NOT DESIGNATED FOR PUBLICATION

No. 124,709

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellant,

v.

LUKAS S. ARMSTRONG,
Appellee.

MEMORANDUM OPINION

Appeal from Douglas District Court; STACEY DONOVAN, judge. Opinion filed June 9, 2023. Affirmed in part, reversed in part, and remanded with directions.

Jon Simpson, senior assistant district attorney, *Suzanne Valdez*, district attorney, *Derek Schmidt*, former attorney general, and *Kris W. Kobach*, attorney general, for appellant.

Michael P. Whalen, of Law Office of Michael P. Whalen, of Wichita, for appellee.

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

PER CURIAM: The State filed this interlocutory appeal from an order of the district court suppressing certain evidence from being presented at trial. On appeal, we find that we have jurisdiction to consider the issues presented. Based on our review of the record on appeal, we find that it was within the district court's discretion to suppress forensic imaging of two cellphones as a discovery sanction. We also find that it was within the district court's discretion to prevent a therapist from testifying at trial—unless necessary to provide foundation or authentication testimony for her records—as an additional discovery sanction. At the same time, we find that the district court erred by suppressing

the therapist's records because they were not in the possession and control of the State. Thus, we affirm in part, reverse in part, and remand with directions.

FACTS

On September 13, 2019, R.J.—who was two years old—was taken to Children's Mercy Hospital by his step-grandmother after she noticed injuries when changing his pull-up diapers. Although the record on appeal is limited, it appears that R.J. had spent the previous night with his mother and Lukas S. Armstrong, who was his mother's live-in boyfriend. When the step-grandmother asked R.J. what had happened to him, he said: "Lukas spanked me." During his examination at Children's Mercy Hospital, R.J. was found to have suffered injuries "indicative of violent child abuse. . . ."

The Lawrence Police Department was notified about the suspected child abuse and began an investigation. As part of the investigation, Officer Brett Horner interviewed the step-grandmother. In doing so, he discovered that she had been taking photographs on her cellphone for about a month that purportedly showed other injuries that she observed on R.J.'s body after his mother dropped him off at her home. After looking at the photographs, Officer Horner obtained images of the photographs of R.J.'s injuries that were taken by the step-grandmother.

According to the step-grandmother, the injuries to R.J. started occurring more consistently after his mother let Armstrong move in with her. The step-grandmother told Officer Horner that the injuries to R.J. had not been there when she had cared for him two nights before. R.J.'s father had cared for him the following morning but indicated that he did not see any injuries. Around lunchtime on September 12, R.J. was returned to his mother's residence. Evidently, Armstrong was alone with R.J. for several hours that afternoon and evening.

Officer Horner also interviewed both R.J.'s mother and Armstrong. They denied abusing R.J. and offered various explanations for his injuries. In addition, they suggested that R.J.'s father's family was putting ideas into his head. While interviewing Armstrong, Officer Horner also obtained Armstrong's permission to perform forensic imaging on his cellphone. After the imaging was completed, Officer Horner returned the phone to Armstrong.

On July 10, 2020, the State charged Armstrong with the abuse of a child and aggravated battery. In support of the arrest warrant, Officer Horner prepared a 15-page affidavit—dated May 8, 2020—in which he set out in graphic detail the information gleaned from his investigation. Significant to the issues presented in this interlocutory appeal, Officer Horner stated that the step-grandmother "started photographing RJ's injuries" and "created a file in her cell phone camera . . . called 'RJ's ouchies.'" She "stated that she had 57 pictures" and "showed [Officer Horner] the camera roll on her cell phone."

Besides obtaining the photographs of R.J.'s injuries from the step-grandmother's cellphone, Officer Horner stated in the affidavit that he asked Armstrong if he could "image his cell phone" and he "agreed." The officer explained that he "forensically imaged [Armstrong's] cell phone" and "gave the phone back to [Armstrong] once [he] was done." The affidavit does not say what happened to the information obtained from either Armstrong's cellphone or the step-grandmother's cellphone.

