NOT DESIGNATED FOR PUBLICATION

No. 124,533

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

JUSTIN TODD REY,
Appellant.

MEMORANDUM OPINION

Appeal from Johnson District Court; BRENDA M. CAMERON, judge. Submitted without oral argument. Opinion filed December 1, 2023. Affirmed.

Michelle A. Davis, of Kansas Appellate Defender Office, for appellant.

Jacob M. Gontesky, assistant district attorney, *Stephen M. Howe*, district attorney, and *Kris W. Kobach*, attorney general, for appellee.

Before GREEN, P.J., SCHROEDER and CLINE, JJ.

PER CURIAM: Justin Todd Rey appeals his convictions for sexual exploitation of a child and contributing to a child's misconduct or deprivation. On the sexual exploitation charges, he argues that the cell phone containing sexually explicit images was not under his exclusive control and that the jury verdict forms contained incorrect language. On his convictions for contributing to a child's misconduct or deprivation, he argues that the statutory language for determining when a child is in need of care is unconstitutionally vague. Lastly, he asserts that cumulative errors deprived him of a fair trial. For the reasons set forth later, we affirm Rey's convictions.

FACTS

The State charged Rey with two counts of aggravated endangering a child, in violation of K.S.A. 2017 Supp. 21-5601; two counts of contributing to a child's misconduct or deprivation, in violation of K.S.A. 2017 Supp. 21-5603; and three counts of sexual exploitation of a child—possessing a visual depiction of a child under 18 years engaging in sexually explicit conduct, in violation of K.S.A. 2017 Supp. 21-5510.

At trial, Bruce Jeffrey testified that he is the executive director at The Principle Foundation, an organization that assists Christian Scientists. Rey brought his wife and child to Kansas City, where they were staying in a hotel. Jeffrey testified that he met the Reys at their hotel room because they had requested help.

A housekeeper at the hotel testified that she saw Rey leave on October 23, 2017. She stated that she saw Rey leave the building in a yellow raincoat, pushing a stroller and pulling a cooler, with a little girl walking alongside. The housekeeper testified that Rey headed toward a bus stop.

Christopher Smith, manager of a U-Haul facility in Lenexa, testified that he rented a storage unit to Rey in August 2017. Smith stated that Rey was "in and out quite a bit," accompanied by his wife and child. Rey's wife was "very pregnant" by October 2017.

The morning of October 24, 2017, Smith went to Rey's storage unit because Rey had set off the alarm the night before. The unit was part of an indoor facility with lighted hallways. The heat in the unit turned on if the temperature dropped below 45 degrees. The unit was 200 feet from a public bathroom, which had a single toilet and sink but no bathtub or shower. The unit had no access to refrigeration for foods and no access to electricity.

Rey told Smith that his wife died the previous day. Rey had apparently slept in the storage unit with his toddler and newborn baby. Because of the weather, the temperature inside the storage facility was very cold. Smith testified that there was a bad odor coming from the unit. Rey left the facility with the older child in a stroller and the infant strapped to his chest in a baby carrier. Smith called the police. Smith testified that he called the police because of the odor, Rey walking around in the cold with two kids, and Smith's overall concern about the children.

That day, Rey called Jeffrey seeking assistance, explaining that his wife had died in childbirth. Jeffrey testified that Rey called him from a Target store in Olathe, requesting help for food. Rey told Jeffrey that he bought cow's milk for the newborn, but another Target customer stopped him, told him that he needed to give the baby formula, and then bought the formula for Rey to give the baby. Jeffrey arranged to meet Rey to provide additional help. Jeffrey and a coworker drove Rey to various locations to pick up a paycheck, mail, and materials left at a hotel. While Rey went into the hotel to collect belongings, Jeffrey had a conversation with his colleague about whether to drive away with the children and leave Rey behind. Jeffrey explained as follows:

> "Nothing felt sort of safe or right about the situation, so there were concerns. What was going to happen to the children? Where was [Rey's wife]? It didn't seem like he was being forthright with us, and we wanted to make sure that the children were going to be in a safe place. We knew that they didn't have a safe place to stay, but later on we decided that keeping him with us and talk to us and keeping his trust were more important."

