NOT DESIGNATED FOR PUBLICATION

No. 123,837

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

BILLY I. DUPREE,
Appellant.

MEMORANDUM OPINION

Appeal from Wyandotte District Court; DANIEL CAHILL, judge. Opinion filed March 3, 2023. Convictions affirmed and sentence vacated in part.

Randall L. Hodgkinson, of Kansas Appellate Defender Office, for appellant.

Brian Deiter, assistant district attorney, *Suzanne Valdez*, district attorney, and *Derek Schmidt*, attorney general, for appellee.

Before HURST, P.J., BRUNS and GARDNER, JJ.

HURST, J.: A jury convicted Billy Dupree of robbery, criminal restraint, and possession of methamphetamine all stemming from a long, erratic day involving accusations of adultery, drugs, threats, and marital strife—most of which Dupree captured on video. Based on the jury's convictions, the district court sentenced Dupree to 130 months' imprisonment and ordered him to register as a violent offender for 15 years. On appeal, Dupree contends that numerous trial errors warrant reversal of his convictions. Finding his arguments for reversal unavailing, this court affirms his

convictions. However, as to the sentencing requirement that Dupree register under the Kansas Offender Registration Act (KORA), this court finds error and vacates the district court's KORA sentence.

FACTUAL AND PROCEDURAL BACKGROUND

While the facts supporting Dupree's convictions are reminiscent of a salacious script, the underlying circumstances are not uncommon to criminal cases before this court. Billy Ivan Dupree and his wife, T.B., had five children and were experiencing severe financial hardship in the summer of 2019. These financial conductions resulted in them being kicked out of their residence and living in hotels. Unfortunately, their financial desperation led the couple to consider having T.B. engage in sex work in exchange for money. According to Dupree, he and T.B. had a relationship that had been marred by infidelity and drug use.

T.B. developed the idea of turning to sex work when she met a man on a dating application, M.C., who offered to pay her for watching him masturbate and to let him perform certain sex acts on her. At trial, Detective Tim Fowler of the Kansas City Police Department later described M.C. as a "slow-minded person" who was looking to lose his virginity. After some negotiations, M.C. eventually arranged to pay T.B. $120 for sex and saved her contact information as "V card taker" in his cellphone. Although Dupree testified that he was not comfortable with the arrangement, he eventually agreed to the plan to obtain money for additional hotel nights for their family.

On July 12, 2019, Dupree drove T.B. to M.C.'s apartment intending to wait in the parking lot while his wife engaged in sex acts with M.C. The meetup did not go as planned. Once inside the apartment, M.C. attempted to perform sex acts with T.B. for a short period, but due to his braces T.B. felt the action seemed "kind of weird and unusual." Because M.C. was unable to perform as agreed, T.B. left his apartment after

about 10 minutes. The factual accounts differ as to whether M.C. actually paid T.B. for the uncompleted sexual encounter that evening. At trial, M.C. testified that he did not pay T.B., but Dupree testified that he and his wife used the money M.C. paid her to get a hotel room in Overland Park that night.

The day after the encounter between T.B. and M.C., Dupree was upset about the encounter so he began looking through T.B.'s text messages. Dupree discovered that his wife planned to return to M.C.'s apartment to get more money. Dupree confronted his wife about this plan, and the couple argued. Dupree testified that he took the keys to his wife's truck and went back to M.C.'s apartment where he knocked on M.C.'s door at about 11 p.m. but left when it appeared that M.C. was not home. Dupree confirmed that he got high on methamphetamine and then returned to M.C.'s apartment at 2 a.m. to ask about T.B.'s actions the night before. This time M.C. answered, Dupree introduced himself, and he explained that his wife had been at the apartment the day before and got money from a man. M.C. responded that he was not aware T.B. was married. Dupree questioned M.C. about T.B.'s visit the night before and asked to see their text messages so he could use them to get a divorce. M.C. was compliant; "I did not hand [the phone] over to him, I let him see it." M.C. told Dupree that he briefly performed oral sex on T.B.

At Dupree's request, M.C. called T.B. using his phone, but Dupree testified that when his wife answered, she hung up when she heard Dupree speak. T.B. did not answer when M.C. called her again. M.C. testified that after they called T.B., Dupree took M.C.'s phone from him and continued to look through his texts with T.B. However, Dupree testified that M.C. simply gave Dupree the phone. According to M.C., he felt "more intimidated" when Dupree took his phone, and Dupree became more "hostile" and "aggressive" after reviewing the texts and "implied that we need to go see his wife." M.C. agreed to accompany Dupree to the hotel "[b]ecause [M.C.] felt as though [he] was becoming powerless" and "had a lack of control of the situation." M.C. testified that

although Dupree never specifically verbally threatened him, Dupree's "tone of voice was threatening . . . ."

Dupree testified that he told M.C. they should not drive his wife's truck back to Overland Park because he thought his wife had reported it as stolen. Instead, they got into M.C.'s car and M.C. drove them to T.B.'s hotel. During this drive, Dupree rode in the passenger seat and filmed the activities on M.C.'s phone. He periodically recorded the evening's events throughout the rest of the encounter. On the way to the hotel, Dupree frequently shouted about his wife and asked M.C. details of their encounter the previous evening; M.C. remained silent, except when directly prompted by Dupree. The bulk of the video footage shows Dupree continuously yelling about his wife's alleged infidelities, at one point exclaiming "I can legally divorce her with God, if you want a divorce! This is the proof that I needed! This is the proof God was waiting on me to get!"

Once they arrived at the hotel, Dupree told M.C. to get out of the car. As they walked to T.B.'s hotel room, Dupree—who was filming a video and narrating using M.C.'s phone—mentioned M.C. and then said that he did not want to show him on camera because "he's kinda scared." M.C. testified that Dupree attempted to use his keycard to open the hotel room door, but it did not work. Instead, he knocked and T.B. opened the door and immediately demanded the keys to her truck and the couple began arguing outside the hotel room. In one of the videos, T.B. told Dupree that M.C. seemed scared, and Dupree responded, "He's scared of me because I've done been to his house." Eventually, T.B. threatened to call the police and accused Dupree of stealing her truck, and Dupree began shouting at her about prostituting herself. M.C. remained silent during the argument and testified that he thought about trying to get away from Dupree and T.B. but thought the "odds of success were relatively low" and that Dupree would catch him. After arguing with his wife for several more minutes, Dupree told M.C. that it was time to go, and they returned to M.C.'s car.

