NOT DESIGNATED FOR PUBLICATION

No. 125,141

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

WILLIAMS NUNEZ,
Appellant.

MEMORANDUM OPINION

Appeal from Lyon District Court; JEFFRY J. LARSON, judge. Opinion filed September 22, 2023. Affirmed.

Jacob Nowak, of Kansas Appellate Defender Office, for appellant.

Amy L. Aranda, assistant county attorney, *Marc Goodman*, county attorney, and *Kris W. Kobach*, attorney general, for appellee.

Before COBLE, P.J., GARDNER and CLINE, JJ.

PER CURIAM: Williams Nunez was convicted of rape under K.S.A. 2020 Supp. 21-5503(a)(2), which, in essence, criminalizes knowingly engaging in sexual intercourse with a victim who cannot give consent because of a medical condition or the effects of a chemical substance when the victim's condition is known by or reasonably apparent to the offender. This crime has been part of Kansas' rape statute since 1969, although its elements have been modified over the years. *State v. Smith*, 39 Kan. App. 2d 204, 209, 178 P.3d 672 (2008).

Nunez admitted to having sex with the victim. But he contended she was not so intoxicated that it prevented her from being able to consent to sex. He also claimed the victim was motivated to fabricate the allegations to gain immigration status.

After a two-day trial, a jury found Nunez guilty. The district court sentenced Nunez to 155 months in prison with lifetime postrelease supervision.

Nunez appeals both his conviction and his sentence. He seeks a new trial based on his claims that (1) the district court did not properly instruct the jury on the mental state element of his offense, (2) the district court erroneously allowed evidence detailing the process of the victim's sexual assault examination, (3) the prosecutor erred by commenting during closing arguments on the victim's credibility and the hardships she endured after coming forward with her allegations, and (4) the cumulative effect of these errors denied him a fair trial. As for his sentence, Nunez contends the district court engaged in improper judicial fact-finding when it imposed a period of lifetime postrelease supervision based on his age. Finding no reversible errors, we affirm.

Issue I—Jury Instructions

Nunez first claims the district court erred when it declined to give an additional jury instruction he proposed to "clarify" the mental state element of the rape charge. We find no error because the pattern jury instructions given by the court fairly and accurately stated the law—unlike Nunez' proposed instruction.

The district court provided the standard PIK jury instructions for the crime's elements and culpable mental state, which explained:

"INSTRUCTION NO. 9

"The defendant is charged with rape. The defendant pleads not guilty. To establish this charge, each of the following claims must be proved:

"1. The defendant knowingly engaged in sexual intercourse with [the victim].

"2. [The victim] was incapable of giving consent to sexual intercourse because of the effect of any alcoholic beverage which condition was known by or reasonably apparent to the defendant.

"3. This act occurred on or about the 21st day of March, 2021 in Emporia, Lyon County, Kansas.

"Sexual intercourse means any penetration of the female sex organ by the male sex organ. Any penetration, however slight, is sufficient to constitute sexual intercourse."

"INSTRUCTION NO. 10

"The State must prove that the defendant committed the crime of Rape knowingly. A defendant acts knowingly when the defendant is aware of the nature of his conduct that the State complains about, or of the circumstances in which he was acting, or that his conduct was reasonably certain to cause the result complained about by the State."

PIK Crim. 4th 52.010 (2021 Supp.) (definition of knowingly); PIK Crim. 4th 55.030 (2014 Supp.) (elements of rape).

Along with these standard PIK instructions, Nunez asked the court to include another instruction, which he had drafted, that read:

"The State must also prove that the defendant acted with knowledge of the alleged victim's impairment.

"[T]he prohibited act is sexual intercourse with a victim incapable of giving consent, but the statute requires a further state of mind of the offender, i.e., knowledge of that condition[.]

"A defendant acts with knowledge when the defendant is aware . . . of the circumstances in which he was acting."

In the second sentence of his instruction, Nunez borrowed language from one of this court's decisions interpreting a prior version of the statutory provision under which Nunez was charged: *State v. Smith*, 39 Kan. App. 2d 204. The language Nunez quoted from *Smith*'s analysis explained why we believed Smith was entitled to a voluntary intoxication defense instruction. 39 Kan. App. 2d at 211. In advocating for his proposed instruction, Nunez argued his additional language was necessary to emphasize that the victim's condition must be "known" to the defendant.

The State objected to Nunez' proposed instruction on the grounds that (1) it quoted the language from *Smith* out of context, (2) the *Smith* quote addressed the pertinence of an instruction explaining a defense Nunez did not assert, and (3) the pattern jury instructions already addressed Nunez' concern by noting that the victim's condition must be known by or reasonably apparent to the defendant. The district court agreed and declined to give Nunez' proposed instruction, also pointing out that providing duplicative instructions may unduly emphasize certain issues.

On appeal, Nunez contends his proposed instruction fairly and accurately stated the law and was necessary to clarify an ambiguity in the pattern instructions given by the court regarding the requisite mental state of the crime.

We apply a multistep analysis when reviewing whether a district court erred in failing to give a particular jury instruction, which requires determining: (1) whether the challenging party has preserved the issue for appeal and (2) whether error occurred, by considering whether the omitted instruction was legally and factually appropriate and also whether the instructions given by the court properly and fairly stated the applicable law and were not reasonably likely to mislead the jury. If necessary, we then examine whether any error requires reversal. *State v. Hilyard*, 316 Kan. 326, 333, 515 P.3d 267 (2022).

Nunez preserved his jury instruction challenge.

The State contends Nunez did not preserve his jury instruction complaint for appeal because he did not "object" at the instruction conference to the district court's decision not to give his proposed instruction. For support, it relies on *State v. Brammer*, 301 Kan. 333, 341, 343 P.3d 75 (2015), for the proposition that "[i]t is not sufficient to simply have filed proposed instructions before trial to preserve a later challenge under our general framework for reviewing jury instructions on appeal." In reaching that outcome, the court in *Brammer* also explained the statutory requirement from K.S.A. 22-3414(3). A party must object on the record to a jury instruction which "allows for review of any objection out of the jury's presence, ensures the district court is aware counsel remains dissatisfied with the instructions proposed, and gives the court opportunity to consider any arguments relating to that dissatisfaction in light of the evidence adduced at trial." 301 Kan. at 341.

