NOT DESIGNATED FOR PUBLICATION

No. 125,291

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellant,

v.

ROGELIO J. SOTO,
Appellee.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; DAVID J. KAUFMAN, judge. Opinion filed April 7, 2023. Affirmed.

Matt J. Maloney, assistant district attorney, *Marc Bennett*, district attorney, and *Derek Schmidt*, attorney general, for appellant.

Charles A. O'Hara, of O'Hara & O'Hara LLC, of Wichita, for appellee.

Before GREEN, P.J., GARDNER, J., and PATRICK D. MCANANY, S.J.

PER CURIAM: Rogelio J. Soto moved for a new trial on first degree-murder charges based on a witness' newly discovered statements. The trial court granted the motion, and the State appeals. The State argues that the witness' statements would not have been admissible at the first trial and, even if they were admissible, would not have changed the jury's verdict. Because the State failed to provide exculpatory evidence to the defense during discovery, we affirm.

FACTS

The first time before the trial court—jury trial and sentencing by the judge.

Rogelio J. Soto received a hard 50 sentence for first-degree murder. Our Supreme Court reversed and remanded for resentencing, holding that Soto's hard 50 sentence violated his Sixth Amendment right to a jury trial. *State v. Soto*, 299 Kan. 102, 124, 322 P.3d 334 (2014) (*Soto I*). Our Supreme Court outlined the facts of the case as follows:

> "On March 17, 2009, Arturo Moreno spent the afternoon and evening at his Wichita apartment with his girlfriend, Aurora Tinoco; Aurora's infant son; Aurora's sister, Pamela Tinoco; and the Tinoco sisters' friend, Lisa Chavez. Aurora had been dating Moreno for about 6 months and knew that he formerly was involved with the Vato Loco Boys, or VLBs, a north side Wichita gang.
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> "With Moreno's permission, Pamela invited her boyfriend, Rogelio Soto, to Moreno's apartment. Soto arrived at Moreno's apartment sometime after 6 p.m., along with his friends Giovanni Gonzalez and Luis Navarrette-Pacheco. Soto and his friends were affiliated with the Lopers, a subset of the Surenos, or Sur 13s, a south side Wichita gang and known VLB rival.
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> Officer Jeremy Miller, a gang intelligence officer, testified at Soto's trial about the rivalry between the Sur 13s and the VLBs. Miller explained that the rivalry intensified in the late 1990s when VLB members killed 8-year-old Tony Galvan, a.k.a. 'Little Tony,' in a drive-by shooting. Although Galvan was not a known gang member, he lived in a close-knit south side community that was primarily Sur 13 territory. According to Miller, the Sur 13s perceived Galvan's murder both as a sign of disrespect to the Sur 13s and as the killing of a family member. Miller explained that just the mention of Galvan's murder could 'spike violence' between the Sur 13s and the VLBs.
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> "On the evening of the murder, Moreno primarily stayed inside his apartment with Aurora and her son, while Pamela, Soto, and their friends congregated outside, dancing, drinking, and listening to music. Pamela took photographs, several of which depicted Soto and Navarrette-Pacheco holding beer cans and bottles and 'throwing up gang signs.' At some point, everyone gathered inside Moreno's apartment and continued drinking and listening to music. Pamela and Gonzalez played chess in Moreno's living

room. According to Aurora and Pamela, Moreno interacted with Soto and his friends, and no one argued about gang affiliation.

"Aurora and her son, along with Pamela and Chavez, left Moreno's apartment at about 9 p.m., while Soto, Gonzalez, and Navarrette-Pacheco remained at the apartment. Neither sister was concerned that anything would happen because when they left 'everything was cool.'

"Shortly after Aurora and Pamela left Moreno's apartment, Gonzalez and Navarrette-Pacheco also left to pick up a fourth friend, Angel Castro. Around 9:25 p.m. Soto sent Pamela a text message from Moreno's cell phone and told Pamela he and Moreno were alone. When Soto's friends returned to the apartment, Soto told Castro not to touch anything. Castro thought Soto was playing around so Castro eventually handled a beer can and a remote control. Everyone gathered in the living room.

"Not long after Castro arrived, he overheard Moreno talking on the phone. It sounded to Castro as though Moreno was either taking responsibility for a young boy's killing or talking to someone who was claiming responsibility for the killing.

"Bryan Duran, Moreno's friend and coworker, testified that at about 10 p.m. the night of the murder he spoke on the phone with Moreno, who sounded as if he had been drinking. At one point, Moreno told Duran he loved him and would die for him. Moreno asked Duran about Tony Galvan's murder, and Duran responded that Galvan's killers were caught almost immediately after the shooting. In the background, Duran could hear music and people conversing in Spanish. Duran asked Moreno if everything was okay and whether Moreno wanted Duran to come over. Moreno said he was fine.

"Shortly after Moreno ended his phone call, Castro looked up and saw Soto holding a knife. Castro stood up to walk outside, and as he did so he heard Moreno twice ask, 'Why?' Castro walked outside to a fence in the backyard, urinated, and stayed outside for a 'short time.' When he returned to the apartment, he could see blood on the floor of the living room.

