninh did become more forceful, she was concerned she might get hurt or injured. While her physical safety was not her expressed primary or main concern, the law does not require a rape victim to prove they were in constant fear of physical harm, or to demonstrate fear of a particular gravity of physical harm. See *Borthwick*, 255 Kan. at 911 (finding no requirement that a rape victim endure a certain degree of physical violence or "endure a beating or be threatened with a deadly weapon" to show they were overcome by force or fear). Her testimony, although minimal, that she feared if she more aggressively tried to stop Ninh from touching her he would just "forcefully" do it anyway or she would be hurt or injured, was sufficient for a rational fact-finder to determine she was overcome by fear.

## *2. The Victim's Fear of Harm to Her Family Stability*

Not only did the State present evidence that the victim experienced fear for her physical safety, she testified extensively that she feared potential consequences to her social and family stability if she stopped Ninh from abusing her. Specifically, during August 2014 to May 2015, she testified that "[i]t was just constantly me thinking, well, should I tell my mom and entirely break up my family or should I let this happen so that my siblings actually grew up with a father." When she was 16, she explained that the abuse subsided and she thought, "I'm not going to tell mom and nothing big is going to have to happen to my family in that sense at all."

When asked the consequences she feared if she "demanded that those sexual contacts stop happening," she explained:

"You know, in my mind, if I don't do these things, I was scared or afraid that he was gonna either—like, I would just lose my Internet access completely. It was the only thing that was honestly the problem. Like, I guess I wanted to be able to, you know, not just sit in the house and read a book because, you know, I wanted to go on the Internet and watch

movies or YouTube or whatnot. And so that's—I guess it's what I feared that would happen. Like, I would lose my phone, lose my Internet, lose, like, just access to going out to friends or just doing, like, extracurricular activity at school or something like that."

And when asked why she did not fight back, she said, "[I]f I do . . . fight back or say something about it, something might happen to me or my siblings or that was, like, what would—what usually would go through my head if I were to tell him off or something like that."

The victim first moved to the United States when she was almost 13 years old and could not yet speak English. Less than six months after her arrival Ninh began sexually assaulting her. She and her sister reunited with their mother after living in another country with their aunt for the preceding seven years. The victim testified that she previously did not have a father figure and moving in with her mom and Ninh was "a different change" and she "wasn't used to having somebody, like, a father figure in my life just to tell me, you know, this is what you're supposed to do or whatnot." She explained that moving to the United States "there's just entirely different traditions" and "what my family actually do here is different from what we do in [my birth country] and all that stuff, and so it was just odd, I guess." Because fear is subjective, it was not unreasonable under the circumstances, which included the victim's age, length of time she had lived without her mother in her birth country, the amount of time she had been part of her new family structure, the family dynamics, her lack of fluency in English, her lack of experience having a father figure, and her inexperience in the United States, for the jury to find that she feared consequences to her family structure for herself, her siblings, and her social life if she did not permit Ninh to sexually assault, sodomize, and rape her.

### 3. *The State's Evidence that the Victim Was Overcome by Fear*

Having found that the State presented sufficient evidence that the victim experienced fear while being raped and sodomized, the State must also demonstrate she was "overcome" by those fears. Ninh argues there was insufficient evidence the victim was "overcome" because she did not testify that Ninh "held [her] down," "blocked her from leaving," or threatened her with consequences for noncompliance. Ninh also claims that there was no evidence she was "emotionally distraught before, during, or after the incidents," and thus there is no evidence she was "overcome." Ninh claims that even if the victim felt fear, the evidence did not establish she was "overcome" by fear but rather that she "acquiesc[ed]."

Ninh's argument that the victim acquiesced to his sexual acts—rather than being overcome by fear—is unavailing. As a panel of this court noted in *State v. Bishop*, No. 118,896, 2019 WL 2398044 (Kan. App. 2019) (unpublished opinion), to acquiesce is different than being overcome by fear and means "'to agree or consent quietly without protest, but without enthusiasm.'" 2019 WL 2398044, at \*8 (quoting Webster's New World College Dictionary 12 [5th ed. 2014]). Acquiescing to a sexual encounter necessarily requires the acquiescing party to consent—and that consent cannot occur or result from fear or coercion. The victim testified that when Ninh started sexually assaulting her at age 13—within months of moving to the United States to live with her mother and new family after 7 years apart—she feared the familial and social consequences if she stopped or prevented Ninh's acts.