While Nunez acknowledges that defense counsel failed to explicitly say "I object" to the court's decision not to include his proposed instruction, he claims the rule cited in *Brammer* was nonetheless satisfied. He points out that defense counsel made the district court aware of his concerns about the proposed instructions at the conference and both sides argued their positions on the inclusion of Nunez' proposed instruction on the record.

We agree with Nunez and find the issue preserved. Contrary to the State's suggestion, Nunez did more than just propose an instruction before trial (like the defendant in *Brammer* had). The district court gave defense counsel an opportunity to present arguments for the proposed instruction on the record at the instruction conference, after which the State responded. Nunez submitted his proposed instruction in writing before trial, and he did not stop there—he also argued on the record for its inclusion at trial. While he offered to consider amending his instruction to address the State's and court's concerns, we do not read the record in the same way as the State and

do not find that counsel conceded the issue. We find the rule cited in *Brammer* was satisfied in both form and function and therefore the issue was sufficiently preserved.

Nunez' proposed instruction did not accurately describe the elements of the rape charge.

Nunez contends the district court should have given his proposed instruction. He claims the pattern instructions given by the court did not accurately instruct the jury on the required mental state for the crime of rape of an impaired victim. Before we review the instructions given by the district court, we must first examine whether Nunez' proposed instruction was legally and factually appropriate. A jury instruction is legally appropriate if it fairly and accurately states the applicable law. *State v. Kleypas*, 305 Kan. 224, 302, 382 P.3d 373 (2016). It is factually appropriate if it is "supported by the particular facts of the case at bar." *State v. Plummer*, 295 Kan. 156, 161, 283 P.3d 202 (2012).

Nunez was charged with rape under K.S.A. 2020 Supp. 21-5503(a)(2), which defines the offense as:

> "Knowingly engaging in sexual intercourse with a victim when the victim is incapable of giving consent because of mental deficiency or disease, or when the victim is incapable of giving consent because of the effect of any alcoholic liquor, narcotic, drug or other substance, which condition was known by the offender or was reasonably apparent to the offender."

He argues that our court has interpreted this statutory language to require the State to prove the defendant had knowledge that the victim was incapable of giving consent, citing *Smith*, 39 Kan. App. 2d 204. He contends his proposed instruction was legally appropriate because he incorporated language from *Smith* which he claims clarifies this requirement. And he claims it was factually appropriate because the district court's

pattern instructions required clarification since they did not address his alleged actual knowledge requirement.

We do not find Nunez' proposed instruction to be legally appropriate. Not only does it present an incomplete description of the required mental state for this offense, but it quotes *Smith*'s language out of context. And the court's pattern instructions are not rendered ambiguous for failing to include Nunez' misreading of both the rape statute and *Smith*.

To begin, Nunez' instruction only addresses the portion of the rape statute which criminalizes rape of an impaired victim if the victim's inability to consent "was known by the offender." It ignores the second alternative—which criminalizes rape of an impaired victim if the victim's inability to give consent "was reasonably apparent to the offender." K.S.A. 2020 Supp. 21-5503(a)(2). His instruction was thus inaccurate because a jury could still convict Nunez under the statute if the State proved the victim's inability to give consent was reasonably apparent to Nunez.

Rather than narrow or invalidate any statutory language, we acknowledged the existence of both paths to conviction in *Smith*. First, we examined the defendant's sufficiency of the evidence challenge in *Smith* in light of both options—noting "a rational jury could have found that [the victim in *Smith*] was too intoxicated to give consent and that Smith had knowledge of this condition, or that it was reasonably apparent, and could therefore convict him beyond a reasonable doubt of the offense charged." 39 Kan. App. 2d at 208. Next, we addressed both possibilities when determining Smith's challenge of the district court's failure to give a voluntary intoxication instruction in his trial. And although Nunez did not assert a voluntary intoxication defense, this is the portion of the *Smith* opinion he cites in support of his proposed instruction.

In answering the instructional challenge presented in *Smith*—a different challenge than Nunez asserts—we examined the knowledge element of the prior version of K.S.A. 2020 Supp. 21-5503(a)(2) (which was not materially different from the current version), finding that the statute required, as an element of the offense, that the defendant knew of the victim's inability to consent, "or that this condition was reasonably apparent to him." 39 Kan. App. 2d at 210. In explaining why this rape offense qualified as a crime to which a voluntary intoxication defense could be asserted under the prior version of K.S.A. 2020 Supp. 21-5205(b), we held that "[t]his knowledge element is above and beyond whatever general intent may be required for the prohibited act of sexual intercourse." 39 Kan. App. 2d at 210. We therefore found the court's failure to give a voluntary intoxication instruction in *Smith* was in error, but determined this error was harmless given the overwhelming evidence against Smith. 39 Kan. App. 2d at 212.

The incomplete quote Nunez included in his proposed instruction was part of our explanation of why the voluntary intoxication defense instruction should have been given in *Smith*, not an articulation of the State's burden of proof for this type of rape charge. And we did not hold—as Nunez suggests—that Nunez could only be guilty of rape of an impaired victim if he was aware of the victim's inability to consent but instead recognized that the statute also criminalizes rape of an impaired victim when the victim's inability to consent was reasonably apparent to the offender.

We further find Nunez' proposed instruction is not legally appropriate. It inaccurately describes the condition which must be known or reasonably apparent to the offender. His proposed instruction begins by stating "[t]he State must also prove that the defendant acted with knowledge *of the alleged victim's impairment*." (Emphasis added.) The "condition" which the State had to prove was known or reasonably apparent to Nunez was not the victim's level of "impairment" but rather the victim's incapacity to consent because of the effect of any alcohol. See *State v. Chaney*, 269 Kan. 10, 20, 5 P.3d 492 (2000) (declining to define "the degree of intoxication required to sustain a rape

conviction" and giving "great deference" to a jury's conclusion that victim lacked the ability to consent because of the effects of alcohol).

