NOT DESIGNATED FOR PUBLICATION

No. 124,252

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

MICHAEL ALEXANDER HORMELL,
Appellant.

MEMORANDUM OPINION

Appeal from Douglas District Court; AMY J. HANLEY, judge. Opinion filed June 9, 2023. Affirmed.

Peter Maharry, of Kansas Appellate Defender Office, for appellant.

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

Before COBLE, P.J., HILL and ATCHESON, JJ.

PER CURIAM: In this direct appeal, Michael Alexander Hormell, convicted of aggravated robbery and attempted voluntary manslaughter, raises several challenges to his convictions. He claims the district court erred by: (1) declining to order a mistrial after a witness vouched for the credibility of another witness; (2) barring the admission of evidence about a witness' reputation; and (3) violating his double jeopardy rights. Our review of the record reveals no errors and we affirm.

Hormell tries to rob a drug dealer.

On a late afternoon in January 2018, William Bellemere met at a park in Lawrence, Kansas, with his former high school classmate, Ardyn Pannell. By text message, Pannell had arranged to buy five grams of marijuana from Bellemere for $50. After Pannell arrived at the park in her truck, Bellemere got in the front passenger seat. Bellemere then noticed a man, who he correctly believed to be Hormell, wearing a black ski mask in the back seat, holding a pistol. Hormell removed his mask and told Bellemere to close the door. Fearing for his safety, Bellemere fled but Hormell pursued and the two fought outside the truck. Sometime during the struggle, Bellemere was shot in the chest. Hormell got back into Pannell's truck, and they drove away.

Based on information from witnesses who saw the altercation, Douglas County Sheriff officers found both Pannell and Hormell after her truck was stopped later that day. Officers interviewed Pannell, who at first said in the patrol car on the way to the police station that the encounter was simply a drug sale and that she did not know why the fight started. But at the station, Pannell told the officers that she and Hormell planned to rob Bellemere rather than paying for the marijuana.

The State charged Hormell with one count of aggravated robbery, one count of conspiracy to commit aggravated robbery, one count of attempted murder in the second degree, and theft. Hormell and Pannell were charged as codefendants.

The parties clashed before trial.

About a month before the jury trial, Hormell moved to have the court determine Pannell's competence as a witness and asked to subpoena her mental health records. The State objected by challenging the relevance of the mental health records and arguing that

Pannell was a competent witness. The court allowed Hormell to subpoena the records but ordered them to be delivered to the court first for an in camera review.

At a motions hearing, the district court considered arguments on Hormell's motion to find Pannell was not a competent witness. Hormell argued that a review of the mental health records showed she was manipulative, often gave inconsistent information that could not be verified, and had substance abuse issues that gave her auditory and visual hallucinations. The court declined to find Pannell incompetent but allowed Hormell to question her about any drug use in the 24 hours preceding the incident or any hallucinations the week before. As for questions about Pannell's mental health or reputation for being manipulative or dishonest, the court cautioned Hormell about the admissibility of the records.

The jury was sworn in by a clerk before the Batson *challenges were decided by the judge.*

The case proceeded to a jury trial. After voir dire, the court told the jury panel that it could talk amongst themselves while the attorneys made their peremptory challenges. Then, just after announcing the names of the 18 excused jurors and telling them to take a seat in the gallery, the clerk swore in the 13 jurors who remained on the panel.

The court thanked the excused jurors for their service and explained they were free to leave or remain in the gallery, then sent the jury panel to the deliberation room. Outside the presence of the jury, the court asked the parties if they accepted the empaneled jury. The State responded affirmatively, but Hormell raised two *Batson* challenges. See *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). The court told the attorneys it was taking the matter under advisement and instructed them to return the next morning. Likewise, the court asked the two jurors who were the subjects of the *Batson* challenges—who had remained in the gallery—to return the next day as well.

The next day, the court began by noting the jury clerk had given the jurors their oath. The problem, of course, is that the court had not yet ruled on the challenges about the State's exclusion of the two potential jurors.

The State believed that Hormell's *Batson* objections were untimely and argued the trial should proceed because there was no mechanism to replace an already sworn juror. In the alternative, the State argued that there were race neutral reasons to support its challenged peremptory strikes.

Hormell argued he had timely raised the *Batson* challenges by mentioning them to the State and because defense counsel was familiar with the district court's practice of waiting to ask when the jury was sworn in. Defense counsel asserted she understood "there was some delay . . . but it was not appropriate to do it before I did."

