

No. 125,316

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellant,

v.

ALEJANDRO MARTINEZ-DIAZ,
Appellee.

SYLLABUS BY THE COURT

1.

An interlocutory appeal by the State is proper when a pretrial order suppressing or excluding evidence substantially impairs the State's ability to prosecute a case. In determining whether evidence substantially impairs the State's ability to prosecute a case, we consider both the State's burden of persuasion and its burden of production.

2.

To protect a defendant's constitutional confrontation rights, testimonial hearsay is inadmissible unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant.

3.

A witness who refuses to testify because he claims his or her trial testimony might subject him or her to a charge of perjury is an unavailable witness for purposes of the Confrontation Clause.

Appeal from Douglas District Court; BARBARA KAY HUFF, judge. Opinion filed April 21, 2023.
Reversed and remanded with directions.

Jon Simpson, assistant district attorney, *Suzanne Valdez*, district attorney, and *Derek Schmidt*, attorney general, for appellant.

Michael R. Clarke, of Lawrence, for appellee.

Before GARDNER, P.J., MALONE and HILL, JJ.

GARDNER, J.: The State brings this interlocutory appeal challenging the district court's refusal to find Javier Romero unavailable and to admit his preliminary testimony or his police interviews. The State charged Alejandro Martinez-Diaz with attempted first-degree murder of Romero and Caylee Nehrbass. Just before trial, State's witness Romero informed the State he would not testify, claiming doing so might expose him to a charge of perjury. So the State granted Romero use and derivative use immunity, but he still refused to testify. The State then moved the district court to find Romero unavailable and to admit his preliminary hearing testimony, or alternatively, his recorded police interviews. The district court denied that motion. Agreeing with the State's position, we reverse and remand.

GENERAL BACKGROUND

In May 2021, in Lawrence, Romero called 911 and reported that the driver and occupants of another car had fired guns at his car and shot his girlfriend, Nehrbass, in the head. Romero rushed Nehrbass to the hospital where she received treatment for gunshot wounds to the side of her head and neck. Nehrbass survived her injuries.

Law enforcement officers interviewed Romero and Nehrbass at the hospital, as well as later. During these initial interviews, Romero and Nehrbass identified Martinez-

Diaz as the driver of the car that chased them. Romero described seeing Ontareo Jackson firing a rifle from Martinez-Diaz' front passenger window. Romero also told officers that Nehrbass was previously in an abusive, romantic relationship with Martinez-Diaz.

The State charged Martinez-Diaz and Jackson with two counts of attempted second-degree murder for shooting at Romero and Nehrbass. But at the end of Martinez-Diaz' bifurcated preliminary hearing, the State amended those charges to two counts of attempted first-degree murder.

Preliminary Hearings

In October 2021, Martinez-Diaz' preliminary hearing began. The State called Romero as its first witness. Romero refused to testify after the State asked its first substantive question, declaring, "I don't want to testify, and I will not testify." The district court paused the proceedings so Romero could speak with his attorney. When his attorney returned from speaking with Romero, he said that Romero still "does not want to testify," despite the attorney's counsel of the court order and obligation to testify truthfully. His attorney "wanted to make . . . clear to the court" that Romero was not choosing silence based on any fear of self-incrimination. With that clarification, the State resumed Romero's direct examination. But Romero again refused to answer the State's questions. Romero answered a handful of questions, but after continued refusals, the district court held Romero in contempt until he purged it. Martinez-Diaz' preliminary hearing proceeded in part with other witnesses.

When the preliminary hearing resumed in November 2021, Romero purged his contempt. He was "duly sworn" and testified that he had no comments or concerns to address before resuming his testimony. So the State, Martinez-Diaz' counsel, and Jackson's counsel all questioned Romero about the events of May 27, 2021.

Romero testified that on that day, he and Nehrbass were driving across the Kansas River bridge into North Lawrence when a grey or silver Hyundai Sonata passed his navy-blue Hyundai Sonata. He noticed the grey Sonata "flip" around and get behind his vehicle. Romero took a couple of turns to "see if the car was following" them. The car remained behind him, so he concluded that the grey vehicle was following him and "somebody was yelling out the window" of that vehicle. For the next 5 to 10 minutes, the grey vehicle continued to follow him as he made about five turns, while driving different speeds. Finally, around the railroad tracks by Lyons Park, the grey vehicle "turned off a different way" and Romero "went back to [driving] the speed limit."