While the case was pending, the parties filed several motions. Moreover, several different prosecutors were assigned to the case at various points. On March 15, 2021, the State filed a motion for reciprocal discovery. In the motion, the initial prosecutor who handled this case stated that "[t]he State has complied with K.S.A. 22-3212 and in accordance with the open record's policy of the District Attorney's Office, has provided defense counsel with all the discovery in this case." Even so, it is undisputed that neither

the photographs obtained from the step-grandmother's cellphone nor the information forensically imaged from Armstrong's cellphone had been provided to defense counsel at that point.

On June 2, 2021, the State amended the complaint against Armstrong to include a higher severity level offense of abuse of a child under K.S.A. 2019 Supp. 21-5602(a)(1), (b)(2)—reflecting that the abuse occurred to a victim less than six years old—while the aggravated battery charge remained unchanged. On the same day, Armstrong waived his right to a preliminary hearing and to a formal arraignment on the amended complaint. Accordingly, the district court bound Armstrong over for trial and set the case for a jury trial to begin on December 6, 2021.

Armstrong moved to compel discovery on August 27, 2021, in which he requested "any evidence, material, or information within the possession, custody and control of the State, agents or representative of the State, or that by the exercise of reasonable diligence may be obtained by the State." Armstrong then referred to the types of discovery requested, including "relevant treatment or counseling records," "[a]ddresses of all endorsed witnesses, and other witnesses known who are material to this case," and "social media data in the care, custody, and control of any witness for the State." In response, the prosecutor indicated that the State had produced "everything that we have," but the information from the cellphones was not provided to the defense. At the same time, the prosecution did acknowledge its ongoing obligation under K.S.A. 2022 Supp. 22-3212 to supplement discovery if additional relevant material was later obtained.

At a hearing held on November 10, 2021, defense counsel told the district court that it appeared that Officer Horner—who was present at the hearing—had obtained information from cellphones during his investigation and stated that he "would like to have those forensic downloads if that was done in this case." In response, the prosecutor representing the State at the hearing told the district court:

"[*W*]*e did provide the dissemination log of all the materials that have been disclosed and disseminated to the defense*. That is everything that we have. The first items were made available online. I know it was prior to the case being filed, but they were made available through Document Manager on November 26 of 2019. Then the most recent dissemination was made on May 28th of 2021.

"*When I spoke with Officer Horner, I had asked if there were any phone downloads. He informed me that there were not.* If it turns out that there were, then if the State were to come into possession of those, we would continue to comply with our obligations and would turn those over to the defense.

"*But based upon asking Officer Horner two days ago if any such items existed, because that's something that I would typically ask as we are getting closer to trial, he told me that they did not conduct any downloads*." (Emphases added.)

The district court then asked the prosecutor to confirm that there were no downloads of cellphones, and the prosecutor responded: "No, your Honor. I had asked if there were any downloads of any witness phones, and Officer Horner told me that there were not." Once again, the State reiterated that all the evidence provided by the Lawrence Police Department to the District Attorney's Office had been provided to defense counsel. Based on the prosecutor's representations, the district court denied Armstrong's motion to compel discovery and found that "the State is in compliance with their duty to provide discovery."

The district court then turned to whether statements made by Armstrong to the police would be admissible at trial, and Officer Horner was called to testify. During his direct testimony, Officer Horner volunteered that Armstrong had "allowed me to forensically image his phone." On cross-examination, defense counsel inquired further regarding the information obtained from Armstrong's cellphone:

"Q. Okay. When you said that you were imaging Mr. Armstrong's phone, is that downloading things off of his phone?

> "A. It's not downloading. *It's a forensic image.* It's a Cellebrite machine. Downloading would mean I'm taking away from it. I'm not taking away. *I'm just making a forensic copy of what's on the phone at the time.*
> "Q. Okay. Has that information—the information that you got out of Mr. Armstrong's phone, was that ever turned over to the district attorney's office?
> "A. I would hope so. I don't know. Standardly, *there is a disk made or it's loaded into . . . our records management system and so it should be in there someplace.* When it's disseminated, I do not know." (Emphases added.)

