

NOT DESIGNATED FOR PUBLICATION

No. 124,620

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

KALIM AKEBA-LLOYD DOWDELL,
Appellant.

MEMORANDUM OPINION

Appeal from Douglas District Court; BARBARA KAY HUFF, judge. Opinion filed May 5, 2023.
Conviction reversed, sentence vacated, and case remanded with directions.

Adam M. Hall, of Thompson-Hall P.A., of Lawrence, for appellant.

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

Before HURST, P.J., MALONE and BRUNS, JJ.

PER CURIAM: Kalim Akeba-Lloyd Dowdell entered into a diversion agreement with the State after being charged with harassment by telecommunication device. Alleging he later violated the terms of the agreement, the State moved to revoke Dowdell's diversion. After an evidentiary hearing, the district court determined that Dowdell violated the diversion agreement, revoked his diversion, found him guilty of the underlying offense, and sentenced him accordingly.

Dowdell appeals, arguing—among a litany of new constitutional challenges—that there was insufficient evidence to revoke his diversion and support his conviction. This court agrees with Dowdell that there was insufficient evidence to find that he violated the terms of the diversion agreement, and the district court therefore erred in revoking his diversion for the reasons asserted. The district court's revocation of Dowdell's diversion and his resulting conviction are therefore reversed, Dowdell's sentence is vacated, and the case is remanded for further proceedings consistent with this opinion.

FACTUAL AND PROCEDURAL BACKGROUND

On December 13, 2015, Dowdell sent unsolicited photos of his penis to R.G. via Instagram. R.G., who was not a resident of the United States, had never met Dowdell or communicated with him in any way. R.G. blocked Dowdell's account but alleged that he created new accounts and continued to send her unsolicited photos of his penis. R.G. then undertook to find information about the person sending these unwanted photos and determined that Dowdell had sent similar unsolicited photos to two other women. Through her investigation, R.G. found Dowdell's personal Facebook and Instagram accounts. In addition to learning Dowdell's name, R.G.'s investigation identified the geolocation of Dowdell's accounts and determined he was in Lawrence, Kansas. R.G. then used Dowdell's User ID Number to further track Dowdell's accounts and discovered that he had changed his account username six times between December 14 and December 17, 2015.

After determining Dowdell's real identity, R.G. messaged him directly to confront him about harassing her. She directed him to write an apology to her and the other women on his Instagram account, or she would contact his school and post it on her weblog. On December 18, 2015, Dowdell wrote an apology on his Instagram page, but R.G. found it inadequate. R.G. then contacted the Lawrence Police Department regarding Dowdell's actions and provided about 20 pages of screenshots of her conversations with

Dowdell. The police observed that "Dowdell had sent photographs of his penis to [R.G.] on two occasions and had also made sexually obscene comments on her Instagram account."

On August 3, 2016, the State charged Dowdell with unlawfully using a telephone to "knowingly make or transmit any comment, request, suggestion or proposal which is obscene, lewd, lascivious, filthy or indecent" in violation of K.S.A. 2022 Supp. 21-6206(a)(1)(A). In the alternative, the State charged Dowdell with unlawfully using a telephone to "transmit any comment, request, suggestion, proposal, image or text with intent to abuse, threaten or harass any person at the receiving end" in violation of K.S.A. 2022 Supp. 21-6206(a)(1)(C).

On December 30, 2016, Dowdell entered into a diversion agreement pursuant to K.S.A. 2016 Supp. 22-2906 et seq., wherein he stipulated to the facts in the charging document. He also stipulated that he "unlawfully used a telephone communication to knowingly make and transmit any comment, request, suggestion or proposal which was obscene, lewd, lascivious, filthy, or indecent, all in violation of K.S.A. 21-6206(a)(1)(A)." The stipulation referenced only K.S.A. 2016 Supp. 21-6206(a)(1)(A) and not the alternative charge of K.S.A. 2016 Supp. 21-6206(a)(1)(C), which included the phrase "with intent to abuse, threaten or harass." Pursuant to the diversion agreement, Dowdell agreed to several special conditions, including:

"I will not transmit, receive, or review any communications with intimate body parts, especially my penis.

"I will not post on social media anything with sexual content, including but not limited to; photos, messages, solicitations/propositions, comments, or videos.

"I agree to allow any commissioned law enforcement officer access to my computer, phone, or any other electronic device at any time requested to search for obscene, rude, lascivious, filthy, or indecent sexual content."

The diversion agreement was to remain in place for 24 months unless violated. If Dowdell violated the terms, the State would move to revoke the diversion agreement and proceed to trial based solely on the charging document, stipulated facts, and other limited information.

In November 2017, the State moved to revoke the diversion agreement because Dowdell owed attorney fees and failed to notify the district attorney of an address in California where he would attend school. In August 2018, the State again moved to revoke the diversion agreement, this time alleging Dowdell violated the diversion agreement as follows:

- "I will not transmit, receive or review any communications with intimate body parts, especially my penis. Law Enforcement identified photos on defendant's phone of intimate body parts.
- "I agree to allow any commissioned law enforcement officer access to my computer, phone, or any other electronic device at any time requested to search for obscene, rude, lascivious, filthy or indecent sexual content. Defendant has failed to provide his encrypted iTunes password.
- "Defendant did not provide a hard copy of his spring semester grade cards.
- "Defendant may be in violation of:
 - I will not post on social media anything with sexual content, including but not limited to; photos, messages, solicitations/propositions, comments, or videos."

The district court held an evidentiary hearing on the State's motion to revoke Dowdell's diversion in which the diversion coordinator testified regarding Dowdell's alleged violations. She explained that the prosecutor's office had granted Dowdell

permission to attend college out of state under certain conditions, including that Dowdell provide his grades. When Dowdell failed to provide the hard copy of his grades, and then failed to timely respond to additional requests for his grades, he was asked to appear at the prosecutor's office on July 31, 2018.