The court explained that the jury clerk had improperly sworn in the jury before Hormell had a chance to raise objections, thus concluding that defense counsel "acted promptly enough." The court explained that the proper remedy—because "jeopardy has attached"—was to declare a mistrial. In closing, the court scheduled the new trial to begin in December and then dismissed the jury after informing it about the declaration of a mistrial.

After Hormell moved for a change of judge, a different judge was assigned. This meant that a different judge dealt with Hormell's double jeopardy violation claim before the second trial.

The new trial raised new legal challenges.

Hormell moved to dismiss this prosecution based, in part, on a violation of his double jeopardy rights. He argued that jeopardy had attached because the jury was sworn before the declaration of a mistrial, and there was no "manifest necessity" to justify a mistrial because the basis for the mistrial was the State's misconduct in striking a juror in violation of *Batson*. See *State v. Johnson*, 261 Kan. 496, 503, 932 P.2d 380 (1997). The State responded that the mistrial was attributable to Hormell mainly because he did not make a timely *Batson* challenge or otherwise object to the declaration of a mistrial.

The court denied Hormell's motion to dismiss on double jeopardy grounds. In ruling, the court identified three facts that supported its ruling:

(1) Hormell failed to make a *Batson* challenge before the jury was sworn in;
(2) the jury clerk did not wait for the judge to ask if the panel was acceptable before swearing in the jury; and
(3) the court upheld one of Hormell's *Batson* challenges. This meant that one of the panel members was wrongfully excluded from the jury.

The court further found there was no dispute that all of these things happened, and they involved actions taken by all the parties. The court determined that while none of these facts alone would have caused a mistrial, collectively they did.

The court added that a mistrial was necessary under three subsections of the mistrial statute—K.S.A. 22-3423—because "it was physically impossible to proceed with the trial in conformity with the law after a released juror was, in effect, reinstated by the *Batson* challenge being sustained"; because of a "legal defect in the proceedings that would reverse a guilty verdict with a *Batson* challenge that's granted after the jury was sworn in"; or because the previous judge "found prejudicial conduct when she sustained

one of the *Batson* challenges, and that would make it impossible to proceed to trial without injustice to the defendant." See K.S.A. 22-3423(1)(a), (b), and (c).

The court held that Hormell consented to the mistrial by not objecting at any point during the first trial. As a result, the court found that double jeopardy was not implicated because the State's conduct that led to the mistrial—improper striking of a potential juror under *Batson*—was not an "intentional, purposeful plan of goading the defendant into not objecting to a mistrial or consenting to a mistrial."

The court added that even if Hormell's lack of objection were not enough to be considered consent, that a manifest necessity existed to support declaring a mistrial and ordering a new trial because there was no legal process to replace a sworn juror.

Before the start of his second trial, Hormell filed a habeas petition with this court reasserting a violation of his double jeopardy rights. This court summarily denied his habeas petition and the following motion for reconsideration.

During the second trial, comments about a witness' truthfulness were offered.

One of the officers who testified at the second trial told the jury about Pannell's demeanor while he was asking her questions about the incident. Detective Lance Flachsbarth described Pannell's demeanor as "a roller coaster of emotions" and she appeared to be suffering from some trauma or shock. He also said her account of what had occurred changed while in the vehicle and "once we arrived at our office and moved into an interview room, her statement evolved and changed ultimately to its final version." Consistent with Pannell's trial testimony, she at first said they only intended to purchase marijuana from Bellemere but later told the detectives that it was a planned robbery.

Detective Flachsbarth testified that once Pannell was in the interview room, he believed "she realized the situation she had herself in at that point in time." The following exchange then occurred:

> "Q.: Did things change then once that realization—she got physically ill and you described it as a realization of the gravity of the situation?
> "A.: From that point forward, I would say that she was what we believed to be fairly truthful with us concerning—
> "[Defense Counsel]: Objection, Your Honor, move to strike.
> "THE COURT: Sustained. The jury will disregard that testimony."

After asking some clarifying questions about the interview and investigation, the State asked, "Okay. So you said at some point then you thought she was becoming more truthful in her statements?" Hormell immediately objected and the district court sustained the objection, then asked the attorneys to approach for a sidebar conference.