"Castro entered the living room to retrieve the beer can and remote control he had touched, and as he did so, he could see Moreno's body lying on the floor in a pool of blood. Castro took the items outside and placed them in Gonzalez' truck and watched as Soto, who had bloody hands, placed a black trash bag in the bed of the truck. Castro did not know the contents of the trash bag, but he thought it might contain the murder weapons. All four men got into the truck, and Castro drove away from the apartment. At some point, Castro asked Soto 'why'd he do it, why did they do it, and [Soto] just said,

[Be]cause of Little Tony.' The group discussed the need to clean Gonzalez' truck and someone suggested they check their shoes for blood.

"Castro drove to an area of south Wichita near the Arkansas River where Soto, Gonzalez, and Navarrette-Pacheco disposed of the black trash bag and other items taken from Moreno's apartment, including the remote control and beer can. Castro then drove the group to Soto's home where Soto, Gonzalez, and Navarrette-Pacheco changed clothes and placed their soiled clothing in Soto's washing machine. Gonzalez left Soto's house around 11 p.m., and Castro and Navarrette-Pacheco left around midnight.

"Sometime after 11:30 p.m., Moreno's brother, David Moreno, discovered Moreno's body and flagged down a police officer driving through the neighborhood. Based on information from David, Aurora, and Pamela, officers quickly developed four suspects: Soto, Gonzalez, Navarrette-Pacheco, and Castro.

"Through investigation, law enforcement officers discovered Moreno's blood on several items: Gonzalez' shoes, Soto's left shoe, Navarrette-Pacheco's shorts, Castro's jeans, and the exterior of Gonzalez' truck near the passenger side door. They also discovered that zigzag patterns on the soles of both Castro's and Soto's shoes were consistent with zigzag shoe patterns found in blood on Moreno's apartment floor. Additionally, after Castro led officers to the location where he and the others disposed of items from Moreno's apartment, officers recovered a torn black trash bag containing a black shirt, beer cans, a beer bottle, and a remote control; a paper sack containing a knife; a DVD player; and several chess pieces.

"Detective Wendy Hummell testified she interviewed Castro twice. During the second interview, Castro said he and Soto talked in Gonzalez' truck after the murder and Soto told Castro that Soto and Moreno had discussed Little Tony's murder while they were alone in the apartment. Further, Soto told Castro that Moreno confessed to killing Little Tony and that Soto '"just kept keeping it cool"' until the others returned to Moreno's apartment.

"Dr. Bamidele Adeagbo performed Moreno's autopsy and testified at trial that Moreno bled to death from a combination of 79 stab wounds and cuts, including cuts to main arteries on both sides of his neck and several deep stab wounds to his right lung, liver, intestines, and diaphragm. Adeagbo explained that while it was difficult to determine from Moreno's injuries whether he had been stabbed by more than one person, the different wound sizes suggested the use of more than one weapon.

> "Gary Miller, a firearm and toolmark examiner, examined several knives recovered during the investigation. Miller compared each knife to a cast made from one of Moreno's deep stab wounds. Miller could not exclude three of the knives as the weapon that caused that particular injury—a knife found on Moreno's bookshelf, a multipurpose tool found in Gonzalez' truck, and the knife found near the river.
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> "In an interview with Detective Robert Chisholm the day following the murder, Soto admitted he was at Moreno's apartment on the night of the murder and he was affiliated with the Lopers. But Soto maintained he and his friends left the apartment immediately after Aurora and Pamela left. When asked to explain the blood found on his shoes, Soto suggested it appeared through 'witchcraft or something.' During the interview, Chisholm did not see any injuries on Soto's hands.
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> "After the State charged Soto, Gonzalez, and Navarrette-Pacheco with first-degree premeditated murder, Castro pled guilty to aiding a felon and agreed to testify at Soto's trial. The district court granted the State's motion to prosecute Soto, who was 16 years old at the time of the murder, as an adult and tried him separately from the other defendants." *Soto I*, 299 Kan. at 104-08.

Gonzalez went to trial before Soto did, and the jury convicted Gonzalez of second-degree intentional murder. Then, at Soto's trial, the State described the role that Gonzalez played in the murder. The prosecutors in Soto's trial were C.J. Rieg and Justin Phelps. During opening argument, the State told the jury the following, "[Arturo Moreno] was killed by Rogelio Soto, the defendant, Luis Navarrette-Pacheco, and Giovanni Gonzalez." The mention of Navarrette-Pacheco is relevant to this appeal because the trial court granted a new trial based on statements made by Navarrette-Pacheco. The State, however, focused at trial on explaining events from Castro's perspective, telling the jury the following:

> "[Castro] . . . notices that [Soto]'s demeanor is changing; and then he sees [Soto], the defendant, standing with a knife, and he knew something bad was gonna happen. So what did [Castro] do? He turned around and walked right out of that apartment and right downstairs. As he was leaving that apartment, and leaving out the door, he heard the victim saying, 'Why? Why?'"