Officer J.L. testified at the revocation hearing that he was "advised that there was a diversion, and the conditions of such diversion were that at any time law enforcement had the ability to inspect, download, view the contents of a—Mr. Dowdell's electronic devices." On July 31, 2018, Officer J.L. asked Dowdell to hand over his phone to be downloaded and examined, but before handing it to the officer, Dowdell "unlocked the device with his thumbprint and immediately began typing into the device." Officer J.L. speculated that Dowdell could have been "deleting information, changing information or otherwise modifying the contents," so he took the phone from Dowdell's hand and laid it on the desk. When Officer J.L. asked Dowdell what he was doing on his phone, Dowdell stated he was exiting a recent Snapchat conversation. Officer J.L. requested the password for the device to which Dowdell initially responded that it was his thumbprint, but when challenged Dowdell provided the officer with his numeric passcode. This passcode allowed the officer to unlock the phone to download the phone's contents.

Officer J.L. described the process for downloading the contents of Dowdell's iPhone:

"So upon seizing the device and getting the password, I went to our computer forensics room at the Law Enforcement Center and I hooked it up to a program called Cellebrite Physical Analyzer.

"Cellebrite Physical Analyzer, when dealing with an Apple device, it will extract what amounts to an iTunes backup file, and then it analyzes that file and it kind of parses it out so that you can see individual file types and obtain that information.

"So that's what I did. I connected it to that device, was connected to our Cellebrite machine, and the download was continuing. While that was happening, I also

did a manual review of the device. Since it only extracts an iTunes backup, not every piece of the device is extracted every time, only things that are written in an area for that phone to be able to create the backup. So when we analyze the device, we also do a manual review."

During his manual review, Officer J.L. opened the preview screen to see what applications were currently open on the device. He testified that he did this because he wanted to try and determine what Dowdell was doing with the phone just before the officer took it. The officer explained that "it showed several applications were open" at the time, but he believed the most recent showed a thumbnail of the photos application—meaning, according to the officer—that the photos application was the most recently used. In the preview of the application, the officer testified that he could see multiple images in small, icon format that showed a nude woman's chest and a nude black man, though he could not identify who they were or what they were doing. Officer J.L. testified that he "clicked onto that screen to make it full screen," and the phone "immediately brought me to the deleted files bin, which was now empty." Officer J.L. explained:

"So basically what that meant is when you are using certain applications, the phone will create a smaller image of whatever that screen shows and it will store that in a location for—it's almost like an icon. It's a much smaller version of that picture. And so that's what it's displaying when you hit the recently used applications tab.

"And so when I actually entered that application, then I was getting the data that was no longer—I was getting the data that is now on the phone—or now not on the phone, in that case. So those pictures had been deleted. That leads me to believe that what Mr. Dowdell was doing is deleting those pictures."

Although the officer could not see the allegedly deleted photos, he then searched through Dowdell's photos that were still on the phone and found several other pictures and videos showing nude women, vaginas, penises, and people engaged in sexual intercourse.

When the computer program finished, Officer J.L. attempted to open the downloaded files located on the law enforcement computer but the downloaded copy of the backup file was encrypted. Dowdell's phone password did not open the encrypted backup file on the law enforcement device. Officer J.L. sought advice from a colleague who told him that the Apple website contained instructions for downloading a nonencrypted backup of the phone, which would then allow law enforcement access. At that time, Officer J.L. notified Dowdell that his phone would not be returned to him that day because the officer believed it could contain potential evidence that warranted further investigation. Officer J.L. did not ask Dowdell for any additional passwords at that time, and Dowdell left. Officer J.L. later determined that he needed Dowdell's iTunes password to access the downloaded backup file, and he asked the diversion coordinator to obtain the additional password from Dowdell. The diversion coordinator emailed Dowdell regarding the additional password, and Dowdell called the coordinator back and said that he could not recall the password off the top of his head, but he would get back to her with it. As of the date of the diversion hearing in December 2018, Dowdell had failed to provide the diversion coordinator with his iTunes password.

While waiting for the iTunes password, Officer J.L. placed Dowdell's phone into airplane mode to prevent it from being remotely wiped. He testified that he followed instructions from Apple's website to turn off the encryption so he could download another backup of the phone without encryption to access its contents without Dowdell's iTunes password. According to Officer J.L., the Apple website clearly stated that if the procedure was followed correctly then it should not remove or alter any data from the phone. It was important to Officer J.L. that the procedure he was attempting not delete data from the phone because, in the event he could not access the downloaded material, he still wanted to be able to manually search the phone. Unfortunately, during the procedure the phone automatically removed airplane mode, and the phone immediately began to factory reset—deleting all data from the phone. Officer J.L. testified that he would have had to go through several steps and would have seen a warning screen that all

data would be lost if his actions mistakenly caused the device to factory reset. As a result, Officer J.L. did not believe his actions caused the device to reset and delete its content.

Officer J.L. testified that after Dowdell's phone went through a factory reset, he still had the encrypted backup he had downloaded onto the law enforcement device, but he could not access it. Without access to the encrypted backup, Officer J.L. could not tell if any of the sexually explicit photographs he found on the phone had been received from or sent to anyone or posted to social media. Officer J.L. testified that when he conducted his manual review of Dowdell's phone, he did not look through the text messages to see if Dowdell had sent any sexually explicit images because it was his "understanding the diversion agreement was targeted at lewd or obscene images . . ." so he inspected the photos first, believing those were a violation. Officer J.L. also testified that he did not take any pictures of the images he saw on the phone because he wanted to try to "get the best evidence, which is the cell phone extraction" first. Officer J.L. testified that the State never asked him to search or inspect any other electronic device belonging to Dowdell. Officer J.L. never received Dowdell's iTunes account password, which Officer J.L. believed would allow him to access the encrypted backup of Dowdell's phone stored on the law enforcement device.

At the diversion revocation hearing, Dowdell's counsel argued that Dowdell was only required to provide the police with access to his phone, but not any passwords because that was not a specific condition of the diversion agreement. He then explained that Dowdell did provide the police with access to his phone by disclosing his passcode which allowed the police to open the phone, search it, and even download its content. He further argued that the diversion agreement did not require Dowdell to provide a hard copy of his grades. Dowdell's counsel argued that there was no evidence that Dowdell distributed, sent, posted, or received any sexually explicit photos, and Dowdell substantially complied with the diversion agreement.