M.C. testified that after leaving the argument with T.B., Dupree's demeanor was "still very hostile, still very aggressive," and he "seemed even more upset." In M.C.'s opinion, Dupree was "becoming increasingly upset, and it often seemed like he could lash out at any moment." The videos Dupree recorded on M.C.'s phone during the drive show that Dupree was noticeably paranoid—repeatedly talking about people following them and repeatedly shouting about T.B.'s alleged infidelities. M.C. testified that as they drove towards M.C.'s apartment, Dupree told M.C. to stop at a bank and to withdraw money for him because it was M.C.'s fault that T.B. had cheated on him and Dupree wanted to get the money that M.C. owed his wife.

M.C. testified that at the bank, he tried to convince Dupree that he did not have any money in his account, but Dupree responded, "I know you got more than $100 in your bank, bro." In one of Dupree's videos, M.C. can be seen counting out bills while Dupree tells him to "keep it going, keep it going. That's $110.00, let's check your account." Dupree continued to yell at M.C. to check his bank account balance and demand more money. He then told M.C. "I don't give a fuck about going to jail. If I wanted to go to jail, I'd put hands on you. And I ain't did that." Dupree recorded video of M.C. using the ATM and Dupree can be heard asking M.C. about the balance in his account. After M.C. told Dupree his account balance, Dupree said,

> "I need that! Get that out! Get all that out. I need that! I need all that out! . . . Get that money, bro! Get that money. You owe her that! And she owes me. We are processing your transaction. This motherfucker better not mess up dawg! Better not fuck up homie!"

In the video, M.C. told Dupree that "I'm just trying to get myself out of this situation," but Dupree began yelling over him. Dupree replied that M.C. would be free to go once he had the proof he needed about his wife's infidelity.

In all, Dupree took $430 from M.C. Dupree testified that he did not threaten M.C. to get the money, but rather "compelled" him, by saying "more, more, more, you know, compelling him, okay, just like I compelled him to get the money out of the ATM." M.C. testified that he gave Dupree the money "[b]ecause he told me he wanted it" and he agreed that Dupree did not threaten him at the bank. M.C. explained that while this was happening, "I didn't want to do anything that would cause him to become violent. . . ."

After handing over about $430, M.C. tried to convince Dupree to let him go home and to end the ordeal. But Dupree shouted: "What you did was fuckin illegal! Do you know who my uncle is?" In the video, Dupree then implied that M.C. could either help him or go to jail for soliciting prostitution. When M.C. continued to resist Dupree's demand to drive back to the hotel, the videos show that Dupree angrily yelled, "I'm gonna beat your ass then!" M.C. responded that Dupree already had his phone and that he could take his car—Dupree then screamed "No, I'm not stealing your car!" In a frustrated tone, M.C. can be heard telling Dupree that he had given Dupree everything he had and that he had nothing left. Dupree then told M.C. to drive him back to M.C.'s apartment so he could get T.B.'s truck, but that he would be risking getting pulled over for driving the truck. Dupree then told M.C. that he would keep M.C.'s phone but would return it later because he needed the videos as evidence.

Searching for a way out of the situation, M.C. testified that he suggested M.C. could get Dupree an Uber or that Dupree could get himself an Uber. But when those suggestions did not work, M.C. "implied that if he used my car to go then he didn't need me to tag along." On the video, Dupree then repeatedly told M.C. "I'm not gonna steal your car. You're letting me use your car right?" M.C. responded, "I'm letting you use it." Dupree repeated, "He's letting me use his car, letting me use his phone." Dupree then left M.C. at his apartment and took M.C.'s car, but before leaving he gave M.C. the keys to T.B.'s truck as an "exchangement."

After Dupree left with M.C.'s car, phone, and money, M.C. walked to a nearby police station to report the incident. M.C. testified that he told Detective Fowler that "a person had showed up to my house, they had dragged me around town taking my money and my phone, and they were currently in my car." Detective Fowler testified that M.C. "seemed a bit shaken still . . . from the incident." M.C. told him about the encounter with Dupree and explained that Dupree's tone and demeanor was "very threatening to him and he was scared, he was in fear of his life throughout this whole ordeal. . . . [H]e said he feared for his life so he went along with it so nothing would happen."

M.C. testified that the next morning, Dupree returned to M.C.'s apartment and banged on the door, wanting the keys to T.B.'s truck back. M.C. did not answer the door, but instead called 911 using his roommate's phone and waited for the police to arrive. One of the officers that responded to the call testified that they arrived at the apartment complex and arrested Dupree. The officers searched Dupree and a black bag that he had with him and found $430 in cash, a meth pipe, a bag of methamphetamine, and M.C.'s cell phone and car keys. Dupree told the officers that he was merely returning the items to M.C.

The State charged Dupree with kidnapping, robbery, and possession of methamphetamine. Dupree proceeded to trial. After hearing all the evidence—including Dupree's own testimony—the jury found Dupree guilty of robbery, the lesser included offense of criminal restraint, and possession of methamphetamine. Thereafter, Dupree moved for a new trial on the grounds that the district court had failed to instruct the jury on the lesser included offense of theft for the robbery charge—a jury instruction he did not request during the trial. The district court considered the arguments and concluded that although a theft instruction was legally appropriate—as theft is a lesser included offense of robbery—it was not factually appropriate because the elements of theft were not consistent with the evidence.

At sentencing, Dupree moved for a downward durational departure. The district court denied the motion, noting that Dupree appeared to show no remorse for his actions and posed a threat to the community. The district court found Dupree's criminal history score to be A—to which Dupree did not object. The court then sentenced Dupree to 130 months' imprisonment followed by 36 months of postrelease supervision, utilizing the robbery conviction as the primary offense and running the two other sentences concurrent. The court further ordered that Dupree register as a violent offender for 15 years based on his criminal restraint conviction.

Dupree appeals.

DISCUSSION

On appeal, Dupree claims that

(1) the evidence was insufficient to support his robbery conviction;

(2) the robbery instruction was clearly erroneous;

(3) the court's failure to give a lesser included offense instruction was clearly erroneous;

(4) the court's failure to give a unanimity instruction was clearly erroneous;

(5) cumulative error deprived him of his right to a fair trial; and

(6) the court erred by requiring him to register as a violent offender.