The State continued, "Well, what happened in that apartment when [Castro] was standing downstairs by the truck waiting for his friends, the defendant and his two buddies surrounded Arturo [Moreno] and started stabbing him."

During closing arguments, the State discussed the aiding and abetting jury instruction as follows:

> "Now, it's also important to take a look at what [Gonzalez] and [Navarrette-Pacheco] were doing, and why is that? Cause of Instruction No. 7, the aiding and abetting instruction. What the evidence shows you is that all three of these guys were involved in this crime, and what this instruction tells you is that it doesn't matter what their level of involvement was, just that they were involved. So if Rogelio Soto stabbed Arturo—Arturo Moreno once, if he stabbed him all 79 times, if he so much as held him down so the other guys could stab him, it doesn't matter because he is involved in the crime. The extent of his involvement is not important to whether he is responsible or not. He's on the hook for his own actions, for [Gonzalez'] actions, and for [Navarrette-Pacheco's] actions."

The State also discussed jury instruction No. 11 during closing argument. Jury instruction No. 11 stated as follows: "An accomplice witness is one who was involved in the commission of the crime with which the defendant is charged. If you find from the evidence that Angel Castro is an accomplice witness, you should consider with caution the testimony of Mr. Castro." The State commented on this instruction as follows: "We've talked about why Angel Castro's testimony is credible, and because it's credible you know that when he says he wasn't there during the murder he means it. He's not an accomplice, and therefore this instruction is not helpful to you."

At sentencing, the trial court determined that the mitigating circumstance—Soto's age—did not outweigh the aggravating circumstance of the heinous, atrocious, and cruel manner of the murder. *Soto I*, 299 Kan. at 108. Soto appealed, challenging his conviction and sentence. 299 Kan. at 103.

Meanwhile, Navarrette-Pacheco entered a plea deal wherein the State agreed to dismiss the first-degree premeditated murder charge against him in exchange for pleading to aggravated burglary, aggravated robbery, and aiding a felon. The State agreed to recommend probation to the trial court instead of prison.

Our Supreme Court affirmed Soto's conviction but vacated his hard 50 prison sentence and remanded for a sentencing by a jury. 299 Kan. at 130.

The second time before the trial court—remanded for a sentencing by a jury.

On remand and preparing for the sentencing by a jury, the trial court ruled that Soto could introduce evidence of the sentences received by the other participants in Moreno's murder. *State v. Soto*, 310 Kan. 242, 244, 445 P.3d 1161 (2019) (*Soto II*). The prosecutors on remand were Jennifer Amyx and Alice Osburn—different prosecutors than at Soto's original trial. The State retrieved information about Navarrette-Pacheco's plea arrangement and e-mailed Soto's defense counsel as follows:

> "'I couldn't figure out why the D.A. on the case gave the plea offer, from the file. But after looking at the [journal entry] of the judgment closer, he used defendant's lack of participation as a departure factor. Since that wasn't in the plea, I pulled the departure motion. It's attached and includes the results of the two polygraphs administered to Navarrette[-Pacheco].'" 310 Kan. at 244.

At the next hearing, the State explained as follows:

> "Here's what took place, Judge. Yesterday we get done. The Court rules against the State, over our objection, about the priors, the convictions, and the sentence is coming in. I think the Court even indicated on the record that the jury was going to wonder why [Navarrette-Pacheco] got so much of a better deal. Frankly, in looking at [Navarrette-Pacheco's] file, I don't know why he got such a good deal. But it bothered me."

The State went on to explain that Navarrette-Pacheco's favorable plea deal seemed to be connected to statements he made during interviews monitored by polygraph. His statements contradicted Castro's testimony at Soto's trial that Castro left the apartment before the attack on Moreno started. The trial court delayed Soto's jury sentencing and directed the parties to brief the procedure and relief sought from discovering the polygraph examination reports. *Soto II*, 310 Kan. at 245.

During Navarrette-Pacheco's polygraph examinations, he stated that Gonzalez was the first person to stab Moreno, that no one communicated a plan to stab Moreno, and that Castro was still in the room during the stabbing. In this version of events, Moreno was stabbed first by Gonzalez and then by Soto, while Navarrette-Pacheco and Castro witnessed it. Soto moved for a new trial. 310 Kan. at 244-45.

Soto sought a new trial based on newly discovered evidence and based on the State violating its duty to disclose exculpatory evidence under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). The trial court noted that our Supreme Court vacated Soto's hard 50 sentence and the mandate on remand was to conduct a new sentencing hearing with a jury. The trial court denied Soto's new trial motion as outside our Supreme Court's mandate. *Soto II*, 310 Kan. at 246. Soto appealed, and our Supreme Court held that the trial court was not procedurally barred from granting Soto's motion and should consider the merits of Soto's arguments. 310 Kan. at 257, 261.

The third time before the trial court—remanded with instructions to consider the new trial motion.

