NOT DESIGNATED FOR PUBLICATION

No. 124,699

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

BUDDY A. JONES,
Appellant.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; DAVID L. DAHL, judge. Opinion filed March 31, 2023. Affirmed.

David L. Miller, of The Law Office of David L. Miller, LLC, of Wichita, and *Angela M. Davidson*, of Wyatt & Davidson, LLC, of Salina, for appellant.

Kristi D. Allen, assistant district attorney, *Marc Bennett*, district attorney, and *Derek Schmidt*, attorney general, for appellee.

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

PER CURIAM: Following the report of a "peeping Tom" incident, and after a bench trial, Buddy A. Jones was convicted of one count of breach of privacy and one count of criminal trespass. Jones appeals his convictions, arguing there was insufficient evidence to find him guilty beyond a reasonable doubt; his trial counsel provided ineffective assistance; and the district court erred in admitting Jones' prior bad acts. Jones also belatedly requests that this court remand the case to the district court for an evidentiary hearing on the issue of ineffective assistance of counsel. After a review of the record and

briefs, we find sufficient evidence to uphold the convictions, decline to reach the issue of ineffectiveness of counsel, deny his motion for remand due to its untimeliness, and find any errors to be harmless.

Factual and Procedural Background

On the night of July 12, 2021, a neighbor of the Clinton and Rachell Deere family reported seeing a man looking into the bedroom window of the Deere's eight-year-old daughter. Responding law enforcement encountered Jones in the area, although they did not initially detain him. After further investigation, Jones was charged with one count of breach of privacy and one count of criminal trespass.

During the bench trial, witnesses recounted the events of the evening. The Deere's neighbor, Earl Dean Murray Jr., testified that night he was smoking on the porch of his house, across the street from the Deere residence. Murray saw a man walk up and stop in front of the Deere's house.

After a while, Murray saw the man put a hoodie over his head, creep near one of the bedroom windows, and peek in through the top half of the window. He observed the man back off and approach the same bedroom window three times. Murray noted that the man had to go through bushes and brick decorations in front of the bushes that impeded the access to the bedroom window. Murray also testified that the man never approached the front door or knocked to alert the residents that he was there. Murray observed the man go back and forth for about five to seven minutes.

At some point, Murray went inside his house and told his wife to call the police. When Murray came back outside, he saw the man was headed down the block away from the Deere's house. Murray testified that he never saw the man put down the hood of his jacket and that the man was wearing shorts. Murray could not see the man's facial

features because it was dark, but he could identify that it was a white male with dark hair, wearing shorts and a black jacket.

Officers Anthony Martinez and Brenna Snyder of the Wichita Police Department were dispatched to the Deere's residence in response to a suspicious character report. Officer Martinez patrolled the area looking for someone matching the 911 caller's description of a white male, wearing shorts, a t-shirt, a black hoodie, and a neck gator. Officer Martinez witnessed a white male matching the description and decided to conduct a pedestrian stop, although the man was not wearing a hoodie at that time. After making contact with the man, Officer Martinez identified him as Jones. Jones was wearing a gray Domino's shirt, shorts, and a neck gator. When Officer Martinez asked Jones what he was doing in the neighborhood, Jones answered that he was going over to a friend's house to see if they were awake. Officer Martinez testified that Jones could not tell him the correct address of the house or the friend's name. Jones told Officer Martinez that he worked for Domino's. Officer Martinez patted Jones down, found nothing suspicious, and the officer allowed Jones to leave.

Officer Brenna Snyder also testified during trial, corroborating the testimony of Officer Martinez. Officer Snyder testified that she responded to the suspicious character report and was awaiting backup when she noticed someone matching the description of the suspect. The officer testified the description of the suspect was "a white male, about six-feet tall, thin build, wearing shorts, a black hoodie, and a face covering." Officer Snyder said it was odd because the suspect was not walking on the sidewalk but through the yard of a house. Although Officer Snyder did not see Jones wearing a hoodie, she found his description close enough to make contact. The officer confirmed the man walking through the neighborhood was Jones, and he was wearing shorts, a Domino's Pizza shirt, and a neck gator. After making contact, the officer allowed Jones to leave.