I. THE STATE PRESENTED SUFFICIENT EVIDENCE TO SUPPORT DUPREE'S ROBBERY CONVICTION

Dupree contends the State failed to present sufficient evidence supporting his robbery conviction because he gained possession of M.C.'s property without the use of force or any threat of bodily harm. When a defendant challenges the sufficiency of the evidence, an appellate court reviews all the evidence at the jury's disposal in a light more

favorable to the State and asks whether a rational fact-finder could have found the defendant guilty beyond a reasonable doubt. *State v. Chandler*, 307 Kan. 657, 668, 414 P.3d 713 (2018). In such cases, "there must be evidence supporting each element of [the] crime." *State v. Kettler*, 299 Kan. 448, 471, 325 P.3d 1075 (2014). The State's evidence need not be copious. If the State presented *some* evidence to support every element of the charged crime, this court must uphold the conviction. See *Chandler*, 307 Kan. at 668; *State v. Burton*, 235 Kan. 472, 476, 681 P.2d 646 (1984) ("[I]f the essential elements of the charge are sustained by any competent evidence the conviction must stand."). Circumstantial evidence can sufficiently support a verdict so long as "it permits the factfinder to draw a reasonable inference regarding the fact(s) in issue." *State v. Banks*, 306 Kan. 854, 859, 397 P.3d 1195 (2017); *State v. McClelland*, 301 Kan. 815, 820, 347 P.3d 211 (2015) ("'A conviction of even the gravest offense can be based entirely on circumstantial evidence and the inferences fairly deducible therefrom.'"). This court will not reweigh the evidence, resolve evidentiary conflicts, or make determinations about the credibility of witnesses. *State v. Lloyd*, 299 Kan. 620, 632, 325 P.3d 1122 (2014).

To support Dupree's robbery conviction, the State was required to prove that Dupree knowingly took property from the person or presence of another, that the taking was made by force or by threat of bodily harm, and that the act occurred in Wyandotte County. K.S.A. 2019 Supp. 21-5420(a); PIK Crim. 4th 54.400 (2012 Supp.). A robbery conviction—unlike theft—requires the State to demonstrate that the defendant's use of force or threat of bodily harm preceded or occurred contemporaneously with the taking from the victim. *State v. Bateson*, 266 Kan. 238, Syl. ¶¶ 1, 2, 970 P.2d 1000 (1998). Dupree focuses his sufficiency argument solely on the forcible element of the crime, claiming the State failed to show that he took M.C.'s property by force or threat of bodily harm. Dupree maintains that he peaceably gained possession of M.C.'s property. Here, there is no dispute that Dupree did not rely on physical force to take M.C.s' phone, car, or money; and the State's case rested solely on Dupree threatening M.C. into submission.

While the robbery jury instruction used the phrase "by threat of force," this sufficiency of the evidence discussion will refer to the statutory language of "threat of bodily harm." Dupree's objection to the jury instruction is addressed below. See K.S.A. 2022 Supp. 21-5420(a) (defining robbery as "knowingly taking property from the person or presence of another by force or by threat of bodily harm to any person"). In determining whether there is evidence of a threat of bodily harm to a victim during a robbery, this court examines the evidence from the victim's point of view "including what the victim reasonably perceived as well as whether the defendant intended [the defendant's] conduct to intimidate or threaten the victim into giving up [the victim's] property." *State v. Moore*, 269 Kan. 27, 33, 4 P.3d 1141 (2000). Such a threat does not have to be explicit, or even verbalized. 269 Kan. at 33.

In *Moore*, the Kansas Supreme Court upheld a conviction for robbery where the defendant and two accomplices backed a car towards the victim's car in a remote parking lot, approached the victim and her boyfriend, and said "Give me your keys." 269 Kan. at 28. The victim complied, and the defendant stole the stereo out of her car. The victim later admitted that the defendant had not actually threatened her and he did not appear to have a weapon—but she nevertheless felt threatened and scared during the encounter. After examining the record, the *Moore* court concluded that the defendant had "orchestrated a situation intended to intimidate the young woman into surrendering her car keys" and that "[t]he victim's surrender of the keys was not a voluntary act." 269 Kan. at 33. A robbery can occur when the defendant takes the victim's property even when the defendant never verbalizes an express threat or an "or else" warning. 269 Kan. at 33. In *Moore*, the defendant's statement or request—"Give me your keys"—was sufficient to constitute a threat of bodily harm when viewed through the victim's subjective reaction under the circumstances of the situation. Other panels of this court have utilized the same victim-centric analysis in addressing sufficiency challenges to the threat of bodily harm element of robbery. See *State v. Burris*, No. 106,617, 2013 WL 1729223, at *6-7 (Kan.

App. 2013) (unpublished opinion); *State v. Dilliehunt*, No. 95,679, 2008 WL 440493, at *2 (Kan. App. 2008) (unpublished opinion).

Dupree breaks down the encounter into the three items of property listed in the State's complaint—M.C.'s phone, money, and car. Dupree claims he took all of M.C.'s items peaceably. See *Bateson*, 266 Kan. at 246 (holding no robbery occurred where defendant gained peaceable possession of the property and used no violence except when resisting arrest or escaping). While Dupree may have never explicitly threatened to physically harm M.C. in order to obtain his property, and did not brandish a weapon, neither is required for his actions to constitute a robbery under Kansas law. There can be no mistake that during this entire ordeal, Dupree consistently presented an intimidating, volatile, hostile, and threatening presence, which resulted in M.C. having concerns for his personal safety and reluctantly acceding to Dupree's various demands for M.C.'s property.

Dupree committed robbery when he took M.C.'s cellphone.

Dupree took M.C.'s cellphone and then used it to record various videos throughout the incident. M.C. testified that Dupree—whom he had never met before—showed up at his apartment unannounced late at night and immediately began talking about M.C.'s sexual encounter with T.B. Dupree demanded to see M.C.'s text messages with T.B., so M.C. showed him the messages but "did not hand [the phone] over to him." Although Dupree claimed that M.C. willingly gave him the cellphone, M.C. testified that Dupree took the phone. M.C. described the encounter as quickly becoming "more hostile," that Dupree became "more aggressive," and M.C. felt "more intimidated." M.C. testified that he felt intimidated "mostly because he took my phone," which made M.C. feel "as though [he] was becoming powerless." While some may have done more to prevent Dupree from taking their phone, M.C. was reasonably intimidated and threatened when a stranger showed up at his door late at night while he was home alone, accused him of sleeping

with the stranger's wife, and angrily demanded proof of the affair. Although Dupree never threatened M.C. with a weapon, and at this point had made no explicit threats, M.C. felt concern for his safety in the presence of Dupree's aggressive demeanor. After obtaining M.C.'s phone, Dupree then kept it throughout the encounter, and Dupree's actions and intimidating presence escalated resulting in an increase in M.C.'s feelings of fear.

Dupree committed robbery when he took M.C.'s money.