At the bench, the court admonished the State not to allow the witness to use words like "truthful" or "honest" again. After the State apologized, defense counsel asserted it was "a clear rule violation." The court agreed, further instructing the State not to allow the witness to use that word again. Hormell moved for a mistrial in part because of Detective Flachsbarth's stricken testimony and the State's reference to it.

The court denied Hormell's motion for mistrial. The court found only one statutory factor in K.S.A. 22-3423 applicable: subsection (1)(c), which allows a mistrial when "[p]rejudicial conduct, in or outside the courtroom, makes it impossible to proceed with the trial without injustice to either the defendant or the prosecution." The court then discussed the detective's testimony and the State's reference to it separately, noting first that Detective Flachsbarth's comment about Pannell was "a clear *Pabst* violation," referring to the rule that witnesses cannot comment on the credibility of another witness. See *State v. Elnicki*, 279 Kan. 47, Syl. ¶ 2, 105 P.3d 1222 (2005).

Next, the district court noted that the objection to the State's question referring to Pannell's credibility "is essentially an issue of prosecutor misconduct in questioning a witness." Although the court found the question was in error, it was not "so gross and flagrant as to deny a fair trial." The court further found no "ill will," meaning that the State did not intentionally disregard the court's objection. Lastly, the court found that the State's question would not "carry much weight in the minds of the jurors due to other evidence surrounding Pannell's credibility," noting particularly that the jury could use the audio recording of Pannell's interview to weigh credibility. The court further declined to find any cumulative prejudicial effect since the errors were "essentially one question and answer."

The jury acquitted Hormell of the conspiracy to commit aggravated robbery charge but found him guilty of aggravated robbery and a lesser included offense of attempted voluntary manslaughter. The court imposed a sentence of 216 months for the aggravated robbery conviction and 32 months for the attempted voluntary manslaughter conviction, ordering the sentences to be served concurrently.

We must address four issues.

In this appeal, Hormell contends

- the district court erred by declining to declare a mistrial after an officer improperly testified about Pannell's credibility at trial, and then the State compounded the error by referring to his stricken testimony;
- the district court erred by barring him from admitting evidence to establish Pannell had a reputation for being dishonest and manipulative;
- the district court improperly denied his motion to dismiss based on a double jeopardy violation because the trial in April 2021 violated double jeopardy due to the district court's declaration of a mistrial in September 2019 which stemmed from the State's misconduct; and

- the cumulative effect of these errors warrants reversal of his convictions.

Refusing to grant a mistrial is not reversible error here.

We review a grant or denial of a motion for mistrial under K.S.A. 22-3423 for an abuse of discretion. *In re Bowman*, 309 Kan. 941, 951-52, 441 P.3d 451 (2019).

One section of the mistrial statute applies here—K.S.A. 22-3423(1)(c). It calls for a mistrial when "[p]rejudicial conduct, in or outside the courtroom, makes it impossible to proceed with the trial without injustice to either the defendant or the prosecution." Under this section, our abuse of discretion inquiry is divided into two parts. First, we must decide whether the district court abused its discretion when deciding whether there was a fundamental failure in the proceeding. If so, then the next step is deciding whether the court abused its discretion when deciding whether the conduct caused prejudice that could not be cured or mitigated through admonition or jury instruction, which resulted in an injustice. See *State v. Fraire*, 312 Kan. 786, 789-90, 481 P.3d 129 (2021). We take up the first question.

Was there a fundamental procedural failure in this trial?

The district court did not explicitly find there was a fundamental failure when ruling on the motion for a mistrial. Even so, the court's ruling makes it clear that it believed a fundamental failure had occurred.

During a bench discussion, the court admonished the State several times about allowing Detective Flachsbarth to comment on Pannell's credibility. Then, when ruling on the motion for mistrial, the court said that Detective Flachsbarth's testimony was a "clear *Pabst* violation." In *State v. Pabst*, 268 Kan. 501, 506, 996 P.2d 321 (2000), the court held it improper for a prosecutor to comment on the credibility of a witness.

