NOT DESIGNATED FOR PUBLICATION

No. 124,442

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

MARK EDWARD BALDWIN,
Appellant.

MEMORANDUM OPINION

Appeal from Jackson District Court; NORBERT C. MAREK JR., judge. Opinion filed August 11, 2023. Affirmed.

James M. Latta, of Kansas Appellate Defender Office, for appellant.

Kristafer R. Ailslieger, deputy solicitor general, and *Derek Schmidt*, attorney general, for appellee.

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

PER CURIAM: Mark Edward Baldwin appeals from his convictions for possession of marijuana and possession of drug paraphernalia.

On March 2, 2020, Deputy Sheriff Dennis Immenschuh was flagged down by Samantha Donaldson as he drove through the Walmart parking lot. Donaldson told Immenschuh that the woman in the car next to her "dinged" Donaldson's car door when the woman opened her car door and then walked into the store.

Donaldson was standing outside her car. Deputy Immenschuh noticed a male driver—the defendant, Mark Edward Baldwin—sitting behind the wheel in Donaldson's car. Immenschuh agreed to wait with Donaldson for the woman to return so he could facilitate the exchange of insurance information between the two women.

While they waited, Donaldson returned to the passenger seat of her car. Deputy Immenschuh got the drivers' licenses from Donaldson and Baldwin. Baldwin "didn't seem very talkative or what I would call cooperative." Immenschuh noted the license plates on the back of the two parked cars. While doing so, he noticed the odor of marijuana in the air. He could identify the odor as marijuana based on his training at the law enforcement academy and his many experiences in detecting the odor of marijuana during his 12 years as a law enforcement officer. When he returned to the front door of Donaldson's car to return the drivers' licenses, he could smell the odor of the marijuana coming from Donaldson's open car window. He directed Donaldson and Baldwin to step out of the car so he could conduct a "probable cause search."

Deputy Immenschuh searched a man's jacket that was in the driver's seat where Baldwin had been sitting. He found a "male wallet" inside the jacket. He also found several other items in the jacket: marijuana cigarettes, a "roach"—a small smoked end of a marijuana cigarette—and a cellophane covering from a cigarette pack which contained green vegetation, which he identified in the video of his search as marijuana. These items ultimately were introduced into evidence at trial along with the video recording of Immenschuh's search. The video showed that when Immenschuh engaged Baldwin outside the car, Baldwin was standing next to the driver's door and was wearing a t-shirt with no jacket. Donaldson was wearing a jacket. These two were the sole occupants of the vehicle.

After Baldwin was arrested for possession of marijuana and placed in the officer's car, Deputy Immenschuh again asked Donaldson for Baldwin's driver's license, which she still had along with her own.

While being transported to jail, Baldwin told Deputy Immenschuh that this "was a waste of time for two grams of . . . 'whatever that is.'" Immenschuh later weighed the vegetation he had identified as marijuana. The substance weighed 2.2 grams.

The State charged Baldwin with possession of marijuana and possession of drug paraphernalia. Deputy Immenschuh testified as described above. The State also introduced the testimony of Bianca Bailey, a forensic scientist with the Kansas Bureau of Investigation. She testified that she analyzed the vegetation Immenschuh had provided and determined the vegetation contained Tetrahydrocannabinol (THC), which is the psychoactive component in marijuana—i.e., the "chemical that gets you high."

Baldwin testified briefly in his own defense. After some initial identification testimony, the majority of Baldwin's direct examination consisted of the following:

"Q. You have heard the testimony?

"A. Yeah, uh-huh.

"Q. What disagreement do you have that you've heard with the testimony?

"A. Probable cause for a search, forceful nature of removing people from a vehicle.

. . . .

"Q. Do you want the jury to consider whether that's fair; is that what you're saying?

"A. Yes, sir.

"Q. Okay. Is there anything else you'd like to tell this jury that I missed?

"A. I don't know what you're getting at.

"Q. Well, what is usually—you wanted to testify in this case on your behalf. Is there anything else you'd like to tell this jury?

"A. The fourth amendment is being uprooted across the country, and we need to uphold the Constitution of our constitutional words that are being eroded beyond a reasonable doubt. There is doubt in this case as to whether the substance was found on anyone's person? Who had it? Who was driving the vehicle? Who owned the vehicle? Who brought the substance or non-substance into said vehicle?

. . . .

"Q. Anything else?

"A. No, sir."

The State's brief cross-examination of Baldwin consisted of the following:

"Q. Mr. Baldwin, it sounds like you are kind of upset that the officer was searching your vehicle; is that right?

"A. It wasn't my vehicle.

