NOT DESIGNATED FOR PUBLICATION

No. 124,318

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

ROBIN ROBERT GALYARDT,
Appellant.

MEMORANDUM OPINION

Appeal from Ellis District Court; GLENN R. BRAUN, judge. Opinion filed August 18, 2023. Affirmed.

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

Natalie Chalmers, assistant solicitor general, and *Derek Schmidt*, attorney general, for appellee.

Before GREEN, P.J., HURST, J., and TIMOTHY G. LAHEY, S.J.

PER CURIAM: A jury convicted Robin Robert Galyardt of three counts of burglary, two counts of attempted burglary, and two counts of theft based on largely circumstantial evidence about a series of acts over about a month. Galyardt appeals claiming there was insufficient evidence to sustain his convictions, and that several trial errors deprived him of the right to a fair trial individually and cumulatively. Although this court agrees that the district court erred in failing to provide a jury instruction on the multiple counts and the prosecutor committed multiple errors during a lengthy closing argument, these errors were individually harmless, and this court is convinced beyond a reasonable doubt that the cumulative effective—if any—did not deprive Galyardt of a fair trial. Additionally,

the jury was presented with sufficient evidence, although mostly circumstantial, upon which to draw reasonable inferences and to sustain his convictions. As explained herein, this court affirms.

FACTUAL AND PROCEDURAL BACKGROUND

After a string of attempted and completed break-ins in Ellis County, specifically Hays, Kansas, between February 2020 and March 2020, the State charged Galyardt with three counts of nonresidential burglary under K.S.A. 2019 Supp. 21-5807(a)(2); two counts of attempted nonresidential burglary under K.S.A. 2019 Supp. 21-5301 and K.S.A. 2019 Supp. 21-5807(a)(2); and two counts of theft under K.S.A. 2019 Supp. 21-5801(a)(1). One nonresidential burglary and one theft charge resulted from acts at the Merle Norman store on February 29, 2020. The second nonresidential burglary charge stemmed from acts at the CBD American Shaman store on March 20, 2020, and the third nonresidential burglary and one theft charge stemmed from acts at the Eagle Tech Solutions store on March 20, 2020. The two counts of attempted nonresidential burglary stemmed from acts at the Body Shoppe Salon on March 20, 2020, and the Daylight Donuts store on March 28, 2020. The State alleged, based on mostly circumstantial evidence outlined herein, that Galyardt committed all of these acts.

February 29, 2020—Merle Norman

On February 29, 2020, an officer responded to a call from the Merle Norman cosmetics store in Hays, Kansas regarding a potential burglary. The officer testified that the owner said she had closed the store on February 28 at approximately 5 or 5:15 p.m. and noticed when she reopened at 11 a.m. the next day that $196 was missing from the cash register. The responding officer obtained surveillance video from a nearby business which showed someone entering the store after business hours. The officer testified that

the Merle Norman store owner did not recognize the person or vehicle in the video. That video footage was not introduced at trial.

March 20, 2020—American Shaman CBD, Eagle Tech Solutions, and Body Shoppe Salon

On March 20, 2020, a detective responded to the American Shaman CBD store in Hays, Kansas, which was on the same street as the Merle Norman store. The American Shaman CBD store manager testified that when an employee tried to open the store that morning, the door was jammed. The manager saw "gouges out of the metal where the lock was and then along the side of the metal door." The detective testified that the lock in the door had been turned upside down 180 degrees. Another police officer who responded observed that "[t]he top part of the lock was slightly broken off, and you could tell someone was prying at it," and it looked "like somebody stuck a device, a prying tool inside there, and busted it outward." There were also "pry marks on the door frame . . . right where the lock enters the frame."

A locksmith with 40 years of experience examined the door and later testified that he believed someone had tried to pick the lock, but had "fouled it up and ended up having to pry the door somewhat to get in." The locksmith explained that the key cylinder had been picked and was "flipped down and locked up," which meant that "whoever messed with the door, ended up prying it, because it was bent and the cylinder itself was popped away from the door on one side."

The American Shaman CBD manager testified that she reviewed the store's surveillance footage and saw someone she did not recognize enter the building at approximately 6 a.m. She confirmed that the person in the video did not resemble any of her employees. The video was admitted into evidence at trial.

The general manager at Eagle Tech Solutions in Hays testified that when she arrived at work on March 20, 2020, her door key just spun around and the door was unlocked. Once inside, the general manager saw coins on the floor behind the register counter and testified that "the cash drawer was pulled open and nothing was in it." The same detective who responded to American Shaman CBD testified that Eagle Tech Solutions' door locking mechanism was rotated 180 degrees so that it was upside down in the same manner as the American Shaman CBD door. The locksmith testified that the lock at Eagle Tech Solutions had been picked and was "bound up" in the same manner as the lock at American Shaman CBD.

On March 20, 2020, the owner of the Body Shoppe Salon in Hays confirmed she went to the salon because her employees had arrived but their keys would not unlock the salon door. She testified that there were scratches on the door near the lock and that "you could tell that someone had tried to pry, pry the lock open." The responding officer testified that he noticed the keyhole in the Body Shoppe door's lock was "flipped upside down." He explained he could "kind of see between the door and the doorjamb" because the "hook had been moved upwards, but it hadn't been raised enough to allow the door to be opened."