Toward the end of the hearing, defense counsel asked for more information about "Amy Muller"—who had been identified as a witness by the State—in order to "know whether or not to object to [the endorsement]." The prosecutor indicated that he did not personally know who this witness was but that he would attempt to find out. At a hearing held the next week, the State clarified that the witness previously identified as "Amy Muller" was actually Amie Mueller, and she was R.J.'s therapist at the Sexual Trauma & Abuse Care Center.

The prosecutor also advised the district court that the State may want to use some of R.J.'s therapy records as evidence at trial and indicated that defense counsel had been advised about the records the previous afternoon. Because the therapist was hesitant to produce sensitive mental health records in response to a business records subpoena, the State recommended that they be provided to the district court for an in camera inspection in order to "streamline" the process. Defense counsel agreed to this process but reserved the right to object at trial to the admission into evidence of some or all of the records.

The district court inspected R.J.'s therapy records and provided them to both parties under a protective order on November 24, 2021. Six days later, on November 30, 2021, Armstrong filed a "Motion to Dismiss for Prosecutorial Misconduct" and a "Motion for Discovery Sanctions." In his motions, Armstrong alleged that the State committed "willful negligence or lack of due diligence" and requested that the district

court either dismiss the charges or impose discovery sanctions. In support of his motions, Armstrong alleged that a private investigator retained by the defense had gone to the Lawrence Police Department the day before and learned that the undisclosed cellphone evidence did in fact exist. Armstrong also objected to the late disclosure of R.J.'s therapy records.

On December 1, 2021, the district court held a hearing to address Armstrong's motions. At the hearing, the prosecutor advised the district court that the District Attorney's Office had now been made aware by the Lawrence Police Department that information taken from the cellphones did exist. Yet at that point it still had not been provided to the District Attorney's Office and it does not appear that it was reviewed by the district court at the hearing. The prosecutor indicated that the police "will get those disks to us" and "[w]e will immediately disseminate them to the defense." The prosecutor further indicated that he did not yet know if there was exculpatory evidence in the data obtained from the cellphones.

Regarding R.J.'s therapy records, the prosecutor explained that he did not know of their existence before November 17, 2021. Once the prosecutor found out about the records, both the district court and counsel were advised. Likewise, the prosecutor pointed out that defense counsel agreed to the in-camera inspection of the records by the district court and—as a result of this procedure—the defense had access to the records before the State following the inspection. The prosecutor also pointed out that the therapy records were not in the State's possession or control.

Turning to the issue of sanctions, the prosecutor suggested that an appropriate remedy would be to grant a continuance rather than dismissing the charges or suppressing the evidence. The district court then questioned the prosecutor about the prior representations the State made that no cellphone evidence existed. The prosecutor explained that the District Attorney's Office had never received notification from the

Lawrence Police Department that it was in possession of this evidence. The prosecutor also told the district court that he had believed that both parties had all the evidence once R.J.'s therapy records were obtained.

The prosecutor also advised the district court that as soon as he received Armstrong's motion to dismiss and motion for sanctions, he had contacted the Lawrence Police Department to find out about the additional evidence. The prosecutor then called Lawrence Police Chief Adam Heffley to testify about what had happened. Chief Heffley confirmed that the information obtained from the cellphones had been stored on two computer disks in the evidence room.

Chief Heffley also testified that a report would normally be completed by the investigating officer that would give the District Attorney's Office notice of what evidence was in the possession of the police department. He explained that in this case, it did not appear that such a report was ever prepared. Chief Heffley further testified that the Lawrence Police Department, the District Attorney's Office, and other stakeholders were working together to adopt "some good plans for additional safeguards" to be put in place to avoid similar issues in the future.

The next morning, Officer Horner was called as a witness to explain what had happened after he had received the photographs and other information from Armstrong's cellphone and the step-grandmother's cellphone. According to Officer Horner, he was contacted by one of the former prosecutors assigned to the case in December 2019 and was told that it could be useful to have the metadata collected from the cellphones to be placed on a computer disk. Although the information was placed on computer disks, they were damaged in August 2020. Officer Horner testified that the Lawrence Police Department was moving to a new location at that time, and he could not copy the extracted data until January 2021. After he copied the data, he again placed the disks in

the evidence room. Even so, Officer Horner admitted that he failed to draft a supplemental report.

