NOT DESIGNATED FOR PUBLICATION

No. 124,238

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

RYAN DAVID REYNOLDS,
Appellant.

MEMORANDUM OPINION

Appeal from Shawnee District Court; DAVID B. DEBENHAM, judge. Opinion filed September 29, 2023. Affirmed.

Corrine E. Gunning, of Kansas Appellate Defender Office, for appellant.

Jodi Litfin, deputy district attorney, *Michael F. Kagay*, district attorney, and *Kris W. Kobach*, attorney general, for appellee.

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

PER CURIAM: The State charged Ryan David Reynolds with two counts of criminal discharge of a firearm at a vehicle, aggravated battery, and criminal damage to property. The State alleged that on the night of November 3, 2017, Reynolds fired a gun at a car containing two people, Cheryl McKinney and John Hickman, and that McKinney sustained bodily harm as a result. The State further alleged that a short time later Reynolds fired his gun at a vehicle containing Cole Lucas. The jury convicted Reynolds of criminal discharge of a firearm at McKinney and Hickman's vehicle, aggravated

battery, and criminal damage to property. The jury acquitted Reynolds of the charge for criminal discharge of a firearm at Lucas' vehicle.

On appeal, Reynolds makes several arguments including prosecutorial error, improper admission of prior bad acts evidence, failure to appoint substitute counsel, multiplicity of crimes causing him to be twice placed in jeopardy, and jury instruction error. Because we find that Reynolds has failed to establish any reversible error, we affirm.

FACTUAL AND PROCEDURAL HISTORY

The following evidence was developed at trial.

McKinney and Hickman were driving to Walmart around 10:45 p.m. on November 3, 2017. McKinney was driving Hickman's vehicle. Someone waved them down so McKinney stopped, thinking the person needed directions or some other kind of assistance. The person who waved them down pulled up next to Hickman's car and asked if they had a problem with his family. The driver then shot a gun at them. At trial, McKinney and Hickman identified Reynolds as the shooter.

McKinney sped away. They stopped at Walmart and called the police to report what happened. While they were waiting for the police to arrive, McKinney felt a burning in her shoulder. Hickman looked and saw that McKinney had a wound. He testified that McKinney "had a round wound on her right shoulder, and we don't know where it came from." He said he "kn[e]w she didn't have it before we left to go to Walmart." McKinney testified that the injury occurred during the shooting.

Hickman described the shooter's vehicle as a blue Suburban with white or silver at the bottom. The Suburban was lifted on large tires. McKinney described the vehicle as a

big vehicle that looked like a Suburban that was dark in color but had a light color at the bottom. Jacqulyn Powell, a witness to the shooting, also went to the Walmart and spoke with police about what she saw. She described the shooter's vehicle as a dark blue or black, lifted SUV.

Cole Lucas, a volunteer firefighter, received a call around 11:30 p.m. on November 3, 2017, that a car had hit a deer in North Topeka. Lucas drove to the site of the collision. While he was driving, a car approached him from behind and glass was blown onto Lucas' vehicle. The vehicle sped in front of Lucas and pulled into a driveway nearby. Lucas proceeded to the collision scene. While Lucas was on the scene, the vehicle from earlier pulled up behind him and Lucas saw the driver. At trial, Lucas identified Reynolds as the driver. After about 45-50 seconds, the vehicle left.

When the glass shattered on his car, Lucas was not really sure what happened. As time passed, Lucas began to develop the belief that he had been shot at. He told a state trooper at the scene of the collision that he thought he had been shot at. He identified the driveway that he saw the vehicle pull into for the trooper. The address was on Northeast 39th Street. And he provided a license plate number to the trooper. Lucas also called 911 to report the incident.

Officers ultimately identified a 1999 Chevy Suburban with a license plate of 457 GSS that matched the descriptions provided by the victims. The vehicle was registered to Reynolds and its registered address was on Northeast 39th Street. Reynolds also owned a GMC Yukon Denali.

The next morning, the police went to the address on 39th Street. Deputy James Landry saw Reynolds outside the house walking to his Denali. Deputy Landry waited and stopped Reynolds' vehicle in the road. Deputy Landry reported that Reynolds acted paranoid and believed that someone was coming after his family. Reynolds was arrested

and interviewed by police. He informed the police that his Chevy had been stolen, but he thought no one listened to him or investigated the theft.

Police located the Chevy Suburban the same morning in North Topeka. The glass of the Chevy's passenger side window was broken. The Chevy and Denali were both taken to a police storage facility and searched. In the center console of the Denali, police found a Taurus Millennium G2 9mm handgun. There were 6 rounds inside the magazine, which had a capacity of 12 rounds, and there was also a round in the chamber of the gun.

Lance Antle, a forensic biologist for the Kansas Bureau of Investigation (KBI), examined swabs of the gun and magazine for DNA. Antle found mixed DNA profiles, one partial major DNA profile and one partial minor DNA profile, from the gun and magazine which looked like a mixture of two people. The partial major DNA profiles aligned with Reynolds' DNA profile.

James Stevens, a firearm and tool mark examiner with the KBI, examined shell casings collected from the site where McKinney and Hickman were shot at. He concluded that the casings were fired from the Taurus gun.

Reynolds testified and denied shooting at the vehicles. He said that on the night of November 3, 2017, he worked until about 9 p.m. After cleaning up, he went to Ryan Drake's house around 10 p.m. to discuss paint colors as Reynolds was planning to paint Drake's house. Drake confirmed that Reynolds came over around 10 p.m. and stayed for about 20 minutes. Reynolds' employee, Jesse Gutierrez, stayed at Reynolds' apartment along with Reynolds' acquaintance Chelsea Brooks.

Reynolds said he returned home about an hour later. Gutierrez wanted to go get drugs, so he and Reynolds left. Brooks stayed at the apartment. Reynolds grabbed one of Brooks' guns before they left, though he said it was not a Taurus.