As a final point, the third paragraph of Nunez' proposed instruction quotes part of the pattern jury instruction for the definition of "knowingly" by stating "[a] defendant acts with knowledge when the defendant is aware . . . of the circumstances in which he was acting." PIK Crim. 4th 52.010. But like his description of the mental state element of the rape charge, Nunez' proposed instruction also inexplicably narrows the definition of the knowledge requirement as stated in jury instruction No. 10. This instruction explains:

> "The State must prove that the defendant committed the crime of Rape knowingly. A defendant acts knowingly when the defendant is aware of the nature of his conduct that the State complains about, or of the circumstances in which he was acting, or that his conduct was reasonably certain to cause the result complained about by the State."

Nunez makes no attempt to justify narrowing the pattern definition, so we find he has abandoned that point. *State v. Davis*, 313 Kan. 244, 248, 485 P.3d 174 (2021) (issues not briefed are considered waived or abandoned).

Having found Nunez' proposed instruction legally inappropriate, we need not address whether it was factually appropriate. *State v. Stafford*, 312 Kan. 577, 581, 477 P.3d 1027 (2020). Instead, we move to examining whether the district court's instructions were legally appropriate.

The district court's instructions fairly and accurately described the law.

We determine whether the district court's jury instructions were legally appropriate by considering the instructions as a whole, without focusing on any single instruction in isolation. This process determines whether the instructions properly and fairly stated the

applicable law or if it is reasonable to conclude that they could have misled the jury. *State v. Buck-Schrag*, 312 Kan. 540, 553, 477 P.3d 1013 (2020). But "it is immaterial if another instruction, upon retrospect, was also legally and factually appropriate, even if such instruction might have been *more* clear or *more* thorough than the one given." *Hilyard*, 316 Kan. at 334 (citing *State v. Shields*, 315 Kan. 814, 820, 511 P.3d 931 [2022]).

The district court instructed the jury on the elements of the rape charge by following the pattern jury instruction, which mirrored the statutory language. Our Supreme Court has "'strongly recommended'" use of the pattern jury instructions unless the particular facts of a case warrant modification or supplementation of the pattern instruction. *Hilyard*, 316 Kan. at 334-35.

Nunez does not contend that the facts here warranted modification of the pattern instructions. Instead, he argues his proposed instruction was necessary because the district court's instructions were misleading for failing to include his alleged actual knowledge requirement. Nunez argues the description of the defendant's mental state in the instructions given by the district court—which specified that the State had to prove "[the victim] was incapable of giving consent to sexual intercourse because of the effect of any alcoholic beverage which condition was known by or reasonably apparent to the defendant"—was ambiguous and required clarification about the State's burden. He contends that, without further explanation, this phrasing was reasonably likely to mislead the jury into concluding the State only had to prove Nunez had actual knowledge that the victim consumed a single alcoholic beverage rather than proving Nunez knew the victim was incapable of giving consent.

But Nunez' claim that the court's instructions were misleading is based on his alleged narrowed requirement of actual knowledge and his contention that the condition that must be known by (or reasonably apparent to) Nunez was the victim's impairment

and not her inability to consent. Neither of these arguments is persuasive, as explained above. We also find his interpretation of the court's instructions unreasonably strained.

We do not find the court's instructions were misleading and, instead, find they properly and fairly stated the applicable law. We therefore find no instructional error.

Issue II—Admission of Sexual Assault Examination Evidence

Nunez next argues the district court erred in allowing the State to present evidence describing the process of the sexual assault examination. He contends this evidence was irrelevant and admitted solely to allow the prosecutor to discuss it during closing arguments to improperly inflame the passions of the jury.

Nunez only preserved part of his evidentiary objections.

The parties again disagree about whether Nunez preserved all aspects of his evidentiary challenge for appeal. K.S.A. 60-404 generally precludes an appellate court from reviewing an evidentiary challenge absent a timely and specific objection to the challenged evidence. This rule requires a party to make a contemporaneous objection to preserve the erroneous admission of evidence. See *State v. King*, 288 Kan. 333, 349, 204 P.3d 585 (2009). A party may not object at trial to the admission of evidence on one ground and then on appeal argue a different ground. *State v. George*, 311 Kan. 693, 701, 466 P.3d 469 (2020). When considering whether a party preserved an evidentiary challenge as required under K.S.A. 60-404, this court exercises unlimited review. *State v. Campbell*, 308 Kan. 763, 770, 423 P.3d 539 (2018).

Nunez identifies four specific instances of testimony about the sexual assault examination that he claims were erroneously admitted: (1) The victim's testimony describing how she disrobed for the exam; (2) her testimony describing the exam table;

(3) testimony from the sexual assault nurse examiner (SANE nurse) describing the process of the exam and the instruments she used; and (4) the SANE nurse's testimony discussing patient discharge information and her mental health recommendations to the victim.

Nunez claims he objected to the State's entire "line of questioning" of the victim about the process of the sexual assault exam, but the record shows only a single relevancy objection during her testimony on that topic. For instance, the following exchange occurred when the prosecutor was questioning the victim:

"Q. Okay. The bed that you sat on, is it one of those ones, does it have the paper covering—

"A. Yes.

"Q. —or was it leather or something else?

"[Defense Counsel]: Objection; relevance.

"THE COURT: Do we need this much detail? What's the relevance of it?

"[Prosecutor]: The relevance, Judge, for the State is the description to the jury of the process that she went through.

"THE COURT: I'll give you a little more leeway, but I think we can move through this a little more quicker.

. . . .

"Q. The bed that you were on, was it one with the paper on it or was it just leather or something else?

"A. With the paper.

"Q. Kind of crinkles when you move around?

"A. Yes.

"Q. Okay. Did you have to lay down on the bed?

"A. Yes."