Officer Horner also testified that when he was asked at the hearing held on November 10, 2021, he did not understand that he was being asked about information he had obtained from Armstrong's cellphone or from the step-grandmother's cellphone. He testified that he thought he was being asked about whether he had taken information from the mother's cellphone. Officer Horner also testified that he informed no one when the private investigator retained by the defense contacted him about the information extracted from Armstrong's cellphone and the step-grandmother's cellphone because he believed the evidence sought had previously been provided.

After hearing the testimony and considering the arguments of counsel, the district court announced its ruling from the bench. Specifically, the district court determined:

> "The Court has great concerns about how discovery has been turned over in this case, when discovery was looked at. And I'm looking at the transcript from the motion hearing on November 10th. In that on Page 11, [the prosecutor] said to the Court, 'When I spoke with Officer Horner, I had asked if there were any phone downloads. He informed me there were not.' I later asked, ' So you spoke to Officer Horner on Monday, November 8th? Is that the date?' [The prosecutor] said 'Yes, it was, Your Honor, yes.' And the Court then said, 'So there are no downloads of [the father's] cell phone or [the step-grandmother's].' And you said, 'No, Your Honor, I had asked if there were any downloads of any witness phones and Officer Horner told me that there were not.'
>
> "And, honestly, when [defense counsel] talked about what happened further, you know, on Page 44 and 45 of that same transcript of that same motion, the Court had forgotten that there were specific questions asked about [Armstrong]'s cell phone. And while the Court does not believe that the State lied to defense [counsel], the Court does believe that due diligence was not done. They did not exercise due diligence in finding this information when the discovery is placed into evidence over a year ago and then the breakdown of communication between the State and its investigator, I don't—I still, after

hearing the testimony of Officer Horner, I don't understand how I can listen to what the State said on the 10th, which was, 'I asked if there were any downloads of any cell phones. He said no,' and his testimony today is, well, I thought he was talking about [the mother's]. I don't understand how both of those things can be correct.

"That being said, the reason that we have these discovery rules are so that the defendant can have the opportunity to mount a defense so that the defendant has due process. And while I don't believe that the remedy is to dismiss this case, I do believe that both the—and I am ordering that the State nor the defense be able to use or hear testimony from Amy Mueller, and I don't—and I'm ordering that the information that has been given to the defense on the disks this morning, the disks the State has known about since 8:30 on Tuesday night and we have them at 10:00 this morning, and it will take some time to look those over. [Those] very well may have exculpatory information on those disks, the State doesn't know, the defense doesn't know, and certainly the defense can renew their motion if they find information. But, at this point, in the vacuum we know that these disks exist. We know that they've existed since July of 2019, were put into the system December 2019, and while asked again and again on the record about the existence of these and the State was pointed to videos where they are discussed, those don't—the images don't appear until this morning two days before trial. I am going to exclude the use of that evidence in trial."

On December 28, 2021, the district court filed a written motion memorializing its ruling in which it found

"[f]or the reasons stated on the record, the Court did not dismiss the matter but instead precluded the State from introducing at trial evidence contained in the mobile phone extractions. Additionally, the Court precluded the State from introducing at trial the therapy records produced by Amie Mueller, LCPC, RPT, as well as her testimony."

Thereafter, the State timely filed this interlocutory appeal.

ANALYSIS

On appeal, the State contends that the district court erroneously suppressed the evidence obtained from the forensic imaging of the cellphones, the testimony of Mueller, and the therapy records. In response, Armstrong contends that we lack jurisdiction over this appeal because the State has not shown that the district court's ruling substantially impaired its ability to prosecute this case. In the alternative, Armstrong contends that the district court properly exercised its discretion in suppressing the evidence.

