NOT DESIGNATED FOR PUBLICATION

No. 125,785

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellant,

v.

EMMANUEL SAHR ELLIE,
Appellee.

MEMORANDUM OPINION

Appeal from Johnson District Court; NEIL B. FOTH, judge. Opinion filed July 28, 2023. Affirmed.

Jacob M. Gontesky, assistant district attorney, *Stephen M. Howe*, district attorney, and *Kris W. Kobach*, attorney general, for appellant.

Richard P. Klein, of Lenexa, for appellee.

Before ATCHESON, P.J., MALONE and PICKERING, JJ.

PER CURIAM: The State brings this interlocutory appeal challenging the Johnson County District Court's ruling barring the use of an unavailable witness' previous testimony in the retrial of Defendant Emmanuel Sahr Ellie on charges of aggravated kidnapping and other serious felonies. The district court concluded the State had failed to make a diligent effort to secure the presence of the witness for the retrial. Given the broad deference appellate courts afford those rulings, we affirm the decision.

FACTUAL AND PROCEDURAL BACKGROUND

The State has charged Ellie with the aggravated kidnapping, rape, and aggravated battery of W.H., who was then his girlfriend. The attack took place at the apartment of Rodney Blue, a friend of Ellie's, in the early morning hours of November 1, 2011—the day after Halloween. W.H. had been out with Blue and drinking heavily. Ellie arrived at the apartment with Brandon Clarke, another friend and the now ostensibly unavailable witness. Blue told Ellie he had sexual relations with W.H. In what W.H. described as a rage, Ellie savagely beat her and violently penetrated her vaginally with his fingers. Based on his preliminary hearing testimony, Clarke saw Ellie repeatedly strike W.H. in a manner that would constitute an aggravated battery. He also recounted circumstances suggesting Ellie had restrained W.H.'s movements in a way consistent with kidnapping or aggravated kidnapping. Clarke testified at both a preliminary hearing and Ellie's first trial; his lengthy testimony was substantially the same in each proceeding.

In January 2013, a jury convicted Ellie as charged, and this court affirmed the verdicts and resulting sentences. *State v. Ellie*, No. 110,454, 2015 WL 2342137 (Kan. App. 2015) (unpublished opinion). The panel's opinion includes a detailed recitation of the procedural history of the prosecution to that point and the trial evidence. After the Kansas Supreme Court declined review, Ellie successfully litigated a habeas corpus motion under K.S.A. 60-1507 for a new trial because his lawyer in the first trial had labored under a conflict of interest and, thus, provided constitutionally inadequate representation. *Ellie v. State*, 312 Kan. 835, 840, 481 P.3d 1208 (2021).

The district court scheduled Ellie's retrial for November 2022. In September, state agents—principally two detectives from the Olathe Police Department and two civilian employees of the Johnson County District Attorney's Office—set about finding W.H., Blue, and Clarke and getting them served with trial subpoenas. They located and served W.H. and Blue. Not so with Clarke. On October 27, the district attorney's office filed a

motion to admit the preliminary hearing testimony of Clarke because he had not been found or served despite ongoing efforts to do so. The district court held an evidentiary hearing on the motion on November 3, several days before the scheduled start of the retrial.

The detectives testified they used various data bases and obtained residential and business addresses and telephone numbers associated with Clarke in the Miami, Florida, area, where he apparently worked as a personal trainer. Some of the telephone numbers were not in service, and others were never answered despite repeated calls from the detectives and an employee in the district attorney's office. The detectives enlisted the help of law enforcement agencies in the Miami area to check the addresses for Clarke. Those efforts proved fruitless, as well. Nobody used Facebook or similar social media platforms to trace Clarke.

In the meantime, another employee of the district attorney's office prepared documents necessary to secure a subpoena for Clarke from a Florida court and sent the paperwork to her counterpart in Broward County. The Broward County District Attorney's Office said the materials were insufficient because they bore electronic rather than ink signatures. The employee redid the documents and overnighted them to the Broward County District Attorney. She was informed that securing the subpoena could take upwards of six weeks, extending past the scheduled trial date.

At the motion hearing, Ellie's lawyer had a private investigator testify that she looked for Clarke on Facebook and a similar site in May 2022 and within 10 minutes had found an address and working telephone number for him. She then spoke with him. The investigator agreed that Clarke appeared to have moved around in the Miami area.

In a short bench ruling the day after the hearing, the district court denied the State's motion to use Clarke's preliminary hearing testimony as a substitute for his in-

person appearance at Ellie's retrial. The district court faulted the State for beginning its witness search about 60 days before the scheduled retrial and, as a result, for having "kind of . . . run out of time" in trying to find Clarke. Although characterizing the information as "scant," the district court suggested Florida authorities were less than fully cooperative in finding Clarke or getting a subpoena issued for him. Finally, the district court pointed out that Clarke was "easily found and contacted though social media"—a search strategy the State ignored. The district court concluded that "all things considered," the attempts to secure Clarke's presence as a trial witness fell short of the required "diligent effort" standard. See *State v. Keys*, 315 Kan. 690, 709, 510 P.3d 706 (2022). The State has appealed, and Ellie's retrial has been continued.