March 29, 2020—Daylight Donuts

A nighttime baker at the Daylight Donuts in Hays testified that when he went to work on March 29, 2020, he noticed the lock to the front door had been spun or jimmied. The hole where he usually put his key into the lock was upside down and his key would not fit into the lock. The baker also thought it appeared someone had used a crowbar or a wonder bar but slipped and scratched the door. However, he could not say for sure whether the scratches on the door were new or old. The responding officer, who had also responded to the calls from the Body Shoppe and Eagle Tech Solutions, testified that he

noticed there was a scratch on the door frame and took a picture of the lock. That picture showed the keyhole bent inward.

Identifying the Vehicle

Detectives used surveillance video footage that was later admitted into evidence at trial from nearby establishments including an apartment complex, Taco Grande, and Fancy That Boutique to establish the vehicle used by the burglar. The detective testified that the February 29, 2020 Taco Grande video footage showed a vehicle resembling a vehicle located at Galyardt's residence driving back and forth several times on Vine Street in front of the Merle Norman store in the early morning hours about the time detectives believed it was burglarized.

Taco Grande's video footage from March 20, 2020—the night of the burglaries or attempted burglaries at American Shaman CBD, Eagle Tech Solutions, and Body Shoppe Salon—showed a vehicle resembling Galyardt's driving back and forth on Vine Street several times between 6:01 a.m. and 6:04 a.m. Footage from a nearby apartment complex showed that at 6 a.m., what may have been a silver or brown Chevy Blazer or GMC Jimmy parked in front of American Shaman CBD. In the video, a man walked back and forth between the store and his car with extended periods between, and then left at about 6:22 a.m.

Lastly, the detective obtained Fancy That Boutique's surveillance footage from March 28, 2020—the night of the Daylight Donuts attempted burglary. Fancy That Boutique was next door to Daylight Donuts and the Body Shoppe. That footage showed a vehicle resembling the one in the Taco Grande footage stopping in front of the Boutique on March 28, 2020, at 10:59 p.m.

By reviewing the video footage from the apartment complex, Taco Grande and Fancy That Boutique, the detective testified that the vehicle had wheels with five points and white lettering. Further, the A, B, and C "pillars" used to identify unique characteristics of vehicles were similar throughout the footage. He explained that the A pillar is on either side of the windshield, the B pillar is behind the front door hiding the front seatbelts, and the C pillar is behind the rear passenger window.

The detective testified that while investigating the burglaries, the police received an anonymous tip. As a result, he went to Galyardt's address and located a vehicle in the driveway with "pillars" consistent with the car in the surveillance videos. The B pillar was colored, and the C pillar had a triangular shape that "kind of canted toward the front of the vehicle; it's not straight up and down." Additionally, the back corner of the vehicle in the surveillance video, "going along those windows where it wraps around to the back window, you can see that there's no real color there, and that it's also black." He also testified that the vehicle's tires had white lettering and five points, and that the door handle placement, luggage rack, trim, and fender wells were similar to the car in the footage. Galyardt's vehicle was a Chevy Blazer, and the A, B, and C pillars appeared similar to those in the footage. The detective confirmed that the police followed up on several tips about vehicles like the one in the surveillance videos, but he testified that "none of them fit into all of those categories with the B pillars, the C pillars, the tires, the writing on the tires. When we looked into all those things, the only one that we found that matched was Mr. Galyardt's."

Items Found in Galyardt's Home

The detective testified that in executing a search warrant for Galyardt's residence and home, they found items in his room, in an adjoining room with a workbench, and in a storage room that could be used to commit burglaries and were consistent with items the burglar appeared to have in the surveillance video footage. He explained that they found

a book titled "Tricks of the Burglar Alarm Trade" copyrighted in 1984, a catalog for buying lock picking devices, and a picking gun and what appeared to be a tubular pick—both of which were available in the catalog. He also found a list of scanner codes used to pick up police frequencies and two scanners that could pick up radio or cell phone frequencies, though he confirmed he did not see if the codes or scanners worked.

The detective also found instructions for using an electric pick, several lock picking guns, and flat pieces of metal bent at an angle. The locksmith testified that a pick gun could be used with the little pieces of metal bent into L shapes—called tension wrenches—to manipulate a key cylinder. There are two sets of pins, one on top of the other, the locksmith explained, and one of the pick guns the detective found "bangs the pins" so that "they separate, and if you are quick enough with a tension wrench, it will allow you to lock or unlock" and can be used on commercial locks like the businesses that were burglarized. The locksmith also testified that he believed a "[t]ension wrench; either the battery-powered bump gun or the pick gun" was used to manipulate the locks at the businesses he responded to.

The detective testified he also found a lock picking gun that was spring-loaded. The locksmith explained that this was a "plug spinner," which can be used to pick locks and turn the lock to the lock or unlock position without repicking the lock. Additionally, the detective testified they found a drawing of a tool like one he uses in executing search warrants to get around a lock without causing much damage, and he photographed the drawing alongside his tool for reference. They also found a bag containing a black hat and items the detective believed were consistent with burglary, including what the locksmith confirmed was another plug spinner.