The victim's testimony was sufficient for a rational fact-finder to determine that she was overcome by fear for her safety, family stability, and social interactions because her fear "'[got] the better of'" her or her fear "'overpower[ed],' 'conquer[ed],' and 'subdue[d]'" her. See *Brooks*, 298 Kan. at 691-92 (defining "overcome" in the context of rape charges citing Webster's Third New International Dictionary definition of

"overcome"). Where the victim's testimony that they were overcome by fear is not "so incredible as to defy belief," sufficient evidence exists to present the ultimate determination to the jury. *Borthwick*, 255 Kan. at 913-14.

The jury is permitted to make reasonable inferences from the evidence, and it is important to consider the victim's testimony in the context of the evidence presented to the jury. See *Borthwick*, 255 Kan. at 913-14 (fear is subjective and the reasonableness of that fear may impact the jury's assessment of the victim's credibility). The jury had ample evidence to examine the reasonableness of the victim's fear. It watched multiple video-taped investigatory interviews where her responses were consistent with her trial testimony. Moreover, the police interviews showed a very quiet, young girl who did not speak English as a first language, and who repeatedly expressed fear that if she stopped or prevented Ninh's sexual assaults her family would be broken up, hurt, or destroyed. The jury could reasonably infer from her youth, inexperience having a father figure, inexperience living in the United States, lack of English fluency, recent move into her mother's and Ninh's home after seven years of being away from her mother, and introduction into a new family structure could have made her fear the consequences to her family if she stopped or prevented Ninh from raping and sodomizing her.

Explicit threats of physical harm are unnecessary for a rational fact-finder to determine that a victim was overcome by force or fear sufficient to convict a defendant of rape or aggravated criminal sodomy. In *Brooks*, a jury convicted the defendant of raping J.P., his ex-wife. Brooks went to J.P.'s house that evening and demanded sex. Brooks threatened J.P. that if she did not have sex with him, he would disclose e-mails to her work that she was having an affair with a married coworker. J.P. did not comply at first but eventually let Brooks have sex with her while she hid her face behind her hands and closed her eyes. The Kansas Supreme Court held that this was sufficient evidence J.P. was overcome by force or fear, stating that a "rational factfinder could infer from the facts presented at trial that J.P. clearly feared Brooks would publicize the e-mails if she

did not submit to having sex with him. And because of this fear, she ultimately submitted to having nonconsensual sex with Brooks." 298 Kan. at 690.

A rational fact-finder could determine under the facts of this case that the victim feared for her family, social stability, or physical safety if she refused to submit to nonconsensual sexual contact from Ninh, even without evidence that he made explicit threats to reinforce those fears.

In *Bishop*, the defendant was convicted of four counts of sex crimes against his girlfriend's 16-year-old child, H.C. Bishop argued there was insufficient evidence H.C. was overcome by force or fear because H.C. merely testified that she feared Bishop would leave the family if she did not comply. Similar to Ninh's argument, Bishop claimed this could not constitute reasonable fear because he had never actually physically harmed H.C. or threatened her safety or family stability. 2019 WL 2398044, at \*7-8. But a victim does not need to be threatened to be overcome by fear. Moreover, reasonableness of a victim's fear is not a question for this court but rather a consideration for the jury when making credibility determinations. See *Borthwick*, 255 Kan. at 914. Thus, here, the victim's testimony and statements about her family and her fear provides a sufficient basis upon which the jury could find that she was overcome by fear under the circumstances.

Sufficient evidence existed for a rational fact-finder to find that the victim was overcome by fear while Ninh raped and sodomized her. Because the rape and aggravated criminal sodomy statutes requiring the victim to be "overcome by force or fear" do not create alternative means of the crimes, that finding is sufficient to sustain Ninh's convictions for rape and aggravated criminal sodomy. Therefore, even assuming without deciding that the State failed to show the victim was overcome by force, sufficient evidence still exists to sustain his convictions for rape and aggravated criminal sodomy.

### III. THE STATE COMMITTED ERROR DURING CLOSING ARGUMENTS BUT THE ERROR IS HARMLESS

Ninh claims the State committed reversible prosecutorial error in its opening statement and closing argument by misstating the law, misstating the evidence, stating facts not in evidence, and making inflammatory and distracting statements to the jury.