"Q. Okay. Searching the vehicle that you were in?

"A. Correct.

"Q. Okay. So, primarily, you want the jury to know that you feel like that was a violation of your constitutional rights; is that right?

"A. Yes, ma'am.

"Q. Okay. Be fair to say that you believe that marijuana should be legal in Kansas?

"A. Cannabis.

"Q. Okay. Do believe that cannabis should be legal in Kansas?

"A. Yes, ma'am."

The jury convicted Baldwin of both counts. The district court sentenced him to 18 months' probation, with an underlying total sentence of 11 months in prison. His appeal brings the matter to us.

ANALYSIS

Baldwin has properly preserved his claim that the evidence was insufficient to convict him of the crime charged.

Baldwin's first argument is that there was insufficient evidence to support his conviction for possession of marijuana because the evidence does not prove that the alleged marijuana here meets the legal definition of marijuana.

The Kansas Legislature has defined marijuana as including all parts of all varieties of the cannabis plant but not the mature stalks of the plant or industrial hemp. According to Baldwin, the State's expert testimony was insufficient to prove the substance qualified as marijuana under the definition provided by the Kansas Legislature.

But the State argues that while Baldwin claims the evidence could not support his conviction, he is really raising an issue of statutory interpretation which he should have raised before the district court to preserve the issue. We disagree.

The State is correct that generally, a party may not raise an issue for the first time on appeal. *State v. Eubanks*, 316 Kan. 355, 365, 516 P.3d 116 (2022). There are exceptions to this rule, but the party raising the new issue must affirmatively invoke and argue an exception to justify consideration of the issue. *State v. Jones*, 302 Kan. 111, 117, 351 P.3d 1228 (2015). But this rule does not apply to a criminal defendant's challenge to the sufficiency of the evidence before the district court. *State v. Hilyard*, 316 Kan. 326, 330, 515 P.3d 267 (2022). A sufficiency of the evidence claim does not cease to be such simply because the defendant relies on statutory text in support. See, e.g., *State v. Wilt*, 273 Kan. 273, 275-78, 44 P.3d 300 (2002) (interpreting statute to find that insufficient evidence existed to support conviction).

Alternatively, the State argues that we should view Baldwin's claim as a claim that the State's expert witness lacked a foundation to support her opinion on the nature of the substance she tested. Because Baldwin failed to object to the expert's lack of foundation for her opinions, it argues the issue has not been preserved. Again, we disagree.

Here, Baldwin is not challenging the validity of the expert's testimony on appeal or the foundation for her testimony. He merely contends the expert's testimony is not enough to establish the substance she tested was marijuana. The State's expert did not specifically conclude the substance she tested was marijuana. She simply concluded the vegetation she tested contained THC and explained that THC is the psychoactive component in marijuana. Baldwin challenges neither statement on appeal.

Baldwin did not need to preserve his challenge to the sufficiency of the evidence supporting his conviction to now raise it for the first time on appeal. *Hilyard*, 316 Kan. at 330. And we find his claim is solely based on the sufficiency of the evidence.

The evidence was sufficient to support Baldwin's conviction for possession of marijuana.

Baldwin was charged with possession of marijuana, a severity level 5 nonperson drug felony. At the time of the incident in the Walmart parking lot, both the Kansas Criminal Code and the Kansas Uniform Controlled Substances Act defined marijuana as "all parts of all varieties of the plant Cannabis whether growing or not, the seeds thereof, the resin extracted from any part of the plant and every compound, manufacture, salt, derivative, mixture or preparation of the plant, its seeds or resin." K.S.A. 2019 Supp. 21-5701(j); K.S.A. 2019 Supp. 65-4101(aa). This was the substance that the State needed to prove was in Baldwin's possession at the time of this incident.

But the Legislature created certain exceptions to this definition of marijuana. These included: (1) The mature stalks of the cannabis plant; (2) any substance listed in Schedules II through V of the Uniform Controlled Substances Act; (3) cannabidiol; and (4) industrial hemp, as defined in K.S.A. 2019 Supp. 2-3901, when cultivated, produced, possessed, or used for activities authorized by the Commercial Industrial Hemp Act. K.S.A. 2019 Supp. 21-5701(j); K.S.A. 2019 Supp. 65-4101(aa). Industrial hemp is defined as "all parts and varieties of the plant cannabis sativa L., whether growing or not, that contain a delta-9 tetrahydrocannabinol concentration of not more than 0.3% on a dry weight basis." K.S.A. 2019 Supp. 2-3901(b)(7).