Soon after, Romero came to the intersection of North Seventh Street and North Street, approaching the intersection from the south. Romero started to turn left at the intersection to drive west on North Street. Yet, there, at the North Street stop sign, Romero saw the same grey vehicle facing him and "next thing [he] knew [he] was getting shot at."

The first person Romero noticed was Martinez-Diaz. He saw "muzzle flashes" from the "handgun" Martinez-Diaz was firing from the grey vehicle's driver's seat. He also witnessed Jackson hanging out of the passenger window, sitting with his legs in the car, his "butt on the window," and his hands on a compact "AR-15"-style pistol, which he fired from the "top of the car." Jackson's firearm had a drum-style magazine and a sticker of "some type of cartoon or something" that covered the middle of the drum. Romero testified it looked like someone may have been in the backseat of the grey vehicle, but he was not sure.

The gunfire lasted from when Romero "hit the intersection" to "after [he] had passed the" grey vehicle. When the shooting started, the grey vehicle was stationary at the stop sign and continued as both cars moved. Romero was not sure precisely how

many shots were fired in total, but he did recall telling officers on the day of the incident that he had heard four or five shots.

Romero "ducked down" to avoid the gunfire as he rounded the intersection, and in doing so, he "swerved off into [a] ditch." He then hit a mailbox before speeding away. After fleeing, he looked at Nehrbass and soon realized blood was coming "down the back of her neck" and he feared she had been shot. He called 911 and tried to calm her while rushing to the hospital.

On cross-examination, Martinez-Diaz' counsel questioned Romero whether the State had made any promises or deals in exchange for his testimony. And counsel challenged his credibility by showing these statements to police on the day of the shooting, which differed from the testimony he had just given:

- Romero and Nehrbass went to North Lawrence because Nehrbass wanted to smoke marijuana;
- a road-rage encounter when he entered North Lawrence that evening involved a different vehicle than the one involved in the shooting; and
- he had seen only one person shooting at him and Nehrbass and did not recognize the shooter.

Romero testified that the version of events he had told officers followed the "street code" of "[n]ot snitching." Romero also admitted that he had a gun in his vehicle during the shooting.

Other evidence at the preliminary hearing aligned with Romero's testimony. Nehrbass testified that a "silver" Hyundai Sonata followed her and Romero as he drove "reckless[ly]" around North Lawrence "trying to get out." She confirmed that Romero eventually lost the car, but only momentarily. "A few minutes later," Romero stopped at a

stop sign, she looked over, and "there was the car." She identified Martinez-Diaz as the driver of the vehicle and Jackson as the passenger. She also spotted "figures in the back" that she could not recognize. Before she "blacked out," she saw Martinez-Diaz and Jackson both "[h]alf in, half out" of their windows, firing weapons. She regained consciousness to the sound of Romero's 911 call and "blood gushing out" of her head. At the hospital, she learned one bullet had "grazed the back of [her] head" and another bullet had "fractured [her] skull." She "still [has] bullet pieces in [her] head."

Officers inspected Romero's vehicle outside the hospital and discovered "three defects that were consistent with bullet holes" on the driver's side. At the North Seventh Street and North Street intersection, officers recovered "approximately 18" shell casings. These shell casings came from "[a]t least three separate firearms," including 9mm casings ("most commonly fired by a handgun"), .223 caliber casings ("most commonly chambered . . . for . . . an AR-15"), and .22 long rifle casings (which "a handgun or a rifle" can fire). The investigation led officers to the home of Roxanna Todd (another of Martinez-Diaz' codefendants), who lived "one long city block" away from the shooting. Todd told officers she came home to Martinez-Diaz, Martinez-Diaz' brother, Jackson, and "a young white kid" talking about how they "[had] returned fire and . . . shot at a person . . . named Javier," which is Romero's first name.

Romero Refuses to Testify at Trial

The case was set for trial in April 2022. Late afternoon on the Friday before jury selection was to begin, the State met with its key witness, Romero, whom they intended to call early in its case. But Romero stated he would not testify and, through counsel, advised he had concerns that his testimony could lead to perjury charges. Romero neither stated what testimony he thought might subject him to perjury charges, nor did he answer any substantive questions. The State told Martinez-Diaz' counsel of Romero's position on Monday when the parties broke for lunch during jury selection.