The district court revoked the diversion agreement but explained that its decision was not based on Dowdell's failure to provide a hard copy of his grades because it believed Dowdell substantially complied with the requirement that he show proof of attending college out of state. However, the district court was concerned about the "inference" that Dowdell "delete[d] things that he thought perhaps could be in violation of his diversion agreement" and Dowdell's failure to give police his iTunes password that would have theoretically allowed law enforcement to access the encrypted backup of Dowdell's phone located on the law enforcement device.

Following revocation of the diversion agreement, the district court moved immediately to an evidentiary hearing on the underlying charge. Based on Dowdell's prior stipulation that he committed the charged crime, the district court found Dowdell "guilty of harassment by telecommunication device, transmitting obscene images and texts," in violation of K.S.A. 2022 Supp. 21-6206(a)(1)(A)—a class A misdemeanor.

At sentencing in January 2019, the district court found that the crime was sexually motivated and required registration pursuant to the Kansas Offender Registration Act (KORA). The district court granted Dowdell probation with an underlying jail term of 12 months.

Dowdell now appeals.

DISCUSSION

Dowdell asserts the following seven claims in this direct appeal:

- (1) violation of his due process rights for basing his revocation on grounds not asserted by the State;
- (2) insufficient evidence supporting his conviction;

- (3) violation of his constitutional right to freedom of speech as applied to his prosecution;
- (4) K.S.A. 2022 Supp. 21-6206(a)(1)(A) is unconstitutionally overbroad;
- (5) K.S.A. 2022 Supp. 21-6206(a)(1)(A) as applied is unconstitutional because it violates the Supremacy Clause of the United States Constitution;
- (6) violation of his due process rights by failing to follow the statutory procedure for diversion revocation and provide adequate notice and opportunity to be heard; and
- (7) the district court erred in revoking the diversion agreement because he complied with the search stipulation and the photographs on his phone were not violations of the agreement.

As explained herein, Dowdell's final claim challenging the district court's revocation of the diversion agreement is meritorious. Therefore, Dowdell's remaining claims are immaterial to the disposition of this case and will not be addressed.

I. *Standards for Interpreting the Diversion Agreement*

A diversion agreement is a contract between the State and a defendant that provides "the specification of formal terms and conditions which a defendant must fulfill in order to have the charges against him or her dismissed." K.S.A. 2022 Supp. 22-2906(d); see *State v. Chamberlain*, 280 Kan. 241, Syl. ¶ 1, 120 P.3d 319 (2005). A diversion agreement can be entered into after the State files a complaint charging a defendant with a crime but before the defendant is convicted. K.S.A. 2022 Supp. 22-2907(a); 280 Kan. at 245. "Diversion is, therefore, a means to avoid a judgment of criminal guilt." 280 Kan. 241, Syl. ¶ 1.

If the defendant fulfills the terms of the diversion agreement, "the district court shall dismiss with prejudice the criminal charges filed against the defendant." K.S.A. 22-

2911(b); *Chamberlain*, 280 Kan. 241, Syl. ¶ 2. However, if the district court finds "that the defendant has failed to fulfill the terms of the specific diversion agreement at a hearing thereon," then the district court "shall resume the criminal proceedings" against the defendant. K.S.A. 22-2911(a). On appellate review, diversion agreements are treated and interpreted as any other civil contract. *State v. Tims*, 302 Kan. 536, Syl. ¶ 7, 355 P.3d 660 (2015) (interpreting diversion agreements "in accordance with contract principles").

When interpreting the terms of a contract, this court considers all the provisions together without merely "isolating one particular sentence," but by "construing and considering the entire instrument from its four corners." *Waste Connection of Kansas, Inc. v. Ritchie Corp.*, 296 Kan. 943, 963, 298 P.3d 250 (2013). This court exercises unlimited review over the interpretation and legal effect of a contract, and interprets a contract as written to "ascertain the parties' intent." *Tims*, 302 Kan. 536, Syl. ¶ 7. This review is done without deference to the lower court's interpretation of the legal consequence of the contract terms. See *Trear v. Chamberlain*, 308 Kan. 932, Syl. ¶¶ 1-2, 425 P.3d 297 (2018). Additionally, any ambiguity in the contract terms should be construed against the drafter. *Botkin v. Security State Bank*, 281 Kan. 243, Syl. ¶ 7, 130 P.3d 92 (2006).

"It is an elementary rule of law that where one party to a contract is privileged to set down in writing the terms to which another party is to give assent, and a controversy arises as to their meaning, the contract should be construed strictly against the writer and liberally toward the other party." *Dillard Dept. Stores, Inc. v. Kansas Dept. of Human Resources*, 28 Kan. App. 2d 229, Syl. ¶ 5, 13 P.3d 358 (2000).

While the interpretation of the terms of the diversion agreement is a question of law, whether Dowdell breached the diversion agreement is a question of fact. See *Wichita Clinic, P.A. v. Louis*, 39 Kan. App. 2d 848, 868, 185 P.3d 946 (2008). This court reviews any disputed factual findings to determine if they are supported by substantial competent evidence. "Substantial evidence is such legal and relevant evidence as a reasonable

person might accept as sufficient to support a conclusion." *Gannon v. State*, 305 Kan. 850, Syl. ¶ 11, 390 P.3d 461 (2017). "In determining whether substantial competent evidence supports the trial court's findings, appellate courts must accept as true the evidence and all the reasonable inferences drawn from the evidence which support the trial court's findings and must disregard any conflicting evidence or other inferences that might be drawn from it." 305 Kan. 850, Syl. ¶ 12.