Thus, Soto has had one jury trial and has been to our Supreme Court twice before reaching this current issue. Now, the State appeals the trial court's grant of a new trial after an evidentiary hearing. The witnesses who testified at the new trial evidentiary hearing were Catherine Zigtema, who represented Soto at trial, John Sullivan, who

represented Navarrette-Pacheco through his plea hearing, and the prosecutors at Soto's trial, Justin Phelps and C.J. Rieg. Because Navarrette-Pacheco had been deported from the United States to Mexico, he was unavailable to testify at the hearing on Soto's new trial motion.

Zigtema testified that she did not recall seeing the polygraph reports while Soto's case was pending. She stated that Navarrette-Pacheco's statements corroborated the version of events that Soto had given her. She also explained the defense's goal in the case as follows: "We were hoping to get an on-the-grid disposition for second intentional murder, maybe even second reckless murder . . . ." She explained that Soto told her that Gonzalez initiated the stabbing, and he joined in the stabbing with another knife.

Zigtema testified that Navarrette-Pacheco's statements would have helped the defense toward its goal of obtaining a conviction for second-degree murder rather than first-degree murder, as she believed that the statements showed the "spontaneous nature" of the killing. She further testified that the statements would have strengthened Soto's plea-bargaining position and would have changed the defense's pretrial and trial strategy. She explained as follows:

> "I probably would have advised Mr. Soto to testify, risk analysis becomes much more different towards testimony because at that point we have a leg to stand on, that's not just my client saying he didn't do it or my client says it didn't happen this way, and Mr. Castro, who [the] State gave us a deal to, said that's not how it went down. Instead of one versus one it becomes two against one, which could sway a jury."

But Zigtema admitted the following: "No, I can't say for certain the jury would have acquitted Mr. Soto or would have even given us the second intentional; but, I can say that I would have—we would have defended this case differently . . . ."

Sullivan testified that his client, Navarrette-Pacheco, sat for an interview with a polygraph examiner. Sullivan gave his client's polygraph results to Rieg, and Rieg requested that Navarrette-Pacheco sit for another polygraph examination administered by the State. Navarrette-Pacheco was originally charged with first-degree premeditated murder. Sullivan explained that he had his client take the polygraphs to try to work out a favorable disposition. After the polygraphs, Navarrette-Pacheco pleaded guilty to aggravated robbery, with the State agreeing to recommend a dispositional departure to probation. Sullivan further stated that the State declined Navarrette-Pacheco's offer to testify against Soto. Sullivan explained that he would not have considered it a good idea for his client to testify for Soto, until after he had pleaded under an agreement with the State. Sullivan testified that he negotiated a deal for probation without his client needing to testify at Soto's trial.

The transcript of Navarrette-Pacheco's plea hearing illustrates his agreement with the State. The State illustrated during the plea hearing the following: "The evidence would have shown that Mr. [Navarrette-Pacheco] was just absolutely with the wrong people, the wrong place at the wrong time, but not involved in the murder itself." The State argued that the two people primarily responsible for Moreno's murder were Gonzalez and Soto. The State noted that Gonzalez had blood all over his shoes, tried to wash his clothes, and helped dispose of the evidence. And the State further pointed out that Gonzalez was convicted of second-degree murder. Meanwhile, the eyewitness—Castro—saw Soto with a knife and reported Soto's comments indicating premeditation.

Sullivan explained Navarrette-Pacheco's plea negotiations to the trial court as follows:

> "[Rieg] called me one day and said here is the deal. I have talked to Pretrial. Your client has been out since July of 2010 and he has been exemplary, you know. We don't believe that he participated in killing this individual and actually perpetrating this horrendous

> crime, but she said I want to make sure that I can hang enough time over his head to give him the motivation to continue down the path that he has been on . . . ."

Sullivan argued the following, "[W]hat my client, Mr. [Navarrette-Pacheco], has said all along was that he was there. . . . What he has said [is that] Angel Castro and he sat right next to each other and this all happened in the blink of an eye." The prosecutors at Soto's trial also handled Navarrette-Pacheco's case, with Rieg signing Navarrette-Pacheco's plea deal and Phelps appearing at the plea hearing.

Phelps also testified at Soto's new trial motion hearing. He provided a timeline of the cases against Soto, Gonzalez, Castro, and Navarrette-Pacheco. Relevant to this appeal, Navarrette-Pacheco did not plead until after Soto's trial. Phelps testified that, in his opinion, Navarrette-Pacheco's statements were not exculpatory for Soto as they "would have just furthered premeditation."

Rieg testified that she did not call Navarrette-Pacheco as a witness for the State because she did not think he was credible. Rieg also testified that the State dismissed the first-degree premeditated murder and lesser charges against Navarrette-Pacheco, despite not finding him credible. She explained as follows, "I know that we had the least amount of evidence on [Navarrette-Pacheco]. And we were fretting on how we were going to prove the case."

Rieg explained why the State did not use Navarrette-Pacheco's statements to corroborate Castro's testimony because the prosecutors did not believe him: "Didn't use it because I didn't believe the statement, what he was saying. I believe that he was mitigating his part of it. I thought he was way more involved than he said he was, and I wasn't going to put that on." She further stated, " I know that we—and I'm saying we because [Phelps] and I talked about this a lot and didn't believe what [Navarrette-

Pacheco] told the interviewer during the polygraphs, so, no, we did not—we weren't putting him on."