Officers Martinez and Snyder proceeded to Murray's residence to contact the witness. After speaking with Murray, the officers searched around the Deere residence to look for anything unusual. The officers found a black jacket with a hood with a Domino's symbol on it, lying in the front yard of the house located one block east of the Deere residence. Officer Snyder testified the jacket was found in the yard of a house in the path of Jones' travel when she first noticed him walking in someone's yard. Nothing in the jacket identified its owner as Jones. The officers then tried to locate Jones at the address he provided during the earlier encounters, but he was not home. Neither officer attempted to locate Jones at Domino's.

Detective Maria Heimerman of the Wichita Police Department was assigned to the suspicious character case. At trial, Detective Heimerman testified that Jones was named as a suspect in the case because he was seen near the area. A few days following the incident, Jones was taken into custody and the detective interviewed him. Jones told Detective Heimerman that he worked for Domino's as a delivery driver on the night of the incident, but he could not run deliveries that day because his driver's license was expired. Jones said his boss allowed him to leave for a couple of hours, so he decided to visit his friends before he had to return to work and clean up. Detective Heimerman testified that Jones said his friends' names were Clinton and Rachell Deere, and that Clinton was his best friend.

Detective Heimerman recalled Jones stating that he went to the Deere's residence that night but did not make contact because the garage door was closed, which is normally opened when they are awake, so he walked back to Domino's. Jones told Detective Heimerman that he was wearing shorts and a Domino's t-shirt, a mask as it was required for work, and he did not wear a jacket since it was warm enough that day. Jones told the detective he clocked back in at work around 10:30 p.m. and received a call from Clinton stating that the police said that someone was looking into his daughter's bedroom window. Detective Heimerman testified that Jones acknowledged he had been inside the

Deere's residence before and that he was aware of the layout of the home including where the Deere's daughter's bedroom was located.

Jones called as a witness Barrett Voisin, the manager at the Domino's store where Jones worked. Voisin testified that Jones did work on the night of the incident and closed that night. Voisin also testified that the black jacket found by the police officers was not a jacket used in the store and that no jackets were checked out from the store that night.

Jones also testified at trial. He reiterated he was scheduled to work on the night of the incident until closing but was not able to make deliveries because his driver's license had expired the previous week. Jones testified that business was slow on the night of the incident and his manager allowed him to leave the store for a couple of hours and come back because he was scheduled to close. Jones stated he planned to go home but because he had only 25 or 30 minutes before returning back to work, he decided to stop by the Deere's residence instead. Jones told the court that he parked his car in front of his neighbor's house to avoid alerting his dog and waking up his girlfriend and walked to the Deere's residence. Once he got to the Deere's residence, he saw that the garage door was closed and continued to walk on by because he knew Clinton usually had the garage door up when he is awake and Jones did not want to wake them up.

Jones testified that he knew the Deere family for more than 10 years and he had been at their residence several times. Jones knew where their daughter's room was located and stated he noticed that the lights were on in their daughter's bedroom when he was slowly walking by the house. Jones testified he did not peer into her bedroom window that night. He said he encountered the police officers as he was walking back to his house through a yard of another house because there were no sidewalks on that side of the street.

Jones further testified he was not wearing the black jacket the officers found, did not own such a jacket, and was not wearing any jacket because it was warm that night. Although Jones confirmed he was wearing his Domino's uniform, he did not admit to wearing black shorts and a neck gator.