#### 1. *Preservation and Standard of Review for Prosecutorial Error*

Ninh was not required to object at the district court to preserve his claim for reversible prosecutorial error resulting from statements made during opening statements and closing arguments. However, this court may consider the absence of an objection in its analysis of the alleged error. See *State v. Bodine*, 313 Kan. 378, 406, 486 P.3d 551 (2021).

Appellate courts use a two-step process to evaluate claims of prosecutorial error, first determining whether an error has occurred, and second, weighing any prejudice to the defendant resulting from the error. Prosecutors commit an error when their comments during opening statements or closing arguments fall outside the wide latitude afforded to prosecutors in discussing the evidence and the law. *State v. Sherman*, 305 Kan. 88, 109, 378 P.3d 1060 (2016). Prosecutors' comments fall outside this wide latitude if they misstate the applicable law, misstate the facts in evidence, inflame the prejudices of the jury, or improperly divert the jury's attention. See *State v. Lowery*, 308 Kan. 1183, 1208-09, 427 P.3d 865 (2018) ("A prosecutor should not make statements intended to inflame the passions or prejudices of the jury or to divert the jury from its duty to decide the case based on the evidence and the controlling law."); *State v. Davis*, 306 Kan. 400, 413-14, 394 P.3d 817 (2017) ("A prosecutor 'cross[es] the line by misstating the law,'" and "'a prosecutor's arguments must remain consistent with the evidence.'").

If an error is found, this court must determine whether the error prejudiced the defendant's due process rights to a fair trial—asking whether the State has shown beyond a reasonable doubt that the error did not affect the outcome of the trial, in light of the whole record. *Sherman*, 305 Kan. at 109.

## 2. *Error Analysis*

Ninh asserts that the State committed five different prosecutorial errors during its opening statement and closing argument:

- (1) the State inflamed the jury's prejudices and distracted the jury by discussing what "some rapists" do;
- (2) the State's discussion of what other rapists do was a discussion of things not admitted into evidence;
- (3) the prosecutor inflamed the jury by referring to Ninh as a "rapist";
- (4) the prosecutor misstated the evidence when she asserted that the jury would hear evidence that Ninh put his finger inside of the victim's vagina and that she thought it hurt; and
- (5) the prosecutor misstated the law in her closing argument when she said that Ninh's "form of force was grooming."

### a. *The Prosecutor's Reference to the Types of Force Used by "Some Rapists" Was Not Error*

In the State's closing argument, Ninh claims the prosecutor committed reversible error when she said:

"He's treating her like she's special. She described how that type of touching he would engage in all through her teenage years, it wasn't the type of touching where—you know, *some rapists* are sadists. Some of them cause pain. *Some rapists* use alcohol so a victim

doesn't know or is incapacitated and can't respond back. His form of force was grooming." (Emphases added.)

Ninh argues that what "some rapists" do to overcome a victim by force or fear was irrelevant to his case.

Pointing out what "some rapists" do was not wholly irrelevant to remind the jury there are many ways the crime of rape may be accomplished. Kansas law does not require the victim to be "physically overcome by force" through violence or physical restraint—it requires that the victim did not consent and was overcome by force or fear. *Borthwick*, 255 Kan. 899, Syl. ¶ 7. In this case, the victim was not physically overpowered, injured, or restrained. Therefore, the prosecutor's statements about "some rapists" illustrates the applicable law that those methods are not the only means for committing rape in Kansas. The statements may not have been relevant to Ninh's actions, but they were not irrelevant under Kansas law to demonstrate the range of actions that could satisfy the material elements of Ninh's charges.

Additionally, the prosecutor's statement about the types of force "some rapists" use were all referenced by Detective C.Z. in his trial testimony, where he stated:

"Q: Okay. Force can come in many different styles, many different types?

"A: Yes.

"Q: Grooming behavior, is that one type of force that you've seen used?

"A: Yes.

"Q: You've seen other types of force that include incapacitating someone with alcohol or drugs?

"A: Several times.

"Q: Other types of force may be excessive types of force to the point where the victim of the sexual assault requires genital reconstructive surgery?

"A: I've seen that, yes.