A detective who reviewed the American Shaman CBD surveillance footage from approximately 6 a.m. on March 20, 2020, testified that it showed the burglar wearing a blue coat with a zipper or button on the left chest, and two buttons on the bottom of the

coat, black gloves, a black hat, and jeans. At Galyardt's house police found a blue coat that had black gloves in the pocket. That coat had a zippered pocket on the left chest, a zipper up the middle, one button at the top of the zipper, and two buttons at the bottom of the zipper. Police also found another pair of black gloves, and in a bag with the alleged burglary tools they found a black baseball cap. The detective testified that the baseball hat, blue coat, and shoes in the video were similar to the ones found at Galyardt's and submitted into evidence.

The shoes in the surveillance footage had a black triangle on the back and a reflective area in that triangle's center; a noticeable reflective stripe pattern on both sides of the toes; and the soles appeared black on the outsides and lighter in the center where there was an interruption in the tread. The detective confirmed and testified that the shoes found at Galyardt's had the same reflective triangles on the back; had a series of lines on the front on both sides of the toes; a Nike symbol on the sides; and a triangle emblem on the tongues. Additionally, he explained, the soles of the shoes found at Galyardt's home were well-worn such that a piece of sole was missing from the heels of both shoes, so it was not continuous black. The detective confirmed that he believed the shoes in the surveillance video were identical to the ones found at Galyardt's home.

The detective also testified that part of the burglar's face was visible in the American Shaman CBD footage and that it appeared similar to Galyardt's driver's license photo. On cross-examination, the detective confirmed that police did not have a license plate number for the vehicle in the surveillance videos. He also confirmed that they did not collect any fingerprints or DNA from any of the burglary sites, as the man in the surveillance videos was wearing gloves and because so many customers would have touched the businesses' door handles any DNA collection could have returned numerous results. He also confirmed that the police did not use a facial recognition program to attempt to identify the burglar, and that he was unaware if such technology was available to him.

The jury found Galyardt guilty of all charges—three counts of nonresidential burglary, two counts of attempted nonresidential burglary, and two counts of theft. Galyardt was sentenced to a total of 54 months in prison, and he now appeals.

DISCUSSION

Galyardt argues the following four errors require reversal of all of his convictions: (1) There was insufficient evidence to sustain each of his convictions because the State improperly relied on inference stacking; (2) the district court erred in not providing a multiple counts instruction; (3) the prosecutor committed reversible error in closing arguments; and (4) the cumulative effect of these errors resulted in an unfair trial.

I. *Sufficient evidence existed to support Galyardt's convictions.*

Galyardt argues that the State relied solely on inference stacking and circumstantial evidence, such that there was insufficient evidence to support his convictions. "'When the sufficiency of the evidence is challenged in a criminal case, we review the evidence in a light most favorable to the State to determine whether a rational factfinder could have found the defendant guilty beyond a reasonable doubt.'" *State v. Aguirre*, 313 Kan. 189, 209, 485 P.3d 576 (2021). This is a high standard that requires this court to uphold the verdict unless the evidence "is so incredible that no reasonable fact-finder could find guilt beyond a reasonable doubt." *State v. Meggerson*, 312 Kan. 238, 247, 474 P.3d 761 (2020). When reviewing the evidence this court does not assess witness credibility, reweigh evidence, or resolve conflicts in the evidence. *Aguirre*, 313 Kan. at 209.

First, Galyardt appears to claim that the State's evidence was insufficient because there was no direct evidence—such as fingerprints, DNA, or witness testimony—but the State relied solely on circumstantial evidence. However, it is well-settled that the State may rely on circumstantial evidence to support even the gravest offenses. See, e.g., *State*

v. Logsdon, 304 Kan. 3, 25, 371 P.3d 836 (2016). Circumstantial evidence is sufficient to support a verdict so long as that evidence is sufficient to afford a basis for the jury to reasonably infer a fact in issue. 304 Kan. at 25. "'Circumstantial evidence, in order to be sufficient, "need not rise to that degree of certainty which will exclude any and every other reasonable conclusion."'" *State v. Colson*, 312 Kan. 739, 750, 480 P.3d 167 (2021). The State permissibly relied on circumstantial evidence from which the jury could reasonably infer conclusions to support Galyardt's convictions.

Second, Galyardt incorrectly mistakes the State's reliance on circumstantial evidence for impermissible inference stacking. Inference stacking occurs "where the State asks the jury to make a presumption based upon other presumptions" and provides insufficient evidence to support the State's burden of proof. See *State v. Banks*, 306 Kan. 854, 859, 397 P.3d 1195 (2017). Criminal convictions based solely on circumstantial evidence "'can present a special challenge to the appellate court'" to ensure that the circumstances are proved and not "'inferred or presumed from other circumstances.'" *Banks*, 306 Kan. at 859. However, the prohibition against inference stacking does not prevent the State from relying on multiple different pieces of circumstantial evidence so long as each circumstance is proven—rather than presumed—from another circumstance. 306 Kan. at 860-61.

> "In other words, while it is impermissible for a case to rely upon the theory that presumption A leads to presumption B leads to presumption C leads to fact D, it is perfectly proper for the State's case to be grounded upon a theory that presumption A, presumption B, and presumption C all separately point to fact D." 306 Kan. at 861.