The diversion agreement is a contract between the State and Dowdell. Before the district court could revoke Dowdell's diversion, the State had the burden of proving by a preponderance of the evidence that Dowdell violated or breached the terms of the diversion agreement. See *Neises v. Solomon State Bank*, 236 Kan. 767, 776, 696 P.2d 372 (1985) (finding "no error in the trial court's application of the preponderance of the evidence standard" where the unlawful act was a breach of contract); *In re T.B.*, No. 120,696, 2019 WL 4724754, at *3 (Kan. App. 2019) (unpublished opinion). "A preponderance of the evidence means evidence that shows a fact is more probably true than not true." *Nauheim v. City of Topeka*, 309 Kan. 145, Syl. ¶ 5, 432 P.3d 647 (2019). When a party challenges a district court's decision as lacking sufficient evidence, this court does not reweigh the evidence or make credibility determinations. "If the evidence, with all reasonable inferences to be drawn therefrom, when considered in the light most favorable to the prevailing party, supports the verdict, it will not be disturbed on appeal." *Wolfe Electric, Inc. v. Duckworth*, 293 Kan. 375, Syl. ¶ 12, 266 P.3d 516 (2011).

II. *The District Court's Legal and Factual Findings*

As a preliminary matter, this court clarifies the district court's finding that Dowdell violated the diversion agreement. Dowdell appears to concede that the district court did not find that he violated the diversion agreement by transmitting or receiving prohibited communications, and that "the district court's finding, in context, appears to be an inference supporting Dowdell's violation of a separate provision regarding access to his

devices by law enforcement." The State likewise asserts that "the district court did not find [Dowdell] in violation of that provision" prohibiting the transmission, receipt, or review of communications with intimate body parts. This court agrees. The district court did not base its revocation of the diversion agreement on a finding that Dowdell violated the term that prohibited the transmission, receipt, or review of communications with intimate body parts, but rather found that Dowdell violated the term requiring that he allow law enforcement access to his electronic devices. As such, this court will not address Dowdell's argument regarding this issue because the district court made no such finding.

Dowdell also argues that there was insufficient evidence to support the district court's finding that he violated the term of the diversion agreement requiring that he allow law enforcement access to his electronic devices. This specific term of the diversion agreement provided: *"I agree to allow any commissioned law enforcement officer access to my computer, phone, or any other electronic device at any time requested to search for obscene, rude, lascivious, filthy, or indecent sexual content."* (Emphasis added.) The district court found that Dowdell violated this term of the diversion agreement, explaining from the bench:

"But I am troubled, very troubled, by this testimony where Mr. Dowdell said that he would provide access to his computer phone and other things when requested.

"Mr. Overstreet makes the point that Mr. Dowdell handed it over, but I heard testimony from Officer [J.L.] that Mr. Dowdell deleted things as soon as he provided his thumbprint.

"And I also heard testimony from Officer [J.L.] that when he looked, he could see photographs that were certainly intimate body parts, and that he could not get access to those when he opened the apps because they had been deleted.

"I think it's a fair inference that Mr. Dowdell immediately tried to delete things that he thought perhaps could be in violation of his diversion agreement. The fact that the officer couldn't get those back when he looked at the phone, again, I think supports the inference that Mr. Dowdell tried to protect himself from what was on his phone.

"In terms of providing access, I also heard that Ms. Spurling said that she talked to Mr. Dowdell, who said that he would get the password for encryption to her, and he never sent it.

"I think it's fair to say that when he says I will give you access to my computer phone, I will cooperate, that not giving encrypted passwords I think is a violation of the agreement, and I do find that Mr. Dowdell has not met the terms of the diversion agreement. And the State has moved to revoke, and I will revoke it.

"Now, the terms of the diversion agreement say that I can consider all facts and stipulations. And Mr. Dowdell stipulated that he unlawfully used the telephone communication to make and transmit obscene, lewd, lascivious, filthy and indecent communications in violation of Kansas law.

"The State has provided sufficient evidence of that."

It appears the district court was "troubled" by the inference that Dowdell deleted things from his phone prior to handing it to Officer J.L., and that Dowdell did not provide the password to his iTunes account which might have allowed law enforcement to search either a downloaded, static backup of his phone located on a law enforcement device or the online cloud-based backup of his phone. Dowdell counters that he complied with this provision of the agreement when he gave his phone to law enforcement, provided his password to unlock, search, and even download the phone, and allowed law enforcement to keep the phone for as long as they desired. The diversion agreement, according to Dowdell, "did not require that Dowdell consent to the copying of his data, and/or the search of that copied data." Therefore, Dowdell argues, "[t]he district court's construction and application of the diversion agreement's requirement that Dowdell permit law enforcement access to his phone was an incorrect construction of the parties' contract, and Dowdell's actions fulfilled those conditions actually present in the agreement."

The State contends that the district court properly interpreted the diversion agreement to require Dowdell to provide his iTunes password in the event it would allow

law enforcement to review the contents of the encrypted backup of Dowdell's phone downloaded onto the law enforcement device:

"[T]he term 'access' here means nothing if it does not allow for *full* access to Dowdell's electronic devices. If the term is construed to only allow for physical access to the device itself, there would have been nothing to prevent Dowdell from simply deleting information to avoid detection, which was what was suspected in this case. Dowdell's failure to provide a password necessary to access the contents of his phone is clearly in breach of the diversion agreement

. . . .

"The argument that Dowdell only agreed to allow for limited access to his phone later is disingenuous, and is a blatant misrepresentation of the facts and the terms of the diversion agreement when read in its entirety."

The State further claims that, even if Dowdell did not directly breach the diversion agreement, "the State was relieved of its obligation to forgo prosecution of this case" under the doctrine of frustration of purpose because "Dowdell's actions undermined the very purpose of the agreement."

III. *The Diversion Agreement's Plain Meaning*

Whether there was sufficient evidence to find that Dowdell violated the term of the diversion agreement requiring that he "*allow any commissioned law enforcement officer access to [his] computer, phone, or any other electronic device at any time requested to search for obscene, rude, lascivious, filthy, or indecent sexual content*" turns on whether the district court accurately interpreted the diversion agreement. The district court's interpretation of a contract is a question of law over which this court exercises unlimited review. See *Trear*, 308 Kan. at 936. The district court apparently interpreted the diversion agreement to prohibit Dowdell from deleting content from his phone while the phone was still in his possession, and to also require Dowdell to provide his iTunes

password. But those requirements are simply not included in the plain language of the diversion agreement.