Baldwin argues that to be guilty of possessing marijuana, the State had to prove the substance met the legal definition of marijuana. See, e.g., *Wilt*, 273 Kan. at 275-78 (evidence insufficient to support conviction where statutory definition of element of offense not met).

Baldwin contends there was no evidence to establish the substance the State's expert tested was part of any variety of the cannabis plant or that it was not an exempt substance listed in Schedules II through V of the Uniform Controlled Substances Act. He also argues the expert's description of the substance as vegetation containing some amount of THC does not exclude the possibility that the substance was the mature stalks of the cannabis plant or industrial hemp, both of which are exempt from the definition of marijuana. He concludes that based on the evidence presented by the State, it is impossible to determine whether the substance alleged to be in his possession was indeed marijuana.

In considering this challenge to the sufficiency of the evidence, we view the evidence in a light most favorable to the State to determine whether a rational fact-finder could find the defendant guilty beyond a reasonable doubt. *State v. Roberts*, 314 Kan. 835, 849-50, 503 P.3d 227 (2022).

Baldwin relies on the unpublished opinion in *State v. Brichat*, No. 91,573, 2005 WL 124169 (Kan. App. 2005) (unpublished opinion), as support for his claim that the presence of THC is irrelevant in determining whether the tested substance meets the statutory definition of marijuana. We find he overstates its holding and as such it does not support the position he espouses.

In *Brichat*, the plant the police found in the defendant's home lacked any THC. The court noted that marijuana was designated as a hallucinogenic drug, but the statutory definition of marijuana did not require a substance to contain THC. Because the plant at issue was cannabis—as indicated by the language the court highlighted from the statute—it qualified as marijuana under the statute. The court in *Brichat* did not hold that the presence of THC is irrelevant in identifying a substance as marijuana, only that it was not necessary under the statutory definition. 2005 WL 124169, at *5. Despite Baldwin's assertion to the contrary, while proof of the presence of THC is not required to meet the statutory definition of marijuana, the presence of THC in a substance may still be relevant to a fact-finder's determination of whether a substance is marijuana.

The State relies on *State v. Luginbill*, 223 Kan. 15, 18-19, 574 P.2d 140 (1977), in which the court concluded the presence of THC in a substance was enough to identify it as marijuana, under the definition as it existed at that time. In *Luginbill*, the court interpreted the original definition of marijuana under the Uniform Controlled Substances Act as it existed in 1972. Looking to the legislative history and purpose of the statute, the court concluded the definition was intended to include those parts of marijuana which contain THC, to exclude those parts which do not, and to outlaw all plants popularly known as marijuana to the extent they contain THC, regardless of the possible existence of more than one species of marijuana. 223 Kan. at 18-19. That said, the court in *Luginbill* was not interpreting the statutory definition of marijuana at issue here, but the definition as it existed in 1972. Since *Luginbill* was handed down, the Legislature has amended the definition of marijuana several times. Given the changes in the definition of

marijuana, an indiscriminate reliance on *Luginbill* would be suspect. Even so, *Luginbill* establishes the presence of THC is one factor that is relevant in establishing whether a substance is marijuana.

Synthesizing *Luginbill*, *Brichat*, and the current statutory definition of marijuana, we note that while THC is one indicator that a substance is marijuana, it is not the only indicator. Circumstantial, as well as direct, evidence can assist a jury in determining whether the substance at issue is marijuana. In fact, a conviction can be based entirely on circumstantial evidence so long as the evidence supporting the verdict permits the fact-finder to draw reasonable inferences regarding the facts at issue. Circumstantial evidence need not exclude every other reasonable conclusion to be sufficient to support a conviction. *State v. Banks*, 306 Kan. 854, 858-59, 397 P.3d 1195 (2017).

We are persuaded by another panel of this court when it found, under similar facts,

> "In sum, just because the definition of marijuana at K.S.A. 2016 Supp. 21-5701(j) refers to the cannabis plant does not mean the State needed to establish with any direct testimony that the substance Holder was charged with possessing came from the cannabis plant. The State needed to prove that Holder possessed 'marijuana' with the intent to distribute, and three witnesses testified without objection that the substance here was marijuana." *State v. Holder*, No. 120,464, 2020 WL 6108359, at *10 (Kan. App. 2020) (unpublished opinion), *aff'd* 314 Kan. 799, 502 P.3d 1039 (2022).

Here, we have Deputy Immenschuh's testimony that—based on his training at the law enforcement academy and his experiences in detecting the odor of marijuana during his 12 years of experience as a law enforcement officer—he could smell the odor of marijuana coming from the open car window. Immenschuh testified that during his search of the vehicle, he found marijuana cigarettes, a "roach," and a cellophane covering from a cigarette pack which contained green vegetation which he identified in the video

of his search as marijuana. Immenschuh stated he later weighed the vegetation he had identified as marijuana, and it weighed 2.2 grams.