Appellate Jurisdiction

"In Kansas, the right to appeal is entirely statutory and, as a general rule, appellate courts may exercise jurisdiction only when authorized to do so by statute." *State v. McCroy*, 313 Kan. 531, 534, 486 P.3d 618 (2021). The State's right to file an interlocutory appeal in a criminal case is set forth in K.S.A. 2022 Supp. 22-3603. See *State v. Myers*, 314 Kan. 360, 365, 499 P.3d 1111 (2021). Whether appellate jurisdiction exists is a question of law over which our review is unlimited. *State v. Lundberg*, 310 Kan. 165, 170, 445 P.3d 1113 (2019).

K.S.A. 2022 Supp. 22-3603 provides:

> "When a judge of the district court, prior to the commencement of trial of a criminal action, makes an order . . . suppressing evidence . . . an appeal may be taken by the prosecution from such order if notice of appeal is filed within 14 days after entry of the order. Further proceedings in the trial court shall be stayed pending determination of the appeal."

The Kansas Supreme Court has found that "the appellate courts of Kansas should not take jurisdiction of the prosecution's interlocutory appeal from every run-of-the-mill

pretrial evidentiary ruling of a district court, especially in those situations where trial court discretion is involved." *State v. Newman*, 235 Kan. 29, 35, 680 P.2d 257 (1984).

Rather, an interlocutory appeal is proper only when the order suppressing or excluding evidence places the State in a position where its ability to successfully prosecute the case is substantially impaired. *Myers*, 314 Kan. at 365 (quoting *Newman*, 235 Kan. at 34). The State is not required, however, to show that the suppression of the evidence completely forecloses it from obtaining a conviction in order to substantially impair its ability to prosecute a criminal case. 314 Kan. at 366; *State v. Huninghake*, 238 Kan. 155, 157, 708 P.2d 529 (1985).

The State argues that it has three ways to establish Armstrong's guilt: "that (1) R.J. was uninjured when he left [his father's] care on September 12, 2019; (2) [his mother] had previously dropped R.J. off injured; and (3) the prospect of spending time around Armstrong upset R.J." The State further asserts that it must attempt to discredit Armstrong's theory of defense that R.J.'s father and step-grandmother colluded to accuse him of child abuse. Consequently, the State maintains that excluding this evidence would undermine its case.

Because of the graphic nature of much of the evidence in this case, we will not repeat it in this opinion. In any event, the parties are well-aware of the nature of the abuse suffered by R.J. as well as the type of evidence that can be found in the data forensically imaged from the cellphones and the information that can be found in the child's therapy records. Although Armstrong is correct that the State was prepared to go to trial without some or all of the suppressed evidence, we find that the State makes a persuasive argument that its case would be significantly stronger with the cellphone evidence and therapy records to support its theory of prosecution. In particular, we find that this case would be particularly difficult to prosecute because of the child's young age at the time the abuse occurred.

In this case, there is no question that the child suffered injuries and that it is likely that these injuries were caused by abuse. "Part of the State's burden is to prove not only that an unlawful act has been committed, but also that the defendant is the one who committed it." *State v. Pollard*, 306 Kan. 823, 839, 397 P.3d 1167 (2017). Because the child is too young to testify, the State must use other evidence to prove that it was Armstrong, and not one of R.J.'s other caregivers, who inflicted the injuries diagnosed at Children's Mercy Hospital on September 13, 2019. Under these circumstances, we find that appellate jurisdiction is appropriate under K.S.A. 2022 Supp. 22-3603.

Imposition of Sanctions

In Kansas, prosecutors have an affirmative duty to disclose evidence favorable to a defendant when "'the evidence is material either to guilt or to punishment.'" *State v. Warrior*, 294 Kan. 484, 505-06, 277 P.3d 1111 (2012) (quoting *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 [1963]). This duty exists "'irrespective of the good faith or bad faith of the prosecution.'" *Warrior*, 294 Kan. at 506 (quoting *Brady*, 373 U.S. at 87). Because law enforcement officers act with state authority, "law enforcement's knowledge of evidence is imputed to the State." *Warrior*, 294 Kan. at 506.