A diversion agreement, like all contracts, is created when the parties have a meeting of the minds as to all the essential elements of the contract. See *U.S.D. No. 446 v. Sandoval*, 295 Kan. 278, Syl. ¶ 4, 286 P.3d 542 (2012) ("In order to form a binding contract, there must be a meeting of the minds on all the essential elements."). Like the creation of any other contract, parties are free to create and agree to the terms they choose in effectuating the diversion agreement's purpose. And this court cannot create or change the terms of the contract—and thus change the respective obligations of the parties—even if the court believes the changes would more effectively further the contract's purpose. *Idbeis v. Wichita Surgical Specialists, P.A.*, 279 Kan. 755, Syl. ¶ 5, 112 P.3d 81 (2005) ("the paramount public policy is that freedom to contract is not to be interfered with lightly"); *National Bank of Andover v. Kansas Bankers Surety Company*, 290 Kan. 247, Syl. ¶ 2, 225 P.3d 707 (2010) ("Competent parties may make contracts on their own terms, provided such contracts are neither illegal nor contrary to public policy, and in the absence of fraud, mistake, or duress a party who has entered into such a contract is bound thereby."). The State and Dowdell chose their contract terms, and this court cannot search for new or better terms to effectuate the contract's purpose.

a. The diversion agreement did not prohibit Dowdell from deleting content on his electronic devices in his possession.

To the extent the district court determined that Dowdell's deletion of content from his phone before surrendering it to law enforcement constituted a violation of the diversion agreement, the district court erred. This is not to say that Officer J.L.'s testimony did not constitute substantial competent evidence supporting the district court's factual finding that Dowdell deleted content from his phone immediately prior to giving it to the officer. However, there is nothing in the diversion agreement prohibiting

Dowdell, while in possession of his phone, from using it in the ordinary course, which could include regularly deleting or altering content. The diversion agreement contained no provisions stating that Dowdell was not permitted to regularly, or irregularly, delete, wipe, clean, or otherwise alter the content of his electronic devices—whether that be the month, week, or morning before meeting Officer J.L. People regularly take and delete photos, emails, and text messages from their phones. As a further example, iPhones have a setting in which text messages are automatically deleted after a certain length of time. Apple Support Community, <https://discussions.apple.com/thread/253064535>. Nothing in the diversion agreement prohibited Dowdell from utilizing such a setting. The diversion agreement required Dowdell to provide *access to his electronic devices* upon request. Dowdell was not required to maintain his phone, computer, or other electronic devices without deleting or altering their content.

Officer J.L. testified that, from his manual examination of the phone, he believed Dowdell had deleted photos immediately prior to handing it over to law enforcement. At the time of his manual review, Officer J.L. mistakenly believed that evidence of explicit sexual content on Dowdell's phone violated the diversion agreement, which likely reinforced his belief that Dowdell deleted explicit images prior to handing over his phone. However, the diversion agreement did not prohibit Dowdell from merely possessing explicit or nude images on his phone. The State did not seek to revoke Dowdell's diversion agreement based on the images Officer J.L. saw. But contrary to the State's apparent argument, the diversion agreement also did not prohibit Dowdell from deleting or altering any content on his phone.

Although Officer J.L. testified that, during his manipulation of Dowdell's phone, the phone factory reset had erased all content—which he did not believe was caused by his actions—the district court did not make a factual finding that Dowdell remotely caused that deletion. As such, this court does not address whether the diversion agreement prohibited Dowdell from remotely accessing his phone while the phone was in

possession of law enforcement. However, there is a clear distinction between the two types of deletion. While the word "access" is not defined in the diversion agreement, it does have a generally accepted meaning. The Merriam-Webster online dictionary defines "access" as "permission, liberty, or ability to enter, approach, or pass to and from a place or to approach or communicate with a person or thing," and as "freedom or ability to obtain or make use of something." Merriam-Webster Dictionary, *available at* <https://www.merriam-webster.com/dictionary/access>. By providing the police with his phone and the password to access, look at, manipulate, alter, and even download its content, Dowdell clearly gave them the "freedom or ability to obtain or make use" of the *phone*. Nothing about the provision requiring Dowdell to permit law enforcement access to his electronic devices creates a burden on Dowdell to not delete or alter content on those devices while in his possession. To find otherwise would be to read new provisions into the diversion agreement that impose a far greater burden on Dowdell than to which he agreed. The district court erred in construing the diversion agreement to require that Dowdell never delete content from his electronic devices. This is not to say that the parties were unable to create a diversion agreement that required Dowdell to maintain all content on his phone and other electronic devices without ever deleting it while the agreement was in effect, but the parties simply did not do that.

b. The diversion agreement required Dowdell to allow law enforcement "access to [his] computer, phone, or any other electronic device at any time requested to search for obscene, rude, lascivious, filthy, or indecent sexual content."

The district court further erred in interpreting the diversion agreement to require Dowdell to provide law enforcement with his iTunes password. Although it is not clear from the record if the requested iTunes password only applied to the encrypted downloaded backup of Dowdell's phone on the law enforcement computer and not his cloud-based iTunes account, no provision of the diversion agreement required that Dowdell subject his phone to copying in the first place, let alone provide ancillary

information necessary to access either the cloud-based or static backup on the law enforcement computer.

The diversion agreement required Dowdell to provide law enforcement with access to his phone or other electronic devices to search for certain content, not to download content from the device or access online storage accounts. The plain language of the diversion agreement requires access to physical devices, which is different than access to online or cloud-based accounts. This court must presume the parties understood and intended that difference in the diversion agreement. See *Tims*, 302 Kan. 536, Syl. ¶ 7 ("The primary rule for interpreting written contracts is to ascertain the parties' intent. If the terms of the contract are clear, the intent of the parties is to be determined from the language of the contract without applying rules of construction.").