After visiting three or four locations, they found some drugs. Reynolds said that he and Gutierrez both did "hot rails," which is a method of ingesting drugs by which lines are heated by a hot glass tube and the drug vapor is inhaled through the tube. Then he got a text from Brooks saying that his car was stolen. Reynolds called his mother, Rhonda Reynolds-Parsons, to pick him up. Brooks denied texting Reynolds that his car was stolen. Instead, she said that Reynolds woke her up at 5:30 or 6 a.m. and told her his car had been stolen.

Parsons testified that Reynolds called her sometime between 4 and 5 a.m. and told her that his truck had been stolen. She picked up Reynolds and Gutierrez. Parsons believed Reynolds may have been under the influence of alcohol or drugs because he was acting upset and afraid that someone would hurt his family. Reynolds also had a gun and was waving it around which concerned Parsons. Reynolds insisted on going to Parsons' apartment and checking it to ensure no one was there that would hurt Parsons. He also thought people were following them. Reynolds found no one in his search of Parsons' apartment. Parsons then took Reynolds and Gutierrez to Reynolds' apartment.

When Reynolds got home around 5:30 a.m., he said Brooks was sitting in his Denali in the driveway. He also saw glass on the driveway. Reynolds was still worried that his family was in danger. He got in his Denali and went to his wife's (now ex-wife's) house on Northeast 39th Street where he was ultimately arrested.

The State also introduced K.S.A. 60-455 evidence at the trial regarding a prior shooting involving Reynolds on October 19, 2017. Reynolds' ex-wife, Kayla Reynolds, said that on that day Reynolds dropped their daughter off at her house and then sat outside in his Denali. After about three minutes she heard gunshots and Reynolds quickly left in his vehicle. Kayla believed Reynolds fired the shots because she saw no one else around. Police collected two 9mm shell casings from outside the residence. The casings were fired from the Taurus gun recovered from Reynolds' Denali. At trial, Reynolds

denied firing the gun on that date. But the State introduced testimony Reynolds made in a prior proceeding in which he testified that after dropping his daughter off he saw a Monte Carlo driving up the street so Reynolds "'let off three rounds.'" Reynolds said he "'shot the gun to let him know that I will defend my family.'"

The jury found Reynolds guilty of the first three charges and not guilty of the fourth charge—criminal discharge of a firearm at Lucas' car.

The district court sentenced Reynolds to 130 months' imprisonment for criminal discharge of a firearm, 12 months for aggravated battery, and 6 months for criminal damage to property with all sentences running concurrently. The court ordered that his sentence in this case would run consecutive to his sentence in the other criminal case.

Reynolds timely appealed.

ANALYSIS

I. THERE WAS NO PROSECUTORIAL ERROR IN CLOSING ARGUMENT

The State charged Reynolds with criminal discharge of a firearm at an occupied dwelling or vehicle. Criminal discharge of a firearm is the "[r]eckless and unauthorized discharge of a firearm . . . at a motor vehicle . . . in which there is a human being whether the person discharging the firearm knows or has reason to know that there is a human being present." K.S.A. 2017 Supp. 21-6308(a)(1)(B). A person acts recklessly "when such person consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation." K.S.A. 2017 Supp. 21-5202(j).

In closing arguments, the prosecutor reviewed the evidence supporting the elements of the crimes charged.

> "And, again, and another thing with both Count 1 and Count 4, which is the criminal discharge of a firearm, it is also that this act by the defendant disregarding the risk must be a gross deviation from the standard of care a reasonable person would use in the same situation.
>
> "Now, let's talk about that. I assume and only you guys can answer this, that you, each one of you believes you are a reasonable person. So put yourself into this situation. Would you have shot at Cheryl McKinney and John Hickman on the side of the highway after you believed maybe they had some beef with your family? Would a reasonable person do that? Again, would a reasonable person shoot at Cole Lucas as they were driving down 39th Street? Again, that gross deviation is from the standard care a reasonable person would take. And, again, I would argue that you guys are reasonable. You can put yourself in that situation and see what reasonable person would."

Reynolds argues that the prosecutor's argument was "an improper argument akin to prohibited 'golden rule' arguments that was outside the wide latitude given to prosecutors in arguing the evidence."

A "'golden rule'" argument "is the suggestion by counsel that jurors should place themselves in the position of a party, a victim, or the victim's family members." *State v. Lowery*, 308 Kan. 1183, Syl. ¶ 5, 427 P.3d 865 (2018). Generally, "'golden rule'" arguments are improper because they "encourage[] the jury to decide the case based on personal interest or bias rather than neutrality." 308 Kan. 1183, Syl. ¶ 5.

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

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

Reynolds' argument is not without some merit. The prosecutor did suggest that jurors put themselves in the situation the State alleged Reynolds was in which aligns with the definition of a golden rule argument. Yet when read in context the prosecutor's statement does not raise the concerns that support the prohibition on golden rule arguments. The prosecutor was reviewing the "reckless" element of criminal discharge of a firearm. See K.S.A. 2017 Supp. 21-6308(a)(1). The prosecutor accurately stated the law. The prosecutor also stayed within the facts presented at trial and did not ask the jury to consider anything other than the evidence. Nothing in the prosecutor's statements appears intended to inflame the passions of the jury or introduce personal bias into the jury's decision-making process. To the contrary, the prosecutor was merely asking the jury to do its job, which was to determine whether Reynolds acted in a manner that would constitute a gross deviation from the standard of care which a reasonable person would exercise in the situation. Accordingly, the prosecutor's statement did not rise to the level of being an impermissible "golden rule" argument.

But even if the prosecutor's comments were error, they were harmless. This was an isolated statement which was not repeated. The district court instructed the jurors that "[s]tatements, arguments, and remarks of counsel, are intended to help you in

understanding the evidence and in applying the law, but they are not evidence." The court further instructed the jurors to disregard arguments that are not supported by the evidence. And the point addressed in the prosecutor's statement—whether Reynolds acted recklessly—was not directly contested at trial. Reynolds' defense was that he was not the shooter; he did not argue that he acted reasonably. The lack of prejudice is supported even more because the jury acquitted Reynolds of Count 4—the criminal discharge of a firearm at Lucas' vehicle. There is therefore no reasonable probability that the alleged error affected the outcome of the trial.