The next morning, before a jury was sworn, the State granted Romero use and derivative use immunity for any crimes but perjury committed while testifying at Martinez-Diaz' trial. The State believed Romero would testify if he were granted immunity. But to the contrary, Romero's counsel said Romero still intended to answer no questions at trial.

The parties and the district court judge then met to address Romero's expressed intent to not testify. Romero's counsel told the district court that Romero remained "concern[ed] about potentially committing perjury . . . by testifying today" regardless "of whether or not he's been granted immunity, and regardless of whether or not he no longer has the Fifth Amendment protections based upon that." The State asserted that Romero's perjury concerns were "a tactic to avoid testifying," so it asked the court to order Romero to testify, hold him in contempt if he refused, and if he refused, declare him unavailable and to let his preliminary hearing transcript be read into the record. It asked for a ruling before the jury was sworn, to permit an interlocutory appeal from any adverse ruling.

The court agreed to hear what Romero had to say, and called him in. Romero was sworn but he refused to answer any questions, including what his name was. The district court judge asked Romero, "why are you not answering questions?" In response, Romero put his hands up and shrugged his shoulders. The district court held Romero in contempt.

Romero's counsel told the court that Romero was concerned that his testimony either at the preliminary hearing or at trial would be perjury:

"Mr. Romero's position would be, it would be one, either here today he would be committing perjury or he would be committing perjury back when he testified at prelim based on what he believed he was going to—what he might testify to.

"So the issue would be, I'm not sure if it would be—I don't want to characterize for Mr. Romero that it was the testimony would be perjury today or perjury at prelim. I

think he was concerned that if he testified today, he would perjure himself, either today or previously."

The district court explained her disappointment that the State had not informed Martinez-Diaz' counsel of the issue sooner, and concluded Romero would not answer any questions under oath and would not purge any contempt at that point.

The district court then determined whether Romero's preliminary hearing testimony would be admitted. Martinez-Diaz' attorney argued that it would violate due process for the State to offer preliminary hearing testimony tainted by a reasonable probability that it was perjured. But the State countered that it did not believe the preliminary hearing evidence was perjured; in its view, Romero was just looking for any reason to refuse to testify.

"We do not believe his testimony to be perjured. We just believe he is refusing to testify and looking for any excuse. And I don't think there's any basis to find we intend to knowingly use perjured testimony, because the, what Mr. Clarke [defense counsel] says is that the only conclusion is that he perjured himself at preliminary hearing.

"I think the Court could also make the opposite conclusion, that he intends to lie on the witness stand today, would not be protected from that perjury because the immunity doesn't protect him from that, and he does not have a right to come on the stand [to] lie. So I think the Court should find that is the basis for his refusal and find him to be unavailable and allow us to use his testimony."

The district court denied the State's motion to admit Romero's preliminary hearing testimony.

Because it could not use the preliminary hearing testimony, the State asked to admit videos of Romero's police interviews at the hospital and police station, stating they met both constitutional (*Crawford*) and statutory (hearsay exception) requirements. See

Crawford v. Washington, 541 U.S. 36, 68, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).
Martinez-Diaz objected, asserting a Confrontation Clause violation.

The district court excluded the police interviews, holding:

"There are *Crawford* issues and confrontation issues that I think Mr. Clarke has the right of.

"These statements were taken by police in furtherance of litigation. I haven't heard or had a hearing on what may be reliable beyond that and I'm not going to sort it out during this trial.

"The fact that Mr. Clarke at one point had the right to cross-examine Mr. Romero, that cross-examination is not going to be heard by the jury because he's not available. The statements that were not subject to cross-examination are not going to come in at this time either."

The State made no proffer of this evidence after the court excluded it.

The State then filed this interlocutory appeal, arguing that the district court erred by excluding Romero's preliminary hearing testimony and the recorded police interviews.