Officer J.L. acknowledged the difference. He testified that he "automatically" puts phones into airplane mode when he receives them to search, in part, because "if I have consent or a warrant to inspect just this device, I want to make sure that I'm not accidentally searching a place that I don't have authority to search, like a cloud storage or something else." Officer J.L. understood that having authority to search someone's "device" was not the same as having authority to search someone's cloud-based or other electronic storage. In fact, if law enforcement had authority to search Dowdell's iTunes account, or other social media, email, or cloud-based account, then there would be less need for access or control over Dowdell's phone or other electronic devices. However, that is not what the parties contractually agreed to. "Competent parties may make contracts on their own terms, provided such contracts are neither illegal nor contrary to public policy, and in the absence of fraud, mistake, or duress a party who has entered into such a contract is bound thereby." *National Bank of Andover*, 290 Kan. 247, Syl. ¶ 2.

The State argues that if the phrase "access to my computer, phone, or any other electronic device at any time requested" did not require Dowdell to provide his iTunes

password, then "there would have been nothing to prevent Dowdell from simply deleting information to avoid detection, which was what was suspected in this case." The State is correct. There is nothing in the diversion agreement requiring Dowdell to maintain his electronic devices without engaging in regular or irregular deletion or alteration of the content. To the extent the State intends to argue that Dowdell's iTunes password would have allowed it to review deleted content, the record seems to reflect the contrary.

Even if law enforcement accessed the encrypted backup of Dowdell's phone that they created on July 31, 2018, there was no evidence demonstrating that the backup would have contained all the data that Dowdell had ever had on his phone during the term of the diversion agreement. As Officer J.L. testified, the Cellebrite backup "only extracts an iTunes backup, not every piece of the device is extracted every time, only things that are written in an area for that phone to be able to create the backup." So, by providing his iTunes password, Dowdell would not be giving "access to [his] phone"—but giving access only to the data stored in the encrypted backup files or, depending upon the password sought, the data stored in a cloud backup for his phone. And as Officer J.L. testified, that backup contains less data than is available on the actual device, which is why Officer J.L. testified that he also does a manual review of the device rather than just rely upon the downloaded backup of the device.

Dowdell was required to provide law enforcement with access to his electronic devices to search for certain content. He complied with that provision when he provided Officer J.L. with his unlocked phone, gave him the password to continue to access, search, and download the unlocked phone, and left the phone for as long as the officer requested. The diversion agreement does not require Dowdell to provide law enforcement with the passwords to his online, cloud-based, social media, email, or messenger accounts. And although the parties' intention in entering into the diversion agreement might have been better accomplished if it had required such access, this court cannot

contrive that additional requirement from the plain language of the diversion agreement. As this court has previously explained:

"It is a fundamental principle that a court may not make a new contract for the parties or rewrite their contract under the guise of construction. In other words, the interpretation or construction of a contract does not include its modification or the creation of a new or different one. It must be construed and enforced according to the terms employed, and a court has no right to interpret the agreement as meaning something different from what the parties intended as expressed by the language they saw fit to employ. A court is not at liberty to revise, modify, or distort an agreement while professing to construe it, and has no right to make a different contract from that actually entered into by the parties. *Courts cannot make for the parties better or more equitable agreements than they themselves have been satisfied to make, or rewrite contracts because they operate harshly or inequitably as to one of the parties, or alter them for the benefit of one party and to the detriment of the other, or, by construction, relieve one of the parties from terms which he voluntarily consented to, or impose on him those which he did not.*" *Razorback Contractors v. Board of Johnson County Comm'rs*, 43 Kan. App. 2d 527, 540, 227 P.3d 29 (2010) (quoting 17 Am. Jur. 2d, Contracts, § 242 pp. 627-29 [1964]).

The State obtained the benefit of the diversion agreement, which required Dowdell to give access to his electronic devices to search for certain content, when law enforcement searched Dowdell's phone and discovered the very type of content contemplated by the disputed term. Dowdell's iTunes password only became necessary when, during law enforcement's second attempt to download content from Dowdell's phone, the phone factory reset and erased its content. Therefore, law enforcement could no longer search the phone for prohibited content.

Officer J.L. did not request Dowdell's iTunes password for the purpose of gaining access to or searching Dowdell's phone. Rather, Officer J.L. believed he needed Dowdell's iTunes password for the purpose of accessing a backup of Dowdell's phone either located as a static file on law enforcement's own device or located in a cloud-based

online storage file. In other words, the State *did* obtain access to Dowdell's phone, it *did* search the phone, and it *did* discover sexual content—all of which the State was entitled to do under the plain terms of the diversion agreement. But when that did not produce evidence that Dowdell violated the diversion agreement, the State sought more access, and its further demands simply exceeded its rights under the plain language of the diversion agreement.

The password to Dowdell's Apple iTunes account—like the passwords to his other online accounts such as Instagram, Snapchat, Facebook, Gmail, Yahoo, Messenger, or AOL—would have allowed law enforcement to search for any prohibited communication, transmission, or social media post made in violation of the diversion agreement. But the diversion agreement did not require Dowdell to provide access to those *accounts*. Additionally, with any of these account passwords, including the iTunes account password, the State could access the contents of Dowdell's accounts *from their own devices*, without access to his physical devices—rendering the requirement that Dowdell surrender his devices unnecessary. A finding that the term of the diversion agreement requiring Dowdell to provide law enforcement with "access" to his "electronic devices" meant he was required to give his iTunes password—despite not needing that password to search Dowdell's phone—could then be used to argue he was required to give passwords for other accounts, like Microsoft backups, Google accounts, or email passwords, even when none are necessary to search his electronic devices. If the password that would have allowed access to the encrypted download was the password to Dowdell's iTunes account—which appears to be presumed by the State—then under the State's interpretation of the diversion agreement, it could have demanded that Dowdell provide the passwords necessary to access any application or backup file that contains data also accessible on his phone or other electronic devices.