"Q: Okay. So in your training, your experience and your years as a detective with EMCU, you've seen force be applied through many different mechanisms?

"A: Yes."

Ninh did not object to Detective C.Z.'s direct testimony regarding the different types of force used by some rapists. Therefore, Ninh's second claim that the prosecutor's statements about "some rapists" were not admitted into evidence also fails.

b. *The Prosecutor Did Not Repeatedly Refer to Ninh as a Rapist and Did Not Err in Her Comments Regarding Rapists*

Ninh claims that the State erred by "repeatedly calling [him] a rapist," because it was inflammatory and improper. See *State v. Scott*, 271 Kan. 103, 114, 21 P.3d 516 (2001) (the court found it was improper to call the accused a "killer"). While Ninh alleges the State "repeatedly" referred to him as a rapist, the record reveals just one instance where this arguably occurred—in the State's closing argument.

During closing argument, when discussing the DNA evidence found on the victim's right breast, the prosecutor said:

"And when they get investigated, the evidence that is found is the evidence that the defendant, the suspect, leaves behind. *It is the evidence that the rapist leaves behind.* He did away with the evidence by wiping it off of [the victim]. He may not have even ejaculated fully, but ultimately he wiped away whatever evidence was going to be on his body. He wiped away the evidence he thought he had left behind on her body. He forgot . . . he didn't wipe away her breast. He didn't wipe his saliva off of her breast, and ultimately that saliva was preserved and it was intact because [the victim] was wearing the same bra that she had worn prior to the attack . . . ." (Emphasis added.)

Not only was this a single reference to a "rapist," and not "repeatedly" as alleged by Ninh, but it was done in the context of an evidentiary discussion and not as a way to name, identify, or refer to Ninh.

The Kansas Supreme Court has held that a prosecutor's statements referring to a defendant as a murderer based on something other than the evidence presented are improper. See *State v. Scott*, 286 Kan. 54, 80-82, 183 P.3d 801 (2008), *overruled on other grounds by State v. Dunn*, 304 Kan. 773, 375 P.3d 332 (2016). Thus, "a prosecutor may refer to the defendant as a murderer or killer in the course of arguing the evidence shows the defendant committed the murder." *Scott*, 286 Kan. at 81. The court further explained:

"However, where such statements imply the prosecutor believes something other than the evidence shows the defendant to be a murderer, such as the prosecutor's belief the defendant 'looks like a murderer' or has 'cold-blooded killing eyes,' or the statements do not relate to the evidence but are simply made to inflame the jury, such as a comment telling the jurors they are 'eight feet from a killer,' the argument will be held improper." 286 Kan. at 81-82.

To date, it does not appear that the Kansas Supreme Court has analyzed this issue in the context of the term "rapist," but panels of this court have addressed the issue. See *State v. Ahmedin*, No. 105,378, 2012 WL 1919925, at \*4-5 (Kan. App. 2012) (unpublished opinion) (finding no error when the prosecutor called the defendant a rapist in closing argument because the statement was made in the context of arguing the evidence showed Ahmedin committed the rape); *State v. Moore*, No. 100,090, 2009 WL 3630897, at \*2-4 (Kan. App. 2009) (unpublished opinion) (finding error when the prosecutor called the defendant a rapist in closing argument because the defendant was charged with *attempted* rape, not rape, and thus the statement was not based on the evidence).

In *Scott*, the prosecutor during closing argument said, "[Y]ou have about eight feet separating you from the hands of a killer right here." 271 Kan. at 114. There, the prosecutor specifically named, identified, and referred to the defendant as a "killer." And the Kansas Supreme Court held that the comment was inflammatory and improper, especially considering Scott was asserting a theory of self-defense and did not deny he caused the victim's death. 271 Kan. at 114.

Here, Ninh was charged with multiple counts of rape. In her closing argument, the prosecutor said that when investigating a crime, the police look at "the evidence that the rapist leaves behind." She then noted that Ninh used a towel to wipe evidence away from his penis and the victim's vagina, but he failed to wipe away DNA evidence from her breast. During trial, the prosecutor introduced evidence that DNA was found on her breast and Ninh could not be excluded as the source of that DNA. The prosecutor's statement in her closing argument was clearly referring to the specific evidence in the case, the DNA found on the victim's breast, and arguing that evidence showed Ninh's guilt. The prosecutor's statement also went to refute Ninh's general denial of all of the victim's allegations. Had Ninh put forth a defense giving a reasonable explanation for why his DNA might be found on her breast, this would be a closer call. But given the evidence and defense, the prosecutor's statement was not improper or inflammatory and Ninh's third claim of error fails.