This rule prohibiting comment on the credibility of witnesses applies to attorneys, as well. The rule about witnesses' comments is given by the Supreme Court in *Elnicki*, 279 Kan. at 53-54, which held that Kansas law dictates an "absolute prohibition" against one witness testifying about another witness' credibility, and "such evidence must be disallowed as a matter of law." Similarly extending the rule to attorneys, "'[q]uestions which compel a defendant or witness to comment on the credibility of another witness are improper' because weighing the credibility of witnesses 'is the province of the jury.'" See *State v. Crum*, 286 Kan. 145, 151-52, 184 P.3d 222 (2008). So, a witness and an attorney cannot comment *nor seek through questioning* a comment on another witness' credibility.

Even though *Pabst* dealt with a prosecutor's improper statements about a witness' credibility during closing arguments, the district court's statements and actions make it clear that it believed a fundamental failure had occurred because it advised the jury to disregard Detective Flachsbarth's testimony and repeatedly admonished the State about the error. The court also offered to advise the jury to disregard the State's question after ruling on the motion for mistrial, but defense counsel declined.

We agree with Hormell and find that a fundamental failure of procedure occurred with respect to Detective Flachsbarth's testimony expressing an opinion on Pannell's credibility and the State's reference to that testimony. We now take up the second question.

Was the district court's cure adequate?

The next step of our inquiry is to determine whether the district court abused its discretion in concluding that it was possible to continue the trial without an injustice. In making that determination, a court must assess whether the fundamental failure affected a party's "substantial rights" under K.S.A. 2022 Supp. 60-261 and K.S.A. 60-2105. *State v. Kleypas*, 305 Kan. 224, 269, 382 P.3d 373 (2016). In other words, a court must determine

whether the error "affect[ed] the outcome of the trial in light of the entire record." *State v. Ward*, 292 Kan. 541, 569, 256 P.3d 801 (2011).

In *Ward*, the Kansas Supreme Court added that an appellate court reviewing whether an injustice has occurred will apply either the statutory or constitutional harmless error analysis, depending on the nature of the right allegedly affected. See *State v. Logsdon*, 304 Kan. 3, 39, 371 P.3d 836 (2016). The Kansas Supreme Court also instructed courts to consider "whether any damage caused by the error can be or was removed or mitigated by admonition, instruction, or other curative action." *Ward*, 292 Kan. at 569-70.

On this point, Hormell argues the district court erred in making its injustice determination by analyzing the issue under an incorrect legal standard. He suggests that the district court's ruling treated the challenge to the State's follow-up question as "an issue of prosecutor misconduct" and analyzed it using factors that were explicitly overruled in *State v. Sherman*, 305 Kan. 88, 108-09, 378 P.3d 1060 (2016). Hormell's suggestion is correct.

In *Sherman*, the Kansas Supreme Court changed the concept of "prosecutorial misconduct." 305 Kan. at 108-09. Now, inappropriate prosecutorial actions that take place during trial that lead to a reversal of a criminal conviction are considered "prosecutorial errors." 305 Kan. at 91-93.

The *Sherman* court created a new two-step analysis for reviewing claims of prosecutorial error. The court ruled:

> "Appellate courts will continue to employ a two-step process to evaluate claims of prosecutorial error. These two steps can and should be simply described as error and prejudice. 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*. 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.' We continue to acknowledge that the statutory harmlessness test also applies to prosecutorial error, but when 'analyzing both constitutional and nonconstitutional error, an appellate court need only address the higher standard of constitutional error.' [Citations omitted.]" *Sherman*, 305 Kan. at 109.

This means, then, at the second step of our analysis we must determine whether the error prejudiced the defendant's due process rights to a fair trial under the traditional constitutional harmlessness inquiry set out in *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705, *reh. denied* 386 U.S. 987 (1967). Under that standard, a prosecutorial error is harmless if the State can show "'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.' [Citations omitted.]" *Sherman*, 305 Kan. at 109.

Also, a reviewing court must consider any ameliorating effect of a jury admonition that tries to remedy a prosecutor's error when determining whether the erroneous conduct prejudiced the jury and denied the defendant a fair trial. *State v. Barber*, 302 Kan. 367, 383, 353 P.3d 1108 (2015).

This means for our purposes, the district court's erroneous legal analysis does not limit this court's analysis because it ultimately ends up in the same place—determining

whether a fundamental failure prevented the trial from continuing without an injustice under the constitutional harmlessness analysis.