While at lunch, Jeffrey received a call from Detective Shannon Murphy, who was at Jeffrey's office. When Jeffrey said that Murphy was coming to the restaurant, Rey bundled up the children and left on foot. Jeffrey later called Rey, offering to provide a hotel. Rey declined because he did not want Jeffrey to disclose his location to police.

Rey took his children to a bar and grill in the Waldo neighborhood of Kansas City, Missouri. A customer was having dinner with his wife when he noticed Rey enter and sit down. The customer watched Rey put his toddler and infant in a booth, have a brief conversation with a woman seated nearby, and then go to the restroom. The customer assumed that Rey had asked the woman to watch the children while he was in the restroom, although the customer could not hear the conversation. When Rey came back from the restroom, the customer saw the woman give Rey some cash. The customer and his wife discussed also helping Rey because of the two children with him. The customer had a brief discussion with Rey before giving him $20 and the leftovers of their meal. Rey told the customer that he was waiting on a bus to go to a U-Haul in Lenexa before traveling on to Arizona. The customer was concerned about the children being out in the cold and dark, so he agreed to give Rey a ride. During the drive to Lenexa, Rey kept the infant strapped to his chest. While the customer was with Rey at the storage facility, police arrived. At trial, the customer testified that he was "questioning" the older child's health, adding, "To be honest, she didn't look well."

Around 7 p.m., Rey called Jeffrey from a Lenexa storage facility asking Jeffrey to pick him up because the police were there. Police conversed with Rey, who admitted that he stayed in the facility overnight with the children. The baby strapped to Rey's chest was crying and police asked if he had any way to feed the child. Rey told police that he had formula. But Rey spent the rest of the police encounter searching unsuccessfully for a nipple for the baby bottle. Police repeatedly asked Rey if he would bring the children inside the facility because of the cold, but Rey insisted on staying outside. Police recalled a bad odor while they were talking with Rey. Rey was transporting a cooler which contained some of his wife's remains.

Police called for emergency medical services (EMS) to perform a medical check on the children. One officer described Rey's toddler as follows, "She had dark bags under her eyes. When she removed her hood, her hair was astonishingly thin. It almost appeared

to me like she was a child on chemotherapy." An emergency medical technician testified that the child's hair thinning could be a sign of malnutrition. Police arrested Rey for child endangerment and seized a cell phone that was in Rey's pocket. While police made the arrest, EMS moved the children into an ambulance.

In the process of arresting Rey, officers started to move his belongings back to Rey's storage unit. The officer who wheeled the cooler back toward the storage unit testified that the cooler "smelled like a decaying body." He also saw a fluid coming from the cooler and recognized from previous experience this could be from a decaying body. He put the cooler down, secured the scene, and applied for a search warrant.

Crime scene investigators discovered human remains in the cooler. Investigators also found some grapes, uncooked ground beef, ramen noodles, and a carrot. In Rey's storage unit, investigators found a black tote bag. This black tote also had another, smaller lunch-size red cooler inside it. Investigators testified that this cooler also had "[m]iscellaneous human tissue" on the inside and on the outside was leaked fluid and a child's "My Little Pony" toothbrush.

When Detective Murphy interviewed Rey, he told her that he was a Christian Scientist. He explained that he did not believe in traditional medical practice but believed in the power of prayer. He claimed to have delivered babies before. Rey also told Murphy that he did not call the authorities when his wife died in childbirth because he was afraid that they would take his children away from him. Rey explained to Murphy that he dismembered his wife's body so that he could transport it to an Indian reservation in Arizona for burial. During this conversation, Murphy realized that Rey's wife died in Missouri and a different agency would need to investigate her death.