While being transported to jail, Baldwin told Deputy Immenschuh that this "was a waste of time for two grams of . . . 'whatever that is.'" At trial, although Baldwin testified in his own defense, he did not dispute the substance found in the car was marijuana. Instead, on cross-examination, he agreed with the prosecutor that he believed cannabis should be legal in Kansas. Finally, the State's expert at trial testified the vegetation she tested contained THC which is the psychoactive component in marijuana: i.e., the "chemical that gets you high." We find this evidence is enough to support a finding that the substance found in the vehicle was marijuana.

Baldwin also asserts the State failed to prove the substance confiscated during the search did not qualify under one of the exceptions as stated in K.S.A. 2019 Supp. 21-5701(j) and K.S.A. 2019 Supp. 65-4101(aa). Baldwin asserts the State failed to prove the substance was not industrial hemp, with a THC "concentration of not more than 0.3% on a dry weight basis." K.S.A. 2019 Supp. 2-3901(b)(7). Here, the State's expert testified that the marijuana contained THC, but she did not testify as to the percentage of THC in the vegetation. In addition, Baldwin argues the State failed to show that the substance did not fall under one of the other exceptions—not being part of the mature stalk of the cannabis plant, not being cannabidiol, and not being listed in Schedules II through V of the Uniform Controlled Substances Act.

In *State v. Brazzle*, 311 Kan. 754, 466 P.3d 1195 (2020), the defendant challenged the sufficiency of the evidence to support his conviction of oxycodone because he claimed the State failed to present evidence that an exception did not apply. Brazzle specifically argued the possession of oxycodone would have been legal if it had been properly prescribed to him, and the State failed to present any direct evidence that he did not have a prescription for the controlled substance. The Court of Appeals found that the

exception of a valid prescription for the substance is an affirmative defense that must be asserted by the defendant before the State is required to prove that the exception did not apply. *State v. Brazzle*, 55 Kan. App. 2d 276, 286-87, 411 P.3d 1250 (2018); see *City of Olathe v. Clark*, No. 111,354, 2014 WL 6777444, at *4 (Kan. App. 2014) (unpublished opinion) (exceptions stand apart from the elements of the violation and are affirmative defenses that must be pursued or asserted).

After granting a petition for review, our Supreme Court found it was unnecessary to "delve into the complex statutory construction issue about whether the existence of the prescription is an affirmative defense." *Brazzle*, 311 Kan. at 767. Instead, our Supreme Court held that the circumstantial evidence in the case—such as where the oxycodone was found and its proximity to other illegal substances—suggested that Brazzle's possession of the oxycodone was illegal. 311 Kan. at 767. While the Kansas Supreme Court did not go as far as to find the assertion of an exception is an affirmative defense, it rejected Brazzle's argument that the State was charged with the duty of presenting evidence rebutting every exception to illegal possession.

Here, as in *Brazzle*, Baldwin made no claim that any of the exceptions applied. Deputy Immenschuh found marijuana cigarettes, a roach, and a cellophane package containing green vegetation in a man's jacket left in the seat of the vehicle where Baldwin had been sitting. Baldwin made no claim the substance was industrial hemp for activities authorized by the Industrial Hemp Act. He also did not claim it was from the mature stalks of the cannabis plant, cannabidiol, fell under Schedules II through V of the Uniform Controlled Substances Act, or he legally possessed the substance for any other reason. See K.S.A. 2019 Supp. 21-5701(j); K.S.A. 2019 Supp. 65-4101(aa). Considering all the evidence, we find sufficient direct and circumstantial evidence supported the State's allegation that Baldwin was in possession of an illegal substance commonly known as marijuana.

Viewing the evidence in a light most favorable to the State, the prevailing party, we conclude the State presented sufficient evidence to support this conviction. The State was not required to prove that the substance derived from the cannabis plant, but only that Baldwin possessed marijuana. And Baldwin failed to assert any argument or present any evidence that a statutory exception applied that would result in a finding that he legally possessed the substance. Accordingly, we find sufficient evidence to support Baldwin's conviction for possession of marijuana.

The district court did not commit clear error in failing to instruct the jury on the legal definition of marijuana.

Baldwin's second argument relates to his claim that the State presented insufficient evidence to support his conviction. He contends the district court committed clear error by failing to instruct the jury on the definition of marijuana. He argues the failure to do so was clear error given the complexity of the definition, and the jury would have reached a different verdict if properly instructed.