II. IT WAS NOT ERROR TO ALLOW THE STATE TO INTRODUCE EVIDENCE OF PRIOR BAD ACTS BY REYNOLDS

Before the trial, the State moved to admit K.S.A. 60-455 evidence. The State wished to introduce evidence that two weeks before the shootings that precipitated this case, Reynolds shot a gun outside of his wife's house. He was driving the Denali in which the 9mm Taurus was located. Two shell casings collected after the shooting matched the Taurus handgun found in Reynolds' possession on November 4, 2017. The district court granted the State's motion, but limited use of the evidence to proving Reynolds' identity. Reynolds argues that the district court erred in permitting the State to introduce this evidence.

K.S.A. 2019 Supp. 60-455(a) provides that "evidence that a person committed a crime or civil wrong on a specified occasion, is inadmissible to prove such person's disposition to commit crime or civil wrong as the basis for an inference that the person committed another crime or civil wrong on another specified occasion." Even so, evidence of prior bad acts may be admitted "when relevant to prove some other material fact including motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident." K.S.A. 2019 Supp. 60-455(b).

In reviewing the admission of prior crimes evidence under K.S.A. 60-455, an appellate court uses a three-step test. First, the court must determine that the fact to be proven by the evidence is material, meaning that the fact shapes the decision in the case. Determining whether the prior crimes evidence is material is subject to de novo review. Second, the reviewing court must determine whether the evidence is relevant to prove a disputed material fact. This determination by the district court is reviewed for an abuse of judicial discretion. Finally, the court must consider whether the probative value of the evidence outweighs its prejudicial effect. This step is also analyzed under an abuse of discretion standard of review. *State v. Claerhout*, 310 Kan. 924, 927-28, 453 P.3d 855 (2019).

A. *The fact to be proven by the evidence was material.*

The district court allowed the State to introduce the K.S.A. 60-455 evidence at issue to prove Reynolds' identity. Reynolds does not dispute that identity was a material fact here. So the district court did not err in this step of the analysis.

B. *The evidence was relevant to prove a disputed material fact—Reynolds' identity.*

Reynolds contends that the evidence of the prior shooting was not relevant to establishing his identity.

Evidence is relevant when it has "any tendency in reason to prove any material fact." K.S.A. 60-401(b). "To establish relevance, there must be some material or logical connection between the asserted facts and the inference or result they are intended to establish." *State v. Gunby*, 282 Kan. 39, 47, 144 P.3d 647 (2006). When a prior act is offered to prove identity,

> "'[T]he evidence should disclose sufficient facts and circumstances of the offense to raise a reasonable inference that the defendant committed both offenses. Similarity must be shown in order to establish relevancy. It is not sufficient simply to show that the offenses were violations of the same or similar statutes; there should be some evidence of the underlying facts showing the manner in which the other offense was committed so as to raise a reasonable inference that the same person committed both offenses. However, the prior offenses need only be similar, not identical, in nature.' [Citation omitted.]" *State v. Wilson*, 295 Kan. 605, 618, 289 P.3d 1082 (2012).

Reynolds contends that the evidence of the shooting two weeks before the crimes here is too dissimilar to be considered relevant. He characterizes the prior shooting as "dropping his daughter off at his house to be with his wife, and, before he drove away, his wife heard three gunshots." He notes that his wife did not see any cars or people in the area when the shots were fired. He characterizes the facts of the current case as waving a car down and indiscriminately firing at the car. He asserts that "[f]iring a weapon outside his former home at no particular target is vastly different from shooting at a vehicle with people in it."

Reynolds minimizes the similarities between the prior crime and the present one. There are several key similarities between the October shooting and the shootings here. First, the same gun was used in both situations. That gun was found in Reynolds' Denali. Second, in both situations there was evidence suggesting that Reynolds fired the gun because he was paranoid that someone might try to harm his family. Finally, in both situations Reynolds denied committing the shooting despite witnesses identifying him as the shooter.

Reynolds compares his case to *State v. Boggs*, 287 Kan. 298, 197 P.3d 441 (2008), but that case is distinguishable. *Boggs* involved nonexclusive possession of marijuana and drug paraphernalia. Charles Boggs was a passenger in a truck driven by Matthew Hockett. Hockett was pulled over on suspicion of driving under the influence of alcohol,

and during the investigation police discovered a multicolored, glass marijuana pipe under the passenger seat where Boggs had been sitting. Hockett said the pipe belonged to Boggs, but Boggs denied it. Both men were arrested, and while being interviewed by police Boggs admitted that he had used marijuana one month before. Before trial, Boggs filed a motion in limine seeking to prevent the State from introducing evidence of Boggs' statement to the police that he had used marijuana about a month before his arrest. The State claimed the evidence of Boggs' prior drug use was relevant to prove his intent to possess the drugs and paraphernalia, his knowledge that the pipe had drugs and constituted drug paraphernalia, and the lack of mistake. The district court denied his motion.

On appeal, the Kansas Supreme Court held that the district court erred because intent, knowledge, and absence of mistake or accident were not material facts at issue in the case. 287 Kan. at 315-16. The only material fact at issue was identity. And evidence that Boggs used marijuana one month before he was arrested did "not raise any inference or provide any details that would lead to a conclusion that Boggs possessed the glass pipe at issue in this case." 287 Kan. at 317. The court believed "[t]he only conceivable connection between the two events is an assumption that because Boggs used marijuana in the past, it was probable that he would use it again in the future and thus possess the pipe." 287 Kan. at 317. Thus, the evidence was "propensity evidence and [wa]s precisely what K.S.A. 60-455 was designed to prevent." 287 Kan. at 317.