After confronting T.B. at her hotel room, Dupree told M.C. to go to an ATM to withdraw money for Dupree in exchange for the alleged sex acts performed by T.B. the night before, and because it was M.C.'s fault that T.B. cheated on Dupree. M.C. testified that Dupree became even more hostile and aggressive as they drove toward the bank. The videos that Dupree recorded using M.C.'s phone show him shouting about his wife's infidelities and blaming M.C. for the situation. At the ATM, Dupree reached a new level of intimidation, telling M.C. that he did not care if he went to jail and implying that he could hurt M.C. if he wanted to: "I don't give a fuck about going to jail. If I wanted to go to jail, I'd put hands on you. And I ain't did that." Dupree then continued shouting at M.C. to show him his account balance and yelling "I need that! Get that out! Get all that out. I need that! I need all that out! . . . Get that money, bro! . . . This motherfucker better not mess up dawg! Better not fuck up homie!" Although Dupree's threats did not explicitly invoke the "or else" language, the function of the threats rather than form is important here. His statements were tantamount to an "or else" statement or threat and achieved the desired effect—that M.C. give Dupree his money. See *Moore*, 269 Kan. at 33 (finding the defendant orchestrated a situation intended to intimidate the victim into complying with his demands without use of explicit threats). Faced with these threats and an increasingly volatile Dupree, M.C. again acceded to Dupree's demands, emptied his bank account, and handed over the cash. While Dupree testified that his actions were merely intended to "compel" M.C. to give him all the money from his bank account, this distinction does not

support Dupree's argument that his actions could not have been perceived as a threat of bodily harm. Dupree did not specifically state that he would harm M.C. if M.C. did not empty his bank account—but no one can say that Dupree was *not* threatening M.C.

Dupree committed robbery when he commandeered M.C.'s car.

Finally, after taking all of M.C.'s money and continuing to use his phone, Dupree demanded that M.C. drive him back to T.B.'s hotel. M.C. tried to avoid going along with this demand and suggested Dupree get a ride-share and offered to find him a ride, but Dupree "wouldn't really listen to reason." Eventually, after acquiescing, M.C. pleaded with Dupree that he wanted to stop driving Dupree around and needed to go home, and Dupree shouted, "I'm gonna beat your ass then!" M.C. responded that Dupree had already taken his phone and he could also take his car—Dupree screamed "I'm not stealing your car!" In the video, Dupree tried to frame the taking of M.C.'s car as borrowing it, as though they were friends or acquaintances doing each other favors, and he even offered M.C. the keys to his wife's truck. Dupree then filmed himself shouting, "He's letting me use his car, letting me use his phone!" Not surprisingly, these proclamations do not eliminate the actual circumstances of the situation or diminish M.C.'s reasonable fear of Dupree that made him willing to do anything to extricate himself from the situation—including offering to let Dupree take his car. M.C. explained that he was trying to avoid being physically harmed by Dupree; "I didn't want to do anything that would cause him to become violent." Dupree gained possession of M.C.'s car by orchestrating a situation with an underlying threat of bodily harm. Dupree's erratic, intimidating, aggressive behavior and threatening statements caused M.C. to comply with his demands to try and get out of the situation and avoid being harmed. See *Moore*, 269 Kan. at 33 ("A reasonable person would not ordinarily surrender his or her car to a stranger under such circumstances unless he or she feels threatened or intimidated.").

M.C. testified that Dupree had not explicitly, verbally threatened him with bodily harm or weapons, and on cross-examination he agreed that he did not acquiesce to Dupree's demands because of a verbalized threat of physical harm. However, M.C. also testified that Dupree was becoming increasingly upset throughout the ordeal and that he thought that Dupree may "lash out at any moment." He said Dupree was "hostile" and "aggressive" and described his tone of voice as "threatening." M.C. testified that "the way [Dupree] had his shoulders risen up I could tell that he was ready to ball his fists and start becoming aggressive." The video also showed Dupree yelling, "I'm gonna beat your ass then," during the encounter. Detective Fowler testified that when he interviewed M.C. hours after the ordeal, M.C. was still visibly shaken, telling the detective that "he was in fear of his life throughout this whole ordeal. . . . [s]o he went along with it so nothing would happen." M.C.'s word choice and somewhat vague description of the encounter might be illuminated by Detective Fowler's testimony that M.C. did not seem particularly astute, and required Fowler to ask questions in an easily understandable manner. Regardless of the reason, any inconsistencies in M.C.'s testimony were presented to the jury who listened to his testimony, watched the videos of the incident recorded by Dupree, and ultimately determined that Dupree deprived M.C. of his property by threats of force or bodily harm. This court will not reweigh the jury's assessment of the witnesses' credibility. *Chandler*, 307 Kan. at 668.

The evidence supports the jury's determination that Dupree deprived M.C. of his property through threats of bodily harm. Although Dupree did not make any overt threats or use a weapon, when viewing the situation from M.C.'s perspective and in a light more favorable to the State, a rational fact-finder could have found that M.C. felt intimidated and threatened into relinquishing his phone, money, and car.

II. THE DISTRICT COURT DID NOT COMMIT CLEAR ERROR IN ITS ROBBERY JURY INSTRUCTION

Dupree next claims that the district court gave the jury a legally erroneous instruction on the charge of robbery because it listed "threat of force" rather than "threat of bodily harm" as a necessary element of the offense. Jury instruction No. 10 for robbery stated:

> "To establish this charge, each of the following claims must be proved:
>
> "1. The defendant knowingly took property from the person of [M.C.].
>
> "2. The taking was by threat of force to [M.C.].
>
> "3. This act occurred on or about the 13th day of July, 2019, in Wyandotte County, Kansas."

But the pattern jury instructions use different language for the second element: "[t]he taking was by threat of bodily harm." PIK Crim. 4th 54.400 (2012 Supp.). This court analyzes claims of jury instruction errors using a three-step process to determine whether: (1) there is a lack of appellate jurisdiction or a failure to preserve the issue for appeal; (2) the instruction was factually and legally appropriate; and (3) any error requires reversal. *State v. Crosby*, 312 Kan. 630, 638, 479 P.3d 167 (2021).

Dupree concedes that he did not make a contemporaneous objection to the robbery jury instruction at trial. Thus, the district court was not given the opportunity to correct or prevent any error, and this court may only reverse on this issue if the robbery jury instruction was clearly erroneous. *State v. Tahah*, 302 Kan. 783, 793, 358 P.3d 819 (2015). An instruction is clearly erroneous if this court is firmly convinced that the jury would have rendered a different verdict if the error had not occurred. K.S.A. 2022 Supp. 22-3414(3); *State v. Williams*, 308 Kan. 1439, 1451, 430 P.3d 448 (2018). Dupree carries the burden to establish the necessary error and prejudice. *Crosby*, 312 Kan. at 639. Before

examining reversibility, however, this court must first determine whether an error occurred. *State v. McLinn*, 307 Kan. 307, 318, 409 P.3d 1 (2018).