The record shows that by the time defense counsel objected, the victim had already described how she waited in the emergency room, met with a different nurse who took her vitals, then everyone except her friend and the SANE nurse left the room for the

sexual assault exam. The victim had described how she had to remove her pants and underwear, put on a hospital robe, and sit on the exam bed. Only when the prosecutor asked about the bed itself did defense counsel object, and even then, defense counsel did not elaborate on the precise scope of the objection since it was the district court who asked about the level of detail needed. The only other objection defense counsel made during the victim's testimony on the topic was for a leading question about whether the SANE nurse had taken swabs from the victim's body, which the court overruled.

Similarly, Nunez attempts to frame his two relevancy objections during the SANE nurse's testimony as objections to the entire "line of questioning." One relevancy objection came when the prosecutor was questioning the SANE nurse about an unused sexual assault exam kit she had brought as a demonstrative exhibit:

> "Q. And you stated you brought an exam kit with you as an exhibit; is that right?
> "A. If you want me to use it, yes.
> "Q. Okay. And so what does this kit have in it?
> "A. Can I open it?
> "Q. Yes. Are they sealed when you start?
> "A. Yes.
> "Q. Okay.
> "A. This one is still sealed. I just took it off.
>
> "[Defense Counsel]: Your Honor, I'm going to object. Is this relevant to what we're doing today?
>
> "THE COURT: The fact that she did one is relevant. I'm going to allow it. I'm not sure we need a whole lot of detail about what's done step-by-step. We've done that to some degree, but I'm not sure we need to see everything, but it's your case. I'll let you try your case.
>
> . . . .
>
> "Q. If you had items to show the jury, would that help you explain the exam that you performed on [the victim]?
> "A. Essentially, what I collect are cotton swabs, like you would use for your ear, but they're long. And what I do is, I roll those on the area. If it's a mucosal area, such as

the mouth or the vagina, I don't have to wet it. I can just roll those swabs in the area to collect the evidence. I let those dry. They come with a package you can stand your swab in so it doesn't touch anything else, sorry, anything else. The kit has instructions in it. Anybody could really use this. They're—it walks you step through step and it walks the patient step through step what I'm doing."

But by this point, the SANE nurse had testified at length about the general process, which included an evaluation of the patient's medical history, a "head-to-toe [medical] assessment," a "detailed genital exam," and collection of forensic evidence. Although the district court overruled Nunez' objection to describing the contents of the exam kit, the prosecutor shifted the line of questioning to have this nurse explain the actual exam process instead. Defense counsel raised no other relevancy objections to this nurse's testimony describing the specific actions she performed in completing the exam.

And finally, the third relevancy objection came during the prosecutor's questioning of the SANE nurse about the end of the exam:

"Q. Now, after you complete all this and have provided that information, do—is it—in your duties as a SANE nurse, do you encourage any type of course of action or do you just get information?

"[Defense Counsel]: Objection; relevance.

"THE COURT: Overruled.

"A. So I—they should be seen by a healthcare provider afterwards because if she did contract an STI, I'm not going to pick that up on my exam. If she was pregnant, she's not going to show she's pregnant on my exam. Mental health-wise, I encourage counseling as this can cause depression, anxiety, other mental health disorders to come out or suicidal ideation, homicidal ideation.

. . . .

"Q. So, but in regards to [the victim], did you—does the patient drive whether a report is made or not to law enforcement?

"A. Oh, yes. Sorry."

By the time defense counsel made this objection, the SANE nurse had already testified about how she spoke with the victim about "STD testing, pregnancy testing, STI prophylaxis, and pregnancy prophylaxis" upon completing the physical exam. This nurse said the victim had "taken a Plan B already, so we did gonorrhea and chlamydia testing and provided antibiotics for those."

If defense counsel had made a timely and specific objection when either the victim or the SANE nurse began describing the process of the sexual assault exam—or otherwise asked for a standing objection to the entire testimony—Nunez may have preserved an evidentiary challenge to the testimony about the entire process. Instead, he merely made a few specific objections to certain questions. As a result, we find Nunez has only preserved evidentiary challenges related to the specific objections he made at trial. This means we need only consider the admissibility of these pieces of evidence: (1) The victim's description of the exam table as having paper that crinkled when she laid on it, (2) the SANE nurse's affirmation that a sexual assault exam kit is sealed, and (3) the SANE nurse's description of any mental health recommendations she provides patients after completing a sexual assault exam.

Even assuming error in the admission of evidence, such error was harmless.

Admission of evidence involves several legal considerations, and appellate courts reviewing a district court's admission of evidence apply different standards of review depending on the consideration at issue.

Nunez challenges the relevance of the admitted evidence, which has two components: materiality and probativity. K.S.A. 60-401(b) (defining "'[r]elevant evidence'" as "evidence having any tendency in reason to prove any material fact"); *State v. Levy*, 313 Kan. 232, 237, 485 P.3d 605 (2021). Materiality presents a question of law subject to unlimited review. *State v. Alfaro-Valleda*, 314 Kan. 526, 533, 502 P.3d 66

(2022). "A material fact is one that has some real bearing on the decision in the case." 314 Kan. at 533.

Appellate courts review whether evidence is probative using an abuse of discretion standard. 314 Kan. at 533. A district court abuses its discretion when its discretionary decision turns on a legal or factual error or when no reasonable person could agree with the decision. *State v. Ingham*, 308 Kan. 1466, 1469, 430 P.3d 931 (2018). The party asserting an abuse of discretion bears the burden of showing the error. *State v. Randle*, 311 Kan. 468, 478, 462 P.3d 624 (2020). Evidence is probative if it tends to prove a material fact. *Alfaro-Valleda*, 314 Kan. at 533.

If an error is established, the party benefitting from the error must show the admission or exclusion of evidence was harmless using the statutory harmless error standard from K.S.A. 2022 Supp. 60-261. *Shields*, 315 Kan. at 832. Thus, the State would need to persuade this court there is no reasonable probability that the error affected the outcome of the verdict considering the entire record. *State v. McCullough*, 293 Kan. 970, 983, 270 P.3d 1142 (2012).