The State presented evidence that (1) Galyardt's vehicle was similar to the one visible in the surveillance video in the vicinity of the March 20, 2020 burglaries; (2) Galyardt possessed clothing similar to that of the burglar recorded in the American Shaman CBD surveillance footage; and (3) Galyardt possessed lock picking tools and

radios that could be used to commit burglaries. While each of these represent circumstantial evidence, neither of them relies on any other piece of circumstantial evidence to draw a conclusion. Galyardt possessing a vehicle similar to the one in the surveillance video can be used on its own as circumstantial evidence that Galyardt committed the burglaries. Rather than build upon each other, each of these circumstances independently point to a common conclusion—Galyardt's guilt. Specifically, it was not necessary for the jury to use the circumstantial evidence that Galyardt had a car similar to the one caught on surveillance video in the vicinity and time of the burglaries to infer that the clothing found at Galyardt's house was the same clothing the burglar was wearing in the surveillance video.

The State presented multiple pieces of circumstantial evidence sufficient to support a common conclusion that Galyardt committed the charged crimes. See 313 Kan. at 209. Considering the evidence in the most favorable light to the State, a reasonable fact-finder could have found Galyardt guilty beyond a reasonable doubt.

II. *The district court did not commit reversible error by not providing a multiple counts instruction.*

Galyardt claims the district court erred when it failed to provide a multiple counts instruction. He asserts that by grouping together multiple charges of the same crime under one jury instruction—such as the three charges of nonresidential burglary, the two counts of attempted nonresidential burglary, and the two counts of theft—the jury instructions inaccurately implied that the multiple counts were not separate offenses. Galyardt claims that without an instruction about multiple counts, these instructions caused jury confusion requiring reversal.

The jury instructions grouped charges of the same type—nonresidential burglary, attempted nonresidential burglary, and theft—under a single numbered instruction, and

then each count of that type was provided with their own list of elements. For example, the instruction for nonresidential burglary stated:

"Instruction No. 6

"The defendant is charged in Count 1 with Non-Residential Burglary of Merle Norman Cosmetic Studio. The defendant pleads not guilty. To establish this charge, each of the following claims must be proved:

"1. The defendant entered the building used by Merle Norman Cosmetic Studio at 2412 Vine Street, Hays, Ellis County, Kansas, which was not a dwelling.

"2. The defendant did so without authority.

"3. The defendant did so with the intent to commit a theft therein.

"4. The act occurred on or about the 29th day of February 2020, in Ellis County, Kansas.

"The defendant is charged in Count 2 with Non-Residential Burglary of CBD American Shaman. The defendant pleads not guilty. To establish this charge, each of the following claims must be proved:

"1. The defendant entered a building used by CBD American Shaman at 2013 Vine Street, Hays, Ellis County, Kansas, which was not a dwelling.

"2. The defendant did so without authority.

"3. The defendant did so with the intent to commit a theft therein.

"4. The act occurred on or about the 20th day of March 2020, in Ellis County, Kansas.

"The defendant is charged in Count 3 with Non-Residential Burglary of Eagle Tech Solutions. The defendant pleads not guilty. To establish this charge, each of the following claims must be proved:

"1. The defendant entered a building used by Eagle Tech Solutions at 1503 E 27th Street, Hays, Ellis County, Kansas, which was not a dwelling.

"2. The defendant did so without authority.

"3. The defendant did so with the intent to commit a theft therein.

"4. The act occurred on or about the 20th day of March 2020, in Ellis County, Kansas."

At the jury instructions conference, Galyardt's counsel raised concerns that this jury instruction format may give an "inference that they are grouped together and should be considered together as almost like one act." The attorney then requested that "these be on individual pages," and explained that she thought each "should be separate instructions for each individual crime." After some discussion, the court declined to separate the groupings into individual instructions. Galyardt's counsel did not request that the court include the multiple acts jury instruction that it now argues should have been included. Prior to deliberation, the court reminded the jury "that each charge in this case is a separate and distinct offense, and your duty as a jury is to render an independent verdict as to each charge as displayed on the verdict form that you will have in the jury room."

When analyzing claims of error related to jury instructions, appellate courts follow a three-step process: (1) determine if there is appellate jurisdiction; (2) if there is appellate jurisdiction, then consider the merits of the claim to determine whether error occurred below; and (3) finally assess whether the error requires reversal. *State v. Holley*, 313 Kan. 249, 253, 485 P.3d 614 (2021). In step one, generally appellate review is reserved for claims properly preserved at the lower court for review. See *State v. Rhoiney*, 314 Kan. 497, 500, 501 P.3d 368 (2021). However, this court will still review an unpreserved claim of jury instruction errors, but the failure to properly preserve the issue changes the standard for reversibility as explained below in step three. Here, Galyardt admits he did not properly preserve this issue for appeal because he did not request that the district court include a multiple counts instruction and did not object to its omission. Therefore, although appellate jurisdiction exists, when assessing whether any error identified in step two requires reversal this court will apply a more rigorous standard than it would had Galyardt's counsel requested the multiple counts instruction before the district court. See K.S.A. 2022 Supp. 22-3414(3) (when a party fails to object to a jury instruction before the district court, an appellate court reviews the instruction to determine if it was clearly erroneous); see also *State v. Williams*, 308 Kan. 1439, 1451, 430 P.3d 448 (2018).