If the K.S.A. 60-455 evidence here was merely that Reynolds had fired a gun before, then this case would be more like *Boggs*. But the K.S.A. 60-455 evidence here went beyond that. Not only was there evidence that Reynolds had previously fired a gun, but the evidence showed that it was the same gun used in the crimes charged here and Reynolds shot the gun because he was concerned for the safety of his family. Additionally, Reynolds' prior use of the gun was only two weeks before the crimes here, which is closer in time than the K.S.A. 60-455 evidence offered in *Boggs*.

For these reasons, the district court did not err in finding that evidence of the prior incident was relevant to establishing Reynolds' identity.

C. *The probative value of the evidence outweighed its prejudicial effect.*

Finally, Reynolds contends that the probative value of the evidence does not outweigh its prejudicial effect.

Factors to consider in evaluating the probative value of K.S.A. 60-455 evidence include, among other factors: "how clearly the prior act was proved; how probative the evidence is of the material fact sought to be proved; how seriously disputed the material fact is; and whether the government can obtain any less prejudicial evidence." *State v. Boysaw*, 309 Kan. 526, 541, 439 P.3d 909 (2019). The prior act here was proven clearly, both through testimony from Reynolds' wife and the forensic evidence that the gun fired outside her house was the same gun used in the crimes alleged here and that Reynolds was in possession of when he was arrested. The evidence is probative of identity, the material fact in dispute, because it demonstrated that Reynolds had shot the Taurus when he believed someone was after his family. The identity issue, as recognized by Reynolds, was "the heart of the case." Finally, nothing suggests that the government could obtain less prejudicial evidence.

When evaluating the prejudicial value of K.S.A. 60-455 evidence, courts may consider, among other factors, "the likelihood that such evidence will contribute to an improperly based jury verdict; the extent to which such evidence may distract the jury from the central issues of the trial; and how time consuming it will be to prove the prior conduct." 309 Kan. at 541.

Reynolds contends that the evidence distracted the jury from the central issues of the trial because the crimes sought to be proven at trial were completely unrelated to the

earlier shooting. That said, the testimony on the K.S.A. 60-455 evidence was fairly limited in context of the four-day trial. Reynolds also contends that the admission of the evidence leads to "very confusing interactions during Ryan's testimony in which they worked to discuss this incident without referencing the previous trial in this case or his trial in another case involving his wife." Even so, this confusion should not be attributed to the evidence. Rather, it should be attributed to the fact that Reynolds failed to directly answer the questions that were asked of him, and only the questions that were asked, as well as Reynolds' decision to testify differently than he did in a prior proceeding. When Reynolds offered information damaging to himself that was not responsive to the question he was asked, the district court called counsel to the bench and said that he told Reynolds "to just answer the question that's been asked of him, but, like, on various questions . . . he volunteers way too much more information."

Several factors support the district court's decision that the K.S.A. 60-455 evidence was not unduly prejudicial. The evidence of the prior crime was not nearly as prejudicial as the evidence offered of the crimes charged as the prior crime did not involve shooting at people. And the district court gave a limiting instruction. See *State v. Garcia*, 285 Kan. 1, 19, 169 P.3d 1069 (2007) ("Further, the court properly instructed the jury that the prior crimes evidence could only be considered for the purpose of proving intent and identity, which helps to dampen any prejudicial effect."). And the jury acquitted Reynolds of the charge involving Lucas. See *State v. Reid*, 286 Kan. 494, 512, 186 P.3d 713 (2008) ("Of great importance to the prejudice analysis is Reid's acquittal of the other honesty-based crimes—burglary and theft from the vehicles across the street earlier that same night. Based upon the acquittal, the jury apparently did not view his theft-based firing as prejudicial propensity evidence.").

Reynolds has failed to establish that the district court abused its discretion in admitting the K.S.A. 60-455 evidence. The identity of the shooter was a disputed material fact. The evidence was relevant to proving identity. And the probative value of the

evidence outweighed any prejudicial effect it may have had. Thus, the district court's decision was not erroneous.

III. THE DISTRICT COURT DID NOT ERR WHEN IT DENIED REYNOLDS' REQUEST FOR NEW COUNSEL

Next, Reynolds argues that the district court erred when it denied his request for new counsel before the start of the second trial.

Napoleon Crews was appointed to represent Reynolds for his first trial. But just over one month later, Reynolds filed a pro se motion for ineffective assistance of counsel. Reynolds stated that he had not yet met with Crews and noted that the motions deadline was quickly approaching.

Reynolds asked the court to appoint the attorney who was representing him in a separate, ongoing criminal case in place of Crews. At a hearing on the motion, Crews apologized for not yet meeting with Reynolds but stated that he had been working the case all the same. The district court denied Reynolds' motion. The court allowed an extension of the motion deadline if, after discussion with Crews, Reynolds wished to file additional motions. When the parties reconvened for pretrial two months later, Crews stated that he believed no other motions were required. Even so, he stated that Reynolds did believe additional motions should have been filed and Reynolds was seeking to hire new counsel.

The case proceeded to trial in February 2019, but when the jury was unable to reach a verdict, a mistrial was declared. The case proceeded to a second trial in September 2019.

At the start of the second trial, Crews said that Reynolds was requesting a continuance and that he may wish to terminate Crews' representation of him. Crews described Reynolds' position as, "if he has to fire me, he still wants a continuance. If firing me would get him a continuance, then that's what he wants to do." The court asked for clarification, stating, "Let me understand this. He wants a continuance because he's going to fire you, or he may have to fire you, or what was that?" Crews explained: "There's some evidence that [Reynolds] feels needs to be developed, and he wants time to do that, and if firing me to get someone else to represent him would allow that evidence to be developed, then that's what he wants to do." Crews added that he had discussed the potential evidence with Reynolds but could not confirm that the evidence even existed.

The district court denied Reynolds' request for a continuance. The court reasoned that there had been many hearings and one jury trial in the case and that Crews had looked for the evidence and it did not seem to exist.