After Rey's arrest, the Kansas Department for Children and Families placed the children in separate protective home placements. The couple that took the infant the first

night testified that she had "quite a bit of drainage coming out of both of her eyes." They kept her eyes clean with a warm washcloth until a doctor's appointment the next morning. After some preliminary treatment, the couple took the infant to an ophthalmologist the following day. The ophthalmologist admitted the infant to the hospital for intravenous antibiotics. After a few days, both children were placed together with a foster family. Their foster parent testified that the infant continued on antibiotics for about a month.

Johnson County investigator Jason Novotny testified that he did a physical extraction of the data on Rey's cell phone in 2018. The extracted data included images of "young females in the nude" who appeared to be under 18 years of age.

Detective Ken Bilderback testified that the web search history of the phone showed the term "'[n]udist teen'" entered as a Google search on October 19, 2017. The search history showed that the user previewed over 300 images from the search results. The user took three screenshots. Bilderback did not know who was holding the phone during this search. He only knew that the phone saved three screenshots on October 19, 2017, at specific times ranging from approximately 2 a.m. to 8 a.m. The images were of girls under the age of 18, nude, posed, and some are "engaged in some sort of sexual activity."

Rey testified that he shared his phone with his wife. Rey denied searching the term "[n]udist teen" on the phone. Rey denied looking at the images of children on the phone and testified that the phone was "clean until it was in the hands of the police officers."

The jury found Rey guilty of three counts of sexual exploitation of a child. Verdict forms 5, 6, and 7 stated the verdicts as follows: "We, the jury, find the defendant, guilty of contributing to sexual exploitation of a child." But the phrase "contributing to" was not part of the language of the complaint, nor was it in the jury instructions.

The State charged Rey with two counts of aggravated endangering a child, a felony. But the jury convicted Rey of two counts of endangering a child, the lesser included misdemeanor.

The jury found Rey guilty of two counts of contributing to a child's misconduct or deprivation by causing the child to become a child in need of care.

The district court found Rey's criminal history score to be D and sentenced Rey to 52 months (4 years, 4 months) on the primary offense of sexual exploitation of a child. The district court also imposed two prison sentences of 32 months each on the additional counts of sexual exploitation of a child. The district court ran these sentences consecutive, capped at a prison term of 104 months (8 years, 8 months). The district court sentenced Rey to 12 months in jail on both counts of endangering a child and another 12 months each on both counts of contributing to a child's misconduct or deprivation, with all four jail sentences concurrent with his prison sentence on sexual exploitation of a child.

Rey timely appeals.

ANALYSIS

Do the erroneous jury verdict forms require reversal?

Rey argues that the jury verdict forms contained erroneous language on all three counts of sexual exploitation of a child. Rey asserts that the jury found him guilty of "contributing to" sexual exploitation of a child, even though "contributing to" is not an element of the crime under the statute or as instructed. Thus, Rey concludes that the district court's verdict forms added an additional element, violating his right to a jury trial on each element of the crime. The State argues that the extraneous wording was of no

consequence, Rey failed to object at trial, and he fails to show that the error requires reversal.

Verdict forms are technically not part of the jury instructions, but the appropriate standard of review for verdict forms is the same as the applicable standard for the instructions. *State v. Fraire*, 312 Kan. 786, 795, 481 P.3d 129 (2021) (quoting *Unruh v. Purina Mills*, 289 Kan. 1185, 1197-98, 221 P.3d 1130 [2009]).

When analyzing jury instruction issues, appellate courts follow a three-step process: (1) determining whether the appellate court can or should review the issue, in other words, whether there is a lack of appellate jurisdiction or a failure to preserve the issue for appeal; (2) considering the merits of the claim to determine whether error occurred below; and (3) assessing whether the error requires reversal, in other words, whether the error can be deemed harmless. *State v. Holley*, 313 Kan. 249, 253, 485 P.3d 614 (2021); see also K.S.A. 2022 Supp. 22-3414(3) ("No party may assign as error the giving or failure to give an instruction . . . unless the party objects thereto before the jury retires to consider its verdict . . . unless the instruction or the failure to give an instruction is clearly erroneous.").