In step two, applying an unlimited standard of review, this court analyzes whether the district court erred when it failed to include the multiple acts instruction by determining whether the instruction was legally and factually appropriate. *State v. McLinn*, 307 Kan. 307, 318, 409 P.3d 1 (2018). The requested instruction provides:

> "Each crime charged against the defendant is a separate and distinct offense. You must decide each charge separately on the evidence and law applicable to it, uninfluenced by your decision as to any other charge. The defendant may be convicted or acquitted on any or all of the offenses charged. Your finding as to each crime charged must be stated in a verdict form signed by the Presiding Juror." PIK Crim. 4th 68.060 (2016 Supp.).

The pattern instructions include notes on the use of this instruction which explains that "[t]his instruction should be given when multiple counts are charged." PIK Crim. 4th 68.060, Notes on Use. The State charged Galyardt with multiple counts of three different crimes; thus, as the State concedes, it was legally and factually appropriate for the district court to provide the multiple counts instruction. Therefore, the district court erred by not including the multiple counts instruction.

Having found jurisdiction in step one and error in step two, this court moves to the reversibility analysis in step three. The court applies the clear error standard in this step to determine if the failure to include the multiple counts instruction requires reversal because Galyardt did not request the multiple counts jury instruction at the trial. See K.S.A. 2022 Supp. 22-3414(3). The failure to include a jury instruction is clearly erroneous if this court is "firmly convinced that the jury would have reached a different verdict" if the multiple counts instruction had been provided. *State v. Crosby*, 312 Kan. 630, 639, 479 P.3d 167 (2021). Here, Galyardt, as the party claiming error has the burden to show both error and prejudice. 312 Kan. at 639. "The failure to give the multiple-count instruction can be reversible error if the jury is misled into believing that a finding of

guilty on one count mandates a finding of guilty on the others. [Citation omitted.]" *State v. Gould*, 271 Kan. 394, 401, 23 P.3d 801 (2001).

Galyardt argues that combining similar charges under one instruction and the prosecutor's reference to common themes and patterns between the crimes created a possibility that the jury would consider the charges together rather than separately. Kansas appellate courts have previously addressed similar claims of error, and consistently found that the risk of jury confusion from multiple counts can be mitigated by how the charges are delineated within the jury instruction, providing separate verdict forms for each count, and verbal instructions by the court. See, e.g., *Gould*, 271 Kan. at 402 (finding the failure to give a multiple counts instruction did not confuse the jury when the "verdict form clearly indicated three separate counts"); *State v. Cameron*, 216 Kan. 644, 650-51, 533 P.2d 1255 (1975) (finding no reversible error in combining jury instructions when the jury verdict form separated the counts); *State v. Donham*, 29 Kan. App. 2d 78, 88, 24 P.3d 750 (2001) (finding no reversible error in failure to give multiple counts instruction when the court grouped 90 counts related to possession of child pornography in one instruction where each count had its own verdict form); *State v. Shockey*, No. 116,375, 2017 WL 3113220, at *8 (Kan. App. 2017) (unpublished opinion).

Here, the district court grouped charges together under a single jury instruction, but the individual counts remained separate. Each jury instruction separated each count and each count included each element the State was required to prove. It was clear from the layout that each count, although grouped under one instruction, must be proved independently. Unlike the *Donham* case, each count was not given its own jury verdict form on its own piece of paper. In fact, the verdict form here included even unrelated counts on the same piece of paper. However, the form separated each count—giving the jury the option to find Galyardt guilty or not guilty of each separate count—demonstrating that separate action was required for each. Additionally, before the jury retired for deliberation, the court instructed it "that each charge in this case is a separate

and distinct offense, and your duty as a jury is to render an independent verdict as to each charge as displayed on the verdict form . . . ."

Although the multiple counts instruction in PIK Crim. 4th 68.060 was legally and factually appropriate in this case—and thus the district court erred by not including it—that error is not reversible under these circumstances. The jury instructions clearly separated each count and delineated each element the jury was required to find the State had proven for those counts. While the verdict forms included multiple counts—including unrelated counts—on the same page, each count was designated with its own number and given separate lines for finding Galyardt guilty or not guilty. Finally, the court instructed the jury that each count must be decided separately. The forms and instructions in this case are clear, and the facts demonstrate that a reasonable juror would not have believed they were prohibited from reaching different verdicts as to each count. Under these circumstances, this court is not firmly convinced that the jury would have come to a different conclusion had the now-requested multiple counts jury instruction been included.

III. *The prosecutor's statements during closing argument do not require reversal.*

Galyardt claims that the prosecutor committed reversible error during closing argument by (1) making "we know" type statements, (2) commenting on the strength of the evidence, and (3) arguing facts not in evidence. Once again this court must determine if it has jurisdiction to address these claims. Although Galyardt did not object to the allegedly erroneous statements at trial, doing so was not required to preserve his challenge on appeal. See *State v. Butler*, 307 Kan. 831, 864, 416 P.3d 116 (2018) (addressing defendant's appeal despite failure to object to the prosecutor's comments at trial). Appellate courts will review a claim of prosecutorial error arising from statements made in closing argument even without a timely objection, but the court may figure the

presence or absence of an objection into its analysis of the alleged error. *State v. Bodine*, 313 Kan. 378, 406, 486 P.3d 551 (2021).