Reynolds told the court that the potential evidence was only brought to his attention at the recent trial of a separate criminal case. Reynolds claimed that "it was brought to [his] attention and [his] attorney's attention that some phone records had been deleted off of [his] phone." He started to explain that one of the State's witnesses sent him a text message about his vehicle, but the court interrupted and asked Reynolds where his phone was. Reynolds thought it might be in evidence. Reynolds then said, "[T]he first attorney I had, Maban Wright and Tonda Hill, even spoke of they could find the data, and somebody has deleted the data off of my phone." Reynolds claimed that his attorney in the other criminal case "said that somebody went to Kansas City, where [Reynolds'] phone was, and deleted the data off of my phone." Reynolds also said that the prosecutor in the other case, Jessica Heinen, "told [his] attorney that somebody deleted it." He added that "Heinen said my attorney deleted the records off of my phone." The district court said this was not grounds for a continuance and that Reynolds should have subpoenaed witnesses to support his claim. The court also noted that neither Reynolds nor his

attorney explained what difference the deleted records would make in the case. Reynolds began to speak again, but the district court told him not to interrupt. The court said it had heard his request for a continuance, denied it, and would not debate the matter further.

It was only then that Reynolds asked, "What if I fired my attorney?" The district court replied that Reynolds did not have grounds to terminate Crews' representation. Reynolds said he did, because "there is evidence on my behalf that would help me. And my attorney didn't look into it. Mr. Crews didn't look into it, and I feel that I'm not being represented the way I should be." The court noted that Reynolds had two trials, the mistrial here and a trial in the separate criminal case but he waited until the morning of trial after his request for a continuance was denied to claim that he was unsatisfied with his attorney. The court then said, "We've gone through I don't know how many attorneys in this case, and you were dissatisfied, and I've let them withdraw. I am not going to continue the case today." The court concluded that Reynolds had made his point and it was on the record if he wished to appeal.

Under the Sixth Amendment to the United States Constitution, criminal defendants have the right to effective assistance of counsel during all critical stages of a criminal proceeding. *State v. Pfannenstiel*, 302 Kan. 747, 758, 357 P.3d 877 (2015). Defendants have no right to choose which attorney will represent them. A defendant must show justifiable dissatisfaction with appointed counsel before substitute counsel will be permitted. 302 Kan. at 759. "Justifiable dissatisfaction can be demonstrated by showing a conflict of interest, an irreconcilable disagreement, or a complete breakdown in communication between counsel and the defendant." 302 Kan. 747, Syl. ¶ 3.

When a criminal defendant articulates dissatisfaction with his or her court-appointed attorney, the district court's duty to inquire into a potential conflict of interest is triggered. There are three types of errors that can occur related to this duty of inquiry, each of which is reviewed for abuse of discretion. 302 Kan. at 760. The first type of error

"occurs when a district court becomes aware of a potential conflict of interest between a defendant and his or her attorney but fails to conduct an inquiry." 302 Kan. at 761. The second type of error occurs when the district court conducts an inquiry, but fails to do so appropriately. 302 Kan. at 761. The third type of error occurs when the district court conducts an appropriate inquiry but abuses its discretion in declining to substitute counsel. 302 Kan. at 762. A judicial action constitutes an abuse of discretion if it is (1) arbitrary, fanciful, or unreasonable; (2) based on an error of law; or (3) based on an error of fact. 302 Kan. at 760.

The first question is whether the district court's duty to inquire into a potential conflict of interest was triggered. Failure to conduct an inquiry constitutes an error of law. 302 Kan. at 761. Crews informed the court before the trial began that Reynolds may wish to fire him, and the district court found out about the reasons why. The district court did not abuse its discretion in failing to inquire into the potential conflict of interest.

The second question is whether the district court conducted an appropriate inquiry into the potential conflict. This question is a little harder to answer. "An appropriate inquiry requires fully investigating (1) the basis for the defendant's dissatisfaction with counsel and (2) the facts necessary for determining if that dissatisfaction warrants appointing new counsel, that is, if the dissatisfaction is 'justifiable.'" 302 Kan. at 761. Reynolds argues that the district court's inquiry was not appropriate for several reasons. He asserts "[t]here was minimal inquiry into [Reynolds'] reasons for requesting a continuance and appointment of different counsel." He adds that when he "tried to explain to the court what evidence he wanted investigated and the steps he had taken to get that information, the court dismissed his explanations out-of-hand, placed blame on him personally for not having the evidence, and cut [Reynolds] off when he tried to provide additional information."

The Kansas Supreme Court has held that a single question by the district court can constitute an appropriate inquiry. In *State v. Wells*, 297 Kan. 741, 305 P.3d 568 (2013), Melissa Wells' counsel alerted the court in a hearing before Wells' preliminary hearing that Wells advised him that she did not want him as her attorney. The district court asked Wells why she did not want the attorney to represent her. She replied, "'[B]ecause I had him the last time and I didn't feel properly represented.'" 297 Kan. at 753. The district court denied her request for new counsel because she failed to allege adequate grounds for substitute counsel. The Kansas Supreme Court found that the district court's inquiry was appropriate. The court explained that "Wells' response to the district judge's first question implicated none of the grounds warranting further inquiry—let alone warranting substitute counsel." 297 Kan. at 755.

Here, the district court's inquiry was more expansive than in *Wells*. And, for similar reasons, the district court's inquiry was appropriate under the circumstances.

Through questioning Crews and Reynolds, the district court determined the source of the conflict: Reynolds believed there was evidence that could support his case, but Crews investigated the evidence and could not find anything. "Justifiable dissatisfaction can be demonstrated by showing a conflict of interest, an irreconcilable disagreement, or a complete breakdown in communication between counsel and the defendant." *Pfannenstiel*, 302 Kan. 747, Syl. ¶ 3. Reynolds' allegation did not demonstrate any of these things. See *State v. Jasper*, 269 Kan. 649, 654, 8 P.3d 708 (2000) (finding that defendant's claims did not allege justifiable dissatisfaction where dissatisfaction was based on counsel's inability to find an expert who would testify on her behalf).

There are several other relevant considerations supporting a finding that the district court did not abuse its discretion in declining Reynolds' request for substitute counsel. First, Reynolds' allegations were confusing. He first said someone told him and his attorney in the other criminal case that someone deleted evidence from his phone.