We review claims of jury instruction errors using the following steps: (1) whether the issue was preserved for review; (2) whether the instruction was factually and legally appropriate; and (3) if the instruction as given was erroneous, whether the error was harmless. If the issue was not raised at trial, the more stringent clear error standard applies. *State v. McLinn*, 307 Kan. 307, 317-18, 409 P.3d 1 (2018); see K.S.A. 2022 Supp. 22-3414(3). Under this standard, an instruction is clearly erroneous if we are firmly convinced the jury would have reached a decision more favorable to the defendant had the error not occurred. *State v. Valdez*, 316 Kan. 1, 6, 512 P.3d 1125 (2022). Here, Baldwin did not object to the instruction as given, so we apply the clear error standard.

Baldwin acknowledges that he did not request the district court give an instruction defining marijuana and that he must therefore show clear error. Even so, he argues that an

instruction defining marijuana was legally and factually appropriate and would have resulted in a different verdict had it been given. Essentially, he claims that if the jury had been informed of the exceptions to the definition of marijuana, it would not have found the substance confiscated from the vehicle qualified as marijuana.

After examining the record, we find no clear error. Baldwin presented no evidence that any of the exceptions in the statute defining marijuana applied here. Even assuming a definition of marijuana is legally and factually appropriate, Baldwin fails to show a likelihood the jury would have reached a different verdict had the instruction been given. At trial, the State presented evidence the substance was marijuana, and Baldwin made no claim the substance was anything but marijuana. And as discussed, he did not argue that any of the exceptions set forth in the statute applied here. Rather, his defense at trial was that he did not possess the marijuana because the State did not show the jacket found in the car belonged to him.

We conclude the jury would not likely have reached a different verdict if the instruction defining marijuana, that he did not request, had been given.

The district court did not commit clear error by instructing the jury regarding the culpable mental state.

Baldwin next argues the district court erred by instructing the jury that the State could prove his conduct was knowing by proving it was intentional. Baldwin claims this instruction was clearly erroneous as it constituted a conclusive mandatory presumption which relieved the State of its burden to prove that Baldwin intentionally or knowingly possessed the marijuana and thus violated the Due Process Clause of the Fourteenth Amendment. Baldwin did not object to the now complained-of instruction about the State's burden to prove the culpable mental state for the crime. Thus, we evaluate this claim using the clearly erroneous standard. K.S.A. 2022 Supp. 22-3414(3).

In challenging the instruction given here as a conclusive mandatory presumption, Baldwin is not arguing the jury instruction misstated Kansas law. Rather, he argues the evidentiary presumption contained in K.S.A. 2022 Supp. 21-5202(c)—which the instruction here accurately describes—is unconstitutional. He argues the conclusive mandatory presumption included in that statute was carried forward in error when given in the now-challenged jury instruction.

A culpable mental state is an essential element of every criminal offense. A culpable mental state may be established by proof that the accused acted "intentionally," "knowingly," or "recklessly." K.S.A. 2022 Supp. 21-5202(a). The Legislature has defined these mental states hierarchically, reflecting three relative degrees of culpability. K.S.A. 2022 Supp. 21-5202(b); see K.S.A. 2022 Supp. 21-5202(h)-(j).

A person acts intentionally with respect to the nature or result of the conduct in question "when it is such person's conscious objective or desire to engage in the conduct or cause the result." K.S.A. 2022 Supp. 21-5202(h). A person acts knowingly with respect to the nature of or the circumstances of such person's conduct "when such person is aware of the nature of such person's conduct or that the circumstances exist." K.S.A. 2022 Supp. 21-5202(i). A person also acts knowingly with respect to a result "when such person is aware that such person's conduct is reasonably certain to cause the result." K.S.A. 2022 Supp. 21-5202(i).

Under this statutory scheme, proof of a more culpable mental state necessarily constitutes proof of a less culpable mental state as well. "If recklessness suffices to establish an element, that element also is established if a person acts knowingly or intentionally. If acting knowingly suffices to establish an element, that element also is established if a person acts intentionally." K.S.A. 2022 Supp. 21-5202(c).

Jury instruction No. 5 states:

> "The State must prove that the defendant committed the crime(s) of Possession of Marijuana and Possession of Drug Paraphernalia:
>
> - Intentionally, or
> - Knowingly
>
> "A defendant acts intentionally when it is the defendant's desire or conscious objective to:
>
> - Do the act complained about by the State, or
> - Cause the result complained about by the State.
>
> "A defendant acts knowingly when the defendant is aware:
>
> - Of the nature of his conduct that the State complains about, or
> - Of the circumstances in which he was acting, or
> - That his conduct was reasonably certain to cause the result complained about by the State."