Rieg further testified that she did not recall turning over the polygraph material to the defense. She explained that her normal practice would have been to send it and, if she did not send it, it would have been inadvertent. Rieg testified that she viewed Navarrette-Pacheco's statements as damaging to Soto, noting that Navarrette-Pacheco said that he saw Soto stabbing Moreno.

The trial court granted Soto's motion for a new trial, finding that the State had committed a *Brady* violation. The trial court determined that Navarrette-Pacheco's statements not only impeached Castro's testimony but also were exculpatory on the element of premeditation. The trial court also determined that the State suppressed the evidence by, at a minimum, negligently failed to provide it. And the trial court found a reasonable probability that the jury would have convicted Soto of the lesser offense of second-degree murder if the State had disclosed the evidence to Soto. The trial court ruled that the statements would have been admissible under the hearsay exception in K.S.A. 2022 Supp. 60-460(j) as declarations against interest.

The State timely appeals.

ANALYSIS

Did the trial court err in concluding that Navarrette-Pacheco's statements would have been admissible?

The State argues that the trial court erred in finding that Navarrette-Pacheco's statements were declarations against interest and therefore admissible under K.S.A. 2022 Supp. 60-460(j). Soto argues that the State has failed to adequately brief and explain its argument and we should not consider the State's argument.

Our review in this case is guided by K.S.A. 2022 Supp. 22-3501(1), which states: "The court on motion of a defendant may grant a new trial to the defendant if required in the interest of justice." An appellate court reviews the trial court's decision on a motion for new trial for an abuse of discretion. *State v. Breitenbach*, 313 Kan. 73, 97, 483 P.3d 448 (2021); see also *State v. Ashley*, 306 Kan. 642, 650, 396 P.3d 92 (2017) (motion based on newly discovered evidence); *State v. Williams*, 303 Kan. 585, 595-96, 363 P.3d 1101 (2016) (motion based on alleged *Brady* violation); *State v. Rodriguez*, 302 Kan. 85, 95, 350 P.3d 1083 (2015) (applying motions for new trial standard under K.S.A. 2014 Supp. 21-2512[f] DNA testing provisions).

This court has jurisdiction over this appeal under K.S.A. 2022 Supp. 22-3601(a) (appellate jurisdiction of the Court of Appeals) and K.S.A. 2022 Supp. 22-3602(b)(4) (appeal may be taken by the prosecution as a matter of right upon an order granting a new trial in any case involving an off-grid crime).

In *Brady*, the United States Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87.

> "There are three components or essential elements of a *Brady* violation claim: (1) The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; (2) that evidence must have been suppressed by the State, either willfully or inadvertently; and (3) the evidence must be material so as to establish prejudice. " *State v. Warrior*, 294 Kan. 484, Syl. ¶ 10, 277 P.3d 1111 (2012).

> "Under the test for materiality governing all categories of *Brady* violations, evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A

> reasonable probability is a probability sufficient to undermine confidence in the outcome." 294 Kan. 484, Syl. ¶ 11.

"[A] trial court's determination as to the existence of a *Brady* violation is reviewed de novo with deference to a trial court's findings of fact, but the trial court's denial of the defendant's motion for new trial is reviewed under an abuse of discretion standard." 294 Kan. at 510.

The State asserts that the admissibility of Navarrette-Pacheco's statements is a threshold question before analyzing a *Brady* violation. The State then argues that his statements were inadmissible. The State contends that the trial court erred in finding the statements declarations against interest under K.S.A. 2022 Supp. 60-460(j).

K.S.A. 2022 Supp. 60-460(j) states the following:

> "Subject to the limitations of the exception in subsection (f), a statement which the judge finds was at the time of the assertion so far contrary to the declarant's pecuniary or proprietary interest or so far subjected the declarant to civil or criminal liability or so far rendered invalid a claim by the declarant against another or created such risk of making the declarant an object of hatred, ridicule or social disapproval in the community that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true."

In setting out its reasons for ruling that Navarrette-Pacheco's statements were a declaration against interest, the trial court stated: "Those are declarations against interest. They have to be declarations against interest as a matter of law, because he's charged with crimes as relates to the statements he made." The State, however, claims on appeal that this analysis of admissibility is insufficient.

But, as Soto correctly argues, the State's failure to request specific findings precludes this issue from appeal. Particularly, Supreme Court Rule 165 (2022 Kan. S. Ct. R. at 234) imposes on the trial court the duty to provide adequate findings of fact and conclusions of law on the record to explain the court's decision on contested matters. See K.S.A. 2022 Supp. 60-252. Generally, a party bears the responsibility to object to inadequate findings of fact and conclusions of law to give the trial court an opportunity to correct any alleged inadequacies. See *State v. Espinoza*, 311 Kan. 435, 436-37, 462 P.3d 159 (2020).