At the second step, appellate courts consider whether the instruction was legally and factually appropriate, using an unlimited standard of review of the entire record. *Holley*, 313 Kan. at 254. In determining whether an instruction was factually appropriate, courts must determine whether there was sufficient evidence, viewed in the light most favorable to the defendant or the requesting party, that would have supported the instruction. 313 Kan. at 255.

Whether a party has preserved a jury instruction issue affects the appellate court's reversibility inquiry at the third step. 313 Kan. at 254. 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. K.S.A. 2022 Supp. 22-3414(3). For a jury instruction to be clearly erroneous, the instruction must be legally or factually inappropriate and the court must be firmly convinced the jury would have reached a different verdict if the erroneous instruction had not been given. The party claiming clear error has the burden to show both error and prejudice. *State v. Crosby*, 312 Kan. 630, 639, 479 P.3d 167 (2021). If the challenging party preserved the issue below, an appellate court applies one of two harmless error tests. If the instructional error impacts a constitutional right, an appellate court assesses whether the error was harmless under the federal constitutional harmless error standard, that is, whether there was no reasonable possibility that the error contributed to the verdict. When no constitutional right is impacted, an appellate court assesses whether there is no reasonable probability the error affected the trial's outcome in light of the entire record. *Holley*, 313 Kan. at 256-57.

When a party asserts an instruction error for the first time on appeal, the failure to give a legally and factually appropriate instruction is reversible only if the failure was clearly erroneous. *State v. Butler*, 307 Kan. 831, 845, 416 P.3d 116 (2018); see K.S.A. 2022 Supp. 22-3414(3). Our Supreme Court explained that "'clearly erroneous'" is not a standard of review, that is, a framework for determining whether error occurred. *State v. Williams*, 295 Kan. 506, 510-16, 286 P.3d 195 (2012). Instead, it supplies a basis for determining if an error requires reversal of a conviction. 295 Kan. at 515-16; see *State v. Lewis*, 299 Kan. 828, 856, 326 P.3d 387 (2014).

Appellate courts consider jury instructions as a whole, without focusing on any single instruction in isolation, to determine if they properly and fairly state the applicable law or if it is reasonable to conclude that they could have misled the jury. *State v. Buck-Schrag*, 312 Kan. 540, 553, 477 P.3d 1013 (2020).

Our Supreme Court "'strongly recommend[s] the use of PIK instructions, which knowledgeable committees develop to bring accuracy, clarity, and uniformity to

instructions.'" *State v. Zeiner*, 316 Kan. 346, 353, 515 P.3d 736 (2022). PIK instructions should generally be the starting point when preparing any set of jury instructions. A district court, however, may modify or add clarifications to PIK instructions if the particular facts in a given case warrant such a change. 316 Kan. at 353.

Rey argues that the erroneous language on the jury verdict forms requires reversal. The pattern jury verdict form for lesser included offenses reads as follows: "We, the jury, find the defendant guilty of *insert principal offense charged*." PIK Crim. 4th 68.110 (2018 Supp.). Rey asserts that correct verdict forms would have replaced "insert principal offense charged" with "sexual exploitation of a child." Instead, the verdict forms given to the jury at trial read as follows: "We, the jury, find the defendant, guilty of *contributing to sexual exploitation of a child*." (Emphasis added.) Rey argues that by adding the phrase "contributing to," the district court misled the jury about the charge of sexual exploitation of a child.