The State established the terms under which it would be able to determine whether Dowdell was complying with the diversion agreement's prohibitions against transmitting,

receiving, or reviewing communications with intimate body parts or posting sexual content on social media, and Dowdell complied with those terms. While it is true that had the terms been different—for example, prohibiting Dowdell from deleting content, requiring him to provide account login information for his social media accounts or email, or requiring him to ensure law enforcement could search downloaded backups or copies of his electronic devices—then the State would have had an easier time determining if Dowdell violated the diversion agreement by transmitting, receiving, or posting prohibited content. But when the plain terms of a contract are clear, legal, and not against public policy, this court cannot create new contract terms not agreed to by the parties even if those terms seem reasonable.

The plain meaning of the diversion agreement does not inhibit or even frustrate the State's purpose. Had Officer J.L. searched Dowdell's phone for messages, communications, or social media activity prior to the content being inadvertently erased, then the State would not have needed Dowdell's iTunes password. Officer J.L. testified that, when law enforcement could not download a phone's content, it was customary to use another device or camera to photograph or record the prohibited content from the seized phone. Had Dowdell's phone not factory reset causing the data to be erased before law enforcement finished searching the phone or downloading an unencrypted copy, then the entire purpose of the diversion agreement would have been accomplished just by application of the plain language of the contract. Clearly law enforcement also thought its purpose could be accomplished with the phone's password because it did not request Dowdell's iTunes password to conduct the manual review or to even create a downloaded backup file of the phone. Dowdell provided his password that allowed law enforcement to open the phone, search the phone's content, and even download the phone's content with or without encryption. The officer only needed the iTunes password because the phone factory reset when the officer attempted to download a second, unencrypted backup file of the phone.

Even if this court found the word "access" in the disputed provision of the diversion agreement to be ambiguous as applied to Dowdell's phone and other electronic devices, "[a]mbiguous language in a written instrument will be strictly construed against the drafter of the document." *Botkin*, 281 Kan. 243, Syl. ¶ 7. The district court made no factual finding regarding which party drafted the diversion agreement, but pattern of practice, the boilerplate language, and common sense leads this court to believe it was likely the State. If the State drafted the diversion agreement, then this court's resulting obligation to strictly construe any ambiguity in the diversion agreement against the State and liberally toward Dowdell, results in the same conclusion. The diversion agreement cannot be read to include and impose additional obligations on Dowdell that simply do not appear within the four corners of the document. See *Dillard Dept. Stores, Inc.*, 28 Kan. App. 2d 229, Syl. ¶ 5; *Daggett v. Board of Public Utilities of Unified Government of Wyandotte County/Kansas*, 46 Kan. App. 2d 513, Syl. ¶ 6, 263 P.3d 847 (2011).

c. The State failed to show that Dowdell frustrated the purpose of the diversion agreement and, therefore, relieved the State of its obligations under the contract.

The State argues that in the event this court finds that the diversion agreement did not require Dowdell to provide law enforcement with his iTunes password, then his failure somehow frustrated the purpose of the diversion agreement which relieved the State of its obligations under the contract. Under the doctrine of frustration of purpose, when "a contracting party's principal purpose is substantially frustrated without that party's fault by the occurrence of an event, the nonoccurrence of which was a basic assumption on which the contract was made, the party's remaining duties to perform are discharged unless the contract language or the circumstances indicate otherwise." *State v. Jones*, 47 Kan. App. 2d 109, Syl. ¶ 5, 271 P.3d 1277 (2012). A party is relieved of its contractual duties under the doctrine of frustration of purpose when the following three requirements are satisfied: (1) the purpose that is frustrated must have been a principal purpose for that party in making the contract; (2) the frustration must be so severe that it

is not fairly to be regarded as within the risks assumed under the contract; and (3) the nonoccurrence of the frustrating event must have been a basic assumption on which the contract was made. 47 Kan. App. 2d 109, Syl. ¶ 6.

The State argues that its

"primary purpose in offering diversion to Dowdell here was to prevent him from continuing to engage in the conduct alleged in the complaint. To that end, it predicated this agreement on the conditions that he cease doing so, and that he allow law enforcement to search his phone to ensure that he was not continuing to harass others in that manner."

The State argues that by failing to give law enforcement his iTunes password to access the encrypted backup of the phone, "the State was unable to determine whether the numerous explicit photographs and videos on Dowdell's phones [*sic*] had been transmitted, received, or posted on social media." Therefore, according to the State, the purpose of the agreement was undermined and frustrated by Dowdell's failure to provide his iTunes password.

But all that argument does is beg the underlying question of whether Dowdell was, in fact, required to provide his iTunes password under the diversion agreement. For the aforementioned reasons, Dowdell was not required to provide his iTunes password to law enforcement. It is therefore nonsensical for the State to argue that Dowdell's refusal to provide his iTunes password was a frustrating event, the nonoccurrence of which was a basic assumption upon which the diversion agreement was made. Law enforcement did not rely upon the assumption it would need or have access to Dowdell's iTunes password to search his phone because they only requested the password after searching the phone and finding no violation, downloading the encrypted backup of the phone, and the content of the phone got inadvertently deleted. The backup of the phone did not contain all of the data law enforcement wanted to search but became a desirable alternative once

the phone's content was deleted. Law enforcement sought to search Dowdell's phone, he provided access for them to search it, and they did in fact perform a search.

Courts cannot infer the intention of the parties and then construe the contract to give effect to such intention, however probable it may be, nor can courts rewrite the contract in whole or in part to conform to such presumed intention. It is the duty of a court to construe, not construct, a contract. See *In re Estate of Haneberg*, 270 Kan. 365, 371, 14 P.3d 1088 (2000).

CONCLUSION

The district court erred in interpreting the diversion agreement to require that Dowdell refrain from deleting or altering content on his phone, computer, or other electronic devices and that Dowdell was required to provide law enforcement access to his iTunes password which may have permitted law enforcement to search a backup image of Dowdell's phone located on a law enforcement device. Under the plain terms of the diversion agreement, the evidence presented to the district court, even when viewed in a light most favorable to the State, was insufficient to support the district court's finding that Dowdell violated the terms of the diversion agreement. The district court therefore erred in revoking Dowdell's diversion. The district court's revocation of Dowdell's diversion and his resulting conviction are reversed, Dowdell's sentence is vacated, and the case is remanded for further proceedings consistent with this opinion.