When no objection is made to a trial court's findings of fact or conclusions of law based on inadequacy, an appellate court can presume the trial court found all facts necessary to support its judgment. *State v. Jones*, 306 Kan. 948, 959, 398 P.3d 856 (2017). Where, however, the record does not support such a presumption and the lack of specific findings precludes meaningful review, an appellate court may consider a remand. See *State v. Thurber*, 308 Kan. 140, 232, 420 P.3d 389 (2018); *Dragon v. Vanguard Industries, Inc.*, 282 Kan. 349, 356, 144 P.3d 1279 (2006) (holding that "in the absence of an objection, omissions in findings will not be considered on appeal").

On appeal, the State argues that K.S.A. 2022 Supp. 60-460(j) includes a requirement that the defendant show a measure of trustworthiness of the out-of-court statement. The trial court may consider factors such as the nature and character of the statement, the person to whom the statement was made, the relationship between the parties, and the probable motivation of the declarant. *State v. Carr*, 300 Kan. 1, 205, 331 P.3d 544 (2014). But these are necessarily fact-findings made at the trial court level, which appellate courts review for abuse of discretion. 300 Kan. at 207 (finding an abuse of discretion).

The State, however, does a disservice to the trial court by asking us to make a finding on the trustworthiness of Navarrette-Pacheco's statements without giving the trial

court the opportunity to rule on this issue first. Indeed, the State, through its inaction at the trial court level, has failed to give the trial court an opportunity to rule on this issue because it is raising this issue for the first time on appeal. Thus, the State has waived and abandoned this argument. See *State v. Godfrey*, 301 Kan. 1041, 1044, 350 P.3d 1068 (2015). Also, for us to credit the State's argument now, we would endorse an unacceptable form of sandbagging. See *Finnegan v. Commissioner of Internal Revenue*, 926 F.3d 1261, 1272-73 (11th Cir. 2019) (characterizing raising new argument on appeal as sandbagging and declining to consider argument); *Raich v. Gonzales*, 500 F.3d 850, 868 n.18 (9th Cir. 2007).

But even if we were to address the merits of the State's claim, the State's argument is fatally flawed and contrary to the record. The State asserts that Navarrette-Pacheco's statement must have been in his interests, instead of against his interests, because he received a favorable plea deal.

Nevertheless, returning to Navarrette-Pacheco's polygraph statements that he made with the police, we note that he had been charged with first-degree premeditated murder of Moreno. During the polygraph, Navarrette-Pacheco stated that Gonzalez was the first person to stab Moreno, contrary to Castro's testimony. Also, Navarrette-Pacheco stated that no one communicated a plan to stab Moreno. He further indicated that Castro was still in the room during the stabbing. Under Navarrette-Pacheco's version of events, Moreno was stabbed first by Gonzalez and then by Soto, while he and Castro witnessed it. Thus, Navarrette-Pacheco's statements subjected him to criminal liability because he later pleaded guilty to aggravated robbery and aggravated burglary—both person felonies with prison sentences of more than one year—and aiding a felon, a nonperson felony.

Also, Navarrette-Pacheco's plea had another detriment, which subjected him (the declarant) to "civil or criminal liability." For example, under 8 U.S.C. § 1227(a)(2)(iii) (2018), any alien who is convicted of an aggravated felony at any time after admission is

deportable, that is, subject to losing legal permanent resident (Green Card) or other status and being removed from the United States. Aggravated felonies include a crime of violence for which the term of imprisonment is at least one year. 8 U.S.C. § 1101(a)(43)(F) (2018).

Although Navarrette-Pacheco's immigration proceedings are not in the record on appeal, his attorney testified that "[Navarrette-Pacheco was] here, I mean, legally and all that, but, Mr. Navarrette-Pacheco was not a citizen, so after he took this plea agreement, he was—he was deported back to Mexico. It was just something we knew was going to happen." Thus, the record shows that Navarrette-Pacheco considered the deportation consequences based on his statements and plea agreement. At Navarrette-Pacheco's sentencing, the State characterized him as "just absolutely with the wrong people, the wrong place at the wrong time, but not involved in the murder itself." Nevertheless, after Navarrette-Pacheco gave his statements during his second polygraph interview, with law enforcement present, he was then convicted of—not only felonies—but of felonies which resulted in his deportation from the United States.

Obviously, Navarrette-Pacheco's statements made to law enforcement during his second polygraph clearly subjected him to criminal liability concerning the stabbing death of Moreno. Also, Navarrette-Pacheco's statements created a risk of making him an object of hatred, ridicule, and social disapproval in the community. Indeed, Navarrette-Pacheco's statements and his involvement with Moreno's murder ultimately led to his deportation from the United States. Thus, Navarrette-Pacheco's statements were a declaration against interest under K.S.A. 2022 Supp. 60-460(j).

Finally, the State offers an argument based on *State v. Myers*, 229 Kan. 168, 625 P.2d 1111 (1981). The *Myers* court held that the declaration against interest hearsay exception at K.S.A. 60-460(j) did not apply to coparticipants in a crime. 229 Kan. at 174. The *Myers* court held that allowing such statements in under K.S.A. 60-460(j) would

conflict with the prohibitions on admitting confessions and incriminating statements of coparticipants under K.S.A. 60-460(f) and (i). 229 Kan. at 174. Thus, the State argues that it is error to admit hearsay statements of coparticipants under K.S.A. 2022 Supp. 60-460(j). *State v. Sean*, 306 Kan. 963, 984-86, 399 P.3d 168 (2017).