K.S.A. 2022 Supp. 22-3212(a) requires prosecutors to allow defendants to inspect and reproduce various items upon request. The statute further requires that prosecutors exercise due diligence to identify and produce evidence within "the possession, custody or control of the prosecution." K.S.A. 2022 Supp. 22-3212(a). The obligation is ongoing, and if a prosecutor "discovers additional material previously requested or ordered which is subject to discovery or inspection . . . the [prosecutor] shall promptly notify the other party or the party's attorney or the court of the existence of the additional material." K.S.A. 2022 Supp. 22-3212(i). Even so, "the prosecution cannot be charged with wrongdoing for failure to permit inspection of recordings not 'in the possession, custody or control of the prosecution.'" *State v. Solem*, 220 Kan. 471, 477, 552 P.2d 951 (1976).

K.S.A. 2022 Supp. 22-3212 grants a district court broad discretion over supervising discovery in a criminal case. A district court may sanction any noncompliance with the discovery statute or its orders by "prohibit[ing] the party from introducing in evidence the material not disclosed, or it may enter such other order as it deems just under the circumstances." K.S.A. 2022 Supp. 22-3212(i). On appeal, we are to "uphold the imposition of a discovery sanction [in a criminal case] unless that action constitutes an abuse of discretion." *State v. Auman*, 57 Kan. App. 2d 439, 445, 455 P.3d 805 (2019); see *State v. Miller*, 308 Kan. 1119, 1175, 427 P.3d 907 (2018).

A district court abuses its discretion if no reasonable person would share its view or if its action is based on an error of law or fact. *State v. Mulleneaux*, 316 Kan. 75, 82-83, 512 P.3d 1147 (2022); *State v. Marshall*, 303 Kan. 438, Syl. ¶ 2, 362 P.3d 587 (2015). Likewise, a district court abuses its discretion if its legal conclusions or judgment are not supported by substantial competent evidence. *State v. Bilbrey*, 317 Kan. 57, Syl. ¶ 3, 523 P.3d 1078 (2023). It is not the role of an appellate court to reweigh the evidence or to determine the credibility of witnesses. *State v. DeAnda*, 307 Kan. 500, 503, 411 P.3d 330 (2018).

Evidence Obtained from Cellphones

In this case, the district court precluded the prosecution from presenting evidence obtained from Armstrong's cellphone as well as that obtained from the step-grandmother's cellphone. Although the district court did not find that the prosecution had committed intentional wrongdoing, it did find that the State had failed to exercise due diligence in attempting to locate the information obtained from the cellphones early on in the investigation. As the district court acknowledged, the confusion here was created due to a "breakdown of communication" between the District Attorney's Office and the Lawrence Police Department.

"In exercising its discretion as to whether sanctions should be applied for violation of a discovery and inspection order the trial court should take into account the reasons why disclosure was not made, the extent of the prejudice, if any, to the opposing party, the feasibility of rectifying that prejudice by a continuance, and any other relevant circumstances." *State v. Jones*, 209 Kan. 526, Syl. ¶ 2, 498 P.2d 65 (1972). Other relevant circumstances may include whether the party's violation was willful or intentional, done in good faith or bad faith, or was a repeated instance of noncompliance. *State v. Winter*, 238 Kan. 530, 534, 712 P.2d 1228 (1986). Also, once a decision has been made to order sanctions, a district court should "impose the least drastic sanctions which are designed to accomplish the objects of discovery but not to punish." 238 Kan. at 534; see also *Auman*, 57 Kan. App. 2d at 445.

In this case, it is undisputed that the defense was not provided with the computer disks containing the evidence obtained from the cellphones until less than a week before trial. Furthermore, despite repeated requests of the prosecution—from both defense counsel and the district court—to confirm whether such evidence existed, a private investigator retained by the defense is the one who finally learned its existence when she visited the Lawrence Police Department. Significantly, the prosecution does not explain why someone from the District Attorney's Office could not have done the same thing in the exercise of due diligence once this issue was brought to its attention.