ANALYSIS

The State may, in some circumstances, admit at trial the previous testimony of an unavailable witness. A witness is considered "unavailable" for that purpose if "he or she is absent from the place of hearing because the proponent of his or her [testimony] does not know and with diligence has been unable to ascertain his or her whereabouts." K.S.A. 60-459(g)(5). Consistent with the statutory provision, the State must make a diligent—though unsuccessful—effort undertaken in good faith to secure the witness' appearance at trial to admit the earlier testimony. *Keys*, 315 Kan. at 709; *State v. Cook*, 259 Kan. 370, Syl. ¶ 2, 913 P.2d 97 (1996). This is sometimes characterized as the "'reasonable diligence rule.'" *State v. Zamora*, 263 Kan. 340, 342, 949 P.2d 621 (1997); *State v. Dunerway*, No. 111,457, 2015 WL 5224703, at *4 (Kan. App. 2015) (unpublished opinion). The sufficiency of the effort to find the witness should be assessed based on all of the circumstances. *State v. Flournoy*, 272 Kan. 784, 800, 36 P.3d 273 (2001); *Cook*, 259 Kan. at 376.

The ultimate determination of diligence and good faith has been entrusted to the district court's judicial discretion. *Keys*, 315 Kan. at 708; *Zamora*, 263 Kan. at 342. We,

therefore, review the decision for abuse of discretion. A district court exceeds that authority if it rules in a way no reasonable judicial officer would under comparable circumstances, if it ignores controlling facts or relies on unproven factual representations, or if it acts outside the legal framework appropriate to the issue. See *State v. Darrah*, 309 Kan. 1222, 1227, 442 P.3d 1049 (2019); *State v. Ward*, 292 Kan. 541, Syl. ¶ 3, 256 P.3d 801 (2011). The party asserting an abuse of judicial discretion, here the State, bears the burden of proving the point. *State v. Thomas*, 307 Kan. 733, 739, 415 P.3d 430 (2018). The standard is a highly deferential one.

Under K.S.A. 2022 Supp. 22-3603, the State may file an interlocutory appeal from a district court order suppressing evidence. The Kansas Supreme Court has held the statute covers rulings precluding the presentation of previous testimony of an unavailable witness if the effect would "substantially impair" the State's prosecution of the defendant at trial. *State v. Newman*, 235 Kan. 29, 35, 680 P.2d 257 (1984). So K.S.A. 2022 Supp. 22-3603 supplies the legal vehicle for the State's appeal here. The loss of the evidence must "seriously impede" the successful prosecution of the defendant to permit an interlocutory appeal. *State v. Huninghake*, 238 Kan. 155, 157, 708 P.2d 529 (1985). Interlocutory appellate review is not, therefore, available to test run-of-the-mill pretrial evidentiary rulings adverse to the State. *Newman*, 235 Kan. at 35; *State v. Quinones-Avila*, No. 120,505, 2019 WL 3210224, at *3 (Kan. App. 2019) (unpublished opinion).

The substantial impairment requirement amounts to a threshold or gatekeeping issue the State must satisfy before an appellate court considers the merits of the suppression ruling itself. Contrary to Ellie's suggestion, however, the State may demonstrate substantial impairment even if the otherwise available evidence establishes prima facie proof of each element of the charged crimes. See *State v. Myers*, 314 Kan. 360, 366, 499 P.3d 1111 (2021). This case illustrates circumstances crossing the substantial impairment line. Although W.H. has testified to the elements of the charged crimes and is the only person (apart from Ellie) who would have witnessed the rape, her

ability to perceive and recall precisely what occurred could be challenged based on her consumption of alcohol and the very trauma of what she asserts happened. That might provide an opening for the defense to argue any criminal conduct was not actually as severe as her recollection might depict—possibly creating reasonable doubt, prompting convictions on lesser included offenses or an outright acquittal on one or more of the charges.

Clarke's account directly corroborated the aggravated battery and strongly supported the aggravated kidnapping circumstantially. Blue's trial testimony was not nearly as directly inculpatory of Ellie, though he, too, described circumstances consistent with serious criminal conduct. Here, Clarke's testimony was sufficiently integral to the State's overall case that its loss would substantially impair or impede the successful prosecution of Ellie.

But our conclusion on that issue simply leads us to consider the district court's decision to bar the use of Clarke's preliminary hearing testimony. The State submits the district court abused its discretion by stepping outside the legal framework governing what amounts to a diligent effort to locate a witness. The State concedes the district court understood the facts. The evidence on the scope of the search for Clarke is essentially undisputed, and Clarke has not suggested the State acted in less than good faith. Likewise, the State does not contend the district court's ruling was so eccentric as to be reversible for its very eccentricity. Rather, according to the State, the district court fashioned a categorical rule requiring resort to social media to track down witnesses who have gone missing and such a rule conflicts with a judicial assessment to be made based on the overall circumstances of the particular case. See *Keys*, 315 Kan. at 709 ("'The question . . . turns on the totality of the facts and circumstances of the case.'") (quoting *Flournoy*, 272 Kan. at 800).

If the district court had concluded the use of Facebook or comparable social media were a necessary condition for *any* search to be considered reasonably diligent and denied the motion for that reason, the State might have a point. But the argument misreads the district court's ruling. The district court recognized social media platforms likely would have been a worthwhile tool in finding and contacting Clarke and, in turn, serving him with a subpoena. But the district court incorporated that entirely sensible observation with other considerations in reaching its ultimate determination—most notably the State's failure to gauge how long it might take to physically locate Clarke, an essential step in getting him served with a subpoena. In that respect, the State didn't take account of the less than attentive assistance they received from various government authorities in Florida. Although that lassitude was not the immediate fault of the Olathe Police Department or the Johnson County District Attorney's Office, it cannot be scrubbed from the overall effort when assessing diligence. The district court recognized and adhered to the appropriate legal test.

Rather than inflexibly focusing on a single factor in denying the State's motion, the district court considered "all things" bearing on the unsuccessful quest to find and serve Clarke, just as it said it did. We cannot attribute an abuse of discretion to the district court in reaching its ultimate conclusion to deny the motion to admit Clarke's preliminary hearing testimony in Ellie's retrial.

Affirmed.