Then he said that this evidence was known by his first attorney, Wright. Wright withdrew in June 2018—over a year before Reynolds' trial. Then Reynolds claimed that Heinen told him the messages were deleted, but directly after that he said that Heinen told him his attorney deleted records off his phone. The district court described Reynolds' allegations as "nebulous" and said it "[did not] even understand what you're talking about."

Kansas courts "impose a threshold burden on the defendant before a district court appoints new counsel . . . A defendant must establish justifiable dissatisfaction with current appointed counsel before substitute counsel is appointed." *Pfannenstiel*, 302 Kan. at 763-64. Reynolds' complaint related to the deleted messages went all the way back to the time when he was still represented by Wright, suggesting his problem was not with his attorneys but with the evidence itself. "[W]hen the defendant's dissatisfaction emanates from a complaint that cannot be remedied or resolved by the appointment of new counsel—such that replacement counsel would encounter the same conflict or dilemma—the defendant has not shown the requisite justifiable dissatisfaction." *State v. Breitenbach*, 313 Kan. 73, 90-91, 483 P.3d 448 (2021). If Wright and Crews could not find the evidence that Reynolds wanted, there is no reason to believe that substitute counsel could.

Furthermore, Reynolds' request for new counsel was couched within a request for a continuance. It was only after the district court denied the continuance that Reynolds asked if he could get a continuance if he fired his attorney. This suggests that the true issue was a desire for a continuance, not justifiable dissatisfaction with Crews.

Another factor the district court considered was the timing of Reynolds' request, made the morning of his second trial. Reynolds provided no reason why his request was made so late. The Kansas Supreme Court has previously approved considering the timeliness of a request for new counsel. *State v. Sappington*, 285 Kan. 158, 170, 169 P.3d

1096 (2007) ("This court has held that a request for substitute counsel made on the first day of trial is not timely."); *State v. Lopez*, 271 Kan. 119, 125, 22 P.3d 1040 (2001) ("Furthermore, because the request for substitution was not made until the morning trial was scheduled to begin, the trial court's action is not beyond the realm of reason."); *State v. Myers*, 62 Kan. App. 2d 149, 168-69, 509 P.3d 563 ("[T]he district court's consideration of the potential delay of appointing new counsel was not necessarily inappropriate."), *rev. denied* 316 Kan. 762 (2022).

One final consideration that the district court stated was, "We've gone through I don't know how many attorneys in this case, and you were dissatisfied, and I've let them withdraw. I am not going to continue the case today." As to this statement, Reynolds argues that "[t]o the extent that the court relied on its belief that [Reynolds] had previously been appointed new attorneys at his request to deny his ultimate request to continue the case and have Crews replaced, the court's decision was guided by factual error and constitutes an abuse of discretion."

The district court's statement does not directly state that Reynolds' previous dissatisfaction with his attorneys led to multiple substitutions of counsel, but it does imply that. The State acknowledges that Reynolds' requests were not the reason his previous attorneys had been removed from the case. The record also supports Reynolds' assertion. One attorney withdrew due to change in employment and another withdrew due to a conflict of interest because her office had once represented a witness in the case. To the extent the district court relied on this as a factor, it is not supported by the record. Even so, there are other factors supporting the district court's ruling, so it cannot be said that the court's final decision amounted to an abuse of discretion.

It was reasonable for the district court to conclude that Reynolds did not demonstrate justifiable dissatisfaction with his attorney. Reynolds' claim was vague. Reynolds' attorney said he investigated the claim. There did not appear to be a problem

that new counsel could fix. The timing of Reynolds' request, made after the denial of a request for continuance and on the first day of trial, also supports the district court's finding. Therefore, the district court did not abuse its discretion in failing to appoint Reynolds substitute counsel.

IV. REYNOLDS' CONVICTIONS WERE NOT MULTIPLICITOUS

Reynolds argues that his constitutional right against double jeopardy was violated because his convictions for criminal discharge of a firearm causing bodily harm and aggravated battery were multiplicitous.

Reynolds did not raise this issue in the district court. Generally, this court does not consider issues raised for the first time on appeal. Still, there are several exceptions to this general rule, including (1) the newly asserted theory involves only a question of law arising on proved or admitted facts and is finally determinative of the case; (2) consideration of the theory is necessary to serve the ends of justice or to prevent denial of fundamental rights; and (3) the district court was right for the wrong reason. *State v. Allen*, 314 Kan. 280, 283, 497 P.3d 566 (2021). Reynolds asserts that the first two exceptions apply. The Kansas Supreme Court has considered a multiplicity argument for the first time in the interest of justice and to prevent denial of fundamental rights. *State v. Gonzalez*, 311 Kan. 281, 295, 460 P.3d 348 (2020). Accordingly, review of this issue is appropriate.

"The Double Jeopardy Clause prevents a defendant from being punished more than once for the same crime." 311 Kan. at 296. Multiplicity occurs when a single offense is charged in several counts of a complaint or information. 311 Kan. at 296. "To establish two convictions are for the same offense, two things must be present: (1) the convictions arise from the same conduct, and (2) by a statutory definition there is only one offense."

311 Kan. at 296. Neither party contests that the first prong of the multiplicity test is met. Reynolds' challenge targets the second prong.

"Convictions for two offenses arising from the same conduct do not violate double jeopardy if each offense requires an element not required by the other." 311 Kan. at 296. Thus, the elements of the statutes forming the basis for Reynolds' convictions should be compared. Reynolds was convicted of criminal discharge of a firearm under K.S.A. 2017 Supp. 21-6308(a)(1)(B) and (b)(1)(C). This statute provides:

> "(a) Criminal discharge of a firearm is the:
>
> (1) Reckless and unauthorized discharge of any firearm:
>
> . . . .
>
> (B) at a motor vehicle, aircraft, watercraft, train, locomotive, railroad car, caboose, rail-mounted work equipment or rolling stock or other means of conveyance of persons or property in which there is a human being whether the person discharging the firearm knows or has reason to know that there is a human being present.
>
> . . . .
>
> "(b) Criminal discharge of a firearm as defined in:
>
> (1) Subsection (a)(1) is a:
>
> . . . .
>
> (C) severity level 5, person felony if such criminal discharge results in bodily harm to a person during the commission thereof." K.S.A. 2017 Supp. 21-6308.