There is no question that the robbery jury instruction was factually appropriate, and the question for this court is whether the instruction was legally appropriate. This court exercises unlimited review over whether the opposed jury instruction was legally appropriate. *State v. Plummer*, 295 Kan. 156, 161, 283 P.3d 202 (2012). To determine if a jury instruction is legally appropriate, this court considers whether the instruction properly and fairly stated the law as applied to the particular facts of the case and whether the instruction given could have reasonably misled the jury. *State v. Bernhardt*, 304 Kan. 460, 469, 372 P.3d 1161 (2016). District courts have a duty to "'define the offense charged in the jury instructions, either in the language of the statute or in appropriate and accurate language of the court'" as well as to "'inform the jury of every essential element of the crime that is charged.'" *State v. Butler*, 307 Kan. 831, 847, 416 P.3d 116 (2018).

Although not required, the Kansas Supreme Court has long recommended that district courts use the pattern jury instructions in the PIK as they are developed by knowledgeable committees and offer "accuracy, clarity, and uniformity to instructions." *Butler*, 307 Kan. at 847; *State v. Appleby*, 289 Kan. 1017, Syl. ¶ 20, 221 P.3d 525 (2009) (noting that absent a need to modify an instruction based on the particular facts of a case, PIK instructions and recommendations should be followed). Unfortunately, here the district court did not utilize the PIK instruction for robbery. See PIK Crim. 4th 54.400 (2012 Supp.). Nor did it use the language from the robbery statute Dupree was charged with violating. K.S.A. 2019 Supp. 21-5420(a). Instead of listing the element as "by threat of bodily harm," the district court's jury instruction described the element as "by threat of force." Thus, the robbery instruction given by the district court did not accurately inform the jury of the exact elements of the offense of robbery under K.S.A. 2019 Supp. 21-5420(a).

The State counters that the robbery instruction fully and accurately instructed the jury of the elements of the offense and that any difference between the phrases, "threat of bodily harm" and "threat of force" is immaterial. In support of this contention, the State accurately notes that panels of this court have utilized the phrase "threat of force" interchangeably with the actual statutory language. See *State v. Edwards*, 299 Kan. 1008, 1014, 327 P.3d 469 (2014) ("The robbery statute requires only a forcible taking."); *State v. Sutherland*, 248 Kan. 96, 103, 804 P.2d 970 (1991) ("If a robbery instruction was unnecessary, a theft instruction was unnecessary because there was no question for the jury as to whether the threat of force was used."); *State v. Ziegler*, No. 118,213, 2018 WL 4517523, at *4 (Kan. App. 2018) (unpublished opinion) ("[W]hen looking at whether a robbery happened in Kansas, the only two things that matter are whether (1) the offender used force or threatened to use force (2) to take property or anything of value, tangible or intangible, from another person."). Despite using the phrase "threat of force," none of these cases actually addressed the question before this court—whether "threat of force" fairly states the offense of robbery, and whether the phrase could have reasonably misled the jury.

Perhaps because the meaning of the term is commonly known, "bodily harm" is not defined in the robbery statute. See K.S.A. 2022 Supp. 21-5420(a). Additionally, the phrase is not defined in any other similar criminal statute. Black's Law Dictionary defines "bodily harm" as "[p]hysical pain, illness, or impairment of the body." Black's Law Dictionary 861 (11th ed. 2019). Whereas "force" is defined as "[p]ower, violence, or pressure directed against a person or thing" and "actual force" is defined as "[f]orce consisting in a physical act, esp. a violent act directed against a robbery victim. — Also termed *physical force.*" Black's Law Dictionary 787 (11th ed. 2019). When defining "bodily harm" for purposes of the aggravated kidnapping statute, the Kansas Supreme Court developed a definition that seems to include elements of force and bodily harm, and found that "[b]odily harm [means] any touching of a victim against (the victim's) will, with physical force, in an intentional, hostile, and aggravated manner, or the

projecting of such force against the victim by the kidnapper." *State v. Taylor*, 217 Kan. 706, 714, 538 P.2d 1375 (1975). "Threat" is defined within the criminal statutes as "a communicated intent to inflict physical or other harm on any person or on property." K.S.A. 2022 Supp. 21-5111(ff). Thus, when comparing the phrase "threat of force" and "threat of bodily injury," both indicate a communicated intent to inflict unwanted physical touching or physical harm.

Dupree contends that "threat of force" is broader than "threat of bodily harm." He argues that one may threaten force without intimating bodily injury such as by threatening to hold a person down, and may threaten bodily injury without force, such as by threatening a poisoning. While "threat of force" and "threat of bodily harm" do not have exactly the same meaning, the differences between both the commonly understood meanings and the legal definitions of the terms are not legally significant in the context of robbery. The phrases are legally synonymous in the context of this case. Thus, the use of the phrase "threat of force" did not mislead the jury here when the statute required a "threat of bodily harm." See *Kansas v. Carr*, 577 U.S. 108, 122, 136 S. Ct. 633, 193 L. Ed. 2d 535 (2016) ("The reality is that jurors do not 'pars[e] instructions for subtle shades of meaning in the same way that lawyers might.'"). While it would have undoubtedly been preferable if the district court had given the jury the precise statutory language of the offense or used the PIK, the challenged instruction fairly apprised the jury of the essential elements of robbery and was therefore legally appropriate and not an error.

However, even had the district court's failure to use the precise statutory language of the offense failed to appropriately inform the jury of the essential elements of robbery—such error was not clear error. Dupree carries the burden to firmly convince this court that the jury would have reached a different verdict had the instruction properly delineated the elements of the offense. *State v. Williams*, 295 Kan. 506, 516, 286 P.3d 195 (2012); *State v. Daniels*, 278 Kan. 53, 57, 91 P.3d 1147 (2004). Therefore, if this court "concludes beyond a reasonable doubt that the omitted element was uncontested

and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error," then the omission did not constitute clear error. *Daniels*, 278 Kan. at 62.

Dupree contends that because the instruction did not require a threat of *bodily* harm, the jurors could have believed that "threat of force" to M.C.'s property—rather than M.C.'s person—was sufficient grounds for conviction. However, Dupree's argument on appeal is inconsistent with the facts presented to the jury. There is no evidence in the record that Dupree made threats of force to M.C.'s property, or that M.C. expressed fear of harm to his property if he failed to comply. Rather, M.C. testified that he feared for his personal safety, and felt powerless and afraid because he believed Dupree could physically hurt him if he did not comply—not because Dupree threatened his property. M.C. testified that he "didn't want to do anything that would cause [Dupree] to become violent." Even assuming the robbery instruction was legally erroneous, there is overwhelming evidence that M.C. was under threat of bodily harm and no real possibility that the jury misunderstood the meaning of "threat of force" in the manner Dupree asserts. See e.g., *Daniels*, 278 Kan. at 62-63 (finding omission of the element of bodily harm from jury instruction for aggravated robbery was harmless error where the element was supported by overwhelming evidence). Even if the instruction had used the statutory language, Dupree's intentional, repeated, and orchestrated intimidation of M.C.—including yelling he would "beat [M.C.]'s ass then"—leaves no doubt that the jury would have convicted Dupree of robbery. Having neglected to object to the jury instruction at trial, Dupree fails to establish the robbery jury instruction was an error and thus failed to establish it was clearly erroneous.