Nunez makes the same arguments on relevance for each portion of the challenged testimony. He contends none of the evidence is material because it "has no legitimate tendency to prove [the victim] was intoxicated to a degree that rendered her incapable of consenting to a sexual encounter." Rather, he claims the purpose of this evidence was to garner sympathy for the victim "by directing the jury to focus on the hardship associated with filing a rape allegation as opposed to the merits of the allegation itself."

The State argues the three remarks at issue should not be viewed in isolation but taken in the context of the topics being discussed. That is, the comments should be considered as part of the description of the sexual assault examination process, which the State claims is relevant to rebut Nunez' claims that the victim fabricated the allegations

and provided background and foundation for the SANE nurse's testimony about the examination results and the Kansas Bureau of Investigation's forensic laboratory report.

We agree with the State that Nunez appears to take a hypertechnical view of these isolated remarks. But even if we assume the district court erred in admitting the challenged testimony, we find no reasonable probability that the error affected the outcome of the verdict considering the entire record. *McCullough*, 293 Kan. at 983.

Nunez claims the outcome of the trial hinged on the victim's credibility. He argues the admission of this evidence was designed to garner sympathy for the victim and distract the jury from fairly assessing that credibility, thus affecting the outcome of the trial. But we do not view the significance of these three isolated comments in the same way as Nunez. Given the overwhelming evidence of his guilt, which we summarize below, we find the State has met its burden to show any error in the admission of these three comments was harmless.

Two of the victim's coworkers, J.S. and V.I., testified the victim began drinking around 10:30 p.m. and stopped between midnight and 12:30 a.m. They both said the victim was intoxicated but diverged when describing the extent of her impairment. According to J.S., the victim "couldn't walk" and was "[l]imping to one side," to the extent that J.S. had to carry her on his back to her car. He also said her voice "was like she was drunk." V.I. described the victim as "a lot more loose" and "tipsy" but, she "wasn't blackout." And while V.I. claimed she did not notice the victim walking or talking differently than normal, she agreed that J.S. helped the victim to her car and said that she did not believe the victim should be driving because of her impairment.

V.I. took the victim to an apartment V.I. shared with Nunez (her boyfriend, with whom she shared a child), so the victim could stay on their couch. V.I. drove the victim's car because V.I. thought the victim was too intoxicated to drive. V.I. picked up Nunez on

the way home. Later, the three of them went to pick up V.I. and Nunez' child and then returned to the apartment.

V.I. told investigating officers that Nunez had to carry the victim into the apartment from the car. V.I. testified she went to bed about 3:15 a.m., but Nunez and their child were still up, and the victim was on the couch. Nunez woke V.I. up later to let her know the victim had left. V.I. told investigating officers she was "really concerned" that the victim had left because she was "really intoxicated." These facts all corroborate the victim's testimony of her limited memory of the night due to having consumed alcohol. This testimony would allow a jury to conclude she lacked the capacity to consent because of the effects of alcohol.

The victim testified about drinking that night with coworkers, but her memory of the events was sporadic. She said she remembered hearing V.I. and Nunez talking as she slept on the couch. She fell asleep and woke up multiple times. Sometime between 2 a.m. and 4 a.m., the victim woke up and could "feel" someone near her and heard breathing. Suddenly, the person pulled down her pants and inserted his penis into her vagina. She remembered the man pulling her pants back on, then she fell back asleep. She remembered nothing about being asked about having sex or if anyone tried to wake her up before it happened. She described feeling like she was "still too drunk [and] didn't feel strong enough" to talk or do anything while it was happening. When she woke up again around 4 a.m., she gathered her things and drove home.

As for Nunez' knowledge of the victim's incapacity to consent, the State correctly notes that the record shows Nunez was aware of her condition based on Facebook messages he sent after she left the apartment. In those messages, he had to remind the victim what had happened and apologized repeatedly when she expressed discomfort. Nunez explicitly acknowledged the victim had "passed out" on the couch and was too drunk to drive home. And when Nunez recounted the sexual encounter in Facebook

messages he exchanged with a friend, Nunez acknowledged that "[s]he was asleep. She was falling asleep."

We therefore find there is no reasonable probability that allowing the victim and the SANE nurse to testify about details of the process of the sexual assault exam somehow distracted the jury from reaching its verdict considering this evidence. As a result, we find any assumed erroneous admission of this evidence was harmless.

Issue III—Prosecutor Statements During Closing Arguments

Nunez next argues the prosecutor erred by making improper statements in closing arguments, including (1) stating a personal opinion about the victim's credibility and (2) commenting on the hardships endured by the victim to inflame the passions of the jury. The State disagrees, arguing the prosecutor's comments were taken out of context and merely reflect the evidence presented in the case. Alternatively, the State contends any error in making these comments is harmless because the district court properly instructed the jury to disregard statements not supported by evidence and due to the overwhelming evidence of Nunez' guilt.

Nunez correctly notes that although he did not object to the prosecutor's comments at trial, this court can still consider his prosecutorial error claims for the first time on appeal. Appellate courts will review a prosecutorial error claim based on a prosecutor's comments made during voir dire, opening statement, or closing argument even without a timely objection, but the court may figure the presence or absence of an objection into its analysis of the alleged error. *State v. Butler*, 307 Kan. 831, 864, 416 P.3d 116 (2018).

Appellate courts examine prosecutorial error claims using a two-step process, by first examining the record for the existence of error and then determining whether that error prejudiced the defendant's rights to a fair trial. *State v. Sherman*, 305 Kan. 88, 109,

378 P.3d 1060 (2016). To establish error, a defendant must show that a prosecutor's actions fall outside the wide latitude afforded prosecutors in conducting the State's case and represent an attempt to obtain a conviction in a manner that offends the defendant's constitutional right to a fair trial. 305 Kan. at 109.

The prosecutor did not err by commenting on the victim's credibility.