And jury instruction No. 6, which is the instruction Baldwin claims was given in error, states: "If the State has proved that the defendant has acted intentionally, then the State has proved as well that the defendant acted knowingly."

The State argues that this instruction was not clearly erroneous, as it mirrors K.S.A. 2022 Supp. 21-5202(c) and the Kansas Pattern Jury Instructions, PIK Crim. 4th 52.020 (2021 Supp.). The State also refutes Baldwin's claim that jury instruction No. 6 constitutes a conclusive mandatory presumption.

In claiming that PIK Crim. 4th 52.020 constitutes an unconstitutional conclusive mandatory presumption, Baldwin argues the instruction ordered the jury to infer a presumed fact—that he acted knowingly—if the State proved certain predicate facts—that he acted intentionally. He alleges this relieved the State of its burden to prove he acted knowingly in possessing the alleged marijuana and paraphernalia. Baldwin argues

the jury would have reached a different verdict had the instruction not been given even though he also acknowledges that it was probable the jury found that it was Baldwin's conscious objective or desire to engage in the possession of the marijuana. Thus, Baldwin admitted the jury likely found that he possessed the marijuana intentionally.

Baldwin does not explain how it is likely the jury would have reached a different result if it had not been instructed that a finding that Baldwin acted intentionally does not necessarily mean that he acted knowingly. The State was charged with proving that Baldwin intentionally *or* knowingly possessed the marijuana, not both. The existence of *either set of facts is enough to satisfy the* required element.

The instruction given here merely clarified the definition of the two mental states, explaining to the jury that if the evidence supports a finding the defendant acted intentionally, it must also support a finding that the defendant acted knowingly. As noted, in K.S.A. 2022 Supp. 21-5202(c), the Legislature has defined these two mental states so that a finding that a defendant acted intentionally also establishes that a defendant acted knowingly. With his admission that it is likely the jury found he intentionally possessed the marijuana, Baldwin essentially admits a different result is unlikely if jury instruction No. 6 had not been given.

We find no error in the district court's instruction, which is consistent with K.S.A. 2022 Supp. 21-5202(c) and PIK Crim. 4th 52.020. Even if we assume the instruction here was an unconstitutional mandatory presumption, Baldwin cannot demonstrate clear error. Baldwin essentially admits that the jury likely found he acted intentionally. The State had to prove that he acted intentionally or knowingly, not both. Baldwin fails to explain how the result would have been different if the complained-of instruction had not been given. As such, we conclude Baldwin has not shown clear error.

Baldwin waived his argument that the district court violated his constitutional rights by omitting an essential element of the crime of possession of marijuana from the jury instructions by failing to raise the issue before the district court.

Baldwin next argues that his right to have a jury find every element of the alleged crime, as guaranteed by section 5 of the Kansas Constitution Bill of Rights, was violated by the omission of an essential element from the jury instructions for the crime of possession of marijuana. He claims the instructions should have informed the jury that the State was required to prove he knew the substance at issue was marijuana or knew that it was controlled, as this is an essential element of the offense. And since section 5 provides that the jury trial right is "inviolate," Baldwin argues the failure to give this instruction was a structural error requiring reversal.

Baldwin did not raise this issue before the district court. In fact, Baldwin specifically agreed to the instruction given to the jury outlining the elements of the crime of possession of marijuana. Generally, issues not raised before the district court cannot be raised on appeal. See *State v. Green*, 315 Kan. 178, 182, 505 P.3d 377 (2022). And constitutional grounds for reversal asserted for the first time on appeal are not properly preserved for review. *State v. Pearce*, 314 Kan. 475, 484, 500 P.3d 528 (2021).

Baldwin claims an exception to the general rule that the constitutional issue is not properly preserved should apply. Specifically, he asserts: (1) His claim involves only a question of law arising on admitted facts and is finally determinative of the case; and (2) consideration of his claim is necessary to prevent the denial of his jury trial right—a fundamental right. Our Supreme Court has held that application of an asserted exception is a discretionary decision: "The decision to review an unpreserved claim under an exception is a prudential one. Even if an exception would support a decision to review a new claim, we have no obligation to do so. [Citations omitted.]" *State v. Gray*, 311 Kan. 164, 170, 459 P.3d 165 (2020).