*c. The Prosecutor Did Not Misstate the Evidence*

In Ninh's fourth claim of prosecutorial error, he alleges that the prosecutor misstated the evidence in both her opening statement and closing argument when she said that the jury would hear evidence that Ninh put his finger inside the victim's vagina and she thought it hurt. Specifically, Ninh alleges the prosecutor's following statements misstated the evidence:

"She'll describe that he will, when she's 14 years of age, start coming into her room when she's sleeping. *He'll put a finger inside of her vagina. She'll describe that it hurt.*"  
(Emphasis added.)

"We then move to Count 2 and Count 3. . . . Those are both for when she is 14 years of age . . . and that specific conduct that is described in those two counts is the *defendant's finger being inserted into her vagina.*" (Emphasis added.)

"Again, this Count 2 is for rape. . . . *He puts his finger in her vagina.* When she describes this action, she describes that it's in between my labia, massaging with his fingertips. . . . *She also described that it would hurt* so she usually pulled away."  
(Emphases added.)

Ninh contends that the victim did not testify that Ninh penetrated her vagina with his fingers but that he only put his finger "between the skin flaps, i.e. her labia." He also argues that because she testified that the sexual contact was "not ever honestly painful," the prosecutor's statements about her describing Ninh's actions as "hurting" misstated the evidence. Although the testimony could be more clear or consistent, there is some evidence to support the prosecutor's statements.

When describing what Ninh would do with his hands underneath her underwear, the victim testified that Ninh's "finger would go between my *vagina* and he would try to, I guess, massage it." (Emphasis added.) She also testified that "he would just undo my bra and he would start grabbing my breast, and for a couple minutes he'll pull down my pants and he'll start to massage my vagina." At another point, she testified that Ninh would pull ". . . down my pants and start touching my vagina" with his hands and he would "cup around my vagina and then start to run his finger in between and then he started massaging it." When the prosecutor tried to clarify and said, "I want to make sure we're all very clear. When you say finger in between, he would actually insert his finger—" then the victim said, "No" before the prosecutor finished the question. The prosecutor then said, "[I]n between—at least in between the labia?" and she said, "Yes."

Later, the prosecutor again asked, "[H]is finger would go inside those flaps of skin" and she replied, "Yes." The prosecutor then said, "[O]n your—in your vagina?" and she replied, "Yeah." She described how he touched her vagina at this time as "a circular motion, up and down my vagina, not around it." While her testimony might have some inconsistencies, taken as a whole, her testimony sufficiently supports the prosecutor's claims in her opening statement and closing argument that Ninh penetrated the victim's vagina with his fingers.

Ninh argues that the victim's testimony that "[i]t was not painful. It was not ever honestly painful. It was just—I guess it was just buildup in tension and sensation as that—that's what I would feel," demonstrates that the prosecutor's statements that the victim would say it hurt was error. However, Ninh fails to acknowledge the contradictory evidence. The jury saw the victim's interview with Detective C.Z. where she said that between August 2014 and May 2015 when Ninh tried to put his finger in her vagina "it was uncomfortable for me, it was hurting me. So, I usually just pull [*sic*] away when I feel like he's going to do that." There is a difference between nonexistent evidence and contradictory evidence. Where there is evidence that could lead a reasonable fact-finder to conclude something did or did not happen, it is up to that fact-finder—the jury—to weigh the evidence and make that credibility determination. Here, the prosecutor's statements could not be considered a misstatement of evidence in the record because there was evidence in the record that the victim said Ninh's attempts to penetrate her vagina and touching her vagina hurt. Therefore, Ninh's fourth claim of error fails.