ANALYSIS

Jurisdiction

Martinez-Diaz argues this court lacks jurisdiction over this appeal because the State has not shown that the trial court's ruling substantially impaired the State's ability to prosecute the case. He argues that Nehrbass' testimony and Romero's testimony would go to the same facts. In other words, Romero's testimony was merely corroborative evidence. The State responds that the suppression of Romero's preliminary testimony substantially impairs its burden of persuasion so that jurisdiction is proper.

"Whether appellate jurisdiction exists is a question of law over which this court has unlimited review. To the extent the court's inquiry requires statutory interpretation, this court also exercises unlimited review. [Citation omitted.]" *State v. Garcia-Garcia*, 309 Kan. 801, 806, 441 P.3d 52 (2019).

"In Kansas, the right to appeal is entirely statutory and, as a general rule, appellate courts may exercise jurisdiction only when authorized to do so by statute." *State v. McCroy*, 313 Kan. 531, 534, 486 P.3d 618 (2021). The relevant statute here is K.S.A. 2021 Supp. 22-3603:

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

But the term "suppressing evidence" as used in this statute has a broader meaning than the suppression of evidence illegally obtained. It includes not only "constitutional suppression" but also rulings of a trial court which exclude the State's evidence so as to substantially impair the State's ability to prosecute the case. *State v. Newman*, 235 Kan. 29, 34, 680 P.2d 257 (1984).

As Martinez-Diaz points out, "the appellate courts of Kansas should not take jurisdiction of the prosecution's interlocutory appeal from every run-of-the-mill pretrial evidentiary ruling of a district court, especially in those situations where trial court discretion is involved." *Newman*, 235 Kan. at 35. Rather, an interlocutory appeal is proper only when the pretrial order suppressing or excluding evidence places the State in a position where its ability to prosecute the case is substantially impaired. 235 Kan. at 35; see *State v. Mitchell*, 285 Kan. 1070, 1080, 179 P.3d 394 (2008) (finding no jurisdiction over the State's appeal, holding "[i]f the exclusion of evidence does not substantially

impair the State's ability to prosecute the case, the State cannot raise the issue as an interlocutory appeal").

Martinez-Diaz argues that because the State can use Nehrbass' testimony, Romero's testimony is superfluous, thus its suppression does not "substantially impair" the State's ability to prosecute him. But this argument ignores that a substantial impairment of the State's ability to prosecute is more nuanced than the mere production of evidence of the crime.

We consider the State's entire burden of proof when determining whether suppression of evidence imposes a substantial impairment on the State's prosecutorial ability. That burden includes the burden of persuasion and the burden of production. See *State v. Ultreras*, 296 Kan. 828, 837, 295 P.3d 1020 (2013); see also *Microsoft Corp. v. i4i Ltd. Partnership*, 564 U.S. 91, 100 n.4, 131 S. Ct. 2238, 180 L. Ed. 2d 131 (2011) (discussing "'burden of proof'" and distinguishing "'burden of persuasion'" that "specif[ies] which party loses if evidence is balanced," "'burden of production,'" that "specif[ies] which party must come forward with evidence at various stages in the litigation," and "'standard of proof'" that specifies "'degree of certainty by which the factfinder'" or reviewing court must be persuaded by party bearing burden of persuasion).

Martinez-Diaz focuses on the burden of production—the State's burden to present a prima facie case of guilt. The State concedes that the exclusion of Romero's prior testimony and statements do not substantially impair the State's ability to sustain its burden of production, because Nehrbass would testify to the same events.

But the State focuses on its burden of persuasion—its obligation to persuade the jury of a defendant's guilt "at the beyond-a-reasonable-doubt level of confidence." *State v. Mukes*, No. 117,082, 2018 WL 4264865, at *6 (Kan. App. 2018) (unpublished opinion). To meet this burden, the evidence must convince the jury beyond a reasonable

doubt that Martinez-Diaz fired a weapon at Romero and Nehrbass with the premeditated intent to kill. See K.S.A. 2021 Supp. 21-5301 (defining attempt); K.S.A. 2021 Supp. 21-5402(a)(1) (defining premeditated first-degree murder). As detailed below, the State shows serious difficulties in meeting its burden of persuasion if it depends only on Nehrbass' testimony.