The record here shows the court acted promptly. The court immediately sustained both of Hormell's objections and considered his request for a mistrial. The court found the conduct was not so prejudicial that it made it impossible to proceed with the trial without injustice to Hormell. See K.S.A. 22-3423(1)(c). After making this determination, the court offered to admonish the jury specifically to disregard the prosecutor's question and remind it that statements of counsel are not evidence, but defense counsel declined the offer. Also, the court instructed the jury at the close of trial to disregard all statements, arguments, and remarks of counsel that were not supported by evidence. We hold also that there was an ameliorating effect of the court's jury admonition which is part of both the injustice and prosecutorial error analyses. See *Barber*, 302 Kan. at 383; *Ward*, 292 Kan. at 569-70.

The record reveals that there was overwhelming evidence of Hormell's guilt through other witnesses, particularly from Bellemere, who testified that he arranged to meet up with Pannell to sell her marijuana and brought it, yet Hormell was the only one who had marijuana in his possession. Bellemere also described seeing Hormell wearing a ski mask upon entering Pannell's vehicle, becoming quickly in fear for his life, being chased with a firearm, and eventually being shot. Other witnesses corroborated Bellemere's account of the incident by describing what they saw as the fight began after he fled from the vehicle and Hormell was chasing him with a firearm. Thus, even without Pannell's testimony, there was no reasonable possibility that the verdict would have changed.

Hormell also contests the district court's determination that the detective's comment and the prosecutor's follow-up question "were essentially one incident and had no cumulative effect." Calling this an error of fact, Hormell contends that forcing him to

object twice "highlighted the fact Detective Flachsbarth thought [Pannell] was being truthful in her last version of events." Despite mentioning it in his brief, Hormell does not provide any pertinent authority to support this point or explain why it affected the outcome of the trial. We deem the contention abandoned. See *State v. Meggerson*, 312 Kan. 238, 246, 474 P.3d 761 (2020). The objections occurred during a single line of questioning, so the district court's curative actions in sustaining both objections mitigated any damage.

We find no abuse of discretion by the court in denying the motion for a mistrial. We see no reasonable possibility that the detective's comment about Pannell's credibility and the State's follow-up question affected the outcome of the trial or contributed to the guilty verdicts.

The claim about reputation evidence was not preserved.

Hormell next contends the district court committed reversible error by preventing him from presenting testimony to prove Pannell's reputation for dishonesty and manipulation, violating his right to present a complete defense.

But Hormell fails to point to anything in the record "where the issue was raised and ruled on" below as required by Supreme Court Rule 6.02(a)(5) (2023 Kan. S. Ct. R. at 36). While Hormell made a clear record of his intentions, at no point did the district court rule that he was prohibited from calling a reputation witness.

To us, the lack of evidence about Pannell's reputation stemmed from Hormell's own failure to present that evidence, not because of a ruling by the district court. Hormell makes no attempt to explain how this court can even consider his claim for the first time on appeal, given that he repudiates any argument that he wanted to admit Pannell's mental health records at trial. In *State v. Green*, 315 Kan. 178, 182, 505 P.3d 377 (2022),

our Supreme Court held that issues not raised before the district court cannot be raised on appeal. And, in *State v. Daniel*, 307 Kan. 428, 430, 410 P.3d 877 (2018), the court admonished that litigants who fail to explain why an issue not raised below should be considered for the first time on appeal risk a ruling that the issue is improperly briefed.

With no explanation being offered here why it was not raised in the district court, we will not rule on this claim.

We see no valid double jeopardy violation.

Hormell contends his second trial in April 2021 violated double jeopardy because the district court's declaration of a mistrial in September 2019 stemmed from the State's misconduct and he did not consent to a mistrial. The State responds that the district court correctly concluded that a "manifest necessity" compelled the court to declare a mistrial. The State's argument is more persuasive.

But first we must address a preliminary argument raised by the State. The State argues that we should not entertain this issue because it was already raised in this court by Hormell's petition for a writ of habeas corpus and it was summarily dismissed. That means he is attempting to relitigate the issue—an attempt that is not permitted by law.

We hold that this court's summary denial of Hormell's habeas petition did not address his double jeopardy claim on the merits because it was summarily denied. See *State v. Cotton*, No. 109,934, 2014 WL 4916447, at *1 (Kan. App. 2014) (unpublished opinion). Our court has already held that a ruling of our motions panel is not a judgment on the merits of an issue but is rather a redirection of the issue to the panel assigned to hear the appeal. 2014 WL 4916447, at *1. We have not decided the merits of Hormell's claims in his petition for habeas corpus relief.