Nunez first asserts the prosecutor impermissibly gave a personal opinion about the victim's credibility by mentioning "credible evidence," followed by recounting the victim's testimony that "she didn't consent to acts [and] wasn't asked for permission."

A prosecutor may not express a personal opinion regarding the credibility of a witness. *State v. Fraire*, 312 Kan. 786, 792, 481 P.3d 129 (2021). And while "fair comment on the interpretation of evidence is allowed," expressions of personal opinion by the prosecutor are a form of "'unsworn, unchecked testimony, not commentary on the evidence of the case.'" *State v. Bodine*, 313 Kan. 378, 410-11, 486 P.3d 551 (2021).

In the final statements of closing arguments, the prosecutor said:

> "Ladies and gentlemen, the State would argue that the evidence that you've heard, the credible evidence you have heard, leaves no doubt that [the victim] was under the influence of alcohol to the extent she could not consent to any acts. And as she indicated, she didn't consent to acts. She wasn't asked for permission. She doesn't remember anybody trying to wake her to engage in this activity. And because of all of that, the State would ask you find Mr. Nunez guilty beyond a reasonable doubt."

We do not find the prosecutor overstepped her bounds in making these statements. We do not read this portion of the closing—which followed the prosecutor's description of evidence from all the witnesses, including the victim, and the Facebook messages—as commenting on the victim's credibility but, rather, we read it as addressing the evidence

the prosecutor just summarized. Indeed, the prosecutor said as much when she referred to the "credible evidence" the jury heard. The prosecutor did not comment on the veracity of the victim's testimony, she simply recounted it. We therefore do not find prosecutorial error on this record.

The prosecutor did not err by improperly inflaming the passions of the jury.

Nunez also asserts the prosecutor erred by discussing the sexual assault exam in closing. He argues the prosecutor's comments sought to "curry sympathy" for the victim and divert the jury's attention from the evidence of guilt or innocence and instead onto the hardships the victim had to endure because of the incident. The State responds that the comments were made to rebut Nunez' defense that the victim was motivated to fabricate the rape allegations to obtain lawful resident status.

Although prosecutors have wide latitude in crafting their arguments and drawing reasonable inferences from the evidence, comments that misstate facts in evidence, inflame the prejudices of the jury, or improperly divert the jury's attention from the evidence are error. See *State v. Lowery*, 308 Kan. 1183, 1208-09, 427 P.3d 865 (2018). "In determining whether a particular statement falls outside of the wide latitude given to prosecutors, the court considers the context in which the statement was made, rather than analyzing the statement in isolation." *State v. Ross*, 310 Kan. 216, 221, 445 P.3d 726 (2019).

Nunez claims the following statements were designed to inflame the passions of the jury and were therefore improper:

> "Going to the U visa issue. You heard testimony that she found out about this from a cousin sometime after this event occurred. She didn't know about it when she was texting or responding back to messages to Mr. Nunez that morning. Didn't know about it Sunday when she threw away her underwear. Didn't know about it Sunday night when

> she told her roommate. Didn't know about it Monday when she told [her friend]. Did not know about Monday when she told her cousin. Didn't know about it Monday before she went to the hospital for an invasive exam where she had to take off her clothes, tell strangers what happened, submit to an exam where swabs where taken from the inside of her body, laying on a table. She didn't know about it then. Then what she did do after knowing about it, she had to come to court and sit on a stand in front of 14 strangers, and whoever else was in the room, and explain and describe what she remembered happening to her."

Nunez contends these remarks are like those made in *State v. Jordan*, No. 123,094, 2021 WL 5143933, at *14 (Kan. App. 2021) (unpublished opinion), *rev. denied* 315 Kan. 970 (2022), which this court found were in error. In *Jordan*, the prosecutor

> "described the sexual assault exam as 'an exam that I will tell you has to be one of the most invasive procedures you could ever have. It's not something that you voluntarily go in and do.' The prosecutor then described how [the victim in *Jordan*] moved out of the residence where the rape occurred because she 'no longer felt safe.'" 2021 WL 5143933, at *13.

The State in *Jordan* tried to justify these comments by characterizing them as fair inferences based on the evidence that had been presented. But this court disagreed, finding they amounted to error because they were designed to inflame the passions of the jury by shifting their focus away from the evidence. 2021 WL 5143933, at *14.

To begin, this court is not bound by decisions from other panels. *State v. Fleming*, 308 Kan. 689, 706, 423 P.3d 506 (2018). Even so, we find the comments here distinguishable from those in *Jordan.* We do not interpret the comments here as asking the jury to "consider the consequences of the crime" to garner sympathy for the victim, as Nunez claims. Nor do we interpret them as asking the jury to decide the case based on sympathy rather than the facts and applicable law.

As the State points out, the prosecutor's comments here were included in a long succession of events which she recited to demonstrate the victim made the statements about the rape without motivation to falsify them. Our Supreme Court has noted that it is not improper for a prosecutor to "'explain[] to juries what they should look for in assessing witness credibility, especially when the defense has attacked the credibility of the State's witnesses.'" *State v. Sean*, 306 Kan. 963, 979, 399 P.3d 168 (2017) (quoting *State v. Stone*, 291 Kan. 13, 19, 237 P.3d 1229 [2010]).

While Nunez mentions *State v. Olsman*, 58 Kan. App. 2d 638, 473 P.3d 937 (2020), in his reply brief, we also find that case distinguishable. In *Olsman*, the prosecutor responded in closing to the defense's attempt to attack the credibility of the victim's accusation by generalizing that "'victims face this in every case like this. Their reputations, their—their respectability and even if they're considered a human being, gets slut—sullied.'" 58 Kan. App. 2d at 658. The prosecutor then pointed out that the defendant considered the victim a "booty call" in the past, noting "'he showed what show of respect he had for her in that statement alone.'" 58 Kan. App. 2d at 658. We found those comments had "little bearing on the charged offenses" and characterized them as a "straightforward appeal for sympathy toward [the victim in *Olsman*]." 58 Kan. App. 2d at 658.