First, Nehrbass' testimony is vulnerable to impeachment because her ability to perceive and accurately recount the shooting are suspect. Evidence suggests that she might have smoked marijuana around the time of the incident. And she testified that she "glanced" at the occupants inside the other vehicle for only "like . . . two seconds," "blacked out" after getting shot, "only remembered one shot," and sustained serious head injuries during the crime. Further, Martinez-Diaz may have abused her during their relationship, so her impartiality could be undermined without corroborating evidence like Romero's. As the State argues, without Romero's testimony, its case rests heavily on whether the jury credits a single eyewitness account, yet it loses its best way to prove that account credible.

Second, Nehrbass' testimony cannot replace Romero's. As the State argues, part of its burden of persuasion is satisfying jurors' expectations about trial, one of which is "expectations about what proper proof should be." *Old Chief v. United States*, 519 U.S. 172, 188, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997). Jurors expect a prosecutor to prove certain crimes with certain evidence. "[F]or example, that a charge of using a firearm to commit an offense will be proven by introducing a gun in evidence." 519 U.S. at 188. If jurors' expectations go unsatisfied, "the effect may be like saying, 'never mind what's behind the door,' and jurors may well wonder what they are being kept from knowing" and "may penalize the party who disappoints them by drawing a negative inference against that party." 519 U.S. at 188-89. Given the facts and charges here, jurors will expect to hear Romero's testimony. Jurors will wonder where he is, why he is not testifying, and what the State might be hiding in his absence. The defendant's state of

mind is paramount, and the jury will determine whether Martinez-Diaz fired a weapon at Romero and Nehrbass with the desire to kill them.

We find the lack of Romero's testimony substantially impairs the State's ability to prosecute the case. Romero and Nehrbass' testimonies reinforce each other. Standing alone, Nehrbass' testimony will not fulfill the court's truth-finding purpose. Even the district court described Romero's testimony as "critical." Its absence "may be determinative of the case." *Newman*, 235 Kan. at 35. Such an interference confers jurisdiction under K.S.A. 2021 Supp. 22-3603. See *State v. Quinones-Avila*, No. 120,505, 2019 WL 3210224, at *4, 7 (Kan. App. 2019) (unpublished opinion) (finding interlocutory jurisdiction in a "close question" case in which the suppressed evidence "counter[ed defendant's] assertion" and "corroborate[d the victim's] testimony").

Exclusion of Evidence

We next address the State's claim that the district court erred by not finding Romero to be unavailable and by refusing to admit either his preliminary testimony or his recorded statements to law enforcement on the day of the shooting.

1. *Standard of Review*

The standard for appellate review of a district court decision that a witness is unavailable to testify is generally abuse of discretion. *State v. Reed*, 302 Kan. 227, 246, 352 P.3d 530 (2015). But when the underlying facts are undisputed, an appellate court's review of whether a witness was available or unavailable and whether a Confrontation Clause issue arose is de novo. Because Romero's testimony is of record, this court is as well-equipped as the district court to determine whether his refusal to testify made him unavailable and whether an issue arose under the Confrontation Clause. Our standard of review is therefore de novo. *State v. Carter*, 278 Kan. 74, 77-78, 91 P.3d 1162 (2004).

2. *Romero's Preliminary Hearing Testimony*

The State argues that the district court erred by excluding Romero's preliminary hearing testimony because he was unavailable to testify and the defendant had a prior opportunity to cross-examine the declarant at his preliminary hearing. Martinez-Diaz responds that the admission of possibly perjured testimony violates his due process rights.

The district court excluded Romero's preliminary testimony based on her concerns about credibility and fairness:

"[T]ruthfully, the Court can't say which one is true. First of all, we haven't heard what he would say even under a grant of immunity. But it is clear that one of these—well, it's clear that Mr. Romero believes that he could be charged for perjury if he testified. So I think it's fair to infer that there would be a change, and it would be a material change from what had been stated under oath, under cross-examination in the preliminary hearing.

"The problem with what you say is, I can't make that call, and you can't make that call, in all honesty. Issues of credibility are for the jury to find. But the jury's not hearing Mr. Romero and seeing him, and seeing his demeanor, and his body language as he refuses to answer questions. The jury's not getting the full picture of Mr. Romero and his credibility as they watch him in contempt of Court and refusing to answer questions.