Reynolds was convicted of aggravated battery under K.S.A. 2017 Supp. 21-5413(b)(1)(B). This statute defines aggravated battery as "[k]nowingly causing bodily harm to another person with a deadly weapon, or in any manner whereby great bodily harm, disfigurement or death can be inflicted."

Recently, in *Myers*, 62 Kan. App. 2d at 180, this court examined similar statutes and found that they were not multiplicitous. There, the State charged Anthony Myers with aggravated battery causing great bodily harm and criminal discharge of a firearm at

an occupied dwelling causing great bodily harm. The only difference between the charges in that case and the charges here are the degree of harm sustained by the victim (bodily harm in this case, great bodily harm in *Myers*) and the target of the shooting (a vehicle here, a dwelling in *Myers*). In finding that the crimes had distinct elements, this court reasoned:

> "Under the same elements test, criminal discharge of a firearm has distinct elements that aggravated battery does not, including reckless discharge of a firearm, at an occupied building, and the criminal discharge resulted in great bodily harm. Similarly, aggravated battery contains a distinct element that criminal discharge of a firearm does not: knowingly causing great bodily harm. While Myers is correct that the State had to establish that he caused bodily harm for both offenses, he fails to recognize that for criminal discharge of a firearm the bodily harm is merely a result of his reckless discharge of the firearm. Whereas for aggravated battery, the defendant's causing the great bodily harm is the actus reus: the defendant must *knowingly* cause great bodily harm. Thus, each offense contains a distinct element the other does not, meaning the two convictions are not multiplicitous." 62 Kan. App. 2d at 180.

Reynolds acknowledges the *Myers* decision, but argues the case was wrongly decided. He concedes that criminal discharge of a firearm has elements that aggravated battery does not. But he argues that aggravated battery "does not contain any elements not contained in criminal discharge of a firearm causing bodily harm." Reynolds cites K.S.A. 2017 Supp. 21-5202 in support of his argument. This statute says that "[p]roof of a higher degree of culpability than that charged constitutes proof of the culpability charged. If recklessness suffices to establish an element, that element also is established if a person acts knowingly or intentionally." K.S.A. 2017 Supp. 21-5202(c). Thus, according to Reynolds, "'[k]nowingly causing bodily harm' encompasses 'reckless acts resulting in bodily harm.'"

Reynolds' argument makes sense, but it fails to demonstrate multiplicity. Reynolds' argument relies too heavily on the facts of the case. Under the "same-elements

test, the evidence of proof offered at trial are immaterial. The sole concern is the statutory elements of the offenses charged." *State v. Schoonover*, 281 Kan. 453, Syl. ¶ 6, 133 P.3d 48 (2006). As recognized in *Myers*, the elements of the two crimes at issue here are different. There are also different policy considerations supporting the Legislature's establishment of these as separate offenses. Criminal discharge of a firearm as defined in K.S.A. 2017 Supp. 21-6308(a)(1)(B) prohibits the reckless and unauthorized discharge of a firearm at motor vehicles and other modes of transportation. The focus in this statute is not to punish someone for intending harm to a person, but to punish someone for the risky action of recklessly firing a gun. Harm to a person need not be intended, in fact the offender need not know a person is there. Harm to a person during the commission of criminal discharge of a firearm merely is a factor that elevates the severity level of the crime. Aggravated battery as defined in K.S.A. 2017 Supp. 21-5413(b)(1)(B) serves a different purpose—punishing offenders who intend to cause bodily harm to another person. The statutes have different elements that target different conduct. This court should adhere to the *Myers* decision.

Reynolds cites *State v. Hensley*, 298 Kan. 422, 313 P.3d 814 (2013), in support of his argument that the two charges at issue are multiplicitous. Michael Hensley was convicted of possession of marijuana and possession of marijuana without a tax stamp. Hensley argued that the convictions violated the Double Jeopardy Clause because possession of marijuana was a lesser included offense of possession of marijuana without a tax stamp. Under K.S.A. 79-5208, possession of marijuana without a tax stamp was defined as "'a dealer distributing or possessing marijuana or controlled substances without affixing the appropriate stamps, labels or other indicia.'" 298 Kan. at 437. The Court of Appeals reasoned that, although possession of marijuana was an element of possession of marijuana without a tax stamp, the statutes had different elements because the possession of marijuana statute prohibited "'a person'" from committing the offense while the possession of marijuana without a tax stamp statute prohibited "'a dealer'" from committing the offense. 298 Kan. at 437. The Kansas Supreme Court disagreed, noting

that "'dealer'" as used in the statute was defined as a person. 298 Kan. at 437. The court concluded that "[b]ecause a 'dealer' is necessarily a 'person,' proving either possession of marijuana or possession of marijuana with no tax stamp requires the State to prove that a 'person,' i.e., the defendant, possessed marijuana." 298 Kan. at 437.

This case is distinguishable from *Hensley*. In *Hensley*, 298 Kan. at 438, possession of marijuana was an element of possession of marijuana without a tax stamp. Here, "knowingly causing bodily harm to another person with a deadly weapon" is not an element of criminal discharge of a firearm. Depending on the facts, such as with the facts here, conduct that constitutes knowingly causing bodily harm to another person with a deadly weapon will also constitute criminal discharge of a firearm causing bodily harm. But the multiplicity has two elements: "(1) the convictions arise from the same conduct, and (2) by a statutory definition there is only one offense." *Gonzalez*, 311 Kan. at 296. Reynolds has failed to satisfy the second element.