Before the trial, the State moved to admit occasions of Jones' prior misconduct as evidence under K.S.A. 60-455. The State argued that the prior bad acts were relevant because all went to show the motivation and intent of Jones when he approached the young girl's window. In its motion, the State sought to introduce five incidents of prior criminal history:

1. "In 1985, defendant broke into a residence in Wichita. In that case, defendant broke into the home of a woman, gagged her and put a knife to her body. When she fought back, she was stabbed multiple times. Defendant was convicted of aggravated battery and aggravated burglary."
2. "While on parole in the above case, defendant was arrested in Tucson, Arizona for attempted burglary. In that case, defendant was trying to break into a home occupied by two young girls and their babysitter."
3. "In June 2006, defendant was stopped by a Wichita police officer in a trailer park in south Wichita. Neighbors had called defendant in as a suspicious character for riding his bicycle between trailers in the park. When stopped, defendant was in possession of scissors, a video camera, gloves, and a stocking cap with eye holes cut in it."
4. "In July 2006, Michelle Rawls was murdered and removed from her home. DNA located at the scene linked defendant to the crime and he was charged with First Degree Murder. . . . Prior to trial, defendant entered a plea of guilty to Involuntary Manslaughter."
5. "While that case was pending, a search of defendant's bedroom revealed seven Polaroid photographs of a naked female child under the age of 14."

The district court granted the State's motion and admitted Jones' prior bad acts as evidence, finding the evidence was relevant because it had the tendency to prove a

material fact. The district court found the evidence was admissible because it went to show plan, preparation, intent, knowledge, identity, absence of mistake, modus operandi, or general method used, and the probative value outweighed the potential prejudice.

During trial, another Wichita Police Department detective, Robert Chisholm, testified regarding the prior bad acts evidence, including his past encounters with Jones in a homicide case between 2006 and 2008. He testified that Jones pleaded guilty to the involuntary manslaughter of Michelle Rawls in 2008. Detective Chisholm also testified that upon exercising a search warrant at Jones' residence on the Rawls' case, he found several polaroid photographs of an underaged naked female. Jones told Detective Chisholm he found those pictures in some client's property while he was working as a mover and decided to keep them because he did not want that person to have them.

Detective Chisholm further testified regarding Jones' other criminal history. In 1985, Jones was convicted of armed burglary (and other charges) after breaking into a woman's home, near his own neighborhood, and threatening her with a knife. Jones was caught hiding in a back yard after discarding his shirt on his path of flight in a nearby yard. While on parole from that case and living in Arizona, Jones was arrested for attempted burglary after he was caught trying to gain entry to a home where two minor girls were home with a babysitter. When arrested on that incident, Jones possessed a condom, screwdriver, some mace, and cut pantyhose—what the detective called a rape kit.

In another instance, a month before Ms. Rawls' murder, Jones was the subject of a suspicious character report. Jones was reportedly riding his bicycle between the trailers of a trailer park in Wichita at 12:30 in the morning. Detective Chisholm testified that, when confronted, Jones was wearing camouflage pants and a dark shirt and had with him a stocking cap with eye holes cut out, and a backpack with a video camera inside, a pair of scissors, and gloves.

At the conclusion of the trial, the district court found Jones guilty of both charges. After the district court pronounced its decision, Jones moved for a new trial and the court denied his motion on the basis that the evidence of the crime was beyond a reasonable doubt, without any of Jones' prior history being considered. Jones was sentenced to 18 months in the Sedgwick County jail.

Jones timely appeals.

THERE WAS SUFFICIENT EVIDENCE TO CONVICT JONES OF BREACH OF PRIVACY AND CRIMINAL TRESPASS

Jones first argues that the State did not meet its burden of proof in showing that he was guilty beyond a reasonable doubt on both charges.

Standard of Review

In reviewing a sufficiency of evidence challenge in a criminal case, this court must "'review the evidence in a light most favorable to the State to determine whether a rational factfinder could have found the defendant guilty beyond a reasonable doubt. An appellate court does not reweigh evidence, resolve conflicts in the evidence, or pass on the credibility of witnesses.' [Citation omitted.]" *State v. Aguirre*, 313 Kan. 189, 209, 485 P.3d 576 (2021). "This is a high burden, and only when the testimony is so incredible that no reasonable fact-finder could find guilt beyond a reasonable doubt should we reverse a guilty verdict." *State v. Meggerson*, 312 Kan. 238, 247, 474 P.3d 761 (2020).