On appeal, this court analyzes allegations of prosecutorial error under a two-step process of identifying any error and determining if the error prejudiced the defendant. *State v. Sherman*, 305 Kan. 88, 109, 378 P.3d 1060 (2016). After determining "whether the prosecutorial acts complained of fall outside the wide latitude afforded prosecutors," the court then determines "whether the error prejudiced the defendant's due process rights to a fair trial." 305 Kan. at 109. Prosecutorial error will be considered 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.'" 305 Kan. at 109.

A. *The prosecutor erred by using "we know" type statements.*

Galyardt argues the prosecutor committed reversible error by using the phrase "we know" and its variations when discussing contested facts in the closing argument. "[A] prosecutor's use of 'we know' is acceptable when it 'does not indicate [the prosecutor's] personal opinion, but demonstrates that the evidence was uncontroverted.'" *State v. King*, 308 Kan. 16, 34, 417 P.3d 1073 (2018) (quoting *State v. Corbett*, 281 Kan. 294, 315, 130 P.3d 1179 [2006]). However, the prosecutor commits error if the "we know" statements are not used to discuss uncontroverted facts but are instead used to draw inferences from controverted facts and make conclusions as to the ultimate issue that are within the purview of the jury. 308 Kan. at 34. Appellate courts review a prosecutor's allegedly erroneous statements in the context that they were made rather than in isolation. 308 Kan. at 33.

The State concedes that the prosecutor erred by making some "we know" type statements referencing controverted facts. Those conceded erroneous statements were:

1. "Feel free to remind your fellow jurors that the [detective] reviewed the footage from Taco Grande from the morning of February 29th of 2020, and *we observed the defendant's vehicle* go up and down and up and down all Vine Street just prior to the burglary." (Emphasis added.)
2. "We see in Exhibit 91 of the State's evidence at 6:04 a.m. the defendant's vehicle is captured going—or at 6:00 a.m. *we see the defendant's vehicle* . . . . At 6:04 a.m. *we see the defendant's vehicle* northbound on Vine Street." (Emphasis added.)
3. "We know based on that, that the shoe fits."
4. "At the end of this case, we know several things. *We know about the shoes of the individual* who was observed in CBD American Shaman." (Emphasis added.)

As the State concedes, each of these statements invades the purview of the jury's responsibility by drawing inferences as to disputed facts. See 308 Kan. at 34. In the first two statements, the prosecutor erred by drawing an inference that the vehicle in the videos was Galyardt's vehicle—which was disputed. The first error also misstates the evidence or argues facts not in evidence by reporting that the vehicle in the surveillance footage was actually Galyardt's vehicle—which was not an accurate recitation of the evidence. The prosecutor also erred in statements three and four by inferring Galyardt's guilt—the ultimate disputed issue—which definitely invades the jury's purview.

Although not conceded as errors by the State, the prosecutor also erred when making "we know" type statements about what is seen in the surveillance video footage of the burglar's clothing and vehicle, and by inferring the items in the video were the same as the evidence in the courtroom which was taken from Galyardt's home. These errors were:

5. "More importantly, we see at the CBD incident the surveillance footage. We see in that footage, and I would encourage you to watch it as a jury, an individual wearing a blue coat, a black hat, black gloves and very unique shoes. *We also see*

in this footage a facial structure consistent with that of the defendant's." (Emphasis added.)

6. "Members of the jury, we see the vehicle of the burglary, the clothes of the burglary, and the tools of the burglary, *and that's evidenced by the physical evidence we have here.*" (Emphasis added.)
7. "We also see a small flashlight, which is consistent with that which would be *observed in the hallway photos of the defendant* walking through the hallway back for the room with the safe." (Emphasis added.)
8. "We have the coat, the hat, the shoes of the burglar. We have the tools of the burglar. We have the vehicle of the burglar."

Contrary to the State's assertion, the prosecutor's statements were not merely references to evidence; they contained inferences that the evidence resolved disputed and controverted facts. "If a prosecutor uses the words 'we know' when drawing inferences for the jury rather than recounting uncontroverted evidence, the prosecutor errs even if drawing a reasonable inference." *State v. Alfaro-Valleda*, 314 Kan. 526, Syl. ¶ 2, 502 P.3d 66 (2022). The prosecutor inferred that the burglar's facial structure was consistent with Galyardt's; that the clothing, flashlight, and vehicle found at Galyardt's home were the items in the surveillance videos; and ultimately concluded that the items taken from Galyardt's home were in fact "the tools of the burglar" and "the vehicle of the burglar." The prosecutor erred in making these statements.

Galyardt next argues that the prosecutor erred by commenting on the strength of the evidence during closing arguments which the State concedes may have been erroneous, but argues their impact was mitigated because they referenced evidence presented at trial. The prosecutor's statements at issue are:

9. "Members of the jury, based on the evidence, we can say *with relative certainty and certainly beyond a reasonable doubt* that the defendant had the vehicle of the

burglary, the tools of the burglary, and the clothes of the burglary." (Emphasis added.)

10. "The State would say that the evidence has demonstrated beyond all reasonable doubt that the defendant was the one behind these crimes because of the common themes that are observed throughout; between the vehicle, the positioning of the locks and the manner of entry."