Two problems exist with the State's reliance on *Myers*. First, we must ask this question: Was Navarrette-Pacheco a coparticipant? At Soto's trial, the State argued that Moreno was stabbed by Gonzalez, Soto, and Navarrette-Pacheco. But at Navarrette-Pacheco's sentencing, the State argued that Navarrette-Pacheco was with the wrong people in the wrong place at the wrong time and did not participate in the murder. For *Myers* to apply, the trial court would have needed to determine whether Navarrette-Pacheco was a coparticipant—as the State initially argued—or a nonparticipant—as the State later argued under Navarrette-Pacheco's plea agreement. What, then, do we know? We know that this situation vividly illustrates the State's failure to bring this issue before the trial court and to give the trial court an opportunity to address the coparticipant versus the nonparticipant issue.

Second, as Soto correctly points out, the *Myers* court's reasoning hinged on the defendant's Sixth Amendment right to confront his accuser. In *Myers*, Joe Buddy Myers and Lorin Axvig murdered Kevin Kitchens. Then Axvig was himself murdered. Before his death, Axvig told his wife Linda Axvig that he had killed someone because Myers told him to. "Under all the circumstances, we cannot say that the trial court committed error in suppressing the proffered testimony of Linda Axvig on the ground that admission of her testimony would violate the defendant's constitutional right of confrontation." *Myers*, 229 Kan. at 176. The *Myers* court further stated: "We cannot believe that it was the intent of the legislature to permit hearsay confessions and extrajudicial statements of coparticipants in crime to be admitted *against the accused* in a criminal case without satisfying the requirements set forth in those sections of K.S.A. 60-460." (Emphasis added.) 229 Kan. at 174. Here, the State is not the accused, and it has no constitutional

right to confront under the Sixth Amendment. Thus, the State's reliance on the *Myers* holding is misplaced.

On a final note, the State never explains why admissibility is a threshold question for analyzing a *Brady* violation. The third prong of *Brady* is materiality—whether there is a reasonable probability that the outcome of the proceeding would have been different if the State made the appropriate disclosures. *Warrior*, 294 Kan. 484, Syl. ¶ 11. Admissible evidence could impact the jury verdict. But the State's disclosure of inadmissible evidence could lead the defense: (1) to uncover admissible evidence, (2) to change trial strategy, or (3) to negotiate a plea differently. The burden to show that inadmissible evidence is material may be high, but there is no formal logic saying that evidence *must* be admissible to be material. The State just assumes that no *Brady* violation occurs unless the evidence is admissible. It provides no citation or argument explaining why it could withhold evidence in discovery as long as that evidence is itself inadmissible.

Did the statements warrant a new trial under Brady*?*

The State argues that, even if Navarrette-Pacheco's statements were admissible, they still would not warrant a new trial under *Brady*. The State argues that the statements are not exculpatory and would not have changed the outcome of the proceeding. Soto argues that the statements undermine evidence of premeditation and that the jury could have convicted Soto of second-degree murder rather than first-degree murder.

The first component of a claimed *Brady* violation is that the evidence must be favorable to the accused, because it is either exculpatory or impeaching. *Warrior*, 294 Kan. at 506. The trial court held that Navarrette-Pacheco's statements were "exculpatory, at minimum, as it relates to the premeditation element of the crime of conviction." The trial court also found that the statements contradicted Castro's testimony and could be used to impeach Castro.

The State claims that the trial court erred on this first *Brady* component. The State notes that Navarrette-Pacheco said in both polygraph interviews that Gonzalez started stabbing Moreno and Soto joined in. The State claims that Gonzalez stabbing first would not help Soto at trial because it shows that Soto chose to join an unprovoked attack on a defenseless man. But Navarrette-Pacheco also stated that no plan to kill Moreno was communicated to him. These statements, taken together, could have allowed the jury to conclude that Soto did not premeditate the murder but reacted to his friend stabbing Moreno. Navarrette-Pacheco's statements undermine the evidence of premeditation, thus, making his statements exculpatory.

The State also argues that Navarrette-Pacheco's statements do not impeach Castro's testimony. Castro testified that he left the apartment before the stabbing began. By contrast, Navarrette-Pacheco stated that he and Castro were both present when the stabbing began. The State asserts that this minor discrepancy has no bearing on Soto's actions. But, as the trial court correctly noted, Castro's statements relevant to premeditation were cast in doubt. By Castro's own testimony, he was outside the room and did not witness who stabbed Moreno first. Navarrette-Pacheco stated that he saw Gonzalez stab Moreno first, further explaining that Castro sat right next to him and would have witnessed the same thing. Navarrette-Pacheco's statements weaken Castro's testimony on the element of premeditation. Overall, Navarrette-Pacheco's statements are favorable to Soto on the element of premeditation.