Perhaps—as the prosecution seems to suggest—the primary blame for the confusion falls upon the investigating officer who failed to submit reports that would have placed the District Attorney's Office on notice of the existence of the evidence when he placed the computer disks in the evidence room. There was added confusion when the prosecutor advised the district court on November 10, 2021, that "[w]hen I spoke with Officer Horner, I had asked if there were any phone downloads. He informed me that there were not." And this confusion was amplified when the prosecutor futher advised the district court at the same hearing that "based upon asking Officer Horner two days ago if

any such items existed . . . he told me that they did not conduct any downloads." Consequently, the district court found that the State was "in compliance with their duty to provide discovery."

Regardless, as reflected above, "law enforcement's knowledge of evidence is imputed to the State." *Warrior*, 294 Kan. at 506. Certainly, the district court could have exercised its discretion not to order sanctions under the circumstances presented here or it could have ordered a continuance of the trial since there were no statutory speedy trial concerns. Although either option would have been reasonable, it is not the role of an appellate court to replace our judgment for that of the district court. Here, we find substantial competent evidence in the record to support the district court's decision, and we do not find its imposition of sanctions to constitute an abuse of discretion.

A review of the record reflects that the district court did not make its decision lightly. Instead, the court held an evidentiary hearing at which it heard the explanations offered by the State, the testimony of the investigating officer, and the testimony of the police chief in an attempt to determine the reason the cell phone evidence had not been previously produced to the defense. After hearing the testimony and the arguments of counsel, the district court expressed "great concerns" with how discovery had been handled in this case. In particular, the district court was concerned about the inconsistent information and explanations that had been provided by the State regarding the existence of the information obtained from Armstrong's cellphone and the step-grandmother's cellphone.

The State argues that the district court did not expressly address the factors set forth in *State v. Jones*, 209 Kan. 526, Syl. ¶ 2. But we can presume that the district court made all the necessary findings from the evidence to support its decision when—as here—there was no objection raised to the district court regarding the adequacy of its findings. *State v. Jones*, 306 Kan. 948, 958-59, 398 P.3d 856 (2017). Even so, a review of

the record confirms that the district court explored all the circumstances before deciding to impose sanctions and made the findings necessary to justify the imposition of discovery sanctions.

A review of the record shows that the district court listened to the reasons and explanations given by the State for failing to produce the cellphone evidence. The district court also considered the prejudice that could result if the charges filed against Armstrong were dismissed and ultimately decided to impose lesser sanctions. By doing so, the district court protected the public interest in not foreclosing the State's ability to attempt to prove Armstrong's guilt at trial. Likewise, by suppressing the cellphone evidence, the district court designed a sanction that focused on the State's lack of due diligence.

The record also reflects that the State proposed a continuance as a possible sanction and that Armstrong opposed this proposal. So, the issue of whether a continuance should be granted was squarely before the district court. After considering its options, the district court exercised its discretion to impose an intermediate sanction of suppression of the evidence that was the subject of the discovery dispute. Although—as we stated above—a continuance would have been a reasonable option, it was not the only reasonable option available to the district court.

We also find the State's argument about the timing of Armstrong's request for the cellphone evidence to be unpersuasive. To the extent that the cellphone evidence contained exculpatory evidence, the defense was not required to make a request for discovery. Rather, the State had an affirmative duty to produce it to the defense. *Warrior*, 294 Kan. at 505-06 (quoting *Brady*). To the extent that the cellphones contained inculpatory or simply relevant evidence, the State at least had a statutory duty under K.S.A. 2022 Supp. 22-3212 to produce the evidence once the defense moved to compel discovery on August 27, 2021. Yet the State denied existence of any additional evidence

and continued to deny the existence of the information taken from the cellphones up until a few days before the jury trial was scheduled to begin.

In summary, we find that the district court carefully considered both the motion to dismiss and the motion for sanctions. We further find that there is substantial competent evidence in the record to support the district court's conclusion that sanctions should be ordered for the State's failure to disclose the cellphone evidence to the defense after several requests that it do so. Finally, under the circumstances presented, we do not find that the district court abused its wide discretion to impose sanctions by precluding the State from presenting the evidence obtained from Armstrong's cellphone or the step-grandmother's cellphone at trial.