"I'm not going to let the preliminary hearing testimony come in because there is more to the story that the jury hasn't heard. I do think it's unfair to Mr. [Martinez-]Diaz that the jury not know that Mr. Romero even under a grant of immunity, is refusing to testify, and is refusing to answer questions. It casts in doubt at that point, his preliminary hearing testimony, so it is suppressed."

But the district court failed to apply the correct analysis under the Confrontation Clause.

Generally, the Sixth Amendment's Confrontation Clause demands that an accused "enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend VI; see also *Pointer v. Texas*, 380 U.S. 400, 403, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965) (holding that Sixth Amendment's Confrontation Clause binds states through Fourteenth Amendment).

In *State v. Terry*, 202 Kan. 599, 601-02, 451 P.2d 211 (1969), a pre-*Crawford* case, the court's analysis shows that the unavailability requirement does not depend on the physical presence or absence of a witness but on the inaccessibility of his or her testimony. There two witnesses had been granted immunity and had testified and faced extensive cross-examination at the defendant's preliminary hearing but "flatly refused to testify" at trial. 202 Kan. at 600. The court found those witnesses were "just as 'unavailable' as though [their] physical presence could not have been procured." 202 Kan. at 603. It reasoned that the prior testimony of the witnesses may be introduced at the later proceeding because "the right of cross-examination initially afforded provides substantial compliance with the purposes behind the confrontation requirement." 202 Kan. at 602. *Terry's* analysis is consistent with *Crawford* and decisions from other jurisdictions. See generally Annot., 92 A.L.R.3d 1138 (gathering cases about unavailability of witness who is present in court but refuses to testify without claiming valid privilege).

Federal rules of evidence define an unavailable witness, in part, as a declarant who "refuses to testify about the subject matter despite a court order to do so." See Fed. R. Evid. 804(a)(2). But Kansas rules of evidence do not. Rather, K.S.A. 60-459(g), which lists situations when a witness is unavailable, says nothing about a witness who refuses to testify:

"'Unavailable as a witness' includes situations where the witness is (1) exempted on the ground of privilege from testifying concerning the matter to which his or her statement is relevant, or (2) disqualified from testifying to the matter, or (3) unable to be

present or to testify at the hearing because of death or then existing physical or mental illness, or (4) absent beyond the jurisdiction of the court to compel appearance by its process, or (5) absent from the place of hearing because the proponent of his or her statement does not know and with diligence has been unable to ascertain his or her whereabouts."

Still, in *State v. Jefferson*, 287 Kan. 28, 37-38, 194 P.3d 557 (2008), the Kansas Supreme Court interpreted this list of situations as exemplary rather than exclusive, focusing on its use of "includes," rather than "includes only." It held that a witness who refuses to testify after being ordered to do so by the court is an unavailable witness under this statute. 287 Kan. at 37-38. *Jefferson* thus affirmed the district court's admission of the witness' preliminary hearing testimony, finding:

"His live testimony was just as inaccessible and just as necessary. His late-blooming reticence, likely generated by events that had transpired between Jefferson's preliminary hearing and trial, should not be permitted to undermine the court's truth-finding purpose."
287 Kan. at 38.

Jefferson addressed confrontation rights generally but not *Crawford*, which was decided a month after Jefferson's crimes occurred.

Crawford held that "[t]o protect a defendant's constitutional confrontation rights, testimonial hearsay is inadmissible unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant. *Crawford*, 541 U.S. at 68." *State v. Gleason*, 299 Kan. 1127, 1165, 329 P.3d 1102 (2014), *rev'd and remanded sub nom. Kansas v. Carr*, 577 U.S. 108, 136 S. Ct. 633, 193 L. Ed. 2d 535 (2016). The United States Supreme Court established a new analysis for Confrontation Clause claims in *Crawford*. *State v. Jackson*, 280 Kan. 16, 35, 118 P.3d 1238 (2005).

Under *Crawford*, the first step is to determine whether the statements are testimonial. 280 Kan. at 35. If so, the Confrontation Clause bars their admission to prove the truth of the matter asserted unless (1) the witnesses are unavailable and (2) the defendants have a prior opportunity to cross-examine those witnesses. See *State v. Robinson*, 293 Kan. 1002, 1024, 270 P.3d 1183 (2012) (discussing *Crawford*); see also *California v. Green*, 399 U.S. 149, 165, 90 S. Ct. 1930, 26 L. Ed. 2d 489 (1970). This unavailability exception arises from necessity and "has been justified on the ground that the right of cross-examination initially afforded provides substantial compliance with the purposes behind the confrontation requirement." *Barber v. Page*, 390 U.S. 719, 722, 88 S. Ct. 1318, 20 L. Ed. 2d 255 (1968).