Discussion

Jones was charged with and convicted of breach of privacy, pursuant to K.S.A. 2021 Supp. 21-6101(a)(3), which states in pertinent part: "(a) Breach of privacy is knowingly and without lawful authority: . . . (3) entering with intent to listen

surreptitiously to private conversations in a private place or to observe the personal conduct of any other person or persons entitled to privacy therein."

Jones was also charged and convicted of criminal trespass under K.S.A. 2021 Supp. 21-5808(a)(1)(B), which states in pertinent part:

> "(a) Criminal trespass is entering or remaining upon or in any:
>
> (1) Land, nonnavigable body of water, structure, vehicle, aircraft or watercraft by a person who knows such person is not authorized or privileged to do so, and:
>
> . . . .
>
> (B) such premises or property are posted as provided in K.S.A. 32-1013, and amendments thereto, or in any other manner reasonably likely to come to the attention of intruders, or are locked or fenced or otherwise enclosed, or shut or secured against passage or entry."

Jones first argues that there was insufficient evidence to prove beyond a reasonable doubt he committed a breach of privacy because no one identified him as the perpetrator. Jones contends that even when he was stopped by the officers, he was not wearing clothing that matched the description and nothing suspicious was found on him. Jones also asserts that the State failed to prove beyond a reasonable doubt that he committed criminal trespass because there was no evidence he was not authorized to be there. He also claims that the State did not prove the required elements of criminal trespass because no evidence showed that the premises were posted in accordance with K.S.A. 32-1013 or that the property was fenced.

Aside from these statements, Jones provides no support for his arguments but merely states these few reasons why the State failed in sufficiently proving the elements of the crime. The State, on the other hand, contends that evidence and testimony from the witnesses sufficiently proves beyond a reasonable doubt that Jones committed the charged acts.

Jones fails to support his arguments with pertinent authority or show why his argument is sound despite the lack of such authority. See *Meggerson*, 312 Kan. at 246. So, we could find Jones failed to properly brief this issue. But even if we consider that Jones sufficiently argued his point, we find that reviewing the evidence in a light most favorable to the State, there was sufficient evidence to convict Jones.

First, Jones only argues that the evidence was insufficient on the breach of privacy charge because no one positively identified him. But viewing the similarities in the witness' description and Jones' appearance, his admitted location in the area, and his questionable explanation for being there in a light most favorable to the State, the circumstantial evidence was sufficient on the breach of privacy charge. Although no one affirmatively confirmed the identity of the individual lurking around the Deere's residence was Jones, there was sufficient circumstantial evidence to support the State's claim. Jones was not wearing a black hoodie but matched the description of the suspicious character provided by the witness. Jones admitted to being at the Deere residence, was found near the Deere's residence around the time of the incident, and admitted his knowledge about the layout of the house.

And circumstantial evidence is enough to support a conviction, if such evidence provides a basis for a reasonable inference by the fact-finder regarding the fact in issue. Circumstantial evidence, to be sufficient, need not exclude every other reasonable conclusion. *State v. Colson*, 312 Kan. 739, 750, 480 P.3d 167 (2021).

Second, as for the criminal trespass, Jones argues the State did not outline the elements required for trespass at trial, let alone admit or prove them. He contends the premises of the Deere's residence were neither posted nor fenced in, and there was no evidence showing that Jones lacked authority to be on the Deere's property in light of their friendship. But Clinton testified that a person would not be allowed to crawl through his bushes and stand over the windows of his home. Both Murray and Clinton testified

that the subject window was surrounded by bushes, which were surrounded by brick pavers, so access to the window was blocked. Jones even testified he assumed the family was sleeping by the closed garage door and did not say he was invited to the home at that time. Under the criminal trespass statute, and again viewing the evidence in the light most favorable to the State, Jones entered land which was "otherwise enclosed" or secured against entry, without being authorized to do so.

By arguing that he did not match the description of the suspect and was doing nothing suspicious, and disputing whether he was permitted to be on the Deere's property, Jones essentially asks this court to reweigh the evidence, assess witness credibility, or resolve conflicting evidence. That is something this court cannot do. *State v. Betancourt*, 301 Kan. 282, 302, 342 P.3d 916 (2015).