Therapist's Testimony and Records

The State also contends that the district court abused its discretion in excluding R.J.'s therapist, Amie Mueller, as a witness at trial. It is undisputed that she was not endorsed as a fact witness in either the original complaint or in the amended complaint. Instead, she was endorsed as a witness on September 29, 2021, and she was subpoenaed as a witness on October 8, 2021. We note that she has not been designated as an expert witness.

When Mueller was endorsed, her name was misspelled—though only slightly—and when asked by defense counsel about her at the hearing held on November 10, 2021, the prosecutor could not identify who she was nor could he identify the substance of her anticipated testimony. A week later, on November 17, 2021, the prosecutor corrected the spelling of Mueller's name and advised the defense that Mueller was R.J.'s therapist. Based on our review of the record, it appears that the district court considered the prosecutor's failure to properly identify Mueller until a few weeks before trial to be part of the lack of due diligence on the part of the State in preparing this case for trial.

Because Mueller was not endorsed as a witness in the complaint or amended complaint, the district court had the discretion under K.S.A. 22-3201(g) to either allow or disallow her endorsement. See *State v. Brosseit*, 308 Kan. 743, 749, 423 P.3d 1036 (2018). Likewise, as discussed above, the district court has the discretion to supervise a criminal case and to impose sanctions for discovery violations. See K.S.A. 2022 Supp. 22-3212; see also *Auman*, 57 Kan. App. 2d at 445. Under the circumstances presented, we do not find that the district court abused its discretion in excluding Mueller as a fact witness.

Finally, the State contends that the district court erred by excluding R.J.'s therapy records from being used by the State as evidence at trial. Unlike the cellphone evidence, the district court provided no explanation either on the record or in its written order to explain its decision to exclude the therapy records. Also, unlike the cellphone evidence, nothing in the record suggests that the State—either the prosecution or the police—had possession, custody, or control over R.J.'s therapy records.

A review of the record reveals that even though it had mistakenly misspelled Mueller's name when she was endorsed as a witness on September 29, 2021—which was 68 days before the jury trial was scheduled to begin—the prosecution corrected the spelling and identified her as R.J.'s therapist on November 17, 2021. On the same day, the prosecutor notified defense counsel. The next day, the prosecutor asked the district court to perform an in camera inspection of R.J.'s therapy records because it appeared unlikely that Mueller would release the mental health records of a child pursuant to a business records subpoena. Although Armstrong's counsel did not stipulate to the admission of the records at trial, she did agree to the in camera inspection as recommended by the prosecution.

Within 48 hours, R.J.'s therapy records were delivered to the district court for an in camera inspection. Then, on November 24, 2021—which was 12 days before trial—the

records were provided to the parties pursuant to a protective order. As discussed above, K.S.A. 2022 Supp. 22-3212(a) requires that prosecutors exercise due diligence in identifying and producing evidence in their "possession, custody or control" but the State "cannot be charged with wrongdoing for failure to permit inspection of recordings not 'in the possession, custody or control of the prosecution.'" *State v. Solem*, 220 Kan. 471, 477, 552 P.2d 951 (1976). Thus, because the child's therapy records were not in the possession, custody, or control of the State, we conclude that the district court's decision to suppress these records is not supported by substantial competent evidence of a discovery violation.

CONCLUSION

In conclusion, we find that the district court appropriately exercised its discretion in suppressing the photographs and other information obtained from Armstrong's cellphone and the step-grandmother's cellphone. We also find that it was within the district court's discretion to preclude the therapist from testifying at trial as an additional discovery sanction. But we do find that the district court erred by suppressing R.J.'s therapy records because there is not substantial competent evidence in the record to show that they were in the possession, custody, or control of the State or to justify their suppression as a discovery sanction. Thus, we affirm in part, reverse in part, and remand for further proceedings.

Affirmed in part, reversed in part, and remanded with directions.