III. THE DISTRICT COURT DID NOT COMMIT CLEAR ERROR BY FAILING TO GIVE A LESSER INCLUDED OFFENSE INSTRUCTION OF THEFT FOR THE ROBBERY CHARGE

Dupree raises another jury instruction error on appeal, claiming the district court erred by not including a lesser included offense instruction of theft for the robbery charge. Once again, Dupree did not raise the matter at trial to afford the district court the opportunity to consider the issue. However, after the jury rendered its verdict, Dupree did file a motion for a new trial based on the district court's failure to include a lesser included offense instruction for theft, and the district court denied the motion, finding a theft instruction was factually inappropriate under the circumstances. On appeal, the State concedes that a theft instruction would have been legally appropriate, but maintains that its inclusion would have been factually inappropriate because the evidence of Dupree's threats towards M.C. were overwhelming.

As above, to address this claim of instructional error, this court must first consider whether Dupree preserved the issue, then consider whether an error occurred. And if an error did occur, this court must address whether it requires reversal. Because Dupree did not object to the lesser included offense issue at trial, even though he addressed it in his motion for a new trial, this court must analyze the issue under the same clear error standard. *Crosby*, 312 Kan. at 638.

A jury instruction for a lesser included offense should be given "[i]n cases where there is some evidence which would reasonably justify a conviction of some lesser included crime as provided in subsection (b) of K.S.A. 2022 Supp. 21-5109, and amendments thereto, the judge shall instruct the jury as to the crime charged and any such lesser included crime." K.S.A. 2022 Supp. 22-3414(3). It is well settled that "[a] district court has a duty to instruct the jury on any lesser included offense established by the evidence, even if that evidence is weak or inconclusive." *State v. Nelson*, 291 Kan. 475, Syl. ¶ 1, 243 P.3d 343 (2010). Additionally, when considering whether a lesser included

offense instruction should have been provided to the jury, this court must consider the evidence in the light more favorable to the defendant. *McLinn*, 307 Kan. at 324-25.

The statutory language for theft includes:

> "any of the following acts done with the intent to permanently deprive the owner of the possession, use or benefit of the owner's property or services:
> "(1) Obtaining or exerting unauthorized control over property or services;
> "(2) obtaining control over property or services, by deception;
> "(3) obtaining control over property or services, by threat;
> "(4) obtaining control over stolen property or services knowing the property or services to have been stolen by another; or
> "(5) knowingly dispensing motor fuel into a storage container or the fuel tank of a motor vehicle at an establishment in which motor fuel is offered for retail sale and leaving the premises of the establishment without making payment for the motor fuel." K.S.A. 2022 Supp. 21-5801.

As explained above, there was sufficient evidence for the jury to find, which it did—that Dupree intimidated M.C., causing him to worry for his physical safety and accede to Dupree's demands for his property—a conclusion sufficient to support his conviction for robbery. However, when viewing the evidence in a light more favorable to Dupree, it is possible that reasonable jurors could also have found there was not sufficient evidence of a threat of "bodily harm" and, therefore, that Dupree was only guilty of theft. Accordingly, a lesser included offense instruction was legally and factually appropriate under the particular circumstances of this case, and the district court's failure to include the instruction was error. See K.S.A. 2022 Supp. 22-3414(3). However, the district court's error in failing to give a theft instruction was not *clearly* erroneous—which is the applicable standard of reversibility under these circumstances.

When a defendant fails to object to a jury instruction error at trial, this court will only reverse when it is firmly convinced that the jury would have reached a different result—by convicting Dupree of theft rather than robbery—had the error not occurred. See *McLinn*, 307 Kan. at 326. Although the district court erred by not providing the jury with a lesser included offense instruction, the fact that a rational jury *could* have found Dupree guilty of theft does not mean that they *would* have convicted him of theft rather than robbery.

Here, the evidence of Dupree's threatening, aggressive, volatile behavior was overwhelming. In addition to M.C.'s testimony about his fear for his safety and his concern that Dupree might lash out at him at any moment, the jury also watched the numerous videos, which displayed the bizarre and hostile nature of Dupree's actions towards M.C. during the ordeal—including his statement that he would "beat [M.C.'s] ass then." This unnerving footage supported the jury's conclusion that Dupree's actions constituted a robbery and directly cut against Dupree's arguments, both at trial and on appeal, that M.C. simply decided to hand over his property. Even if the jury had doubts about whether Dupree's actions constituted threats of bodily harm, any weakness in the evidence of "threat of bodily harm" is not substantial enough to carry Dupree's burden of reversal on appeal. Even when viewed in a light more favorable to Dupree, including Dupree's testimony that he intended to "compel" M.C. to relinquish his property, the evidence presented at trial does not demonstrate that the jury would have chosen to convict him of theft rather than robbery had the lesser included instruction been given. Dupree cannot meet the clearly erroneous standard of reversal because the evidence presented at trial and his argument on appeal do not firmly convince this court that the jury would have found him guilty of the lesser included offense of theft had the instruction been given.

IV. THE DISTRICT COURT DID NOT COMMIT CLEAR ERROR BY FAILING TO GIVE UNANIMITY INSTRUCTIONS

In his final claim of instructional error, Dupree argues that the district court erred by not providing a unanimity instruction. Dupree argues the State alleged several possible acts that could have constituted the crimes of robbery and criminal restraint, and thus such an instruction was required to ensure the jury agreed about which acts constituted the crimes.

In analyzing Dupree's instructional error claim, this court must first consider whether Dupree preserved the issue, then whether an error occurred, and finally, if such an instruction should have been given, determine whether the failure to give it requires reversal. See *Crosby*, 312 Kan. at 638. Again, Dupree failed to request a unanimity instruction at trial and failed to object to its omission from the final jury instructions. Therefore, the clear error standard applies, and this court will only reverse the district court if it is firmly convinced that the jury would have reached a different verdict had the error not occurred. See K.S.A. 2022 Supp. 22-3414(3).

The next question is whether the State presented a multiple acts case regarding the robbery and criminal restraint charges. If so, a unanimity instruction was required. See *State v. Cottrell*, 310 Kan. 150, 155, 445 P.3d 1132 (2019). "A criminal defendant has a statutory right to a unanimous jury verdict" when multiple acts are alleged, and providing the unanimity jury instruction protects the unanimity of a jury's verdict. *State v. Cheffen*, 297 Kan. 689, 695, 303 P.3d 1261 (2013). In a case involving multiple acts where no unanimity instruction is given, a jury might convict a defendant without unanimous agreement on which act constituted the charged crime. *Cottrell*, 310 Kan. at 154-55.