The error on the verdict forms here resembles other Kansas cases with mistaken verdict form language. In *Unruh*, the district court gave the jury verdict forms with the wrong defendant's name. The verdict form captions read as follows: "'Kenneth E. Unruh and Robert K. Carter, Plaintiffs, vs. State Farm Mutual Automobile Insurance Company, Defendant,'" even though the defendant was Purina Mills, LLC and State Farm was not a party to the case. 289 Kan. at 1197. "It appears the captions were copied from the verdict form of another case, and the court inadvertently neglected to change the name of the defendant." 289 Kan. at 1197. The *Unruh* court noted that the defendant had an opportunity to review the jury instructions, including the verdict forms, and did not object to the mistake. Finally, the *Unruh* court held that the accidental mention of an insurance company would not have affected the jury's verdict and that the caption on the verdict form is surplusage which has little, if any, impact on the jury. 289 Kan. at 1199-1200.

Here, the verdict forms for counts 3 and 4 were identical, with the first line reading as follows: "We, the jury, find the defendant, guilty of contributing to a child's misconduct." Then, the verdict forms for counts 5, 6, and 7 look identical to counts 3 and 4, except that "a child's misconduct" is changed to "sexual exploitation of a child." The phrase "contributing to," which appears on counts 3 and 4, also appear on counts 5 through 7, even though that phrase should not appear. In short, the error here would appear to be a similar copy-paste error as in *Unruh*.

But in *Unruh*, the mistake was in the caption, naming the wrong party. Here, the name of the criminal charge contains an error, making this case more like *State v. Brown*, 311 Kan. 527, 464 P.3d 938 (2020). In *Brown*, the jury received a verdict form which mistakenly read as follows: "'We, the jury, find the defendant guilty of the lesser offense of attempted *involuntary* manslaughter as set forth in Instruction No 7.'" 311 Kan. at 528. But Instruction No. 7 referred to the correct crime of attempted voluntary manslaughter.

The *Brown* court held that the intent of the jury controls over the literal language of the verdict form. 311 Kan. at 532. "[W]e have tended to view anything in the verdict form that clearly and obviously contradicts the charging documents, the jury instructions, and the record as a whole, as surplusage," which may be disregarded when the jury's verdict is otherwise responsive to the charge. 311 Kan. at 533, 535. When the jury's intent is clear, a mistaken description of the crime of conviction on the verdict form may be discarded as "'surplusage'" when the verdict form also refers to the correct charge by pointing back to the charging document or the jury instructions. 311 Kan. at 537.

Also, the *Brown* court provided a three-part test for when the district court may discard surplusage on a verdict form as follows:

> "First, the district court must start with a strong presumption in favor of the literal text of the verdict form and only move to interpretation when the record as a whole necessarily

> creates doubt as to its meaning. Secondly, the district court may consider anything in the record that tends to show with certainty what the jury intended. Finally, only if the district court is convinced, beyond a reasonable doubt, that the record as a whole clearly demonstrates the intent of the jury can the court discard contrary surplusage in the jury's verdict. Appellate courts will review a district court's application of the surplusage rule de novo." 311 Kan. at 538-39.

Applying the surplusage rule from *Brown* to the facts here, it could be argued that disregarding the erroneous language in the verdict forms as surplusage would be appropriate. The erroneous phrase on the verdict forms could reasonably be viewed as surplusage because: (1) Even though the mistake on the verdict forms necessarily creates doubt as to the meaning of the jury's verdict, (2) other parts of the record demonstrate the jury's intent with certainty, and (3) the record as a whole shows beyond a reasonable doubt that the jury intended to convict Rey of sexual exploitation of a child. Thus, it would appear that this court could discard "contributing to" from the verdict forms as mere surplusage.

The following portions of the record would form support for this reasoning:

- The crime of contributing to sexual exploitation of a child was never at issue at trial.
- Defense counsel did not object to the verdict forms' language.
- The instructions for counts 5, 6, and 7 correctly named the offense of "sexual exploitation of a child" and listed its elements.
- The district court correctly read the instructions to the jury, including the instructions for counts 5, 6, and 7.
- During jury selection, the State told the prospective jurors that Rey was charged with "three counts of sexual exploitation of a child."