As a result, when viewing the evidence in a light most favorable to the State, we conclude beyond a reasonable doubt that there was sufficient evidence to support the convictions for both breach of privacy and criminal trespass.

WE DO NOT REACH JONES' INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM, AND HIS MOTION FOR *VAN CLEAVE* REMAND IS DENIED

Jones next argues that his trial counsel provided ineffective assistance of counsel because he failed to argue the State did not prove all elements of the crime beyond a reasonable doubt and did not call Murray's wife, the 911 caller, as a witness for Jones to confront. Jones contends that these failures fell below the objective standard of reasonableness. But we generally do not address such a claim on direct appeal. And, although Jones very belatedly asks that we remand his claim for a *Van Cleave* hearing, we find his motion untimely and lacking in merit, and deny his motion.

Standard of Review

Claims of ineffective assistance of trial counsel are analyzed under the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and adopted by the Kansas Supreme Court in *Chamberlain v. State*, 236 Kan. 650, 656-57, 694 P.2d 468 (1985). Under the first prong, the defendant must show that defense counsel's performance was deficient. If successful, the court moves to the second prong and determines whether there is a reasonable probability that, absent defense counsel's unprofessional errors, the result would have been different. *Khalil-Alsalaami v. State*, 313 Kan. 472, 485, 486 P.3d 1216 (2021).

Appellate courts generally will not consider an allegation of ineffective assistance of counsel raised for the first time on appeal. *State v. Salary*, 309 Kan. 479, 483, 437 P.3d 953 (2019). The factual aspects of a claim of ineffective assistance of counsel generally require that the matter be resolved through a K.S.A. 60-1507 motion or through a request for remand to the district court for an evidentiary hearing under *State v. Van Cleave*, 239 Kan. 117, 118-19, 716 P.2d 580 (1986). This is because "the trial court is best equipped to deal with the analysis required for such claims because it observed counsel's performance and competence first-hand and can apply that knowledge to the facts." *State v. Levy*, 292 Kan. 379, 388-89, 253 P.3d 341 (2011) (citing *Rowland v. State*, 289 Kan. 1076, 1084, 219 P.3d 1212 [2009]). An appellate court may consider a claim of ineffective assistance of counsel for the first time on appeal only when there are no factual issues, and the two-prong ineffective assistance of counsel test can be applied as a matter of law based upon the appellate record. *Salary*, 309 Kan. at 483-84.

In *Van Cleave*, our Supreme Court established guidelines for an appellate court to follow when exercising its discretion to decide whether to remand a case for an evidentiary hearing. See 239 Kan. at 119-21. There, the Supreme Court noted an appellant's counsel "must do more than simply read the cold record of the proceedings

before the district court and then argue that he or she would have handled the case differently." *Levy*, 292 Kan. at 389. The court found that appellate counsel must conduct some investigation into the claimed ineffectiveness, and "[e]xcept in the most unusual cases, [for an appellate counsel] to assert a claim of ineffective assistance . . . without an independent inquiry and investigation apart from reading the record is questionable to say the least." *Van Cleave*, 239 Kan. at 120-21.

Discussion

At the outset, we note that in his initial appellate briefing, Jones urges this court to consider his claim of ineffective assistance of counsel for the first time on appeal with no supporting argument as to why we should. The factual aspects of Jones' ineffective assistance of counsel claim were not resolved by the district court, in either a K.S.A. 60-1507 motion or an evidentiary hearing under *Van Cleave*. Nor does Jones articulate on appeal that there remain no factual issues in dispute and that the *Strickland* two-prong test could be applied as a matter of law. This court construes issues not adequately briefed waived or abandoned. *State v. Gallegos*, 313 Kan. 262, 277, 485 P.3d 622 (2021).

And, in his initial brief, rather than ask us to remand his case for a *Van Cleave* hearing, Jones simply demands we vacate his convictions. But if an appellant's claim of ineffective assistance of counsel cannot be resolved on the record, the appellate court is not obligated to sua sponte remand for a *Van Cleave* hearing when it has not been requested by the appellant. See *Mundy v. State*, 307 Kan. 280, 299-300, 408 P.3d 965 (2018). This would have been the end of our inquiry, had Jones not recently filed a motion for *Van Cleave* remand.