The State argued this unavailability exception here. First, neither party disputes that Romero's statements are testimonial. The *Crawford* Court defined testimonial statements to include "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." 541 U.S. at 52. Testimonial statements include, at a minimum, "prior testimony at a preliminary hearing, before a grand jury, or at a former trial . . . and to police interrogations." 541 U.S. at 68. If the statement is not testimonial, the *Crawford* Court stated that it is wholly consistent with the Confrontation Clause to analyze the issue based on the applicable hearsay law. 541 U.S. at 68.

Second, the parties agree that Martinez-Diaz got the chance to cross-examine Romero, and did cross-examine Romero, at the preliminary hearing. When a witness is unavailable and has given testimony at a previous judicial proceeding against the same defendant which was subject to cross-examination by that defendant, the State may introduce the prior testimony of that witness at the later proceeding because "the right of cross-examination initially afforded provides substantial compliance with the purposes behind the confrontation requirement." *Terry*, 202 Kan. at 601-02; see *Crawford*, 541 U.S. at 68-69 ("Where testimonial statements are at issue, the only indicium of reliability

sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation."). "The Sixth Amendment right of confrontation is satisfied if the accused confronted the witnesses against him at any stage of the proceedings in the same case and has had an opportunity of cross-examination." *State v. McCray*, 267 Kan. 339, 353, 979 P.2d 134 (1999); see *State v. Stano*, 284 Kan. 126, 141, 159 P.3d 931 (2007); see also K.S.A. 2021 Supp. 60-460(c)(2)(B).

The interest and motive of the adverse party on the prior occasion for cross-examination of a witness need only be similar, not identical, to the interest and motive at a later point. See *Stano*, 284 Kan. at 144-45. And although Romero's statements at the preliminary hearing may have been inconsistent with his statements to officers on the day of the crime, his counsel could have addressed any inconsistency by cross-examination during the preliminary hearing. Martinez-Diaz' inability to cross-examine Romero a second time at trial does not equate to a Confrontation Clause violation. See *State v. Young*, 277 Kan. 588, 599, 87 P.3d 308 (2004). At the preliminary hearing, Martinez-Diaz was defending against the same charges for which he was on trial. This satisfies the statute and the concerns underlying the Confrontation Clause. See *State v. Reed*, 302 Kan. 227, 246-47, 352 P.3d 530 (2015).

Third, the record shows that Romero was an unavailable witness because he refused to testify. See *Gleason*, 299 Kan. at 1167-68 (affirming district court's determination that witness' refusal to testify rendered him unavailable); *Young*, 277 Kan. at 599 (witness who does recall making earlier statements or who simply refuses to testify is unavailable as witness at trial); *Jefferson*, 287 Kan. at 37-38 (witness who refuses to testify after being ordered to do so by the court is an unavailable witness under this statute); *Terry*, 202 Kan. at 603 (a witness who "flatly refused to testify" at trial is "just as 'unavailable' as though [his] physical presence could not have been procured").

Martinez-Diaz does not contend that the prosecutor failed to make reasonable efforts to compel Romero to testify at trial. See *Gleason*, 299 Kan. at 1168-69. We agree that the record shows that the prosecutor met this duty. Romero was sworn and refused to answer any questions on the morning of trial. The district court asked for an explanation, then found him in contempt. His counsel told the judge that Romero was refusing to testify even though he had a grant of full immunity and even after being found in contempt. Because each element of the unavailability exception to the Confrontation Clause was met, the district court should not have excluded Romero's preliminary hearing testimony on these grounds.