While prosecutors may argue the evidence proves a defendant's guilt, they may not give their opinion about the ultimate issue of the defendant's guilt. *State v. Brown*, 316 Kan. 154, 164, 513 P.3d 1207 (2022) (citing *King*, 308 Kan. at 31). Here the prosecutor's statements went beyond commenting that the evidence tended to prove certain facts, but contained personal opinions about the strength of the evidence. The prosecutor did not merely give the facts supporting why the vehicle in the video was Galyardt's vehicle—but actually said that the evidence "demonstrated beyond all reasonable doubt" that the defendant committed the crimes. This is an improper opinion about the weight of the evidence.

B. The prosecutor's numerous errors in closing argument were individually and cumulatively harmless.

Having found the prosecutor committed multiple errors in his closing argument, this court must now determine whether the errors prejudiced Galyardt's due process rights to a fair trial. In evaluating the prejudice, this court applies the traditional constitutional harmlessness inquiry. *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967); see *State v. Fraire*, 312 Kan. 786, 791-92, 481 P.3d 129 (2021). A prosecutorial error is harmless if this court is convinced beyond a reasonable doubt that, when considering the entire record, "that the error did not affect the outcome of the trial," which means that "there is no reasonable possibility that the error contributed to the verdict." 312 Kan. at 792.

This court analyzes "any and all alleged indicators of prejudice, as argued by the parties" to determine if the prosecutor's erroneous statements prejudiced the defendant's ability to receive a fair trial. *Brown*, 316 Kan. at 169. Galyardt argues that he was prejudiced by the prosecutor's erroneous statements because they improperly compelled the jury to make the "inferential leap" from circumstantial evidence to a finding of guilt. The State responds that although the prosecutor used "we know" type phrases, the phrases were not an attempt to convey opinion but a rhetorical device that was used when accurately summarizing the evidence against him. Moreover, the State contends that the inferences drawn by the prosecutor were reasonable and the evidence against Galyardt was so strong that the jury would have reached the same conclusion regardless of the prosecutor's errors. Finally, the State points to the mitigating instruction provided by the court that attorney arguments and personal belief are not evidence.

The use of "we know" type statements that inappropriately and inaccurately convey the evidence and assert factual certainty over controverted conclusions, even through inferences, raises the risk of undermining the right to a fair trial. Kansas appellate courts have established a standard that acknowledges the impact of these misstatements as errors while also weighing those errors against their prejudicial effect in any given circumstance. Each case carries a different potential for harm, and that is what is reviewed in this second step.

There are 10 different erroneous statements at issue which the State must demonstrate are each individually as well as cumulatively harmless. In so doing, the State first argues that most of these statements were made as part of evidence summaries and not to draw inferences and conclusions. This court notes the relatively substantial length of the prosecutor's closing argument which consists of about 21 transcript pages, of which about 6 are rebuttal, and defense counsel's argument was about 11 pages total. Errors one, two, six, and eight all relate to statements where the prosecutor improperly inferred the truth of controverted facts that the vehicle and clothing depicted in the

surveillance videos were the same vehicle and clothing belonging to and retrieved from Galyardt. Each error occurred as part of the prosecutor's lengthy and accurate recitation of the witness testimony for each burglary, and evidence collected from Galyardt that appeared similar to that in the surveillance footage.

The prosecutor was similarly reciting evidence when he made errors five and seven inferring that Galyardt was the individual in the surveillance footage. The prosecutor's statements surrounding those errors likewise accurately recited the evidence and pointed to potential shortcomings from the State. In rebuttal the prosecutor explained that the police did not use facial recognition software, and pointed to the surveillance video image that showed the "bottom half, the jaw line structure and the nose structure. . . ." The prosecutor asked the jury to "look at the similarities" between the images in the surveillance footage and the evidence collected and noted many similarities. These "we know" statements were a type of reasonable summary of the evidence.

Viewing the prosecutor's use of "we know" statements in errors one, two, and five through eight in context, each were surrounded by summaries of the evidence that could reasonably lead to the stated inference. In *Brown*, the court found the prosecutor's use of "we know" statements did not prejudice the defendant when made in reference to evidence that supported her inferences, and the inferences were reasonable. 316 Kan. at 170-71. Here, not only were the inferences reasonable—the individual facts supporting the inferences were not directly controverted in the defendant's closing argument. The surveillance video from American Shaman CBD was clear and the clothing items found in Galyardt's home resembled the items in the video. Further, the vehicles in the surveillance footage and at Galyardt's home were similar, and he possessed tools that could be used to commit burglary. While defense counsel explained in her closing that the evidence required the jury to make inferences, she did not point to any deficiencies in the evidence that would support the inference. For example, she did not point out the

ways in which Galyardt's clothing, shoes, or vehicle differed from the items in the surveillance videos or demonstrate that such an inference would be inappropriate because of the commonality of these items.

Additionally, while making these statements the prosecutor acknowledged deficiencies in the State's evidence. He explained that one of the locks had been damaged at least in part by the store owner's spouse, that the burglary alarm book was decades old, that there were no fingerprints or shoeprints collected, and that the police did not use facial recognition software. These acknowledgments were not always made contemporaneously with the prosecutor's "we know" or similar arguments but did notify the jury that they need to consider and weigh all the evidence. As the court explained in *Brown*, noting such deficiencies in that context "underscored for the jury that it needed to consider how, and if, the evidence supported" the prosecutor's statements. 316 Kan. at 171.