The timing of Jones' new motion is troubling, and a brief review of the timeline of the appeal is helpful. Jones' notice of appeal was docketed in this court on January 6, 2022. His trial counsel was replaced by his first appellate counsel a month prior. After the

filing of Jones' notice of appeal and appellate brief, this court permitted his first appellate counsel to withdraw. Jones' current appellate counsel entered his appearance on June 27, 2022.

Four months after this substitution of Jones' counsel, on October 20, 2022, this court provided summary calendar notice to the parties. This notice informed the parties that this case was deemed submitted without oral argument. On November 2, 2022, the parties received notice that the case was assigned to a panel of this court for conference on January 10, 2023, and that an opinion may be released prior to that docket date without further notice. On January 10, 2023, the noted panel conferenced the matter and a written opinion—though not yet filed—was already circulating between panel members when, on February 22, 2023, Jones' appellate counsel filed the motion for *Van Cleave* remand.

Although there is no firm statutory deadline to request a *Van Cleave* hearing, such a request is typically filed early in the life of an appeal, most often even before the parties file their briefing. Here, Jones' appeal had been pending for over a year when he filed the motion, and although Jones' current counsel did not submit the appellant's brief, he was appointed more than nine months ago. The *Van Cleave* request was not filed until after the case was placed on a summary calendar docket and six weeks after the court conferenced the case. The motion does not sufficiently explain why counsel waited almost eight months to submit the request, or why he waited until after the summary calendar setting in this case had passed. There is simply no explanation for the significant delay.

And our review of the motion demonstrates Jones' request lacks merit. The motion attaches a picture taken by Jones' girlfriend of the Deere residence on November 25, 2021, as well as street level views of the same residence from Google, taken in 2011 and 2015. Jones suggests these photos are "new" evidence and would somehow prove that the

window in question, in which Jones was alleged to have looked, was not actually obstructed by bushes, and the brick structures are behind the bushes, not in front, as both Murray and Deere testified at trial.

But Jones' arguments are unpersuasive, at best. First, each photo shows the window in question, when looking from the street, with a bush directly to the left and under the window, and another bush directly under the right half of the window, with brick landscaping material located on the street side (outside) the bushes. These photos track the testimony both Murray and Deere presented at trial. And the photos presented are dated in 2011, 2015, and 2021—certainly available to counsel long before the belated request for remand.

Not only is Jones' motion for *Van Cleave* remand significantly untimely, but the arguments presented in his motion are not so convincing as to qualify his request as an "unusual" circumstance under which his case should be remanded for evidentiary hearing. For these reasons, we do not address Jones' claim of ineffective assistance for the first time on appeal, and his motion for remand is denied.

EVEN IF THE DISTRICT COURT ERRONEOUSLY ADMITTED PRIOR BAD ACTS EVIDENCE, ANY ERROR WAS HARMLESS

For his final argument, Jones contends the district court erred by allowing the State to admit into evidence his criminal history and prior interactions with law enforcement. The State responds that Jones failed to adequately brief his argument on appeal and it should be deemed waived, pursuant to Kansas Supreme Court Rule 6.02(a)(5) (2022 Kan. S. Ct. R. at 36). The State also argues that even if this court should consider Jones' argument on appeal, the admission of the evidence would not have affected the outcome of the trial.

Standard of Review

When reviewing the admission of prior crimes evidence under K.S.A. 60-455, an appellate court uses a three-part test. *State v. Torres*, 294 Kan. 135, 139, 273 P.3d 729 (2012). First, the court considers whether the evidence is relevant to establish a material fact at issue. Determining whether the prior crimes evidence is material is subject to de novo review. Second, the reviewing court must determine whether the material fact is disputed and whether the material fact is relevant to prove the disputed fact. This determination by the district court is reviewed for an abuse of judicial discretion. Finally, this court must consider whether the probative value of the evidence outweighs its prejudicial effect. This step is also analyzed under an abuse of discretion standard of review. 294 Kan. at 139.