d. *The Prosecutor Misstated the Law in Her Closing Argument*

In his final claim of prosecutorial error, Ninh argues that the prosecutor misstated the law in her closing argument when she said that Ninh's "form of force was grooming." Ninh argues that grooming is something that takes place before an offense, while force is something that must be present at the same time as the other elements of the offense—

essentially at the same time as the nonconsensual sexual intercourse or sodomy. Ninh relies on *State v. Akins*, 298 Kan. 592, 606, 315 P.3d 868 (2014), for the proposition that the force must occur at the same time as the sexual intercourse or sodomy. But, as Ninh acknowledges, the error in *Akins* was different than that alleged here. In *Akins*, the prosecutor implied that the defendant's grooming satisfied the specific intent element of his charge of aggravated indecent liberties with a child. Here, the prosecutor argued that Ninh's grooming satisfied the element of "force" in the context of Ninh's general intent crimes of rape and aggravated criminal sodomy. However, the State has failed to provide any legal authority supporting the prosecutor's statement that grooming can constitute a form of force sufficient to sustain a conviction for rape or aggravated criminal sodomy in Kansas.

This court has also found no authority supporting the prosecutor's statement of the law, and as such, the prosecutor's statement that Ninh's "form of force was grooming" was a misstatement of the law and constitutes prosecutorial error. This court must next determine whether this error prejudiced Ninh's right to a fair trial.

### 3. *Prejudice Analysis and Reversibility*

When error is found, this court must next determine whether that error prejudiced the defendant's due process rights to a fair trial. To determine if Ninh was prejudiced in his right to a fair trial, this court considers all alleged indicators of prejudice and determines whether the State has shown beyond a reasonable doubt that the error did not affect the outcome of the trial. *Sherman*, 305 Kan. at 109. The "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.'" 305 Kan. at 109 (quoting *State v. Ward*, 292 Kan. 541, Syl. ¶ 6, 256 P.3d 801 [2011], *cert. denied* 565 U.S. 1221 [2012]).

Ninh claims the prosecutor's statement about grooming as force prejudiced him because it was one of the last statements she made in her closing argument. The State cannot show the jury did not rely on "grooming" as force for its verdict. While it is true that the prosecutor made the grooming statement toward the end of her rebuttal closing argument, that was her only reference to grooming as a form of force and it came after she made arguments about Ninh's other forms of force and fear.

In her closing argument, the prosecutor discussed multiple other types of "fear or force" that supported the charges. In the State's initial closing argument, the prosecutor identified evidence demonstrating the victim felt "force or fear," such as when "[s]he grabs his hands and moves them off of her body," or when "[s]he pushes his hand down off of her breast," or when she "moved away . . . stood up . . . walked away." The prosecutor said "[t]hese are all actions that are communicating . . . describing and she is showing the defendant that she's not okay with this form of contact." The prosecutor also discussed the victim's testimony and interviews where she expressed fear of not submitting would break up her family, would harm her siblings, or cause her to lose social access to her peers. The prosecutor also suggested that Ninh's measure of force was "playing on her fears of a broken family" and his "parental authority." The primary evidence of the victim being overcome by force or fear related to her fear of her family breaking up or suffering, her siblings suffering, facing social consequences, Ninh's persistence in his physical actions, and her fear that Ninh would "forcefully just do the things that he does to me" if she resisted more.

Reviewing the record as a whole, the amount of the nongrooming force or fear evidence shows that there is no reasonable doubt that the State's error did not affect the outcome of Ninh's trial, and thus such error was harmless.

#### IV. THE STATE DID NOT VIOLATE NINH'S CONSTITUTIONAL OR STATUTORY RIGHT TO A UNANIMOUS VERDICT

Ninh's final claim asserts that he was denied his right to a unanimous verdict in violation of his Sixth Amendment rights, his section 5 rights under the Kansas Constitution, and K.S.A. 22-3421. He argues that the State did not provide sufficient evidence for the jury to agree to a unanimous verdict on any of his convictions such that he is entitled to reversal on all six convictions.

##### 1. *Preservation and Standard of Review for Unanimity Challenges*

This court generally does not review claims seeking reversal on constitutional grounds that are brought up for the first time on appeal. *State v. Daniel*, 307 Kan. 428, 430, 410 P.3d 877 (2018). Ninh raised the unanimity challenge in his motion for a new trial under the Sixth Amendment to the United States Constitution and K.S.A. 22-3421 but did not argue a violation of section 5 of the Kansas Constitution below. This court recognizes several exceptions to the general prohibition that, when applicable, can be asserted to permit review of a constitutional objection for the first time on appeal. Those exceptions include circumstances when the claim involves only questions of law and is finally determinative of the case, or when resolution of the claim is necessary to prevent the denial of fundamental rights. See *Johnson*, 309 Kan. at 995. Ninh argues that his section 5 argument should be heard for the first time on appeal under both exceptions. This court agrees and will address Ninh's unanimity challenge under the Sixth Amendment, K.S.A. 22-3421, and under section 5 of the Kansas Constitution Bill of Rights.