Baldwin had the opportunity to raise this issue below—and he was specifically given the opportunity to discuss any changes to the proposed jury instructions—but he failed to do so and instead agreed to the jury instructions as written. We find it appropriate, under these circumstances, to exercise our discretion and decline to consider, for the first time on appeal, the merits of an argument that Baldwin now claims to be so serious as to be a structural error under the Kansas Constitution, when he acquiesced by agreeing to the instruction that was given.

The district court did not commit clear error by omitting an essential element of the charged offense from the jury instruction.

Alternatively, Baldwin argues that even if his constitutional rights were not violated, the district court committed reversible error by failing to instruct the jury as to all of the essential elements of the crime of possession of marijuana. Baldwin did not object to the now complained-of instruction on the essential elements of the crime of possession of marijuana. Thus, we again evaluate this claim using the clearly erroneous standard. K.S.A. 2022 Supp. 22-3414(3).

The district court has the duty to define the offense charged in the jury instructions—either in the language of the statute or in appropriate and accurate language of the court—and to inform the jury as to the essential elements of the crime. *State v. Richardson*, 290 Kan. 176, 181, 224 P.3d 553 (2010).

"[P]ossession of a controlled substance requires specific intent to exercise control over the substance, with knowledge of the nature of the substance." *State v. Keel*, 302 Kan. 560, 567, 357 P.3d 251 (2015). This is because to "possess"—i.e., to intentionally or knowingly exercise control over—a controlled substance, an individual must understand the nature of the substance by either knowing the identity of the substance or that it is controlled. *State v. Rizal*, 310 Kan. 199, 206, 208, 445 P.3d 734 (2019). Thus, mistake of

fact is an appropriate defense to a charge of possession of marijuana, as a person does not knowingly possess marijuana if the person has an actual mistaken belief the item is some other lawful substance. 310 Kan. at 208-09.

Baldwin argues the district court failed to define the offense of possession of marijuana in the appropriate and accurate language of the Kansas Supreme Court by omitting the rule laid out in *Keel* and *Rizal*. He claims this failure rendered the instructions given on possession of marijuana legally inappropriate and thus erroneous. Baldwin claims the jury verdict would have been different had the jury been given this instruction because the State failed to present any direct evidence that he knew the substance was marijuana or a controlled substance.

The requirement that a defendant either know the identity of the substance or that it is controlled to be guilty of possession of a controlled substance is not evident from the face of the statute. Rather, this requirement flows from the definitions of the words "possession" and "knowingly." Based on the definition of "possession," the crime of possession of a controlled substance requires proof that the defendant *knowingly* exercised control over the substance. 310 Kan. at 206-07. And to act knowingly, a person must understand the nature of the act; here, the nature of the substance possessed. 310 Kan. at 207.

The district court instructed the jury that to establish the charge of possession of marijuana, the State was required to prove that Baldwin possessed marijuana and that he committed this crime either intentionally or knowingly. The jury was also instructed that "possession" meant intentionally or knowingly exercising control over an item, and the district court provided accurate definitions for both intentionally and knowingly. By defining possession in the jury instructions, the district court effectively instructed the jury that the defendant must know the nature of the substance possessed. When viewed as a whole, the jury instructions required the jury to find all the essential elements of the

crime of possession of marijuana. Thus, we find no error in the district court's jury instructions.

Even if the instructions given here were erroneous, Baldwin cannot demonstrate clear error. Baldwin's theory of defense was not that he was unaware the substance allegedly in his possession was marijuana. Rather, he claimed the jacket containing the marijuana did not belong to him.

And the State presented circumstantial evidence that Baldwin knew the nature of the substance in his possession. When Deputy Immenschuh approached the vehicle, he smelled the odor of marijuana, suggesting the substance had been recently smoked. When Immenschuh searched the car, he found the marijuana along with several marijuana cigarettes. One of the cigarettes was partially smoked, suggesting the person in possession of the marijuana understood what it was. Finally, Baldwin made a statement to Immenschuh revealing that he knew the item in the jacket was contraband when he said he thought arresting someone for 2 grams was a "waste of time." Considering the evidence presented and Baldwin's theory of defense, we find it unlikely the jury would have returned a different verdict had the instruction Baldwin now requests been given.

The prosecutor did not commit reversible error by shifting the burden of proof to Baldwin during closing arguments.

Baldwin contends that in closing argument the prosecutor impermissibly shifted the burden of proof to him, and this error denied his right to a fair trial.