A judicial action constitutes an abuse of discretion if (1) it is arbitrary, fanciful, or unreasonable; (2) it is based on an error of law; or (3) it is based on an error of fact. *State v. Levy*, 313 Kan. 232, 237, 485 P.3d 605 (2021). The party asserting the district court abused its discretion bears the burden of showing such abuse of discretion. *State v. Crosby*, 312 Kan. 630, 635, 479 P.3d 167 (2021).

Discussion

We again note that Jones fails to adequately brief the issue on appeal. See *Gallegos*, 313 Kan. at 277. Jones only states the differences between the facts of this case and the prior bad acts the State sought to admit into evidence. He presents no pertinent authority to argue that the district court abused its discretion in finding the prior bad acts were relevant to establish a material fact or that the probative value of the evidence outweighed the potential prejudice. We could find, then, that Jones has waived or abandoned this issue on appeal.

But if we do consider that Jones has sufficiently argued his point on appeal, we must first determine whether the issue has been properly preserved. The State correctly points out that Jones did not contemporaneously object to Detective Chisholm's testimony during the bench trial itself, and it is true that K.S.A. 60-404 generally precludes an appellate court from reviewing an evidentiary challenge absent a timely and specific objection made on the record. *State v. Dupree*, 304 Kan. 43, 62, 371 P.3d 862 (2016).

But the hearing on the admission of the evidence was held immediately prior to the bench trial, by the same judge, on the same day. At that hearing, Jones raised his objection to the State's motion for the admission of evidence and articulated the specific grounds for his objection. Because Jones clearly objected to the State's motion during the hearing just minutes prior to trial and before the same judge, we could narrowly consider an exception to the contemporaneous objection rule and address the merits of the claim. See *State v. Spagnola*, 295 Kan. 1098, 1103, 289 P.3d 68 (2012) (finding the evidentiary issue preserved for appeal when the same judge twice ruled on the suppression issue and then conducted the trial and noting the purpose of the contemporaneous objection rule was fulfilled without necessitating repeated interruptions of the trial). However, in *Spagnola*, the trial court "explicitly stated it understood that any future objections would be based on its ruling on the suppression issue and that the issue was clear," where here, no such statement was made. 295 Kan. at 1103. Jones' failure to object at the time the evidence was offered during trial leaves the issue of preservation a close call.

Jones argues each of his prior bad acts introduced by the State were irrelevant here and should not be admissible because of dissimilarities between his prior acts and the instant charges. The district court explained in detail its reasoning for admitting the prior bad acts as evidence, finding the evidence was relevant to show a material fact and admissible to show plan, preparation, intent, knowledge, identity, and absence of mistake. For each prior bad act, Jones fails to address whether the district court abused its

discretion because the evidence was not relevant to a material fact or if the probative value of admitting the evidence was outweighed by the prejudice against Jones. Merely highlighting the factual differences, without more, is inadequate to reach appellate review and avoid waiver. See *Gallegos*, 313 Kan. at 277. And without more, Jones fails to demonstrate the district court abused its discretion by admitting the evidence.

Ultimately, even if we allow leniency as to Jones' preservation of his objection and the thoroughness of his briefing and find the district court erred by admitting the evidence, the error is harmless. See K.S.A. 2021 Supp. 60-261; *State v. Lowery*, 308 Kan. 1183, 1235, 427 P.3d 865 (2018). Under the statutory harmless error standard, this court must determine if there is a "'reasonable probability that error will or did affect the outcome of the trial in light of the entire record.'" 308 Kan. at 1235. In its ruling, the district court explicitly stated that the prior bad acts were ignored and were not considered in reaching its decision. The district court examined the trial witnesses' testimony in detail and found the evidence to be strong. The district court concluded that even without taking Jones' prior bad acts into account, the evidence was "crystal clear" to prove Jones guilty beyond a reasonable doubt. As a result, even if the district court erred in admitting the prior bad acts evidence, Jones fails to show there is a reasonable probability the error affected the outcome of his trial in light of the entire record.

Affirmed.