But the prosecutor did not generalize here, and, while perhaps a close question, we find the comments were grounded in the evidence and the prosecutor's efforts to rebut the defense rather than an appeal to sympathy. We do not find the prosecutor erred.

Even if the prosecutor erred, the errors were harmless.

Once prosecutorial error has been determined, the appellate court evaluates prejudice by adopting the constitutional harmlessness inquiry demanded by *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). Under that standard,

the State must show "'beyond a reasonable doubt that the error complained of will not or did not affect the outcome of the trial in light of the entire record, *i.e.*, where there is no reasonable possibility that the error contributed to the verdict.' [Citation omitted.]" *Sherman*, 305 Kan. at 109. Even if we found the prosecutor's comments were improper, we do not find these comments had any reasonable probability of affecting the jury's verdict.

As the State notes, the prosecutor reminded the jury at the start that the arguments she was making were not evidence and that the jury needed to determine credibility and evaluate the evidence to decide whether Nunez was guilty. Likewise, the district court accurately instructed the jury that "[s]tatements, arguments, and remarks of counsel are intended to help you in understanding the evidence and in applying the law, but they are not evidence. If any statements are made that are not supported by evidence, they should be disregarded." The court also accurately instructed the jury of the State's burden to prove guilt beyond a reasonable doubt.

Juries are generally presumed to have followed the instructions given by the district court. *State v. Rogers*, 276 Kan. 497, 503, 78 P.3d 793 (2003). Likewise, the instructions are a relevant consideration for appellate courts when assessing whether a jury was misled by a prosecutor's alleged improper comments. See *State v. Huddleston*, 298 Kan. 941, 956, 318 P.3d 140 (2014). Because there is no indication to the contrary, we presume the jury followed the instructions given by the district court by disregarding the prosecutor's alleged erroneous statements and holding the State to its burden of proof.

In addition, although not determinative, defense counsel's failure to object to the prosecutor's statements also supports concluding that the prosecutor's errors were harmless. See *Lowery*, 308 Kan. at 1211. The record reflects no objections were made when the prosecutor made the comments in question, so the district court had no chance

to discuss any of the comments with the parties. As a result, this consideration weighs against a finding that the comments had an outcome on the verdict.

Lastly, as explained above, there was substantial evidence of Nunez' guilt presented by the State. Even if we construed the prosecutor to have been commenting on the victim's credibility, the statement was of limited evidentiary value considering her own limited memory of the encounter. Multiple witnesses corroborated her testimony about having consumed alcohol to the point of impairment and ending up falling asleep on the couch at the apartment. And the comments about the sexual assault exam and having to tell strangers about the encounter were brief and offered in the context of refuting Nunez' primary defense rather than repeatedly emphasized to the jury.

Given the totality of the evidence presented at trial, any assumed error resulting from the prosecutor's comments was harmless.

Issue IV—Cumulative Error

Nunez also argues that the cumulative effect of the above errors deprived him of a fair trial. Appellate courts review cumulative error claims under a de novo standard. *Ross*, 310 Kan. at 227.

Nunez summarily lists all his claimed errors and then asserts that their cumulative effect denied Nunez a fair trial, without providing much explanation. And we dismissed all but one of his claims of error, which leaves nothing to accumulate. Even if we consider the assumed harmless error in the admission of the three remarks about the sexual assault examination along with the prosecutor's comments about the examination in closing, we still do not find a reasonable probability that these alleged errors contributed to the verdict.

As explained above, we found the prosecutor's statements in closing arguments relevant to rebut Nunez' defense. And we found the evidence of the sexual assault examination relevant in that context as well as in providing background and foundation for the results of the exam and admission of the forensic report. And as already explained, the prosecutor's comments about the victim's credibility were not nearly as important as Nunez makes them out to be, since there was significant and overwhelming corroborating evidence to establish that she consumed alcohol and lacked the capacity to consent to sexual intercourse. We find the State has shown beyond a reasonable doubt that the jury's verdict would not have changed even if the claimed errors had not occurred. As a result, we affirm Nunez' conviction.

Issue V—Judicial Fact-finding in Sentencing

Lastly, Nunez contends the district court engaged in improper judicial fact-finding when sentencing him to lifetime postrelease supervision. See *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."). In particular, he argues the district court ordered lifetime postrelease supervision without a jury finding that he was 18 years old or older when he committed his crime.

Nunez concedes that he is raising this issue for the first time on appeal and argues this court should consider his claim because it involves only a question of law on proved or admitted facts and is finally determinative of the case or because consideration of the issue is necessary to serve the ends of justice or to prevent denial of fundamental rights. Other panels of this court have addressed identical claims under these exceptions. See *State v. Entsminger*, No. 124,800, 2023 WL 2467058, at *6 (Kan. App. 2023) (unpublished opinion), *petition for rev. filed* April 10, 2013; *State v. Schmeal*,

No. 121,221, 2020 WL 3885631, at *8 (Kan. App. 2020) (unpublished opinion). We will do the same and consider the issue under these exceptions.

Whether a defendant's constitutional rights under *Apprendi* were violated by a sentencing court raises a question of law subject to unlimited review. *State v. Huey*, 306 Kan. 1005, 1009, 399 P.3d 211 (2017). To the extent that resolving this question requires interpretation of any statutes, that also presents a question of law subject to unlimited review. See *Nauheim v. City of Topeka*, 309 Kan. 145, 149, 432 P.3d 647 (2019).

Under K.S.A. 2020 Supp. 22-3717(d)(1)(G)(i), "persons sentenced to imprisonment for a sexually violent crime committed on or after July 1, 2006, when the offender was 18 years of age or older, and who are released from prison, shall be released to a mandatory period of postrelease supervision for the duration of the person's natural life." Nunez admits this statute applies to his conviction but still argues the court violated *Apprendi* in imposing lifetime postrelease supervision because the State never presented any evidence of his age to a jury.