Prosecutorial error in closing argument occurs when the prosecutor's statements fall outside the wide latitude afforded prosecutors to conduct the State's case in an attempt to obtain a conviction in a manner that denies a defendant the constitutional right to a fair trial. *State v. Sherman*, 305 Kan. 88, 102, 378 P.3d 1060 (2016). On review, we

consider any challenged argument in context and not in isolation; and if an error is found, we consider whether the error prejudiced the defendant's due process rights to a fair trial. A prosecutorial error is harmless if we are satisfied beyond a reasonable doubt that the error 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. See *State v. Bodine*, 313 Kan. 378, 406, 486 P.3d 551 (2021).

During closing argument, Baldwin's counsel argued the evidence did not establish that the coat in which the alleged marijuana was found belonged to Baldwin. He ended his closing argument by stating "[the prosecutor] had a chance to ask [Baldwin] if that was his coat. That would've settled it. She didn't. So you don't have that evidence."

During the State's rebuttal, the prosecutor stated the following in response to defense counsel's argument: "Baldwin also had the opportunity to tell you that that wasn't his marijuana. He didn't do that." Defense counsel objected because this statement constituted impermissible burden-shifting, and the defendant did not have to present any evidence. The district court noted the objection for the record. Then the prosecutor stated that "the defendant chose to testify in this case, and at no time during his testimony did he deny that that marijuana was his."

The prosecutor should not impermissibly attempt to shift the burden of proof to the defendant. *State v. Watson*, 313 Kan. 170, 176, 484 P.3d 877 (2021). Even so, a prosecutor does not shift the burden of proof to the defendant by merely pointing out a lack of evidence to support a defense or to corroborate a defendant's argument related to deficiencies in the State's case. Likewise, a prosecutor does not shift the burden of proof by posing a general question about the lack of evidence offered to rebut the State's witnesses. 313 Kan. at 176-77. We give the prosecutor considerable latitude to comment on the weakness of the defense. *State v. Williams*, 299 Kan. 911, 939, 329 P.3d 400 (2014).

The Kansas Supreme Court has held that when the district judge properly instructs the jury on the prosecution's burden of proof, the prosecutor does not err by arguing inferences based on the balance or lack of evidence, even where the prosecutor's remarks suggest to the jury that the defense has the responsibility to rebut the State's evidence and failed to do so. Where the prosecutor's comments in general on the defendant's failure to produce evidence to rebut the State's evidence rather than commenting on the defendant's failure to take the stand, the remarks are permissible. *State v. Cosby*, 293 Kan. 121, 136, 262 P.3d 285 (2011).

Baldwin argues the prosecutor impermissibly shifted the burden of proof by focusing the jury's attention to his failure to testify that the marijuana was not his. In *State v. Wilson*, 295 Kan. 605, 623-25, 289 P.3d 1082 (2012), our Supreme Court found no error in the prosecutor's comments that the defendant had testified but failed to provide an innocent reason as to why his DNA was found at the crime scene. Similarly, in *Watson*, the Kansas Supreme Court found no error when the prosecutor pointed out that the defendant had provided no evidence in support of his testimony. 313 Kan. at 176. Likewise, we find the prosecutor's argument here was allowable comment on the evidence and within the wide latitude afforded prosecutors in discussing the evidence. The prosecutor pointed out that Baldwin chose to testify and did not deny that the marijuana belonged to him, but it did not suggest that Baldwin had the burden of proof to show his innocence.

Even if the comment were error, Baldwin has failed to show prejudicial error. Baldwin claims prejudice because the trial was short, and his entire defense was the alleged marijuana did not belong to him. Because this was his sole defense, he argues the State cannot prove beyond a reasonable doubt that its improper comment did not affect the outcome of both verdicts.

We note the evidence tending to establish Baldwin's possession of the marijuana was unrefuted. The officer found the marijuana in a man's jacket located where Baldwin had been sitting in the vehicle just before the search. In addition, Baldwin's comments while in Deputy Immenschuh's patrol car establish the marijuana was Baldwin's because he knew the approximate weight of the substance and expressed displeasure that his arrest was a "waste of time." This aligned with his testimony that he believed cannabis should be legal. During his brief testimony, Baldwin focused on his complaints about the search of the vehicle rather than providing any testimony that the marijuana was not his. Finally, we note the jury instructions informed the jury that the State had the burden of proof to establish the defendant's guilt beyond a reasonable doubt.

Given the evidence, we find no reasonable probability that the prosecutor's comments during the rebuttal portion of the closing argument affected the outcome of the verdict.

The cumulative error doctrine does not apply.

Finally, Baldwin argues that cumulative errors denied him a fair trial. But here, there were not multiple trial errors to accumulate. See *State v. Hilt*, 299 Kan. 176, 200, 322 P.3d 367 (2014). Thus, the cumulative error doctrine does not apply.

Affirmed.