Ninh had a statutory right to a unanimous jury verdict. K.S.A. 22-3421; see *State v. Santos-Vega*, 299 Kan. 11, 18, 321 P.3d 1 (2014). Additionally, the United States Supreme Court held that the Sixth Amendment right to a jury trial in federal criminal

cases should be incorporated, via the Fourteenth Amendment, to state criminal prosecutions thus extending the Sixth Amendment right to a unanimous verdict in federal criminal proceedings to state court criminal defendants. See *Ramos v. Louisiana*, 590 U.S. \_\_\_, 140 S. Ct. 1390, 1396-97, 206 L. Ed. 2d 583 (2020). While the Kansas Supreme Court has not yet addressed whether the Kansas Constitution provides similar protections post-*Ramos*, prior panels of this court have presumed so, and this court finds no reason to disagree. See *State v. Spackman*, No. 122,021, 2021 WL 4929156, at \*4 (Kan. App. 2021) (unpublished opinion) ("[T]here is a right to unanimous jury verdicts in criminal cases grounded in [section] 10 of the Kansas Constitution Bill of Rights and, perhaps, in [section] 5.").

When a defendant asserts a violation of their right to a unanimous jury verdict, an appellate court must first determine whether it is presented with a case involving multiple acts. This determination presents a question of law over which appellate courts exercise unlimited review. *Santos-Vega*, 299 Kan. at 18. If the case involves multiple acts,

"the appellate court must then determine whether error was committed because either the State must have informed the jury which act to rely upon for each charge during its deliberations or the district court must have instructed the jury to agree on the specific criminal act for each charge in order to convict. The failure to elect or instruct is error."  
299 Kan. at 18.

If the appellate court finds an error, it then determines whether the error was harmless or requires reversal, using the constitutional harmless standard for constitutional claims and the statutory harmless standard for statutory claims. See *Lowery*, 308 Kan. at 1235; *Sherman*, 305 Kan. at 109; *Santos-Vega*, 299 Kan. at 18.

## 2. *Unanimity Analysis*

The facts are clear, and the State concedes that it presented evidence of multiple acts for each of Ninh's six convictions. So, this is a multiple-acts case, and this court moves to the next step of the analysis—whether an error occurred in instructing the jury about what to rely upon for each charge.

The district court issued a multiple acts instruction for each of Ninh's six convictions that the jury "must unanimously agree upon the same underlying act" for each of Counts 1-6. This court must presume the jury followed these instructions. See *State v. Gray*, 311 Kan. 164, 172, 459 P.3d 165 (2020) ("[W]e presume jury members follow instructions."). Because the district court "instructed the jury to agree on the specific criminal act for each charge in order to convict," Ninh cannot show error arose from the district court's actions. See *Santos-Vega*, 299 Kan. at 18.

Next, Ninh claims that despite the multiple-acts instruction, the State violated his right to a unanimous verdict because of "the way in which the State chose to present its case." Ninh asserts that even with the unanimity jury instructions, the State did not provide enough evidence of each encounter between the victim and Ninh for the jury to unanimously agree on the underlying acts for each conviction. This is essentially a recitation of Ninh's claims challenging the sufficiency of the evidence.

A panel of this court addressed a similar argument in *State v. Hunt*, 61 Kan. App. 2d 435, 503 P.3d 1067 (2021). In *Hunt*, the defendant was convicted of two counts of aggravated indecent liberties with a child. Hunt appealed, asserting the State violated his right to a unanimous verdict under the Sixth Amendment, section 5 of the Kansas Constitution, and K.S.A. 22-3421 because one count dealt with multiple-acts evidence—the victim testified about a specific sex act and alleged it occurred on six different occasions within a certain time span. Just as Ninh asserts, Hunt argued that the State did

not provide any evidence for the jury to differentiate between the alleged instances of misconduct, such that the jury could not have unanimously agreed on any given incident. The *Hunt* panel addressed this argument as follows:

"Hunt's case is typical of many cases alleging the defendant committed a sex act against a child. The child can often describe the sex act but is unsure of the time frame or how many times the act occurred. Unless the State presents evidence of separate and distinct acts that could cause jurors to disagree on which act supports the charge, there is no jury unanimity issue.