The State concedes that there was no evidence of Nunez' age presented at trial. Yet it points out that Nunez listed his age as 32 and his date of birth in 1988 on a financial affidavit for court-appointed counsel early in the case. And the State notes that Nunez filed a presentencing motion for a departure reflecting he "was born in Zacatecas, Mexico in 1988," and then testified similarly in support of his motion at sentencing. The presentence investigation report also listed Nunez' age as 32, and Nunez did not object to it at sentencing.

Following *Apprendi*, the United States Supreme Court has clarified multiple times that facts admitted by a defendant can elevate a sentence without violating the right to a jury trial. In *Blakely v. Washington*, 542 U.S. 296, 303, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), the Court held that "the 'statutory maximum' for *Apprendi* purposes is the

maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." The next year, the Court reaffirmed this holding in *United States v. Booker*, 543 U.S. 220, 244, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005) ("Accordingly, we reaffirm our holding in *Apprendi*: Any fact [other than a prior conviction] which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt.").

Nunez attempts to subvert these holdings by relying on *State v. Bello*, 289 Kan. 191, 211 P.3d 139 (2009), and *State v. Obregon*, 309 Kan. 1267, 444 P.3d 331 (2019). In *Bello*, the Kansas Supreme Court held that *Apprendi* required vacation of life sentences imposed under Jessica's Law when neither the complaint nor jury instructions included a determination of the defendant's age. *Bello*, 289 Kan at 199-200. But *Bello* does not help Nunez because the defendant's age is not an essential element of the offense for which he was convicted. Moreover, the *Bello* court recognized the *Blakely* holding that facts admitted by a defendant can serve as the basis for elevating a sentence. *Bello*, 289 Kan. at 199.

In *Obregon*, the defendant pleaded no contest to drug distribution charges and the district court imposed a sentencing enhancement because he possessed a firearm when committing the crimes. On appeal, this court found an *Apprendi* violation occurred and vacated the sentence with directions on remand to conduct a jury trial to determine whether the firearm enhancement should apply. *Obregon*, 309 Kan. at 1276. The Kansas Supreme Court granted review and reversed the order remanding for a jury trial. The court instead directed the district court to resentence without the firearm enhancement. The court held that the panel's original order violated the general rule against special verdicts in criminal cases and that the appropriate remedy was to resentence without the enhancement since the judgment of conviction had been entered. 309 Kan. at 1276-78.

As in *Obregon*, Nunez argues the only appropriate remedy here is to vacate his lifetime postrelease supervision term and remand with directions to enter a reduced term since there is no indication in the record that the district court advised him of his right to a jury trial to determine his age or otherwise obtain a valid jury trial waiver. The State disagrees, arguing that Nunez fails to acknowledge that his many admissions constitute an *Apprendi* exception. The State also correctly points out that other panels of this court have rejected similar claims based on a defendant's numerous admissions of their age. See, e.g., *Entsminger*, 2023 WL 2467058, at *6; *State v. Reinert*, No. 123,341, 2022 WL 1051976, at *4 (Kan. App.) (unpublished opinion), *rev. denied* 316 Kan. 762 (2022); *State v. Kewish*, No. 121,793, 2021 WL 4352531, at *4 (Kan. App. 2021), *rev. denied* 316 Kan. 761 (2022); *Schmeal*, 2020 WL 3885631, at *8-9. Nunez does not acknowledge any of these decisions in his initial brief, so he has perhaps failed to adequately brief the issue. *State v. Meggerson*, 312 Kan. 238, 246, 474 P.3d 761 (2020) (failure to show why a point is sound despite a lack of supporting authority or in the face of contrary authority is like failing to brief the issue).

Even so, Nunez points out in a reply brief that *Reinert* and *Schmeal*—which the State cites in its appellate brief for the same proposition as the previous paragraph—specifically involved defendants who had entered plea agreements. According to Nunez, that fact distinguishes his case because without a plea agreement, there is no indication in the record that he waived his right to a jury trial in any capacity. Thus, he contends adopting the State's position would violate the "doctrine of unconstitutional conditions" by forcing defendants to choose between exercising their constitutional right to effective assistance of counsel or their constitutional right to a jury trial. See *State v. Mueller*, 271 Kan. 897, 901, 27 P.2d 884 (2001) ("'The doctrine of unconstitutional conditions provides that the Government cannot condition the receipt of a government benefit on waiver of a constitutionally protected right.'") (quoting *Louisiana Pacific v. Beazer Materials & Services*, 842 F. Supp. 1243, 1248 [E.D. Cal. 1994]). To explain how this doctrine applies here, Nunez references a United States Supreme Court decision that held

a defendant's testimony at a suppression hearing could not be used against them at a trial on guilt. See *Simmons v. United States*, 390 U.S. 377, 394, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1968). Although Nunez makes an interesting argument, we find the doctrine of unconstitutional conditions does not apply here because he fails to establish a violation of his constitutional rights.

Although not binding, we find our prior decisions mentioned above persuasive and adhere to their reasoning. Even despite not entering a plea agreement, the record reflects that Nunez admitted his age several times before the district court imposed lifetime postrelease supervision under the applicable statute. As a result, we find Nunez does not establish he was deprived of his constitutional right to have the State prove his age to a jury beyond a reasonable doubt under *Apprendi*.

But even if Nunez could show an *Apprendi* violation, he would still not be entitled to relief because the error is harmless. In *Schmeal*, this court recognized that while an *Apprendi* violation implicates harmless error review, such a violation does not automatically require reversal as a structural error. *Schmeal*, 2020 WL 3885631, at *10-11 (citing *Washington v. Recuenco*, 548 U.S. 212, 222, 126 S. Ct. 2546, 165 L. Ed. 2d 466 [2006]; *State v. Reyna*, 290 Kan. 666, 681-82, 234 P.3d 761 [2010]). We then concluded that unless the record contained evidence that could lead to a contrary finding on the defendant's age, the error could be held harmless. *Schmeal*, 2020 WL 3885631, at *11. The record here has no such evidence but contains several admissions by Nunez that he was at least 18 years old at the time he committed the offense. We therefore conclude any *Apprendi*-type error was harmless and affirm Nunez' sentence.

Affirmed.