Reynolds also briefly argues, based on the same reasoning, that aggravated battery with a deadly weapon causing bodily harm is a lesser offense of criminal discharge of a weapon causing bodily harm. A lesser included crime includes "a crime where all elements of the lesser crime are identical to some of the elements of the crime charged." K.S.A. 2017 Supp. 21-5109(b)(2). For the reasons discussed above, aggravated battery with a deadly weapon causing bodily harm has elements that are not found in criminal discharge of a weapon causing bodily harm and thus this argument is not persuasive.

V. THE DISTRICT COURT DID NOT ERR BY FAILING TO INSTRUCT THE JURY ON A LESSER INCLUDED OFFENSE

Reynolds next argues that the district court erred in failing to instruct the jury on the lesser offense of criminal discharge of a firearm that does not cause bodily harm. Reynolds did not request the lesser instruction.

When a party fails to object to a jury instruction before the district court, an appellate court reviews the instruction to determine whether it was clearly erroneous. K.S.A. 2022 Supp. 22-3414(3). For a jury instruction to be clearly erroneous, the instruction must be legally or factually inappropriate and the court must be firmly convinced the jury would have reached a different verdict if the erroneous instruction had not been given. The party claiming clear error has the burden to show both error and prejudice. See *State v. Crosby*, 312 Kan. 630, 639, 479 P.3d 167 (2021).

Appellate courts exercise unlimited review over the record to determine whether a jury instruction was legally and factually appropriate. *State v. Holley*, 313 Kan. 249, 254, 485 P.3d 614 (2021). In determining whether an instruction was factually appropriate, courts must determine whether there was sufficient evidence, viewed in the light most favorable to the defendant or the requesting party, that would have supported the instruction. 313 Kan. at 255. If there is error, this court then must determine whether the error requires reversal, in other words, whether the error can be seen as harmless. 313 Kan. at 253. Where an appellant fails to request an instruction as in this case, the failure to give a legally and factually appropriate instruction is reviewed for clear error. K.S.A. 2022 Supp. 22-3414(3). For this court to find clear error, it must be "firmly convinced that the jury would have reached a different verdict if the instruction error had not occurred." *Crosby*, 312 Kan. at 639. The burden of showing clear error under K.S.A. 22-3414(3) is on the defendant. *State v. Williams*, 295 Kan. 506, 516, 286 P.3d 195 (2012).

A lesser included offense includes "[a] lesser degree of the same crime." K.S.A. 2017 Supp. 21-5109(b)(1). The charge here was criminal discharge of a firearm that resulted in bodily harm. Criminal discharge of a firearm that does not result in bodily harm is a lesser degree of the crime with which Reynolds was charged. The State agrees that the instruction would have been legally appropriate. The State disagrees that the instruction was factually appropriate. When the parties offer several competing reasons

why the requested instruction was or was not factually appropriate, the appellate court may move straight to the harmlessness inquiry. Thus, the court will assume—without deciding—that when the evidence is viewed in the light most favorable to the defendant, it was sufficient for a rational fact-finder to find for the defendant on the requested lesser included offense, and proceed directly to determining whether the failure to give the instruction was harmless. *State v. Salary*, 301 Kan. 586, 598-99, 343 P.3d 1165 (2015).

Here, the failure to give a lesser offense instruction is not clearly erroneous. *Williams*, 295 Kan. 506, demonstrates this. In that case, Keshia Williams was convicted of severity level 4 aggravated battery under K.S.A. 21-3414(a)(1)(A) for stabbing her friend, Sandra Kelly, multiple times. The charge required the State to prove that the victim suffered "great bodily harm." K.S.A. 21-3414(a)(1)(A). Kelly testified that, though she had to receive about 100 stitches in her head, she had not felt much pain, the only subsequent medical needs she had was having her stitches removed, and that her wounds healed in a couple of months. On appeal, Williams argued that the district court erred in failing to give a lesser included offense on severity level 7 aggravated battery under K.S.A. 21-3414(a)(1)(B) which only requires bodily harm (rather than great bodily harm). The court found that an instruction on K.S.A. 21-3414(a)(1)(B) would have been legally and factually appropriate. 295 Kan. at 521, 523. As for factual appropriateness, the court noted that Kelly's "testimony sent mixed signals to the jury as to whether her injuries were great bodily harm or mere bodily harm" because "[a]lthough she related that her wounds required a large number of stitches, she also minimized the pain she had suffered and said that she did not require any follow-up medical services other than to remove the stitches." 295 Kan. at 523. The court held, however, that failure to instruct on the lesser included offense was not clearly erroneous, reasoning:

> "But our determination that the omission of the instruction was erroneous does not answer the question of whether the failure to give the unrequested instruction was *clearly* erroneous. In other words, just because we find that a rational jury *could* have

> found Williams guilty of the lesser included offense does not necessarily mean that we believe that the jury *would* have convicted her of the lesser offense. Here, the evidence is such that we simply cannot be firmly convinced of which crime the jury might have chosen, as between the severity level 4 and severity level 7 versions. That degree of certainty, or perhaps more accurately, that degree of uncertainty falls short of what is required to meet the clearly erroneous standard." 295 Kan. at 523-24.

Here, as in *Williams*, even if this court were to find that a jury could have found Reynolds guilty of the lesser included offense does not compel a conclusion that the jury would have found Reynolds guilty of the lesser offense. In fact, the case for declining to find error here is even stronger than in *Williams*. In *Williams*, there was mixed testimony as to the severity of the harm Kelly suffered. Here, there was not mixed testimony—evidence from multiple sources supported finding that McKinney suffered bodily harm from Reynolds shooting at her. For these reasons, we find that the district court did not commit reversible error in failing to give a lesser included instruction.

VI. CUMULATIVE ERROR DOES NOT REQUIRE REVERSAL

Finally, Reynolds argues that cumulative error requires reversal of his convictions. Yet the analysis in this memorandum did not reveal any errors except for an assumption of factual error in the failure to give a lesser included offense instruction. But that error was considered harmless. The cumulative error rule does not apply if there are no errors or only a single error. *State v. Gallegos*, 313 Kan. 262, 277, 485 P.3d 622 (2021). Cumulative error thus does not require reversal.

Affirmed.