Conviction reversed, sentence vacated, and case remanded with directions.

MALONE, J., dissenting: I respectfully dissent because I believe there was sufficient evidence for the district court to find that Kalim Akeba-Lloyd Dowdell violated the conditions of his diversion agreement by not allowing law enforcement full access to

his cellphone including providing the encrypted password when requested. Thus, I would find the district court did not err in revoking Dowdell's diversion agreement.

After Dowdell was identified for sending unsolicited photos of his penis to R.G., the State charged him with one alternative count of harassment by a telecommunication device. Under his diversion agreement, Dowdell stipulated to the facts in the charging document and agreed to several special conditions, including that he would not "transmit, receive, or review any communications with intimate body parts, especially [his] penis." Dowdell also agreed "to allow any commissioned law enforcement officer access to [his] computer, phone, or any other electronic device at any time requested to search for obscene, rude, lascivious, filthy, or indecent sexual content." The State later moved to revoke Dowdell's diversion agreement, alleging he violated these conditions.

Officer Joshua Leitner testified that he asked Dowdell to hand over his cellphone to be examined, but before he did so, Dowdell unlocked the phone with his thumbprint and immediately began typing into the device. It appeared to Leitner that Dowdell was deleting information from the device. Leitner took the cellphone and immediately opened the preview screen to try to determine what Dowdell was doing with the phone just before Leitner retrieved it. Leitner testified that he could see multiple images in small, icon format that showed a nude woman's chest and a nude black man, though he could not identify who they were or what they were doing. Leitner then searched through Dowdell's photos still on the cellphone and found several other pictures and videos showing nude women, vaginas, penises, and people engaged in sexual intercourse.

Leitner "thought there could potentially be some more evidence on the device and that would warrant further—further investigation." He tried to download a backup file on the cellphone and discovered it was encrypted. Leitner later determined that he needed Dowdell's iTunes password to access the backup file, and he asked the diversion coordinator to get the password from Dowdell. Dowdell said that he could not recall the

password off the top of his head, but he would provide the password later. Dowdell never provided the password to the diversion coordinator. Leitner later attempted a procedure to create an unencrypted download of the contents which he believed would have allowed him access to the download without Dowdell's iTunes password. During the procedure the phone began to factory reset itself and deleted all data from the cellphone, although Leitner testified that "[his] actions did not wipe this device."

From this evidence, the district judge expressed concern that Dowdell appeared to delete material from the cellphone before handing it to Leitner and stated, "I think it's a fair inference that Mr. Dowdell immediately tried to delete things that he thought perhaps could be in violation of his diversion agreement." As for Dowdell agreeing to allow law enforcement access to his cellphone, the district judge stated, "I think it's fair to say that when he says I will give you access to my computer phone, I will cooperate, that not giving encrypted passwords I think is a violation of the agreement." Based on these findings, the district court revoked Dowdell's diversion agreement and found him guilty of the charged crime based on the stipulated facts.

The majority correctly sets forth our standard of review. An appellate court exercises unlimited review over the interpretation and legal effect of a contract such as a diversion agreement. *State v. Tims*, 302 Kan. 536, 546, 355 P.3d 660 (2015). Whether Dowdell breached the diversion agreement is a question of fact, and we review the district court's factual findings to determine whether they are supported by substantial competent evidence. *Gannon v. State*, 305 Kan. 850, 881, 390 P.3d 461 (2017).

To begin, I believe the State presented sufficient evidence to support the district court's finding that there was "a fair inference" that Dowdell deleted things from his cellphone that violated the provision in the diversion agreement that he would "not transmit, receive, or review any communications with intimate body parts." But the

State's brief asserts that "the district court did not find [Dowdell] in violation of that provision," so I will not address this provision further.

Turning to the provision about Dowdell allowing law enforcement access to his cellphone, I would find that the district court correctly interpreted the provision to require Dowdell to provide his encrypted iTunes password. The majority finds that "[t]he plain language of the diversion agreement requires access to physical devices, which is different than access to online or cloud-based accounts." Slip op. at 19. I disagree that the diversion agreement only required Dowdell to provide law enforcement with physical access to his cellphone. The plain language of the agreement required Dowdell to allow any law enforcement officer access to his cellphone "to search for obscene, rude, lascivious, filthy, or indecent sexual content." Leitner testified that he believed the encrypted backup file could contain potential evidence that warranted further investigation. The officer determined that he needed Dowdell's iTunes password to access the backup file, but Dowdell failed to provide the password when requested.

Leitner knew the difference between searching someone's physical device and accessing a cloud-based account, but he testified about this difference only to explain why he automatically put any device in airplane mode when he seized a device from anybody. As Leitner explained, putting the cellphone in airplane mode would prevent the owner from remotely wiping the device. But Leitner never testified that he had no right to access a cloud-based account as part of his investigation into whether Dowdell violated the diversion agreement. In fact, Leitner testified that Dowdell's failure to provide the encrypted password was the only thing that prevented him from discovering whether Dowdell had used his cellphone in violation of the diversion agreement:

"Q. [PROSECUTOR:] Without that password, were you able to tell if any of those photos of body parts and unclothed males and females—if any of that was posted on social media or sent or received?

"A. [LEITNER:] I have no way of telling without further examination of that contents."

The district court correctly interpreted the diversion agreement as requiring Dowdell to provide law enforcement with *full* access to his cellphone and other electronic devices to search for obscene content. Leitner needed Dowdell's encrypted password to determine whether he had used his cellphone in violation of the diversion agreement. Dowdell failed to provide the password. There was substantial competent evidence to support the district court's finding that Dowdell violated the diversion agreement by not giving the encrypted password. For this reason alone, I would find that the district court did not err in revoking the diversion agreement.