- During opening statements, the State again referred to the charges as "three counts of sexual exploitation of a child."
- Outside of the verdict forms, the record contains no reference to "contributing to sexual exploitation of a child."

Taken together, the record as a whole clearly demonstrates that the error on the verdict forms did not misdirect the jury. The jury understood from the instructions the elements that the State needed to show. The jury intended to convict Rey of three counts of sexual exploitation of a child. The record shows beyond a reasonable doubt that the portion of the verdict forms inconsistent with the jury's intent are surplusage.

In Rey's brief, he cites *Brown* to argue for a different result. Rey points to two differences between his conviction and Brown's. First, Rey argues that the verdict forms did not refer back to the charging document or the jury instructions. See 311 Kan. at 528 (referring back to Instruction No. 7). But there is obvious weakness in this objection. Verdict forms for counts 5 through 7 necessarily refer the jury back to the instructions for counts 5 through 7, simply by virtue of the count numbers.

Rey also argues that the error was more than a "'mistaken description of the crime.'" 311 Kan. at 537. He asserts that the verdict form error added an element to the crime. He contends that "[t]he literal text of the verdict forms resulted in a jury finding of guilty for the act of 'contributing to,' which was not charged, was not defined for the jury, and was not a statutory crime in Kansas." But Rey argues against himself on this point because he contrasts the error here against the confusion between voluntary and involuntary manslaughter in *Brown*. Voluntary and involuntary manslaughter are both crimes in Kansas. The fact that the erroneous language here is not part of any Kansas crime runs in favor of discarding that part of each verdict form that was inconsistent with the jury's intent. Indeed, the district court here correctly read the instructions to the jury, including the instructions for counts 5, 6, and 7. Each instruction stated: "The State must

prove that the defendant committed the crime of sexual exploitation of a child intentionally." Also, the elements were listed in each instruction. Outside of the verdict forms, the record contains no reference to "contributing to sexual exploitation of a child."

Finally, Rey argues that "contributing to" adds an element to the crime. But he misreads the verdict forms. The verdict forms read as follows: "We, the jury, find the defendant, guilty of contributing to sexual exploitation of a child." On appeal, Rey contends that the jury returned verdicts for contributing to the possession of the images. Rey's brief does not fully explain how the plain text of "contributing to sexual exploitation" means contributing to *possessing* visual depictions of sexually explicit conduct.

But Rey's point does raise another concern. The record does not clearly show the origin of the error. Like in *Unruh*, the assumption of a copy-paste error is a reasonable one because: (1) All the forms—even the ones without a lesser included offense—appear to be modeled on PIK Crim. 4th 68.110 with the line for a lesser included offense deleted, and (2) the phrase "contributing to" appears in the immediately preceding verdict form. Scrutiny of the record shows that the mistake began with the State. The erroneous language appears in the State's proposed verdict forms. But the district court clearly reviewed the State's proposed verdict forms because the district court made an edit. The district court inserted a comma, changing the phrase "find the defendant guilty" to "find the defendant, guilty." This comma between "defendant" and "guilty" does not appear in the pattern instructions. PIK Crim. 4th 68.110. The comma does not appear in the State's proposed verdict forms. But the inserted comma shows that the district court reviewed the instructions. Thus, the district court either failed to catch a copy-paste error or it affirmatively approved of the erroneous language for reasons not evident from the record.