However, a unanimity instruction is only required when the defendant's conduct constituted separate and distinct acts. Whether a case presents a multiple acts issue is a

question of law over which this court has unlimited review. *State v. King*, 297 Kan. 955, 981, 305 P.3d 641 (2013); *State v. Voyles*, 284 Kan. 239, 244, 160 P.3d 794 (2007). In resolving this issue, this court must examine "the defendant's conduct to determine if the alleged acts are separate and distinct from one another or part of a single continuous course of conduct," because "[i]f the incidents in question are not legally or factually separate, there are not multiple acts." *King*, 297 Kan. at 980. In other words, "a multiple acts problem requires evidence of 'separate incidents that independently satisfy the elements of the charged offense.'" *Cottrell*, 310 Kan. at 156; see *State v. Sanborn*, 281 Kan. 568, 569, 132 P.3d 1277 (2006) ("A unanimity instruction is used when the State charges one crime *but relies on multiple acts to support that one crime*." [Emphasis added.]). Accordingly, this court "must determine 'whether jurors heard evidence of multiple acts, each of which could have supported conviction on a charged crime[.]" *Cottrell*, 310 Kan. at 155.

Although there is no definitive test for whether a defendant's conduct constitutes one act or multiple acts, Kansas courts examine four factors to make the determination, including whether (1) the acts occurred at or around the same time; (2) they occurred at or near the same location; (3) a causal relationship exists between the various acts, in particular whether there was an intervening event; and (4) a fresh impulse motivated some of the acts. *King*, 297 Kan. at 981; *State v. Allen*, 290 Kan. 540, 544, 232 P.3d 861 (2010). Dupree contends that both the criminal restraint and robbery convictions were based on separate acts and thus both necessitated a unanimity instruction.

Dupree's acts to restrain M.C. did not constitute multiple acts necessitating a unanimity instruction.

Dupree's actions in restraining M.C. over the course of the evening are based on acts that occurred over an extended period of time but are ultimately factually inseparable. The kidnapping charge and lesser included offense of criminal restraint

encompassed Dupree's continuous conduct from the moment he arrived at M.C.'s door until he finally took M.C.'s car at the end of the encounter. To prove Dupree guilty of the lesser included offense of criminal restraint, the State was required to prove that he "knowingly and without legal authority restrained [M.C.] so as to interfere substantially with his liberty." Although the event occurred over several hours, M.C. was restrained and forced to cooperate with Dupree's demands from the beginning and throughout the duration of the ordeal as there was no point when Dupree relented. The majority of Dupree's restraint of M.C. occurred in M.C.'s car while Dupree forced M.C. to drive him around town. Thus, although the acts occurred over an extended period and across the Kansas City area, the location was mostly within and related to M.C.'s vehicle without cessation, and thus the first two factors weigh slightly in favor of finding unitary conduct.

The third and fourth factors, however, weigh heavily in favor of finding that Dupree's actions were part of a continuous course of conduct. There was no intervening event throughout the evening that stopped or changed the course of Dupree's restraining of M.C. and forcefully requiring him to do his bidding. Dupree's actions and his refusal to let M.C. go throughout the ordeal were all related to the sexual encounter between M.C. and Dupree's wife the night before. There was no evidence of fresh impulse differentiating Dupree's actions and no intervening occurrence that disrupted Dupree's actions or broke up the incident into separate acts. The four *King* factors clearly demonstrate that the criminal restraint charge was not supported by multiple acts, but rather was based on Dupree's continuous conduct throughout the ordeal. Accordingly, the district court did not err by not providing a unanimity instruction for the criminal restraint charge.

Assuming Dupree's robbery of M.C. constituted multiple acts necessitating a unanimity instruction, such failure was not clearly erroneous.

As for the robbery charge, Dupree contends that taking M.C.'s phone, money, and car occurred at separate locations, at different times, and was motivated by different impulses and thus constituted multiple acts for committing robbery. The State disagrees and maintains that Dupree's taking of each item was part of a single continuous incident. The jury instruction merely stated that the jury needed to find that Dupree "knowingly took property" from M.C., and the charging document alleged that Dupree had taken M.C.'s "cash and/or vehicle and/or phone." The evidence presented at trial and the prosecutor's closing statements highlighted that Dupree took each of these three separate pieces of property from M.C. Rather than electing the particular property that would form the basis of the charge, the prosecutor told the jury that the robbery charge could be based on Dupree taking "the car, it can be the phone, and it's the money at that teller machine."

The court analyzes the same four factors to determine if the robbery charge required a multiple acts instruction. Dupree took M.C.'s phone, money, and car at different locations and times during the course of Dupree's restraint of M.C. Dupree took M.C.'s phone while outside of M.C.'s apartment, he took M.C.'s money while they were in M.C.'s car at the bank, and then he took M.C.'s car from the parking lot at M.C.'s apartment. Although these events appear separate and distinct, a clear causal relationship exists between the various acts—Dupree was angry with M.C. and his wife for engaging in sexual acts the night before and wanted to take M.C.'s belongings to somehow fix the situation. While Dupree became more hostile and erratic throughout the ordeal, there were no intervening events or fresh impulses that spurred Dupree's decision to take each of M.C.'s items. Dupree took M.C.'s phone to investigate M.C.'s communications with Dupree's wife related to their sexual interactions, he took M.C.'s money as payment for his wife's sexual acts, and he took M.C.'s car to return to his wife's hotel.

Despite the causal interconnection of the three takings, the totality of the evidence presented to the jury could show that each of Dupree's takings constituted separate acts that could each satisfy the elements of robbery when considered in isolation. Thus, under these circumstances, this court will assume—without deciding—that the State presented evidence of multiple acts that could have supported a robbery conviction and the district court erred by not giving the jury a unanimity instruction for the robbery charge. See *State v. Trujillo*, 296 Kan. 625, Syl. ¶ 1, 294 P.3d 281 (2013).