Given the importance of the rights at stake for Hormell, and because the law generally favors a hearing on the merits of the claims raised by the parties, we decline the State's request and will address the merits of Hormell's double jeopardy claim. See *Tyler v. Cowen Construction, Inc.*, 216 Kan. 401, Syl. ¶ 2, 532 P.2d 1276 (1975).

When ruling on Hormell's motion to dismiss, the court relied on three subsections of the Kansas mistrial statute, K.S.A. 22-3423(1)(a), (b), and (c):

> "(1) The trial court may terminate the trial and order a mistrial at any time that [it] finds termination is necessary because:
>
> (a) It is physically impossible to proceed with the trial in conformity with law; or
>
> (b) There is a legal defect in the proceedings which would make any judgment entered upon a verdict reversible as a matter of law and the defendant requests or consents to the declaration of a mistrial; or
>
> (c) Prejudicial conduct, in or outside the courtroom, makes it impossible to proceed with the trial without injustice to either the defendant or the prosecution."

The court cited each provision as a basis for ordering the mistrial and the reason for each was essentially the same: that the sustained *Batson* challenge after the jury was already sworn required a mistrial because there is no legal process to replace a sworn juror.

We note that Hormell does not appear to challenge the district court's finding that a mistrial was necessary for this reason. Although he mentions in his brief that "the district court improperly granted a mistrial," Hormell then argues only that the district court erred in concluding that the State could retry him for the same crimes after jeopardy attached.

In other words, Hormell fails to bring forward any challenge to the district court's reason for declaring a mistrial. We thus find that issue abandoned. An issue not briefed is

considered waived or abandoned. *State v. Davis*, 313 Kan. 244, 248, 485 P.3d 174 (2021). This means the only question we have to answer is whether the State was barred from trying Hormell a second time after jeopardy had attached in the first trial.

The statute that controls the grant of mistrials states:

> "(a) A prosecution is barred if the defendant was formerly prosecuted for the same crime, based upon the same facts, if such former prosecution:
>
> . . . .
>
> (3) was terminated without the consent of the defendant after the defendant had been placed in jeopardy, except where such termination shall have occurred by reason of:
>
> . . . .
>
> (C) the impossibility of the jury arriving at a verdict." K.S.A. 2022 Supp. 21-5110.

This court has addressed double jeopardy claims most recently in *State v. Kornelson*, No. 118,091, 2019 WL 1213248, at *3-4 (Kan. App. 2019) (unpublished opinion). The trial court in that case declared a mistrial—which neither party objected to—because of a jury deadlock. At a second trial, the jury found the defendant guilty of the charged crimes. For the first time, on direct appeal, he argued that the second trial violated double jeopardy.

A panel of this court disagreed, finding that the defendant's lack of objection to the mistrial meant he needed to show that "the prosecutorial conduct giving rise to the mistrial was intended to 'goad' the defendant into moving for a mistrial." 2019 WL 1213248, at *3-4. In making the ruling, the panel relied on *State v. Graham*, 277 Kan. 121, 83 P.3d 143 (2004).

The Kansas Supreme Court reviewed *Kornelson* and affirmed the panel's decision on double jeopardy but did so by overruling *Graham*. In particular, the court held that

"when a trial court sua sponte declares a jury deadlocked and orders a mistrial when the defendant does not object or consent to the mistrial, retrial should be permitted only when there was a manifest necessity for the court's action." *State v. Kornelson*, 311 Kan. 711, 718, 466 P.3d 892 (2020). The court held that a manifest necessity existed to justify the declaration of a mistrial because of the jury deadlock. 311 Kan. at 720-21.

The district court here relied on *Graham* when it concluded that Hormell's failure to object amounted to consent to the mistrial. The district court's decision came before the *Kornelson* court's decision overruling *Graham*, so it was still good law at the time the district court ruled on this question. But the *Kornelson* ruling makes it clear that when a defendant neither objects nor consents to a mistrial, the retrial should be permitted only when a manifest necessity justifies the court's action.

In making its ruling here, the court, in fact, addressed the concept of manifest necessity. The court found there was a manifest necessity to justify a mistrial, explaining "[t]he trial could not have proceeded with a released juror now reinstated through a sustained *Batson* challenge when . . . the jury had already been sworn in. There's no procedure for that, no procedure under law to replace a sworn juror." In other words, the lack of any remedy to cure the *Batson* error creates a manifest necessity to declare a mistrial and hold a retrial.