While the *Unruh* court assumed a copy-paste error, the statute at issue here presents an alternative explanation. K.S.A. 2017 Supp. 21-5510(a)(1) defines sexual

exploitation of a child as "[e]mploying, using, persuading, inducing, enticing or coercing a child under 18 years of age, or a person whom the offender believes to be a child under 18 years of age, to engage in sexually explicit conduct with the intent to promote any performance." And any performance would include, for example, a film, photograph, computer hardware, software, or other printed or visual medium. See K.S.A. 2017 Supp. 21-5510(d)(3). But Rey was not charged under subsection (a)(1). The State charged Rey under K.S.A. 2017 Supp. 21-5510(a)(2), which prohibits "possessing any visual depiction of a child under 18 years of age shown or heard engaging in sexually explicit conduct with intent to arouse or satisfy the sexual desires or appeal to the prurient interest of the offender or any other person." An offense under subsection (a)(1) is a severity level 3 person felony while an offense under (a)(2) is only a severity level 5 person felony. K.S.A. 2017 Supp. 21-5510(b)(1)(A), (b)(1)(B).

In short, the statute recognizes a difference between the child pornographer and the child pornography consumer. The person who coerces a child into sexually explicit conduct to sell photos or videos has direct contact with the child. Yet, the person who possesses the visual depictions has a less direct connection to the sexual exploitation. Thus, rather than a copy-paste error, the district court may have kept the "contributing to" phrase to clarify for the jury that consumers contribute to sexual exploitation of children when they create a market for visual depictions of children engaged in sexually explicit conduct. Whether the district court erred by failing to catch a copy-paste error or otherwise, there is no reasonable possibility that the error contributed to the verdict.

Did the district court err by not instructing the jury on the definition of possession?

Rey argues that the district court erred by not instructing the jury on actual versus constructive possession of the cell phone because he shared his cell phone with his wife. The State argues that Rey did not constructively possess the phone. He physically possessed the phone because the police found it on his person.

Rey raises this argument for the first time on appeal, like his argument related to the verdict forms. Thus, the standard of review is the same. Rey must show clear error. K.S.A. 2022 Supp. 22-3414(3). When analyzing jury instruction issues, appellate courts consider whether the instruction was legally and factually appropriate, using an unlimited standard of review of the entire record. *Holley*, 313 Kan. at 254. In determining whether an instruction was factually appropriate, courts must determine whether there was sufficient evidence, viewed in the light most favorable to the defendant or the requesting party, that would have supported the instruction. 313 Kan. at 255.

On appeal, Rey cites *State v. Hazley*, 28 Kan. App. 2d 664, 19 P.3d 800 (2001). Emeline Hazley was convicted of possession of methamphetamine and marijuana. The jury instructions provided the elements of the crime but no definition of possession. The *Hazley* court reversed and remanded, finding that the State had asked the jury "to conclude that Hazley was guilty simply because she lived in the place where the drugs and paraphernalia were found." 28 Kan. App. 2d at 672-73. The district court's instruction error, combined with prosecutorial misconduct, warranted a new trial.

Rey also cites *State v. Beaver*, 41 Kan. App. 2d 124, 200 P.3d 490 (2009). The district court granted Cody W. Beaver's motion to dismiss all charges related to methamphetamine and drug paraphernalia. On appeal, the *Beaver* court affirmed the dismissal, explaining that Beaver's mere presence and proximity to illegal drugs in a house that he was visiting was not enough to establish that he constructively possessed the drugs. 41 Kan. App. 2d at 132.

The State correctly distinguishes *Hazley* from the facts here because Rey had actual, physical possession of the cell phone. Police found the phone on Rey's person. Thus, Rey's citations to *Hazley* and *Beaver* are inapposite. "This was a constructive possession case because none of the illegal items was found on Hazley's person." *Hazley*, 28 Kan. App. 2d at 672. "[N]o controlled substances or paraphernalia were found on

Beaver's person." *Beaver*, 41 Kan. App. 2d at 129. Rey exclusively possessed the cell phone on his person. When the item is found on the defendant's person, omitting the definition of possession is not clear error. *State v. Frazier*, 30 Kan. App. 2d 398, 401, 42 P.3d 188 (2002).