The district court was concerned that the jury would be unable to view Romero's demeanor and body language, limiting its ability to assess his credibility. But such a consideration is not proper as it would nullify the unavailability exception. "[T]he role of the trial judge is not, for Confrontation Clause purposes, to weigh the reliability or credibility of testimonial hearsay evidence; it is to ensure that the Constitution's procedures for testing the reliability of that evidence are followed." *Hemphill v. New York*, 595 U.S. ___, 142 S. Ct. 681, 692, 211 L. Ed. 2d 534 (2022); see *State v. McMackin*, No. 109,022, 2013 WL 3970210, at *7 (Kan. App. 2013) (unpublished opinion) (rejecting argument that "jury should not be permitted to make decisions based on a 'cold record'" because that proposition "would all but invalidate" statute and caselaw excepting admission of prior testimony from an unavailable witness). The district court's holding was thus an error of law, and an abuse of discretion. See *Biglow v. Eidenberg*, 308 Kan. 873, 893, 424 P.3d 515 (2018).

Like the district court, this panel has no way to know whether Romero's preliminary hearing testimony was perjured. Any conclusion on that issue would be pure speculation. True, "a conviction based on perjured testimony is a violation of due process." *State v. Lewis*, 33 Kan. App. 2d 634, 651, 111 P.3d 636 (2003), *overruled on other grounds by State v. Davis*, 283 Kan. 569, 158 P.3d 317 (2006); see *State v.*

McKinney, 272 Kan. 331, Syl. ¶ 5, 33 P.3d 234 (2001) ("A conviction obtained by the introduction of perjured testimony violates a defendant's due process rights if [1] the prosecution knowingly solicited the perjured testimony, or [2] the prosecution failed to correct testimony it knew was perjured."). But Martinez-Diaz has not been convicted, so any claim that he might be prejudiced by a due process violation is premature and speculative.

And given his broad grant of immunity, it is most unlikely that Romero could be charged with perjury. The State granted Romero

"use and derivative use immunity to Javier Romero on account of any testimony which said Javier Romero shall give in the trial . . . and . . . such testimony, or any evidence derived therefrom, shall not be used against the said Javier Romero in any prosecution . . . except for the crime of perjury committed in giving such evidence."

This means that the State could not use his trial testimony, if true, to convict him of any crime, including perjury for any contrary statements made during his preliminary examination. Only if Romero perjured himself at trial would he be subject to a perjury charge, given the broad scope of his immunity. Romero's refusal to testify at trial for fear of a perjury charge suggests that he intended for his trial testimony to differ significantly from his preliminary hearing testimony, but it does nothing to suggest that his preliminary hearing testimony was not reliable or true.

The district court was apparently concerned that Romero did not "choose" to withhold his testimony but was instead boxed into a situation in which his only option was to refuse to testify or to face a perjury charge. But we see no distinction between a witness' choice not to testify for fear of incriminating himself or herself on the charge laid against the defendant, and the choice of a witness who refuses to testify for fear of incriminating himself or herself on a perjury charge. "Admittedly, in each of these cases, the 'choice' presented to the witness to testify or not to testify is a hard one; but the

witness nonetheless chooses not to provide evidence that existed all along and that was unavailable only because the witness . . . asserted a right against self-incrimination."

United States v. Earles, 983 F. Supp. 1236, 1253 (N.D. Iowa 1997), *aff'd sub nom. United States v. Papajohn*, 212 F.3d 1112 (8th Cir. 2000).

In short, Romero's reason for refusing to testify—that he thinks his trial testimony might subject him to a charge of perjury—makes no difference under these facts. Romero was an unavailable witness and Martinez-Diaz had a prior chance to cross-examine him. We thus find that Romero's testimony given at Martinez-Diaz' preliminary hearing falls within the unavailability exception to the Confrontation Clause. Romero's testimony is not excludable on that basis.

Romero's Statements to Police

We find it unnecessary to address whether the district court also erred in excluding the videos of Romero talking to police officers on the day of the crime, at the hospital, and later that evening at the police station. These recordings were not played at the preliminary hearing nor were they played during the hearing about Romero's refusal to testify, but Martinez-Diaz' counsel cross-examined Romero at length during the preliminary hearing about his statements to police.

CONCLUSION

The State asks us to reverse and remand with directions that if Romero again refuses to give immunized testimony at Martinez-Diaz' trial, then the district court must, subject to any applicable evidentiary rules Martinez-Diaz invokes, allow use of Romero's prior testimony. We do so.

Reversed and remanded with directions.