Indeed, the State used Castro's testimony to fit its theory of the case: that Soto was the initiator in the stabbing death of Moreno. Also, the State used Castro's testimony that he first saw Soto with a knife before Moreno was stabbed to support the State's theory that Soto first stabbed Moreno. But Castro's testimony suppressed a very important fact: that Navarrette-Pacheco's statements indicate that he first saw Gonzalez with a knife and that Gonzalez first stabbed Moreno. Navarrette-Pacheco's statements would have discredited Castro's claims about what he had saw. Moreover, Navarrette-

Pacheco's statements could have caused the jurors to disbelieve anything that Castro had testified to.

The second component of a claimed *Brady* violation is that the State must suppress the evidence either willfully or inadvertently. The State offers no argument that the trial court erred in finding inadvertent suppression.

The third and final component of a claimed *Brady* violation is whether the result of the proceeding would have been different if the evidence had been disclosed to the defense. The trial court found a reasonable probability that the jury would have convicted Soto of the lesser included crime of second-degree intentional murder. The State argues that the outcome would have been the same because: (1) Navarrette-Pacheco's statements do not call the element of premeditation into question and (2) Soto has not shown that he would have introduced the statements.

The State, in its attempt to minimize the value of Castro's testimony, states, in its brief, that Castro's testimony about the stabbing itself was indirect because he stated that he was not in the room at the time: "At [Soto]'s trial, no witnesses testified that they saw [Soto] stab the victim. Against this backdrop, it defies logic to think that the jury would have reached a result more favorable to [Soto] if they had heard Navarrette-Pacheco's account that he personally saw [Soto] stab the victim." But the State ignores a telling point: the jury concluded that Soto stabbed the victim based on Castro's testimony about what he did not see while he was not in the room. So, it is logical that a more detailed account from someone inside the room would have given the jury more information on whether the stabbing was premeditated or an intentional response to Gonzalez' intentional stabbing of Moreno. Navarrette-Pacheco's statements would have been relevant to a jury in determining whether Soto committed first-degree premeditated murder or second-degree intentional murder.

The obvious weakness in the State's argument is that the jury did not need a witness to testify that he saw Soto stab Moreno to convict Soto of first-degree premeditated murder. Indeed, the jury was only given Castro's one-sided testimony to evaluate. And this one-sided testimony was sufficient to convict Soto of murdering Moreno in the first-degree.

Also, on the issue of premeditation, the State argues that the number of stab wounds shows time for premeditation, citing *State v. Marks*, 297 Kan. 131, 139, 298 P.3d 1102 (2013). The State cites *Marks* for the proposition that stabbing someone with a knife eight times is not instantaneous like rapid gunfire and showed that the defendant had time to premeditate the killing before the ultimate act. There are two issues with this citation.

First, the *Marks* court actually held that it was prosecutorial error to discuss the speed and sequence of the wounds and state that premeditation could be formed "'during the act itself.'" 297 Kan. at 139. The *Marks* court held that the prosecutor misstated the law, even though the misstatements did not warrant reversal. 297 Kan. at 141.

Second, Rickey Marks was a single attacker with a single knife and all eight wounds were attributed to him. Thus, *Marks* is unlike this case, where it was never clear which knife Soto used or how many times he stabbed Moreno. The State points out that Navarrette-Pacheco stated that Gonzalez and Soto kept stabbing Moreno after he was on the ground, noting the total number of 79 stab wounds. But, as Soto correctly argues, a jury found Gonzalez guilty of second-degree murder despite the same evidence of 79 stab wounds. While there is no certainty that Soto would receive the same outcome, there is a reasonable probability that a jury would have convicted him of second-degree murder if the State had provided him with Navarrette-Pacheco's statements.

The State's final argument on materiality is that Soto has not shown that he would have used Navarrette-Pacheco's statements at trial. Soto's trial attorney, Zigtema, specifically testified that they hoped for an on-the-grid disposition for second-degree murder and that Navarrette-Pacheco's statements would have helped. But the State argues that this testimony is not enough because a lawyer may not present a guilt-based defense over a client's objection. *State v. Carter*, 270 Kan. 426, 440, 14 P.3d 1138 (2000). According to the State, Soto himself needed to testify at the remand hearing that he would have pursued such a strategy if he had known about Navarrette-Pacheco's statements. But as Soto correctly argues, the State raises Soto's burden at the evidentiary hearing by complaining that Zigtema's testimony is not sufficient by itself. There is no rule requiring the defense to memorialize explicit consent to a guilt-based defense on the record. *State v. Hilyard*, 316 Kan. 326, 339, 515 P.3d 267 (2022).

The trial court correctly granted a new trial based on a *Brady* violation. Navarrette-Pacheco's statements were exculpatory on the issue of premeditation and could be used to impeach Castro's testimony. The State failed to turn over this information to the defense. And there is a reasonable probability—sufficient to undermine confidence in the outcome—that the result of Soto's trial would have been different. *Warrior*, 294 Kan. 484, Syl. ¶¶ 10-11.

For the preceding reasons, we affirm.