But even if we were to view this as a constructive possession case, the State's evidence showed that Rey possessed the images, like in *State v. Coburn*, 38 Kan. App. 2d 1036, 1068, 176 P.3d 203 (2008). A jury convicted Edward N. Coburn, Sr. of sexual exploitation of a child. Coburn argued that there was no evidence that he opened the web sites at issue, downloaded the pictures, or even knew of their existence. But the evidence showed that Coburn was the only person who used the computer, was "'always'" on it, and his name was on the internet account. 38 Kan. App. 2d at 1068. The evidence also showed that child pornography sites had been visited on dates when Coburn was living in the house.

Similarly, Rey claims on appeal that the State could not provide evidence of who was using the phone when the images were accessed. But the undisputed evidence clearly shows that the imagery was saved to the phone on October 19, 2017, between 2 a.m. and 8 a.m. Rey testified that the only people with him that morning were his wife and daughter. He also testified that the phone was in the hotel room with them. Testimony from law enforcement showed that Rey regularly used this phone throughout that week. Lastly, Rey argues on appeal that he had nonexclusive possession of the phone, but at trial he offered a different explanation for the images. When the State asked Rey if his two-year-old daughter or his nine-month pregnant wife would have taken the screenshots in the hotel room that morning, Rey answered that the phone "was clean until it was in the hands of the police officers." Because Rey had actual possession of the phone and because the evidence showed that he intentionally possessed the imagery, Rey's argument fails to firmly convince us that the jury would have reached a different verdict if the district court had defined "possession."

Is the child-in-need-of-care statute unconstitutionally vague?

Rey argues that the definitions for a child in need of care are overly broad and vague, making the related criminal statute unconstitutionally vague. He contends, for example, that "adequate" parental care is subjective because different potential jurors could differ on what is adequate care. The State argues that the statute—and the instructions given to the jury—use readily understood terms that provide sufficient warning of the prohibited conduct to guard against arbitrary enforcement. Because Rey failed to preserve his constitutional challenge, we decline to review the issue.

Issues not raised before the district court cannot be raised on appeal. *State v. Green*, 315 Kan. 178, 182, 505 P.3d 377 (2022). Constitutional grounds for reversal asserted for the first time on appeal are not properly before the appellate court for review. *State v. Pearce*, 314 Kan. 475, 484, 500 P.3d 528 (2021).

There are several exceptions to the general rule that a new legal theory may not be asserted for the first time on appeal, including the following: (1) The newly asserted theory involves only a question of law arising on proved or admitted facts and is finally determinative of the case; (2) consideration of the theory is necessary to serve the ends of justice or to prevent denial of fundamental rights; and (3) the district court was right for the wrong reason. *State v. Allen*, 314 Kan. 280, 283, 497 P.3d 566 (2021).

"[A] 'decision to review an unpreserved claim under an exception is a prudential one.' Even if an exception may apply, we are under no obligation to review the claim. [Citation omitted.]" *State v. Rhoiney*, 314 Kan. 497, 500, 501 P.3d 368 (2021).

Rey did not argue before the district court that K.S.A. 2017 Supp. 21-5603(a)(1) was unconstitutionally vague. After his conviction, Rey appeals to this court, arguing that the conviction should never have happened because the statute is unconstitutional. The

decision to review this issue is a prudential one. We decline to review this issue because Rey raises it for the first time on appeal.

Does cumulative error warrant a new trial?

Rey argues that cumulative error deprived him of a fair trial. Cumulative trial errors may require reversal when, under the totality of the circumstances, the combined errors substantially prejudice a defendant and deny a fair trial. *State v. Alfaro-Valleda*, 314 Kan. 526, 551, 502 P.3d 66 (2022). The cumulative error rule does not apply if there are no errors or is only a single error. *State v. Gallegos*, 313 Kan. 262, 277, 485 P.3d 622 (2021). Here, the district court committed one harmless error. A single error cannot support reversal under the cumulative error rule.

Because Rey's arguments do not warrant reversal, we affirm his convictions.

Affirmed.