"But even if count two can somehow be analyzed as a multiple acts crime, the district court instructed the jurors that they 'must unanimously agree upon the same underlying act.' Hunt cannot have it both ways. If the State's evidence did not separate and distinguish the acts supporting count two, then there is no jury unanimity issue. But if the State's evidence was presented in a way that could have caused jurors to disagree on which act supported the charge, then the jurors were instructed to unanimously agree on the act. . . . Either way, the State's prosecution of count two did not violate Hunt's constitutional and statutory rights to a unanimous verdict." 61 Kan. App. 2d at 446.

Like the defendant in *Hunt*, Ninh cannot have it both ways. If this court accepts Ninh's argument that the State did not provide enough evidence to separate and distinguish the victim's multiple allegations supporting each of Ninh's individual convictions, then a true multiple-acts issue did not exist and there was no violation of Ninh's right to a unanimous verdict. However, if this court accepts Ninh's assertion that the State's evidence was presented in a way that the jurors could disagree as to which of the multiple acts supported each charge, then the multiple-acts instruction attached to Counts 1-6 cured any potential unanimity issues.

Ninh's unanimity argument is less rooted in a traditional multiple acts challenge and is more akin to a challenge of the sufficiency of the testimony supporting his convictions for Counts 1-6. He argues that the victim's testimony regarding the dozens

and dozens of sexual assaults was not specific enough for the jury to have unanimously agreed on the underlying acts supporting each conviction. A panel of this court addressed a similar argument in *State v. Spackman*, No. 122,021, 2021 WL 4929156, at \*4 (Kan. App. 2021) (unpublished opinion). In *Spackman*, the defendant was convicted of six felony sex crimes against a child but argued on appeal that the victim's testimony "was so nonspecific the jurors could not have reached a constitutionally permissible unanimous verdict." 2021 WL 4929156, at \*2. Similar to Ninh, Spackman's defense at trial was that the incidents did not occur and the child was making the allegations up. The *Spackman* panel addressed the argument as follows:

"We feel adrift in navigating Spackman's constitutional argument. The jurors had to resolve a credibility contest between L.S. and Spackman and did so in favor of L.S. If believed, L.S.'s testimony established physical acts on Spackman's part that entailed sexual contact proscribed under the applicable statutes. L.S. described where the acts took place and identified Spackman as her abuser. Although the abuse involved repeated instances of the same sort of conduct, that does not amount to a constitutional defect in the State's proof. Spackman has not satisfactorily explained why we should treat it that way. A putative victim's unusually generic testimony about the charged criminal conduct might open a line of attack on [their] credibility and a closing argument urging the jurors to find a reasonable doubt about what really happened. But that's far different from a constitutional defect requiring reversal of a conviction for lack of jury unanimity. Spackman hasn't crossed that threshold." 2021 WL 4929156, at \*4.

As in *Spackman*, the jury in this matter had to resolve a credibility determination between Ninh and the victim, and clearly did so in favor of the victim. While her testimony lacked some specificity, it was clearly sufficient to establish that Ninh engaged in physical acts with her that were prohibited under each applicable statute and which occurred during the timespans alleged by the State for each individual count. The victim described the numerous sexual acts, testified where the acts took place, estimated how many times the acts occurred, and identified Ninh as the abuser each time. At trial, Ninh had the opportunity to question the reliability of those statements, and effectively did so

as to the count for which the jury did not convict him. Ninh cannot now rely on a claim of unspecified testimony to create a unanimity issue requiring reversal. Ninh's final claim of error fails.

#### CONCLUSION

A jury convicted Ninh of one count of aggravated indecent liberties with a child, three counts of rape, and two counts of aggravated criminal sodomy stemming from his abuse of the victim over the course of four years—and this court finds no reversible error with the charged statutes, sufficiency of the evidence, prosecutorial error, or unanimity of the verdict. Ninh's convictions are affirmed.

Affirmed.