Hormell challenges the district court's manifest necessity finding by arguing that the State's improper action in striking a juror based on their race cannot serve as the basis for a manifest necessity to warrant a mistrial. In his view, this is prosecutorial error. As support, he cites *Johnson*, 261 Kan. at 504, for the proposition that "manifest necessity does not exist when prosecutorial or judicial overreaching has occurred."

In *Johnson,* an assigned magistrate judge—who was sitting in a district five hours away from his home district—declared a mistrial based on an inconvenient forum without

consulting the parties, after realizing during the bench trial that it could not be completed that day. The parties did not learn about the declaration until the next day. When the State refiled the charges, the defendant moved to dismiss on double jeopardy grounds. The district court agreed and dismissed the charges. The State appealed, but the Kansas Supreme Court affirmed the dismissal, holding that an inconvenient forum for the magistrate judge did not constitute a manifest necessity to justify a mistrial. 261 Kan. at 506-07.

But the Supreme Court has declined to extend this language from *Johnson* in a case involving a similar challenge. In *State v. Wittsell*, 275 Kan. 442, 448, 66 P.3d 831 (2003), one of the State's witnesses violated a motion in limine by mentioning a polygraph examination when testifying at trial. The district court sua sponte declared a mistrial and imputed the violation to the State, thus denying retrial and dismissing the complaint on double jeopardy grounds.

A panel of this court rejected an application of the manifest necessity standard because it agreed that "the fault for the mistrial cannot lie at the feet of the prosecution or the judge. There simply can be no 'manifest necessity' for prosecutorial or judicial misconduct. [Citation omitted.]" *State v. Wittsell*, 30 Kan. App. 2d 1083, 1087, 53 P.3d 1248 (2002). But the Supreme Court reversed, determining that the rule mentioned in *Johnson* did not apply to the present facts because it concluded that the State's witness was acting outside the scope of the prosecutor's duty to inform witnesses of improper subjects for testimony. *Wittsell*, 275 Kan. at 454-55. Since the prosecutor fully and properly advised the witness to avoid the mention of a polygraph examination, there was no prosecutorial error.

When we apply the reasoning of the Supreme Court in *Wittsell* to this case, we find that the *Johnson* rule does not apply here. As the State points out, the fault for the

circumstances that resulted in a mistrial cannot be placed at the feet of the prosecution here because of a sustained *Batson* challenge, but it is because that request was untimely.

But Hormell was not entirely at fault either simply because he failed to lodge a timely *Batson* challenge. In *State v. Jackson*, 60 Kan. App. 2d 424, 435, 494 P.3d 225 (2021), our court held that a *Batson* challenge must be raised "before the remaining venire members are released and the last juror is sworn in." The record reveals that while the *Batson* question was going on, the clerk swore in the jury. Frankly, the "bad confluence of events" was attributable to both parties, but mainly to the district court. The true triggering event seemed to be that the jury was sworn in by the court clerk at an unexpected time, before the judge had released the venire members and the parties had a chance to lodge objections based on *Batson*.

Given these circumstances, we agree with the district court and find that a manifest necessity justified declaring a mistrial. Proceeding with the jury that had been sworn in would have made it impossible to proceed with the trial without injustice to either party because it was not a properly selected jury, and Hormell failed to make a timely challenge. See K.S.A. 22-3423(1)(c). Faced with such circumstances, it was not error for the district court to declare a mistrial.

There is no cumulative error.

Lastly, Hormell argues that the cumulative effect of the above errors warrants reversal of his convictions.

If there is no error or only a single error is detected, 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). In assessing whether cumulative errors during trial require reversal, this court will examine the errors in context and consider how the trial judge dealt with

the errors as they arose; the nature and number of errors and whether they are interrelated; and the overall strength of the evidence. If any of the errors being aggregated are constitutional, the party benefitting from the error must establish beyond a reasonable doubt that the cumulative effect did not affect the outcome. *State v. Alfaro-Valleda*, 314 Kan. 526, 551-52, 502 P.3d 66 (2022).

The only error Hormell establishes is the detective's improper testimony, and a single error cannot sustain a cumulative error claim.

We affirm Hormell's convictions for aggravated robbery and attempted voluntary manslaughter.

Affirmed.