Similarly, the prosecutor commented on the strength of the evidence in the context of larger explanations of the evidence, and drew reasonable inferences. Although the State's case was not insurmountable, it was strong. The prosecutor did not use "we know" statements to draw or infer conclusions from thin air, but as a segue from the recitation and explanation of the available evidence. The State presented substantial evidence supporting Galyardt's convictions. He possessed a vehicle with unique characteristics that closely resembled the suspected burglar's vehicle, possessed a multitude of tools specifically used to pick locks, had an instruction manual about alarms, possessed clothing and shoes resembling those in the surveillance footage, and his face resembled the burglar's as captured in the footage. Moreover, although Galyardt contested the inference that his vehicle, clothes, and shoes were the ones in the surveillance video—the defense counsel's closing argument did not contest that his items resembled those in the surveillance footage. The strength of the evidence supported the inferences drawn by the

prosecutor which supports the conclusion that Galyardt was not prejudiced by the statements.

Finally, before the closing arguments the district court instructed the jury as to the purpose of the closing argument and how the attorney statements should not be viewed as evidence. The court explained:

> "Ladies and gentlemen, you are now about to hear closing arguments. As we discussed at the start of the case, arguments of the attorneys are not evidence. These arguments are based upon the evidence and are intended to help you in understanding the evidence that was presented during the trial. This is the attorney's chance to try to persuade you and demonstrate to you what they believe the evidence has shown.
>
> "There is a difference between arguments by an attorney and the expressions of personal beliefs or opinions. As we've talked about, opinions or personal beliefs are not evidence, and it is not proper for an attorney to express a personal belief or opinion during closing argument. However, attorneys are entitled to make vigorous argument to you about what they believe the evidence has shown and that is the purpose of closing argument."

These instructions clearly direct the jurors that the persuasive remarks made during closing are not evidence, and an appellate court presumes that jurors follow these instructions. *Brown*, 316 Kan. at 170.

The State reached its burden in proving beyond a reasonable doubt that "'there is no reasonable possibility that the error contributed to the verdict.'" *Sherman*, 305 Kan. at 109. The prosecutor's "we know" type statements did not individually or cumulatively prejudice Galyardt because: (1) the court notified the jury that counsels' statements in closing were not evidence, (2) the statements were made before and after accurate summaries and descriptions of evidence supporting the inference drawn, (3) the inferences were reasonable, and (4) the State presented a strong case against Galyardt.

IV. *The cumulative effect of errors did not deprive Galyardt of a fair trial.*

Galyardt argues that even if not individually reversible, the cumulative effect of the trial errors deprived him of a fair trial and thus require reversal. Multiple trial errors, when considered together, may require reversal of the defendant's conviction when the totality of the circumstances establish that the defendant was substantially prejudiced by the errors and denied a fair trial. *Alfaro-Valleda*, 314 Kan. at 551.

Because the prosecutor's errors in closing argument implicated Galyardt's constitutional right to a fair trial, this court applies the constitutional harmless standard to determine if the State has established beyond a reasonable doubt that the cumulative effect of the errors did not affect the outcome of the trial. In determining whether the cumulative error affected the outcome, this court examines the errors in context, considers any mitigating actions by the district court, evaluates whether there is a relationship between the errors, and assesses the strength of the evidence. 314 Kan. at 551-52.

This cumulative error analysis is similar to that conducted above. As explained previously, the prosecutor's several "we know" type comments were harmless error because they were made in the context of the evidence, the jury had been instructed that counsels' statements were not evidence, and there was strong evidence incriminating Galyardt. The district court's error in not providing a multiple counts instruction did not constitute clear error, and adding its effect to the prosecutorial error in closing argument has little cumulative impact. First, this court does not see how the jury instruction error and prosecutor errors aggregate or relate to create reversible cumulative error. These two errors are unrelated and do not combine to create greater error. Second, as described above, the court mitigated the effect of both errors. The jury instruction error was minimized by the separation of each count in the jury instructions and on the verdict form and with the court's instruction that each count should be decided individually. The court

also mitigated the potential impact of the prosecutor's errors in closing argument with the instructions to the jury that attorney statements are not evidence and should be disregarded as such. See 314 Kan. at 552 (the prosecutorial errors were harmless and the court was unconvinced that the calculus changed when adding in the trial judge's failure to instruct the jury about the limited use of certain evidence). Finally, the strength of the evidence convinces this court that these errors did not have a cumulative effect of denying Galyardt the right to a fair trial and this court is convinced beyond a reasonable doubt that the errors did not affect the trial outcome.

CONCLUSION

Not all criminal charges are supported by direct physical evidence or confessions, but the weight of Kansas law is clear that circumstantial evidence and the reasonable inferences drawn therefrom is sufficient to sustain criminal convictions. This case is a prime example of a case with copious circumstantial evidence from which the fact-finder can reasonably infer the defendant's culpability. Although the district court should have included a multiple counts jury instruction, the jury instructions and verdict form were laid out in a way that made it clear each count must be decided separately. Additionally, the prosecutorial errors of drawing inferences of the ultimate question of guilt and on controverted evidence were ultimately harmless under the circumstances of this case.

Affirmed.