However, this error does not entitle Dupree to a reversal unless he can firmly convince this court that the jury would have returned a different verdict if the unanimity instruction had been given. See *Trujillo*, 296 Kan. 625, Syl. ¶ 2. Dupree argues the district court's failure to give a unanimity instruction was clearly erroneous because the jury *could* have agreed that a robbery occurred and yet disagreed on which act constituted the taking. However, as explained above the State presented evidence to support each of the three potentially distinct acts that would have sufficed to constitute robbery. There was no question that Dupree took each of the three items. At trial, Dupree's defense was the same as to each taking—that he never threatened M.C. into letting Dupree take the phone, money, and car. But the State disputed Dupree's defense as to each item and M.C. testified that Dupree took each item without authority and that he was in fear for his personal safety throughout the entire encounter. The jury heard this contradictory testimony, viewed the cell phone videos of the encounter, and concluded that Dupree did not act peacefully—this court will not second-guess that credibility determination. See *Chandler*, 307 Kan. at 668. Dupree's only defense was that he peacefully obtained possession of M.C.'s items and this court is not firmly convinced that the jury would have not found him guilty of robbery had the court provided a unanimity instruction informing the jury that it was required to be unanimous as to at least one of the items. Assuming the district court erred in not providing a unanimity instruction for robbery, this court finds such failure was not clearly erroneous and does not warrant reversal.

V. CUMULATIVE ERROR DID NOT DEPRIVE DUPREE OF A FAIR TRIAL

Finally, Dupree argues cumulative error deprived him of his right to a fair trial. This court reviews a claim of cumulative error de novo, looking at the issue anew. *State v. Ross*, 310 Kan. 216, 227, 445 P.3d 726 (2019). When there is no error or only a single error found, there is no error to accumulate and therefore no basis to reverse a conviction. See *State v. Gonzalez*, 307 Kan. 575, 598, 412 P.3d 968 (2018); *State v. Haberlein*, 296 Kan. 195, 212, 290 P.3d 640 (2012). However, when this court finds multiple errors it "aggregates all errors, even if they are individually reversible or individually harmless" to determine if cumulative error occurred. *State v. Taylor*, 314 Kan. 166, 173, 496 P.3d 526 (2021).

This court has identified a single error—the district court's failure to give a lesser included jury instruction of theft—and assumed a second error, the failure to give a unanimity instruction for robbery. So, for cumulative error analysis this court assumes that two trial errors occurred even though neither error was clearly erroneous requiring reversal. When the court finds multiple errors but none of them alone constitute clear error requiring reversal—as is the case here—it must consider "whether the totality of the circumstances substantially prejudiced the defendant and denied that defendant a fair trial." See *Taylor*, 314 Kan. at 173 (finding cumulative error where five errors were identified, requiring reversal). And when, as here, any of the errors being aggregated are considered constitutional, "the constitutional harmless error test" applies, and this court must determine if "the party benefiting from the errors [has] establish[ed] beyond a reasonable doubt that the cumulative effect of the errors did not affect the outcome." *State v. Thomas*, 311 Kan. 905, 914, 468 P.3d 323 (2020).

In determining whether the two trial errors identified here—when neither alone created reversible error—collectively acted to deprive Dupree of a fair trial, this court "examines all the errors in context, considers how the district court dealt with them,

reviews the nature and number of errors and whether they are connected, and then weighs the strength of the evidence." *Taylor*, 314 Kan. at 173. The two trial errors here both related to Dupree's robbery conviction, but they are not connected. That is, they do not accumulate, combine or relate to create greater prejudice to Dupree than they created individually.

As previously explained with regard to the unanimity error—there was overwhelming evidence upon which the jury could have relied to find Dupree guilty of robbery as to at least one of the three identified items. Dupree's general defense was clearly not persuasive, and this court has no doubt that the inclusion of a unanimity instruction would not have altered the verdict. Moreover, the prejudicial effect of the court's presumed error of failing to include a unanimity instruction for robbery does not increase when combined with the court's second error—the failure to include a lesser included offense instruction for theft. The reverse is also true, the prejudice from the court's failure to include the lesser included offense of theft is not increased by the court's failure to include a unanimity instruction for robbery.

The court's failure to include an instruction on the lesser included offense of theft does not compound with or relate to the unanimity error to create such prejudice as to deprive Dupree of a fair trial. When the court finds two or more errors that individually do not rise to the level of the required standard for reversal—here, the standard being clear error—and those errors do not accumulate, combine, or relate to each other in a manner that increases the prejudicial effect on the trial, then the cumulative error doctrine does not apply to effectively reduce the defendant's burden to show clear error for reversal. When multiple trial errors are not individually reversible, and when considered together do not have a cumulative prejudicial effect, this court is convinced beyond a reasonable doubt that the cumulative effect of the errors did not affect the outcome of the trial.

VI. THE DISTRICT COURT ERRED IN REQUIRING DUPREE TO REGISTER AS A VIOLENT OFFENDER.

Dupree also contends the district court erred by requiring him to register as a violent offender. Here, the State agrees with Dupree. KORA requires offenders deemed "violent" to register. See K.S.A. 2022 Supp. 22-4902(a)(2) (defining "'[o]ffender'" to include "violent offender"). Whether Dupree is a violent offender within the meaning of KORA turns on the interpretation of K.S.A. 2019 Supp. 22-4902(e)(1)(H), which is a question of law subject to de novo review. *State v. Marinelli*, 307 Kan. 768, 788, 415 P.3d 405 (2018). Although the district court did not explain its ruling at sentencing, the journal entry of judgment noted that the registration requirement stemmed from Dupree's criminal restraint conviction. In relevant part, KORA defines "violent offender" to include defendants convicted of criminal restraint "except by a parent, and *only when the victim is less than 18 years of age*." (Emphasis added.) K.S.A. 2019 Supp. 22-4902(e)(1)(H). Thus, for Dupree to be deemed a violent offender under KORA, the district court was required to make a finding on the record that M.C. was less than 18 years old at the time of Dupree's criminal restraint of him.

The State concedes that the district court made no finding of fact, and the State presented no evidence that M.C. was less than 18 years old at the time of the incident. Dupree has no obligation to register under KORA unless "some statutorily permitted judicial fact-finding classifies the defendant as an 'offender.'" *State v. Thomas*, 307 Kan. 733, 748, 415 P.3d 430 (2018). Therefore, the district court erred by requiring Dupree to register under KORA and that registration obligation "simply never materialized." 307 Kan. at 749. Accordingly, this court vacates that portion of the district court's sentence requiring Dupree to register under KORA.

CONCLUSION

Dupree forced M.C., a person who was a stranger to him, to drive him around the city for hours while Dupree took his property and threatened him into relinquishing his property. The jury heard the evidence, which was abundant because of Dupree's decision to video record the events with the victim's own cellphone. While Dupree alleged numerous errors on appeal, he failed to make those objections to the district court, and on appeal failed to firmly convince this court that the jury's verdict would have differed had these alleged errors not occurred. Moreover, the two errors assumed by this court did not relate to one another so as to create a cumulative error. However, Dupree correctly claims the district court erred in requiring him to register under KORA. Therefore, the district court's determination that Dupree's criminal restraint conviction required him to register as an offender is vacated, but Dupree's convictions for robbery, criminal restraint, and possession of methamphetamine are affirmed.

Convictions affirmed and sentence vacated in part.